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Evolving Trends for IP Licenses in NFT Terms and Conditions

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With the proliferation of non-fungible tokens (NFTs), particularly in the art space, an interesting and potentially groundbreaking practice has developed where certain intellectual property (IP) pertaining to the NFTs is licensed to the NFT buyers and their subsequent transferees. This type of IP license was made famous by the developers of the Bored Ape Yacht Club, who included a commercial use license in their terms and conditions¹ and, based on public statements, intended that these licenses would allow NFT holders to more fully commercialize their Bored Apes. Granting the owner of an NFT, or for that matter any work of art, a commercial use license has until now not been common practice, as traditionally the

buyer is allowed only limited non-commercial use rights over that art. This trend of granting greater IP rights to NFT owners is aligned with the ethos of Web3—allowing holders to have more control over digital assets and contents.

Web3, at its highest level, is the latest iteration of the Internet that is enabled by smart contracts and other technological developments made possible by blockchain. This is opposed to the original iteration of the Internet, Web1, which was a read-only version of the Internet, and Web2, which introduced social platforms and dynamic content and is the version of the Internet most of us know today. Web3 has the perceived advantages of being censorship resistant due to decentralization, allowing for direct payments through cryptocurrencies, decentralizing control of content, and permitting proven ownership of digital assets (such as NFTs) that is not reliant on third parties continuing to operate a platform.

This licensing of commercialization rights to a particular NFT holder presents interesting opportunities for buyers to monetize their NFT purchases. It also presents new challenges as developers try to work out the most appropriate legal construct to serve the interests of both the overarching project and individual owners of the NFTs. Some of those challenges recently played out when major changes were made to the license terms in two popular NFT projects: Moonbirds² and CryptoPunks,³ each demonstrating a different strategy of allocating IP ownership of NFTs. Moonbird NFTs have been sold for as high as 350 ETH (approximately \$570,000 based on current price of ETH as of August 22), and CryptoPunk NFTs have sold for as high as 8,000 ETH (approximately \$13 million based on the current price of ETH as of August 22).

Moonbirds Shift to CC0

One approach to licensing, which is uniquely “Web3,” is the placement of otherwise protectable

copyright IP into the public domain through the use of Creative Commons “No Rights Reserved”⁴ (CC0) agreements. The idea behind CC0 is that when art is placed into the public domain, it allows more people to use and otherwise advance that art without fear of infringement, which in turn increases the notoriety and value of the original works.

The original Moonbirds Terms of Sale⁵ licensed the artwork in the individual Moonbird NFTs to the holders of those NFTs for commercial use. The relevant excerpt from those original terms is below:

Commercial Use. Subject to your continued compliance with these Terms, PROOF grants you a worldwide license to use, copy, and display the Art represented by your Moonbirds NFT for the purpose of creating derivative works based upon the Art (Commercial Use). Examples of such Commercial Use would be the use of the Art to produce and sell merchandise products (e.g., T-Shirts etc.) displaying copies of the Art. For the sake of clarity, nothing in this Section will be deemed to restrict you from (i) owning or operating a marketplace that permits the use and sale of Moonbirds NFT generally, provided that the marketplace cryptographically verifies each Moonbird NFT owner’s right to display the Art for their Moonbirds NFT to ensure that only the actual owner can display the Art; (ii) owning or operating a third-party website or application that permits the inclusion, involvement, or participation of Moonbirds NFT generally, provided that the third-party website or application cryptographically verifies each Moonbirds NFT owner’s rights to display the Art for their Moonbirds NFT to ensure that only the actual owner can display the Art, and provided that the Art is no longer visible once the owner of the Moonbirds NFT leaves the website/application; or (iii) earning revenue from any of the foregoing.

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On August 4, 2022, Kevin Rose (a founder of the Moonbirds project) announced on Twitter⁶ that Moonbirds would be moving to a CC0 public license. This change from licensing the artwork only to individual owners—to now allowing the public at large to have equal rights over the use of that artwork has upset certain Moonbirds NFT holders⁷ who previously had greater IP rights and suddenly were left with diluted commercialization rights due to the sudden change in license terms.

Yuga Labs Releases Long-Awaited CryptoPunks Licensing

Another example of the potential decentralization of the IP ownership of NFTs is contained within the terms recently released by Yuga Labs in conjunction with CryptoPunks. When Yuga Labs acquired CryptoPunks in March of 2022, they issued a press release⁸ that said “[w]ith this acquisition Yuga Labs will own the CryptoPunks and Meebit brands and logos, and as they’ve done with their own BAYC collection, Yuga Labs will transfer IP, commercial, and exclusive licensing rights to individual NFT holders.”

On August 15, 2022, those long-awaited licensing terms⁹ were finally released. Some interesting features of those terms include:

- An explicit coupling of licensing rights to the asset itself, which means when the asset is transferred the licensing rights which accompany that asset follows.
- Listing of the smart contract which the applicable NFTs were deployed on, potentially to preemptively cut off claims by V1 CryptoPunk owners¹⁰ to IP rights under the agreement. V1 CryptoPunk owners purchased an NFT with an error in the code for the smart contract. To fix the coding error, the original creator (Larva Labs) sent out a new smart contract. V2 CryptoPunks became successful and popular. Recently, original V1 CryptoPunk owners decided to wrap their V1 CryptoPunk NFTs in a new smart contract and sell them. The wrapped version of the V1 CryptoPunks fixes the coding error but resulted in duplicate CryptoPunk NFTs (*i.e.* the artwork is identical between V1 and V2).
- No explicit reservation of rights to amend the IP licensing terms on a going-forward basis (as was included in the Moonbirds terms).

These terms by Yuga Labs are far more comprehensive than the Bored Ape Yacht Club licensing agreement. Ed Lee, the author of Nau NFT,¹¹ put together a helpful infographic¹² showing certain differences between the CryptoPunks and Bored Ape Yacht Club licenses.

It is unclear if this CryptoPunks license was released first to determine any potential weaknesses or holes before releasing a revised license for Bored Ape Yacht Club holders, or if it was simply done to create clarity after their statement on the issue regarding their CryptoPunk IP purchase.

The Andreessen Horowitz (a16z) “Can’t Be Evil” NFT Licenses

A16z is one of, if not the single, biggest venture investor in the Web3 space. Shortly after Moonbirds and CryptoPunks made the above changes to their IP licensing, a16z released a set of free, public licenses designed to be used by NFT project developers as a uniform licensing standard in the space.

The self-titled “Can’t Be Evil” licenses¹³ are a set of six licenses ranging from the most restrictive “Personal Use License” (CBE-PR) to the least restrictive “CC0 1.0 Universal” agreement (CBE-CC0). A16z’s stated goal in creating these licenses was to “transparently [codify] the rights of NFT creators, buyers, and sellers so that every party has a common understanding of the rights associated with NFT ownership.”

All six licenses are available on the a16z crypto GitHub,¹⁴ and they also provide a legal primer (PDF) with a number of additional considerations for potential modifications. In their release announcing the licenses, a16z stated “[b]y making the licenses easy (and free) to incorporate we hope to democratize

access to high-quality licenses and encourage standardization across the web3 industry. Greater adoption could lead to incredible benefits for creators, owners, and the NFT ecosystem as a whole.”

Final Thoughts

The Web3 industry mentality surrounding the decentralization of ownership, including ownership of copyrights and other IP, is a new development which is likely to have legal ramifications across all industries. As with any developing industry, it will likely take time for law to be established regarding these current Web3 industry practices. As shown in the above Moonbirds and CryptoPunks licensing changes and the a16z “Can’t Be Evil” licenses, these current practices and the laws surrounding them are constantly changing. That is why it is important for developers to engage legal counsel early to assist those developers in creating an appropriate IP strategy for their particular goals. While there are clearly challenges in expanding and decentralizing the IP of NFT owners, these trends are an exciting development demonstrating Web3 ideals being put into commercial practice.

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