

NFTS AND CANADIAN COPYRIGHT LAW

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Non-Fungible Tokens, or “NFTs”, have garnered significant media attention, due largely to the high price tag attached to many NFT sales. Famously, an NFT of Beeple’s digital artwork was auctioned off for \$69 million USD through Christie’s Auction House.^[1] NFTs are now being sold by artists, musicians, sports leagues, fashion designers, and more. In spite of their increase in popularity, some confusion still surrounds the intellectual property rights associated with the purchase of an NFT.

To read more about the potential securities law considerations of NFTs, please see our firm’s bulletin on that topic, found [here](#).

What is an NFT?

An NFT is a digital certificate of certain rights associated with an asset. An NFT is composed of (1) a base that consists of cryptocurrency transformed into a non-currency token, (2) a digital file and (3) a series of smart contracts^[2] governing the rights associated with the NFT. When these three components are combined, or “minted”, the result is a unique digital file that can be bought, sold and traded. Each sale of an NFT is recorded on a blockchain (most usually the Ethereum blockchain), thereby creating an indisputable and verifiable ledger of the owner of each NFT.

What do you get when you buy an NFT?

The buyer of an NFT that includes a piece of art receives the same rights as would a buyer of a physical version of that art. When buying an NFT, the purchaser does not acquire the copyright to the underlying work, unless there is an agreement to the contrary. As the copyright remains with the original copyright owner, the purchaser of the NFT is granted ownership only over that specific version of the digital work underlying the NFT, and the details of ownership are dictated by the terms of the smart contracts underlying the NFT. Further, under Canadian copyright law, the author of the artistic work associated with the NFT enjoys moral rights in respect of that work, whether the or not the author is the copyright owner. Moral rights inuring to an author upon creation of a work in which copyright subsists include the right to the integrity of the work and the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.^[3] Moral rights may not be assigned, but may be waived in

whole or in part.^[4]

The smart contracts accompanying each NFT can vary which proprietary rights are transferred to the purchaser. For instance, an NFT may include restrictions on the ability of an owner of an NFT to alter, modify, or commercialize the digital file.^[5] Further, creators of NFTs can prepare certain terms in a smart contract to ensure the payment of royalties to the creator upon each subsequent sale of the NFT or payment to a third party (for example, a charitable organization).

An NFT that comprises an artistic work (i.e. paintings, drawings, maps, charts, plans, photographs and compilations of artistic works) is afforded the same copyright protection that a physical artistic work would be entitled. For that reason, the Canadian *Copyright Act* governs a number of the intellectual property issues that surround NFTs.

Since the copyright does not transfer to the purchaser of an NFT, without an agreement to the contrary between the creator of the NFT and a subsequent owner, the original copyright owner retains the right to mint new NFTs using the same underlying work. Since NFTs derive their value in large part based on their rarity, for a copyright owner to mint new, highly similar NFTs can significantly alter an NFT's value after it is purchased.

To mint an NFT, one must be the copyright holder with sufficient rights to tokenize the work into an NFT. As such, in order to avoid a potential copyright infringement, anyone without full and complete copyright ownership, such as a copyright licensee, must evaluate whether their rights extend to the ability to mint an NFT. For instance, in the U.S., artist Jay-Z recently filed a lawsuit against Damon Dash, the co-founder of his record label, for attempting to mint and auction off an NFT of the copyright to one of Jay-Z's albums. The complaint alleges that Dash's status as minority shareholder of the record label does not give Dash sufficient rights to mint an NFT of Jay-Z's work.^[6] While this case is still ongoing, it highlights the risks one faces when minting NFT's based on copyrighted work that they do not fully and completely own.

Conclusion

It may come as a surprise to some purchasers that the rights associated with their NFT do not include the intellectual property rights to the underlying work. It is important to scrutinize the smart contracts associated with each NFT to understand which rights the purchaser is truly acquiring. When investing in physical artwork, future profitability is typically based upon the value of each specific piece as art, rather than upon any scheme to modify or reproduce the artwork or to commercialize the copyright in the artistic work. Similarly, for individuals or investment funds purchasing NFTs with an intent to monetize them, profitability from such investments is typically based on the specific edition purchased rather than any opportunity to exploit the underlying work (akin to the value of first print versus the final print of a limited edition release of piece of artwork, i.e. 1/100 versus 100/100).^[7] Lastly, in negotiating future copyright licenses, it is now relevant to

explicitly account for the ability to mint an NFT using the copyrighted work. It is always a best practice to work with an expert in intellectual property law when drafting and negotiating intellectual property licenses. For assistance with your intellectual property licensing needs, please [contact one of our practitioners](#).

[1] [ps2id id='1' target='']Michaela Moscufo, "[Digital artwork sells for record \\$69 million at Christie's first NFT auction](#)" (2021) NBC news, online.

[2] [ps2id id='2' target='']A smart contract is a self-executing contract whereby the terms of the agreement between buyer and seller are directly written into lines of code. The code and the agreements contained therein exist across a distributed, decentralized blockchain network. The code controls the execution, and transactions are trackable and irreversible. For more information on smart contracts click [here](#).

[3] [ps2id id='3' target='']*Copyright Act*, RSC 1985, c C-42, s 14.1(1), 14.2.

[4] [ps2id id='4' target='']*Copyright Act*, RSC 1985, c C-42, s 14.1(2)

[5] [ps2id id='5' target='']National Basketball Association, "[Terms of Use](#)."

[6] [ps2id id='6' target='']*Roc-A-Fella Records, Inc. v. Damon Dash* (18 June, 2021), [Complaint, No. 1:21-cv-5411](#).

[7] [ps2id id='7' target='']The conventions for numbering artistic prints are well-established, a limited edition is normally hand signed and numbered by the artist, typically in pencil, in the form (e.g.): 14/100. The first number is the number of the print itself. The second number is the number of overall prints the artist will print of that image. The lower the second number is, the more valuable and collectible the limited editions are likely to be, within their price range. Other marks may indicate that a print has been made in addition to the numbered prints of an edition. For more click [here](#).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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