

## Article Information

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Service: Blockchain, FinTech

Sector: Financial Services, IT & Telecommunications

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## Blockchain Bites: Half of ASIC study participants held crypto, A lot at stake with staking, NFTlord? New Eth token standard, The (safety)pin in CryptoPunks Licence, Appeal in bitcoin developers duty case

*Michael Bacina, Steven Pettigrove, Sally Fetouh, Jade McGlynn, Luke Misthos, Jordan Markezic and Lola Hickey of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.*

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### Almost half of investors surveyed (a year ago) hold cryptocurrency: ASIC

According to an ASIC report released last week, nearly half of Australian investors surveyed hold cryptocurrency as an asset. [Report 735: Retail Investor Research \(REP 735\)](#) found that amongst those traded at least once between March and November 2021, 40% of those surveyed held cryptocurrencies. This compared to 43% for residential investment property and the median balances of property and cryptocurrency came out equal at 30% of portfolio value.

ASIC commissioned the survey to gather insight into Australian retail investor behaviour. Despite [claims that the crypto space is an unregulated 'wild west'](#), the high ownership percentage could indicate that the current regulatory position of crypto assets, that investors get involved at their own risk, is not a barrier to participation.

While Australian shares continue to be the most popular and largest form of investment, cryptocurrencies had surged last year to become the second most commonly held investment asset in those surveyed at least.

Of the 1,053 people surveyed, almost one third (31%) only hold cryptocurrency in their portfolio as their only asset. Despite the increased volume of people speculating on crypto-assets, 83% of investors who only hold crypto did not believe the assets they held were risky or speculative. It was unclear whether those investors were considering this view because they had a deep understanding of digital assets, or held only stablecoins for example, or considered the risk as lower on a long term horizon or treat risk differently for some other reason (there were no questions directly addressing whether investors thought they understood crypto-assets or volatility in digital asset markets for example).

It's unclear why the data being released is so outdated, as the recent crypto price falls would be expected to dramatically alter the make up of portfolios in the surveyed cohort. It may be this is a prelude to further ASIC announcements in coming weeks given comments in the press release accompanying the report.

REP 735 not only shows the increasing popularity of cryptocurrency, but the comments of ASIC chair Joe Longo accompanying the report highlights that the regulation which the crypto-industry in Australia has been pressing for for years will help better protect consumers from unscrupulous operators.

The devil will, of course, be in the detail and consultations are underway for the CASSPr licensing regime which will aim to provide a market licence regime for digital currency exchanges in particular.

That detail should be the subject of very transparent discussions with due consideration to policy objectives of the government so as to encourage local innovation in blockchain while also protecting consumers.

## **A lot at stake with interest bearing staking products**

Coinbase has issued a statement saying that it is [currently being probed](#) by the US Securities and Exchange Commission (SEC) over its staking programs that allow users to earn rewards for holding specific classes of cryptocurrencies.

In a letter to Coinbase shareholders earlier this week, Coinbase confirmed that the SEC sent a voluntary request for information in May 2022, including a request for particulars into its listing process. Coinbase has [also confirmed](#) that at this stage it is unaware if the inquiry will become a formal investigation. The exchange has also come under heavy scrutiny from the SEC for allegedly making unregistered securities available for trading.

According to a quarterly regulatory [filing](#):

*has received investigative subpoenas and requests from the SEC for documents and information about certain customer programs, operations and existing and intended future products...*

Staking is a loosely defined process ranging from a process whereby users are able to generate yield on certain crypto holdings by delegating them to verify transactions and secure the blockchain network to centralised entities borrowing crypto from users and paying interest on it (such as offered by Celsius Networks). Coinbase's staking offering contributed towards 8.5% of net revenue in its second quarter, and fell 16% to [US\\$68.4 million](#) during that same quarter.

[According to Coinbase](#):

*As with all regulators around the world, we are committed to productive discussion with the SEC about crypto assets and securities regulation...*

Last year, Coinbase abandoned its plans to offer the [ill fated Lend program](#) which would have allowed eligible customers to earn interest on select assets, starting with four percent APY on USD Coin after an SEC 'Wells' notice.

With competition in the crypto exchange market fierce, this serves as a timely reminder for crypto exchange businesses to remain aware and vigilant of their regulatory obligations, especially where offering returns in a way which bear similarities to interest bearing financial products.

## **NFTlord? New Ethereum token standard allows for NFT loans and rentals**

NFT owners can now rent out their digital assets for use by others following a new Ethereum token standard being finalised.

The new standard "ERC-4907" is the newest of many of Ethereum development standards which set out rules, conditions and functions a token must follow in order to operate as intended on the Ethereum blockchain.

Standards are essentially a list of functions, or a "blueprint" a smart contract should include for creating tokens with certain features. These are usually made available from the Ethereum Foundation following approval of a project with the same feature, for instance ERC-20 (one of the most well-known) a standard, which must be followed to create fungible tokens on the Ethereum network.

According to [thirdweb](#), a software developer which specialises in web3 app building, the this exciting new standard follows a clear market demand for NFT rentals:-

People often want to access the utility of certain NFTs without making the commitment to purchase them. 'Renting' NFTs lets people pay a fraction of the price to hold the NFT in their wallet temporarily, using the NFT to unlock utility or digital experiences.

Introducing an entirely new use case for NFTs, the "ERC-4907" standard introduces two roles a NFT holder can now assume - "owners" and/or "users", allowing adopters of the standards to separate NFT ownership and usage rights - which in effect automates NFT "leasing" without additional smart-contract functionality, the standard includes an expiration date for the rental as well.

ERC-4907 unlocks some [exciting prospective applications](#):-

- Video game trait NFT rentals, for example backing esports teams by loaning them assets for use in-game;

- Temporary membership of a token gated clubs;
- Temporary usage of token gated software;
- NFTs as collateral for loans; and
- NFTs which represent real world rentable assets, (ie. vacation home, such as an smart lock which opens if an NFT rented to a particular user interacts with the lock).

The ability to rent NFTs has massive potential for both lenders and borrowers. For the borrower, it allows them to try out an NFT community or take advantage of an NFT's utility they otherwise wouldn't be able to afford without buying the NFT. For lenders, it represents ways to earn money on their NFT collections, rent out art to digital galleries, share NFTs with others, and potentially activate whole new business models without requiring substantial additional effort and cost.

### **Putting a (safety)pin in it: reviewing the CryptoPunks NFT licence**

Yuga Labs, [recent purchasers of the IP in](#) popular NFT project CryptoPunks, today announced terms of use governing the intellectual property rights that Punk holders enjoy. We unpack those terms below.

Yuga Labs is going to continue to hold the intellectual property rights in the CryptoPunk art associated with a Punk, including all rights, title, and interest in and to such art, such as copyrights, trade marks and other intellectual property. This is a fairly sensible approach and commonly seen in NFT projects.

Prior to the acquisition, there was a bit of debate in the community as Punks were sold without any licence whatsoever initially, and in 2019 it seems Larva Labs adopted the [Nifty Licence](#) for the project (but whether that is legally binding is unclear).

There had been some situations of Punks being used in derivative works, such as the [CryptoPhunks](#) project, with [DMCA takedown requests](#) being issued around certain Punks (but not others).

From this new position of clarity Yuga Labs provides Punk holders with a licence to use the associated art corresponding to their owned NFT for as long as they own that Punk. The licence allow the holders to 'reproduce, distribute, publicly display, publicly perform, transmit', and even create derivative works from the NFTs, so works based on the artwork associated with the Punk can be made. The licence also allow holders to make use of the artwork for both commercial and non-commercial purposes, in any media.

This means that the owner of a Punk can do all sorts of things, including making other products and services and selling them, involving their Punk, but upon sale of their Punk, can no longer make those derivative works or objects.

There is a twist, that Punk holders own and hold any rights to any derivative works in accordance with United States copyright legislation, which opens up the licence to any decisions or changes of law in the US.

Some more restrictions apply, including:-

- The licence to the artwork only extends to the artwork as a whole, and not to the traits of each Punk, so Punk holders have to exploit the whole art, and not the 12 pixels which make up the hairpiece, for example;
- Any registration of trademarks in derivative works have to be lodged while the holder owns the Punk used in those works and have "actually been used in commerce";
- No use of derivative works for hate crimes;
- No use of derivative works which violates "applicable law" (whatever that might be);
- Yuga Labs gets to use any derivative art to promote the collection;
- The owner of a punk indemnifies Yuga Labs against a half a page of potential things; and
- Any disputes are to be addressed in arbitration under the American Arbitration Association's Consumer Arbitration Rules.

The Terms are a mixture of community minded and accessible language plus some lawyer grade boilerplate terms which underscore the importance, when buying an NFT, of understanding just what it is that is being purchased. In time we would expect to see more standardised licensing terms emerging which will assist consumers, but for now the terms applicable vary greatly. Who would have thought buying expensive jpgs would expand your reading list so much?

### **English Courts to further consider developers' duty of care**

The English Court of Appeal has granted leave in *Tulip Trading v Van de Laan & Ors* to further consider the question of whether developers of cryptocurrency and other digital assets have fiduciary or tortious duties to token holders.

The first instance [judgment](#) by Mrs Justice Falk (**Falk J**) delivered in March summarily dismissed a claim by Tulip Trading

Limited (**Tulip**) alleging breach of fiduciary and tortious duties by 16 international bitcoin developers. Ruling last week, Lady Justice Andrews (**Andrews LJ**) granted Tulip – and by extension, its CEO, Dr Craig Wright, leave to appeal that decision on the basis that it was at least arguable that the relevant claims were not susceptible to summary determination. It remains to be seen whether the Court of Appeal will accept that there is a serious issue to be tried and remit the matter to a full trial before the English High Court.

Tulip alleges that 16 international bitcoin developers are bound to write software ‘patches’ to enable the recovery of assets valued at over £1 million, which were stolen in a hack on Dr Wright’s computer. Dr Wright famously claims to have invented the bitcoin digital currency.

Andrews LJ, in handing down her decision, [said](#) that:

*‘The issue as to whether developers owe duties of care and/or fiduciary duties to the owners of digital assets and if so, what is the nature and scope of those duties is one of considerable importance and is rightly characterised as a matter of some complexity and difficulty. Given that in addition to its complexity and difficulty the underlying facts will play a significant role in determining that issue, it is arguable with a real prospect of success that it is not susceptible of summary determination in the context of a challenge to the jurisdiction, and therefore that the judge fell into error in deciding that there was not even a serious issue to be tried and in the approach she adopted.’*

*Tulip Trading* is the first case heard by the English Courts to consider the roles and duties of cryptocurrency software developers, and one closely watched by others around the world. While that battle will now continue in the Court of Appeal, it is unlikely that the Court of Appeal will reach any definitive conclusions even if it dismisses the appeal on the facts in this case. This topic is one that developers and start-ups will need to continue to monitor for some time to come.