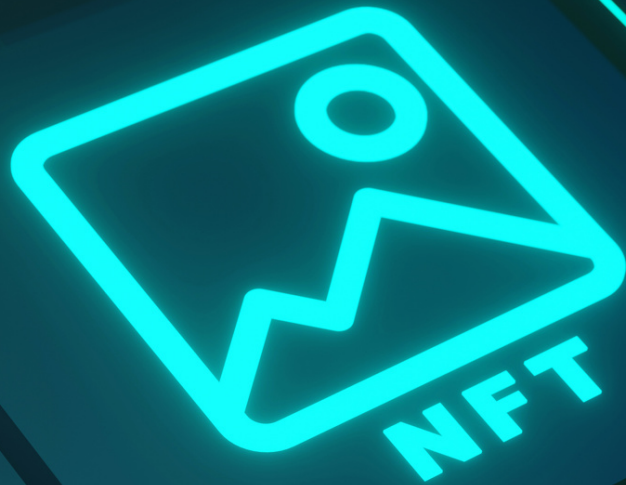


REGULATORY CONCERNS FOR NFTS IN NIGERIA



INTRODUCTION

The last decade has witnessed a massive rave in the use and acceptance of digital currencies and assets all around the world. Amongst these digital assets, Nonfungible Tokens (“NFTs”), has gained so much popularity—particularly amongst creatives and content creators. NFTs are currently being projected as the “NEXT BIG THING” as a digital art collage was recently sold through the British Auction House as an NFT, for USD69.3 million. [1]

What are NFTs?

NFTs are unique and non-interchangeable units of data that are stored or accounted for on a digital ledger, and such data represents something specific. NFTs can represent easily reproducible items such as a piece of art, music video (or a collection of same), audio, photos (or a collection of photos) and other digital files. NFTs have characteristics which makes them a means of identifying someone or something in a unique way, and they also provide individuals with ownership claims/rights over digital assets that can be obtained by others on the internet.

It is instructive to note that NFTs are not regular digital assets/currencies like Bitcoin and Ethereum. They are different from regular digital assets for certain reasons. First, NFTs cannot be directly exchanged for the same amount as cryptocurrencies

This is particularly because there are no two NFTs that are identical or of the same kind. Every NFT is different, and their difference extends to their value. Secondly, NFTs are indivisible i.e., they cannot be divided into small denominations like regular cryptocurrencies [2].

However, it is imperative to note that their trading is done using cryptocurrencies as they are accessible on blockchains.

Interestingly, the NFT market is beginning to gain so much popularity in Nigeria, and as a matter of fact, a Nigerian by the name Jason Osinachi recently sold two NFTs for \$16,227 and \$23,633 [3]. In a similar vein, legendary Nollywood actor, Chinedu Ikedieze (aka Aki) in June 2021, announced that he will be getting his “Aki” meme minted as NFTs [4], while in July 2021, his counterpart, Osita IHEME (aka PawPaw) also announced that his memes are now available to be minted as NFTs [5].

While these developments are welcome given the value associated with the sale of NFTs, it is germane that we examine the regulatory framework governing NFTs in Nigeria as although they are not regulated by a single legislation, there are certain regulatory concerns that must be considered by the players in this industry. These concerns are captured as provisions which are contained in other laws in Nigeria, and they are addressed in this article.

[1] Anne Quito “A jpeg just sold for \$69.3 million amid the NFT craze” (published on March 11, 2021, <https://qz.com/1982872/an-nft-backed-jpeg-sold-for-69-3-million-at-a-christies-auction/>).

[2] NDTV Business Desk “what is the difference between NFTs, Cryptocurrency and Digital Currency?” (Last updated on September 1, 2021, <https://bit.ly/3lhS4dU>).

[3] Alexander Onukwue “How Nigeria’s leading crypto artist makes and sells NFTs” (published on March 19, 2021, <https://techcabal.com/2021/03/19/osinachi-nigeria-nft-crypto-art-artist/>).

[4] Precious “Mamazeus” Nwogu “Chinedu Ikedieze is getting his Aki memes minted as NFTs (Published on June 9 2021 <https://www.pulse.ng/entertainment/movies/chinedu-ikedieze-is-getting-his-aki-memes-minted-as-nfts/57kbxfp>)

[5] Princess “Nigerian Meme King Osita IHEME Turns his Viral Content into NFTs” (published on July 19, 2021, <https://nftevening.com/nigerian-meme-king-ostia-iHEME-turns-viral-content-into-nfts/>)

Intellectual Property Concerns

A person who puts up an NFT for sale or a buyer of same, even up to the proprietor of the platform where the NFT is sold, must ensure that he or she is not in breach of the laws governing intellectual property (IP) protection in Nigeria. Under Section 15(1)(d) of the Copyright Act [6], a person is liable for copyright infringement where he or she without the licence or authorisation of the owner of the copyright distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed. On this ground, the sale of an NFT must be such that the NFT being sold is not one which the seller does not have an intellectual property right (IPR) over or has infringed on the IPR of another person or entity.

Also, Section 25 of the Cybercrime (Prohibition, Prevention, etc) Act 2015 (Cybercrime Act) prohibits IP infringement on the internet. This provision makes the seller of an NFT liable for IP breach on the internet, where such seller uploads for sale, an NFT in respect of which he or she does not have an IPR over or is in breach of the IPR of another.

This issue of IP protection is important because of the general notion that the IPR of a seller is transferred upon the sale of the NFT to the buyer, and the buyer automatically reserves the right to resell same (including the IPR), when in fact this notion is not correct.

Securities and Investment Concerns

NFTs may be subject to regulation by the Securities and Exchange Commission (SEC) under certain circumstances. In Nigeria, NFTs as digital assets are deemed regulated by SEC where they fall within the line of virtual crypto/digital assets that are regulatable by the SEC.

A digital asset deemed within the line of crypto asset regulatable by SEC is an asset whose character according to SEC, qualifies as “securities” or “a unit of investment”, and is transacted as “securities transaction”. So, where it is the case that the type of NFTs sought to be traded are virtual crypto assets (crypto tokens) that are considered as securities by the SEC, then they will be subject to SEC’s regulations.

However, in order to determine whether they fall within the classification of virtual crypto assets regulated by SEC, issuers or sponsors are expected to prove that crypto assets do not constitute securities.

This is done by making an initial assessment filing to determine whether they will be classified as securities. [7]

[6] CAP 138, LFN 2004

[7] SEC “Statement on Digital Assets and their Classification and Treatment” (published on September 14 2020, <https://sec.gov.ng/statement-on-digital-assets-and-their-classification-and-treatment/>)

Content Restriction Concerns

In Nigeria, there are certain laws that regulate content(s) that are displayed or put up on internet platforms. For example, parties involved in the sale and purchase of NFTs and the proprietors of platforms where the sale of NFTs is transacted, must adhere to the Nigerian Communications Commission Internet Code of Practice, particularly as it relates to content accessible by minors, and Section 23 of the Cybercrime Act, which prohibits content reflecting or pertaining to child pornography in Nigeria. Hence, they must ensure that the NFT(s) sought to be sold do not reflect content(s) that is prohibited under Nigeria law.

Consumer Protection Concerns

Sellers and proprietors of platforms where NFTs are transacted are required to adhere to the consumer rights provided for under Part 15 of the Federal Competition and Consumer Protection Act (FCCPC Act). For example, under Section 114 of the FCCPC Act, a consumer (in this case, a buyer of an NFT) is entitled to any needed information in plain and understandable language, particularly as it relates to the NFT(s) being transacted. Any seller that hoards any relevant information pertaining to an NFT being sold may be in breach of this provision.

Data Protection Concerns

This concern mainly relates to proprietors of platforms where NFTs are transacted. They must ensure that the personal data that are obtained and processed under their platform, are obtained legally i.e., with the prior consent of the data subject, and with regards to other considerations provided for under the Nigerian Data Protection Regulations.

CBN Regulation Concerns

The Central Bank of Nigeria in its circular dated 12 January 2017 stated that virtual currencies are not legal tenders in Nigeria and any bank or financial institution that transacts with them does so at their own risk [8]. In a similar move four years after, in a letter dated 5 February 2021, the CBN also reminded financial institutions and banks not to hold cryptocurrency or facilitate payments with them and further instructed them to identify persons transacting in crypto or operating crypto exchanges and immediately close their bank accounts [9].

Although it is debatable whether CBN has the powers to issue such directives, these circulars apply to NFTs because they are traded/transacted with the use of digital currencies, and as such their trading has been impeded by the CBN.

[8] It is also instructive to note that this model is followed by the EU e-commerce directive, US Digital Millennium Copyright Act.

[9] The Nigerian Copyright Commission ("The Draft Copyright Bill 2015", http://graduatedresponse.org/new/wp-content/uploads/2016/02/DRAFT_COPYRIGHT_BILL_NOVEMBER-2015.pdf)

Taxation Concerns

The Finance Act 2019 (the Finance Act) introduced the concept of Significant Economic Presence (SEP) into Nigeria's tax regime, as a new basis for the taxation of online and digital transactions by non-resident companies [10]. Prior to the enactment of the Finance Act, only companies with a fixed base or a permanent establishment in Nigeria or companies that derived passive/investment income in Nigeria, i.e., income from rent, royalties, dividends and interests, were taxable

The enactment of the Finance Act now implies that digital/online companies or organisations that provide services and goods to Nigerians without any physical presence i.e., SEP are now liable to pay income tax. This is as a result of Section 4 of the Finance Act which amends Section 13(2) of the Companies Income Tax Act (CITA) by introducing a new paragraph (c).

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This new paragraph makes digital/online transactions of non-resident companies subject to income tax if such companies are deemed to have derived profits in Nigeria.

This provision is imperative for the NFT industry in Nigeria because most transactions carried out in this realm are performed online. Most companies that operate/run platforms for the sale and purchase of NFTs are companies that do not have a fixed base, and most likely do not have any intention of having a fixed base in Nigeria. This means that in the course of events, they may be liable to pay companies' income tax.

CONCLUSION

While, as earlier noted, the rave associated with NFTs in Nigeria is deemed a welcome development, players in this industry that seems relatively novel in Nigeria, must adhere to the various regulations and laws directly or indirectly governing NFTs.

As it relates to CBN's position on the issue of cryptocurrency, it is expected that given the legal and political challenges being mounted against CBN regarding its actions, this stand may be upturned over time. However, for now, traders of NFTs must understand that crypto assets are not legal tenders, and Nigerian Banks are also prohibited from authorising any transaction or even permitting holders of crypto assets from maintaining bank accounts with them.

[8] CBN "Circular to Banks and other Financial Institutions on Virtual Currency Operations in Nigeria" (<https://www.cbn.gov.ng/out/2017/fprd/am1%20january%202017%20circular%20to%20fis%20on%20virtual%20currency.pdf>)

[9] CBN "Letter to all Deposit Money Banks, Non-Bank Financial Institutions and other Financial Institutions" (<https://www.cbn.gov.ng/out/2021/ccd/letter%20on%20crypto.pdf>)

[10] The Finance Act 2019 came into force on January 13, 2020.

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