

NFTs And Copyright Quandary

by Adarsh Vijayakumaran*

Abstract: NFTs have garnered massive investor attention in the last few years. While the technology is still at its nascent stage, the massive price pump for major NFTs such as Dragon kitty, Shatner's digital cards, etc. show that NFTs are going to be with us for a very long time along with other blockchain innovations. The present article focuses on the right to create NFT as part of the statutory bundle of rights provided under the Copyright Act. The article discusses the copyright jurisprudence through historical lenses to exhibit that the copyright law has always been in a state of constant evolution encompassing wide variety of technological innovation on one hand

and protecting the rights of the creators on the other. The article addresses questions such as if NFTs can be copyrighted, whether creation of an NFT without authorization amounts to copyright infringement, whether there exists a right to create an NFT among others. Finally, the article concludes the discussion by suggesting various ways in which the NFTs can be availed without the hullabaloo of copyright infringement by introduction of delimitation of rights and liabilities clauses within smart contracts, and by recognizing the right to create NFT as part of the copyright framework.

Keywords: NFTs; Copyright; Tokens; Blockchain

© 2021 Adarsh Vijayakumaran

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Adarsh Vijayakumaran, NFTs And Copyright Quandary, 12 (2021) JIPITEC 402 para 1

A. Introduction

1 Non-fungible tokens (NFTs) have recently generated an unparalleled level of mainstream interest in blockchain technology with a weekly trading volume of \$8.2 million.¹ NFT is a unit of data on a dig-

ital ledger called a blockchain.² Each NFT represents a unique digital item, and thus they are not interchangeable.³ NFTs can represent digital files such as art, audio, videos, items in video games and other forms of creative work.⁴ The idea behind NFT is that, while anyone can read the article or view the tweet, NFTs would give the owner a representation

* The Author is a B.A.LLB (Hons.) student at the National University of Advanced Legal Studies, Kerala, India. He wishes to thank Adv. Ashwini Sharma, Founding Partner, Maadhyam Law Associates for encouraging him to write on NFTs.

1 Lawrence Wintermeyer, *Non-Fungible-Token Market Booms As Big Names Join Crypto's Newest Craze*, FORBES (Feb. 12, 2021, 8:00AM), <https://www.forbes.com/sites/lawrencewintermeyer/2021/02/12/non-fungible-token-market-booms-as-big-names-join-cryptos-newest-craze/?sh=2c7b3cab460a>.

2 Adarsh Menon, *NFTs Explained: What they are, how they work, and their future*, GITCONNECTED (Apr. 03, 2021), <https://levelup.gitconnected.com/nfts-explained-what-they-are-how-they-work-and-their-future-8808937d92b3>.

3 Edd Pritchard, *NFTs represent unique digital content that are not interchangeable*, CANTONREP (Mar. 24, 2021), <https://www.cantonrep.com/story/news/2021/03/24/non-fungible-nft-token-digital-ownership-certificates/6987626002/>

4 *Id.*

of “ownership” in that work.⁵ However, the empirical constraint of owning an NFT is different from the traditional ownership of assets. This is because owning an NFT by itself doesn’t grant the right to print or distribute the work without the copyright holder’s permission.⁶ The situation becomes even worse when an unauthorized person makes an NFT without the copyright holder’s permission. This article will trace the need to create a suitable framework under India’s current copyright law in regulating the unauthorized creation of NFTs and the rising need to recognize the right to create NFT as part of the statutory bundle of rights under section 14 of the Copyright Act 1957.

- 2 In order to do that, the authors in Part B of this paper will provide a primer on Blockchain and NFTs and in Part C will study the challenges associated with NFT for both the buyer and the copyright holder. Part D of this paper will provide an overview of the concept of ownership and copyright jurisprudence while Part E will analyze NFTs *vis a vis* Copyright Act, 1957. This part will discuss the difference between ownership of a ‘work of copyright’ as against ownership of an ‘NFT’, and whether NFTs can be copyrighted as well as who can legally create an NFT. Part F of this paper will explore the right to create an NFT as part of the statutory bundle of rights under section 14 of the Copyright Act. Part G of this paper will provide a way ahead as to how law should balance the interest of various stakeholders to come to a middle ground. Part H will conclude this discussion.

B. Blockchain & NFTs?

- 3 Blockchain is a novel data structure of storing information on a computer by synchronizing data over multiple nodes.⁷ It is a unique facility of the distributed ledger technology (DLT), where the transactions are grouped in a block, and each new block includes a hash of the previous one, chaining them

together.⁸ This shared record of transactions serves as a single point of truth agreed by the network participants’ consensus.⁹

- 4 However certain the technology behind blockchain is, it is equally uncertain who its original inventor was. The technology of blockchain is linked very much to Bitcoin that has gained traction over the years. The inventor of Bitcoin blockchain, Satoshi Nakamoto, is believed to be an anonymous individual or group that, through their nine-page bitcoin white paper in 2008, introduced a decentralized, free to use value-transfer system.¹⁰
- 5 Whenever a transaction is created in a blockchain network, a pre-fixed amount of crypto tokens will move from the sender’s address to the receiver’s address.¹¹ Crypto tokens, or crypto assets, are special kinds of virtual currency tokens that reside on their underlying blockchains and represent an asset or utility.¹² While blockchain facilitates the transactions, it is these crypto tokens that are actually transferred.¹³

I. Smart Contract

- 6 Smart contract takes an important role in a discussion about blockchain. Unlike the Bitcoin blockchain, which was developed primarily to record Bitcoin transfers, Ethereum was developed to both enable the transfer of Ether, its native cryptocurrency, and include a self-executing software programming language, facilitated by the brain-child of Nick Szabo, the smart contract.¹⁴ The trend was followed by

5 Kayleigh Barber, *What is an NFT?*, DIGIDAY (Mar.11, 2021), <https://digiday.com/media/wtf-is-an-nft/>

6 See Jonathan Bailey, *NFTs and Copyright*, PLAGIARISM TODAY (Mar. 16, 2021), <https://www.plagiarismtoday.com/2021/03/16/nfts-and-copyright/#:~:text=Other%20than%20purchasing%20the%20token,without%20the%20copyright%20holder%27s%20permission.&text=It%20confers%20to%20you%20no,more%20unique%20connection%20to%20it.>

7 See Adarsh Vijayakumaran, *Legally Blocked: Evolution and legality of smart contracts*. S. RAIZADA ET. AL., *ADVANCEMENT IN LEGAL RESEARCH: TRANSDISCIPLINARY AND INNOVATIVE DIMENSION*, 231 (2019).

8 *See id.*

9 *See id.*

10 See Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN (last visited Mar. 21, 2021), <https://bitcoin.org/bitcoin.pdf>.

11 See *What is a Blockchain Token? Intro to Cryptographic Tokens*, BLOCKCHAIN HUB (last visited Mar. 11, 2021), <https://blockchainhub.net/tokens/>.

12 *See id.*

13 See generally Marco Iansiti & Karim R. Lakhani, *The Truth About Blockchain*, HARVARD BUSINESS REVIEW (last visited Apr. 02, 2021), <https://hbr.org/2017/01/the-truth-about-blockchain>.

14 Stuart D. Lev & Alex B. Lipton, *An Introduction to Smart contracts and their Potential and Inherent Limitations*, Harvard Law School Forum on Corporate Governance (May 26, 2018), <https://corpgov.law.harvard.edu/2018/05/26/an-intro->

other blockchain engineers making smart contracts an important part of their specific blockchain.

- 7 These smart contracts are a set of promises, including protocols within which the parties perform on the other promises.¹⁵ These protocols are usually implemented with programs on a computer network, or in other forms of digital electronics, thus these contracts are “smarter” than their paper-based ancestors.¹⁶ For example the underlying blockchain in Inmusik enables the validation of the ownership of a song through a transparent tagging system.¹⁷ Because of which, the party who creates the track gets their portion of fees allocated from the royalties.¹⁸ Similarly, the smart contracts associated in NFTs are used to implement various arrangements of their underlying code.

II. Fungibility

- 8 An important characteristic of a crypto token is its fungibility. Fungibility determines whether or not items of the same or similar type are exchangeable and of equal value when transferred or utilized.¹⁹ Each crypto tokens for this purpose uses its own standard of tokens. While ERC-20 is the final token standard for fungible third party identical tokens recorded on the Ethereum blockchain, ERC-721, ERC-1155 etc., is the finalized coding standard interface for non-fungible tokens in the Ethereum chain.²⁰ Similarly, different blockchain tokens use different standards.²¹

duction-to-smart-contracts-and-their-potential-and-inherent-limitations/.

- 15 See Adarsh Vijayakumaran, *supra* note 7.
- 16 See Adarsh Vijayakumaran, *supra* note 7.
- 17 See Sam Daley, *17 Blockchain Music Companies You Should Know*, BULLET IN (Mar. 16, 2019), <https://builtin.com/blockchain/blockchain-music-innovation-examples>.
- 18 See *id.*
- 19 Tony M. Evans, *Cryptokitties, Cryptography, and Copyright: Non fungible Digital Creativity on the Blockchain*, Copyright Symposium, 12 (last visited Apr. 15, 2021), https://copyrightsymposium.byu.edu/papers/CryptoKitties_Cryptography_and_Copyright.pdf.
- 20 See *id.*; See also *How to deploy an NFT token*, TOMO CHAIN DOCS (last visited Apr. 5, 2021), <https://docs.tomochain.com/developer-guide/tutorials/how-to-deploy-a-nft-token>.
- 21 See *id.*

III. Non-Fungible Tokens (NFT)

- 9 NFT represents a data unit in a blockchain ledger where each NFT represents a unique digital item that is not interchangeable.²² NFTs can be used to represent digital files such as art, audio items, video items, tweets and even a video game-based avatar.²³ While digital files are easily reproducible in multiple numbers, NFTs representing them are traced on their underlying blockchain, providing buyers with proof of ownership.²⁴
- 10 NFTs are very much similar to other cryptographic tokens such as Namecoin and DOGE Coin. However, unlike these creatures of fungibility where each coin can be exchanged with another, NFTs most often represent the ownership of the NFT itself and sometimes even the underlying assets and even the copyright. Nevertheless, the value of each NFT is unique and is determined by the end buyer.
- 11 Usually, an NFT is created by uploading a file, such as an artwork, to an NFT auction market which creates a copy of the file recorded on the digital ledger as an NFT that can be bought with cryptocurrency and resold.²⁵ Although an artist can sell an NFT representing a work, the artist is not proscribed from retaining the copyright to the work and creating more NFTs.²⁶ Therefore, it doesn't necessarily mean that a buyer of the NFT gains exclusive access to the work or gains possession of the “original” digital file. Moreover, the person who uploads work as an NFT does not have to prove that they are the original artists leading to NFTs often being uploaded without the original creator's permission.²⁷

22 See Edd Pritchard, *supra* note 3.

23 Ryan Browne, *NFTs: Why crypto art and sports collectibles are suddenly so popular*, CNBC (Feb. 25, 2021), <https://www.cnbc.com/2021/02/25/nfts-why-digital-art-and-sports-collectibles-are-suddenly-so-popular.html>.

24 See Kayleigh Barber, *supra* note 5.

25 See *NFT Shop*, CHIPPR ROBOTICS (last visited Apr. 17, 2021), <https://www.chipprbots.com/projects/nft-shop/>.

26 See generally Kal Raustiala & Christopher Jon Springman, *NFTs might not solve the digital art authenticity problem* (Apr. 14, 2021), <http://slate.com/technology/2021/04/nfts-digital-art-authenticity-problem.html>

27 See Dan Gross, *Non-fungible tokens: What they are and why artists are upset about work being 'tokenized'*, RochesterFirst (Mar. 10, 2021), <https://www.rochesterfirst.com/news/digital-exclusives/non-fungible-tokens-what-are-they-and-why-are-artists-upset-about-their-work-being-tokenized/>

12 Nevertheless, NFTs have gained traction over time. With the gratefulness of blockchain technology, gamers and collectors can now become the immutable owners of in-game items and other unique assets and make money from them. In some cases, players can create and monetize structures like casinos and theme parks in virtual worlds, such as the Sandbox and Decentraland.²⁸ Then, there are crypto millionaires like William Shatner, who issued 90,000-star trek based digital cards on the WAX blockchain showcasing various images of himself. Each of these cards which were initially sold for approximately \$1, now provides Shatner with passive royalty income every time one is resold.²⁹ There are also cases such as the famous dragon crypto kitty valued at 600 ETH and an Axie named Angel from the NFT-based game Axie Infinity sold for 300 ETH.³⁰ No matter what an asset entails, NFT markets are often filled with crypto connoisseurs who see value where the naked eyes fail.

C. Challenge with NFTs

13 NFTs are today exploding with popularity which begs the question: how do they fit into the existing frameworks that govern the finance, technology, and cryptocurrency industries? Since NFTs are non-fungible and unsuitable for trading on cryptocurrency exchange platforms such as Binance or Coin DCX, it is unrealistic to treat NFTs like a normal “commodity” or even a “security” (subject to the underlying contracts). And while there are specific laws that govern the behavior of the underlying artifact that NFT represents, the current global framework is unclear in understanding what rules should govern the NFT as a whole. As it turns out, although most NFTs are digital representations in web 3.0 they are, in reality, nothing but representations of an off-chain asset. Hence, with little surprise, many of the challenges associated with off-chain assets are directly or indirectly relevant to NFTs as well.

14 The distinction between the token and the digital object to which it binds is crucial in understanding the challenges associated with NFT. In the case of most fungible crypto assets, the ownership of private key vests with the person, the ownership of assets like BTC, ETH, etc as well.³¹ However, coming to the case of an NFT, the ownership of a token may or may not mean you own the digital object to which the token maps. This is because blockchains use a hash function to establish uniqueness, but a JPEG file and its copy both produce the same hash.³² This problem was reduced drastically with the introduction of “issue systems” that allow information to be retrieved based on its content rather than location, e.g. a decentralized network like InterPlanetary File System (IPFS) solves this problem by allowing an NFT to bind with an IPFS URL such that you own the resource but the copy of the JPEG is a different resource.³³

15 However, the challenges associated with NFTs become huge when multiple non-fungible tokens can be mapped to the same underlying digital file, IPFS URL or different copies of the same digital file.³⁴ This means on-chain ownership is not sufficient for off-chain objects unless the legal framework governing an NFT owner’s rights respects and enforces these rights in the off-chain world. For example, say A has copyright ownership over an Art K, and A decided to sell the NFT of it to B. Since the asked price was too high, B decided to link an NFT within a different blockchain to this asset without A’s authorization and sold it to C. Now, since B has sold only an NFT linked to this asset, can A claim that his Copyright has been infringed? Can there be even a right to create an NFT under Copyright Law? And what happens if the artist them/itself makes different NFTs of the same asset and sells it to other buyers at various points in time? What rights do the buyers have in this scenario?

16 The above questions essentially point to the question: what does a person get when they buy an NFT? The answer to these questions depends on what an NFT marketplace will do to honor and enforce an NFT

28 *The World Of NFT: Non Fungible Token*, SOLULAB (last visited Apr. 20, 2021), <https://www.solulab.com/the-world-of-nft/#:~:text=Players%20can%20also%20create%20and,currency%2C%20on%20a%20secondary%20market>.

29 See William Shatner, *Makes History on the WAX Blockchain!*, GLOBAL NEWSWIRE (last visited Apr. 02, 2021), <https://www.globenewswire.com/news-release/2020/07/31/2071168/0/en/William-Shatner-Makes-History-on-the-WAX-Blockchain.html>.

30 Ollie Leech, *What Are NFTs and How Do They Work?*, CoinDesk (last visited Mar. 23, 2021), <https://www.coindesk.com/what-are-nfts>.

31 See generally Public Keys and Private Keys: How they work with Encryption, COMODO (last visited Apr. 17, 2021), <https://www.comodo.com/resources/small-business/digital-certificates2.php>.

32 See Ajit Tripathi, *NFTs can Bring the real world on chain*, CoinDesk (Mar. 17, 2021), <https://www.coindesk.com/nfts-can-bring-the-real-world-on-chain>.

33 See *id.*

34 See generally *NFTs explained: daylight robbery on the blockchain*, Malwarebytes Labs (Mar. 19, 2021), <https://blog.malwarebytes.com/explained/2021/03/nfts-explained-daylight-robbery-on-the-blockchain/>.

owner and the copyright holder's rights.³⁵ In the absence of specific laws regulating the NFT and NFT marketplace such a voyage is unintelligible. However precarious it seems, the issues associated with the NFTs can be resolved adequately by understanding ownership, intellectual property jurisprudence and the technology itself.

D. Understanding Copyright

17 “Thou shalt not steal” is an axiomatic underpinning for both law and morality of all societies.³⁶ The concept of ownership that has caused many perplexities to the jurists’ worldwide stems from this moral and legal norm of not infringing someone else’s right.³⁷ In fact, our law has never known any other meaning for a title or ownership to a property than a relatively better right to possess, which of course means a better right to enjoy through such control without someone else stealing it away. For example, Austin pointed out a century ago the variable meaning of “ownership”, as involving (a) indefinite and exclusive liberties of user-protected (b) by the right to exclude others from participation therein, and (should they oust the owner) by the right (c) to recapture the thing which is the object of ownership-plus (d) indefinite duration of such liberties of the user.³⁸ While this definition manifestly assumes ownership of real property, a person’s rights to possessing intellectual property such as copyright are not much different. These physical controls of all the varieties and the absolute ability to exclude others are the central aspects of the possessory interest in any property.³⁹

18 Initially, the debate was if there should be an ownership to protect an incorporeal body? For example, Justice Thompson in 1834 raised the criticism on copyright protection by explaining that “it is a well-established maxim, that nothing can be an object of property which has not a corporal

substance.”⁴⁰ Yeates captures this essence and articulated that the whole existence [of Copyright] is in the mind alone, incapable of any other modes of acquisition or enjoyment than by mental possession. Indeed, no tort can affect them; no fraud or violence diminish or damage them.⁴¹

19 However, modern copyright law has completely disregarded the above arguments. The earliest recorded historical case law on copyright ownership descends from Ireland in the 6th century A.D., wherein a dispute arose over the granting of copyright protection over a “vulgate” which was manually copied by St. Columba—a monk.⁴² While delivering the judgment, the high king Diarmait noted that just like “to every cow belongs her calf, therefore to every book belongs its copy.”⁴³ Judge Posner also introduced a similar analogy wherein he said the need to prevent non-owners from exploiting the property’s value is closely aligned with that of farmers’ need to protect their crops from being stolen.⁴⁴

Statutory Recognition

20 The origin of statutory recognition of copyright law in most European countries stems from the church’s and government’s effort to regulate and control printers’ output.⁴⁵ While the government and church supported the dissemination of government information and bibles among the common folks, dissent and criticism also circulated rapidly with printers’ coming.⁴⁶ As a result, governments established controls over printers across Europe, requiring them to have official licences to trade and produce books as well as the exclusive right to print particular works for a fixed period of years, and preventing others from printing the same work during that period.⁴⁷

35 See generally Ajit Tripathi *supra* note 32.

36 See Jon M. Garon, *Normative Copyright: A conceptual Framework for Copyright Philosophy and Ethic*, 88(5) CORNELL LAW REVIEW 1280, 128-1281 (2003).

37 See generally Igor Chiroasca, *The Work of Fine-Art - A Source of Potential Conflicts between the Author and the Owner of the Material Support of the Work*, 2009 ROM. J. INTELL. PROP. L. 28 (2009).

38 See FRANCIS SAMUEL PHILBRICK, *PROPERTY* 105-250 (P. F. Collier & Son 1939).

39 Thomas W Merrill, *Property And The Right To Exclude*, 77(4) NEBRASKA LAW REV 730, 730-35 (1998).

40 See Jon M. Garon *supra* note 36, at 1287.

41 See Jon M. Garon *supra* note 36, at 1287.

42 See Ruth Suehle, *The story of St. Columba: A modern copyright battle in sixth century Ireland*, OpenSource (Jun. 09, 2011), <https://opensource.com/law/11/6/story-st-columba-modern-copyright-battle-sixth-century-ireland>,

43 See *Id.*

44 See Jon M. Garon *supra* note 36, at 1286.

45 See BENEDICT ATKINSON & BRIAN FITZGERALD, *A SHOT HISTORY OF COPYRIGHT: THE GENIE OF INFORMATION* 16-22 (SPRINGER 2014).

46 See *id.*

47 See *id.*

- 21 In 1710 in the U.K. Parliament, the Statute of Anne was enabled to encourage “learning by vesting the copies of printed books in the authors or purchasers of such copies.”⁴⁸ Though the coming of the Statute of Anne marked a historical moment in the development of copyright, the debates ranged when the statutory protection of 14 years of copyright under the Statute of Anne began to expire.⁴⁹ To defend their dominant position, the booksellers shifted to common law and sought injunctions for works by authors that fell outside the Statute of Anne’s protection.⁵⁰ The debate was finally settled in 1774 where it was decided by the House of Lords that the author had the sole right of printing and publishing his book, but that once a book was published, the rights in it were exclusively regulated by the Statute—a classic case of *generalia specialibus non derogant*. Nevertheless, the comings of Copyright Act, 1911 considerably extended the earlier time slab to life and 50 years—a handsome victory for most booksellers.⁵¹
- 22 The first copyright law of India was enacted by the British colony in 1847 as an imitation of the English Law.⁵² Later it was replaced by the Copyright Act of 1914.⁵³ While India’s Constitution does not make an explicit remark on intellectual protection, Article 300A of the Indian Constitution prevents deprivation of property from persons except under the authority of law.⁵⁴ Today, the Copyright Protection Act, 1957 (as amended in 2012) governs the copyright framework in India.⁵⁵ It designates the owners with the rights of reproduction, communication to the public, adaptation and translation of their work.⁵⁶ The Copyright law grants protection to literary, dramatic, musical and artistic work.⁵⁷
- 23 Regardless of a variety of laws that govern copyright protection in different jurisdictions, the philosophical rationale for granting such protection has remained consistent. The copyright ownership rationale relies on the three prongs: economic interest, moral interest and natural rights interest with some slight variations. The economic interest propounds an incentive-based approach where the creator is rewarded through protection for his making for the creation he has made of public value.⁵⁸ The moral right ascribes a moral consideration of protection for one’s making as it is morally right to give such a grant for the labour he has done.⁵⁹ The natural interest that goes side by side with moral interest hinges that every person has a property right to their intellectual labour.⁶⁰ Justification of copyrights in lines of these interests is approximated as either deontological or consequentialist.⁶¹ No matter what the creation is, if one was/should be given protection under the copyright jurisprudence, they necessarily pass through these philosophical rationales. This is the reason that every product in literary, scientific and artistic domains that were not previously classified as copyrightable are protected despite the form of its expression. The vesting of copyright ownership under this jurisprudence aims to mitigate the creation from being violated through different means.

48 See JANE C. GINSBURG, INTELLECTUAL PROPERTY STORIES (FOUNDATION PRESS 2006).

49 See *Id.*

50 See ROGER PARRY, ASCENT OF MEDIA FROM GILGAMESH TO GOOGLE VIA GUTTENBERG 5-102 (Nicholas Brealey Publishing 2011),

51 See J. A. L Sterling, Crown Copyright in the United Kingdom and other Commonwealth countries, LEXUM (Last accessed Apr. 11, 2021), <https://lexum.com/conf/dac/en/sterling/sterling.html>.

52 Upendra Baxi, Copyright Law and Justice in India, 28(4) JOURNAL OF THE INDIAN LAW INSTITUTE 497, 497-540 (1986).

53 See *id.*

54 IND. CONST. art. 300A.

55 See *The Copyright Act 1957*, Copyright, (last access Apr. 02, 2021), <https://copyright.gov.in/documents/copyright-rules1957.pdf>.

56 See *id* §14.

57 See *id* §14.

58 See William Landes & Richard A. Posner, An economic analysis of Copyright Law, An Economic Analysis of Copyright Law, Cyber Harvard (Last accessed Apr. 05, 2021), <https://cyber.harvard.edu/IPCoop/89land1.html>.

59 See Betsy Rosenblatt, Moral Rights Basics, Cyber Harvard (Last accessed Apr. 05, 2021), <https://cyber.harvard.edu/property/library/moralprimer.html>.

60 See *Basic Notions of Copyright And Related Rights*, WIPO (last accessed Apr. 2, 2021), https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/basic_notions.pdf.

61 See Robert P. Merges, *The Philosophical Foundations of IP Law: The Law and Economics Paradigm* (UC Berkely Public Law Research Paper No.2920713), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920713#.

E. NFT vis a vis The Copyright Act, 1957

- 24 The copyright jurisprudence has always been in a state of constant evolution. The Act has been amended in 1983, 1984, 1985, 1991, 1992, 1994, 1999 and 2012 to meet various national and international requirements.⁶² It is interesting to note that every time an amendment happens in the Copyright Act, it connotes that the law has encompassed novel inputs within its ambit to recognize the rights of a copyright owner, which again is viewed through the lens of natural interest, moral interest and economic interest of the creator.⁶³ Nevertheless, more than conferring certain rights on creators that flow historically through the lens of copyright philosophies, the primary reason the law has accepted the rights of owners of their work as against any external infringement has been to stimulate activity and progress in the arts for the intellectual enrichment of the public.⁶⁴
- 25 As per section 2(y) of the Copyright Act, a work in which copyright subsists includes literary, dramatic, musical and art works.⁶⁵ This consists of both sound recordings as well as cinematography.⁶⁶ The question of copyright is of utmost relevance in NFTs as they are nothing but blockchain engraved literary, musical or art work.⁶⁷ While owning an NFT does not by itself confers the owner of an NFT with the ownership of the artwork or even the copyright of

that work, the question, if there is a right to create an NFT, is important since NFTs are of utmost economic value, and are “unique” meaning, there can only be one NFT of a particular artifact created in a specific blockchain.

- 26 Section 14 of the Copyright Act confers the creators of copyrighted work to do or authorize the doing of reproduction, communication, adaptation and translation of the work.⁶⁸ The tricky part is whether the rights available to the owners under section 14 of the Copyright Act confers the copyright owner with the creation of an NFT as well? More importantly, should the creation of an NFT be viewed separately from its underlying creative work? Furthermore, can there be a right to create separate NFTs for the same artwork? These questions that first arose in part C of the article will be addressed here. This part of the article must be read with part B of this article, where an extensive discussion has been made on NFTs. Nevertheless, the process of making an NFT is reemphasized in this section for easier comprehension.

I. Ownership of a ‘work of copyright’ vs. ownership of an ‘NFT’

- 27 The ownership of NFT as a unique token against ownership of content that the NFT is linked with requires a clear distinction. Various buyers and crypto enthusiasts worldwide often perceive that you own the work once you buy an NFT of a particular creative work.⁶⁹ This notion is fallacious from its very origin. The reality is fundamentally different. When someone purchases an NFT linked to a piece of content, they don’t automatically purchase the underlying intellectual property rights in such a piece of content. What happens here is that they have purchased the NFT associated with it and nothing more (absent certain documentation)⁷⁰.

62 Abhay Pandey, *Development In Indian IP Law: The Copyright (Amendment) Act 2012*, Intellectual Property Watch (Jan. 22, 2013), <https://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012/>.

63 See for e.g. *id*; Also see Zakir Thomas, *Overview of Changes to Indian Copyright Law*, 17 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 324, 324-334 (2012).

64 See generally *University of Oxford v. Rameshwari Photo Copy Services*, 2016 SCC Online Del 5128, ¶80 (India).

65 See for e.g. *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey & Ors*, 1984 AIR SC 667; Also see *Entertainment Network (India) Limited v. Super Casette Industries Limited*, 2009 AIR SC 1150.

66 See *Super Casette id* ¶28.

67 See Jaideep Reddy Et. Al., *Cryptocurrency: The status and future of NFTs and crypto art in India*, The Economic Times (Apr. 08, 2021), <https://economictimes.indiatimes.com/tech/catalysts/the-status-and-future-of-nfts-and-crypto-art-in-india/articleshow/81970883.cms#:~:text=Simply%20put%2C%20non%2Dfungible%20tokens,and%20even%20casks%20of%20whisky.>

68 The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, §14 (India).

69 See for e.g. Andrew R. Chow, *What Are NFTs and Why They Are Shaking Up the Art World?*, Time (Mar. 22, 2021), <https://time.com/5947720/nft-art/>.

70 See Ghaith Mahmood, *NFTs: What Are You Buying and What Do You Actually Own?*, The Fashion Law (Mar. 18, 2021), <https://www.thefashionlaw.com/nfts-what-are-you-buying-and-what-do-you-actually-own/>. (“Many market participants claim that NFTs can be used to prove authenticity. In fact, NFTs can authenticate ownership of a token itself, as well as the unique history of how such token was developed and linked to a creative work — on the public blockchains, anyone can see an owner’s wallet address and its linked meta-data, as such information is available as a public record.

28 Referring to part B of our discussion, NFT is nothing but a non-fungible unique cryptographic token. Under Section 14 of the Copyright Act, as mentioned previously, a copyright owner has certain exclusive rights to reproduce, prepare adaptations of a work, perform, display and distribute the copyrighted works in public.⁷¹ As a general rule, the purchase of a piece of art does not transfer all copyright in such work to the buyers that work.⁷² Instead, when someone buys a painting from an art gallery, they acquire the physical painting itself, which they can display, but not the underlying rights to reproduce, make adaptations of works or distribute copies of that painting.⁷³ The underlying copyright only transfers if the copyright's owner evidence in writing that they intend to transfer those rights alongside the composition of the work to the buyer.⁷⁴ Unless the NFT owner has received such explicit permission from the seller, the NFT owner does not automatically acquire the legal right to take pictures of the creative work attached to the NFT and make copies of it to distribute in any form to the public. This same principle applies to the artwork's ownership. Unless the owner of the original asset sells the work to the buyer with underlying documentation as to the rights associated with it in the NFT, the buyer does not actually possess the work. This means, absent specific documentation, the purchaser of an NFT acquires through that purchase a right to the NFT only and that too, to display the related media in their token wallet for personal purposes and to sell it to prospective buyers when needed.

However, a simple NFT by itself cannot help with matching the creator or owner of an NFT to a real person in the physical world, nor does it validate that the creator of the NFT has the underlying rights to tie that NFT to any specific creative work.”)

71 The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, §14 (India).

72 See generally Rich Stim, *Copyright Ownership: Who Owns What? - Copyright Overview*, Stanford Copyright and Fair Use Center (last visited Apr. 20, 2021), <https://fairuse.stanford.edu/overview/faqs/copyright-ownership/>.

73 See generally *Principles of Copyright*, WIPO (last accessed Apr. 17, 2021), https://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo_pub_844.pdf.

74 See *Saregama Ltd v. The New Digital Media & Ors.* C.S. No. 310 of 2015, Cal HC (India); See *How Does Transferring a Copyright Work?*, MightyRecruiter, (last visited Apr. 21, 2021), <https://www.mightyrecruiter.com/recruiter-guide/how-does-transferring-a-copyright-work/>; Also see *Copyright Licenses and Assignments*, Bitlaw (last visited Apr. 20, 2021), <https://www.bitlaw.com/copyright/license.html>.

29 Therefore, due regard must be given to the properties of an NFT as noted in its smart contract. If the smart contract does not vest with the buyer either the ownership of the asset itself or the copyright ownership, then what you are probably buying is just the NFT itself and nothing more. Most often, it happens that crypto-pirates associate an unauthorized piece of content with the blockchain and make an NFT out of it, absent laws restricting such linking, the NFT sold due to it only vests with the buyer of the token and not any other rights. This point has to be noted whenever someone buys a new NFT. While it is a general habit that NFTs are traded inattentive of their actual value, the knowledge that there are other rights a user will possess will help enrich the buyer mark the right price for the Token since the Token's value, in that case, will be cryptography and rights value (if any).

II. Can NFTs be copyrighted?

30 Crypto marketplaces today are flooded with NFTs as new players are entering the market every day. Very recently, Wazir X—an India based crypto exchange platform, launched its version of an NFT auction site.⁷⁵ These developments have created a seamless exchange of digital assets and intellectual properties, including art pieces, audio files, videos, programs and even tweets, as part of the greater blockchain ecosystem attracting users from everywhere in India.⁷⁶ It is at this time of ascending transcendence of blockchain becoming the next internet, the question of the right to create an NFT becomes all the more essential.

31 Indeed, section 14 of the Copyright Act vests the author with a bundle of statutory rights that enables the author to create various methods of public display of their work as well as prevent others from doing so.⁷⁷ Still, when it comes to NFT, the Act does not explicitly identify blockchain enabled digital or digitized works as copyrightable subject matter because

75 Omkar Godbole, *Binance-Owned WazirX Launches India's First NFT Platform*, CoinDesk (Apr. 06, 2021), <https://www.coindesk.com/binance-owned-wazirx-launches-indias-first-nft-platform#:~:text=Created%20with%20Sketch.,digital%20assets%20and%20earn%20royalties>.

76 See Benita Fernando, *How a new platform may start the next big trend in the Indian art market — NFTs*, The Indian Express (Apr. 25, 2021), <https://indianexpress.com/article/express-sunday-eye/how-a-new-platform-may-start-the-next-big-trend-in-the-indian-art-market-nfts-7287485/>.

77 See Arathi Ashok, *Economic Rights of Authors under Copyright Law: Some Emerging Judicial Trends*, 15 Journal of Intellectual Property Rights 46, 46-54 (2010).

the law applies with equal force to physical embodiments and those requiring the aid of a machine or a device to perceive. Moreover, the current law only recognizes literary, dramatic, musical work and a computer program for copyright protection.⁷⁸ An NFT being merely a cryptographic token that represents a proof of ownership either of the token itself or the work or even the copyright of the work or a combination of any of these is not copyrightable by itself unless a minimal amount of creativity within it is shown along with originality and fixation that forms substructure of any copyrightable work. Therefore, any copyrightable authorship-including creative NFTs such as [Cryptokitties]⁷⁹ contributed by an author must showcase these characteristics

III. Who can create an NFT?

32 The narrow wordings of section 14 of the Copyright Act have limited even the remote acceptance of the right to create NFT as part of the statutory bundle of rights given to an author. However, an NFT being a purely technological innovation that does not any have an ounce of root to be considered by the framers of the Copyright Act presupposes the existence of a meta legal right that could be associated with the creation of an NFT or any other technological innovation that hinges on the authority of authors to their creation. The meaning of copyright for the purposes of the Copyright Act includes but is not limited to the exclusive right to communicate the work to the public, issue copies that are not already made to the public, make adaptations, as well as translations of the work.⁸⁰ The question we should address here would be whether making an NFT could be considered communication of the work to the public? Or to issue copies of the work? Or to make adaptations, or even the translations of the work?

33 To answer, we will emphasize here once again the process involved in the making of an NFT. The creation of an NFT is a very easy process that does not need little to any amount of technical know-how compared to its underlying technology. Any person could make an NFT by first connecting their crypto

wallet to the NFT marketplace.⁸¹ The wallet address would probably be the login info in most scenarios so that one won't have to share any other details. After the wallet has been connected, one can move to the "Create" section on the marketplace, then upload their artwork and finalize the process by clicking the right buttons.⁸²

34 Interestingly, the issues of copyright take their birth at the point where they upload the work. The uploading in any platform could be through various ways, for example, uploading from the cloud, uploading by connecting the link, uploading from the hard drive, etc.⁸³ If the work uploaded is an original one or even if it is a copy (with an obvious case of copyright violation) in the absence of specific authorization, infringement of copyright happens as soon as it has been uploaded into the NFT marketplace. This is because although downloading or other private copying is permitted sometimes, once the content has been uploaded for public display (NFT marketplace) by uploading or otherwise offering to share copyright-protected content (without authorization), it remains illegal in almost every jurisdiction.⁸⁴

35 Now assume the person has been authorized to display such by virtue that they bought the article. Now, will there be a copyright violation if that person creates an NFT of the specific piece? We rely on the rights exclusive to the copyright owner as a part of the statutory bundle under section 14. These rights include the right to create adaptations as well

78 See The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, §13 (India).

79 See Fitz Tepper, *People have spent over \$1M buying virtual cats on the Ethereum blockchain*, TechCrunch (Dec. 04, 2017, 5:18 AM), <https://techcrunch.com/2017/12/03/people-have-spent-over-1m-buying-virtual-cats-on-the-ethereum-blockchain/>.

80 See for e.g., *R. G. Ananad v. Delux Fimls and Ors*, 1978 AIR SC 1613 (India).

81 See Georgia Cogan, *Confused about NFTs? Here's all you need to know*, Creative Bloq (Mar. 24, 2021), <https://www.creativebloq.com/features/what-are-nfts#:~:text=Technically%2C%20yes%2C%20everyone%20can%20sell,buys%20the%20piece%20%E2%80%93%20including%20resales.>

82 See for e.g. *How to Create an NFT*, alchemy (last visited Apr. 25, 2021), <https://docs.alchemyapi.io/alchemy/tutorials/how-to-create-an-nft>.

83 See generally *Different ways to upload a file?*, Stack Overflow (last visited Apr. 26, 2021), <https://stackoverflow.com/questions/31238641/different-ways-to-upload-a-file>; Also see generally *7 Ways to Upload Images to the Internet*, wikiHow (last visited Apr. 17, 2021), <https://www.wikihow.com/Upload-Images-to-the-Internet>; See Alex Atallah, *Create NFTs for Free on OpenSea*, OpenSea blog (Dec. 29, 2020), <https://opensea.io/blog/announcements/introducing-the-collection-manager/>.

84 See generally *Christian Louboutin Sas v. Nakul Bajaj*, 2014 SCC ONLINE DEL 4932 (India); Also see *Luxottica Group S. P. A. v. Mify Solutions Pvt Ltd.*, 2018 SCC ONLINE DEL 12307 (India);; See *Charsur Digital Workstation v. ASV Cyber Solutions Inc*, 2016 SCC ONLINE MAD 32741 (India).

as translations of the work.⁸⁵ While an argument that the copyrighted work has been translated to the blockchain languages of GO, C++, Java etc. by converting it to an NFT, it would be difficult to comprehend for the prudent mind the argument that by creating an NFT, the creator of NFT has made an adaptation of the original work. The adaptations under copyright are basically a change of format.⁸⁶ If an adaptation is made by adding a significant amount of new material, then such work would not be considered as adaptation under the Copyright Act,⁸⁷ but in an NFT, no such significant work is added to transform it, rather a blockchain-enabled proof of ownership is created.

F. Recognizing the Right to create an NFT

36 The word right is a blind guide in its own proper field. As noted by Pound, the word right is used in at least five senses. (1) It represents interest as recognised and delimited to secure it through the legal order. (2) It can designate the chief means which the law adopts in order to ensure interests, namely, a recognition in persons, or a conferring upon persons, of specific capacities of influencing the action of others. (3) In another sense, “right” is a capacity of creating, divesting, or altering “rights” in the second sense, and also of creating or altering duties. (4) It can signify a condition of legal immunity from liability for what otherwise would be a breach of duty. (5) Lastly, it can also be used in a purely ethical sense to mean that in the balance of equities, a person should probably have it.⁸⁸

37 When an author creates a work, certain rights flow from it. It could be economic rights, or moral rights or even natural rights. These rights are ascribed with every work of the creator so that the creator can enjoy the benefits of the creation as a reward for the contribution to the public of that creativity. Article 12 of the Berne Convention recognizes authors of lit-

erary or artistic works’ exclusive right of authorizing adaptations, arrangements and other alterations of their works. This right of an author is a combination of economic, moral and natural rights that allows the author to preserve their integrity of work and have an exclusive say on what to do with it. Even though the Article refrains from laying down what constitutes adaptation, it is agreed that this includes any new form of the substance of the work, marginal cases being left to the courts. India has been a signatory to the Berne Convention since 1928. This is further established under (a) and (c) of section 14 of the Copyright Act that protects the author’s exclusive right to create adaptations.

38 In our present scenario based on the above discussions, although the balance of equities that Pound postulates lies in favour of the original copyright holder to claim the right to create an NFT, the copyright owner must have an exclusive right under the copyright framework to claim it in the first place. This is because, as noted in various judgments dealing with copyright infringement in India, there exists no right outside the statute.⁸⁹ Since copyright is merely a statutory right in India, the claim that the author has an exclusive right to create an NFT of their work does not hold. For a right to be recognized, it has to be settled through the legal order.⁹⁰ In India, such recognition could happen in either of the three ways: the judicial order based on the judiciary’s power under the basic structure of the Constitution, through an executive order or through a legislative amendment, representing the people’s will.⁹¹ In the absence of such explicit recognition the metaphysical right that every author has for their Creative work to make an NFT will be infringed without any recourse.

39 Now assume, such a right has been granted to the copyright holder, even then certain issues arise. This is because beyond the Copyright domain where the debate of the copyright holder’s right to create or to not create NFTs bestrides the programmable nature of NFTs which present new ways for creators to license, monetize and enforce their copyrights. From the copyright holder to the owner of the work and potential NFT buyer, each can be empowered in

85 The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, §14 (India).

86 *Copyright Law and a Derivative Culture*, SUPREME COURT CASES (last accessed Apr. 19, 2021), www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=19308; See Nandita Saikia, *Adaptations, Derivations and Transformations in Copyright Law*, Lawmatters, <https://copyright.lawmatters.in/2010/10/adaptations-derivations-and.html>.

87 *Id.*

88 ROSCOE POUND, *JURISPRUDENCE VOL. 1*, 39-163 (West Publishing Co. 1959).

89 See for e.g. *Time Warner Entertainment Company, LP & Ors. v. Columbia Pictures Inc. and Ors*, 2007 AD DEL 10 577 (India); Also see for e.g., *Bristol Myers Squibb Holding Ireland and Ors v. Natco Pharma*, CS(COMM) 342/2019 (India).

90 *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr*, 1973 AIR SC 1461, ¶1459.

91 See Ashish Bhan & Rohit Rohtagi, *Legal systems in India: Overview*, Thomson Reuters: Practical Law (Mar. 01, 2021), [https://uk.practicallaw.thomsonreuters.com/w-017-5278?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-017-5278?transitionType=Default&contextData=(sc.Default)&firstPage=true).

Web 3.0 to exert greater control and enjoy more substantial financial participation throughout the copyright's duration. Any area that can reasonably be distilled to "if, then" outcomes and matters of timing that lend themselves well to automated outcomes can benefit significantly in a blockchain atmosphere through the process of automatic reversions, terminations etc., that blockchain smart contracts contribute.⁹² The power of NFTs to tokenize copyright interests (including fractional interests), encoded with immutable instructions, would be of great use to the Copyright Office in storing and easier access of copyright records.⁹³ Therefore, granting such an exclusive statutory right for the copyright holder would mean requiring the copyright holder's permission in every move related to the storing of copyright records in a blockchain, where if the creator of the original work is disinterested in the tokenization then it would mean the storing of multiple data units—one with the traditional mechanism and the other within a blockchain enabled channel for those who are interested in NFTs.

- 40 Furthermore, sometimes it may happen that the copyright holder might create multiple NFTs of the same asset in different blockchains which is one of the well known mechanisms to hedge against any price deviations that may occur in the volatile market places of NFTs. Assume, if a buyer buys an NFT when there was only one NFT created on that particular artifact and later finds out that the copyright holder has created a different NFT of the same artifact in a different blockchain. Now, this could have potential implication on the price of the NFT that was bought before since there are now, more than one NFT for the same artifact. What recourse does the previous buyer have against this? The next part of the discussion will provide further insight on these scenarios as to how to deal with it.

G. The Way Ahead

- 41 The emergence of Non-Fungible Token standards to create unique crypto assets presents massive opportunities for creators to leverage digital technology and the Internet in the Web 3.0 world in ways far more empowering than what the Internet appeared to be in the dotcom era of the 90s. Cryptography and digital signatures, combined with non-fungible token standards, offer new opportunities to solve some of the chronic concerns regarding the lack of imbalance of power and profit tilted for centuries in favour of intermediaries. While we are still

in the nascent stages of building the crypto infrastructure and have just begun to test the waters in the uncharted seas of white paper promises beyond cryptocurrencies, the possibilities abound to create a new age of digital revolution where the transparent atmosphere with accessible records of data and automated programmes could change the way we perceived many of the traditional functions.

- 42 However, the future of NFTs in India, especially the creative art-based assets, is haunted by regulatory uncertainty and the narrow wordings of intellectual property laws. The questions regarding copyright protection for the artist for both NFTs as well as original creative works are discussed in this article. Now, it is up to the legislators to make a suitable amendment in the existing law to recognize the rights of copyright holders as part of the statutory bundle of rights under section 14 of the Copyright Act. While, as noted in the previous discussion, recognizing such a right does not come with a bed of roses, many of the shortcomings can be mitigated with either the technology itself or through suitable wordings in the assignment/license/intellectual property transfer (smart) contracts associated with the NFT.
- 43 The addition of necessary demarcation of rights and liabilities for a creative art buyer with implications of the potential creation of NFT would help the buyer sell the work in an NFT marketplace in the future. Similarly, while a person owns only the NFT rather than the original asset or the copyright ownership in normal scenarios, suitable smart contracts coupled with other legal mechanisms could widen the ambit of NFTs. However, the problem with this approach is that most of the marketplace smart contracts are ready-made. However, if there is a mechanism within the NFT platform to create custom made smart contracts that could draw the line as to the originality of the assets, the rights conferred, royalties, if any etc., then the problems associated within the market regarding intellectual property infringement associated with the sale of NFTs could be brought down.
- 44 Furthermore, in a situation which we have mentioned in the previous section where the copyright holder might create different NFTs for the same asset; the problems associated with such NFT dizygotic twins can be addressed if the buyer ensures that the smart contract associated with the particular NFT is supplemented with terms and conditions (non-executable or otherwise in the same blockchain but forms the crux of relationship between the buyer and the seller) that prohibits or waiver multiple creation of NFT for the same assets by the copyright holder.

⁹² Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 *AIPLA Q. J.* 219, 265 (2019)

⁹³ *Id* at 235.

45 Finally, coming into the unauthorized creation of NFTs, it must be noted that the marketplace, even though exploding with various products, suffers hugely from copyright piracy.⁹⁴ We could wait for the platform owners to only allow the original works to be uploaded and displayed as well as require necessary copyright authorization rather than violation; however, most policies associated with these platforms are designed for increased usership rather than the protection of the copyright holders. Moreover, the current law does not allow a right to create an NFT as part of the statutory bundle. Thus, the legal recognition of the NFT is necessary to resolve the current copyright issues involved within NFTs. Once this recognition has been granted, most marketplaces will become an authentic platform to buy/sell unique crypto assets. However, law makers must in addition to the recognition of NFT must also look forward for a suitable code of conduct and model rules to contain the growth of fraudulent sites.

H. Conclusion

46 Blockchain and the NFT standards show a substantial promise to offer viable answers to solve the various real world problems that have been surrounding the artifacts market and the copyright offices for a very long time.⁹⁵ While the technology is significantly new, like cryptocurrencies the unique NFT tokens have also gained a massive amount of real world traction in India as well as elsewhere.⁹⁶ Nevertheless, these speculative markets are surrounded by crypto-pirates and gullible buyers hoping to win fortunes in the volatility. The issues of copyrights in NFT are not a new age problem. Whenever a new technology is born, the intellectual property law has always faced a Freudian dilemma in recognizing their place in the

broad framework of rights and duties that forms the bedrock of law.⁹⁷

47 The present article has explored the scope of NFT within the wide framework of Copyright law and ownership. The article has also brought forth and addressed various issues that are surrounding the NFT marketplace. While some of the issues can be solved using the technology itself others require broad legal frameworks and suitable wording under various provisions of the copyright law. The need to recognize the right to create NFT as part of the statutory bundle of rights could be the first step in addressing the major copyright issues that surround the NFT market today. Nonetheless, it will be interesting to see how the regulators, the lawmakers, and various stakeholders will balance their interests in creating the novel NFT framework in India.

94 See Kal & Christopher *supra* note 26; Also see *supra* note 34.

95 See *India Shouldn't Throw Out the NFT Baby With the Crypto Bathwater*, The Wire (Apr. 04, 2021), <https://thewire.in/tech/india-nft-cryptocurrency-digital-content-royalties-regulation>; Also see generally Ferdinand Regner Et. Al., NFTs in Pr s in Practice – Non-F actice – Non-Fungible Tokens as Core Component of a Blockchain-based Event Ticketing Application (last visited Apr. 22, 2021), <https://core.ac.uk/download/pdf/301384284.pdf>

96 Emmanuel Chibuzor Precious, *Non Fungible Tokens, the next big thing in the DeFi Ecosystem?*, Trust Wallet (Jan. 08, 2021), <https://trustwallet.com/blog/non-fungible-tokens-next-big-thing>; Also see Tribal Scale Inc, *What are NFTs and Why are They Becoming Popular?*, Medium (Mar. 09, 2021), <https://medium.com/tribalscale/what-are-nfts-and-why-are-they-becoming-popular-c3ca2c84a4b3>.

97 See for e.g., *The Digital Dilemma: Intellectual Property in the Information Age*, The National Academies Press (last accessed Apr.04, 2021), <https://www.nap.edu/read/9601/chapter/7>.

The (Missing) Parody Exception in Italy and its Inconsistency with EU Law

by **Gabriele Spina Ali***

Abstract: The Italian Copyright Statute does not contain a general exception for ‘parody, caricature and pastiche’ pursuant to Article 5(3k) of the InfoSoc Directive. In spite of this, commentators believe that the case law prior to the Directive sufficiently safeguards parodies against infringement, by granting them the status of autonomous, ‘transformative’ creations and leveraging on the fundamental freedoms of speech and artistic expression as enshrined in the Italian Constitution. In addition, they

have lauded this approach for avoiding downgrading parody from an ‘overarching principle’ to a narrowly defined ‘exception’ to copyright protection. The present article criticizes this construct by dissecting and rebuking the related arguments. It emphasizes its inconsistency with the InfoSoc Directive and the recent case law of the Court of Justice of the European Union and submits that, paradoxically, framing parody as a principle leads to more restrictive outcomes than an ad verbum implementation of Article 5(3)(k).

Keywords: Parody; Copyright; Exceptions and Limitations; Three-step test

© 2021 Gabriele Spina Ali

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Gabriele Spina Ali, The (Missing) Parody Exception in Italy and its Inconsistency with EU Law, 12 (2021) JIPITEC 414 para 1

A. Yet another boring contribution on a fun topic

1 It is commonplace that lawyers take professional matters overly seriously, even the most laughable ones. Italian lawyers are no exception to the rule and the debate surrounding parody does confirm to the cliché. Commentators submit that the lack of an explicit exception in the Italian Copyright Statute (ICS) does not undercut the importance of parody in the legal system, nor undermines the freedom to engage into humorous reinterpretations of prior works. Quite on the contrary, it reflects a well-pondered choice: not to relegate parody to a mere ‘exception’ but to reaffirm its status of overarching principle in the Italian copyright system. In this sense, parody is not a defense-type rule that grants immunity against conduct that would otherwise constitute infringement, but an activity that falls outside the reach of copyright. According to this view, the legitimacy of parodies derives from the

basic principles governing the scope of copyright protection and infringement, as well as the fundamental rights of freedom of speech and artistic expression, as enshrined in Articles 21 and 33 of the Italian Constitution.

2 The present article takes issue with this framing and casts doubts over its legitimacy. In particular, it submits that the recent caselaw of the European Court of Justice (CJEU) on the relationship between fundamental rights and copyright exceptions and limitations (E&L), as well as the scope of the exclusive rights of reproduction, distribution and communication to the public, undermine the Italian construct on parody.¹ Under this perspective, the

* Senior Research Fellow MPI, Executive Editor GRUR International Intellectual Property and Competition Law.

1 *Spiegel Online GmbH v Volker Beck* C 516/17, CJEU (2019); *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* C 476/17, CJEU (2019); *Funke Medien NRW GmbH v*