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## Senators Dive into the World of NFTs, Asking U.S. Patent and Copyright Offices to Consider Questions Regarding Related Intellectual Property Rights

By Jessica Cohen-Nowak and Andrew D. Kasneovich

Senators Thom Tillis (“R-NC”) and Patrick Leahy (“D-VT”) have sent a letter to the directors of the U.S. Patent and Trademark Office (“USPTO”) and U.S. Copyright Office, requesting that the agencies jointly undertake a study of intellectual property (“IP”) rights considerations with respect to non-fungible tokens (“NFT or NFTs”).

NFTs are digital objects – each NFT has a unique digital footprint that is unchangeable – recorded and stored on a blockchain. NFTs represent ownership of unique items. NFT ownership and assignment are also recorded on a blockchain, allowing for secure, transparent recordkeeping, and the blockchain ensures only one NFT can be created for each item. (This is different than, e.g.,

streaming music files or digital photographs, which may be copied, pasted and broadly distributed.)

The creation and sale of NFTs has generated a large volume of activity around the world and, with high-profile purchases reaching tens of millions of dollars, significant media attention. So far, NFT adoption has been most prominent in the artwork and collectibles space (e.g., with respect to drawings, music, pictures and videos), but NFTs can designate ownership of any unique asset (digital or physical), and their acceptance is likely to grow.

### THE ROLE OF SENATE COMMITTEE

Senators Tillis and Leahy, the ranking member and chair of the Senate Committee on the Judiciary Subcommittee on Intellectual Property, respectively, have taken notice. Citing their Committee’s obligation to consider IP rights for emerging technologies and the impact such technologies might have on IP rights, the letter asks the USPTO and Copyright Office to study the following questions<sup>1</sup> regarding NFTs and IP over the next year:

1. What are the current applications of NFTs and their respective IP and IP-related challenges?

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2. What potential future applications of NFTs do you foresee and what are their respective potential IP challenges?
  3. For current and potential future applications of NFTs:
    - a. How do transfers of rights apply? How does the transfer of an NFT impact the IP rights in the associated asset?
    - b. How do licensing rights apply? Can and how can IP rights in the associated asset be licensed in an NFT context?
    - c. In what way does infringement apply? What is the potential infringement analysis where an NFT is associated with an asset covered by third-party IP or where the underlying asset associated with an NFT is owned by the NFT creator and infringed by another?
    - d. What IP protection can be afforded? What IP protection can be afforded to the NFT creator? What if the NFT creator is a different person or entity from the creator of the associated asset?
    - e. How else does 17 U.S.C. § 106 apply?
  4. What are current and potential future uses, internal and external to the agencies, for using NFTs to secure and manage IP rights?
  5. How do current statutory protections for copyright, such as the Digital Millennium Copyright Act (“DMCA”), apply to NFT marketplaces and are those protections adequate to address current infringement concerns?

## **THE FUTURE OF NFTs**

The Senators are seeking to “understand how NFTs fit into the world of intellectual property

rights – as said rights stand today and as they may evolve as we move into the future”<sup>2</sup> and urge the directors to consult with the private sector in formulating answers. While some questions may seem broad, they are geared at producing a wide-reaching report that, ideally, will provide guidelines for how NFTs should be treated in the IP realm going forward.

The questions are important because copyright and trademark rights, and in certain scenarios patent rights, can protect NFTs or certain elements thereof; various trademark and copyright owners have successfully enforced their rights through infringement claims in district court or by filing DMCA takedowns in NFT marketplaces (e.g., OpenSea). However, litigation in the subject matter area is proliferating and results are uncertain; we expect subsequent alerts to discuss some of those rulings as they issue.

Unfortunately, the problems that NFT innovation seeks to resolve by providing an NFT buyer some verification of authenticity do not always align with the reality of whether an NFT seller actually owns any trademark or copyright rights that may be attached to the NFT. Relatedly, the sale of an NFT does not necessarily transfer copyright or trademark ownership (or even licensing rights). As a result, proof of NFT ownership is not presently sufficient to prove ownership of IP rights to the USPTO or Copyright Office.

It is clear that as the use of NFTs rapidly expands, so will the legal implications. The USPTO and Copyright Office have a difficult task in preparing an IP rights report in response to the questions asked by Senators Tillis and Leahy that address both the present and future of NFTs.

## **Notes**

1. Letter, pp. 1–2.
2. Letter, p. 1.

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