



**The Journal of Robotics,
Artificial Intelligence & Law**

Editor's Note: A Triple-Token Merger
Victoria Prussen Spears

Three-Body Problem: Challenges and Considerations for a First-of-Its-Kind Triple-Token Merger
Joseph A. Castelluccio, Paul C. De Bernier, Rohith P. George,
Stephanie M. Hurst, and J. Brandon Birdsall

Insights for Innovators Working to Secure and Protect Their Intellectual Property in the Robotics Market
Monica Grewal, Alexander J. Nemtzow, and Daniel S. Clark

Questions to Ask Your Law Firms About Their Use of Artificial Intelligence
William T. Garcia, Matthew D. Coatney, and Julie D. Honor

Federal Communications Commission Requires Consent for Artificial Intelligence–Generated Cloned Voice Calls
Jason D. Krieser, Shawn C. Helms, and Brian Long

Training Artificial Intelligence Models on Synthetic Data: No Silver Bullet for Intellectual Property Infringement Risk in the Context of Training AI Systems—Part 1
Gareth Kristensen, Angela L. Dunning, Gaia Shen, Prudence Buckland,
Jan-Frederik Keustermans, and Alix Anciaux

Beyond the Blockchain: Legal Challenges and Opportunities in the Era of Digital Assets
Romaine C. Marshall and Jonathan E. Schmalfeld

European Data Act Enters into Force, Putting in Place New Rules for a Fair and Innovative Data Economy
Wolfgang Maschek, Francesco Liberatore, Charles Helleputte, Matthew Kirk, and Christina Economides

Unlocking the Code to a Successful Acquisition of Artificial Intelligence Technology
Matthew Misichko

Is Your Artificial Intelligence Testing Tool a Breach of Contract Claim Waiting to Happen?
Mia Rendar and Samuel Reno

Start-Up Corner: Comparing Convertible Notes to Safes
Jim Ryan, Scott M. Perlov, and Maxwell R. Rich

- 321 Editor’s Note: A Triple-Token Merger**
Victoria Prussen Spears
- 325 Three-Body Problem: Challenges and Considerations for a First-of-Its-Kind Triple-Token Merger**
Joseph A. Castelluccio, Paul C. De Bernier, Rohith P. George, Stephanie M. Hurst, and J. Brandon Birdsall
- 333 Insights for Innovators Working to Secure and Protect Their Intellectual Property in the Robotics Market**
Monica Grewal, Alexander J. Nemtzow, and Daniel S. Clark
- 357 Questions to Ask Your Law Firms About Their Use of Artificial Intelligence**
William T. Garcia, Matthew D. Coatney, and Julie D. Honor
- 361 Federal Communications Commission Requires Consent for Artificial Intelligence–Generated Cloned Voice Calls**
Jason D. Krieser, Shawn C. Helms, and Brian Long
- 365 Training Artificial Intelligence Models on Synthetic Data: No Silver Bullet for Intellectual Property Infringement Risk in the Context of Training AI Systems—Part 1**
Gareth Kristensen, Angela L. Dunning, Gaia Shen, Prudence Buckland, Jan-Frederik Keustermans, and Alix Anciaux
- 369 Beyond the Blockchain: Legal Challenges and Opportunities in the Era of Digital Assets**
Romaine C. Marshall and Jonathan E. Schmalfeld
- 377 European Data Act Enters into Force, Putting in Place New Rules for a Fair and Innovative Data Economy**
Wolfgang Maschek, Francesco Liberatore, Charles Helleputte, Matthew Kirk, and Christina Economides

- 385 Unlocking the Code to a Successful Acquisition of Artificial Intelligence Technology**
Matthew Misichko
- 389 Is Your Artificial Intelligence Testing Tool a Breach of Contract Claim Waiting to Happen?**
Mia Rendar and Samuel Reno
- 395 Start-Up Corner: Comparing Convertible Notes to Safes**
Jim Ryan, Scott M. Perlov, and Maxwell R. Rich

EDITOR-IN-CHIEF

Steven A. Meyerowitz

President, Meyerowitz Communications Inc.

EDITOR

Victoria Prussen Spears

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

Melody Drummond Hansen

Partner, Baker & Hostetler LLP

Jennifer A. Johnson

Partner, Covington & Burling LLP

Paul B. Keller

Partner, Allen & Overy LLP

Garry G. Mathiason

Shareholder, Littler Mendelson P.C.

Elaine D. Solomon

Partner, Blank Rome LLP

Linda J. Thayer

Partner, Finnegan, Henderson, Farabow, Garrett & Dunner LLP

Edward J. Walters

Chief Strategy Officer, vLex

John Frank Weaver

Director, McLane Middleton, Professional Association

THE JOURNAL OF ROBOTICS, ARTIFICIAL INTELLIGENCE & LAW (ISSN 2575-5633 (print) /ISSN 2575-5617 (online) at \$495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint. Copyright 2024 Fastcase, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at support@fastcase.com.

Publishing Staff

Publisher: Leanne Battle

Production Editor: Sharon D. Ray

Cover Art Design: Juan Bustamante

Cite this publication as:

The Journal of Robotics, Artificial Intelligence & Law (Fastcase)

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Copyright © 2024 Full Court Press, an imprint of Fastcase, Inc.

All Rights Reserved.

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005

<https://www.fastcase.com/>

POSTMASTER: Send address changes to THE JOURNAL OF ROBOTICS, ARTIFICIAL INTELLIGENCE & LAW, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@
meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, scientists, engineers, and anyone interested in the law governing artificial intelligence and robotics. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Leanne Battle, Publisher, Full Court Press at leanne.battle@vlex.com or at 202.999.4777

For questions or Sales and Customer Service:

Customer Service
Available 8 a.m.–8 p.m. Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

ISSN 2575-5633 (print)
ISSN 2575-5617 (online)

Beyond the Blockchain: Legal Challenges and Opportunities in the Era of Digital Assets

Romaine C. Marshall and Jonathan E. Schmalfeld*

In this article, the authors explain that the landscape of digital asset litigation and regulation is evolving rapidly, reflecting the dynamic nature of this burgeoning industry.

Web3 represents the next evolution of the internet, characterized by decentralized networks and blockchain technology, enabling user-centric platforms and applications with enhanced security and data ownership. Digital assets, a cornerstone of Web3, include cryptocurrencies, non-fungible tokens (NFTs) and other blockchain-based assets, offering novel methods of value exchange, investment, and digital ownership.

Looking ahead, several discernible trends are surfacing that demand attention from companies actively involved in, contemplating entry into or indirectly influenced by the blockchain, Web3, and crypto sectors. The sphere of influence exerted by these emerging technologies extends far beyond the direct participants, potentially encompassing a broader range of industries and sectors than initially anticipated.

This expanding impact underscores the importance for a wide array of businesses to stay informed and adapt to the evolving landscape of digital innovation.

Rise in Litigation in the Increasingly Legitimate and Valuable Industry

The year 2023 saw an unprecedented amount of litigation in the industry, and we expect litigation will continue to rise. Thus far, the litigation has been primarily related to regulatory issues, with the three largest digital asset exchanges in the United States all currently subject to litigation with the Securities and Exchange Commission (SEC).¹

Additionally, a conclusion is expected in the agency's highly publicized case against Ripple Labs Inc., with both sides securing partial victories followed by a likely appeal after the decision is finalized. The high-profile criminal prosecutions and convictions of the former heads of FTX and Binance and others have dominated 2023 news, and we now will likely see other or related litigation.²

While regulatory litigation has been a constant in the industry, a new wave of private litigation is occurring and likely to increase, which can be expected, as industries in the billions have comparatively fewer economic incentives for litigation than do industries in the trillions, which the digital asset industry has risen into. After the digital asset market downturn in the spring of 2022, there was a wave of bankruptcy and insolvency filings and proceedings that now will work their way through the courts. We also expect continued growth in trademark and other intellectual property litigation,³ as well as private securities⁴ and ownership disputes.⁵

As asset values go up, so do the incentives to incur litigation costs to resolve disputes over those increasingly valuable assets. With financial giants such as BlackRock and Fidelity⁶ entering the crypto space through a range of exchange-traded funds and with the growing value and use of digital assets, we expect litigation will continue to rise. While these lawsuits will primarily involve traditional contract, statutory, and tort legal issues that are not unique to digital assets, the knowledge of an attorney who is familiar with these assets and their unique features will be an essential factor in efficiently and successfully managing, addressing, and resolving these lawsuits.

United States and International Regulation Specific to Digital Assets

Throughout the digital asset industry's growth thus far, digital assets have been forced to fit within general regulatory frameworks surrounding traditional securities and commodities. These existing regulations were designed for use of intermediary reporting mechanisms, do not address tax issues specific to barer assets like digital assets, and have a variety of other shortcomings when applied to digital assets.

In short, this has led to square-peg/round-hole issues when it comes to regulating crypto. The new risks that digital assets introduce are not adequately addressed by the general regulatory framework for traditional securities and commodities.

Additionally, certain historical risks that digital asset technology eliminates are also not acknowledged or reflected. As aptly stated during a congressional hearing on digital assets: “Shouldn’t we take seriously the possibility that algorithms and open-source software that take a measure of human error, greed, negligence, fraud, and bias out of the system might make the system better on net even if there are some new risks that need to be examined and understood?”⁷

In the United States, the biggest issue has been, and will continue to be, the SEC’s treatment of digital assets as if they were traditional securities and thus the lack of specific rulemaking for digital assets, which are not traded or used in the ways traditional securities are traded or used. That is an issue that has been thoroughly written about.⁸

Furthermore, the SEC has recently rejected a request for rulemaking on this subject⁹ while other jurisdictions have moved forward with comprehensive digital asset regulations. It is expected that the United States will now follow this trend to some extent.

In 2023, the European Union passed legislation titled Markets in Crypto Assets (MiCA) designed to govern the cryptocurrency market within its member states.¹⁰ The primary objective of MiCA is to provide a harmonized set of rules across the European Union for crypto assets, aimed at promoting innovation while ensuring consumer protection, market integrity, and financial stability.

In the United States, two bills regarding digital assets proceeded on a bipartisan vote through the House Financial Services Committee: the Financial Innovation and Technology for the 21st Century Act,¹¹ and the Clarity for Payment Stablecoins Act of 2023.¹² In the Senate, the Lummis-Gillibrand Responsible Financial Innovation Act,¹³ and the Digital Asset Anti-Money Laundering Act¹⁴ were introduced but neither passed through committee.

While none of these digital asset bills passed through Congress in 2023, that was more attributable to the general congressional backlog than to lack of motivation to get digital asset legislation passed. With fierce industry proponents (such as House Financial Services Chair Patrick McHenry) and detractors (such as Senate Banking Committee Chair Elizabeth Warren) making digital asset legislation a priority, we expect that some industry-specific legislation will now be on the agenda. Additionally, with administrative agencies moving forward with formal rulemaking, such as the Internal Revenue Service’s proposed digital asset broker rules¹⁵ and the Consumer Financial Protection Bureau’s proposed non-bank

digital payment provider rules,¹⁶ we expect digital asset-focused regulation and legislation to now come to the forefront.

Privacy Takes Center Role in Digital Assets

In the Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence, President Biden emphasizes the need to “[s]trengthen privacy-preserving research and technologies, such as cryptographic tools to preserve individuals’ privacy. . . .”¹⁷ At the same time, there is ongoing litigation over the Department of Treasury’s sanctioning of crypto mixing service Tornado.cash¹⁸ and the criminal prosecution of one of its creators, Roman Storm.¹⁹

In the late 1990s, with the rise of email, there was also an attempt to regulate the publication and exportation of privacy-preserving cryptographic technologies so they wouldn’t be used by terrorists and other bad actors to avoid government surveillance. The result of those laws and associated challenges was *Bernstein v. DOJ*²⁰ in which the U.S. Court of Appeals for the Ninth Circuit recognized the proposition of “code is speech” and that any attempt to regulate the mere publication of computer code must pass the heightened scrutiny test required for government regulation of otherwise constitutionally protected speech.

While the ruling in *Bernstein* was for First Amendment protections, there is often overlooked dicta in the case that states: “the government’s efforts to retard progress in cryptography may implicate the Fourth Amendment, as well as the right to speak anonymously, the right against compelled speech, and the right to informational privacy.”²¹

The Bank Secrecy Act, the Patriot Act, and a large number of the financial surveillance regulations currently in place are predicated on the assumption that people always need intermediaries to transact and thus surveillance can be done at the intermediary level. This is extended under the “third-party doctrine,” which is the legal principle that a party lacks a reasonable expectation of privacy under the Fourth Amendment over information “revealed to a third party and conveyed [by that third party] to the Government authorities.”²²

While transfers of (most) cryptocurrencies occur on public and immutable blockchains, the records of which are available to all, these transactions are done through largely anonymous digital wallets free of any centralized intermediaries that could be regulated.

Additionally, the creation of these wallets does not depend on any intermediary, and creation of a compatible digital wallet on most blockchain networks can be done with publicly available computer code and a random number generator.

We expect to see an intense discussion and debate about whether the government can and should seek to impose financial surveillance at a more direct level and at an individual level, as opposed to the financial intermediary level consistent with historical practices. The rights of individuals to transact in digital assets through the use of privacy-preserving technologies such as zero-knowledge proofs, cryptocurrency mixing protocols, virtual private networks, and anonymous digital wallets will now be at the forefront of regulations and litigation.

Conclusion

The landscape of digital asset litigation and regulation is evolving rapidly, reflecting the dynamic nature of this burgeoning industry. As digital assets gain legitimacy and value, they attract more regulatory scrutiny and private litigation. The industry's fit within existing regulatory frameworks remains a square-peg/round-hole dilemma, particularly in the United States. Internationally, however, strides are being made with comprehensive regulations like the EU's MiCA.

In the United States, despite stalled legislation in 2023, there is a growing momentum for industry-specific laws and regulations, with key figures in Congress and various administrative agencies taking active roles. Privacy issues, particularly regarding transactions in digital assets, are set to take center stage, challenging traditional regulatory assumptions and possibly reshaping the legal landscape. This evolving regulatory and litigation environment underscores the need for specialized legal expertise in navigating the unique challenges and opportunities presented by digital assets.

Notes

* The authors, attorneys with Polsinelli PC, may be contacted at rmarshall@polsinelli.com and jschmalfeld@polsinelli.com, respectively.

1. SEC v. Coinbase, Inc., Case No. 1:23-cv-04738 (S.D.N.Y. June 6, 2023); SEC v. Binance Holdings, Ltd., Case No. 1:23-cv-01599 (D.D.C. June 5, 2023); SEC v. Payward, Inc., Case No. 3:23-cv-06003 (N.D. Cal. Nov. 20, 2023).

2. *United States v. Samuel Bankman-Fried*, Case No. 22-CR-673 (S.D.N.Y. Dec. 13, 2022); *United States v. Changpeng Zhao*, Case No. CR23-179 (W.D. Wash. Nov. 21, 2023); *United States v. Braden John Karony*, Case No. CR23-433 (E.D.N.Y. Oct. 31, 2023).

3. *Yuga Labs, Inc. v. Ripps*, Case No. 2:22-cv-04355 (C.D. Cal. June 24, 2022).

4. *Risley v. Universal Navigation, Inc.*, Case No. 1:22-cv-2780 (S.D.N.Y. April 4, 2022).

5. *Anderson v. Consensus Systems, Inc.*, Index No. 655151/2023 (N.Y.S.C. Oct. 19, 2023).

6. See *iShares Blockchain and Tech ETF*; *Depository Trust and Clearing Corporation*.

7. Statement of Brian Brooks, *Digital Assets and the Future of Finance: Understanding the Challenges and Benefits of Financial Innovation in the United States* (Dec. 8, 2021).

8. Rodrigo Siera, *Due to SEC Inaction, Registration Is Not a Viable Path for Crypto Projects* (Mar. 23, 2023), <https://policy.paradigm.xyz/writing/secs-path-to-registration-part-i>.

9. Gary Gensler, *Statement on the Denial of a Rulemaking Petition Submitted on behalf of Coinbase Global, Inc.* (Dec. 15, 2023), at <https://www.sec.gov/news/statement/gensler-coinbase-petition-121523>.

10. Regulation (EU) 2023/1114.

11. *Financial Innovation and Technology for the 21st Century Act*, H.R. 4746, 118th Cong. (2023).

12. *Clarity for Payment Stablecoins Act of 2023*, H.R. 4766, 118th Cong. (2023).

13. *Digital Asset Anti-Money Laundering Act of 2023*, S. 2669, 118th Cong. (2023).

14. *iLummis-Gillibrand Responsible Financial Innovation Act*, S. 2281, 118th Cong. (2023).

15. *Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions*, Proposed Rule by IRS (Aug. 29, 2023), <https://www.federalregister.gov/documents/2023/08/29/2023-17565/gross-proceeds-and-basis-reporting-by-brokers-and-determination-of-amount-realized-and-basis-for>.

16. *Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications*, Proposed Rule by CFPD (Nov. 7, 2023), <https://www.consumerfinance.gov/rules-policy/rules-under-development/defining-larger-participants-of-a-market-for-general-use-digital-consumer-payment-applications/>.

17. Exec. Order No. 14110, 88 FR 75191 (Oct. 30, 2023).

18. *Van Loon v. Dept. of Treasury*, Case No. 23-50669 (5th Cir. Nov. 13, 2023).

19. *United States v. Roman Storm*, 23-CRIM-430 (S.D.N.Y. Aug. 23, 2023).
20. *Bernstein v. United States Department of Justice*, 176 F.3d 1132 (9th Cir. 1999).
21. *Id.* at 1146.
22. *United States v. Miller*, 425 U.S. 435, 443 (1976).