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Copyright Implications on Non-Fungible Tokens

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ABSTRACT

When buying an NFT, one is essentially buying a unique digital certificate that represents ownership of a digital asset, such as a piece of artwork. The NFT contains information about who owns the asset and who sold it, making it easily verifiable. Most NFTs are found on the Ethereum blockchain. However, the NFT itself is not a work of art or a physical asset but simply a link to it with a unique digital signature. Ownership of an NFT is different from ownership of the underlying work, which can be subject to copyright laws. The person minting the NFT must have the legal right to do so, either by being the author of the work, obtaining the copyright, or having specific legal permission to mint the NFT. When buying an NFT, one can either purchase just the metadata or the underlying work and associated rights. It is important to understand what rights come with the NFT before making a purchase.

Keywords: *nft, non-fungible tokens, copyright, smart contracts, blockchain, assignment.*

INTRODUCTION

Let's say there is a budding painter who wants to host an online painting exhibition for all of her digital artworks. There is a concern, though, that the artworks won't be safe because anyone might easily fake or copy them. Non-Fungible Tokens (NFTs), which are reliable and simple to

transfer and will also aid in maintaining ownership rights of the artworks, may be the answer to this issue. By generating a special digital signature that identifies the owner of an asset and can be exchanged for fiat currency, cryptocurrencies, or any other form of money, NFTs make a digital asset unique. They are not interchangeable and each of them represents a unique asset owned by a specific person while on the other hand, fungible tokens are interchangeable and can be divided into smaller units to form the same value, for ex- a \$100 note which can further be exchanged for two notes of \$50. However, the painting of the Mona Lisa cannot be divided or regenerated and even if copied it will not be authentic.

Each NFT contains distinguishable information like who owns the digital asset and who sold it making them distinct and easily verifiable as it is impossible to forge such a certificate. In essence, NFTs produce a blockchain-based digital certificate for any type of digital collectibles, such as music, art, games, etc. An artwork is given a distinct identification by this certificate. NFTs utilise the same underlying technology and programming languages as other cryptocurrencies, including blockchain and ethash or script.

The Ethereum blockchain, a distributed ledger that keeps track of all transactions, is where most NFTs are found. NFT, however, is very distinct from these other cryptocurrencies. Because bitcoin and Ethereum are fungible tokens, you can exchange one for the other and get back the same amount of money or value. However, because NFT is a unique token, attempting to exchange it could result in you holding something entirely different. One must "mint" the NFT if one chooses to make an NFT from the Work. Tokenisation is a procedure through which a digital form of the underlying work is made and this whole procedure is known as the minting of the NFT. To tokenize something, it must first be uploaded to a particular website or marketplace before a token guaranteeing its authenticity is issued. The token ID, a number that is generated when a token is created, is the first fundamental component of an NFT. The contract address, a blockchain address that can be seen anywhere in the globe using a blockchain scanner, is the second fundamental component. Only one token in the world exists with that combination of a token ID and contract address, making the token unique due to the combination of its

components. The drawback to NFTs is that they cannot actually hold an asset but just a link to that asset with a unique digital signature. This is where the confusion begins.

HOW DOES COPYRIGHT APPLY TO NFT?

An NFT is inherently a link to the underlying asset usually via a simple URL. The problem with URLs is that they can and will die. Traditional URLs cause NFTs significant issues. The URL could be changed by the domain holder to point to another website, or they could just forget to pay their hosting subscription and everything goes away. To tackle this problem the underlying work of an NFT is now tied up to an Inter Planetary File system. We now understand that an NFT is a mere representation of a work therefore, an NFT in itself may not be subjected to copyright. According to section 13¹ of the Copyright Act of 1957, “copyright shall subsist throughout India in the following classes of works, that is to say, – (a) original literary, dramatic, musical and artistic works; (b) cinematograph films; and (c) sound recording.” An NFT is not an original or derivative work that is required to come under copyright. However, the represented work in itself can be subjected to copyright. Further, section 14² of the Copyright Act provides for the different rights that the copyright owner enjoys concerning what he can do with the copyrighted piece of work.

According to section 18³, the owner of the copyright in the Works may assign the complete copyright in the Works to a person or entity or may provide the individual or group with a licence in return for particular rights over the Works, such as the capacity to mint NFTs.

To mint an NFT, one needs to be legally permitted to do both reproduction and public communication of the Work. Absent such a privilege, minting an NFT of the Work would be a copyright violation. So, it is clear now that authorship or ownership of the underlying work from which the NFT is derived is different from the actual ownership of the NFT. The ownership of the NFT lies with the individual who mints the NFT therefore the owner of an NFT and the actual work might differ. However, minting an NFT based on a work whose ownership and

¹ Copyright Act 1957, s 13

² Copyright Act 1957, s 14

³ Copyright Act 1957, s 18

right lies with someone else will amount to stealing of work and in turn, will be called copyright infringement. Therefore, the person minting an NFT must have the legal authority to do so, either by being the Work's Author, obtaining the Work's copyright, or obtaining the specific legal authority to mint the NFT.

WHAT DO YOU GET WHEN BUYING NFT?

NFTs are being sold at high prices but there is confusion as to what exactly one gets by buying NFT. What rights does he get along with it? There are two different ways to sell an NFT. First, in cases where the customer just purchases the metadata associated with the Work and not the underlying Work related to the NFT or the associated rights. So, how precisely might the buyer benefit from the NFT? With the purchase of an NFT, the buyer gains ownership of the token as well as the non-exclusive authority to display it in their e-wallet. However, this licence is only valid for personal use; the purchaser is not allowed to use the Works on any website or item that is owned by a third party to commercially exploit this privilege. For instance, the buyer of an NFT may show it in his token wallet but is not allowed to launch his line of clothing, footwear, or other goods for sale. The second type is where the seller of NFT (who also has the rights over the underlying work) while selling the NFT also assigns certain if not all the rights over the underlying work to the buyer. For example, in the case of the popular NFTs by the NBA called 'Top Shots' the sale of such NFTs permit the NFT's owner to "use, copy, and display" the "moment" it captures, but it forbids them from "reproducing, distributing, or otherwise commercializing" the NFT. A sale of NFT is accompanied by a 'smart contract'. The sale of an NFT is always accompanied by a smart contract, which is an agreement between the parties that is stored on the blockchain and is written in code. The blockchain-based digital ledger that houses the NFTs also creates a digital signature and makes it easier to trace the ownership of the NFTs. The NFTs are given legal status and can be sold during a transaction thanks to the smart contract. While it's important to know who owns the NFT, smart contracts occasionally have the disadvantage of being hard to change or standardise. because the parties' preferred terms and conditions cannot always be encoded into the terms and conditions of the sale of the NFT. Smart contracts containing any cryptographic licences for NFTs are not very prevalent.

However, it is customary for sellers of NFTs to establish a set of terms and conditions that apply to any possible purchasers of their NFTs. All parties included within the trade of an NFT listed on a marketplace are subject to the link (which goes along with the NFT) regarding the terms and conditions. For example, an NFT collaboration between the fashion brand Givenchy and the artist Chito has certain terms and conditions;

“Unless expressly permitted in this Agreement or with GIVENCHY’s written consent, You may not:

- *modify the Art associated with the NFT in any way, including, without limitation, the shapes, designs, drawings, attributes, or colour schemes;*
- *use the Art associated with the NFT to advertise, market, or sell any third-party product or service;*
- *use the Art associated with the NFT in connection with images, videos, or other forms of media that depict hatred, intolerance, violence, cruelty, or anything else that could*

reasonably be found to constitute hate speech or otherwise infringe upon the rights of others;

- *use the Art associated with the NFT in movies, videos, or any other forms of media, except to the limited extent that such use is expressly permitted in Section 4.1 above or solely for the Owner’s own personal, non-commercial use;*
- *sell, distribute for commercial gain (including, without limitation, giving away in the hopes of eventual commercial gain), or otherwise commercialize merchandise that includes, contains, or consists of the Art associated with the NFT;*
- *attempt to trademark, copyright, or otherwise acquire additional intellectual property rights in or to the Art associated with the NFT; or*
- *otherwise, utilize the Art associated with the NFT for Your or any third party’s commercial benefit.”*

A smart contract has a wide array of uses in an NFT transaction which can also include a copyright transfer from the seller to the buyer. However, this use of a smart contract to assign copyright is not applicable in India as it is not permissible under section 19(1)⁴ of the Copyright

⁴ Copyright Act 1957, s 19(1)

Act of 1957, which states “No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.”⁵Therefore, there must exist a mutually accepted and executed agreement regarding the assigning and licensing to the new owner of the work for him to legally insure his rights over the work. At any time during the transfer or sale of the NFT, the one who acquires the NFT doesn't automatically acquire the right to abuse the represented work through his desired means which can either be selling or using images of the NFT for business purposes, unless the buyer has acquired the copyright to the NFT through a written agreement from the seller (assuming the seller owns the copyright to the NFT). A typical NFT purchase only grants the owner a few limited rights, such as the freedom to use the item solely for non-profit activities. Even though the majority of NFT transactions only include the transfer of a licence, the NFT owner occasionally qualifies for fantastic benefits like variable incentives on all ensuing sales. But under Section 30⁶ of the Copyright Act, which specifies that licencing of copyright is subject to the same condition, that “The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by licence in [writing by him] or by his duly authorised agent”⁷

CONCLUSION

NFTs are the new hype and the market is in a boom with certain NFTs selling for millions of dollars. Even Indians have hopped on to this trend with many famous names entering the NFT market and launching their lines of NFTs. Amitabh Bachchan has recently sold his NFT collection of poetry, signed posters, etc. for more than Rs. 7 crores. Salman Khan has launched an NFT platform focused on the Bollywood industry called ‘bollycoin’. Music artists like Sonu Nigam are releasing their new songs through NFT. Even these released artistic works by Bollywood celebrities raise an Intellectual Property issue between the artist and the producer or individual or organisation who might have the ownership of the copyright for the work but the artist may sell the same in form of NFT. This comes under the general or basic concepts of IPR.

⁵ Copyright Act 1957 s 19

⁶ Copyright Act 1957, s 30

⁷ *Ibid*

However, the idea of transferring copyright while the sale of NFT is a different issue on the whole. From the above discussion, two things are clear. Firstly, the purchase of NFT does not amount to actual ownership of the underlying asset. As NFTs are a mere representation of a work and don't amount to actual work, therefore, buying an NFT doesn't mean buying the underlying work until not mentioned and agreed upon explicitly by both the buyer and seller. Secondly, again due to the separation of NFT and the underlying work assigning of copyright is not complementary to the sale of NFT. There is a common practice of using smart-contract such rights can also be transferred through a pre-determined and accepted agreement between the parties. However, such smart contracts are not permitted according to the Indian copyright law and instead require a separate written agreement between the party to legally assign the copyright to the new owner of the NFT.