

GM! Time to Wake Up and Address Copyright and Other Legal Issues Impacting Visual Art NFTs*

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I. INTRODUCTION

A. HOLD ON FOR DEAR LIFE (OR AS THE CRYPTO COMMUNITY SAYS, “HODL”)

The art world is slow to adapt to new technology. Back in 2019, which seems like eons ago in Internet time, the Hiscox online art trade report noted that the online art market grew 9.8% in aggregate in 2018 to \$4.64 billion, a slowdown from the growth experienced in the previous three years.¹ More telling, the same report notes that the “art world’s adoption of blockchain technology remains slow as convincing [use cases] fail to materialise.”² Of course, there are structural reasons and specific factors that make the art world unique in its steadfast commitment to “traditional” transactional formats, including the benefits reaped from in-person inspection of

* In the crypto and NFT communities, “GM” (often presented even less formally as “gm”) is an abbreviation for “good morning” and a common salutation addressed to fellow members, engendering camaraderie.

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1. HISCOX & ARTTACTIC, HISCOX ONLINE ART TRADE REPORT 2019 3, <https://perma.cc/NLZ2-PJ6R>.

2. *Id.* at 2.

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unique works executed in a physical medium, as well as the privacy and competitive benefits afforded by relative market opacity.³

Like it or not, the art world is being forced to reckon with the metaverse. During the COVID-19 pandemic, homebound collectors helped to buoy the online art market. Online sales in 2020 accounted for “15.8% of all art sales, up from 7.5% in 2019,” with “sales in the first half of 2021 . . . up by 72% to \$6.8 billion.”⁴ Sales of non-fungible tokens (NFTs) reached around \$3.5 billion in the first three quarters of 2021.⁵ Although not a person, ERC-721, which sets forth a standard specification for tokens on the Ethereum-based blockchain, topped ArtReview’s annual “Power 100” list of the most influential people in the contemporary art world in 2021.⁶

Specifically with respect to NFTs, art-world stakeholders appear to be of two camps: some curious and diving in, and others feeling skeptical.⁷ What is it about NFTs that make certain art-world stakeholders wish they were a passing fad? What is the legal landscape for this fast-growing portion of the metaverse? And how can artists and purchasers protect themselves using pre-existing legal concepts and frameworks? These are some of the questions that we discuss in this Article. After covering what NFTs are and the application of the pre-existing U.S. copyright framework to the NFT format, we elucidate some considerations and issues that artists face when they decide to mint their work and sell NFTs. We also address some concerns that purchasers of NFTs may have. Because the environment is fast-paced and a single set of standards or guidelines has not yet been adopted, we discuss certain types of terms and conditions that currently govern the sale and use of NFTs. In sharing recent case studies, contracts, and projects we have worked on, we hope to provide a snapshot—if fleeting—of the current dynamic world of NFTs.

B. THE NFT FORMAT IN THE ART WORLD

An NFT is a unique set of data traded on the blockchain that can represent ownership of, or other rights in or to, another asset. The tokenized asset can be a digital artwork, an online game or digital item (e.g., a “skin”) to be used in online gaming, a ticket, a domain name, a music file, manga content, or other form of digital

3. Zohar Elhanani, *How Data Is Transforming the Art Market and Lowering Its Entry Barriers*, FORBES (Nov. 19, 2018, 12:15 PM), <https://perma.cc/X6CV-T3BG>.

4. HISCOX & ARTTACTIC, HISCOX ONLINE ART TRADE REPORT 2021 4, <https://perma.cc/6G2T-YQT3>.

5. *Id.* at 28.

6. ERC-721 is an open standard that describes how to build NFTs on the Ethereum blockchain. ERC-721, <https://erc721.org/> [<https://perma.cc/UF44-9BZ9>] (last visited Mar. 3, 2022); @corwintines, *ERC-721 Non-Fungible Token Standard*, ETHEREUM (Mar. 9, 2022), <https://perma.cc/N65B-C8PM>; *Power 100 (2021)*, ARTREVIEW, <https://perma.cc/R7NR-T5M3> (last visited Mar. 3, 2022).

7. In an informal survey of approximately 200 art-world stakeholders asking whether they believe NFTs are the future or a fad, 47% voted “Here to Stay” and 53% voted “Please Let it be a Fad.” Yayoi Shionoiri (@yayoi_shionoiri), INSTAGRAM, https://www.instagram.com/yayoi_shionoiri/ (Nov. 6, 2021, 8:35). *See also* Tina Rivers Ryan, *Will the Artworld’s NFT Wars End in Utopia or Dystopia?*, ARTREVIEW (Dec. 2, 2021), <https://perma.cc/FC4X-A3K3>.

content.⁸ The asset can also be a physical object or a digital or physical experience (including access to a physical space).⁹ In practical terms, a work such as *CryptoPunk 4156* is represented online as a pixelated monkey with a blue bandanna, but the actual NFT contains the underlying metadata for the transaction, including the alphanumeric chain that specifically identifies the token on the Ethereum blockchain, as well as a hyperlink to the hosting space at which the underlying digital file is maintained.¹⁰

Typically—and with notable exceptions (such as in the case of ASCII-based artworks¹¹)—the package of files comprising an NFT does *not* contain the media file for the associated asset.¹² It does, however, contain a written code that executes commands under pre-set conditions—a so-called “smart contract.”¹³

Thus, at a very basic level, the NFT is simply the underlying code written to evidence an associated asset’s existence and non-fungibility. The code also records the transfer of ownership of that asset or rights in or to the asset (which may include custodial rights and/or intellectual property rights). In common parlance, however, collectors, speculators, enthusiasts, the popular media, and even developers use the term “NFT” to refer not just to the token itself, but *also* to the asset to which the token relates (particularly when that asset is a digital artwork).¹⁴

This representation is a unique way to think about ownership of a seemingly intangible asset, but it is not necessarily a new concept in the art world. Arguably, the NFT format is merely an enhanced type of—or distribution channel for—new

8. Pinar Çağlayan Aksoy & Zehra Özkan Üner, *NFTs and Copyright: Challenges and Opportunities*, 16 J. INTELL. PROP. L. & PRAC. 1115, 1118 (2021).

9. *Id.*

10. The visual asset commonly known as *CryptoPunk 4156* can be viewed along with LarvaLabs’ identification of its attributes and market tracking information at <https://perma.cc/RKM9-CA4P>; the underlying code to the token’s smart contract can be viewed at <https://etherscan.io/address/0xb47e3cd837ddf8e4c57f05d70ab865de6e193bbb#code> [<https://perma.cc/D824-RZAL>].

11. For an explanation of this art medium employing standard printable characters from the ASCII character set, see *ASCII Art FAQ*, ASCII ART ARCHIVE, <https://www.asciart.eu/faq> [<https://perma.cc/GBA9-X2UF>] (last visited Apr. 3, 2022). The authors wish to acknowledge time-based media specialist Regina Harsanyi for identifying this type of artwork as includable within a token’s actual code during a Clubhouse conversation in early 2021.

12. Most commonly, the visual asset associated with an NFT—be that a JPEG, GIF, or other digital file format—will be separately hosted on the InterPlanetary File System (IPFS), a distributed file system and peer-to-peer network, or arweave, a decentralized blockchain data-storage protocol. INTERPLANETARY FILE SYSTEM, <https://ipfs.io/> [<https://perma.cc/B7KZ-355Z>] (last visited Mar. 22, 2022); ARWEAVE.ORG, <https://www.arweave.org/> [<https://perma.cc/P5A7-23SQ>] (last visited Mar. 22, 2022). However, the NFT-associated asset(s) may also be hosted by a cloud-computing platform like Amazon Web Services, or by any secure server that can reliably store content linked to the NFT.

13. The term “smart contract” is somewhat misleading as applied to NFTs’ technical structure. Smart contracts contain the metadata controlling the NFT transaction, but generally not much more information. See, e.g., Joel Ferree, Jeffrey Blair & Sarah C. Odenkirk, *NFTs and the Museum Part 2: Legal Issues for Acquisitions*, LACMA UNFRAMED (Aug. 30, 2021), <https://perma.cc/R62A-A9MV>. In her conversation with Los Angeles County Museum of Art General Counsel, Jeffrey Blair, Conley Odenkirk advocates for the use of the terms “armature” instead.

14. See Alfred “Dave” Steiner, *The Paper It’s Printed On: NFTs, Ownership and Conceptual Art 4–5* (Dec. 30, 2021), <https://perma.cc/3YLK-YFYV>.

media art. There are many digital artists, including Shigeo Kubota¹⁵ and Jennifer and Kevin McCoy,¹⁶ who have consistently incorporated new media into their artistic practices. Further, NFTs are often compared to digital certificates of authenticity on the blockchain. Other notable examples where a certificate provides the evidence of a conceptual artwork's ownership or authenticity of at-times intangible or otherwise non-distinguishable assets include Felix Gonzalez-Torres' candy spills¹⁷ and Yves Klein's *Zone of Immaterial Pictorial Sensibility*.¹⁸

Other similarities exist between the growing NFT community and the traditional legacy art world. Unfortunately, some identifiable structural similarities are not entirely positive, including the concentration of secondary sales at the upper echelons of the markets and the lack of female-presenting representation. In its two-year evaluation of NFT sales in both the primary and secondary markets on the Nifty Gateway platform as of November 2021, ArtTactic notes that 55% of the sales, representing a turnover of about \$260 million, stemmed from just 5% of the artists on the platform—a total of only sixteen artists.¹⁹ Within this group of sixteen, the only female-presenting creator was Grimes.²⁰ Male-presenting artists accounted for 77% of tracked sales, while female-presenting artists accounted for just 16% of tracked sales.²¹

As analysis of similarities and differences between the crypto space and the broader art world continues, arts writer Tim Schneider has noted that the two worlds appear to be parallel at best or, perhaps, are even diametrically opposed, particularly when considering the way that pricing and market-making function in the two

15. Erica Papernik-Shimizu, Shigeo Kubota, & Gloria Sutton, *Shigeo Kubota: Liquid Reality* (video sculpture), MUSEUM OF MODERN ART, <https://perma.cc/Y77P-5MRQ> (last visited Mar. 22, 2022).

16. JENNIFER AND KEVIN MCCOY, <https://www.mccoospace.com/> [<https://perma.cc/P5UL-S68U>] (last visited Mar. 2, 2022).

17. *Untitled (Public Opinion)*, 1991, is an example of a Gonzalez-Torres candy spill in a public institutional collection. See *Collection Online*, GUGGENHEIM, <https://www.guggenheim.org/artwork/1512> (last visited Apr. 3, 2022).

18. In this series of artwork, Yves Klein sold certificates that could be purchased with gold. A buyer could then trigger a performative ritual wherein Klein would throw away fifty percent of the gold, and the buyer would burn their certificate. See Yves Klein, *Transfer of a "Zone of Immaterial Pictorial Sensibility" to Michael Blankfort, Pont au Double, Paris, February 10, 1962*, YVES KLEIN ARCHIVE, <https://perma.cc/XJ2W-YFYD> (last visited Mar. 2, 2022). For an NFT art project inspired by Klein's work, see Mitchell F. Chan, *Digital Zones of Immaterial Pictorial Sensibility*, BLUE PAPER (Aug. 2017), <https://perma.cc/4BK5-6T7D>, describing Chan's proposal to tokenize a shade of blue, allow a purchaser of the NFT to remove the token from circulation, and by completing said removal, automatically trigger Chan's obligation to relinquish half of the Ethereum he received from the purchaser to the miner of the block on which the function is executed. Chan's concept was realized and an NFT from this series sold in Sotheby's "Natively Digital 1.2" auction held October 17–25, 2021, for a hammer price of \$1.25 million. See Mitchell F. Chan, *Digital Zones of Immaterial Pictorial Sensibility*, SOTHEBY'S METAVERSE, <https://perma.cc/9TCA-4DWY>.

19. Anders Petterson & James Cocksey, *NFT Art Market Report*, ART TACTIC (Nov. 2021), <https://perma.cc/7B7Y-D2KT>. See also Anny Shaw, *Not So Metaverse: Women Account for Just 16% of NFT Art Market*, ART NEWSPAPER (Nov. 3, 2021), <https://perma.cc/GJ5L-ENTB>.

20. While Grimes is a well-known and interdisciplinary creator, she is most well known for her music.

21. Shaw, *Not So Metaverse*, *supra* note 19. See also *The Arnet NFT 30*, ARTNET (Dec. 15, 2021), <https://perma.cc/2HPJ-5YL5>, which included only eleven total female-identifying or non-binary-identifying persons within the top thirty NFT market stakeholders selected for the shortlist.

communities.²² Artist, art historian, and NFT-creator Kenny Schachter describes the two worlds as “combatants, adversaries, fearful, hesitant, doubtful, leery, covetous of the money, fearful of ceding control.”²³ It remains to be seen how these two communities will continue to converge or align with each other.

II. COPYRIGHT IN NFTS

Against this dynamic backdrop, creators who *do* choose to create works for tokenization—and collectors who engage with NFTs—must contend with complex intellectual property issues. In the United States, the Copyright Act of 1976 (“the Act”) and related case law provide the applicable framework for understanding the exclusive copyright interests afforded to creators of digital artworks associated with NFTs, as well as those afforded to the creators of protectible computer code comprising the underlying tokens. Under the Act, copyright protection subsists in “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²⁴ In this way, the alphanumeric code underlying the token itself may be afforded a layer of copyright protection relative to its minimal degree of originality.²⁵ Where a digital artwork asset that is represented by a token also exists in a fixed, tangible form (as a natively digital work or as a digitized work originally created in another medium), it may be separately copyrightable, provided it is sufficiently original.²⁶

On the one hand, transferring ownership of a copy of a copyrighted work (or of a token granting rights therein) will not, in the absence of a written agreement, transfer copyright in the underlying work to the buyer.²⁷ As in the traditional art market, the default statutory position for tokenized artworks is that the creator retains copyright in any creative work linked to an NFT absent explicit terms of such a transfer.²⁸ On the other hand, the minting and selling of NFTs still brings with it a variety of legal risks for artists. Further, because smart contracts do not often contain robust terms regarding rights allocation, artists seeking to protect their rights in the NFT landscape need to consider options other than relying on the executable functions of such code components.

22. For Schneider’s discussion of the worlds as parallel, see *4 Ways the Crypto Space Is Splintering from the Art World, as Seen at This Week’s Blockbuster NFT Conference (and Other Insights)*, ARTNET NEWS (Nov. 3, 2021), <https://perma.cc/EZU5-B9WH>. For Schneider’s analysis of the worlds as opposed, see Tim Schneider, *Art and NFTs Are Wooing Each Other in Miami. But Whether the Romance Lasts Is Far from a Given (and Other Insights)*, ARTNET NEWS (Dec. 1, 2021), <https://perma.cc/T7FL-TM6V>.

23. Interview by Yayoi Shionoiri with Kenny Schachter, Artist (Dec. 29, 2021) (Discord private message, on file with Shionoiri).

24. 17 U.S.C. § 102.

25. See *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983) (clarifying that binary code is copyrightable).

26. See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 904 (3d ed. 2014), <https://perma.cc/KX4F-NHNT> (noting that a visual artwork can be fixed in a digital file format).

27. 17 U.S.C. §§ 201–202.

28. *Id.*

Failing to fully consider and articulate which rights travel with an NFT and which rights the creator maintains can lead to marketplace confusion in a number of areas, including the unclear application of licensing terms or fair use standards for derivative uses (which could lead to unauthorized remixing or misappropriation),²⁹ claims sounding in false designation of origin or appropriation of goodwill,³⁰ uncertain display rights (which could impact loans or gifts to museums),³¹ and the assessment and enforceability of rights to resale royalties (which can lead to unrealistic expectations of receiving future profits).³² Sections A and B accordingly seek to outline key copyright concerns from both the creator's and purchaser's perspectives, and Section C discusses applicable terms and conditions which may be used to allocate rights between such stakeholders.

A. COPYRIGHT QUESTIONS FROM A CREATOR'S PERSPECTIVE

1. Copyrightability

While the previously identified issues assume that the digital artworks associated with NFTs are copyrightable in the first place, some NFT projects pose an existential question about who owns the copyright because they rely on algorithms to randomly generate unique outputs. For example, Art Blocks is an Ethereum-based platform that provides on-demand,³³ generative NFT artworks.³⁴ When a buyer mints, they receive a token that generates an artistic output based on the artist's original code, resulting in a unique combination of rarity traits such as color and shape.³⁵ The creative expression of generative artwork is fixed in a tangible medium, so the generated artwork itself is copyrightable. A question that may arise, however, is whether the original artist who created the algorithm can claim copyright in the resulting work, or whether the algorithm should be understood to be the "author"

29. Ferree, Blair & Odenkirk, *supra* note 13.

30. See Andrew Hayward, *Arizona Ice Tea's Bored Ape Brand Use Was "Inappropriate," Creators Warn*, DECRYPT (Aug. 23, 2021), <https://perma.cc/PE5V-N7VY>.

31. Ferree, Blair & Odenkirk, *supra* note 13.

32. While the shortcomings of "smart contracts" are worrisome to those working hard to protect artists' rights, this quickly evolving area also presents occasion for legal innovation—a welcome, if rare, opportunity for legal practitioners. To wit, a thoughtful and collaborative effort between two international legal practitioners generated a form agreement that can be used by creators anywhere wishing to further substantiate their NFT projects. See Yayoi Shionoiri & Ryan Su, *A Proposed Artist's Contract for NFTs*, 125 ARTASIA PACIFIC 26 (Sept./Oct. 2021), <https://drive.google.com/file/d/1QpkONIIW-QtMIBBIgWnNjfSpKS2fYBBW/view>. The efficient format offers a streamlined solution for addressing the lack of substance found in "smart contracts."

35. The term "on demand" references the model employed by certain NFT projects for which the original creator has provided a generative code, but has not actually minted the individual tokens representing the application of that code. Rather, the *buyer* mints the NFT—typically by connecting their digital wallet to a project-specific website and authorizing a transaction—and a token based on the original artist's generative algorithm is created and assigned to the buyer at the time of such minting. The appearance of the associated asset may be revealed at the time of minting or at a later date (e.g., after all of the token supply for the project has been minted).

34. ART BLOCKS, <https://perma.cc/5KJS-TWVB> (last visited Mar. 23, 2022).

35. The Shrimpy Team, *What Is Art Blocks? The Generative Art NFT Platform Explained*, SHRIMPY ACADEMY (Nov. 17, 2021), <https://perma.cc/6EHZ-S734>.

thereof. Because U.S. copyright law requires human authorship,³⁶ a finding that a computer program is responsible for the authorship of generative artworks could result in a determination of non-copyrightability. However, we believe that generative art has analogies to past conceptual practice in which a conceptual plan originally devised by an artist is the actual artwork, and the resulting different outputs based on certain triggers or conditions are simply separate manifestations of the artist's original artwork.³⁷

2. Collaboration and the Moral Right of Attribution

Regarding the artist's right of attribution, two solutions have emerged: (1) incorporating a notice of rights in the data fields and descriptions included in the NFT metadata; and (2) having separate written documentation that applies to the NFT project and that clearly articulates expectations pertaining to attribution or other terms).³⁸ The practical questions then become: (1) how to best word and place those articulations (i) in a manner consistent with the creator's expectations, (ii) in a location that is obvious and accessible to the purchaser, and (iii) in a manner that encourages compliance; and (2) how to pursue enforcement should the need arise.

NFT projects often still give rise to complicated issues regarding who is recognized as the "author" for copyright purposes, especially when multiple parties collaborate to create the finished project. We have observed that the concept of "authorship" may be presumptively tied to attribution or compensation (i.e., revenue share). While the question of how to properly value, compensate, and credit collaborators in creative endeavors was not invented by the NFT visual art community,³⁹ these conflicts are being raised in a somewhat different context, including a sentiment that the value of contributions which make up the whole may need to be more honestly, publicly, and proportionately acknowledged.

Most NFT projects are collaborative in some way, in the sense that multiple parties contribute to them by bringing their diverse skillsets to actualize the work. However, building collaborative structures into the NFT armature to account for not just labor but intellectual property rights as well, requires careful forethought, discussion, and mutual agreement among the parties. This may be hard to

36. *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016), at *4, *aff'd*, 888 F.3d 418 (9th Cir. 2018).

37. As an example, the *Variable Piece* series by American artist Douglas Huebler (1924–1997) left the final forms of each work open to a participant, owner, or viewer. As part of *Variable Piece No. 49 Bradform Mass.-New York City* (1971), the collector must select the most "boring" image from those taken by the artist for photographic enlargement and printing. Only with this selection is the set of documents comprising the piece complete. ALBRIGHT KNOX MUSEUM, <https://perma.cc/29FK-SK77> (last visited May 13, 2022).

38. See *infra* Part II.C.3 (discussing project-specific terms and conditions). Such an articulation of rights may take the form of a separate document linked through the NFT's metadata or platform sale listing and separately may be hosted in the same manner NFT-associated visual assets. See *infra* note 104.

39. To the contrary, the tensions created by artists failing to credit or acknowledge studio assistants, fabricators, engineers, and others (without whom many works of art would never be created at all) have been inherent in large-scale art-making. See Mia Fineman, *Looks Brilliant on Paper. But Who, Exactly, is Going to Make it?*, N.Y. TIMES (May 7, 2006), <https://perma.cc/NXB5-DQHG>.

accomplish, especially if the project's final product has not yet been fixed. The nature of the NFT ecosystem therefore necessitates growth and innovation in this area.

Issues may arise at various points in the collaborative process. If a visual artist creates a work on paper that an animator adapts into a moving clip and to which a musician adds an audio element, how does copyright law account for each of their contributions to the finished product that is then tokenized and sold? The answer to this question is a resounding (and lawyerly), "It depends!" That is, it depends on the relationship established between the contributors as the work is being created. Is one of the creators hiring the others in a work-for-hire situation,⁴⁰ or are the creators each contributing in a meaningful way as partners in creating the NFT asset?⁴¹ It also depends on the contributing parties' objectives for the creative work or the project more generally. Sometimes a party's priority may be credit, or revenue sharing, which can be granted with or without affecting the underlying copyright ownership.⁴² Such grant of rights depends on the capabilities of the blockchain on which the NFT is minted to accommodate the terms written into the NFT metadata and to execute automatic transactions.

Just as living creators are contending with authorship and attribution questions, so too are the stewards of artistic legacies. If an artist's estate has retained the copyright to an artist's body of work, the estate has the legal right to adapt the original work and issue it in a digital form tied to an NFT. Moreover, if an artwork is in the public domain, technically, anyone can reproduce the image of the original work and issue it in such a digital form.⁴³ While ensuring that any such newly-created NFT accurately identifies the work, including specifying who has minted the NFT, it is also important to consider the art-historical context for an estate creating a posthumous NFT or a third party creating an NFT from a public domain work. Re-examining artist intent is significant, including by asking questions about the artist's experimentation with new media during their lifetime, and determining if the artist

40. If the intention is for a dominant contributor to truly commission components to fulfill their overarching vision and retain full copyright ownership of all resulting constituent parts, a clear work for hire agreement should be drafted and executed and should include a back-up assignment of rights, just as would be done in any creative endeavor specifically covered in the 17 U.S.C. § 101 definition of "work for hire." See also *Works Made for Hire*, U.S. COPYRIGHT OFFICE, <https://perma.cc/EDE4-2AU3> (enumerating nine categories of possible works made for hire as prepared pursuant to a special order or commission).

41. If the intention is for collaborators to reserve independently-exercisable rights in the copyrighted work, joint authorship rules would apply pursuant to the definition of "joint work" in 17 U.S.C. § 101, the provisions of 17 U.S.C. § 201, and the other applicable sections of the Act.

42. For example, artist Nancy Baker Cahill goes to great lengths to give credit to and even share revenues with contributors to her art projects. This allows for those participating to be recognized for the additional richness they bring to the projects, but does not necessitate the artist giving up exclusive copyright ownership in the work. See e.g., *Mushroom Cloud LA/Proximities* (2022), <https://nancybakercahill.com/work/mushroom-cloud-la>.

43. Museums have begun selling NFTs of works in their permanent collections that are in the public domain. See, e.g., *LaCollection, The Gallery*, BRITISH MUSEUM, <https://perma.cc/6WNM-QP4J> (last visited Mar. 23, 2022) (offering for sale editioned NFTs of reproductions of original images by Katsushika Hokusai dated 1800–1820).

had a preference as to whether the work could be transferred to a different medium if the original medium became obsolete.⁴⁴

3. Derivative Versus “Fair” Use of NFT-Associated Artworks

Assuming that a particular NFT-associated artwork is copyrightable, in the absence of specific assertions of the creator’s rights in that work or the grant of a license therein, the potential for unauthorized copying is especially high in an international marketplace where different jurisdictions apply different default rules and standards. For example, Japan has a narrowly prescribed fair use concept and has determined that integrating a fair use standard similar to that recognized in the United States might be untenable.⁴⁵ Related concerns exist with regard to the South Korean legal system’s inability to support a fair use standard similar to that of the United States given the current, limited legal precedent.⁴⁶ On the other end of the spectrum, jurisdictions such as Canada and Sri Lanka apply a much broader fair use standard than that used in the United States.⁴⁷ With so much variety around the world, the ability to rely on a fair use argument to justify the appropriation of artwork for derivative or remixing purposes is uncertain.

In the United States, fair use precedent—particularly in the visual art and tech spaces—continues to evolve, and not necessarily in a consistent manner. The Supreme Court’s decision in *Google v. Oracle*, a fair use dispute between technology companies, seems to suggest that a media shift in and of itself could justify a finding of fair use.⁴⁸ By comparison, the more recent *Warhol v. Goldsmith* opinion seems to suggest that in the visual arts context where the purpose of the artwork’s use is the

44. The Warhol Foundation received some critical feedback when it minted and sold five NFTs with associated high-resolution TIFF images. Warhol created the original images in a now-obsolete file format by using ProPaint, a software that was never released to the public. The resulting images were saved to 1.4 MB floppy disks. The Foundation’s high-resolution images were “excavated” from that disk. See Sarah Cascone, *The Warhol Foundation Is Auctioning off the Artist’s Computer-Based Works as NFTs. An Archivist Who Uncovered Them Is Outraged*, ARTNET NEWS (May 21, 2021), <https://perma.cc/F472-EDA2>.

45. See Niva Elkin-Koren & Neil Weinstock Netanel, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, 72 HASTINGS L.J. 1121, 1146 (2021) (providing a comprehensive analysis of international fair use standards and the commentary provided on the same by the International Intellectual Property Alliance); see also *id.* at 1146 n.133 (citing INT’L INTELL. PROP. ALL., 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 383 (2009), <https://perma.cc/D6Y8-LD9X> [hereinafter IIPA SPECIAL REPORT (2009)] (“[I]t would be extremely difficult to integrate [fair use] doctrine into a civil law copyright system such as Japan’s.”)); Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. ILL. L. REV. 111 (2019) (examining the transplant of the fair use model in U.S. copyright law on to foreign soil).

46. Elkin-Koren & Weinstock Netanel, *supra* note 45, at 1146 n.134 (citing IIPA SPECIAL REPORT (2009), *supra* note 45, at 295 n.14 (noting that the report “express[es] grave concern about proposal to adopt fair use in South Korea given that ‘Korea is a civil law system which generally lacks the precedential background against which the U.S. fair use exception has developed’”)).

47. *Id.* at 1146 nn.132, 137 (first citing INT’L INTELL. PROP. ALL., 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 85–86 (2015), <https://perma.cc/KG9N-486T> (Canada), then citing INT’L INTELL. PROP. ALL., 2003 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 595 (2003), <https://perma.cc/K52Q-K4QM> (Sri Lanka)).

48. *Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183, 1203 (2021).

same (in this case, both the Warhol painting and the underlying photograph were portraits of Prince), such use does *not* qualify as fair use.⁴⁹ One of the issues in this case is whether a court can consider the meaning of the potentially infringing work when determining whether an artwork is transformative.⁵⁰ The Second Circuit indicated its desire to narrow the application of “transformative use” as compared to the “high water mark” established by its 2013 decision involving alleged appropriation by contemporary artist Richard Prince of photographs by Patrick Cariou.⁵¹ Time will tell whether the courts are truly trending in a less-generous direction when it comes to the application of “transformative use”—indeed, in March 2022, the Supreme Court granted certiorari to the Warhol Foundation’s appeal of the Second Circuit’s decision in this case⁵²—but whatever the outcome, the enforcement of copyrights may present an even more difficult hurdle for creators.

4. Enforcement

Even where a secondary user acknowledges access to a creative work and copying seems likely, a copyright infringement analysis may prove challenging for practical reasons in the visual art NFT space. For example, the sheer volume of visual assets associated with certain projects in the NFT landscape—where it is not uncommon for a “profile pic” (i.e., avatar or “PFP”) collection to number 5,000 or even 10,000 images—makes such an undertaking time-consuming and potentially prohibitively expensive.⁵³

Moreover, enforcing artists’ rights on the blockchain is complicated. While Digital Millennium Copyright Act (DMCA) rules still apply, it is not possible to entirely remove infringing content from the marketplace.⁵⁴ A takedown notice may result in a platform’s removal of the sale listing of a *token* associated with the allegedly-infringing content, but that token can easily and anonymously be offered

49. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 40 (2d Cir. 2021).

50. *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, SCOTUSBLOG, <https://perma.cc/R53B-A5XL> (last visited May 15, 2022).

51. *Andy Warhol Found.*, 11 F.4th at 38 (quoting *TCA Television Corp. v. McCollum*, 839 F.2d 168, 181 (2d Cir. 2016) for its characterization of Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013)).

52. *See Andy Warhol Foundation*, SCOTUSBLOG, *supra* note 50.

53. Anecdotal data observed by the authors suggests it is uncommon for the creators or other rights-holders of the visual assets used for large-volume PFP projects to seek registration in the copyrights for individual images prior to project launch. Commencing a lawsuit in relation to a large-scale infringement would require creators to register their assets with the Copyright Office and a Copyright Office determination to have been rendered with respect thereto. *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881, 888 (2019). Seeking expedited determinations would also be exponentially more costly than obtaining standard registrations prior to project launch, and yet for start-ups moving quickly and often without legal guidance, even the cost of filing several thousand *non*-expedited copyright applications may be prohibitive.

54. 17 U.S.C. §§ 512, 1201–1205, 1331–32; 28 U.S.C. § 4001. *See also The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, U.S. COPYRIGHT OFFICE (Dec. 1998), <https://perma.cc/JS4T-S6YB> (noting DMCA’s purpose of addressing important parts of the relationship between copyright and the Internet, and summarizing notice and takedown procedure requirements for allegedly-infringing material posted online to networks or systems hosting user-generated content).

for sale elsewhere,⁵⁵ and the separately-hosted content may persist in the same separately-hosted location outside the marketplace's reach.⁵⁶ Theoretically, if there were a lawsuit and the alleged infringer lost, the court could order that the infringing NFT(s) be "burned."⁵⁷ However, as NFT owners are often practically untraceable due to the anonymous nature of online crypto identities, figuring out exactly whom to chase might pose an impossible challenge.⁵⁸ Thus, the already difficult "whack-a-mole" situation existing for the online infringement that was the original target of DMCA regulation is only exacerbated in the NFT marketplace.

B. COPYRIGHT QUESTIONS IMPACTING PURCHASERS' AND OTHER THIRD-PARTIES' RIGHTS

1. "First Sale" Doctrine and Public Display Rights

Current case law dictates that, absent specific permission from the artist, digital artworks cannot be copied for resale pursuant to the "first sale" doctrine.⁵⁹ This is

55. Perhaps the most publicized example to date is the CryptoPhunks, a project that bills itself as a "punk" version of CryptoPunks. CryptoPunks is a successful PFP project featuring simplistic, pixelated heads of 10,000 uniquely generated characters all oriented with their heads facing to the right. *CryptoPunks*, LARVA LABS, <https://perma.cc/M63A-PAWD> (last visited Mar. 23, 2022); @CryptoPhunksV2, TWITTER, <https://twitter.com/CryptoPhunksV2>; see also Sergei Khitrov, *Why are CryptoPunks So Expensive and What Will Happen to Them in 2022?*, HACKERNOON (Dec. 30, 2021), <https://hackernoon.com/why-are-cryptopunks-so-expensive-and-what-will-happen-to-them-in-2022>. CryptoPhunks took CryptoPunks characters and simply flipped them so that they face to the left. *CryptoPhunks*, NOT LARVA LABS, <https://perma.cc/Q58U-45MH> (last visited Mar. 23, 2022). The derivative Phunks were initially listed for sale on OpenSea, but after being taken down in response to a DMCA takedown notice filed by the Punks team, the Phunks established their own marketplace, <https://notlarvalabs.com/cryptophunks>.

56. Allegedly-infringing content contained in or otherwise comprising NFT-associated digital assets (i.e., digital assets referenced in a token's URI) stored on IPFS or arweave, see *supra* note 12, poses a particular enforcement challenge since the data comprising a single asset may be stored in many locations, by anonymous users in different jurisdictions.

57. See 17 U.S.C. § 503 (including as remedies to infringement the possibility of court ordered impoundment or destruction of infringing copies). Because a token incorporates reference (as a URI, SHA256 hash, or other) to the infringing work in this hypothetical scenario, the authors believe it is possible to conceive of a court awarding relief in the form of an order that the token itself be destroyed, or "burned." Burning an NFT is a technical term of art that may have different technical protocol on different blockchains. However, one common way of "burning" a token on the Ethereum blockchain involves sending an NFT to an unusable digital wallet in order to intentionally remove the NFT from circulation. The NFT actually still exists, but as it is in an unusable wallet, it cannot be retrieved or transferred.

58. The anonymity of online actors is also problematic in the context of related intellectual property infringements, such as false designation of source or origin. For example, Bleep's infamous *5000 EveryDays* was the target of a so-called "sleep-minting" scheme, whereby a "hacktivist" (i.e., an activist developer) created a seemingly-identical token corresponding to the image of this artwork making it look like the token originated in the artist's wallet. See Tim Schneider, *The Gray Market: How a Brazen Hack of That \$69 Million Bleep Revealed the True Vulnerability of the NFT Market (and Other Insights)*, ARTNET NEWS (Apr. 21, 2021), <https://perma.cc/33KB-ACLC>.

59. *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018), cert. denied, 139 S.Ct 2760 (2019). In this case involving digital music, the circuit court upheld the lower court's determination that despite ReDigi's innovative technology, it infringed the Plaintiffs' copyrights by making copies of digital

true even if the original file is deleted upon sale, because the transfer of a digital file necessarily creates an unauthorized reproduction thereof.⁶⁰ Arguably, however, the reasoning used to prohibit the copying of digital music files at issue in *Capitol Records, LLC v. ReDigi*⁶¹ may not apply in the case of NFTs; indeed, a defining feature of NFTs is the ability to transfer ownership rights to a digital file *without moving the file itself*, as the associated token is the data being transferred (much in the way that ownership of real property such as a house changes hands through transfer of a deed, without the house being moved, let alone “copied” for creation at a new location).⁶²

In the digital art context, the commercial appeal of NFTs, and that which creates scarcity further derives from the fact that the token-asset pairing enables the marketplace to verify ownership of a particular copy of a creative work, giving that copy the imprimatur of authenticity (as distinguished from otherwise identical copies that are not identified within the token’s URI, and are thus not sanctioned). As noted above, the key feature of NFTs is this linkage—i.e., the marketplace’s understanding that the token (comprising “smart contract” metadata with a unique hash connecting it to the blockchain) works *in tandem* with any files (including the artwork) that are linked through the metadata and hosted on a separate distributed server. If the *ReDigi* rationale precluding application of the “first sale” doctrine is indeed inapposite, then by extension, the use of the image of an NFT-associated artwork for purposes of advertising or illustrating a token being listed for sale may also be closer to a traditional “fair use in support of first sale” scenario.⁶³

Pursuant to the Act, and again assuming that an NFT-associated digital artwork is copyrightable, the creator of such work retains the exclusive right of display,⁶⁴ and the purchaser of an NFT artwork has the right to own and privately enjoy that work.⁶⁵

files in order to enable their resale. *ReDigi* is important as the only currently-existing precedent expressly addressing the question of the applicability of the “first sale” doctrine in the digital context.

60. *Id.* at 655–60.

61. *Id.*

62. We continue to see a general lack of understanding as to this relationship between the token and the associated asset, as evidenced by the oft-repeated criticism of NFTs for the fact that anyone can “right click” and download the image. See Clive Thompson, *The Untold Story of the NFT Boom*, N.Y. TIMES (May 12, 2021), <https://perma.cc/W5L3-F7PD>.

63. See, e.g., *Stern v. Lavender*, 219 F. Supp. 3d 650, 681 (S.D.N.Y. 2018) (citing *Rosen v. eBay, Inc.*, No. cv-13-6801-WF-EX, 2015 WL 1600081, at *14 (C.D. Cal. Jan. 16, 2015)) (each case finding display of images of copyrighted works incident to an offer for sale on a commercial website to be fair use). Note that this “fair use in support of first sale” precedent may also apply in the context of NFTs being used as a form of advertising or as redemption tickets in connection with the sale of physical objects, although that is, as of the time of this article’s writing, an issue of first impression. Symposium presenter Brian Frye’s provocative NFT project, Pantry Tokens, seeks to test this theory. Through the project, Frye offers NFTs for sale on the platform OpenSea. The image for each NFT depicts a drawing by Warhol from AMY VANDERBILT, *COMPLETE COOKBOOK* (1961), for which Frye has set aside the physical page and of which he will transfer physical custody or control to the NFT purchaser upon request. See *Andy Warhol’s Pantry Tokens*, OPENSEA, <https://opensea.io/collection/andywarholspantrytokens> (last visited Mar. 23, 2022).

64. See 17 U.S.C. § 106(5).

65. Presumably in recognition of such purchasers’ perceived private display rights, platforms and mainstream media device companies are moving towards technological innovations to support the same. See, e.g., Pierce Dhaese, *Nifty Gateway Releases NFT Display for Open Beta* (July 20, 2020),

However, potential challenges arise if an NFT owner “lends” the work for public display and as third-party services emerge offering opportunities for peer-to-peer sharing of NFT collections.⁶⁶ If lending or sharing the NFT entails the owner transferring the NFT to the borrower’s wallet for the temporary exhibition period, there is likely no issue. On the other hand, if in lending or sharing the NFT artwork a copy is made, the right of reproduction may be violated.⁶⁷ If collectors and donors wish to lend or donate NFTs to museums, and museums wish to accept these NFTs for display or acquisition, these are issues of first impression for museums that necessitate the establishment of clear policies on how they will manage such property.

Moreover, museums have traditionally taken the position that the creation of digital copies to develop an index of works or provide educational information to the public falls within the fair use doctrine.⁶⁸ These justifications almost certainly do not apply to the display of digital works—whether backed by an NFT structure or not—without specific permissions from the copyright holder. As the adoption of NFT artwork beyond a speculative marketplace continues and NFTs are framed within a broader and longer-term art-historical and curatorial narrative, artists and institutions alike should carefully consider these legal questions alongside other developing questions such as those regarding insurance and valuation.⁶⁹

2. Resale Royalties

The concept of implementing contractual terms protective of artists’ moral rights or economic rights (including an interest in revenue from downstream sales) is not new; Seth Siegelaub and Robert Projansky developed the original artists’ rights

<https://perma.cc/B2X5-524L>; Chris Welch, *Samsung Promises “Groundbreaking” New TV Feature: NFT Support*, VERGE (Jan. 2, 2022, 9:00 PM), <https://perma.cc/7Z52-S2VZ>. However, unlike with the purchase of artworks in physical form, it is not at all clear that the “public display” language of § 109 of the Act applies to digital works. To wit, the relevant provision explicitly references physical location, raising questions about where a digital file hosted on a distributed or decentralized system (such as the IPFS or arweave) is actually “located” and how this language will be interpreted vis-a-vis NFTs. See *supra* note 12; see also Steiner, *supra* note 14, at 10.

66. What “lending” means in the NFT context is also still up for debate, since a third-party display of an NFT-associated artwork may involve, on one end of the technical spectrum, taking custody of the actual token and then “casting” the associated artwork image to a blockchain-connected device such as an Atomic Form screen. On the other end of the spectrum, it may involve simply obtaining and displaying a .jpeg file from the token’s owner (who thus both reproduces and distributes the copyrighted work). Certainly NFT “loans” do not involve the same kinds of physical logistical issues as are traditionally contemplated for loans of artworks in physical form, and NFT loans raise questions about whether there is a true bailment giving rise to a protectible secured interest on the part of the “lender” (i.e., NFT holder).

67. See Simon J. Frankel, *What Copyright Lawyers Need to Know About NFTs*, BLOOMBERG L. (July 16, 2021, 4:01 AM), <https://perma.cc/TFR9-VU6F>.

68. See *Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums*, ASSOCIATION OF ART MUSEUM DIRECTORS (Oct. 11, 2017), <https://perma.cc/Y8U9-PNSH>.

69. See Ferree, Blair, & Odenkirk, *supra* note 13; see also Rhizome, *From Black Boxes to Open Systems: NFTs and the Law*, VIMEO (Jun. 7, 2021), <https://perma.cc/G2RV-62WD> (discussing display rights and continued hosting obligations); Megan E. Noh, *Brave New Media: Collector Risks in Relation to the Insurability and Valuation of NFTs*, in DELOITTE ART FINANCE REPORT 2021, at 304 (7th ed. 2021), <https://perma.cc/D4H5-QLVR>.

contract over forty years ago.⁷⁰ Despite many artists' enthusiastic support for certain concepts underlying its drafting, the Siegelaub-Projansky contract never saw widespread adoption in the marketplace. Galleries found it cumbersome and problematic to inject into their existing relationships with collectors. Collectors, for the most part, simply did not see the value in being bound by its terms.⁷¹ The conversation around protecting artists' rights through contractual obligations at the point of sale continues to resurface every few years, with a variety of Sisyphean efforts having been exerted to enact further statutory protections or to develop a new form of contract for industry-standard implementation.⁷² However, in stark contrast to the laws of European countries where resale royalties are an expected part of doing business in the art market,⁷³ the United States has never successfully implemented a workable resale royalties law at the state or federal level,⁷⁴ and contracts with resale royalty-type provisions are not yet used as a matter of course⁷⁵ and remain difficult to enforce in the largely opaque traditional art market.

However, when NFTs exploded in the mainstream art world early in 2021, the effort to secure resale royalties for artists dovetailed with technological innovation in a revolutionary manner. Many standard NFT structures automatically include a ten-to-twenty percent royalty coded into the NFT's underlying "smart contract" so that the royalty payment is automatically triggered upon resale. The resale royalty proceeds are paid automatically to an artist's digital wallet, rather than relying on individual purchaser compliance. Moreover, the royalty is based on the gross amount realized as a result of the token's resale, which is a larger share for artists than that

70. See Seth Siegelaub & Robert Projansky, *The Artist's Reserved Rights Transfer and Sale Agreement*, PRIMARY INFORMATION (1971), <https://perma.cc/BZ98-QAJN>.

71. Between 1996 and 2005, Maria Eichhorn conducted interviews with artists, gallery owners, and others about sales of artworks, speculation, the role of collectors, and museums and artists' rights, with a specific focus on the role of the Siegelaub-Projansky artist contract. MARIA EICHHORN, *THE ARTIST'S CONTRACT: INTERVIEWS WITH CARL ANDRE, MICHAEL ASHER, DANIEL BUREN, PAULA COOPER, HANS HAACKE, JENNY HOLZER, ADRIAN PIPER, ROBERT PROJANSKY, ROBERT RYMAN, SETH SIEGELAUB, JOHN WEBER, LAWRENCE WEINER, JACKIE WINSOR* (Gerti Fietzek ed., 2009). A few artists (Hans Haacke, for example) have successfully used the Siegelaub-Projansky contract, but most have given up on this battle. See Kibum Kim, *Could a Long-Forgotten Contract Settle the Artist Resale Royalties Debate?*, HYPERALLERGIC (Jan. 5, 2015), <https://perma.cc/HWX4-Q7ZJ> (noting Haacke's usage); Lauren van Haften-Schick, *Can Artists Use Their Sale Contracts to Game the System?*, FRIEZE (Mar. 10, 2021), <https://perma.cc/3LBZ-VC3W>.

72. See van Haften-Schick, *supra* note 71.

73. Laurel Wickersham Salisbury, *It's Not That Easy: Artist Resale Royalty Rights and The ART Act*, CENTER FOR ART LAW (July 1, 2019), <https://perma.cc/TTL2-Q5V7>.

74. See H.R. 1881, 114th Cong. (2015); CAL. CIV. CODE § 986. See also *Estate of Graham v. Sotheby's, Inc.*, 178 F. Supp. 3d 974 (C.D. Cal. 2016) (finding California Resale Royalty Act preempted under Copyright Act of 1976).

75. *But see* Virginia Rutledge, Megan E. Noh, Andrea Crane, Destinee Ross-Sutton, & Jean-Paul Engelen, *Navigating Market Control: Resale Provisions in Art Contracts*, VIMEO (Oct. 15, 2020), <https://perma.cc/7L9P-BAQ8>; Eileen Kinsella, *Speculation on Black Artists Has Gotten So Intense That for Christie's Latest Sale, Its Curator Is Asking Buyers to Sign a Special Contract*, ARTNET NEWS (Aug. 13, 2020), <https://perma.cc/47JU-54GA>.

afforded by European *droit de suite*, under which royalties are calculated as a percentage of net profit.⁷⁶

However, a major challenge to be overcome in order for resale royalties to become standard and automated is interoperability among platforms, i.e., as NFTs move from one marketplace to the next, even where such marketplaces recognize royalties for natively-minted tokens. Currently there is no way to guarantee that, even if a marketplace is transacting with compatible cryptocurrency, the terms of the “smart contract” created on a different platform will be recognized and the payment of resale royalties will be automatically triggered.⁷⁷ Moreover, creators must consider the possibility that NFT purchasers will seek to subvert resale royalty protocols by conducting transactions “off chain,” such as through marketplaces like Sudoswap.⁷⁸

C. MARKETPLACE TERMS AND CONDITIONS

We have seen that the copyright framework only partially addresses the behaviors of members of the NFT community and what these community members want to achieve. In this fast-evolving and fast-paced environment, terms and conditions (“T&Cs”)⁷⁹ as set forth by various platforms in the NFT marketplace are one structure through which stakeholders envision the rights affixed to NFTs. Artists may offer NFTs in the “primary” market through “drops” facilitated by traditional auction houses,⁸⁰ on dedicated NFT platforms,⁸¹ or through hybrids of the two,⁸² and

76. The potential chilling effect this could have on resales is an impact to be considered, but at least initially it seems that the impact is to normalize the expectation both for artists and collectors (not to mention marketplaces) that a resale royalty of some amount will be part of future transactions. An unexpected result of the inclusion of resale royalties in NFT “smart contracts” is that more artists are also asking for similar provisions to be written into their traditional art world transactions and, more than ever before, galleries and collectors are accepting these terms. Time will tell whether there will be substantial adherence to these terms when works make their way back to the market and how enforcement will be achieved outside of the most public (i.e., auction house) transactions.

77. *But see* Zach Burks, James Morgan, Blaine Malone, & James Siebel, *EIP-2981: NFT Royalty Standard*, ETHEREUM IMPROVEMENT PROPOSALS (Sept. 15, 2020), <https://perma.cc/9JZW-ENJF> (proposing a “standardized way . . . to enable universal support for royalty payments across all NFT marketplaces and ecosystem participants”); *How Do Royalties Work with Secondary Market Sales on OpenSea?*, FOUNDATION SUPPORT (Jan. 15, 2022), <https://help.foundation.app/hc/en-us/articles/5488416313755-How-do-royalties-work-with-secondary-market-sales-on-OpenSea> (noting inter-platform agreement to respect royalties for NFTs minted on either platform).

78. SUDOSWAP, <https://perma.cc/V2VT-J9CT> (last visited Mar. 23, 2022).

79. Platforms also use the title “Terms of Service.” Both variations (i.e., “Terms of Service” and “Terms and Conditions”) typically refer to the generally-applicable terms and conditions governing actions taken on a website or platform.

80. Christie’s, Sotheby’s, Phillips, and Bonhams have all conducted NFT sales. Auction houses have pursued a variety of sale structures, or rather, underlying technical processes, with some auction houses requiring consignors to transfer purchased NFT lots directly to winning bidders, others taking an intermediate approach of custodial NFTs for transfer by the auction house, and one auction house having recently acquired a fully on-chain sale platform through which it provides custodial wallets to bidders. *See Metaverse*, SOTHEBY’S, <https://perma.cc/QZ7Q-GQWW> (last visited Mar. 23, 2022).

81. At the time of this Article’s writing, SuperRare, Foundation, NiftyGateway, and Makersplace are prominent examples of such marketplaces.

82. Several auction houses have presented NFT sales in collaboration with dedicated NFT platforms. For example, the auction houses may curate the NFTs being offered while the platform handles

their work may also trade on the “secondary” market (i.e., when resold by a collector who previously acquired it) through the same venues.⁸³

Venerable auction houses’ rapid adoption of NFTs as both a legitimate collectible category and a profit center is of particular note with respect to these primary sales; historically, auction houses have not played a significant role in developing emerging artists’ careers.⁸⁴ While auction house participation in the NFT marketplace has arguably lent significant credibility to NFTs and has contributed to an increase in both traditional collector and mainstream interest therein, the conflation of the primary and secondary markets for NFT artists upends a distinction between primary and secondary market players, and, for some, has raised questions about—or a perceived threat with respect to—the role and “value add” of gallerists in the NFT space.

It bears highlighting the diversity of different intellectual property rights structures resulting from the lack of standardization for T&Cs governing these transactions. This Part discusses three main categories of T&Cs, with each analysis focusing on both “incoming” licenses (i.e., the licenses provided by a creator to a platform or sale venue) and “outgoing” licenses (i.e., the licenses provided to the purchaser of an NFT by such platform or sale venue).

1. Auction House T&Cs

Perhaps precisely because auction houses have not historically handled primary market material with any regularity, standard auction house consignment agreements do not seek a broad incoming license in the consigned work—nor could they seek such a license from a secondary market owner who did not create the artwork in question.⁸⁵ Rather, these agreements (again, geared toward secondary market sales) generally seek a license from the non-creator owner of an artwork that permits the auction house to take photographs of the artwork, illustrate it in sale catalogues and

the transactions (i.e., custodying tokens and processing payments) and marketing may be undertaken jointly. See, e.g., *The Fungible Collection by Pak*, SOTHEBY’S (Apr. 12–14, 2021), <https://www.sothebys.com/en/digital-catalogues/the-fungible-collection-by-pak> (sale in collaboration with NiftyGateway); *CryptOGs: The Pioneers of NFT Art*, BONHAMS (June 21–30, 2021), <https://perma.cc/874B-SF7Z> (sale in collaboration with SuperRare).

83. OpenSea and Rarible are considered the dominant NFT platforms for secondary market sales, although both platforms also have “drops” for primary works, and most (if not all) of the auction houses noted above have conducted sales of secondary market NFTs. See, e.g., *No Time Like Present*, CHRISTIE’S (Sept. 17–28, 2021), <https://perma.cc/4J42-XBLK> (Hong Kong auction of contemporary art and luxury property, including both traditional media lots and NFT lots such as numerous secondary-market CryptoPunks and Bored Apes).

84. In the traditional art world, the responsibility to grow an artist’s market has often fallen to gallerists, who may be the driving force in the promotion of an artist’s talent, cultivating collector interest therein, and may even provide resources to an artist to facilitate their production of inventory—in addition to taking on logistical responsibilities with respect to that inventory (e.g., storage, transport, insurance)—all in exchange for a commission.

85. This, of course, assumes that the non-creator owner of an artwork has not obtained from its creator (or other copyright holder) an assignment of the underlying copyright, or a broad transferable or sub-licensable license therein. The default model for an acquisition of physical artwork is that no such assignment or license is extended.

other sale marketing materials, and/or continue to display an image of the work for post-sale archival, informational, or general promotional purposes.

While a secondary market seller may not give much thought to agreeing to such a license (particularly because the successful sale of the artwork will, in some sense, sever the connection between the collector and the artwork), the requested grant may raise very different concerns for a consignor who is also the creator of the consigned property. For example, such a consignor may wish to consider whether the photographs being created of the consigned artwork may appropriately be considered independently copyrightable derivative works, and what rights the auction house secures therein.⁸⁶

Conversely, the incoming license typically sought by auction houses does not relate specifically to uses by the purchaser of the consigned artwork (and again, auction houses handling secondary market material would be barking up the wrong tree in seeking to obtain such rights from a consignor who did not create the property). As a result, the outgoing license that auction houses extend to NFT purchasers is either relatively narrow⁸⁷ or nonexistent.⁸⁸ The narrow construction tends to give an NFT purchaser equivalent rights to those that the purchaser of a physical artwork would obtain pursuant to § 109 of the Act⁸⁹ and under case law that authorizes reproduction and display in furtherance of the owner's resale of the purchased artwork as a fair use.⁹⁰

This “silent” construction assumes that the NFT purchaser would only obtain rights by statutory default, which is an open question given the unclear application of § 109 to digital artworks.⁹¹ This situation thus bears revisiting in support of a marketplace “norm” with respect to what rights NFT purchasers at auction have in relation to the digital artworks associated with their tokens.⁹²

86. It may be possible to limit such an incoming license where the NFT creator is in fact providing all of the images to be used in marketing materials. For NFTs that have a physical companion piece, however (see, e.g., Oseanworld, *Radio!*, SOTHEBY'S (Oct. 15, 2021), <https://www.sothebys.com/en/buy/auction/2021/contemporary-art-day-auction-4/radio>), an auction house may be engaging in a sufficiently creative activity when it composes, lights, and captures an image of the property.

87. As of November 2021, one auction house's T&Cs extended to NFT purchasers the “right to use, copy, and display the digital asset for [their] own personal, non-commercial use or in connection with a proposed sale or transfer of the NFT.” *Buying at Christie's: New York Conditions of Sale*, CHRISTIE'S, <https://perma.cc/5ESX-MJLQ> (last visited Mar. 10, 2022).

88. As of November 2021, another auction house's T&Cs avoided the question of whether an NFT purchaser receives any license, simply noting that “[a]ny copyright(s) in and to the NFT and Referenced Content, including but not limited to, any reproduction rights in any Referenced Content, remain with the creator(s) thereof, and the purchase of the NFT does not constitute an assignment thereof.” *NFT Auction Terms*, WOLFRAM, <https://perma.cc/HW8J-K3G7> (last visited Mar. 23, 2022). A third house similarly dodged the question, stating that neither it nor the consignor of an NFT lot make any “representations or warranties that the buyer of the NFT will acquire any copyright or derivative works rights, or rights to commercial use in the NFT or the Artwork.” *Conditions of Sale for Online Only Auction and Authorship Warranty*, MDJ x PHILLIPS, <https://perma.cc/B4BT-A6JK> (last visited Mar. 23, 2022).

89. 17 U.S.C. § 109 (detailing public display rights and the first sale doctrine).

90. See *supra* Part II.B.1.

91. See *id.*; Frankel, *supra* note 67.

92. It should also be noted that several major auction houses' T&Cs do not clearly recognize that an NFT purchase actually denotes corresponding *ownership* of the particular copy of the associated digital

2. Dedicated Platform T&Cs

The T&Cs published by dedicated NFT platforms are also not uniform but tend to seek broader incoming licenses and provide broader outgoing licenses. These rights do not specifically attach to each NFT but are generally applicable to NFTs transacted on the platform, and until case law determines otherwise, it is unclear whether rights licensed pursuant to such general platform terms are enforceable. Also problematic is that downstream buyers of the NFT may be simply unaware of any licensing terms that were originally applied to and are intended to travel with the NFT if those terms are not either included in the NFT metadata or in an attached file.

Putting aside enforceability questions, the typical platform incoming license tends to be quite broad in order to give the platform extensive use rights, and such licenses arguably extend to uses by the platform that generate revenue (albeit indirectly or less directly than, for example, the sale of NFTs).⁹³ Such an incoming license may even permit the platform to modify or alter the creator's content.⁹⁴

artwork—i.e., the copy stored at the particular location identified by the token's URI. This raises questions about whether the sale of NFTs through traditional auction houses may in some sense be counter-productive, as it tends to divorce the token from the associated artwork, which is seemingly antithetical to the purpose of NFTs. Moreover, at the time of the writing of this Article, only one auction house actually warrants the associated digital artwork's authenticity. The others warrant only the authenticity of the *token itself*, which can be verified, but for which in many instances the "author" does not correspond to the associated artwork's author, since artists may engage developers or similar technology providers to code the "smart contracts" governing the actual tokens. With the goal of promoting greater marketplace clarity and standardization in mind, it is worth considering whether further changes to the auction house contract models currently in circulation are merited with regards to both issues.

93. See, e.g., *Terms of Service*, FOUNDATION LABS (Mar. 8, 2022), <https://perma.cc/384V-U94R> [hereinafter *Foundation Labs Terms of Service*] ("launching a Digital Artwork on Foundation constitutes an express and affirmative grant to Foundation, its affiliates and successors a non-exclusive, world-wide, assignable, sublicensable, perpetual, and royalty-free license to make copies of, display, perform, reproduce, and distribute the Digital Artwork on any media whether now known or later discovered for the broad purpose of operating, promoting, sharing, developing, marketing, and advertising the Platform, or any other purpose related to Foundation. . . .") (emphasis added).

94. See, e.g., *Terms of Use*, NIFTY GATEWAY (Sept. 23, 2021), <https://perma.cc/ET8C-NWYB> (permitting platform to "use, copy, *modify*, distribute, publish and otherwise transmit [content] for marketing or promotional purposes") (emphasis added). The application of moral rights law to digital artwork is also uncertain. In a 2010 article, one scholar argued that natively digital artworks—i.e., artworks produced from inception in a digital format, as distinguished from digital *reproductions* of an artwork that would not qualify for VARA protection as set forth in *Martin v. Walt Disney Internet Grp.*, No. 09CV1601-MMA, 2010 WL 2634695 (S.D. Cal. June 30, 2010) and other cases—should be eligible for protection. See Llewellyn Joseph Gibbons, *Visual Artists Rights Act (VARA) and the Protection of Digital Works of Photographic Art*, 11 N.C. J.L. & TECH. 531 (2010). Regardless of such application or non-application, however, an artist's blanket grant to a commercial entity to alter creative content should be carefully considered. Interestingly, while one platform requires artists to expressly waive moral rights to the fullest extent permissible by law, see *Terms of Service*, MAKERSPLACE (Apr. 19, 2021), <https://perma.cc/VK8P-T22R>, another platform expressly prohibits the *purchaser's* modification, distortion, mutilation, or performance of an artwork "which would be prejudicial to the [a]rtist's honor or reputation," thereby mirroring VARA language and effecting a contractual right tantamount to an artist's integrity right under VARA, except only as between the artist and purchasers of the artist's work or platform users (and not other third-parties). See *SuperRare Terms of Service*, SUPER RARE (Mar. 8, 2022), <https://www.notion.so/SuperRare-Terms-of-Service-075a82773af34aab99dde323f5aa044e>. Clearly the application of moral rights in the digital context will continue to evolve. It remains to be seen whether that evolution will be through contract and marketplace norms alone or by aid of statutory intervention.

Platform outgoing licenses are typically expressly restrictive of commercial use⁹⁵ but inclusive of language providing rights equivalent to both first sale and “fair use in support of first sale” rights.⁹⁶ Moreover, some platforms seemingly take pains to clearly enumerate specific examples of the application of those rights in the context of the evolving digital landscape—for example, expanding on the “public display”—equivalent language as expressly extending to “virtual” museums or metaverse spaces,⁹⁷ or enumerating certain forms of reproduction required for resale such as the re-listing of an NFT-associated artwork on another NFT marketplace website.⁹⁸ These more nuanced permitted uses reflect a greater understanding than is perhaps typical of auction house T&Cs with respect to the growing place of NFTs within a larger Web 3.0 context or ethos.⁹⁹

3. Individual Project T&Cs

One distinguishing feature of T&Cs drafted in connection with particular NFT projects is that they “cut out the middleman,” providing rights from the artist(s) or other rights holders directly to purchasers. This removal of an intermediary facilitates the development of bespoke T&Cs that go even further than dedicated platform T&Cs in considering the unique objectives of the project, the specific technology of the project tokens, and the broader marketplace conditions. For example, project-specific T&Cs may expressly condition reproduction and display rights in the resale context on the website’s use of technology to verify that the party undertaking such re-listing is in fact the holder of the original token with which the

95. See, e.g., *Foundation Labs Terms of Service*, *supra* note 93 (“Collectors have the right to sell, trade, transfer, or use their Digital Artwork, but Collectors may not make ‘commercial use’ of the Digital Artwork. . . .”). MakersPlace and Nifty Gateway also both set forth very broad prohibitions on using content from their sites for anything other than strictly private use.

96. See, e.g., *SuperRare Terms of Service*, *supra* note 94 (providing purchaser with license expressly approximating fair use concepts, including the right to “display or perform the Work privately or publicly . . . for the purpose of *sharing, promoting, discussing, or commenting* on the Work.”) (emphasis added).

97. See, e.g., *Foundation Labs Terms of Service*, *supra* note 93 (providing display right for use in “decentralized virtual environments, virtual worlds, virtual galleries, virtual museums, or other navigable and perceivable virtual environments”); *SuperRare Terms of Service*, *supra* note 94 (providing right to display for the purpose of promoting or sharing “the Collector’s purchase, ownership, or interest in the Work . . . on *social media platforms, blogs, digital galleries, or other Internet-based media platforms* . . . decentralized virtual environments, virtual worlds, virtual galleries, virtual museums, or other navigable or perceivable virtual environments, including simultaneous display of multiple copies of the Work within one or more virtual environments.”) (emphasis added).

98. See, e.g., *SuperRare Terms of Service*, *supra* note 94 (providing right of display on “third party Marketplaces, exchanges, Platforms, or applications in association with an offer to sell, or trade, the Token associated with [the] Work. . . .”); *Foundation Labs Terms of Service*, *supra* note 93 (providing display right “on third party marketplaces, exchanges, platforms, or applications in association with an offer to sell, or trade, the Digital Artwork. . . .”).

99. Web 3.0 is the term used to refer to the next phase of the Internet owned by users. See Daniel Van Boom, *What is Web3? The Confusing Term, Explained*, CNET (Apr. 28, 2022), <https://perma.cc/4CHE-DU2H>.

artwork in question was associated.¹⁰⁰ Other projects may blur the lines between the contract and the artwork, such as pioneering new media artist Rhea Myers' 2014–2015 work *Is Art*.¹⁰¹

Additionally, while auction house and dedicated NFT platform T&Cs generally prohibit purchasers from making commercial uses of the artworks associated with their acquired tokens, the T&Cs for certain individual NFT projects do permit such uses. The model agreement drafted in the context of the CryptoKitties project¹⁰² is perhaps the best-known template for this structure, capping the purchaser's commercial use at a specified annual monetary threshold. Other project T&Cs go further, seeking to approximate an assignment of copyright to the NFT purchaser—a model that is extremely uncommon (if not nonexistent) in the traditional art market and that speaks to some digital creators' sentiment that Web 3.0 is a “post-copyright” landscape.

The use of project-specific T&Cs may be on a standalone basis or may be layered “on top” of marketplace or auction house T&Cs, thereby seeking to modify or supplement the same.¹⁰³ For example, the project-specific contract for the interactive metaverse environment, *The Meeting Place*, designed by Benny Or and Cyril Lancelin, supplemented the SuperRare platform T&Cs pursuant to which the associated NFT was originally offered.¹⁰⁴ *The Meeting Place*'s project-specific T&C sought to clarify use rights for this unique, functional asset. They accordingly provided for administrative privileges in a 3D file hosted by a supporting VR platform, the express and exclusive grant to the purchaser of the use of the particular corresponding copy of the virtual space (including by invitation to the purchaser's guests), as well as a license to display the environment or still images thereof on VR

100. See, e.g., *NFT License 2.0*, DAPPER LABS (Nov. 5, 2018), <https://perma.cc/4N9H-HX8A> (early model/template developed for customization by creators of individual NFT projects, including language granting a license to “use, copy, and display the Art . . . as part of a marketplace that permits the purchase and sale of your NFTs, provided that the marketplace cryptographically verifies each NFT owner's rights to display the Art for their Purchased NFTs to ensure that only the actual owner can display the Art . . .”).

101. *Is Art* is an Ethereum-based decentralized application that allows people to toggle between designating the contract itself as art or not art. *This Contract Is Not Art*, RHEA MYERS, <https://perma.cc/LEW2-9VLB> (last visited Mar. 23, 2022); see also Chan, *supra* note 18 (which project can also be discussed in this category of conceptual, contract-oriented works).

102. See *Terms of Use*, CRYPTOKITTIIES (Nov. 15, 2018), <https://perma.cc/EM8X-7BBX> (adapted from *NFT License 2.0*); see also Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 AIPLA Q.J. 219 (2019).

103. See, e.g., Kevin McCoy, *Quantum*, SOTHEBY'S, <https://www.sothebys.com/en/buy/auction/2021/natively-digital-a-curated-nft-sale-2/quantum> (last visited Mar. 23, 2022) as sold in and subject to the T&Cs of *Natively Digital: A Curated NFT Sale*, SOTHEBY'S (June 3–10, 2021), <https://www.sothebys.com/en/digital-catalogues/natively-digital-a-curated-nft-sale>. The auction lot catalogue expressly linked to McCoy's separate Rights Agreement, identified within the token code as being hosted at IPFS, <https://perma.cc/X2BN-DGFC> (last visited Mar. 23, 2022).

104. See Cyril Lancelin and Benny Or, *The Meeting Place*, SUPERRARE, <https://superrare.com/artwork-v2/the-meeting-place-30351> (last visited Mar. 23, 2022) (as offered on SuperRare and subject to the platform's T&Cs). The cataloging expressly links to Megan E. Noh, *Supplemental Terms and Conditions Applicable to Sale of the Meeting Place* (Nov. 15, 2021) [hereinafter *TMP Supp. Terms*], https://drive.google.com/file/d/1Lg_38Tp9AACPo0wZBYY_EIYEi7gPgJcZ/view?usp=sharing.

platforms and NFT marketplaces, subject to a required credit line.¹⁰⁵ Perhaps most notably, the project-specific T&C also overtly signaled the creators' collaborative spirit, noting their intention not to "unreasonably" withhold permission for proposed *commercial* uses of the work by the purchaser, subject only to a "fair" revenue split.¹⁰⁶

Nancy Baker Cahill's *Contract Killers* project was among the first NFT projects independent of any platform terms to focus on the dearth of contractual content in the "smart contract."¹⁰⁷ Each NFT in the project contains a document articulating the full range of responsibilities and remedies for both artist and collector.¹⁰⁸ The contract addresses issues of copyright ownership and the responsibilities of collectors to participate in the care and maintenance of the NFT.¹⁰⁹ Unable to solve the enforcement problem given current technological restrictions, *Contract Killers*

105. TMP Supp. Terms, *supra* note 104, ¶¶ 5, 7.

106. *Id.* ¶ 7.

107. Nancy Baker Cahill, *Contract Killers*, SNARKART, <https://snark.art/contract-killers> (last visited Jan. 15, 2022). The project, minted on the environmentally-friendly Tezos blockchain, was born out of a concern both for the quick shift away from the scrutiny of systemic exclusion, as well as the lack of attention by the burgeoning NFT market of the environmental impact of blockchain. *Contract Killers* consists of four different dissolving augmented-reality (AR) handshakes located in front of the Hall of Justice, the City Hall, a pile of cash, and a blank wall, each representing different broken social contracts.

108. Sarah Conley Odenkirk, *Contract Killers Agreement*, <https://perma.cc/S62R-ZTHK> (last visited Mar. 23, 2022) ("This Agreement regarding the Contract Killers project (the 'Project'), is between Nancy Baker Cahill (the 'Artist') and the purchaser (the 'Owner') of one or more of the Contract Killers NFTs (the 'NFT'). This Agreement is intended to be readable and understandable by non-lawyer, NFT purchasers, so that there is no confusion as to intent, application, and scope of the terms. Both parties acknowledge the importance of mutual assent in the formation of an enforceable agreement, and the need to recognize the value of the artistic process beyond the primary transaction. Purchasers of the Asset are encouraged to engage with this Project as innovators in a truly collaborative and creative process, and share the experience by circulating the asset to as many others as possible. Every exchange provides an opportunity for the Artist's value to be recognized, for a broader creative community to receive support, and for the Owners to be rewarded with incentives honoring the Owners' commitment to making the world a better and more responsible place: elevating the place of artists, and advocating for environmentally sound practices.").

109. *Id.* at 4 ("Ownership. There is sometimes the misperception that by owning an artwork, the collector owns all rights including intellectual property rights like copyright. This is not the case with object-based artwork and it is also not the case with NFTs. Even though an Owner does not have any intellectual property rights in the Asset to which the NFT points, there are definitely responsibilities that come with ownership. The responsibilities that come with either collecting art or participating in society require attention and maintenance. This transaction is no different, and thus, Owner agrees to participate in this NFT ownership pursuant to the following terms: Registration of Ownership. Upon purchasing the NFT, Owner is required to register by filling out and submitting a basic contact form. This contact information will constitute a true record of provenance. This record will not be accessible to the public, but only to subsequent purchasers upon proof of ownership and written request submitted to Artist through Artist's website. While the content of the record will not be accessible to the public, the Project website will list the wallet numbers of Owners who are in compliance with this registration requirement, and those who are not. Should an Owner see his/her/their wallet number listed as not in compliance, submission of the basic contact form will be necessary in order to be moved to the list of Owners in compliance. In the event that an Owner has submitted the basic contact form and still remains on the list of Owners not in compliance, Owner may notify Artist via email and Artist will, upon verification of receipt of the basic contact form, ensure that Owner is moved to the list of Owners in compliance and that Owner receives the reward for registration as detailed in paragraph b. below.").

offered a positive reinforcement system instead, rewarding those who chose to comply with the artist's clearly-articulated wishes with additional NFTs.¹¹⁰

Peter Wu+'s EPOCH Gallery project¹¹¹ is a rare project that managed to create a genuinely collaborative work "on chain,"¹¹² and illustrates an equitable solution to some of the thorny collaboration and co-authorship issues previously raised. As EPOCH's founder, Peter Wu+ is the lead artist who creates a virtual reality environment into which he builds other artists' works. In order to properly structure this complex set of relationships, the project needed two agreements: (1) a collaboration agreement between EPOCH and the included artists; and (2) another agreement with the collector. In addition, the project, which is built on the Algorand blockchain, has a custom "smart contract" that allows for multiple royalty distributions to all the participating artists so that every transaction benefits EPOCH, as well as all included artists.¹¹³ While Peter Wu+ owns the overall exhibition as a compilation work and this compilation work was sold as an NFT, the included artists all share in the proceeds of the primary and any secondary market sales.

4. Problems of Conflicting Terms

Standalone and supplemental project-specific T&Cs are subject to the same questions of assent and enforceability as other contracts (e.g., evolving precedent on browse-wrap and click-wrap user acceptance, as well as traditional adhesion and

110. *Id.* at 4.b. ("As a reward for complying with the registration requirement, the first Owner of object-bearing NFTs will receive an object from Artist that relates to the NFT Asset. This object can be kept even if the NFT is later resold or destroyed. This object will be shipped to the address provided in the contact information and arrive approximately 8–12 weeks after registration is provided and verified. As a reward for complying with the registration requirement, all subsequent Owners, and Owners of non-object-bearing NFTs will receive a digital asset from Artist.")

111. *Echoes*, EPOCH GALLERY (Oct. 9, 2021–Jan. 14, 2022), <https://perma.cc/RB8P-4LAL>.

112. "On chain" refers to transactions that are verified and registered on a blockchain. This feature is seen as the primary strength of transacting business on blockchains, and what allows for the system to be "trustless," as all "on chain" transactions are automatically and immutably recorded in the blockchain's publicly accessible ledger. These transactions are distinguishable from "off chain" transactions for which there is no record in the public ledger. The fact that many NFT creators and consumers do not have a clear understanding as to which parts of NFT transactions will be "on chain" or "off chain" leads to misperceptions as to the current limitations of NFTs. This is one reason that the EPOCH Gallery project is so innovative. Most platforms are limited as to how many wallets into which sales proceeds can be automatically divided and deposited. Often, the solution is that the "on chain" sales transaction automatically deposits the revenues into one wallet, and afterwards someone working for the platform (or alternatively, one of the project collaborators) manually divides the revenues and makes deposits into multiple wallets. Thus, the manual division and deposit of revenues is "off chain" and could be subject to human error or theft (as well as possible tax implications). Further, at an even more basic level, most of the artwork associated with NFTs is in fact stored on a separate distributed file storage system as opposed to the blockchain, meaning the artwork itself is stored "off chain." See *supra* note 12 for more discussion as to the actual location of associated artwork.

113. As noted *supra* note 112, it is unusual to find an NFT structure that allows for distributions to multiple wallets on chain. This is one area where innovation is quickly catching up with artists' desires to more easily create collaborative projects with automatic revenue sharing. Since the release of the EPOCH project, some platforms have begun to offer limited options in this regard. See, e.g., Jeff Kraus, *How Can I Create a Split on Foundation?*, FOUNDATION LABS, <https://perma.cc/T39E-J6M6> (last visited May 15, 2022).

conflict principles). In some cases, T&Cs may be focused less on strict or formal enforceability and more on establishing a relationship between the artist and the collector to further greater collaboration, understanding, or marketplace parity among those stakeholders.¹¹⁴ Other T&Cs attempt to provide—in and of themselves—a site to explore the norms of artists’ rights and intellectual property law in the context of NFTs or, more broadly, the digital evolution.¹¹⁵ Still other T&Cs provide for the collector’s participation in the artistic process¹¹⁶ or establish “ground rules” restricting certain uses by a purchaser that might be offensive or inconsistent with the artist’s philosophy or values.¹¹⁷

On the flip side, project-specific T&Cs (or lack thereof) can also create confusion about purchasers’ rights and potentially even give other projects a competitive edge. Originally, anyone with an Ethereum wallet could claim LarvaLabs’ CryptoPunks at no cost to the purchaser except the gas fees incurred in minting the NFT, but during

114. Toward the end of 2020, Nancy Baker Cahill launched another project entitled *Mushroom Cloud*, continuing the conversation started with *Contract Killers* and expanding on the aspects of engagement that can be facilitated through carefully communicated objectives. Nancy Baker Cahill, *Mushroom Cloud*, AORIST (Nov. 29, 2021, 7:52 PM), <https://perma.cc/W2A4-Y9HZ>. This project not only continued the intense focus on the environment but also pushed the boundaries of the artist-collector relationship. The two main areas on which the articulated intentions focused were the long-term rights to lend and display the work and the engagement of the audience through the dissemination of physical objects. To emphasize the focus on engaging with the audience rather than on creating a binding contract that would serve as the basis for any formal enforcement process, the document was not called a “contract” but a “blueprint” instead. This terminology was also intended to evoke the vocabulary and ethos of the current Web 3.0 community by presenting the document as a building block toward a constructive, community-supported project existence, rather than as a legal document intended to create binding and enforceable commitments. Unfortunately, there was again less appetite for crafting cutting-edge tools for engagement than there was to ensure that sales would not encounter any friction in the marketplace, so the original document was replaced with a more stripped-down version. Thankfully, the broad strokes of the two main structural pillars of the project remain: (1) allowing the artist to display any and all elements of the *Mushroom Cloud* project and create multiple versions for such display purposes (imperative for future museum shows and derivative works) and (2) providing the collector with seven physical objects (inviting them to gift six of the objects to other people as a way of creating a real life network).

115. See, e.g., *The License Project*, OPENSEA, <https://opensea.io/collection/untitled-collection-68153692> (last visited Jan. 15, 2022) (NFTs for which the associated digital assets are JPEG images of text purporting to transfer copyright therein to the NFT purchaser).

116. See Hackatao, *Queens+Kings Terms of Use*, QUEENS + KINGS (Jan. 11, 2022), <https://perma.cc/UNK9-DHGX>. The T&Cs for Milanese duo Hackatao’s recent PFP project—which was launched in collaboration with Sotheby’s and NFT studios and through which collectors acquire avatar NFTs comprised of eight to ten individual traits (i.e., appearance characteristics)—implement a bifurcated license structure. Each avatar can be “hacked” (i.e., removed from the avatar and replaced with other traits through a process of trait NFT purchases or swaps). Upon purchase, collectors obtain a non-commercial license in the avatar image; only upon “freezing” an avatar can the collector exercise rights to make commercial uses of the image thereof.

117. See, e.g., *Terms of Service*, JUNKYARD DOGS, <https://perma.cc/RLU3-WZ4M> (last visited Mar. 23, 2022) (prohibiting use of NFT-associated artwork in connection with racism, hate speech, or pornography); see also Hackatao T&Cs, *supra* note 116, at 5.b. Interestingly, this type of restriction can be seen as effecting a type of protection for the artists that is even broader than VARA and more akin to the *droit moral* systems of European countries such as France, which recognize a “right to respect of the work” (a loose translation of the term *droit moral*) and thereby giving an artist rights to seek to prevent an improper contextualization or decontextualization of a protected work.

the first quarter of 2022, CryptoPunks regularly sold for seven figures each.¹¹⁸ The CryptoPunks project launched without an official set of T&Cs, leading to controversy around which rights were retained by the creators versus transferred to the Punk owners.¹¹⁹ In the wake of that controversy, Yuga Labs' Bored Ape Yacht Club project enjoyed massive sales, perhaps in part due to its comparatively clearer grant of rights.¹²⁰ This market data, while anecdotal, suggests that establishing clear and easy-to-understand T&Cs from the outset can be critical to the success and adoption of the project and can also promote broader goals of marketplace clarity.

However, even assuming that these T&Cs are enforceable, there is a possibility of ambiguity as to which T&Cs ought to take precedence where multiple applicable T&Cs are inconsistent. For example, certain stakeholders' reluctance to honor and prioritize project-specific T&Cs may even affect the NFT project's artistic and conceptual content.

118. See MK Manoylov, *Highest-Ever CryptoPunk Sale Nets \$24 Million*, BLOCK (Feb. 14, 2022), <https://perma.cc/Z5H7-C2AS>; *CryptoPunks*, NONFUNGIBLE, <https://nonfungible.com/market/history/cryptopunks> (last visited Jan. 15, 2022).

119. See Edward Lee, *The Cryptic Case of the CryptoPunks Licenses: The Mystery over the License for CryptoPunks NFTs* (Dec. 6, 2021), <https://perma.cc/J46N-RAE4>. By contrast, LarvaLabs' subsequent project, Meebits, was launched with clear T&Cs in place, providing limited commercial use. See *Meebits Terms and Conditions*, LARVALABS (May 2, 2021), <https://perma.cc/JU3Y-A366>. Notwithstanding questions surrounding rights in CryptoPunks, LarvaLabs signed with prominent Hollywood talent agent UTA in August 2021, presumably to control intellectual property licensing in CryptoPunks for the purposes of adaptation in the film and/or television context. See Alex Weprin, *UTA Signs NFT Art Projects CryptoPunks, Meebits and Autoglyphs (Exclusive)*, HOLLYWOOD REPORTER (Aug. 31, 2021, 8:30 AM), <https://perma.cc/Y79N-37Y6>.

120. See Brady Dale, *Bored Apes' Generous Copyright Approach Besting Stricter CryptoPunks*, DEFIANT (Dec. 7, 2021), <https://perma.cc/G5NH-4X2E>; Alyssa Exposito, *A Tale of Two NFTs: Could Bored Ape Yacht Club Flip CryptoPunks?*, COINTELEGRAPH (Dec. 18, 2021), <https://perma.cc/C5BD-J29M>. See also *Terms & Conditions*, BORED APE YACHT CLUB, <https://perma.cc/MD77-DNTH> (last visited Mar. 23, 2022) (providing a license to produce derivative works and sell commercial merchandise). Although this set of T&Cs has been in existence since the project launch and does include a grant of commercial rights to NFT owners in the particular Ape images corresponding to their purchased tokens, there has still been some marketplace confusion about the breadth of that license, with Yuga Labs apparently drawing the line at use of the BAYC logo by AriZona (the maker of popular iced tea beverages). See Hayward, *supra* note 30. Notwithstanding the AriZona dust-up, the use of individual Ape images has evolved into a project whereby the Ape owners may partner with other "Writer's Room" NFT holders (corresponding to different levels of creative control and other perks) issued by Tally Labs to collaborate in licensing Apes and their newly-invented back stories for an inclusion in a "memoir" written by best-selling author Neil Strauss. See Jeff Wilser, *Neil Strauss Pens the Bored Ape Yacht Club "Tell-All,"* COINDESK (Dec. 13, 2021), <https://perma.cc/NRC6-Q54L>; *The Writer's Room*, JENKINS YACHT VALET, <https://perma.cc/JS73-E9M9> (last visited Mar. 23, 2022). This effort, effectively a crowd-sourced collaboration, represents an extremely novel way to monetize the intellectual property Yuga Labs' terms transfer to Ape owners.

More recently, Yuga Labs acquired CryptoPunks, immediately thereafter announcing (via Twitter) that it would apply a more Bored Ape-like IP model to the Punks (i.e., granting commercial rights to holders). See Lucas Matney, *Bored Apes Maker Yuga Labs Acquires CryptoPunks NFT Collection*, TECHCRUNCH (Mar. 11, 2022) <https://techcrunch.com/2022/03/11/bored-apes-maker-yuga-labs-acquires-cryptopunks-nft-collection/>. How such a structure will be implemented retroactively and what impact that may have on the original creators' entertainment industry uses, remain unknown as of the date of publication.

The White Male Artist (WMA) provides such a cautionary tale.¹²¹ *\$HT Coin* was a performative NFT project that unfolded over the course of a month during which the anonymous White Male Artist dropped NFTs of digital cans of excrement informed by the diets of the top-grossing artists of all time, who all happen to be white men.¹²² Initially, the project was presented as originating from White Male Artist, and a WMA Collector Agreement was linked in the NFT metadata, reflecting the tone and nature of the White Male Artist persona.¹²³ Following a reveal that transgender artist Cassils was the project's creator,¹²⁴ the WMA Collector Agreement was replaced with a new agreement reflecting the true goals and spirit of the project through a "back door" in the NFT coding. Through this performative and unilateral replacement of the terms governing the project, Cassils called into question the claim that NFTs are immutable by showing that it is relatively easy to manipulate the underlying code.¹²⁵

The two versions of the Collector Agreements were intended from the beginning to evolve over the course of the durational performance as a way to illustrate that, without a collector's knowledge, an NFT can contain a mechanism by which the creator can continue to change and alter the metadata comprising the NFT. However, due to the potential conflict between the NFT's embedded terms and the auction house's standard T&Cs, the original Collector Agreements were removed, thus substantially and meaningfully altering a core component of the artwork.¹²⁶

III. SUMMING UP AND LOOKING FORWARD

The NFT world is still evolving and moving at an incredibly quick pace. Because of this, we have observed that standards, best practices, and trending NFT projects

121. WMA's project was inspired by the original work of Piero Manzoni, who famously canned and sold his own excrement as a conceptual art commentary in 1961. See Jesse Damiani, *White Male Artist Wants to Know If You'll Buy His \$HT NFTs*, FORBES (July 19, 2021, 5:00 PM), <https://www.forbes.com/sites/jessedamiani/2021/07/19/white-male-artist-wants-to-know-if-youll-buy-his-ht-nfts/> ("In May 1961, the Italian conceptual artist Piero Manzoni produced a series of 90 works that, collectively, became his breakthrough: *Merda D'Artista*. Known as *Artist's Shit* in English, the work involved the artist canning 30g of his own excrement in a numbered and signed can. Driving home its critique of consumerism and mass consumption, each can's price was correlated to the price of the equivalent weight of gold, which at time amounted to about \$37 USD.")

122. Details about the project can be found at <https://whitemaleartist.com/> [<https://perma.cc/32N7-FJ98>] (last visited Mar. 2, 2022). *\$HT Coin* entailed the artist's daily performance of consuming top-grossing white male artists' diets and minting thirty-five digital cans of shit. Each can represent one artist and details the Internet-documented consumption habits of that white male artist. The details for the dietary sources can be found at *Source References*, WHITE MALE ARTIST, <https://whitemaleartist.com/sources> [<https://perma.cc/7GEH-GKVB>] (last visited Mar. 2, 2022).

123. See Damiani, *supra* note 121.

124. By embodying WMA, Cassils adopted a persona with which they do not identify, in part as a way to observe the frenzy of speculation around the newly visible and influential NFT technology, but also as a way to continue their exploration of the power of identity especially within the context of queer and trans identities which are particularly scarce in the crypto art community.

125. By analogy, the technology's mutability is analogous in many ways to the fluid spectrum of human identity and gender identity specifically.

126. Though not ultimately attached to the NFTs, both agreements can be found at *The Rules of the Game*, WHITE MALE ARTIST, <https://perma.cc/32N7-FJ98> (last visited Mar. 2, 2022).

also change rapidly. Given this environment, the “move fast and break things” mantra repeated by many NFT enthusiasts means that innovation will plow ahead, but it will also almost certainly create collateral damage. The lack of focus on and consideration for artists’ legal rights when minting and selling NFTs will eventually catch up in the marketplace, and creators and consumers will be caught in the tangle. While existing copyright and contract laws that apply to the physical art world apply to the NFT world as well, the pre-existing legal framework does not always appropriately reflect the collaboration that takes place among NFT project creators. Inconsistent and incomplete attempts to apply such established rules to this quickly evolving digital space will continue to cause complications regarding the rights shared or transferred among stakeholders. For now, NFT purchasers must rely on the T&Cs put forth by the primary or secondary marketplace platform or on the T&Cs related to individual NFT projects to attempt to understand the rights they are receiving.

Looking forward, it also remains to be seen when automation approaches to compliance and enforcement will be possible due to the often-nuanced analysis that is needed to detect infringement. Despite the seemingly insurmountable issues that enforcement currently presents, it is likely that existing technology such as artificial intelligence will be improved¹²⁷ and that future technologies will be developed to make automated tracking and infringing content elimination more feasible.

Finally, the opinion of the crypto community should not be underestimated, as it is a strong indication and driver of future behavior. Call-out culture can sometimes create the necessary peer pressure that instigates real—and perhaps more democratic—change within a system that signals a healthy appetite to explore new paradigms for rights allocations, protection, and enforcement. Perhaps a Web 3.0 world’s true appeal includes not only rethinking existing systems but also reconsidering the value that each participant brings to the creative landscape.

As blockchain capabilities evolve and as the platforms creating artist-to-blockchain interfaces become more sophisticated and attuned to these issues, we anticipate that new solutions for crediting and remunerating artists will emerge.¹²⁸ Collaboration and the ability to create automated sharing mechanisms will become crucial means of bringing more equity, diversity, and inclusion to the NFT space. While it is yet to be determined whether current solutions are effective or scalable, they present interesting examples that have already proved to be inspirational to subsequent projects and creators. In the end, we hope that the players building the marketplace architecture will adopt models that respect artists and are financially successful because of this stance, and we also hope that mutually beneficial financial and engagement paradigms continue to emerge.

127. See Artists Rights Society, *The AIR Project*, ARS NEWS + BLOG (June 23, 2020, 3:11 PM), <https://arsny.com/blog/air-project/> (discussing partnership with French sister society ADAGP to develop automatic image recognition based on digital fingerprinting technology to assist in monitoring infringing image uses on the Internet).

128. By the time this Article is published, we expect that there will already be new or further-developed models.