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Who owns the NFT copyright: Purchaser or creator?

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Abstract
NFT is a term for non-fungible tokens, a digitized asset that can be marketed using blockchain technology. This technology has become a new way to monetize intellectual property in the current scenario. Specifically, concerning copyright, the some NFTs are considered copyrighted works within the meaning of Section 2(y) of the Copyright Act 1957. Accordingly, the NFTs' copyright belongs to the NFT's creator. But as mentioned above, it is used by the blockchain industry; Therefore, each NFT comes with a license that allows the buyer to purchase the copyrights to use the NFT, just as NFTs become trading cards. Most articles on NFT and copyright authors raise the question of whether the right to the digital asset remains with the creator of that asset or whether it passes to the buyer of the NFT. The copyright usually rests with the author, and the NFT owner receives a limited right. Still, there is confusion about rights; Buyers acquire all rights when they purchase an NFT. In such a situation, there needs to be clarity about what a person gets when purchasing an NFT. Therefore, this paper aims to analyze whether buyers acquire rights when they buy an NFT or whether the buyer who purchases an NFT can be considered the copyright owner of the NFT.

Keywords: NFT, copyright, digital, ownership, rights, blockchain

Introduction

In distributed ledgers and cryptocurrencies, the non-fungible token (NFT) has gained prominence and become one of the most important tech stories in 2021. NFT has been an effective medium for producing, selling, and acquiring art in recent years. Due to this development of NFT, conflicts also arise between rival parties who potentially want to make a significant profit from the underlying asset of NFT art. In the current context, the most frequently asked question regarding copyright and NFT is whether the sale of NFT includes any of the exclusive rights provided for in copyright. In many articles, authors mention a controversial issue: whether the sale of NFT by the creator to a third party transfers all copyrights in the NFT to the buyer. In theory, most NFT sales typically do not involve the transfer of copyright. Likewise, the sale of books, music, etc. does not constitute a transfer of copyright in the book or music. In such a context, only the physical form of the thing is sold, not the copyright in it, as in the case of NFT, the particular work of art is sold, does not own the copyright to the NFT. It is obvious that no rights have been transferred. It was, therefore, necessary to analyze why such confusion exists.

NFT and Copyright

The first step in resolving the above confusion is to examine what NFT is and the extent to which it is copyrighted work. As mentioned earlier, NFTs are assets that have been tokenized on a blockchain. And the uniqueness of NFTs is that they have unique identification numbers and information that differentiate them from other tokens. It is a tradable good that can be used for money, but only based on the value that the market and owners place on it. This means that the value of the NFT will fluctuate every time, not only that it is the work that NFTs stand for that gives them value. If the NFT belongs to a rare work, its value is very high, and the seller can achieve a higher price. However, the value of an NFT is ultimately determined by market factors such as demand of the NFT work around the market. As mentioned above, the value is determined based on the work. Therefore, it is very important to know whether all NFTs are copyrightable.

NFT as A Work?

Is NFT a copyrightable work or not can be determined by the definitions. According to World Intellectual of Property Organization (WIPO), Copyright is a term used to describe the rights of creators, over their literary, dramatic or musical work, artistic works, computer programme, cinematograph film, sound recording etc. Copyright work includes books, music, paintings, sculpture, films, computer programs, technical drawings, etc [1]." According to this definition, NFTs cannot be treated as copyrightable work because they are categorized as a copy or derivative of the original work. [2] In other words, NFT is a token that stands in for an underlying asset which is a creative or literary work that is protected by copyrights. Therefore, from the definition mentioned above, it can be said that while looking at NFTs as a whole do not fall under the purview of copyrights, but the underlying assets in with the NFTs created are eligible for copyrights [3]. Similarly, like a content-carrying single, NFT is only a digital asset of the existing work as it merely represents specific works on blockchain technology. Hence, NFT can't classify as original work because it is based upon existing work. That's why NFT is considered as mint as it is creating the digital representation of the Work, essentially tokenization [4]. Therefore, whether NFT is copyrightable is determined through the underlying work in which NFT is created. In practical majority of the NFTs works are represented in the blockchain are digital assets of work such as art, audio, and video, objects in video games, and other forms of creative work, the author of these works actually enjoy copyright protection like the works.

However, not all NFTs are restrained from considering as original copyrighted work; those NFT works, which is an original works of art, where the works were created without using an existing work, may enjoy copyright protection, if they are original works as mentioned in copyright. In such cases, according to section 14 of the Copyright Act, 1957, ownership of the copyright is the exclusive rights of author; even in the case of the existing traditional copyright work, the author of the work has the right to mint the NFT of Work. In practical context especially in digital platform majority of NFT are stolen works and these issues are happing in the normal context as well therefore the illegally reproducing or disseminating copyrighted material, such as computer programs, books, music, and films both in traditional as well as digital context are common issues seen in both contexts.

The copyright over the NFT work is given to the person who creates the original NFT work and the author can further transfer the rights to an individual entity through license or assignment. As in the case of the transfer of rights or even the sale of work, every transfer of rights involves the purchase of a work, but not every purchase of a work consists of a transfer of rights. Because when someone buys an NFT, the buyer actually acquires the metadata in the work, not the copyright associated with the NFT work. For example, in a sale of NFTs, there are two parties: one who owns the copyright and having exclusive economic rights such as right to copying the work and making the work public etc. The other person is who buys the NFTs through purchase he owns ownership over the NFT. However, ownership and authorship of the works on which the NFT is based are distinct from ownership over the NFT gain through purchase. These are two set of ownership or different ownership; for example, buying a physical work of art, means owning the physical copy of the work of art and not the copyright of the book. Similarly owing an NFT, means owning the metadata (owning a unique digital asset) [5] not the copyright existed in the work. This makes clear that there is no difference between owning physical work and digital artworks linked to an NFT. The only differences are in terms of origin, ease of access, market, authenticity, preservation, etc but in terms of law, both are the same. This means the buyer has the same right through the purchase of physical and digital artworks linked to an NFT.

Differences between traditional artwork vs. Digital artwork linked to an NFT

Although right is the same but there are some core differences between these two types of work; first main difference is with regard to the nature of work or creation, i.e. tangible and intangible; when it comes to digital art, ownership does not operate in the same manner as it does with tangible property, such as paintings, where exclusive possession and the right to bar others from obtaining the painting are implied. Owning a cryptographic key to a small computer program on a blockchain that documents the presence and ownership of the connected artwork kept elsewhere and having sole custody of a real work of art is more than simply a semantic difference. [6] This led to the second difference that easy access, compared to physical artwork or traditional art, accessibility of the work is not easy. Still, as in the case of digital artwork, as it is in the digital platform with a finger point, anyone can access the NFT ever sold. When accessibility increases, the chance for appropriation also increases; this, in fact, leads to stolen art, stolen ideas, and a breach of copyright, which blight the NFT space. The third difference is that purchasing an NFT records the buyer as the registered owner of the artwork associated with the NFT on the blockchain. However, this does not ensure that the buyer will receive a copy of the artwork, not even for display reasons. Fourth is market-based differences; due to such distinction, the earning from conventional art is less compared to NFTs. Because due to digital technologies, NFT artists can reach a much larger mass through that huge market benefit can gain from the marketplace. This led to the fifth difference in different marketing tactics that are used to maintain their role in the market, and even these NFTs can potentially transform the creative industry. But as more NFTs increased due to the commercial gain factor, it might decrease the chance of good art. These are the main difference; as mentioned earlier, the right will be the same for both.

Rights

With the purchase of a physical work of art, the buyer gets an exclusive ownership right over the physical possession of the work of art, but the the right to display the physical work of art, the right to resell the physical work of art, and the right to show off, which exist with the author/owner of the work. But there is one exceptional situation that by a valid transaction of sale takes place then the owner of the book in question cannot control or prevent further sale of the book bearing the said rights. Because after the first sale of the work by the copyright owner the right to control copies of their work exhausted [7]. This happened in the normal case, as in case of NFT also if the work is the original work, then the right to control copies of their NFT work will be exhausted after the first sale of the work.

Other than this right by the sale of a work not all the copyright exist in the work will be transfer to the purchaser of the work unless expressly granted separately by the author/owner of the work. Which means the buyer has no right to reproduce or create derivative works from the artwork, by the purchasing of tokenized digital artworks, i.e., NFTs the buyer only has sole ownership over the metadata, in some case the boasting rights, as they are the registered owner of the artwork. Other than there is no right to copy or create derivative works of art unless expressly granted by the author/owner of the digital artworks. Hence in normal context the purchaser of NFT only provide right that granted by the author/owner of the work likewise in normal work situation.

Right of NFT Purchaser

By the purchase of NFT, the purchaser gets a private key known as a cryptographic access tool. As NFT is only a digital replica of an underlying original work, this key enables the user to activate a smart contract [8]. When they wish to sell the NFT, they transfer the private key to the new buyer. Similar to the purchase of physical artwork, like the NFT purchase, the purchaser will have no copyright rights to the works linked to the NFT [9]. The best example is famous paintings being offered for sale as NFT in any blockchain by selling only a digital photograph of the paintings is being sold not the copyright over the painting. This clarified that when you purchase an NFT, you purchase the copyright in that NFT is entirely wrong. The truth is that the copyright is still owned by the author (or artist) itself. Through purchase, it does not grant full ownership over those assets simply because a person owns such NFTs. Still, the purchaser of the NFT may use and display the NFT for non-commercial personal use without possessing the ability to sell or distribute copies of the NFT's material unless there is a written contract between the creator and the purchaser. Thus, it became clear that the question of whether the purchaser who purchases NFT can be considered a copyright owner of the NFT does not seem to be a relevant question or issue to be analyzed. Because when someone buys an NFT related to the content, it does not instantly get the underlying intellectual property rights in the content. In such cases, they only acquire the NFT linked with it [10], which means a digital copy of the work.

The reason behind such confusion is that buyers usually misunderstand the difference between owning an NFT and their rights to reproduce that NFT because of the price tag associated with the uniqueness of the token. Thus, it creates a wrong impression that buying an NFT in such a huge amount purchaser though they own all copyright over the work [11]. This assumption is completely wrong from the beginning; the truth is that one does not get any intellectual property rights over a particular creative work when purchasing the NFT related to that particular creative work [12]. Though it says that they own the ownership of the NFT in digital spaces, but the intellectual property of the underlying NFT theoretically always belongs to the creator. If he never openly transfers intellectual property ownership to other individuals, it will be vested with the author himself. In such situations, the smart contract plays a prominent role because even if the author is the legal owner of the NFT's intellectual property through the smart contract, the author can transfer copyright ownership to the NFT buyer along with the sale of NFT to the new owner [13] *Saregama Ltd v. The New Digital Media & Ors*.2015). When the author in writing mentioned that the author intended to transfer the rights together with selling the buyer the composition of the work, in such case, the transfer of ownership is valid other than the simple purchase of NFT will not amount to transfer of rights. This implies that, in the absence of particular paperwork, the buyer of an NFT gains a right to the NFT alone via that purchase and the right to store the associated media in their token wallet for personal use and to sell it to potential purchasers when necessary [14]. That is why the majority sale of an NFT is always accompanied by a 'smart contract' an agreement between the parties, because the NFTs are sold for massive amounts. Even according to India, the Copyright Act, 1957 Section 19(1) expressly specifies *no copyright assignment in any work shall be valid unless it is in writing signed by the assignor or by his duly authorized agent [15]*. This means if the author of the work agreed to transfer their copyright right to the purchase, it would be valid if the parties have fully executed the license or assignment agreement by granting the buyer either certain rights over the NFT or transfer of all of the copyright rights in the Works [16].Thus, in such cases, according to the contract, it will be determined whether, through the purchase of NFTs, the purchaser acquired any copyright vested in the purchased work. And generally, the question of who legally owns the NFT's copyright is not a perplexing issue as it is clear that the author is the legal owner of the NFT's intellectual property even after its sale.

The Practical Aspect of NFT

In practice, more than ownership issues, the major concern is the originality of the NFT because though NFTs are copyrightable work, in practical terms, 90% of the art on NFTs is derivative or repetitive. And among them, a lot of it is not good, even though there are also stolen arts [17].The primary reason for this is that now NFTs are used mainly for profit, as the Indians are getting interested and expressing interest in investing in or developing their own NFTs as the sector has grown internationally. Presently, there is no established legal structure for NFTs. Hence, even if it is unclear what will happen to NFTs in the future, they may still be held and traded right now. In India, there are several active NFT exchanges that you may use to buy NFTs online. They also provide artists the ability to sell their work as an NFT. Thus, in India, creators are currently looking into the opportunities of setting up their own NFTs. But, in this case, it is becoming more than just a new method of revenue generation by giving fans more specialized access. Some famous NFT creators are Prasad Bhat, Sneha Chakraborty, Khyati Trehan, Laya Mathikshara, etc [18]. All these NFT holders are gaining huge profits, proving that the NFT market is still growing in India.

Dynamics of NFTs and Copyright: A Look at Case Laws, Statutes, and International Issues

As mentioned earlier, grant to use NFTs as digital assets, doesn't necessarily grant copyright ownership of the underlying work. The copyright for the digital asset (image, video, etc.) remains with the creator unless explicitly transferred. Currently, cases relate to NFTs and copyright is not much developed. However, both in the US and UK, there is an important lawsuit on NFT issues. [19] In US in Miramax v. Quentin Tarantino the issue is regarding rights to Pulp Fiction NFTs [20] and in UK, the case Yuga Labs v. Ryder Ripps involving copyright infringement of Bored Ape Yacht Club NFTs [21].

Miramax case highlights the complexities and legal challenges that can arise with the creation and sale of NFTs, especially when they involve copyrighted material. Where Yuga Labs case highlights the ongoing legal challenges and complexities surrounding NFTs, intellectual property rights, and the art world. Both cases made a huge impact in the field of copyright and NFT’s and in comparison, of both cases, it highlights the need for clear guidelines and regulations in this new digital frontier. From article point of view these cases underscore the importance of understanding and respecting intellectual property rights when creating or purchasing NFTs. Creators must ensure they have the rights to the content they are tokenizing, and buyers should be aware of what they are purchasing - which often does not include the underlying copyright.

Regarding statutory protection, as of right now, no particular legislation specifically addresses NFTs and copyright globally. Different countries create their own copyright laws, and NFTs are a relatively recent development. Nonetheless, NFT cases are subject to the current copyright regulations; some pertinent factors to take into account are as follows, National Copyright Laws [22] and International Copyright Treaties [23]. Even in the absence of specific laws as such to regulate these issues, it can be resolved through Smart Contracts, transparent transactions and the specification of the rights transferred between parties can be facilitated by smart contracts. However, smart contracts must be clear, enforceable, and compliant with current laws to effectively handle copyright concerns.

Conclusion

It has become clear that there is a common misconception regarding buyers' rights while purchasing an NFT. By purchasing underlying artworks, you are only acquiring the metadata related to the object, not the work itself. Therefore, unless a smart contract is in place, there is no transfer of rights through the sale of NFTs in which the creator licenses some of its economic rights to the buyer. Furthermore, this smart contract ensures that the buyer owns all the rights and specifies how the buyer can use the NFT as they acquired it, which helps reduce the chances of copyright infringement. Therefore, the idea that when you buy an NFT of a particular creative work, you own the work is wrong from the start. Because when someone buys an NFT, they don't actually own the work; rather, they only own the cryptographic token, which they can only use for personal purposes and not for commercial purposes unless the author of the work has permitted them to do so. This is very similar to buying a painting in an art gallery; In this case, you only get the physical painting, not the copyright. Hence artists need to grasp the intricacies of NFT sales, particularly regarding the rights transferred to buyers. The misconception that purchasing an NFT equates to owning the underlying artwork must be dispelled. Instead, artists must utilize smart contracts to delineate the specific rights granted to buyers, safeguarding their intellectual property and ensuring fair compensation for commercial use.

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