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**NFTS: ‘A HISTORIC TREND IN DIGITAL OWNERSHIP OR THE
DEATH OF ARTISTIC CREATION?’- INTERSECTION OF
INTELLECTUAL PROPERTY AND DIGITAL ASSETS**

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Abstract

NFT was a phrase seldom heard a decade ago until they traced their way into the digital-tech world. NFTs often surface to prove ownership of rare objects, such as virtual artifacts and artwork. From Jack Dorsey selling his first tweet as an NFT for more than \$2.9 million to J.P. Morgan launching its first virtual branch in the decentralized metaverse, the buzz of the digital market has been rapidly expanding. While NFTs are gaining recognition, their operation and existence are still unclear. This fundamental leads us to the question- What is an NFT?’ Pragmatically Non-fungible Tokens are the tokenized assets via blockchain. They are distinguished from other tokens through their metadata and identifying numbers. Owners of NFTs include organisations, authors, screenwriters, game developers and individuals who create physical work. There is a significant risk of infringement upon these owners’ rights because their assets, when shared, are likely to be used by others to create an NFT. However, NFTs do not automatically confer intellectual property rights. “There is a stark difference between owning an NFT and owning the primary or other associated assets of intellectual property; owning an NFT is akin to merely having a display piece on a shelf.”

The first part of this paper is concerned with the evolving concept of property- throwing light, to clear some shrouds regarding NFT and their impact on Intellectual Property Rights. The second part seeks to delve into the regulatory landscape, particularly India, stressing the need for a clear legal framework and protections. Additionally, it also addresses the social and cultural impact on the art world and the environment, and the potential of NFT to democratize access to digital assets. Finally, the paper concludes with an emphasis on the need to

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distinguish between the owning of an NFT and holding the associated IP rights.

Keywords: Intellectual Property Rights, Non-Fungible Token, Blockchain, Smart Contracts, Infringement, Digital, Assets

Introduction

The legal concept of 'Property' has undergone a continuous change throughout history. Traditionally, the term was used to denote tangible possessions such as land or houses. The term property typically refers to any legitimate claim or interest that a person has in a thing that can be owned or possessed. Pt. Jawaharlal Nehru reflected on this evolution in his Constituent Assembly speech³, which discussed the changing nature of the definition of property, contrasting the past where humans were seen as property of their masters. Every property was seen to be belonging to the king and was quantified in terms of cows and bullocks. These concepts have ceased to exist, and the meaning of property has taken a different form.

Contemporarily, there are various definitions of property defined under different acts. However, there is no definite definition of 'property' in the Transfer of Property Act, of 1882⁴. Section 2(c) of the Benami (Prohibitions) Transactions Act, 1988⁵ defines property as "any property whether movable or immovable, tangible or intangible and any interest or right vested in such property." It is considered the most comprehensive definition in the ambit of property under Indian law. Property has been classified in various ways, one of which is the distinction between corporeal and incorporeal property. Corporeal property refers to property that has material existence. Land, houses, and jewellery are examples of the same. Incorporeal property includes entities that do not have a real or tangible existence.⁶ This category encompasses intellectual property, such as patents and copyrights, as well as other legal creations like leases and securities.

In layman's language intellectual property relates to the creations of a human mind like inventions, literary and artistic work.⁷ It is referred to as intellectual innovation, where the law aims to protect the interest of the creators by conferring upon them certain time-limited

³ Constituent Assembly debates, vol. IX at 1194.

⁴ Transfer of Property Act, No. 4 of 1882, (Ind.)

⁵ Benami (Prohibitions) Transactions Act, No. 45 of 1988, §2(c) (Ind.)

⁶ A.K. Ganguli, "Right to property: Its evolution and constitutional development in India" 48 *Journal of the Indian Law Institute* 490 (2006).

⁷ THE INSTITUTE OF COMPANIES SECRETARIES OF INDIA, INTELLECTUAL PROPERTY RIGHTS-LAW AND PRACTICE 2 (2015), <https://www.icsi.edu/media/website/IntellectualPropertyRightLaws&Practice.pdf>

exclusive rights to control and manage their creations. Such rights only apply to the intangible or intellectual creation, not its physical embodiment. The intellectual property is collectively referred to as patents (innovations), trademarks (symbols), copyrights (literary and artistic work) and registered designs. However, the recent trends in intellectual property have seen several inclusions under its gambit.

With the expansion of the digital age, non-fungible tokens (hereinafter ‘NFTs’) have become its touchstone. Over time NFT business is envisaged to be prosperous and will continue to flourish, as per the predictions by the experts. In this study, an attempt has been made to analyse and understand the concept and definition of NFTs. An exploration has been strived to contour the converging enigma between NFT and IPR.

Technical And Functional Overview of NFTs

Despite Bill Gates’ claim that NFTs cannot benefit the world and is based on a “greater fool theory,” the NFT market continues to thrive.⁸ With the evolution of technology, a new digital era has been penetrating its way into the creative world. Several businesses, governments and other organisations are utilising blockchain technology, offering security and traceability against accelerating cyber-crimes. The world’s greatest economies suffered during the COVID-19 pandemic, but globally there was also an increase in the use of numerous commodities and activities, one of which was the massive amount of money invested in Crypto and NFTs.

The rising demand for Cryptocurrency and its technology of Blockchain has given a new dimension to what constitutes incorporeal property. Just as cryptocurrency is a complex subject, so is NFT. Yet, it is more difficult to understand the attraction towards it. NFT, short for Non-Fungible Token, means it is ‘non-fungible,’ indicating that, ‘it is of such nature that it cannot be easily exchanged or replaced either in whole or in part with another possible similar TYPE’ and a token is the ‘item included in the digital asset or an entry on the blockchain.’⁹ Hence, NFTs are digital tokens, which could range from artwork, music, videos and other creative work.¹⁰ They can only have one owner at a time.¹¹ These are unique and irreplaceable,

⁸Runhua Wang & Jyn-An Lee, *Unwinding NFTs in the shadow of IP Law* 61 ABLJ 31-55 (2024). <https://onlinelibrary.wiley.com/doi/full/10.1111/ablj.12237>

⁹Daniel Horasman & Kholis Roisah, *NFT in the Perspective of Intellectual Property in Indonesia* 6 IJSSHR 3084-3088 (2023). <https://ijsshr.in/v6i5/Doc/75.pdf>

¹⁰ NFTS EXPLAINED- OWNERSHIP, LICENSES, AND THE LAW <https://www.mondaq.com/india/fintech/1172342/nfts-explained--ownership-licenses-and-the-law> (last visited on Aug. 08, 2023).

¹¹ Mehab Qureshi, *What are NFTs? How are they different from Cryptocurrency?* INDIAN EXPRESS (Feb. 23, 2022) <https://indianexpress.com/article/explained/what-are-non-fungible-tokens-nft-7783662/>

which makes it different from Cryptocurrency, which is replaceable and all the same, hence, making it fungible is a relatively new trend, working on the same technology as that of crypto assets such as Bitcoin and Ether.¹²

This ‘decentralized’ technology, that is, one which eliminates intermediaries from the selling and buying process, has introduced the concept of digital assets and their ownership.¹³ This ensures that no single entity has control over the entire blockchain, providing security and transparency. It has further extended the purview of incorporeal property to the digital realm. All of the transactions are recorded publicly on the internet, in what is known as a ‘ledger.’¹⁴ A digital ledger is called a blockchain. In case an NFT is purchased, this purchase of token is recorded in this unalterable ledger, after it is verified by a bunch of computers across nodes of the communication network.¹⁵ After this verification, the ownership of the token changes and is recorded. The creation of value comes from the acknowledgement that the purchase is considered valid and one of a kind by an entire group.

Each NFT has a unique number- that allows it to be easily distinguished from others in the same series. This has the advantage of being unique, and because many NFTs have circulating issues and in the NFT market scarcity equals value. Additionally, NFT has high interoperability, meaning, it can be traded across multiple platforms and marketplaces. An NFT obtained from one marketplace can be traded on another, making them versatile and more desirable. They are also highly programmable, that is, they can incorporate complex functionalities through smart contracts, as will be discussed in the upcoming section. With a fundamental understanding of NFTs established, it is crucial to explore how these digital assets intersect with existing intellectual property laws and what challenges arise in this new landscape.

¹² Shubham Swastek Dalai, *A study of NFTs (Non-Fungible Tokens)- Diagnosis through the lenses of classical Economics* (Unpublished, Uppsala Universitet).

¹³ NFT TRADING PLATFORM: A DECENTRALIZED APPLICATION USING THE ETHEREUM BLOCKCHAIN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453987 (last visited on Aug. 08, 2023).

¹⁴ An intro to Blockchain and NFTs, <https://www.blockchainresearchinstitute.org/an-intro-to-blockchain-and-nfts/> (last visited on Aug. 08, 2023).

¹⁵ Adarsh Vijayakumaran, “NFTs and Copyright quandary” 12 *JIPITEC* para 28 https://www.jipitec.eu/issues/vijayakumaran_pdf

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Intellectual Property Rights Vis-À-Vis NFTs

Intellectual property laws regulate ‘*corpus mysticum*’ assets, which refer to intangible assets, in contrast to ‘*corpus mechanicum*’ or tangible assets.¹⁶ NFTs are categorized as intangible or incorporeal personal property since they lack physical existence but hold assigned value.¹⁷ NFTs are treated as property as they are a representation of ownership and authenticity of the asset. It exists purely in digital form on a blockchain.¹⁸ When the creator mints an NFT which features a design, music or trademark, that they do not own or have a valid license to use, they fall within the ambit of possible trademark infringement.

*Free Holdings Inc. v. McCoy*¹⁹ spotlights the concern regarding the ownership challenges around NFTs. The dispute revolves around the NFT ‘Quantum’ minted by McCoy on the Namecoin blockchain. Namecoin required periodic renewal, and McCoy did not renew Quantum, causing it to expire in 2015.²⁰ However, he later reminted Quantum of Ethereum in 2021. Free Holdings later re-registered the Namecoin Quantum in 2021. McCoy’s action led to legal claims by Free Holdings, arguing ownership of both Namecoin and Ethereum versions. The court did not support any of the two arguments and dismissed the complaint on procedural grounds.²¹ Therefore, although the conflict underscores that artists can create multiple NFTs connecting to identical digital networks on various blockchain platforms like Ethereum,²² the legal standing of the quantum NFT based on Namecoin and the ownership of the double-minted NFTs remains ambiguous.

The ownership of NFTs is limited as compared to the general ambit of the word. The ownership is of the token and not of the creative work that it represents. Thus, Possessing an NFT does not automatically grant the holder the legal entitlement to capture images of the underlying artistic creation, reproduce them, and publicly distribute them in any manner.²³ The underlying asset is the property of the creator, as long as the creator does not waive off their

¹⁶ Andy Ramos, *The Metaverse, NFTs and IP Rights: to regulate or not to regulate?* WIPO Magazine (June 2022) <https://www.wipo.int>.

¹⁷ Timothy Chan, *The nature of property in cryptoassets*, 43 CAM.UNI. P. 480-498 (2023). <https://www.cambridge.org/core/content/view>

¹⁸ Vasundhara Shankar and Mudit Kaushik, *Using NFTs for Intellectual property transactions*, IJLT (2021) jlt.in/post/using-nfts-for-intellectual-property-transactions

¹⁹ *Free Holdings Inc. v. Kevin McCoy*, No. 22-CV-881 (JLC) 2023 WL (S.D.N.Y 2023)

²⁰ See FAQ, Namecoin, <https://www.namecoin.org/docs/faq/#why-do-names-have-to-be-renewed-regularly> (last visited Aug. 24, 2024).

²¹ See *Free Holdings*, 2023 WL 2561576, at *10–12 (ruling that Free Holdings had failed to establish standing to sue).

²² Thomas Smith, *Solving the NFT Double Minting Problem with Computer Vision*, Geek Culture (July 5, 2021), <https://medium.com/geekculture/solving-the-nft-double-minting-problem-with-computer-vision-c57bbbb4652d>.

²³ Adarsh Vijayakumaran, *NFTs and Copyright quandary* 12 JIPITEC 402-414 (2023) https://www.jipitec.eu/archive/issues/jipitec-12-5-2021/5497/vijayakumaran_pdf.pdf.

ownership rights through a contract of sale or a smart contract. Smart contracts are self-executing contracts whose terms are directly written in code. They help to facilitate and enforce contract negotiations and performance. It has different clauses embedded in an NFT, that automatically execute certain actions such as payment of royalties with each subsequent sale. The Medium or mode of expression is immaterial here.

As per the “Berne Convention for the Protection of Literary and Artistic Works,” it is required by the contracting parties to provide the writer with exclusive rights over their works. The 1996 WIPO Copyright Treaty upgraded the Berne Convention according to the digital era. According to this agreement, the act of saving a protected work in a digital format on an electronic medium (such as NFT) constitutes reproduction, necessitating prior authorization from the copyright owner.²⁴ Copyright issues can also arise, as the authenticity of NFTs can be called into question when the initial entry in the blockchain is false or contains errors. With brands like Gucci, Jimmy Choo, Prada, and Burberry, releasing their own NFT collections on various platforms, they need to review existing trademark applications and registrations to determine if the classification of goods or services provides them with coverage for NFTs and digital fashion.²⁵ It is a good time for brands and companies to explore this new space to protect their Intellectual Property rights.

It is hard to verify an owner during an infringement when the owner is not well known in the public domain, or the art is abstruse. The same happened in the art by Basquiat, titled “Free Comb with Pagoda.” The right to destroy the original artwork was also handed over to the winning bidder, once the digital version was sold by the alleged seller who minted the same NFT, disregarding the moral rights of the author.

The technology driving the NFT can be licensed by the blockchain owner, allowing users to purchase authentic collectables via brands. A renowned shoe company, Nike holds a patent in “cryptographic digital assets for footwear.” This patent enables the buyers to verify the authenticity of their purchased items and own a digital collectable version of their sneakers in their Digital Wallets, known as Cryptokicks. To be entitled to patent protection the idea should be novel and eligible. Patents are initially novel and hence, non-Fungible. A blockchain can simplify and promote licensing agreements by incorporating automatic royalty collection methods within a portfolio. An inventor by minting their patent as an NFT, can create a

²⁴ Nishant Gulyani, *Nexus between NFTs and Intellectual Property Law* 6 INT’L J.L. MGMT. & HUMAN. 446 (2023).

²⁵ Beibei Zhou, *Applications of NFTs in luxury brands* 82 FIN. TECH. AND BUS. ANY. 28-36 https://www.researchgate.net/publication/380752540_Application_of_NFTs_in_luxury_brands
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commercial IP portfolio and automatically generate licensing revenue.²⁶ Patents in the digitalised NFT world have the scope to promote transparency and liquidity and also welcome innovators into the market who aim to effectively commercialise their inventions.

The primary objective for a business owner minting an NFT for an underlying asset is to distinguish themselves from competitors in the market. Trademark protects the brands inclusive of the NFT brand. The procedure involves the reviewing of the existing trademark by the brand owner and application for the additional Trademark for the authenticated by NFT such as digital assets and virtual goods.²⁷ Infringement occurs when an unauthorised or competing party mints, sells, or resells that NFT using the asset owner's registered trademarks without the owner's consent. In the case of *Nike, Inc. v. StockX LLC*,²⁸ StockX was selling NFTs linked to products they had in stock, offering the buyer the right to exchange the NFT for a physical item. Nike discovered NFTs associated with their products and sure StockX, accusing them of using undue leverage to market goods. In another case of *Hermès Int'l v Rothschild*,²⁹ where Rothschild had minted NFTs titled "MetaBirkins" depicting Hermès "Birkin Bags."

Remember, that the worth of an NFT lies in the trust that it indicates authentic ownership of a unique item. The same has been planned by Mattel Inc. to do with its Hot Wheels NFT Garage trademark. NFT Trademark also keeps your NFT brand unique making it more valuable, such as Saks LLC planning to do with its SAKS trademark. Even personalities such as Kobe Bryant, and Jay-Z have filed an application for their NFT trademark.

Hence these approaches ponder upon, what one acquires when purchasing an NFT. Besides the bragging rights, they obtain a digital key- an encrypted code that records the existence and ownership of digital or physical assets on the blockchain. This holds as a perpetual proof of an artist's creation; something which acts as an impetus for the artists to enter this space. This digital key is linked to a smart contract that gives the purchaser sole ownership over the NFT, though not the copyright to the artwork, unless otherwise agreed upon. The extent to which Intellectual Property Rights are transferred to the purchaser is covered in the smart contract. Another point to be noted is that ownership of an NFT does not prevent one from copying the

²⁶ Nina Shapiro, *A Digital Marketplace for Patents: Patents as NFTs*, AM. UNI. IP-BRIEF (Nov. 03) <https://www.ip-brief.com/blogs/patents-as-nfts#:~:text=To%20rid%20the%20current%20patent,trustworthy%20and%20extensive%20digital%20marketplace.>

²⁷ Michael Kondudis, *NFT and Trademarks: The Ultimate Guide*, MEIKPLAW (2023) <https://www.mekiplaw.com/nfts-and-trademarks-the-ultimate-guide/>

²⁸ *Nike, Inc. v. StockX LLC*, 1:22-cv-983-VEC (S.D.N.Y. Jul. 14, 2022)

²⁹ *Hermès Int'l v. Rothschild*, 654 F. Supp. 3d 268 (S.D.N.Y. 2023).

digital image linked to it.³⁰ The NFT owner is the registered owner of the original, but anyone can still replicate the image.

Purchasing an NFT does not automatically grant the purchaser intellectual property rights associated with the NFT. Although the ownership of the NFT may be correctly transferred to the new owner, the NFT collector does not gain the right to modify or replicate the NFT. However, NFTs can be sold and transferred in a manner that allows the original inventor to receive royalties through the smart contract's functionality. The benefits of owning an NFT are often highlighted in product descriptions of NFT marketplaces. Nevertheless, these benefits typically do not include the transfer of intellectual property rights, as IP rights can only be transferred through legally binding contracts.

With a foundational understanding in its place, it is crucial to gain a wider standpoint on how this fundamental concept is applied to the Indian perspective. Hence, the NFT regulations in India are discussed in the upcoming sections.

Social And Cultural Implications

The realm of NFTs in the digital sphere extends far beyond just a cat gif priced at \$600,000³¹ or a tweet worth \$3 million.³² It delves into the underlying human psyche, and how technology is reshaping the way humans value it. The profound and pervasive role that technology plays in modern life is something that could not have been anticipated. Artists strive to connect with their audience often through storytelling. "NFT Storytelling" projects and companies sometimes embark on remarkable projects. One such company, JumpCut Creative, aims to disrupt the Hollywood Status Quo with its project "Women of Mystery".³³ Similar projects have been undertaken by companies like 'R3wind' and 'Crypto Coven'. Though their approaches and narratives differ, the common goal is to build a sense of loyalty and kinship through shared narratives.

³⁰ Michael D. Murray, *NFT Ownership and Copyrights* 56 IND. L. REV. 375 (2022) <https://mckinneylaw.iu.edu/practice/law-reviews/ilr/pdf/vol56p367.pdf>

³¹ Grace Kay, 'Nyan Cat' flying Pop-Tart meme sells for nearly \$600,000 as one of a kind crypto art, BUSINESS INSIDER INDIA (Feb. 21, 2021) <https://www.businessinsider.in/tech/news/nyan-cat-flying-pop-tart-meme-sells-for-nearly-600000-as-one-of-a-kind-crypto-art/articleshow/81179350.cms>

³² Jeff Kauflin, *Why Jack Dorsey's first tweet NFT plummeted 99% in value in a year*, FORBES (Apr. 12, 2022) <https://www.forbes.com/sites/jeffkauflin/2022/04/14/why-jack-dorseys-first-tweet-nft-plummeted-99-in-value-in-a-year/?sh=3e83796465cb>

³³ Falon Fatemi, *How Storytelling is Driving NFTs*, FORBES (Jan. 27, 2023) <https://www.forbes.com/sites/falonfatemi/2023/01/27/how-storytelling-is-driving-nfts/>

With a focus towards India, NFTs remain a niche market, unlike in the US, where artists have occupied top spots by tokenizing digital works and selling them for substantial amounts. In India, popular actors and content creators have also embraced this trend. Amitabh Bachchan sold his NFT collection, “Madhushala”, featuring his father’s renowned poetry.³⁴ Additionally, companies like Tanishq and Mahindra & Mahindra have ventured into the Metaverse space, releasing their latest collection and products as NFTs.³⁵ This move is seen as a significant marketing opportunity.

Nonetheless, there is a popular consensus that this decentralization has democratized participation in this blockchain-enabled production and distribution through intrinsic features such as openness, transparency and accessibility. The hassle with galleries, music companies and distributors has zeroed, in contrast with the traditional control these entities had of digital assets like art and music. This control allowed them to set the terms for access and distribution, thereby closing opportunities for many creators. The founding of decentralized platforms such as OpenSea, and Rarible, where artists can create, mint, showcase and sell their artwork directly in the form of NFTs, has eliminated barriers posed by traditional intermediaries.

Considering the significant reduction in the platform fees, as compared to that of art galleries, the cost and complexity required to launch an NFT has tremendously decreased. Decentralized platforms allow artists to create NFTs at a low price. At the same time, buyers can engage through cryptocurrencies in more forms than traditional banking systems across different parts of the globe. Owing to Blockchain, there are no geographical boundaries between participants worldwide, allowing involvement in this ecosystem without using traditional financial infrastructure or middlemen. ‘Decentralized Autonomous Organizations’ (DAO) are becoming popular as new models for community-led initiatives.³⁶ They decentralize authority, giving the community the final say over issues such as direction of projects, funding and governance. Some platforms support collective art creation and NFT ownership which encourage more than one individual artist to contribute to a single work while sharing ownership stakes and profits. This creates a sense of belonging among creators and collectors alike. Fractional ownership allows various investors to own some percentage of an individual NFT reducing the entry cost for more people to invest in high-value NFTs. It makes valuable digital resources accessible to

³⁴ AMITABH’S NFT- CURATED BY THE LEGEND HIMSELF, <https://amitabh.beyondblif.club/> (last visited June 12, 2024)

³⁵ Ajita Shashidhar, *India Inc. tryst with Metaverse*, FORTUNE INDIA (May 09, 2022) [ortuneindia.com/long-reads/india-incs-tryst-with-metaverse/108082](https://fortuneindia.com/long-reads/india-incs-tryst-with-metaverse/108082)

³⁶ Jens Lowitzsch, *Investing in Renewable Future- Renewable Energy Communities Consumer (Co-) Ownership and Energy Sharing in the Clean Energy Package* 9 REN. ENERGY. LAW. AND POL. REV. 18 (2019) <https://www.jstor.org/stable/26743437>

all, thus raising participation levels. Other income-generating possibilities provided to the users through NFTs are linked to ‘play-to-earn’ models and other rewards-based systems.³⁷ By doing so, it embraces decentralization through inclusive economic systems that directly pay off participants for their contribution and involvement in them.

This technology has extensive ramifications on the environment as well. Cryptocurrencies and NFTs are classic examples of how, as soon as humans have enough abundance to meet their basic needs, they move on to create value in something that has no inherent value³⁸. Their exclusivity and unique nature create psychological hype, making it more appealing³⁹. The art industry revolves around this hype of allotting exorbitant value to objects of limited inherent value. But now, it is possible to do so in a non-physical way through sophisticated technology.

These digital assets with no substantial use, have a huge environmental impact in terms of the energy that is consumed to keep the computers running in huge warehouses⁴⁰. The trading of NFTs has introduced another stream to generate revenue within the Metaverse. Consider the Metaverse as a virtual and alternate world, where even “real virtual estate” is bought for millions, because Snoop Dog’s property is located next door.⁴¹ It is seen by many as an escape from reality, where everything can be controlled through one’s devices and their avatars. NFTs are prime examples of the deep real-world consequences that a new and hyped technological advancement can have, and how it continues to permeate various aspects of society. It becomes imperative to address the legal and regulatory framework governing them to ensure fair and protected digital interactions.

Policy And Regulatory Perspective

The NFT boom in 2021 presented a novel legal challenge. Regulations addressing various aspects that came into play with this new technology became apparent. A unified global policy framework is difficult to attain, considering the varying levels of technological advancement and development across countries. Some nations require a more stringent approach to tackle

³⁷ PLAY TO EARN: NFTs, IP AND THE FUTURE OF GAMING, <https://www.taylorwessing.com/en/insights-and-events/insights/2022/03/play-to-earn-nfts-ip-and-the-future-of-gaming> (last visited on Aug. 18, 2024)

³⁸ Terry Ngyen, *The Value of NFTs, explained by an expert*, VOX NEWS (Jun. 10, 2024) <https://www.vox.com/the-goods/22358262/value-of-nfts-behavioral-expert>

³⁹ Robert Young, *The Psychology Of Nfts: Is Your Wallet The Next Social Flex?*, THE MEDIUM (Jun. 10, 2024) <https://medium.com/@robertdtyoung/the-psychology-of-nfts-is-your-wallet-the-next-social-flex-35919dc5130>

⁴⁰ WHAT IS THE ENVIRONMENTAL IMPACT OF NFTS? <https://www.vice.com/en/article/bvnp95/what-nft-environment-impact-climate-crypto-explainer> (last visited on Aug. 08, 2023).

⁴¹ *Understanding the Metaverse*, 22 Women of Color Magazine 41-54 <https://www.jstor.org/stable/48697562>
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these issues. For instance, Ecuador has recognized the exponential potential of Cryptocurrency and accepted it as a legal tender, whereas many other countries have banned it entirely due to high risks of money laundering and fraud. The tax treatment of NFTs also varies; in some places, they are referred to as “collectables” and taxed accordingly. Other countries do not treat them as taxable assets, while others tax them for capital gains and inheritance. Below, we examine the policy framework and considerations of several countries, followed by an analysis of common trends.

In the United States, the first case, *Miramax, LLC v. Tarantino, et al.*⁴², involved the creation of NFTs featuring unreleased scenes of an iconic 90s film: “Pulp Fiction,” without prior authorization. The distributor of the film sued the director for breach of contract, trademark and copyright infringement. Ultimately, the matter was settled outside of court, leaving no landmark ruling. In contrast, a more definitive outcome was provided in the case of *Hermès International v. Rothschild*.⁴³ Luxury French brand, Hermès, sued artist Mason Rothschild over his NFT creation of “MetaBirkin”, featuring Hermès Birkin, a rare and hard-to-get luxury in the fashion world. While Rothschild’s argument that his work constituted free speech under the First Amendment was considered plausible, it was rejected by the Court on the ground that the design was “intended” to confuse potential consumers and “deceive” them into believing that the ‘MetaBirkins’ were in some way, related to the luxury brand.” This judgement will serve as a crucial precedent in understanding the extent to which NFTs can infringe existing trademark rights for non-NFT users.

In Singapore, recent court decisions have affirmed the status of NFTs as valid property. However, existing Singaporean legislations such as the Payment Service Act (PSA) and the Securities and Futures Act (SFA) do not align neatly with the concept of NFTs. NFTs do not meet the criteria for digital payment tokens under the PSA nor do they exhibit traits that classify them as a capital markets product under the SFA. A notable judgement was rendered by the Singapore High Court involving the “Bored Ape Yacht Club” NFT. Moreover, while the concept of smart contracts is not yet explicitly regulated in Singapore, the legal jurisdiction is considered broad enough to encompass blockchain technologies, provided that the essential requirements for the formation of a legally binding contract are fulfilled.⁴⁴ This regulatory stance has fostered significant growth of the FinTech sector in Singapore.

⁴² *Miramax, LLC v. Tarantino*, No. 2:21-cv-08979-FMO-JC (C.d. Cal. Mar. 10, 2022)

⁴³ *Hermès Int’l v. Rothschild*, 654 F. Supp. 3d 268 (S.D.N.Y. 2023).

⁴⁴ Ben Chester Cheong, *Application of Blockchain-enabled Technology: Regulating Non-Fungible Tokens (NFTs) in Singapore*, The Singapore Law Gazette (Jan. 2022) <https://lawgazette.com.sg> › feature › application-of-bloc...
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In India, there is no definite legal framework for digital assets due to the nature of the property. In 2018, the RBI issued a circular discouraging companies and banks from dealing in any virtual currency.⁴⁵ However, the Supreme Court, in its judgement of *Internet and Mobile Association of India v. Reserve Bank of India*,⁴⁶ struck down the aforementioned circular, considering it to be violative of Art. 19(1)(g) of the Indian Constitution.⁴⁷ Drastic changes have been seen in the position of India on digital currency since this judgement, with the finance minister declaring that cryptocurrency will not see a complete ban in the country. This decision will be determinative for the growth of the NFT market in India, considering that cryptocurrencies are commonly used as consideration in NFT transactions. According to the Indian Contract Act, 1872,⁴⁸ a lawful consideration is an essential element in the formation of a valid contract, without which, smart contracts would be rendered ineffective. Another issue with the existing legal framework is the validity of digital signatures. Smart contracts utilize digital signatures, created by converting decrypted input into encrypted output, known as a “hash”, ensuring that the document has not been tampered with. This, however, is not consistent with the Information Technology Act, 2000,⁴⁹ as it only declares a digital signature permissible upon issuance by a government-designated authority. Consequently, in case of a dispute, such documents would not be accepted as evidence in a court of law due to the provision of Section 65B of the Indian Evidence Act, 1872,⁵⁰ which permits digitally signed contracts to be recognized as a form of evidence.

China has significantly diverged from other nations in its approach when it comes to the NFT space. Unlike other countries, where the value for NFTs is hinged on hype and scarcity, China has imposed strict supervision over the valuation and pricing of NFTs.⁵¹ With its Communist regime’s strict crackdown against cryptocurrency, NFTs are restricted to trading solely in the Chinese Renminbi. China’s Copyright Law includes mechanisms for combating infringement, such as unauthorized reproduction or distribution of NFTs. However, ambiguity remains concerning the liability of miners and platforms facilitating NFT transactions. The courts have begun to recognize ownership rights over virtual assets, and cryptocurrencies are not discussed alongside NFTs. Specific legislation or judgements directly addressing NFTs are still in their

⁴⁵ Press release, Reserve Bank of India, RBI cautions users of Virtual Currencies (Feb. 01, 2017) <https://www.rbi.org.in/commonman/English/Scripts/PressReleases.aspx?Id=2152#:~:text=The%20Reserve%20Bank%20of%20India%20advises%20that%20it%20has%20not,so%20at%20their%20own%20risk.>

⁴⁶ *Internet and Mobile Association of India v. Reserve Bank of India*, W.P (Civil) No. 528/2018.

⁴⁷ The Indian Constitution. art. 19(1)(g).

⁴⁸ The Indian Contract Act, No. 09 of 1872, §10 (Ind.)

⁴⁹ The Information Technology Act, No. 21 of 2000, §35. (Ind.)

⁵⁰ The Indian Evidence Act, No. 03 of 1872, §65B. (Ind.)

⁵¹ Baiyang Xiao, *Copyright Law and Non-Fungible Tokens: Experience from China* 4 IJLIT 444-471 (2023) <https://doi.org/10.1093/ijlit/eaad007>

early stages.

Countries like Japan do not recognize ownership of NFTs because ownership under Japanese Law is restricted to tangible goods,⁵² as opposed to Switzerland, where cryptocurrency is legal and subject to income tax.⁵³ These regulatory trends involve the establishment or proposed development of a comprehensive framework tailored to address the unique attributes of digital assets. Many jurisdictions are actively clarifying the legal status of cryptocurrencies, NFTs and their subsequent impact on related sectors through court decisions or legislative amendments. Key objectives often involve enhancing consumer protection, maintaining market integrity and combating financial crimes. Further emphasis is made on transparency, disclosure requirements, and oversight of crypto-asset service providers. These common trends reflect efforts to foster innovation in the digital technology sector while safeguarding intellectual property rights and the interests of all stakeholders involved.

Conclusion

NFTs are poised to initiate a race in the metaverse, playing significant roles in developing influential brand images and monetizing the metaverse. Although they hold tremendous potential, they are still in the early stages of development. It is no harm to deduce that, at least legally, NFTs are not as disruptive as it is assumed so in the recently developed digital world. NFT offers limitless and revolutionary possibilities, shaping the technological era for the forthcoming years while still being on a nascent pedestal and gradually replacing traditional norms. Like a physical painting or sculpture, NFT can serve as an investment within the art world. In India, NFTs have not come under judicial scrutiny, leaving questions about their legality and potential infringement unanswered. Such issues will vary from case to case concerning intellectual property rights and technology laws. Certain global standards and specific frameworks are to be regulated for this technology along with established remedies.

Nonetheless, challenges persist regarding intellectual property rights and NFT ownership. It is paramount to distinguish between owning an NFT and holding the associated IP rights, as already discussed earlier. The rights granted by an NFT seller depend on the license terms, which vary for each NFT. Protecting works, especially the upcoming ones, is important in the

⁵² Takeshi Nagase, *The boom in NFTs and potential legal issues in Japan*, The In-House Lawyer (2021) <https://www.inhouselawyer.co.uk/legal-briefing/the-boom-in-nfts-and-potential-legal-issues-in-japan/>

⁵³ SWISS TAXATION OF CRYPTOCURRENCIES- HOW ARE INVESTORS TAXED? <https://blogs.deloitte.ch/tax/2024/01/swiss-taxation-of-cryptocurrencies-how-are-investors-taxed.html> (last visited on Jun. 14, 2024).

digital scenario. To address the myriad issues presented by NFTs, it is suggestive to detail the conditions of sale, and the rights conferred. Additionally, a third-party entity could oversee the issuance and display of illicit and unverified NFTs on the marketplace. An administrative body should be established to inspect the legitimacy of minted works to protect innocent consumers. Even though registration is not mandatory for copyright, creating an accessible database of certified works supported by IP owners in registering their copyrights would ultimately enhance the protection.
