LEGAL ISSUES

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Legally Speaking – NFTs, Blockchain, and Copyright Issues

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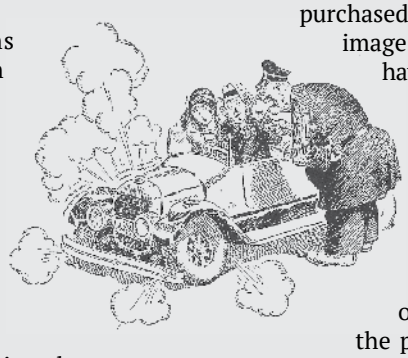
Blockchain technology has begun to enter many facets of businesses, education, and healthcare. The technology that is a secure distributed ledger system has been implemented in various ways to decentralize services, such as the use of Blockcerts in higher education, which was introduced by the Massachusetts Institute of Technology in 2017. The Blockcerts allow students to receive a digital diploma that includes their transcripts from a secured Blockchain system. Upon graduation, students are able to share their digital diploma with the transcripts to potential employers as their official transcripts. This service bypasses the need for the student to contact the registar's office and pay for their official transcripts to employers for degree verification.

Blockcerts is one of many applications that organizations are utilizing Blockchain technology that is beneficial for the organization and those they serve. While Blockchain is most noted for cryptocurrency, there other uses beyond decentralizing services or providing a secure system for businesses. A recent use for Blockchain has been in the realm of entertainment, which is causing some issues that includes the use of Non-Fungible Tokens (NFT).



This relatively new concept is complicating the already complicated world of intellectual property protection. This column will examine two recent legal issues that involve the popular book and movie *Dune* and a few other issues of copyright infringement through the use of NFTs. While this paper is noting copyright litigations, NFTs are also an issue with trademarks, as Nike and Hermès recently filed lawsuits in the United States in March.

Non-Fungible Tokens

Of course, we have to understand the concept of Non-Fungible Tokens, which is about as easy as defining the Internet or Blockchain technology. According to Mottet, et al. (2022), "NFTs stand for 'Non-fungible tokens' (non-fungible meaning non-interchangeable, a thing that cannot be directly exchanged for something else of equal value). They are digital assets that represent real-world objects like drawings, music, videos, clothes, handbags, etc. They can be minted (created) from any work and are bought and sold online, frequently with cryptocurrency."

These NFTs are creating value, primarily because of the rarity of the item. In other words, the more rare an item is, the more value the item is worth. An example of this is the CryptoKitties craze in 2017 that allowed people to purchase a digital kitten through Blockchain technology, which the kitten was specially bred using a computer algorithm that makes each kitten unique and rare. It is the equivalent of Pokémon or Beanie Babies collectibles. In other words, people are purchasing these digital items because they are rare.

During the peak of the CryptoKittie craze, some kittens were being sold between $23.06 to $117,712.12 (BBC, 2017). Because these are considered collectibles, people are able to sell to others similarly to baseball cards. This is also an example of how NFTs can become complicated in regards to copyright. Those that purchased a cute picture of a CryptoKittie do not own the image. Instead, those that purchased a CryptoKittie have actually purchased the computer code, which is the same concept of the baseball card. A person that owns a baseball card is typically not the copyright owner of the image of the baseball player.

Basically, the token is a certificate of ownership, which is the reason for the recent copyright issues. While an NFT is proof of ownership of an object, it does not mean that the person is the copyright owner, which people are purchasing artwork, videos, literature, etc. and attempting to sell the NFTs. Mottet, et al. (2022) people are making the understanding that purchasing an NFT is considered "buyer beware." They (2022) stated, "As a consequence, the transfer of an NFT does not automatically entail the transfer of the copyright on the work. Usually when an NFT is sold, what is exchanged is not the work itself nor its support, but the associated unique token. An NFT seller (that is also the owner of the copyright on the work) can, of course, also transfer the copyright to the buyer. However, said transfer must be contractually stipulated in writing."

Of course, this is no clear cut case of copyright infringement should someone sell a token of ownership. As mentioned by Motett, et al. (2022), "Anyone is indeed able to mint an NFT from a work, even if he or she does not own any rights to the specific work. Although this practice would seem to be a clear case of copyright infringement, it is not that simple. Indeed, the NFT is neither the original work or a copy of the work, it is merely a token, a 'receipt of ownership' so there is *per se* no unauthorized reproduction, copy or sale."

Mottet, et al. (2022) also noted, "However, there might be copyright infringement if: The process of minting an NFT

involves making a copy of the underlying work without the consent of the copyright holder; An image is used as an illustration of the NFT without the necessary permission; The minter of the NFT first creates a digital file of a copyrighted work without any permission; and the metadata does not contain the correct information about the author of the work (violation of the moral rights of the author)."

Dune

A recent issue of NFTs and copyright infringement involves the rare book (approximately 10 copies exist) about the filmmaker, Alejandro Jodorowsky and the book *Dune*. According to Angeleti (2021), "The group Spice DAO planned to sell NFTs based on the contents of the book, which details Alejandro Jodorowsky's ambitious but failed adaption of Frank Herbert's sci-fi novel." The Spice DAO (Decentralized Autonomous Organization) is one of several DAOs that are purchasing rare items and creating NFTs. This organization purchased the book for $3 million in November 2021 at a Christies' auction in Paris.

The intent of the Spice DAO was to place portions of the book into NFTs for sale and then eventually burn the physical copy. Angeleti (2021) noted the organization's goal to "issue a collection of NFTs that are technically innovative and culturally disruptive, a first-of-its-kind, and that burning the book would be an incredible marketing stunt which could be recorded on video." The video would also be sold as an NFT, along with a digitized copy of the book for sale. In addition, the organization was going to create an animated series for streaming based on the derivatives of the book.

The organization also Tweeted their intentions "We won the auction for €2.66 M. Now our mission is to: 1. Make the book public (to the extent permitted by law); 2. Produce an original animated limited series inspired by the book and sell it to a streaming service; 3. Support derivative projects from the community." While the intent to place the book online for free is currently available, so this goal is not the issue. However, creating works based on the book's content is a violation of copyright law.

Even though there have not been any attempts to follow through with their goals of producing works based on the contents of the book, it does bring to the forefront the issue of placing copyrighted items into the NFT realm for profit. In other words, Spice DAO thought the purchase of the book entitled them to copyright, but it did not, which has brought a spotlight on NFTs and intellectual property protection as other organizations enter the market, such as Rarible, OpenSea, SuperRare, and Nifty Gateway.

NFT Market and Other Copyright Issues

According to Tiwari (2022), "The NFT industry has grown faster than even its participants could have imagined. The market sales surpassed $40 billion in 2021 just on the Ethereum blockchain ... The prime reason for this growth is the hype that has surrounded these assets for the last two years from minting platforms, games, marketplaces, exchanges and others." Tiwari also noted that these platforms have opened a massive issue with scams and copyright violations. Due to this new innovation, the marketplace will have to have further copyright regulations, since this is a space for authors and creators to sell and promote their works.

Due to the increase of copyright issues with NFTs, there is more awareness to patrol these new mediums. Tiwari (2022) noted that "A platform called GuardianLink is using its proprietary artificial intelligence technology to monitor the web for any duplicate, rip-offs and copy-cat NFTs of the creators using their platform. This enables both creators and collections to protect their NFT assets."

Other issues with copyright and NFTs include several major artists, such as Jay-Z and Quentin Tarantino. According to Hale (2022), "In June 2021, Roc-A-Fella Records initiated a lawsuit against its co-founder Damon Dash for allegedly attempting to 'mint' and sell Jay-Z's album *Reasonable Doubt* as an NFT. Roc-A-Fella's complaint alleges that Dash planned to sell an NFT of the *Reasonable Doubt* copyright through an auction on an NFT platform." The court agreed that there was the attempt of copyright infringement and barred "Dash from altering, selling, or otherwise disposing of any copyright or other property interest in *Reasonable Doubt*, including the auction of an NFT reflecting such interest."

Tarantino's case is a little more complicated because he was being sued by the production company Miramax for his "intention to auction seven 'exclusive scenes' in the form of NFTs from his handwritten *Pulp Fiction* script. Miramax's complaint alleges that NFTs do not fall under Tarantino's limited contract rights for the film" (Hale, 2022). This case will be important in how NFTs impact not only copyright but also contracts.

Issues with NFTs

Poritz (2022), noted that "Some of the legal liabilities in NFT projects may arise from a misconception that innovations in blockchain technology can replace the legal legwork needed to defend against costly lawsuits, attorneys say." As noted by Poritz, Blockchain's ability to create "smart contracts" does not mean that these are actual contracts, which has caused some confusion, and implies that some sellers are attempting sell items without understanding how the technology works.

In order to avoid issues of copyright, the sellers will need to clearly indicate all information regarding the NFT. This information will include ownership, copyright or trademark rights, licensing agreements, and other important information to the buyer. The more information provided by the seller will best prevent some issues of copyright infringement. Of course, there will need to be more regulations and best practice standards regarding NFTs in the future.

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Questions & Answers – Copyright Column

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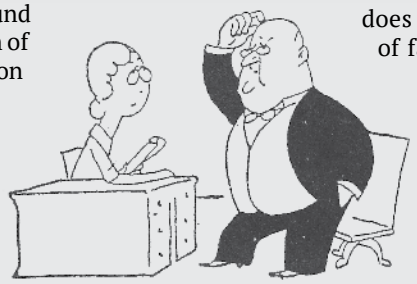
QUESTION: An attorney working in a university counsel's office asks, "Do you have any predictions about how Judge Ketanji Brown Jackson can be expected to lean on copyright cases if she is appointed to the Supreme Court?"

ANSWER: This question is one that has been on the minds of a lot of court watchers and policy wonks over the past few months. With Justice Stephen Breyer's retirement, the Supreme Court lost one of the most knowledgeable and engaged voices it had on copyright issues. Breyer's deep knowledge of copyright goes back to his early career as an academic before he joined the judiciary. His article "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Program" published in the *Harvard Law Review* in 1970 is often cited as an early and influential critique of copyright expansion.

On the Supreme Court Breyer wrote numerous influential copyright opinions including the majority opinion in *Kirtsaeng v. Wiley* (2013) holding that the first sale doctrine applied to works produced outside the United States with the authorization of the copyright owner, a critical decision for library lending. He also authored last term's major copyright decision, *Google v. Oracle* (2021), where the Court found that fair use permitted Google's replication of Java declaring code in the Android application programming interface. Beyer also wrote or joined several majority opinions supporting stronger applications of copyright including *MGM v. Grokster* (2005) and *ABC v. Aereo* (2014).



In all cases, Breyer was a consistently thoughtful voice on copyright issues and his retirement leaves a major gap on the Court going forward. As a result, all eyes are on Judge Ketanji Brown Jackson, the current (as of this writing) nominee who is expected to be confirmed before the start of the new term. Jackson is highly-respected as a jurist and served as Justice Breyer's clerk in 1999-2000 so it may be natural to speculate as to how Jackson's approach to copyright will shape the Court going forward.

Unfortunately, we don't have a lot of information to rely on. While Judge Jackson has heard several cases that touch on copyright, most do not directly address substantive issues in a way that suggests what her approach will be in future cases. Instead, those cases were generally decided on procedural grounds due to failure to state a claim, lack of subject matter jurisdiction, and so forth.

The Copyright Alliance, an organization which represents the interests of creators and rightsholders, released a useful overview of Judge Jackson's record in copyright cases: https://copyrightalliance.org/president-biden-judge-ketanji-brown-jackson/. This resource walks through the cases that Jackson has heard or been involved with and concludes that "while Judge Jackson may have had very few public interactions with copyright law, there is no doubt that she has a firm grasp of the basic principles of copyright law, including copyrightability, registration, and elements in an infringement case."

Assuming Judge Jackson does become Justice Jackson, we will just have to wait and see how she approaches cases dealing with copyright issues. One early test case for Justice Jackson is already on the horizon. As highlighted in the "predictions for 2022" column in December, the Supreme Court has agreed to review the much discussed *Andy Warhol Foundation v. Goldsmith* case dealing with fair use of images, a topic not addressed directly by the Supreme Court in many years. By this time next year, we may have a much better sense of how Justice Jackson views copyright and fair use.

QUESTION: A librarian asks, "I've heard a lot about Controlled Digital Lending in the U.S. How do you think this practice fits with the Canadian law of fair dealing?"

ANSWER: The practice of Controlled Digital Lending (CDL) has been discussed in this column in the past. For a refresher you can review the overview and white paper available at this site: https://controlleddigitallending.org/. In brief, CDL is a legal theory that supports libraries loaning print books to digital patrons in a "lend like print" fashion based on the American doctrine of fair use. While Canadian law does not include fair use itself, the Canadian law of fair dealing is designed with many of the same policy goals in mind. Indeed, as noted Canadian copyright expert Carys Craig wrote in a recent Code of Best Practice document, "today, the fair dealing doctrine in Canada is remarkably similar, in purpose and scope, to the U.S. fair use doctrine."

Where does that leave Canadian institutions seeking to apply the principles of CDL in their own legal contexts? In order to answer that question, a group of Canadian copyright experts working on behalf of the Canadian Federation of Library Associations Copyright Committee recently released a paper exploring "the legal and policy rationales for the [CDL] process in Canada, as well as a variety of risk factors and practical considerations that can guide libraries seeking to implement such lending." The paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031054, walks through the policy purposes that CDL might support as well as the application of fair dealing to common scenarios where CDL may be beneficial for libraries working to meet their mission. It also explores three primary risks associated with CDL: 1) the risk that a library is sued in the first place, 2) the risk that the library loses the lawsuit, and 3) the risk of consequences in the face of defeat in a lawsuit. In order to manage those risks, the paper concludes with a set of recommendations for system design and library policies, collections choices, and relationship to the Canadian Public Lending Right. Overall, the paper offers a detailed and thoughtful guide to controlled digital lending grounded in the specific legal context of Canadian copyright and fair dealing.

QUESTION: A faculty member asks, "What's going on with that professor who is suing their student for posting an exam online?"

ANSWER: In March it was reported that a business professor at Chapman University had found questions and test prompts from his previous exams posted on Course Hero, a website marketed as a study aid but often used to share exams and other assessments in ways that could be used by students to cheat. Many (perhaps most?) instructors have had this experience, but this professor chose to do something that most do not — he decided to sue the students who posted the materials for copyright infringement.

The professor claims that the lawsuit is necessary because Course Hero will not reveal the name of the student or students who posted the materials. His attorney, quoted in the *Washington Post*, argued that "he's not trying to bankrupt his students or their parents. What he's trying to do is prevent cheating and have a chilling effect on students cheating going forward." Although the claim does request financial damages, the professor claims that once the names of the students are revealed he will "probably drop the case" and simply turn the students over for disciplinary action with the university.

Regardless of the intentions of the professor, this case is an interesting fit with copyright law. First, it is not entirely clear that the professor actually owns the materials at issue. Assuming the materials are original and creative enough to qualify for copyright protection (not all test questions are) many institutional policies claim copyright in course materials as works made for hire. The question of faculty ownership has always been somewhat blurry with older cases referring to a "teacher's exception" that exempted lecture notes and related course materials from ownership under work for hire. The *1976 Copyright Act* did not include any language on this type of exception and many scholars believe there is no blanket right to traditional academic works unless embodied in a contract, policy document, or other agreement. The Chapman University policy grants copyright to the author for "textbooks or other pedagogical works" but claims all rights in "syllabi and courseware."

The professor has been able to register copyright in the work with the Copyright Office as required to file a lawsuit, which grants him at least a presumption of validity and the university has declined to participate in the lawsuit in any capacity, so the baseline issues of ownership are not likely to come into play in this case. What may be more relevant is that the stated aims of the professor are so out of line with the purpose of copyright that the case might be filed for what a court considered an improper purpose. As a general principle, litigation solely intended to achieve something totally extraneous to the litigation such as using a copyright lawsuit to reveal the name of an anonymous person online, is problematic.

Whether or not this could reach the level of abuse of process and/or malicious prosecution under California law, a judge or jury may push back on opportunistic litigation that seems to be using copyright law to achieve something copyright is in no way designed to do. While the legal issues are clearly distinct, the first thing that came into my own head when I read this story was the ongoing discussion over strategic lawsuits against public participation (SLAPP). These suits intended to censor, intimidate, and silence critics have been the subject of much discussion and thirty-one states have developed legislative protections against SLAPP lawsuits.

To be clear, there are significant differences between SLAPP suits, which usually involve frivolous claims of defamation, and this case which seeks to use copyright in order to intimidate and unmask students suspected of academic dishonesty. But opportunistic litigation that bends the law far beyond any reasonable reading of the purpose and policy of that law can lead to whiplash that comes back on the individual litigant or the other stakeholders in their area of practice.

Regardless of the legal outcome, it would be easy to imagine the reaction of students at Chapman to this litigation. If the ultimate aim of the litigation is to have a chilling effect on students sharing information about the course, it may succeed in ways beyond the professor's stated intentions. What student would want to subject themselves to a classroom where they may be subject to opportunistic (and arguably frivolous) litigation by their professor? One can only imagine what the course evaluations will say at the end of this semester...

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