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Non-Fungible Tokens and Copyright Law

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A topic at the edge of intellectual property ("IP") law is the ambiguous relationship between non-fungible tokens ("NFTs") and copyright law. NFTs have been put under the spotlight this year, as several sales of NFTs recorded purchase prices exceeding a million dollars.

Astoundingly, an NFT of a digital artwork, "Everydays: The First 5000 Days" by Beeple, was sold by the famous auction house Christie's for US$69.3 million in March 2021.

It is unclear at this stage whether the popularity of NFTs is merely a "hype" that will fade away or whether NFTs are a genuinely revolutionary product of blockchain technology that could permanently transform businesses, like cryptocurrencies have done.

WHAT ARE NFTs?

An NFT is a cryptographic tool using a suitable blockchain, most commonly Ethereum, to create a unique, non-fungible digital asset. The blockchain keeps an immutable ledger of ownership of the NFT. Each NFT that is "minted," i.e., created, is powered by a smart contract, typically utilizing Ethereum's ERC-721 standard. Each NFT is composed of metadata that makes it unique and not interchangeable (i.e., non-fungible).

The interest in NFTs is that they are used to represent other assets, typically digital assets such as digital artworks, videogames, photos, and videos. In the case of digital assets, an NFT generally contains a link to the asset being represented, which can be stored on a blockchain or off-chain, such as on a website.

The commercial value of an NFT is in its ability to prove ownership and authenticity of the asset which it represents. For example, in the art industry, "provenance" – the history of ownership from the time an art object is created – is very important, especially when the artwork is purported to originate from a famous artist. With the use of NFTs, provenance becomes indisputable.

USE CASES FOR NFTs

Presently, NFTs are most often used to represent digital content. Famously, the founder and CEO of Twitter, Jack Dorsey, sold his first Tweet, which simply read "just setting up my twttr" for US$2.9 million on March 23, 2021. A commonplace argument against the use of NFTs to represent digital artworks is that the works themselves can be easily copied, rendering the unique NFT arguably moot.

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For example, a screenshot can be taken and saved of a digital artwork, or a MP3 file of a song can be easily downloaded and saved on one's computer.

However, proponents of NFTs dismiss this argument, claiming that it misses the fundamental purpose of NFTs: to prove ownership and originality, which are independent of how many copies of an object exist in the world. As stated by cryptocurrency investor Paul Kell, "you can take a picture of [a] picture, but you don't have what's under the picture."

Interestingly, NFTs can also be used to verify the authenticity of physical assets.

For instance, instead of issuing physical certificates, Breitling now issues a "digital passport" which utilizes NFT technology to certify the authenticity of its luxury watches. Similarly, artist Kieren Seymour provides the buyer of his paintings with a digital version of the artwork, which is encoded into an NFT.

OWNERSHIP AND COPYRIGHT IN THE UNDERLYING ASSET

As one might expect, NFTs are not currently addressed in Australian legislation or case law, and this is the case in most (if not all) other jurisdictions. Accordingly, any legal analysis and commentary in respect of NFTs is based on fundamental principles of IP, information technology, and commercial law.

Ownership of the Underlying Asset

Generally, the purchase of an NFT only grants the purchaser ownership of the specific copy or version of the work that the NFT represents. As stated by copyright law expert, Dr. Andres Guadamuz, an NFT is simply "a cryptographically signed receipt that you own a unique version of a work." It is a misconception that purchasing an NFT gives the buyer a proprietary right to every copy or version of the underlying work.

Does the Sale of an NFT Grant Copyright in the Underlying Asset?

This is arguably the most popular question among lawyers in relation to NFTs. The discourse is unanimous on this point:

> Acquiring ownership of an NFT representing a work in which copyright subsists does not, without more, grant the new owner of the NFT copyright in the underlying work.

However, this position can be varied by contract. The smart contract that governs an NFT could specify how proprietary rights, including copyright, are transferred upon sale of the NFT.

Further, or alternatively, standard terms and conditions can apply to the sale of NFTs. For example, the co-founder and lead vocalist of Linkin Park, Mike Shinoda, sells NFTs under the following "NFT Terms," which are located on his website:

> Only limited personal non-commercial use and resale rights in the NFT are granted and you have no right to license, commercially exploit, reproduce, distribute, prepare derivative works, publicly perform, or publicly display the NFT or the music or the artwork therein. All copyright and other rights are reserved and not granted.

Further, or alternatively, a sale of an NFT can be accompanied by a contract for sale, deed of copyright assignment or deed of copyright license, which expressly sets out how copyright is dealt with in the transaction. Presumably, in a valuable sale of an NFT, a formal, written agreement would govern the transaction and clearly stipulate how copyright is dealt with.

"Copyfraud" and Infringement of Copyright and Moral Rights

The minting and sale of NFTs are susceptible to "copyfraud" and infringement of copyright in the underlying work as well as the infringement of the moral rights of the author of the original work. Copyfraud can occur when a person mints an NFT of a public domain work, falsely claiming to own copyright in the underlying asset as an original work.

Similarly, infringement of copyright and moral rights can occur when a person who is not the author or copyright owner in the underlying asset in which copyright subsists, mints an NFT and misrepresents that they are the author or copyright owner of the work. Such conduct is especially problematic in relation to NFTs due to the anonymity features of the blockchain, which make it difficult to verify who is the rightful creator or owner of copyright in the underlying work of an NFT.

LOOKING AHEAD

NFTs are a fascinating product of blockchain technology which presents exciting possibilities. For instance, NFTs could completely democratize industries such as art, real estate, and wine collection, eliminating the need for auction houses to verify authenticity of works as buyers and sellers can deal with each other directly.

However, there are significant hurdles in the way, including the copyright issues and legal grey areas pointed out above. Many commentators have also expressed concerns over the environmental harm caused by NFTs as well as the technical risk that an NFT links to an off-chain digital asset that no longer exists.