



Intellectual Property Group Podcast

Rights and Issues Associated with Non-Fungible Tokens (NFTs)

By: Philip Hammarberg and Zachary Cohen

Philip Hammarberg: Hello, and welcome to the Garfunkel Wild Intellectual Property Group Podcast. Today we are going to be discussing NFTs and how they relate to intellectual property, specifically copyrights. You are here with Zach Cohen, a Partner with Garfunkel Wild, and Philip Hammarberg, an Attorney with Garfunkel Wild.

Philip Hammarberg: Zach, I guess the first thing to ask as a baseline “What’s an NFT?”

Zach Cohen: Yes, thank you. An NFT stands for non-fungible token. Basically the simplest way I can describe it is that it is a digital file that has some sort of unique identifier on it and it is verified on a certain block chain. The difference between an NFT and another piece of crypto, is that regular crypto coins, something like bitcoin, it is fungible meaning while there might be some difference between each bitcoin, like each bitcoin might have a difference serial number, they are all the same thing. I would trade your bitcoin for my bitcoin. It doesn’t matter which bitcoin you have, they are all the same value. They don’t have any uniqueness to them that makes them worth more or less.

Zach Cohen: With an NFT, each NFT has a unique aspect to it that makes it different from somebody else’s. Whether it be that it is different artwork, it is a one of one artwork that no one else has or it could be a series like an artist might do one of one hundred paintings and it is the same exact painting but it all has a different number sequence to it and people might assign value to being the one who has the number 1 versus number 71 or something like that. For example, if I have number 1 of a certain piece and you have number 17, we might not want to trade that because I might value number 1 more than yours. So that’s what makes it a non-fungible.

Zach Cohen: There has been a huge boom of NFTs lately, and so I think it makes sense to talk about the copyright aspects of it that people need to know both and if you want to create an NFT what you need to know and if you want to buy an NFT what you need to know.

- Zach Cohen:** So in terms of creating NFTs, again you are basically putting a digital file on the block chain, And so I wanted you to start talking about what do people who want to put their copyrighted material on the block chain. What do they have to think about?
- Philip Hammarberg:** So they definitely want to think about whether they have adequate intellectual property rights in whatever they are creating an NFT in. There seems to be, generally speaking, a significant overlap between NFTs and copyrightable works. Images, sounds, videos, I can see this extending to books or written documents as well. But the key point is that you want to make sure you have adequate rights to create the NFT which I would consider and NFT to be a derivative work. So the person who is minting and/or creating the NFT, should ensure they have adequate intellectual property rights to create a derivative work in the copyrighted work. One way to do that is to create an NFT of work that you created. So rather than taking something that somebody else created, and using that as the basis for the NFT, you can create something yourself and then the copyright would automatically vest with you provided that what you create is in itself a derivative work.
- Zach Cohen:** Also, potentially if you have created anything and you have given certain rights of what you have created to other people already.
- Philip Hammarberg:** Yes, that is certainly a good point. This would be subject to any existing contracts. If you signed an exclusive deal with a music label, for example, then you may not have the rights to create an NFT for music you have created due to that contractual relationship.
- Zach Cohen:** Yes, exactly. And so now that an NFT has been created and you have looked into, you made sure you have the rights to the work or you have create the work and you have not given away the rights that prevent you from creating this NFT. Now there is an NFT that has been created and now on the flipside of that there is going to be a potential someone who wants to buy that NFT. So as an investor or as a collector or as just a person who is interested in technology, what do they have to think about now before they buy an NFT from any sort of copyright perspective or any other intellectual property perspectives?
- Philip Hammarberg:** So I think a very important question or issue is the question of what you are really getting with the NFT. What I mean by this is not all NFTs come with the same rights. Some NFTs come with a very broad intellectual property rights, such as the right to monetize, the right to create derivative works, the right to reproduce or publicly display the content of the NFT.
- Philip Hammarberg:** Whereas other NFTs can be highly restrictive and those restrictive NFTs while you still would own the NFT you wouldn't be able to reproduce the work publicly or you might not be able to you might not be able to monetize the work.
- Philip Hammarberg:** It may be limited to basically being a collectible. I mean as an NFT I would assume typically you would be able to sell that NFT as a collectible to somebody else but that might be your only right.

- Zach Cohen:** And then to the extent that a marketplace gives you a broader rights, if you wanted to look for something, and you say "I want to be able to have this NFT and be able to do a lot of cool stuff with it," what should that person who is looking to buy, what should they be looking for on the marketplace on the terms and conditions on the marketplace that they're buying from what are they looking forward to make sure that they now have the rights that they're looking for?
- Philip Hammarberg:** Sure. So you would basically have to do a legal analysis of the terms and conditions or terms of use, as the case may be, and you will be looking for a really broad license. Something that was certainly perpetual or, at least for the term that you own the NFT. Something that gave you the rights to monetize the content of the NFT something that allowed you to reproduce it in various forms.
- Philip Hammarberg:** Ideally, something that allowed you to create derivative works. Just something that sort of mirrored the types of rights that are sort of in the bundle of copyright rights, which is to run through those.
- Philip Hammarberg:** The bundle of copyrights rights include the right to reproduce, the right to prepare derivative works, the right to distribute copies of the work, the right to publicly perform the work the right to publicly display the work, and the right to digitally transmit the work of the public performance.
- Philip Hammarberg:** So those are the kinds of rights that I would be looking for, if I wanted to purchase an NFT with the broadest rates possible.
- Zach Cohen:** Another thing I think I would point out, is when you're looking to buy an NFT, you also need to do a little bit of diligence of who you are buying it from because just because a creator should be only creating things that they have the right to we all know that people do things that are not allowed to do and so you don't want to just "Oh, I like this type of art and I love this artist and here's an NFT of that of that artists' work I'm going to go buy it." You should do a little bit of diligence, to make sure that what you're buying was actually done from that artist and not some random person who just minted that persons' art onto a block chain and is now trying to sell it.
- Philip Hammarberg:** Yeah I think that's a good point I read a press release recently from OpenSea which is a one of if not perhaps the biggest NFT marketplace, which stated that approximately 80%, at least as with the data, the publication, of the content on OpenSea had intellectual property issues that the creators may or may not have had the rights to create that content.
- Zach Cohen:** Interesting. Yeah I know on OpenSea, and some of these other marketplaces, if you're a well known creator, sometimes you get a checkmark, like a verified checkmark like on Twitter so that you know that that's been verified but that doesn't mean just because someone doesn't have the checkmark they're not the legitimate owner of that work it just might mean that they haven't been verified by OpenSea or they're not political big enough talent to want the attention to get that checkmark.

- Zach Cohen:** So definitely, if you're going to spend you know real money on something, you want to do your do your due diligence, just like you do due diligence on anything on state, you were to spend you know your money on.
- Philip Hammarberg:** That makes a lot of sense.
- Zach Cohen:** Any other points that you that you have that should be brought up?
- Philip Hammarberg:** No, I think that wraps it up I can see by the clock here that we're almost out of time.
- Philip Hammarberg:** So thank you for being available for this podcast and I thank you to the listeners for listening, please like and subscribe and check us out next time.