

[Translation]

## Guidelines for the Joint Establishment of an NFT Package Sales and Secondary Distribution Market Utilizing Sports Content

Council for Sports Ecosystem Promotion

### 1. Purpose

Recent years in the U.S. have seen a rise in popularity of Dapper Labs, Inc. (“Dapper Labs”) service, “NBA Top Shot,” which provides both NFT package sales (meaning a type of sales in which multiple NFTs are randomly combined and sold with the contents unrevealed; hereinafter the same) and a secondary distribution market therefor (meaning a secondary distribution market operated and managed by a business operator that makes package sales; hereinafter the same). However, in Japan, concern has been expressed on more than a few occasions that providing services like NBA Top Shot may constitute the crime of gambling (Article 185 of the Penal Code of Japan). Due to such concern, many business operators hesitate to offer NFT package sales together with a secondary distribution market. This hesitation has seriously hindered the development of business utilizing NFT in Japan’s sports industry.

In addition, the rights and rules for returning revenue from NFT sales and the secondary distribution market to sports organizations and players (e.g., the legal nature of revenue from the secondary distribution market and the method of returning revenue to retired or transferred players) are not addressed sufficiently, which makes it difficult for the business operators to deploy NFT secondary distribution services using players’ portraits or other sports content as NBA Top Shot.

In light of this situation, these Guidelines provide a legal framework for the provision of NFT package sales utilizing sports content together with a secondary distribution market thereof, as with NBA Top Shot, which helps to identify whether such a combination constitutes the crime of gambling, and to define the scheme for profit returns from the secondary distribution market, and present a business model that can be deployed in Japan with consideration for consumer protection, by which these Guidelines aim to achieve the sound development of NFT business in the Japanese sports industry and the appropriate circulation of funds to sports organizations and athletes.<sup>1</sup>

### 2. Formulation

These Guidelines have been adopted by the board of Council for Sports Ecosystem Promotion (“C-SEP”)<sup>2</sup> through a process including the following: the Sports Digital Transformation Industry Working

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<sup>1</sup> On April 26, 2022, the Liberal Democratic Party’s Headquarters for the Promotion of a Digital Society released “Digital Nippon 2022: The Challenge of New Capitalism through Digital Technology,” Appendix 1, “NFT White Paper: Japan’s NFT Strategy for the Web 3.0 Era” prepared by its NFT Policy Project Team (the “NFT White Paper”), suggesting the necessity to resolve the aforementioned situations and measures therefor in sections “(1) Organizing interpretations of the applicability of NFT business to gambling” and “(5) Arrangement of rights related to royalty collection” in “3. Measures necessary for NFT business development.” These Guidelines have been prepared and released based on, for example, the statement in “3. Measures necessary for NFT business development” of the NFT White Paper (“The establishment of rules from the perspective of protecting consumers who purchase NFTs through random sales and secondary distribution marketplaces should be analyzed separately, and it is expected that guidelines will be established by service providers based on the views of the relevant government agencies.”).

<sup>2</sup> <https://council-sep.org/en/>

Group established within C-SEP (i) holding discussions with C-SEP's board member companies,<sup>3</sup> external experts (including multiple persons engaged in the NFT business and affiliated with professional sports organizations, and Professor Takashi Hashizume of the University of Tokyo Graduate Schools for Law and Politics), the Sports Industry Office of the Commerce and Service Industry Policy Group of the Ministry of Economy, Trade and Industry as an observer, and the C-SEP Secretariat; and (ii) individually exchanging opinions with industry associations related to blockchains<sup>4</sup> and gaming industry associations<sup>5</sup>.

### 3. Scope of Application

These Guidelines are applicable to all services in Japan that have both package sales and a secondary distribution market for NFTs, such as images using portraits of athletes and playing videos that are clipped from game footage. It is assumed that the business operators subject to these Guidelines have obtained a license for the use of materials such as player portraits and game footage from the relevant leagues or teams/clubs.

### 4. Overview of NBA Top Shot Services

In these Guidelines, the overview of NBA Top Shot services is based on the following:

- (i) NBA Top Shot is a service provided by Dapper Labs. Dapper Labs has license agreements with the National Basketball Association ("NBA") and the National Basketball Players Association ("NBPA"),<sup>6</sup> respectively, and provides the following services through "NBA Top Shot," which is an application created on a blockchain (Flow) operated and managed by Dapper Labs: (i) the sale of NFTs in packages; and (ii) operation and management of a marketplace (secondary distribution market) allowing users to purchase and sell NFTs amongst themselves. Users are prohibited by the terms of service from trading NFTs outside the marketplace operated and managed by Dapper Labs.
- (ii) Dapper Labs randomly selects multiple NFTs of materials called "Moments" (e.g., videos of athletes playing basket ball), combines them in packages, and sells them to member users. The types of Moments are classified according to their rarity, and each package clearly indicates which types of and how many Moments are included. The price of the package varies depending on the types and number of Moments included. Specifically, a lower-priced package is sold at nine dollars (approximately 990 yen), while a higher-priced package is sold at 999 dollars (approximately 100,000 yen). Users are not allowed to know the individual Moments included in the relevant package before purchasing it. Further, Dapper Labs does not sell Moments individually by setting selling prices on individual Moments.
- (iii) Users may resell the Moments that they own in the secondary distribution market and convert them into cash. The transaction price can be set freely by users. Dapper Labs charges a certain percentage (approximately 5%) of the transaction amount in the

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<sup>3</sup> The number of board member companies is 41 as of the release date of these Guidelines.

<sup>4</sup> Blockchain Collaborative Consortium (BCCC), Japan Blockchain Association (JBA), Japan Cryptoasset Business Association (JCBA), the Japan Contents Blockchain Initiative (JCBI), and Japan DeFi Alliance (JDA).

<sup>5</sup> Computer Entertainment Supplier's Association (CESA), Japan Online Game Association (JOGA), and Mobile Content Forum (MCF).

<sup>6</sup> The NBPA manages NBA players' group portrait rights, and a corporation named THINK450 established by the NBPA handles the operations to manage those group portrait rights.

resale as a commission and as consideration for using the publicity rights of the relevant NBA players. Users are not allowed to sell packages in the secondary distribution market.

- (iv) Dapper Labs does not sell Moments in the secondary distribution market, nor does it buy Moments included in a package from users.

## 5. Whether the Gambling Crime Regulation Applies<sup>7</sup>

- 5.1. “Gambling” under Article 185 of the Penal Code is constituted when a person (i) competes to gain or lose property (ii) by fortuitous victory or defeat. “Competes to gain or lose property” in (i) means that there must be a two-way relationship of gain or loss where the winner gains property and the loser loses the same. If none of the parties lose property, it is not considered that the parties “compete to gain or lose” property.
- 5.2. NFTs are issued independently by each selling companies, focusing on their individual characteristics (such as the rights and contents represented by the NFTs). The selling companies determines, at its own discretion, a selling price in a primary distribution market, comprehensively taking into account the supply-demand situation and other factors. Unlike commodities for which a market price can be found or stable coins, the value of which is linked to legal tender, it is difficult to find an objective index to calculate the value of NFTs other than the price set in the actual act of sale. Therefore,

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<sup>7</sup> The Consumer Commission’s Opinion (as defined in 6.2. below) provides the Commission’s views on the applicability of gambling crime regulation, the outline of which is as follows:

- (i) Generally speaking, considering the fact that, in electronic lotteries that we see in smartphone games, an item or the like that will be provided is solely determined by a game program, the “fortuity” factor in “gambling” seems to be satisfied. Furthermore, judging from the interpretation of “economic benefits” and the fact that a lower court once found that the crime of fraud was committed in a case where an item within an online game, which was initially acquired for a fee, was later taken by deception, electronic lottery items and the like may fall under “economic benefits.”
- (ii) Whether an electronic lottery actually constitutes the crime of gambling should be determined on a case-by-case basis, including applicability of “economic benefits” and “something that is provided for temporary recreational amusement.” If a business operator provides a system where items or the like acquired in electronic lotteries can be converted into cash, or if users use games for the purpose of converting items or the like into cash, those items or the like may fall under “economic benefits,” which results in a higher possibility of constituting the crime of gambling.

These views address the applicability of “economic benefits” in relation to electronic lotteries. However, to constitute gambling crimes, (not only the “economic benefits” requirement but also) the “competing to gain or lose property” (Article 185 of the Penal Code) requirement needs to be satisfied. While these Guidelines deny that the NBA Top Shot services satisfy the “competing to gain or lose property” requirement, NFTs satisfying the “economic benefits” requirement is not denied in these Guidelines. Therefore, we would like to note, just to be sure, that these Guidelines neither are contradictory to, nor do they deny, the abovementioned views expressed in the Consumer Commission’s Opinion.

it is reasonable to consider the value of NFTs in the primary distribution market based on the actual selling price determined by the seller as a benchmark.<sup>8 9</sup>

- 5.3. Whether NBA Top Shot services constitute gambling comes down to issues between Dapper Labs and its users, and between individual users. First, as between Dapper Labs and its user, Dapper Labs receives money (property) equivalent to the selling price it set, and the user receives a Moment (property) with a value equivalent to the amount paid to Dapper Labs. There is nothing to distinguish this from an ordinary sale and purchase. Since neither Dapper Labs nor the user loses their property, there is no relationship of “competing to gain or lose” property. Next, in terms of relationships between users, if money contributed by one user is transferred to another user, it could be considered that there is a relationship of “competing to gain or lose” property, but no such relationship exists in the NBA Top Shot services. Therefore, there is no relationship of “competing to gain or lose” property either between Dapper Labs and the user or between the users. Consequently, “competing to gain or lose property” is not applicable. This view on applicability of “competing to gain or lose property” can be taken for not only the package sales used in NBA Top Shot but also random type sales in general.
- 5.4. As price setting in a primary distribution market is not directly related to price formation in a secondary distribution market, providing a secondary distribution market does not affect the conclusion that “competing to gain or lose property” is not

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<sup>8</sup> Takashi Hashizume’s paper entitled “Issues Concerning Gambling Crimes” (Fifth Meeting of the Study Group on Rights for the Expansion of Sports Content and Data Business; Material No. 5: Paper by Professor Hashizume, the University of Tokyo) says “it would be difficult to specifically calculate an objective value or reasonable price of NFTs outside of sales acts,” which we consider to be a view to the same effect.

<sup>9</sup> In the case of ordinary commodities, a selling price is calculated based on costs, necessary expenses, etc., and the selling price may fluctuate depending on the supply-demand balance. Therefore, it is strongly presumed that the selling price reflects the value of the relevant commodities. In contrast, it is difficult to find an objective index that can be used to calculate the value of NFTs. Therefore, theoretically, using resale prices in a secondary distribution market as a benchmark seems to be an available option. However, as stated in footnote No. 10, the issue of pricing in a primary distribution market should not be confused with the issue of price formation in a secondary distribution market. Thus, it is not appropriate to consider the value of NFTs in a primary distribution market using resale prices in a secondary distribution market as a benchmark. Based on the foregoing, if selling prices in a primary distribution market are not extremely unreasonable, and sales are actually made at such prices, it would be most appropriate to consider the value of NFTs using the selling prices in the primary distribution market as a benchmark.

applicable.<sup>10 11</sup> Similarly, the fact that Dapper Labs operates the secondary distribution market and charges commissions linked to transaction amounts does not affect the conclusion. If Dapper Labs sets a separate purchase price or resale price for, and purchases or resells Moments included in packages in, the secondary distribution market as opposed to just charging commissions, there is a risk of there being a relationship of “competing to gain or lose” property between the parties as a result of the transactions between Dapper Labs and users in the primary and secondary distribution markets being considered as integrated. However, Dapper Labs does not make purchases or resale in the secondary distribution market.

- 5.5. If Dapper Labs sets a separate unit price for a Moment included in a package and sells it to users in the primary distribution market (“Individual Sales”), careful consideration is required when determining whether the methods employed constitute gambling. However, Dapper Labs does not sell Moments in the form of Individual Sales.<sup>12</sup>

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<sup>10</sup> Where specific market values have been formed for NFT resale prices as a result of transactions in the secondary distribution market provided by Dapper Labs, and packages including those NFTs are sold in the primary distribution market, if we consider the primary and secondary distribution markets as integrated, users may make sales at a resale price lower than the selling price in the primary distribution market. However, while the transactions in the primary distribution market are between Dapper Labs and users, the transactions in the secondary distribution market are between users. Therefore, it is not appropriate to consider the secondary distribution market and the primary distribution market as integrated when considering whether a gambling crime exists in terms of the relationship between Dapper Labs and a user. Moreover, price formation in the secondary distribution market is based on circumstances that are separate from the price setting for the sale of NFTs in the primary distribution market. In other words, whether the resale price of an individual NFT will go up or down in the secondary distribution market is a matter of price formation between users in the secondary distribution market. It is not directly related to the price setting by Dapper Labs in the primary distribution market. In addition, prices in the secondary distribution market constantly go up and down, which makes it impossible to accurately predict, at the time of sale in the primary distribution market, at which price NFTs that appear in package sales will be traded in the secondary distribution market. Therefore, the issue of pricing in the primary distribution market should not be confused with the issue of price formation in the secondary distribution market; and even if there are resale prices between users, it does not affect the determination of whether there is a relationship of “competing to gain or lose” property between Dapper Labs and users. (The abovementioned Hashizume’s paper says “price formation in a secondary distribution market is based on circumstances that are separate from the price setting for the sale of NFTs,” which we consider to be a view to the same effect.)

<sup>11</sup> We often see cases where a gap exists between a price set in a primary distribution market and a price formed in a secondary distribution market. For example, when a package of trading cards is sold in a primary distribution market, rare trading cards that may be contained in that package are traded at high prices (for example, extremely rare trading cards are resold at price of 10 million yen or more) in a secondary distribution market. However, the selling company of that package sells the package containing those rare trading cards at a fixed price (for example, 300 yen) in the primary distribution market and does not need to, or will not, set a price linked to the market value in the secondary distribution market.

<sup>12</sup> In the case of Individual Sales, there will be multiple unit prices for a single Moment set by Dapper Labs. If the separate unit prices for the Individual Sales deviate from the unit price based on which the selling price was set for package sales of a Moment using the same NFT as the first-mentioned Moment, that may cause a suspicion that the selling prices of packages are not comparable in value with Moments that consumers obtain; therefore, careful consideration is required when determining whether the methods employed constitute gambling. However, that needs to be determined based on individual and specific form of sale among other factors. Thus, business operators should consider lawful business models with advice of lawyers and other experts.

## 6. Framework for Consideration of Consumer Protection

- 6.1. If NFT package sales and a secondary distribution market are provided together, it is assumed that the packages may include rare NFTs that may be traded at high prices in the secondary distribution market and, depending on the contents of the service, the transaction prices in the secondary distribution market, etc., it may overly stimulate the consumers' desires for gain by chance, leading to damage to such consumers, including minors.
- 6.2. When operators of smartphone games provided systems for converting items or the like obtained through electronic lotteries into cash, consumers' desires for gains by chance were stimulated, and the sharp increase in high value charges, particularly by minors, has become a social issue. Given that situation, the Consumer Commission released the "Opinion on Consumer Issues Concerning Smartphone Games - Viewpoints to Watch" on September 20, 2016 (the "Consumer Commission's Opinion") outlining the issues that business operators should address from the perspective of consumer protection. Matters contained in the Consumer Commission's Opinion that relate to these Guidelines are as outlined below:
- (i) It is preferable for a business operator to provide appropriate information to users about the appearance probability of items or the like and the amount estimated to be spent to obtain items or the like.
  - (ii) As for an appropriate appearance probability of items or the like, it is difficult to provide a specific benchmark figure; however, if a business operator sets the probability so low that appearance cannot be practically expected, having users join electronic lotteries in a manner where they cannot be aware of it, it may be an issue from the perspective of consumer protection.
  - (iii) If a business operator arbitrarily changes, without any rational reasons, the appearance probability of rare items depending on the user or the amount the user spends and provides services in a manner where users cannot be aware of it, it may be an issue from the perspective of consumer protection.
  - (iv) It is preferable for a business operator to ensure that the manner and the content of messages displayed are easy to understand so that even minors can understand.
  - (v) With respect to the tendency for trouble to be caused through use of smartphone games, it is important to watch future trends to see whether there is any social adverse effects.<sup>13</sup>
  - (vi) It is important to (i) pay attention to the fact that an amount considered to be high differs depending on age, as opposed to uniformly treating all minors the same and (ii) understand the actual circumstances of high value charges involving minors, such as by comparing and reviewing the circumstances of minors who spend a large amount of money and the circumstances of minors who do not spend money or who spend only a small amount.
- 6.3 A business operator needs to design a business model that gives enough consideration to the interest protected by the gambling regulations and consumer protection, while

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<sup>13</sup> To be more specific, it is necessary to closely observe whether there is an increase in social adverse effects, such as frequent occurrence of extortion, theft, or unauthorized use of a credit card that is under the name of a relative for the purpose of obtaining money to be spent on smartphone games.

taking into account the Consumer Commission's Opinion stated in 6.2 above and the trends of the Consumer Affairs Agency's Internet-Based Consumer Transaction Liaison Meeting.<sup>14</sup>

## 7. Business Types that can be Legally Deployed in Japan

When making NFT package sales with a secondary distribution market established together, a business operator needs to design a business model that gives enough consideration to the interest protected by the gambling regulations and consumer protection as well as whether the gambling crime regulation applies, which is addressed in 5. above. The C-SEP considers at least business models wherein services (i) to (iii) below, which are similar to NBA Top Shot, are provided and consumer protection in (iv) to (ix) below is taken into account, to be legal in Japan.

- (i) NFTs of materials (e.g., videos of athletes playing) are sold to users as packages. The types of NFTs are classified according to their rarity, and each package clearly indicates which types of and how many NFTs are included. The price of the package varies depending on the types and number of NFTs included.
- (ii) Users may resell NFTs that they own in the secondary distribution market operated and managed by the business operator and convert them into cash. The transaction price can be set freely by users. The business operator charges a certain percentage of the transaction amount in the resale as a commission. Users are not allowed to sell packages in the secondary distribution market.
- (iii) The business operator does not sell NFTs in the secondary distribution market, nor does it buy NFTs included in a package from users.
- (iv) The business operator needs to explain to users that prices in the secondary distribution market do not always exceed the prices at which they acquired NFTs in the primary distribution market and that the price of the same NFT may change depending on the circumstances.

In particular, the business operator should carefully consider whether it will provide services to minors, whose capability for judgment and fund resources tend to be insufficient, and what kind of restrictions should be placed when providing services to minors, taking into account the degree of disadvantages that may be suffered by minors and burdens on the business operator, among other factors. For example, if a user turns out to be a minor through age verification, the business operator needs to emphasize the abovementioned matters to be explained (and prevent the user from using the services if the business operator decides not to provide the services to minors). Furthermore, if the business operator decides to provide the services to minors, the business operator can, for example, restrict the amount of package purchases allowed or require consent of a parent or guardian for purchases of packages or purchases of Moments in the secondary distribution market.

- (v) In order to avoid circumstances where users seek to cancel their purchases of Moments when the business operator decides to cease to sell Moments and provide the secondary distribution platform, the business operator needs to explain in advance to

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<sup>14</sup> A meeting body established by the Consumer Affairs Agency on July 22, 2011 with the aim of enhancing practical collaboration and cooperation among the parties concerned to ensure security and safety of consumers in internet-based transactions. The participants include relevant administrative agencies, trade associations, etc.  
([https://www.caa.go.jp/policies/policy/consumer\\_policy/policy\\_coordination/internet\\_committee/](https://www.caa.go.jp/policies/policy/consumer_policy/policy_coordination/internet_committee/))

users, and set forth in the relevant terms of service, that it does not guarantee permanent ability to view Moments and that Moments purchased by users may disappear due to the termination of service.

- (vi) The business operator should avoid arbitrarily changing, without any rational reasons, the appearance probability of a certain rare Moment in the primary distribution market based on the state of trading by users in the secondary distribution market and then providing services in a manner where users cannot be aware of it.
- (vii) The business operator should avoid providing information that is considered to strongly stimulate desires for gain by chance (e.g., advertisement that excessively stimulates users' desires to purchase by implying that the price of a certain Moment that may be included in a package will rise in the future or that the speculative value of such Moment is high).
- (viii) If the business operator discloses a scheduled number of issuances and the appearance probability when making sales, the business operator should avoid indicating a scheduled number of issuances larger than the actual scheduled number of issuances or an appearance probability higher than the actual appearance probability for any specific Moment, since it may constitute a misleading representation (a representation that invites misperception of superiority<sup>15</sup> or advantageousness<sup>16</sup>).
- (ix) The business operator should avoid stating when making sales that a certain Moment will appear when in fact there is no possibility of appearance, such as where the business operator has set the appearance probability for the Moment so low that the appearance thereof cannot practically be expected, since it may result in users spending unjustly high amounts in transactions to acquire Moments they want and

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<sup>15</sup> Any Representation where the quality, standard or any other particular relating to the content of goods or services is portrayed to general consumers as being significantly superior to that of the actual goods or services, or as being, contrary to fact, significantly superior to that of other business operators who supply the same kind of or similar goods or services as those supplied by the relevant business operators, thereby being likely to induce customers unjustly and to interfere with general consumers' voluntary and rational choice-making (Article 5, item (i) of the Act against Unjustifiable Premiums and Misleading Representations ("Premiums and Representations Act")).

<sup>16</sup> Any Representation by which price or any other trade terms of goods or services could be misunderstood by general consumers to be significantly more advantageous than those of the actual goods or services, or than those of other business operators who supply the same kind of or similar goods or services as those supplied by the relevant business operator, thereby being likely to induce customers unjustly and to interfere with general consumers' voluntary and rational choice-making (Article 5, item (ii) of the Premiums and Representations Act).



may also constitute a misleading representation (a representation concerning decoy advertisement<sup>17</sup>).

## 8. Rights Related to Return of Revenue from Secondary Distribution Markets

### 8.1 Framework

8.1.1 In the case of NFT transactions between users in the secondary distribution market, as with the case of NFT sales by business operators, such transactions utilize the power of portraits and the like to attract customers, and therefore, they are considered to have an aspect of utilizing the publicity rights of players (the right to exclusively utilize the power of individuals' names, portraits, and other personal elements, to attract customers).

In the case of NBA Top Shot, Dapper Labs charges a certain percentage (approximately 5%) of a transaction amount in resale as a commission and as consideration for using the publicity rights of the relevant NBA players and returns the revenue to NBA and NBA players' association. However, the handling of players' portrait rights and publicity rights is something to be agreed upon in the rules and regulations of each sports league, and consideration for the use of publicity rights does not necessarily have to be directly returned to the players' association of the relevant sports league.

8.1.2 If a subject player (a player who has a player contract with his/her team/club, under which, among others, the team/club controls the publicity rights) retires or transfers to another team/club after the secondary distribution of an NFT, his/her player contract with his/her team/club is terminated, and the team/club to which the player belonged loses the legal basis to receive revenue from the secondary distribution market after the player's retirement or transfer.

On the other hand, if the player contract contains a special provision concerning the handling of publicity rights after the termination of the contract (including where a memorandum that is considered to be incorporated into the player contract has been separately entered into), there are cases where the former team/club may continue to receive revenue even after the player's retirement or transfer.

### 8.2. Points to Note Concerning Return of Revenue from Secondary Distribution Markets

Business operators need to design a business model that appropriately realizes the flow of funds to sports organizations and athletes based on contracts with them, taking

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<sup>17</sup> The following representations are regarded as "representations concerning decoy advertisement" and thus fall under misleading representations under the Premiums and Representations Act: (1) any representations regarding goods or services offered for a transaction in the cases where those goods or services are not ready for the transaction or where it is actually impossible to enter into the transaction; (2) any representations regarding goods or services offered for a transaction in the cases where, despite the supply volume of those goods or services being significantly limited, no details of such limitation are explicitly stated; (3) any representations regarding goods or services offered for a transaction in the cases where, despite the supply period, counterparties of supply, or supply volume per customer of those goods or services being limited, no details of such limitation are explicitly stated; or (4) any representations regarding goods or services offered for a transaction in the cases where an act that hinders the transaction is conducted without any reasonable grounds or where there is actually no intention of conducting the transaction (Public notice pursuant to Article 5, item (iii) of the Premiums and Representations Act (Public Notice No. 17 of 1993 of the Japan Fair Trade Commission)).

into consideration the rights related to revenues from secondary distribution markets. In particular, business operators should pay attention to the following:

- 8.2.1 Whether business operators that issue NFTs may receive a part of the transaction amounts in secondary distribution markets differs depending on the design of the secondary distribution markets in which the NFTs are traded. When a business operator that issues NFTs receives as commission a part of transaction amounts in the secondary distribution market, the business operator needs to determine whether license fees need to be paid, the terms of payment, etc. through discussions and negotiations with the relevant sports organizations and players, taking into consideration the fact that the players' portraits are used in both the primary and secondary distribution markets. Whether license fees for the primary or secondary distribution market will be paid to the league or team/club that controls publicity rights or players in person should be determined on a case-by-case basis in accordance with common industry practice and internal rules of each sport and the details of the contract with the business operator.
- 8.2.2 If a subject player retires or transfers to another team/club after the secondary distribution of an NFT, it is necessary to check whether the relevant player contract contains a special provision concerning the handling of publicity rights after the termination of the contract (and whether a memorandum that is considered to be incorporated into the player contract has been separately entered into) and appropriately determine whether license fees need to be paid, payment destination, etc., taking into consideration common industry practice and internal rules of each sport and the details of the contract with the business operator.

## 9. Points to Note Concerning NFT Sales of Playing Videos Clipped from Game Footage

- 9.1. When NFTs of playing videos that are clipped from game footage are traded, as with NBA Top Shot, we consider it to be necessary to obtain consent from the league or team/club that owns the broadcasting right (i.e., an exclusive right to broadcast sports games) for the sale of NFTs and establishment of a secondary distribution market, unless otherwise set forth in the relevant contract on broadcasting right.

If the business operator that sells the NFTs and establishes the secondary distribution market is not the entity that controls the broadcasting rights of the relevant videos, it is necessary to check who owns the broadcasting rights of those videos and obtain consent from the owners.

In this case, it is necessary to individually check common industry practice and internal rules of each sport because who owns the broadcasting right (for example, it may be a league or an individual team/club) and the rules concerning use of footage vary from sport to sport.

- 9.2. Usually, sports game footage is found to be creative in terms of camera angles, camera work, etc.; therefore, sports game footage, except for that taken by fixed cameras, is considered to be protectable as a copyrighted work<sup>18</sup> under the Copyright Act of Japan. For sports footage that was broadcast or cablecast, the broadcaster or cablecaster owns neighboring rights.

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<sup>18</sup> If any sports footage that constitutes a copyrighted work is recorded on any media, it is a cinematographic work under the Copyright Act.

Therefore, when a business operator sells NFTs of videos of athletes playing or establishes a secondary distribution market therefor, the business operator needs to obtain consent from the copyright owner<sup>19</sup> and neighboring rights owner in many cases. Business operators should keep this in mind.

Moreover, if those playing videos contain trademarks, logos, etc. of a league or team/club, other measures, business operators should also keep in mind that they may need to obtain license to use them in some cases.

## 10. Other Points to Note

- 10.1. These Guidelines are only a set of rules to be complied with by business operators when providing services similar to NBA Top Shot from the perspective of criminal gambling offenses under the Penal Code and of consumer protection. Business operators need to separately confirm their compliance with the Financial Instruments and Exchange Act, the Payment Services Act, and other laws and regulations.
- 10.2. NBA Top Shot is a closed service wherein transactions of NFTs between users are only allowed in the marketplace provided by Dapper Labs. Thus, these Guidelines assume cases where a business operator that makes package sales operates and manages a secondary distribution market. However, we cannot deny that it is useful to utilize open marketplaces (e.g., OpenSea) used by many overseas users as a means to promote export of Japanese sports content. Thus, these Guidelines do not discourage such business operator from providing services that are premised on the use of such marketplaces.

Even if a business operator that makes package sales allows users to utilize a marketplace<sup>20</sup> other than the secondary distribution market managed and operated by the business operator, our view does not change in that there is no crime of gambling if the business types stated in 7 above are adopted. On the other hand, particularly in cases where an open marketplace is utilized, there are various issues and risks, such as those concerning business operators' earnings structure or method of returning revenue to content holders, risks that NFTs are sold in an external marketplace by somebody that misrepresents itself as the content holder or without the necessary authorization, and various issues that arise due to appearance of NFT holders to whom the relevant terms of service are not applicable. Therefore, business operators need to be careful so that lawful operations of their services are ensured with advice of lawyers and other experts. Business operators also need to have adequate discussions with sports organizations and other entities that are content holders based on the risks and issues stated above.

End

Established on September 20, 2022

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<sup>19</sup> In practice, ownership of a copyright in sports footage is often provided for in a contract on broadcasting right or entrustment of video production. However, if no copyright owner is provided for in any contract, the Copyright Act will apply. Therefore, business operators need to separately check the interpretation under the Copyright Act.

<sup>20</sup> Including a marketplace operated by a business operator other than the business operator that makes package sales.