

On the Status of Copyright Law for NFT Collections of Cultural Heritage

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Non-fungible Tokens (NFT) collections of cultural heritage are virtual digital commodities produced by museums and related entities with the help of blockchain, photography, scanning, virtual reality, and other digital technologies based on the resources in their collections, which show promising market potential. The marketability of NFT collections is evident in their utility and scarcity, although these two concepts differ in virtual and real spaces. The former relates to collectible utility and the scarcity defined by copyright law, while the latter pertains to the functionality enabled by programming potential and the scarcity constructed by blockchain and smart contract technologies. Structurally, NFT collections can be deconstructed into technical information and content information. The content information manifests as audiovisual media, which can enjoy copyright protection if it meets legal composition criteria. NFT collections provide the public with a novel avenue for cultural participation. Affirming the copyrightability of content information not only ensures relative exclusivity of utility for buyers but also fosters a competitive market environment that prioritizes quality.

Keywords: Non-fungible Tokens (NFT), cultural heritage, copyright law

Introduction

In the digital economy era, the concept of the metaverse gains traction, leading to the emergence of various business models grounded in its underlying technologies. A typical example is the development and sale of digital collections by museums. Utilizing digital technologies such as blockchain, photography, scanning, and virtual reality, museums can digitize physical artifacts and transform them into Non-fungible Tokens (NFTs) for distribution and sale. Unlike regular digital collectibles (ANT Group, 2022), *gestaltungshoch* of these NFT collections of cultural heritage (hereinafter referred to as “NFT collections”) heavily relies on museum resources;

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they remain the procedural characteristics of precise replication and secondary creation. The market for NFT collections in China is thriving, with relic-based digital collectibles once even reaching the highest level of market popularity. As key issuers, museums and related entities face substantial market opportunities as well as challenges in copyright governance. On one hand, the wide dissemination of museum resources in the form of digital collections helps uncover their derivative value, while also reducing the time and financial costs of appreciating these resources. On the other hand, questions surrounding the copyright protection of NFT collections and the extent of such protection significantly impact the interests of both issuers and buyers, thereby influencing the long-term orderly development of the relevant collectible market.

Currently, scholars in China focus on copyright issues related to the digital replication of cultural heritage (P. J. Wei & X. X. Wei, 2022). They also examine the legal risks and corresponding strategies for managing collections resources in the metaverse era (Xu & Tan, 2022). A key area of investigation revolves around whether museums have the right to exclusively develop digital collections using their collection resources. However, few have explored the legal status of NFT collections under the Copyright Law of China (hereinafter referred to as “Copyright Law”). Addressing this issue benefits public understanding of the market foundations for NFT collections in China. It also aids front-end enterprises and departments in constructing a collectible market that aligns with current stage of digital technology developments through effective copyright operations and management. Therefore, this article will begin by defining NFT collections, analyzing the copyrightability of these NFT collections, and distinguishing the specific copyright entitlements of different types. Ultimately, it will discuss the scope of copyright protection for NFT collections considering basic principles of Copyright Law and established judicial rulings, aiming to provide insights for resolving the aforementioned issues.

The Status of Copyright Law for NFT Collections

Whether NFT collections can qualify as works and thus warrant copyright protection is the primary issue in discussing their copyright status. In addressing this issue, one must compare the definition of NFT collections with the criteria established by Copyright Law for qualifying works. Given the diversity of NFT collections, a blanket classification regarding their entitlement to copyright protection is inappropriate; instead, a categorical analysis is necessary. Currently, the use value and scarcity of these collections in the physical space serve as the basis for their market viability: The former reflects their collectible and aesthetic worth, while the latter, derived from Copyright Law, corresponds to their transactional value. Although the potential use and scarcity of these collections in a virtual space exist, these factors should not be the primary drivers of marketability. Collections resources embody a public function of recording history and inheriting culture; therefore, the collections created from these resources must consistently uphold this mission and avoid descending into speculation and market manipulation.

Conceptual Analysis of NFT Collections

NFT collections are virtual digital commodities with unique identification numbers, created directly by museums or through commissioned work using digital technologies. These collections derive from the museum’s collection resources or its creative derivatives, which integrate technologies like blockchain and smart contracts. Consequently, such collections become “materialized” within a virtual space constructed on specific blockchains.

They are marketed to the public through digital collectible platforms, thus establishing a marketplace. Within this virtual space, each NFT collection possesses a corresponding proof of ownership, establishing its scarcity. In the physical space, consumers of these collections can collect and appreciate them on designated platforms, gaining partial use value from the ownership. Currently, many domestic digital collectible platforms have not opened a secondary market. Although some platforms permit the transfer of collections through gifting, they often impose strict limits on the frequency and timing of such gifts. This situation has led to a unidimensional trading dynamic in domestic collectibles, where the functionality of ensuring ownership differs significantly from practices overseas.

Academics have varying interpretations of NFT collections at different stages, with technological advancement serving as the profound driving force behind this phenomenon. Some argue that the digitization of museum collections resources entails using various digital technologies to collect, process, and store relevant information, ultimately resulting in a digital collection that consolidates this information (Miao, 2017). This perspective defines NFT collections as products of the digitalization of the collection resources themselves, emphasizing preservation and exhibition aspects. However, as digital technologies continue to evolve, the commercialization of NFT collections has expanded. Technologies such as blockchain, virtual reality, and augmented reality have propelled NFT collections into the realm of the digital economy. The intangible “digital creative products” have become increasingly popular in cultural consumption, and defining concepts based on existing domestic commercial practices serves as a foundation for exploring these issues. Therefore, this article defines NFT collections focusing on artifacts that possess (one-way transferable) commodity attributes. This approach aligns with the typical descriptions of domestic digital collectible platforms and differentiates them from NFT digital collectibles that can circulate freely abroad.

The Copyrightability of NFT Collections

From a structural perspective, NFT collections can be deconstructed into two components: “technical information” and “content information”. The former pertains to ownership and transfer details recorded on a specific blockchain, serving as the technical foundation that ensures the potential use and scarcity of items in virtual space. The latter consists of content information digitally documented and uploaded to a specific node within the blockchain, presenting audiovisual materials directly to the public in the real space. Technical information encapsulates content information, and their combination forms NFT collections. Content information is the focal point of Copyright Law, as its characteristics directly influence the copyrightability of items in the real space, embedding the logic of economic benefit distribution and the value orientation of social utility.

NFT Collections Is Copyrightable

Copyright Law does not exclude the provision of copyright protection for NFT collections. The classification of NFT collections as works under Copyright Law serves as a prerequisite for enjoying copyright protection. The recent third amendment of Copyright Law introduces several adjustments to the definitions, categories, and general clauses concerning works, aimed at accommodating a broader range of new types of works. On one hand, the “open mode of work types” has replaced the “statutory mode of work types”, allowing for original and reproducible intellectual products in literature, science, and art to qualify as works under Copyright Law without needing to meet specific statutory categories. On the other hand, “audiovisual works” have replaced “film works and works created by methods similar to film production”, thereby excluding the

requirement of “filming” as a creative method. This change permits more intellectual outcomes expressed in audiovisual formats to be included as works. Consequently, from a judicial perspective, whether one adopts a statutory approach or an open approach to work types, NFT collections can find interpretive bases to fall under the category of works. The content information presented in audiovisual forms within these collections can qualify as works, and the final assessment depends on whether the specific content aligns with the statutory criteria for works.

The copyright protection of NFT collections requires differentiation among various types. Collections can qualify as a work according to Copyright Law; the focus lies in whether it meets the criteria of originality and replicability, with originality being particularly significant. The creation of content information heavily relies on museum collection resources, including physical collections and their corresponding digital representations. The challenge arises from the lack of original expression, which suggests that accurate reproduction of publicly available collections by museums and other entities may not warrant copyright protection for the artifacts. However, examining the content information creation process shows that precise replication of collection resources can serve as both the final digital information and a foundation for secondary creation. The former yields a digital copy of the collection resources, which may be copyrightable if the resource is not in the public domain. The latter, when original criteria are met, allows the artifact to be recognized as a new work eligible for copyright. Therefore, how content information is sourced and created profoundly impacts its copyrightability. Accurate replication of publicly accessible collection resources only applies to certain categories of artifacts, not universally. Notably, within China’s practice, diverse NFT collections exist; these include highly accurate 3D representations of collection resources, such as the “Sword of King Goujian” from the Hubei Provincial Museum (Lian, 2021), and creative outputs that transcend the original collections, showcasing the creator’s intellectual choices, like the “Virtual Dunhuang” from the Dunhuang Academy (Zhong, 2021) and the “Singing Figurine” from the Sichuan Museum (The Carefree Traveler, 2022). Therefore, examining the copyrightability of NFT collections should analyze the actual characteristics of the content information.

The Copyright Protection of NFT Collections Forms the Foundation for the Healthy Development of the Collectibles Market

The copyrightability of NFT collections serves as an institutional guarantee for the long-term, orderly development of the collectibles market. The trading foundation of these digital items lies in their use value and scarcity; however, one should differentiate such use value and scarcity in virtual spaces and physical spaces. In the virtual space, the utility manifests as usability, reflecting the potential to engage with these items similarly to collecting and appreciating art in the physical space. Essentially, this operates as a homomorphic reflection of real-world actions within the metaverse. Enabled by blockchain technology, ownership and circulation of these items in virtual space become feasible. Furthermore, the limited production and sales contribute to their scarcity, analogous to the limited sale of tangible goods in physical spaces. Currently, while the scarcity and corresponding ownership and circulation functionalities can be realized in virtual space, the remaining aspects of utility remain tethered to possibilities reserved by programming potential. In the physical space, the utility of collectibles manifests as buyers can utilize digital platforms to collect and appreciate these items, which means they can enjoy the content information at specific times and locations. Unlike in the virtual space, collectibles in the real space

do not possess inherent scarcity. The content information, as their sole form of representation, can be copied and disseminated randomly, without any high technical threshold. Transactions of NFT collections maintain relevance, affirming the potential for potential use and scarcity in virtual space while also emphasizing the paramount importance of their utility and scarcity in the physical realm. Thus, granting qualified collections with copyright protection can provide utility a legal fiction type of scarcity, ensuring exclusivity of usage for buyers and subsequently stabilizing the order of collectible transactions in the real world.

The copyrightability of NFT collections serves as an incentive for creating high-quality collections. Copyright Law promotes the protection of property rights over these collections, encouraging the creation and dissemination of works that contribute to socialist spiritual and material civilization. The resources utilized for producing collections carry profound historical significance and represent high-quality, non-renewable creative materials. Thus, it is appropriate to implement copyright protections to motivate museums and various sectors of society to continuously produce digital goods with high-quality content, enriching the cultural participation of the populace. The “Guiding Opinions on Promoting the Reform and Development of Museums” emphasizes that advancing museum reform and development should adhere to a correct direction. It underscores the comprehensive leadership of the Chinese Communist Party over museum undertakings, firmly grasping the primary role of ideological work, guided by socialist core values. This approach highlights public welfare attributes and social benefits, aiming to better construct Chinese spirit, values, and strength (China. National Cultural Heritage Administration, 2021). In April 2022, the National Cultural Heritage Administration (2022) held a symposium in Beijing concerning digital cultural artifacts (hereinafter referred to as “Beijing Digital Artifacts Symposium”). During this meeting, it signaled that cultural heritage institutions must adhere to a public welfare orientation in the development and utilization of cultural resource information. It encouraged societal forces to utilize cultural resources for reasonable creative innovation through formal authorization, aiming to leverage information technology to enhance the interpretation and dissemination of cultural value. This clearly indicates a proactive stance from relevant authorities toward engaging in content creation utilizing museum collections, aligning with the legislative intent of Copyright Law. Consequently, the content information of NFT collections should be a focal point for developers to refine and serves as the foundational value for constructing a consumption market for these NFT collections. Bestowing copyright protection on them with originality-based content information not only safeguards the transaction order of collections but also guides purchasers to appreciate the collection and aesthetic value of them, while curbing speculative and opportunistic purchasing behaviors.

Typological Analysis of NFT Collections

The copyright legal status of NFT collections depends on the specific characteristics of their content information. Based on the intellectual creativity invested during the creation of these collections, we can categorize NFT collections into data- information-based collections and create-derivative-collections. The former accurately reproduces the museum’s resources without incorporating creative labor from the museum or related entities during the content information production. The latter involves creative transformation and innovative development of museum resources, integrating the content information into the unique expressions of the museum and related entities. Both data-information-based collections and create-derivative-collections have the potential to obtain copyright protection: The former presents an original expression of the museum’s

resources, while the latter showcases a completely new and unique expression from the museum and related entities.

Data-Information-Based Collections

Data-information-based collections generally do not acquire new copyright. The creation process of these collections aims to accurately replicate collection resources on a specific blockchain. The content information of such collections can be categorized into two types: first, the collection's physical items and their original information; second, information formed after editing and cropping original data based on collections and their preliminary information. The former lacks the intellectual creativity of the museum and related entities; thus it should be regarded as a digital copy of the physical collection. The latter may include prior intellectual contributions from the museum and related entities, but it does not extend to publicly accessible information resources. Therefore, if the collection resources used in creating data-information-based collections hold copyright and remain under protection, the collections reflect the copyright protection of the original resources. If the used collection resources fall into the public domain, then the collections do not enjoy copyright protection.

The domestic and international perspectives on data-information-based collections without copyright uphold a cautious approach. During Beijing Digital Artifacts Symposium, experts asserted that cultural heritage institutions should not directly market original collection data as limited edition commodities (China. National Cultural Heritage Administration, 2022), which reflects a downward attitude towards such collections lacking copyright. Similar perspectives have emerged abroad. Recently, the Uffizi Gallery faced controversy after selling digital reproductions of Michelangelo's works without yielding appropriate profits, prompting intervention from the Italian Ministry of Culture (Museum Headlines, 2022). It is evident that leveraging museum collection resources within the public domain as content information, then transferring them into digital collections and sales is increasingly unpopular and often meets resistance. The underlying issue can be traced back to the foundational aspects of collectable transactions. The use value and scarcity of items in physical space serve as the primary basis for trade, while their potential use and scarcity in virtual space are secondary. Data-information-based collections devoid of copyright do not possess scarcity in physical space and cannot be protected through copyright; thus their trading foundation relies heavily on the two elements present in virtual space, which results in high uncertainty and the potential to become instruments for speculation. Museum collection resources bear significant public welfare responsibilities; the valuation of creating collections should prioritize the documentation of history and cultural inheritance rather than overstressing their financial attributes.

Create-Derivative-Collections

Generally, create-derivative-collections can acquire new copyright. The production process of these create-derivative-collections aims not only to accurately reproduce collection resources on a specific blockchain but also to explore the entertainment functions of the collections in depth. The National Cultural Heritage Administration (2019), in its "Guidelines for Copyright, Trademark, and Brand Authorization Operations for Museum Collection Resources (Trial)" indicates that "copyright for museum collection resources can manifest in digital information resources that exhibit characteristics of create-derivative-collections. These digital information resources encompass digitized representations of museum collections, textual descriptions, images, videos, 3D models of the museum building, and all digital resources that deeply explore and organize the cultural

significance of collections, relevant cultural backgrounds, and the museum's cultural content". The content information in create-derivative-collections results from recreations conducted by the museum or commissioned to others, reflecting a creative interpretation rather than a mere digital reproduction. Therefore, if the collection resources are copyrighted, then the artifacts produced based on them constitute derivative works of the original. Conversely, if the collection resources are not copyrighted, the artifacts produced become new works. In both scenarios, the collections can obtain copyright protection.

To assess whether create-derivative-collections meet originality criteria, one can reference the established pathways for evaluating the originality of derivative works. In judicial practice, these pathways typically manifest as the "substantial alteration standard" (*Gracen v. Bradford Exchange*, 1983) and the "distinguishable change standard" (*Alfred Bell & Co. v. CataIda Fine Arts*, 1951). The former examines whether there exists a significant distinction between the derivative work and the original, applying stricter criteria, while the latter evaluates whether there are identifiable changes between the two, allowing for a more lenient standard. The content within create-derivative-collections may not always qualify as adaptations, yet it draws heavily from both copyright-protected or non-protected institutional resources. While the work maintains a close connection to the resources, copyright protection does not extend to the resources itself, aligning with the protective logic for transformative works. When ultimately determining whether a create-derivative-collection constitutes an original transformative work or a new creation, one must also consider the fundamental principles governing the utilization of museum collections, namely the priority of social benefits and the unity of social and economic advantages (China. National Cultural Heritage Administration, 2019). If granting copyright protection to such works assists in upholding these principles without excessively encroaching on the public domain, then protection should not be withheld. Thus, the author asserts that imposing excessively stringent originality thresholds on create-derivative-collections and adopting the "distinguishable change standard" are inadvisable. The specific scope of copyright protection will be delineated by the provisions for substantial similarity and fair use.

The Scope of Copyright Protection for NFT Collections

The preceding discussion indicates that NFT collections, which meet the criteria of Copyright Law, can be granted copyright protection. However, the scope of this protection requires clarification from the perspective of infringement determination. The principle of substantial similarity and fair use doctrine is the key to infringement judgments, which must adhere to the fundamental principles of Copyright Law, established judicial practices, and policy considerations relevant to industry development. Given the public-oriented nature of museum collection resources, it is essential to ensure the social benefits of these resources, striving for a balance between economic and social advantages. Therefore, museums and related entities should proactively develop high-quality digital products that are eligible for copyright protection and safeguard their rights. This approach will help maintain the scarcity of the use value of collections in physical spaces, thereby fostering a market for NFT collections that aligns with the current stage of digital technology advancement.

The Determination of Substantial Similarity

The determination of substantial similarity directly influences the scope of copyright protection for NFT collections. The primary criterion for identifying copyright infringement is "access + substantial similarity". NFT

collections are typically sold openly, making the proof of the accused infringer's "access" element generally undisputed. However, the "substantial similarity" aspect serves as the focal point for delineating the copyright protection scope of the collections. From a legal perspective, one can explore this issue through three dimensions: selecting guiding principles, considering public policy, and applying fundamental principles.

First, select the guiding approach. Reductionism and the principle of total concept and feel represent two distinct pathways for assessing substantial similarity and copyright infringement. The former advocates for analysis and deconstruction when determining the scope of copyrightability, while the latter seeks a holistic determination. The copyright protection range derived from these two analytical approaches differs significantly (Lu, 2015, pp. 138-145). The selection of approach should depend on the characteristics of the works; the delineation between these approaches may not always be clear-cut and can coexist. Among NFT collections, audiovisual content primarily manifests visually, exhibiting characteristics of visual art. Therefore, the principle of total concept and feel is applicable for similarity comparison in this context. Simultaneously, reductionism may apply to textual elements such as voiceovers, explanations, and scripts within the content, allowing for similar comparative analysis aimed at identifying protectable original expressions through abstraction.

Secondly, consider public policy. The scope of copyright protection for NFT collections should remain appropriately limited. It must encourage various entities to consistently produce high-quality collections while balancing the public's freedom to access resources in the public domain. The creation of NFT collections heavily relies on collection resources. Museums and their related entities possess the physical collection resources and their digital information. Thus, others usually lack the ability to replicate the same collections for direct competition with NFT collections. However, if others duplicate the content information of collections through screenshots or screen recordings and subsequently provide it to the public, they may undermine the use value of purchased collections. This situation could harm the interests of both issuers and consumers. Such circumstances should be restricted by copyright to ensure the scarcity of NFT collections in real space and to promote the long-term, orderly operation of the collection market.

Thirdly, apply fundamental principles. The idea/expression dichotomy (including consolidation and scene principles) forms the basis of Copyright Law. This framework can exclude elements that should not be part of the comparison when assessing substantial similarity. The creation of NFT collections heavily relies on museum collection resources. Regardless of whether they result in new works or create-derivative-collections, copyright protection should not extend to these collection resources, which means the protective scope should cover only the original expression of the museum and related entities. If the collection resources fall within public domain, they fall under the category of idea rather than expression. If the collection resources are copyrighted works, they include both the original expression from the author and the fundamental information of the collection items. Neither should fall under the protection of newly create-derivative-collections.

The Application of Fair Use

Copyright Law offers comprehensive protection for "exclusive rights" while imposing necessary limitations. This approach reflects an understanding of copyright-related property interests and seeks to balance various objective interests in social relationships. It aims to regulate these interests purposefully and directionally, promoting their formation and development (Wu, 2021, p. 232). The fair use doctrine constitutes a vital part of

the limitations within Copyright Law and serves as the ultimate tool for regulating the scope of copyright protection for NFT collections. If an act that seemingly infringes copyright meets the criteria of fair use, an exemption may apply. The standards for applying fair use must align with public policy and legal regulations, providing supplementary criteria for assessing substantial similarity.

The application of fair use should thoroughly consider public policy. NFT collections not only serve as virtual commodities but also act as links that preserve history and culture, intertwining social benefits with economic advantages, where social benefits hold precedence. For example, in video creation, if the public employs the original expressions contained in the NFT collections for further creation and uncovers entertainment value that enhances the social benefits of the collections, appropriate encouragement may be warranted. In such instances, even if the public utilizes the original expressions without the permission of the rights holders, if they leverage the content information according to Copyright Law, the judiciary may contemplate classifying this under fair use, provided it does not exceed the established legal criteria.

The application of fair use should adhere to legal regulations. The Copyright Law outlines that actions qualifying as fair use must pass the “three-step test” while complying with the law (Yang & Intellectual Property Tribunal of High People’s Court of Beijing Municipality, 2021, pp. 240-241). The determination of whether the public’s use of original expressions in collections constitutes fair use remains a focal challenge in this assessment. The guidelines published by the High People’s Court of Beijing Municipality summarized four key factors for evaluating proper citation, serving as a reference framework. Although the recent amendments to copyright law include a catch-all clause, it only pertains to legislative safety nets (specifying circumstances within laws and administrative regulations) and disallows the judiciary from defining new categories through interpretation. Thus, it will not alter the existing patterns of fair use determinations in judicial practices at this stage.

Conclusion

NFT collections emerge from the intersection of cultural assets and technologies such as blockchain and smart contracts, which have developed a new market and exhibit considerable growth potential. However, while these NFT collections generate economic and social benefits, they also give rise to issues like market disorder and speculation. The use value and scarcity of these collections form the foundation of their marketability, though they manifest differently in real and virtual space. In real space, the use value derives from collection and appreciation, alongside with scarcity framed by copyright protections. In virtual space, it highlights the potential usage of collections within the metaverse, along with scarcity defined by blockchain technology and smart contracts. Given the current technological development, the potential usage and scarcity in virtual space only serve as supportive roles in the market; overemphasis on them risks leading to speculative trading practices. Museums and relevant entities should harness their collections effectively, continuously producing high-quality NFT collections to reinforce the public benefit of their assets while innovating new forms of cultural engagement for the public. Copyright Law can provide copyright protections for NFT collections that meet statutory criteria, safeguarding consumers’ relatively exclusive use while encouraging creators to produce high-quality items, ultimately fostering a “good money displaces bad money” market. The scope of copyright protection for NFT collections should delineate with substantial similarity and fair use. The judiciary must carefully balance the

economic interests of creators against the social benefits for the public, ensuring alignment with the public service aspect of cultural resources.

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