

Simon Oldfield¹—written evidence (CRF0046)

House of Lords Communications and Digital Select Committee inquiry “A creative future”

Reason for Submitting Evidence

Simon Oldfield submits this evidence as an expert in the convergence of art, law and blockchain technology. He advises a range of clients in this field including Hauser & Wirth and BMW.

As an expert commentator on the subject, Oldfield regularly gives talks, sharing his insights with recent highlights including the Talk Art podcast, Amazon Prime, BMW Welt, GQ, Laguna Art Museum and the London School of Economics. Established as a leading voice on how blockchain technology is impacting the art world, changing the cultural landscape, and offering a radically different approach to creating, exhibiting, and valuing art, Oldfield is an authoritative guide for long-term strategies in this newly evolving space. Talented at demystifying the complexities in this fast-changing world, Oldfield aims to deliver deeper understanding of the possibilities new technology affords the creative industries.

Oldfield is also the appointed art advisor to private and corporate art collections, as well as art funds across the globe, and has curated art/cultural programmes at major institutions including the Royal Academy of Arts. Offering confidential advice rooted in market intelligence and extensive experience, Oldfield is known for his breadth of knowledge, strong network, and adept understanding of stakeholders in the artworld.

Oldfield co-founded the organisation Pindrop and is the editor of books including *A Short Affair*, has sat on the judging panel for various awards including the British Book Awards, the Caitlin Art Prize and the Sunday Times Watercolour Competition, and written for various publications including Monocle, Harper's Bazaar and FT Weekend.

Evidence

It is reasonable to assume that many areas of the creative industries will face disruption in the next 5-10 years as a direct result of emergent technologies, coupled with a pace of change that is expected to accelerate as blockchain and associated web3 technologies are developed and adopted. This presents a range of risks and opportunities for stakeholders in the creative industries, and especially for the visual arts sector.

The following observations are noted:

1. New forms of creation and display of intellectual property (IP)

Creators and/or owners of IP have been early to recognise the potential of blockchain and associated technology, and to explore its use as a new medium with some compelling results. Digitally native artists have received significant attention over the past 18 months, and some have

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enjoyed fantastic success with substantial financial gain through the use of non-fungible tokens (NFTs). Traditional artists have also begun to use this technology and several prominent artists have developed new bodies of digital work, often using and/or incorporating various technologies including NFTs. Flowing from new forms of creation, many artists, museums, art galleries and other stakeholders have explored new forms of digital delivery and display methods, allowing for greater audience engagement with art and culture.

We are beginning to see meaningful experimentation with various technologies that are complimentary to burgeoning decentralised digital ecosystems through the creation of immersive experiences in real life and the metaverse, using various technologies including virtual reality (VR), augmented reality (AR) and artificial intelligence (AI). This development continues to blur the boundaries between the physical and digital, which is sometimes described as 'mixed-reality', and which is also serving to blur the lines between different forms of creativity. For instance, as gaming platforms successfully adopt the technology of the metaverse, some artists are exploring how the concepts of gaming can be incorporated into their work to offer a truly immersive experience. In another example, AI technology is at the heart of the growing area of generative art. Artists are also creating new artworks specifically for VR and AR, and they are experimenting with NFTs and smart contracts as a medium, treating code as art. Arguably, these developing forms of technology are as much a new medium as they are a functional utility for delivery, display and trade of artworks. In the way that the internet itself, or the invention of the camera provided new mediums for artists, they also provided functional utility. Therefore, if we view blockchain, VR, AR, AI, NFTs and other associated web3 technologies as new mediums, it is reasonable to expect that these technologies will produce artists as great as the most celebrated painters, photographers, and sculptors throughout art history.

It is also noted that some public museums and cultural institutions have been particularly open to experimentation in this field and are providing spaces to showcase new creative work rooted in new technology, while also offering platforms for education and debate around the associated opportunities and risks. The function of UK public and private arts institutions in this space is vital, as it allows artists and other creatives the space and support for experimentation and development. It enhances the audience experience, allowing for new forms of engagement through, for example, VR and AR, while also having the potential to expand its footprint beyond its physical presence through the metaverse. Arts institutions across the globe have the potential to expand their audiences to every corner of the world and deliver engaging digital visitor experiences to limitless virtual visitors, which may for some people be the closest they come to visiting such venues.

The metaverse, as it develops, and in tandem with other technologies, has the potential to deliver something extraordinary, expanding the two-dimensional web2 internet experience into a three-dimensional web3 mixed-reality, alongside integrated digital commerce made possible by blockchain technology. If realised in the way many predict, it could prove

to be one of the greatest forms of cultural exchange the world has ever witnessed.

2. Exploitation of IP & enhanced creator royalties

Another significant area of enquiry and development related to new technologies is a creator's ability to exercise greater control over, and participation in, the future value of their IP. This has led to well-publicised areas of experimentation and enquiry that has centred on visual artists seeking to improve upon the patchwork of artist resale royalty rights afforded to them in various jurisdictions. This has, so far, been affected through a complex bundle of contractual resale royalties attached to digital assets sold via NFTs with associated smart contracts. However, there are technical, legal, and jurisdictional issues which remain a barrier to effective implementation and enforcement of such contractual resale royalties via blockchain mechanisms, which is likely to result in numerous multi-jurisdictional disputes.

Despite these issues, the efforts made in this area have been a catalyst for debate about the potential to establish a robust, fair, and effective universal framework for creator royalties using blockchain technology to benefit all artists and creatives, whether they are 'crypto'/digital natives or more traditional creators. This is an area of enquiry that has been the focus of my attention, yielding promising results and potential solutions, bridging technical possibilities with legal and practical realities.

3. Evolving business models & potential legal developments

It is inevitable that business models will be shaped by new technology, while creating new opportunities for its participants.

Considering the shifting landscape being ushered in by blockchain and other new technologies, and the growing prominence of digital assets situated within a global decentralised digital economy, some participants in the creative industries will understandably be reticent or even fearful of change and/or being left behind for whatever reasons.

For stakeholders in the creative and technology industries, especially those with prominent reputations, there is a need for guidance alongside a relevant and amenable legal framework. They require clarity in respect of the rules and regulations around the commercial operation and implementation of blockchain/web3 technology, especially in respect of trading in digital assets and new forms of collective organisation and/or corporate structures. Understandably, these stakeholders do not want to run the risk of being penalised for experimentation and innovation. However, they do not seek an overreaction and encourage a balanced approach, acknowledging that some matters are purely commercial and/or the subject of industry practice. As such it is advised that existing legal and commercial frameworks are examined, and where necessary, adapted accordingly in response, while remaining flexible to the changing landscape.

It is noted that enquiries and developments are already underway, and a pragmatic approach is being adopted. This includes the Law Commission's

recently published consultations on digital assets and a forthcoming enquiry into Decentralised Autonomous Organisations (DAOs).

The Law Commission's central proposal in its consultation on digital assets is for the recognition of a third category of personal property, described as "data objects", to ensure that the law recognises and protects digital assets, which often do not fit into the two existing categories of property. The Law Commission's proposals, combined with the willingness of the English courts to adopt a progressive approach to addressing issues parties encounter with digital assets, indicates that the UK is well placed to create a robust and responsive framework for the future digital economy. For example, in *Lavinia Deborah Osbourne v Persons Unknown & Ozone [2022] EWHC 1021 (Comm)*, the High Court found that NFTs are capable of being recognised as legal property for the purposes of granting an injunction. This approach has the potential to attract creative industries and its participants to the UK, establish a framework for international adoption and a forum of choice for dispute resolution.

Related to the decentralised digital ecosystem, DAOs are already being used in a variety of ways, including in the creative industries. For example, DAOs have been created for the collective acquisition of single or multiple artworks for private investment and/or the benefit of charity. There are also artists and cultural organisations exploring the use of DAOs, often in tandem with NFTs, as a form of fundraising for institutions and/or creative projects. It is, therefore, reasonable to assume that the use of DAOs will increase as a form of organisation as the decentralised digital economy expands and use cases increase accordingly. However, the UK does not yet legally recognise DAOs which leads to uncertainty and missed opportunities for wider adoption.

The Law Commission's forthcoming enquiry into DAOs, which is due to begin imminently with a call for evidence expected later this year, will hopefully address some of the areas being explored by both the creative and technology industries. It might also be possible to draw on the approach adopted by other jurisdictions including the USA and Australia, and the Law Commission will no doubt reference its consultation paper on digital assets and its proposal for a third category of personal property, "data objects", perhaps to arrive at a proposal for DAOs to be recognised as a unique type of legal entity with the ability to own property and enter contracts, combined with limited liability for members. If such a proposal is made, successfully implemented and balanced with the principles of decentralisation, this unique form of legal corporate structure could encourage wider adoption and innovation, while offering safeguards to participants including stakeholders from the creative industries.

4. Convergence

As boundaries between the physical and digital worlds become less defined, so too are the boundaries between the creative and technology industries. This could lead to the convergence of their respective requirements to effectively facilitate and support the expansion of both the creative and technology industries in the UK, as they seek to compete in jurisdictions with certainty and clarity around the rules and regulations

by which they conduct their business. As early adopters of new technology, the creative industries are and will continue to perform a valuable role in introducing blockchain technology and the concepts underpinning it to broad audiences, which will have a halo effect as blockchain technology and web3 is adopted far more broadly in society. However, stakeholders within the creative industries will need ongoing assurance that mechanisms to mitigate fraud and other harmful activities are strengthened where necessary, and that meaningful efforts continue to be made to address environmental concerns around blockchain technology.

If the UK can foster an environment that encourages experimentation and innovation within a strong yet flexible legal and regulatory framework designed to ensure the UK's creative and technology industries remain dynamic and highly competitive, while being supported by a robust and accessible system for dispute resolution for when things go wrong, there is no reason why the UK cannot thrive in a digital creative future.

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