

A Primer on NFTs and Intellectual Property

By: Jeremy S. Goldman

Published: March 11, 2021

Advertising watchdog Truthinadvertising.org (otherwise known as [TINA.org](https://www.truthinadvertising.org/)) has [released](#) its five advertising trends to watch out for. Non-Fungible Tokens (NFTs), the latest cryptographic craze, have exploded into the world of media and entertainment, creating new markets and opportunities for artists, musicians, brands, innovators, investors and consumers. As the once obscure technology gains mass appeal and rapidly evolves into a mainstay of popular culture, companies and individuals across the globe are racing to jump aboard the NFT train, exploring whether and how they can leverage NFTs to connect with consumers, extract new value from existing and newly created digital assets, and generate new streams of income.

Over the last several weeks, a diverse group of clients spanning our entertainment, advertising, video game, art law, corporate, privacy and litigation groups have asked us to answer a range of novel intellectual property, consumer protection and other legal questions related to NFTs. The speed, volume, and diversity of NFT-related questions speaks to the scope of the matter and widespread uncertainty regarding the legal status of NFTs.

Like all technological breakthroughs, NFTs carry not just great promise, but the potential for abuse and a host of complex and novel IP, consumer protection and other legal issues. This post provides a quick primer on NFTs, answers some of the big IP questions about NFTs, and flags some of the key issues that we've been tackling in the NFT space.

What is a Non-Fungible Token (NFT)?

An NFT is a unique cryptographic asset linked to an object, typically (at least thus far) a piece of digital art, music, collectable, or in-game item. Think baseball or Pokémon cards for the digital age. But with far greater reach and potential.

Some NFTs, like [this LeBron James dunk](#) and [this adorable CryptoKitty named Dragon](#) (see photo), are trading for millions of dollars. An NFT issued by digital artist [Beeple just sold for a jaw-dropping \\$69M](#). Bidding on the world's first Tweet [has reached \\$2.5M](#). Last week, music group Kings of Leon [dropped an album via NFT](#). Like cryptocurrency (e.g., Bitcoin, Ethereum), NFTs use blockchain technology to record ownership and validate authenticity. Unlike cryptocurrency, each token is unique (*i.e.*, non-fungible). NFTs are bought and sold on various marketplaces like [OpenSea](#) using cryptocurrency.

What is a Blockchain?

A blockchain is a list of records—a ledger—that are linked using cryptography. A key feature of a blockchain is that it is decentralized. Instead of being kept on a single computer system or network managed by a particular organization, a blockchain is

distributed and replicated across multiple computer systems by peer-to-peer networking, rendering its entries, at least in theory, immutable.

The most actively used blockchain, and the one being used for most NFTs, is the “Ethereum” blockchain. However, certain NFTs, like the NBA “moments” at NBA Top Shop, are on a proprietary blockchain.

Could you please give me an analogy so I can better understand this?

Real property is a useful analogy. An NFT is like a deed to a house. A deed is not the house itself, but a record of ownership of the house. In the same token (see what I did there?), an NFT is not the digital asset itself, but an electronic record representing ownership of the asset. That said--and this is an important distinction--owning an NFT does not necessarily mean that you own the asset underlying the NFT.

When you buy a house, you record your deed in an index kept at the county clerk’s office. We trust the clerk to keep accurate records. When you buy an NFT, that transaction is recorded on the blockchain. We trust the blockchain because it is a distributed ledger, its entries are immutable, and there is billions of dollars riding on that immutability.

What do you *own* when you buy an NFT?

When you buy an NFT, you hold the right to claim ownership of the NFT itself and the right to exclude others from claiming ownership of the NFT. Beyond that, it will depend on whatever terms govern the NFT.

As a matter of property law, I would characterize an NFT as intangible or incorporeal personal property – that is, an item that cannot be touched or held but has some level of value assigned to it. Like other personal property, it can, at least in theory, be bought, sold, gifted, bequeathed, mortgaged, used as collateral, and levied.

What *don’t* you own when you buy an NFT?

Absent terms stating otherwise, ownership of an NFT does ***not*** entitle you to ownership of the digital asset, the underlying artwork, or any other object. As discussed below, ownership of an NFT also does not, by default, grant you any rights to the intellectual property of the underlying asset.

Who owns the *copyright* in the underlying work of an NFT?

That’s the million dollar question, right?

The quick answer is the ***author*** initially owns the copyright in their work unless and until they transfer ownership of the copyright to someone else. So, unless the NFT includes a transfer of copyright in the underlying asset—which is ***not*** the case by default, then the author, ***not*** the NFT holder, owns the copyright. Some implications of this are discussed below.

A point of clarification: as a general matter, the NFT itself will likely ***not*** be protected by copyright. NFTs typically comprise a ledger or record of ownership and a link to an

underlying asset. I am skeptical that this data suffices to constitute an “original work of authorship” to qualify for copyright protection. That said, so-called “on chain” assets—NFTs that embed the underlying asset itself—may qualify.

Who is the *author* of a digital asset connected to an NFT?

If you are talking about an individual who independently creates a piece of digital artwork or music, the answer is straightforward: the individual is the author.

The answer quickly becomes less simple when dealing with other scenarios, such as works created through the contributions of multiple people, works created by employees or commissioned artists, works derived from other works, and works created with the assistance of artificial intelligence or other technology developed by others. These are some of the thorny issues we have had to sort through with our clients.

A key point to keep in mind is that the author remains the author forever. The copyright owner may change, but the author is always the author. This is important because certain rights, like the right to terminate copyright transfers after a certain length of time, and moral rights, belong to the author and cannot be waived.

Can the author of a work underlying an NFT transfer copyright ownership?

Of course, though the mechanics may be tricky given the blockchain context. As mentioned, copyright ownership initially vests in the work’s author. The author is free to transfer ownership of the copyright, but to do so, the transfer must be in writing and signed by the copyright owner. Until that happens, the author retains the copyright. The same rules apply to subsequent copyright owners. How to implement copyright’s “signed writing” requirement in the context of the blockchain--with digital wallets and absolute anonymity--is a wonderful question.

Can the NFT owner acquire the copyright in, or a license to use, the underlying work?

Absolutely, though again, the mechanics may be tricky. The copyright owner is free to transfer their entire copyright in a work to an NFT holder. The scenario we expect to see more frequently, however, is for the copyright owner to grant the NFT owner a **license** to make certain uses of the work. Copyright is often described as a bundle of “exclusive rights” that the copyright owner is free to break up and grant to others as they please. There is nothing preventing a copyright owner from exercising that power through the mechanism of an NFT. Likewise, an NFT issuer may wish to restrict certain uses -- for example, prohibiting unsavory uses for brand protection.

What uses can NFT owners make of “their” digital assets?

That depends on the terms governing the NFT, which vary wildly. For example, the [NBA Top Shot license](#) grants the owner of a “moment” a non-exclusive license “to use, copy, and display” the moment solely for “personal, non-commercial use,” “as part of a marketplace,” or “as part of a third party website or application that permits the inclusion” of the moment. On the other hand, the [CryptoKitties license](#) allows NFT owners to make

commercial use of their kitties as long as the use does not result in earning more than \$100,000 in gross revenue each year.

Determining the scope of rights that will accompany an NFT requires a lot of careful thought incorporating an overall IP strategy.

What are some other IP and legal issues raised by NFTs?

So many! Here are some key ones:

How can NFT platforms, issuers and IP owners limit their liability?

What rights and remedies does a creator have if their work is tokenized without their permission?

How can platforms, issuers, and IP owners enforce their rights and remedies against NFT owners in violation of license terms and contractual restrictions?

Does a licensee of an existing work need to go back to the licensor to acquire additional or different rights to create an NFT in connection with the work, or does the existing license cover the use?

How do you clearly and conspicuously "attach" terms and conditions to an NFT and ensure that those terms follow the NFT and bind subsequent owners?

What right of publicity and SAG (Screen Actors Guild) issues are triggered by the tokenization of an asset that includes an individual's image, likeness, voice, or performance?

How do moral rights impact NFTs in the U.S. and abroad? Does the Visual Artists Rights Act (VARA) apply, or should it?

What rights and remedies does an NFT owner have, and against whom, if the underlying asset disappears or changes?

How does the first sale doctrine (17 U.S.C. § 109) operate in the world of NFTs?

When ownership of an NFT is transferred, do the rights and privileges of the original NFT owner persist, disappear, or something in between?

How do you design NFT projects to comply with existing laws and regulations, such as auction laws, tax laws, securities regulations, anti-money laundering statutes?

What are implications of the unauthorized tokenization of trademarked goods and services?

How do copyright terminations work in a world of NFTs that is designed to last for eternity?

* * *

{ Like all technological breakthroughs, NFTs carry not just great promise, but the potential for abuse and a host of complex and novel IP, consumer protection and other legal issues.

