

---

## **ANALYSING THE APPLICABILITY OF FIRST SALE DOCTRINE IN VIRTUAL FASHION ERA**

---

Swaraa Kulkarni, ILS Law College, Pune

### **ABSTRACT**

‘Digitization’ has led the world into a new unexplored space. New norms and laws are shaping up to regulate this atmosphere. One such revolution has been brought about in the virtual fashion area. With growing digitization of fashion, older laws surrounding trading of fashion which protected the creator’s rights are becoming redundant.

This article explores the ‘first sale doctrine’ in copyright law which limited the creator’s rights to resell the same copy of production once sold in digital space. With oncoming of new age fashion technology such as NFTs, the validity and applicability of first sale doctrine to digital fashion is brought into grey shades.

Various cases like the Capitol Records v ReDigi case have held that digital goods don’t fall under this doctrine due to their reproducibility. This sets a complicated precedent for countries like India, where virtual fashion is just gaining ground.

However, technologies like NFTs offer a potential solution. By giving digital items a unique identity on the blockchain and preventing duplication through smart contracts, NFTs could help apply the spirit of the First Sale Doctrine to virtual goods.

Yet even NFTs come with their own set of issues—like value retention, minting duplications, and resale saturation. This article argues that with thoughtful tweaks—like embedding expiry dates, resale royalties, or diminishing returns into smart contracts—we can create a fair balance.

As fashion becomes more digital, our laws and tech tools must evolve together to protect both creativity and consumer rights. Only by bridging the gap between innovation and regulation can we create a future-ready framework for virtual fashion’s growth.

## Introduction

The advancement of technology has opened new avenues for several fashion designers to introduce their fashion designs through digital virtual platforms. Customers can virtually try on garments using a digital avatar that accurately reflects their body measurements, eliminating the need for physical try-ons. Luxury brands such as *Gucci*, *Chanel*, *Louis Vuitton*, *Nike* have already accustomed themselves to this shift by actually selling their fashion products on virtual platforms.<sup>[i]</sup> In India, Manish Malhotra has recently marked his debut in virtual fashion in the Milan Fashion Week.<sup>[ii]</sup> With such rapid shifts, growing concerns of Intellectual Property Law applicability arise in the virtual realm. One such important aspect to be considered is the applicability of the *first sale doctrine* of the Copyright Law to the virtual fashion presented to the customers.

## Understanding the First Sale Doctrine: Tangible v Digital

The *first sale doctrine* under the Copyright Act, 1957 basically puts a limitation on the rights of a copyright holder.<sup>[iii]</sup> It precludes the copyright holder from asserting any ownership rights on a piece of work that has already been sold by him to a customer.<sup>[iv]</sup> This means that the customer is now empowered to resale, lease, rent the product without the permission of the copyright owner. This avoids monopoly of the copyright holder in the market and price discrimination. The Copyright Act, 1957 u/s. 14, protects the right of reproduction of the copyright holder.<sup>[v]</sup> This means that the copyright holder has a right to produce a similar or exact copy as was previously sold. However, he does not have any right over the copies which are *already sold* or *already in circulation*. That being said, application of the first sale doctrine to digital copies violates the right of reproduction of the copyright holder. This rationale has been explained by the U.S. Supreme Court in *Capitol Records v ReDigi*<sup>[vi]</sup> case and the rationale behind the principle can be applied to Indian copyright law as well. When a digital copy of a product is sold, it is held by the U.S. Supreme Court that the original creator withholds the original piece of work with him and a copy is sold to the purchaser.<sup>[vii]</sup> Furthermore, the purchaser can create several copies of the work received. These copies are exactly similar to the original as digital transfer does not lead to value deterioration. This in turn violates the right of reproduction of the copyright holder.<sup>[viii]</sup> The difference between physical and digital goods is based on the ability to infinitely replicate digital files without any loss of quality.<sup>[ix]</sup> This leads to conflicts with the copyright holder's reproduction rights. Therefore, digital goods are

held to be an exception to the first sale doctrine in copyright law. By doing so, primacy is given to the ‘tangibility’ of the work that is to be transferred.

### **The Loophole in Virtual Fashion**

In 2021, Nike acquired RTFKT, a brand that sells digital footwear and other digital artifacts.<sup>[x]</sup> Its virtual sneaker designs in particular have gained much popularity since then. This first of its kind brand is selling its “VOID” edition footwear for \$222.0 per pair of shoes.<sup>[xi]</sup> This is a type of a virtual fashion where the digital footwear is being sold with an NFT on a blockchain. Similarly, Manish Malhotra forayed into the world of NFTs where he sold a custom-made constellation sketch for the actress, Kareena Kapoor Khan called the *Illuminous Showstopper* for \$3,753 within 12 seconds of the collection being dropped.<sup>[xii]</sup>

#### **a) NFTs- The problem solver**

An NFT is a non-fungible token.<sup>[xiii]</sup> When a person makes a digital purchase, they get issued an NFT which has a unique identification number to it. This NFT and the digital work are stored on the blockchain which is basically a ledger account and it keeps track of all the transactions.<sup>[xiv]</sup> This ledger is a decentralized ledger, meaning, it can be accessed by people everywhere in the world. When a digital piece is sold, the NFT attached to it is received by the purchaser. This (NFT) makes the piece of work truly unique. Therefore, when a digital piece of work is purchased, it is affirmed already that this is not a copy but a unique piece itself. Moreover, the blockchain technology<sup>[xv]</sup> has facilitated the tracing the sale of the work from one seller to another, therefore the ledger records the current ‘owner’ of the digital work as the person to whom it was last sold.<sup>[xvi]</sup> An NFT is also immutable; meaning that once sold, its properties cannot be changed. Therefore, the uniqueness and the immutability of the NFT together make the work scarce, valuable and *tangible*. This helps in the application of the first sale doctrine to the NFTs, given that the *exception* rationale as established by the U.S. jurisprudence is solved by the NFTs.<sup>[xvii]</sup>

#### **b) NFTs- The new age problems**

NFT’s *forward and delete* technology is what makes it eligible to apply the first sale doctrine. Meaning that, when an NFT is transferred from one person to another the previous owner no longer holds the digital artwork<sup>[xviii]</sup> Therefore, the right to reproduce the copyright and the

tangibility aspect are both protected. However, it is argued here that when an NFT is minted onto the blockchain, meaning that when work is uploaded on the blockchain, a copy is still created while uploading the document from the owner's computer onto the blockchain ledger. This digital problem will continue to exist in case of all virtual goods that are to be sold.<sup>[xix]</sup> Furthermore, the quality of digital work does not deteriorate.<sup>[xx]</sup> Therefore, the creators worry that people will not buy new products and will continue to buy the existing products on the blockchain. Therefore, the owner, even after owning the copyright, might not be able to benefit much from artwork once created.

### **Virtual Fashion and First Sale Doctrine**

The author argues that the existing challenges of applying the first sale doctrine to virtual fashion can be addressed by refining the use of NFTs in conjunction with smart contracts.<sup>[xxi]</sup> While NFTs provide immutability and uniqueness, concerns regarding the creation of a digital copy during blockchain minting and resale saturation still persist. To mitigate this, smart contracts could be programmed to incorporate progressive devaluation where each resale slightly reduces the value or exclusivity of the virtual garment, incentivizing buyers to purchase new items from the creator.<sup>[xxii]</sup> Additionally, creators could embed time-limited access rights into the NFT. This would ensure the lifespan of virtual items after which they expire or need to be renewed through the creator. Thus, maintaining the demand for new digital goods. Finally, implementing a royalty mechanism that adjusts royalties based on the number of times a product has been resold would ensure sustained revenue for creators, even in a resale-heavy marketplace. This approach balances between copyright protection and consumer rights vis-a-vis the first sale doctrine to the digital realm.

### **Conclusion**

The intersection of virtual fashion and the first sale doctrine presents unique challenges due to the digital nature of virtual goods. By embedding features like resale royalties, limited reproduction rights, and time-based ownership models, these technologies can address the core issues surrounding the first sale doctrine's application in a digital context. Developing a digital first sale doctrine, specifically tailored for virtual goods, could further ensure fair use and resale rights while safeguarding creators' interests. As the virtual fashion industry evolves, a combination of legal and technological advancements will help create a more equitable marketplace, benefiting both creators and consumers in this new digital economy.

## Endnotes:

[i] AI, VR and AR: The Artisan in Luxury Fashion, Appnova (last visited Jan. 24, 2025), <https://www.appnova.com/ai-vr-and-ar-the-artisan-in-luxury-fashion/>.

[ii] Manish Malhotra becomes India's first fashion designer to launch NFTs, Indian Express (Oct. 14, 2021, 5:12PM), <https://indianexpress.com/article/lifestyle/fashion/manish-malhotra-india-first-fashion-designer-nft-7557844/>.

[iii] Doctrine of First Sale in Copyright Law, IILS (last visited Jan. 23, 2025), <https://www.iilsindia.com/blogs/doctrine-of-first-sale-in-copyright-law/>.

[iv] Id.

[v] Copyright Act, 1957, § 14 (India).

[vi] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

[vii] Id.

[viii] Sumeet Guha & Shreya Matilal, First Sale Doctrine in India with Special Reference to Digital Copyright Works, NLU Journal of Intellectual Property Rights, Vol. 2, Issue 2, at 1 (2021), <https://nluassam.ac.in/docs/Journals/IPR/vol2-issue-2/1.%20FIRST%20SALE%20DOCTRINE%20WITH%20SPECIAL%20REFERENCE%20TO%20DIGITAL%20COPYRIGHT%20WORKS.pdf>.

[ix] Id.

[x] Nike x RTFKT: Cryptokicks IRL Public Draw, Nike (last visited Jan. 26, 2025), <https://www.nike.com/launch/t/nike-x-rtfkt-cryptokicks-irl-public-draw>.

[xi] RTFKT x Nike Dunk Genesis Void Edition, Nike (last visited Jan. 26, 2025), <https://www.nike.com/launch/t/rtfkt-x-nike-dunk-genesis-void-edition>.

[xii] Supra note 2

[xiii] Lynne Lewis, Jane Owen, Hamish Fraser & Rohit Dighe, Non-Fungible Tokens (NFTs) and Copyright Law, BIRD & BIRD (June 2, 2021), <https://www.twobirds.com/en/news/articles/2021/australia/non-fungible-tokens-nfts-and-copyright-law> [https://perma.cc/MXT3-PTWY].

[xiv] Id.

[xv] Id.

[xvi] Chelsea Lim, The Digital First Sale Doctrine in a Blockchain World: NFTs and the Temporary Reproduction Exception, Fordham Law Review (Nov. 2022), [https://fordhamlawreview.org/wp-content/uploads/2022/11/Lim\\_November.pdf](https://fordhamlawreview.org/wp-content/uploads/2022/11/Lim_November.pdf).

[xvii] Supra Note 6

[xviii] Jordan Parker, New Kids on the Blockchain: How NFTs Might Bring About a Digital First Sale Doctrine, 60 Hous. L. Rev. 467 (2022), <https://houstonlawreview.org/article/66219-new-kids-on-the-blockchain-how-nfts-might-bring-about-a-digital-first-sale-doctrine>.

[xix] Id.

[xx] Id.

[xxi] Ella McElwaine, NFTs and Their Digital First Sale Doctrine Applicability, [Univ. of N.H. Law Review] (last visited Jan. 27, 2025), [https://law.unh.edu/sites/default/files/media/2024-03/mcelwaine\\_publication\\_nfts-and-their-digital-first-sale-doctrine-applicability.pdf](https://law.unh.edu/sites/default/files/media/2024-03/mcelwaine_publication_nfts-and-their-digital-first-sale-doctrine-applicability.pdf).

[xxii] Supra Note 16