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February 3, 2023

LIBRARY OF CONGRESS
Copyright Office

Docket PTO–C–2022–0035

Notice of Inquiry:
Study on Non-Fungible Tokens and Related Intellectual Property Law Issues

Comments Submitted by the Graphic Artists Guild, Inc.

The Graphic Artists Guild welcomes the opportunity to submit comments in response to the Copyright Office’s Notice of Inquiry on NFTs and related IP issues. The artists represented by the Graphic Artists Guild – illustrators, animators, cartoon and comic book artists, communication designers, and textile and surface designers – rely upon copyright to monetize and control the use of their works. They both materially benefit from and are challenged by NFT markets.

NFTs present an exciting potential for individual creators to corral the marketplace to their benefit. The decentralized nature of the Web3 space combined with blockchain technology underlying the NFT marketplaces empowers artists monetize and control their works while building a community of supporters. The mass appeal of NFTs escalated once artists became involved, and NFTs of visual works continue to be the most popular¹. NFTs present an opportunity for the public to “own” a piece of visual culture – to show proof that they were there at the emergence of a new artist or culturally significant work, or to create a sense of “ownership” of a work that has meaning to them.

However, the decentralized nature of the technology underlying NFTs has enabled plagiarism and copyright theft with little oversight from the platform marketplaces. NFTs can be quickly and easily created and minted in vast quantities from any work posted online. For the artist, that has opened yet another arena which they have to patrol for infringements. Once infringements are unearthed, the traditional methods of dealing with the infringement – identifying and contacting the infringers, issuing takedown notices, bringing suit, and correcting the record – are complicated by the decentralized nature of the NFT marketplaces.

In our comments, we are limiting our responses to questions addressing graphic artists’ experiences within the NFT marketplaces. We’ve indicated where we have elected to not answer a question.

¹ <https://www.makeuseof.com/different-types-of-nfts/>



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1. Please describe:

- a. The current uses of NFTs in your field or industry, including the types of assets associated with NFTs (e.g., digital assets, physical goods, services); and
- b. Potential future applications of NFTs in your field or industry, including the types of assets that could be associated with NFTs (e.g., digital assets, physical goods, services).

Visual works of art were an early driver of the NFT marketplace, and artists continue to create NFTs based on simple visual works. However, as the NFT marketplace has both matured and slowed, buyers are placing a higher value on NFTs which provide more than just a token linking to a visual work. Artists are motivated to build additional value into their NFTs. Additionally, artists are using NFTs to monetize works that normally would not have found their way to the market. Lastly, NFT marketplaces are becoming global spaces where artists can meet with other creators they otherwise would not have connected with, leading them to work on collaborative projects that incorporate text, music, and imagery.

The ways in which graphic artists monetize work via NFTs include:

- a) Developing collections of images based on a theme, and creating iterations in different color palettes, with different elements, different typography, etc.
- b) Creating multiple images for use in dynamic NFTs.
- c) Partnering with brands to develop NFT collections based on a theme, event, or product.
- d) Repurposing physical artwork, sketches, and images of work-in-progress which otherwise would not be monetized.

One Guild member produces NFTs which provide a good example of how artist build value into an NFT and create ongoing revenue streams. This artist inherited a large collection of physical artworks – painted canvases – from his late father. He is minting NFTs of his father's artwork by posting a digital image of a painting, linking the NFT token to the work, and incorporating an anecdote about his father into the blockchain ledger of that work. The purchaser of the NFT also receives the physical artwork, and an invitation to private online community of supporters of the artist. Since the artist retains the copyrights to his father's paintings, he can create father-son derivative works by incorporating his own artwork, and minting NFTs from those. The terms of the smart contract ensure that he receives resale royalties as the NFT is sold down-market. The artist has thus minted NFTs which memorialize his father on the blockchain in perpetuity, has built an online community of patrons, and has created an ongoing revenue stream of resale royalties which he can pass on to his family.

Dynamic NFTs are a new development which expand the market for visual artists by requiring the creation of additional visual assets to be bundled in one NFT. In dynamic NFTs, the artwork associated with an NFT changes in response to changes in external conditions. Often the change occurs via automatic changes encoded into the NFTs smart contract, which trigger changes to the NFT metadata. Dynamic NFTs can be used, for example, to create avatars which change as a player moves up levels in an augmented reality gaming.²

² <https://chain.link/education-hub/what-is-dynamic-nft>



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2. Please any IP-related challenges or opportunities associated with NFTs or NFT markets:

Challenges:

The decentralized environment which removed barriers of entry into the NFT marketplace has also created the greatest challenges for artists attempting to exert their copyrights. As has been widely reported, plagiarism is common on NFT marketplaces. This is facilitated by “lazy minting”³, whereby platforms permit the creation of NFTs for free outside the blockchain; the NFT is minted, and the corresponding fees charged only once the NFT has sold. Through lazy minting, plagiarists and copyright infringers can quickly create scores of NFTs at no-cost. By the time the artist discovers the infringement and convinces the platform to take down the NFT, the copyright infringer may very well have already profited from the theft of the work.

Copyright infringement of artwork for NFTs is facilitated by NFT bots, which scrape online portfolios or pull up images through Google’s image search.⁴ Infringement is also facilitated by NFT generators such as APPY⁵, which permit individuals to create thousands for NFTs from a single layered file. The number of NFTs generated from one layered file is only limited by the statistically possible number of iterations possible. This permits copyright infringers to generate thousands of NFTs from one file within minutes.

The culture of the NFT marketplace is resistant to changes to address the issue of copyright infringement and plagiarism. For example, upon discovering that their free lazy minting tool was being widely used by plagiarists, OpenSea limited the number of NFTs and collections which could be created using its free tool. In response to a huge backlash from the NFT marketplace, they later retracted those guardrails.⁶

Platforms offer varying degrees of authentication of NFT minters, from no authentication (putting the onus on purchasers to do their own research – if possible – to determine if an NFT is an original, authorized work), to selling the works of curated and/or verified artists⁷. However, artists have reported plagiarism occurring even on platforms which claim they verify their users.⁸

Artists seeking to have their infringed work taken down via the DMCA process are frustrated by lackluster responses from the marketplaces.⁹ However, when a platform complies with a DMCA notice, it may only be able to prevent the linked image from being displayed in that marketplace. Once the NFT has been minted and sold, the market no longer be able to destroy or “burn” the NFT. Unless the smart contract gives the NFT issuer admin access to the wallet, the marketplace doesn’t have the ability to access the NFT and may not have the means to contact the owner of the wallet containing the NFT.¹⁰

³ <https://learn.bybit.com/nft/mint-nft-for-free/>

⁴ <https://www.theverge.com/22905295/counterfeit-nft-artist-ripoffs-opensea-deviantart>

⁵ <https://www.appypie.com/nft-generator>

⁶ <https://www.engadget.com/opensea-free-minting-tool-220008042.html>

⁷ <https://pastel.network/how-are-nfts-authenticated/>

⁸ https://medium.com/@nturkewitz_56674/2021-the-year-of-the-nft-24cbe958134a

⁹ <https://www.theverge.com/22905295/counterfeit-nft-artist-ripoffs-opensea-deviantart>

¹⁰ https://www.skadden.com/-/media/files/publications/2022/05/how_the_dmca_applies_to_nfts.pdf



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A further complication is that even when an NFT removed via a DMCA notice, the underlying artwork could be used in other NFT marketplaces. The best solution for the artists would be to have the infringing artwork removed from wherever it's stored. However, that could be any number of places – in the cloud, on a server associated with the marketplace, etc. Often the artwork underlying an NFT is stored in a Web3 decentralized file system, in which the image is duplicated across many servers and identified via a content identifier “hash”. This means the metadata in the NFT for the image does not use a location identifier, thwarting attempts to locate the image.¹¹

Opportunities:

On NFT markets, artists can convey their claim of authorship of their work in an immutable record which exists permanently on the blockchain. That claim is coupled with a visual representation of the work. As the NFT is resold, the artist's information follows the artwork, establishing an unbroken record of their claim.

Most NFT marketplaces permit artists to set and earn royalties on the resale of their NFTs, into perpetuity.¹² Through these royalties, artists derive an ongoing income from downstream sales of their digital works.

3. Please describe how NFT markets affect the production of materials subject to IP protection.

The production of artwork has not essentially changed because of the emergence of NFT marketplaces. As noted above, tools such as NFT generators permit the generation of thousands of NFTs from layered files, greatly reducing the labor involved in creating collections of works. However, the process of producing that layered file is essentially the same as before the advent of NFTs.

NFTs create scarcity for a digital works, restoring a value that previously existed in physical artwork. To maintain scarcity, artists may refrain from creating derivative works. Or they may emulate physical print runs by creating a limited number of NFTs of an artwork, and including a number (essentially the equivalent of a print run number) within the smart contract for those NFTs.

As stated above, NFTs provide a market for works which may not have otherwise been considered for sale. The preliminary sketches and images of works-in-progress can be marketed as attractive collectibles alongside an NFT of the finished artwork.

Where NFT markets have affected artists is less in the production of their works and more in the marketing of those works. Because of the prevalence of plagiarism in NFT marketplaces, some artists feel compelled to create accounts, essentially claiming digital territory and establishing their presence before a fraudster can do so.

¹¹ IBID

¹² <https://learn.bybit.com/nft/what-are-nft-royalties/>



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4. Please describe whether, how, and to what extent NFTs are used by or could be used by IP rights holders (including those who hold trademarks, patents, and/or copyrights) to:
 - a. Document the authenticity of an asset;
 - b. Document the seller's ownership of or authority to sell an asset;
 - c. Document the seller's authority to transfer any relevant or necessary IP rights associated with an asset; and
 - d. Document any limitations related to IP rights surrounding the sale, or the purchaser's use, of an asset.

NFTs provide artists a record which permanently exists in the blockchain, with the underlying artwork identified via a unique code. As the NFT is sold from seller to seller, the record of the original minter of the NFT – the creator – is retained in the blockchain. That blockchain record is not a substitute for a copyright registration. But for visual artists who for a variety of reasons do not register their copyrights – the high cost of registration and/or volume of artwork they've created – an NFT can provide an immutable record of their claim of authorship.

Artists can also include licensing terms within their smart contracts, stipulating what rights the purchaser of the NFT has in displaying, copying, or otherwise using that work.

5. Please describe whether, how, and to what extent NFTs present challenges for IP rights holders, or those who sell assets using NFTs, with respect to the activities described in Question 4 above.

As we described earlier, plagiarists can and do create fraudulent claims of authorship in minting NFTs, and copyright infringers take advantage of NFT markets to quickly sell unauthorized works. These problems are exacerbated by slow DMCA takedown responses and lapses in verification processes, where those exist.

6. Please describe whether, how, and to what extent NFTs are used by, could be used by, or present challenges or opportunities for IP rights holders (including those who hold trademarks, patents, and/or copyrights) to:
 - a. Obtain their IP rights;
 - b. Transfer or license their IP rights;
 - c. Exercise overall control and management of their IP rights (e.g., digital rights management tools, mechanisms to facilitate the payment of royalties, etc.); and
 - d. Enforce their IP rights, including any mechanisms that could mitigate infringement or help ensure compliance with contractual terms associated with the sale of an asset.

There is a great deal of confusion around copyright ownership and licensing of NFTs. Many purchasers of NFTs do not realize that the purchase does not automatically confer copyright ownership, and many sellers of NFTs do not realize the necessity of stipulating licensing terms for the transaction. The confusion is compounded when a sale of rights is included in the NFT transaction – sellers may not realize that a sale of rights requires a written, signed transaction –



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or when NFTs are resold.¹³ The licensing terms provided by popular NFT collections such as Bored Ape, with their deceptively simple terms and conditions, compound the confusion.

Licensing terms or a transfer of copyrights may be conveyed in contracts provided separately from the smart contract. When that occurs, those agreements are decoupled from the NFT, causing confusion about who owns which rights as the NFT is resold downstream. In those instances, royalties on the resale of the NFTs are also decoupled from the transfer of copyrights. An artist may continue to receive royalties from artwork to which they no longer own the rights.

7. Please describe how and to what extent copyrights, trademarks, and patents are relied on, or anticipated to be relied on, in your field or industry to:
 - a. Protect assets that are associated with NFTs;
 - b. Combat infringement associated with NFT-related assets offered by third parties; and
 - c. Ensure the availability of appropriate reuse of NFT-related assets.

Artists rely upon copyrights in setting licensing terms and monetizing their works on NFT markets, just as they do in traditional markets. However, plagiarism and copyright infringement are a significant problem in those markets. The greatest challenge facing visual artists in combatting plagiarism and copyright infringement in NFT markets is the inadequacy of the DMCA process. NFT markets are yet another vast arena which artists must police for infringements. As we described earlier, when an artist rights holder is successful in issuing a DMCA notice, the token pointing to the artwork remains on the blockchain.

Since NFT markets provide the APIs which display an NFT within the virtual, once the market has taken down an NFT listing the image no longer appears in the wallet. However, once companies start creating APIs which provide access to the blockchain outside of the NFT market, removing the sale listing may no longer prevent the display of the infringed images in the virtual wallets. The artist rights holder would then need to target the DMCA notice to the original location of the infringed artwork – provided they can find that location. NFT artwork may instead be stored as content-addressed material in a Web3 decentralized file system. In that case, the artist rights holder could target a DMCA notice to the gateway services which provide access to content-addressed materials. However, such gateway services are proliferating, requiring artists to repeatedly issue DMCA notices¹⁴.

8. Are current IP laws adequate to address the protection and enforcement of IP in the context of NFTs? If not, please explain why, including any gaps in current IP laws, and describe any legislation you believe should be considered to address these issues.

¹³ <https://medium.com/initc3org/copyright-vulnerabilities-in-nfts-317e02d8ae26>

¹⁴ <https://www.blockchainandthelaw.com/2022/03/will-nft-piracy-compel-changes-to-the-digital-millennium-copyright-act/>



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The difficulties artists face in protecting and enforcing their copyrights in NFT markets highlight the inadequacy of the DMCA process. However, problems associated with the ineffectiveness of the DMCA process predate the emergence of NFT markets. The decentralized nature of Web3 will pose significant challenges to finding legislative solutions based on sound technology.

9. Please describe any IP-related impacts those in your field or industry have experienced in connection with actual or intended uses of NFTs. When relevant, please describe any legal disputes that have arisen in the following contexts, and the outcome of such disputes, including citations to any relevant judicial proceedings:
 - a. The relationship between the transfer of an NFT and the ownership of IP rights in the associated asset;
 - b. The licensing of IP rights in the asset associated with an NFT;
 - c. Infringement claims when either (i) an NFT is associated with an asset in which another party holds IP rights, or IP rights in the asset associated with an NFT are owned by the NFT creator;
 - d. The type and/or scope of IP protection afforded to the NFT creator, including when that party is not the creator of the associated asset; and
 - e. The application of one or more of the exclusive rights under 17 U.S.C. 106 to transactions involving NFTs.

We are not addressing this question.

10. Please describe any instances you have observed in which a party has sent or received:
 - a. A notification of claimed copyright infringement, counternotice or material misrepresentation, pursuant to 17 U.S.C. 512, in connection with an NFT; and
 - b. Other IP-related legal claims seeking the removal or reinstatement of NFT-associated materials.

We are not addressing this question.

- c. Please describe the extent to which adjustments are being made to IP portfolio planning and management in light of the emergence of NFTs.

We are not addressing this question.

11. Please describe any experiences in seeking IP protection for, or use of, assets associated with NFTs in foreign jurisdictions.

We are not addressing this question.



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12. Please identify any additional IP issues associated with NFTs that you believe the Offices should consider in conducting this study.

The emergence of NFT markets have provided artists with an opportunity to monetize works which they may otherwise overlook: sketches, images of works in progress, additional derivative works generated to create collections, etc. To fully enforce their copyrights, artists will need to register the copyrights to these works. It is imperative that visual artists other than photographers have a group registration option that meets their needs. The Group Registration of Unpublished Works option, limited to 10 works total, is entirely inadequate.

Thank you for considering these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rebecca Blake".

Rebecca Blake
Advocacy Liaison
Graphic Artists Guild

Graphic Artists Guild

For over 50 years, the Graphic Artists Guild has advocated on behalf of our members: graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists. The *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines* has raised industry standards, and provides graphic artists and their clients guidance on best practices and pricing standards. We also advocate for graphic artists on Capitol Hill on a wide range of legislative initiatives, as well as internationally through active membership in global umbrella organizations