Show Me the Tokens - Using Cryptographic Tokens to Activate Fans

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The 2022 Australian Open will likely be remembered for the Rafael Nadal and Ash Barty match where in which Ash Barty's dominant play enabled him to become the first Australian to win the Australian Open in over four decades. But it should also be appreciated for what happened in the digital world. The tournament organizer's creative use of cryptographic tokens was instrumental in making this year's event accessible to tennis fans around the world and even potentially activating a new generation of fans.

Cryptographic tokens are digital assets that exist on a blockchain. One common type of token is a utility token, which is essentially a digital voucher or ticket that allows its holder to gain access to a future product or service. Some tokens are fungible and, thus, readily interchangeable like cryptocurrencies or fiat currency. But the type of token used at this year's Australian Open—a non-fungible token ("NFT")—cannot be replaced or directly substituted with another token. NFTs, which include digital certificates that allow their holders to prove ownership, authenticity, and provenance, are specifically designed to be unique and verifiably scarce. In some cases, NFTs include or are linked to static pieces of digital art. These are more commonly understood among the general public. But NFTs can also be linked to dynamic content that can be updated or manipulated over time or even to real-world assets like real estate, luxury goods, or event tickets.

The first major tennis event to mint NFTs, the Australian Open sold all 6,776 "Art Ball" NFTs they created, each featuring a unique piece of generative art, in a matter of minutes. To foster a stronger connection to this year's tournament, the NFTs were randomly assigned to 19x19-centimeter digital plots of a tennis court surface and updated using live match data from motion-sensing cameras installed around the real-world courts. Each winning shot was assigned to a corresponding plot, creating a digital record of points for that square, and that NFT was updated with video footage of the winning shot, along with a holographic sticker presenting it as a winning NFT. Additionally, physical tennis balls from the tournament's eleven finals matches were distributed to the holders of the NFTs corresponding to the plots struck by the championship points. NFT holders were also provided with other benefits, such as limited-edition wearables and merchandise.

The Australian Open's Art Ball NFTs are just the latest example of an emerging trend in sports. NFTs present new opportunities for ball clubs, leagues, athletes, and influencers to connect with their fans. However, there are number of outstanding legal issues that should be considered:

- Trademark Infringement and Dilution: Some NFTs include or are linked to trademarks without the trademark owner's knowledge or permission. StockX, a streetwear resale marketplace, launched an NFT project to mint NFTs tied to specific pairs of physical shoes held by the company. In a fifty-page complaint, Nike brought trademark infringement and dilution claims against StockX for selling NFTs of Nike shoes. StockX may have a plausible defense for posting a picture of a shoe bearing a Nike mark to resell a pair of Nike shoes under the First Sale Doctrine, but is that the same as posting a picture of a Nike shoe to sell the picture as an NFT, even if the NFT comes with the (smart-contractual) right to a pair of Nike shoes? Nominative use of Nike's marks is expected, perhaps even reasonable, when selling a product that gives the buyer the right to a pair of Nike shoes, but did StockX use only as much of Nike's mark as is necessary? Hypothetically, would it be different if the mark owner had no intention of being in the Metaverse or NFT market, or if the NFT were given away as a promotional item or as an add-on to a shoe purchase? It would be advisable for NFT creators to conduct proper trademark clearances before minting NFTs and for trademark owners to actively police the Metaverse and NFT markets to make sure their marks aren't being used on or in connection with any NFTs or digital goods.
- Trademark Filings: NFTs will likely play a key role in the Metaverse for their ability to demonstrate ownership, authenticity, and provenance. Whether it's as an offensive move or a defensive one, companies across various industries have been rushing to register their marks in connection with virtual products and services. Since Meta announced its rebrand in October 2021, numerous companies including Nike, Walmart, McDonalds, L'Oreal, Ralph Lauren, Sports Illustrated, and Johnson & Johnson have filed several trademark applications to protect their respective marks in connection with downloadable virtual goods, retail store services featuring virtual goods, and the like. It will be interesting to see how the U.S. Patent and Trademark Office and other trademark offices around the world will handle these cases when brands that otherwise peacefully coexist may be at odds when trying to elbow their way into the same computer- and software-related classes.
- Copyright Infringement: Of course, NFT creators should obtain the appropriate permissions before incorporating the work of others, but thousands of NFTs are being created every day with third-party intellectual property without permission. If a copyright holder learns that their copyrighted material was minted without their consent, they could make a Digital Millennium Copyright Act ("DMCA") takedown request or perhaps file a claim with the new Copyright Claims Board, which should be available to hear

small claims as of this summer. But in a decentralized Metaverse where many NFTs are being minted anonymously, there may be some question as to who the infringing party is, or who the appropriate online service provider is, or even if the infringing materials could be removed. Given the prevalence of counterfeit NFTs in the marketplace, artists and copyright holders will expect OpenSea, and other platforms, to take robust actions to stop the use and sale of infringing NFTs.

- **Ownership Rights:** It is important to understand exactly what is being sold and transferred with the sale of an NFT. For example, an NFT may include or be linked to a work of art, but fail to define exactly what its holder can or can't do with the work. NFT holders should not assume that they have the copyright to any part of the NFT. In fact, many NFT buyers simply acquire a copy of the work and a digital certificate of ownership, authenticity, and provenance, and none of the underlying rights to exploit that work—without an express written agreement, the copyright to the work stays with the copyright holder. Moreover, if the NFT does not stipulate that the work is singular, unique, and non-editioned, or that the creator can't recreate the work or create any more copies, then any value of the NFT from its perceived scarcity may be in question.
- **Link Rot:** While NFTs themselves exist on blockchains, their content is usually stored off-chain in private or centralized servers. Storing content in this manner could subject the NFT to link rot, in which case the NFT would be rendered useless. For example, the NFT may not be linked to anything if its content were taken down (e.g., due to a DMCA takedown request), the server crashing, or the business hosting the server going out of business. The NFT itself may be immutable, but the content would be left vulnerable if it is not stored on the blockchain. Moreover, if the NFT does not include the content or at least a detailed description of the content, it could be changed at any time or even be removed altogether. NFT buyers should understand where their content is stored, how long it will be stored, and what steps they can take to ensure its persistence.
- **NFT Theft:** Data storage platforms can be hacked, and the token economy is susceptible to scams. At one point, it was estimated that 80% of NFTs minted using OpenSea's free minting tool were spam, scams, or fraudulent. In a brazen phishing attack, hundreds of NFTs valued at more than $1.7 million were stolen from OpenSea users by hackers who abused a feature of the NFT's smart contracts. It should be reasonably anticipated that there could be litigation requiring platforms to do more to prevent NFT theft. Indeed, one plaintiff has already sued OpenSea in federal court in Texas for negligence and breach of contract. In his complaint, the plaintiff alleges that an unlisted NFT was stolen when OpenSea knew about the bug that allowed for the theft but did nothing to stop it.

NFTs and utility tokens are digital assets that will continue to be prevalent for the foreseeable future. These digital assets should be used to maximize fan loyalty and create new revenue streams for organizations. However, organizations should remain cautious as the legal risk for these new assets is emerging, and legal counsel should be involved to assess risk.

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