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Legal Alert

NFT - LEGAL ASPECTS

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In the legal community, comments on the subject of NFTs mainly belittle the issue – this is another trendy slogan that causes a media circus but amounts to little. Reports heard all over the world, of NFT transactions involving astronomical amounts, are more likely to be treated with skepticism about what is actually acquired through that "purchase" and be considered tabloid sensation. Whether we like it or not, **NFTs have already caused a number of legal problems, primarily in intellectual property law**, which await resolution (today often in common courts). Thus we cannot avoid commenting on the **legal aspects of NFTs**, and do so in this newsletter. In addition to articles on copyright, industrial property rights, the possible use of **NFTs to combat counterfeiting, and NFTs in gaming**, we analyze the scope for use as evidence in court cases. There is also increasingly broad discussion of use of **NFTs in real estate transactions**. In closing, we comment on the **cyberthreats connected with NFT technology**. While we would not seek justification by claiming that at present there are more questions than answers, we expect to have an opportunity to find solutions to the legal issues described, in practice, in the near future.

Anna Sokołowska-Ławniczak, PhD

In this issue:

NFTs in copyright

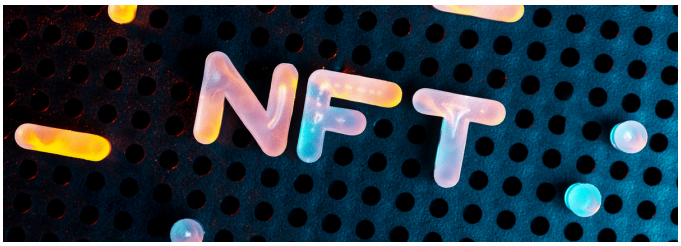
Tomasz Targosz, PhD

Whenever a new technology-related trend emerges, papers attempting to relate it to various areas of intellectual property law pile up (X and copyright, tort, contract, patent, etc.. Law). There is often little new behind this, and the legal "problems" described are artificially formulated and not difficult to solve. A text on NFTs in copyright could also be classified as a piece of this kind, but in this case there are at least some questions that need to be answered. Even if NFTs do not have as much practical significance, as some believe, the category is unlikely to disappear altogether. It is therefore worth exploring the question of where copyright and NFTs might come into contact and what the implications are (or are not, which is no less important).

The simplest way to describe NFTs is information in a blockchain that represents a resource (digital goods). The difference between an NFT (non-fungible token) and fungible tokens is not so much that they cannot be traded ('trading' NFTs is one of the reasons for their existence), but that they are unique (no two data chains are the same). This property means that NFTs bring something rare to the digital world that is known in the physical world. A good example is a real sculpture, of which there is only one (original) copy. NFTs and copyright converge because the object that can be represented by the token can be an object that is considered creative, i.e. a work in the sense of copyright, even though this is of course not necessarily required (e.g. Twitter founder Jack Dorsey's first tweet that was "converted" into an NFT was sold for almost USD 3 million though it is not a copyright work). If an NFT is not connected to a work, it is not of interest for copyright purposes. For this reason, we will focus on cases where there is a work, e.g. a digital file containing a photo, a video, etc.).

NFT issues of copyright interest start with the creation itself and then with the "transmission" of NFTs. In this context, the "technical" approach of copyright law to the question of whether there is a legally significant exploitation is important. The token itself (as a data string) is not a work. Given the amount of data that would be required to include a work in a blockchain, NFTs do not usually contain works as such, but, as mentioned above, merely establish a link to a work via a smart contract. When copyright-protected content is recorded in a blockchain, this of course means reproduction of the work. However, if there is only metadata and a link to content on an external server in the blockchain, which is much more common, the mere creation of a token (imprint) does not require copying of the work. If the content in question (the work) is made available in a way that constitutes communication to the public within the meaning of copyright (making it publicly available), this is of course a use of the work, but merely changing the token holder's data does not result in reproduction and does not require the copyright holder's consent. It is therefore possible and even typical that the mere "sale" of a token does not infringe copyright (so the answer to the question of the nature of this type of transfer is a question of civil law).

If the represented content is a work, consent is required to use. Creation of an NFT on the basis of that consent does not change anything in this regard. The NFT proprietor does not acquire copyright to the content represented by an NFT merely due to the NFT being registered to them. There is a debate in literature concerning whether provisions such as art. 52(1) of the Polish Copyright Law should apply to NFTs *mutatis mutandis*. Under that provision, unless a contract states otherwise, transfer of ownership title to a copy of a work does not constitute transfer of economic copyright to the work. In fact, this is not necessary to invoke such provisions. An NFT proprietor who wishes to use content in a manner that encroaches into the sphere of copyright needs to obtain the respective consent, such as a license, from the copyright proprietor. A party that creates an NFT should be able to grant that consent (hold the relevant rights), but one cannot guarantee that this will always be the case. Making available certain content, with the data relevant to it, may also encroach into the sphere of moral rights (for example misidentification of the creator could result in breach of moral rights). A breach of this kind might be irreparable, due to the nature of blockchain.



The concept of a copy leads us to another question, which is whether, due to an NFT, a work in digital form can be an original as defined in copyright law. The traditional view is that the concept of an *original* refers to physical copies, and according to this definition does not include NFTs. This applies in principle even if the file containing the work is saved on a portable data carrier such as a USB drive. There is no need to revisit this view. Because an NFT does not exist as a physical copy, the right conferred also cannot be exhausted. In other words, creation of an NFT will not be considered the same as placing a copy on the market with the consent of the copyright holder. This would be relevant if the copyright holder created or transferred the NFT. Quite apart from this, in many cases, the mere transfer of an NFT will not require exploitation of a work, and therefore there will be no need for exhaustion of the distribution right.

Droit de suite (in absence of a copy) is also not applicable to an NFT. This does not have severe consequences, however, as NFT creators may secure for themselves, through a smart contract, payment for each subsequent transfer.

The fact that creation and transfer of an NFT does not necessarily encroach into the sphere of copyright does not mean that there is a ready answer to the question of whether, if in fact a work represented by an NFT is used (for example is made available) this constitutes use in a new field of exploitation. This question has many practical implications, and will determine whether the creator can use in an effective way a work to which they transferred the NFT generation right in the past. If for example the creator has transferred rights in the field of exploitation of availability on demand (not to mention reproduction) the question arises whether they can create an NFT containing that work, which this time will be a "unique" copy, or whether these new opportunities for earnings are enjoyed at that point by the party that has acquired reproduction or communication rights. This seems to be one of the most challenging of the NFT-related copyright issues. On the one hand, if the economic significance criterion is considered crucial for distinguishing a field of exploitation, there are grounds to argue that this is a new field of exploitation, as it provides opportunities for earnings by the creator that did not exist before. On the other hand, if the work represented by the NFT is made available publicly, adopting a new, separate field of exploitation in that case could undermine the interests of the party that acquired rights. At first glance, a compromise would seem to be a standpoint that creating and selling the NFT as such would be considered a new field, while if using the token might result in the work being made publicly available, then the consent of the copyright proprietor in this field of exploitation would be required. There are legitimate concerns about this view, however. As mentioned, the creation and transfer alone of an NFT does not always require actions that encroach into the sphere reserved for copyright, even if the NFT represents a work and the field of exploitation cannot relate to actions that do not encroach into the sphere reserved for copyright.

Usually, concerns of this kind are eventually resolved in case law, but it will probably be some time before this happens.

NFTs and trademark law

Anna Sokołowska-Ławniczak, PhD

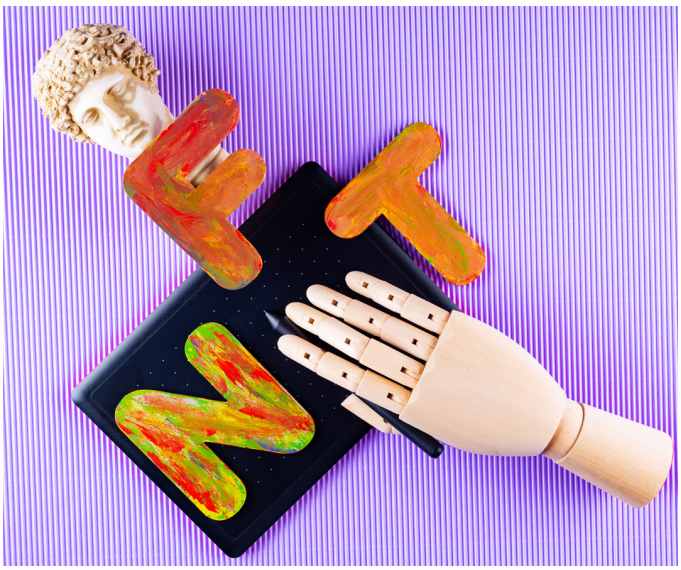
While not reiterating explanations concerning what NFTs are, there are at least two areas worth mentioning from the perspective of trademark issues. One of these is certainly the increasing popularity of trademark applications that use NFT-related terminology when listing goods and services, and how they should be correctly classified. The other issue, which has now arisen in practice, is potential trademark infringement due to use of another's mark in the form of an NFT.

With regard to the issue of trademark applications – the hype surrounding NFTs is also having an impact on authorities that grant intellectual property rights. As of January 2020, there were no trademark applications containing the term NFT in the USPTO (USA), while exactly one year later the term was mentioned in dozens of applications every day. Naturally, these include the major global brands such as Victoria Secret, McDonald's, Nike, and others, apparently reacting more to certain marketing or PR trends rather than to legal necessity. Meanwhile, the applications concerned not only NFTs, but also terms that have recently been in vogue, which are *metaverse, virtual goods or virtual services*.

Likewise, the EUIPO has observed a significant increase in NFT trademark applications over the last two years, with

- 1,277 NFT trademark applications in 2021, and
- 1,157 NFT trademark applications in 2022

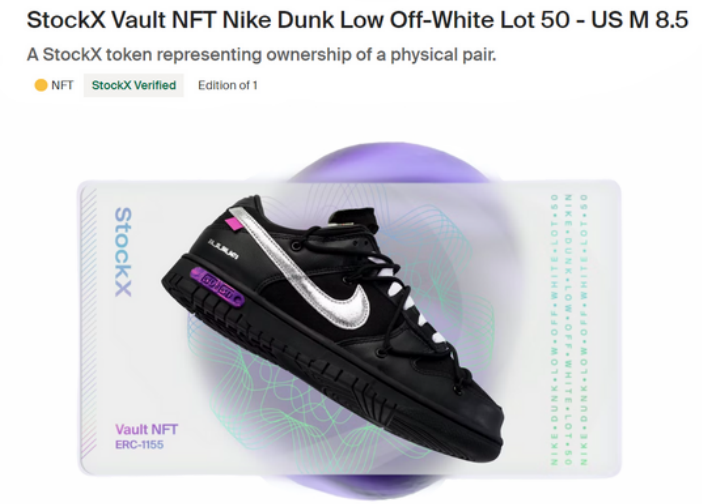
Questions concerning the correct classification of the term NFT as goods or services would inevitably be raised, considering the volume of applications. In June 2022, the EUIPO published a statement on its approach to classification of trademark applications containing the term *NFT*. The EUIPO stated that class nine in the twelfth edition of the Nice Classification would contain the term *downloadable digital files authenticated by non-fungible tokens*. Importantly, the term *non-fungible tokens* by itself cannot be accepted, as the EUIPO always requires the type of digital item authenticated by the NFT to be specified. This is because the EUIPO makes a distinction, and incidentally rightly does so, between the NFT and the item it "authenticates" – an NFT is a kind of "front cover" for a particular digital item.



In view of the nature of an NFT – which "authenticates" a particular digital item, the situations can be considered in which use of another's mark in the form of an NFT by a third party will constitute trademark infringement. Current laws (Polish or EU) sufficiently address a situation of this kind, because from the point of view of trademark infringement, the crucial issue is use of a particular mark for specific goods and services in trade. Thus there could be cases in which a third party uses another's mark as an NFT on the Internet (for obvious reasons NFTs can only be used in the virtual world). Whether infringement has occurred will naturally depend on the goods or services used, or, where applicable, whether there are grounds for considering a trademark with reputation to have been infringed. When considered in this way, interpretation of current laws with regard to use of a mark in NFT form does not present particular problems.

Meanwhile, in practice, one noteworthy case arose of potential infringement connected with an NFT. It will come as no surprise that the case has been in progress since February 2022 in the US, as it is mainly there, for

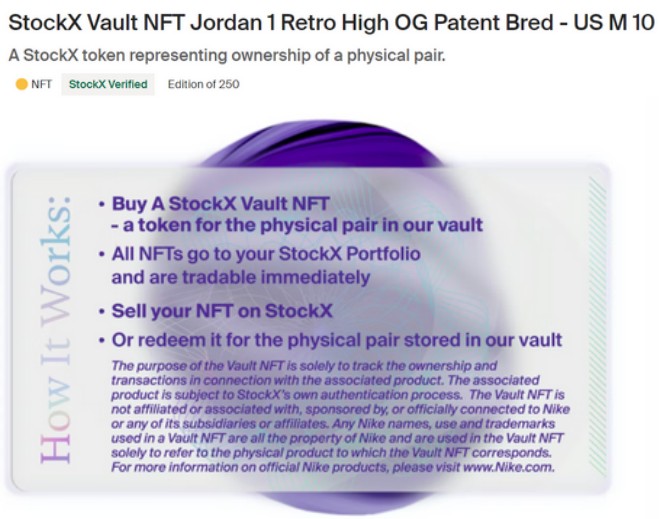
the moment, that any court cases concerning NFT have been instigated. In the case, StockX – a popular online footwear store, launched the *Vault NFT* series in January 2022. The idea behind it was that an NFT was linked to a particular footwear item, in this case NIKE shoes. As, in general, limited edition footwear is resold by a series of buyers until the final customer is found, linking an NFT to a specific item meant firstly that the goods could be authenticated, and secondly that the physical item of footwear could be kept in the StockX storage facility until the final buyer claimed it.



Source: https://stockx.com/dunk-low-off-white-lot-50-vault-nft

Thus StockX customers each in turn "resold" only the NFT linked to the footwear item concerned, and not the physical goods. The item was therefore traded much more quickly than by the conventional method. This situation led NIKE to file a claim against StockX for infringement of NIKE trademarks, stating that using the NIKE trademark in the form of an NFT could be misleading for consumers. Interestingly, NIKE included in the trademark infringement claims allegations that StockX was selling counterfeit products, which is odd, because before the dispute arose NIKE itself recommended the authentication procedures used on that site, and its policy regarding combating counterfeit goods. Naturally, StockX denies NIKE's allegations.

Assuming that StockX sells genuine NIKE products and not counterfeit products, the question is whether the site was entitled to use the NIKE trademark to generate an NFT and then allow the site's customers to "trade" in that NFT. StockX has stated that in this instance the NFT merely serves as a "virtual receipt" for a specific product, while StockX itself does not allow trade in "digital goods" which are in some way separate from the physical goods. However, because the physical product is kept in the StockX storage facility until it is claimed by the final buyer, the NFT can be sold repeatedly during this time, which in NIKE's view is grounds for concluding that the NFT is somehow a separate product, and not a "virtual receipt". Therefore, the foremost issue to be ruled upon in court is what in fact an NFT is, and subsequently whether use of the NIKE trademark in this way may constitute trademark infringement. All of this assumes, of course, that StockX did not have counterfeit footwear on its site; if this was the case the dispute would center on entirely different issues. In view of this factual background and the essence of an NFT, NIKE's assertion that an NFT is a product separate from the physical goods seems too extreme.

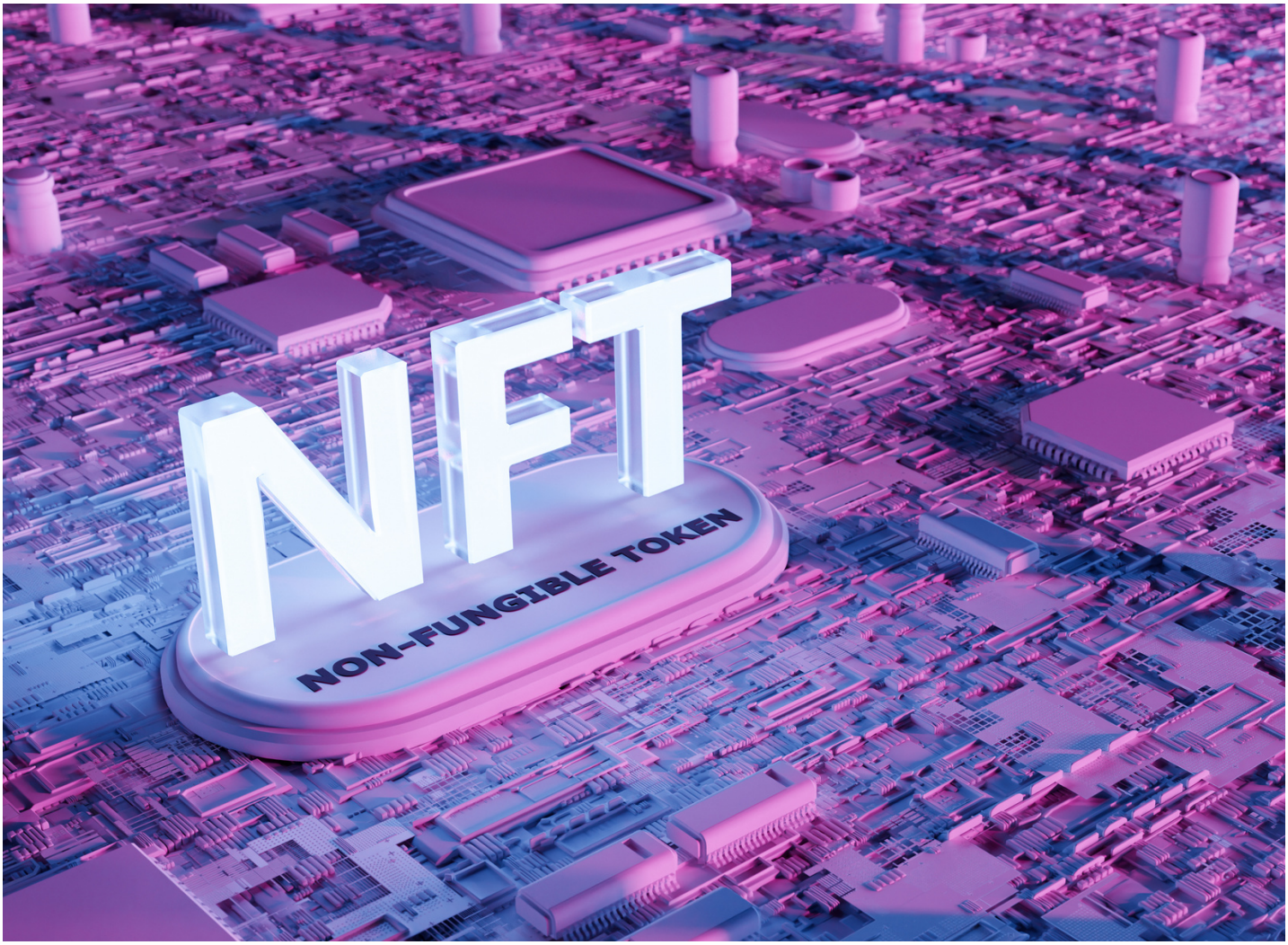


Source: https://stockx.com/aj1-retro-high-og-patent-bred-vault-nft

When the issue described above is considered in terms of Polish or EU law, the question of exhaustion of the right conferred by the trademark has to be addressed. Assuming that StockX had on sale items of NIKE shoes that could be demonstrated in an effective way to have been placed on the market for the first time by the trademark proprietor or with their consent, the right conferred by the trademark was exhausted with respect to those particular items of NIKE footwear. This raises the question of whether, due to exhaustion of the right conferred by the trademark, StockX was entitled to generate an NFT using the NIKE trademark, and link that

NFT to each particular pair of shoes. The exception according to which the trademark proprietor is able to object to trademark-related activities is quite broad in scope – under Polish law and EU regulations, provisions on exhaustion of the right conferred by the trademark do not apply when this is supported by reasonable grounds for the trademark proprietor to object to further distribution of the product, especially when the condition of the product changes or deteriorates after being placed on the market. Proprietors of trademarks with reputation make use of this exception relatively frequently, stating that certain behavior with respect to the mark (such as the manner of distribution, advertising, etc.) breaches the reputation of the trademark concerned. In view of the above, it is of course unclear whether using an NFT with the NIKE trademark falls under that exception.

While unfortunately none of the concerns expressed above are properly solved, at present we can at least consider whether use of an NFT with a registered trademark relating to a specific product is an evident infringement of a trademark, or whether it may fall under exhaustion of the right conferred by the trademark.



NFTs and court cases

Beata Matusiewicz-Kulig

Opening remarks

NFT technology is rapidly growing in popularity, with an ever greater presence and consequence in economic and various other areas as well. It is worth considering therefore how NFTs may affect or even be used in court proceedings.

> An NFT (*non-fungible token*) is information recorded in a blockchain, usually linked to data that exists elsewhere (it does not contain any digital files by itself). In other words, an NFT is a type of virtual, encrypted certificate that grants a right of exclusive disposal to a user of a particular digital file.

For this reason, having an NFT is not by itself evidence that particular legal relationships exist, such as holding copyright to digital content, for example graphics or musical works, linked to the NFT. Meanwhile, transfer of an NFT between users, and specifically between addresses in a blockchain, i.e. modification of information recorded in the blockchain, does not confirm transfer of property rights. This is a general rule applicable unless smart contracts attached to NFTs provide otherwise and the formal legal requirements for such transactions are met as well.

Can an NFT be evidence in a civil proceedings?

Due to the above, can an NFT be evidence in a Polish civil proceedings, and if so, what kind of facts can be proven using an NFT? In view of the essential nature of an NFT, evidence from an NFT could be classified as evidence in a document in the meaning of art. 77(3) of the Civil Code, i.e. a data carrier of which the contents can be reviewed. At the same time, it is not clear whether provisions in art. 243(1) of the Civil Procedure Code et seq. on evidence in documents, relating to textual documents (containing text and of which the issuer can be determined) apply to NFT-form evidence, or whether art. 308 of the Civil Procedure Code is applicable as well, on evidence in documents of other kinds, where information in an NFT is not classed as a text entry, and the holder of the NFT cannot be definitively determined. However, in view of the open-ended list of means of evidence specified in art. 309 of the Civil Procedure Code, NFT can certainly be a different form of evidence used in evidentiary proceedings, provided that in the situation in question it is a source of facts relevant to adjudication of the case. In this context, there is no reason under the law why an NFT cannot be evidence in a civil proceedings. Greater problems may arise with determining what can be proven by way of an NFT.

As mentioned, an NFT by itself is information contained in a network with a link to digital content usually placed outside of the network. Therefore, an NFT can only be evidence of the information alone contained in the blockchain, i.e. that the NFT proprietor has a right of exclusive access to the digital content represented by the NFT. Meanwhile, having an NFT is not proof of ownership of copyright or ownership title to the digital content itself.

In view of the above, as a rule, submitting evidence in the form of an NFT in court is not proof of rights to digital content represented by the NFT, and at the most is proof that the NFT proprietor has obtained exclusive, unique access to a specific digital file.

Meanwhile, an NFT may be a suitable form of evidence demonstrating that specific digital content exists at a particular time (a time marker for particular digital content), or evidence that can be used to determine certain modifications to a digital file linked to an NFT (examine the integrity of those files). In all of the cases described above, this evidence would probably be combined with an opinion issued by an expert witness who reviews the data in the NFT and its digital content.

There are known cases in Europe of courts admitting NFT evidence. In July this year, the High Court of England and Wales in D'Aloja vs. Binance allowed a plaintiff to submit evidence in NFT documents.[1]

Can NFTs be used to serve court documents?

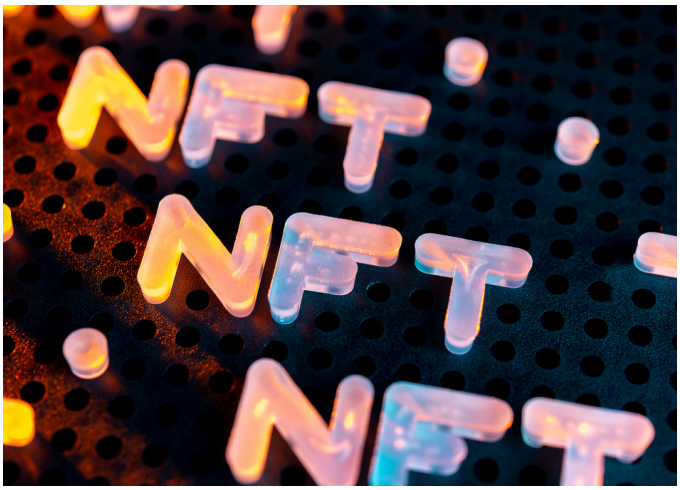
To address this issue, first a brief comment is required regarding *John Doe lawsuits*. It seems that an NFT could be used in such a case. A *John Doe lawsuit* is now an option used in the US and UK.

It is used when the identity of the infringing party is unknown. This mainly concerns cases of hate speech, particularly hate on the Internet, and also recently cryptocurrency theft cases.

Court documents were served using an NFT in a *John Doe lawsuit* in June 2022 in the US in LCX AG vs. John Doe Nos. 1-25. In that case, the plaintiff argued that they did not have verifiable information regarding the location of the defendant or defendants, and therefore procedural documents could not be filed by the conventional methods specified in US civil procedure. For this reason, the plaintiff proposed serving the defendants notice via an NFT in a blockchain controlled by the defendant or defendants, and the Supreme Court of New York ordered service in this way.[2]

This example demonstrates that an NFT can also be used in court proceedings at the service stage. This makes reaching the alleged infringers/ defendants more likely.

With regard to current laws in Poland, however, there is no provision for service of a *John Doe lawsuit*. In 2017, a proposal was drafted amending the Civil Procedure Code to introduce *separate proceedings in personality rights protection cases against persons unknown*[3]. A further attempt to introduce this institution was made in 2021 in the *Social Media Freedom of Speech Act*[4], proposing amendment of the Civil Procedure Code in a similar manner to that proposed in 2017, but neither proposal was enacted.



Under current laws, therefore, in Poland it is not possible to file a *John Doe lawsuit* and use an NFT as a means of filing a lawsuit of that kind against a user in control of a particular address on a blockchain linked to an NFT, where the person's first name and surname are not known. Under art. 126 § 1(2) and art. 126 § 2(1) of the Civil Procedure Code, there is a formal requirement to specify the adverse party (first name, surname, and address) in a pleading, and a lawsuit is returned if this requirement is not observed.

Despite the many concerns with regard to NFTs, there is a discernible tendency demonstrated by the case described, LCX AG vs. John Doe Nos. 1-25, showing that courts appear to be aware that this technology can be used as an aid in reaching potential defendants and a form of evidence, especially in cases concerning various aspects of cryptocurrency transactions.

[1] https://www.cryptopolitan.com/uk-courts-allow-nft-documents/ dostęp 2.08.2022 r
[2] https://www.hklaw.com/en/general-pages/lcx-ag-v-doe, dostęp 2.08.2022 r.
[3] Docket 1715, https://orka.sejm.gov.pl/Druki8ka.nsf/0/E8CEC7BE71903FBFC1258156002D2C8A/%24File/1715.pdf, accessed 2.08.2022 r
[4] https://www.gov.pl/web/sprawiedliwosc/zachecamy-do-zapoznania-sie-z-projektem-ustawy-o-ochronie-wolnosci-uzytkownikow-serwisow-spolecznosciowych, dostęp 2.08. 2022 r.

Can NFTs solve the problem of counterfeiting?

Małgorzata Kutaj

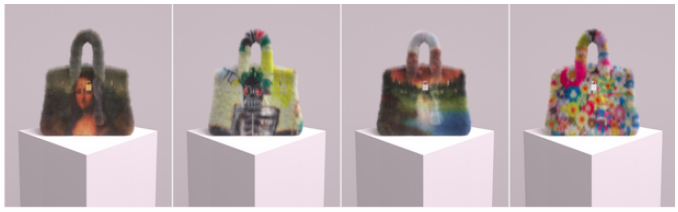
The term NFT (*non-fungible token*) is being usedmore and more in public discourse. To put it simply, this is a unit of data recorded on a blockchain (a database used for cryptocurrencies). The data recorded may represent a specific artwork, photograph, graphics, clothes, and many other things – in fact any type of creativity imaginable. The Nike brand, which has successfully marketed a footwear collection using NFTs, is a good example.

According to media reports, the record price for a single digital Nike NFT sneaker was as high as **USD 134 000**[1].

RTFKT and Nike CryptoKicks, introduce the Future of Sneakers

This solution is considered special due to it being a unique, non-exchangeable token – and thus when we purchase a specific NFT we receive a certificate of authenticity and an assurance that we have a digital product that is one of a kind, and represents a financial asset. This at least is the main precept of NFTs, while due to being uniquely recorded on a blockchain, and due to it also including particular data concerning (as a minimum) the creator of the NFT concerned, the time at which it is created, or also the range of rights granted to the buyer by the creator, this in fact appears to be an ideal assurance of authenticity, but is it really?

In February this year, news was circulating in the media that counterfeit NFTs had been identified on the Cent currency exchange – a large number of transactions were suspended, which was quite a painstaking activity because freezing one account caused a number of others to be created[2]. Similar allegations were made with regard to the French fashion brand Hermès, and one of its flagship handbags – Birkin. This was due to one US artist beginning to sell MetaBirkin tokens which were an artistic variation on the well-known Hermès handbag, in the form of an NFT. Hermès contested this activity, saying that it was an infringement of the company's trademarks, which were clearly also a renowned brand[3]. Thus this issue needs to be examined in terms of current criminal law in Poland on combating counterfeiting.



Source: https://metabirkins.com/notyourmothersbirkin/

Firstly, let us look at the definition of a counterfeit trademark. Under the Polish Industrial Property Law[4] this is an identical mark used unlawfully or a mark that is indistinguishable in normal trading conditions from marks registered for protected goods. Thus in the case of NFT goods bearing a trademark of that kind, the definition of a counterfeit trademark is applicable. An important consideration is the requirement for the trademark to be registered – because only registered

[1] G. Kubera, *Nike zarobiła 185 mln dolarów na sprzedaży NFT*, 24.08.2022, https://mycompanypolska.pl/artykul/nike-zarobila-185-mln-dolarow-na-sprzedazy-nft/9962 (accessed: 4.10.2022).
[2] D. Górecki, *Uwaga na fałszywe NFT. Giełda zawiesza transakcje ze względu na zalew podróbek*, 15.02.2022, https://ithardware.pl/aktualnosci/uwaga_na_falszywe_nft_gielda_zawiesza_transakcje_ze_wzgledu_na_zalew_podrobek-19901.html (accessed: 4.10.2022).
[3] *Hermès oskarża artystę o nielegalny handel tokenami NFT z torebkami Birkin*, 28.01.2022, https://www.wirtualnemedia.pl/artykul/hermes-torebki-birkin-nft-pozew (accessed: 4.10.2022).
[4] Industrial Property Law of 30 June 2000 (consolidated text, Journal of Laws of 2021, item 324).

trademarks are protected under Polish criminal law. The mark does not have to be identical; to simplify a quite complex definition given later in that provision – the mark may also resemble a registered trademark. The important issue is restriction of protection under criminal law to goods that are a specialty for the trademark concerned. This is the point at which the first concerns are raised regarding digital goods. In that case, for which goods classes should NFTs be registered? In view of the current list of goods and services in the Nice Classification, this could be the goods in class 9 or services in class 41. Meanwhile, for goods that are traded as physical items, these will be different classes for particular product types. In this situation, protection under criminal law will not apply, unless the product is a trademark with reputation protected beyond the limits of the specialty. This would probably apply to the examples given above, i.e. the Nike and Birkin trademarks. Of course, if a particular trademark is protected in the classes appropriate for NFTs as well (which will be the case mainly once the company concerned is at the point of conquering the NFT market) there will be no difficulties as to protection.

Also, certain practical problems will arise when combating counterfeit NFTs, relating to detection of this process by law enforcement agencies. Where physical products are traded on the market, law enforcement agencies can identify counterfeit goods during surveillance operations and then seize them in a physical manner at stores, stalls, or trade fair venues. This is not an option in the case of NFTs. Moreover, in order to even identify counterfeit NFTs, presence on a particular NFT exchange is required, and this can be done by setting up an account and trading in cryptocurrency that can be used to purchase NFTs. The most popular cryptocurrency for purchasing NFTs at the moment is Ethereum. On the other hand, law enforcement agencies can gain access to those exchanges in a similar way to that in which they identify infringement on other marketplace sites. The only problem that might arise is that it is not possible to seize physical goods. Therefore they will have to be secured via other, digital means so that the appropriate evidence can be gathered for pre-trial proceedings and eventually for a court case. Close cooperation between exchange owners and law enforcement agencies, and identifying accounts through which counterfeit NFTs are sold so that they are frozen immediately, is an important factor for success of the measures taken. Meanwhile, this should not be the only response to infringement, as under Polish law both labeling products with counterfeit trademarks and trading in those products, and thus separate acts, are offenses. Each of these types of conduct is punishable, by a fine, restriction of liberty, or even imprisonment. Imprisonment is envisaged as the sole criminal law response to an offense where this becomes a permanent source of income, or goods of substantial value are involved. In the case of counterfeit NFTs, it is also important that the proprietors themselves be especially diligent with regard to trademarks and steer enforcement agencies towards unlawful copies.

The final aspect important from the viewpoint of protection of trademark proprietors is the possibility of redress of damage, which can also be achieved in criminal proceedings. Problems frequently arise in calculating the value of damage in ordinary trading conditions, and thus the difficulty will be even greater in the case of counterfeit goods in NFT form. Therefore, how is the value of damage incurred by an entity that in general trades in physical goods to be determined in a credible manner where infringement occurs by way of a digital product in NFT form? There is no obvious answer, and therefore the solution is probably to resort to pecuniary damages (awarded when there are major hindrances to calculating damage). Meanwhile, the question of whether damage can be found to have been inflicted at all in such cases is resolved by reference to examples that exist in practice.

To reiterate, trading in digital goods in NFT form will clearly pose a challenge for law enforcement agencies in terms of both methods of identifying infringement, and securing the appropriate evidence. This will probably present a legislative challenge as well.

Investing in players in NFT games – NFT scholarships and other options for earning in NFT games without playing, and the related legal concerns

Zbigniew Pinkalski, PhD

The growth of the NFT (blockchain) gaming market since 2021 has caused a major increase in the entry point for certain popular games of this kind. To take part, the appropriate number or quality of NFT elements is required, such as the characters, spellbooks, land plots, etc.In general, the price of this starter pack increases as the game in question grows in popularity, and can reach several thousand dollars (for the sake of comparison, a license to an "ordinary" game such as *Cyberpunk 2077* costs sixty dollars). On one hand, this is an obstacle preventing new players joining, while on the other it means that there is a need for financial and investment cooperation schemes for people involved in the game. In general, an inadequate number of players hampers growth of the game and reduces the likelihood of market success.

For this reason, in the case of particular NFT games, systems are created that enable a kind of sponsorship of new players by people with capital enabling them to enter (purchase of the NFTs required to begin playing). The first scheme of this kind was introduced for *Axie Infinity*, and involved distribution of profit from the NFTs gained and generated in the game, between:

- the player being sponsored;
- the guild sponsoring the player[1] (10%);
- The recruiter that attracted the player in question and also acts as their scholarship manager.

More games, and schemes and guilds formed independently, followed this example, resulting in the NFT *scholarship* model becoming commonplace. In prac-tice, sponsored players are often players from developing countries such as Pakistan, Bangladesh, Nepal, Thailand, Sri Lanka or the Philippines. While playing, they work and produce higher values of the specific NFTs that function in the game. These NFTs can then be traded and generate investment profit.

The current situation and rapidly growing value of the NFT gaming market could render this market increasing attractive for investment purposes. In other words, interest on the part of persons wishing to profit from NFTs without playing can be expected to increase. Achieving this goal will require cooperation with people interested in playing, and this can be in the form of the scholarship programs described above, the creation of guilds (presumably requiring contractual arrangements) and direct agreements between the investor and player. The player is given access to the NFTs purchased by the investor. In practice, the question has been raised of whether players and investors can enter into cooperation outside of the NFT scholarship models defined by particular organizations. The answer is that they can, as, according to the principle of freedom of contract, concluding agreements of this kind is not prohibited. The terms of use (license) for a particular game may provide for certain limitations in this regard. For this reason, it is advisable to begin analysis of the investment project relating to NFT players by reviewing the terms of use in question.

[1] More on how guilds operate can be found for example here https://pl.beincrypto.com/gildie-sekretny-grach-nft-edensol/ (accessed: 22.09.2022).

Moreover, in each of the cases described above, from the Polish law perspective, there are certain noteworthy issues to consider when signing an agreement of that kind:

- Above all, this is whether a particular agreement might cause infringement of trademarks or other intellectual property rights of proprietors of the game. This might occur for example if the scholarship program or guild created was given a name that is a registered mark of the manufacturer, for example the game title.

- It needs to be determined whether the agreement concluded directly with the player might have certain features causing it to be classified as an employment contract under Polish law. This would trigger a range of risks and levies for the investor, such as paying social security contributions, and place it in a difficult negotiating position in the future if a dispute arose with the sponsored player (for example due to restrictions on employment of minors).

- In the agreement itself, the issues of participation in the NFT (and who is stated in the agreement as the owner of the token), sharing of generated revenue, the bearing of costs of currency conversion, and the law governing the contract, are especially important.

Clearly, therefore, investing in an NFT game needs to be considered beforehand, with respect not only to financial, but to legal aspects as well. However, due to the growth of this market and its increasing value, it can be expected to become increasingly popular among private and institutional investors alike.

NFT-Style house (under the roof of Polish law)

Michał Sobolewski

A lot of solutions in which NFTs can be used relate to the real estate market. Potentially, ownership title to land or buildings could be transferred using non-fungible tokens that represent entire pieces of real estate or even very small portions of real estate. On one hand, this is intended as a significant aid to facilitate the transaction itself, which in practice is quite time-consuming and complex, and involves a number of formalities and appointments with a notary. On the other, it is intended to open up the market to people who might not have the means to become owners of an entire piece of real estate, and wish to become involved in investment projects with a large number of small investors. If correctly structured, NFT smart contracts could also automatically regulate a number of issues concerning options for using real estate, maintaining real estate, generated earnings, or outlays.

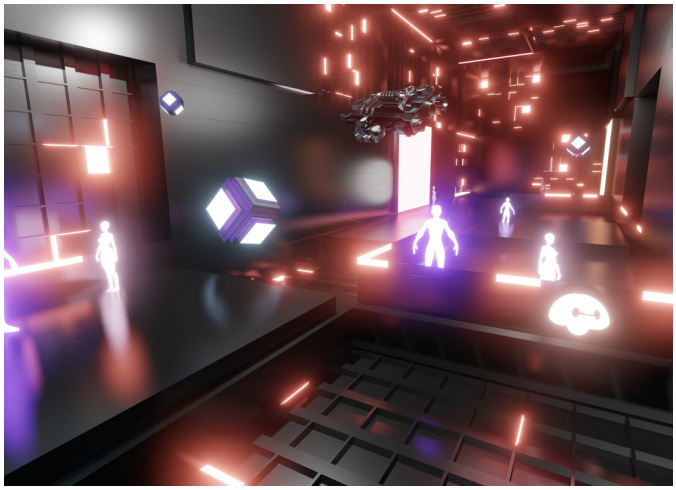
There are numerous ideas about how NFTs can be used on the property market, and some of those are discussed below. However, it should be first determined whether it is possible under Polish law to purchase real estate in the form of a straightforward purchase of an NFT representing a particular piece of real estate, and if so, based on which rules.

An NFT is a token. Tokens are used to represent an asset, for example an item or right, in the form of digital registration[1]. This means, among other things, that when ownership title to the token is transferred, ownership title to the asset the token represents is also transferred. Tokens can be fungible or non-fungible. In the financial sense, the principle of fungibility is that the item in question represents the same value as that of a different item of the same type, and thus they can be readily exchanged[2]. Non-fungible tokens (which is what NFTs are) are a unique asset that cannot be exchanged in a simple manner for a different token of the same type[3]. The authenticity of the link between an NFT and the asset in question – in the case at hand real estate – which is authenticity written into a blockchain, is intended to ensure[4] that when the ownership title to the NFT in question is transferred, in reality we transfer the right represented by the token. In turn, an NFT smart contract contains a precise description of that right.

For the sake of further argument, it is assumed that ownership title to real estate is in fact recorded in a smart contract, and the real estate is individually identifiable in the meaning of art. 155 § 1 of the Polish Civil Code[5], by a number in the land and mortgage register, by area, and registered plot numbers, while formal concerns as to the real estate represented by the particular NFT are ruled out.

[1] T. Zalewski, *Tokenizacja – nowe życie starej koncepcji*, LinkedIn, 21.04.2022, https://www.linkedin.com/pulse/tokenisation-old-concept-given-new-life-tokenizacja-tomasz-zalewski/ (accessed: 29.08.2022).
[2] A.-D. Popescu, *Non-Fungible Tokens (NFT) – Innovation beyond the craze*, Proceedings of Engineering & Technology Journal 2021, IBEM 2021, https://www.academia.edu/50920483/Non_Fungible_Tokens_NFT_Innovation_beyond_the_craze?auto=citations&from=cover_page (accessed: 29.08.2022).
[3] Ibidem.
[4] NFT authentication is a quite complex process, although it may not seem so. The initial purchase of a token – from the person who *minted it* – is in fact based on trust in the NFT proprietor concerned, according to their portfolio and held assets, and at the same time their recognizability. Subsequent purchases are also based on the history of trades in the NFT. This is because there are no technical factors that prevent any person from creating their own NFT when using an asset of any kind, including an asset that does not belong to them.
[5] Civil Code of 23 April 1964 (consolidated text, Journal of Laws of 2022, item 1360).

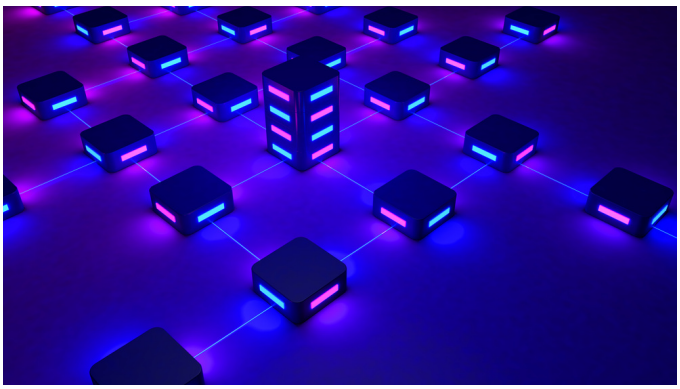
In a blockchain transaction concerning an NFT, a specific asset belonging to the holder of a particular portfolio is assigned to the holder of a different portfolio. The transaction should be effected when both parties declare, using their portfolio keys, that the transaction – an asset transfer – has in fact occurred. When being assigned to a specified person, the key can be considered a signature, but it confirms at best that the declarations made by the parties have been documented (art. 77(2) of the Polish Civil Code). This is because a signature placed in the form of a portfolio key cannot be considered to fulfill the electronic form requirement under art. 78(1) of the Polish Civil Code, i.e. to be a qualified signature.



Under Polish law, the special form, i.e. a notarial deed, must be observed for transfer of ownership title to real estate. This applies equally to a single agreement in which a real estate transfer obligation is undertaken and transfer is made, and where the real estate transfer obligation and real estate transfer agreements are separate (art. 158 of the Polish Civil Code). The requirement as to form is especially important because it specifies the role of the notary – a person of public trust – in ensuring that the transaction is safe for the parties themselves and for civil law transactions in general. In turn, the requirements for a notarial deed are specified in art. 92 of the Polish Law on the Notary Profession[6]. The notary's duties include precise vetting of the parties to the transaction, verifying their citizenship, providing the appropriate instructions and advice, ensuring that the parties duly understand the wording of the declarations made, and ensuring that the declarations reflect their wishes (art. 94 § 1 of the Law on the Notary Profession).

This means that if the smart contract relates directly to transfer of real estate, that smart contract will be **void and invalid** under Polish law, regardless of whether it provides solely for an obligation to transfer ownership title to real estate, or it is intended as an agreement in which a real estate transfer obligation is undertaken and transfer of ownership are made. In such a case, the buyer of the token will not be able to demand that the seller render the performance being the obligation to sell the real estate or transfer ownership title to the real estate because there are no legal grounds for doing so. The buyer is left with only a claim for the funds paid into the seller's account to be returned, due to the due performance not being rendered.

Is it possible, therefore, to structure an NFT smart contract as a preliminary agreement in which the real estate owner has an obligation to conclude an agreement of sale of the real estate in future? The answer is that it is possible, subject to the consequences that follow from the form in which that contract is concluded. Under art. 390 § 2 of the Polish Civil Code, conclusion of a final agreement can only be demanded successfully when the preliminary agreement has been concluded in the form prescribed for the final agreement. If the preliminary agreement is concluded in document form, as is currently the procedure in NFT transactions, the parties are each able to seek successfully from the other only redress of damage resulting from the fact that the agreement was not concluded. Therefore, as ownership title to the real estate would not ultimately be transferred in an effective manner until after the parties met in the presence of a notary, this approach to using NFTs in real estate transactions could be counterproductive, as it is intended to simplify and render the transaction secure.



[6] Law on the Notary Profession of 14 February 1991 (consolidated text, Journal of Laws of 2022, item 1799).

On the other hand, this does not mean that NFTs cannot be used effectively on the real estate market in a different way that reflects the financial rationale for potential investors, although entailing greater risk than purchase in the conventional manner. One of the most common methods used in practice is using tokens to represent shares in commercial companies, where the sole property is or will be real estate, and where the laws of the country in which the company is registered do not require the special form for the sale. This was the manner employed for one of the first and most prominent transactions of this type on the market, in which in May 2021, according to reports, real estate in Kyiv was sold which was represented by an NFT recorded on a blockchain[7]. The start-up Lofty[8] operates in a similar way. It allows investment of a minimum of USD 50 in purchase of a token representing a shareholding in a company that is due to purchase a particular piece of real estate once funds have been raised. This needs to be qualified once again by noting that in fact, in the cases described, the transactions do not relate to the real estate itself, but shares in particular LLCs registered in the state of Delaware in the USA.

Also, where NFT smart contracts are suitably structured, lease agreements can be concluded, with a right to grant further access, with respect to entire pieces of real estate or even very small parts of real estate, where hundreds of investors are involved at one time. It is also possible to create closed markets or communities to which only holders of specific tokens have access, in which real estate is on offer that is not available to a broader target group[9]. Offers for purchase of virtual real estate, functioning solely in the metaverse, with no material representation, is an entirely different issue, even with regard to the applicable law[10].

The enthusiasm that accompanies NFTs around the world cannot be disregarded, and is also reflected to some extent on the real estate market as well. The current legal framework, for which there are strong grounds due to the need to safeguard trade, requires a certain level of restraint with respect to using this technology on the real estate market. At the same time, this does not mean that use of tokens to represent real estate should not continue to develop. Assuming that there will be greater certainty as to the parties to a transaction, the terms on which the transaction is effected, and – above all – the subject of the agreement itself (which must be linked by straightforward and technical means to the register comprising the real estate on the basis of records in land and mortgage registers), there could be grounds (more likely over the next ten to twenty years) for considering a legal framework for opening the market up to this technology.

[7] See https://www.coindesk.com/business/2021/05/25/techcrunch-founders-apartment-to-be-sold-as-nft/ (accessed: 29.08.2022).
[8] See https://www.lofty.ai/ (accessed: 29.08.2022).
[9] One example is the Real Estate Investment Club: https://realestateinvestmentclub.io/?utm_source=Bitcoinist&utm_medium=PR&utm_campaign=REIC (accessed: 29.08.2022).
[10] One example is Decentraland: https://decentraland.org/ (accessed: 29.08.2022).

NFTs and cybersecurity

Jakub Chlebowski

Like other digital solutions, an NFT (*non-fungible token*) is exposed to the danger of cyberthreats. As an NFT uses blockchain technology, the cybersecurity problems that might affect an NFT are similar to those that affect a broad range of blockchain technology solutions. Equally, the token is only as (cyber)secure as the technology is secure from which it is formed.

Although NFTs are still not common and are used little due to the technology being relatively new, the associated cyberthreats are already apparent.

Above all, NFT security depends among other things on the technology used to create it. One of the major security factors is the level of decentralization of the blockchain system from which the NFT is created. The more centralized the blockchain system, the greater the risk of an unauthorized person taking control. Although this is at odds with the idea itself of *distributed ledger technology*, which blockchain is, blockchain is created by one or a small number of parties. This technology is intended to ensure security due to roles played by a large number of parties in the operation of that technology, as this minimizes the risk of an unauthorized person taking control. The lower the number of parties managing NFT production projects, the easier it might be to gain control of the entire token resources created in the project. This might even result in them being lost completely.

Another serious risk that may impact all users of a particular solution from which an NFT is generated is vulnerabilities that might enable control to be gained over the tokens or their integrity or authenticity to be endangered in an unauthorized manner. The best example is an error in the Ethereum platform source code, which in June 2016 led to theft of tokens worth approximately USD 50 m[1]. This is relevant above all to platforms that are just in the process of being launched. As they are start-ups, they may disregard the issue of security, and this may place users at risk of loss of the funds they invest in the NFT.

In addition, there is a broad spectrum of NFT cyberthreats, now well known, that might affect individual users. These threats will become increasingly common. As NFTs are used, new types of risk to token security will emerge. The major threats existing at the moment include:

- sale of fake NFTs, for example for copies of artworks that do not have a token or have a counterfeit token;
- gaining control of users' accounts on NFT trading marketplaces, which could result in theft of the funds accrued on those accounts and unauthorized trade in NFTs held by users;
- phishing, leading to unauthorized access to users' bank accounts.

Although blockchain technology ensures greater technological security than the "conventional" IT solutions, NFT security is not only a question of technological resilience of NFTs to possible threats. NFT cybersecurity measures include a range of other factors such as organizational matters concerning use of NFTs, developing the appropriate processes within an organization that has NFT-generating systems, or as a minimum a suitable policy for advising NFT users of cyberthreats related to generating

[1] *What Was The DAO?*, Gemini, 17.03.2022, https://www.gemini.com/cryptopedia/the-dao-hack-makerdao#section-the-dao-hack-remedy-forks-ethereum (dostęp: 31.08.2022).

tokens or trading in products that contain NFTs. Only a multifaceted approach to cybersecurity can mitigate the risk of incidents that pose a threat to security of tokens, token producers, and buyers of tokens.

NFTs and laws on cybersecurity

NFT (cyber)security is not only a question of technical or technological security guaranteed by systems used to create NFTs. There might also be legal aspects, due to cybersecurity legislation that is being developed at EU and national level.

Both the current cybersecurity legislation (in the form of the NIS directive[1] and the National Cybersecurity System Act[2]), and the envisaged legislation (NIS2 directive[3], DORA regulation[4] and a bill amending the National Cybersecurity System Act) – are intended to protect the most important areas of the national economy against cyberthreats and ensure that they function smoothly. These laws will apply if entities that are operators of essential services, providers of digital services, or state entities required to comply with these laws use NFT technology when providing an essential service or digital service, or performing public duties, as the case may be.

With regard to operators of essential services, the NIS directive requires member states to specify at national level the *appropriate and proportionate technical and organisational measures to manage the risks posed to the security of network and information systems they use*[6]. Similar obligations are placed on digital service providers[7].

This means that both operators of essential services and digital service providers should for instance undergo cybersecurity incident risk analysis and analysis of management of that risk, where the NFT technology or systems used in their business operations enabling them to make use of tokens are used to perform their essential services or digital services, as the case may be. Operators of essential services and digital service providers need to take measures of a technical and organizational nature (such as managing continuity of operations, and monitoring or testing systems) enabling them to make use of those solutions in a secure and continual manner and which will keep the effects of incidents on the essential services and digital services provided to a minimum.

Because NFT technology is relatively new, at the moment it will be used by operators of essential services and digital service providers to provide their services on a limited scale, if at all. Nonetheless, even now, essential sectors of the economy, such as banking, have been identified, on which NFTs could have a major impact[8].

In addition, this demonstrates even further that the ongoing legislative developments concerning cybersecurity that cover new areas of the economy in which NFT technology is used more frequently than in other sectors, or the establishing of a particular practice due to application of soft law instruments and norms, could change this, as could the emergence of new services that use NFTs. It is possible that the obliged parties that make use of these services will have to conduct security assessment for specific NFT solutions. This would be done in particular by analyzing risks that may arise when using these solutions, and by taking measures to mitigate the negative consequences of using NFT technology.

[2] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (OJ L 194, 19.7.2016, p. 1).
[3] National Cybersecurity System Act of 5 July 2018 (consolidated text, Journal of Laws of 2020, item 1369).
[4] Proposal for a Directive of the European Parliament and of the Council on measures for a high common level of security across the Union, repealing Directive (EU) 2016/1148.
[5] Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulation (EC) no 1060/2009, (EU) no 648/2012, (EU) no 600/2014, and (EU) no 909/2014.
[6] Art. 14(1) of the National Cybersecurity System Act.
[7] Art. 16(1) of the National Cybersecurity System Act.
[8] B. Legters, *Will The Growth In NFTs Change The Trajectory Of The Banking And Payments Industry?*, Forbes, 23.06.2021, https://www.forbes.com/sites/boblegters/2021/06/23/will-the-growth-in-nfts-change-the-trajectory-of-the-banking-and-payments-industry/?sh=1771e0a554ad (accessed: 31.08.2022).

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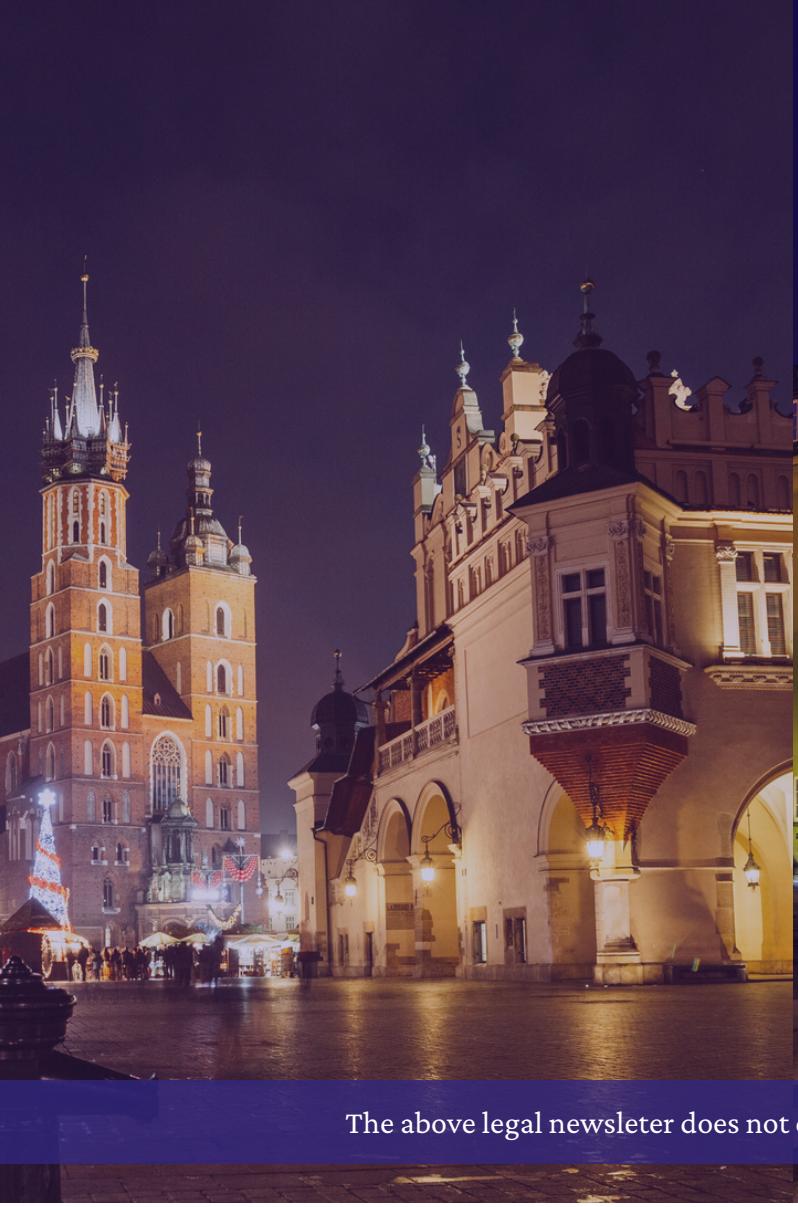

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