



Mine? Yours? Theirs?

What are the copyright implications of NFTs?

Dr. habil. Péter Mezei, PhD, Associate Professor
University of Szeged, Faculty of Law and Political Sciences (Hungary)

Adjunct Professor (dosentti), University of Turku (Finland)

Visiting Professor, Université Jean Moulin Lyon III (France)

Member of the Hungarian Copyright Expert Board

Member of the European Copyright Society

The nominee member of the Unified Patent Court's Advisory Committee



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)

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.”



What are NFTs?

What's the Importance of Non-Fungible Tokens?

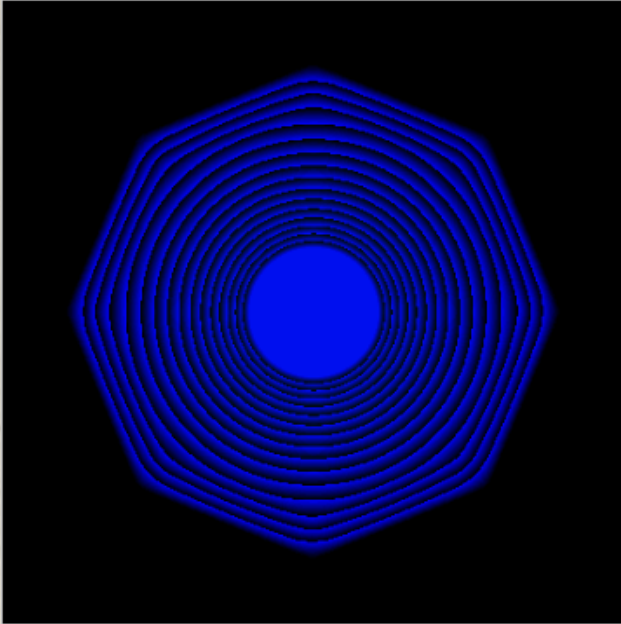
There are many reasons. A non-fungible token (NFT) is unique and can represent any digital asset on the Ethereum blockchain, thus making it scarce, provable, and valuable. The advent of NFTs have created a new medium for artists and creators to showcase their creations or collections. In turn, a revolution 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/>



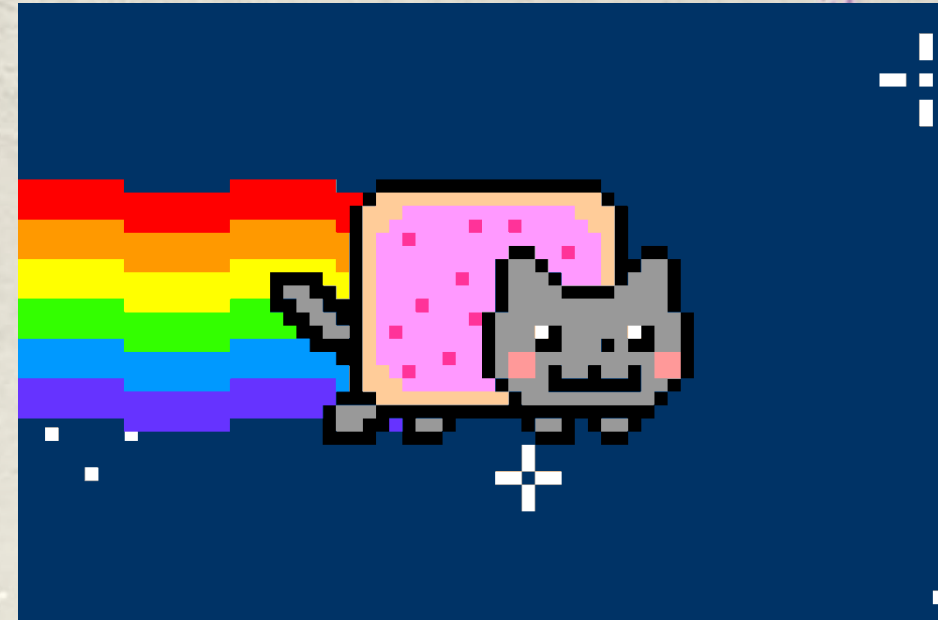
From Quantum, Rare Pepe and Nyan Cat...



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>

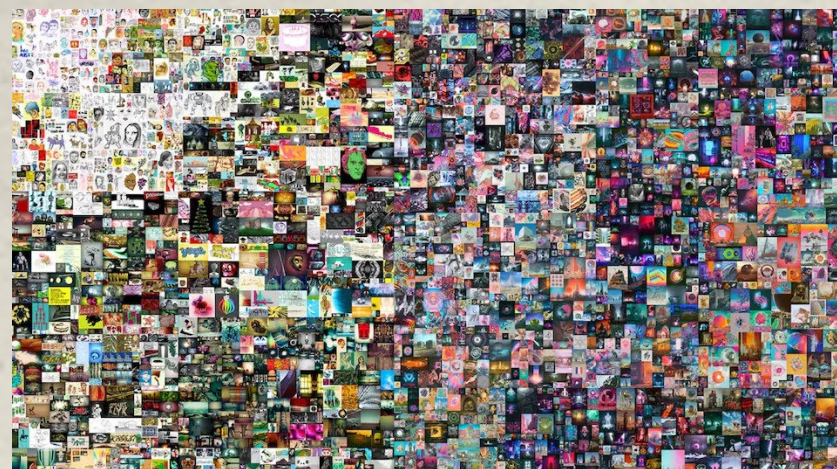


Nyan Cat

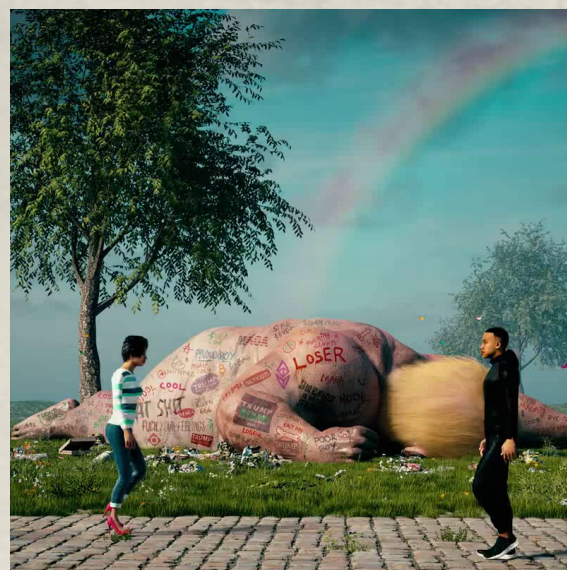
<https://f8n-production.s3.amazonaws.com/creators/profile/c8gley51s-nyan-cat-large-gif-gif-mbf1sa.gif>



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



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



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

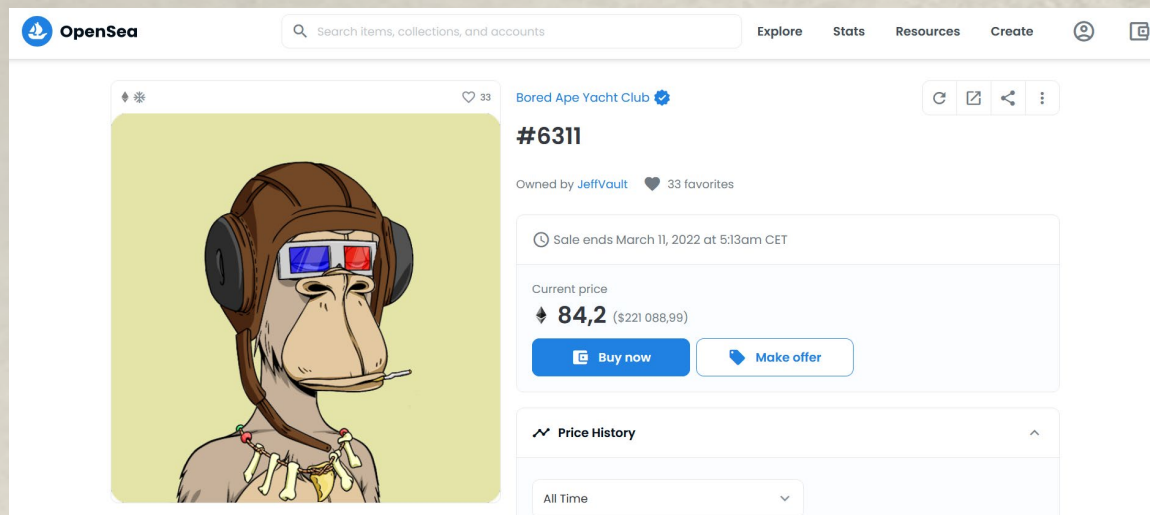
NBA Top Shots
NBA Videos via
<https://www.theverge.com/22348858/nba-nft-top-shot-dapper-labs>



La Liga <https://www.laliga.com/en-GB/news/laliga-partners-with-sorare-to-enter-the-world-of-nfts>

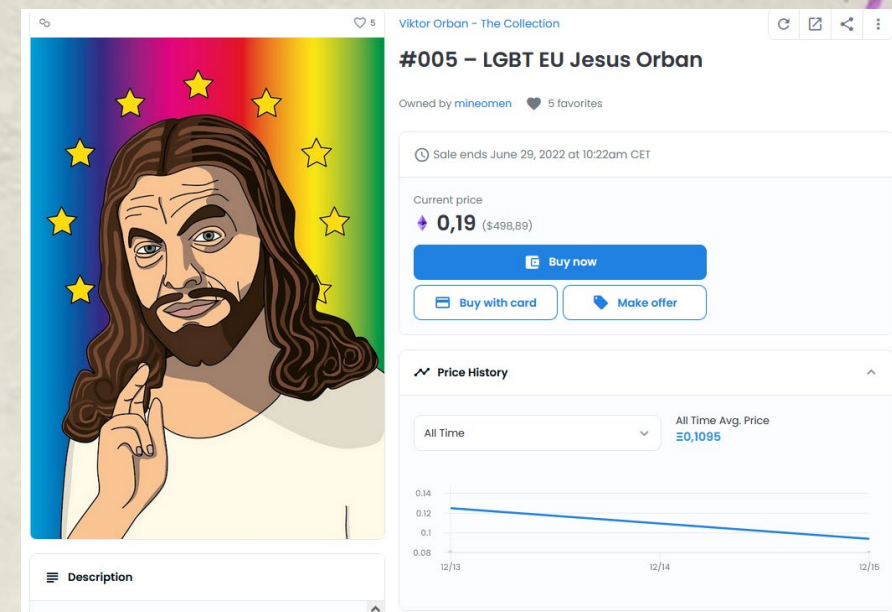


To collectible avatars (PFPs)...



Source: **OpenSea**

(<https://opensea.io/assets/0xbc4ca0eda7647a8ab7c2061c2e118a18a936f13d/6311>)



Source: **OpenSea**

(<https://opensea.io/assets/matic/0x2953399124f0cbb46d2cbacd8a89cf0599974963/95529254593112144780090531727274498215759590913312364221094218960806130745345>)

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





And digital museums and galleries...



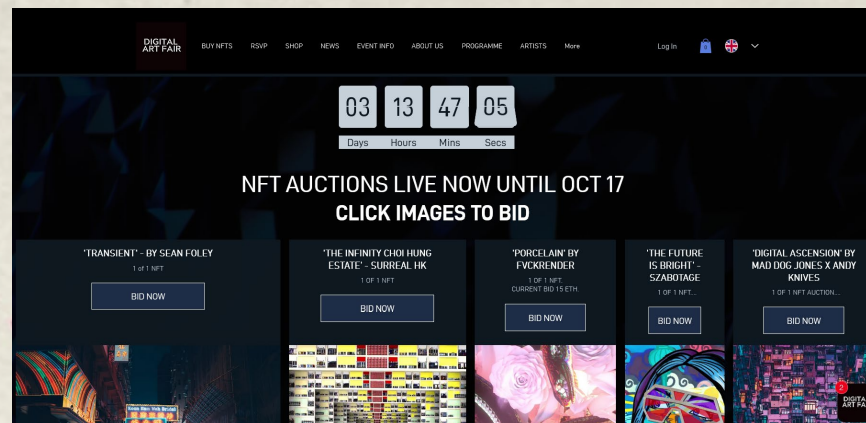
Binance

<https://www.binance.com/en/blog/421499824684902408/nft/binance-nft-marketplace-to-feature-tokenized-art-including-leonardo-da-vinci-from-the-state-hermitage-museum>



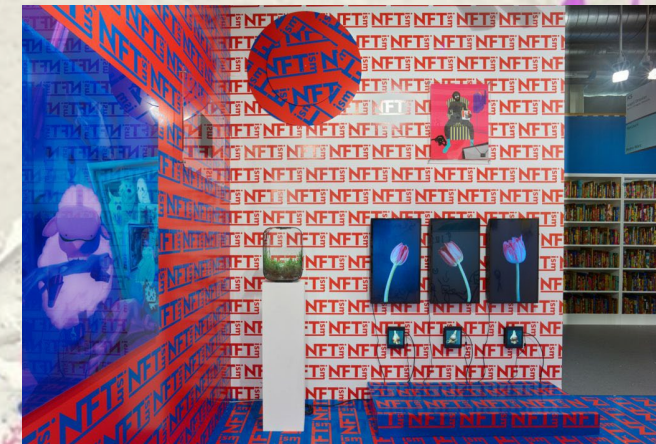
Patrons of the art dealership Unit London looking at a digital replica of Leonardo da Vinci's "Portrait of a Musician," in Unit's "Eternalizing Art History" exhibition. Justin Tallis/Agence France-Presse — Getty Images

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



Digital Art Fair in Hong Kong
(bidding on NFTs last until
October 17)
<https://www.digitalartfair.io/>

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



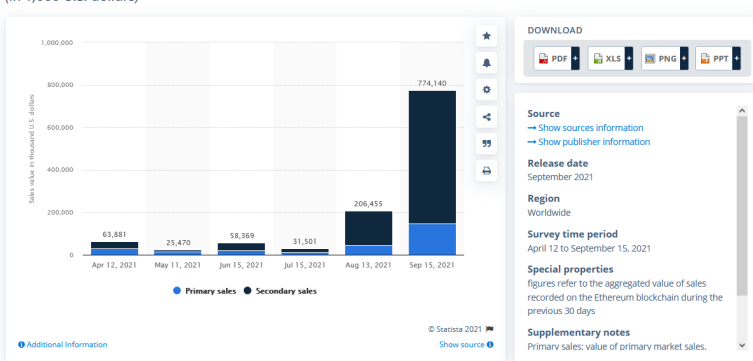


ReCreating Europe

Economic realities...

Sports & Recreation > Art & Culture

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)

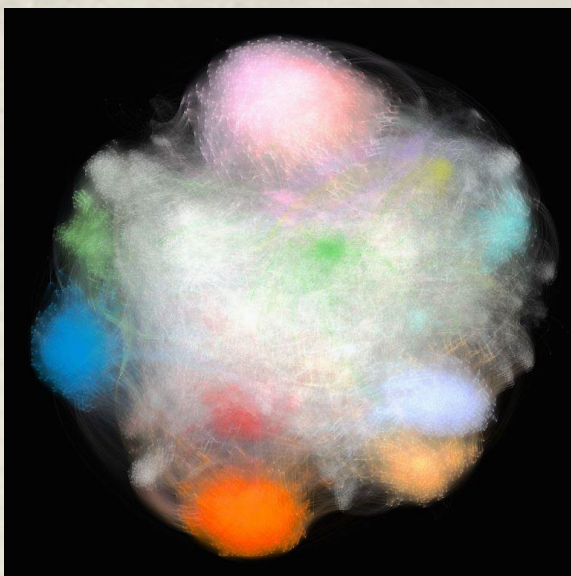


Statista (2021)

<https://www.statista.com/statistic/s/1235263/nft-art-monthly-sales-value/>

BarabásiLab via NYT

<https://www.nytimes.com/2021/05/07/opinion/nft-art-market.html>



\$23.7 million!



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

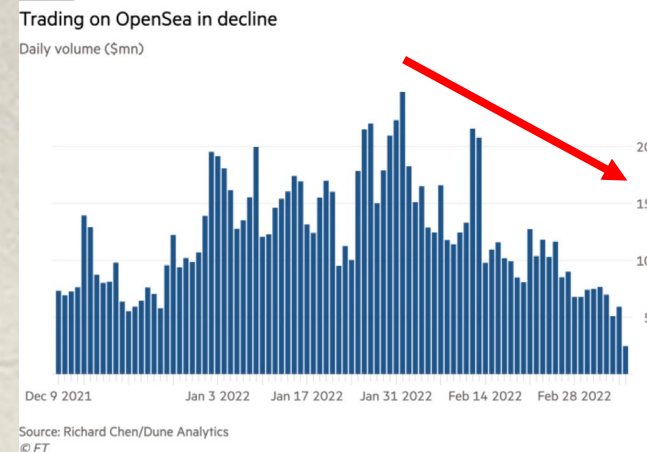
Mike Isaac: OpenSea valued at \$13.3 billion in new round of venture funding, *The New York Times*, January 4, 2022 (<https://www.nytimes.com/2022/01/04/business/opensea-13-billion-valuation-venture-funding.html>).

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.

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 (<https://www.forbes.com/sites/jonathanponciano/2022/01/20/nfts-shatter-monthly-trading-record-with-4-billion-in-sales-heres-why-theyre-still-booming-despite-the-crypto-crash/?sh=4fdf3f637910>)



Major copyright issues...

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

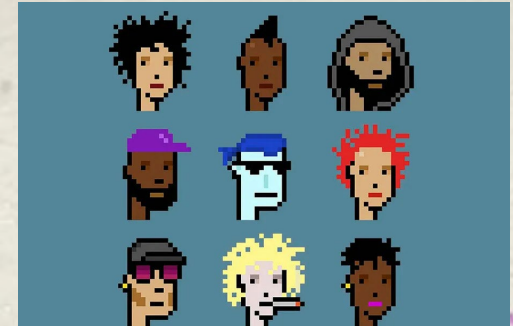
- CJEU case law: from Infopaq to Brompton Bicycle: “author’s own intellectual creation” + “personal touch”

- **Automated content generation?**

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



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



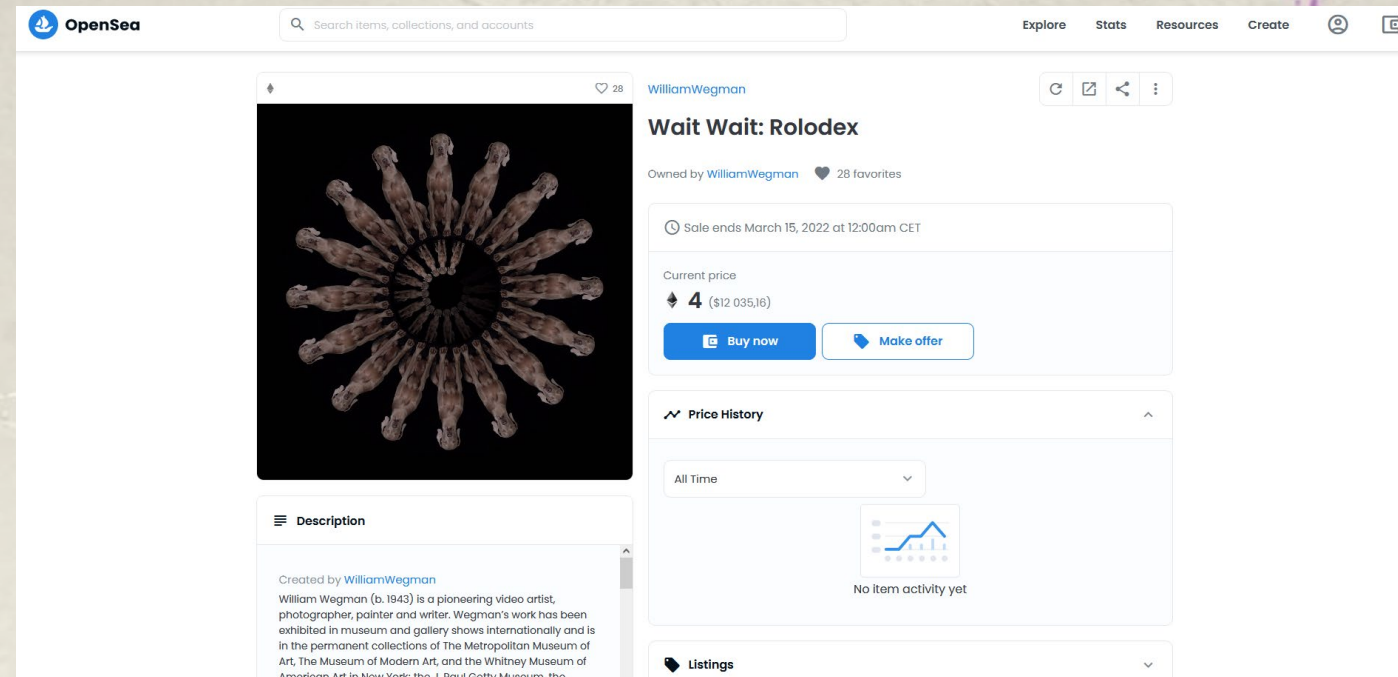
- The most successful NFTs today–CryptoPunks, Art Blocks, Bored Ape Yacht Club, Meebits, and VeeFriends–all rely on randomly generated art that creates thousands of NFTs, typically by randomly changing some features on a simple character, such as a person or animal. (For an explanation, see our blog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

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



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



Source: <https://opensea.io/assets/0x2ecd9318569d5fcb68e4958688f5324b33e7c484/600000002>



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-art-wars-sold-nfts-linked-to-their-art-for-millions-allegedly-without-their-permission>)

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

EXCLUSIVE



6/18/2021 6:06 PM PT



Source: <https://www.tzm.com/2021/06/18/roc-a-fella-records-sues-damon-dash-jay-z-reasonable-doubt-nft-non-fungible-token-auction-copyright-lawsuit/>



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

Kal Raustiala and Chris Sprigman: 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/tarantino-miramax-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



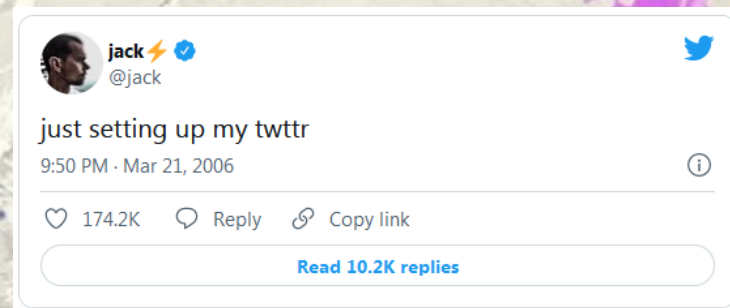
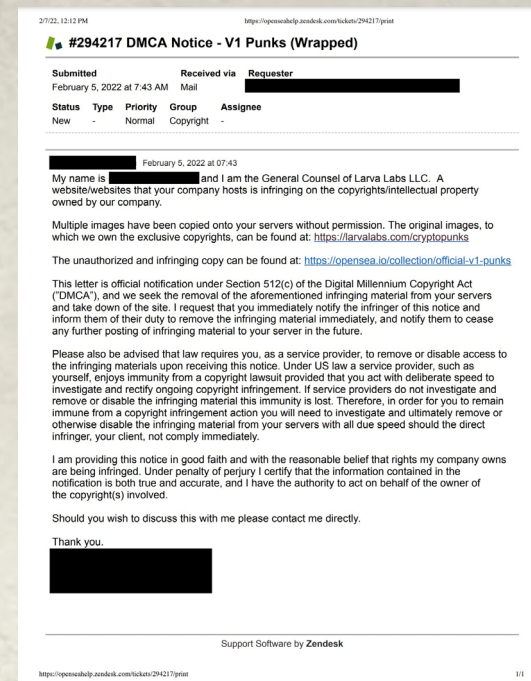
Major copyright issues - #4 Economic rights

- *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”.*



Major copyright issues - #5 Acquisition of what?

- **Peer-to-peer**: no transfer of ownership; no license!
But acquisition of authenticity → 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)
 - Except if such flexibilities are lawfully excluded via EULAs (via code).
- **Platform v. user**: is it lawful to share tokenized platform GUI? → EULAs!





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 → **excluded** 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 **DSA**!



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...**



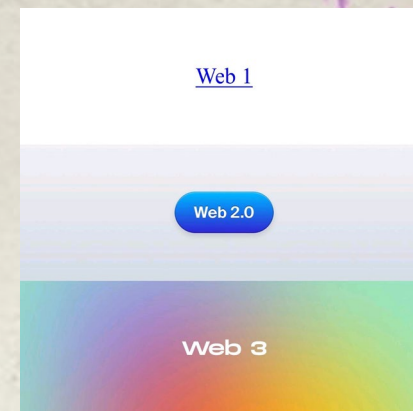
Josh White <https://time.com/6093982/nft-art-teens-money/?amp=true>



Imran Ahmed <https://www.cnbc.com/2021/10/01/12-year-old-helped-code-non-fungible-heroes-nfts-that-made-millions.html>



Source: Twitter (<https://twitter.com/CNN/status/1499323749459447809>)



OpenSea



CHRISTIE'S



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)

<https://ssrn.com/abstract=4000423>

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