



THE INTERSECTION OF NFTS AND IP RIGHTS AND PROTECTION

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ABSTRACT

NFTs have now been around since early 2012 but have gained massive popularity in recent times especially with the NFTs in the collection of Bored Apes Yacht Club (BAYC) being sold for millions of dollars around the world. The block chain technology upon which NFT is based on is not new, however the NFT marketplace is, and has raised several issues, especially when it comes to intellectual property rights. Creators of literary and artistic works in the digital world can create their own NFTs and benefit from it. However, with the sale and transfer of NFTs, the question arises as to whether the copyright of the underlying artistic work has also been transferred along with the ownership of the NFT. The current vacuum in law regarding cryptocurrencies and block chain technology leaves room for ambiguity of application of IP laws on NFTs directly, instead needing to seek protection under individual laws such as The Copyright Act, 1957 and the IT Act, 2000, to either seek an injunction from the intermediary or claim damages.

This paper aims to understand the need for regulation of NFT vis-a-vis IPR and its protection and to find the ways to enforce IPR in the current legal vacuum of block chain technology. With the evolution of the online world into Metaverse and the likes, NFT is the technology that will be relied upon to verify the uniqueness of any particular thing attached to it in the online world. Recently, there have been instances of NFTs being created of other people's artistic works. This study further suggests steps for regulation of NFTs and suggestions for amendments in the current IP laws for effective application w.r.t. the IP protection of the underlying literary or artistic work.

Keywords: *Non-Fungible Token (NFT), Crypto, IPR, Copyright, Block chain.*

Problem Statement

The present paper aims to understand and analyse the evolving world of NFTs and its intersection with IP rights and protection. The grey area of NFT, cryptocurrency and block chain technologies has enabled NFT marketplace to function slightly outside the ambit of legal obligations. There is a need for the regulation and linking of laws relating to new technology and IP laws. Technology is inevitable, with the growth of online universes such as the Metaverse, a regulating law is necessary to limit the ambit of misuse and exploitation of the vacuum that currently exists with respect to NFTs and IP rights.

Objective

- To understand the meaning of NFTs.
- To understand the transfer of ownership of NFT vs IP rights.
- To critically analyse the current legal position of India regarding NFT and block chain technology.
- To understand and analyse the application of current IP laws to NFTs.
- To suggest changes to The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 and current IP laws such as The Copyright Act, 1957 along with the IT Act, 2000.

Methodology

A Doctrinal approach will be used in this research. This method will be used and applied to gain an understanding of the meaning and nature of NFTs and its intersection with IP rights and its protection.

Sources of Data: Primary Source (Acts and legislations, case laws- Indian as well as international) and Secondary sources include reports, articles and books (although it was observed that there is a paucity of literature on the subject matter.)

Footnote Format: Bluebook Citation Method.

INTRODUCTION

This chapter discusses the meaning, nature, and scope of NFTs vis-a-vis IP rights. NFTs are tokens that are built on the Ethereum block chain. NFTs are made or ‘minted’ and then put up on block chains- from where they can be put up for displays, or for sale. NFTs are similar to cryptocurrencies, however with one key difference- Fungibility. NFTs- in its name- are non-fungible, i.e. it cannot be replaced like-for-like with another NFT token. Cryptocurrencies on

the other hand can be exchanged as they are replaceable and possess the same value.

1 Bitcoin = 1 Bitcoin, whether it is held by the author or the reader. NFTs are simply unique tokens that possess certain characteristics of Cryptocurrencies.

The Ethereum website itself defines NFTs as

“A Non-Fungible Token (NFT) is used to identify something or someone in a unique way. This type of Token is perfect to be used on platforms that offer collectible items, access keys, lottery tickets, numbered seats for concerts and sports matches, etc.”¹

The most important aspect of NFTs being this unique non-fungible token is that it is generally attached to anything digital in nature. A photograph, digital art, music/audio file, signature, any writing (even something as simple and ridiculous as a tweet)² among many other things. The implications of such a technology which can virtually associate a uniqueness to any item that is digital, are immense. A jpeg file can be copy-pasted and claimed as original or unique, but an NFT created on an image is the ultimate proof of uniqueness, originality and most importantly- ownership.³ Another aspect of NFT is that it can track the ownership and its sale. Royalty based on sales can be attached to NFTs and the creator of the NFT (note that it is the creator of the NFT and not the creator or the artwork attached to it, which will be dealt in the later chapters) can generate revenue out of Royalty each time the NFT changes hands.

The originality of any artwork, or literary item, can be challenged. In the non-digital world, away from the keyboard, even the Mona Lisa can be checked for its originality by experts. How would that work for a digital file? How can one verify and authenticate the originality of a digital file that can be copied, moved and replicated with a simple ‘right-click’? Anyone could create an original masterpiece digitally, and even have it known to the world that ‘you’ created it. But that still does not stop people from resharing, duplicating it indefinitely with practically no effort. In terms of legal recourse, the creator of such art could approach the

¹ Ethereum Foundation. ethereum.org. 2021. ERC-721 Non-Fungible Token Standard | ethereum.org. [online] Available at: <<https://ethereum.org/en/developers/docs/standards/tokens/erc-721/#:~:text=What%20is%20ERC%2D721%3F,something%20else%20like%20its%20visual.>> [Accessed 3 March 2022].

² Lee, I., 2021. Twitter CEO Jack Dorsey's first-ever tweet sold for \$2.9 million as an NFT. [online] Business Insider. Available at: <<https://www.businessinsider.in/stock-market/news/twitter-ceo-jack-dorseys-first-ever-tweet-sold-for-2-9-million-as-an-nft/articleshow/81639599.cms#:~:text=Twitter%20CEO%20Jack%20Dorsey%20has,The%20buyer%20was%20Sina%20Estavi.>> [Accessed 2 March 2022].

³ Wang, Q., Li, R., Wang, Q. and Chen, S., 2021. Non-fungible token (NFT): Overview, evaluation, opportunities and challenges. arXiv preprint arXiv:2105.07447. <https://arxiv.org/abs/2105.07447>

courts and stop its use in commercial activities to a certain extent, but there are many other questions than just originality.⁴ In digital files where files can be duplicated identical to the original in every manner, how can one prove which one is the original? Many can own a copy of the Mona Lisa, but there is only one original at the Louvre Museum.⁵ Before NFTs, it was impossible to determine the originality of any digital artwork or literary work. The way to own digital art and transfer its ownership was completely limited in terms of security, protection of the asset and to prove its original or ownership. NFTs have completely changed that.

When the whole world has transitioned drastically to digital means albeit forcefully, it was a need that arose to bring about change in digital asset ownership and accountability. Cryptocurrencies and its technology have been in development and in the market since long, but its use case and need arose now. Twitter has allowed for NFTs to be displayed right on the profile, and there is news that so will Instagram- being one of the largest social media platforms, it becomes a step in the direction of mainstreaming NFTs and its display or creating a marketplace. One more industry where NFTs have tremendous value is the gaming or Esports Industry. In games like ‘Counter-Strike: Global Offensive’, the weapons have a design and artistic element, purely for aesthetics as they do not affect the actual gameplay whatsoever. Still, players spend an unimaginable amount of money to get these ‘skins’ and they are of real monetary value on the digital marketplace ‘Steam Market’.⁶

The gaming industry would benefit largely from NFTs as these skins in-game could be minted into NFTs and players could showcase their digital collections and their originality, ownership, uniqueness etc. and also make it easier for players to sell and buy said skins as NFTs. Many game developers have already started developing the required technologies in game to enable NFT placement in games. Unique, one-of-a-kind skins, which may be collectibles, or several variations of a skin can all be attached to an NFT, and the players could showcase these skins on the profile for the world to see. They can further trade these skins

⁴ Kugler, L., 2021. Non-fungible tokens and the future of art. *Communications of the ACM*, 64(9), pp.19-20. <https://dl.acm.org/doi/fullHtml/10.1145/3474355>

⁵ Valeonti, F., Bikakis, A., Terras, M., Speed, C., Hudson-Smith, A. and Chalkias, K., 2021. Crypto collectibles, museum funding and OpenGLAM: challenges, opportunities and the potential of Non-Fungible Tokens (NFTs). *Applied Sciences*, 11(21), p.9931. <https://www.mdpi.com/1327296>

⁶ Fowler, A. and Pirker, J., 2021, October. Tokenfication-The potential of non-fungible tokens (NFT) for game development. In *Extended Abstracts of the 2021 Annual Symposium on Computer-Human Interaction in Play* (pp. 152-157). <https://dl.acm.org/doi/abs/10.1145/3450337.3483501>

and the NFTs in exchange for other NFTs or even monetary value.⁷

WHAT ARE THE IP RIGHTS UNDERLYING AN NFT?

This chapter explores what are the IP rights of an NFT and the underlying artistic or literary work, along with the ownership of said IP.

NFTs inherently provide many features compared to that of already existing digital works, whether it is a photograph clicked by a photographer, a digital art created by a visual artist, music by a musician. Minting all of the above mentioned into NFT confers upon them many rights and protections, but also exclusivity. The Mona Lisa is a very famous painting, one can even argue it to be the most famous painting as many writers always refer to it when making any comment regarding any art. If there were more than one Mona Lisas made, perhaps even more than ten, its value would have dropped extensively. Such is the scenario with NFTs. Many can simply obtain a duplicate copy of the Mona Lisa, but there will always only be one original.⁸

Every digital item essentially can be replicated, duplicated exactly as it is. That is its nature. But when any digital item is attached to a block chain technology and smart contracts, it is next to impossible to create a duplicate. The certificate of authenticity of an NFT is like no other.⁹

NFTs clearly have many applications so far, not many have been used extensively to solve the real-world problems. Copyrights, Patents and Trademarks being one of them. NFT can hugely benefit the IP world. Applying for a patent and trademark or contesting for a copyrighted material in courts is a very tedious and time-consuming process. Its registration can take months and even years in some cases and the litigation resulting in any violation of its terms of use can result in the loss of lots of time and money. NFT can be used as a step in reducing these issues with a proper mechanism. In the case of Copyrighted materials, such as any online digital creation, photographs, digital arts, cinematic videos, music and audio, or

⁷ Choi, S.W., Lee, S.M., Koh, J.E., Kim, H.J. and Kim, J.S., 2021. A Study on the elements of business model innovation of non-fungible token blockchain game: based on 'PlayDapp' case, an in-game digital asset distribution platform. *Journal of Korea Game Society*, 21(2), pp.123-138. <https://www.koreascience.or.kr/article/JAKO202113759910660.page>

⁸ Thaddeus-Johns, J. (2021) What are NFTs, anyway? One just sold for \$69 million. *New York Times*. <https://www.nytimes.com/2021/03/11/arts/design/what-is-an-nft.html> [Accessed 20 February, 2021].

⁹ Choudhary, V.V., 2022. Non Fungible Token (NFT): Delve Into the World of NFTs Crypto Collectibles and How It Might Change Everything?.

even text, all iterations can be minted into an NFT granting them the protection and declaration of ownership of the creations, and this protection can sustain until a formal protection under the relevant laws has been obtained, and even then, NFT will only further bolster the protection provided by laws.¹⁰ In case of a copyright infringement or a digital image, an NFT to prove the originality and ownership can prove critical to establishing the facts and granting necessary protection and damages. In case of patents, the minting of NFT of said technology can enable the creator interim protection of some sort while the application is pending with the authorities. In the current world, time is of such short nature that losing even one or two years in litigation for IP claims can virtually render such technology obsolete in the process.

Another aspect of NFTs in the world of IP is that it can enable buying, selling, and also licensing of IP easier and safer.¹¹ NFTs being part of the block chain technology, which is a public ledger which is impossible to forge, can prove of paramount importance in establishing ownership, originality, and uniqueness. Patent, trademark, and copyright holders will benefit from such innovations. NFTs also allow tracking ownership and exchanges of hands by way of smart contracts embedded in them, which allows the NFT creator to enable automatic royalty payment collection every time the NFT changes ownership. Patent holders and Copyright owners will especially benefit from such technology as it would make it immensely easier to track the IP licensing and ownership changes. Every NFT can be compounded into an IP portfolio along with other IPs especially in the case of patents and can be together minted as an NFT and each investor would automatically receive their royalty payments without the need for any kind of manual excavation and tracking.

Do NFTs grant IP rights on their own?

The short answer is no. An NFT is simply a tokenisation that allows for any digital item to be identified on a public ledger on the block chain technology that is virtually un-editable. By creating or minting an NFT, a person is simply attaching a token on the block chain to said digital item. For example, a person can simply take a photograph clicked by another person and mint it into an NFT as their own. The copyright would still subsist with the original photographer and not with the NFT owner. The original photographer can claim the copyrights of the photograph through legal means, and there are certain provisions in NFT

¹⁰ Vanherpe, J. and Janssens, M.C., 2021. Non-Fungible Tokens and Copyright: crypto-buyer beware.... <https://lirias.kuleuven.be/3476693?limo=0>

¹¹ Goanta, C., 2020. Selling LAND in decentraland: the regime of non-fungible tokens on the ethereum blockchain under the digital content directive. In *Disruptive Technology, Legal Innovation, and the Future of Real Estate* (pp. 139-154). Springer, Cham. https://link.springer.com/chapter/10.1007/978-3-030-52387-9_8

technology that enable and adhere to court orders.¹² But this does prove to be an issue that NFTs being so rigid and final in their nature, it would be a double-edged sword to fight where if the copyright infringed upon has been minted into an NFT by any other person than the owner, the process of claiming it would be difficult under current provisions of law.

NFTs can only aid Intellectual property rights at the moment. The current laws around the world have not yet accustomed themselves to the developments of block chain, NFT and smart contract technologies. This issue is not of grave concern when it comes to patents, as the process of registration of patents is of compulsory nature if one intends to gain protection of the law for it.¹³ NFTs only aid the patent process in ascertaining its originality and ownership during the patent registration process and do not form as conclusive proof as to the same. Whereas, when it comes to copyrights and trademarks, it acts as a certificate of authenticity and ownership attached to the digital asset.

NFT and copyright have especially developed a niche bond to solve the digital asset ownership dilemma. Copyright holders have always been worried about the unauthorised use of their digital work as it directly eats into the revenue that can be generated through them. Without any technological means to stop the consumption of copies made without the licence of the creator, consumers of the works would never resort to obtaining a licensed copy. The digital technology that is currently large, which is mainly a peer-to-peer network through the centralized web (internet), does not provide any means of making ownership tags of digital assets.¹⁴ The application of copyright laws when it comes to digital artwork is considerably difficult compared to non-digital works. The digital world allows for copies to be used for commercial purposes and to generate revenue with almost nothing but a few clicks and has a wide reach which the creator of the artwork cannot possibly monitor all the time, and even if such an instance is encountered, it would be unfeasible, extremely tedious as well as time consuming.

¹² Çağlayan Aksoy, P. and Özkan Üner, Z., 2021. NFTs and copyright: challenges and opportunities. *Journal Of Intellectual Property Law and Practice*, 16(10), pp.1115-1126. <https://academic.oup.com/jiplp/article-abstract/16/10/1115/6307085>

¹³ Guadamuz, A., 2021. The treachery of images: non-fungible tokens and copyright. *Journal Of Intellectual Property Law and Practice*, 16(12), pp.1367-1385. <https://academic.oup.com/jiplp/article-abstract/16/12/1367/6449489>

¹⁴ Ante, L., 2021. Non-fungible token (NFT) markets on the Ethereum blockchain: Temporal development, cointegration and interrelations. Available at SSRN 3904683. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3904683

One good example of copyrights in NFTs is the case study of ‘Cryptokitties’. Cryptokitties is the first block chain project that utilizes the ERC-721, which is an Ethereum based, established itself as an online gaming platform which allows players to create (breed) digital cats that the player owns, and then they can buy, sell, trade said cats using the methods provided by the platform. The unique feature of this platform is the fact that any digital item created, bought or traded as an NFT retains its value in other platforms as well. Each Cryptokitty is an individual NFT owned by the players and can be used across other platforms that support the same standard as ERC-721. A Cryptokitty NFT is basically a standalone digital artwork. Each Cryptokitty is unique in its properties.¹⁵

The question of copyright also arises in this system. What if somebody creates an NFT system similar to that of Cryptokitties? For example, Cryptokittens, which has very similar properties to that of the Cryptokitties gaming platform, and the Cryptokittens that are minted are extremely similar to Cryptokitties. Just by minting it into an NFT does not absolve the creators of any copyright infringement liabilities. They would still be encroaching upon the rights of the Cryptokitties platform creators and the NFT holders of the Cryptokitties. This question can only be answered by the Copyright legislations and how they deal with this technology of NFTs.

CURRENT LEGAL FRAMEWORK

This chapter aims to understand and analyse the current legal framework regarding NFTs and the block chain technology vis-a-vis IP laws.

Around the world, there are variations of the laws around copyright. The main purpose of copyright laws has always been to incentivize creation of artistic and literary works. In India, Section 13 of the Copyrights Act, 1957¹⁶ states that copyright subsists in literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording. And as per Section 17,¹⁷ the author or the creator is the first owner of the copyright subsisting in it (except when the employer has employed the author and it is created within the scope and course of employment, the copyright lies with such employer). These provisions in India aim to promote creation of such works by enabling the author a monetary protection. Disabling other persons from illicitly using another person's copyrighted work, and providing

¹⁵ Evans, T.M., 2019. Cryptokitties, cryptography, and copyright. AIPLA QJ, 47, p.219. <https://www.sciencedirect.com/science/article/pii/S1544612321001781>

¹⁶ The Copyright (Amendment) Act, 1992. S. 13.

¹⁷ Ibid, S. 17.

injunctions, or damages for infringing said rights.

Another aspect of Copyright laws has been to always promote progress in the arts and sciences and the spread of knowledge. All systems of copyright protection in the world are similarly set up, with some variations with respect to the given goals in the legal frameworks. IP rights in some or the other way have always been a threat to the free transfer of knowledge and access to information and knowledge.¹⁸ One circumvention to enable free transfer of knowledge has been to introduce the notion of 'fair use'. This allows fair use of IP rights that are protected to be used to further disseminate knowledge and information only, but not for commercial use. These are some of the key elements in UNESCO's mandate which stated that the main challenge posed by the Information Society is that of balancing a coherence between the legal framework for the protection of the creators' interest, with that of the fundamental rights and freedoms of the public at large. In this day and age of digitalisation- Cryptocurrencies and NFTs, this system for balancing is in dire need of a makeover.

Currently there is no separate legislation regarding NFTs specifically. Even the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021¹⁹ has not been put up for deliberation in the last winter session of the parliament. Nevertheless, this bill does not mention NFTs in particular and heavily relays the government's intention to ban all private cryptocurrencies. However, in the new Budget that was introduced, any gains made from cryptocurrencies and digital assets in India would be taxed at 30%. No deductions would be allowed except the cost of acquisition of such digital assets. This essentially means that any gains made from NFTs would be taxed at 30%.

NFTs being merely tokens in the block chain of an underlying digital asset, the question of whether such NFT carries inherently the right of copyrights along with the ownership, and time and again, the answer by experts has been that NFTs would not carry copyrights with them. It is essential that the owner of the copyright of an NFT also transfers or licences the copyrights to a buyer or user of said NFT if they intend to use such copyrights of the underlying asset. These NFTs owned by the buyers or licensors are protected under the Copyright Act, meaning the buyer simply cannot abuse the copyrights of the NFT. Any

¹⁸ Fisher, K., 2019. Once Upon a Time in NFT: Blockchain, Copyright, and the Right of First Sale Doctrine. *Cardozo Arts & Ent. LJ*, 37, p.629. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/caelj37§ion=29&casa_token=D8xkuC4U9cwAAAAA:X-SCmCCQbqzhV2XHHyZ6EfO1XfionlYTZY4EXdKjrWI6VNu5S30cwFvpWuG1cpzxuWSU7IR64Wy

¹⁹ Cryptocurrency and Regulation of Official Digital Currency Bill, 2021

unauthorised reproduction or distribution is also protected under S. 14 of the Act.²⁰ The reason NFTs are complicated for the copyright act to impede upon is the fact that NFTs have the ability to form smart contracts in which further sale and distribution can be marked and automatic royalty payments can be made to the original creator of the NFT. Any contravention of the copyright act would definitely attract the provisions and penalties of the act, but it is extremely difficult at the moment to control the block chain technology and NFTs as there is no current mechanism to allow for intrusion.

NFTs are traded on a global network, and the issue of jurisdiction once an NFT has crossed international borders is still at large. There is a dire need for international coherence on the subject of NFTs, their regulation as well as IP protection of each country and its citizens. NFTs may be classified as ‘intangible assets’ under the FEMA (Foreign Exchange Management Act).²¹ If done so, it still poses further complications as this classification of intangible assets requires the location of such assets to be clear. But NFTs are recorded and edited on the global ledger and exist on every system that is part of the block chain regardless of the location. This makes it extremely difficult to associate a location with the NFT. The location of the buyer of NFT may be noted, but NFTs are easily traded on the network, and it would be hard to keep track of such change of hands and location.

DRAWING A COMPARISON WITH THE NFT AND IP LAWS IN USA, UK AND OTHER RELEVANT COUNTRIES

It is important to look at and analyse the legal framework in other countries and how the learnings can be applied to the Indian scenario.

NFTs are part of a public ledger that is internationally spread across borders. It is a barrier for all the nations since block chain technology is practically inevitable. Even in India, with the introduction of the Crypto bill, it is attempting to make all private cryptocurrencies illegal in nature, meaning that NFT technology would also be rendered essentially illegal as the standards followed are currently majorly part of the Ethereum network.

In the UK, the copyright law, Copyright Designs and Patents Act, 1988²² (CDPA) requires in writing any assignment of copyrights by or on behalf of the assignor. To translate and apply

²⁰ Supra note 16.

²¹ The Foreign Exchange Management Act, 1999.

²² Copyright Designs and Patents Act, 1988.

that to NFT, it would mean that, by way of smart contracts, copyrights within an NFT, of the underlying digital asset, may be assigned through the NFT itself. But the law does not explicitly state that this would be counted as the requirements being fulfilled. If the courts interpret that these do not fulfil the requirements of the act, then such assignment of copyrights within an NFT would be nullified.

However, the European commission, which is generally an eager legislator to act as a pioneer for legal change, seems to have exempted, or excluded NFTs from their newest regulation attempt under MiCA (Markets in Crypto Assets Regulation). This new development leads to a gap in regulation and does not solve any legal complications.

The gaps in the legislations regarding Trademarks, and especially Copyrights are very similar to that of India. In India the Crypto bill aims to completely eliminate all private cryptocurrencies, which would essentially make NFTs illegal as well. The budget made all income from crypto assets taxable at a 30% rate. There is clearly ambiguity in the intentions of the government whether to legalise crypto assets and if so, to what extent. Block chain Technology is inevitable. Any attempts made to stop its development will only hamper oneself and moreover, render all block chain activities into the black market which would feed into the ever-burning pit of money-laundering and funding of illegal activities.

In the US, the law relating to NFTs, and copyrights is more established compared to that of Europe and India. Wherein the creator of the Digital asset is the owner of the IP rights attached to it. IP rights, especially copyright, exist independent of that of its NFT. Similar to the selling of any physical copy of almost any type of artwork. Copyright does not automatically transfer with the sale and trade of NFTs. Ownership of copyrights is provided solely to the owner under 17 USC § 106,²³ which provides the right to reproduce, derivate further works, distribution, displaying of the work and also performance of the works. The question posed here as well is whether the minting of an NFT on an existing digital work, can automatically grant the NFT copyright protection as well? Would the owner of such an NFT hold the copyrights of the underlying asset?²⁴

The US law regarding copyrights states that creation of NFT can be categorised as a copy or

²³ 17 USC § 106

²⁴ Guadamuz, A., 2021. The treachery of images: non-fungible tokens and copyright. *Journal Of Intellectual Property Law and Practice*, 16(12), pp.1367-1385. <https://academic.oup.com/jiplp/article-abstract/16/12/1367/6449489>

even a derivative work based upon pre-existing works. Although the NFT does not carry the digital artwork in itself and it is merely a code or hash that exists on a public ledger, this interpretation allows the creators of the digital artwork further protection from illegal distribution, or reproduction- meaning persons who are not the owners of the copyright of a digital asset should not be permitted to mint an NFT of it. In 17 USC § 101²⁵ classifies any work based upon pre-existing works, art reproduction may be recast, transformed, or adopted, as a copy or a derivation of the original work. Under US law, it is only the copyright holder and their licensees (within their scope) who may have the authority to transform any digital artwork into an NFT.

This approach would solve the question of persons other than the creator of the digital work, or the owner of the copyright and the licensee (to a certain limit) minting NFTs. Such NFTs would fall under copyright infringement ab-initio and would count as an illegal reproduction, or derivation of the original digital asset. From this point onwards, it would be easier for the copyright holder to claim infringement upon the illicit NFT minted by such an unauthorised person.

An example to show this mechanism in use would be the case of Larva Labs (one of the most famous NFT creators- they also created the CryptoPunk project which is a 10,000 unique character collection formed into NFTs) submitting their DMCA takedown (Digital Millennium Copyright Act)²⁶ request to the NFT platform foundation for an online display of CryptoPunk NFTs by Ryder Ripps as their own work. The dispute is ongoing; however, the arguments are based on the above notion that NFTs are basically a reproduction or derivation of the original artwork, and any unauthorised copy, including minting an NFT, would amount to infringement of the copyrights of the underlying assets.

SUGGESTIONS TO THE CURRENT LAWS GOVERNING NFTS, BLOCKCHAIN TECHNOLOGY, AND IP RIGHTS AND PROTECTION

This chapter aims to provide suggestions in- The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 and current IP laws such as The Copyright Act, 1957 along with the IT Act, 2000.²⁷

The current direction of the world in general is to wait and watch how the development of

²⁵ Supra Note. § 101.

²⁶ The Digital Millennium Copyright Act of 1998.

²⁷ The Information Technology Act, 2000.

NFTs occurs. The speed at which block chain technology is developing is unprecedented and incomprehensible. Governments of each country have been scrambling to regulate this massive piece of technology that knows no bounds. Block chain technology has many complications and challenges that are new to us. The whole concept of block chain is that it forms a chain of blocks of information through all the network systems that are part of it throughout the world. There is no such thing as geographical limitation for block chain. Naturally, the first issue that pops up is jurisdiction. How will the countries operate and regulate a technology that itself knows no singular location? Purely on the basis of transactions it is to be determined.

When it comes to IP protection, there are international as well as local legislations in place that have sufficed until now. With the advent of Block chain into the world of digital works through NFT, the complications of Copyright and Trademark protection are newly posed. NFTs are mere codes and hashes that refer to another object, whether it be an image, video, or audio. The ownership and trade, buying or selling of NFTs is currently done on Online NFT marketplaces that are part of the block chains. NFTs are unique as they render any image, audio, video created by a person or organisation to be original, unique and authentic. An artist can create a digital art and mint an NFT on that digital art, it would give authenticity and a certificate of ownership of that particular NFT and the underlying art.

The issue always arises when the question of the rights of the underlying assets are concerned. An image whether it is digital or on paper, has inherent rights in it that lie with the creator. The creator of an image has the copyrights on that particular asset. Now that same artist can create an NFT out of the digital asset and bolster his/her rights as it would provide protection against other illicit persons claiming the artwork to be their original work. The same can be misused as well. A person who happens to be in possession of a digital asset that was created by someone else can mint it into an NFT and claim it as their own. The rights of the creator of such asset are infringed. The only resolution to the owner of the copyright of such asset is to file a claim citing infringement and seek either an injunction from further reproducing the asset, derivations, duplicating, or even displaying such asset, and also claim damages for such infringement. This process, however, is very tedious, time consuming and infeasible.

There are several ways in which IP rights protection can be made when it comes to NFTs:

1. Updating Legislations: The current legislations in place around the world have yet to fully recognise the potential of NFTs and the block chain technologies. In India, the

Crypto bill merely discusses a potential ban on all private cryptocurrencies and creation of a digital currency based on the value of rupee. It does not engage into the need for legislation regarding the NFT technology. The budget, which taxes all digital asset gains at 30% rate, is simply an attempt to disincentivize persons from diving into this unregulated and uncertain market.

In the USA, the legislation regarding the copyright can be interpreted to define NFTs of digital works as a mere duplication, distribution, derivative work, or display of the underlying artwork, which makes any unauthorised minting of NFTs violative of the creator's copyrights ab-initio. This approach may work in the short term, however, the growth of NFT in the current world is at a pace unimaginable and it will fall short of implementation when the claims arrive in large numbers.

2. Legalising NFTs, cryptocurrencies and block chain:

The first step in the right direction would be to legalise all ventures of NFTs, cryptocurrencies and any form of block chain technology all across the world. The fear of governments that NFTs, cryptocurrencies and block chain technologies will be misused to launder money and fund illicit and illegal activities, has to pave the way for regulation and legislation. Only by legalisation can the governments benefit from such technology as it provides revenue and reduces money laundering. The legalisation of such technology also means that other legislations connected to it can also benefit from the same. Copyrights and Trademark legislations can only make provisions for NFTs and block chain protection once such technology has been legalised and regulated.

3. Creating an open access NFT library search tool:

Currently Google images can search for images based on predetermined images. This machine learning technology has already been in use and development since a long time and has been reliable. Every video on YouTube goes through a screening process to check if it infringes upon any existing copyright, which is why movies are not available on YouTube to watch freely. Such machine-learned technology can also be developed and used for NFT tracking and searching.

Each NFT that needs to be minted can be screened for similarity to an already existing NFT of digital work, whether it is an image, video or audio and sometimes even plain

simple text. If there is an instance where an unauthorised user is trying to mint an NFT on an existing asset or NFT, such existing NFT owner and its copyright owner can be notified through this automatic screening process and the owner or creator can initiate a takedown process for such infringing NFT.

There needs to be a proactive approach towards regulating NFTs, cryptocurrency and block chain technology. The world cannot hide behind the veil of ignorance anymore. It is high time that governments take steps to ensure the IP rights are protected against this new opportunity to prevent it from getting out of control.
