

**Charles University**  
**Faculty of Law**

**NFT and Copyright**

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## Introduction

The advent of the internet has dramatically transformed the world. Many areas of human activity have emerged that did not exist before; many fields have also found themselves in crisis, which they had to either deal with or overcome. Among such fields was law. The ease with which digital information could be copied led some non-experts to perceive the law, including copyright law, as a relic in the newly emerging digital world<sup>1</sup>.

After nearly 30 years of coexistence between copyright law and the internet, it can be said that although concerns about the future of this legal field were not entirely unfounded, it has successfully dealt with the initial challenges of the digital era.

However, now comes the second wave of challenges related to the phenomenon of blockchain, which has enabled the emergence of two of the most popular phenomena of the internet in recent years: cryptocurrencies and NFTs (Non-Fungible Tokens).

It is precisely the latter of these phenomena that I will focus on in this work. Although NFTs are known to the general public (at least partly because they are occasionally expensive<sup>2</sup>), only a smaller portion can describe how these tokens are created, exist, and how they function. It is therefore logical that inadequate familiarity with the technical context prevents deep exploration of the legal aspects of this phenomenon, namely the relationship between Copyright Law<sup>3</sup> and NFTs.

In connection with the above, I consider it necessary to start my work with a brief technical context of NFTs, providing answers to simple questions: what they are, how they are created, what they are used for, and how they are transferred. After introducing the technical context, I will then provide a brief overview of Copyright Law fundamentals to delineate the boundaries of this legal field, or to specify which parts of it relate to the NFT phenomenon. Then we will move on to the section dedicated to examining the intersection of Copyright Law and NFTs and all the nuances arising from this intersection, including infringement of individual artists' rights,

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<sup>1</sup> Peter Popham, Independent on Sunday, Sunday 13 October 1996

<sup>2</sup> Josie Thaddeus-Johns, *What Are NFTs, Anyway? One Just Sold for \$69 Million*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/03/11/arts/design/what-is-an-nft.html> [<https://perma.cc/C3NY-G2X5>]

<sup>3</sup> Here and in the following, I will use the term "Copyright Law" to refer to the field, and the term "copyright" to refer to the author's subjective right to the result of their creative intellectual activity.

legal complications related to sales, and the extent of rights succession resulting from ownership of NFTs. Finally, we will answer the question of what the owner of the tokens actually owns in specific cases and what is the extent of the rights that can arise from owning NFTs. In the conclusion of the work, I will describe my thoughts on how the position of these tokens will change in the future and what role potential legal regulation will play, and whether it will be beneficial at all.

## Introduction to NFT

NFT is a unique record in a decentralized ledger called the blockchain<sup>4</sup>; the token itself may relate to a specific asset or a certain set of rights that may have tangible value in the physical world<sup>5</sup>. From this definition, it can be inferred that an indispensable element of any NFT is a record on the blockchain, not the material value or a set of rights transferred along with the token. Confirmation of this thesis can also be found in a detailed analysis of the process during which NFTs are created. This process is called "minting" or tokenization, which will be discussed below.

However, what can be an NFT? Are there any requirements that would exclude or include some tangible or intangible object in the set of items that could potentially become NFTs? For an object to be tokenized<sup>6</sup>, it must first exist at least in digital form to be subsequently added to the token's code and later placed on the blockchain. Therefore, if the object existed only in a material form, it should first be digitized before tokenization. The only requirement placed on the object of tokenization is thus its ability to be digitized, logically excluding intangible matters such as tastes or smells from this list. Other objects, whether material or digital, could be converted into NFTs. Tokenization works on the same principle as the digitization of objects. For example, a photograph, or its original, can be created either in a material or digital form. The same applies to NFTs, which represent only a certain state of the original object, its "new life" by starting to exist on the blockchain.

However, it is necessary to understand what a blockchain is at the beginning. Blockchain is a digital ledger or database in which encrypted blocks of data are stored and chained together, forming a chronologically unified source of information<sup>7</sup>. The crucial point, however, is that the storage and modification of data in the ledger are not managed by a single central entity, but rather by each active participant in the blockchain<sup>8</sup>. The functioning of this process can be

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<sup>4</sup> LegalEagle, *NFTs Are Legally Problematic ft. Steve Mould and Coffezilla*, YouTube, na 1:12 (27 of April 2022), [https://www.youtube.com/watch?v=C6aeL83z\\_9Y&t=10s&ab\\_channel=LegalEagle](https://www.youtube.com/watch?v=C6aeL83z_9Y&t=10s&ab_channel=LegalEagle)

<sup>5</sup> CoinDesk, *NFTs and the Law*, YouTube na 2:33 (10 of March 2021), [https://www.youtube.com/watch?v=L\\_8j5T4UNZo&ab\\_channel=CoinDesk](https://www.youtube.com/watch?v=L_8j5T4UNZo&ab_channel=CoinDesk)

<sup>6</sup> Tokenization – the proces of creating an NFT, or token.

<sup>7</sup> SAM DALEY, *What is Blockchain?* BuiltIn (31 of August 2022) <https://builtin.com/blockchain>

<sup>8</sup> For better understanging, we can envision a „blockchain participant“ as a computer with installed software

seen in the example of minting NFTs, demonstrating how blockchain works in practice and how a token is created.

A token is created by programming on the blockchain, where its two integral components are entered: a "smart contract" (a self-executing digital contract that enables two or more parties to perform transactions – essentially, it is an algorithm contained within the token<sup>9</sup> that performs a specific operation under certain conditions<sup>10</sup>) and metadata (coded data determining the content of the NFT – image, music, video). Subsequently, the data is confirmed by the "hash" of the token issuer<sup>11</sup> and the "hash" of the block of information preceding it. Along with this process, the "minter"<sup>12</sup> pays a commission to the involved parties, which represents a fee for the creation of a new item on the blockchain. This fee is called "gas"; without this fee, the token cannot be created.

Although the above may seem confusing, it is important to understand that it is a pillar of information in the form of programming code, which, after payment of the creation fee, will be publicly displayed on the blockchain as a "fresh item"<sup>13</sup>. These pieces of information are then taken care of by "miners"<sup>14</sup>, who add our token creation information to a block along with other information provided by other users. Subsequently, the "miner" labels this block with their "hash", thereby closing it and preventing any subsequent changes, and thus storing it on the blockchain. The next block will have to attach to this newly created one, thus creating a single chain of information in which records of any changes made can be found, and information about the creation of the token will also be permanently stored there.

An important aspect regarding blockchains is also their classification according to types. The most popular type of blockchain (also the one described above) is the public blockchain; it is the opposite of a private blockchain. Their key difference lies in the fact that anyone can participate in operations on a public blockchain without restrictions. Participants in a private blockchain can only join based on an invitation, which simultaneously verifies their identity or the authenticity of other data<sup>15</sup>. The type of blockchain can play a significant role in NFTs – the reasons for this will be further elaborated in the chapter describing the relationship between copyright and NFTs.

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<sup>9</sup> ANDREW ZAPOTOCHNYI, *What are Smart Contracts?* Blockgeeks (19 of October 2022)

<https://blockgeeks.com/guides/smart-contracts/>

<sup>10</sup> A common and highly important component for the NFT industry is the „smart contract“ for example, the automatic payout of a specified commission to the token „minter“ upon its sale.

<sup>11</sup> It is a cryptographic function used to confirm transactions (VANDA KOCIANOVÁ, *Blockchain and Copyright Law*, Master's Thesis, Faculty of Law, Charles University [August 31, 2022]. Thus, it serves as a key confirming the authenticity of the key.

<sup>12</sup> A „minter“ is a person who „mints“ or issues an NFT. They are the author of the „smart contract“ that is part of the NFT and the owner of the original „hash“ that is recorded on the block containing information about the issuance of the NFT. Here and throughout, the term „minter“ and issuer or author are interchangeable.

<sup>13</sup> In the sense that this item did not exist on the blockchain before.

<sup>14</sup> „Miners“ are independent participants who receive rewards for collecting data from various blockchain users into large repositories called blocks. This is also the reason why blockchain has its current name.

<sup>15</sup> SHOBHIT SETH, „Public, Private, Permissioned Blockchains Compared“ Investopedia (28. July 2022) <https://www.investopedia.com/news/public-private-permissioned-blockchains-compared/>

The above details describe the technical process of creating NFTs, which is relatively complex for individual implementation, and therefore most "minters" do not program all the details themselves but utilize some form of technical assistance (e.g., using established algorithms or ready-to-go programs), which is not problematic in general. However, theoretically, this could lead to complications in the realm of copyright law; the reasons for this will be described in the following chapter devoted to the basics of copyright law.

After introducing the basic technical aspect, it will be possible to describe in detail what NFT is. As mentioned above, an NFT is a code on the blockchain, while also being an attribute that proves the existence of this data on it<sup>16</sup>. With the help of NFT, the relevant data can be retrieved and its authenticity verified. From a purely technical standpoint, NFT exists solely to verify itself (i.e., the data about its creation contained on the blockchain). The external content referenced by the token, manifested by the aforementioned images, videos, and audio recordings, is therefore a kind of additional product. However, this product is also what "fills" this token in terms of objectively perceivable content. In my opinion, considering NFT tokens as mere certificates of ownership of themselves is justified, but it also sharply narrows the perspective through which we can view NFTs. Therefore, in my work, I will consider NFTs as a state of work expressed in the form of a unique code on the blockchain that refers to certain content and simultaneously serves to verify its validity, and I will proceed with further exploration from this definition.

An important question is also the transfer of NFTs. Fortunately, this is not particularly tricky. We find no difference in disposal compared to standard movable property – we can sell, buy, rent, donate the token, etc. All these transactions can be carried out among individuals on the blockchain, but due to anonymity, these are rather exceptions, as much greater demands are placed on communication and contractual processes in general. Much more popular is the version of transfer that takes place on online marketplaces (e.g., the most popular being "OpenSea"), which are essentially websites where owners and "minters" are allowed to sell tokens either through advertisements or in public auctions within the online marketplace. Online markets are advantageous because they receive greater attention from the audience, making it an easy way for a "minter" to find interested parties to transfer their token to.

In the case of a transfer that takes place outside of a marketplace (i.e., on the blockchain), all its legal details are left to the agreement of the parties and the "smart contract", as well as the method by which the rights arising from the NFT are transferred. In the case of online markets, a third party – the marketplace itself – intervenes in the transfer process through its terms of service, which may affect this inherently closed relationship, possibly claiming a portion of the rights associated with the token. For example, the terms of service on the aforementioned online marketplace "OpenSea" include a provision stating that by using the marketplace, the NFT seller (either the "minter" or any of the buyers who decided to sell their owned token) grants "OpenSea" a worldwide, non-exclusive, sublicensable, royalty-free license to use, reproduce, modify, and publicly display any material associated with any NFT that the user has submitted or published during their activity on the website<sup>17</sup>. They may also play a role in definitively establishing the scope of rights transferred with the NFT, and if contracting parties wish to trade on the relevant platform, they will have to agree to these terms.

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<sup>16</sup> See footnote number 7

<sup>17</sup> Terms Of Service, 7. Intellectual Property Rights, OpenSea, <https://opensea.io/tos>

Online markets thus facilitate the technical process of issuing NFTs by allowing the "minter" to agree to the marketplace's terms instead of issuing their own "smart contract". However, it's worth noting that some online marketplaces have no terms of service and serve only as technical intermediaries for transfers, receiving commissions for transactions. In such cases, the issuer's "smart contract" comes to the forefront again.

Special attention will also be required in answering the question of what NFTs are used for. This cannot yet be answered definitively because dozens of new projects are emerging practically every day, in which tokens are used in various ways, and their purposes vary significantly across different fields. Nevertheless, it is possible to make a broader generalization and divide NFTs into three main groups: **tokens that serve as investment assets**<sup>18</sup>, **tokens that are used to confirm or grant some rights to the token owner**<sup>19</sup>, and finally, **tokens that are considered works of art in the traditional sense of the term**. In this work, I focus exclusively on NFTs as works of art, but I cannot exclude the possibility that in the following chapters, I will refer to other types of tokens.

As a rather marginal note in terms of the significance of my work, but important for categorizing tokens into traditional legal categories, it should be noted that **NFTs are not securities**. It is true that NFTs share similarities with securities. For example, we can also embody rights into them, just like in securities. We can also observe material similarity in the fact that NFTs, like certain types of securities, also become objects of speculation. However, the fundamental difference is that NFTs lack the essential element of a security, namely the written expression of will made by the issuer<sup>20</sup>. Therefore, the conclusion that NFTs are not securities is unequivocal without any doubts, and the legal regulation of securities should not be applied to tokens<sup>21</sup>.

At the end of this chapter, it will not hurt to repeat the conclusions stated above. Therefore, NFT is a code on the blockchain that demonstrates certain content but technically serves only to verify itself. The blockchain is a digital public chain of data blocks. Each block, which has its "hash" from a "miner", i.e., the person who closed this information into the respective block, is linked to the block created just before it. A blockchain can be public, meaning it does not restrict the participation of its members, or private, in which the person who devised a particular network can establish a certain control mechanism for participants. It is worth noting that adding new information to both types of blockchains incurs a fee.

NFTs can either be programmed independently or by using auxiliary programs. The transfer of these tokens is free within the entire blockchain on which they were created, but it is usually carried out on online marketplaces, which may intervene in the transfer in some way (either formally – through their terms of service, or materially – by receiving a commission for a successful transfer). Tokens have three general ways of use: as investment assets, to confirm/provide a certain right to the owner of the NFT, and as works of art. Also, they are not securities because they lack the written expression of the issuer's will.

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<sup>18</sup> One of the most significant NFT collections is "CryptoPunks." A defining characteristic of such NFTs is that their price is influenced more by current market demand and supply than by overall artistic value

<sup>19</sup> An example of this type of token is the project "NiftyCert." This project utilizes NFTs as digital certificates of completion for its course

<sup>20</sup> DAVID, O., DEVEROVÁ, L., DOLANSKÁ BÁNYAIOVÁ, L., DVOŘÁK, J., DVOŘÁK, T., FIALA, J., FRINTA, O., HOLČAPEK, T., HURDÍK, J., KINDL, T., MACKOVÁ, A., PAULY, J., PAVLÍK, P., PELIKÁN, R. et al. Civil Code: Commentary, Volume I, (§ 1-654). ASPI, Wolters Kluwer

<sup>21</sup> The amendment of securities regulations would be beneficial for the NFT sector as investment assets





## Introduction to the Basics of Copyright Law

Since NFTs are often categorized as collectible items and considered works of art, it is essential to address the content of copyright law and establish what constitutes a work of art and what rights are associated with it.

Copyright law is an absolute right that belongs solely to an individually identified natural person (the creator), and corresponds to the obligation of other persons to refrain from any unauthorized interference with the author's rights. Copyright is classified as non-time-barred rights<sup>22</sup>. The subject matter of copyright is a work that is intangible but must be expressed in any form perceptible by human senses<sup>23</sup>. The law sets out general requirements that a work must meet to be recognized as such. It must be a literary, artistic, or scientific work, which is also a unique result of the author's creative activity and is expressed in any objectively perceivable form<sup>24</sup>.

Here, it is necessary in my opinion to repeat the passage from the previous chapter regarding the token being a state of a work, expressed in a unique code contained on the blockchain, which refers to certain content and simultaneously serves to verify its validity. Therefore, NFT is an expression of a work in a new, unique form, so it will be examined whether any of the legal requirements have been lost through the tokenization of the work and whether NFT is in compliance with them.

Starting with the first requirement, which is that it must be a literary, artistic, or scientific work. It is evident that NFTs cannot by their nature be scientific works, so it should be examined whether tokens fall under the categories of artistic or literary works. The aforementioned definition is elaborated upon by the Berne Convention for the Protection of Literary and Artistic Works, which stipulates that the term "literary and artistic works" includes all creations in the literary, scientific, and artistic fields, regardless of the manner or form of their expression<sup>25</sup>. By the fact that the code of NFT (except for exceptions of tokens that confirm or provide a right to the owner) contains images, videos, or audio recordings, which undoubtedly fall into the artistic field themselves (outside of the NFT form), it is not possible to exclude their technical expression through NFT from this field. Additionally, we can also embody some smaller literary works into NFT, for example, an article<sup>26</sup>. However, larger texts cannot be included due to technical limitations.

The second legal requirement for a work is that it must be the result of the author's creative activity: literary, artistic, scientific, that is, mental activity. The conceptual attribute of creative activity is only satisfied by such a mental creation that is an individual expression of the author

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<sup>22</sup> IVO TELEČ, PAVEL TŮMA; Copyright Law. 2nd edition. Prague: C. H. Beck, 2019, p. 5

<sup>23</sup> Judgment of the Supreme Court of the Czech republic, dated April 30, 2007, file number 30 Cdo 739/2007

<sup>24</sup> Section 2 paragraph 1 of Act No. 121/2000 Coll., on Copyright, on Rights Related to Copyright, and on the Amendment of Some Laws (hereinafter referred to as the "Copyright Act").

<sup>25</sup> Decree No. 133/1980 Coll., decree of the Minister of Foreign Affairs on the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1889, supplemented in Paris on May 4, 1896, revised in Berlin on November 13, 1908, supplemented in Bern on March 20, 1914, and revised in Rome on June 2, 1928, in Brussels on June 26, 1948, in Stockholm on July 14, 1967, and in Paris on July 24, 1971 (hereinafter referred to as the "Berne Convention")

<sup>26</sup> KEVIN ROOSE, *Buy This Column on the Blockchain!* N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/03/24/technology/nft-column-blockchain.html>

created by creative imagination<sup>27</sup>. However, it is not excluded that the author's mental activity may be supplemented by mechanical, automatic activity... allowing the creation of the work in terms of organizational, technical, craft, or other similar aspects<sup>28</sup>. At the beginning of the first chapter, I wrote that NFT is a new state of an object. The situation with a work and its form as an NFT token does not materially differ from the situation when a photographer decides between a digital or physical form of the original photograph. If the author has decided that his work (for example, a song) will take the form of an NFT, nothing can change his authorship, even the fact that various programs will be used to create the token, through which he will convert his work into the desired state. The law stipulates that the author can only be a natural person who created the work<sup>29</sup>. Greater assistance from mathematical-electronic algorithms or artificial intelligence during the process of creating the work could result in the work not being created at all, as well as any copyright of any person against it. It can be successfully argued that the original work, which should be tokenized into the form of an NFT, was still created independently by the author; technical assistance was only used to facilitate the conversion of the work into NFT form. **Based on the above, it can be argued that NFT, by containing the author's work in its code, fulfills the second legal requirement and is therefore the result of creative activity.**

The legal requirement for the uniqueness of this result of the author's creative activity is assessed separately for each work. We can imagine an NFT that contains a unique painting created by the author, thus fulfilling the requirement of uniqueness. However, we can also imagine a situation where there is an entire collection of tokens and the only distinguishing feature is their code, and the resulting different location on the blockchain. In such cases, uniqueness cannot be attributed to these tokens.

The final defining characteristic of a copyright work is its objectively perceptible form. The law itself states that this form can also be electronic<sup>30</sup>. Given the fact that an NFT is a digital token, it is undeniable that this requirement is also fulfilled because its content can be perceived.

In the situation where we have determined that NFTs constitute copyrighted works, we can continue our examination. The content of copyright law is divided into property rights and moral rights<sup>31</sup>. Although they have different natures, what unites them is that the author of the work cannot waive any of them, not even partially. Unlike moral rights, the author is entitled to transfer property rights. In the realm of NFTs, there is no conflict regarding moral rights – the author creates a work, which is modified by converting it into a token, and the moment the token is anchored on the blockchain, the work can be considered published, even in cases where the author did not previously consider their work to be published<sup>32</sup>. Most issues related to NFTs revolve around the property aspect of copyright content. Property rights to a work are divided into a large group of internal rights, the complete list of which is provided by the Copyright Act<sup>33</sup>. In the context of NFTs, discussions usually revolve around the right to reproduce the work, the right to distribute the original or reproduction of the work, and the right to exhibit the original or reproduction of the work.

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<sup>27</sup> CÍSAŘOVÁ, Z., DOBŘICHOVSKÝ, T., FALADOVÁ, A., HOLCOVÁ, I., KŘEŠŤANOVÁ, V., KŘÍŽ, J., WÜNSCHOVÁ PUJMANOVÁ, A., ŽIKOVSKÁ, P. Copyright Law: Commentary. ASPI Wolters Kluwer.

<sup>28</sup> Judgment of the Supreme Court, dated November 10, 2009, file number 30 Cdo 4924/2007

<sup>29</sup> Section 5, Paragraph 1 of Copyright Law.

<sup>30</sup> See footnote number 25

<sup>31</sup> Section 10 of Copyright Law

<sup>32</sup> Section 11 of Copyright Act

<sup>33</sup> Section 12, Paragraph 4 of Copyright Act

The right to reproduce is crucial for NFTs because of the question of how the token was created. However, by reproduction, I do not mean the technical process of creation, as every NFT must originate from some work. Therefore, we will address NFTs in the context of copyright law. NFTs, as a visible result of code (such as an image or video), can be created either based on a separate underlying work that the author considered completed or did not intend to change. This can happen partly or entirely based on the content of the underlying work<sup>34</sup>, or the token is the initial expression of a work that the author considers complete, making it a wholly independent work by its nature.

The first scenario, the creation from an underlying work, can be considered an indirect reproduction of an existing copyrighted work. A reproduction is considered indirect when the work is expressed differently than through direct reproduction and when the reproduction changes its form compared to the original work<sup>35</sup>. The fact that an NFT can be seen as a reproduction is based on the fact that despite its immaterial nature, it is captured on blockchain servers and can be publicly displayed through any suitable technical means, thus fulfilling the requirement of capturing the work in a material carrier capable of objectively perceptible expression<sup>36</sup>. To prove that it is an indirect reproduction, we can compare the relationship between an NFT and the underlying work to the relationship between a physical photograph and an electronic photograph. An electronic photograph is an indirect reproduction because it was reproduced but in a substantially different way than mere copying: an electronic copy was created, making it an indirect reproduction of the original photograph. Similarly, this applies to the relationship between an NFT and the underlying work. The underlying work existed in some form, and then a copy was created that replicates it, but not directly in relation to it, as it is placed on the blockchain. However, if the underlying work existed in digital form, the type of reproduction is subject to specific examination, which must be conducted on a case-by-case basis. It should be noted that it may be a direct or indirect reproduction, but in both cases, it enjoys the same legal protection as any other physical or digital reproduction. It is also important to note that due to its derivation from the original work, an NFT will never acquire the status of an independent copyrighted work – it will forever remain just a reproduction. This situation could be remedied if the author considers their token and the original work as one entity<sup>37</sup>.

In the second scenario, the creation of an NFT as a completely unique work falls under the definition of a copyrighted work. In this case, the author created some object with the intention of turning it into an NFT; thus, the material work represents the developmental part of the work, which does not exclude the creation of copyright to the work<sup>38</sup>. However, the author must bear in mind that their work must fulfill the legal requirements of a work even before the creation of the token itself, as the tokenization process cannot remedy any defects in the work. The question in this case is how the author must deal with the material work after the creation of the token. Here, too, there are two ways: to destroy the material work<sup>39</sup> or to consider it as part of the token<sup>40</sup>. However, both methods have the exact same consequence – the method the author

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<sup>34</sup> We can imagine NFT Mickey Mouse, which originated from the copyrighted work of Walt Disney.

<sup>35</sup> IVO TELEC, PAVEL TŮMA; Copyright Law. 2nd edition. Prague: C. H. Beck, 2019, p. 180

<sup>36</sup> IVO TELEC, PAVEL TŮMA; Copyright Law. 2nd edition. Prague: C. H. Beck, 2019, p. 178

<sup>37</sup> An example of such tokens could be the collection "99 originals" by American internet celebrity Logan Paul, in which individual components of the NFT collection are sold and will be sold together with a physical copy of the photograph.

<sup>38</sup> Section 2, paragraph 3 and section 9, paragraph 1 of Copyright Act

<sup>39</sup> CRISTINA CRIDDLE „Banksy art burned, destroyed and sold as token in „money-making stunt“ (March 9 2021) <https://www.bbc.com/news/technology-56335948>

<sup>40</sup> See footnote number 38

chooses does not jeopardize the status of the token and the copyrighted work expressed in the token.

In conclusion of this chapter, it is necessary to examine the doctrine consistent with both the Czech, European, and American legal systems, namely the doctrine of exhaustion of copyright (by sale), also known as the "First-sale doctrine." Its essence lies in the fact that the author's rights to distribution are exhausted concerning such an original or copy of the work in tangible form by the first sale or other transfer of ownership made by the author or with their consent<sup>41</sup>.

The "standard" doctrine of exhaustion of copyright is based on the sale of the original or copy of the work, which has a tangible form. However, the jurisprudence of the European Court of Justice has changed this conclusion, or expanded it to cover intangible copyrighted works as well<sup>42</sup>. **Therefore, we can confidently say that the doctrine of exhaustion of copyright will also apply in the case of NFTs**, meaning that after the first legitimate purchase of the token, the acquirer no longer needs the consent of the "minter" for future transfers. If the Court of Justice were to exclude NFTs from the doctrine of exhaustion of copyright, it could have devastating consequences for the future development of this industry because the requirement for repeated consent from the "minter" for any further transfer would be burdensome for both them and the buyers, who would never have the chance to freely dispose of the token.

It is important to note that according to the jurisprudence of the Court of Justice, if a copyrighted work-containing object is modified to such an extent after its first lawful placement on the market that it constitutes a new reproduction of the work, then the consent of the rights holder is required for the legal distribution of such an object<sup>43</sup>. Although this opinion pertained to a material copyrighted work that was significantly altered by the first purchaser, it can be assumed that the Court of Justice would apply the same opinion in the case of NFTs transferred outside the blockchain into the real world without explicit consent contained in the license agreement. Therefore, any transfer of a copy or reproduction of the work outside the blockchain or to another blockchain network would require the consent of the author (the "minter"). We will further examine this issue in detail in the following chapter.

## Intersection of NFT and Copyright Law

At the beginning of this section of my work, it is necessary to recapitulate the key conclusions from the previous chapters. NFT is a state of a work expressed in a unique code contained on the blockchain, which refers to certain content and simultaneously serves to verify its validity. It is created by tokenizing a work and placing it on the blockchain. It can arise as an indirect reproduction of an existing work or as the final version of the work with a developmental part in the tangible work. Since NFT is a state of a work, it depends on the original work whether it will meet the legal requirements to be recognized as a copyrighted work. It can be assumed that the doctrine of exhaustion of copyright, despite the absence of explicit expression in case law, is applicable to NFTs, and the first legitimate acquirer of the token is therefore not restricted in their right to subsequent transfer of the purchased work or reproduction without the consent of the "minter."

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<sup>41</sup> PETR PRCHAL, "Limits of Copyright Protection", Dissertation, Faculty of Law, Palacký University Olomouc, July 15, 2015

<sup>42</sup> Judgment of the Court of Justice of the European Union dated July 3, 2012, case number C-128/11

<sup>43</sup> Judgment of the Court of Justice of the European Union dated January 22, 2015, case number C-419/13

In the first part of this chapter, I will focus on the transfer of NFTs and how different "minters" have dealt with or not dealt with the transfer of rights to their work and the problems that may arise from this; while also considering the roles of third parties in these circumstances. Subsequently, we will move on to the section where we will explore various infringements of copyright that NFTs (or rather their "minters" and acquirers) may be susceptible to, and we will also focus on interim case law dealing with these issues.

### Transfer of NFT. Where and how?

This part needs to begin by debunking a popular misconception in the world of NFTs that the transfer of the token itself also transfers the copyright associated with that token. This claim has its merit but is not entirely accurate. As mentioned earlier, an author has two components of rights stemming from their work: moral rights and economic rights (see Chapter 3). The exercise of moral rights regarding their work cannot be transferred to another person; transfer is only possible with their economic component. "Disposition of economic copyright is possible only through constitutive transfer of the right to use the work (i.e., license), which is part of the remaining non-transferable content of absolute copyright."<sup>44</sup>

Consequently, the transfer of the token may entail the transfer of copyright, with the exception that it is not a mere transfer but rather a licensing agreement, through which the "minter" transfers their economic copyright to the buyer, but not the copyright to the work itself, which remains with the token issuer. In my opinion, any agreement regarding the transfer of NFT as a copyrighted work (including oral agreements) should include a clause containing a licensing agreement specifying the scope of copyright. For example, determining whether the buyer has the right to create a physical copy of the work or create further reproductions of the work. Such a licensing agreement could be included in a "smart contract." If the transfer agreement does not contain any similar provisions, the buyer does not acquire any of the economic copyright. It is even questionable whether, in the absence of a licensing agreement in the transfer of NFT, the placement of the token on the buyer's personal website, if accessible to the public, is permissible. Licensing agreements are a relatively rare occurrence in the transfer of tokens, which can be attributed either to the fact that the vast majority of "minters" are reluctant to grant licenses to their artworks, or that generally the parties to the transfer of NFTs neglect the legal aspect of their transaction.

It goes without saying that the absence of a licensing agreement weakens the legal position of the token buyer, but the situation can be further complicated. Consider a theoretical situation where the "minter" and the initial buyer agree between themselves on the transfer of NFT, a licensing agreement for a certain set of economic rights to the work (e.g., the right to use the work for commercial purposes) was drawn up between these parties. The buyer owns the token and possesses certain economic copyright, while the "minter" received financial compensation and still retains the copyright to their work. Later, the buyer decides (as is typical in the world of NFTs) to sell their owned token, which they do. It can be confidently argued that if the token was properly acquired from the "minter," it is in the ownership of the initial buyer and can pass into the ownership of any subsequent buyer in the same manner. However, how does this align with the licensing agreement that was concluded between the "minter" and the initial buyer?

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<sup>44</sup> IVO TELEČ, PAVEL TŮMA; Copyright Law. 2nd edition. Prague: C. H. Beck, 2019, p. 336

The licensing agreement was properly concluded between both parties, and the relationship established by this agreement still persists. Therefore, there may suddenly arise a situation where the person holding the token and the person who is a party to the licensing agreement are not identical. Such a situation is easily solvable through the institution introduced by the new Civil Code - assignment of contract<sup>45</sup>. However, the initiative and assignment of the contract according to this legal regulation should come from the party that (in our case) has the licensing agreement. Nevertheless, this party may not want to further transfer this agreement. So, if a conflict arises between the owner of the NFT and the party to the licensing agreement, it becomes unsolvable. However, it can be easily averted by embedding the licensing agreement directly into the smart contract - this way, the contract would transfer along with the token. Alternatively, another approach is that the licensing agreement must include a condition that the party to the contract must also own the token.

It is appropriate to positively acknowledge the role of online marketplaces here because their terms and conditions (if any) are binding on both parties to the transfer, thereby taking over the regulation of the copyright aspect of the transfer. The terms of the online marketplace can thus completely eliminate copyright-related issues associated with the transfer of the token.

### Violation of copyright with NFT

As I have mentioned several times above, the basis for any NFT must be a digitized work, which we convert into code and place on the blockchain for a fee, which can be either private or public. In this sentence formally describing the creation of NFT, two problems plaguing the NFT world are contained.

The first problem is the authenticity of the owner. On a public blockchain, we can never know if the "minter" is truly the artist he claims to be, and thus whether he has copyright to the work or not. How can we know that an exhibited painting as an NFT by Banksy is really from Banksy, that it did not arise from copyright infringement, but moves within its framework? The answer to this question is short - if the issuance of NFT is not associated with any public claim of its alleged author, we cannot say with certainty that this token was truly issued by the rightful owner. In simple terms, we cannot technically prevent the issuance of an NFT token by an unauthorized person. However, what we can do is prevent this person from dealing with the token and transferring it in any way. Since most transfers take place on online marketplaces, a short KYC procedure<sup>46</sup> is sufficient, which allows confirmation (or refutation) that the person who issued the token is indeed the one who had the right to do so. Unfortunately, at present, due to the absence of any legal regulation of online marketplaces, only a fraction of the marketplaces has opted for the KYC procedure, as this logically increases their costs.

Another way that could solve the problem of doubts about who issued the token could be the issuance of this token on a private blockchain. This type of blockchain guarantees that the person who issued the token was invited by the network administrator, and this administrator also verified the identity of the "minter". Some have gone even further, for example, the American basketball league NBA has created its private blockchain to sell its tokens. It is logical that in this case, there can be no doubts about whether the tokens were issued rightfully or not.

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<sup>45</sup> Section 1895 et seq. of Act No. 89/2012 Coll., the Civil Code

<sup>46</sup> KYC - "Know Your Customer" procedure. It is a legal requirement for providers of certain services to verify the identity of incoming users before allowing them to use their services. It is often used in the banking sector.

The second problem is whether the issuer of the NFT could have issued the token at all, i.e., whether its issuance was in line with the author's intent. The anonymity of the blockchain can lead, and does lead, to the creation of many tokens that have an underlying work, but the author of this work may not even know that this has happened, and that his rights have been so significantly affected. The problem is further deepened by the fact that no one, except for the "minter" or possibly the token owner (depending on how it is regulated in the smart contract or the terms of the online marketplace), has the authority to remove the token from the blockchain. The author can prevent any transfer on the online platform by contacting its administrator, but the "minter" can move to another platform. Unfortunately, such a violation cannot be prevented.

However, it is different when the violator creates their private blockchain for their promotion, as was the case in a legal dispute where the plaintiff was Playboy, which stood against two defendants - Playboyrabbittars.app and Playboyrabbitt.com. Playboy was selling its NFT collection on a private blockchain on the Playboyrabbittars.com website, but at the same time, the opposing party was selling tokens that were almost identical to those from Playboy, and moreover, on almost identical websites. Since the violators owned their website, and therefore were not anonymous, Playboy managed to prevent the misuse of its right, stop the sale of tokens by the defendants, and obtain compensation<sup>47</sup>. It is worth noting that Playboy was also helped by the fact that the situation did not fall solely under copyright infringement but also into the field of unfair competition, which allowed for higher compensation.

What is the consequence of both of these problems? The consequence of unauthorized authorship, as well as unauthorized placement of an NFT by an author who, for example, transferred the exercise of property rights to another through a licensing agreement<sup>48</sup>, is that the token is not a work but a violation of the work from which its digitized form originated. Certain types of violations can be prevented, either by the actions of online marketplaces in the form of a set KYC procedure or by judicial protection. However, other types of violations (e.g., the existence of an unauthorized token issued on the blockchain) cannot be prevented.

Moreover, NFTs often bring complications related to licensing the works they contain. Nevertheless, I believe that in the case of NFTs, it is not a temporary phenomenon, and I believe that NFTs will continue to exist in the world, thus coexisting with copyright. I will provide the reasons for this in the final part of my work.

## Conclusion

NFTs have a lot of problems, most of which I have mentioned or hinted at in my work. However, I believe that the positives of NFTs outweigh the negatives. For example, the ability to set up automatic commission payouts in a smart contract with each token sale streamlines the process for artists to monetize their works. Additionally, having a work on the blockchain can ensure its "eternity" in terms of mathematical and technical processes.

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<sup>47</sup> United States District Court, S.D. New York, November 13, 2021. 21 Civ. 08932 (VM)

<sup>48</sup> This was also the case in the legal dispute between Quentin Tarantino and Miramax. Tarantino released an NFT collection based on characters from the movie "Pulp Fiction," for which he holds the copyright to the recording. However, Miramax holds the license to all other proprietary rights arising from the film. The legal dispute revolved around the question of whether Tarantino had the authority to issue the tokens. Since the dispute was settled out of court, the possibility of determining whether Tarantino did or did not have the right to issue the tokens no longer exists.

Currently, if an author decides that the original version of their work will exist only in digital form, they must accept that the work will lack any uniqueness on the web in a technical sense. An original work in JPEG format cannot be distinguished from its depiction in the same form. The benefit of NFTs, therefore, is that they allow for the identification of a digital original of the work, and thus its origin, which is not possible with other expressions of digital works.



Furthermore, most blockchain problems can be addressed with less extensive legal regulation. We do not consider NFTs as copyrighted works because they represent only a new state of the work (similar to the relationship between digital photography and physical photography), so no amendment to the Copyright Act will be necessary. It is sufficient to impose obligations on online marketplaces to conduct KYC procedures on their users, and both problems (authenticity of the author and unauthorized issuance of the token) will be eliminated because an unauthorized "minter" will know that, although they may successfully issue an NFT, they will not be able to subsequently sell it on any online platform, which will deter them from parasitizing on someone else's copyrighted work.

Regulation should also apply to NFT "minters." Imposing a legal obligation to attach a license clause relating to the token when selling it, either to them or again to online marketplaces, would mitigate any copyright disputes in this sphere.

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