

Article Information

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Can't Be Evil? Considering Creative Commons NFT Licenses

Michael Bacina and Jordan Markezic of the Piper Alderman Blockchain group provide insight and commentary to the novel NFT creative commons licenses.

The rise in popularity of non-fungible tokens (NFTs) has seen these “very expensive JPEGs” rise in popularity around profile picture (PFP) NFTs including Cryptopunks and the Bored Ape Yacht Club, shifting more recently to more mainstreaming of NFTs with images embedded in tickets planned by Ticketmaster, and brands like the NBA, AFL and Formula 1 issuing NFTs to fans.

With very low barriers to entry, early PFP project creators could simply hire an artist (which often occurred via Upwork), create art linked in the metadata to the NFTs being minted, and sell them. The tokens themselves contained in many cases no reference to any rights to use the images linked in the tokens and there has been legal uncertainty as to just what NFT holders were buying.

A sensible approach has been to suggest that the buyer of an NFT is buying an implied right to use the image associated with an NFT, much like the buyer of a print obtains when they purchase a physical print. However, some projects purported to give commercial use rights or in some cases total copyright over the images associated with the NFTs sold (which doesn't make sense at law given how copyright can be sold / assigned). In response a range of NFT licences have emerged which set out more clearly what rights NFT holders have (for example to use and enjoy the art associated with an NFT, enjoy commercial use rights and the right to make derivative works) and critically what rights the holders do not have (for example commercial use, or to use the art to make further NFTs or derivative works).

A16z Crypto - the Web3 investment division of Andreessen Horowitz venture capital and an investor in some of the leading NFT projects, has recently launched a Creative Commons (CC) Licensing for NFTs. Referred to as “[Can't be Evil NFT Licenses](#)”, in a riff on Google's (former) motto “Don't be Evil”, these are intended to help NFT projects use the low barriers of entry to Blockchain tech to launch projects with reduced legal friction as well.

The Can't Be Evil moniker derives its meaning from a fundamental concept in Web3 - that, blockchains enable a ‘trustless’ version of the internet where users do not need to trust one another or rely on centralised services and corporations to transact. In other words, instead of trusting people or corporations to not be ‘evil,’ blockchain users can be confident that no one person can manipulate transactional systems for their own benefit or affect them with a moral judgment.

Miles Jennings and Chris Dixon of A16z [said](#):

‘Can't Be Evil’ licenses explicitly outline the buyer's rights regarding the artwork for their NFTs, including whether these rights are exclusive and whether they include commercial rights...

The greater adoption of standard licensing could lead to benefits for NFT creators, owners and the NFT ecosystem as a whole.

The Can't Be Evil licensing regime includes six separate licenses to allow digital content creators and collectors as well as participants in the secondary market for NFTs to have different profiles of use for NFTs. Specifically, the five intellectual property exploitation rights conferred on license holders include the following on a sliding scale for the different licence types:

1. i) the right to copy, display and distribute;
 2. ii) hate speech revocation – the NFT owner is unable to use the NFT in such a way that is unlawful, defamatory, harassing, abusive, fraudulent, racist, hateful, vulgar, cruel, illegal or obscene, or that promotes any such activity;
 3. iii) commercial use of the art linked in the NFT;
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1. iv) the right to modify and adapt the art linked in the NFT; and
 2. v) the right to sublicense – the license holder may sublicense their rights to the art associated with the NFT or, if permitted to make modifications and adaptations, their modifications and adaptations of the art linked to in the NFT.

The six licenses are as follows:

1. **CBE-CC0 (hosted [here](#))**

All copyright in the art associated with the NFT is waived under the terms of CC0 1.0 Universal developed by Creative Commons. This form of licence gives the maximum usage rights for holders of an NFT but arguably undermines the value of an NFT, as there is nothing stopping any ‘right-click save’ of the art. Under this kind of licence, the only value in an NFT will be in the NFT itself, or in the projects which support that NFT.

2. **CBE-ECR (hosted [here](#))**

The Exclusive Commercial Rights with No Creator Retention license grants the holder full and exclusive commercial rights, with no termination right for hate speech. Importantly, the creator does not retain any exploitation rights at all, so while the copyright is held by the creator, the holder of the NFT can have some confidence that the art associated with the NFT is not freely available to anyone to use, especially the original creator.

3. **CBE-NECR (hosted [here](#))**

The Non-Exclusive Commercial Rights license grants the holder full and non-exclusive commercial rights, with no termination for hate speech. Importantly, the creator retains exploitation rights over the art associated with the NFT and can use it as well as the holder of the NFT.

4. **CBE-NECR-HS (hosted [here](#))**

Non-Exclusive Commercial Rights with Creator Retention and Hate Speech Termination license grants the holder full and non-exclusive commercial rights, with a termination right for use of the NFT in association with hate speech. Importantly, the creator retains exploitation rights over the art associated with the NFT. A sublicense right is also included in relation to the art so the holder can create derivative works.

This is the only license which confers upon the license holder all five rights mentioned above, but importantly sublicences terminate upon sale of the original NFT.

5. **CBE-PR (hosted [here](#))**

The Personal License grants the holder with personal rights only in relation to the NFT to use and enjoy it, and sell it, and there is no right for termination on the basis of hate speech.

6. **CBE-PR-HS (hosted [here](#))**

This licence is the same as the personal licence but has a right for the creator to terminate the licence should the art associated with the NFT be used in association with hate speech by the holder.

NFT Licensing in Australia

The Australian copyright legislative framework is derived from the following four areas: i) international instruments such as treaties and trade agreements; ii) domestic legislation and decisions; iii) industry practice; and iv) community and behavioural norms.

The *Copyright Act 1968* (Cth) is Australia’s primary piece of legislation that deals with copyright and the rights that accrue to a copyright holder.

Under the Act, copyright will broadly protect ‘works’ including literary works, dramatic works, music and artistic works. Sound recordings, films, broadcasts and published editions of works are also generally protected.

Copyright protection is free and conferred automatically on an author as soon as the work is derived into a material form. In order to obtain copyright protection, all works must be: i) expressed, not merely an idea; ii) the expression must be in a material form; iii) original; and iv) made by a human author.

A copyright owner has several economic rights to their work including the right to reproduce the work, publish it, adapt it and perform it in public. Copyright holders also have moral rights over their works, which protect their right to accurate attribution and to not have their works treated poorly.

Copyright protection will generally extend for the life of the creator plus 70 years. The owner of the copyright is generally the author of the work, save for any agreements to assign their economic or moral rights. There are also several statutory exemptions to copyright that act as a defence for those subject to a potential copyright infringement claim.

As noted above, in the absence of an express licence, it is likely under Australian law that no copyright passes upon sale of any NFTs, but rather an NFT might be seen as an implied bearer licence under which the holder of the NFT enjoys the personal right to use, display and sell the NFT associated with art. Under this approach, there would be limited to no rights to terminate the licence for use in association with hate speech. Increasingly, however, terms of licences have been developed which include termination rights for things such as attempts to avoid secondary payments on sale, use in hate speech, counterfeiting of the artwork and other uses which the issuer does not wish to occur. NFTs sold as part of ticketing or bundled into real-world products come with further restrictions.

There is presently no targeted legislation or regulation in Australia specifically addressing the overlap between copyright and NFTs and even the taxation position regarding NFTs is not clear. The economic and moral intellectual property rights that an NFT buyer will acquire upon purchase will depend on the terms of sale and common law in the absence of such terms existing.

What's next?

The NFT licenses discussed above may well see considerable adoption as a cheap way of ensuring there are some terms around an NFT drop, and with the terms hosted on Arweave they can be easily incorporated by reference into an NFT sale. As noted in the explainer documentation they are not legal advice and per A16z "should be tailored to meet your specific requirements". Using any NFT licence terms without a clear understanding of what the licence does (and not just relying on the helpful table from A16z) is likely to lead to poor outcomes and potentially litigation.