



PROTECTING DIGITAL ART: A COMPARATIVE STUDY BETWEEN INDIA AND THE UNITED STATES

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Abstract: With the evolution of technology, digital art has emerged as a prominent form of artistic expression, challenging traditional concepts of creativity and ownership. This research paper delves into the legal frameworks safeguarding digital art in India and the United States, offering a comparative analysis of their efficacy and adaptability in the digital age. In the Indian scenario, the study evaluates the Copyright Act of 1957 and subsequent amendments, shedding light on their applicability to digital art and the challenges posed by evolving mediums and distribution channels. Concurrently, the research delves into the United States' Digital Millennium Copyright Act (DMCA) and its effectiveness in safeguarding the rights of digital artists. This research paper presents a comparative lens to assess the strengths and weaknesses of each legal framework, considering the aspects such as copyright duration, fair use provisions, and enforcement mechanisms. This research paper examines the role of technologies such as blockchain and non-fungible tokens (NFTs) in enhancing the protection and provenance of digital artworks by scrutinizing landmark legal cases and recent developments. Further, this research paper attempts to contribute to the discourse on digital art protection, offering a comprehensive analysis in both India and the United States, fostering a conducive environment for the flourishing digital art landscape in the global arena.

Index Terms – NFT, Digital Art, Copyright Act 1957, Blockchain, DMCA.

I. INTRODUCTION

In the digital age, artistic expression has transcended conventional mediums, finding new forms and platforms through which to manifest creativity. One of the most groundbreaking developments in the art world has been the rise of digital art, which has expanded its boundaries even further with the advent of Non-Fungible Tokens (NFTs). NFTs are powered by blockchain technology, have revolutionized the art market, providing a novel way for artists to tokenize their creations, establish ownership, and trade unique digital assets. However, this digital renaissance has brought forth a myriad of legal challenges, particularly concerning intellectual property rights, copyright laws, and the safeguarding of digital art in both India and the United States.

In India, the examination will delve into the Copyright Act, 1957 and its successive amendments, assessing their applicability and effectiveness in the realm of digital art. In the United States, the focus will be on the Digital Millennium Copyright Act (DMCA) and other relevant legislations, dissecting their provisions and interpretations concerning digital creations, particularly NFTs. By understanding the legal foundations, this

study will illuminate the gaps, strengths, and adaptability of each nation's legal system in protecting digital artists.

Furthermore, the research paper attempts to investigate the enforcement mechanisms and judicial decisions in both countries, analyzing landmark cases and their implications on digital art protection. The study will also explore the role of emerging technologies such as blockchain, which underpins the NFT ecosystem, and its potential to revolutionize the provenance, authenticity, and ownership tracking of digital artworks. The examination of these technological solutions will provide valuable insights into the future of digital art protection.

Contemporary copyright challenges are emerging in connection with the rise of NFTs. This is due to the fact that the majority of digital works that are tokenized as NFTs are either musical compositions or artwork that may be protected by copyright. The situation has been made tougher by accusations of copyright infringement made against NFT merchants by the authors of works that are protected by copyright. On the one hand, NFTs have the potential to completely change how copyright laws are applied. However, it appears that some of the IP challenges that NFTs offer are not adequately covered by the current copyright legislation. Therefore, it is crucial to conduct a study on the relationship between copyright and NFTs in order to understand how they affect one another.

NFTs have taken over the digital landscape. Digital tokens called NFTs are used to prove ownership of unique products. They let consumers tokenize goods like collectibles, artwork, and even memes. They can only have one official owner at a time, and they are hosted on Blockchain technology, which means that no one can change the ownership record or create a new NFT.¹ In economics, items such as computers, furniture, and music files are referred to as “non-fungibles” and because of their special qualities, these products cannot be replaced by alternatives. Fungible goods, on the other hand, can be substituted because what characterizes them is their worth and not their unique features.²

To understand what non-fungible tokens are, the terms “fungible” and “token” can be considered individually.³ The word “fungible” is used to indicate that an item is interchangeable with another identical item of the same kind. Currencies are considered fungible because they can be exchanged as long as they are of the same value.⁴ NFT (non-fungible token) was first introduced in 2014 with the idea to connect technology and art to help artists gain money and control over their digital work (‘work’ is defined in Section 2 (y) of The Copyright Act, 1957).⁵ NFTs give artists control over their position as the technology is specifically designed for creators/artists so that they can put up their work for auction digitally.⁶ It makes use of a technique that generates special codes for every invention and since the technology is not able to keep the entire design file, the unique ID has a hyperlink to the URL in which the artwork is stored and details about the pixels of the digital artwork. NFTs are created through a process called “minting” and are traded on a blockchain, this technology is referred to broadly as a distributed ledger.⁷ Put simply, blockchain technology provides a ledger

to store and record data on the internet and the ledger, can also be understood as a database, keeps track of the transfer of virtual currency.⁸ Unlike other databases, the blockchain technology is decentralized, which means that there is no one central authority which controls the information, instead, the responsibility for management is rather distributed among various users within the network. NFTs are bought and sold in several different marketplaces, such as OpenSea.io, Rarible, and NiftyGateway, and the parties transact by way of “smart” contracts.⁹ Smart contracts are not universally defined, yet they are understood as self-executing agreements. In relation to NFTs a “smart contract” is a software code which stores as well as runs on a blockchain system. The terms and clauses of the smart contract exist as a code and are self-executed once pre-defined conditions and circumstances are met. The creation as well as sale of an NFT is governed by these terms/clauses of services as mentioned in the smart contracts of various marketplaces which will be applicable on the NFT.

II. DOMESTIC AND INTERNATIONAL LAWS GOVERNING NFTs

In the *Indian scenario*, NFT (non-fungible token) was first introduced in 2014 with the idea to connect technology and art to help artists gain money and control over their digital work (‘work’ is defined in **Section 2 (y)** of The Copyright Act, 1957).¹⁰ The artist/creator of a work that qualifies for copyright is the initial proprietor of that work under **Section 17** of the Indian Copyright Act 1957. Therefore, the original copyright will belong to the author of the work if the seller of an NFT is also the author.¹¹ Taking the assignment and licensing debate into consideration, **Section 18** of the Act, the owner of copyright in an existing or future work is authorized to either wholly or partially assign such copyright to another person.¹² Such an assignment must be made in writing and signed by the assignor or a designated representative. If the NFT is sold, copyright assignment might be conceivable, but it would depend on the conditions of the agreement made between the seller—who must be the copyright owner—and the buyer. Furthermore, solely an interest in the copyright is granted to the licensee under a licensing agreement; no copyright is really transferred. This indicates that some acts about the work that might normally be considered infringement are permitted under the license. A buyer may be granted a limited license to utilise the underlying work as a result of an NFT transaction. Again, this would rely on the conditions of the transaction as outlined in the agreement. Therefore, it is improbable that the buyer of an NFT would likewise be entitled to the copyright in the underlying asset through its sale. A limited license of the copyright may typically result from the sale of an NFT, but the copyright inherent in the underlying asset will not be assigned. However, we cannot say that an assignment of copyright will not be possible through an NFT if in case the terms of such sale are accounted for.

In the *United States*, a copy is defined as “material objects other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise directly communicated, either directly or with the aid of a machine or device.”¹³ From this definition, it can be surmised that a “copy” of the underlying work must significantly represent the original

work, or, at the very least, the copyrightable aspects of the original work.¹⁴ Further, **Section 106(2)** of the Copyright Act grants the owner of a copyright the exclusive right to “prepare derivative works based upon the copyrighted work” which frequently overlaps with the exclusive right to reproduce.¹⁵

Further, as per the *first sale doctrine*, anyone in possession of a lawful copy of a work protected by copyright is free to rent, sell, or lend it without the copyright owner’s prior authorization. The owner of copyright typically has sole authority to duplicate and distribute their creations. The first sale doctrine, permits the lawful buyer of any copy of the work to distribute it further, is an exception to the copyright owner’s exclusive distribution right. The theory in question is well recognised in legal systems; therefore, it is imperative to confirm its applicability to the selling of NFTs. However, the US Courts have, time and again held that this doctrine is not applicable in case of digital works.

III. A COMPARATIVE STUDY

Non-Fungible Tokens (NFTs) have changed the discourse of the digital art market, enabling artists to tokenize and sell their digital creations securely. However, this innovation brings forth complex copyright issues. *First*, India’s Copyright Act, 1957 governs intellectual property, but it does not explicitly address NFTs. The Act does, however, encompass digital creations, granting artists exclusive rights. Yet, gaps exist regarding NFT-specific copyright provisions. The U.S. has the Copyright Act, 1976 and the Digital Millennium Copyright Act (DMCA). While these laws don’t directly mention NFTs, courts often apply existing copyright laws to digital assets, adapting them to emerging technologies.

Second, Indian law supports the creator’s rights, implying that the artist typically retains copyright, even when selling an NFT. However, specific guidelines for NFT platforms and resale royalties still need to be included. U.S. copyright laws prioritize artists’ rights, too. Creators generally retain copyright unless explicitly transferred. Additionally, although enforcement challenges persist, artists can embed information in NFT metadata, ensuring attribution and royalties during resales.

Third, India faces challenges in enforcing copyright, exacerbated in the digital realm. Legal procedures can be lengthy, leading to difficulties promptly addressing NFT-related infringements. The DMCA provides mechanisms for reporting copyright violations. NFT marketplaces often comply swiftly with takedown requests. U.S. courts have also proactively addressed digital copyright infringements, setting influential precedents.

Fourth, India is exploring blockchain applications but lacks specific regulations concerning smart contracts in NFTs. This technology could ensure automated royalty payments and transparent ownership records. The U.S. has embraced blockchain technology and recognizes smart contracts as legally binding. This fosters transparent, self-executing agreements, benefiting NFT creators by ensuring streamlined transactions and royalty payments. *Fifth*, India participates in international IP agreements, yet collaborative efforts specific to NFTs are nascent. Harmonizing global standards is crucial to address cross-border NFT transactions effectively. The U.S. actively engages in international IP discussions. Standardization efforts, such as creating

uniform metadata standards for NFTs, facilitating global collaboration and easing copyright enforcement challenges. Thus, this calls for International Collaboration and Standardization

India and the United States face common challenges in regulating copyright issues in NFTs, ranging from legislative gaps to technological complexities. However, the United States exhibits a more mature legal landscape and infrastructure, leveraging existing laws to address NFT-related concerns. Its proactive approach to embracing blockchain technology and facilitating international collaboration positions it as a frontrunner in regulating NFTs effectively. While grappling with enforcement challenges and legislative gaps, India has the opportunity to learn from the U.S. experience. Implementing specific NFT-related amendments and fostering collaboration between stakeholders, including artists, platforms, and legal experts, can enhance the country's ability to protect digital creators and promote a thriving NFT ecosystem.

Ultimately, addressing the nuances of NFT-related copyright issues necessitates continuous dialogue between legal experts, technology innovators, and policymakers on a global scale. Harmonizing international standards, bolstering legal frameworks, and embracing blockchain technology are pivotal steps toward ensuring the sustainable growth of the NFT market while safeguarding the rights and interests of digital artists worldwide.

IV. ROLE OF JUDICIARY

In the *Indian* legal scenario, trading in NFTs is legalised. Although the fact that cryptocurrencies have been used in India for the past 10 years, the main discussion around their legality started in June of 2018 when the Reserve Bank of India (RBI) published a circular warning banks against dealing with them but in *Internet and Mobile Association of India v. Reserve Bank of India*¹⁶, the Supreme Court overturned this ruling, holding that the Constitution guarantees the right to commerce as a fundamental freedom.

The idea that trading in NFTs is prohibited by the Securities Contract (Regulation) Act, 1956 (SCRA) adds to the confusion surrounding the legality of NFTs in India. NFTs are not subject to a different legal framework in India. This has caused disagreement over how to classify the NFTs while some claim that NFTs are derivatives, others believe that they are contracts. The definition of "derivative" in Section 2(ac) of the SCRA states that a contract that gets its value from the prices of the securities under consideration or an index of those values is also considered a derivative. Should NFTs be deemed derivatives, their trading on virtual platforms would be prohibited by Section 18A of SCRA, which stipulates that derivative contracts can only be lawfully executed through trading on an accredited stock exchange. In such a case, the NFT trading platform will need to apply to the Central Government for recognition as a stock exchange.

Therefore, it would be incorrect to classify a specific NFT as a security or a derivative if it only pertains to an existing asset and is promoted as a guarantee of the legitimacy of the ownership of such an asset. The broad rules of contracts should be the governing principles instead. Conversely, fractional NFTs—which offer a partial ownership stake in the NFT—might be referred to be securities because they were created as a result of NFTs being extremely expensive, which most people cannot pay. Moreover, NFTs may be treated as securities in India if returns on investment are promised, as this will make them look more like speculative investments than digital collectibles.

Whereas in the *United States*, NFTs are unregulated, and the law is currently in an unclear state. On April 12, 2021, a petition was submitted to the Securities and Exchange Commission (SEC) insisting the agency to establish a framework for NFT regulation. There isn't a formal document about NFTs other than this. SEC officials, however, believe that trading of NFTs may be considered as against the law because they frequently resemble “investment contracts.”

Further, it is important to discuss the “**Howey Test**,” which was established by the U.S. Supreme Court in the case of *SEC v. W. J. Howey Co.*¹⁷ ‘Investment contract’ is one of the numerous items that make up the definition of ‘security’ under US statute. According to the U.S. Supreme Court, when money is invested in a joint venture when rewards are anticipated via the labour of others, a contract for investment is formed. “Efforts of others,” which are essentially third-party attempts to realise an asset's investment potential, are the most controversial element in this situation. It varies from case to case as to whether the earnings are attributable to the work of others.

V. CONCLUSION

To address the disparities in the NFT economy, certain adjustments can be implemented. *First*, rather than numerous unidentified bodies with separate regulations, there must be a single legally controlled governing organisation marketplace. The government can establish a governing market with regulations that all NFT markets must abide by. For instance, the RBI serves as another bank's governing body. In this manner, the NFT marketplaces will however not be able to exploit artist.

Second, a KYC mechanism is mandated for both buyers and sellers on these NFT marketplaces. This will lessen and even completely eradicate the chances of fraud and violations. Because most artists at the NFT marketplace are anonymous, they can express their creativity without fear of criticism. But there's also an increased risk; in fraud situations, for example, purchasers were kept in the dark about the artists or sellers. But it will get simpler with the KYC system. The authorities are able to track down the seller's identity, which benefits the buyers. An anonymous system of selling digital art will be possible while guaranteeing that fraudsters can be identified by disclosing the details of the seller to the marketplace operator and the relevant authorities only in exceptional circumstances.

Lastly, legislation or a statute governing digital trade should exist. Not only will it aid in market and trade regulation overall, but it will also educate individuals. People currently lack an accurate and convenient means to learn about NFTs and digital currency, which contributes to the lack of information about them. The majority of artists who are buyers or sellers are unaware of their rights and obligations. The government should establish regulations on digital assets and cryptocurrencies rather than outright prohibiting them, as this would force merchants to turn to other nations and hurt India's economy.

The NFT marketplace has created a sea of opportunities for creators and artists to sell and earn in the virtual world. Although, India can be seen as slightly behind as compared to other jurisdictions but with the enforcement of the Digital Personal Data Protection Act, 2023 it is safe to assume that the Indian Government is inclined towards regulating the digital world and we may see amendments in current legislations as well as the implementation of new legislations in the way forward to govern and protect digital art. The necessity of

having such a legislation in place will not only protect/safeguard the rights of the artists and creators but will also assist in striking a fine balance between infringement and ownership of a third party when it comes to a digital art as a part of an NFT.

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