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USPTO and Copyright Office Announce Joint Study and Request for Comment on the Impact of NFTs on Intellectual Property Rights

On November 23, 2022, the United States Patent and Trademark Office (USPTO) and the U.S. Copyright Office announced a joint study into the intellectual property law and policy issues implicated by non-fungible tokens (NFTs) and sought public comment on a range of intellectual property issues associated with NFTs. The joint study and request for comments were initiated following a request from the U.S. Senate Subcommittee on Intellectual Property. According to the announcement, in January, the offices will host three virtual public roundtables on intellectual property considerations relating to NFTs.

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An NFT is a unit of data stored on a blockchain that offers a unique certificate of ownership of a digital asset. They frequently represent real-world assets like art, music, and videos protected by intellectual property rights.

The interplay between NFTs and intellectual property rights has been the subject of a flurry of lawsuits over the last few years. Nike is embroiled in litigation with StockX in the Southern District of New York (S.D.N.Y.) based on allegations that StockX created NFTs displaying Nike's trademarks without authorization. Another S.D.N.Y. court recently denied an artist's motion to dismiss trademark infringement, dilution, and cybersquatting claims brought by fashion brand Hermès over the creation of NFTs that depict the company's Birkin bags and are branded as "MetaBirkins." In November 2021, production company Miramax brought copyright and trademark infringement allegations against director Quentin Tarantino in the Central District of California over Tarantino's alleged plans to auction off "exclusive scenes" from the 1994 movie *Pulp Fiction* in the form of NFTs. In another California lawsuit, rapper Lil Yachty claims that two music companies used his name and likeness without his permission to raise \$6.5 million in venture capital funds for a line of NFTs. Yuga Labs, the creators of the popular Bored Ape Yacht Club (BAYC) NFTs, brought trademark infringement allegations in the Central District of California against another NFT creator for creating and selling a line of NFTs using BAYC imagery.

In June, the top two members of the Senate's intellectual property subcommittee, Sens. Patrick Leahy, D-Vt., and Thom Tillis, R-N.C., called for the USPTO and Copyright Office to study NFTs and their impact on intellectual property rights in light of their growing popularity. "NFTs can be found in nearly all spheres — from academia to entertainment to medicine, art and beyond," the letter states. "Thus, it is imperative that we 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."

The agencies' joint announcement proposed several questions and topics for discussion, including the interplay between intellectual property rights in digital and physical assets and whether an NFT associated with an asset in which another party already has preexisting intellectual property rights may infringe those rights. They also have asked whether current legislation adequately addresses infringement on NFT platforms or whether new legislation is needed to protect and enforce IP rights in NFTs. Other topics of conversation include how NFTs have affected IP portfolio planning and management, and experiences in seeking IP protection for NFTs outside the United States.

According to the announcement, the comment period will end on January 9, 2023 and will be followed by virtual roundtable meetings on January 10 (patents), January 12 (trademarks), and January 18 (copyrights).