



NFTs and the Role of Copyright Law

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INTEGRATED LEGAL CONSULTANTS

Newsletter

Editor's Note

Integrated Legal Consultants (ILC) was founded in April 2007, in Accra, Ghana, to offer dedicated and innovative corporate legal services while ensuring that the Ghanaian and West African business community and our network of international clients benefit from the highest quality of corporate and commercial legal services that the Practice provides.

As part of this vision, our Practice has introduced the publication of newsletters on legal and economic issues that would be of interest to its clients and equally affect their transactions. This is our 16th edition.

A Non fungible token (NFT) is a unique piece of data that is stored on a blockchain which can be linked to digital and physical objects that can be bought and sold with cryptocurrency. NFTs and big data have in

recent times gained popularity and have raised certain issues in relation to copyright globally. This Newsletter takes a look at NFTs and the role of copyright law in the Ghanaian context.

In this issue, we have highlighted some key issues regarding NFTs, their use and the role of copyright law in relation to NFTs.

We hope you find it informative and educative. Your feedback is welcome.

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NFTs and the Role of Copyright Law

Background

NFT's have been in existence since 2014 when the first NFT called Quantum was minted by Kevin Mccoy, however, NFT's went mainstream and created a lot of buzz in 2021 when Mike Winkelmann popularly known as Beeple sold his ***Everydays: The First 5000 Days*** composite at Christie's for \$69 million in March 2021. This sudden momentum in the NFT community may partly be credited to the COVID 19 pandemic and people's shift to virtual and digital means of communication and day to day interaction.

What is an NFT?

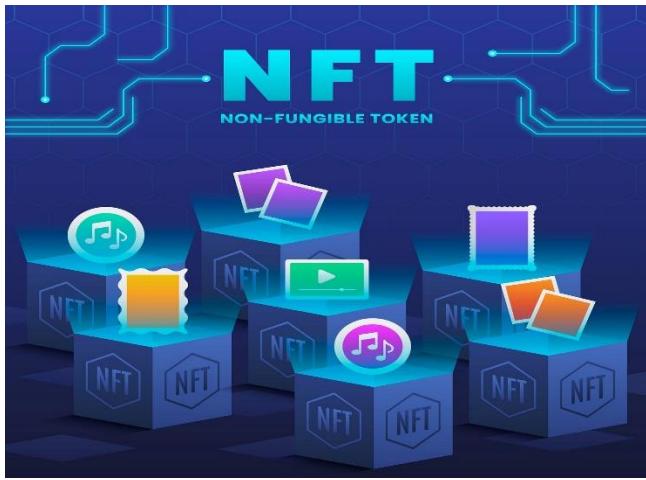
NFT stands for "Non fungible token". In simpler terms, a Non fungible token is a unique piece of data that is stored on a blockchain that can be linked to digital and physical objects that can be bought and sold with cryptocurrency. The data an NFT contains can be tied to digital images, songs, videos, and more. However, they can also be used to give an NFT owner access to exclusive merchandise, tickets to live or digital events, or be linked to physical assets like cars.

In many cases, NFTs are large files and, thus, a link to the actual photo, video, or audio file is what is stored on the blockchain rather than the actual piece of artwork. It does not grant ownership of the intellectual property or commercial rights in respect of the subject matter artwork to the purchaser of the NFT, it merely serves as proof of ownership of the digital file, and they only have the right to sell, trade or transfer the NFT.

One may wonder what is a blockchain? In response to this, it is a system in which a record of transactions made in bitcoin, or another cryptocurrency are maintained across several computers that are linked in a peer-to-peer network. In simpler terms, it is a digitally distributed, decentralized, public ledger that exists across a network.

NFT's are created by a process called Minting. Minting involves the process of tokenizing the artwork. First, the asset which is to be sold as an NFT is selected by the owner. It is uploaded to a given marketplace platform where a token is issued to guarantee its authenticity. As an owner you will then be required to pay "gas fees" to initiate the transaction on the blockchain and publish the artwork as an NFT on a marketplace. Once a piece of artwork has been minted on a particular marketplace as an NFT, it should never be minted on another platform as it may be flagged and removed.

The sudden rise of NFT's in popular culture and the amount some of these NFT's are being auctioned for has resulted in many people questioning the use of owning an NFT when you do not acquire full ownership and commercial rights to the original artwork.



Why Purchase an NFT?

So why own an NFT when you can download a picture of an artwork from the internet on your phone and make use of it or share it with friends?

There are many reasons why someone may purchase an NFT. One of them being the fact that it gives them the chance to own a “rare” collectible or to add on to their digital collection, because there can be only one owner of that NFT at a given time, thus creating an exclusive right which most people crave or aspire to own.

NFT’s can also be seen as an investment, considering the price at which it is bought or sold most purchasers believe it will appreciate over time and acquire a higher resale value. For example, the most expensive NFT of 2021 was sold for US\$69 million and it has been estimated that the monthly sales for NFTs averages about US\$2 billion. However, it is a risky investment to make because it is volatile and can only be purchased with cryptocurrency which constantly fluctuates because it is easily affected by supply, demand, government regulations and media hype.

Role of Copyright Law

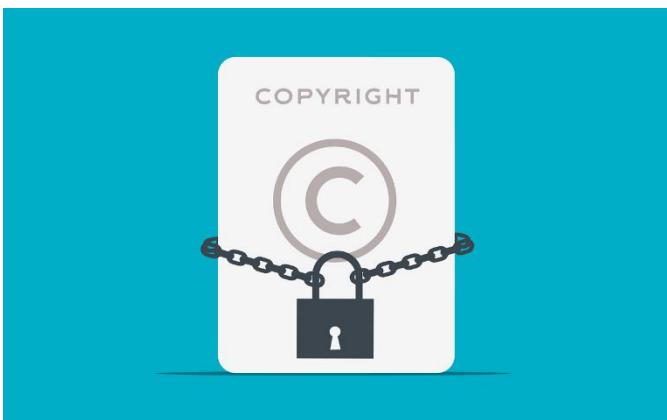
NFT’s are a fairly new technological development involving original works and it is important to understand the role that Copyright Law plays in the usage rights acquired by an NFT buyer as opposed to the owner of the original work. When an artist makes a new piece or artwork, they acquire a Copyright interest in the original work which may be protected. The term original is a “term of art” and does not mean novel but simply anything that is the product of the independent effort of the artist. Hence an artist of an original work has the exclusive right to reproduce, duplicate, reproduce, distribute and profit commercially off his art piece or work.

A copyright owner has exclusive rights to make an NFT based on his original piece of artwork, since the creation of an NFT can be categorized as a copy or even a derivative of the original work. So, for instance if you make a painting, you are the copyright owner of that painting which makes you the only one who can mint it and turn it into an NFT, because you have the exclusive rights to duplicate or reproduce the work by virtue of being the Copyright owner. Thus, if another person converts it into an

NFT that may be considered an actionable copyright infringement. The courts are yet to be faced with this scenario through litigation thus there is no case law pronouncement on this as of now.

As indicated earlier, an NFT serves as proof of ownership of the digital file and it only gives the right to sell, trade or transfer that NFT. This raises an important question on whether NFT's are protected by Copyright?

They are most likely not because the NFT is just a digital link which represents data on a block chain of an original work which belongs to an original artist and hence may not meet the criteria for Copyright protection. The original owner of the minted art piece however retains the right to commercially profit of his work unlike the NFT holder who only acquires the right to buy, sell or trade the NFT in question but cannot turn it into commercial merchandise to profit off.



There are a few exceptions that may allow a person who is not the originator of a piece of art to mint an artwork. One is the Fair Use exception. Which allows a person to make use of an original work some years (dependent upon the jurisdiction and its copyright law) after the death of the originator. Per **Section 12**

of the Copyright Act, 2005 (Act 690), the right of fair use can only be exercised seventy (70) years after the death of the original author or in the case of joint authors, after the death of the last surviving author.

The second exception may be in the form of a license or authority in writing granted to another by the original author to use or reproduce his original work per **Section 5 of the Copyright Act, 2005 (Act 690)**.

Conclusion

Nevertheless, the concept of NFT's is still very new and may likely transform over time due to technological advancement. It is important to keep in mind that even though NFT's may not be protected by Copyright, they are still subject to copyright laws and only an original author or artist can mint his art piece to create an NFT.

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