

# **GM! Time to Wake Up and Address Copyright and Other Legal Issues Impacting Visual Art NFTs<sup>1</sup>**

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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 technology. Back in 2018, 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 past 3 years.<sup>3</sup> More telling, the same report notes that the “art world’s adoption of blockchain technology remains slow as convincing user-cases [sic] fail to materialize.”<sup>4</sup> 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 unique works executed in a physical medium, as well as the privacy and/or competitive benefits afforded by relative market opacity.<sup>5</sup>

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<sup>1</sup> 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.

<sup>2</sup> The authors jointly presented at the “NFTs: Future or Fad” Symposium held on November 19, 2021 at the Kernochan Center for Law, Media and the Arts that served as the basis for this article. Each author is grateful to the others for the truly collaborative way that everyone worked together, contributing substantially and equally to both work products. If only all working relationships could be so generous, generative, and engaging! The authors would also like to thank Philippa Loengard, Director and Lecturer in Law, Kernochan Center, for bringing the authors together for the Symposium, as well as to the artists with whom the authors have the privilege to work, whose quest for innovation and creativity provides the foundation for the art world and helps shape the continually evolving art-and-technology landscape.

<sup>3</sup> Hiscox and ArtTactic, *Hiscox online art trade report 2019 3* <https://www.hiscox.co.uk/sites/uk/files/documents/2019-04/hiscox-online-art-trade-report-04-2019.pdf>.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> Zohar Elhanani, *How Data Is Transforming the Art Market and Lowering Its Entry Barriers*, FORBES (November 19, 2018), <https://www.forbes.com/sites/zoharelhanani/2018/11/19/how-data-is-transforming-the-art-market-and-lowering-its-entry-barriers/?sh=172472272416>.

But, like it or not, the art world is being forced to reckon with the metaverse. During the 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.<sup>6</sup> Sales of non-fungible tokens (NFTs) reached around \$3.5 billion in the first three quarters of 2021.<sup>7</sup> Although not a person, ERC-721, which sets forth a standard specification for tokens on the Ethereum-based blockchain, topped ArtReview's annual most influential people in the contemporary artworld list in 2021.<sup>8</sup>

Specifically with respect to NFTs, art world stakeholders appear to be of two camps: some curious and diving in, and others feeling skeptical.<sup>9</sup> 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 hope to 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 will elucidate some considerations and issues that artists face when they decide to mint their work and sell NFTs, as well as concerns that purchasers of NFTs may face. Because the environment is fast-paced and a single set of standards

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<sup>6</sup> Hiscox and ArtTactic, *Hiscox online art trade Report 2021*, 4 [https://www.hiscox.co.uk/sites/default/files/documents/2021-10/21674a-Hiscox\\_online\\_art\\_trade\\_report2021-part\\_one\\_1.pdf](https://www.hiscox.co.uk/sites/default/files/documents/2021-10/21674a-Hiscox_online_art_trade_report2021-part_one_1.pdf).

<sup>7</sup> *Id.* at 28.

<sup>8</sup> Art Review Power 100 (2021), <https://artreview.com/artist/erc-721/?year=2021>.

<sup>9</sup> 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, Instagram stories (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://artreview.com/will-the-artworld-nft-wars-end-in-utopia-or-dystopia/>.

or guidelines has not yet been adopted, we will discuss certain types of terms and conditions that currently govern the sale and use of NFTs. In sharing case studies of recent examples, contracts and projects we have worked on, we hope to provide a snapshot – if fleeting – of the dynamic world of NFTs, as of the end of 2021.

## **B. The NFT Format in the Art World**

To start at the very beginning, an NFT is a unique set of data traded on the blockchain which represents ownership of, or other rights in or to, another asset. The tokenized asset can be digital art, online games, parts for online gaming, tickets, domain names, music files, manga content, or other forms of digital content; physical objects; or digital or physical experiences (including access to a physical space).<sup>10</sup> In practical terms, a work such as Beeple’s *Every Days: the First 5000 Days* (2021) is represented online as a collage of 5,000 digital images created by the artist for his *Everydays* series, 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.<sup>11</sup>

Typically – and with notable exceptions (such as in the case of ASCII-based artworks<sup>12</sup>) – the package of files comprising a NFT does *not* contain the media file for

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<sup>10</sup> Pinar Caglayan Aksoy and Zehra Ozkan Uner, *NFTs and copyright: challenges and opportunities*, 16 J. INTELL. PROP. L. & PRAC. 1115, 1118 (2021).

<sup>11</sup> The visual asset commonly known as *CryptoPunk 4156* can be viewed along with LarvaLabs’ identification of its attributes and market tracking information at <https://www.larvalabs.com/cryptopunks/details/4156>; the underlying code to for the token’s smart contract can be viewed at <https://etherscan.io/address/0xb47e3cd837ddf8e4c57f05d70ab865de6e193bbb#code>.

<sup>12</sup> For an explanation of this art medium employing standard printable characters from the ASCII character set, see ASCII Art Archive, *ASCII Art FAQ* <https://www.asciart.eu/faq> (last visited Jan. 15, 2022). The authors wish to acknowledge time-based media specialist Regina Harsanyi for identifying this type of artwork as includable within an actual token’s code, during a Clubhouse conversation in early 2021.

the associated asset.<sup>13</sup> It does, however, contain any written code that executes commands under pre-set conditions – a so-called “smart contract.”<sup>14</sup>

Thus, at a very basic level, the NFT is simply the underlying code written to evidence the existence and non-fungibility of an associated asset, as well as to enable the recording of the transfer of ownership of that asset or rights in or to the asset (including, without limitation, 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 *a/so* to the asset to which the token relates (particularly when that asset is a digital artwork).<sup>15</sup>

This representation is a unique way to think about ownership of a seemingly intangible asset but is not necessarily a new concept in the art world. Arguably, the NFT format is just an enhanced type of (or distribution channel for) new media art. There are many digital artists, including Shigeko Kubota<sup>16</sup> and Jennifer and Kevin McCoy,<sup>17</sup> who have consistently attempted to incorporate new media into their artistic practice. Further, NFTs are often compared to digital certificates of authenticity on the blockchain. Other notable examples of conceptual artwork for which ownership and/or

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<sup>13</sup> 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,” at <https://ipfs.io/>), a distributed file system and peer-to-peer network, or arweave (at <https://www.arweave.org/>), a decentralized blockchain data storage protocol. 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.

<sup>14</sup> The term “smart contract” is somewhat misleading as applied to the technical structure of NFTs. “Smart contracts” contain the metadata controlling the transaction of NFTs, but generally not much more information. See, e.g., Joel Ferree, Jeffrey Blair, and Sarah Conley Odenkirk, *NFTs and the Museum Part 2: Legal Issues for Acquisitions*, LACMA UNFRAMED (Aug. 30, 2021), <https://unframed.lacma.org/2021/08/30/nfts-and-museum-part-2-legal-issues-acquisitions>.

<sup>15</sup> See Alfred ‘Dave’ Steiner, *The Paper It’s Printed On: NFTs, Ownership and Conceptual Art* (December 30, 2021), at 4 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3997352](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3997352).

<sup>16</sup> ERICA PAPERNIK-SHIMIZU, SHIGEKO KUBOTA, AND GLORIA SUTTON, SHIGEKO KUBOTA: LIQUID REALITY (Museum of Modern Art, New York, 2021).

<sup>17</sup> JENNIFER AND KEVIN MCCOY, <https://www.mccoyspace.com/> (last visited Jan. 15, 2022).

authenticity of at-times intangible, or otherwise non-distinguishable, assets are evidenced by a certificate, include Felix Gonzalez-Torres' candy spills<sup>18</sup> and Yves Klein's *Zones of Immaterial Pictorial Sensibility*<sup>19</sup>.

Other similarities exist between the growing NFT community and the traditional legacy art world. Unfortunately, structural similarities are identified, including the concentration of turnover volume at the upper echelons of the markets, and the lack of female-presentation representation in both spaces. In tracking NFT sales in the primary and secondary market on the Nifty Gateway platform across an almost two-year period as of November 2021, ArtTactic notes that 55% of the sales, representing a turnover of about \$260 million, stemmed from 5% of the artists on the platform, representing a total of only 16 artists.<sup>20</sup> Within this group of 16, the only female-presenting creator was Grimes.<sup>21</sup> Male-presenting artists accounted for 77% of tracked sales, while female-

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<sup>18</sup> *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 Jan. 15, 2022).

<sup>19</sup> In this series of artwork, Yves Klein sold certificates that were purchased with gold. A buyer could then trigger a performative ritual where Klein would throw away 50% of the gold, and the buyer would burn their certificate. See YVES KLEIN ARCHIVE, *Transfer of a "Zone of Immaterial Pictorial Sensibility" to Michael Blankfort, Pont au Double, Paris, February 10, 1962*, <http://www.yvesklein.com/en/oeuvres/view/640/transfer-of-a-zone-of-yyimmaterial-pictorial-sensibility-to-m-blankfort-pont-au-double-paris/> (last visited Jan. 15, 2022).

For an NFT art project inspired by Klein's work, see Mitchell F. Chan, *Digital Zones of Immaterial Pictorial Sensibility*, *Blue Paper* (August 2017), <https://github.com/mitchellfchan/IKB/blob/master/Digital-Zones-Of-Immaterial-Pictorial-Sensibility-Blue-Paper.pdf>, describing Chan's proposal to tokenize a shade of blue, and allow the purchaser of the NFT to remove the token from circulation, and in doing so, 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 from Oct. 17-25, 2021, for a hammer price of \$1.25M. See SOTHEBY'S METAVERSE, *Lot 10: Mitchell F. Chan, Digital Zone of Immaterial Pictorial Sensibility (Series 0. Edition 10), 2017*, [https://metaverse.sothebys.com/natively-digital/lots/digital\\_zone\\_of\\_immaterial\\_pictorial\\_sensibility](https://metaverse.sothebys.com/natively-digital/lots/digital_zone_of_immaterial_pictorial_sensibility) (last visited Jan. 15, 2022).

<sup>20</sup> Art Tactic, *NFT Art Market Report* (November 2021), <https://arttactic.com/product/nft-art-market-report-november-2021/>. See also Anny Shaw, *Not so metaverse: women account for just 16% of NFT art market*, THE ART NEWSPAPER (Nov. 3, 2021), <https://www.theartnewspaper.com/2021/11/03/not-so-metaverse-women-account-for-just-16percent-of-nft-art-market>.

<sup>21</sup> While Grimes is most certainly a well-known and interdisciplinary creator, some may argue that she is not a fine artist.

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As analyses of similarities and differences between the crypto space and the broader art world develop, arts writer Tim Schneider notes that the two worlds appear to be parallel at best, or, perhaps even diametrically opposed when analyzing the way that pricing and market-making occur in the two communities.<sup>23</sup> Artist, art historian, and NFT creator Kenny Schacter describes the relationship between the two worlds as “combatants, adversaries, fearful, hesitant, doubtful, leery, covetous of the money, fearful of ceding control.”<sup>24</sup> Therefore, it remains to be seen how these two communities will continue to converge or be adjacent to one another.

## 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 1976 Copyright Act (the “Act”) and related case law remains the applicable framework to understand the exclusive copyright interests afforded to creators of digital artworks associated with NFTs (as well as to the creators of protectible computer code comprising the actual 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

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<sup>22</sup> Anny Shaw, *Not so metaverse: women account for just 16% of NFT art market*, THE ART NEWSPAPER (Nov. 3, 2021), <https://www.theartnewspaper.com/2021/11/03/not-so-metaverse-women-account-for-just-16percent-of-nft-art-market>; see also the Artnet NFT 30 (December 15, 2021), [https://media.artnet.com/image/upload/v1639499700/2021/12/THE\\_ARTNET\\_NFT\\_30\\_qdfyc4.pdf](https://media.artnet.com/image/upload/v1639499700/2021/12/THE_ARTNET_NFT_30_qdfyc4.pdf) (including only where 11 either female-identifying or non-binary-identifying persons are within the top 30 NFT market stakeholders selected).

<sup>23</sup> For Schneider’s opinion about the worlds being 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://news.artnet.com/news-pro/gray-market-nftnyc-metaverse-2029366>. For Schneider’s analysis of the worlds being opposed, see *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://news.artnet.com/news-pro/nft-miami-art-week-gray-market-2042440>.

<sup>24</sup> Interview with Shionoiri, conducted in a private Discord message on or around December 29, 2021.

otherwise communicated, either directly with or with the aid of a machine or device.”<sup>25</sup> In this way, the alphanumeric code underlying the token itself may be afforded a thin layer of copyright.<sup>26</sup> Where a digital artwork asset that is represented by a token also exists in fixed tangible form (as a natively digital work or a digitized work originally created in another medium), it may be separately copyrightable, provided it is sufficiently original.<sup>27</sup>

On the one hand, the transfer of 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 – similar to 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.<sup>28</sup> On the other hand, the minting and selling of NFTs still brings with it a variety of legal risks for artists. And 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.

Failing to fully consider and articulate which rights travel with the NFT – versus which are maintained by the creator – 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); claims

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<sup>25</sup> 17 U.S.C. § 102.

<sup>26</sup> See *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983) (clarifying that binary code is copyrightable).

<sup>27</sup> See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 904 (3d ed., 2014), <https://www.copyright.gov/comp3/chap900/ch900-visual-art.pdf> (noting that a visual artwork can be fixed in a digital file format).

<sup>28</sup> 17 U.S.C. § 102.

sounding in false designation of origin or appropriation of goodwill;<sup>29</sup> uncertain display rights (which could impact loans or gifts to museums); and the assessment and enforceability of rights to resale royalties (which can lead to unrealistic expectations of receiving future profits).<sup>30</sup>

## 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 generative NFT artwork.<sup>31</sup> 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.<sup>32</sup> The creative expression of generative artwork is fixed in a tangible medium, so the artwork itself is copyrightable. A potential question that may arise, however, is whether the original artist who created the algorithm can claim the resulting work, or whether the algorithm can claim

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<sup>29</sup>See Andrew Hayward, *Arizona Ice Tea's Bored Ape Brand Use Was 'Inappropriate,' Creators Warn*, DECRYPT (Aug. 23, 2021), <https://decrypt.co/79231/arizona-iced-tea-bored-ape-nft-brand-use-inappropriate>.

<sup>30</sup> 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 (Sep/Oct 2021), <https://drive.google.com/file/d/1QpkONiIW-QtMIBBlgWnNjSpKS2fYBBW/view>. The efficient format offers a streamlined solution for addressing the lack of substance found in "smart contracts."

<sup>31</sup> ART BLOCKS, <https://www.artblocks.io/> (last visited Jan. 15, 2022).

<sup>32</sup> The Shrimpy Team, *What Is Art Blocks? The Generative Art NFT Platform Explained*, SHRIMPY ACADEMY (November 17, 2021), <https://academy.shrimpy.io/post/what-is-art-blocks-the-generative-art-nft-platform-explained>.

ownership. Because only humans can claim copyright under the U.S. copyright law,<sup>33</sup> the authors believe that generative art has analogies to past conceptual practice, where 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 (or derivatives) of the artist's original artwork.

## **2. Collaboration and the Moral Right of Attribution**

Regarding the artist right of attribution, two solutions have emerged: incorporating a notice of rights in the data fields and descriptions included in the NFT metadata; and/or associating separate written material that clearly articulates expectations pertaining to attribution (and/or other terms pertaining to the NFT).<sup>34</sup> The practical questions then become 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, in a manner that encourages compliance, and (iii) how to pursue enforcement should the need arise.

NFT projects often still give rise to complicated issues around who is recognized as the "author" for copyright purposes. The concept of "authorship" may be improperly tied to attribution and/or to compensation (*i.e.*, revenue share). While the question of how to properly value, compensate, and credit collaborators in creative endeavors was not invented by Web 3.0 proponents,<sup>35</sup> these conflicts are being raised in a somewhat

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<sup>33</sup> *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).

<sup>34</sup> See *supra* discussion at Section II.3.C. (discussing Project-Specific Terms & Conditions). Such an articulation of rights may take the form 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 *supra* note 13.

<sup>35</sup> To the contrary, the tensions created by artists failing to credit or include acknowledgement for 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 for generations.

different context, including a rising 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 by bringing 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 do, especially if the final product resulting from the project has not yet been fixed. The nature of the NFT ecosystem therefore necessitates growth and innovation in this area.

Collaboration in the creation of NFTs raises potential issues at different points. 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 do we 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 as the work is being created: is one of the creators hiring the others in a work for hire situation,<sup>36</sup> or are they truly partnering<sup>37</sup> in creating the NFT asset? It also depends on the contributing parties’ objectives for the creative work or the project more generally. Sometimes it is crediting or revenue share that takes

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<sup>36</sup> If the intention is for a dominant contributor to truly commission components to fulfill his/her/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 U.S. Copyright Office, Circular 9, *Works Made for Hire*, <https://www.copyright.gov/circs/circ09.pdf> (last visited Jan. 15, 2022) (enumerating nine categories of possible works made for hire as prepared pursuant to a special order or commission).

<sup>37</sup> If the intention is for collaborators to reserve independently-exercizable 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.

priority, and either can be granted with or without affecting the underlying copyright ownership; 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.

And just as contemporary, emerging, and otherwise-still-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 has fallen into the public domain, technically, anyone can reproduce the image of the original work and issue it in such a digital form.<sup>38</sup> 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 a NFT from a public domain work. Re-examining artist intent is significant, including by asking questions probing the artist's experimentation with new media during their lifetime, and determining if the artist had a preference as to whether their work could be transferred to a different media if the original medium they used became obsolete.<sup>39</sup>

### **3. Derivative versus 'Fair' Use of NFT-Associated Artwork**

Assuming that a particular NFT-associated artwork is copyrightable, the potential

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<sup>38</sup> Museums have begun selling NFTs of works in their permanent collections that are in the public domain. See, e.g., THE BRITISH MUSEUM, *LaCollection, The Gallery*, <https://lacollection.io/artworks/590000> (last visited Jan. 15 2022) (offering for sale editioned NFTs of reproductions of images by Katsushika Hokusai, the original copy of which is dated 1800s-1810s).

<sup>39</sup> The Warhol Foundation received some critical feedback when it minted and sold 5 NFTs with associated high resolution TIFF images; the original version was created by Warhol using a now-obsolete program called ProPaint, resulting in images saved to a 1.4 MB floppy disk. 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://news.artnet.com/market/andy-warhol-nft-christies-1971474?artnet-logout-redirect=1>.

for unauthorized copying is especially high in an international marketplace where different jurisdictions apply different default rules and standards in the absence of specific assertions of rights or grants of licenses. For example, Japan has a narrowly prescribed fair use concept that integrating a fair use standard similar to that recognized in the United States might be untenable.<sup>40</sup> Similar concerns exist with regard to the ability of Korea's legal system to support fair use standards similar to the United States given the current limited legal precedent.<sup>41</sup> On the other end of the spectrum, there are jurisdictions such as Canada and Sri Lanka that potentially apply a much broader fair use standard than in the United States.<sup>42</sup> 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 alone, fair use precedent – particularly in the visual art and tech spaces – continues to evolve, and not necessarily in a consistent manner. The U.S. Supreme Court's decision in a fair use dispute between a software platform and a technology company<sup>43</sup> decision seems to suggest that a media shift in and of itself could

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<sup>40</sup> 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 comprehensive analysis of international fair use standards and the commentary provided on the same by the International Intellectual Property Alliance); see also INTELL. PROP. ALL., 2009 SPECIAL REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 301, 383, [https://www.iipa.org/files/uploads/2018/01/2009\\_Special\\_301.pdf](https://www.iipa.org/files/uploads/2018/01/2009_Special_301.pdf) (opposing proposal to adopt fair use in Japan given that "it would be extremely difficult to integrate this common-law doctrine into a civil law copyright system such as Japan's") (hereinafter, "IPA SPECIAL REPORT"); Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, Vol. 1 U. ILL. L.J. 111 (2019).

<sup>41</sup> IPA SPECIAL REPORT at 295 note 14 (expressing 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"), cited in 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).

<sup>42</sup> *Id.*, citing to IPA SPECIAL REPORT at 85-86 (objecting to Canadian Supreme Court's adoption and application of open-ended exceptions modeled on fair use), 595 (calling on Sri Lanka to narrow its copyright exceptions and limitations, including fair use, to make clear that they comport with the three-step test).

<sup>43</sup> *Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183, 1203 (2021).

justify a finding of fair use. By comparison, the opinion from the more recent *Warhol v. Goldsmith*<sup>44</sup> case seems to suggest that in the visual arts context where the purpose of the use of the artwork is the same (in this case both the Warhol painting and underlying photograph were portraits of Prince), such use does *not* qualify as fair use.<sup>45</sup> In its decision, the Second Circuit indicated its desire to narrow the application of “transformative” 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.<sup>46</sup>

#### **4. Enforcement**

Even where a secondary user acknowledges access to a creative work and copying seems likely, an infringement analysis (*e.g.*, evaluating “substantial similarity”) may prove challenging for practical reasons. 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.<sup>47</sup>

Moreover, enforcement of artist rights on the blockchain is complicated. While

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<sup>44</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021).

<sup>45</sup> *Id.* at 40.

<sup>46</sup> *Id.* 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)).

<sup>47</sup> Similarly, anecdotal market data suggests it is uncommon for the creators or other rights-holders in the visual assets used for large-volume PFP projects to seek registration in the copyrights for individual images prior to project launch. Commencing lawsuit in relation to a large-scale infringement would require such registrations to have been filed and a Copyright Office determination to have been rendered with respect thereto. *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC, et al.*, 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.

the rules of the Digital Millennium Copyright Act (the “DMCA”)<sup>48</sup> still apply, it is not possible to entirely remove infringing content. A takedown notice may result in a marketplace’s removal of the sale listing of a *token* associated with the allegedly-infringing content, but the NFT can easily and anonymously be offered for sale elsewhere,<sup>49</sup> and the separately-hosted content may persist in the same separately-hosted location outside the marketplace’s reach.<sup>50</sup> Theoretically, if there were a lawsuit and the alleged infringer lost, the court could order that the infringing NFT(s) be “burned.”<sup>51</sup> But 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.<sup>52</sup> Thus, the already difficult “whack-a-mole” situation existing for

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<sup>48</sup> 17 U.S.C. §§ 512, 1201-1205, 1331-32; 28 U.S.C. § 4001. See also United States Copyright Office, The Digital Millennium Copyright Act of 1998: U.S. Copyright Office summary (Dec. 1998), <https://www.copyright.gov/legislation/dmca.pdf> (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).

<sup>49</sup> Perhaps the most publicized example to date is the Cryptophunks, a project that bills itself as a “punk” version of CryptoPunks. The instigators of Cryptophunks took the successful PFP project, CryptoPunks, (which are simplistic, pixelated heads of 10,000 uniquely generated characters all oriented with their heads facing to the right <https://www.larvalabs.com/cryptopunks#>) and simply flipped the exact characters to face the left. 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>.

<sup>50</sup> 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, *supra* note 13, poses a particular enforcement challenge since the data comprising a single asset may be stored across many nodes, by anonymous users in different jurisdictions.

<sup>51</sup> 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, 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.

<sup>52</sup> 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, Beeple’s infamous *5000 EveryDays* was the target of a so-called “sleep-minting” scheme, whereby a “hactivist” (*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*

the online infringement that was the original target of DMCA regulation is only exacerbated in the NFT marketplace.

## **B. Copyright Questions Impacting Purchaser and/or Other Third-Party Rights**

### **1. “First Sale” 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.<sup>53</sup> This is true even if the original file is deleted upon sale, because the transfer of a digital file necessarily creates an unauthorized reproduction thereof.<sup>54</sup> Arguably, however, the reasoning used to prohibit the copying of digital music files at issue in *ReDigi* 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).<sup>55</sup>

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 which has 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

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*of That \$69 Million Beeple Revealed the True Vulnerability of the NFT Market (and Other Insights)*, Artnet News (April 21, 2021) <https://news.artnet.com/opinion/sleepminting-nftheft-monsieur-personne-1960744>.

<sup>53</sup> *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018), *cert. denied*, 139 S.Ct 2760 (2019).

<sup>54</sup> *Id.* at 655-60.

<sup>55</sup> 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, updated Aug. 12, 2021), <https://www.nytimes.com/2021/05/12/magazine/nft-art-crypto.html>.

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.<sup>56</sup>

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,<sup>57</sup> and the purchaser of an NFT artwork has the right to own and privately enjoy that work.<sup>58</sup>

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<sup>56</sup> 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 work 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/control to the NFT purchaser upon request. See OpenSea listing, [https://opensea.io/collection/andywarholspantrytokens?embed\[0\]=%2798991%2A97996%2A98991%2A97996&embed\[1\]=stryking](https://opensea.io/collection/andywarholspantrytokens?embed[0]=%2798991%2A97996%2A98991%2A97996&embed[1]=stryking) (last visited Jan. 15, 2022).

<sup>57</sup> See 17 U.S.C. § 106(5).

<sup>58</sup> Presumably in recognition of such perceived private display rights of purchasers, 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), [https://medium.com/@pierce\\_85676/nifty-gateway-releases-nft-display-for-open-beta-2c84ce793a3c](https://medium.com/@pierce_85676/nifty-gateway-releases-nft-display-for-open-beta-2c84ce793a3c); Chris Welch, *Samsung promises ‘groundbreaking’ new TV feature: NFT support*, THE VERGE (Jan. 2, 2022), <https://www.theverge.com/2022/1/2/22858698/samsung-2022-tvs-nft-support-announced-cryptocurrency>.

However, unlike with the purchase of artworks in physical form, it is not at all clear that the “public display” language of Section 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 13; see also Steiner, *supra* note 15, at 10.

However, potential challenges arise if an owner of a NFT “lends”<sup>59</sup> the work for public display, and as third-party services emerge offering opportunities for peer-to-peer sharing of NFT collections. If lending or sharing the NFT entails the owner transferring the NFT to the borrower’s wallet for the temporary exhibition period, then, likely there is no issue. On the other hand, if in lending or sharing the NFT artwork a copy is made, the right of reproduction may be potentially violated.<sup>60</sup> These issues are of clear and immediate concern for museums, if collectors and donors wish to lend or donate NFTs into museum collections, and museums will need to have clear policies identifying how they will manage such property.

Moreover, museums have traditionally taken the position that the creation of digital copies for the purpose of creating an index of works or providing educational information to the public falls within the fair use doctrine.<sup>61</sup> 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, these legal questions should be carefully considered by artists and institutions alike alongside other

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<sup>59</sup> What “lending” even 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 – or on the other end of the spectrum, simply obtaining and displaying a .jpeg file from the owner of the token (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 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).

<sup>60</sup> See Simon J. Frankel, *What Copyright Lawyers Need to Know About NFTs*, BLOOMBERG LAW (July 16, 2021) <https://news.bloomberglaw.com/ip-law/what-copyright-lawyers-need-to-know-about-nfts>

<sup>61</sup> See also Association of Art Museum Directors, *Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums* (Oct. 11, 2017), <https://aamd.org/sites/default/files/document/Guidelines%20for%20the%20Use%20of%20Copyrighted%20Materials.pdf>.

developing questions such as those around insurance and valuation.<sup>62</sup>

## 2. **Resale Royalties**

The concept of implementing contractual terms protective of artists' moral rights and/or economic rights (including an interest in revenue from downstream sales) is not new: the original artists' rights contract was developed by Seth Siegelau and Robert Projansky over 40 years ago.<sup>63</sup> Despite the enthusiastic support of many artists for certain concepts underlying its drafting, the Siegelau/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.<sup>64</sup> 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. However, in stark contrast to the laws of European countries where resale royalties are an expected part of doing business in the art market,<sup>65</sup> the United States has never successfully implemented, at the state or federal

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<sup>62</sup> See Ferree, Blair, and Odenkirk, *supra* note 14; see also Leila Amineddoleh, Alana Kushnir, Megan Noh, and Yayoi Shionori, *From Black Boxes to Open Systems: NFTs and the Law*, RHIZOME (panel presentation, Jun. 7, 2021), <https://vimeo.com/563722573> (discussing display rights and continued hosting obligations); Megan Noh, *Brave New Media: Collector Risks in Relation to the Insurability and Valuation of NFTs*, Deloitte Art Finance Report 2021 at 304, <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-art-finance-report-2021.pdf>.

<sup>63</sup> See PRIMARY INFORMATION, *Siegelau / The Artist's Reserved Rights Transfer and Sale Agreement* (1971), <https://primaryinformation.org/product/siegelau-the-artists-reserved-rights-transfer-and-sale-agreement/> (last visited Jan. 15, 2022).

<sup>64</sup> A few artists have successfully used the Siegelau/Projansky contract (Hans Haacke for example), 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, 2016), <https://hyperallergic.com/172688/could-a-long-forgotten-contract-settle-the-resale-royalties-debate/> (noting Haacke's usage).

<sup>65</sup> Laurel Wickersham Salisbury, *It's Not That Easy: Artist Resale Royalty Rights and The ART Act*, CENTER FOR ART LAW (July 1, 2019), <https://itsartlaw.org/2019/07/01/its-not-that-easy-artist-resale-royalty-rights-and-the-art-act/>.

level, a workable resale royalties law,<sup>66</sup> and contracts with resale royalty-type provisions are not yet used as a matter of course<sup>67</sup> 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 royalty of 10% to 20% of resale proceeds, paid automatically to an artist's digital wallet (coded into the NFT's underlying smart contract) 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 afforded by European *droit de suite*, under which royalties are calculated as a percentage of net profit.<sup>68</sup>

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. There is currently no way to guarantee that, even if a marketplace is transacting with compatible cryptocurrency, the terms of the "smart

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<sup>66</sup> H.R. 1881, American Royalties Too Act of 2015 (114<sup>th</sup> Congress); CAL. CIV. CODE § 986; *see also Est. 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).

<sup>67</sup> *But see* Virginia Rutledge, Megan Noh, Andrea Crane, Destinee Ross-Sutton, Jean-Paul Engelen, *Navigating Market Control: Resale Provisions in Art Contracts* (presentation at New York County Lawyers' Association, Oct 15, 2020), <https://vimeo.com/user27287947/review/477576012/3e120e9f09>; 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://news.artnet.com/market/say-loud-show-christies-1901685>.

<sup>68</sup> 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, these terms are being accepted by galleries and collectors. Time will tell whether there will be substantial adherence to these terms when works make their way back to market and how enforcement will be achieved outside of the most public (*i.e.*, auction house) transactions.

contract” created on a different platform will be recognized and the payment of resale royalties will be automatically triggered.<sup>69</sup> 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 such as Sudoswap.<sup>70</sup>

### **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”)<sup>71</sup> as set forth by various platforms in the NFT marketplace are one way that scaffold how these stakeholders envision rights affixed to NFTs. Artists may offer NFTs in the “primary” market through “drops” through traditional auction houses,<sup>72</sup> on dedicated NFT platforms,<sup>73</sup> and/or through hybrids of the two,<sup>74</sup> and their work may also

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<sup>69</sup> *But see* Zach Burks, James Morgan, Blaine Malone, and James Siebel, *EIP-2981: NFT Royalty Standard*, ETHEREUM IMPROVEMENT PROPOSALS (Sep. 15, 2020), <https://eips.ethereum.org/EIPS/eip-2981> (proposing “standardized way ... to enable universal support for royalty payments across all NFT marketplaces and ecosystem participants”); Foundation Support, *How do royalties work with secondary market sales on OpenSea?*, <https://help.foundation.app/en/articles/5455321-how-do-royalties-work-with-secondary-market-sales-on-opensea> (last visited Jan. 15, 2022) (noting inter-platform agreement to respect royalties for NFTs minted on either platform).

<sup>70</sup> SUDOSWAP, <https://sudoswap.xyz> (last visited Jan. 15, 2022).

<sup>71</sup> Platforms also use the term “Terms of Service” and these terms (*i.e.*, Terms of Service and Terms and Conditions) refer to the generally-applicable terms and conditions governing actions taken on a website or platform.

<sup>72</sup> 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 custodizing 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 SOTHEBY’S | METAVERSE, <https://metaverse.sothebys.com/> (last visited Jan. 15, 2022).

<sup>73</sup> SuperRare, Foundation, NiftyGateway, and Makersplace are, at the time of this article’s writing, prominent examples of such marketplaces.

<sup>74</sup> Several auction houses have presented NFT sales in collaboration with dedicated NFT platforms, through which the NFTs being offered may be curated by the auction house but the transactions are handled (*i.e.*, tokens custodied and payment processed) by the platform, and/or through which marketing is undertaken jointly; see, *e.g.*, SOTHEBY’S, *The Fungible Collection by Pak* (Apr. 12-14, 2021), <https://www.sothebys.com/en/digital-catalogues/the-fungible-collection-by-pak> (sale in collaboration with

trade on the “secondary” market (*i.e.*, when re-sold by a collector who previously acquired it) through the same venues.<sup>75</sup>

The rapid adoption by venerable auction houses 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 the careers of emerging artists.<sup>76</sup> While auction house participation in the NFT marketplace has arguably lent significant credibility and has contributed to an increase in both traditional collector and mainstream interest in NFTs, 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 multiplicity of different intellectual property rights structures resulting from the lack of standardization of T&Cs governing these transactions. For the purposes of this article, three main categories of such T&Cs will be discussed, 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).

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NiftyGateway); BONHAMS, *CryptOGs: The Pioneers of NFT Art* (Jun. 21-30, 2021), [https://www.bonhams.com/online\\_auctions/27285/](https://www.bonhams.com/online_auctions/27285/) (sale in collaboration with SuperRare).

<sup>75</sup> 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.*, CHRISTIE’S, *No Time Like the Present* (Sep. 17-28, 2021), <https://onlineonly.christies.com/s/no-time-present/lots/2097> (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)).

<sup>76</sup> Rather, that responsibility has often fallen to gallerists, who may be the driving force in the promotion of an artist’s talent, cultivate collector interest therein (*i.e.*, a market therefor), 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. As a result, typically an artist’s primary sales are gallery sales or sales directly from the artist’s studio, and auction sales take place only as secondary sales.

## 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.<sup>77</sup> 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 other sale marketing materials, and/or continue to display an image of the work for ongoing/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 work<sup>78</sup> may appropriately be considered independently-copyrightable derivative works, and what rights the auction house secures therein.

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<sup>77</sup> 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, and/or a broad transferable/sub-licensable license therein. The default model for an acquisition of physical artwork is that no such assignment or license is extended.

<sup>78</sup> 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!* (*Physical/Digital: A Modern Diptych*), as included in Sotheby's *Contemporary Art Day Auction* (Oct. 15, 2021), <https://www.sothebys.com/en/buy/auction/2021/contemporary-art-day-auction-4/radio>), an auction house may be engaging in sufficiently creative activity when it composes, lights, and captures an image of the property.

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 extended by auction houses to NFT purchasers is either relatively narrow,<sup>79</sup> or is non-existent.<sup>80</sup> The narrow construction tends to give a NFT purchaser equivalent rights to those that the purchaser of a physical artwork would obtain under Section 109 of the Act (i.e., public display and first sale), and/or under case law precedent recognizing reproduction and display in furtherance of the owner's resale of the purchased artwork as a fair use.<sup>81</sup>

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 Section 109 to digital artworks.<sup>82</sup> 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.<sup>83</sup>

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<sup>79</sup> As of November 2021, one auction house's T&C 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.”

<sup>80</sup> As of November 2021, another auction house's T&C 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.” Still 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.”

<sup>81</sup> See *supra*, discussion at Section II.B.1.

<sup>82</sup> *Id.*, note 58.

<sup>83</sup> It should also be noted that several major auction houses' T&C do not clearly recognize that a purchase of an NFT actually denotes corresponding *ownership* of the particular copy of the associated digital 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 – seemingly antithetical to the purpose of NFTs.

## 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 to give the platform extensive use rights, and arguably may extend to uses by the platform that generate revenue (albeit indirectly or less directly than, e.g., the sale of NFTs).<sup>84</sup> Such an incoming license may even permit the platform to modify or alter the creator's content.<sup>85</sup>

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Moreover, as of the time of drafting this article, only one auction house actually warrants the authenticity of the associated digital artwork (with the others instead warranting the authenticity of the *token itself* – which can be verified, but for which in many instances the “author” does not correspond to the “author” of the associated artwork, since artists may engage developers or similar technology providers to code the smart contracts governing the actual tokens). Both of these issues merit consideration as to further changes to the auction house contract models currently in circulation, again in promotion of greater marketplace clarity and standardization.

<sup>84</sup> See, e.g., Foundation T&C at <https://foundation.app/terms> (“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).

<sup>85</sup> See, e.g., NiftyGateway T&C at <https://niftygateway.com/terms> (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 Group, ESPN, Inc. et al.*, No. 09-cv-1601-MMA (POR), 2010 WL 2634695 (S.D. Cal. Jun. 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*

Platform outgoing licenses are typically expressly restrictive of commercial use,<sup>86</sup> but inclusive of language providing rights equivalent to both the first sale and “fair use in support of first sale” rights.<sup>87</sup> 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,<sup>88</sup> and/or enumerating certain forms of reproduction required for resale such as the re-listing of an NFT-associated artwork on another NFT marketplace website.<sup>89</sup> These more nuanced permitted uses reflect a greater understanding than perhaps typical of auction house

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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 artist to expressly waive moral rights to the fullest extent permissible by law, see MakersPlace T&C sec. 5.c. at <https://makersplace.com/terms/>, 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/users of the platform (and not other third-parties). See SuperRare T&C at <https://www.notion.so/SuperRare-Terms-of-Service-075a82773af34aab99dde323f5aa044e>. Clearly the application of moral rights in the digital context will continue to evolve, although it remains to be seen whether that evolution will be through contract and marketplace norms alone, or by aid of statutory intervention.

<sup>86</sup> See, e.g., Foundation T&C, supra note 81 (“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.

<sup>87</sup> See, e.g., SuperRare T&C (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).

<sup>88</sup> See, e.g., Foundation T&C (providing display right for use in “*decentralized virtual environments, virtual worlds, virtual galleries, virtual museums, or other navigable and perceivable virtual environments*”); and SuperRare T&C (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).

<sup>89</sup> See, e.g., SuperRare T&C (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”); and Foundation T&C (providing display right “on third party marketplaces, exchanges, platforms, or applications in association with an offer to sell, or trade, the Digital Artwork”).

T&C with respect to the growing place of NFTs within a larger Web 3.0 context or ethos.

### 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&C to consider the unique objectives of the project as well as the specific technology of the project tokens and/or the of the surrounding marketplace or wider landscape. For example, project-specific T&Cs may expressly condition reproduction/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 artwork in question was associated.<sup>90</sup> Other projects may blur the lines between the contract and the artwork, such as the 2014/15 artwork “Is Art” by pioneering new media artist Rhea Myers, comprised of an Ethereum decentralized application with enabling the controller thereof to toggle between states designating the contract itself as art (or not art).<sup>91</sup>

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 project<sup>92</sup> is perhaps the

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<sup>90</sup> See, e.g., Dapper Labs, NFT License 2.0 (last revised Nov. 5, 2018), <https://www.nftlicense.org/> (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”).

<sup>91</sup> See Rhea Myers, *Is Art*, <https://rhea.art/is-art> (last visited Jan. 15, 2022). Mitchell F. Chan’s *Digital Zones of Immaterial Pictorial Sensibility*, *supra* note 19, could also be discussed in this category of conceptual, contract-oriented works.

<sup>92</sup> See <https://www.cryptokitties.co/terms-of-use> (adapted from NFT License 2.0) see also Tonya AM. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 AIPLA Q.J. 219 (2019).

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 which is extremely uncommon (if not nonexistent) in the traditional art market, and speaks to the sentiment of some digital creators that the metaverse 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,<sup>93</sup> thereby seeking to modify and/or supplement the same. 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.<sup>94</sup> The project-specific T&C sought to clarify use rights for this unique, functional asset, and accordingly provided for administrative privileges in a 3D file then-hosted by a supporting VR platform, as well as 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 (and/or still images thereof, such as “screen caps”) on VR platforms and NFT marketplaces, subject to a required credit line.<sup>95</sup> Perhaps most radically, the project-specific T&C also overtly signaled the creators’ collaborative spirit,

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<sup>93</sup> See, e.g., Kevin McCoy, *Quantum* (2014-21), as sold in and subject to the T&C of Sotheby’s *Natively Digital: A Curated NFT Sale* (June 10, 2021), <https://www.sothebys.com/en/buy/auction/2021/natively-digital-a-curated-nft-sale-2/quantum>, with the auction lot cataloguing expressly linking to McCoy’s separate Rights Agreement, identified within the token code as being hosted at <https://ipfs.io/ipfs/QmRWhsnDKBwWDozDgDp8Te25KDVidcfz83zDs7ykR1x995/Quantum%20Rights%20Agreement.pdf>.

<sup>94</sup> See Cyril Lancelin and Benny Or, *The Meeting Place*, as offered on and subject to the platform T&C of SuperRare, <https://superrare.com/artwork-v2/the-meeting-place-30351> (last visited Jan. 15, 2022), which cataloguing expressly links to “Supplemental Terms and Conditions Applicable to Sale of the Meeting Place” (last revised Nov. 15, 2021), available at [drive.google.com/file/d/1Lg\\_38Tp9AACPo0wZBYY\\_EIYEi7gPgJcZ/view?usp=sharing](https://drive.google.com/file/d/1Lg_38Tp9AACPo0wZBYY_EIYEi7gPgJcZ/view?usp=sharing).

<sup>95</sup> *Id.* at paragraphs 5, 7.

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.<sup>96</sup>

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.”<sup>97</sup> Each NFT in the project contains a document articulating the full range of responsibilities and remedies for both artist and collector.<sup>98</sup> The contract addresses issues of copyright ownership and the responsibilities of collectors to participate in the care and maintenance of the NFT.<sup>99</sup> Unable to solve the problem of

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<sup>96</sup> *Id.* at paragraph 7.

<sup>97</sup> The project, minted on the environmentally friendly Tezos blockchain, was born out of a concern both for the quick shift away from 2020’s scrutiny on systemic exclusion and social justice, as well as the lack of attention the quickly burgeoning NFT market was then paying to the environmental impact of blockchain. *Contract Killers* consists of four different dissolving 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. Nancy Baker Cahill, *Contract Killers*, as originally dropped through SNARK.ART, <https://snark.art/contract-killers> (last visited Jan. 15, 2022).

<sup>98</sup> “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.” Sarah Conley Odenkirk, *Contract Killers Agreement*, <https://ipfs.io/ipfs/QmVeYVi1Quqq1J2hd1aTWq4uwYSy6hj5UkSgXgGwKinr1P> (last visited Jan. 17, 2022).

<sup>99</sup> *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

enforcement given current technological restrictions, *Contract Killers* offered a positive reinforcement system instead, rewarding those who chose to comply with the artist's clearly-articulated wishes with additional NFTs.<sup>100</sup>

Peter Wu+'s EPOCH Gallery project<sup>101</sup> is a rare project that managed to create a genuinely collaborative work "on chain,"<sup>102</sup> and illustrates an equitable solution to some of the thorny collaboration and co-authorship issues previously raised. As the founder of EPOCH, 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: a collaboration agreement between EPOCH and the included artists, and another agreement with the collector. In addition, the project, which is built on the Algorand blockchain, has a custom "smart contract" that

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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.").

<sup>100</sup> *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.").

<sup>101</sup> EPOCH GALLERY, *Replicants* (Oct. 9, 2021-Jan. 14, 2022), <https://epoch.gallery/>.

<sup>102</sup> "On chain" refers to transactions that are verified and registered on a blockchain. This 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 then 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, and 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, making the artwork itself stored "off chain." See *supra* note 56 for more discussion as to the actual location of associated artwork.

allows for multiple royalty distributions to all the participating artists so that every transaction benefits EPOCH, as well as all included artists.<sup>103</sup> 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 conflict principles, etc.). 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 in furtherance of greater collaboration, understanding, or marketplace parity among those stakeholders,<sup>104</sup> or on being – in and of themselves – a site for exploration

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<sup>103</sup> As noted above, 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., <https://help.foundation.app/en/articles/5305276-how-can-i-create-a-split-on-foundation> (last visited Jan. 17, 2022).

<sup>104</sup> Toward the end of 2020, Nancy Baker Cahill launched another project entitled *Mushroom Cloud*, continuing the conversation started with *Contract Killers*, but expanding on the aspects of engagement that can be facilitated through carefully communicated objectives. This project continued the intense focus on environment, but also pushed the boundaries of the artist-collector relationship. The two main areas on which the articulated intentions focused were on the long-term rights to lend and display the work; and the engagement of the audience through the dissemination of physical objects. To clarify that the document was about engaging with the audience rather than creating a binding contract that would serve as the basis for any formal enforcement process, the document was not called a "contract," but rather "a blueprint." 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 a legal document intended to create binding and enforceable commitments. Unfortunately, again, there was less appetite for crafting cutting-edge tools for engagement than there was for ensuring 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: (i) 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 (ii) 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. Nancy Baker Cahill, *Mushroom Cloud*, as released through AORIST (Nov. 29, 2021), <https://collect.aorist.art/releases/9>.

of the norms of artists' rights and intellectual property law in the context of NFTs or, more broadly, the digital evolution.<sup>105</sup> Still other T&Cs provide for the collector's participation in the artistic process,<sup>106</sup> or establish "ground rules" restricting certain uses by a purchaser that might be offensive or inconsistent with the artist's philosophy or values.<sup>107</sup>

On the flip side, project-specific T&C (or lack thereof) can also create confusion about purchasers' rights and potentially even give other projects a competitive edge. LarvaLabs' CryptoPunks – originally claimable by anyone with an Ethereum wallet at no cost except gas fees and over the last months, regularly selling for seven-figures each<sup>108</sup> – launched without an official set of T&Cs, leading to controversy around what rights were retained by the creators versus transferred to the Punk owners.<sup>109</sup> In the

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<sup>105</sup> See, e.g., *The License Project*, <https://opensea.io/collection/untitled-collection-68153692> (last visited Jan. 15, 2022) (NFTs for which associated digital assets are JPEG images of text purporting to transfer copyright therein to the NFT purchaser).

<sup>106</sup> The T&C for Milanese duo Hackatao's recent PFP project, launched in collaboration with Sotheby's and NFT studios, 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. See Hackatao, *Queens+Kings Terms of Use* (last revised Jan. 11, 2022), <https://queenskings.hackatao.com/terms-of-use>, paragraphs 6-8.

<sup>107</sup> See, e.g., Junkyard Dogs T&C at <https://junkyarddogs.io/tos> (prohibiting use of NFT-associated artwork in connection with racism, hate speech, or pornography); see also Hackatao T&C, *supra* note 106, 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, loosely translated, a "right to respect of the work" (thereby giving an artist rights to seek to prevent an improper contextualization or decontextualization of a protected work).

<sup>108</sup> See NONFUNGIBLE, *NFT Market History*, CryptoPunks, <https://nonfungible.com/market/history/cryptopunks> (last visited Jan. 15, 2022).

<sup>109</sup> See Edward Lee, *The Cryptic Case of the CryptoPunks Licenses: The Mystery over the License for CryptoPunks NFTs* (Dec. 6 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3978963](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978963). By contrast, LarvaLabs' subsequent project, Meebits, was launched with clear T&C in place, providing limited commercial use. See LarvaLabs, *Meebits Terms and Conditions* (last updated May 2, 2021) <https://meebits.larvalabs.com/meebits/termsandconditions>.

Notwithstanding questions surrounding rights in CryptoPunks, LarvaLabs signed in August 2021 with prominent Hollywood talent agent UTA, presumably to control licensing of intellectual property in the CryptoPunks for the purposes of adaptation in the film and/or television context. See Alex Weprin, *UTA*

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).<sup>110</sup> 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.

Even assuming the enforceability of these T&Cs, however, we see that there is a possibility for ambiguity as to which T&Cs ought to take precedence in the case of inconsistency between multiple applicable T&Cs. For example, the reluctance of certain stakeholders to honor and prioritize the applicability of project-specific T&Cs may even impact and affect the artistic and conceptual content of the NFT project.

The White Male Artist Project (“WMA”) provides such a cautionary tale.<sup>111</sup> WMA

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*Signs NFT Art Projects CryptoPunks, Meebits and Autoglyphs (Exclusive)*, THE HOLLYWOOD REPORTER (Aug. 31, 2021 8:30am), <https://www.hollywoodreporter.com/business/digital/uta-cryptopunks-nft-film-tv-vieo-games-1235005392/>.

<sup>110</sup> See Brady Dale, *Bored Apes' Generous Copyright Approach Besting Stricter CryptoPunks*, The Defiant (Dec. 7, 2021), <https://thedefiant.io/bored-apes-yacht-club-cryptopunks-copyright-fight/>; Alyssa Exposito, *A tale of two NFTs: Could Bored Ape Yacht Club flip CryptoPunks?*, COINTELEGRAPH (Dec. 18, 2021), <https://cointelegraph.com/news/a-tale-of-two-nfts-could-bored-ape-yacht-club-flip-cryptopunks>.

See also <https://boredapeyachtclub.com/#/terms> (providing license to produce derivative works and sell commercial merchandise). Although this set of T&C 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 29.

Notwithstanding the AriZona dust-up, the use of individual Ape images has evolved into a project whereby the Ape owners may partner with the holders of other “Writer’s Room” NFTs (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://www.coindesk.com/layer2/2021/12/13/neil-strauss-pens-the-bored-ape-yacht-club/>; Jenkins Yacht Valet, <https://www.jenkinsthevalet.com/> (last visited Jan. 15, 2022). This effort, effectively a crowd-sourced collaboration, represents an extremely novel way to monetize the intellectual property Yuga Labs’ terms transfers to Ape owners.

<sup>111</sup> WMA was inspired by the original work of Piero Manzoni, who famously canned and sold artists’ shit as a conceptual art commentary in 1961. See Jesse Damiani, *White Male Artist Wants To Know If You’ll Buy His \$HT NFTs*, FORBES, Jul 19, 2021, 5:00pm EDT, <https://www.forbes.com/sites/jessedamiani/2021/07/19/white-male-artist-wants-to-know-if-youll-buy-his-ht-nfts/?sh=2142f30238eb> (“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

was a performative NFT project that unfolded over the course of a month with the anonymous White Male Artist dropping NFTs of digital cans of excrement based on the diets of the top-grossing artists of all time, which happen to all be white men.<sup>112</sup> 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. Following the reveal that it was in fact transgender artist Cassils who was the artist and creator of the project,<sup>113</sup> the WMA Collector Agreement was replaced through a “back door” in the NFT coding with a new agreement to reflect the true goals and spirit of the project. 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 easily to manipulate the underlying code.<sup>114</sup>

The two versions of the Collector Agreements were intended from the beginning to evolve over the course of the durational performance as a way of illustrating 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 of the NFT’s embedded terms with the auction house’s standard

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its critique of consumerism and mass consumption, the price of each can was correlated to the price of the equivalent weight of gold, which at the time amounted to about \$37 USD.”).

<sup>112</sup> Details about the project can be found at <https://whitemaleartist.com>. The WMA project entailed the daily performance of the artist consuming the diets of top-grossing white male artists, and minting 35 digital cans of shit. Each can represents one artist and details the internet-documented consumption habits of that white male artist. The details for the dietary sources can be found here: <https://whitemaleartist.com/sources>.

<sup>113</sup> 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/trans identities which are particularly scarce in the crypto art community.

<sup>114</sup> By analogy, of course, the mutability of the technology is analogous in many ways to the fluid spectrum of human identity, and gender identity specifically.

T&Cs, the original Collector Agreements were removed, thus substantially and meaningfully altering a core component of the artwork.<sup>115</sup>

### **III. Summing Up and Looking Forward**

As discussed in our article, 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 also rapidly change. 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 legal rights of artists 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, this pre-existing legal framework does not always appropriately reflect the collaboration that takes place among creators of NFT projects. 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 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 discern infringement. Despite the seemingly insurmountable issues enforcement currently presents, however, it is likely that existing technology such as

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<sup>115</sup> Though not ultimately attached to the NFTs, both agreements can be found in the “Rules of the Game” section on <https://whitemaleartist.com/>.

artificial intelligence will be improved,<sup>116</sup> and future technologies will be developed to make automated tracking and elimination of infringing content more feasible.

Finally, the opinion of the crypto community should not be underestimated as a strong indication and driver of 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 the true appeal of a Web 3.0 world 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 the interface between artists and the blockchains become more sophisticated and attuned to these issues, we anticipate and expect that new solutions for crediting and remunerating artists will emerge.<sup>117</sup> Collaboration and the ability to create automated mechanisms for sharing will become a crucial means for 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 that mutually beneficial financial and engagement paradigms continue to emerge.

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<sup>116</sup> See Artists Rights Society, *The AIR Project*, ARS NEWS + BLOG (Jun. 23, 2020 3:11pm), <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 internet).

<sup>117</sup> By the time that this article is published, we expect that there will already be new or further developed models.