The Rise of Non-Fungible Tokens (NFTs) and the Role of Copyright Law - Part II

Rosen Copyright Blog
April 22, 2021

Where Copyright Law meets Blockchain

As noted by the managers of the Part I of this post, NFTs are used in a variety of ways that have potential implications for copyright. From that perspective, they are the latest example of the previous and challenges of blockchain-based systems for this area of law. As noted in a 2021 article by two of us, certain public works or blockchain-based systems creating a quasi-copy of a work of authorship must be considered to have a life of its own. Moreover, the digital artwork or copy thereof is subject to copyright, even if the original authorship has been altered. The Digital Rights Management (DRM) system, when applied to these systems, was presented as an opportunity to reduce market friction and increase both licensing efficiency and the sustainability of creation. However, as noted in that article, many of the old problems remain even in the face of this new technology. It was noted that it would be challenging to apply the current fragmentation of copyright law—a regime for managing territorially subject matter, different types of works, different subject matter, and different regulatory; and copyright or administrative procedures.

The reasons for the enthusiasm and the later disillusionment around the use of blockchain for copyright are related. Blockchain-based systems are great technologies to manage copyright metadata in a scalable and transparent manner. The system can even control an unsecured digital asset. However, the problem of scalability is more fundamental than technological: the system is only useful if the conditions of use are met. This does not even have to be the case in the copyright space.

Copyright Law and NFTs

It is agreed that blockchain-based NFTs present many of the same copyright law questions. Before others, there is already relevant legal analysis of NFTs from a copyright perspective, including a comprehensive survey by Andrew Pergament, as well as a summary by Lucio Alfonso and Jesse Lee, and a more technical overview by Ivan, which, for the purposes of this article, we will not discuss in detail.

In this blog, we are interested in discussing aspects of NFTs that are related to digital assets. We are not concerned with the transfer of ownership of the underlying artwork, or with the exploitation of the artwork itself. Moreover, and as discussed in more detail below, the type of analysis that we are interested in is a sui generis, sui generis
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(c) Ownership, digital exhaustion, and resale

Based on our previous analysis, one central question that arises is whether copyright ownership of the underlying artwork attaches to the NFT. As noted, for the purposes of this article, we assume that the digital object is protected by copyright. As we saw in Part I, the sale of an NFT transfers the ownership, but not the copyright. This is true even if the NFT is itself a copy or derivative of a work. As a result, the ownership of the NFT is not transferable, even if the underlying artwork is.

Due to their technical characteristics, NFTs do not easily match existing concepts of ownership as they relate to digital assets. They are not intended to secure payment of royalties, but rather to provide a secure record of ownership. The question of ownership is thus not the same as the question of the underlying artwork.

First, the sale of an NFT may not be a property transfer in the customary digital context. Indeed, it may be the case that the owner of an NFT is a digital asset, and the owner of an NFT is the person who possesses the NFT. In other words, the issue of ownership is not the same as the question of the underlying artwork with the same type of ownership of the underlying artwork and the same type of ownership of the NFT.

Second, the purchase of an NFT grants the acquiree a limited right to use a digital version of the artwork. The digital version is a copy of the original artwork, and the acquiree has the right to use it. This is true even if the acquiree does not have the right to sell the digital version.

Finally, when an NFT is sold, the metadata is transferred to the new owner. This is true even if the metadata is only a representation of the underlying artwork. In other words, the new owner has the right to use the artwork, but not to sell it.

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In the current highly intermediated environment of NFT minting and distribution, the unique properties of NFTs (i.e., the absence of copies) can make it easier to ensure the authenticity of the artwork. However, potential drawbacks include the risk of misattribution and the loss of control over digital assets. This can create significant challenges for creators, other rights holders, and users if their expectations are not met. In a way, NFTs represent a meta-ownership concept, which relies on code to allow for ownership-like digital expression.

The regulation of choice in the NFT space is not copyright law but code. From this perspective, NFTs are the expression of an underlying system that promises digital scarcity and enables commercial exploitation. The ‘digital life of intellectual properties’ – to paraphrase Coombe (1998) – comes into being through the use of code to represent the rights thereto (Raustiala and Sprigman consider NFTs “as a separate marketplace for a novel digital (metadata) artefact – neither the work nor the copyright to the work is digitalised but a new artefact that promises digital scarcity – NFTs”)

The tokenization of everything, even of intellectual property, is being discussed for blockchain-based technologies in the field of copyright. This is especially true for the copyright in musical works, where NFTs can offer an appealing new remuneration model for creators. However, for the most part, the current NFT hype is for marketing reasons.

Against this backdrop, it is safe to say that tokenizing copyright-related metadata has the potential to improve collective rights management. Interestingly, the press release mentions that the system is “designed… to be able to transfer management rights even if the resale right and royalty do not apply.” It is vector-based so it is safe to say that this entails the rights holder, what type of rights are being sublicensed, and what effects of a right will be on SIAE transfers to represent the member authors or creators to the rights attached to the blockchain NFTs.

Not perhaps the most fundamental question is whether NFTs are useful for granting the type of exclusive rights licenses that collecting societies typically engage with. Past experiences of collecting societies indicated that the characteristics and functioning of distribution technologies were not ideal to address the complex reality of collective rights management. During other issues, existing systems were slow, did not scale well, and their quasi-immutable nature prevented necessary ongoing correction and cleaning of rights. The SIAE/Algorand project aims to develop a system that can help address some of these problems, offers a new value proposition for authors’ remuneration, and is expected to lead to the current NFT hype for marketing reasons.

Concluding remarks

The tokenization of everything, even of intellectual property, may come to represent the core of a new intellectual property system. This is especially true for the copyright in musical works, where NFTs can offer an appealing new remuneration model for creators. However, for the most part, the current NFT hype is for marketing reasons.