

CYBER LAW

The Mysteries of NFT Ownership ... Explained

Would you pay over \$50 million for a live calculator of Julian Assange's imprisonment? Or almost \$30 million for an artwork (HUMAN ONE) of an astronaut displayed in a transparent box that can be changed from time to time by its creator—an artist known as "Beeple" (Mike Winkelmann)? How about a video reel of iconic moments of your favorite NBA star? Millions of people are buying NFTs of all sorts—in 2023 they will spend billions of dollars on them through numerous marketplaces that facilitate their purchase and sale.

Collecting things of all kinds is a human past-time: fine art, baseball or Pokémon cards, coins, stamps, comic books, CDs, DVDs, you name it and someone has probably collected it. For decades now the Internet has allowed a collector's paradise, with what were previously hard to find rarities available through specialty websites or eBay.

Today, new digital technologies have expanded opportunities to buy and sell collectibles, artworks, and all manner of physical items in ways never anticipated even two decades ago. Blockchain technology enables the creation or minting

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of nonfungible tokens or "NFTs"—NFTs are bought and sold on a number of marketplaces that frequently, but not always, use cryptocurrency as the regular medium of exchange. As investment in NFTs has grown, so has the confusion and the questions surrounding what is really included in a purchase.

For creative works, one of the most confusing areas relates to what precise intellectual property rights are—or are not—acquired in an NFT purchase.

There is no doubt that NFTs—as unique items—can convey and hold a lot of value; but like any other thing that people buy and sell, they can be worth a lot less than you think as well. It's good to know where the boundary lines are in what you're selling, or what you're getting, with an NFT.

For creative works, one of the most confusing areas relates to what precise intellectual property rights are—or are not—acquired in an NFT purchase. Let's start from the beginning and try to demystify this a bit.

Starting with first principles: what's an NFT really? The first thing you need to know about an NFT is that *it is digital*—while it's called a "token," it's in fact digital code—you don't get some round object (a physical "token") delivered to your door by FedEx when you buy one. The digital code that comprises an NFT represents the ownership of an asset recorded on a blockchain ledger. When someone wants to create an NFT they record code on the blockchain ledger—this is called "minting" an NFT.

The second thing you need to know is that when you buy an NFT, you are typically buying digital data linked to, or associated with, a digital or even physical object *located somewhere else*. In other words, the object is typically not on the blockchain, and you are not getting the object itself in hand: you are getting its "address."

As we said above, the NFT is like a certificate of ownership—and *is not* the work or thing that you bought itself. The address can be a physical location, or a link to a digital one. Practically, this means that when you are buying an NFT of an artwork, or something else, you are getting an asset, the nature and location of which is defined by code within a blockchain ledger entry. Think of it like this: If the NFT is a certificate of ownership written in code, whatever that code says delineates the boundaries of what you are actually buying. If the code does not convey some aspect of rights to a work, you are not buying those rights.

The third thing you need to know is that you can make an NFT of almost anything. The first NFTs people started talking about were digital artworks—CryptoPunks were among the earliest. But now most people have heard that you can somehow invest in the music of a favorite musician, or buy a clip of a favorite sports moment. You can also buy physical artwork.

One of the most confusing things about art, music, videos, pages from manuscripts, that have been “tokenized,” or made into NFTs, is that people often think they have acquired each and every right associated with that work, and that’s unlikely.

Longstanding principles of intellectual property law, and copyright in particular, define what is acquired when a person buys a physical or digital embodiment of a copyrighted work. We will talk about those principles—but let me clarify that well-drafted and properly executed contracts can always alter what is transferred to be more than what these principles otherwise provide.

Let’s be reductionist for a moment in order to make the points about NFT easily, so forgive this summary of certain copyright principles: Copyright law provides that the designated author a work owns the copyright, unless the copyright has been transferred through a contractual arrangement (think: recording contract for a song). But for a new work, as to which rights have not been conveyed to another, the author holds onto the exclusive rights accompanying a copyright. For instance, a copyright gives an author the right to control when and how any additional copies of the work may be made, to control displays, distributions, and commercialization.

Pieces of physical artwork and copies of published books have been bought and sold for as long as the copyright laws have existed. It’s perfectly clear that, when a person buys a physical piece of art, they can sell that same piece of art, but (in the absence of some special arrangement that typically does not exist) they don’t have

the right to make postcards of that art, or have other kinds of copies made. They have the right to that one physical piece. The artist retains the underlying copyright, and all of the exclusive rights contained therein. You can sell your physical piece of art—and not have to pay the artist anything—you own that one copy.

The same is true for a piece of music. If you acquire a copy of a song in the physical world (like on a CD, or on iTunes), you don’t have the right to license it for use in a movie or TV show, and you don’t have the right to include it on an album of your favorite songs that you then sell on the Internet. You have the right to listen to your copy to your heart’s content. And with a book, you can read your copy as many times as you want, and sell it or give it away—just as you could with a CD or piece of art, but you cannot put it on the duplicating machine, run off copies and sell them. The exclusive right to copy and distribute stays with the copyright owner, and when you bought your copy, you got your copy and not the copyrights.

There’s nothing particularly unsettled about any of these principles. So let’s move onto NFTs. With an NFT, you are getting a certificate of ownership over the particular work you have bought—but unless you have made a special deal, when you buy the NFT, you are buying *the thing* (the piece of art, a copy of an NBA video moment), but not the copyright in it.

This means that for you NBA video, you can watch it as many times as you want, but you can’t put it on a website and charge others to watch it, and you can’t license it to a sports network for viewing. The same thing is true with regard to the digital art you purchased: you have the right to your copy, and you can sell your copy, or look at it as much as you want, but you cannot duplicate it, or distribute it over the internet.

Some NFTs have additional complexities—music is one area with examples of that. Music NFTs come in various forms:

some are essentially contributions of support to a musician, but others may be early tickets to performances, special information about a work, or advance access to a new work. But other music NFTs may be the acquisition of a digital copy that—like buying music on iTunes—allows the purchaser to include a track in a personal library, but does not give the purchaser rights to make further copies or distribute it. Yet another form of music NFT might be a form of participation right in a royalty stream for a song or album.

NFTs do not, by virtue of their interesting blockchain form, alter the law of copyright. The purchaser acquires only what is sold—and no more. In short, when selling an NFT, the principles of buying and selling copyrighted works apply.

But there is yet another layer of complexity that can come with buying an NFT and trying to understand the boundaries of what you have: any other contractual or licensing arrangements that may exist with regard to the work. For instance, it may be that the seller of an NFT associated with a copyrighted work may have previously transferred his or her rights to another. In such a case, the right to (for instance) make an NFT of certain pages of the score of a musical work may be complicated by a prior transfer of music publishing rights; or, an athlete’s own personal tape of a game in which an iconic moment occurred, may be owned by a team or network.

This all means that investing in an NFT of an artistic work is like investing in a physical copy of it: you want to know its provenance, the extent of what you are getting, and what you are leaving behind. Additional contractual arrangements can be made to provide additional rights, if they haven’t been given away already. But what you want to avoid is thinking that what you have bought is not what you thought.