



Tackling the Intellectual Property Issues Relating to Non-Fungible Tokens (NFTs) – Lessons from the Republic of Korea

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Abstract. A Non-Fungible Token or an NFT is described as a digital certificate representing ownership of, or rights to a unique digital asset, where the ownership is recorded on a non-centralized blockchain (a digital ledger of transactions that is not owned by the state or authoritative bodies). Common examples of NFTs are usually digital art or artistic works, including photos, videos, audio files, and collectibles, and may extend to game items, tickets, and other digital assets. Under the Malaysian Copyright Act 1987, works eligible for copyright include literary works, musical works, artistic works, films, sound recordings and broadcasts. Generally, an artist, being the author of their artistic works retains the copyright. An artist's copyright includes right to control in Malaysia the making of copies of the works, display and distribution of copies of works to the public for sale and commercial rental of the works to the public. Generally, a NFT buyer does not own the copyright of the artistic work created by the artist and therefore shall not replicate the artistic work for any commercial use without prior written consent of the artist. Hence, a person may possess, sell, buy and transact in NFT, but he does not automatically own the copyright to such NFT (which will only be owned by the artist/author). This paper analyses the adequacy of the legal framework that regulates among others, the copyright issues in this new category of 'work' by looking at recent developments relating to this issue in South Korea.

Keywords: Non-fungible tokens, Copyright, Regulatory.

1 Introduction

1.1 The Digital Revolution – The Game Changer

The Digital era which began in the 1990's took the world by storm and gave birth to new technologies and experiences which were unfathomable. Digitization revolutionized business transactions from physical monetary exchange to paperless intangible systems which gave rise to various platforms where people can execute their day to day financial and business transactions without leaving the comfort of their homes. As physical money transforms into digital transactions, goods followed suit where people began to like the idea of owning digital 'property' as well as physical products. The rapid transformation and advancement of digital technologies also triggered the birth of new generations of people (known as the Millennials and GenZs) who rely almost a hundred percent relies on the internet, and they fancy digitized goods as an intangible property to own and trade. With the introduction of blockchain technology, these new generations started to embark on a new digitized method of trading with cryptocurrency as the medium of exchange, replacing traditional money. Hence, the NFTs were created.

The first NFT trading could be traced way back in 2014 although the term NFTs was only coined popularly in 2017 when a wider interest on it started to gain momentum among the millennials and the GenZs.

What is an NFT? A Non-Fungible Token or an NFT is described as a digital certificate representing ownership of, or rights to a unique digital asset, where the ownership is recorded on a non-centralized blockchain (a digital ledger of transactions which is not owned by the state or authoritative bodies). Common examples of NFTs are usually digital art or artistic works, including photos, videos, audio files, and collectibles, and may extend to game items, tickets, and other digital assets. NFTs may even include social media posts such as Facebook or Instagram posts and YouTube videos. In Malaysia, transactions involving NFTs have seen a rise in popularity since 2021. It became the flavour of the month and artists especially have taken full advantage of this so called NFT-bubble with people starting to venture, trade and deal in NFTs to a point that there are specific marketplaces dedicated to NFTs. In Malaysia alone, there are 6 exclusive NFT marketplace currently.

Hence this research aims to firstly investigate and explore this new digital frontier in relation to its regulatory dimension. Currently there is no specific regulatory mechanisms dedicated for NFT transactions in Malaysia. Secondly, this research also will analyse the intellectual property aspects of the digital works involved as the subject matter of the NFTs. Granted, a work of art is eligible for copyright protection under the Copyright Act 1987, but the ownership and infringement issues might have to be dealt with rather differently when it comes to a digital art work or music. Thirdly, to

attempt to recommend certain legal framework for the issues above by learning from other jurisdictions facing the same predicament. For the purpose of this paper, the jurisdiction chosen is the Republic of Korea, as our research discovered that this country has just issued a Guideline on Copyright and NFT Trading for NFT users in their country.

2 Problem Statement

2.1 NFTs Regulatory Framework

To date, there is no specific law governing NFTs yet in Malaysia as also in many parts of the world. However, there are regulations pertaining to digital currency and digital tokens. This takes form as the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 ("Prescription Order"). Section 2 defines a "digital token" (which is a category of digital assets) as a digital representation which is recorded on a distributed digital ledger, whether cryptographically secured or otherwise. Further, Section 3 recognises digital assets as securities (and accordingly, all the securities law will be applicable to such digital assets), only if all the following conditions are fulfilled:

- a. The digital token represents a right or interest of a person in any arrangement made for the purpose of providing facilities for the person.
- b. The person receives the digital token in exchange for a valuable consideration.
- c. The consideration or contribution from the person, and the income or returns, are pooled.
- d. The income or returns of the arrangement are generated from the acquisition, holding, management or disposal of any property or assets or business activities.
- e. The person does not have day-to-day control over the management of the property, assets or business of the arrangement.
- f. the person expects a return in any form from the trading, conversion or redemption of the digital token or the increase in its value; and
- g. The digital token is not issued or guaranteed by any government body or the Securities Commission ("SC") may specify central banks of any country as.

So far, there has been no issuance of NFT yet in Malaysia, which meets all the conditions in the Prescription Order above or are eligible to be legally traded as securities. As such, NFT players in Malaysia will not be affected by any security laws promulgated through the SC. How then would these digital assets be regulated?

Which body or agency would be the authority to govern the trading of NFTs in Malaysia?

NFTs and Intellectual Property. Under the Copyright Act 1987, works eligible for copyright include literary works, musical works, artistic works, films, sound recordings and broadcasts. Generally, an artist, being the author of their artistic works retains the copyright. An artist's copyright includes right to control in Malaysia the making of copies of the works, display and distribution of copies of works to the public for sale and commercial rental of the works to public. Generally, a NFT buyer does not own the copyright of the artistic work created by the artist and therefore shall not replicate the artistic work for any commercial use without prior written consent of the artist. Hence, a person may possess, sell, buy and transact in NFT, but he does not automatically own the copyright to such NFT (which will only be owned by the artist/author). Another underlying issue would be the subsistence of copyright in digital assets. Some argue that in essence, there is no expression of the work in material form as the NFTs are in digital form throughout the transactions. It will not be turned into a physical object at all. There is nothing creative in the tokenization of an asset given that they are metadata files that contain a (unique) combination of token ID and contract address. The NFT itself is not a 'work'. So the question is, are these digital assets considered as copyrighted material? These are the issues to be explored at this part of the research.

In light of the aforementioned gaps, this research aims to come up with more literature and findings pertaining to the regulation of NFTs and to give more light to intellectual property issues so that the regulatory body would have a term of reference and the stakeholders in this industry would be made aware of certain potential legal risk that could be triggered in this uncharted territory. Since NFT related transactions occur online, infringement of copyright may occur more easily as compared to sale of physical artistic works. For instance, if one owns or buys an NFT of an image or video of a certain sports game, one cannot prevent others who have the same picture or video to upload or use it anywhere else on the internet. Would the existing provisions under the Copyright Act be sufficient to tackle this kind of litigation?

In terms of the literature review found in relation to this topic, there is a common theme relating to legal aspects of NFTs. That common theme is the non-regulation or uncertain legal framework, or even unsuitable legal provisions within a particular jurisdiction. In the US, where NFTs first started circa 2017, the growth of NFT transaction was colossal. The total NFT sales volume grew from \$159.142 million in 2018 to \$250.846 million in 2020 which meant a 299% growth since 2019. (Quarterly NFT Market Report 2021). No one can deny the popularity of the market for NFT. NFT trading, and mining has now reached the Malaysian shores with more and more traction acquired especially with the GenX and the millennials. Certain legal repercussions have been highlighted by legal practitioners and academics. Since the Malaysian

Contracts Act was passed in 1950, there are no indications on whether it applies to transactions involving digital assets, including NFTs.

As at the date hereof, NFT-related disputes have also not reached the Malaysian courts yet. (M.I. Hassan Shah and F.H.A. Latif 2022). However, the writers opined that since cryptocurrencies have been regulated and given legal recognition under the Contracts Act, the Malaysian courts would probably treat NFTs the same way as NFT trading uses cryptocurrencies as the medium of exchange. Another potential legal issue which was highlighted by the same writers was regarding the sale and purchase of the copyrights to the NFT, especially NFTs involving artistic works such as drawings, music etc. Under Section 7 of the Copyrights act 1987, the authors of literary works, musical works, artistic works, films, sound recordings and broadcasts which have been written down, recorded or otherwise reduced to material form are eligible for copyright, irrespective of the quality and purpose such work was created. According to Section 13(1) of the Act, the copyright shall include the exclusive right to control of the reproduction and distribution of copies of the work in Malaysia. Hence, a person may possess, sell, buy and transact in NFT, but he does not automatically own the copyright to such NFT (which will only be owned by the author). As he does not own the copyright, he cannot exploit the digital asset commercially. As for whether an NFT in itself can be considered as having any intellectual property rights (including copyright), Y.J. Foo and H.K. Harbans Singh (2021) stated that, it can be argued that as an NFT is essentially a ledger in a block chain containing unique code, an NFT may fall under the purview of the Copyright Act 1987 as a “computer program” under Section 3 of the CA, which is defined as “an expression, in any language, code or notation, of a set of instruction intended to cause a device having an information processing capability to perform a particular function”. It is therefore arguable that an NFT would attract copyright protection under the CA. There is a distinction between the NFT itself and the underlying work that it relates to. A person may sell an NFT, but copyright privileges in the underlying work to which the NFT relates is not automatically granted to the buyer when the NFT is sold. An NFT can therefore be seen as merely a proof of ownership of a work, which is separate from copyright in the work itself. In this regard, the copyright owner of the underlying work would be able to create more NFTs in respect of the same work if the copyright is not assigned to the buyer.

3 Research Questions and Research Objectives

This research would give rise to two research questions, namely:

- a) What are the relevant laws that would be applicable in relation to activities and transactions of NFTs in Malaysia and would it be sufficient?

- b) Would the digital assets traded as NFTs be considered as ‘works’ within the definition of the Copyright Act 1987? As such how would this affect the rights of the creator of these digital assests?

Following the above research questions, three research objectives are aimed as the output of this research project as follows:

- a) To analyse what exactly are NFTs and the transactions involved and explore and identify the relevant laws that would be applicable in Malaysia.
- b) To investigate the definition of subsistence of copyright and determine whether the tokenization of the digital assets would be eligible for copyright protection.
- c) To recommend a specific legal framework in relation to NFT transactions and intellectual property rights in Malaysia.

4 Purpose of Study/Research

The purpose of this research is first and foremost, to create awareness on the recent intellectual property issues relating to creative digital works as interests on this have gained a lot of traction in Malaysia, especially with more social media platforms providing access and freedom to share media content. Apart from awareness, this research also seek to propose a framework or guideline for stakeholders and users of the NFT marketplace to ensure that the transactions done are according to the relevant laws and in cases or infringement or abuse, the owner of the copyright or NFTs would be able to refer to this guideline to pursue their next action. The scope of this study is only in the aspect of the legal implications in the area of intellectual property law in general and specifically for this paper, the copyright issues, and not the technical aspects of block chain technology and how people well versed in this area may abuse the NF marketplace.

It is hoped that this study can benefit active digital content creators to further pursue their careers and business activities with knowledge and awareness so that they will tread on NFT trading with caution.

5 Research Methodology

The methodology used in this research is a qualitative research where the research design is exploratory, as it aims to explore the legal frameworks and substantive law in this area. Due to the exploratory nature of this study, this research employs a combination of two components: (i) doctrinal analysis, and (ii) library-based research. The doctrinal approach is adopted because this research requires an examination of legislation pertaining to NFT transactions and the underlying principles of intellectual

property specifically copyright in Malaysia and selected jurisdictions. This approach serves two purposes, (i) determining the current legal treatment of transactions of digital assets as NFTs, and (ii) establishing a legal foundation for formulating a proposed legal framework for the regulation of digital assets in the NFT platforms and marketplace in Malaysia. Next, library-based research is employed as this research requires the researchers to fully understand the technicalities behind the transactions which are based on blockchain technology and cryptocurrencies.

6 Findings

6.1 Republic of Korea – Guide to Copyright and NFT Trading

In October 2022, the Republic of Korea’s Ministry of Culture Sports and Tourism issued a Guideline on the country’s copyright laws and NFT trading. This guideline was initiated by the Korean Copyright Protection Agency (KCPA) and the Korean Copyright Commission (KCC). This guideline contains useful information about the parties involved in the creation and sale of an NFT based on a copyrighted work. It discusses potential copyright issues and procedures to take while acquiring such an NFT to ensure compliance with copyright laws. Essentially, there are two significant parts in the Guideline; the first part explains what copyright law is and how it affects an NFT trading. It also provides a full information of the minting and trading process of NFTs with copyrighted works. The situation of the vendor, marketplace, purchaser, and rights holder are addressed. Readers can avoid copyright infringement and defend their rights as a creator or purchaser of NFTs including copyrighted works by knowing each viewpoint. The first part also explains the distinction between moral and economic rights of the copyright owner. Neighbouring rights were also explained as rights of those who participated during the creation of the work. NFTs are described as something created using blockchain technology and comprised of a smart contract, metadata, and digital data associated with the copyrighted work and how it can function as digital certificates of authenticity and enable simple owner identification.

The second part of the Guideline is more comprehensive, as it divides the part into situations and strategies on the actions to be taken by the NFT seller, the marketplace (the NFT platform), the NFT purchaser and also the rightsholder. The situations or possible occurrences which be faced by the parties above can be summarised from the tables below:

Table 1. Guidelines for NFT Seller (Republic of Korea Guide to Copyright and NFT Trading)

No.	Situation	Guideline/Strategy
1.	If you are the author and you directly mint and sell NFTs	You may freely mint or sell but recommended to register your work linked to the NFT at the Korea Copyright Commission (KCC) before selling the

 NFTs.

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| 2. | If you sell an NFT after being assigned economic rights to a work by the author | 1. You must hold the right to make copies and to interactively transmit the work linked to the NFTs.

2. It is recommended that you register your ownership to the KCC before making any NFT transaction.

3. You must indicate the author's name when selling an NFTs.

4. You need the author's permission to sell an NFT with modified content, format, or title. |
| 3. | If you are one among several co-authors (and one of many copyright holders) of a work, and you want to sell an NFT of the work. | 1. You need consent from all other authors before you trade an NFT of this work.

2. It is recommended that rights to a work underlying an NFT be registered at the KCC before any NFTs transaction |
| 4. | If a holder of neighbouring rights is also involved | 1. You need to get permission from each and every rights holder

2. It is recommended that all rights related to the work linked to an NFT be registered at the KCC before getting involved in an NFT trade |
| 5. | If you are a licensee, getting permission to mint and sell an NFTs | You may trade an NFT of a copyrighted work only within the scope licensed by the copyright holder. |
| 6. | Reselling an NFT after purchasing it | You have to get permission from the rights holder. (Copyright Act Article 46) |
| 7. | If you are selling an NFT of a work in the public domain. | The rights holders may still exist, particularly if the term of protection has not expired or the works were donated, meaning there may be certain limitations to their exploitation. Therefore, special precautions must be taken when NFTs are being minted from such works and sold. |
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Table 2. Guidelines for NFT Purchaser (Republic of Korea Guide to Copyright and NFT Trading)

No.	Situation	Guideline/Strategy
1.	Check the legitimacy of the rights holder	1. Using information posted by the seller 2. search the KCC registration system (www.cros.or.kr)
2.	Check the NFT to be traded	1. Looking at the details, such as the contract address, token ID, type of blockchain used and the edition number (including total minted volume) 2. Check for any such deletion of metadata or related work
3.	Check the terms of the transaction	1. If the seller had indicated what rights are being assigned and the scope of the license, you may exercise those rights or use the work within that scope. 2. If the seller did not indicate the terms of the transaction, but the marketplace policy contains provisions about what the purchaser will be acquiring, then selling an NFT at the marketplace under the established policy will be considered an act of consent to the policy. 3. If the seller did not indicate the terms of the transaction, nor is there any relevant provision in the marketplace policy, this means that you are not assigned with any of the rights to the underlying work, nor can you exploit the work even though you had bought the NFT.
4.	Precautions when re-selling an NFT	You need to provide guidance on whether the terms of the copyright license set by the initial seller (rights holder) also apply to the secondary purchaser and if those terms do apply and rights are transferred, you need to convey to the secondary purchaser the details.

Table 3. Guidelines for Rights holders (Republic of Korea Guide to Copyright and NFT Trading)

No.	Situation	Strategy
1.	When the owner of copyright wants to mint and sell an NFT	<p>1. If you, as a rights holder, want to mint and sell an NFT, you must clearly tell the purchaser what rights you are handing or not handing over, and to what extent the purchaser may exploit your work (or derivative work).</p> <p>2. You also must ensure that the link between the NFT and your work is not broken off and is properly maintained during the NFT transaction</p>
2.	Someone mints and sells an NFT using your work (or derivative work) but without your permission	<p>1. Raising a claim.</p> <p>2. Requesting an injunction and filing for compensation for damages.</p> <p>3. Filing a criminal lawsuit and seeking punishment.</p> <p>4. Settling a dispute through mediation (The mediation fee is only KRW 10,000 to 100,000, and the case is closed within three months)</p>

Guidelines for Marketplace (NFT Platform). Marketplaces must provide guidance to NFT sellers and disclose important information about the NFT and underlying work, such as the creation date, author, and transaction terms, in order to prevent copyright infringement. In transaction posts, they should also display copies of certificates or numbers proving copyright registration. Prior to completing a purchase, buyers should double-check important information and be aware of the seller's restrictions and policies to prevent violation. To assist sellers in demonstrating their ownership of intellectual property, marketplaces should offer elements like copyright registration certificates or licence agreements, social media links, and details like contract address, token ID, and edition number. The market must stop the selling of fake or copyright-violating NFTs and designate a representative to handle such complaints. In conclusion, marketplaces are responsible for avoiding fake or copyright-infringing NFTs and addressing any claims that may arise, as well as directing sellers and customers and ensuring authenticity.

It is interesting to note also that this Guideline impart valuable information regarding copyright issues in general. There is a section where there is a discussion on copy-

right law that addresses the categories of protected and unprotected works, as well as the distinction between authors' moral and economic rights. There are exceptions to the general rule that authors own all rights to their work, such as commissioned works where the employer owns all rights. Readers are made to be aware and observe that ownership of a physical property does not necessarily confer copyright ownership over that property. Registration with the Korean Copyright Commission can establish legal proof of ownership and creation date, but registration after one year may not be accepted as evidence of the creation date. Moreover, registering ownership modifications can protect the ownership claim in the event of a dispute. In the event of copyright infringement, the holder of the rights may seek statutory damages of up to KRW 10 million per work or KRW 50 million for intentional, for-profit infringement. In addition, they may file for an injunction to stop the infringement, request the destruction of infringing materials, and pursue damages. Infringement of economic rights may result in imprisonment with labour for up to five years or a fine of up to 50 million KRW, while infringement of moral rights or defamation may result in imprisonment with labour for up to three years or a fine of up to 30 million KRW. Publication of a work under a false name can result in up to one year of imprisonment with hard labour or a fine of up to 10 million Korean won.

7 Conclusion

7.1 Lessons from Republic of Korea

Upon deep analysis of the Guideline, it can be safely assumed that the copyright laws in Korea somewhat resembles the significant provisions in the Malaysian Copyright Act 1987. The basic rights and methods of copyright exploitation works the same way in Malaysia and Korea where the exploitation rights are within the control of the copyright owner or rights holder. The Korean Guideline clearly showed a comprehensive and detailed situations which an NFT trader will face in the marketplace. Table 1 showed what a seller should be aware of before embarking on a sale of his NFT. Awareness regarding underlying rights in the NFT to be sold is emphasized, in case the seller is not selling a digital creation which is probably not one hundred percent original, or in other words, not fully created by the seller. The different types of seller are listed so that the seller knows which rights he is entitled to, by describing to the seller whether he is the author, assignee, licensee, re-seller, owning only neighbouring rights or whether the NFT you are selling is a public domain work. The guide or strategy is outlined for each type of seller so that the seller enters the transaction with his eyes wide open.

Likewise, as per Table 2, the purchaser of an NFT is cautioned as to the legitimacy of the NFT that he is buying. The purchaser is advised to check the rights holder of the NFT to ensure the contractual transactions would be valid. Purchasers are also advised to find out what rights are transferred to him upon purchase and if this information is not given by the seller, the purchaser should read the terms or policy given by the marketplace. The purchaser is also informed of situations when he will be regarded as consenting to the policy given by the marketplace. With these guidelines

and strategies, a purchaser would execute the transactions carefully as well. The rights holders are also not forgotten in this Guideline. Table 3 demonstrates the options and actions to be taken by the rights holders in cases where he is minting and selling the NFT and what to do if his rights have been violated by sellers who have not asked for his permission for the sale of his NFT or related copyright infringements. It also important to highlight that registration of the NFT to be traded is highly recommended to secure a documentary evidence of ownership of the NFT. Since the republic of Korea is a member of the Berne Convention, a compulsory registration is not needed for a copyright to subsist as it subsists automatically upon the creation of the work. However, a registration system would be very helpful for the NFT traders as suggested by this Guideline.

This Guideline is clearly not a legislative document and does not have any legally binding effect. However, it provides an assistive reference since like Malaysia, there is no statutory control yet for NFT transactions.

Takeaways for Malaysia. There are six NFT marketplace in Malaysia as this paper was written. They are, Pentas.io, NFT.my, NFT Pangolin, TRART, NFTapir ad Art lab. Upon surface search, these Malaysian based marketplace are thriving with trading activities, with each marketplace having its own special features. Being a developing country, awareness of intellectual property rights in general and copyright in particular is not a strong trait yet. The interest on intellectual property is seen to be growing, but the importance of being aware of your own and other people's rights have yet to arrive as a day-to-day element especially in the lives of the millennials and the GenZs.

The Malaysian Intellectual Property Office (MyIPO) has already put in place a Voluntary Copyright Notification system for rights holders to register their work, as long as their work meets all the requirements for copyright to subsist. This can be a platform or vehicle for NFT rights holders to secure ownership documentations. The Korean Guide on Copyright and NFT Trading would be a remarkable reference for MyIPO so that a guide similar to that can assist and guide NFT traders. It is recommended that a Malaysia equivalent can be issued and made mandatory to be posted by all Malaysian based NFT marketplace as an awareness campaign effort, a precautionary measure and also actions to be taken when something goes awry in the NFT transaction.

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