

JUNHE SPECIAL REPORT



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Legal Perspective of NFT Digital Collections in China

Non-fungible Tokens (NFT)¹ have been around for some years, but they have gained in popularity since 2020 and continue to attract attention both from within and outside the global blockchain community. China is no exception. According to recent statistics², from November 2021 to July 2022, China's NFT platforms expanded dramatically from 26 platforms to over 700³. The number of China's NFT platforms is still growing.

NFT digital collections generally refer to digital collections in the form of NFTs, and include original artworks, museum collections, humanities and historical derivatives (for instance, virtual assets of games, and cultural and creative peripherals), as well as audio and video works. Due to the nature conferred by their underlying blockchain technology (uniqueness, immutability, traceability, timestamp, scarcity, etc.), NFTs also represent (or their Hash Function directs to) specific dependable and unique digital assets or data. With the technological development of the Value Internet built on Web 3.0 networks, NFTs would become identifiable and have unique assets and data in the operation of the Metaverse. NFTs can be unique digital assets and data (digital extensions of real-world assets) or their proof of interest mapped on the blockchain originates from real-world assets and any carrier thereof, or they represent any unique digital assets and data originated directly within the digital

world.

NFTs are digital tokens that can represent various attributes such as identities, assets and interests in the Web 3.0 networks. Their nature is dependent on the original assets and asset operation models, and as a result there is difficulty in terms of the identification of the uniform legal nature of NFTs⁴. This article briefly discusses the current Chinese legal framework concerning NFT digital collections, which are currently the main form of NFTs. This article considers the recent decision by the Hangzhou Internet Court concerning an NFT digital collection copyright infringement dispute (hereinafter referred to as the “Golden Idea Case”⁵).

1. NFT Digital Collections should not be Virtual Currency Prohibited by PRC Law

On 15 September 2021⁶, the People's Bank of China, the Cyberspace Administration of China (“CAC”), the Ministry of Public Security and seven other government agencies, issued the *Notice on Further Preventing and Dealing with the Risk of Speculation in Virtual Currency Transactions* (Yin Fa [2021] No. 237) (hereinafter referred as “Notice 237”) which sets out the strictest prohibitions to date on business and civil juristic acts relating to virtual currency. Although “virtual currency” refers not only to “fungible currency,” Notice 237 follows the regulatory targets indicated in

¹ A token can also be translated as “代币”, “令牌”, etc. We believe that tokens are sometimes used in the same way as virtual currency, which is slightly ambiguous for NFT digital collections, and can easily be confused with coin or other cryptocurrency, and I suggest that it is more appropriate for NFTs to be referred to as “非同质化通证”.

² See *Research Report: Counting and Analysis of Domestic NFT Offering Platforms*, published on a WeChat public account “白话元宇宙 NFT” on 26 April 2022.

³ <https://vr.sina.com.cn/news/hot/2022-08-09/doc-imizmscv5441589.shtml>.

⁴ For example, if an NFT is used in digital identity recognition, proof of

offline asset rights, forensic identification and evidence, etc., then it shall be categorized and the relevant legal rules are applicable.

⁵ (2022) Zhe 0192 Min Chu no.1008, first instance judgment made by Hangzhou Internet Court regarding the information network communication right's dispute between Shenzhen Golden Idea Ltd. (claimant) and Hangzhou Yuanyuzhou Technology Co., Ltd. on 22 April 2022. We are not aware of any information regarding appeals and second instance hearings relating to the foregoing case.

⁶ Notice 237 was promulgated and effective on 15 September 2021.

the *Notice on Preventing Bitcoin Risks* promulgated by the People's Bank of China and four other government agencies in 2013 and other regulations previously published by various ministries and commissions, all aimed at maintaining the stability of the financial order. Therefore, the superior laws of Notice 237 are the *Law on the People's Bank of China*, the *Law on Commercial Banks*, the *Law of Securities*, the *Law of Cybersecurity* and other relevant regulations⁷. Notice 237 lists Bitcoin, Ethereum (ETH) and Tether USD (USDT) as typical virtual currency⁸ prohibited by Chinese law. Most virtual currencies are used in a Public Blockchain with fully decentralized blockchain technology as the fundamental technology, and they are of a monetary or financial nature (i.e., negotiable, exchangeable fiat currency and tradable; the value of the Stable Coin is also directly anchored to certain fiat currency). These Public Blockchain coins are currently held, exchanged and used in many regions outside China, and they are subject to the various monetary or financial licenses and anti-money laundering regulatory requirements of different countries and regions.

Assuming the NFT digital collections, although they are based on blockchain technology, do not have a financial nature or fall within the scope of financial activities, we believe that the NFT digital collections should not be defined as virtual currency regulated and prohibited under Notice 237. On 13 April 2022, the China Internet Financial Association, the China Banking Association and the China Securities Association jointly issued the “*Initiative on Preventing Financial Risks Related to NFTs*” (the “**Three Associations Initiative**”) which sets out six codes of conduct aimed at “containing the trend of the financialization and securitization of NFTs”. These are (i) prohibiting the launch of financial products associated with NFTs, (ii) prohibiting the weakening of

non-fungible features (e.g. securitization practices such as creating bulk collections or massive splitting collections), (iii) prohibiting the provision of centralized trading or establishing trading venues for NFT transactions, (iv) prohibiting the use of virtual currency as a means of payment, (v) requiring real name authentication, and (vi) prohibiting the direct or indirect investment in NFTs.

The above codes of conduct are not mandatory but provide recommended guidelines to avoid the “financialization” and “securitization” of NFT digital collections. Understandably, NFT digital collection projects that include activities forbidden by the codes of conduct would be more likely to be challenged as financializing or securitizing NFT digital collections, and therefore shall be subject to the requirements of Notice 237. Thus, for the time being, compliance with Notice 237 shall be prioritized for the management of domestic NFT digital collection projects in mainland China.

2. Decentralization vs. Centralization

In order to avoid the financialization and securitization of NFT digital collections, we have observed that it is relatively easy to satisfy the six codes of conduct, since the original commodities of NFT digital collections issued in China thus far are mainly non-financial products such as artworks and cultural products. These platforms require real name authentication in order to comply with anti-money laundering requirements and generally do not create bulk collections or massive split collections.⁹ However, to launch NFT digital collection projects, it is recommended to avoid using virtual currency, speculate on NFT digital collections or offer relevant speculation possibilities.

⁷ The regulations listed in Notice 237 include: the *Law on the People's Bank of China*, the *Law on Commercial Banks*, the *Law of Securities*, the *Law of Cybersecurity*, the *Regulation of Telecommunications*, the *Regulations on the Prevention and Dealing of Illegal Fund Raising*, the *Regulations on the Administration of Futures Trading*, the *Decision of the State Council on Clearing and Reorganizing Various Trading Places to Effectively Prevent Financial Risks*, and the *Implementation Opinions of the Office of the State Council on Clearing and Reorganizing Various Trading Places*.

⁸ Chinese laws and regulations generally use the phrase “virtual currency,” but words such as “enciphered currency”, “digital currency” and “token” are

also used in the market.

⁹ The laws do not specify the quantity limit that would result in being deemed as securitization. Many digital collections for example are generally limited to a few thousand or ten thousand copies (each copy is obviously unique and has a unique private key). In addition, the number of digital collections issued may actually affect the value and scarcity.

Notice 237 bans the use of Public Blockchain coins such as bitcoin and ETH within mainland China. Global NFT platforms currently allow the use of virtual currencies, some platforms or projects only accept virtual currency, and some NFT platforms may also issue virtual currency for specific projects (i.e., fungible virtual currencies). Therefore, the ban on Public Blockchain coins under the existing Chinese legal framework makes it impossible in practice for domestic NFT digital collections to be issued and circulated on fully decentralized Public Blockchains (such as the ETH and Flow Public Blockchains, and various sidechains or platforms running on these Public Blockchain platforms), otherwise it would be impossible to avoid the use of virtual currencies. Such a ban has resulted in a gap between mainland China NFT digital collections markets and the NFT market outside mainland China.

The minting, issuance and circulation of most NFT digital collection projects in mainland China are launched on centralized (or partly decentralized) Consortium Blockchains (or Private Blockchains). For example, the Huanhe (幻核)¹⁰ NFT platform was launched on the Tencent Zhixin Chain, the Topnod (鲸探) NFT platform was launched on the Ant Chain, and the NFTCN (元宇宙中国) platform (Bigverse) was launched on the sidechain of Ethereum. It is worth noting that although the NFTCN platform was launched on the sidechain of Ethereum, as the decision of *Golden Idea Case* indicates, the sidechain is still a Consortium Blockchain with a “de-coined” nature. Cross-chain functions are not open to sidechain users, and users cannot transfer their NFT digital collections to the Public Blockchain of Ethereum.

In accordance with the *Administrative Regulations on Blockchain Information Services* issued by CAC on 10 January of 2019, blockchain projects shall be filed with CAC through its blockchain information service filing management system. Since the issuance of these regulations, CAC has issued nine batches of filed

blockchain projects to date¹¹. Several digital collection projects are included among the seventh (March 2022), eighth (May 2022) and ninth (July 2022) recent batches of filed blockchain projects.

3. Primary and Secondary Markets for NFT Digital Collections (Distribution and Circulation of NFT Digital Collections)

According to the *Decision on Cleaning and Rectifying Various Trading Venues to Effectively Prevent Financial Risks* (Guo Fa [2011] No. 38) issued by the State Council on 11 November 2011 and its subsequent implementation opinions, trading venues engaged in the trading of financial products such as insurance, credit and gold must be approved by the relevant financial management departments of the State Council and the relevant provincial people’s governments. The Three Associations Initiative also clearly recommends not “directly or indirectly investing” in NFT digital collections, not establishing trading venues in disguise, and not providing services for NFT transactions such as centralized trades and standardized contract trades. Considering these recommended guidelines and the requirements relating to prohibited financial activities under Notice 237, there are currently no mandatory legal requirements explicitly forbidding the issuance and circulation of NFT digital collections without a financialization nature.

Current Chinese laws do not prohibit a platform from engaging in the issuance and circulation of NFT digital collections through an e-commerce platform (including any third-party platforms), provided that such platform holds all the necessary corresponding licenses. For instance, subject to its respective business model, the platform may be required to obtain the appropriate value-added telecommunications operation permits/filings, network culture operation permits, artwork trading institution filings and other permits. However, given the different business models and future development of business, and NFT asset holders’ investment expectations worldwide, market players

¹⁰ Huanhe Platform ceased to offer digital collections on 16 August 2022.

¹¹ http://www.cac.gov.cn/2022-07/25/c_1660369837207693.htm.

who are engaged in the circulation and trading of NFT digital collections in the secondary market or related business in mainland China shall be more cautious in identifying compliance risks and keep across the different regulatory requirements and changes.

Based on our observations thus far of domestic NFT platforms, as issuers in the primary market, most platforms tend to be more cautious in selecting the collections source for distribution. For instance, domestic NFT platforms only invite artists to mint NFT works, but do not allow everyday users to freely upload their work to platforms. Further, many domestic NFT platforms are more cautious about secondary market trading of NFT digital collections¹² and do not fully open or only open the secondary market to a limited extent. For instance, in some platform user service agreements, users are required to hold digital collections for individual purposes only, such as personal study, research, entertainment or self-collection, and commercial activities are forbidden. We have also observed that a significant proportion of platforms do not allow the resale of collections, and the rules applicable to the granting of collections vary from platform to platform: some platforms do not allow resale or gift giving, whilst some platforms set certain thresholds for gift giving, for example, the restricted period for prohibiting gift giving may vary from 7 days to 30 days or sometimes up to 6 months or 2 years after a user obtains the collections. There are platforms which not only allow resale and granting as gifts, but also gain fees from secondary transfers. For instance, the decision in the *Golden Idea Case* described NFTCN's business model as the following: (i) for a primary sale, NFTCN charges a user a Gas fee and a commission equivalent to a certain percentage of the sales price; (ii) for secondary sales, NFTCN charges 10% of the profit generated by the sell side user as a commission, and the artist receives 2.5% of the profit as royalties (if there is no premium due to a lower resale

price, no commission or royalties shall be generated).

As discussed above, NFT platforms in mainland China operate on Consortium Blockchains on a centralized basis. The operators of such Chinese NFT platforms shall comply with all requirements and standards applicable to the internet information platforms stipulated under Chinese laws, including but without limitation, those legal requirements relating to personal data and privacy protection, payment specifications, APP compliance requirements, technical cybersecurity and other relevant aspects.

4. Right Attributes of NFT Digital Collections: Ownership of Virtual Property

In this section, we are referring to the rights of NFT digital collections under the Civil Code of the People's Republic of China (hereinafter referred as the "Civil Code") and related civil legal regulations. Article 127 of the Civil Code stipulates that, "Where any other laws and regulations contain provisions in respect of the protection of data and network virtual property, such laws and regulations shall apply." Although the foregoing article introduces the concept of "data and network virtual property," it is still unclear whether the term "network virtual property" covers NFT digital collections. Further, even if "network virtual property" covers NFT digital collections, the Civil Code only confirms that such collections could be protected if provisions exist protecting such network virtual property. Accordingly, in the absence of interpretation and implementing rules in Article 127 of the Civil Code, the legal rights attributes of NFT digital collections as well as the nature and type of the corresponding rights (creditor's rights, real rights or intellectual property rights, or a new type of right or interest)¹³ are still subject to further clarification.

Based on the legal principles of the Civil Code, and judicial decisions on property disputes (including the

¹² Currently, about 29% of NFT platforms in China have a secondary market for NFT digital collections and about 71% of NFT platforms do not have a secondary market. See *Research Report: Counting and Analysis of Domestic NFT Offering Platforms*, published on WeChat public account "白话元宇宙 NFT" on 26 April 2022.

¹³ See Si Xiao, "Analysis of the Property Legal Issues on Blockchain Non-Fungible Tokens (NFTs)," published on 23 August 2021 on the WeChat public account "腾讯研究院".

Golden Idea Case) , such as game currency, game equipment, NFT digital collections and even virtual currency associated with the Public Blockchain prohibited by Chinese laws, we believe that the property attributes of NFT digital collections shall not be denied, and therefore users shall own the property of the NFT digital collections after purchasing the collections on the compliant NFT platforms¹⁴. Subject to the content of the property ownership, the property owner shall be able to occupy, use, transfer and dispose the relevant property.

Besides the relevant applicable legal requirements (such as the de-financialization requirement under Notice 237), users' ownership of NFT digital collections is also subject to the corresponding platform service agreements and user agreements. Specifically, the platform service agreements or user agreements may contain various specific requirements for NFT digital collections, such as purchases, and their use is not permitted for commercial or investment purposes. Therefore, though users may essentially be deemed as the owner of the property, it would still be difficult for them to freely transfer the property without support from the platform or without a well-established cross-platform circulation system. Additionally, if the original assets of a digital collection are derived from works or other assets containing intellectual property rights, a user may still need to obtain the appropriate and necessary authorizations of the relevant intellectual property rights. An analysis of intellectual property rights is briefly described in the section 5 of this article.

In addition to the unclear determination of the nature of virtual property, some hold the opinion that, for the protection of network virtual property and data (including blockchain original digital assets), according to Article 127 of the Civil Code, blockchain

original digital assets shall be protected in accordance with the rules concerning real rights, while other network virtual property and data with weaker controls and dominance shall be protected in accordance with the rules concerning other forms of property interests¹⁵. We believe that this opinion is worthy of further discussion and exploration. If real rights exist in NFT digital collections and certain other digital assets, the owners of such real rights may create usufructuary rights and security interests on their NFT digital collections and other assets, or at least adopt similar principles applicable to the management of real rights of NFT digital collections.

Besides the uncertainty of the property attributes of NFT digital collections, including the connotation, identification, protection and circulation thereof¹⁶, it is advisable to observe the development of legislation and judicial practice regarding pricing in the primary and secondary markets, investment standards, taxation, and the determination of administrative or criminal liabilities¹⁷.

5. Right Attributes of NFT Digital Collections: Intellectual Property Rights and other Civil Rights

Digital collections currently published on different NFT platforms on the market mainly include the following types: original art works, collections of museums and other cultural institutions, game products, cultural and historical derivatives or peripheral products, and audio and video works. The original assets of these digital collections usually contain corresponding intellectual property rights, which may include: (i) original art works, and audio and video works that are still within the copyright protection period, (ii) cultural relics and collections owned by

¹⁴ The Beijing Chaoyang District People's Court's criminal first instance judgement on Ling Yasheng and others on theft (Judgement No. (2021) Jing 0105 Xing Chu 1302), upheld that, whether the platform in question was non-compliant and whether the virtual currency on this platform was protected by law, was two separate issues. Therefore, we understand that compliance of the NFT platform does not necessarily affect the property interest of NFT digital collections associated with that platform.

¹⁵ See Si Xiao, "Theory of Real Rights of Blockchain Digital Assets," published on 27 January 2022 on the WeChat public account "腾讯研究院".

¹⁶ The transactions and circulations discussed in this article refer to

circulations and transactions on platforms within the territory of mainland China. If the NFT digital collection involves a cross-border transfer, it may constitute an import or export of digital artworks, which is a more complex issue and is not addressed here.

¹⁷ Depending on the specific circumstances, the relevant administrative penalty or criminal prosecution threshold may involve specific amounts of money, so the valuation of the property of the corresponding NFT digital collections will be an important consideration.

cultural institutions with ownership or right to use and their copyrights of corresponding image and video works, etc., (iii) copyrights of design works, design patents, etc., and (iv) works published by brand companies containing relevant trademarks or logos of their respective brands. In some cases, NFT digital collections may contain the attributes of personality rights such as portrait rights and name rights.

Therefore, when a user is purchasing an NFT digital collection on a NFT platform, besides acquiring the property ownership of the corresponding collection, the user may be required to obtain an authorization to use the intellectual property rights associated with the original digital work, since the intellectual property rights of the digital collection owned by the collection issuer or designer would not naturally be transferred together with the property ownership of the corresponding collection. As mentioned above, the service agreements and user agreements of various platforms usually prohibit users from using the works for commercial or investment purposes. For instance, permitted use may include self-collection, study, research, entertainment and display, and granted authorization of intellectual property rights are subject to specific restrictions such as restricted terms, non-exclusivity and restricted usage.

However, there are also NFT trading platforms that offer a broader range of authorization. For instance, some platforms will grant the purchaser of a NFT digital collection with perpetual worldwide license to use the copyright during the possession period of the collection, which is non-exclusive, transferable, and non-sublicensable; meanwhile, the purchaser may utilize the collection for the purpose of advertising, printing, publication, product packaging, design, video, animation and gaming. The purchaser may assign the digitally licensed collection. After the transferee purchases a digitally licensed collection, the corresponding license would be transferred simultaneously. Upon the request of the holder of the

NFT digital collection, the copyright owner will cooperate with the purchaser to conduct the relevant filing for the transfer of the copyright¹⁸.

The above discussed practice allows the original copyright owner to enter into a copyright transfer agreement with the buyer instead of entering into a license agreement for the grant of use rights. However, as described in the above user agreements, we believe that unless a user enters into an explicit transfer agreement with the original copyright owner, a user who purchases NFT digital collections on the platform shall still be granted a non-exclusive use right for the corresponding intellectual property rights. In order to avoid confusion between the license and the assignment of copyright, under the transfer agreement (if signed), it is advisable to explicitly provide that (i) the transferee of a NFT digital collection shall become the copyright owner of the digital work and other property rights (e.g. reproduction rights, distribution rights, rental rights, exhibition rights, performance rights, screening rights, broadcasting rights, information network transmission rights, filming rights, adaptation rights, compilation rights, translation rights, etc.), associated with such copyright except for personality rights, and (ii) the original copyright transferor shall no longer own other copyrights other than the rights of person.

The *Golden Idea Case* introduced a meaningful exploration of the intellectual property rights attributes of NFT digital collections. Specifically, (i) the original collection was deemed as an art work with a physical carrier from a copyright law perspective¹⁹, (ii) the decision defined that an NFT transaction is a sale in which the digitalized content is the target of the transaction, and the purchaser acquires through the transaction a kind of property interest, which shall be neither defined as an authorization to use a digitalized property, nor be defined as a transfer or an authorization of intellectual property rights, and (iii) the decision determined that the transaction of NFT digital

¹⁸ See the NFTCN platform agreement for details.

¹⁹ It is consistent with the characteristics of originality, reproducibility and

certain aesthetic significance of the artwork.

collections shall be defined as an information network transmission activity.

Regarding the liability of NFT platforms, the *Golden Idea Case* also provided a noteworthy analysis from the perspective of intellectual property infringement:

(1) A platform operator shall be (i) obliged to conduct due diligence on the issuer of collections at least on a customary basis, including establishing an effective intellectual property rights inspection mechanism and an infringement prevention mechanism, to conduct a preliminary review of the copyright of NFT digital collections traded on the platform, and (ii) subject to a duty of care in the occurrence of any infringements.

(2) any secondary sale of NFT digital collections shall be defined as an information network transmission activity rather than an issuance of works²⁰, and thus the “Exhaustion of Rights Principle” does not apply. This means that a secondary sale of NFT digital collections by users through the platform would still require the granting of a license from the copyright owner for the use of copyright²¹; and

(3) given that copying NFT digital collections is to make the collections available to the public through the Internet, which belong to the act of network transmission, the damages caused by copying should be absorbed by the damages caused by the information network transmission activity, and do not need to be evaluated separately.

Given that the *Golden Idea Case* is an intellectual property rights infringement lawsuit between the intellectual property rights holder and a third-party platform, it provided less comments concerning the property ownership attributes of NFT digital collections, and the boundaries of various rights and

responsibilities of intellectual property rights associated with the transaction of NFT digital collections.

In terms of the property attributes of NFT digital collections, the current Chinese legal framework acknowledges their attributes of property ownership and intellectual property rights, but the connotations and extensions of property ownership remain unclear. NFT digital collections transactions (including primary and secondary sales) could generally be considered as a transfer of property ownership plus a granting of the license of the corresponding intellectual property rights (or the transfer of intellectual property). Currently, platform operators and users rely on the platform service agreements to regulate the relevant parties’ rights and obligations. Considering the complexity of the content of intellectual property rights and the exercise of rights, the boundaries of rights and obligations among all parties (e.g., among rights holders, platform operators, purchasers and transferees and transferors in a secondary sale, etc.) will further be clarified following the development of business operations, legislation and judicial practices.

6. Conclusion and Prospects

The laws and regulations applicable to NFT digital collections are uncertain and subject to further development of legislation and judicial practice. Chinese regulatory authorities generally hold a relatively cautious position in respect to the development of financial markets and financial products under the Chinese legal framework. Therefore, the digital economic development in China, including the development of NFT digital assets, would follow a specific path, which shares some commonality but may still vary from that of other legal jurisdictions (such as

²⁰ The determination that the sale is an act of information network dissemination is limited to the analysis of this case, and we are looking forward to more developments in practice and analysis.

²¹ The court's analysis of the exhaustion of rights principle is based on the principles of copyright law. If the relevant platform agreements and rules are

explicitly agreed upon in relation to copyright licensing or transfer, we believe that the determination and scope of the copyright ownership of the specific work is subject to the provisions of such agreements and rules, if it does not violate the mandatory regulations.

the United States, Hong Kong and Singapore).

We also have observed that the application of NFTs would not be limited to digital collections. In the era of Web 3.0, assets, documents and data mapped from “off-chain” to “on-chain” could also be associated with NFTs in various scenarios with a rich and broad application scope, including original and digitalized assets, such as user accounts and data information, bank accounts, content on the blockchain, transaction data, Internet of Things (IoT) data, etc. With the development of China’s innovative sectors, we will

continue to make observations and expect relevant new businesses comply with China’s economic development and solve some of the issues, including but without limitation, (i) to balance the efficiency of a centralized business with the fairness of a decentralized market, (ii) to promote the tokenization of digital assets (NFTs, fungible tokens or digital-encrypted fiat currency), and (iii) to build a token economy function based on smart contracts and decentralized autonomous organization (DAO). All these matters are inspiring topics and will be explored further.

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简述中国法律视角下的 NFT 数字藏品

NFT (Non-fungible Token, 非同质化通证¹) 的产生已有多多年,但随着 2020 年以来的急剧升温到大火,逐渐走入全世界区块链圈内圈外人士的视线。中国概莫能外。根据有关统计²,从 2021 年 1 月逐渐开始至升温,中国 NFT 数字藏品平台已自 2021 年 11 月份的 26 家急剧扩大到 2022 年 7 月的七百多家³,且势头不减。

首先需说明,一般所述 NFT “数字藏品”,指的是以 NFT 形式铸造的数字化藏品,主要有原创艺术品、博物馆藏品、人文历史类衍生品(如游戏虚拟资产、文创周边)、音视频作品等。实际上,NFT 因其底层区块链技术所赋予的特征(唯一性、不可篡改、可追溯性、时间戳、稀缺性等),除了数字藏品,NFT 也代表了(或说其地址哈希值指向了)可以信任的、唯一的特定数字资产或数据;随着 Web3.0 网络构建的价值互联网的技术发展,NFT 将是元宇宙运行中的可识别唯一性的资产和数据要素。而且,NFT 既可来源于现实世界的资产和任何载体作为其在链上映射的唯一对应的数字资产和数据(现实资产的数字延伸)或其权益凭证,也可代表原生于数字世界的唯一对应的特定数字资产和数据。

因此 NFT 是 Web3.0 网络中可以代表身份、资产、权益等各类属性的数字通证,其法律属性将取

决于其原生资产和资产运营模式等,因此也很难以统一的法律属性所规制⁴。本文现就现有中国法律框架,并结合最近杭州互联网法院判决的国内首例关于 NFT 数字藏品的著作权侵权纠纷案件(以下简称“奇策案”⁵),从中国大陆法律的视角,就 NFT 数字藏品这一 NFT 的目前主要应用形态,作一简述。

一、NFT 数字藏品非为法律禁止的虚拟货币

中国人民银行会同国家互联网信息办公室(“网信办”)、公安部等十部门于 2021 年 9 月 24 日⁶发布的《关于进一步防范和处置虚拟货币交易炒作风险的通知》(银发[2021]237 号)(以下简称“237 号通知”)就虚拟货币相关的业务及民事法律行为制定了迄今最严格的禁令,并规定了一些明确的禁止行为。虽然这里的“虚拟货币”并未强调一定仅指“同质化”货币,但该 237 号通知,系沿袭 2013 年中国人民银行等五部委首次颁布的《关于防范比特币风险的通知》以及其后不同部委多次发布的有关规定和文件所表达的监管目标和监管基础,乃出于维护金融秩序的稳定,故 237 号通知的上位法为《中国人民银行法》、《商业银行法》、《证券法》、《网络安全法》等有关规定⁷。237 号通知列举了比特币、以太币、泰达币等作为中国法律所禁止的虚拟货币⁸作为典型。这些虚拟货币基本是在以完全去中心化

¹ Token 也有翻译为“代币”,“令牌”等。笔者个人以为,代币有时与虚拟货币混同使用,对于 NFT 数字藏品来说略有歧义,易与同质化的货币(coin)或其他加密货币(cryptocurrency)混淆,建议 NFT 称为“非同质化通证”更合适。

² 参见《研究报告:国内 NFT 发售平台盘点及分析》,2022 年 4 月 26 日发布于微信公众号“白话元宇宙 NFT”。

³ <https://vr.sina.com.cn/news/hot/2022-08-09/doc-imizmsev5441589.shtml>

⁴ 举例来说,如果 NFT 运用于数字身份识别、作为线下资产权益凭证、作为司法鉴定及证据等,则另需分别对应和适用相关的法律规定。

⁵ (2022)浙 0192 民初 1008 号,关于原告深圳奇策逸出文化创意有限公司诉被告杭州原与宙科技有限公司侵害作品信息网络传播权纠纷一案一审判决,由杭州互联网法院审理,判决书日期为 2022 年 4 月 22

日。目前暂未获悉该案的上诉或二审相关信息。

⁶ 237 号通知成文时间且生效日期 2021 年 9 月 15 日。

⁷ 237 号通知列举所依据的规定包括:《中华人民共和国中国人民银行法》《中华人民共和国商业银行法》《中华人民共和国证券法》《中华人民共和国网络安全法》《中华人民共和国电信条例》《防范和处置非法集资条例》《期货交易管理条例》《国务院关于清理整顿各类交易场所切实防范金融风险的决定》《国务院办公厅关于清理整顿各类交易场所的实施意见》等。

⁸ 目前境内有关通知多以“虚拟货币”称呼,市场上如“加密货币”、“数字货币”、“代币”等用语亦有使用。

的区块链技术为底层技术的公链上运行并流通，而且这些虚拟货币确实具有一定的货币或金融属性（可流通、可双向兑换法币、可交易；稳定币价值亦直接锚定某些法定货币）。即使受制于不同国家和地区所要求的货币牌照或金融牌照以及反洗钱监管要求等，这些公链币目前实际得以在中国境外的很多区域被持有、流通和使用。

如果同样基于区块链技术的 NFT 数字藏品不具有金融属性或涉及金融性活动的话，我们认为 NFT 数字藏品并不必然属于 237 号通知所规制和禁止的虚拟货币。2022 年 4 月 13 日中国互联网金融协会、中国银行业协会和中国证券业协会发布《关于防范 NFT 相关金融风险的倡议》（“三协会倡议”）为“坚决遏制 NFT 金融化证券化倾向”提出了六条行为规范，包括金融产品不可以 NFT 化、不可以削弱非同质化特征（如批量创设、大量分割藏品等证券化行为）、不为 NFT 交易提供集中交易、设立交易场所、不使用虚拟货币计价和结算、实名认证、不直接或间接投资 NFT。

上述行为规范并非强制性规定，但确实为避免“金融化”或“证券化” NFT 数字藏品提出了一个指导性建议。可以理解，触碰到这些行为的 NFT 数字藏品项目将更可能面临涉嫌金融化、证券化 NFT 数字藏品的合规风险，从而受到 237 号通知的规制。因此遵守 237 号通知的禁止性规定是目前国内 NFT 数字藏品项目合规管理所需首先做到的。

二、去中心化 vs 中心化

那么，为避免 NFT 数字藏品项目的金融化和证券化，我们对照上述六大行为规范，可以看到，目前国内发行的 NFT 数字藏品的底层商品大部分为艺术品、文化产品等非金融产品，且平台均要求采用实名认证以符合反洗钱要求等，一般也不会过量分割或过量创设导致证券化⁹，因此这几项规范较易满足。但 NFT 数字藏品项目在合规方面目前尤需注意的是：应避免使用虚拟货币、以及不炒作 NFT 数字藏品或不提供炒作和投机的平台。

237 号通知已经禁止境内使用比特币、以太币等公链币。目前全球 NFT 平台基本是允许虚拟货币流通的，有些平台或项目甚至只接受虚拟货币，NFT

平台还可能就项目本身也发行虚拟货币（即同质化虚拟货币）。因此，现有法律框架下对于公链币的禁令，使得境内 NFT 数字藏品实际上不能在完全去中心化的公链上（如以太坊、flow 公链，以及依托这些公链平台上运行的各种侧链或平台）发行和流通，否则难以避免虚拟货币的使用。该禁令导致目前 NFT 数字藏品实际已形成了在境内与境外处于两个不同的并未打通的市场。

目前中国境内 NFT 数字藏品项目一般来说应是依托在中心化（或不完全去中心化）的联盟链（或私链）上铸造、发行和流通的。比如幻核¹⁰NFT 平台依托腾讯至信链、鲸探 NFT 平台依托蚂蚁链、NFTCN 平台（bigverse）依托以太坊侧链。这里需指出的是，亦如奇策案的判决对其模式的说明，NFTCN 平台虽然依托以太坊公链侧链，但该侧链仍是“去币存链”的联盟链，其侧链未对用户开放跨链功能，用户不能将 NFT 数字藏品转移至以太坊公链上。

同时，按照网信办于 2019 年 1 月 10 日发布的《区块链信息服务管理规定》，区块链项目应在网信办区块链信息服务备案管理系统办理备案。自该规定发布至今，网信办共发布了九批备案项目¹¹。比如在最近第七批（2022 年 3 月）、第八批（2022 年 5 月）、第九批（2022 年 7 月）备案项目中，即包含了多个数字藏品项目。

三、NFT 数字藏品的一级市场及二级市场（NFT 数字藏品的发行与流通）

根据国务院于 2011 年 11 月 11 日发布的《关于清理整顿各类交易场所切实防范金融风险的决定》（国发〔2011〕38 号）及其后续实施意见，从事保险、信贷、黄金等金融产品交易的交易场所，必须经国务院相关金融管理部门及相关省级人民政府批准设立。三协会倡议也明确建议“不直接或间接投资” NFT 数字藏品，不得变相违规设立交易场所、为 NFT 交易提供开展集中交易、标准化合约交易等服务。基于此建议性要求，以及 237 号通知对于涉足金融活动的禁令，目前来说，在符合非金融化的前提下，法律尚无明确禁止 NFT 数字藏品发行和流通的强制性规定。

⁹ 法律并未明确导致被认定为证券化的数量限制。目前很多数字藏品比如一般限量发行几千份、1 万份（当然每一份藏品都是唯一的，均有唯一的私钥）。另外，发行数量其实也可能影响数字藏品的价值和稀

缺性。

¹⁰ 幻核平台已于 2022 年 8 月 16 日起停止数字藏品发行。

¹¹ http://www.cac.gov.cn/2022-07/25/c_1660369837207693.htm。

因此，如果一家平台以电商平台（包括第三方平台）方式从事 NFT 数字藏品的发行和流通，在持有相应合规牌照（如分别按其业务模式，可能需要领取相应的增值电信业务经营许可证/备案、网络文化经营许可证、艺术品经营单位备案等牌照等）的情况下，并不被目前法律所禁止。当然，鉴于业务模式的不同，以及业务的实际发展情况，加之全球环境下 NFT 资产持有者确实是有投资预期，在境内从事 NFT 数字藏品的二级市场的流通与交易或相关业务的，从业者更需要谨慎检视其业务模式的合规风险、并随时跟进监管要求和态势的变化。

根据我们目前对境内 NFT 数字藏品平台的观察，大多数 NFT 数字藏品平台，作为一级市场的发行方，其在源头上可能会比较谨慎地选取发行作品，比如只对邀请艺术家开放入场铸造其 NFT 作品，而不开放针对任何用户上传作品铸造 NFT 数字产品。众多境内 NFT 平台针对 NFT 数字藏品的二级市场交易的态度亦较为谨慎¹²，并未开放或仅有限开放二级市场。比如这些平台在平台用户服务协议中要求用户仅以个人学习、研究、欣赏或收藏等个人目的持有平台数字藏品，不得从事商业活动等。基于我们的观察，未允许转售的平台占相当比例；对于转赠，我们发现各平台的规定多有所区别，有些仍是不允许转售或转赠，有些则是设置一定的转赠门槛（如有支持 7 天后转赠、30 天后转赠、6 个月直至两年后转赠的）。当然，也有一些平台，不仅允许转让和转赠，还从二次转让中取得收益。如，奇策判决中描述的 NFTCN 业务模式：对于初次出售，其向用户收取 Gas 费及抽取作品售出价格的一定比例的佣金；在其平台的二级出售的作品，平台收取卖家赚取差价的 10% 作为佣金，而艺术家将获得卖家赚取差价的 2.5% 作为版税（若低价入手没有溢价，则不产生佣金或版税）。

如前所述，中国境内 NFT 数字藏品平台均是运行于联盟链，仍是采用中心化管理方式。中国法律对互联网信息平台的要求和标准规范，有关 NFT 平台运营方应同样遵守，包括个人数据及隐私保护、支付规范、App 合规要求、技术网络安全等各方面。

四、NFT 数字藏品的权利属性：虚拟财产所有权

我们现就 NFT 数字藏品在民事法律规范下的权利做一简要阐述。《民法典》第 127 条规定，法律对数据、网络虚拟财产的保护有规定的，依照其规定。首先，民法典此条款提出了“数据、网络虚拟财产”的概念，但具体网络虚拟财产的定义及边界是否涵盖 NFT 数字藏品，尚无法律规定。第二，即使属于网络虚拟财产，《民法典》亦仅表明如果有法律规定保护该等网络虚拟财产的，则可以受到该法律保护。据此，在《民法典》第 127 条的解释或者配套规定缺失的情况下，NFT 数字藏品的法律权利属性以及相应权利的性质及类型（债权、物权或知识产权，抑或是一种新型权利或权益）¹³，尚待澄清。

根据民法典法律原则，以及与区块链技术之前已有的游戏货币、游戏装备、以及 NFT 数字藏品、甚至中国法律所禁止流通的公链虚拟货币等有关财产纠纷的司法判决（包括奇策案），我们认为 NFT 数字藏品的财产属性不应被否定，因此用户在合规 NFT 平台¹⁴购买的 NFT 数字藏品所获得的是该 NFT 数字藏品的财产所有权。按照财产所有权的权利内容，所有权人应可以享有占有、使用、转让和处分财产的权利。

尽管如此，除了该等财产亦受制于去金融化等相关法律规定（如 237 号通知）外，用户对于 NFT 数字藏品的所有权亦受制于相应的平台服务协议和用户协议等。首先，平台服务协议或用户协议中，可能对 NFT 数字藏品有不同的具体要求，如非为商业目的购买和使用，不能用于投资等。所以，尽管用户可能被认为确实拥有财产所有权，但在没有平台的支持或者没有跨平台流通生态的完善，则财产的自由流转其实还是比较困难的。其次，如果数字藏品的原生产资产来自于艺术作品或其他包含知识产权的资产，亦需获得相关知识产权的适当且必要的授权。有关知识产权的分析见本文第 5 部分简述。

除了尚未被法律明确的虚拟财产的认定，业界还有观点进一步建议，基于《民法典》第 127 条规定，将来立法在保护包括区块链原生数字资产在内

¹² 目前中国 NFT 数字藏品有二级市场的 NFT 平台约占 29%，无二级市场的 NFT 平台约占 71%，参见《研究报告：国内 NFT 发售平台盘点及分析》，2022 年 4 月 26 日发布于微信公众号“白话元宇宙 NFT”。

¹³ 参见司晓：《区块链非同质化通证（NFT）的财产法律问题探析》，2021 年 8 月 23 日发布于微信公众号“腾讯研究院”。

¹⁴ 根据北京市朝阳区人民法院凌亚胜等盗窃一审刑事判决书（判决书

文号（2021）京 0105 刑初 1302 号，判决日期为 2021 年 11 月 5 日），法院认为涉案平台是否属于违规平台，与该平台上的虚拟货币是否属于法律所保护的财产，属于两个范畴的问题。由此，我们理解，甚至 NFT 平台的合规性与否，也并不必然影响与该平台相关的 NFT 数字藏品的财产权益。

的网络虚拟财产和数据时，可采取区分原则，明确规定对区块链原生数字资产以物权规则进行保护，而对具有弱控制性和弱支配性的其他网络虚拟财产和数据以其他形式的财产权益进行保护¹⁵。笔者亦认为该观点具有参考价值、值得探讨。如果 NFT 数字藏品等一些类别的数字资产的物权得以确立，则该等物权的所有权人，可在其 NFT 数字藏品等资产上设立用益物权和担保物权，或者至少可以对 NFT 数字藏品援引类物权管理的原则。

另外，作为新生事物的 NFT 数字藏品，其财产属性除了其权利内涵、确权、保护和流转¹⁶尚无相应法律规定外，其在一、二级市场的定价、投资规范、纳税、行政、刑事法律责任的边界认定¹⁷，均尚待观察，并跟进立法和实践的发展。

五、NFT 数字藏品的权利属性：知识产权及其他民事权利

目前市面上不同 NFT 数字藏品平台发布的数字藏品类型，从大类上来说，主要包括原创艺术作品、博物馆等文化机构拥有的藏品、游戏产品、其他各类文化历史衍生品或周边产品、音视频作品等等。这些数字藏品的源头资产大多已包含了相应的知识产权：或是尚在著作权保护期限内的原创美术作品、音视频作品，或是文化机构拥有所有权或使用权的文物、藏品以及其拥有相应图像视频作品的著作权等，或是拥有设计作品的著作权、外观设计专利权等，或是品牌企业的发行作品中尚包含其商标或标识的。此外，NFT 数字藏品在有些情形下可能还包含肖像权、姓名权等人格权的权利属性。

因此，在 NFT 平台上购买 NFT 数字藏品时，如数字藏品的知识产权由发行方或原创者拥有，并不当然随着交易行为而发生转移的，用户除取得相应藏品的财产所有权外，亦需取得对原生数字作品知识产权的使用许可的授权。如前所述，目前很多平台提供的服务协议和用户协议，一般已要求用户仅为自身收藏、学习、研究、欣赏和展示等非投资、非商业目的，从而获得知识产权许可的范围也比较有限，包括时效性、非排他性、用途限制等在内的特定限制。

但也有 NFT 交易平台提供了更宽泛的许可范围。例如有平台规定，购买方在持有数字许可作品期间将获得该作品全球范围内永久性的著作权使用许可授权，该许可为非排他性的，可转让的、不可转许可的权利；且购买方在持有数字许可作品期间可将作品用于广告、印刷、出版物、产品包装、设计、视频、动画、游戏等用途。购买方可将数字许可作品进行转让，受让方在受让数字许可作品后，该许可授权将转移至受让方。如数字作品许可持有人需要，著作权人可配合购买方进行著作权转让备案登记¹⁸。

上述规定其实已允许原著作权人与买方签订著作权转让协议，而不仅是使用权许可协议。但按照上述用户协议的描述，我们认为，在与原著作权人签订明确的转让协议之前，平台用户在平台购买 NFT 数字藏品时就知识产权而言获得的仍是使用权（且非排他性的）。在转让协议项下（如签订的话），为避免著作权许可和著作权转让之间的混淆，我们建议应明确约定，该 NFT 数字藏品的买方为该数字作品的著作权人，拥有除了人身权利之外的其他著作权的财产权内容（复制权、发行权、出租权、展览权、表演权、放映权、广播权、信息网络传播权、摄制权、改编权、汇编权、翻译权等），而原著作权转让方应不再拥有除人身权利之外的其他著作权。

奇策案作为 NFT 数字藏品第一案，其对涉案作品的 NFT 数字藏品的知识产权权利属性所作的探讨具有借鉴意义。首先，该案涉案作品的原生作品被认定属于著作权法意义上的美术作品¹⁹，是有线下物理载体的原生美术作品；其次，其界定 NFT 交易模式的本质属于以数字化内容为交易内容的买卖关系，购买者获得的是一项财产权益，交易的本质并非对一项数字财产的使用许可，亦非对一项知识产权的转让或许可授权；再次，该案认定 NFT 数字作品的交易符合信息网络传播行为的特征。

另外，奇策案中关于 NFT 平台的责任，其从知识产权的侵权责任角度，亦做了值得关注的分析：

- (1) 首先，对平台方作为发行者提出了至少采用“一般可能性”标准的尽职义务，要求平台方建立有效的知识产权审查机制和

¹⁵ 参见司晓：《区块链数字资产物权论》，2022年1月27日发布于微信公众号“腾讯研究院”。

¹⁶ 本文论述的交易及流转指在大陆境内的平台上的流转与交易。如 NFT 数字藏品涉及跨境流转的，可能构成数字艺术品的进出口，问题将更为不明确及复杂，本文在此暂不述及。

¹⁷ 根据具体情形，相关行政处罚或刑事追诉门槛，可能涉及具体涉案金额，故相关 NFT 数字藏品对应的财产估值将成为一个重要的考量因素。

¹⁸ 有关内容参见 NFTCN 平台协议。

¹⁹ 符合美术作品具备独创性、可复制性和一定审美意义的特点。

侵权预防机制,对平台上交易的 NFT 作品的著作权做初步审查,并且对侵权情况负有较高的注意义务;

- (2) 其次,数字藏品购买者的二级市场出售属于信息网络传播行为而非发行行为²⁰,NFT 数字藏品交易不适用权利穷尽原则,这就意味着,购买者通过平台二次销售 NFT 数字藏品仍然需要获得著作权权利人的著作权使用许可²¹;以及
- (3) 另外,法院亦确认,对 NFT 数字作品的复制行为的目的是以互联网方式向公众提供作品,属网络传播的一个步骤,故复制行为造成的损害后果已被信息网络传播行为造成的损害后果所吸收,无须单独予以评价。

尽管如此,由于奇策案本身为知识产权权利人提起的针对第三方交易平台的知识产权侵权诉讼,其对 NFT 数字藏品的财产所有权属性,NFT 数字藏品交易中知识产权各类权利的边界、责任等的很多问题尚涉及不到。

简而言之,NFT 数字藏品的权利属性,目前的法律框架是认可其财产所有权属性和知识产权属性的,但对财产所有权的权利内涵和外延尚不明确。NFT 数字藏品交易(一级和二级市场交易)的权利属性通常可以被认为是财产所有权转让加相应知识产权的授权许可(或者知识产权的转让)。目前平台方和用户主要依据平台协议规制各方的行为。在此方面,鉴于知识产权权利内容和权利行使的复杂性,各方(权利人、平台方、买方和二次交易的买方和卖方等)的权利边界、责任边界,将随着业务实践、立法与司法的逐步发展得以深化。

六、结论及展望

NFT 数字藏品作为一个新生事物,其所将遵循的法律和规则必伴随着诸多待定因素,需假以时日,待立法和实践的逐渐成熟和完善。加之,中国法律框架下,监管部门一直以来对于金融市场和金融产品的发展持谨慎态势,因此中国数字经济的发展,包括 NFT 数字资产在内的数字经济的发展必有其特点,其所走道路亦可能与其他法律管辖区域(如

美国、香港、新加坡等)既有相同之处,亦有其不同特色。

我们也看到,NFT 的运用前景将绝不仅限于数字藏品。在 Web 3.0 的时代,从链下映射到链上的资产、单证、数据可以 NFT 化,原生与线上的数字资产,包括网络用户账号及数据信息、银行账户、线上内容、交易数据、物联网数据等各种可能 NFT 化的场景亦将有拥有丰富广阔的运用空间。随着各种创新业务发展,我们期待符合中国经济发展特征的业务,兼顾中心化业务的效率和去中心化市场的公平,促进数字资产的通证化(NFT、同质化通证或数字加密法定货币)、构建以智能合约、自治组织(DAO)运行的通证经济等。其所涉法律问题的思考将是一个持续发展的领域,令人期待。

²⁰ 出售属于信息网络传播行为这一认定限于本案分析,我们理解尚期待更多实践的发展情况和分析。

²¹ 法院就此权利穷尽原则的分析系从著作权法的原则出发。如果就著

作权许可或转让,有关平台协议和规则有明确约定,我们认为在不违反强制性规定的情况下,有关具体作品的著作权权属的认定和范围尚需结合该等协议和规则的约定。

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