Bollywood Buzzing Over NFTS

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By: Pravin Anand, Dhurv Anand and Udita Patro

Non-fungible tokens (NFTs) are all the rage among Indian celebrities, but scepticism remains due to the legal ambiguity of the blockchain ecosystem

NFTs lure with the prospect of big returns. Indian actor Amitabh Bachchan reportedly sold his NFT collection of poetry recitals from his father's famous poem, Madhushala, along with autographed movie posters and more, for almost USD900,000.

The perceived utility of NFTs has also enabled content creators to monetise their work by connecting directly with audiences rather than via intermediaries like galleries, auction houses and record labels. In view of this buzz, it is important to understand whether NFTs are legal and, if they are, the implications involved in their use.

WHAT ARE NFTS?



Pravin Anand
Managing Partner

NFTs represent blockchain-based digital records comprising information recorded on a blockchain linked to a specific underlying tangible asset like a music video, digital artwork, video clip or photograph. But it is important to understand the difference between an NFT, which is merely a token

on a blockchain, and the underlying work it represents. A question often asked is whether the sale of an NFT also transfers copyright in the underlying work to the buyer. The answer is that IP rights in the underlying work are almost never transferred.

What the purchaser generally gets is only a copy of the digital work, duly authenticated by the blockchain record. In most cases, NFT ownership only provides what can informally be called "digital bragging rights". The real value of an NFT is due to its non-fungible nature, which means it is unique and, unlike cryptocurrency, is not interchangeable. Due to this associated element of exclusivity, certain NFTs get treated as collectibles, garnering wide demand from enthusiasts.

Public perception of rarity and uniqueness of the underlying tangible asset also plays a significant role in determining its value. This is also what makes NFT trading highly speculative, as there is no way to predict or assess how it may be valued in future, namely, whether it appreciates or depreciates.

LEGALITY

Presently, no laws in India expressly regulate commercial dealing in NFTs. The only statutory reference is the Income Tax Act, 1961, which has been amended to include NFTs under the definition of virtual digital assets (VDAs). Income generated from trading in NFTs is consequently taxed at 30%.



Dhruv Anand
Partner

As assets with utility, which can be bought and sold on marketplaces, NFTs may also be considered goods under the Sales of Goods Act, 1930. Consequently, certain implied warranties under the Act may become applicable. As a virtual product, purchasers are further likely to be protected under the Consumer Protection Act, 2019. The Consumer Protection (E-commerce) Rules, 2020, issued under

the Act specifically apply to all goods and services bought or sold over a digital or electronic network, including digital products. Therefore, the Act and the Rules in all likelihood cover NFT consumers, with entitlement to raise liability claims for defective products.

Additionally, advertising NFTs would be governed under the Advertising Standards Council of India Rules, requiring advertisements to include risk disclaimers. NFT advertisements must also comply with the recent Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022.

TRADING

NFT trading can only take place via cryptocurrencies, and uncertainty in India over the legality of cryptocurrencies is a major roadblock. In 2018, the Reserve Bank of India (RBI) issued a circular prohibiting its regulated entities from dealing in cryptocurrencies. But in *Internet and Mobile Association of India v Reserve Bank of India*, the Supreme Court struck down this circular, basically holding that in the absence of any legislative ban on cryptocurrencies, the RBI could not impose restrictions on trading them, since this would tend to interfere with the fundamental right of an Indian citizen to carry on any trade deemed legitimate under the law.

Subsequently, the government sought to introduce the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021, prohibiting all private cryptocurrencies. However, as of now, the legal status of cryptocurrencies remains in a state of flux, with no regulations or bans.

TEST CASES

NFTs have been subject of litigation internationally. Some noteworthy lawsuits highlight novel questions arising over their use.



Udita Patro
Partner

Shenzhen Qice Diechu Cultural Creativity v Hangzhou Yuanyuzu Technology, in 2022, was China's first copyright infringement case involving NFTs. The copyright owner of the "Fat Tiger" cartoon series (first published on social media platform Weibo) sued an NFT marketplace for contributory copyright infringement after discovering it had minted and sold an NFT identical to the copyrighted work. The Hangzhou Internet Court dismissed the marketplace's defence of being a mere intermediary and ordered destruction of the digital, work with the plaintiff awarded USD600 in damages.

Juventus FC v Blockeras, in 2022, was the first judgment on NFTs by a European court. Italian football club Juventus filed against NFT creator Blockeras for selling NFTs depicting football players, including former star Christian Vieri, wearing Juventus shirts that prominently featured the club's trademark. While Vieri contractually licensed his image to Blockeras, Juventus had not authorised the use of its trademarks. The Rome Court of First Instance ruled in favour of Juventus, restraining Blockeras from dealing in the NFTs.

Nike v StockX is ongoing, filed by Nike in New York against online marketplace StockX for trademark infringement, counterfeiting and false advertising in launching an NFT collection tied to actual Nike sneakers without authorisation. The shoemaker claims StockX sold NFTs at heavily inflated prices, while StockX refutes these claims, arguing its NFTs are merely claim tickets or digital receipts used to track ownership of the specific physical Nike product that StockX has authenticated. Therefore, says StockX, the sale of sneakers and NFTs are covered by "first-sale" doctrine, which allows resale of products that contain someone else's IP without the owner's permission, as long as the person lawfully owns the product.

Hermès International v Mason Rothschild is also ongoing in New York, with the luxury brand claiming trademark infringement against Mason Rothschild, creator of the MetaBirkin NFTs, which

are furry renderings of Hermès' famous Birkin Bag. Rothschild argues his fanciful depictions of the bags and name are artistically relevant and do not mislead as to their source. The court holds that whether or not the trademark use has any artistic relevance, or is explicitly misleading, can only be determined by trial.

In *Miramax v Quentin Tarantino*, Miramax sought to restrain the famous director from auctioning exclusive memorabilia associated with Pulp Fiction film-related NFTs. Miramax alleged copyright and trademark infringement, and breach of contract, as it owns all rights to the film. The parties eventually notified the court they had settled the dispute.

IMPORTANT TAKEAWAYS

Although courts in India are yet to rule on an NFT-related issue, important legal principles are evident from the above-mentioned cases:

- NFTs are a form of property with ensuing rights or obligations, not merely information or code on the blockchain. Courts can exercise their jurisdiction to hear cases involving blockchains, despite its borderless and decentralised nature. The location and place in which the claimant carries on business would be sufficient to clothe the court with jurisdiction.
- Copyright infringement may take place at two levels: either by the NFT creator or seller, who may cause unauthorised minting or publication, not knowing the actual scope of rights, as in *Miramax v Quentin Tarantino*; or as a buyer undertaking unauthorised reproduction and distribution of the NFT. In many cases, this may also be innocent infringement by buyers who mistakenly believe they have become copyright owners, which in most cases is not true.
- NFT marketplaces can be liable for contributory copyright or trademark infringement where a user mints and sells an NFT linked to an infringing work on its platform. But marketplaces can defend as being an intermediary and claim safe harbour under section 79 of the IT Act, 2000.
- However, such marketplaces can be deemed to have a heightened obligation to take reasonable measures to prevent copyright or trademark infringement because the platform is obliged to ensure the minter and seller own all IP rights in the NFT. If ownership is not guaranteed, it would only weaken trust in transactions. The entire NFT ecosystem is built around trust in authentic records.
- Additionally, the platform has significant control over the digital works and is able to review and monitor IP associated with them. It also directly profits from the NFT sale by charging gas fees (transaction fees) as well as commissions on each transaction. It is therefore difficult for NFT Platforms to claim the safe harbour defence.
- Whether a digital work infringes copyright of an existing work needs enquiry into whether it is sufficiently transformative to garner a separate copyright. In such cases, courts can apply existing traditional tests.

- Whether the company asserting trademark infringement has a registration in class 9 of the International (Nice) Classification of Goods and Services may also be an important consideration. However, this may not be relevant in cases where the plaintiff's trademark is well-known in India. In such cases, even without class 9 registration, the plaintiff can assert trademark infringement under section 29(4) of the Trademarks Act, 1999.

KEY CONTACTS



Pravin Anand

Managing Partner

View Bio of Pravin Anand



Dhruv Anand

Partner

View Bio of Dhruv Anand

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