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# Legality and Intellectual Property of NFTs in Malaysia

# WEBINAR HOUSEKEEPING

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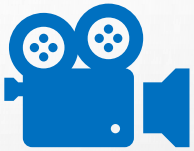
The session is **1 hour 15 minutes** including a Q&A session

Please ensure that your mic is **on mute** throughout the session



The session will be **recorded** and made available on CFA Institute ARX platform

**CFA Institute ARX platform**

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- It should NOT be regarded as rendering professional advice or recommendations for making investment decisions.
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# AGENDA

- Welcome Address
- Part 1: Introduction to NFTs
- Part 2: Legality of NFTs
- Part 3: Intellectual Property of NFTs
- Panel Discussion
- Q&A Session

# POLLS AND Q&A

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Please scan the QR code below to join in our polling and Q&A session

meet.ps/nft-part1

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## Chong Jin Yoong, CFA

**President, CFA Society Malaysia**

- Co-founder and Director of Ogos Learning, a company that specialises in education for the financial industry.
- Plays an active role with the Asian Institute of Chartered Bankers (formerly IBBM) as an Examiner for various examinations programs and played a significant role in curriculum development.

# Moderator's Profile

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GLT Law
GAN, LEE & TAN

**ADVOCATES & SOLICITORS**

An award-winning, innovative and forward-thinking law firm in Malaysia

## AREAS OF PRACTICE

- Corporate, Mergers & Acquisitions
- Capital Markets
- Dispute Resolution & Arbitration
- Commercial & Business Advisory
- Privacy, Internet & Technology
- Cryptocurrency & Blockchain Technology
- Real Estate & Property

## Kelvin Wong

**Legal Associate, GLT Law**

- Obtained Certificate of Legal Practice (CLP) in 2017 and was admitted as an Advocate and Solicitor of the High Court of Malaya in 2019.
- Strives to provide practical legal advice to clients on all corporate and commercial law areas, finding solutions to meet their commercial needs and resolving any issues that may arise.
- Core practice areas include mergers and acquisitions, joint ventures, restructurings, commercial contracts, private fund-raising exercises, corporate advisory, corporate governance, and employment matters.

**Speaker's Profile**

CFA Society Malaysia

## Yeow Jie Han

**Head of Intellectual Property and Technology, GLT Law**

- Partner at GLT Law and head the intellectual property and technology practice group and part of the corporate commercial practice group.
- Expansive experience in areas relating to corporate commercial law, intellectual property law, data privacy regulations and compliance in the fields of information and emerging technologies.
- Worked with various multinational corporations on secondments, gaining first-hand insight and opportunities to solve legal and operational issues in the field.

**Speaker's Profile**

CFA Society Malaysia

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# Part 1:

# Introduction to NFTs

**Kelvin Wong**

GLT Law
GAN, LEE & TAN

# THINGS THAT CAN BE MINTED AS NFTS

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## Creative Artworks

## Creative Contents

## In-Game Assets

## Health Records

## Hotel Suites

## Domain Names

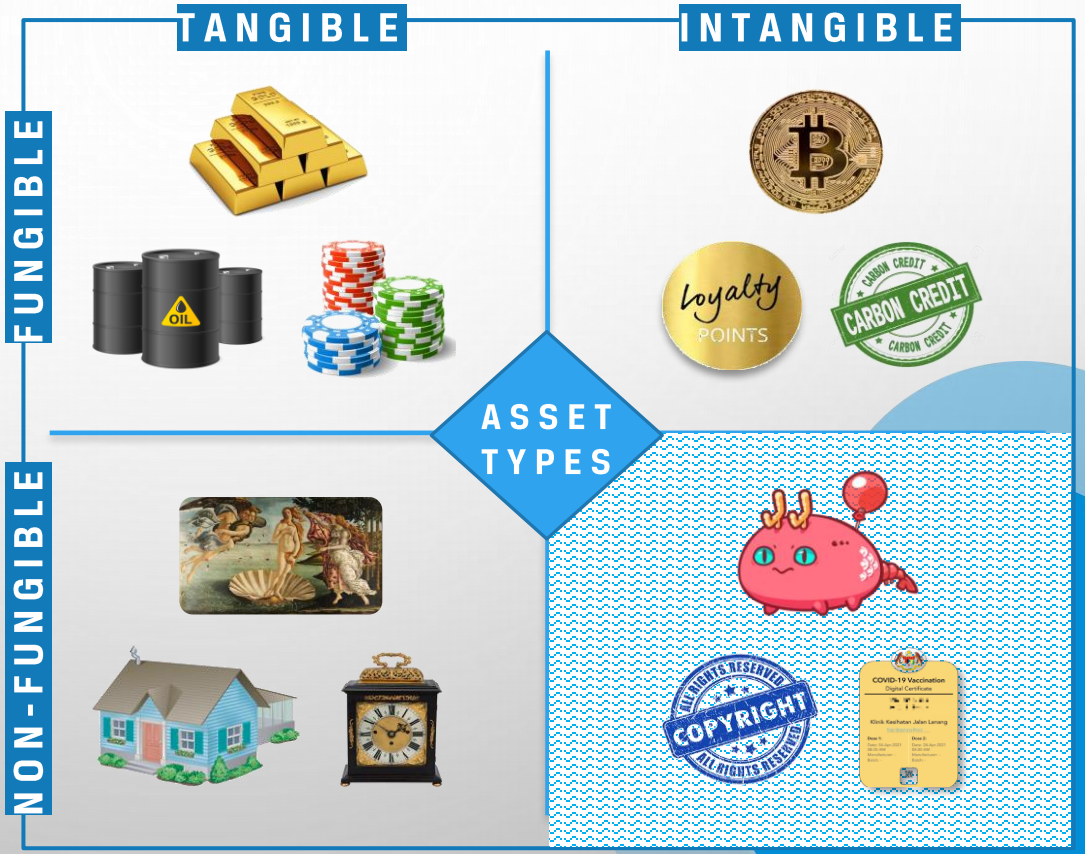
## Concert Tickets

## News Articles

## Unique Collectibles

# ASSET TYPES

- Fungible & Non-Fungible
- Tangible & Intangible



# COMMON TRAITS

- Digital
- Generative
- Social
- Metaversal
- Speculative

# PART 1 | SUMMARY

- NFT is a digital certificate of ownership based on blockchain technology for unique 'one-of-a-kind' non-fungible assets.

- Although it was originally popularized by digital art and video games, NFTs are increasingly being used for various types of assets.

- The NFT industry has moved from pure collectors to speculators, and now to business marketers and product developers.

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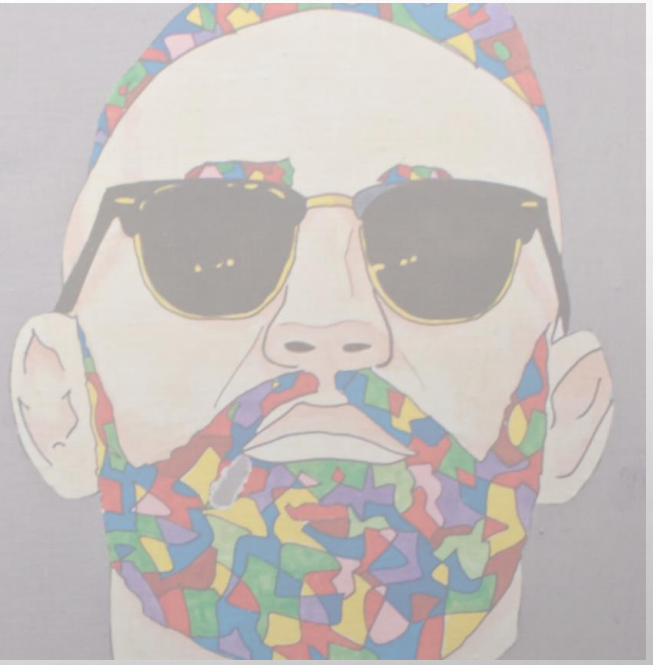
# Part 2:

# Legality of NFTs



**Kelvin Wong**

GLT Law
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# DEFINITION | DIGITAL CURRENCY AND DIGITAL TOKEN

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As per the ***Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019***:

**"Digital currency"** means a digital representation of value that is recorded on a distributed ledger whether cryptographically secured or otherwise, that functions as a medium of exchange and is interchangeable with any money, including through the crediting and debiting of an account.

**"Digital token"** means a digital representation that is recorded on a distributed ledger whether cryptographically-secured or otherwise.

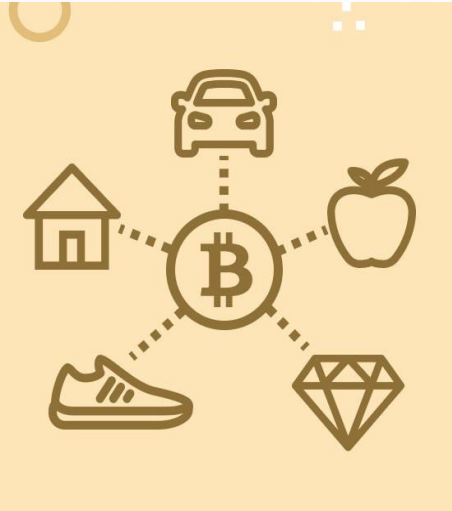
# PRESCRIPTION | DIGITAL CURRENCY AS SECURITIES

**Rule 3(1):** A digital currency which –

a. is traded in a place or on a facility where offers to sell, purchase, or exchange of, the digital currency are regularly made or accepted;
b. a person expects a return in any form from the trading, conversion, or redemption of the digital currency or the appreciation in the value of the digital currency; and
c. is not issued or guaranteed by any government body or central banks as may be specified by the Commission.

is prescribed as securities for the purposes of securities laws.

# QUESTION | IS IT A 'MEDIUM OF EXCHANGE'?



Can NFT be characterised as a 'medium of exchange'?

NFTs are commonly priced in Ether, which is a digital currency. Some platforms may price it in digital tokens such as BNB (Binance Coin).

There is no cut-and-dry characterization.

It depends on its adoption and usage.

A digital currency would be a security if it is tradable, in active market, privately issued and the buyer expects return.

# PRESCRIPTION | DIGITAL TOKEN AS SECURITIES

**Rule 3(2):** A digital token which represents the right or interest of a person in any arrangement made for the purpose of, or having the effect of, providing facilities for the person, where –

a. the person receives the digital token in exchange for a consideration;
b. the consideration or contribution from the person, and the income or returns, are pooled;
c. the income or returns of the arrangement are generated from the acquisition, holding, management or disposal of any property or assets or business activities;
d. the person expects a return in any form from the trading, conversion or redemption of the digital token or the appreciation in the value of the digital token;
e. the person does not have day-to-day control over the management of the property, assets or business of the arrangement; and
f. the digital token is not issued or guaranteed by any government body or central banks as may be specified by the Commission,

is prescribed as securities for the purposes of the securities laws.

# QUESTION | IS IT A COLLECTIVE INVESTMENT SCHEME?

Digital tokens which (are security) are similar to collective investment schemes. Therefore, NFTs do not fit into this definition.

However, as the use cases for NFTs grow especially in the DeFi (Decentralised Finance) sector, where NFTs are pooled or 'staked' together for the purpose of generating returns from holding, lending or investment activities etc., it may be classified as digital tokens.

# UPSHOT | WHAT IF IT IS A SECURITY?

If the NFT falls within the ambit of securities, then the jurisdiction of Securities Commission will apply. For instance, based on the ***Guidelines on Digital Assets***:

a. The NFT will have to be issued by recognised market operators (e.g., IEO).
b. The NFT creator/artist may likely have to qualify as an issuer under the IEO guidelines.
c. The NFT issuance and transfer will have to recorded in an internal registry of the IEO operator.
d. The sale and purchase of NFTs may likely have to be conducted in fiat not crypto.
e. NFTs may not be allowed for secondary market trading yet.

# UPSHOT | WHAT IF IT IS NOT A SECURITY?

If NFTs are neither classified as digital currency or digital token, it will create a third category outside the taxonomy or scope of CMS Order 2019.

This could mean that it is an unregulated market, transacting in digital assets, without any reporting obligations or AML-CFT supervision (see next slide). But this position seems unlikely.

There is no 'safe harbour' protection provided in CMS Order 2019 for NFTs as of this date.

# PART 2 | SUMMARY

- Regulatory issues to look out for as Digital Assets like NFT are very likely to be classified as securities in Malaysia.

- There are questions as to how NFTs will counteract with the Initial Exchange Offering (IEO) guidelines.

- Serious Money Laundering & Terrorist Financing (ML/TF) risk factors as the buyers and sellers are anonymous in unidentified locations, and there is no fair market value for prices.

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# Part 3:

# Intellectual Property of NFTs

**Yeow Jie Han**

GLT Law
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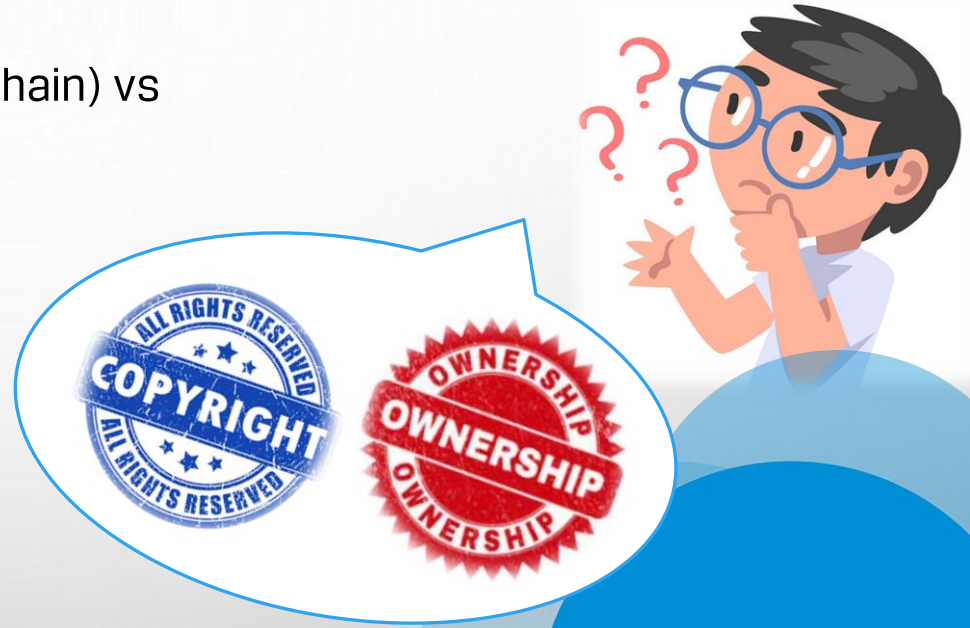
# OWNERSHIP IS NOT COPYRIGHT

- Ownership of digital asset (on the blockchain) vs rights of reference asset (copyright)
- Who owns what?
- How do all these affect NFT?



# AUTHENTICATION | RIGHTS TO ASSETS

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**Authentication issue:**
**Does the Minter have the rights to the reference asset?**

**Potential Scenario:**

a. Content creator creates an original piece of digital artwork (protected by copyright)

b. Minter takes the digital artwork (without content creator's consent) and mints it on a platform

c. Buyer purchases the minted artwork from Minter for RM 1 million

d. The content creator realises that his/her digital artwork has been reproduced and sold without his/her consent, and pursues legal action against the Minter, platform and even buyer

e. Potential outcome: the Minter disappears, the NFT may have to be "burned", the Buyer is left with nothing at all or is embroiled in a lawsuit with the platform

As can be seen, this presents a myriad of legal complexities when due diligence is not carried out adequately by either the platform and/or buyer.

# AUTHENTICATION | RIGHTS TO ASSETS

- Real life situation: **DC Comic's official statement**

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COMICS

## DC Comics Tells Artists to Stay Out of NFT Business or Else

Source: https://gizmodo.com/dc-comics-tells-artists-to-stay-out-of-nft-business-or-1846466427

# KNOW YOUR RIGHTS

- It is important for content creators, creation companies, and buyers alike to be clear on the rights that exist in the underlying reference asset of the NFT.

- This can be via the T&Cs on the platform, exclusive licensing agreements, rights purchase agreements, employment agreements (in situations where a company relies on its employees or freelancers to create works) etc.

For more high-profile works where the intrinsic value is provenance (the history of ownership from the time an art object is created), then the IP concerns may be less prevalent. For example, the first tweet by the CEO of Twitter, Jack Dorsey.

Source: https://www.ledgerinsights.com/jack-dorsey-sells-his-first-tweet-as-an-nft-for-2-9-million/

# PART 3 | SUMMARY

- Owning the digital asset is different from owning the copyright.
- The rights to the reference asset have to be authenticated.
- Ensure that you know you have purchased is in line with your objectives.

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# PANEL DISCUSSION

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# Q&A SESSION

# POLLS AND Q&A

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Part 2

# Navigating a Future Filled by NFTs | 1PL

Thursday, 17 February 2022

6:00 PM - 7:15 PM

SAVE THE DATE

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# THANK YOU!