

LEGAL STATUS OF NON-FUNGIBLE TOKENS (NFT): CURRENT STATE AND PROSPECTS OF LEGAL REGULATION**

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The subject. The paper considers the legal status of non-fungible tokens – a technology that allows to secure and confirm the possession of a certificate that refers to a specific digital object, based on a distributed ledger (blockchain).

The purpose of the article is to research the current state of the legal status of NFTs in the Russian Federation, as well as to determine the applicability of the current Russian legislation to NFTs.

The research methodology is based on the application of methods of systemic and structural analysis, formal logic, as well as methods of legal forecasting and interpretation of legal norms.

The results. There is a lack of comprehensive studies on this issue in legal science. The value of NFT is substantiated through the categories of "rivalrousness" and "scarcity". The process of creating NFT - "mint", that is, the tokenization of a digital object, is described. The legal status of NFT is investigated, as a result of which it is concluded that the token is not equivalent to a digital object, but rather acts as a custodian of information about this object. Taking into account, firstly, the independent nature of the NFT, which is not only a digital copy of the original work, secondly, the vast scope of utilitarian application and, thirdly, its independent commercial value, it is indicated that in the perspective of the development of legislation and judicial practice, NFT should be regarded as an independent digital asset, the rights to which are subject to legal protection.

Conclusions. At present, Russian legislation does not contain a legal structure suitable for NFTs. The problems of using NFT are highlighted, including the "tokenization" of other people's works, interference in the operation of trading platforms using technical vulnerabilities, as well as fraud. Since NFT can confirm not only the right of ownership, but also represent any subjective right, it is assumed that this technology can be used to maintain decentralized blockchain registries of real estate, shares, members of the society, vote in elections, as well as to verify identity, while simultaneously ensuring the protection of personal data.

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1. Introduction

2021 was the year of active development of non-fungible tokens (NFTs). This technology, based on the distributed ledger (blockchain) principle, involves providing and validating ownership rights to a linked digital object. Uniqueness is the key feature of NFTs, which distinguishes them from fungible tokens like cryptocurrencies. For example, one bitcoin or one ether (as well as one ruble or one dollar, in the case of fiat money) is interchangeably equivalent to another unit of the same currency; the same principle applies to one gram of gold. However, a jewelry item made of one gram of gold is not equivalent to another of the same weight, as it has specific identifying traits, and the number of such items is limited. Besides, if this item is, for example, a wedding ring, it holds personal value for its owner (apart from its objective uniqueness). Technologies confirming unique or limited ownership have become popular in the art communities, particularly among art collectors. NFTs cannot solve the problem of illegal copying and distribution of digital assets, but they can prove the right to use them. That is why numerous digital works of art were integrated into blockchains and traded as NFTs. After a painting by Banksy, a famous street artist, was intentionally burned during a live stream, an NFT of its digital image was created and sold for \$95,000.¹ Jimmy Wales, the co-founder of Wikipedia, sold an NFT copy of the first Wiki edit for \$750,000 at Christie's². Meanwhile, the NFT potential is not limited to artworks: this token format can be used as proof of ownership to other property types. For instance, the US movie theater chain AMC Theatres deployed exclusive NFTs to over 580,000 of its shareholders, promising them discounts and other

perks³. The VCR Group company announced its plans to open a private restaurant in New York, available only to NFT-owning members⁴. Rapper Nas released an extended NFT, which acts as a limited digital asset (LDA), enabling its owners to obtain royalty rights for two of his tracks⁵. The ruling party of South Korea issued a series of NFTs with the images of their presidential candidate Lee Jae-Myung to raise funds for his election campaign⁶. Unlike traditional mechanisms of ownership registration and verification (or any other legally relevant activities), the information on NFT transactions is not stored by one centralized subject: instead, it is divided between thousands of computers, which constitute the blockchain (i.e., the distributed ledger). This structure established a new way of managing and claiming ownership rights to digital assets. As pointed out by D.V. Zykov, the blockchain system “is based not on the “if-then-else” legal principle, with its potential freedom of action, but on the “if-then” physical law of a program code script, where every event or action is invariable” [1, p. 43]. As we have put it in our earlier study, the distributed ledger architecture or “code” (the term used by L. Lessig to describe the design of the Internet) “determines the specifics of establishing and developing legal procedures impacting the Internet or impacted by the ICT” [2, p. 53]. As a result, the matters of NFT legal status and regulation are becoming relevant for the law theory.

2. Extent of prior research and relevance

It should be mentioned that present-day Russian law science does not offer any

¹ Blockchain company buys and burns Banksy artwork to turn it into a digital original. URL: <https://www.cbsnews.com/news/banksy-nft-injective-destroy-art-digital-token/> (accessed January 30, 2022).

² Wikipedia's first ever edit sells as NFT for \$750K. URL: <https://edition.cnn.com/style/article/jimmy-wales-wikipedia-edit-nft-scli-intl/index.html> (accessed January 30, 2022).

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³ Dogecoin-Friendly AMC Rewards 580K Shareholders With Free NFTs. URL: <https://decrypt.co/90673/dogecoin-friendly-amc-rewards-shareholders-free-nfts> (accessed January 30, 2022).

⁴ VCR Group launches restaurant membership as NFT. URL: <https://www.nrn.com/finance/vcr-group-launches-restaurant-membership-nft> (accessed January 30, 2022).

⁵ NAS IS SELLING HIS MUSIC STREAMING RIGHTS TO TWO SONGS IN NEW NFT DEAL. URL: <https://thesource.com/2022/01/09/nas-is-selling-his-music-streaming-rights-to-two-songs-in-new-nft-deal/> (accessed January 30, 2022).

⁶ Ruling party to issue NFTs for fundraising in presidential election. URL: https://www.koreatimes.co.kr/www/biz/2022/01/488_321539.html (accessed January 30, 2022).

comprehensive studies of the emerging NFT phenomenon. The question of the legal status of smart contracts and blockchain technology, in general, has gained academic coverage [3, 4], yet at the moment, there are only a few academic papers on non-fungible tokens. Most of them analyze NFTs from the intellectual property standpoint [5-11], but some have either put forth proposals for amending the current Russian legislation to provide legal regulation of NFTs [12] or explored their legal status [13-15]. Overall, economics [16-18] and finance [19] focus more on NFT analysis than law theory.

As for foreign academic research, the most comprehensive research on NFTs has been done by J. Fairfield [20, 21]; also, in 2021, a team of authors published a comparative study of the legal status of tokens [22]. However, papers published by legal consultants and practitioners, as well as studies on NFT from the viewpoint of other disciplines, prevail over complex legal research on this topic⁷. Thus, it seems necessary to analyze the legal status of NFTs in the Russian Federation and the applicability of current Russian laws to NFTs. This study is based on the methods of systemic and structural analysis, formal logic, and legal forecasting and interpretation.

3. Results.

Before discussing the legal status of NFTs, we need to describe their production process. Digital assets are minted, i.e., “tokenized” on one of the blockchain systems (Ethereum, Solana, etc.) via an NFT trade platform (e.g., OpenSea or Rarible). As a result, the token’s metadata provides information on the digital asset, its owner, and its operations. However, tokens rarely include the original digital asset: in most cases, they share a link to an external resource containing an image, audio recording, video file, etc. Thus, the primary conclusion we can make is that a token is not

equivalent to a digital asset: it would be more accurate to say it acts as a storage of information on said object. In that aspect, it is similar to ownership certificates used in the physical world (with the exception that the latter can be forged or edited by the centralized registering and storing agency, while a blockchain network, with each block containing information on preceding ones, maintains self-execution of smart contracts)

According to this principle, the purchase of an NFT provides ownership rights to the token, but not the object linked to it. Having examined the legal structures applicable to more traditional phenomena, one can assume that the author of the original work, who minted (i.e., created) the NFT, holds the copyright to it (which is considered the exclusive and unalienable personal right). Thus, the buyer gets the exclusive right to said work. However, the analysis of popular NFT trade platforms and their user agreements, as well as auctions trading NFTs, demonstrates that the purchase of a token may not involve the delegation of exclusive rights to the origin. For example, in 2021, digital artist Beeple sold an NFT of his work at Christie’s for a record 69 million USD⁸, but according to the auction house rules, the buyer was not granted any exclusive rights to the original artwork⁹. Meanwhile, some trade platforms have other options specified in their terms of service – for instance, OpenSea states that users uploading their NFTs grant the platform the worldwide, non-exclusive, royalty-free license to use, copy, modify, and display their content. Still, the question of whether this license is delegated to buyers of NFTs remains open.

To answer this question, we must first analyze the existing assumptions regarding the legal status of NFTs. D.S. Emelyanov and I.S. Emelyanov claim that following the interpretation of Articles

⁷ Rodge, F., Perkins. T., Non-fungible tokens – legal issues. Penningtons Manches Cooper. URL: <https://www.penningtonslaw.com/news-publications/latest-news/2021/non-fungible-tokens-legal-issues/> (accessed 05.04.2022); 24. Witkam, A., NFTs: New legal challenges on the horizon. Stibbe. URL: <https://www.stibbe.com/en/news/2021/october/nfts-new-legal-challenges-on-the-horizon/> (accessed April 5, 2022).

⁸ [25 Feb - 11 Mar 2021 | Online Auction 20447 Beeple | The First 5000 Days. URL: <https://onlineonly.christies.com/s/beeple-first-5000-days/beeple-b-1981-1/112924> (accessed January 30, 2022).

⁹ CONDITIONS OF SALE FOR CHRISTIE’S INC. URL: <https://www.christies.com/pdf/onlineonly/ECOMMERCE%20CONDITIONS%20OF%20SALE%20-%20NEW%20YORK-8Mar21.pdf> (accessed January 30, 2022).

128 and 1225 of the Russian Federation Civil Code, “an NFT itself cannot be considered a result of intellectual activity, as it simply confirms the rights of its owner to another object” [13, p. 73]. Clause 1, Article 141.1 of the Civil Code defines digital rights as obligations and other rights, the content and conditions of which are determined following the rules of the information system that meets the criteria established by law. Thus, for NFTs to be considered as such, they must be directly recognized by the Russian law. However, according to Part 2, Article 1 of Federal Law No. 259-FZ “On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation” of July 31, 2020, digital financial assets are defined as “digital rights including monetary claims, the possibility of implementation of rights on issued securities, the rights to equity participation of non-public joint-stock company, the right to require a transfer of issued securities (provisioned by the decision on the release of digital financial assets according to the procedure established by this Federal Law), the release, accounting and circulation of which are possible only by entering (changing) records into an information system based on the distributed ledger, as well as other information systems.” Following this definition, the researchers conclude that NFTs are considered neither digital assets (by the current Russian legislation) nor utility digital rights (as understood by Article 2 of Federal Law No. 259-FZ “On Attracting Investments with the Usage of Investment Platforms and on Amending Separate Laws of the Russian Federation” of August 2, 2019) and propose to legally categorize NFTs as separate digital assets [13, p. 75]. Similar ideas have been put forth by A.V. Popva and S.I. Semtsiva [12].

The value of NFTs can be explained through the categories of rivalrousness and scarcity, described by J. Fairfield [20]. The former means the inability to share ownership of a certain specified object, and the latter – its uniqueness or limitedness (e.g., a music record will be more valuable if it was personally signed by the performer). Given said categories, the number of copies, is also a significant factor. For instance, VeVe, the trading platform licensed to distribute

tokens of Disney, Marvel, DC, and other brands, releases exclusive digital collectible figurines, comics, cards, etc. as NFTs. Limited edition of each item (and whether a character makes its first NFT appearance) directly impacts its value on the secondary market.

A.A. Dolganin suggests applying the term “underlying asset” (used in financial investments) to NFT trade, arguing that “the ability of an NFT to become an object of deals stems from at least two conditions: 1) the presence of a tokenizable underlying asset; 2) a unique digital certificate protocoling its non-interchangeability, which brings new commercial value and effectively protects the authenticity of the original work” [6, p. 49]. Apart from having an added value, an NFT ensures control over access to its underlying asset, so that the latter cannot be distributed by third-party persons or entities (while the underlying asset itself does not protect its digital distribution). It should be noted that works can be illegally distributed in a digital format with or without tokenization - however, the presence of an NFT makes such violations easier to detect, as the data on all smart contracts related to the token is stored in a blockchain.

Considering the specifics of NFTs (which distinguish them from ordinary digital copies of original work), the vast scope of their application, and their commercial value, we believe that the development of legislative and judicial practices should consider NFTs as a separate form of digital assets, the rights to which are subject to legal protection.

Given that, we find it reasonable to discuss the issues of NFT-related violations, examples of which can already be found (despite the novelty of this technology).

The first distinctive problem is unauthorized tokenization, when a subject without exclusive rights to a work mints an NFT and uses said work as its underlying asset. From the technical standpoint, such tokens can be created by any third party – the only available countermeasure is to detect the violation and report it to the trading platform, which must stop the demonstration of this NFT. However, the platforms are incapable of removing such tokens from blockchains.

The second problem is the interference in

trading platforms' operations by exploiting their technical vulnerabilities. For example, in January 2022, an OpenSea user took advantage of a loophole in the system by purchasing several tokens for a significantly lower price and reselling them for their actual market value, "earning" 347 ETH (approximately \$779,000). That incident was more of a technical issue than a legal one – still, it caused legal consequences, as OpenSea had to pay \$1.8 million to affected users to compensate for their losses¹⁰.

The third problem is fraud. While platforms like VeVe distribute only authorized NFTs minted by copyright owners (under the terms specified in the license agreements), any OpenSea users can create and publish their NFTs. Moreover, an NFT is a risky investment, backed only by buyers' trust in its creators. In 2022, developers of Blockverse, a play-to-earn Minecraft server, sold all their NFTs, which allegedly granted access to the game server, in about eight minutes (earning approximately \$1.2 million) – and then went silent and disappeared¹¹. Apparently, this situation has elements of an economic crime. But detection and investigation of such offenses are constrained by the anonymity of parties, their residence in different countries, and the innovative technology in question.

The NFT community has started to take self-regulation measures to address the abovementioned problems. For instance, OpenSea has imposed several technical limitations, claiming that over 80% of NFTs minted for free are plagiarized, spam, or fraudulent¹². Still, legal

regulations are required to ensure a full-scale use of NFTs by citizens and organizations, so that their rights could be protected in case of a violation.

How can NFTs be potentially used in the state and legal areas? First of all, they can confirm certain rights to an object (that is how the technology is most commonly used nowadays by collectors). In the private sphere, ownership of a token does not imply ownership of its linked work – however, in the public sphere, it seems possible to introduce blockchain-based registers of ownership rights. Certificates from the Unified State Register of Real Property, currently used in Russia to validate ownership rights to real estate, cannot be considered NFTs, as the Register is the centralized database managed by an authorized federal service. We think that the increase in blockchain registers would correlate to the increase in deals involving smart contracts. Similarly, NFTs can be applied to managing various registers of shareholders or company members. Apart from that, non-fungible tokens, distributed among citizens, could be used in the voting process, eliminating the risk of election fraud. Furthermore, if all citizens get a unique token, they can prove their identity and confirm various operations without the need to reveal any personal information.

4. Conclusion

Non-fungible tokens are a promising technology, which establishes a new environment requiring legal protection, on the one hand, and offers new opportunities for the law and the state, on the other. Meanwhile, an NFT is not equivalent to a digital object: it is more of a storage of the data on that object. Due to its separate nature, an NFT has its own commercial value, different from the underlying asset it is based on. Besides, NFTs are not categorized as digital assets or digital rights by the current Russian legislation, so defining their legal status seems to be an important task, which would ensure proper legal protection of NFT-related rights as part of smart regulation [25].

Nowadays, several challenges of NFT use can be identified, such as tokenization of works without owners' permission, interference with the

¹⁰ OpenSea Reimburses Users \$1.8 Million After NFT Listings Error. URL: https://www.bloomberg.com/news/articles/2022-01-28/opensea-reimburses-users-1-8-million-after-nft-listings-error?utm_content=billionaires&cmpid%3D=socialflow-twitter-billionaires&utm_medium=social&utm_source=twitter&utm_campaign=socialflow-organic (accessed January 30, 2022).

¹¹ Unofficial 'Minecraft' NFT project 'Blockverse' goes quiet after raising £975,000. URL: <https://www.nme.com/news/gaming-news/unofficial-minecraft-nft-project-blockverse-goes-quiet-after-raising-975000-3146982> (accessed January 30, 2022).

¹² Nearly All NFTs Created With OpenSea's Free Minting Tool Are Fake, Plagiarized, or Spam. URL:

<https://gizmodo.com/nearly-all-nfts-created-with-opensea-s-free-minting-too-1848445234> (accessed: January 30, 2022).

activities of trade platforms by exploiting their technical vulnerabilities, and fraud. Because NFT deals are generally decentralized, transnational, and anonymous, any attempts to resolve those problems are limited to communities' self-regulations or measures imposed by trade platforms.

Since NFTs can represent now only ownership but any subjective rights, we assume this technology can serve various purposes, including managing decentralized blockchain registers (of real property, shareholders, and company members), voting, and providing personal identification. Furthermore, its implementation would safeguard personal data, replacing their disclosure with a demonstration of a unique token. Thus, we consider NFTs to be an important technology, which must not be left ignored by legal institutions.

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