

COMMERCIAL TEAM OUTLINES NFT LITIGATION IN USLAW MAGAZINE

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“Pulp Fiction” and Beyond: The Future of NFT Litigation

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As the market value of non-fungible tokens (“NFTs”) continues to soar, legal practitioners will soon face the contractual, copyright and trademark issues that accompany this new technology. This article explains how a recent headline-grabbing case over rights in the 1994 film “Pulp Fiction” is a harbinger of NFT-related litigation to come.

WHAT IS AN NFT?

In its simplest terms, an NFT is a digital certificate of authenticity, recording ownership of an asset. The underlying asset is usually digital, but it can also be physical. Much of the value in NFT technology lies in the fact that it records identifying information (like ownership) on the blockchain. The blockchain is a digital ledger that cannot be modified, ensuring security in transactions. In addition to recording ownership, an NFT may also contain a “smart contract” – including terms and conditions that automatically govern later sales of the NFT and provide royalties for the original creator beyond the first sale.

THE TARANTINO-MIRAMAX LAWSUIT

In November 2021, Quentin Tarantino, the award-winning director of the cult classic “Pulp Fiction,” announced he would be selling seven NFTs related to the film. Each NFT would include “uncut first handwritten scripts” from the film with “exclusive custom commentary” by Tarantino, as well as a unique work of art inspired by the film that will be visible to the public. In response, Miramax, the film’s distributor, filed suit in California federal court to stop Tarantino from auctioning off NFTs based on “Pulp Fiction,” alleging breach of contract, copyright infringement, and trademark infringement. Citing its own broad rights in the film, Miramax argued Tarantino did not have the rights required to create and sell the NFTs. The NFT auction continued as planned in January 2022, with court dates set for February 2022 and beyond.

The outcome of this suit will likely turn on the language in a 1993 agreement between Tarantino and Miramax, in which Tarantino granted to Miramax: “all rights...in and to the Film...now or hereafter known including without limitation the right to distribute the Film in all media now or hereafter known...” In this agreement, Tarantino reserved a limited set of rights to himself, including “print publication (including without limitation screenplay publication...in audio and electronic forms as well, if applicable).” Tarantino argues the creation and sale of the “Pulp Fiction” NFTs fall within his print publication rights – specifically his screenplay publication rights. Miramax counters that the NFTs fall within its broader, forward-looking rights, which govern “all media now or hereafter known.” In other words, this case will turn on contractual provisions drafted well before the invention of the technology now at the heart of the dispute, leaving courts to use traditional copyright and trademark concepts to find a solution.

COPYRIGHT LAW

Miramax claims Tarantino infringed upon its copyrights in “Pulp Fiction” under the federal copyright statute. The copyright dispute turns upon whether the creation of NFTs in this instance constitutes “publication” under U.S. copyright law, as Tarantino’s rights under the contract are limited to the publication of the screenplay. Generally, distribution of a copyrighted work to a small group, for a limited purpose, and with limitations on distribution does not constitute publication. Miramax argues that is how Tarantino’s sale of NFTs should be classified: as a one-time transaction of screenplay pages. Tarantino, on the other hand, argues his sale of NFTs should be treated as a “publication” because purchasers of the NFTs are free to share their NFTs with the whole world if they wish.

Copyright law is an area ripe for complications when addressing NFTs, as different rights might apply to the NFT itself and the work underlying the NFT. The

holder of a copyright controls many rights relating to the work in question, including the right to copy, sell and prepare derivative works. Before selling or purchasing NFTs, it is crucial to identify which rights are being granted or transferred to avoid legal complications down the road. For instance, let's say the NFT in question is a piece of digital artwork. In one scenario, the person creating and selling the NFT is the artist of the underlying work itself, who at the time of selling possesses all of the exclusive copyright rights, including the right to sell, reproduce, and distribute the work. As such, the seller can pass on as many of these rights as she wants to a buyer. In another scenario, the person creating and selling the NFT is not the artist of the work itself, but a person who previously purchased the digital artwork from the original artist. The seller in this case will only be able to pass onto the buyer rights that he himself acquired from the original artist. More difficulties can arise under this scenario, as the seller may not properly possess the rights to reproduce or sell derivative works of the original, which suggests he may lack the rights to properly create and sell an NFT. Note that in both of these cases, as with physical artwork, members of the public with no ownership rights in the work may still be able to access or view the digital artwork online.

TRADEMARK LAW

Miramax also argues that Tarantino has infringed on its trademarks in "Pulp Fiction." Federal trademark cases are governed by the Lanham Act, which prohibits the unauthorized use of a trademark in a way that is likely to confuse consumers. In the Tarantino-Miramax case, for instance, Miramax alleges that Tarantino's creation and sale of "Pulp Fiction" NFTs without authorization will cause consumers to believe that Miramax created or endorsed the sale, creating confusion and misappropriating Miramax's goodwill with the public.

As with copyrights, determining which trademark rights have been allocated to the seller and buyer is critical, as the proper ownership of an NFT could turn on the breadth of rights granted in a trademark license. Federal and state trademark dilution statutes may also impact NFTs in cases where a widely recognizable trademarked phrase or image is used. Under these laws, parties can sue if a similar phrase or image is used to "dilute" the original trademark, either by rendering it less distinctive or by harming its reputation.

CONCLUSION

The creation and sale of NFTs will create new legal issues, complicated by high financial stakes, the fast pace of the digital world, and the new concepts and evolving technology involved. The Tarantino-Miramax case will be among the first indicators of how courts will treat these issues. NFTs will inevitably follow the same process that all emerging technologies follow in the realm of intellectual property law, as courts enlarge existing concepts in copyright and trademark law to encompass NFTs. At the same time, practitioners will catch up and begin to add specific rights language into future contracts.

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