



Mine? Yours? Theirs? What are the copyright implications of NFTs?

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What are NFTs?

"Blockchain-based NFTs (Non-Fungible Tokens) are uniquely identifiable digital *representations* of physical or digital items. Usually, the tokens are indivisible into smaller units. NFTs represent structured metadata referring to physical or digital objects. The tokens represent a separate identifier and are often not tied to the objects. Their proponents claim they further the interoperable commercialisation of digital or physical goods." (Idelberger & Mezei, 2022, forthcoming)



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

Source: https://knowyourmeme.com/photos/2268067-nft-non-fungible-token-crypto-art



"So you can't own the precious physically, but you can pay to have your name listed as its owner in an online distributed database."

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What are NFTs?

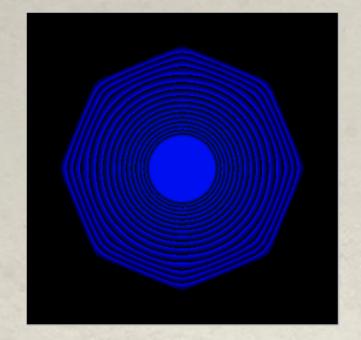
What's the Importance of Non-Fungible Tokens?

There are many reasons. A non-fungible token (NFT) is unique and can represent any digital asset on the Ethereum blockchain, thus making it scarce, provable, and valuable. The advent of NFTs have created a new medium for artists and creators to showcase their creations or collections. In turn, a revolution is paving the way for artists to create and monetize their work while collectors have full transparency into the authenticity and provenance into their purchases.

NFT assets can take the form of digital art, collectibles, a creative extension of music, a synergy between all three, or entirely new and unexplored compositions. Creators continue to push the boundaries of creativity using NFTs, adapting them in new and innovative ways.

Source: https://blog.portion.io/the-history-of-nfts-how-they-got-started/

Recreating Europe From Quantum, Rare Pepe and Nyan Cat...



Kevin McCoy: Quantum (2014) https://blog.portion.io/the-history-of-nfts-how-they-got-started/ Nakamoto Rare Pepe collectible card

https://opensea.io/assets/0x82c7a8f707110f5fbb16184a5933e9f78a34c6ab/2152031



Nyan Cat https://f8n-production.s3.amazonaws.com/creators/profile/c8gley51s-nyan-cat-large-gif-gifmbf1sa.gif



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To born-digital art and sports collectibles (fandom)...

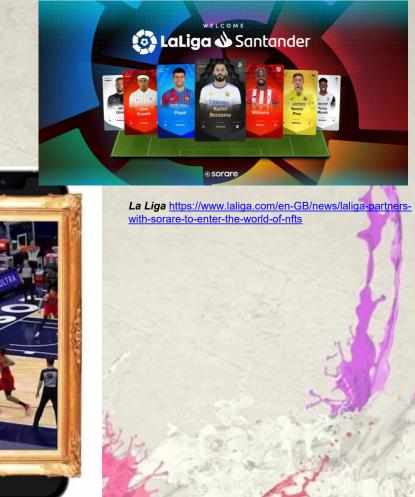


Beeple: Everydays: The First 5000 Days (2020) https://gadgets.ndtv.com/internet/news/beeple-nft-buyer-auctionmetakovan-metapurse-usd-69-million-digital-artwork-christies-winningbid-reveal-first-5000-days-2389849



Beeple: Crossroad – Biden Win (2020) https://www.artsy.net/artwork/beeple-crossroad-biden-win

> NBA Top Shots NBA Videos via https://www.theverge.co m/22348858/nba-nft-topshot-dapper-labs





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Andres Guadamuzz (https://www.technol



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To collectible avatars (PFPs)...

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And digital museums and galleries...



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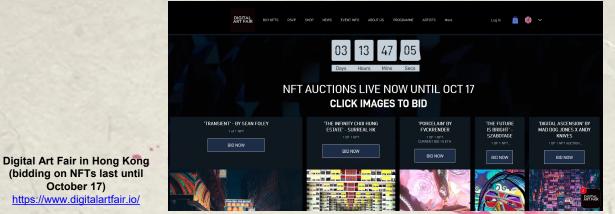
Binance https://www.binance.com/en/blog/421499824684902408/nft/binance-nftmarketplace-to-feature-tokenized-art-including-leonardo-da-vinci-from-thestate-hermitage-museum

October 17)



Patrons of the art dealership Unit London looking at a digital replica of Leonardo da Vinci's "Portrait of a Musician," in Unit's "Eternalizing Art History" exhibition. Justin Tallis/Agence France-Presse - Getty Images

Scott Reybrun: Museums Are Cashing In on NFTs, The New York Times, March 25, 2022 https://www.nytimes.com/2022/03/25/arts/design/museumsnfts.html?

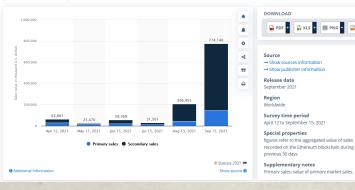


Galerie Nagel Draxler's booth art Art Basel 2021. Photo: Simon Vogel https://news.artnet.com/market/nfts-art-basel 2011438/amp-page



Economic realities...

Total value of sales involving a non-fungible token (NFT) in the art sector worldwide over the previous 30 days from April 12 to September 15, 2021 (in 1.000 U.S. dollars)





Statista (2021) https://www.statista.com/statistic s/1235263/nft-art-monthly-salesvalue/



Barabásilab via NYT https://www.nytimes.com/2021/05/07/opinion/ nft-art-market.htm



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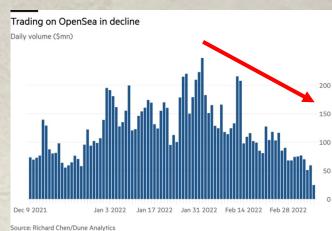
Mike Isaac: OpenSea valued at \$13.3 billion in new round of venture funding, *The New York Times*, January 4, 2022 (https://www.nytimes.com/2022/01/04/business/opensea-13-billion-valuation-venture-funding.html).

Daily Business Briefing >

OpenSea valued at \$13.3 billion in new round of venture funding.

The blockchain start-up, one of the most talked about in Silicon Valley, said on Tuesday that had it raised \$300 million in new venture capital.





© FT

Miles Kruppa, Cristina Criddle and Tim Bradshaw: The great NFT sell-off: has the digital collectibles craze hit its peak?, Financial Times, March 10, 2022 (https://www.ft.com/content/46349496-790a-4223-8c65-d6a0bde897bc)

BREAKING | Jan 20, 2022, 06:30am EST | 13 017 views

NFTs Shatter Monthly Trading Record With \$4 Billion In Sales—Here's Why They're Still Booming Despite The Crypto Crash

Jonathan Ponciano: NFTs Shatter Monthly Trading Record With \$4 Billion in Sales – Here's Why They're Still Booming Despite the Crypto Crash, *Forbes*, January 20, 2022 (<u>https://www.forbes.com/sites/jonathanponciano/2022/01/20/nfts-shatter-monthly-</u> trading-record-with-4-billion-in-sales-heres-why-theyre-still-booming-despite the-crypto-

crash/?sh=4fdf3f637910)



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Major copyright issues...

- Work? Author?
- Moral rights?
- Copyfraud?

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- Economic rights: Making available to the public? Sale? Distribution? Resale royalty?
- Acquisition of what? (Copyright v. contract law)
- Platform liability?
- Not to be addressed today: limitations & exceptions; collective rights management; registration of works; jurisdiction; digital preservation.





Major copyright issues - #1 Subject matter

- Work? Authorship?
 - Not the token, but the content behind the token!
 - Originality needed
 - CJEU case law: from Infopaq to Brompton Bycicle: "author's own intellectual creation" + "personal touch"
 - Automated content generation?

Andres Guadamuz: NFTs could have a generative art copyright problem, TechnoLlama, February 19, 2022 (<u>https://www.technollama.co.uk/nfts-could-have-a-generative-art-copyright-problem</u>)



Crypto Punks Christie's / Larva Labs via https://www.theverge.com/2021/5/11/22430254/cryptopunks-christies-sale-larva-labs



 The most successful NFTs today–CryptoPunks, Art Blocks, Bored Ape Yacht Club, Meebits, and VeeFriends–all rely on randomly generated art that creates thousands of NFTs, typically by randomly changing some features on a simple character, such as a person or animal. (For an explanation, see our blog on Pudgy Penguins.)

Source: https://nounft.com/2021/09/06/nft-factories-how-randomly-generated-nfts-10000-per-collection-have-taken-over-



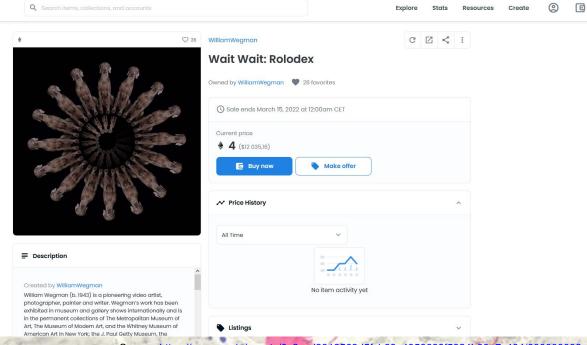


Major copyright issues - #2 Moral rights

 No harmonization in the EU = moral rights for authors & performer are questions of national law (paternity, integrity, first publication)

🕗 OpenSea

- All are applicable for NFTs
 - technologically neutral rights
 - provable and interoperable metadata



Source: https://opensea.io/assets/0x2ecd9318569d5fcb68e4958688f5324b33e7c484/60000002



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Major copyright issues - #3 Copyfraud



Riah Pryor: 'May the image rights be with you': Artists claim Art Wars sold NFTs linked to their designs for Stormtrooper helmets without their permission, *The Art Newspaper*, November 23, 2021 (https://www.theartnewspaper.com/2021/11/23/artists-claim-artwars-sold-nfts-linked-to-their-art-for-millions-allegedly-without-theirpermission)

ROC-A-FELLA Sues Damon Dash ... TO STOP NFT SALE OF 'REASONABLE DOUBT'

EXCLUSIVE f 743 9 6/18/2021 6:06 PM PT



#FreeHawaiiPhoto by Cath Simard. Source: https://www.technollama.co.uk/the-interface-between-nfts-and-thepublic-domain

> Kal Raustiala and Chris Srigman: Guest Column: Tarantino vs. Miramax - Behind the NFT 'Pulp Fiction' Case, and Who Holds the Advantage, *The Hollywood Reporter*, November 24, 2021 (https://www.hollywoodreporter.com/business/digital/tarantinomiramax-pulp-fiction-nft-1235052378/)

Guest Column: Tarantino vs. Miramax — Behind the NFT 'Pulp Fiction' Case, and Who Holds the Advantage

Big-name players are likely to come to blows over NFTs sooner rather than later, and often there's no clear contractual language to determine rights.

BY KAL RAUSTIALA, CHRIS SPRIGMAN NOVEMBER 24, 2021 6:55AM



ADVERTISEMENT

Source: https://www.tmz.com/2021/06/18/roc-a-fellarecords-sues-damon-dash-jay-z-reasonable-doubt-nftnon-fungible-token-auction-copyright-lawsuit/

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Major copyright issues - #4 Economic rights

- NFTs → pointer → hyperlink → on-demand → Making available to the public
- No ownership over intangibles → No sale → No distribution
- No resale royalty, but alternative means of remuneration
 - Typically, 10% share of "resale" price to the creator →
 - No need for a 3-years grace period;
 - Not only works "resold" by art professionals are covered;
 - No minimum "resale" price needed;
 - Higher share than the gradually shrinking resale royalty (from 4 or 5 to 0,25%)
 - No maximum remuneration;
 - No authors (subject matter) is excluded.
 - Already in March 2021: 36% of "sales" were "resales".

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Major copyright issues - #5 Acquisition of what?

- **Peer-to-peer:** no transfer of ownership; no license! But acquisition of authenticity \rightarrow also a contract!
- **NFT v. offline:** in the lack of transfer of ownership over the copyright protected work via the sale of NFTs, the rightholder controls the offline uses!
 - But L&Es also apply (including quasi-L&Es, e.g. hyperlinking and the second sec
 - Except if such flexibilities are lawfully excluded via EULAs (via co
- **Platform v. user:** is it lawful to share tokenized platform GUI? \rightarrow EULAs!

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The unauthorized and infringing copy can be found at: https://opensea.io/collection/official-v1-punks
This letter is official notification under Section 512(c) of the Digital Millennium Copyright Act (*DMCA*), and we seek the removal of the aforementioned infringing material from your servers and take down of the site. I request that you immediately notify the infringer of this notice and inform them of their duty to remove the infringing material immediately, and if when notify them to cease any further posting of infringm gmaterial to your server in the future.
Please also be advised that law requires you, as a service provider, to remove or disable access to the infinging materials upon receiving this notice. Under US haw a service provider, such as investigate and recitly oroging copyright infingement. If service providers do not investigate and remove or disable the infinging material this immunity is lost. Therefore, in order for you to remain immune from a copyright infingement at loss you will need to investigate and unmouse form a copyright infingement at favor you will need to investigate and utilinately remove or otherwise disable the infinging material from you servers with all due speed should the direct infinger, your client, not comply immediately.
I am providing this notice in good faith and with the mascnable belief that rights my company owns are balog infininged. Under yeahly of perjury I certify that the Information contained in the notification is both true and accurate, and I have the authority to act on behalf of the owner of the copyright(s) involved. Should you wish to discuss this with me please contact me directly.
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Major copyright issues - #6 Platform liability

- Are NFT platforms OCSSPs or not?
 - Certainly "content sharing service providers", but not OCSSPs
 - Compare to recital 62 of the CDSM Directive → <u>excluded</u> from the scope of the Directive: "online marketplaces" and "open source software development and sharing platforms"
- InfoSoc Directive + E-Commerce Directive
 - Liability stands for active contribution to copyright infringements of users (compare to CJEU's YouTube/Cyando judgment) → BUT empirical data shows NFT platforms are rather "passive" (Bodó et al., forthcoming)
 - Hyperlinking case law of the CJEU (esp. GS Media) are applicable
 - Safe harbors apply (for hosting contents)
 - Keep your eyes on the <u>DSA</u>!

Mind the gap!

- Born-digital art, digital art collections and collectibles
- Participatory culture
 - for digital natives
 - express political opinions
- Web3 / NFT = word of the year (at Collins Dictionary)
- Existing business models... (traditional and online marketplaces)
- But not a real business for everyone...
 - Number of active accounts in March 2022: 194,000 (that is a global number!)
 - Investments in NFTs decreased as the war in Ukraine started
- And fraud charges, NFT seizures, NFT sales suspensions...



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teens-money/?amp=true



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NFT of Ukraine's flag backed by a member of sy Riot has raised over \$6.7 million for the intry's defenses as cryptocurrency donations itinue to flood in following the Russian invasion.	Web 1
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cryptocurrency donations flood into Ukraine following the Russian invasion, NFT of the Ukrainian flag has raised over \$6.7 million for the country's) AM · Mar 3, 2022 · SocialFlow purce: Twitter (https://twitter.com/CNN/status/1499	323749459447809)
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Thanks for your audience!



mezei.peter@szte.hu





Recommended Readings

Bodó, B., Giannopoulou, A., Quintais, J. P., & Mezei, P. (2022). The Rise of NFTs: These Aren't the Droids You're Looking For. *European Intellectual Property Review*, 44(5) (forthcoming) <u>https://ssrn.com/abstract=4000423</u>

Gibson, J. (2021). The thousand-and-second tale of NFTs, as foretold by Edgar Allan Poe. *Queen Mary Journal of Intellectual Property*, 11(3), 249–269.

Guadamuz, A. (2021). The Treachery of Images: Non-fungible Tokens and Copyright. *Journal of Intellectual Property Law & Practice*, 16(12), 1367-1385.

Idelberger, F., & Mezei, P. (2022). Non-fungible tokens. *Internet Policy Review*. Glossary of decentralised techno social systems - 2021 edition (forthcoming)

Lapatoura, I. (2021). Creative digital assets as NFTs: a new means for giving artists their power back? *Entertainment Law Review*, 32(6), 169-172.

Moringiello, J. M., & Odinet, C. K. (forthcoming). The Property Law of Tokens. *Florida Law Review* (forthcoming)

Pinto-Gutiérrez C and others, 'The NFT Hype: What Draws Attention to Non-Fungible Tokens?' (2022) 10 *Mathematics* 335