



FOLEY & LARDNER LLP

Preparing for Liftoff

Legal Considerations when Launching an NFT Marketplace

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Meet the Speakers



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Meet the Speakers



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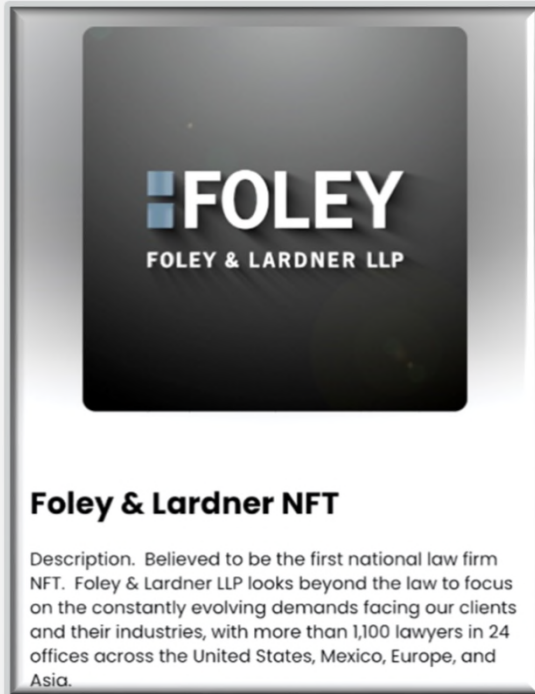
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Bret Waters is the founder and CEO of Silicon Valley startup accelerator 4thly. Bret has successfully raised capital multiple times in his career, and the entrepreneurs he has worked with have raised hundreds of millions of dollars in capital. Bret also teaches entrepreneurship at Stanford University and coaches startup CEOs at Miller Center for Social Entrepreneurship, and he has been chief Mentor with the European Innovation Academy.

What is an NFT?

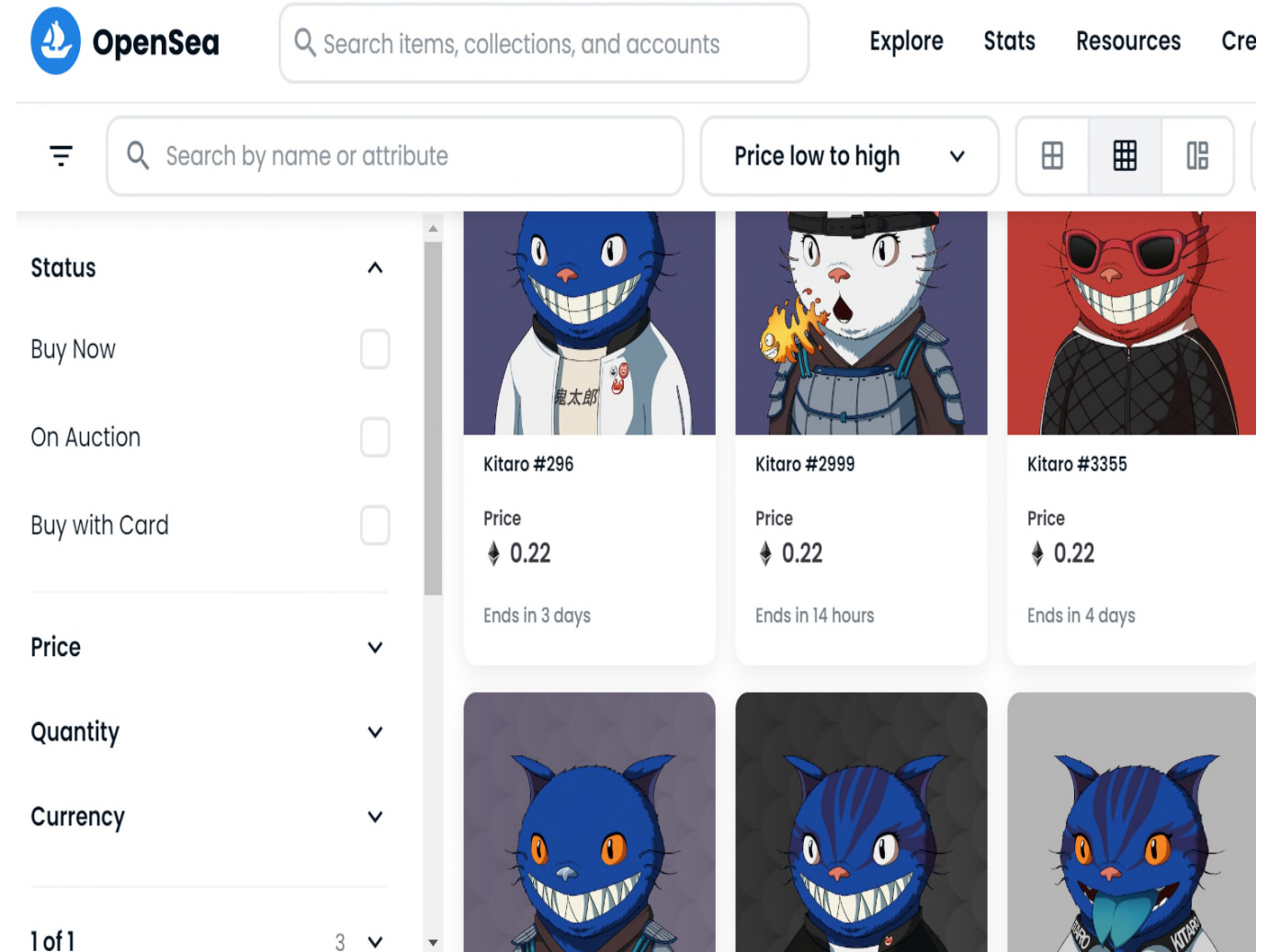


Above is an NFT that was created by Foley & Lardner LLP team members during a live demonstration of the technology.

- NFT is short for **Non-Fungible Token**.
- NFTs are non-fungible because they are unique tokens (representing digital assets) that cannot be interchanged with other tokens.
- When an NFT is minted (created) the NFT is recorded onto the blockchain. Due to the nature of blockchain, NFTs contain immutable data stored across a distributed ledger. This means that no one can unilaterally modify the record of ownership associated with an NFT, nor can anyone make another copy of an NFT.
- Each NFT is unique, incorruptible, unfalsifiable, and indestructible, eliminating the need for outside authentication of assets like artwork or other collectibles.

What is an NFT Marketplace?

- A NFT marketplace is a platform where NFTs can be stored, displayed, traded and in some cases minted.
- NFT tokens are minted with content creators' digital assets, and buyers can browse listed assets and buy or participate in an NFT auction
- Users can engage in primary and secondary sales of NFTs in the marketplace



- Are NFTs securities?
 - No blanket answer; each NFT must be analyzed on a case-by-case basis.
 - If the NFTs on your marketplace are found to be securities, you must register as a securities exchange or alternative trading system and broker-dealer. To avoid this obligation and associated risks, your NFT marketplace should prohibit and prevent users from:
 1. marketing an NFT as part of a fundraising effort to build a network or platform for future sales;
 2. engaging promoters, sponsors, or third parties to drive the NFTs' appreciation; and
 3. enticing purchasers with the prospect of capital appreciation of the digital asset or profit linked to the efforts of the creator or other third party

- Custodial wallet services

- If your marketplace offers wallet services to store and transfer NFTs and conduct cryptocurrency transactions, you may be considered a “money transmitter” and be subject to financial regulations.
- You can protect yourself against risks and obligations under financial regulation by using a third-party wallet provider (e.g. Metamask).



- Buying an NFT does **not** give the purchaser ownership of the underlying work.
 - Original content underlying an NFT and all related IP rights are owned by the original content creator.
 - Your marketplace terms should clearly explain the allocation of rights between content creator, seller, buyer, any third parties, etc.
- Your marketplace should support functionality to respond to reports of copyright and other IP violations (e.g. removing NFT listings, removing display of underlying work, etc.).

- User minting
 - If your marketplace allows users to mint their own NFTs, your marketplace terms and code of conduct should clearly explain:
 1. What type of content is permissible
 2. Allocation of IP rights
 - Some risks associated with user-introduced content can be mitigated if your marketplace mints all NFTs offered on the platform.
- Social media functionality
 - If your marketplace supports social media functionality or otherwise allows users to interact with each other, the marketplace terms and code of conduct should clearly explain:
 1. What type of content is permissible
 2. Allocation of IP rights

■ Data Subject Rights

- Data protection laws, especially within the General Data Protection Regulation (GDPR) framework in the EU, tend to give individuals the “right to be forgotten” and the right to either rectify or even erase their data from both public and private businesses.
- Blockchain technology’s immutable property might make this privilege impossible to exercise or burdensome to implement. For this reason, nonfungible tokens that contain personal data might infringe data protection laws.
- Your marketplace may set limitations on the type of information that may be provided at the minting stage, to prevent the introduction of personal data.

- In general, the IRS considers NFTs to be “property,” and anyone engaged in their sale or purchase could be obligated to pay sales tax, losses, and capital gains taxes on them.
- Your NFT marketplace should have mechanisms in place for collecting and remitting sales taxes and documenting sale prices, commissions, and other fees accurately.

- **Product Liability**

- Many NFTs promise access to experiences and tangible goods (e.g. tickets to event, meet and greets, limited edition clothing, etc.), which may carry risks that are not otherwise applicable to purely digital assets. The terms of the NFT sale must clearly identify who bears the risk and responsibility of delivering these items.

- **Consumer Protection**

- Most major jurisdictions have laws to protect consumers against acts such as deceptive or unfair advertising. Your marketplace should have technical measures in place designed to ensure successful delivery of purchased NFTs.
- Your marketplace terms should also make clear that failure to deliver goods or services associated with an NFT should be a risk that the content provider bears, not your marketplace.

How Can You Prepare?

- Form a corporate entity
 - Having a corporate entity will offer the strongest liability protection for business owners and shield your assets from business obligations.
 - Having a corporate entity will also give you greater ability and credibility to seek financing from external sources and more flexibility to accommodate growth.
- Prepare Terms of Use
 - The marketplace terms should cover all functionality available to users and clearly explain the allocation of rights and risks.
 - If your marketplace relies on any third-party services, the terms should contain a link to the third-party terms and should clearly inform users that use of such services will be governed by the third-party terms.

How Can You Prepare? (cont.)

- Prepare Code of Conduct
 - This is particularly important for marketplaces that support social media features or otherwise provide ways that users can interact with each other.
- Prepare Privacy Policy
 - Privacy policies are required by law and must accurately reflect your data collection practices
- Enact technical measures that allow you to control the situation
 - Enact KYC measures and anti-money laundering measures to reduce risk associated with financial regulations.
 - Retain the ability to ban or freeze user accounts in the event of a breach of the Code of Conduct.
 - Enact measures to remove listings, displays, or any other portion of an NFT in response to allegations of IP infringement.

The Market(place) Is Hot

- Now is the time to be bullish about NFTs
 - New Congress will be crypto-friendly
 - Pending legislation in Congress will clarify ambiguities
 - As federal interest rates go up, digital assets offer greater buy-in and investment opportunities
 - Follow the VC money
 - Cryptocurrency is backing the future: THE top global fintech investor in Q3 of 2022 was Coinbase Ventures
 - NFTs are the foundation of the metaverse

Thank You

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