

National Cultural Policy Submission

Tech for Social Good

Context

Australia has a tremendously talented and diverse arts and culture sector. TSG believes that comprehensive institutional, legal, and commercial support for artists will encourage and enable them to contribute to the sector.

The sector, which was disproportionately impacted by the global COVID-19 pandemic, has commendably innovated by integrating digital capabilities to produce ongoing cultural outcomes, reaching more geographically and culturally diverse audiences domestically and internationally. One manifestation of this innovation is the popularisation of non-fungible tokens (NFTs).

Use cases for NFTs are continuously expanding, making them increasingly relevant to national culture. While historically used as a means to develop and distribute digital art, more recent use cases of NFTs have included music NFTs, access to limited edition clothing, and exclusive access to member or VIP benefits.

NFT sales value of all categories reached just under US\$2.5 billion in the [first half of 2021](#), up from just US\$13.7 million in the first half of 2020. The NFT market is currently [heavily concentrated](#) in North America and Europe, with US, British and Canadian artists accounting for 73 per cent of NFT sales totals. Since February 2020, US artists have generated 50 per cent of total sales, followed by British artists 13 per cent and Canadian artists 10 per cent.

What is an NFT?

An NFT is a piece of data that is hosted on the blockchain. Its 'non-fungible' nature means that each token is unique and cannot be replaced with another (unlike a banknote).

NFTs are usually linked to a particular asset. Once linked, NFTs are used as a digital certificate of authenticity which certifies that a person "owns" the asset to which the NFT is attached. The blockchain can be inspected by anyone at any time to verify who owns the asset.

NFTs are tradable and the records of these transactions are automatically recorded on the blockchain. These records cannot be altered manually, adding to the security and certifiability of the process. Assets can include digital assets such as digital art, photos, music, or property in virtual worlds. However, there is no reason why an NFT cannot also be used to certify the authenticity or ownership of physical assets.

International examples of NFTs

Various industries have begun to see the potential of NFTs and blockchain technologies in generating more engaging interactions with audiences, attracting sponsors, and engaging global markets.

Digital Art

Viewing art in physical galleries and museums can have powerful effects on an individual's mood, stress, and well-being. This effect has now [been shown](#) to occur in relation to digital art galleries as well. Results show that even very brief viewings can have significant effects, leading to lower negative mood, anxiety, and loneliness, and improve wellbeing. These results are comparable to other interventions such as nature experiences and visits to physical art galleries.

During the first wave of the COVID-19 pandemic, arts and cultural institutions quickly shifted from stationary buildings to the Internet. For the first time, digital museums and online art galleries became the focus of public attention. Digital art suddenly became empowered to reduce barriers of inequity in accessing, as well as becoming able to reach a much wider, non-local audience.

On 12 March 2021, an NFT by artist Beeple entitled 'Everydays: The First 5000 Days' sold for [US\\$69.3 million](#). This represented the sixth highest sale of an artwork by a living artist and the [most expensive sale](#) of an NFT. The work is now displayed in a digital museum which the public can access through a web browser.

Since the sale of The First 5000 Days, there has been an observable spike in interest in the Australian digital art world. Works by a number of prominent Australian artists have been made available for purchase on online platforms such as [Culture Vault](#), an Australian platform and creative agency which presents and sells high-quality NFTs and helps artists and cultural brands navigate the blockchain.

While NFTs are being made available for purchase on Australian marketplaces, an NFT is yet to come up for sale at an art auction in Australia. [international auction houses](#) have comparatively transacted millions in NFTs, with [significant increase in demand](#) during the COVID-19 pandemic.

NFTs in the fashion industry

In August 2020, Louis Vuitton introduced its mobile game 'Louis: The Game' to celebrate the 200th birthday of its founder, Louis Vuitton. The game simulated the journey to Paris of its mascot – Vivienne. The game offered 30 free NFTs as rewards for players to collect throughout the adventure.

A year later, Dolce & Gabbana integrated into its Alta Moda Show in Venice the auctioning of NFTs representing digital ownership of the outfits on show. A number of NFTs were purchased for six figure amounts, including those which were not tied to physical assets such as a dress or suit. Vogue later described the approach as 'A [Million-Dollar Success Story](#)' which '[blurred]... the lines between the physical and virtual'.

Online store Uniqly.io allows artists to create NFTs of digital clothing featuring their designs. Once the NFT is purchased, the owner may 'burn' the NFT to receive a physical copy of the item. The NFT is no longer 'burnable' to receive another physical copy but may be kept as a certificate of authenticity of the physical item. Uniqly states on its [website](#) that "[as] a creator of unique design, collection or art of any kind, you will no longer be concerned with the risk of counterfeiting thanks to our Proof of Ownership with easy-scanning QR codes and safe-to-wash NFT tags."

Music NFTs

Music NFTs usually contain links to images, audio, or a combination of both. Music NFTs allow artists to sell their content directly. As the blockchain allows the original seller to take a cut of future sales,

NFTs are a crucial mechanism for musicians to earn future royalties on their sales of their digital content on the blockchain. Compare this with the fraction of cents artists receive through music streaming services.

The use of NFTs in the music industry has grown rapidly. In March 2021, American rock band Kings of Leon became the [first band to publish an NFT album](#). Purchasers of the limited NFT received a physical vinyl record of the album and/or exclusive concert benefits, making the NFT and its entitlements a popular collector's item.

Internationally acclaimed artist and entrepreneur, Snoop Dogg, recently announced plans to launch the [world's first 'NFT record label'](#).

NFT-related issues

Trademark

In May 2022, high-profile merchandiser, Hermès, [successfully initiated proceedings](#) against a defendant by the name of Mason Rothschild for breach of trademark. Rothschild is a 'digital speculator' who sought to get rich quick by appropriating the brand 'METABIRKINS' for use in creating, marketing and selling NFTs which featured the name. METABIRKINS was a brand simply ripping off Hermès famous 'BIRKIN' trademark by adding the generic prefix 'meta', referring to virtual worlds and economies where digital assets such as NFTs can be traded.

Rothschild openly revealed that he intended to make his fortune by swapping out Hermès' 'real life' rights for 'virtual rights'. As he has explained, he tried to 'create the same kind of illusion that [the Birkin] has in real life as a digital commodity.

He also acknowledged that he chose to sell his NFTs as METABIRKINS because a BIRKIN handbag is a highly valuable asset in the physical world. Rothschild secured the trademark for 'METABIRKINS' and began trading the NFT collection prior to commencement of Hermès' legal action, recording sales in excess of US\$1 million.

Companies in the US that have become involved in the NFT space have begun directly [trademarking NFTs](#) – whether those NFTs were used as a certificate of authenticity, a digital 'ticket' to redeem a physical asset, or simply as a collectible. In the Australian context, there remain significant uncertainties around the level of protection provided by trademark laws over blockchain assets.

Copyright

Like physical artwork, the purchase of an NFT does not confer copyright of the work upon the purchaser. Controversy recently arose around model and actress, Emily Ratajkowski, selling [an NFT depicting an image of herself](#) during a photoshoot. While Ratajkowski owns the physical artwork, the copyright in both the photo and the framing are unlikely to have been expressly granted to her. Under Australian copyright law, copyright seeks to protect two categories of subject matter: 'works', being literary works, dramatic works, musical works and artistic works; and 'subject matter other than works', being sound recordings, films, television and sound broadcasts and published editions.

In addition, it must originate from an 'author'. Historically, Australian courts have made it clear that it is necessary to have a human author. In *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239

CLR 458, the High Court emphasised that, for a work to be protected by copyright, it must be the product of independent human intellectual effort. In *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCAFC 149, the Full Federal Court further held that the human intellectual effort must be directed to the creation of the material form of the work (rather than some antecedent activity).

Many assets linked to NFTs are generated by computers with little human input or effort. This means that ‘minting’ an NFT (technical term for creating an NFT) does not automatically confer copyright over the NFT upon the ‘minter’. In *Thaler v Commission of Patents* [2022] FCAFC 62, the Full Court reaffirmed the requirement for human effort in content creation, but commented that:

In our view, there are many propositions that arise for consideration in the context of artificial intelligence and inventions. They include whether, as a matter of policy, a person who is an inventor should be redefined to include an artificial intelligence. If so, to whom should a patent be granted in respect of its output? The options include one or more of: the owner of the machine upon which the artificial intelligence software runs, the developer of the artificial intelligence software, the owner of the copyright in its source code, the person who inputs the data used by the artificial intelligence to develop its output, and no doubt others. If an artificial intelligence is capable of being recognised as an inventor, should the standard of inventive step be recalibrated such that it is no longer judged by reference to the knowledge and thought processes of the hypothetical uninventive skilled worker in the field? If so, how?

This is a developing area of law, and it is not yet clear how these digital artworks will be treated by copyright law. Without further guidance on how blockchain assets are treated under Australian copyright law, artists are likely to be discouraged from creating blockchain-hosted content due to potential legal liability.

Law Enforcement

Significant attention has been given to the supposed ‘untraceability’ of cryptocurrencies. When Bitcoin first entered mainstream discussion in 2009, the asset was heralded as a secure, decentralised and anonymous way to conduct transactions outside the conventional financial system. This led to the widespread belief that cryptocurrencies would be used by drug dealers, arms traffickers, and tax evaders.

In reality, blockchain assets are anonymous, but not private or untraceable. The blockchain retains a historical ledger of all pending and finalised transactions. Transaction records are publicly viewable and cannot be modified, ensuring that records are completely accurate and time stamped. Compare this to the effort and resourcing required to obtain records from traditional banks which can often take months or years of navigating paperwork and bureaucracy, particularly when those banks are overseas.

The traceability of blockchain assets has been demonstrated a number of times around the world. High-profile law enforcement action includes:

- the June 2021 seizure of [US\\$2.3 million](#) in bitcoin paid to a ransomware extortion group
- successful prosecution of an ex-Microsoft engineer who stole and attempted to launder US\$10 million in digital goods [by using a Bitcoin ‘mixing’ service](#)
- nearly [US\\$1 billion](#) seized from a Bitcoin address linked to the Silk Road black market
- a [record AU\\$8.5 million cryptocurrency seizure](#) in August 2021 by Victoria Police, linked to a dark web drug dealing syndicate.

An analysis of digital asset seizure activity demonstrates the efficacy of law enforcement in relation to this type of property. Considering the untraceability and anonymity of physical cash, and the

continued improvement of law enforcement capabilities, it is clear that concerns relating to criminal or tortious misuse are largely unfounded.

Gender Diversity

Traditionally, artists have needed to be represented by established galleries to engage an audience and generate a meaningful income. This approach presented an accessibility barrier for unestablished artists, particularly those from low socio-economic, culturally and linguistically diverse (CALD), or gender-diverse backgrounds. The decentralised nature of NFTs, however, presents modern artists with new pathways into global cultural markets.

Currently, global NFT transactions illustrate similar inequitable diversity trends to that of traditional art markets. A 2021 report by ArtTactic found that female artists accounted for just 5 per cent of all primary NFT art sales, [with only one female artist in the top 10 highest earners](#) by sales volume. Even after taking into account [secondary sales](#), women account for just 16 per cent of NFT sales.

Founder and Managing Director of ArtTactic, Anders Petterson, recently opined that “[b]efore we throw ourselves into the metaverse, it might be a good idea to stop and ask ourselves what we want this digital universe to look like, before we repeat our mistakes from the past”. To this end, cultural emphasis is needed to bring exposure to historically underrepresented communities in the art world, with proactive steps required to shape the NFT market into one that can celebrate and empower artists from all backgrounds.

First Nations Culture

Australian First Nations culture is enjoyed and passed down through art, music and dance. Sadly, the disenfranchisement of Indigenous Australians has only worsened with the emergence of the internet, where art, music, and other cultural assets have been subject to misappropriation.

Historically, certification of Indigenous art has been laborious or impossible due to the highly fragmented nature of digital traceability. However, the inherent record-keeping feature of blockchain assets (as discussed previously) overcomes the need for any such tracing work. NFTs therefore overcome a significant barrier to the consumption and enjoyment of First Nations cultural material as well as the deserved revenue stream it provides to First Nations artists. [Walking Between Worlds](#) is an example of a community-focused project showcasing and empowering First Nations art through NFTs. As described on its website:

Walking Between Worlds (WBW) is an ambitious, community-focused project that brings a level playing field of opportunity for global indigenous artists and creatives to capitalise on the disruptive tsunami of the NFT revolution.

For too long, global indigenous communities have been disenfranchised with the accelerating speed of technologies only worsening this effect. While NFT’s are early, they are exploding. WBW is bypassing the expected lag to indigenous communities by developing a community-based platform that empowers global indigenous communities to capitalize [sic] on this growth market, NOW.

Recommendation

Based on the context and evidence provided in this submission, TSG submits that the following actions be included in the next iteration of the National Cultural Policy:

1. Consider funding options for capacity building in the Australian NFT industry.
2. Assess the economic and social potential of a thriving NFT industry in Australia.
3. Advocate for reform of Australian intellectual property law to appropriately govern the creation and sale of NFTs.
4. Develop a suite of guiding materials on the design, minting and sale of NFTs to support artists seeking to transition into the NFT sector.
5. Support the development of pathways into the NFT space for female and First Nations artists.