

NON-FUNGIBLE TOKENS (“NFTS”): DEVELOPMENTS AND LEGAL ISSUES

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This is a second article on NFTs following upon our first article on NFTs titled “Non-fungible tokens and their legal implications” published on 27 May 2021. Our first article explained some of the basic terminology, identified some fundamental intellectual property rights and other legal issues of concern. This article presents a deeper dive into the world of NFTs, NFT platforms and some ensuing legal issues.

Since the purchase by Vignesh Sundaresan, a Singapore resident at a Christie’s auction, of a S\$93 million non-fungible token representing certain rights to a piece of digital art “Everydays: The First 5000 Days” by Mike Winkelmann (a digital artist known as Beeple) (the “Beeple NFT”) which had the effect of catapulting NFTs into the headlines across the arts, digital and commercial news around the world, developments have been rapid, as many tech savvy entrepreneurs have been fast in going into NFTs to be a part of the phenomenon that have since given rise to a host of novel legal issues and implications.

Aside from the NFT creator (i.e. the individual minting the NFT) and the purchaser of the minted NFT, another important player in the NFT process has been under the spotlight recently, namely: the NFT minting platform. NFT marketplace Mintable, headquartered in Singapore, recently raised US\$13 million from its investors in a Series A funding round, which include Metapurse, an investment fund backed by Metakovan, the alter ego of the purchaser of the Beeple NFT. Minting platforms also serve to create a marketplace for the sale, purchase and trading of NFTs.

With an almost exponentially increasing number of NFT minting platforms allowing users to mint their own NFTs becoming available (including MakersPlace, OpenSea, Foundation, SuperRare and Rarible, to name but a few), we can expect an increasingly competitive landscape with some platforms seeking an edge over others by providing a unique selling proposition to differentiate themselves. Many minting platforms

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double up as a market place thus providing an artist with a one-stop shop for a full suite of services. In such situations, the minting (and market place) platform will have to consider its legal relationship not only vis-à-vis the artist (i.e. vendor) but also vis-à-vis all subsequent purchasers of the NFTs minted and then traded on its platform. The legal issues involved include formulating an appropriate set of terms and agreements to govern such relationships whereby the process of an artist minting an NFT to an original piece of art (digital or otherwise) or of a performance artiste minting an NFT to an original or a private performance of a song is made efficient, balancing in a reasonable manner, the competing interests of the initial buyer, of each subsequent seller and buyer in subsequent downstream transactions and of the platform. The scope of such terms and agreements in turn depend on the commercial process flow of a platform and marketplace. Looking at just an artist for present purposes, the platform may purchase the minted NFT from the artist, before putting it up for sale or it may function purely as a marketplace or a combination of both. In each situation, different legal implications may arise.

Intellectual property rights and laws

A platform that allows artists to mint and list NFTs for sale may want to consider the possibility of an “artist” minting and subsequently selling an NFT pegged to an artwork (digital or otherwise) that may not necessarily belong to the “artist”. Consider a situation where a rendition of a popular folksong represented by an NFT minted by one artiste is performed by another artiste. In such situations or a situation of an artist minting a piece of art which although created by the artist was done on the commission of another party or done during his employment by the other party, how would the platform protect itself from legal liability? Must a minting and marketplace platform scrutinise every single NFT as well as the provenance of every piece of underlying art that the NFT is minted on? At first glance, it would seem appropriate for the minting platform to insist on an indemnity from an artist seeking to list his or her NFT on the platform. The artist can also be subject to takedown orders issued by the platform upon verification that an NFT is pegged to a piece of “artwork” that is clearly in contravention of copyright laws. Some online marketplaces appear to have developed procedures to address the potential for infringement (for example, OpenSea’s Terms of Service invite rights holders to submit complaints, and state the site “will take down works in response to formal infringement claims and will terminate a user’s access to the Services if the user is determined to be a repeat infringer.”). Whether such terms are legally effective, and if so, how helpful these terms are to the marketplace in general, remains to be seen. While this would seem similar, if not the same, as the position taken by video sharing platforms such as YouTube, a separate and novel problem arises when an NFT (minted on an artwork in contravention of copyright laws) is subsequently traded before the platform is even made aware of, or can take appropriate action to stave off the potential litigation.

The artist (being the *prima facie* rights holder) of the minted NFT or subsequent rights holder of the NFT may have recourse to litigation against the seller or creators of the NFTs (which may include a minting platform and a marketplace platform) for say, copyright infringement. Who will have the right to make a legal claim will depend on who owns the copyright: the artist or the owner of the physical work. In general terms, unless the artist expressly conveyed the copyright to someone else in signed writing or other form of

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legally binding assignment of copyright, the artist will likely be the party entitled to make a claim for infringement of the right to prepare derivative works, such as digital images.

Even in a situation where an artist seeks to mint an NFT pegged to his or her own original artwork, the artist's true ability to do so may first require a close consideration of the legal rights owned by the artist, as taking a leaf from the commercial music world and pop artistes, these legal rights may be contingent or curtailed by rights granted to third parties, such as a record label, music publisher or merchandise rights holders or an employer. It is worth mentioning that typically, master rights to musical works are held by a label, and even recently, comic book behemoths such as Marvel and DC Comics have notified their artists that any NFTs featuring Marvel or DC Comic's intellectual property is expressly prohibited. Furthermore, some pieces of work may have been produced by joint creators. Following from this, it would appear that artistes who are not signed to a label or record will have the most room to manoeuvre when it comes to the minting of NFTs, as they are free to deal with their artwork in any manner they please.

In a separate but similar vein, an owner of an NFT may not necessarily own the intellectual property rights to the artwork underlying the NFT. While the sale and purchase agreement for an NFT would (and should) include specific terms on such ownership rights, such agreements would typically be between the artist and the original purchaser, and care would need to be taken to ensure that the same terms would also be required to be included in each subsequent sale and purchase of the NFT. Further, a minting and/or marketplace platform should consider taking legal advice on protecting itself legally from claims by a disgruntled purchaser who only realises after purchasing an NFT via the platform that he does not own the original artwork itself and/or the intellectual property rights to the artwork. To protect itself as much as reasonably possible in such eventualities, rather than try to rely on the principle of "caveat emptor" (or "buyer beware" doctrine), marketplace platforms should expressly make clear in its user terms and conditions, exactly what rights (if any) a purchaser of an NFT would be getting, what rights the purchaser will not be getting when he purchases an NFT via the platform, and include reasonably wide and appropriate disclaimers and/or specifically worded limitations of liability.

Going forward, and as the NFT market expands and matures, we expect that all parties to an NFT transaction (viz. the artist, the purchaser, each subsequent seller and purchaser as well as minting and/or marketplace platforms) will be more cognizant of the importance of their respective legal rights and of managing their expectations. Also, this growing market and maturity of the players involved will hopefully result in a clearer and more transparent ecosystem for NFTs to encourage positive growth and developments to help the artists and their supporters.

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