



NFTs and Their Copyright Implications

2022.03.28

1. What is an NFT?

Non-fungible tokens (NFTs) continue to be one of the most discussed topics in the crypto space in 2022. Whereas cryptocurrencies such as Bitcoin are interchangeable or “fungible”, NFTs hold their unique identify and value and, therefore, non-fungible. It is this uniqueness that drives the notion of digital scarcity making NFTs one of the largest new hypes in the blockchain realm.

NFTs are built on blockchain technology. However, contrary to popular understanding that a creation of an NFT of a digital asset requires the “on-chain” recordation of the digital asset (i.e., the digital asset is recorded onto the blockchain), the actual content of the NFT, such as a piece of a digital art, is not typically stored on the blockchain but on the web due to the size of the relevant digital art and gas fees incurred for “minting” an NFT. Instead, an NFT will typically have a weblink recorded on blockchain pointing to the NFT’s storage location.

The NFTs also contain other information and attributes pertaining to the digital asset called “metadata”. OpenSea is a well-known NFT marketplace where NFTs can be created and traded. In creating an NFT on OpenSea, the creator can enter information particular to the digital asset, such as the year of creation, dimensions, edition quantity, any collaboration details, etc. Such information constitutes “metadata”.

The NFT creation process is called “minting”. During the minting process, the weblink information, other metadata, minting person, minting date and time, etc. are recorded in the NFT. Once the minting process is completed and the NFT starts trading, key details of the relevant transactions (e.g., seller, buyer, transaction date, price, etc.) are also recorded on the blockchain, making such NFT related information highly reliable as it cannot be tampered with, manipulated or forged. This is why NFTs can be considered as certificates of authenticity of a digital work.

2. Why NFTs?

Let us consider the painting sector, an industry with a sharp growth of NFT utilization. Digital art forms exist, for instance, in JPG and other digital file formats which are very easily replicated. Such characteristic of digital arts makes it

almost impossible to identify the original work, causing them to be freely available and thus unattractive assets as collectables in the traditional online environment. Introduction of NFTs have added the ingredient of scarcity to digital artworks, helping artists create financial value for their work, and collectors view them as genuine financial investment assets.

For collectors, if they are aware of the existence of the original version of an artwork, they are likely to desire the “authentic” piece. For instance, the painting of the Mona Lisa at the Louvre Museum attracts people from all over the globe to travel to see the original piece, despite there being hundreds of replicas, pictures or prints that are much more easily accessible. This is due to the original Mona Lisa being in a physical form of painting which one can touch and hold. In contrast, viewers have been able to appreciate and admire digital artworks irrespective of their authenticity. In this respect, the benefit of owning an NFT digital art lies not so much on the enhanced ability to appreciate the physical form of the artwork, but the ability to verify the ownership over the original piece. This leads to the conclusion that unlike physical artworks, NFT artworks hold their value as ‘assets’ more so than as an ‘object of aesthetic appreciation’.

Despite NFTs being generally perceived as stable assets (as they cannot be altered or forged), one may still question whether NFT assets can be hacked, damaged, destroyed or lost due to most underlying assets being stored in an online space rather than being recorded “on-chain”. Such risk would be real if the NFT asset were stored in a server, but such risk is negligible with the usage of the IPFS (Interplanetary File System) which distributes, stores and shares the digital file.

3. NFT Minting

The intention of this newsletter is not to outline an all-encompassing review of NFTs and each type of intellectual property, but to touch upon NFTs and relevant copyright implications. To understand such implications, it is helpful to understand how an NFT is created or is ‘minted’. ‘Minting’ an NFT is the act of converting digital files into crypto collections or digital assets into NFTs by creation of a code on a blockchain network which includes a unique ID to the digital asset. Whilst ‘minting’ comprises recordation of information (weblink, metadata, etc.) on the NFT and thus is not primarily an artwork copying task, registration of the NFT on the relevant exchange (e.g., OpenSea) inevitably requires the digital asset’s replication onto the network, meaning only the copyright holders of the underlying digital assets are in principle entitled to ‘mint’ NFTs.

Of course, it would be fine for the author of an artwork to mint his own digital art piece, as such author acquires the copyright to his work upon its creation.¹ However, a myriad of complex legal questions arise where a person mints an edition of an existing creative work.

Natural separation of the ownership and copyright dictates that, for a purchase of a physical artwork, its ownership is transferred to the collector upon the consummation of the purchase, while its copyright will remain with the artist in the absence of a different agreement. What if someone creates an NFT of a photographed image of an existing artwork? Will there be a new line of counterfeit issues for copyright holders? Will it heighten the burden of copyright holders to employ heavier screening standards on NFT exchanges or platforms? Despite the surging popularity of NFTs, the answers to such questions have yet been fully answered. In fact, cases are beginning to emerge in Korea, such as the Whanki Foundation

case, in which the artist's foundation brought a lawsuit against a company which created and auctioned NFTs of artworks of Whanki Kim, Sugeun Park, Joongseop Lee for infringements of the artists' copyrights.

4. NFT Exhibitions

Like any other physical artwork, if a collector purchases an NFT, the collector would only hold the ownership and the copyright would remain with the original creator of the underlying artwork under applicable copyright laws. Accordingly, to upload NFTs to social media such as Instagram or to use it as a profile image on a messenger such as KakaoTalk or Whatsapp, one would ordinarily need to also purchase the right from, or otherwise obtain consent of, the copyright holder to copy or transmit the image to such social media or messenger platform.

On NFT exchanges such as OpenSea, contracts are executed between (i) exchanges copyright holders and (ii) exchanges and NFT acquirers, in accordance with terms and conditions dictated by such exchanges. This means the terms of the ownership and copyright usage pertaining to the NFT artwork are determined by the relevant exchanges. Whereas on a certain exchange, a purchaser would be permitted to post the NFT digital art for non-commercial purposes on social medias or other public display platforms such as Instagram or online messengers (e.g., KakaoTalk or Whatsapp), other exchanges may not provide for such right. It would be prudent to review the differing terms and conditions of various NFT exchanges.

On the other hand, what if NFT owners wish to hold exhibitions of their NFT artworks? For physical artworks, Article 35(1) of the *Copyright Act* provides for the artwork owner's ability to hold exhibitions without having to obtain consent of the copyright owner of such artwork by stating "...[t]he holder of the original of a work of art, etc., or a person who has obtained the holder's consent, may exhibit the artwork in its original form, except where the artwork is to be permanently exhibited on the street, in the park, on the exterior of a building, or other places open to the public...". However, the foregoing concept of a display on exhibitions would not apply to NFTs as the definition of an "exhibition" under the *Copyright Act* entails display of tangible artworks for appreciation by the general public. Rather, a display of an NFT would more appropriately be classified as a type of 'screening' or 'public performance' under the current provisions of the *Copyright Act*, which would require the copyright holder's consent. This places NFT owners at a significant disadvantage to owners of physical artworks under the current copyright regime. Relevantly, it will be interesting to observe the development of the copyright laws and introduction of any NFT specific regime in Korea which accommodate for the growing volume of NFT sales in the digital market and the new demand for the display or exhibition of NFT artworks.

5. NFT Artists and Resale Profit

Discussions on the artists' entitlement to secondary or indirect profit on the artworks' resale are ongoing. Such right is referred to as the 'resale royalty right', 'droit de suite', or 'claim for compensation of resold artworks'. The Berne Convention has introduced provisions on the recognition of such rights to be reflected in the laws and regulations of signatory states, which are not adopted by Korea. On this front, one benefit to NFT artists is that such resale royalty right

can be intrinsically coded as part of a smart contract when minting an NFT. Again, it would be interesting to observe how relevant regime would develop to ensure artists rights to resale royalty are better protected with physical artworks in light of the development of the NFT market.

¹ Article 10(2) of the Copyright Act.

[\[Korean version\]](#) NFT와 저작권 – 디지털 아트를 중심으로

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