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**DEMYSTIFYING NFTS - THE JOURNEY FROM IDENTIFICATION
TO DIGITAL COLLECTIBLES**- Sukhmani Choudhary¹**Abstract**

NFT stands for Non-Fungible Tokens. This term might be a bit unclear initially, so let's break it down by first understanding the meaning of 'non-fungible.' Essentially, non-fungible implies something that is one of a kind, unique, and cannot be replaced with something else. Examples of NFTs range from digital pictures, videos, GIFs, or songs to legal documents or representations of real-world collectibles.

NFTs are cryptoassets utilised to authenticate ownership of assets in the digital world. To simplify, in the digital realm, there are various assets similar to those in the real world that can be bought and sold. NFTs are employed to establish and record ownership of these digital assets. They publicly provide a secure record, including a unique identification code, which is stored on the blockchain.

It's noteworthy that a majority of existing NFTs are part of the Ethereum blockchain. In essence, NFTs can be regarded as a distinct form of rare collectibles, allowing for the ownership, trade, and sale of unique digital items in the digital marketplace. They have gained significant attention, particularly in the art and entertainment industries."

Introduction

Intellectual Property Rights (IPR) is an umbrella term. It consists of various legal rights namely copyright, trademark, patents, industrial designs, geographical identifications, Trade secrets. These legal rights provide protection to the work of intellectual property owners over the creations of their mind. In words of WIPO (World Intellectual Property Organisation), Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce. These rights enable the inventor or creator to gain benefits such as recognition, financial gains etc. for their work.

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Copyright: These right safeguards the work of creators such as literary work, like paintings, books etc. or artistic work like movies, songs etc.

Patent: This right is given to an inventor for his invention. It gives the inventor the right to decide when, how and by whom their invention can be used, in return the inventor makes technical information regarding his/ her invention public.

Trademark: Trademark is a sign which helps the consumers to distinguish between products or services of one enterprise from that of another enterprise. These signs or marks could include any logo, symbol, design, colour combination, music etc.

Navigating Intellectual Property Challenges in the NFTS Era

In this digital era, NFTs are a hot topic, having gained significant popularity since 2021. It's not surprising that this rising trend of NFTs has given rise to many IPR related complications. Due to a lack of legal provisions, there is no definitive answer to these problems, as the process of forming laws is lengthy, and the future of such trends is always debatable. Some believe NFTs will expand further in the coming future, while others think it may not last very long.

A common misconception is that when you buy an NFT, the intellectual property rights of that particular asset are automatically transferred. Most of the time, however, that is not the case. Another significant problem with NFTs is that their sale solely depends on demand. For example, if a photograph of a specific incident is the asset, its value might increase if there are people interested in owning that particular picture; otherwise, its value may be negligible. Another challenge people face is the unpredictability of NFT resale – it might yield a profit of millions of dollars or result in a total loss.

These issues are not the end of the complications. NFTs can have several digital copies. For instance, if the NFT represents a painting like "The Starry Night" by Van Gogh, there is no limit to the number of times people can download the image and have a copy of that painting. Similarly, if the NFT is a small clip of a player scoring a perfect shot, anyone can have the recording of the entire game from which the clip was taken. Some argue that there's no need to spend millions when you can have the exact thing for free, while others believe that being the owner of the original asset is what matters.

From a legal perspective, there are currently no provisions to safeguard the rights of the creator or inventor concerning NFTs. NFTs involve valuable intellectual properties like digital artwork, representatives of branded goods, or representatives of respected individuals such as players and musicians. Many questions arise in this context. Does the

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NFT owner get the IP rights as well? Can NFTs be trademark registered or copyright registered? Who has the authority to register NFTs? Is the permission of the IP owner required in the case of NFTs? We understand that NFTs are causing a lot of IP infringements, with trademarked or copyrighted assets frequently replicated in NFTs. When the NFT is a painting or a creation of someone's mind, buying the NFT does not give you the right to reproduce or distribute derivative works from it; that right lies with the creator.

How is Right to Trademark suffering in this NFTs Era?

A trademark serves as a symbol indicating the origin of an asset in relation to a specific enterprise. Its primary function is to assist consumers in discerning the products or services of one enterprise from those of another. In the context of NFTs, where exclusivity is a key selling point, trademarks play a critical role in establishing and verifying their authenticity. The legal landscape surrounding the application of trademark laws to NFTs is exemplified by the case of *Hermès v Rothschild*, representing a milestone in this domain. The dispute involved Hermès, a luxury goods company, engaging in a trademark litigation against the artist Mason Rothschild. Central to this case was the clash between Hermès, defending its trademark rights for the luxury Birkins bags, and Rothschild, who minted and sold NFTs known as the metabirkins collection. These NFTs depicted the Birkins handbag rendered in colourful faux fur. The case hinged on whether Rothschild committed trademark infringement and trademark dilution, specifically, whether consumers were confused about the origin of metabirkins being Hermès. The jury ruled in favour of Hermès, stating that Rothschild's production was likely to cause confusion among customers, leading to irreparable damage to the company. As a result, Mason Rothschild's sale of Metabirkins NFTs was permanently banned.

For further comprehension, let's explore another case: *Nike v StockX*. To understand this case, it's essential to grasp the concept of Digital Twin NFT, where the NFT corresponds to a real physical item, commonly used in the fashion industry. In this scenario, individuals can purchase NFTs and later redeem them for actual physical goods in the fashion industry, providing the buyer with a right to the real-world item.

Returning to the case, StockX, a marketplace selling various items, including Nike's sneakers, introduced its Vault NFT program in 2022. This program allowed people to purchase digital twin NFTs representing an exact pair of Nike sneakers, redeemable in-store for the physical pair. Nike filed a complaint against StockX for trademark

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infringement and trademark dilution, specifically related to its swoosh logo. Nike argued that the program confused customers about the origin of the sneakers. The case is ongoing, with the objections of Nike sustained, and the judgement is pending.

In many cases, the accused often relies on the defence of fair use. Fair use is a legal doctrine that provides a limited exemption for using another's trademark, provided certain conditions are met, and the usage is in good faith. In trademark disputes involving fair use, it falls upon the discretion of the judge to determine whether the defence is applicable based on the specific facts and circumstances of the case. Trademark fair use is typically categorised into two types:

Classic fair use, also known as descriptive fair use, occurs when a mark is used to describe one's own products or services. This usage doesn't lead to confusion in the minds of consumers regarding a clash with another company. For instance, if a business sells apples and incorporates the word "apple" into its mark, it wouldn't infringe on a famous apple company's trademark. This defence is rooted in the spirit of promoting free competition and focuses on describing one's own product characteristics without association with other companies or services.

Nominative fair use involves using someone else's trademark to refer to or indicate one's own trademarked goods or services. In these cases, the burden of proof lies with the trademarked company to demonstrate infringement and show the likeness and the confusion caused. To establish nominative fair use, certain conditions need to be fulfilled, such as necessary identification, absence of sponsorship implication, and limited use. For instance, if an individual owns a mobile phone repair workshop specialising in fixing Samsung devices and adds the term "Samsung" to their trademark, this situation may be considered nominative fair use.

To sum it up, fair use in trademark law provides a framework for legitimate use of another's mark, and the specific category, whether classic or nominative, depends on the nature of the use. Legal decisions are based on a careful assessment of the details surrounding each case.

India's View in Trademark Right in NFT Space

Earlier, NFTs were commonly classified under class 9 by most countries. However, in 2023, the 12th edition of the Nice Classification brought significant changes. Downloadable files authenticated by NFTs were included in class 9. Additionally, the 12th edition expanded the scope for NFTs in other classes:

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- Class 35: Online marketplaces and websites for buying and trading NFTs.
- Class 36: Electronic transfer of NFTs via blockchain technology and financial transactions through blockchain networks.
- Class 41: Information services or training for NFTs.
- Class 42: Non-downloadable software for accessing, storing, trading, buying, selling, and other activities related to NFTs, as well as digital wallets. In India, there are no specific legal provisions governing NFTs or cryptocurrency.

However, under the Finance Act 2022, NFTs are categorised as virtual digital assets (VDAs) and taxed at a flat rate of 30%.

Legal issues surrounding NFTs are addressed through cases. One notable case is *Digital Collectables v. GalactusFunware*, commonly known as *Rario v. Striker*, dated April 26, 2023. This case revolved around celebrities' right to publicity, with key points including: This case involves two companies dealing with digital play cards, which are virtual representations of cricket players. The central issue revolves around the right to personality of the players and whether it is being infringed by selling their digital play cards without permission, or if there is no requirement for prior permission or a licence to sell these digital play cards. The plaintiffs argue that the right to publicity is inherent, while the defendants contend that it is subject to various restrictions.

The plaintiff, Digital Collectables, is a Singapore-based company that operates a platform called Rario for the sale, purchase, and exchange of digital play cards representing different cricketers. Rario holds licences from various players to represent them in the form of digital play cards, which include personal information, pictures, short video clips of their victory moments, etc. These digital cards serve as collectibles.

The defendant, GalactusFunware, is a gaming platform, and its MPL platform includes various games, including an Online Fantasy Sports (OFS) game called Striker. One of such game is an OFS (Online Fantasy Sports) called Striker. OFS allows users to form their fantasy team which further they fight with other teams. The whole platforms revolves around fights between these fantasy teams.

The plaintiffs argue that they have invested significantly in obtaining exclusive licences from players to use their personal information for creating digital play cards. Using such information without consent, they claim, violates the players' right to personality and right to privacy.

In defence, the defendants argue that the digital cards are merely a necessity for entry into gaming facilities. Furthermore, they contend that the information used in these digital play cards is already in the public domain. Unlike the plaintiffs, they do not sell or trade moments or video clips related to the player; instead, the cards are valued based on conditions like previous games or game forms.

The Delhi High Court passed a landmark judgement in favour of the defendant, asserting that using information already available to the public, and with the players' awareness of its existence, does not amount to the infringement of individual rights. The court emphasised that the right to publicity is violated only when a renowned person's name or image is used to mislead the public. The judgement highlighted the delicate balance between the right to publicity and the freedom of speech and expression.

This case underscores the evolving legal landscape surrounding NFTs and emphasises the need for a nuanced approach in addressing issues related to intellectual property rights in the digital space. This case underscores the evolving legal landscape surrounding NFTs and highlights the need for a nuanced approach in addressing issues related to intellectual property rights in the digital space.

In jurisdictions where explicit regulations or legal provisions are absent, judges often rely on existing laws and principles to make decisions. They may also consider precedents set in other jurisdictions around the world when faced with novel cases.

The legal landscape surrounding NFTs is expected to evolve as more cases are brought before the courts. Landmark judgments and precedents will play a crucial role in shaping how legal issues related to NFTs are addressed in the future. Judges, legal practitioners, and lawmakers may need to adapt and refine existing legal frameworks to account for the unique characteristics of NFTs.

It is essential for legal systems to keep pace with technological advancements to ensure a fair and effective resolution of disputes. As the use of NFTs becomes more widespread, legal frameworks and precedents will likely develop to provide clearer guidelines on issues such as ownership, intellectual property rights, and contractual obligations related to NFTs.

Conclusion

In conclusion, the intersection of NFTs and intellectual property rights poses challenges that require careful consideration and legal adaptation. As the legal landscape evolves, there is a growing need for clarity in defining and protecting intellectual property rights in the digital space, especially concerning the unique characteristics of NFTs. This ongoing

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evolution emphasises the importance of a balanced approach that respects both the rights of creators and the dynamics of the digital marketplace.

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