



## What is Bitcoin: Currency, Property... or Tulips?

By Christopher B. Hopkins

If you heard about bitcoin early, it was likely 2011. At first, the public's impression of bitcoin was positive: a digital currency, imbedded in a string of code, which could be transmitted and verified without cost across a peer-to-peer network using open source software. Readers of this column may recall, "Will Your Law Firm Accept Bitcoin?" from September 2011. A Google Trends search depicts our increasing interest in "bitcoin" over the last three years however the major spikes of attention were premised on *bad news*: hacking of wallets, ban in China, and the closure of the Mt. Gox exchange.

Bitcoin has also been negatively associated with the Silk Road drug trafficking website, fraud charges, and even (so far, speculative) links to terrorist financing. The concern is that bitcoin can be transmitted (somewhat) anonymously without oversight, regulation, or tax. A dark perception of bitcoin does not match its bright potential.

Few people understand that every bitcoin transaction is verified by broadcasting the details across the network and the information is then posted on a public ledger. By tracing the ledger and IP addresses, law enforcement does not appear significantly hampered by bitcoin anonymity. Fewer people understand the reliability of the bitcoin protocol or that blockchain technology has an array of alternate, fascinating uses; in March 2014, UBS boldly praised the "robust and secure way of securing customer funds" yet that report drew scant attention.

Not surprisingly, the combination of money, instability of an emerging technology, and the specter of criminal behavior has drawn the attention of civil lawyers, prosecutors, as well as state and federal agencies which are grappling with how to make claims, bring charges, oversee, regulate, and tax. A landmark in bitcoin's development will be its final legal definition: is it a currency? Property? Something else? Here is a summary of how various agencies presently categorize bitcoin:

### Florida Office of Financial Regulation

The Florida OFR issued a March 2014 alert which cautioned consumers about unpredictable value and security, noting that "oversight of virtual currencies has not been thoroughly developed." The Florida OFR Commissioner was appointed to the Conference of State Bank Supervisors' task force which is expected to issue guidance to state regulators later in 2014. Florida OFR has issued at least one money transmitter license for a bitcoin ATM. *Verdict: currency.*

### Financial Crimes Enforcement Network

In March 2013, FinCEN cautioned that an "administrator" or "exchanger" of bitcoin must register as a money services business (MSB) and comply with the Bank Secrecy Act (anti-money laundering laws). Ordinary "users," who use bitcoin to purchase goods and services, do not. This guidance has led bitcoin ATMs as well as some "miners" to register with FinCEN; typically, federal registration is coupled with state licensing. *Verdict: currency.*

### GAO and IRS

In May 2013, the Government Accountability Office issued a report indicating that, while the IRS had described the taxable

consequences of virtual economy transactions in 2009, the IRS should now explain the tax reporting requirements for virtual currency.

Ahead of the April 2014 filing date, the IRS held that bitcoin was property. This creates bookkeeping headaches and may lead states to apply sales tax – also be aware of confusion due to the IRS's and FinCen's contradictory definitions.

*Verdict: property.*

### Federal Election Commission

Political candidates angling for the "tech vote" have been interested in accepting bitcoin contributions (much like candidates in prior elections took to social media). The FEC considered the issue in November 2013 but deadlocked. As of early 2014, FEC is considering alternative proposed advisory opinions on whether a PAC could accept and transact bitcoins. Proposed "draft A" confirms that a PAC could accept bitcoin as in-kind contributions as well as buy and sell with limitations. Draft B limits bitcoin contributions to \$100, same as cash, and disallows exchanging for goods or services. The FEC postponed its April 2014 vote. *Verdict: (likely) currency.*

### Criminal Cases

Avoid confusing *criminals who use bitcoin* and the *criminal use of bitcoin*. On April 24, 2014, a U.S. Attorney announced an anticipated guilty plea to drug conspiracy charges after a man was caught selling drugs on Silk Road. Despite use of Tor anonymizer and bitcoin, the government tracked their international suspect, made an arrest in Florida, and cashed in bitcoin for over \$3 million dollars. Bitcoin was a nominal feature to that case -- in the 7-page information, there are three references to bitcoin.

On the other hand, bitcoin can be the centerpiece of criminal charges, such as the case of two Florida men who allegedly sought to use bitcoin to buy stolen credit card numbers. They were charged under anti-money laundering statutes (trading in currency in excess of \$10,000) as well as for acting as unlicensed money transmitters. Defense counsel reportedly challenged that bitcoin was not "money" and therefore the statutes did not apply.

In a case of first impression, a district court in Texas held, in *SEC v. Trendon Shavers et al.*, that, under federal securities laws, bitcoin "is a currency or form of money." That said, this 3-page order from August 2013 was merely a jurisdictional finding from a single court. *Verdict: currency.*

### Other States

Texas: *not currency* (April 2014). New York: undetermined but accepting applications for virtual currency exchanges: *currency* (March 2014).

### Netherlands

The Dutch, meanwhile, take a more elegant view of bitcoin: it is not money but more like a property item which once experienced a frenetic jump in value: tulip bulbs.

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