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Research

Tracking NFTs from Code to Court

Legal Considerations and Disputes

February 2024

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and Disputes**

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DMS Code: 26703.2



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Contact

For any help or assistance please email us on conciierge@nishithdesai.com or visit us at www.nishithdesai.com.

Acknowledgements

Parva Khare

parva.khare@nishithdesai.com

Purushotham Kittane

purushotham.kittane@nishithdesai.com

Alipak Banerjee

alipak.banerjee@nishithdesai.com

Vaibhav Parikh

vaibhav.parikh@nishithdesai.com

Vyapak Desai

vyapak.desai@nishithdesai.com

* We would like to thank **Abhimanyu Shah**, **Janavi Venkatesh**, and **Rishabh Rao** for their contribution to the paper.

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Introduction

Non-fungible tokens or NFTs are another kind of cryptographic asset (“**crypto asset**”) based on the blockchain technology. NFTs are a digital alternate to the collectibles. However, NFTs significantly differ from crypto assets such as Bitcoins as NFTs are non-fungible and can’t be traded/exchanged. The global NFT transactions have grown exponentially, with the last estimates valuing the global NFT market at USD 21.39 billion in 2022, and an expected growth of 33.7% (CAGR 2023–2030) to reach USD 212 billion by 2030.¹ NFTs range from digital artworks like “Merge” by digital artist “Pak” (sold for USD 91.8 million in December 2021)² and Beeple’s artwork called “The First 5000 Days” (sold for USD 69.3 million)³ to the NFT of the first ever tweet by founder of Twitter, Jack Dorsey (sold for USD 2.9 million).⁴ However, the rights sold with the NFTs may vary. Such as, the sale of Beeple’s “The First 5000 Days” included the NFT as well as the copyright in the art piece. However, the sale of the NFT by Jack Dorsey was without the rights in the underlying intellectual property in the tweet.

The potential of NFTs is not limited to just digital art or artworks. NFTs represent a new form of sale-purchase mechanism based on the “Blockchain” technology. In effect, NFTs can be understood to be a form of an agreement that gets recorded on the blockchain. In the following sections, we will delve deeper into what is an NFT, how they work, and the functions of NFTs. Furthermore, with the growth of the NFT market, and the involvement of millions of dollars in its creation and trade, we will have a look at the possible areas of concern and attempt at identifying the disputes that may arise in relation to the NFTs, their transactions and their regulation.

1 Global Non-Fungible Tokens (NFTs) Market Size, Skyquestt.com, April 2023, available at: <https://www.skyquestt.com/report/non-fungible-token-NFT-market>, last accessed on 26 December 2023.

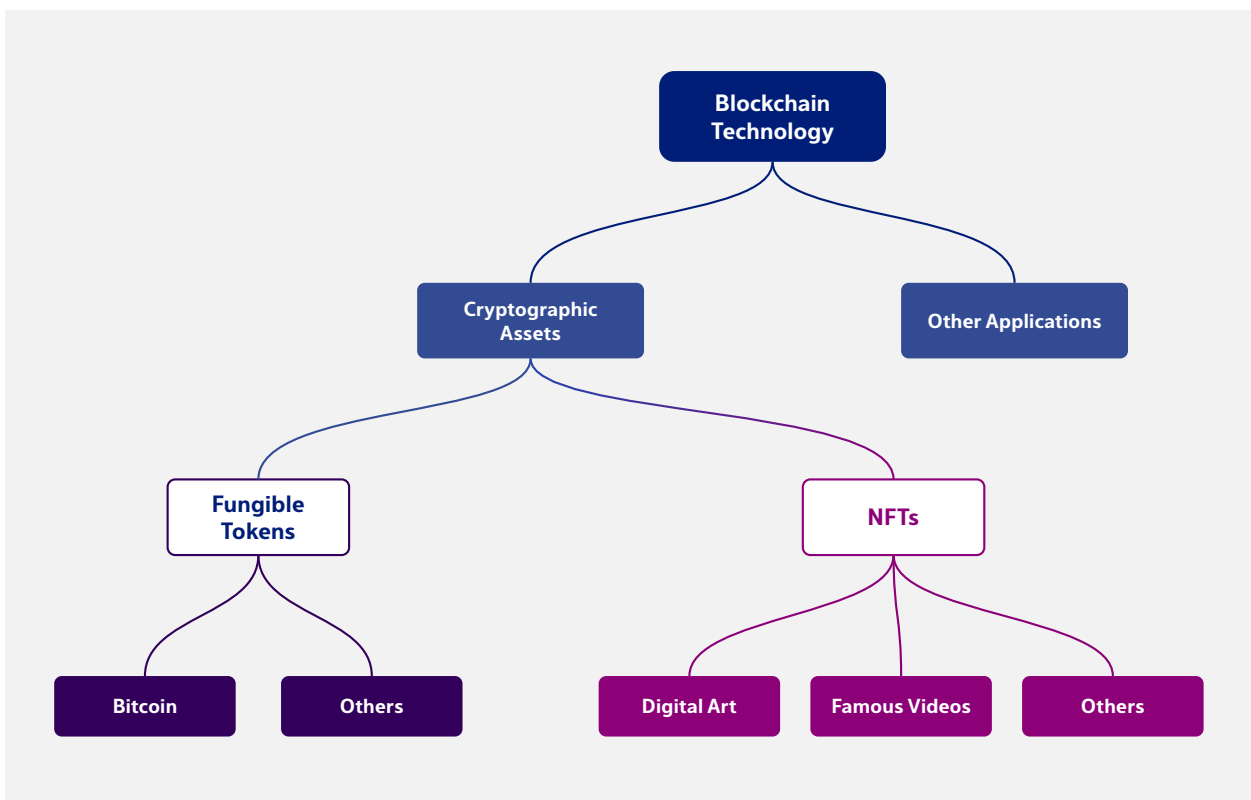
2 The Most Expensive NFTs Ever Sold, Crypto.com, 04 January 2023, available at: <https://crypto.com/university/most-expensive-nfts>, last accessed on 26 December 2023.

3 The Most Expensive NFTs Ever Sold, Crypto.com, 04 January 2023, available at: <https://crypto.com/university/most-expensive-nfts>, last accessed on 26 December 2023.

4 Taylor Locke, Jack Dorsey sells his first tweet ever as an NFT for over \$2.9 million, CNBC, 22 March 2021, available at: <https://www.cnbc.com/2021/03/22/jack-dorsey-sells-his-first-tweet-ever-as-an-nft-for-over-2point9-million.html>, last accessed on 26 December 2023.

What is an NFT?

NFTs are crypto assets stored on a blockchain, just like other crypto assets, such as cryptocurrencies like Bitcoin, Ethereum, etc. A blockchain is a distributed ledger that stores data of any kind. Unlike a conventional database, a blockchain is completely decentralized, i.e., the blockchain is stored on multiple computers across a network.¹ As the name suggests, a blockchain is a chain of “blocks”. Whenever new data is to be added, a new “block” is created and attached to the “chain”. Instead of a central authority monitoring and protecting the ledger and recording the transactions, the information is added and protected through advanced cryptographic techniques on a blockchain. We have analyzed blockchain technology in greater detail in our paper titled *The Blockchain: Industry Applications and Legal Perspectives*.²



An NFT is a digital manifestation of an asset and derives its value from the public perception of the same. This causes each NFT to be unique and non-fungible. This is the reason that makes it hard to answer questions like “How much should ownership of the first tweet cost” or “Can the tweet ownership be traded for a rare mural?”

In contrast, fungible tokens are identical and can therefore be interchangeable. Bitcoin is a popular fungible token, and it has the same worth regardless of what it is used, or to whom it belongs. One Bitcoin can be interchanged with another Bitcoin. The same cannot be said for NFTs.

¹ David Rodeck & John Schmidt, What is Blockchain?, Forbes, 04 May 2023, available at: <https://www.forbes.com/advisor/in/investing/cryptocurrency/what-is-blockchain/>, last accessed on 26 December 2023.

² Nishith Desai Associates, The Blockchain: Industry Applications and Legal Perspectives, Nishith Desai Associates, November 2018, available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/The_Blockchain.pdf, last accessed on 26 December 2023.

Defining Features of NFTs

Both digital and physical assets can be used to mint an NFT. However, the basic features and functions of the NFTs remain the same.

Scarcity

NFTs derive high value through their uniqueness and scarcity. The basic idea behind it is simple, lesser the supply, higher the price. This is not a new concept and has been successfully employed by various companies in the real-world to their advantage. Brands like “Supreme” create an illusion of scarcity by “dropping” limited products to specific markets.¹ Even luxury brands use such methods to increase the desirability of their products by presenting it to be unique and only accessible to a select few.² However, with the advent of NFTs, this method has been employed to new levels. In the digital world, it is easy to “copy” or “download” a copy of the digital artwork such as Beeple’s art, or even the tweet by Jack Dorsey. However, by tokenizing these into NFTs, an artificial scarcity is created by allowing only one person to own such NFTs. Many artists support the tokenization of their works as it allows them to better capitalize on their works.

Uniqueness

As is in the name, each NFT is non-fungible, which means that each NFT is a unique token. Each NFT carries a different cryptographical signature or standard (such as BRC-721E). Such cryptographical signatures or standards can be understood as the fingerprint of the NFT, meaning that no two NFTs can share or have an identical signature. The uniqueness of the NFTs means that there can only be one owner of each NFT. Fractional ownership of NFTs has revolutionized owning NFTs by bridging the gap between scarcity and ownership. Fractional ownership of an NFT is created where, ‘fractions’ of a given NFT can be issued to multiple individuals, giving them joint ownership of the asset. The uniqueness of the NFT is ensured by the distributed authority, all of whom have access to the NFT details (known as attributes). It’s worth mentioning here that the ownership is assigned to an account (such as a wallet address on a blockchain) and not an individual. Anyone with the private key to an asset can modify the account details linked to it. In fact, ownership of an NFT is transferred in this way.

Indivisibility

NFTs cannot be divided into smaller parts. For example, the NFT backed by Beeple’s artwork cannot be split into multiple NFTs. Even where there is fractionalization, it is done by a smart contract that creates a certain number of tokens that is linked to the original indivisible NFT.

1 The Irregular Reports by Irregular Labs, The Illusion of Scarcity: Supreme, Fluid Values, and Drops, Medium, 08 June 2019, available at: <https://medium.com/irregular-labs/the-illusion-of-scarcity-supreme-fluid-values-and-drops-f113d84f7bd8>, last accessed on 26 December 2023.

2 Tom Teicholz, Cult of Luxury: Craftmanship, Scarcity and the Hermes Brand, Forbes, 12 March 2015, available at: <https://www.forbes.com/sites/tomteicholz/2015/03/12/cult-of-luxury-craftmanship-scarcity-and-the-hermes-brand/?sh=9b1175951ca5>, last accessed on 26 December 2023.

Functions of NFTs

NFTs serve two primary functions for their underlying assets: Digital Value Creation (“DVC”) and Certification of Authenticity and Title (“CAT”). Digital value creation refers to the value created by assigning unique ownership to a digital asset. While almost anyone in the world can access and utilize digital works (such as watching videos), even simultaneously, only one person can own the NFT linked with it. It is this function of NFTs that have allowed creators to monetize digital artwork and other such digital assets. Bored Ape Yatch Club, Saved Souls and Moonbirds make use of this NFT function.

The second NFT function is that of CAT of the underlying asset. The power of this NFT function is to a large extent inherited from its blockchain framework. The blockchain ensures the existence of a distributed ledger and a decentralized verification authority. These features, in addition to the uniqueness of NFTs make for a very secure and reliable method for verifying the authenticity and ownership of the NFT.

NFTs can be used to certify the authenticity of any kind of asset. An NFT may serve as a license for a piece of underlying software. It may also certify the unique ownership of a digital artwork, or the authenticity and rightful owner of an underlying tangible asset like a diamond. NFTs backed by tangible assets are sometimes referred to as “physical NFTs”.¹

More often than not, both NFT functions are simultaneously at play. For instance, the NFT backed by Beeple’s digital artwork creates value through ownership but is also serves the important function of proving and protecting that ownership. Digital assets are often omnipresent, and it is therefore imperative to safeguard their rightful ownership. For many digitally backed NFTs, the NFTs serve to protect the value they create.

1 Physical NFT, Flipkick, available at: <https://www.flipkick.io/physical-nft>, last accessed on 26 December 2023.

Dependance of NFTs on Underlying Assets

Unlike many digitally backed NFTs, the value of a physical NFT need not be perception based. Consider a physical NFT linked to a luxury watch. Here, the NFT would simply certify the originality (authenticity) of the watch, and record the credentials of the rightful owner. Any damage to the watch should be reflected by a decrease in the value of its NFT. If the watch is completely destroyed, its NFT may, in all likelihood, become worthless. In general, it seems that the value of an NFT backed by a tangible asset will reflect, and vary in accordance with, that of its underlying asset.

At the moment, most NFTs are backed by digital assets which fundamentally lack both scarcity and value. Their worth is therefore largely perception based, and artificially generated through their corresponding NFTs. Such NFTs may continue to hold value even after their underlying assets cease to exist. If the original copy of a rare Cryptopunk is permanently erased, the NFT linked with it may continue to have value, because of the significance it carries. In fact, this may even become a rare new feature and increase its value. In contrast, a physical artwork-backed NFT may not have value if the underlying artwork is no more.

For digital assets, there is much speculation on how dependent the value of the NFT is on the underlying asset. Famous works may continue to have value, while lesser-known works may not.

A brief chart highlighting the similarities and differences between NFTs and Traditional Artworks is given below for ease of understanding:

NFTs	Traditional Artworks
NFT ownership is recorded on a blockchain with a unique and verifiable proof of ownership.	Artworks involve transfer of a physical asset in terms of change of ownership.
NFTs can be offered to millions of buyers on the blockchain simultaneously.	Traditional artworks can be offered to a limited buyers at a physical auction or sale of the artwork.
NFTs have in-built mechanism for authenticity and uniqueness and blockchain technology makes it easier to deal with ownership issues.	Traditional artworks need to be physically proved as authentic involving the critical process of certification.
NFTs have emerged as an affordable asset for the masses to invest in owing to the concepts of fractional ownership.	Rare artworks have long been owned and invested in by the upper classes of the society with immense financial capital.

Application of NFTs

Digital Artwork

The development of NFTs has provided a lifeline to many digital creators. For years, their artworks have been illegally downloaded and replicated, leaving the work devoid of much value. By assigning unique owner in a reliable manner, NFTs have facilitated the creation of a sense of scarcity, and in turn increased the value of the digital asset. Popular works sold in the last year include Beeple's *Everydays*, Kevin McCoys *Quantum*, Trevor Jones and Jose Delbo's *Genesis* and Trevor Andrew's *Gucci Ghost*.¹

Canadian concept artist and NFT-critic Kimberley Parker argues that while NFTs may be a boon to some artists, the vast majority of them do not make much money.² The reason, she argues, is that the high marketplace charges offset most of the revenue earned from sales. She estimates that a staggering 30% of artists are either barely breaking even or losing money.³ Her analysis serves as a cautionary tale to small artists looking to make money by tokenizing their work.

Another growing problem is an increasing number of NFTs that are created from works which are not authentic or have been plagiarized. Opensea recently admitted that “*more than 80% of the NFTs minted for free on its platform were plagiarized works, fake collections and spam*”.⁴

Digital Collectibles

People have long traded in tangible collectibles like antiques, rare coins and even Pokémon cards. Trading in digital collectibles is a relatively novel concept, and was practically founded through the genesis of NFTs. Jack Dorsey's tweet, Rare Pepes, Cryptopunks and the Bored Ape Yacht Club collection are some of the more popular digital collectibles. Similarly, Bitcoin Ordinals are NFTs which may be used as digital collectibles and are traded on the Bitcoin Blockchain, which was and has been the most widely adopted blockchain in the world.⁵

NBA Top Shots is another popular digital-collectibles platform. It's interesting to note that the makers have made the active decision to visualize the NFTs as packs of cards or cuboidal boxes, thus giving the impression of a tangible asset.⁶ They also market their platform as a place for basketball enthusiast to convene and socialize.⁷

1 Georgia Coggan, The best NFT artwork created so far, Creative Bloq, 01 December 2021, available at: <https://www.creativebloq.com/features/nft-artwork>, last accessed on 26 December 2023.

2 Kimberley Parker, Most artists are not making money off NFTs and here are some graphs to prove it, Medium, 19 April 2021, available at: <https://thatkimparker.medium.com/most-artists-are-not-making-money-off-nfts-and-here-are-some-graphs-to-prove-it-c65718d4a1b8>, last accessed on 26 December 2023.

3 Kimberley Parker, Most artists are not making money off NFTs and here are some graphs to prove it, Medium, 19 April 2021, available at: <https://thatkimparker.medium.com/most-artists-are-not-making-money-off-nfts-and-here-are-some-graphs-to-prove-it-c65718d4a1b8>, last accessed on 26 December 2023.

4 Elizabeth Howcroft, Marketplace suspends most NFT sales, citing 'rampant' fakes and plagiarism, Reuters, 12 February 2022, available at: <https://www.reuters.com/business/finance/nft-marketplace-shuts-citing-rampant-fakes-plagiarism-problem-2022-02-11/>, last accessed on 26 December 2023.

5 Chainalysis Team, Ordinals: A New Innovation Powering Bitcoin NFTs and Maybe More, Chainalysis, 06 March 2023, available at: <https://www.chainalysis.com/blog/ordinals-protocol-bitcoin-nfts/>, last accessed on 26 December 2023.

6 NBA Topshot, available at: <https://nbatopshot.com/>, last accessed on 26 December 2023.

7 NBA Topshot, available at: <https://nbatopshot.com/>, last accessed on 26 December 2023.

Media

The Media and film industry have rapidly embraced NFTs both as a marketing tool to garner engagement and to beef up revenue generation. From global pop icons such as Justin Bieber launching NFT for his popular song,⁸ to a host of Indian superstars such as Amitabh Bachchan, Rajnikanth, Salman Khan, Kamal Haasan, etc.,⁹ even major media house, such as Shemaroo,¹⁰ has their own NFTs.

Typically, these media houses or celebrities tie up with NFT development platforms or marketplaces to mint and sell NFTs through the same platforms. Some NFT launches also accompany other benefits that may be claimed by fans such as physical collectibles or access to exclusive content. These partnerships with NFT platforms typically are a result of meticulously structured contractual arrangements clearly delineating the rights provided to mint and market NFTs including conditions of continuing royalty payments or revenue sharing, restrictions on use of personality rights, limited use of digital avenues, etc.

Gaming

The digital gaming industry, especially the internet-based gaming industry is heavily invested in NFT technology. Cryptokitties, the game in which players breed and trade digital, animated cats grew in popularity so rapidly, that it clogged the Ethereum network. Since then, many other NFT based games have been released, but few have attained that level of success as yet. Notwithstanding, there is tremendous potential for NFTs in this space in form of in-game purchases.

There are other types of games, like those played at casinos and on virtual gambling platforms that can benefit from the use of NFTs. In these cases, NFT use would be primarily focused on preventing fraud: as a way of certifying the outcome of a game in a reliable and verifiable manner. By tokenizing game outcomes and assigning ownership to the rightful winner, gaming houses can protect against counterfeiting and other fraudulent tactics.

Luxury Products and Collectibles

In a previous section, we mentioned the physical NFT — those NFTs that are backed by tangible assets. They are not nearly as common as conventional digitally-backed NFTs, but they show tremendous promise in the collectible and luxury product markets. For example, some jewelers are considering using NFTs and a digital- physical pair, to certify the authenticity of jewelry.¹¹

8 Savannah Fortis, Justin Bieber hit Track becomes an NFT for Royalty-Sharing, Cointelegraph, 06 September 2023, available at: <https://cointelegraph.com/news/justin-bieber-hit-track-becomes-nft>, last accessed on 26 December 2023.

9 Reya Mehrotra, Decoding India's great NFT rush and the celeb connection, Financial Express, 22 May 2022, available at: <https://www.financialexpress.com/digital-currency/decoding-indias-great-nft-rush-and-the-celeb-connection/2533229/>, last accessed on 26 December 2023.

10 Polygon Labs, Bollywood NFTs are coming to Polygon with Shemaroo's Web3 Debut, Polygon, 09 February 2023, available at: <https://polygon.technology/blog/bollywood-nfts-are-coming-to-polygon-with-shemaroo-s-web3-debut>, last accessed on 26 December 2023.

11 Anna Tong, Can NFTs work for luxury jewellery?, Vogue Business, 21 June 2021, available at: <https://www.voguebusiness.com/technology/can-nfts-work-for-luxury-jewellery-asprey-cartier>, last accessed on 26 December 2023.

Application of NFTs

In 2021, automotive manufacturer DeLorean Motor Company tokenized the ownership of some of its limited-edition vehicles.¹² In this case, the NFT ownership serves as proof of ownership of the underlying vehicle. The vehicle being auctioned was famously featured in the movie franchise *Back to the Future* and is therefore highly sought after by automobile aficionados and pop-culture enthusiasts.¹³

Acquicent is helping people monetize their collectibles by creating and selling NFTs linked to them.¹⁴ NFT owners would share ownership of the asset, in the same way that stock owners share ownership of a company.

Finance

The use of NFTs in the financial industry is in its infancy. Startups like NFTfi,¹⁵ Drops¹⁶ and PawnSpace¹⁷ are working on NFT-backed loans, i.e., adding utility to idle NFT assets. However, it remains to be seen the nature of NFTs that will be accepted by such companies. Further, it is very difficult to arrive at a proper valuation for NFTs, because they are non-fungible and each one is unique.

The COVID-19 pandemic served as a testament to the fact that ecommerce is here to stay. Startups like NFTify provide a framework that helps people set up their own NFT ecommerce marketplaces to tokenize and thereby monetize their tangible and digital assets.¹⁸

Real Estate

In 2021, the world's first real-estate-backed NFT was sold for over USD 90,000.¹⁹ The apartment, and associated NFT, belonged to TechCrunch Founder, Michael Arrington. In this case, the NFT purchaser received ownership of the apartment, a picture of it, an NFT artwork and a printed cyberpunk.²⁰ Similarly, Metropoly is the first virtual marketplace backed by real-world properties where users can purchase high-end properties with fractional ownership at affordable prices.²¹

NFTs may be very well suited for real estate, because of their ability to serve as authentic proof of ownership.²² Title searches and subsequently legal disputes related to the ownership of real estate bleed a lot of funds. An NFT based ownership model could provide much needed transparency on such issues. Unfortunately, the existing framework for performing these tasks has so much inertia that it may be difficult to adopt this model on a large scale.

12 DeLorean 40TH ANNIVERSARY NFT COLLECTION, available at: <https://delorean40nft.com/>, last accessed on 26 December 2023.

13 DeLorean 40TH ANNIVERSARY NFT COLLECTION, available at: <https://delorean40nft.com/>, last accessed on 26 December 2023.

14 Acquicent, available at: <https://acquicent.com/#about>, last accessed on 26 December 2023.

15 NFTfi, available at: <https://www.nftfi.com/>, last accessed on 26 December 2023.

16 Drops, available at: <https://drops.co/>, last accessed on 26 December 2023.

17 PawnSpace: A Decentralized NFT Collateralized Lending Protocol, available at: <https://pawnspace.io/>, last accessed on 26 December 2023.

18 NFTIFY: Your own NFT Marketplace, available at: <https://nftify.network/>, last accessed on 26 December 2023.

19 PROPY: The World's First Real Estate NFT, available at: <https://propy.com/browse/propy-nft/>, last accessed on 26 December 2023.

20 PROPY: The World's First Real Estate NFT, available at: <https://propy.com/browse/propy-nft/>, last accessed on 26 December 2023.

21 Alan Draper, Metropoly Raises \$1.1 million for NFT Market Place Backed by Real Estate Assets, 22 April 2023, available at: <https://www.techopedia.com/metropoly-nft-marketplace-backed-by-real-estate-assets>, last accessed on 26 December 2023.

22 Natalia Karayaneva, NFTs Work For Digital Art. They Also Work Perfectly for Real Estate, Forbes, 08 April 2021, available at: <https://www.forbes.com/sites/nataliakarayaneva/2021/04/08/nfts-work-for-digital-art-they-also-work-perfectly-for-real-estate/?sh=417e9bf743f3>, last accessed on 26 December 2023.

Application of NFTs

First-time owners could create NFT based ownership certificates, but for resales, this may be challenging, because the real owner must first be determined without any uncertainty — since NFTs are immutable, any mistake made would be very cumbersome to correct.

NFTs in DeFi Applications

DeFi, or Decentralized Finance, applications (“**DeFi Apps**”) are applications that provide ways to manage financial services such as payments, borrowing, saving, trading, etc., on the blockchain.²³ The advantage of DeFi over traditional banking systems is that DeFi eliminates the need of a third parties, such as banks or non-banking financial institutions.²⁴ NFTs serve as an excellent tool for DeFi sector as NFTs can securely store the proof of ownership for the users. This allows the DeFi Apps to easily verify the ownership of a particular asset and provide an additional layer of security to its users.²⁵ Further, application of NFTs in DeFi would also allow the DeFi sector to facilitate faster and more efficient transactions. Other than serving as a method to verify the transactions on a blockchain, NFTs also help in generating revenue, and facilitate transactions in relation to real world assets. One only needs to create and store an NFT of a real-world asset, such as real estate deeds, intellectual property rights, etc., which can then be used as collaterals in securing loans or transferred through DeFi Apps.²⁶ Some examples of integration of NFTs and DeFi are Rarible, NFTfi, Solr Protocol, etc.²⁷

23 NFTICALLY, What are the Major Applications of NFTs in the DeFi Sector, NFTICALLY, 20 February 2023, available at: <https://www.nftically.com/blog/what-are-the-major-applications-of-nfts-in-the-defi-sector/>, last accessed on 26 December 2023.

24 NFTICALLY, What are the Major Applications of NFTs in the DeFi Sector, NFTICALLY, 20 February 2023, available at: <https://www.nftically.com/blog/what-are-the-major-applications-of-nfts-in-the-defi-sector/>, last accessed on 26 December 2023.

25 Hedera, NFT DeFi Applications Are Gaining Power, available at: <https://hedera.com/learning/decentralized-finance/nft-defi>, last accessed on 26 December 2023; NFTICALLY, What are the Major Applications of NFTs in the DeFi Sector, NFTICALLY, 20 February 2023, available at: <https://www.nftically.com/blog/what-are-the-major-applications-of-nfts-in-the-defi-sector/>, last accessed on 26 December 2023.

26 Hedera, NFT DeFi Applications Are Gaining Power, available at: <https://hedera.com/learning/decentralized-finance/nft-defi>, last accessed on 26 December 2023; NFTICALLY, What are the Major Applications of NFTs in the DeFi Sector, NFTICALLY, 20 February 2023, available at: <https://www.nftically.com/blog/what-are-the-major-applications-of-nfts-in-the-defi-sector/>, last accessed on 26 December 2023.

27 NFTICALLY, What are the Major Applications of NFTs in the DeFi Sector, NFTICALLY, 20 February 2023, available at: <https://www.nftically.com/blog/what-are-the-major-applications-of-nfts-in-the-defi-sector/>, last accessed on 26 December 2023.

Legal Implications and Disputes

While no specific definition of NFTs has been given under the Indian laws, virtual digital assets or VDAs have been defined under the Income Tax Act, 1961, which includes “non-fungible tokens”.¹ This definition is only limited to the Income Tax Act and has only been additionally adopted for the purposes of Prevention of Money Laundering Act, 2000 (as detailed in the subsequent section). However, in absence of any other definition, the definition under the Income Tax Act may serve as a guidance for applying other laws to NFTs. Further, in absence of any specific legislation or regulation to govern the NFT space, India, along with the G20,² has endorsed the Financial Stability Board’s final report on regulation and supervision crypto assets,³ which would include NFTs. These global declarations and reports would shape the regulation of crypto assets in India.

India has already taken the first step towards regulating VDAs. Therefore, it is important to identify the possible laws and regulations that may extend to NFTs and their implication on the NFT space. Given the functionality and use cases of NFTs, such as in digital art, finance, real estate, DeFi, etc., it is pertinent to consider the implication of certain specific laws, such as securities law, anti-money laundering laws, FDI, intellectual property laws, etc. We can also draw guidance from the developing jurisprudence globally.

Securities Law

The term ‘security’ has been broadly interpreted across jurisdictions. However, governments are still hesitant to incorporate NFTs under the broad spectrum of securities law due to the innovation of NFTs and the novel trading methods.

In the US, the courts were of the view that the definition of security is sufficiently expansive to allow the U.S. Securities and Exchange Commission (“SEC”) authority to regulate a diverse range of products as securities. While the interpretation of security is very broad, it does not explicitly specify digital assets or NFTs.

1 Income Tax Act, 1961, Section 2(47-A): “virtual digital asset” means—

- a) any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account including its use in any financial transaction or investment, but not limited to investment scheme; and can be transferred, stored or traded electronically;
- b) a non-fungible token or any other token of similar nature, by whatever name called;
- c) any other digital asset, as the Central Government may, by notification in the Official Gazette specify Provided that the Central Government may, by notification in the Official Gazette, exclude any digital asset from the definition of virtual digital asset subject to such conditions as may be specified therein.
- d) Explanation.—For the purposes of this clause,—
 - a) “non-fungible token” means such digital asset as the Central Government may, by notification in the Official Gazette, specify;
 - b) the expressions “currency”, “foreign currency” and “Indian currency” shall have the same meanings as respectively assigned to them in clauses (h), (m) and (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

2 G20 New Delhi Leaders’ Declaration, New Delhi, India, 09-10 September 2023, available at: <https://www.mea.gov.in/Images/CPV/G20-New-Delhi-Leaders-Declaration.pdf>, last accessed on 26 December 2023; G20 Finance Ministers and Central Bank Governors (G20 FMCBGs) also adopted the policy roadmap for crypto regulation taken up at the G20 New Delhi summit. What this means: (1) International Organization of Securities Commissions (IOSCO) will publish its recommendations on crypto and DeFi regulation by end-2023; (2) SEBI is part of the a member of the IOSCO Board and member of its policy committees; (3) Hence, what IOSCO recommends could be a good indicator to see how SEBI looks at future crypto regulation; Fourth G20 Finance Ministers and Central Bank Governors Meeting, Marrakesh, Morocco, 12-13 October 2023, Communiqué, available at: <https://static.pib.gov.in/WriteReadData/specificdocs/documents/2023/oct/doc20231013260201.pdf>, last accessed on 26 December 2023.

3 Financial Stability Board, High-Level Recommendations for Regulation, Supervision and Oversight of Global Stablecoin Arrangements: Final Report, 17 July 2023, available at: <https://www.fsb.org/wp-content/uploads/P170723-3.pdf>, last accessed on 26 December 2023.

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The SEC was of the view that in terms of enforcement actions, offerings of digital assets may be deemed as investment contracts.⁴ The test for determining whether a transaction/agreement can be deemed as “investment contract” has been laid down by the U.S. Supreme Court in its judgment in the *Securities and Exchange Commission v. W J. Howey Co.*,⁵ known as “Howey Test”. Under the Howey test, an investment contract is any contract, transaction, or scheme involving (a) investment of money, (b) in a common enterprise, (c) with an expectation for profits derived from the efforts of a promoter/third party. The Howey Test resulted in the inclusion of numerous nontraditional offerings within the scope of the term “security”.

The SEC has been silent on when an NFT is deemed as a security. However, they recognize that the main issue in analyzing a digital asset under the Howey test is whether the purchaser has a reasonable expectation of profits or other financial incentives derived from the efforts of third parties. A purchaser may even expect a return through participation in distributions or other methods of realizing appreciation on the asset, including reselling for a gain in a secondary market. Though not in relation to the NFTs, the US Department of Justice is of the view that a non-convertible virtual currency⁶ may be considered a convertible virtual currency⁷ when: (a) there is existence of a secondary market for the currency; and (b) provides the opportunity to exchange the “non-convertible” currency for fiat or other virtual currency.

While the definition of security is very broad, it does not explicitly include digital assets or NFTs.⁸ An NFT may not be classified as a security if it links to an existing asset, is marketed as a collectible, and offers a public guarantee of authenticity on the blockchain. An NFT might be seen as a security if it guarantees a profit from the labour of others. The SEC staff did state in its 2019 Framework that price appreciation deriving simply from external market forces (such as general inflationary trends or the economy) affecting the supply and demand for an underlying asset is generally not considered ‘profit’ under the Howey test.⁹

In the European Union, many countries have taken hybrid and counter approach. As per the directives issued by the Spanish Government for developing rules, principles and criteria regulating advertising activity on crypto assets and the powers of the financial regulators in terms of supervision and control over the advertising of crypto assets, NFTs lay outside the scope of Securities Regulation.¹⁰ While German law on NFTs highlight the need for harmonization in NFT status across laws in the country and on a global level.¹¹

4 Rob Peters, The SEC Tackles NFTs, Intelligize, 10 March 2022, available at: <https://www.intelligize.com/the-sec-tackles-nfts/>, last accessed on 26 December 2023.

5 Securities and Exchange Commission v. W J. Howey Co., 328 U.S. 293 (1946).

6 Cryptocurrency: Enforcement Framework, U.S. Department of Justice, October 2020, <https://www.justice.gov/archives/ag/page/file/1326061/download>, last accessed on 26 December 2023.

7 “Non-convertible virtual currency” is intended to be specific to a particular virtual domain or world, such as a Massively Multiplayer Online Role-Playing Game (MMORPG) or Amazon.com, and under the rules governing its use, cannot be exchanged for fiat currency. Examples include: Project Entropia Dollars; Q Coins; and World of Warcraft Gold. “Convertible virtual currency” has an equivalent value in real currency and can be exchanged back-and-forth for real currency.⁹ Examples include: Bitcoin; e-Gold (defunct); Liberty Reserve (defunct); Second Life Linden Dollars; and WebMoney. See, Virtual Currencies Key Definitions and Potential AML/CFT Risks, FATF, June 2014, available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf>, last accessed on 26 December 2023.

8 In the Matter of Boon. Tech, et al. (Aug. 13, 2020), available at: <https://www.sec.gov/litigation/admin/2020/33-10817.pdf>, last accessed on 26 December 2023.

9 Framework for “Investment Contract” Analysis of Digital Assets, SEC, 2019, available at: <https://www.sec.gov/corpin/framework-investment-contract-analysis-digital-assets>, last accessed on 26 December 2023.

10 Circular 1/2022, De 10 De Enero, De La Comisión Nacional Del Mercado De Valores, Relativa a La Publicidad Sobre Criptoactivos Presentados Como Objeto De Inversión, Boletín Oficial Del Estado, 17 January 2022, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-666, last accessed on 26 December 2023; Spanish National Securities Market Commission (CNMV) Circular 1/2022 of 10 January, on advertising of crypto-assets presented as a means of investment, Comision Nacinal Del Mercado Del Valores, available at: https://cnmv.es/DocPortal/Legislacion/Circulares/Circular_1_2022_EN.pdf#:~:text=Spanish%20National%20Securities%20Market%20Commission%20%28CNMV%29%20Circular%201%2F2022,crypto-assets%20presented%20as%20a%20means%20of%20investment%20I, last accessed on 26 December 2023.

11 Dash, NFTs and German Law: Rights and Duties of NFT Holders, Medium, 13 September 2021, available at: <https://medium.com/@dash/nfts-and-german-law-rights-and-duties-of-nft-holders-83f1bb86d9bd>, last accessed on 26 December 2023.

However, German securities law is still unclear on the status of NFTs since the security status depends on the NFTs underlining asset and use case. In most instances, NFTs do not fall under German securities regulations or financial market regulations. However, in rare cases, NFTs may be deemed as securities if NFTs are attached with cash flow rights or other security characteristics. However, NFT does not fall under securities requirements if cash-flows and factors falling under securities regulation are not connected with the NFT under review.¹²

In India, the Securities Contracts (Regulation) Act, 1956 (“**SCRA**”) and the Securities and Exchange Board of India Act, 1992 (“**SEBI Act**”) regulate the business of dealing with securities. The afore-mentioned laws aim at preventing illicit transactions in securities, protecting investor rights and regulating the securities market. The SCRA provides an inclusive definition of “securities”.¹³ Although, NFTs are not explicitly mentioned in the list, they may be deemed as “derivates”.¹⁴ One could infer that some NFTs derive their value from an underlying asset, such as real estate tokens. These tokens may be regarded as derivatives of a commodity, such as, in the case of a real estate token, the real estate property. However, this argument may be easily rebutted. According to the SEBI, a “commodity” is widely understood to be any form of tangible goods that can be exchanged for other goods of similar kind, and are typically used as an raw materials in the production of other goods or services, such as grains, gold, crude oil, copper, and natural gas.¹⁵ Hence it is unlikely that NFTs may be derivatives of raw commodities such as crude oil and gold and may not be deemed to be “securities” under the SCRA.

However, the SCRA gives the government the power to notify NFTs as securities to be regulated under the relevant laws. But NFTs are unlikely to be considered as securities and thus may not be restricted to being bought and sold on regulated exchanges only like in the case of shares or debentures. Presently, NFTs are freely tradeable on the blockchain.

Further, the Foreign Exchange Management Act, 1999 creates two classes of securities as ‘securities’¹⁶ and ‘foreign securities’.¹⁷ The former refers to shares, stocks, bonds and debentures, government securities, savings certificates, deposit receipts in respect of deposits of securities and units of the Unit Trust of India or of any mutual fund and includes certificates of title to securities along with promissory notes or bills of exchange of the Government or as notified by the Reserve Bank of India (“**RBI**”).

12 Datash, NFTs and German Law: Rights and Duties of NFT Holders, Medium, 13 September 2021, available at: <https://medium.com/@datash/nfts-and-german-law-rights-and-duties-of-nft-holders-83f1bb86d9bd>, last accessed on 26 December 2023.

13 Securities Contracts (Regulation) Act, 1956, Section 2(h):
“securities” include—
(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;
(ia) derivative;
(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;
(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
(id) units or any other such instrument issued to the investors under any mutual fund scheme;
(ii) Government securities;
(ia) such other instruments as may be declared by the Central Government to be securities; and
(iii) rights or interest in securities.

14 Securities Contracts (Regulation) Act, 1956, Section 2(ac).

15 FAQs on Commodity Derivatives, SEBI, available at: https://www.sebi.gov.in/sebi_data/faqfiles/nov-2021/1636459847983.pdf (last accessed on 26 December 2023).

16 Foreign Exchange Management Act, 1999, Section 2(za): (za) “security” means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944 (18 of 1944), savings certificates to which the Government Savings Certificates Act, 1959 (46 of 1959) applies, deposit receipts in respect of deposits of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 (52 of 1963)* or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act;

17 Foreign Exchange Management Act, 1999, Section 2(o): “foreign security” means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;

The foreign securities on the other hand refers to any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return is payable in Indian currency. Since digital currency or crypto assets may not fall within the ambit of securities as discussed above due to its decentralized nature, consequentially it would also be out of bounds of the foreign securities regulations as well.

Lastly, contributing funds or making payments towards an NFT may also be seen under the lens of a “collective investment scheme”, as regulated by the Securities and Exchange Board of India (“SEBI”). According to the SEBI (Collective Investment Scheme) Regulations, 1999, any payment or contribution made by investors in a scheme or arrangement—which may be a property, contribution, or investment—where the scheme or arrangement is not directly managed by the investors on a daily basis may be deemed to be a collective investment scheme. An NFT may be created through a financial contribution and can be programmed so that each sale afterwards results in a specific royalty payment being made to the NFT’s original inventor. While the NFT itself wouldn’t need daily oversight to guarantee royalties were paid to the creator, it is still unclear whether the setup would qualify as a collective investment scheme.

Prevention of Money Laundering Laws

Money laundering is the process of concealing the unlawful sources of criminally generated income. Laundered money typically comes from theft, insider trading, corruption, or fraud. Because the market prices of traditional art are so speculative and personal, they are one of the most frequently exploited assets for money laundering. Money Launderers could pay high sums for art and use a method called placement to transfer their illicit funds into the legitimate economy. Thereafter there is a need to integrate the purchased artwork itself, perhaps by moving it through a channel with simplified procedures for customs and tax. The artwork may then be sold to the subsequent buyer, enabling the money launderer to recoup their cash from a legitimate source. Per United Nations Office on Drugs and Crimes, nearly USD 3 billion worth of art transactions are directly attributable to money laundering and financial crimes.¹⁸

Additionally, the possibility of anonymously purchasing expensive physical artworks has created the ideal scenario to use it as a technique for money laundering. However, it has a limited impact because moving and storing actual art can be difficult and expensive. If NFTs that grant an actual ownership interest in artwork are created, they would give the advantages of buying physical art while eliminating the issues of physical transportation and storage and might pose a significant threat to Anti-money laundering (“AML”) efforts. Further, when purchasing an NFT, the majority of exchanges only request a wallet address, which provides a high level of anonymity that makes NFTs a desirable avenue for money laundering.¹⁹ An individual desiring to launder money could construct an NFT and use an anonymous account to post it for sale on a marketplace. The NFT might then be purchased using a different wallet address, and the proceeds could subsequently be registered as legitimate revenues from the sale of NFTs, giving rise to risk of money laundering.

¹⁸ Tom Mashber, *The Art of Money Laundering*, International Monetary Fund: Finance & Development, September 2019, available at: <https://www.imf.org/en/Publications/fandd/issues/2019/09/the-art-of-money-laundering-and-washing-illicit-cash-mashberg>, last accessed on 26 December 2023.

¹⁹ Scott Chipolina, *Art Has a Money Laundering Problem. NFTs Could Make It Worse*, Decrypt, 08 May 2021, available at: <https://decrypt.co/70190/art-has-a-money-laundering-problem-nfts-could-make-it-worse>, last accessed on 26 December 2023.

However, the ballooning volume of trading in NFTs has prompted the Union Government to define the Virtual Digital Assets (“VDAs”) such as NFTs, crypto assets and other digital assets under the Income Tax Act, 1961.²⁰ Subsequently, the regulation of VDAs has been expanded within the ambit of the Prevention of Money-laundering Act, 2002 (“PMLA”). Under the PMLA, Virtual Asset Service Providers (“VASP”) have been included under the definition of “reporting entities”. A reporting entity under PMLA is defined as a “banking company, financial institution, intermediary or a person carrying on a designated business or profession”.²¹ In March 2023, the Ministry of Finance under the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 (“PMLA Rules”) has included VASPs undertaking activities such exchange of VDAs or fiat currencies, transfer of VDAs, administration of VDAs or participation in financial services pertaining to VDAs to comply with the provisions of PMLA, 2002. This statutory amendment now requires VASPs to undertake Know Your Customer (“KYC”) requirements, due diligence, and appoint designated personnel to report to the Financial Intelligence Unit — India, among other AML responsibilities of the reporting entities.²² This was also followed by the Financial Intelligence Unit — India issuing the *AML & CFT Guidelines For Reporting Entities Providing Services Related To Virtual Digital Assets* which have been effective from March 10, 2023.²³

Similar KYC obligations are also imposed under Section 11A of the Securities Exchange Board of India Act (“SEBI Act”), which requires all reporting organizations, including banks, financial institutions, and other intermediaries to use an Aadhaar card, passport, or other legally recognized identification document to confirm the clients’ identities.

Prior to starting some transactions, reporting organizations are required to perform additional due diligence under Section 12AA of SEBI Act. This entails verifying the client’s identification, documenting the transaction’s goal, and looking into the client’s funding source. Many regulations and circulars published by RBI under the SEBI Act regarding the required processes for client identification, transaction monitoring, and risk assessment are consolidated in the RBI Master Circular on KYC requirements.²⁴ Based on these regulations, cryptocurrency exchanges in India have already implemented KYC/AML criteria for users. Therefore, NFT markets may also benefit from following suit.²⁵

Any legislative attempt at regulating and curbing money laundering through NFTs would require global cooperation to ensure effective implementation of the AML laws and regulations. Financial Action Task Force (“FATF”), an intergovernmental policymaking body, establishes international standards to combat money laundering and financing of terrorism.²⁶ While FATF has no enforcement capability, it has the power to suspend member countries (including the US) that fail to comply with the issued guidelines in a timely manner.

20 Income Tax Act, 1961, Section 2(47-A).

21 Prevention of Money Laundering Act, 2002, Section 2(1)(wa).

22 For a detailed analysis of the same, see NDA Hotline: Alipak Banerjee et al., Making Crypto Industry Compliant in India: A Welcome move under the Anti-Money Laundering Laws, Nishith Desai Associates, 13 March 2023, available at: <https://www.nishithdesai.com/generateHTML/9522/4>, last accessed on 26 December 2023.

23 Financial Intelligence Unit – India, AML & CFT Guidelines for Reporting Entities Providing Services related to Virtual Digital Assets, 10 March 2023, available at: https://fiuindia.gov.in/pdfs/AML_legislation/AMLCFTguidelines10032023.pdf, last accessed on 26 December 2023.

24 Master Circular – Know Your Customer (KYC) norms / Anti-Money Laundering (AML) standards/ Combating of Financing of Terrorism (CFT)/Obligations of banks under PMLA, 2002, Reserve Bank of India, 01 July 2008, available at: <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/85454.pdf>, last accessed on 26 December 2023.

25 ETech, IAMAI board to oversee self-regulation by crypto exchanges, The Economic Times, 01 June 2021, available at: <https://economictimes.indiatimes.com/tech/technology/iamai-board-to-oversee-self-regulation-by-crypto-exchanges/articleshow/83142246.cms>, last accessed on 26 December 2023.

26 James K. Jackson, CRS Report RS21904, The Financial Action Task Force: An Overview, Congressional Research Service, 23 March 2017, available at: <https://crsreports.congress.gov/product/pdf/RS/RS21904/20>, last accessed on 26 December 2023.

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In 2021, FATF issued updated guidance²⁷ to evaluate NFTs for potential regulation as virtual assets (“VAs”).²⁸ The guidance recognized that some NFTs that may not appear to constitute VAs, on their face, may still fall under the ambit of VAs; for transactions pertaining to payments or investments.²⁹ However, the guidance further recommends that countries consider the application of the FATF standards to NFTs on a case-by-case basis.

Whether NFTs are subject to current AML regulations will depend on how FATF guidance is implemented locally in pertinent jurisdictions and the particular NFT in question.³⁰ Digital representations of fiat money, securities, and other financial assets that are already regulated elsewhere in the FATF Recommendations are not considered VAs.³¹ The US Treasury Department noted money laundering risks in the design of NFT marketplaces in a report from 2022. According to the research, if transactions happen quickly back-to-back, the incentive to transact can possibly be larger than the incentive to verify the identity of the buyer of the work, or perhaps can create a situation where it is not viable to undertake due diligence.³²

For instance, OpenSea earns 2.5% of every transaction on its marketplace, which may incentivize the company to prioritize transaction volume over money laundering and illicit activity concerns. NFTs may be particularly susceptible to money laundering since they are easily sent across geographic borders without incurring the financial or regulatory costs of physical shipping. Additionally, the price of digital art is highly variable, which enables money launderers to set the desired value with little historical context in which to compare prices.³³

The popularity of NFT markets has expanded along with the prevalence of their illegal trading activities. The US Treasury Department stated that NFTs are vulnerable to “wash trades,” in which the same account trades assets back and forth to inflate their value. The design of NFT marketplaces may encourage these illegal acts. For instance, OpenSea requires sellers to hold minimum 100 ETH (Ethereum-based cryptocurrency) in trade volume in order to authenticate a collection, which is a group of NFTs with related characteristics or a common factor. This might make it difficult for emerging artists or collections, while encouraging consumers to engage in wash trading. On the NFT platform LooksRare, which at the time had only accumulated about USD 9.5 billion worth of deals overall, one industry data aggregator discovered more than USD 8 billion worth of wash trading.³⁴

27 Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers, Financial Action Task Force, 2021, available at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf>, last accessed on 26 December 2023.

28 The FATF Updated Guidance defines VA as “a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations.”

29 Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers, Financial Action Task Force, 2021, available at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf>, last accessed on 26 December 2023.

30 James K. Jackson, CRS Report RS21904, The Financial Action Task Force: An Overview, Congressional Research Service, 23 March 2017, available at: <https://crsreports.congress.gov/product/pdf/RS/RS21904/20>, last accessed on 26 December 2023.

31 Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers, Financial Action Task Force, 2021, available at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf>, last accessed on 26 December 2023.

32 Study of the Facilitation of Money Laundering and Terror Finance Through the Trade in Works of Art, US Department of the Treasury, February 2022, available at: https://home.treasury.gov/system/files/136/Treasury_Study_WoA.pdf, last accessed on 26 December 2023.

33 Matthew Long, The New Digital Art Trade Is Ideal for Criminals, Bloomberg Law, 20 April 2021, available at: <https://news.bloomberglaw.com/white-collar-and-criminal-law/the-new-digital-art-trade-is-ideal-for-criminals>, last accessed on 26 December 2023.

34 Andrew Hayward, LooksRare Has Reportedly Generated \$8B in Ethereum NFT Wash Trading, Decrypt, 28 January 2022, available at: <https://decrypt.co/91510/looksrare-has-reportedly-generated-8b-ethereum-nft-wash-trading>, last accessed on 26 December 2023.

FEMA – Exchange Control

As most notable NFT marketplaces are located outside India, an individual resident in India using these platforms to buy or sell NFTs can be regarded as making crossborder transfers. These may be governed by the Foreign Exchange and Management Act, 1999 (“FEMA”). In absence of any guidance from the RBI on the treatment of cross border transfers of VDAs or NFTs, one needs to extrapolate from existing provisions and case law to see how NFTs would be regulated under FEMA.

Depending on their classification, different NFTs may be handled differently under FEMA. NFTs are essentially a type of software or computer code. The Supreme Court of India, in the case of *Tata Consultancy Services v. State of Andhra Pradesh*,³⁵ held that the term “goods” cannot be given a specific definition and refers to all types of tangible and intangible transportable property. It was decided that if an item is useful, can be purchased or sold, and can be transported, stored, delivered, and possessed, then it qualifies as a “good”.³⁶ It was decided that since software met all three qualifications, it qualified as “goods”.³⁷ As a result, NFTs can legitimately be categorised as “intangible items” under FEMA because they meet the same three criteria.

The second challenge in deciding how NFTs are treated under FEMA is finding the situs or location of the NFT. This will determine whether or not the transaction crosses international boundaries. The blockchain, which is often a globally distributed ledger, is where NFTs are kept. Virtual currencies cannot be stored anywhere, in the true sense of the word, as they do not exist in any physical shape or form.³⁸ Although this assertion refers to virtual currencies, it may also apply to NFTs because they are native to the blockchain.

It will be easier to understand how the situs of an NFT is likely to be decided if recent decisions by Indian courts dealing with the situs or location of other intangible assets, such as intellectual property rights, are referred to. In *Cub Pty Ltd. v. Union of India & Ors.*,³⁹ the Delhi High Court held that the location of an intangible asset is at the residence of its owner. For NFTs, it is likely that a similar rationale may be applied.

However, identifying the owner of an NFT can be challenging. Since the NFT was either produced by the marketplace or is kept in its custody, it may be presumed that the marketplace itself is the owner of any NFT that is purchased from a custodial or proprietary marketplace. Using an NFT marketplace outside of India to buy or sell NFTs may throw up the question whether such transactions involving NFTs are import or export of intangible goods or not. Depending on such assessment, these transactions may be subject to a plethora of laws and restrictions, such as the FEMA (Export of Good and Services) Regulation 2015 and the FEMA (Current Account) Rules 2000.

Further, in cases of NFTs based on decentralized blockchains, determining the situs (location) of the NFT may be even more difficult. Though, there are Indian case laws on the situs of intangible assets (for example, *Cub Pty Ltd. v. Union of India & Ors.* as discussed above), there are no judgments on the situs of NFTs or crypto assets. Therefore, guidance may be drawn from the developing jurisprudence around the globe, which has been discussed in detail in the subsequent sections.

35 *Tata Consultancy Services vs. State of Andhra Pradesh*, (2005) 1 SCC 308.

36 *Tata Consultancy Services vs. State of Andhra Pradesh*, (2005) 1 SCC 308, Para. 27.

37 *Tata Consultancy Services vs. State of Andhra Pradesh*, (2005) 1 SCC 308, Para. 29.

38 *Internet and Mobile Association of India vs Reserve Bank of India*, (2020) 10 SCC 274, Para. 201.

39 *Cub Pty. Ltd. vs. Union of India & Ors.*, 2016 SCC OnLine Del 4070.

Foreign Direct Investment in NFT Marketplaces

The necessity for marketplaces as well as other facilities that make it simple for Indians to buy and mint NFTs has increased as a result of NFTs' rising appeal in India. The Department for Promotion of Industry and Internal Trade (DPIIT) implements India's Foreign Direct Investment Policy, which governs capital inflows from outside the country. Whether it can be used to regulate NFT marketplaces will depend on the kind of NFTs being exchanged.

Per the Consolidated FDI Policy 2020, E-commerce is the “buying and selling of goods and services including digital products over digital and electronic network”.⁴⁰ The majority of NFT markets will probably be categorised as “e-commerce entities” because the definition is broad enough to encompass the majority of NFT use cases, including art, music, and fashion. An e-commerce organisation must either be an Indian corporation, a foreign corporation exempt from Indian jurisdiction under section 2(42) of the Companies Act, 2013, or an Indian office, branch, or agency (as defined in section 2(v)(iii) of the FEMA) that is under the management of a foreign national. Other participants in the cryptocurrency industry, like CrossTower, have also expressed a desire to establish NFT markets in India.⁴¹

Depending on the e-commerce model chosen, an entity's FDI restrictions may vary. The following two models are defined by the Policy:

- a. A model based on inventory, in which the e-commerce company owns the inventory of goods and services and sells them directly to customers. In the approach based on inventories, FDI is not allowed.
- b. A marketplace-based business model, where an online marketplace is provided by an e-commerce company to enable trade between buyers and sellers. The marketplace model allows FDI up to 100% via the automatic method, i.e. without Government permission.

Due to the fact that they do not wield control or ownership over the NFTs exchanged on their platform, which typically belong to and are kept in the custody of their creators, gated and open NFT marketplaces like OpenSea and Rarible appear to follow the marketplace-based concept. Thus, there are no restrictions on how much foreign cash these exchanges can raise. On the other hand, proprietary marketplaces like NBA Top Shot and Rario produce NFTs themselves and offer them for sale to customers. Private marketplaces appear to use the inventory-based e-commerce paradigm, which forbids foreign direct investment.

Additionally, the “infrastructure company in the securities market” portion of the FDI Policy may apply to a market supplying fractionalised NFTs, which may be similar to securities. Under the automatic method, up to 49% of FDI is permitted in this area. Fractionalised NFT marketplaces may need to comply with various other rules and regulations imposed by the Government, the RBI, and SEBI, if made applicable. Additionally, they may also be required to submit an application for government accreditation as a “recognised stock exchange” in accordance with Section 4 of the Securities Contracts Regulation Act. Hence, entrepreneurs and developers looking to set up NFT exchanges must carefully consider the implications of their platform structure and the nature of NFTs they offer on their ability to raise capital from foreign sources.

40 Consolidated FDI Policy (Effective from October 15, 2020), Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, available at: https://dpiit.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_0.pdf, last accessed on 26 December 2023.

41 Sachin Dave, Crypto exchanges bet on NFTs amid regulatory concerns, The Economic Times, 02 January 2022, available at: <https://economictimes.indiatimes.com/markets/cryptocurrency/crypto-exchanges-bet-on-nfts-amid-regulatory-concerns/articleshow/88643603.cms>, last accessed on 26 December 2023.

The Government may also provide clarity to stakeholders by including NFT marketplaces within the ambit of the ‘marketplace model’ of e-commerce, since most NFT marketplaces exercise little to no control over the underlying asset and merely act as a platform to facilitate its purchase and sale. Beyond providing the necessary clarity, such a move may also boost inflow of capital into India. Experts had suggested in 2021 that greater regulatory certainty could unlock up to USD 400 million of risk capital for the blockchain and VAs sector in India.⁴²

Payment System Laws

In India, The Payments and Settlement Systems Act (“**PSS Act**”) regulates the payments ecosystem in India. It requires payment systems i.e. systems that enable payments including clearing, payment or settlement services to obtain registration from the RBI to operate in India. Typically, the RBI has sought to regulate any system that involves payments from retail payment systems such as NPCI to card networks such as Visa, MasterCard to digital payments providers issuing prepaid instruments such as Amazon Pay, Mobikwik and Sodexo. Any system that involves crypto assets which are used primarily for payments to merchants to obtain various goods or services may attract the applicability of the PSS Act and may need to register with the RBI. However as discussed before in this paper with regards to NFTs, their non-fungible nature and inability to act as a medium of exchange distances them from being viewed as a payment cryptographic token and therefore, there is a possible argument that the PSS Act may not apply.

Intellectual Property Rights

NFTs and intellectual property rights are intrinsically intertwined since NFTs generally require identification of unique underlying assets which could range from art and posters (artistic works), musical tunes and songs (musical works and sound recordings), scripts and dialogues (literary works), video clips to films (cinematographic work), or even limited-edition collectibles with unique branding (trademarks). This leads to a plethora of challenges regarding intellectual property (“**IP**”) which leads us to pertinent questions such as who is the owner of the IP rights in the NFTs, as well as, the underlying work for the NFT, whether the ownership is transferred with each sale, if the original owner of the underlying work continues to earn royalty, who can be held liable for infringement, etc.

Copyright Law

The most frequent use of the NFTs is seen in the media and gaming industries. Any original work, whether it is musical work, artistic work, literary work, cinematograph film or sound recording (physical or digital form), can be used to create NFTs and be uniquely portrayed in the digital world. In India, the Indian Copyright Act, 1957 (“**Copyright Act**”), in tandem with the Copyright Rules, 1958 (“**Copyright Rules**”), protects every one of these “works,” along with any software.

⁴² Apoorva Mittal, India’s crypto industry attracts foreign funds, but local investors remain wary, Economic Times, 18 June 2021, available at: <https://economictimes.indiatimes.com/tech/technology/indias-crypto-industry-attracts-foreign-funds-but-local-investors-remain-wary/articleshow/83615324.cms>, last accessed on 26 December 2023.

A “copyright” is defined under the Copyright Act as a bundle of rights for use, communication and publication of original works, or creating derivative works from such original works. Each right subsists separately in each of the original literary, dramatic, musical or artistic work or cinematograph films, and sound recordings.⁴³ Moreover, software programmes⁴⁴ are also given protection as literary works under the Copyright Act.⁴⁵ In case of original work, rights under the Copyright Act vest with the creator the moment they are created.⁴⁶ These rights (as a whole or as separate rights) can also be licensed under a valid agreement.

Disputes concerning who has the right to create digital works and who has the right to exploit those works by investing time, effort, and labour to mint NFTs may arise when NFTs are minted from original works. Often, multiple people may own different rights in relation to a single work under the Copyright Act. For instance, one person may hold the right to a music video for broadcast over television while another party may have the right to use the music video for minting an NFT.⁴⁷ The use of a copyright may also be subject to limitations, such as those on gamification, merchandise, etc. Parallel to this, if performers or celebrities have given permission for their similitudes, caricatures, voices, etc. to be used in an NFT made from a video clip starring them, their individual authorization might not be necessary.

The bundle of rights under copyright includes the right to create derivative works, such as digital artwork/asset backing the NFTs. Under the Copyright Act, a copyright assignment or license must be executed in writing⁴⁸ and contain a detailed contract outlining each party’s rights. The owner of the copyright may frequently only grant a limited license to mint NFTs without transferring/assigning the ownership. For instance, many media sector artists provide developers restricted licenses to mint NFTs based on their works while retaining ownership of the actual works. In rare circumstances, the owner of the copyright may also transfer that copyright to the person creating the NFT.

It is essential to examine the chain of title and the clauses of the assignment/licensing agreement in order to ascertain whether the necessary rights to mint and sell NFTs are contractually granted and whether any royalties would be paid to the creators of the underlying work. Industry participants have begun carving out NFTs as a specific entitlement in media contracts as a result of the Indian film industry’s growing trend of releasing NFTs concurrently with the release of films. A condition for the perpetual payment of a percentage of the sale price as a royalty to the original author every time the NFT is sold is also present in some contracts. For gamification and merchandising rights, further consent from artists may be required under some NFT development agreements. Such provisions in the contract depend upon the negotiation between stakeholders.

43 Copyright Act, 1957, Section 13.

44 Copyright Act, 1957, Section 2(ffc): “computer programme” as a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.

45 Copyright Act, 1957, Section 2(o).

46 Copyright Act, 1957, Section 14: This section provides the rights of a copyright owner. This includes the right to reproduce works, issue copies, make adaptations, etc.

47 A dispute in this regard arose when Damon Dash, co-owner of Roc-A-Fella Records, announced his intention to publish Jay-Z’s first album “Reasonable Doubt” as NFTs. Roc-A-Fella Records owns the copyright in the said album, and therefore decided to sue Damon Dash seeking injunction against release of any NFTs; See, Roc-A-Fella Records Inc. vs. Damon Dash, Case No. 1:21-cv-05411-JPC (SDNY 2022).

48 Copyright Act, 1957, Section 19(1).

Trademark Law

Due to its rarity and the resulting perception of its premium value, many NFTs gain traction and experience a boom in popularity. As a result, branding plays a huge part in determining an NFT's value. This function is further enhanced when brands capitalize on the NFT trend and develop NFTs in the form of their branded goods or under their brand names. For instance, a nine-piece set of NFTs by the high-end clothing company Dolce & Gabbana was sold at auction for a total of 1885.719 Ethereum, which at the time was equivalent to nearly USD 5.7 million.⁴⁹ Therefore, such branded NFTs would need to be protected under trademark law from infringement.

The Trade Marks Act, 1999 (“**Trademark Act**”) governs trademark protection in India. A trademark is defined as a mark capable of graphical representation and of distinguishing the goods or services of one person from another's, “including shape of goods, their packaging and combination of colours”,⁵⁰ and will cover brands incorporated in NFTs. Brands globally, including Gucci, Prada, Nike, etc., have filed suits for enforcing their trademark rights relating to “virtual assets” and “virtual goods”. In India, trademarks applications have increased multi-fold under classes 9,⁵¹ 35⁵² and 41⁵³ for registration of trademarks relating to online virtual goods and services by brands such as Walmart, Vogue, Ajio Luxe, etc. Conversely, given that trademark rights are territorial⁵⁴ and the virtual nature of NFTs and cryptographic tokens on the blockchain are borderless, the degree of protection under trademarks in each jurisdiction would have to be factored in by organizations as part of their global brand strategies.

The licencing conditions set forth by corporations for the use of their trademarks in NFTs certainly hold weight. Whilst creator of an NFT may secure the necessary trademark licences to mint, it is also important to determine whether the brand's licence extends to any subsequent purchasers of the NFTs and, if so, how much of it will be used by them. For instance, a well-known brand could produce an NFT and sell it to a customer without obtaining authorization to further licence the brand to NFT purchasers in the future. In such cases, the purchaser may not be able to display or utilize the NFT, and therefore, the value of the NFT may depreciate.

Additionally, brands may want to forbid specific use cases or guarantee quality control when customers purchase and use their NFTs. Considering that the primary function of a trademark is to serve as a source identifier, the use of an NFT with the trademark of a brand may adversely affect such brand by its use. How the brand will curb such use of the NFTs will depend upon the terms of the licensing agreement.

49 Dana Thomas, Dolce & Gabbana Just Set a \$6 Million Record for Fashion NFTs, The New York Times, 04 October 2021, available at: <https://www.nytimes.com/2021/10/04/style/dolce-gabbana-nft.html>, last accessed on 26 December 2023.

50 Trade Marks Act, 1999, Section 2 (zb).

51 Scientific, nautical, surveying, electric, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life saving and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire extinguishing apparatus.

52 Advertising, business management, business administration, office functions.

53 Education; providing of training; entertainment; sporting and cultural activities.

54 Affirmed by the Supreme Court of India in the case of Toyota Jidosha Kabushiki Kaisha vs. Prius Auto Industries Limited & Ors., (2018) 2 SCC 1.

Patents Law

Considering the uniqueness of NFTs and their numerous use cases, patents law can govern anything from specific NFTs, to novel methods of utilizing the NFTs. In 2019, Nike applied for and obtained a patent in US for a “*system and method for supplying cryptographically secured digital assets*” for digital sneakers called “Crypto-Kicks”.⁵⁵ Basically, Nike received a patent on its digital representation of its sneakers.

NFTs are cryptographic tokens on the blockchain, i.e., fundamentally computer codes or algorithms that a person may perceive through a computer system. The Indian Patents Act, 1970 (“**Patents Act**”) prescribes a three-pronged test of novelty, non-obviousness, and industrial utility, for patentability of an invention. However, certain inventions are statutorily excluded from patentability regardless of their novelty, non-obviousness and industrial utility.⁵⁶ One such exclusion relates to software programmes per se.⁵⁷ The invention should preferably include both hardware and software aspects in order for a computer programme to be patented in India. For instance, a hardware crypto-wallet created exclusively for NFTs⁵⁸ combined with software may have a higher probability of being patentable than computer-related inventions that just use software.

However, recently, inventions that are primarily connected to software have also been considered patentable. In order for such inventions to be regarded patentable, the applicants would need to demonstrate a technical effect/technical contribution exceeding prior art or be able to demonstrate that the invention can provide a technical solution to a technological problem.⁵⁹ However, “technical contribution”/ “technical effect” are not defined under law. The *Guidelines for Examination of Computer Related Inventions, 2013* (“**2013 Guidelines**”)⁶⁰ had defined “technical effect” as “*the solution to a technical problem, which the invention taken as a whole, tends to overcome.*” The 2013 Guidelines included some examples, such as increased speed, shortened hard-disk access times, more efficient memory usage, etc. The 2017 Guidelines for Examination of Computer Related Inventions, however, have removed this definition.⁶¹

In the recent past, the Intellectual Property Appellate Board (“**IPAB**”) has relied on several EU decisions to determine what constitutes “technical effect”.⁶² The IPAB ruled that patent filing for a “*method and device used for obtaining information sources and services of the web*” was patentable and was not barred under the Patents Act for being a mere “computer programme”. The IPAB arrived at the conclusion, after considering the evidence, that the invention had a technical effect and made a technical addition to the art. On the basis of such rulings, it might be conceivable to claim that an NFT that offers a stable cryptographic method for accessibility and authentication of a digital asset (such as a piece of art or a game item) has made a technical contribution, has the technical effect of uniquely identifying an asset, and is therefore potentially patentable. However, the criteria for determining whether something has a technical effect can differ on a case-to-case basis.

55 Chris Katje, Why NFT Sneakers Could be Coming, Yahoo! Finance, 25 March 2021, available at: <https://finance.yahoo.com/news/why-nft-sneakers-could-coming-181755561.html>, last accessed on 26 December 2023.

56 Patents Act, 1970, Section 3.

57 Patents Act, 1970, Section 3(k); Other exclusions include inventions which are frivolous, inventions which could be contrary to public order or morality, business methods, etc.

58 For instance, see SecuX, available at: <https://shop.secuxtech.com/pages/nifty>, last accessed on 26 December 2023.

59 See *Telefonaktiebolaget Lm Ericsson v. Intex Technologies (India) Limited*, 2015 SCC OnLine Del 8229.

60 Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs and Trade Marks, 2013, available at: https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_36_1_2-draft-Guidelines-cris-28june2013.pdf, last accessed on 26 December 2023.

61 Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs and Trade Marks, 2017, available at: https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_86_1_Revised__Guidelines_for_Examination_of_Computer-related_Inventions_CRI_.pdf, last accessed on 26 December 2023.

62 *Allani Ferid vs. Assistance Controller of Patents & Designs & Anr.*, 2020 SCC OnLine IPAB 1000.

Intellectual Property Infringement

The novelty of NFTs require a re-imagining of the traditional IP laws to meet the new challenges of infringement posed by use of NFTs. Numerous IP disputes involving NFTs have already started to surface in diverse contexts. For instance, the luxury company Hermes had filed a lawsuit against Mason Rothschild, the maker of the MetaBirkin NFTs, in the US for using the design and name of their well-known Birkin bags without any authorization.⁶³ The jury found Rothschild to be liable for trademark infringement.⁶⁴ Another dispute arose in respect to certain famous paintings by M.F. Hussain, which were used to mint and sell NFTs by a well-known art dealer.⁶⁵ The estate of M.F. Hussain argued that although the art dealer had the rights to display the paintings themselves, they did not have the right to make derivative works of the same, i.e., turn it into a digital work. However, as per the publicly available information, the parties have resolved their dispute.⁶⁶ In similar vein, another dispute arose between Miramax LLC and the renowned Hollywood director Quentin Tarantino. Miramax decided to sue Quentin Tarantino, when the latter decided to release certain uncut scenes from the movie “Pulp Fiction” as NFTs, accusing Tarantino of infringing Miramax’s copyright.⁶⁷ The dispute was finally settled by the parties.⁶⁸

NFTs are based on and stored on blockchains, which in many cases are decentralized ledgers. Therefore, an NFT can be stored anywhere in the world, even if it is owned by a person from a particular jurisdiction. This raises the issue of determining the relevant jurisdiction for enforcement of IP rights in NFTs. India is a party to Berne Convention for the Protection of Artistic Works and the Universal Copyright Convention, which guarantees automatic protection in all members states of either of the two conventions, for any work originally published in any one of the member states. Although these norms make it easier to enforce copyrights, both patents and trademarks are strictly territorial rights. As NFTs are easily accessible everywhere, it becomes important to determine how such rights are enforced in various countries.

The question of jurisdiction is also important to determine where one can institute a suit for infringement of IP rights in relation to NFTs. India has adopted the test of “purposeful availment” as laid down by the Delhi High Court in its judgment in *Banyan Tree Holdings (P) Ltd. vs. A. Murali Krishna Reddy & Anr.*⁶⁹ The test of “purposeful availment” may be applied to NFT-related cases.

The ease with which digital files can be duplicated is another issue that requires consideration. Therefore, any unlawful use of a third-party trademark through an NFT or the illegitimate replication, adaption, or dissemination of the original IP may be regarded as infringement. To grant any effective remedy, it must be determined if Indian courts have the jurisdiction to order global takedowns or if the relief would be limited to geo-blocking in India. In *Swami Ramdev and Anr. v Facebook Inc and Ors.*,⁷⁰ the Delhi High Court ordered the global takedown of all defamatory movies, if the same were uploaded from India.

63 TFL, Hermes’ Response in MetaBirkins Case Raises Questions About Virtual Marks, The Fashion Law, 07 April 2022, available at: <https://www.thefashionlaw.com/hermes-response-in-metabirkins-case-raises-questions-about-virtual-marks/>, last accessed on 26 December 2023.

64 Hermes vs. Rothschild, 1:22-CV-00384 (S.D.N.Y.); Zachary Small, Hermes Wins MetaBirkins Lawsuit; Jurors Not Convinced NFTs Are Art, The New York Times, 08 February 2023, available at: <https://www.nytimes.com/2023/02/08/arts/hermes-metabirkins-lawsuit-verdict.html>, last accessed on 26 December 2023.

65 Kelcee Griffis, NFT Rights Suit by Indian Artist M.F. Husain’s Estate Is Dropped, Bloomberg Law, 29 June 2022, available at: <https://news.bloomberglaw.com/ip-law/artists-estate-drops-ownership-defense-in-nft-copyright-suit>, last accessed on 26 December 2023.

66 Kelcee Griffis, NFT Rights Suit by Indian Artist M.F. Husain’s Estate Is Dropped, Bloomberg Law, 29 June 2022, available at: <https://news.bloomberglaw.com/ip-law/artists-estate-drops-ownership-defense-in-nft-copyright-suit>, last accessed on 26 December 2023.

67 Legal Entertainment, Pulp Fiction NFT Lawsuit (Miramax V. Tarantino, Et Al.): A Preview Of Coming Attractions, Forbes, 25 July 2022, available at: <https://www.forbes.com/sites/legalentertainment/2022/07/25/pulp-fiction-nft-lawsuit-miramax-v-tarantino-et-al-a-preview-of-coming-attractions/>, last accessed on 26 December 2023.

68 Adi Robertson, Quentin Tarantino settles NFT lawsuit with Miramax, The Verge, 09 September 2022, available at: <https://www.theverge.com/2022/9/9/23344441/quentin-tarantino-pulp-fiction-nft-miramax-lawsuit-settled>, last accessed on 26 December 2023.

69 Banyan Tree Holding (P) Limited vs. A Murali Krishna Reddy & Anr., 2009 SCC OnLine Del 3780.

70 Swami Ramdev & Anr. vs. Facebook, Inc. & Ors., 2019 SCC OnLine Del 10701.

Further, the Delhi High Court directed the platforms to geo-block content uploaded from outside India in order to prevent users in India from accessing the content. Similarly, in cases of IP infringement in relation to NFTs, a global take down may be ordered if it is found that the infringing NFT is minted/created in India.

The NFT platform where an NFT is sold or auctioned may occasionally be impleaded for aiding and abetting the infringement. Since the majority of these platforms function on the marketplace model, i.e., providing a platform for trading NFTs advertised on their websites, they are probably eligible to be classified as “intermediaries”⁷¹ under India’s Information Technology Act, 2000 (“IT Act”). As long as they meet the established due diligence criteria, the platform may assert safe harbour (i.e., immunity from conduct beyond their control) in the event of an infringement case.⁷²

Additionally, the anonymity of the NFT holder may prove to be a significant barrier when taking enforcement actions against such a person for infringement. However, the same can be resolved by complying with the applicable KYC/AML requirements.

NFT-Related Offences

The billions of dollars’ worth of NFT market has attracted not only regulatory or legal hurdles but it has also fallen prey to the designs of scammers and cons. One of the most common scams to have hit the NFT market is the classic rug-pull scam. This scam relies on the fact that NFTs’ value is generally based on the public interest and hype around it rather than any tangible asset. This has led to a series of scammers who are able to generate a high-decibel noise about their NFTs in public and consequentially receive substantial funds from investors. These are able to generate public interest and trust in their projects via massive social media campaigns and marketing, promising exclusive giveaways and other lucrative offers. Once enough money has been received by them, these scammers pull out and shut down their projects. One of the most publicized of these rug-pull scams is the Frosties NFT rug-pull, executed by two 20 years-old men in January 2022. The accused Ethan and Andre defrauded the investors after soliciting nearly USD 1.1 million and then abruptly shutting down their Frosties NFT project while holding onto the funds invested in their project. The accused shutdown their website along with social media handles while transferring the funds in a host of crypto wallets linked to them in order to prevent tracing of the original source of the funds. Finally, both the accused were arrested under charges of conspiring to commit money laundering and committing wire fraud.⁷³

Other rug-pull scams that made headlines globally included USD 2.7 billion worth of Thodex scam, formerly one of Turkey’s largest crypto exchanges. Further, Evolved Apes, AnubisDAO are other rug-pull scams that defrauded investors worth millions of dollars. Within the first six weeks only of 2023 at least USD 14 million were lost to such rug-pull scams. The unregulated of NFTs market space makes rug-pull scams easier. Numerous jurisdictions across the world have taken varied and inconsistent views on regulating and controlling crypto currencies and NFTs.

71 Information Technology Act, 2000, Section 2 (w).

72 Information Technology Act, 2000, Section 79, read with Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Part II.

73 Benjamin Pimentel, Anatomy of an NFT art scam: How the Frosties rug pull went down, Protocol (24 February 2022) available at: <https://www.protocol.com/fintech/frosties-nft-rug-pull>, last accessed on 26 December 2023.

NFT-Related Disputes Around the World

Presently, there are various ongoing disputes in relation to NFTs, ranging from securities-related litigation, to the issue of intellectual property and personality rights. A brief summary of such ongoing and/or decided disputes is given below.

Determining the Situs (Location) of NFTs

The question of situs or location of the NFTs is extremely important. The situs of the NFT will not only determine the jurisdiction governing the NFT, but also what laws will be application to the transactions involving such NFT. For example, if the test for determining the situs is such that a transaction sees the transfer of an NFT from a foreign jurisdiction to India, the transaction may be subject to FEMA.

One of the first guidance in relation to determining the situs of NFTs came from the High Court of England and Wales in the case of *Ion Science Ltd. & Anr. v. Person Unknown & Ors* (“*Ion Science*”).¹ The Plaintiff in *Ion Science* was defrauded of 64.35 bitcoins, which were valued at GBP 577,000/-. The High Court, in its judgment, held that the lex situs (the law of the jurisdiction in which the property that is the subject of litigation is located) for the bitcoins would be England, as the owner of the bitcoins, i.e., the Plaintiff was domiciled in England. The High Court relied upon the analysis provided by Professor Andrew Dickinson in his book *Cryptocurrencies in Public and Private Law*, approving the principle that the lex situs of a crypto asset would be at the place where the person or the company who owns it is placed or situated.² While approving the principle laid down in *Ion Science*, the High Court, in *Tulip Trading v. Bitcoin Association & Ors.* (“*Tupil Trading*”), held that the situs is not where the owner is domiciled, but rather where such owner resides or carries on business.³ The Singapore High Court, in its recent judgment in *Cheong Jun Yoong v. Three Arrows Capital Ltd. & Ors.* (“*Yoong v. 3AC*”),⁴ adopted an identical test to the one laid down in *Ion Sciences* and *Tulip Trading*. In *Yoong v. 3AC*, the Singapore High Court held that the situs of crypto assets, including NFTs, would be at the residence of the person exercising control over such crypto asset.

This is similar to the test of situs for intangible assets laid down in India, in the case of *Cub Pty Ltd. v. Union of India & Ors.*⁵ Therefore, while we await the first Indian decision in relation to the situs of the NFTs or crypto assets, it is probable that the same test may be extended to them.

- 1 *Ion Science Ltd. & Anr. v. Persons Unknown & Ors.*, No. CL-2020-000840, Judgment dated 21 December 2020, available at: [https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/15438c9dc7c3911ebbea4f0dc9fb69570.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=46272085-fd04-46df-8fc0-77f4eaf9c61&ppcid=9896ae-34b1f24461b0a8f99ae954bd42&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/15438c9dc7c3911ebbea4f0dc9fb69570.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=46272085-fd04-46df-8fc0-77f4eaf9c61&ppcid=9896ae-34b1f24461b0a8f99ae954bd42&contextData=(sc.Default)), last accessed on 26 December 2023; Andrew Moir et al., High Court considers where cryptocurrencies are located and compels disclosure of information by cryptocurrency exchanges outside the UK, Herbert Smith Freehills, 24 February 2021, available at: <https://hsfnotes.com/litigation/2021/02/24/high-court-considers-where-cryptocurrencies-are-located-and-compels-disclosure-of-information-by-cryptocurrency-exchanges-outside-the-uk/>, last accessed on 26 December 2023.
- 2 *Ion Science Ltd. & Anr. v. Persons Unknown & Ors.*, No. CL-2020-000840, Judgment dated 21 December 2020, Para. 13, available at: [https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/15438c9dc7c3911ebbea4f0dc9fb69570.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=46272085-fd04-46df-8fc0-77f4eaf9c61&ppcid=9896ae-34b1f24461b0a8f99ae954bd42&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/15438c9dc7c3911ebbea4f0dc9fb69570.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=46272085-fd04-46df-8fc0-77f4eaf9c61&ppcid=9896ae-34b1f24461b0a8f99ae954bd42&contextData=(sc.Default)), last accessed on 26 December 2023.
- 3 *Tulip Trading Limited v. Bitcoin Association for BSV & Ors.*, [2022] EWHC 667 (Ch), Paras. 142-148, as approved by the UK Court of Appeals in *Tulip Trading Limited v. Bitcoin Association for BSV & Ors.*, [2023] EWCA Civ 83, Para. 7.
- 4 *Cheong Jun Yoong v. Three Arrows Capital Ltd. & Ors.*, [2024] SGHC 21, Paras. 57, 60-63.
- 5 *Cub Pty. Ltd. vs. Union of India & Ors.*, 2016 SCC OnLine Del 4070; Also see, *M/s Lal Products vs. Intelligence Officer & Anr.*, 2018 SCC OnLine Ker 5304 and *Ambalal Sarabhai Enterprises Ltd. v. Sales Tax Officer & Ors.*, 2006 SCC OnLine Guj 468.

NFTs in Securities

In one of the first, the SEC moved against Ripple Labs in 2020 for classification of digital assets as securities under the Howley Test. SEC brought the action against Ripple Labs for raising over USD 1.3 billion through unregistered digital asset securities offering.⁶ SEC argued that the requirement for registration of public offerings are to provide the investors, especially retail investors, with important information regarding the issuer, such as their financial health, business operations, etc. Ripple made a public offer for XRP without complying with these requirements, violating the rights of the investors and depriving them of such vital information. Further, SEC argues that XRP qualified as securities under the Howley test as, (i) XRP was purchased by investors who assumed that they were investing in a joint venture; (ii) due to Ripple's marketing efforts and supply manipulation, investors believed that price of XRP would climb due to company's activities; and (iii) Ripple sold approximately USD 1.3 billions worth of XRP.⁷

Ripple's primary argument was that SEC never notified Ripple that XRP could be classified as securities under the Federal Securities laws. Further, the Ripple claimed that the action brought by SEC was biased, as they do not classify Bitcoins as securities. Further, certain members of SEC also had links to other crypto platforms like Ethereum.⁸

In July 2023, the Court ruled on Ripple's motion for summary judgment, holding that XRP does not qualify as security, but only in relation to programmed sales on digital assets exchanges.⁹ However, in a partial win for SEC, the Court also held that XRP would qualify as security when it's sold to institutional investors, as it met the conditions set in the Howley test.¹⁰ While this dispute did not relate to NFTs, it provides necessary guidance on the question of digital assets being categorized as securities.

However, the question before the Court in *Friel vs. Dapper Labs, Inc.* was whether NFTs "NBA Top Shots" qualify as securities under the Howley test.¹¹ The suit is a class action brought by the customers of Dapper Labs, alleging that the "NBA Top Shots" NFTs qualify as securities as they meet the requirements under the Howey test. These NFTs are an investment of money, in a common enterprise, with a reasonable expectation of profits to be derived from the efforts of others. Dapper Labs had filed a motion to dismiss. This was dismissed by the Court, vide order dated 22 February 2023,¹² holding that if the facts pleaded by the Plaintiff are taken to be true, then the "NBA Top Shots" NFTs qualify as securities.¹³

The Court held that the "NBA Top Shots" NFTs meet the requirements under the Howley test. The first prong of the test was met, as investors had invested money in the NFTs. Further, the second prong of common enterprise was as the investors purchase the NFTs from a single source, the funds are used for business operations, and the investors' fortune depended on each other and Dapper Labs.

6 SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering, SEC, 22 December 2020, available at: <https://www.sec.gov/news/press-release/2020-338>, last accessed on 26 December 2023.

7 The SEC vs. Ripple lawsuit: Everything you need to know, Cointelegraph, available at: <https://cointelegraph.com/learn/the-sec-vs-ripple-lawsuit-everything-you-need-to-know>, last accessed on 26 December 2023.

8 The SEC vs. Ripple lawsuit: Everything you need to know, Cointelegraph, available at: <https://cointelegraph.com/learn/the-sec-vs-ripple-lawsuit-everything-you-need-to-know>, last accessed on 26 December 2023.

9 Tristan Greene, Breaking: Judge rules XRP is not a security in SEC's case against Ripple, Cointelegraph, 13 July 2023, available at: <https://cointelegraph.com/news/ripple-wins-case-against-sec-as-judge-rules-xrp-is-not-a-security>, last accessed on 26 December 2023.

10 Tristan Greene, Breaking: Judge rules XRP is not a security in SEC's case against Ripple, Cointelegraph, 13 July 2023, available at: <https://cointelegraph.com/news/ripple-wins-case-against-sec-as-judge-rules-xrp-is-not-a-security>, last accessed on 26 December 2023.

11 Melissa L Steinman, et al, Layup or Airball? Court Holds NBA Top Shot NFTs may be a Security in *Friel v. Dapper Labs*, Mondaq, 06 March 2023, available at: <https://www.mondaq.com/unitedstates/fin-tech/1288902/layup-or-airball-court-holds-nba-top-shot-nfts-may-be-a-security-in-friel-v-dapper-labs#:~:text=Last%20week%2C%20in%20Friel%20v,Shot%20platform%20could%20be%20securities>, last accessed on 26 December 2023.

12 *Jeeun Friel vs. Dapper Labs, Inc. & Rohan Gharegozlou*, 1:21-cv-05837-VM.

13 Tanner Sandor, To Be or Not to Be a Security: What *Friel v. Dapper Labs* Means for NFTs, American University Business Law Review, available at: <https://aublr.org/2023/03/to-be-or-not-to-be-a-security-what-friel-v-dapper-labs-means-for-nfts/>, last accessed on 26 December 2023.

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Lastly, the third prong of “profit expectation from efforts of others” was met as the “Flow” blockchain on which “NBA Top Shots” NFTs were located was under complete control of Dapper Labs. Further, once the NFT was purchased, it could only be sold on the Flow Blockchain. Thus, “NBA Top Shots” NFTs met all the requirements under the Howley test. However, the Court also caveated its decision by stating that not all NFTs would qualify as securities under the federal laws, and such determination would need to be made on a case-by-case basis.¹⁴

Fraud and Money Laundering Using NFTs

There have been numerous instances of fraud being committed through NFTs. As explained in the previous section of the paper, the ease of transportation and anonymity provided by NFTs make it a hotbed for fraud and money laundering. The US Government charged two individuals, namely Ethan Nguyen and Andre Llacuna for conspiracy to commit wire fraud and money laundering by defrauding the purchasers of their NFTs “Frosties”.¹⁵ Nguyen and Llacuna, the creator of Frosties, sold their NFTs and promised various benefits to the purchasers, such as giveaways, early access to later NFTs and metaverse games, exclusive passes to Frosties events, etc.¹⁶ They also refunded gas fee to various purchasers. This created more publicity for the project.¹⁷ However, after collecting roughly USD 1.2 million, the creators shut down their operations or “pulled the rug” and transferred the amount collected from the OpenSea wallet of Frosties to numerous other accounts.¹⁸ The US Internal Revenue Service, Criminal Investigation (“IRS-CI”) and Homeland Security began their investigation in January 2022 after receiving numerous complaints of people being defrauded after purchasing Frosties NFTs. After their investigation, IRS-CI and Homeland Security charged Nguyen and Llacuna each with one count of commit wire fraud, in violation of 18 U.S.C. § 1349, which carries a maximum sentence of 20 years in prison; and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), which carries a maximum sentence of 20 years in prison.¹⁹

In another case of fraud, the US Government pressed charges against one, Nathaniel Chastain in the first ever case of insider trading involving digital assets.²⁰ Chastain was a product manager at OpenSea, the world’s largest NFT marketplace.²¹ Chastain was responsible for selection of the NFTs to be featured on the homepage of OpenSea.

14 Melissa L Steinman, et al, Layup or Airball? Court Holds NBA Top Shot NFTs may be a Security in Friel v. Dapper Labs, Mondaq, 06 March 2023, available at: <https://www.mondaq.com/unitedstates/fin-tech/1288902/layup-or-airball-court-holds-nba-top-shot-nfts-may-be-a-security-in-friel-v-dapper-labs#:~:text=Last%20week%2C%20in%20Friel%20v,Shot%20platform%20could%20be%20securities>, last accessed on 26 December 2023.

15 Two Defendants Charges in Non-Fungible Token (“NFT”) Fraud and Money Laundering Scheme, United States Attorney’s Office, 24 March 2022, available at: <https://www.justice.gov/usao-sdny/pr/two-defendants-charged-non-fungible-token-nft-fraud-and-money-laundering-scheme-0>, last accessed on 26 December 2023.

16 Two Defendants Charges in Non-Fungible Token (“NFT”) Fraud and Money Laundering Scheme, United States Attorney’s Office, 24 March 2022, available at: <https://www.justice.gov/usao-sdny/pr/two-defendants-charged-non-fungible-token-nft-fraud-and-money-laundering-scheme-0>, last accessed on 26 December 2023; Benjamin Pimentel, Anatomy of an NFT art scam: How the Frosties rug pull went down, Protocol (24 February 2022) available at: <https://www.protocol.com/fintech/frosties-nft-rug-pull>, last accessed on 26 December 2023.

17 Benjamin Pimentel, Anatomy of an NFT art scam: How the Frosties rug pull went down, Protocol (24 February 2022) available at: <https://www.protocol.com/fintech/frosties-nft-rug-pull>, last accessed on 26 December 2023.

18 Benjamin Pimentel, Anatomy of an NFT art scam: How the Frosties rug pull went down, Protocol (24 February 2022) available at: <https://www.protocol.com/fintech/frosties-nft-rug-pull>, last accessed on 26 December 2023.

19 Two Defendants Charges in Non-Fungible Token (“NFT”) Fraud and Money Laundering Scheme, United States Attorney’s Office, 24 March 2022, available at: <https://www.justice.gov/usao-sdny/pr/two-defendants-charged-non-fungible-token-nft-fraud-and-money-laundering-scheme-0>, last accessed on 26 December 2023.

20 Unites States of America vs. Nathaniel Chastain, 1:22-cr-00305-JMF, 22 CRIM 305.

21 Jody Godoy, Ex-OpenSea manager sentenced to 3 months in prison for NFT insider trading, Reuters, 23 August 2023, available at: <https://www.reuters.com/legal/ex-opensea-manager-sentenced-3-months-prison-nft-insider-trading-2023-08-22/#:~:text=Chastain's%20lawyers%20argued%20at%20trial,Chastain%2C%20No>, last accessed on 26 December 2023.

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Upon featuring on the homepage, the value of the NFTs as well as other NFTs by the same creators increased exponentially.²² Chastain used this information to purchase over a dozen NFTs and sold them at two to five times the purchase price. The Prosecutors sought a prison sentence of 27 months, considering that Coinbase ex-manager, Ishan Wahi was handed a two year prison sentence for insider trading with cryptocurrency.²³ However, the Court sentenced Chastain to 3 months of home confinement, and 200 hours of community service after that. Further, Chastain was also directed to pay a fine of USD 50,000/- and surrender/forfeit 15.98 ETH (ether cryptocurrency), which is roughly worth USD 26,000 at the time of writing.²⁴

In UK, the HM Revenue and Customs (“**HMRC**”), the tax authority, seized three NFTs in a case involving tax fraud to the tunes of GBP 1.4 million (USD 1.9 million approx.).²⁵ This was a first where the tax authorities seized digital assets in cases of fraud and money laundering. In his statement, the Deputy Director (Economic Crimes) of HMRC said that this seizure of NFTs “serves as warning to anyone who thinks they can use crypto assets to hide money from HMRC”.²⁶

Contractual Disputes

Contractual disputes involving NFTs vary in kind, ranging from disputes relating to the terms of sale of NFTs, i.e., disputes between buyers and sellers, and disputes relating to NFTs as collateral for transactions between the parties.

A dispute arose in the US regarding the terms of sale of NFT “Rare Pepe” based on the sensational internet meme “Pepe The Frog”.²⁷ Furie had minted 100 “Rare Pepe” NFTs and had advertised on Twitter that only one “Rare Pepe” NFT would be sold, and remaining 99 NFTs would remain with the decentralized autonomous organization (“**DAO**”) indefinitely.²⁸ Thayer participated in the auction and purchased the “Rare Pepe” NFT for 150 ETH (USD 500,000 approx.). However, two weeks after the auction, Furie transferred the remaining “Rare Pepe” NFTs to the members of the DAO for free of charge. The suit was brought against Furie alleging the breach of the term that only one NFT would be sold and the remaining NFTs would be held indefinitely. Thayer filed a suit against Furie seeking to rescind the contract of sale of “Rare Pepe” NFT between Thayer and Furie. Thayer also sought monetary damages being the difference between the amount paid by him and the real value of the “Rare Pepe” NFT. The Court, vide order dated 24 August 2022 dismissed the suit filed by Thayer, upon a joint motion to dismiss moved by Thayer and Furie.²⁹

22 Former Employee Of NFT Marketplace Charges In First Ever Digital Asset Insider Trading Scheme, Unites States Attorney’s Office, 01 June 2022, available at: <https://www.justice.gov/usao-sdny/pr/former-employee-nft-marketplace-charged-first-ever-digital-asset-insider-trading-scheme>, last accessed on 26 December 2023.

23 Jody Godoy, Ex-OpenSea manager sentenced to 3 months in prison for NFT insider trading, Reuters, 23 August 2023, available at: <https://www.reuters.com/legal/ex-opensea-manager-sentenced-3-months-prison-nft-insider-trading-2023-08-22/#:~:text=Chastain’s%20lawyers%20argued%20at%20trial,Chastain%2C%20No>, last accessed on 26 December 2023; Jody Godoy, Coinbase ex-manager sentenced to 2 years in prison in US insider trading case, Reuters, 10 May 2023, available at: <https://www.reuters.com/legal/coinbase-ex-manager-sentenced-2-years-prison-us-insider-trading-case-2023-05-09/>, last accessed on 26 December 2023.

24 Jody Godoy, Ex-OpenSea manager sentenced to 3 months in prison for NFT insider trading, Reuters, 23 August 2023, available at: <https://www.reuters.com/legal/ex-opensea-manager-sentenced-3-months-prison-nft-insider-trading-2023-08-22/#:~:text=Chastain’s%20lawyers%20argued%20at%20trial,Chastain%2C%20No>, last accessed on 26 December 2023.

25 HMRC seizes NFT for the first time in £1.4m fraud case, BBC, 13 February 2022, available at: <https://www.bbc.com/news/business-60369879>, last accessed on 26 December 2023.

26 HMRC seizes NFT for the first time in £1.4m fraud case, BBC, 13 February 2022, available at: <https://www.bbc.com/news/business-60369879>, last accessed on 26 December 2023.

27 Matthew Gault, Rare Pepe NFT Is Not Rare Enough, \$500K Lawsuit Alleges, Vice, 25 March 2022, available at: <https://www.vice.com/en/article/dypj37/rare-pepe-nft-is-not-rare-enough-dollar500k-lawsuit-alleges>, last accessed on 26 December 2023.

28 Halston Thayer vs. Matt Furie (2:22-cv-01640), Exhibit B – Twitter Screenshot, available at: <https://www.courtlistener.com/docket/63154336/halston-thayer-v-matt-furie/>, last accessed on 26 December 2023.

29 Halston Thayer vs. Matt Furie (2:22-cv-01640), Order dated 24 August 2022, available at: <https://www.courtlistener.com/docket/63154336/halston-thayer-v-matt-furie/>, last accessed on 26 December 2023.

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In another dispute, the Singapore High Court held that NFTs are properties and the Courts at Singapore have jurisdiction to pass injunctions restraining the alienation of the NFTs.³⁰ The dispute arose between Janesh and an unknown person, known only by the account name “chefpierre.eth”. Janesh had entered into a loan agreement with chefpierre to borrow cryptocurrency and had put up his Bored Ape NFT as collateral for the transaction. When Janesh defaulted in his payment to chefpierre, chefpierre foreclosed the Bored Ape NFT. Janesh’s primary argument was that it was specified in the loan agreement that he would retain the ownership of the NFT and the same would not be relinquished under any circumstance.³¹ While hearing the matter, one of the primary challenges before the Singapore High Court was whether it could exercise jurisdiction over the dispute, especially since the defendant was unknown. The Singapore High Court held that they had jurisdiction to try the suit as the claimant/plaintiff resided in Singapore and carried on his business there. Further, the Court also held that they had the power to pass an injunction against the sale of NFT as NFTs are properties, and any sale of the NFT would adversely affect the proprietary interest of the claimant/plaintiff.³² This is in line with the judgment of the High Court of England and Wales in *Osbourne v. Persons Unknown*, where the English High Court held that NFTs are properties and can be subjected to freezing injunctions.³³

IP and Personality Rights Infringement Through NFTs

IP and personality rights disputes generally revolve around the minting/creation of NFTs by people not having the IP rights the underlying work represented in the NFTs. They can be specifically classified as copyright or trademark or personality right infringement suits depending upon what has been represented in the NFT.

For example, when Quentin Tarantino announced the auction of NFTs of the seven uncut scenes from the movie “Pulp Fiction”, the studio, Miramax LLC brought a suit from copyright infringement against him.³⁴ Miramax claimed that they had acquired all rights in relation to the movie “Pulp Fiction”, and Tarantino only had a limited set of rights reserved with him for the same. These reserved rights were alleged to be too narrow for Tarantino to cover a right to produce NFTs in relation to the movie. The dispute was finally settled between the parties.³⁵ Another suit for copyright infringement was brought by Rockafella Records against one of its co-owners, Damon Dash for the infringement of Rockafella’s copyright in Jay-Z’s album Reasonable Doubt.

30 Nandakumar Ponniya, et al., Singapore Court recognises non-fungible tokens as property and grants interim injunction against persons unknown in Janesh s/o Rajkumar vs. Unknown Person (CHEFPIERRE”) [2022] SGHC 264, Baker McKenzie, 09 November 2022, available at: <https://insightplus.bakermckenzie.com/bm/dispute-resolution/singapore-court-recognises-non-fungible-tokens-as-property-and-grants-interim-injunction-against-persons-unknown-in-janesh-so-rajkumar-v-unknown-person-chefpierre-2022-sghc-264/#:~:text=In%20the%20recent%20decision%20of,prevent%20the%20dissipation%20of%20NFTs>, last accessed on 26 December 2023.

31 Nandakumar Ponniya, et al., Singapore Court recognises non-fungible tokens as property and grants interim injunction against persons unknown in Janesh s/o Rajkumar vs. Unknown Person (CHEFPIERRE”) [2022] SGHC 264, Baker McKenzie, 09 November 2022, available at: <https://insightplus.bakermckenzie.com/bm/dispute-resolution/singapore-court-recognises-non-fungible-tokens-as-property-and-grants-interim-injunction-against-persons-unknown-in-janesh-so-rajkumar-v-unknown-person-chefpierre-2022-sghc-264/#:~:text=In%20the%20recent%20decision%20of,prevent%20the%20dissipation%20of%20NFTs>, last accessed on 26 December 2023.

32 Nandakumar Ponniya, et al., Singapore Court recognises non-fungible tokens as property and grants interim injunction against persons unknown in Janesh s/o Rajkumar vs. Unknown Person (CHEFPIERRE”) [2022] SGHC 264, Baker McKenzie, 09 November 2022, available at: <https://insightplus.bakermckenzie.com/bm/dispute-resolution/singapore-court-recognises-non-fungible-tokens-as-property-and-grants-interim-injunction-against-persons-unknown-in-janesh-so-rajkumar-v-unknown-person-chefpierre-2022-sghc-264/#:~:text=In%20the%20recent%20decision%20of,prevent%20the%20dissipation%20of%20NFTs>, last accessed on 26 December 2023.

33 *Osbourne v. Persons Unknown*, [2022] EWHC 1021 (Comm).

34 Jack Queen, Tarantino, Miramax settle copyright suit over ‘Pulp Fiction’ NFTs, Reuters, 09 September 2022, available at: <https://www.reuters.com/legal/tarantino-miramax-settle-copyright-suit-over-pulp-fiction-nfts-2022-09-09/>, last accessed on 26 December 2023.

35 Adi Robertson, Quentin Tarantino settles NFT lawsuit with Miramax, The Verge, 09 September 2022, available at: <https://www.theverge.com/2022/9/9/23344441/quentin-tarantino-pulp-fiction-nft-miramax-lawsuit-settled>, last accessed on 26 December 2023.

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The dispute arose when Dash announced that he would create and sell NFTs of Jay-Z’s album Reasonable Doubt, in collaboration with Jay-Z and Kareem Burke. Rockafella brought an action for copyright infringement against Dash seeking to prevent Dash from selling any interest in Reasonable Doubt and to declare that Rockafella Records owns all the rights to Reasonable Doubt, including its copyright and that Dash, being a partial owner of Rockafella Records, may not sell/alienate any interest in Reasonable Doubt.³⁶ The Court for Southern District of New York passed an order in favour of Rockafella Records declaring it as the owner of copyright in the work Reasonable Doubt and prevented Dash from selling the impugned NFTs.³⁷

A suit for trademark infringement can be brought when the NFTs impinge upon the trademarks of third parties, either by branding the NFTs using the infringed mark or by incorporating the trademark in the NFT itself. Such as when the famous Frech fashion brand Hermes sued Mason Rothschild for infringing their “BIRKIN” trademark.³⁸ Rothschild launched an NFT project called “MetaBirkin”, minting 100 iterations of NFTs based on Hermes’ Birkin Bag.³⁹ One of the primary question before the Court was whether the NFTs created by Rothschild were protected as “artistic expression” under the Rogers test laid down by the US Court of Appeals for 2nd Circuit in *Rogers vs. Grimaldi*.⁴⁰ Hermes argued that the Rothschild had no discernible artistic intent or expression in promoting and selling the MetaBirkin NFTs. Thus, the test applied must be of “commercial purpose” under Gruner + Jahr test, as laid down by the US Court of Appeal for 2nd Circuit in the case of *Gruner + Jahr USA Publishing, A Division of Gruner + Jahr Printing and Publishing Co. vs. Meredith Corp.*⁴¹

On the other hand, Rothschild argued that his representation of the MetaBirkin bags was an artistic expression under Rogers test, and thus was protected under the First Amendment of the US Constitution.⁴² The Court, while applying the Rogers test, held that not all artistic expressions can be protected under the First Amendment. The Court also found that the present dispute involved a mixed question of law and fact, and found it well suited for a jury determination. In its verdict, the jury found Rothschild’s use of “MetaBirkins” to be explicitly misleading and directed him to pay USD 133,000.00 as damages to the Hermes.⁴³

Similar suits for trademark infringement have also been filed by Yuga Labs (the creators of the Bored Ape Yacht Club NFTs)⁴⁴ and Nike.⁴⁵ Yuga Labs brought an action from trademark infringement against Ryder Ripps, a self-proclaimed “conceptual artist” and outspoken critic of Yuga Labs, for his NFT collection known as the Ryder Ripps Bored Ape Yacht Club (“RR/BAYC”).⁴⁶ The NFTs of RR/BAYC point to the same digital artwork files as the BAYC NFTs, with the ownership of both collections recorded on the Ethereum blockchain.

36 *Roc-A-Fella Records, Inc. vs. Damon Dash*, 1:21-cv-05411-JPC, Complaint.

37 *Roc-A-Fella Records, Inc. vs. Damon Dash*, No. 1:2021-cv-05411 - Document 86 (S.D.N.Y. 2022).

38 *Hermes vs. Rothschild*, 1:22-CV-00384 (S.D.N.Y.).

39 Zachary Small, *Hermes Wins MetaBirkins Lawsuit; Jurors Not Convinced NFTs Are Art*, The New York Times, 08 February 2023, available at: <https://www.nytimes.com/2023/02/08/arts/hermes-metabirkins-lawsuit-verdict.html>, last accessed on 26 December 2023.

40 *Rogers v. Grimaldi*, 875 F.2d 994, 1000 (2d. Cir. 1989).

41 *Gruner + Jahr USA Pub., a Div. of Gruner + Jahr Printing & Pub. Co. v. Meredith Corp.*, 991 F.2d 1072 (2d. Cir. 1993).

42 The First Amendment of the US Constitution protects an individual’s right to religion and free speech and expression, and is akin to the freedom of religion and free speech and expression under Article 19(1)(a) of the Indian Constitution.

43 Zachary Small, *Hermes Wins MetaBirkins Lawsuit; Jurors Not Convinced NFTs Are Art*, The New York Times, 08 February 2023, available at: <https://www.nytimes.com/2023/02/08/arts/hermes-metabirkins-lawsuit-verdict.html>, last accessed on 26 December 2023.

44 Jeremy S. Goldman, *Unites States: Yuga Labs Wins Key Victory In NFT Infringement Case Against Rydeer Ripps*, Mondaq, 23 December 2022, available at: <https://www.mondaq.com/unitedstates/trademark/1264300/yuga-labs-wins-key-victory-in-nft-infringement-case-against-rydeer-ripps>, last accessed on 26 December 2023.

45 *Nike, Inc. vs. StockX LLC*, 1:22-cv-00983, Complaint.

46 Jeremy S. Goldman, *Unites States: Yuga Labs Wins Key Victory In NFT Infringement Case Against Rydeer Ripps*, Mondaq, 23 December 2022, available at: <https://www.mondaq.com/unitedstates/trademark/1264300/yuga-labs-wins-key-victory-in-nft-infringement-case-against-rydeer-ripps>, last accessed on 26 December 2023.

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While partially deciding in favour of Yuga Labs,⁴⁷ the Court here held that RR/BAYC NFTs do not qualify as “artistic expression” warranting protection under Rogers test.⁴⁸ The court reasoned that the sale of the RR/BAYC NFTs was akin to selling counterfeit goods.⁴⁹ Second, the court rejected the defense of normative fair use since Ripps used Yuga Labs’ marks for the sale of his own competing NFTs.⁵⁰ Lastly, the court denied the anti-SLAAP motion on the grounds that Ripps failed to demonstrate that Yuga Labs’ claims “arise from” his protected speech.⁵¹

Nike had brought an action for trademark infringement against StockX LLC, a sneaker retailer.⁵² Nike alleged that StockX is “minting” NFTs prominently featuring Nike’s well-known marks and selling them at heavily inflated price points to customers who may be led to believe that the “investible digital assets” are authorized or originate from Nike. According to StockX, each of its Vault NFTs is connected to a particular good, such as a pair of Nike sneakers it acquired from the owner secondhand and is now selling on its marketplace.⁵³ With the Vault NFT, the owner is also free to resell the NFT and the option to exchange it for a real pair of sneakers without having to pay any shipping or storage costs. StockX has relied on the doctrine of first sale to justify its use of Nike branding and images as part of its display and sale of Vault NFTs.⁵⁴ There is yet to be any decision in the matter.

Lastly, in India, the NFT platform Rario and some Indian cricketers filed a suit against Mobile Premier League and the online fantasy sports (“OFS”) game, Striker, for their use of NFTs of Indian cricketers in their OFS game.⁵⁵ Rario had alleged that they had entered into agreements with the Indian cricketers exclusively licensing the right to use their personality for minting their NFTs. The defendants admittedly had no license from the Indian cricketers. Therefore, the NFTs made by the defendants were in violation of exclusive rights of Rario, as well as the right to publicity of the Indian cricketers. However, the Court held that the information used by the Defendants, such as player name and statistics, were in public domain name the Plaintiffs cannot restrain the use of the same in NFTs. Further, such of the information is protected under Article 19(1)(a) of the Constitution of India (right to freedom of free speech and expression). The use of NFTs in an OFS was incidental and would not change the fundamental nature of the game, which are dependent on the use of a player’s name and other attributes. The judgment of the Delhi High Court has been appealed against by Rario and the cricketers.

47 Dhruva Krishna & Laura Franco, Bored Apes Earns Victory In Trademark Suit, Winston & Strawn LLP, 01 May 2023, available at: https://www.winston.com/en/crypto-law-corner/bored-apes-earns-victory-in-trademark-suit.html#!/closed_state, last accessed on 26 December 2023.

48 Jeremy S. Goldman, Unites States: Yuga Labs Wins Key Victory In NFT Infringement Case Against Rydeer Ripps, Mondaq, 23 December 2022, available at: <https://www.mondaq.com/unitedstates/trademark/1264300/yuga-labs-wins-key-victory-in-nft-infringement-case-against-rydeer-ripps>, last accessed on 26 December 2023.

49 Jeremy S. Goldman, Unites States: Yuga Labs Wins Key Victory In NFT Infringement Case Against Rydeer Ripps, Mondaq, 23 December 2022, available at: <https://www.mondaq.com/unitedstates/trademark/1264300/yuga-labs-wins-key-victory-in-nft-infringement-case-against-rydeer-ripps>, last accessed on 26 December 2023.

50 Jeremy S. Goldman, Unites States: Yuga Labs Wins Key Victory In NFT Infringement Case Against Rydeer Ripps, Mondaq, 23 December 2022, available at: <https://www.mondaq.com/unitedstates/trademark/1264300/yuga-labs-wins-key-victory-in-nft-infringement-case-against-rydeer-ripps>, last accessed on 26 December 2023.

51 Jeremy S. Goldman, Unites States: Yuga Labs Wins Key Victory In NFT Infringement Case Against Rydeer Ripps, Mondaq, 23 December 2022, available at: <https://www.mondaq.com/unitedstates/trademark/1264300/yuga-labs-wins-key-victory-in-nft-infringement-case-against-rydeer-ripps>, last accessed on 26 December 2023.

52 Nike, Inc. vs. StockX LLC, 1:22-cv-00983, Complaint.

53 Benjamin Stasa & Brooks Kushman P.C., Nike v. StockX Case Highlights Many Unanswered Questions About IP and NFTs, JDSUPRA, 07 September 2022, available at: <https://www.jdsupra.com/legalnews/nike-v-stockx-case-highlights-many-9205701/>, last accessed on 26 December 2023.

54 Benjamin Stasa & Brooks Kushman P.C., Nike v. StockX Case Highlights Many Unanswered Questions About IP and NFTs, JDSUPRA, 07 September 2022, available at: <https://www.jdsupra.com/legalnews/nike-v-stockx-case-highlights-many-9205701/>, last accessed on 26 December 2023.

55 For our detailed analyses of the judgment of the Delhi High Court, please see, Parva Khare, Purushotham Kittane & Aparna Gaur, Delhi High Court holds right to publicity is not absolute; Rules on use of likeness of sports star in online fantasy sports, Nishith Desai Associates, 13 June 2023, available at: <https://www.nishithdesai.com/SectionCategory/33/Research-and-Articles/12/66/ResearchatNDA/10632/1.html>, last accessed on 26 December 2023.

Fiduciary Responsibilities of NFT Platforms

The UK Court of Appeal recently held that the question whether the developers of Bitcoins owe a legal duty to the plaintiff to help recover the stolen bitcoins is a “*serious issue to be tried*”.⁵⁶ The appeal arose from a suit filed by Tulip Trading against the developers of the Bitcoin software, when the systems of Tulip Trading were hacked, and bitcoins worth GBP 3 billion were stolen. Tulip had claimed that the software developers owed a fiduciary and/or tortious duty to assist Tulip in regaining access to its digital assets. The High Court, while deciding the issue, held that there was “no serious issue to be tried” in the present suit. In appeal, the Court of Appeal ruled that the determination of duty of the developers of bitcoins involved a “serious issue to be tried”. While not a dispute in relation to NFTs, this decision has the implication of placing such fiduciary duties upon the developers of the platforms maintaining the digital assets, including NFTs.

This can also have implications in India as the Virtual Assets Service Providers (“**VASPs**”) have been made reporting entities under PMLA, and are required to carry out KYC obligations regarding the people using their platforms. Further, it has been seen in a large number of cases in India where the “intermediaries”, such social media websites, are impleaded in suits solely to assist and provide the necessary details so that the parties can proceed against the real culprits.

56 Tulip Trading Limited (A Seychelles Company) v. Bitcoin Association For BSV & Ors., [2023] EWCA Civ 83; Liang Pu et al., Stolen crypto – UK Court of Appeal opens door to software developers’ legal duties to users, Mayer Brown, 21 February 2023, available at: <https://www.mayerbrown.com/en/perspectives-events/publications/2023/02/stolen-crypto-uk-court-of-appeal-opens-door-to-software-developers-legal-duties-to-users>, last accessed on 26 December 2023.

Future of NFT-Related Disputes

While the previous section gives a brief overview of the ongoing disputes in relation to the NFTs, there may be other disputes that may arise as the NFTs see a tumultuous growth around the world. The growing NFT frenzy which peaked in 2021 with multi-million dollar deals is now seeing a downturn. The NFT industry hit its rock bottom in 2022 with some of the biggest NFT collections such as Boat Ape Yatch Club plummeting by an astounding 88% and cryptocurrency like Ethereum being devalued by at least 82%. This devaluation of NFT market may be linked to the bursting of the NFT bubble, when public perception of NFTs took a nosedive, rendering almost 95% of the NFTs worthless.

To comprehend the extent of this worthlessness, it is imperative to grasp the inner workings of NFTs. These tokens derive their value from the demand generated by collectors and investors. When demand diminishes, as it has in the case of the 69,795 collections with a market cap of 0 ETH, NFTs lose their intrinsic worth. Unlike traditional investments, NFTs are not backed by physical assets or tangible securities, making them exceptionally vulnerable to market sentiment and trends.¹ The NFT market has crashed owing to a host of other issues such as reckless speculation, multi-million dollar scams and pursuit to make quick gains. This crisis of devaluation coupled with inherent issues within the NFT market leads us to identify some possible NFT-related disputes in the future.

- i. With the advent of smart contracts incorporated within NFTs, there is a likelihood of an increase in contractual disputes between the purchaser and seller of NFTs. This would entail the enforcement of NFTs as contracts between parties.
- ii. Since smart contracts exist in a distributed ledger system it becomes difficult to decide upon the jurisdictional questions while moving a court of law in case of a dispute.
- iii. Further, in cases of decentralized NFTs, the question of situs and jurisdiction would play an important role. The jurisprudence in relation to the same will keep on evolving as more and more complex cases appear before the courts.
- iv. With metaverse effectively being borderless and most transactions being undertaken anonymously, it becomes difficult to assert a definitive situs for such transactions in order to regulate, tax or govern them.
- v. With new tools such as Chat GPT, and OpenArt, that allow the use of AI for creation of works, such literary works (poems, stories, articles, etc.) using Chat GPT, or artistic works (digital art) using OpenArt, the disputes may arise as to who would own the right to mint NFTs for such work.
- vi. With NFTs susceptible to wash-trading, there may be a rise in disputes regarding the sale and purchase price of NFTs between the buyer and seller.
- vii. The ease of transportation and storage of NFTs also increases the likelihood of money laundering using NFTs. Such disputes may attract the provisions of PMLA.
- viii. Pursuant to any determination by Courts around the world to treat NFTs as securities, disputes relating to insider trading, dumping, etc.

1 Gurshan Kaur, Shocking Revelation: 95% Of NFT Investments Deemed Valueless, Leaving Millions In Despair, Inventiva, 25 September 2023, available at: <https://www.inventiva.co.in/trends/95-of-nft-valueless/>, last accessed on 26 December 2023.

Future of NFT-Related Disputes

- ix. Disputes may also arise under Foreign Exchange control laws, depending upon the purchase of NFTs using fiat currencies, or cryptocurrencies.
- x. Disputes in relation to taxation of transactions for transfer of NFTs. This would be a complex issue, as it would require establishing the jurisdiction over the transactions based on the nationality of the parties involved in the transfer, the jurisdiction within which the NFT is stored, etc.
- xi. With newer methods being developed for utilization of NFTs, from trading of digital art to entering into agreements through smart contracts, any such further development may see disputes for infringement of intellectual property rights, especially patent law, to protect such new method or invention associated with the exploitation of NFTs.
- xii. The ownership of NFTs brings an added challenge of succession of NFTs much like other assets. Lack of legal framework for sharing of private keys, security passcodes etc. leaves room for foreseeable succession and inheritance disputes.
- xiii. With the concept of fractional ownership of NFTs reconstitution of an NFT as a whole poses a problem where a dispute arises among multiple owners and option of buyout auctions as a solution turning in to an undesired buyout auction.

While this is only an illustrative list of the disputes that we may see in the future, the reality might differ with the way such developments are adopted and accepted by the world.

Conclusion

NFT and any related disputes are still largely novel, and the jurisprudential tone for the regulation of the NFTs will be set by the jurisdiction taking lead in the regulation of the same. While some disputes have reached courts in US and other countries, the application of the existing legal framework, and further development of the laws surrounding NFTs is yet to be seen. The countries have taken a measured approach so far, with a concerted international effort to arrive at some common principles/ground rules to establish a baseline for the NFT regulation regime across jurisdictions. This is necessary due to the blurring global boundaries with the advent of technologies, and especially, the ease of transfer of the NFTs across borders without much hassle.

Furthermore, the decentralized nature of the blockchain system means that while the owner of the NFT may be based in one jurisdiction, the NFT itself might be stored on computer resources in various other jurisdictions. Therefore, settlement of any dispute in relation to NFTs will have major global implications for the whole ecosystem of NFTs.

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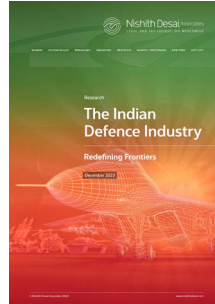
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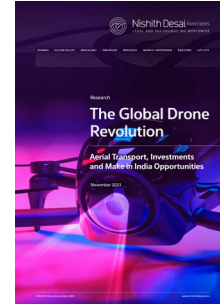
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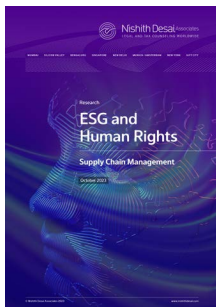
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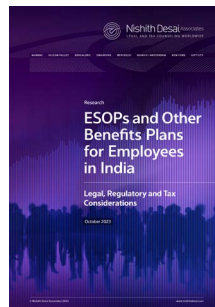
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MUMBAI

93 B, Mittal Court, Nariman Point
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Tel +91 22 6669 5000

SILICON VALLEY

220 S California Ave., Suite 201
Palo Alto, California 94306, USA

Tel +1 650 325 7100

BENGALURU

Prestige Loka, G01, 7/1 Brunton Rd
Bengaluru 560 025, India

Tel +91 80 6693 5000

SINGAPORE

Level 24, CapitaGreen
138 Market St
Singapore 048 946

Tel +65 6550 9855

MUMBAI BKC

3, North Avenue, Maker Maxity
Bandra-Kurla Complex
Mumbai 400 051, India

Tel +91 22 6159 5000

NEW DELHI

13-H, Hansalaya Building, 15
Barakhamba Road, Connaught Place
New Delhi 110 001, India

Tel +91 11 4906 5000

MUNICH / AMSTERDAM

Maximilianstraße 13
80539 Munich, Germany

Tel +49 89 203 006 268

NEW YORK

1185 6th Avenue, Suite 326
New York, NY 10036, USA

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