

**Before the
DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
AND
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, D.C.**

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In the Matter of)	
Study on Non-Fungible Tokens and)	Docket No. PTO-C-2022-0035
Related Intellectual Property Law Issues)	Submitted February 3, 2023
)	

**COMMENTS OF THE
MOTION PICTURE ASSOCIATION, INC.**

INTRODUCTION

The Motion Picture Association, Inc. (“MPA”) is pleased to provide comments in response to the Notice of Inquiry (“NOI”) regarding the Study on Non-Fungible Tokens (“NFTs”), published at 87 Fed. Reg. 71,584 (November 23, 2022) (Docket No. PTO-C-2022-0035).

The MPA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPA serves as the voice and advocate of the film and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and supporting the creative ecosystem that brings entertainment and inspiration to audiences worldwide. The MPA’s member companies are Paramount Pictures Corp., Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, Warner Bros. Entertainment Inc., and Netflix Studios, LLC. These companies and their affiliates produce and distribute the vast majority of filmed entertainment in the United

States through the theatrical and home entertainment markets. Indeed, the MPA’s members create thousands of films and television shows that entertain, educate, and inform the public.

NFTs represent an exciting business opportunity for MPA’s members to promote their core products—motion pictures and television programs—in new ways, expand their merchandise offerings, and connect with their audiences on a deeper level. Although NFTs are still in their infancy, and it is difficult to predict future marketplace developments and potential uses of this new technology, the MPA currently believes that existing intellectual property law can address issues if and when they arise.

RESPONSES

- 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).**

At the present time, MPA members are primarily using NFTs in connection with unique digital assets based on films and television shows: digital collectibles. MPA members have released NFT-associated collections with motion pictures and television shows including *The Matrix*; *Star Wars*; *Jurassic Park*; *Lord of the Rings*; *Fast and the Furious*; *Ghostbusters*; *Back to the Future*; *Star Trek*; *Stranger Things*; *Love, Death + Robots*; *Adventure Time*; *Powerpuff Girls*; and more.¹ Generally, these NFT-associated collections contain either randomly generated avatars or items based on the fictional world of the show—10,000 unique images is typical—or a small number of images taken directly from the show, and made unique by assigning individual numbers (similar to trading cards or limited edition prints). In either case, the images themselves

¹ The Matrix: <https://niftys.com/thematrix>; Stranger Things: <https://www.candy.com/netflix>; Love Death + Robots: <https://opensea.io/collection/love-death-robots-official>; Ghostbusters, Powerpuff Girls, Adventure Time, Star Trek et al.: <https://www.veve.me>

may be static or permit a small amount of animation. For new movies and television shows, NFT-associated collections are typically released in conjunction with the opening of the movie or television season, and the initial opportunity to obtain an NFT will be tied to the purchase of a movie ticket, the completion of a game, finding a QR code in the program, or similar promotion. NFT-associated assets are also released in conjunction with older movies, typically “blockbusters” that remain popular. At least one studio has also released individual copies of a full-length movie with bonus content in connection with an NFT.² Some independent film producers (not MPA members) are experimenting with other uses for NFTs. For example, some have funded productions through the sale of NFTs (*I Live Here Now*)³ and optioned NFT-associated collections as the basis for films (*World of Women*, *Aku*).⁴

NFT-associated assets can generate additional revenue through the sale of the NFT itself as well as excitement for the related movie or TV program. MPA members have explored several different models for NFT-associated products and will continue to do so, as new uses for the technology have yet to be fully developed.

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

See response to Question 6.

² Lord of the Rings, The Fellowship of the Ring: <https://web3.wb.com/warnermedia/movieverse>

³ Keith Nelson Jr., *Julie Pacino Is Using NFTs to Fund Her Film – And It’s Working*, MIC (December 22, 2021), <https://www.mic.com/culture/julie-pacinos-film-funding-nfts>

⁴ Andrew Hayward, *Here Are All of the Major NFT Projects Being Turned Into Movies*, Decrypt (March 4, 2022), <https://decrypt.co/94142/major-nft-projects-hollywood-movies>

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

As discussed in response to Question 1, MPA members are exploring various ways to exploit this technology and are producing some NFTs. Both the NFTs and the underlying works are typically subject to both copyright and trademark protection. Thus far, the NFT-associated works created by MPA members have been derivative works based on a movie or television program, and the MPA members have not sought copyright registrations for the NFTs alone.

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 could be effective in authenticating certain rights in a digital asset, akin to other legal instruments that perform similar functions: a license agreement, a deed for real property, a receipt for goods purchased, or a certificate of authenticity. What is novel about NFTs is that details of the arrangement are kept in a secure and publicly accessible form on the blockchain, and the blockchain records are automatically updated when the asset is transferred. This can help NFT holders prove the authenticity of the underlying NFT to which the blockchain record refers and the extent of their rights to the NFT. That makes further transfers of the NFT and any associated rights more efficient and secure, fostering a marketplace. It's what makes NFTs useful and can lead to innovative ways for creators of consumer products and intellectual property to convey or license certain rights, to the benefit of owners and consumers alike. However, the ability to use the blockchain to authenticate NFTs or the rights one has to them, to help delineate any authority to transfer the NFT and any associated rights, and to spell out what rights are conveyed, are not unique to NFTs. These functions can be performed as well by a traditional

instrument written in plain English and exchanged between the parties. Indeed, a traditional license may even be more clear than an NFT in detailing the limitations regarding IP rights, as some NFT purchasers have apparently believed—mistakenly—that the purchase of an NFT conveyed the copyright in the underlying work.⁵ In short, NFTs are primarily of value only to the extent that there is clarity and confidence regarding what underlying asset and rights are conferred, and a reliable marketplace develops for them. More work needs to be done before NFTs can be a common-place mechanism for facilitating the transfer of rights in mainstream physical or digital goods.

NFTs do not currently have a role to play in authenticating MPA members' movie or television content, in documenting the members' ownership of or authority to sell the content, or in documenting the members' authority to transfer any relevant or necessary IP rights associated with the content. Indeed, a well-functioning system that tracks the ownership of copyrights already exists: the Copyright Office's registration and recordation system, including its publicly accessible database. The copyright or licensed rights in the work are documented in contracts for which blockchain applications are not currently being used. Individual copies of the work that are released to the public could potentially be distributed with an associated NFT indicating that a particular file is owned by or licensed to a particular user, although we are not aware of examples of MPA member companies doing that today.

⁵ James Grimmelmann, *The Tangled Truth About NFTs and Copyright*, The Verge (June 8, 2022) <https://www.theverge.com/23139793/nft-crypto-copyright-ownership-primer-cornell-ic3>; Gabriella Angeleti, *Crypto Group Shamed for Spending \$3m on 'Dune' Book, Mistakenly Believing It Had Acquired Copyright to Produce NFTs*, The Art Newspaper (January 17, 2022) <https://www.theartnewspaper.com/2022/01/17/nft-group-shamed-jodorowsky-dune-book-copyright>

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.

The main challenge in the use of NFTs in authenticating the transfer of IP rights is their novelty. NFTs are very new, and much of the consuming public is unaware what one actually obtains when one “buys an NFT.” Some people acquire an NFT believing it conveys copyright interests in the underlying work⁶ or perhaps ownership of some associated physical item.⁷ But that is almost never the case, any more than buying a book conveys the copyright in that book to the purchaser. Consumers are gradually becoming more experienced with how NFTs work, but more could be done to inform purchasers. IP owners and NFT marketplace platforms should work together to educate consumers as to what they have obtained by buying an NFT. In particular, NFT platforms must develop and publish clear terms of use that spell out the rights associated with the purchase of an NFT. The NFT ecosystem will likely need to evolve significantly before it could help improve the copyright registration and recordation process, the sale or licensing of IP between businesses, or the wide dissemination of content to audiences.

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.

⁶ *Id.*

⁷ Artforum, *Basquiat NFT Pulled from Auction after Sparking Controversy* (April 28, 2021) <https://www.artforum.com/news/basquiat-nft-pulled-from-auction-after-sparking-controversy-85640#:~:text=An%20NFT%20of%20a%20drawing,work%2C%20The%20Art%20Newspaper%20reports>

One of the opportunities presented by NFTs is the potential to implement so-called “downstream royalties.” NFTs can be used to implement “smart contracts” that update information regarding ownership of the NFT with each transaction. Smart contracts theoretically can be programmed to charge each reseller a percentage of the sales price to be paid as a royalty to the original creator of the NFT. The potential for the original artist to share in the increasing value of the NFT is one of the reasons NFTs are attractive to creators. Unfortunately, implementing downstream NFT royalties is logistically very challenging, and many NFTs do not include them at this time.⁸ From the perspective of corporate NFT creators such as MPA’s members, further market development regarding royalties is necessary before it can be determined whether NFTs can improve this aspect of the business.

NFTs can serve a limited role in the context of access controls to streaming content. Specifically, if the user’s license were contained in an NFT, the streaming service could implement a system to ensure that the NFT is in the user’s crypto wallet before initiating the stream. This system has been utilized to a very limited extent thus far. Beyond that, there is no reason to believe that NFTs can currently solve the overall problem of online piracy. An NFT may indicate ownership of a particular copy of a copyrighted work like a piece of digital art, a song, or a movie. But the existence of an NFT does not itself impede the ability to make an unauthorized copy of that copyrighted work to view, listen to, watch, or distribute. In other words, while the NFT may be perfectly secure on the blockchain, that fact does nothing to enhance the security of copies of the underlying work or prevent unauthorized exercise of any of the §106 rights. The NFT simply creates a chain of alleged ownership of the particular copy.

⁸ Casey Wagner, *NFT Royalties Top \$1.8 Billion: Galaxy Digital*, Blockworks (October 21, 2022) <https://blockworks.co/news/nft-royalties-top-1-8-billion-galaxy-digital>

Similarly, NFTs cannot solve the problem of, and indeed represent a new opportunity for, counterfeit goods. Just as in the real world, counterfeiters can associate NFTs with someone else's copyrighted or trademarked property and distribute them through NFT marketplaces. Many well-known brands have been the victim of this practice.⁹ Opensea admitted that 80% of the NFTs minted with its free tool were not sponsored by the owner of the underlying IP.¹⁰ NFT marketplaces do not appear to routinely screen NFTs to ensure that they are created with the permission of the actual copyright or trademark owner. IP owners are therefore left with the DMCA notice and takedown system as their primary remedy. Just as platforms making user-generated audiovisual works have developed tools to screen for unauthorized content, NFT marketplaces will need to do so as well. And just as piracy increases costs for content creators and can depress production so, too, can "counterfeit" NFTs depress production of innovative use of NFT's and their associated works.

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.

Copyright will continue to perform the role it has always done in incentivizing the creation and dissemination of artistic works, by granting authors the exclusive rights set forth in §106. As discussed in response to Question 6, the DMCA notice and takedown provisions will continue to serve their role in combatting infringement associated with NFT-related assets. Likewise,

⁹ Metav.rs, *Fake NFTs and How to Avoid Them* <https://metav.rs/blog/fake-nfts/>

¹⁰ Jody Serrano, *Nearly All NFTs Created with OpenSea's Free Minting Tool Are Fake, Plagiarized, or Spam*, Gizmodo (January 29, 2022) <https://gizmodo.com/nearly-all-nfts-created-with-opensea-s-free-minting-too-1848445234>

trademark law will continue to perform its role, ensuring that consumers can accurately identify the source of goods or services. The presence of an NFT associated with a particular copy of an underlying work has no effect on those interests.

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.

In the MPA members' experience with NFTs thus far, existing law has proven adequate to address any associated copyright or trademark issues. As noted above, to date the most significant copyright issue regarding NFTs has been a misunderstanding on the part of some consumers of what rights, if any, the NFT conveys.

With regard to trademark issues, some commentators have expressed the view that the selection of the appropriate international trademark class for NFT-associated collections is unsettled or that the description of goods or services in owners' existing marks are insufficient to cover NFTs.¹¹ We disagree. Like video games, software and other similar digital items, NFTs are digital goods that easily fit into Class 9, so no new class needs to be created to accommodate NFTs. Moreover, the description of goods or services need not specifically use the words "NFT," "non-fungible token," or the like for a registration in Class 9 to cover NFTs, because NFTs are simply a type of downloadable software. NFTs and similar digital goods are already covered by existing descriptions.

¹¹ Jan Buza, *Trademark Perspective on NFTs: New, Fabled and Thrilling*, TramaTM (February 2022) <https://www.tramatm.cz/blog/category/ecommerce/trademark-perspective-on-nfts-new-fabled-and-thrilling>

- 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 (ii) 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.**

The DMCA notice-and-takedown system is regularly used to address NFTs that contain unauthorized material, but we are not aware of litigation that has addressed this particular issue. We are aware of lawsuits in other industries relating primarily to alleged trademark infringement, but claims raising novel copyright issues have thus far not emerged. A well-known NFT case in the motion picture context involved a claim by Miramax against writer and director Quentin Tarantino's creation of a series of NFTs based on *Pulp Fiction*.¹² Although the case related to the creation of a new kind of digital asset, the legal theories were not novel, and the parties were able to quickly settle their dispute.¹³ Nothing about that case suggests existing IP law is inadequate to address similar cases in the future.

¹² *Miramax, LLC v. Tarantino*, No. 2:21-cv-08979-FMO-JC (C.D. Cal., filed Nov. 16, 2021).

¹³ See Variety, *Quentin Tarantino Settles With Miramax Over 'Pulp Fiction' NFT Auction*, Sep. 8, 2022, available at <https://variety.com/2022/film/news/quentin-tarantino-miramax-pulp-fiction-nft-settlement-1235365550/>

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. For each such instance, please describe the nature and outcome of this claim or process, including whether the material was ultimately removed, and if so, whether the material subsequently reappeared. If an infringement or 17 U.S.C. 512(f) action was filed, please provide citations to the court docket and any relevant judicial decisions.

MPA's members monitor NFT platforms and engage with those platforms regularly to remove unauthorized uses of their intellectual property with NFTs.

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

We have no comment in response to this question.

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

We have no relevant experience in foreign jurisdictions.

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

There are no additional issues we wish to raise at this time.

Respectfully submitted,



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