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COPYRIGHT AND NON- FUNGIBLE TOKENS (NFTs)

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Abstract

This article talks about what are NFTs and what role does copyright play in NFT with recent examples and case. Non-fungible Tokens (NFTs) have become extremely popular in 2021, fusing the technological and artistic worlds. These distinctive cryptographic tokens represent ownership of physical or digital assets and are one-of-a-kind, which has caused them to become increasingly popular. Early in the year, generative art and profile image initiatives like CryptoPunks and Bored Ape Yacht Club garnered popularity and even celebrity endorsements, making NFTs into markers of membership in the crypto ecosystem. The value of NFTs has been expanded by digital artists to include more than just speculative trading on secondary markets, which has sparked creative marketing initiatives that include TV shows and other items. NFTs are digitalized replicas of numerous materials, including memes, artwork, and apparel. They are constructed mostly on the Ethereum architecture, using ERC-20 for fungible tokens and ERC-721 for non-fungible tokens, and are tokenized by blockchains with distinctive identifying numbers. On systems like Open Sea and Super Rare, NFTs are digitally represented, tokenized, and issued. NFTs, however, present issues with ownership and copyright. Buyers of NFTs only receive the related metadata and not the actual job, which may cause misunderstandings. Furthermore, because to the open nature of blockchain platforms, anybody with technical know-how may create an NFT, generating issues with bogus ownership claims. NFTs are subject to the same copyright regulations as traditional works of art. The unique rights that copyright owners have over their creations include the ability to base NFTs on their original works. NFTs, however, do not transfer copyright; instead, they just provide the buyer a licence. In the NFT industry, new legal issues involving copyright infringement and right-to-publicity breaches are arising. In conclusion, NFTs represent a unique point where technology and art converge and have major legal and copyright ramifications. While many issues will be settled at the platform level, as NFTs continue to gain popularity, the market is expected to witness an increase in copyright challenges. The lack of explicit legislation for the

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NFT market necessitates clarity in the interpretation and usage conditions of smart contracts, lowering the danger of copyright infringement.

Keywords: Non-fungible token, Cyber Squatting, Copyright, Blockchain, Copyright infringement

Copyright and Non- fungible tokens

“In 2021 NFTs, have taken the art and tech world by storm”²

Since 2021 there has been a rise in popularity of Non-fungible Tokens (NFTs). Early in 2021, while generative art and profile picture (PFP) initiatives like CryptoPunks and Bored Ape Yacht Club were advertised by celebrities and utilized as a badge of membership in various crypto forums, non-fungible tokens (NFT) gathered popularity. These cryptographic tokens signify ownership of a real or virtual item and cannot be duplicated. While the beginning of the NFT rush has died down, digital artists have sought to raise the value of these goods above speculator commerce on the secondary market. Some initiatives have increased opportunities for commercializing NFT artwork, including TV series and products. 'Everydays: The First 5000 Days' by Beeple, an NFT of a digital work, was sold by the renowned auction house Christie's for USD69.3 million on March 2021. It is difficult to tell if the growing popularity of NFTs is only a passing trend or a really groundbreaking application of blockchain technology which has the potential to fundamentally alter industries, much like cryptocurrencies have.

Recently, Mason Rothchild in late 2021, crated and sold 100 “Meta Birkin” NFTs, these “Meta Birkin” depicted Hermès iconic “Birkin” bags covered in fur rather than leather. In a court battle, the designer Rothchild was accused by the high-end label Hermès of selling "Meta Birkin" NFTs that were \$450 apiece and offered royalty on further sales. The main question was whether these NFTs qualified as commercial goods that would confuse customers and violate intellectual property rights, or if they were an example of creative expression covered by the First Amendment. Many customers assumed incorrectly that Hermès was somehow connected to the selling of these NFTs, which sparked worries about possible dilution, unfair competition, and cybersquatting. The basis of Rothchild's defense was the claim that because his works were works of creative expression, they were completely protected by the First Amendment. In the end, the matter proceeded to trial, where a jury was given the difficult challenge of deciding what exactly these "Meta Birkin" NFTs were. However, the jury found in favour of Hermès on every point. They discovered that Rothchild's intention was to deceive potential consumers, even if they acknowledged that the NFTs may be viewed as works of creative expression to some extent. This significant discovery demonstrated that the Constitution's First Amendment could not, in this instance, protect him from legal responsibility. The jury's

² WIPO, https://www.wipo.int/wipo_magazine/en/2021/04/article_0007.html (last visited 5th October 2023).

verdict led to Hermès receiving a damage award of \$133,000 as a result. This decision successfully underlined how crucial it is to sell NFTs in a transparent and truthful manner, especially where there is a chance of customer misunderstanding and a chance that intellectual property rights may be violated. In the developing world of NFTs, the case serves as a precedent for the need for distinct lines to be drawn between commercial endeavors and artistic expression, ensuring that both the safeguarding of intellectual property rights and First Amendment rights are taken into account within the context of each individual case.

What is NFT and how does it work

NFTs are the digitalized form of assets of underlying works (defined under section 2(y) of Copyright Act, 1957) like meme, gifs, art and even clothes. These are assets that are tokenized by blockchains and are assigned with unique identification codes or metadata which distinguishes them from other tokens. These tokens are a type of digital ledgers that have a programmable digital unit of value and they can constitute of anything such as commodities, share, coins, etc. NFTs can be marketed or can be exchanged for cryptocurrencies, money etc. Fungible goods are exchangeable regardless of the item that is specifically sold or bought like silver, oil etc. while the nonfungible goods are one of a kind like custom made gold anklet, a painting, or an artwork. There are many different types of token standard, and the most common is Ethereum infrastructure. The token standards for fungible tokens are ERC20³ and for non- fungible tokens are ERC-721⁴. Any work that is digital, including physical good that can be converted into digital form like photo etc. can be turned into a non-fungible token. The first-time use of Ethereum infrastructure in NFT standard was used in characters of Cryptopunks which was a set of pixelated images. Among the various type of NFTs most common is a metadata file which contains information that is being tokenized with an encrypted digital version of the work and the other type is in a blockchain, but as the information form it is expensive to upload so they are less common.

The main elements of an NFT are tokenID that is a number which is generated when a token is created and a contract address which is a blockchain address. The combination of element in a unique form makes a token unique. In a contract there are other elements like wallet address of a creator that can be present this helps in identifying the NFT of an originator. In most of the times the NFTs have a link to where an original work can be found, this is because an NFT is a unique digital signature that is linked to the original work. When a person decides to create an NFT for his work, he has to ‘mint’ the NFT. Minting⁵ means digitally representing a work which is then tokenized. This tokenization means uploading it to a specific platform or

³ ERC20 Token Standard, <https://ethereum.org/en/developers/docs/standards/tokens/erc-20/> (last visited 5th October 2023).

⁴ Ethereum Improvement Proposals, <https://eips.ethereum.org/EIPS/eip-721> (last visited 5th October 2023).

⁵ Open Sea <https://opensea.io/learn/what-is-minting-nft> (last visited 6th October 2023).

marketplace like Open Sea, Super Rare and Bored Ape Yacht Club (these marketplace offers the sale and purchase of NFTs) and then issuance of token for its authenticity.

Confusions and problems

Till now we can say that NFTs are mere representation of work and can never be considered as a new work. As they are just a mere representation of a work, they are likely to get copyright protection. Buyers think that when they buy an NFT they acquire all the associated rights with the work, but they are only buying the metadata associate with the work and not the work itself. Due to the large amount spent on the NFTs it is assumed that the buyer has itself bought the original piece but the money was spent on the metadata file, a string of numbers and letters of uncertain artistic value.

NFT as a blockchain can be used as a set of ownership claims, which can be further used for verifying and authenticating. If any person with enough technical knowledge and appropriate tools to generate a token and that token is like that of the authors then this means that there can be an erroneous claim of ownership.

A written code of an agreement between parties that is stored in a blockchain is a smart contract. License can be given for an NFT, but cryptographic smart contract license on form of NFT are not produced by most of the NFT platforms.

A quick scan of NFT markets reveals a wide variety of illegal listings. A few artists have gone to social media to express their displeasure about their works being issued as NFTs without their consent. Even pieces at the Rijksmuseum in Amsterdam's public domain have been transformed into an NFT. The elimination of the token from the auction marketplace has often been the method used to resolve the majority of claimed infringement cases outside of the courts. But one of these instances will eventually get to court, and then the issue of whether the NFT is truly violating the rights of a copyright holder will come up.

Example of this was a case that centers on a cartoon image of a fat tiger receiving a vaccination injection that was one of several pieces of art from the well-known cartoon series "Fat Tiger" that a Chinese artist posted on Weibo, China's most popular social media platform. Shenzhen Qice Diechu Cultural Creativity Co., Ltd. (the plaintiff), the owner of the "Fat Tiger" illustration series' copyrights, filed a lawsuit against Hangzhou Yuanyuzhou Technology Co., Ltd. (the defendant), which controls the Bigverse NFT marketplace, a platform for exchanging digital art. The plaintiff discovered on Bigverse that a user had produced and sold an NFT digital work that was like the in question copyrighted work and even had the artist's Weibo watermark. In Hangzhou Internet Court, the plaintiff therefore filed a lawsuit against the defendant for contributing to copyright infringement. The court held the NFT platform liable for copyright

infringement.

We are aware that the production of codes on a blockchain network (such as Ethereum, EOS, Bitcoin Cash, and others) that provides a special ID to the digital asset together with extra fields for ownership information constitutes the actual minting process. Anyone who gets access to any of these platforms can thus create a new NFT. The digital asset can be marketed or otherwise made available for purchase to purchasers after the NFT has been generated. In the same way that physical wallets are made to hold traditional currencies, buyers of NFTs must have digital wallets that can receive and store such digital assets. They can buy NFTs on platforms like OpenSea, Mintable, and Rarible using cryptocurrencies which can be purchased using credit card payment. Let us consider the example of Andy Warhol Foundation for the Visual Arts has accomplished by producing five digital works that were restored from Andy Warhol's floppy discs and that were initially made in the 1980s on his Commodore Amiga computer. The five NFTs were made with the idea of being auctioned off; no further NFTs were intended to be made. In May 2021, the combined sales of these five NFTs exceeded \$3.3 million. The Andy Warhol Museum received annual financing from the sales, while artists who had been affected by COVID-19 received emergency assistance. The demand for "minting" of "NFTs" connected to creative works is growing (NFTs also get minted for projects such as music, gaming assets, and many sorts of videography), and this phenomenon unavoidably raises difficulties about ownership enforcement as well as copyright ownership.

Copyright and its role in NFT

NFTs are a new and unfamiliar kind of art, but copyright law will regard them exactly as many other conventional works of art. A copyright for an artist's new work of art is immediately granted to them. Upon producing a copyrighted work, a copyright owner instantly acquires several rights. Exclusive rights to reproduce, create derivative works, and disseminate copies of the work belong to the copyright owner. Because the "creation of an NFT could be categorized as an imitation or even as a copy of the original work," a copyright owner possesses the exclusive authority to create an NFT according to an original work of art. Let us say, for illustration, that I have the copyright on a well-known work of art. I am given the exclusive authority to duplicate, create derivative works from, and distribute duplicates of the work because I hold the copyright. Like how I would have been able to make and sell a reproduction of the original piece of art, I can build an NFT based on the artwork and sell it without giving up the rights to the original. Since my rights as an artist are exclusive, I may also prevent others from violating them by filing a lawsuit over copyright infringement if someone produces a piece of art, such as an NFT, that violates or copies my copyrighted work.

We know that anything that can be digitalized can be an NFT and the original work of an NFT is only need for the Token ID and contract address, so NFTs has little to do with copyright. But there are a lot of art work

that are traded as NFTs are protected under copyright law. This creates a question as to what kind of protection are we getting while buying an NFT. We all know that the author (Section 2(d) of Copyright Act, 1957) of the work is the one who has created the work itself. An author can be the sole owner unless he has co-authored with another person or the work is created under employment or is commission by other person. Section 14 of Copyright Act, 1957 specifies the provision of the exclusive rights provided to owner of the copyright work. This includes the right to mint the NFT of a work by the way of licensing. For minting, the right of reproduction and communication of the work to public must be possessed by the person, without this he will be infringing the copyright. Therefore, for minting an NFT of a work one should either be an author of the work or obtain the copyright over the work or obtain the specific rights to mint the NFT. NFTs are mostly sold by auction where the seller feels that there is a great demand for their NFTs so they list it on a marketplace for a specific price and can sell it to the buyer on that price. The transaction of NFTs is usually done through Ethereum Cryptocurrency as most of the NFTs are built on Ethereum Blockchain. The seller can sell its NFT for a higher prize as the value of that NFT increases if the NFT is of extremely rare work but, the value of it can only be determined by its demand and hype in the market. When a buyer buys an NFT then it is thought that he got all its accompanying rights and its underlying work of art but they are not buying the work itself rather they are only buying its metadata associated with it. On the Purchase of an NFT the buyer acquires the Non-exclusive license for displaying the NFT in their e-wallet only, this also means that they cannot commercialize the right of displaying the work in any third-party website/product but can use it for personal purpose only. This is because there is no transfer of copyright. Under section 14 (c) of Copyright Act, 1957 the seller can transfer all the copyright of his artistic work. 'Smart Contract' is an agreement, written in code between the parties during the sale of an NFT and stored in a blockchain. This creates a digital signature and helps in tracking the ownership of NFT. License is there in copyright and so the smart contract for the NFT. As the Smart Contract is difficult to edit or standardize, it becomes difficult for the parties to encode its terms and conditions. In Indian laws Section 19 (1) of Copyright Act, 1957 does not permit underlying works of NFT to the buyer by Smart Contract. Most NFTs only convey the license to the buyer who becomes the owner by buying it. There had been lot of instances where someone had generated an NFT that does not belong to them and by committing they have infringed the rights of the owner of that copyrighted work. For infringement to take place firstly, the infringer has taken the advantage of the exclusive rights of the author. Secondly, the NFT should be directly copied from the original work and lastly, the work is wholly or substantial part of it is copied. These three points will further help in future. There is a very casual connection between a token and work in case of an NFT which infringes the right to communication to the public, so as it is not a substantial reproduction of code but rather it is a simple code it is not infringing those rights.

*In case of Digital Collectibles Pte. Ltd. and Ors. vs Galactus Funware Technology Private Limited and Anr*⁶. 'Rario' is a digital collectibles platform built on NFTs that is owned and run by Digital Collectibles Pte. Ltd. The marketplace makes it easier to buy, sell, and trade legally licensed DPCs with cricketers on them. They gave Digital Collectibles Pte. Ltd. an exclusive licence to use their names and pictures on the Rario platform because they are well-known cricket players. These DPCs, which use Rario's private blockchain, include the names, images, and other personality attributes of cricket players and can be purchased, sold, or exchanged for actual money. The popularity and reputation of the individual cricketers have an impact on both supply and demand for each DPC, which in turn affects the cost of each DPC. The owner and operator of the mobile application "Striker," which is listed on the MPL, is another defendant. Galactus Funware Technology Private Limited is an owner and owner of the online fantasy sports platform, MPL. Users of Striker may trade, buy, and sell DPCs much like those of Rario, and Striker uses the technology of NFT to authenticate DPCs on the platform it operates on. The defendants were sued in February 2023 at the Delhi High Court for utilizing players' names, photos, and other characteristics on the platforms they operate without the players' consent or license. In the case, the Delhi High Court acknowledged that the criteria for establishing whether the right to publicity has been violated are consistent with the rules and principles of the tort of passing off. It is clearly obvious that using a celebrity's name, likeness, or other characteristic in a way that might lead to confusion is against their right to privacy. This order highlights the necessity to strike a balance between justly implementing the right to publicity and respecting the fundamental right to freedom of speech and expression while also giving Indian law on the right to publicity more clarity. In addition, the court's ruling could affect how Indian courts perceive the integration of cutting-edge and developing technology into our daily lives. It is yet unclear how the Indian judiciary would follow this pattern of interacting with cutting-edge notions because this area of law is still being developed.

Conclusion

NFTs and copyright will inevitably interact in practice, however most disagreements will be resolved at the platform's level. By promoting the presence of a place where artists may sell the tokens they have created, the market is already serving as a gatekeeper, reducing potential infringement. The NFT area may still see a significant number of copyright conflicts, though, due to the structure of the market and the motivation for high profits. It shall be intriguing to observe how ownership claims and disputes play out in the early stages

⁶ *Digital Collectibles Pte. Ltd. and Ors. vs Galactus Funware Technology Private Limited and Anr*, CS(COMM) 108/2023
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of a potentially revolutionary technology.

Still there exists no law regulating specifically for the NFT marketplace. If a way to interpret the smart contracts for the buyer and certain terms and conditions are setup for the use of NFT is laid down it will be very helpful. This will reduce the risk of Copyright infringement.
