

The relationship between non-fungible tokens and IP rights

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In the popular world of blockchain innovations, non-fungible tokens (NFTs) are gaining traction at a rapid pace and have become a popular forum for people to commercialise their intellectual property rights.



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Over the past year, several NFT sales have made headlines after recording impressive figures. Amongst these sales is the first ever tweet of Twitter's CEO, Jack Dorsey, which was auctioned off for roughly \$3m. In the music industry, Kings of Leon were the first band to release an album as an NFT with revenue received to date of a whopping \$200m and on local ground, Bryan Habana was the first South African sports star to sell an NFT, in the form of a digital turntable, for R150,000 (the proceeds of which were donated to the Bryan Habana Foundation).

What are NFTs?

An NFT is a non-interchangeable digital asset that records ownership in respect of a copy or reproduction of an underlying digital or physical asset which it represents. Each NFT that is created is done so through a smart contract which utilises blockchain platforms such as Ethereum. The smart contract records the material terms and conditions relating to the NFT.

NFTs and intellectual property law

As it stands, the relationship between intellectual property rights and NFTs has not been addressed in South African legislation or case law. Nevertheless, one may paint an interesting picture by looking at the topic through the lens of fundamental principles in intellectual property and commercial law both in South Africa and worldwide.

Ownership and copyright

In terms of the Copyright Act No. 98 of 1978 (the Copyright Act), South African authors are granted copyright protection over original works immediately upon creation. For instance, our rugby superstar could have automatic intellectual property rights over his original digital turntable as an eligible artistic work in terms of sections 2(1)(c) and 7 of the Copyright Act without any form of prior registration. However, an NFT that represents that underlying original work is subject to different considerations.

In general, the acquisition of an NFT only affords the purchaser ownership of a particular copy of the original work that the NFT represents and not ownership in the original work itself. In addition, without specific terms and conditions to the contrary, ownership of an NFT does not automatically afford the buyer any form of intellectual property rights in the underlying original work. The default position is that an author of an original work retains their intellectual property rights in the underlying original work even upon the sale of an NFT. Thus, in the case of Habana, a purchased NFT would not grant the purchaser ownership of or any intellectual property rights in Habana's original digital turntable. This scenario can be further illustrated with the auction of NFTs in respect of Jack Dorsey's tweet, the terms of which specifically state that the NFTs represent an autographed certificate of the tweet and do not transfer ownership or intellectual property rights in the original tweet to the buyer of the corresponding NFT.

Notably, the above default position may be varied by express agreement. Such variation may be done via a smart contract (a program utilised to immediately effect agreements upon certain conditions being met), an agreement of copyright assignment or a contract for sale which sets out the terms and conditions regarding the transfer of ownership and intellectual property rights upon conclusion of a NFT transaction.

Copyright infringement

The minting and sale of NFTs gives rise to the risks of copyright infringement and exploitation of an author's intellectual property rights in underlying original works. This may transpire when an individual or entity who is not the author or copyright owner in the underlying original work, creates an NFT and misrepresents that they hold intellectual property rights in the original work or that they have the requisite permission to reproduce or copy the original work and commercialise its intellectual property.

Additionally, it is worth noting that the re-sale of an unauthorised NFT could also constitute copyright infringement and thus a due diligence should be conducted before concluding any NFT transaction.

Conclusion

NFTs are an exciting innovation of blockchain technology and present wide-ranging beneficial opportunities. It will be interesting to see how the law evolves to deal with NFTs and their ambiguous relationship with intellectual property rights.

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