Copyright and NFTs: new wine in old bottles?

For 'nyfties' to cement their phenomenal early success they will require regulation, but this could face strong opposition, says Dinusha Mendis of Bournemouth University

Non-fungible tokens—also known as NFTs or "nyfties"—are digital assets on the secure blockchain. They are mainly used to sell exclusive, digital items online and since a digital artwork tokenised as a NFT sold for $69 million at Christies in March 2021, it has expanded into various other industries, ranging from sport, fashion, music, films, entertainment to many more.

One of the striking characteristics of NFTs have been their high sale value. For example, in August 2021 a series of 8,888 adorable 'Pudgy Penguins' each reflecting its own, unique characteristics made a splash in the NFT space with one selling for 150 ethereum, approximately $500,000 in the first-hour of trading.

Similarly, the Bored Ape Yacht Club NFT tokens which were first minted in May 2021, resold for $24.4 million in summer 2021, at an auction hosted by Sothebys. These are simply a few examples, among many.

However, whether it is a piece of digital artwork, a cute digital penguin or a bored ape, they are essentially traceable JPEGs or GIFs, which are represented as NFT tokens. If so, what is someone actually buying when they purchase a NFT and do they have ownership of it, from a legal perspective?

Before delving into this question, it is important to understand NFTs and how they came in to being—as described below.

What are non-fungible tokens?

To understand NFTs, it is important to understand what is meant by 'fungible'. Fungible, is *derived from the Latin verb fungor* (or 'fungi' which is an imperative conjugation of 'fungor') meaning to perform and in the broader context means *interchangeable*. It relates to something that can be exchanged.

For example, money is fungible—a consumer can buy a commodity with any €10 note. On the other hand, NFTs, are *non*-fungible and represent a digital token which cannot be exchanged for another; it is something unique and denotes one of a kind tokenised as NFTs and are sold on platforms such as OpenSea, OpenBazaar, RareBits, and NftTrader.

Coins, memes, punks and kitties

NFTs are a more recent development than the blockchain and bitcoins. Its history can be traced back to 2012, when Yoni Assia wrote a blog post suggesting that new tokens for bitcoin needed to be made, in paving the way for a more streamlined process for transferring assets while using the bitcoin blockchain. This led to the emergence of 'Colored Coins' (2012), Counterparty (2014), Spell of Genesis (2016) – the first blockchain based mobile game—before the explosion of the Ethereum-based Rare Pepe memes in 2017. This final step, was the most significant in the rise of NFTs.

The popularity of the Rare Pepe meme, demonstrated the appetite among the public for rare digital items, which in turn led John Watkinson and Matt Hall to develop a 'character generator' that produced 10,000 pixelated characters with unique variables, known as CryptoPunks in 2017.

This was the beginning of digital collectibles—as we know it today—leading to the introduction of digital assets and their monetisation and tokenisation on the blockchain, in the form of NFTs. Similarly, the creation of CryptoKitties—a mobile game from 2017—allowed players to "breed Kitties" with the permission of both owners, with each "new born" Kitty having its own distinguishing features.

On the other hand, NFTs can reflect a collaborative work, such as Imogen Heap's series of music NFTs, "Firsts" with transparent and sustainable revenue models for all involved in its creation. Or it can represent the most traditional method of creation as was the case with Kings of Leon's album as part of a series called "NFT Yourself".

Authorship and ownership of NFTs

It is important to note that an NFT is a digital certificate of ownership representing the purchase of a digital asset. In other words, an NFT owner will not be able to display Beeple's artwork, a Pudgy Penguin or a Bored Ape in a physical sense, in their home for example, but, the NFT owner will have a digital certificate illustrating that they are the original buyer of the digital asset. In terms of what they can do with it, will depend on the smart contract that is embedded within the NFT and the terms which govern it.

As such, when someone buys an NFT from the creator, they obtain ownership in the sense that gain ownership of the item. However, apart from that, the NFT holder does not have any other rights to the work, such as those offered under copyright law, for example the right of communication to the public, distribution, reproduction and so on.

These rights will not automatically transfer to the NFT holder, and the only way any such rights can be transferred is if those rights have been licensed or assigned by the creator to the NFT buyer.

This is akin to the situation in the physical world. Owning a piece of artwork does not automatically give an individual the right to make a copy of it; nor can that individual sue someone if they infringe the copyright attached to the artwork. This is because the creator(s) of the artwork—or digital asset in the present context—will always remain the owner of the copyright and they alone will have the exclusive rights conferred by copyright, to do what they wish with it.

For example, the creator of the work may restrict certain uses as was the case with Kings of Leon, who restricted the use of their NFT music for personal purposes only. Or it can allow an NFT owner to make commercial use of the asset, as long as the use does not result in earning more than $100,000 in gross revenue each year as was the case with CryptoKitties.

If ownership is restricted to a digital certificate reflecting ownership of the property, then why should someone buy or invest in an NFT? This is essentially because NFTs are seen as a speculative investment that will appreciate in value over time.

Furthermore, it has opened up the possibility of owning a digital asset which is truly unique—such as the first-ever tweet or owning an item from an admired band, brand, sports team, etc.

While the opportunities are immense, challenges posed by NFTs have also emerged—such as piracy, counterfeiting and security as outlined below.

Copyright infringement, NFT marketplaces and decentralisation

While the blockchain on which NFTs are traded, has many benefits such as security, transparency, time-stamp etc, the blockchain cannot absolutely know whether a creative work is original—ie, whether it is the author's own intellectual creation—as is required under EU copyright law.

This means that it is possible for someone to sell a copy of an original creative work as an NFT and keep the original in their possession. This was demonstrated by Terence Eden when he sold a fake Mona Lisa through the arthouse Verisart, for which he also obtained a 'certificate of authenticity'.

Through this example, Eden underlined the issue of piracy attached to NFTs on the one hand, while also highlighting the fact that the pirated copy will now forever remain on the blockchain, without the possibility of having it removed through an injunction. This is because the blockchain is a permanent ledger of purchase and sale records. Similar examples have emerged since then.

More recently, Calvin Becerra, the owner of three Bored Ape NFT tokens worth nearly $1 million, was duped into handing them over to a group of scammers. In an attempt to recover them, Becerra reached out to the NFT community and in response, NFT marketplaces, OpenSea, Rarible and NftTrader banned the sale of the stolen apes on their platforms.

While the action taken by the platforms was positive in dealing with such scammers, it was not positively embraced by the NFT community, who saw it as a move away from decentralisation in the blockchain-NFT era.

While this is a valid point, it does raise the question of how acts of piracy as well as security can be dealt with, if not for some form of regulation by the platforms which hosts NFTs.

Conclusion

NFTs have opened up a new world of opportunities for trading, dissemination and revenue making mechanisms. However, as with any new technology it has also brought several challenges to the forefront, including issues around ownership, authorship, piracy, counterfeiting, security and platform liability.

It also reflects some of the challenges surrounding decentralisation. As we enter the next phase of the online era through the Metaverse, recently embraced by Facebook, these issues will only continue to gather speed. For these reasons, better and clearer regulation will be key in furthering this technology as well as protecting those in the creative industries.

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