

NFTs

CAN THEY CURE COPYRIGHT LAWS' ILLS?

Non-Fungible Token Summit 2018

Presentation by

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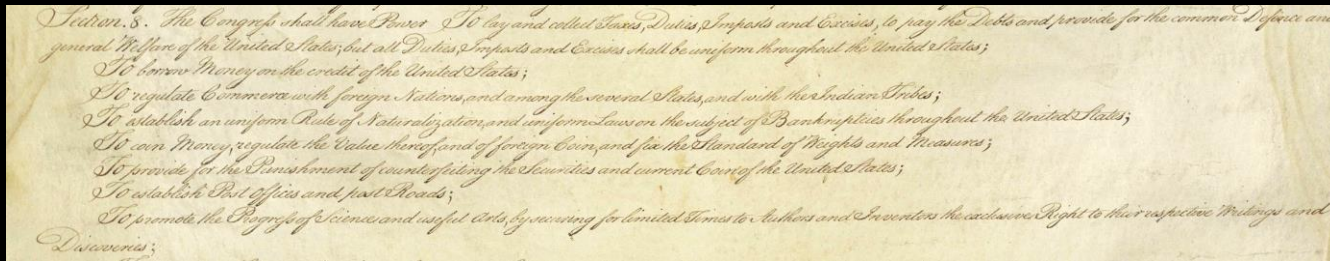
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PROPOSITION FOR NFTS

NFTs are an opportunity to face head-on whether US copyright laws' struggling interpretation of infringement, in the form of copying, will survive this new use case.

COPYRIGHT 101



“The Congress shall have Power To ... **promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;**”

COPYRIGHT 101

Benefits:

- ✓ Inexpensive (\$35 for individual to register and extra benefit of statutory damages/attys fees)
- ✓ Registration not necessary to prove copyright (but for infringement will have to show actual damages)
- ✓ Recorded and independent (Copyright office is neutral – doesn't get any more/less money depending on popularity)

COPYRIGHT 101

What's the fuss?

✓ Contracts

People seem to be particularly upset with copyright owners – but generally, they are upset about the contracts (recently, copyright protection granted to sound recordings made before 1972 – including SRs made in 1923!)

New contracting forms could remedy that – and NFTs and related smart-contracts may eliminate some hostility toward draconian copyright licensing terms.

Copyright law along with reasonable contracting terms related to copyright-related digital assets may usher in a new era!



COPYRIGHT 101

Enumerated rights –

17 U.S. Code § 106 - **Exclusive rights in copyrighted works**

- (1) to **reproduce** the copyrighted work in copies or phonorecords;
- (2) to **prepare derivative works** based upon the copyrighted work;
- (3) to **distribute copies** or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform the copyrighted work publicly**;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display the copyrighted work publicly**; and
- (6) in the case of sound recordings, to **perform the copyrighted work publicly by means of a digital audio transmission**.

COPYRIGHT 101

Limits on exclusive rights –

17 U.S. Code § 107 - **Limitations on exclusive rights: Fair use**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as **criticism** [NOTE: this includes parody], **comment**, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

17 U.S. Code § 109 - **Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord**

Notwithstanding the provisions of section 106(3), **the owner of a particular copy** [NOTE: basis of “first sale” doctrine] or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

COPYRIGHT AND EU ARTICLE 13

Chapter 2

Article 13 - Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their user

This article directs that:

“online content sharing service providers and right holders shall cooperate in good faith in order to ensure that unauthorised protected works or other subject matter are not available on their services”

Never fear, the meme ban is not here! The obligation is on large user-content based organizations to take down copyright infringing content. Is your meme a parody?

Exception: “special account shall be taken of **fundamental rights, the use of exceptions and limitations** as well as ensuring that the burden on SMEs remains appropriate and that automated blocking of content is avoided.”

COPYRIGHT AND EU ARTICLE 14

Chapter 3: Fair remuneration in contracts of authors and performers

Article 14 - Transparency obligation

The alleged “meme ban” received a lot more attention than Article 14 which seeks to ensure that:

“authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due.”

TOKEN CHARACTERISTICS BY FIELD

Finance - Fungibility

Fungibility versus non-fungibility - Idea of substitution – a property is fungible if it is capable for substitution or interchangeable – non-fungible if it is not **[terms of art for investing]** **Token example:** digital images/music maybe fungible, but once an element of a token with a specific hash may be non-fungible since the hash may be linked to a specific transaction even if, in the case of art or music, the work is visually or audibly identical.

Law – Specific Performance

Specific performance versus injunction/damages - Idea that certain things are by their nature unique, such as a work of physical art, rare personal property, or a piece of land, that the seller cannot substitute another for the one purchased and selected by the buyer) **[terms of art for law]** **Token example:** a buyer purchases a specific 1 of 10,000 Cryptopunk, seller cannot substitute the specific Cryptopunk with another without the buyer demanding specific performance related to the sale of the specific Cryptopunk. Would not be the case if the buyer said “please sell me a Cryptopunk” without identifying a specific one.

Economics – Elasticity

Elasticity versus inelasticity - Monopolies or exclusive IP ownership of a particular thing may lead to inelasticity because there are no substitutes and demand is high, the monopolist is a price maker. **[terms of art for economics]** **Token example:** one of one token – there are no substitutes – owner can set the price but if there is no market for it, does not create an economic monopoly – elasticity of demand.

ALIENATION CHARACTERISTICS BY PROPERTY TYPE

Personal Property

Includes:

1. Licenses **[exception – licensed digital assets like s/w]**
2. Physical Objects **[specific performance (contract) – first sale (IP)]**
3. Can be tangible or intangible **[includes IP rights]**
4. Leases
5. Inherited
6. Some of which can be bought or sold **[first sale]**

Intellectual Property

Can be:

1. Licensed
2. Transferred or assigned **[for copyright, assignments/ transfers must be in writing]**
3. Bought/sold
4. Inherited **[exceptions – licensed digital assets]**
5. Rights are “intangible” **[separate from physical object]**

Real Estate

Can be:

1. Leased/rented
2. Bought/sold **[specific performance]**
3. Inherited **[exceptions for leases]**
4. Writing generally required

Proposition

In order to unleash the full capability of art-related tokens, I would recommend that there be an equivalent of the first sale doctrine and right to alienate property (the right assign/sell/give property interests) for copyright protected digital assets. Using a property model is more in line with the recent CFTC case determining that virtual currencies are commodities (*CFTC v. My Big Coin*, US Dist. Ct. D. Mass. Case 1:18-cv-10077-RWZ, Sept. 26, 2018). Below are what I think are the requirements:

- ✓ **Separate art from token function:** In order to treat art manifested in a token as personal property, it might be necessary for a user to have the ability/right to separate the art from the function of the token. It would necessarily have to be self-contained/reliant. (Composability?)
- ✓ **Art manifested in token separate from 3rd party s/w:** The performance/display of the “art” should not rely on third party software or access to a third party database if it is to be considered personal property. (Is decentralized storage enough?)
- ✓ **Art not reliant on specific OS:** The “art” should exist separately from a specific operating system. (Display/performance token specific OS?)
- ✓ **Copyright rights not transferred:** Unless the art creator specifically states otherwise, the creator’s copyright interests will not be transferred via token subject to first sale doctrine.



Thank you!

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