

# KUDUN & PARTNERS



## Thought Leadership | Cryptocurrencies

### NFTs: A Passing Trend, or the Future of Digital Art?

Non-fungible tokens (NFTs) have made world headlines this year, as people have begun paying extraordinary prices for the right to own pieces of unique digital assets. From a digital collage sold by Christie's auction house for a whopping USD 69.3 million, to a video clip of LeBron James dunking a basketball, to breed-able digital kitties, the ever-increasing metamorphosis of NFTs has taken the art world by storm. With demand among wealthy art consumers running red hot, a collection of buyers, sellers, exchange platforms, and other relevant stakeholders is seizing the opportunity to get hold of this new type of product.

Perhaps inevitably, this meteoric rise has ignited controversy. Some believe that the potential of NFTs far exceeds that of other types of digital collectibles, while many others believe that the market value of NFTs comes from their novelty, making them little more than a bubble that will burst in time. The uncertainty surrounding these competing viewpoints has prompted experts in various industries to use their breadth of expertise to analyze the true worth of the NFT market.

Legally speaking, the very recent appearance of NFTs has meant that their legal framework is still largely unclear – and future developments also remain to be seen. Even at this early stage, however, it is worth a preliminary exploration of the legal status of these digital tokenized assets.

Before diving into the legal intricacies, however, it will be helpful to discuss the nature of this new type of product.

### What exactly is an NFT?

An NFT is a marker (or 'token'), stored within the blockchain, that signifies ownership of a digital product. These digital products can

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be anything coded into 1's and 0's, such as photos, paintings, videos, or even tweets. The digital assets themselves can be copied endlessly all over the internet – subject to copyright law, of course – but they can only have one recognized owner.

The key word, therefore, is “non-fungible” – meaning that each NFT is unique and not directly interchangeable. A Bitcoin is “fungible” because one Bitcoin could be exchanged for another which is identical. But there is only one version of that particular [LeBron dunk video](#), just as there is only one Mona Lisa. To own it is to acquire some measure of personal satisfaction or prestige.

NFTs are mostly created within the Ethereum blockchain by way of cryptography. The blockchain's function as a decentralized ledger automatically records all transactions, guarding against fraud or disagreement by ensuring that no two NFTs are identical. Such a record guarantees both uniqueness and scarcity, which ultimately give value to each NFT.

Of course, as with any other piece of fine art, the *amount* of value is completely determined by buyer demand. This variable has given rise to a price-volatile market where a simple meme like [Nyan Cat](#) can be sold for USD 580,000.

## Status of NFTs in Thailand

Thailand's digital asset community has largely embraced NFTs, with enthusiasts carrying out investments and exchanges. However, this activity came to a halt when the Securities and Exchange Commission of Thailand (SEC) decided to [ban outright the trading of NFTs](#) alongside other meme- or fan-based tokens, effective immediately.

Reasons for the ban seem to be based on the perspective that NFTs serve as a market distraction, or a type of gimmick, that brings no real value. Here we explore some key concerns from the investment community as they relate to this new prohibition.

**1. Locked out without warning** – Certain exchanges and investors expressed distaste not only for the ban itself, but also regarding the SEC's abrupt method of executing it.

The sudden ban leaves relevant players with their digital asset ambitions suspended, and little to show for the resources they may have already invested in this new sector. Many in the community feel that the SEC should have – at the very least – acknowledged,

## About Us

### FinTech Practice Group

Kudun and Partners has a team of dedicated lawyers well versed in the financial services sector including Fintech. While the relevant laws related to digital assets businesses only came into effect in 2018 in Thailand, the fast growing investment opportunities via Cryptocurrencies and Initial Coin Offerings (ICO) has prompted governments and regulators around the world to re-strategize their approach in handling digital assets.

We continue to represent international and local clients in the financial sector, including capital markets. We offer cutting edge advice on financial regulatory, capital markets transactions, fund investment, derivatives, structured finance, private banking, wealth management as well as corporate secretarial services.

consulted, and communicated with the digital asset community, while also holding a public hearing before their official announcement of the ban.

**2. Losing out on profit** – Bans affect supply but not demand. With the NFT hype still going strong, digital asset enthusiasts unable to operate in Thailand may find alternative exchange platforms that are outside Thai jurisdiction. In such cases, Thai-based exchange platforms lose out on potential revenue from NFTs, while Thailand itself misses out on tax-generated profit.

**3. Ambiguous legal definition of NFTs** – Given the unclear legal framework that NFTs already possess worldwide, the SEC's self-imposed definition may create interpretational controversies. Essentially, there may be digital assets that fall under the "grey area" of this definition, causing unnecessary confusion and uncertainty.

Therefore, instead of a clean ban on the trading of NFTs, the SEC may now have to manage countless cases of "would-this-digital-asset-fall-under-your-definition", brought by Thai exchange platforms seeking for clarity. This extra workload could put additional strain on the SEC, incurring additional expenses – and even delay the listing of permissible digital tokens on the relevant platforms.

## Other legal issues surrounding NFTs

The novelty of NFTs has created varying legal interpretations within different countries. While some countries embrace the development of NFTs, others like Thailand ban trading in these and other types of digital tokens. Considering the complex status of NFTs generally, it is worth discussing the various types of legal issues surrounding them.

**1. Jurisdiction** – As NFTs circulate globally within the decentralized blockchain, the question arises as to which jurisdiction, or which law, should govern NFTs. In most cases, the answer is simple: Legal jurisdiction is assigned to the country or territory where the NFT is created (or "minted"). It is worth stressing that some jurisdictions may impose legal restrictions on NFTs – such as a ban on trading them, as mentioned earlier. However, as in other legal domains, the question is largely unresolved as to which jurisdiction should govern a multi-border NFT, or cases where tokens have illegally traveled across borders.

**2. NFT Data Storing and Hosting** – A storage method called "on-chain storage" can be used to link an NFT with a creative work. This

process involves storing the whole data of the digital work (e.g., artwork or video) inside the NFT code, within the blockchain. Such a method may be impractical, however, particularly with larger files, as on-chain storage would normally incur a costly transaction fee commensurate with the size of the NFT. Therefore, an alternative solution is to link the NFT to storage off the chain, usually on a standard online web server, which tends to be less costly and time-consuming.

With this type of arrangement, however, a legal question arises as to who is legally obliged to host off-chain data related to NFTs. In other words, without clearly identifying who is legally obligated to host NFT-linked data off the chain, this data may be taken offline, or the code may be deliberately changed – and the owners of the NFT will not have any legal protection to retrieve their data at will. An inability to resolve this technical and legal risk defeats the purpose of storing it on the blockchain in the first place – to obtain absolute security.

**3. Intellectual Property (IP)** – The purchase of an NFT grants the purchaser the ownership, but not the underlying IP rights, of the digital asset. The original creator of the work retains the IP rights, and purchasers may not duplicate, reproduce, distribute, or make derivative work from the asset they have purchased unless they receive express permission to do so. The underlying IP right (specifically, copyright) may only be transferred when explicit written consent, or licensing, has been granted by the creator.

Thus, even the owners of NFTs may be held liable if their actions infringe on the IP rights of the original creator. For instance, DC Comics recently issued a copyright infringement warning letter to one of its artists. The artist had made USD 1.85 million by selling NFTs linked to artworks featuring a DC character, stating that such use represented a copyright infringement.

In other cases, however, IP infringements could be difficult to enforce, as relevant parties in the blockchain tend to use pseudonyms which confer anonymity. Whether the enforcement of IP rights for NFTs would be practical, or would in turn devalue NFTs themselves, remains to be seen.

## The future of NFTs

Despite these legal hurdles, the popularity of NFTs may open the door to various new business ventures. For instance, despite the SEC's ban on the trading of NFTs on licensed platforms, demand

surrounding the creation and ownership of digital arts and collectibles is still sky high. We therefore believe that lifting the ban would create more opportunities for all concerned. Issuers and investors would have the chance to own and trade digital art, while artists or creators could use this demand as inspiration to create new types of original art for this digital market.

Beyond the world of digital art and the realm of SEC rule, the NFT model could have practical applications in otherwise complex procedural matters, such as the transfer of land ownership. An NFT may represent one land title deed, and encode the essential information related to that land title deed into the tokenized asset. Such an arrangement would ensure the safety and security of the information, allowing purchasers efficiently to verify the asset data via NFTs.

NFTs, secured by blockchain technology, hold considerable promise for future business ventures and transactions. Given these benefits, it remains to be seen if Thailand's SEC will amend its blanket ban on NFT trading and open the door to the further development of this new sector.

Kudun & Partners is closely following the legal and practical developments in this space, to better serve our clients. For legal guidance surrounding NFTs or other types of investments, [contact us](#) today.

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