

NFTS AND THE COPYRIGHT ASSIGNMENT



Intellectual Property Team



The acquisition of an NFT generates an authenticity seal, **a property certificate on that token**, which is published ("minted") in a *blockchain* in a transaction that takes place via a self-executing *smart contract*.

The token's buyer obtains the right to its URL, which is where the token is hosted on the server of the company that mediated the sale (typically a company operating in a marketplace specializing in NFT transactions), ensuring the buyer's ownership of that NFT.

IMPORTANT

The **NFT is a certificate, a digital asset**. That digital property is reified by the purchase and sale contract (a *smart contract*, recorded in a *blockchain*). This contract **refers only to that digital asset and what was defined by the parties to the contract** (as long as compliant with the applicable laws). In other words, generally something existing in the "real world" is not included in the sale of the NFT.

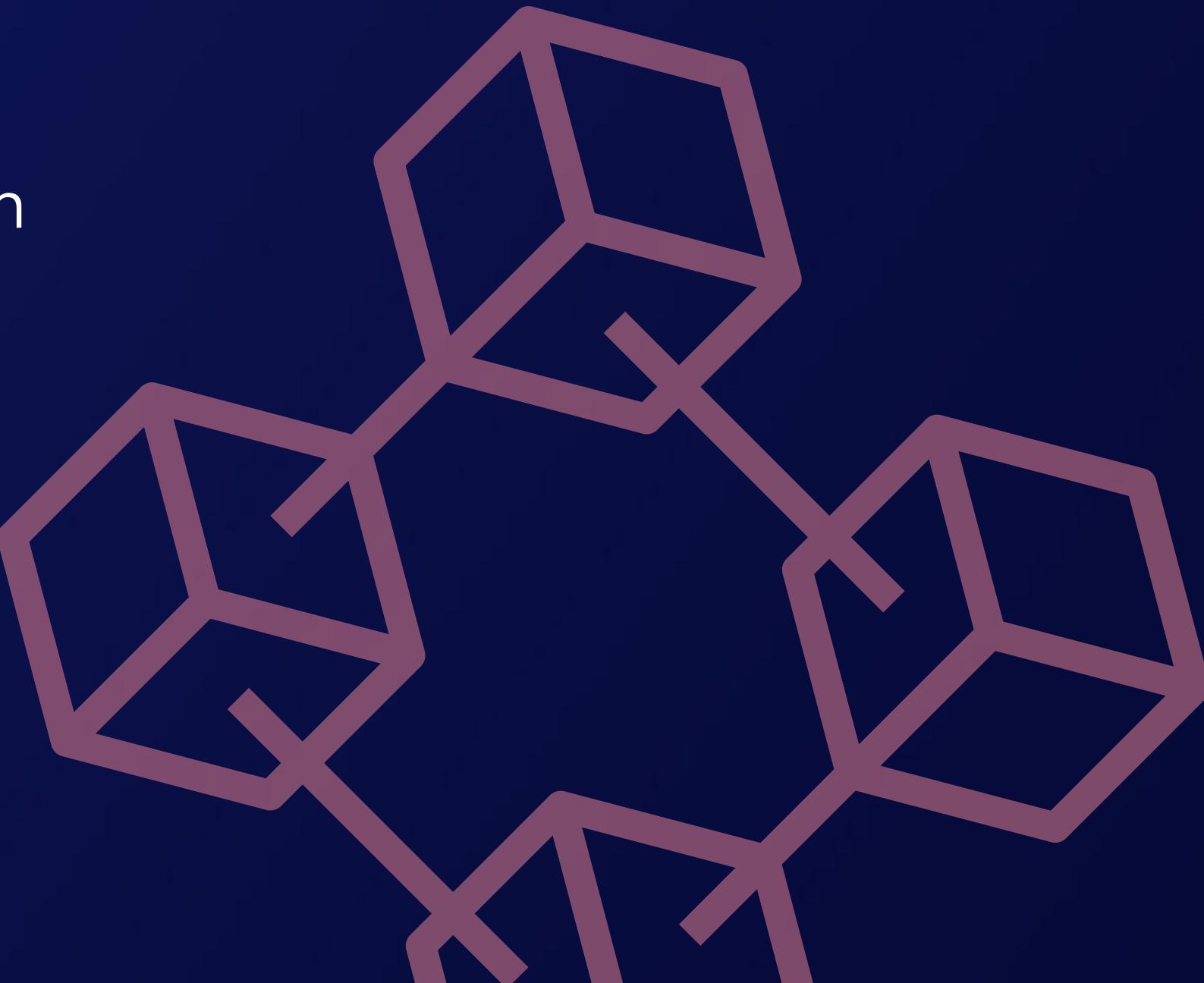
So possession via a smart contract doesn't mean necessarily possession in the real world and involves the same problems faced during performance of regular contracts, especially the effective acquisition of what has been purchased.



HOW DOES THE COPYRIGHT ASSIGNMENT BECOME EFFECTIVE IN BRAZIL?

Law n. 9.610/1998 (the “Copyright Law” or “LDA”) establishes that the total and definitive transmission of a copyright is **up to the owner**— who is not necessarily the author/creator and who must do the transfer under written contractual stipulation (article 49, section II, from the LDA).

That way, it isn’t possible to presume a copyright assignment because the assignment is effective only as expressly defined on a contract between the parties: the one who intends to acquire those rights and the one who currently owns them.





DOES BUYING AN NFT ALSO MEAN BUYING ITS COPYRIGHT?

Buying an NFT means buying its authenticity seal, which confirms the property to be an asset of the person who bought it through a ***smart contract*** in that blockchain.

However, the NFT's creation, which is protected by copyright, and the digital asset itself are different things, under different legal regimes. Therefore the purchase of each may be handled differently, depending on the parties' wishes.

Smart contracts are “lines of code stored on a blockchain and executed automatically when pre-determined conditions are met.” (GOPIE, 2020).

They are currently recognized as valid contracts according to Brazilian law, generating legal effects through the agreement negotiated.

So, as with a traditional, “offline” contract, a ***smart contract*** is binding on the parties unless there is a flaw, such as the agreement violating a law or a party not complying with the law’s requirements—which may make the agreement null or invalid.



THEREFORE,

as long as a smart contract is drafted in compliance with the Copyright Law, a smart contract on an NFT **could result in a copyright assignment.**



HOWEVER,

even if the NFT sale doesn't result in a copyright assignment by the copyright's owner, there are other ways for the owner to grant the use, modification and even commercialization of the NFT's creation. Similar to the way licensing is handled on **Creative Commons**, the license category intended by the copyright owner could be specified in a clause of the NFT's smart contract.



DOES RESELLING AN NFT GRANTS ITS AUTHOR/CREATOR RESALE RIGHTS?

The resale right is granted to the author, irrevocably and inalienably, according to the article 38 of the Copyright Law.

However, according to the law, the author's resale right is applied to the resale of the work (the copyrighted creation) but not of the token.





While the payment of a percentage of the NFT sale to its author is common, bearing in mind that the ownership of the NFT and the creation can go separate ways, **the applicability of the author resale right is challengeable.**

The person who was paid for an NFT resale can question whether it would be legally necessary to pay the author, if someone else, 5% the sale price, the minimum percentage required by the Copyright Law.

It's also essential that an author expressly specify in the smart contract if the resale of the NFT would also mean the resale of the creation.



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