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Will NFTs Solve Some of the Age-Old Problems in Art Law?

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WILL NFTS SOLVE SOME OF THE AGE-OLD PROBLEMS IN ART LAW?

*Ursula von Schlehenried**

ABSTRACT

Non-Fungible Tokens, or NFTs, are digital assets based on blockchain technology and are steadily growing in popularity in the art market. The technology has created a novel way of establishing ownership through tamper-resistant cryptographic records. A majority of NFTs are created via the Ethereum protocol and are most notably associated with other assets, such as digital art. Even prominent auction houses, like Christie's, have joined the action. NFTs offer a whole host of new and interesting legal concerns, including questions surrounding smart contracts. The concerns surrounding traditional art, however, are long-standing and include (but are not limited to) provenance, authenticity, title, copyright infringement, and various art crimes established by statute. The combination of existing law and new technology creates uncertainty and requires exploration.

This note explores how NFTs may influence a few of the long-standing issues in art law, specifically if an NFT were to be associated with tangible artwork. Further, this note argues that NFTs show promise at resolving some of the issues surrounding provenance, title, and authenticity if the artwork is created with an NFT in mind; however, the technology can also complicate these same issues—most notably copyright issues—especially with existing artworks not created with NFTs in mind. The legal concerns surrounding NFTs are uncertain and only just emerging, and as is the case with most nascent technology, regulation lags. Yet, the potential benefits to artists are encouraging and ever evolving.

I. INTRODUCTION

Non-fungible tokens (NFTs) are unique cryptographic records that are enabled through blockchain technology and are connected or associated with a corresponding digital file or asset.¹ Given the uniqueness of NFTs and the lack of central authority inherent in blockchain technology, NFTs have been linked to digital art as well as to physical assets to establish ownership.²

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1. Brian Curran, *What Are Non-Fungible Tokens? Unique & Authentic Digital Assets*, BLOCKONOMI (Aug. 19, 2019), <https://blockonomi.com/non-fungible-tokens/> [https://perma.cc/54BT-MT7C].

2. *Id.*

NFTs are most notable in the world of digital assets and digital art,³ but the traditional art world is plagued with the problems that NFTs might solve, such as problems regarding provenance, authenticity, title, copyright infringement, and art crime. This Note considers how NFTs might affect the non-digital art market and whether the use of NFTs will solve some of the age-old problems in art law, such as issues surrounding provenance, title, authenticity, copyright infringement, and art crime.

First, this Note will discuss the background of how NFTs create unique ownership through blockchain technology, as well as some of the traditional issues that arise in art law and the existing legal rules and laws that deal with those issues. The Note will then discuss the advantages and disadvantages of linking NFTs to physical art, antiquities, and cultural objects and whether NFTs will be able to solve some of the issues highlighted here.

II. BACKGROUND

A. How NFTs Create exclusive Ownership Through Blockchain Technology

To understand how NFTs create exclusive ownership, one must first be familiar with decentralized exchange protocol or distributed ledger technology.⁴ Blockchain is a type of distributed ledger technology on which NFTs exist and which make cryptocurrency transactions possible.⁵ A network of computers, known as nodes, each have access to a ledger that records transactions.⁶ Algorithms verify each group of transaction records or “blocks” and link each block to previous blocks as time-stamped “chains” through an encrypted “hash.”⁷ Once a block is verified and added to the blockchain, it cannot be changed without detection because doing so would change the hash.⁸ Further, the entire peer-to-peer network would have access to the en-

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3. Antonia von Appen, *NFTs: How a Technological Trend Redefined Art Ownership*, CTR. FOR ART L. (Apr. 27, 2021), <https://itsartlaw.org/2021/04/27/nfts-how-a-technological-trend-redefined-art-ownership/> [https://perma.cc/CG86-HXHA].
 4. Lindsay X. Lin, *Deconstructing Decentralized Exchanges*, 2 STAN. J. BLOCKCHAIN L. & POL’Y 1, 2 (2019).
 5. Kristin Cornelius, *Betraying Blockchain: Accountability, Transparency and Document Standards for Non-Fungible Tokens (NFTs)*, 12 INFO. 9, 358 at 4, (Aug. 31, 2021) <https://doi.org/10.3390/info12090358> [https://perma.cc/TDV5-Q2HR].
 6. *Id.* at 4.
 7. See Primavera De Filippi & Aaron Wright, *Blockchain and Law: The Rule of Code*, HARVARD UNIV. PRESS, 13, 22 (2018) https://www.jstor.org/stable/j.ctv2867sp?turn_away=true [https://perma.cc/B6UT-SU2Z] (last visited Apr. 9, 2022).
 8. *See id.* at 23.

tire ledger.⁹ Transactions on a blockchain are conducted via decentralized digital currency commonly referred to as “crypto” currency (“cryptocurrency”).¹⁰

Bitcoin was the first type of cryptocurrency to go mainstream.¹¹ They are electronic tokens or bits of data that may be interchanged with each other as a kind of non-monetary currency due to their fungible qualities.¹² Bitcoins are fungible tokens that have a one-to-one value and are interchangeable—just as a dollar has the same value as another and can be exchanged for that other dollar.¹³ But, bitcoin does not have the physical counterpart of a paper bill.¹⁴ Ethereum, which uses the cryptocurrency Ether, is the protocol used for most NFTs.¹⁵ Bitcoin/blockchain transactions also make use of public-private key cryptography.¹⁶ Anyone can have a bitcoin account or “wallet” and a unique private key (similar to an email account and password), and when a transaction occurs, it is digitally signed with the person’s private key in combination with a public key.¹⁷ Then, the recipient uses the public key and their own private key to unencrypt.¹⁸

In June 2017, Witek Radomski created a code for the first *non*-fungible token, which led to the creation of the ERC-721 token that enables NFTs.¹⁹ Unlike fungible tokens like Bitcoin, the token or code associated with the NFT is a unique string of alphanumeric characters that gives its asset a specific “digital identity” that is not interchangeable.²⁰ The non-fungible characteristic of the token is what makes it unique to its owner as it represents a

9. *See id.*

10. *See id.* at 19.

11. Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J. L. & POL’Y 25, 29 (2020).

12. *Id.*

13. *See* De Fillipi, *supra* note 7, at 19.

14. *See id.*

15. *See* Anatol Antonovici, *NFT Marketplaces: A Beginner’s Guide*, COINDESK (July 12, 2021), <https://www.coindesk.com/tech/2021/07/12/nft-marketplaces-a-beginners-guide/> [<https://perma.cc/M6B3-8C4S>].

16. *See* De Fillipi, *supra* note 7, at 15–16.

17. *See* De Fillipi, *supra* note 7, at 15–16.

18. *See* De Fillipi, *supra* note 7, at 15–16.

19. *See* Adrian Mathieu, *Inventor of the Non-Fungible Token Creates New Standard that Could Replace ERC-20 and ERC-721*, ETHEREUM WORLD NEWS (June 25, 2018), <https://ethereumworldnews.com/inventor-of-the-non-fungible-token-creates-new-standard-that-could-replace-erc-20-and-erc-721/> [<https://perma.cc/MPH8-J6MC>].

20. *See* Sean C. Griffin, *Legal Cybersecurity Challenges of NFTs and ‘Smart Contracts’*, 39 WESTLAW J. COMPUT. & INTERNET, 1,1 (July 3, 2021).

cryptographic record.²¹ The NFT can then be “bought, traded, or sold” using other cryptocurrencies.²²

In addition to the unique token, there is generally a digital file or asset to which it is linked along with a smart contract, and when these three components are combined, the NFT is said to be “minted.”²³ Minting occurs once the smart contract is triggered and an automatic transaction occurs on the blockchain.²⁴ The unique NFT is associated with a digital file, such as art, a gif, music, a video, or ownership rights in a tangible or intangible asset.²⁵ The NFT file is stored on the blockchain, or it may be stored on an external database or “marketplace.”²⁶

Marketplaces are online platforms where an NFT may be stored, displayed, and sometimes minted (depending on the platform).²⁷ The marketplace allows a user to create an account and provides the user with a “crypto wallet” prefunded with the cryptocurrency that is compatible with the NFT that the user wishes to buy or sell. Then the user can purchase or create the NFT.²⁸ If the user wishes to buy an NFT based on the Ethereum protocol, for example, then one must have a wallet compatible with Ethereum and prefunded with ether.²⁹ Listing and creating NFTs on a platform will incur a fee depending on the blockchain-based system (Ethereum is the system that underpins the majority of NFTs and has higher fees).³⁰ These fees are usually referred to as “gas” and depend on the congestion or “traffic” of transactions taking place at a given time on the blockchain.³¹

NFTs may be purchased for a specific price or through a bidding process.³² The marketplace is essentially the intermediary between buyer and seller, and once a seller is ready to sell an NFT through the marketplace, they are directed to a page where they may define the conditions of sale such as whether it will be a fixed sale or an auction type sale.³³ The conditions of sale

21. See Cornelius, *supra* note 5, at 4.

22. *Id.* at 4.

23. *Id.* at 2, 4–5.

24. *Id.* at 5.

25. *Id.* at 7.

26. See Cornelius, *supra* note 5, at 4.

27. Antonovici, *supra* note 13.

28. *Id.*

29. *Id.*

30. Ollie Leech, *How to Create, Buy, and Sell NFTs*, COINDESK (Feb 4, 2022), <https://www.coindesk.com/learn/how-to-create-buy-and-sell-nfts/> [https://perma.cc/6DNQ-2JRD].

31. *Id.*

32. *Id.*

33. *Id.*

may also include royalties for the original owner of the NFT depending on the platform or marketplace, so that every time the NFT is resold, the original owner automatically earns a royalty.³⁴ This essentially depends on the type of smart contract associated with the NFT.

Traditional contracts encompass offer, acceptance, and consideration, but this is not the case with data-oriented or “smart” contracts. Data-oriented contracts make use of computer code to carry out *part* of a contractual arrangement.³⁵ Alternatively, a contract may be “computable” when a system can produce automated assessments of conformance.³⁶ In other words, data relevant to performance and obligation are inputted, then the algorithm compares what was promised to what has occurred as a “prima-facie indica of performance.”³⁷ However, smart contracts are merely computer software that execute based on “if-then” rules.³⁸ Smart contracts may execute performance based on conditions, but they do not commit any party to do anything, or make any prospective promises.³⁹ With respect to NFTs, once an NFT transaction is initiated through a database, the accompanying smart contract automatically interacts with the blockchain and mints or trades the NFT.⁴⁰

B. The Traditional Problems in Art Law and Existing Solutions

Some of the greatest problems in art law involve provenance, disputed title, authenticity, and copyright violations.⁴¹ Because the problems surrounding art, artifacts, antiquities, and cultural objects has existed for so long, Congress and the courts have come up with various laws, doctrines, and treaties.⁴² This section will attempt to briefly define and discuss some of the existing problems in art law and their attempted solutions. This is not an exhaustive list of the issues that arise in art law, but rather, some of the highlights to be further discussed in the context of the technological advancement of NFTs.

34. See von Appen, *supra* note 3.

35. See Harry Surden, *Computable Contracts*, 46 U.C. DAVIS L. REV. 629, 634 (2012).

36. See *id.* at 635.

37. See *id.*

38. See von Appen, *supra* note 3.

39. Kevin Werbach & Nicolas Cornell, *Contracts Ex Machina*, 67 DUKE L. J. 313, 341 (2017).

40. See Cornelius, *supra* note 5, at 4–5.

41. *Infra* Part B(1)–(4).

42. *Infra* Part B(1)–(4).

1. Authenticity

In distinguishing forgeries and fakes, intention and context matter. A forgery is a fake that is passed off as an original with intent to deceive, whereas a fake is merely something that can be passed off as something else and depends on the context.⁴³ Art authenticity evolves over time based on expert consensus and scholarship, which conflicts with the legal notion of authenticity as an unchanging objective inquiry.⁴⁴ Therefore, the art world and the courts' ideas surrounding authenticity are often at odds given these conflicting principles.⁴⁵ Authenticity concerns arise in circumstances involving intentional forgeries, mistake, and as a moral right through the viewpoint of the artist.⁴⁶

Intentional forgeries are dealt with through criminal law.⁴⁷ Authenticators and intermediaries between buyer and seller face liability regarding authenticity as well.⁴⁸ Sellers and intermediaries, like auction houses and authenticators, may be subject to their representations and warranties according to the corresponding state versions of the Uniform Commercial Code (UCC), specifically UCC § 2-313, which deals with express warranties.⁴⁹ Some states, like New York, have their own laws specifically dealing with express warranties made by art merchants.⁵⁰ Additionally, the Visual Artists Rights Act of 1990 allows artists to denounce works that distort their creations or falsely use the artist's name.⁵¹

2. Title

As with authenticity, there is a tension between the legal concept of title and the art world's concept of title regarding an artwork, artifact, or cultural object. There is a notion in property law that one cannot pass better title than one has (*nemo dat quod non habet*).⁵² The UCC deals with title in section 2-312, regarding the implied warranty of title and the entrustment exception in

43. Thierry Lenain, *The Narrative Structure of Forgery Tales*, in *CULTURAL PROPERTY CRIME: AN OVERVIEW AND ANALYSIS OF CONTEMPORARY PERSPECTIVES AND TRENDS* 39 (Joris D. Kila & Marc Balcells eds., 2014).

44. See ANNE-MARIE RHODES, *ART LAW & TRANSACTIONS* 107, 112, 114–15 (2d ed. 2021); *Jendwine v. Slade* [1796] 170 Eng. Rep. 459 (Eng. & Wales).

45. See *id.* at 113.

46. See *id.* at 107.

47. See *id.* at 114.

48. *Id.* at 25.

49. Rhodes, *supra* note 40, at 122–23.

50. N.Y. ARTS & CULT. AFF. § 13.01; see Rhodes, *supra* note 44, at 123.

51. 17 U.S.C.A. § 106A (Westlaw through Pub. L. No. 117-80); see Rhodes, *supra* note 44, at 337, 339.

52. *Legal Maxims*, BLACK'S LAW DICTIONARY (11th ed. 2019).

section 2-403.⁵³ Civil causes of action include replevin, fraudulent concealment, and conversion, among others.⁵⁴

In the art world there are three viewpoints of cultural objects: (1) the Nationalist viewpoint; (2) the Internationalist viewpoint; and (3) the Object-Context viewpoint.⁵⁵ The Nationalist viewpoint suggests that each nation has the right to set its own rules with respect to its own property and encompasses the notion that the owner of property has the right to deal with their property as they see fit.⁵⁶ The Internationalist viewpoint (or “Cultural Nationalist” viewpoint) is that there exists a common cultural heritage shared by all human beings.⁵⁷ In other words, human beings are a collective and share an interest in the preservation and protection of cultural property, and therefore, should all have access to it.⁵⁸ Under this theory, museums are the best place to keep cultural items because they are best equipped to protect such property and provide shared experiences for all.⁵⁹ The Object-Context viewpoint, an offshoot of the Internationalist viewpoint, suggests that the best place for an object is the place where it comes from.⁶⁰ Therefore, objects like antiquities or formerly looted pieces from historical churches and sites (often on account of war, political unrest, and colonialism) should be returned to the cultures and archaeological locations from where they were taken.⁶¹ The context of the object is important— under this theory the Elgin Marbles, for example, should be returned to their place of origin at the Acropolis instead of sitting in a museum in England.⁶²

Given these differing viewpoints, title may seem clear under the laws and cultural property viewpoint of one jurisdiction, but not another. Disputes may arise between nations as to the true owner of an artwork or antiquity, meaning that title to an artwork or cultural property may be in constant flux.

53. U.C.C. §§ 2-312, 403 (Am. L. Inst. & Unif. L. Comm’n 2003) (amended 2003) (withdrawn 2011).

54. *Pritchett v. Pound*, 2004 WL 7334119, at *1 (E.D. Tex. Dec. 27, 2004).

55. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 832, 846 (1986).

56. *Id.* at 832.

57. *Id.* at 847.

58. *See id.*

59. *Id.*

60. *Id.* at 844.

61. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 844 (1986).

62. *See generally* John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985).

For example, the Afo-a-Kom sculpture, sacred in Cameroon, that ended up in the hands of an art dealer at the Furman Gallery in New York.⁶³

3. Provenance

Given that authenticity and title are such prominent issues, the provenance of an artwork is therefore highly important in establishing the latter, and issues with provenance may ultimately result in issues with authenticity and title.⁶⁴ Artworks and antiquities often move across state lines or may be looted from their sources because of war or political instability.⁶⁵ An artwork, artifact, or antiquity may go missing for long periods of time, then later pop up in a different country or the home of a collector or celebrity.⁶⁶ The FBI, therefore, deals with theft, fraud, looting, and trafficking of art across state and international lines through its art crimes team.⁶⁷ Additionally, the FBI hosts the National Stolen Arts File (“NSAF”), which is a database of lost or stolen artworks and artifacts.⁶⁸ Other federal statutes include Theft from Interstate Shipment, the Hobbs Act, Interstate Transportation of Stolen Property, Theft of Major Artwork, Illegal Trafficking in Native American Human Remains and Cultural Items, and the Theft of Government Property Act.⁶⁹ Conventions include the 1970 UNESCO Convention that was

63. Alessandro Chechi et al., *Case Afo-A-Kom – Furman Gallery and Kom People*, ARTHEMIS (Feb. 2012), <https://plone.unige.ch/art-adr/cases-affaires/af0-a-kom-2013-furman-gallery-and-kom-people> [https://perma.cc/KTE9-PSHQ] (“The Afo-A-Kom is a wooden sculpture sacred to the Kom people, a tribal population of Cameroon. In 1966, it was stolen and subsequently sold to a New York art dealer. In 1973, the Cameroon Government was informed of the location of the Afo-A-Kom and immediately requested the possessor, the Furman Gallery, to return it. Eventually, the Gallery sold the Afo-A-Kom to a businessman, who returned it to the Kom people.”).
64. See Jackie Mansky, *Why It’s So Hard to Find the Original Owners of Nazi-Looted Art*, SMITHSONIAN MAG. (May 31, 2017), <https://www.smithsonianmag.com/arts-culture/why-its-so-hard-find-real-owners-nazi-looted-art-180963513/> [https://perma.cc/FR5Y-AVGP].
65. Richard J. Evans, *Art in the Time of War*, 113 THE NAT’L INT., 116, 116 (2011).
66. See *Solomon v. Cutler*, No. 2:07–cv–645, 2010 WL 3909980, at *4 (D. Nev. Apr. 8, 2010) (exemplifying that the painting *Russian Schoolroom* by Norman Rockwell was stolen from Arts International Gallery, only to later be obtained by another dealer and subsequently sold to Steven Spielberg who later learned of the theft and informed the FBI).
67. See FBI, ART THEFT, <https://www.fbi.gov/investigate/violent-crime/art-theft> [https://perma.cc/G77T-KSXF] (Last visited Feb. 28, 2022).
68. See FBI, NATIONAL STOLEN ART FILE, <https://www.fbi.gov/investigate/violent-crime/art-theft/national-stolen-art-file> [https://perma.cc/2HDN-V5HC] (Last Visited Feb. 28, 2022).
69. ART THEFT, *supra* note 62.

ratified by the U.S. as the UNESCO Convention on Cultural Property Implementation Act, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Property Objects.⁷⁰

Provenance of artworks is of utmost importance to buyers, sellers, and intermediaries, and one's position in a transaction may determine one's idea of properly conducted provenance.⁷¹ Once again, conflict arises between legal principals and the standard practices of the art world, because auction houses have traditionally had a practice of not questioning their most prominent suppliers.⁷² For example, in *Menzel v. List*,⁷³ a New York gallery innocently came into possession of a Chagall painting that turned out to have been taken from a private home by Nazis and turned up in France.⁷⁴ The proprietors, Mr. Perls and his wife, who were extremely well known art dealers and donors, had engaged in the art-world practice of not asking questions about origin so as not to insult the Parisian gallery from which they acquired the painting.⁷⁵ This behavior resulted in the court pushing back:

An objection raised by the Perls to this measure of damages is that it exposes the innocent seller to potentially ruinous liability where the article sold has substantially appreciated in value. However, this 'potential ruin' is not beyond the control of the seller since he can take steps to ascertain the status of title so as to satisfy himself that he himself is getting good title. (Mr. Perls testified that to question a reputable dealer as to his title would be an 'insult.' Perhaps, but the sensitivity of the art dealer cannot serve to deprive the injured buyer of compensation for a breach which could have been avoided had the insult been risked.)

. . . .

. . . Had the Perls taken the trouble to inquire as to title, they could have sold to List subject to any existing lawful claims unknown to them at the time of the sale. Accordingly, the 'prospects of ruin' forecast as flowing from the rule are not quite as ominous

70. 19 U.S.C.A. §§ 2601–13; International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, 34 I.L.M. 1330 (June 24, 1995).

71. *What Every Art Collector Needs to Know About Provenance*, ARTWORK ARCHIVE, <https://www.artworkarchive.com/blog/what-every-art-collector-needs-to-know-about-provenance> [<https://perma.cc/87LG-DML5>] (last visited Apr. 9, 2022).

72. See generally Katie Dixon & Zachary Shufro, *Risky Business: Fraud, Authenticity, and Limited Legal Protections in the High Art Market*, 10 NYU J. OF INTELL. PROP. & ENT. L. 246, 276 (2021).

73. See *Menzel v. List*, 24 N.Y.2d 91, 93 (N.Y. 1969).

74. See *id.*

75. See *id.*

as the argument would indicate. Accordingly, the order of the Appellate Division should be reversed as to the measure of damages and the judgment awarding List the value of the painting at the time of trial of the Menzel action should be reinstated.⁷⁶

4. Copyright

Copyright remains an issue in art law, because often it can be disputed as to whether an artwork that lends from another meets the fair use exception.⁷⁷ Article I, Section 8 of the Constitution gives artists a limited time “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷⁸ As such, Congress attributes several rights to the automatic copyright holder including the rights to make copies of the work, to distribute the work, to display the work, to perform the work, and the rights to modify or make derivatives of the work.⁷⁹

Notwithstanding these rights, Congress also allows for a fair use defense based on various factors like the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market or value of the copyrighted work.⁸⁰ A transformative use is a very strong factor in the fair use analysis and many artworks have been able to get by on this defense.⁸¹ However, the fair use defense in terms of artwork is not always clear cut and courts have found violations.⁸²

Once again, legal notions conflict with the artistic viewpoint.⁸³ An artist may view their art as a transformative work in the artistic sense, but judges and juries will ultimately decide whether this factor has been met in the legal sense.⁸⁴ Counsel may call in experts, but legal constructs surrounding federal rules of evidence as well as jury instructions will ultimately guide a deci-

76. *See id.* at 98.

77. Jennifer Gregor & Mark Hancock, *Appropriation as Art: The Arts & Copyright for Fair Use*, WIS. LAW., 32, 32-3 (2016).

78. U.S. CONST. Art. I, § 8, cl. 8.

79. 17 U.S.C.A. § 106(1)-(5) (West).

80. 17 U.S.C.A. § 107(1)-(4) (West).

81. *See generally* Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013).

82. *See generally* Rogers v. Koons, 960 F.2d 301, 308-09 (2d Cir. 1992).

83. Debra L. Quentel, “*Bad Artists Copy, Good Artists Steal.*”: *The Ugly Conflict Between Copyright Law and Appropriationism*, 4(1) UCLA ENT. L. REV. 39, 54 (1996).

84. *See Cariou*, 714 F.3d at 704-05.

sion.⁸⁵ Therefore, an artist's notions of self-expression may well be at conflict with the legal viewpoint.⁸⁶

III. DISCUSSION

A. The Advantages of Linking an Art Sale to an NFT

As discussed, NFTs provide exclusive ownership through blockchain technology, and linking this emerging technology to physical artwork shows promise at addressing some of the issues associated with provenance, title, and authenticity.⁸⁷

NFTs show promise at addressing the issue of provenance and title.⁸⁸ The combination of blockchain technology and the exclusive ownership created by the NFT establishes a clear chain of ownership that is not constrained by geographic borders when the NFT is bought and subsequently resold.⁸⁹ The clear line of transactions created by the blockchain ledger provide certainty as to provenance and title meaning that intermediaries and sellers can provide assurances to buyers with less risk and without having to ask uncomfortable questions of their sources, as was the case in *List*.⁹⁰ Traditional auction houses like Christie's have already realized this and started their own NFT marketplaces.⁹¹ Christie's touts the advantage of improved provenance to its prospective buyers on the NFT dedicated portion of its website.⁹² Granted, Christie's has only auctioned digital art (more strongly attached to

85. Monika Isia Jasiewicz, "A Dangerous Undertaking": *The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases*, 26 *YALE J.L. & HUMAN.* 143, 146, 172-73 (2014).

86. Azmina Jasani & Emelyne Peticca, *The Tension Between Copyright Law and Appropriation Art: Where is the Line Between Artistic Innovation and Stealing?*, *THE ART NEWSPAPER* (Sept. 29, 2021), <https://www.theartnewspaper.com/2021/09/29/the-tension-between-copyright-law-and-appropriation-art-where-is-the-line-between-artistic-innovation-and-stealing> [https://perma.cc/8BFL-U7KL].

87. Steven James, Ruth M. Arkley & Clara Krivoy, *NFTs – An Introductory Guide*, *BROWNRUDNICK* (Oct. 7, 2021), <https://brownrudnick.com/alert/nfts-an-introductory-guide/> [https://perma.cc/77PH-DPX7].

88. *Id.*

89. *See generally id.*

90. *Id.*

91. *Christie's Encrypted: Welcome to the Future*, *CHRISTIE'S*, <https://www.christies.com/auctions/christies-encrypted> [https://perma.cc/SQ8K-YTJV] (last) Apr. 9, 2022.

92. *Id.* ("NFTs allow us to trace provenance, exhibition history and the authenticity of ownership in digital art and other assets in a secure and permanent manner.")

the NFT itself), but given that one of its digital works sold for \$69 million,⁹³ it seems worthwhile that auction houses like Christie's should try explore associating NFTs with physical works as well.

The association of physical artwork with an NFT creates an argument for sellers that reasonable inquiry into provenance was conducted.⁹⁴ It might be more likely that newer physical works of art should be the guinea pigs for this technology, because not only can an artist earn royalties this way (depending on the smart contract associated with the platform), but also, because newer works make it less likely that the dealer or auction house will run into problems tracing the provenance when said work was created along with an NFT.⁹⁵ Additionally, outside contracts like the auction house's conditions of sale may reinforce the obligation to sell the NFT along with the artwork and evidence the existence of an NFT that was created with a new physical work.⁹⁶

If an artist creates an NFT with a physical artwork independently and then a buyer wants to resell it to an auction house or dealer, then that future buyer can trace the previous transactions.⁹⁷ However, if there is a break in the chain to the original artist, then the buyer or auction house need not purchase the work.⁹⁸ Therefore, NFTs show promise at resolving the issue of provenance of physical artworks, or at least heavily reducing burden on the sellers for newer works created with an NFT in mind.⁹⁹

Not only do NFTs show promise at addressing the issue of provenance, but also, they may show promise at addressing authenticity as well.¹⁰⁰ The UCC is a poor fit regarding authenticity in the art world because a work of

93. *Beeple's Opus*, CHRISTIE'S, <https://www.christies.com/features/Monumental-collage-by-Beeple-is-first-purely-digital-artwork-NFT-to-come-to-auction-11510-7.aspx> [<https://perma.cc/HQU5-QK3K>] (last visited Apr. 9, 2022).

94. James et al., *supra* note 81.

95. *See generally* Urth HQ, *Can Physical Works of Art Be Linked to NFTs?*, URTH MAG., <https://urth.co/magazine/physical-nft> [<https://perma.cc/P2VW-TZQ7>] (last visited Apr. 9, 2022).

96. Jennifer English, Toby Futter, David Grable, Emily Kapur, Luke Nikas & Robert Schwartz, *NFTs: Legal Risks from "Minting" Art and Collectibles on Blockchain*, JD SUPRA (Mar. 25, 2021), <https://www.jdsupra.com/legalnews/nfts-legal-risks-from-minting-art-and-4997056/> [<https://perma.cc/KS2Z-YLJD>].

97. *See generally* URTH MAGAZINE, *supra* note 89.

98. *See generally* Jonathan Bailey, *NFTs and Copyright*, PLAGIARISM TODAY (Mar. 16, 2021), <https://www.plagiarismtoday.com/2021/03/16/nfts-and-copyright/> [<https://perma.cc/2FFL-3TBW>].

99. James et al., *supra* note 81.

100. *Id.*

art's authenticity changes over time based on scholarship.¹⁰¹ However, NFTs might alleviate some of these problems when it comes to newer artworks where the artist is still alive and can link their physical work to an NFT from its very inception.¹⁰² NFTs provide a level of authenticity previously unknown because newer artists can create a digital asset as well as a physical asset to go with the NFT.¹⁰³ For example, an artist can create a digital video file to go along with their NFTs showing the physical artwork being created.¹⁰⁴ They can even announce who they are selling the artwork to, which auction house they have partnered with, and their intention to sell the work with an NFT.¹⁰⁵ While an existing artwork that was *not* created with an NFT in mind *could* have an NFT created for it down the line, there is still no way to know that the physical artwork is not a fake or a forgery.¹⁰⁶ Therefore, NFTs show the most promise at solving the issues of authenticity with newer works of art that are created with an NFT and that can be linked to the artist through the blockchain ledger and through a digital file such as a video.¹⁰⁷

NFTs show great potential at reducing the issues around authenticity, provenance, and title, because they alleviate some of the tensions between legal principles and the art world.¹⁰⁸ This technology takes some of the burden off the seller regarding reasonable inquiry into provenance and gives more control to the original owner or artist by establishing a mode to strengthen the authenticity surrounding a physical artwork.¹⁰⁹ While NFTs provide the greatest advantage when associated with a digital asset, there is no reason why linking NFTs to physical artworks should not be explored as well.¹¹⁰

101. See Rhodes, *supra* note 44, at 90.

102. URTH MAGAZINE, *supra* note 89.

103. *Id.*

104. See Sebastian Smee, *Will NFTs Transform the Art World? Are They Even Art?*, WASH. POST (Dec. 18, 2021, 6:00 AM), <https://www.washingtonpost.com/arts-entertainment/2021/12/18/nft-art-faq/> [<https://perma.cc/X7MQ-6MKT>].

105. *Id.*

106. English et al., *supra* note 90.

107. See generally URTH MAGAZINE, *supra* note 89.

108. See Tarisai Ngangura, "Blockchain is a Perfect Record Keeper": Could the Viral NFT Craze Help Countries Reclaim Their Stolen Art?, VANITY FAIR (Apr. 27, 2021), <https://www.vanityfair.com/news/2021/04/blockchain-is-a-perfect-record-keeper-could-the-viral-nft-craze-help-countries-reclaim-their-stolen-art> [<https://perma.cc/N2JU-LT8R>].

109. See Commentary by Fintelics, *The Advantages of NFTs*, MEDIUM (May 19, 2021), <https://fintelics.medium.com/the-advantages-of-nfts-fe0969b062b1> [<https://perma.cc/PX86-FVG2>].

110. See generally URTH MAGAZINE, *supra* note 89.

B. Disadvantages or Unknown Consequences of Linking an Art Sale to an NFT

While NFTs lessen some of the issues surrounding provenance, title, and authenticity, they arguably further complicate the issue of copyright infringement and, in some regard, title as well.¹¹¹ While there are several issues with unknown consequences with respect to NFTs, including contract issues, securities law issues, and environmental issues, this section limits discussion to the context of those traditional art law issues discussed in Section II *supra*.¹¹²

NFT technology does nothing to alleviate copyright infringement, in fact, it arguably complicates the matter further.¹¹³ This holds true for NFTs created for digital works and for those NFTs that might be created for physical artworks.¹¹⁴ Unless the artist specifically gives up their copyrights, they still hold said copyrights for the artwork connected with the NFT.¹¹⁵ Because NFTs are a new technology, purchasers may assume that they are purchasing the underlying copyrights as well.¹¹⁶ Copyrights may be transferred via outside contracts or partially through the smart contracting process,¹¹⁷ but it is certainly not automatic that just because somebody owns the NFT that they will own the copyright to the work. Owning the NFT is essentially like owning the painting, but not having all the rights granted to the copyright holder.¹¹⁸

111. See ABOU NAJA, *NFTs & Copyright Law*, BLOG (last updated March 3, 2022) <https://abounaja.com/blogs/nfts-and-copyright-law> [https://perma.cc/J46J-FP4G].

112. See generally, Mercedes Tunstall, *A Look Ahead: The NFT Craze*, LOEB & LOEB LLP (July 2021), <https://www.loeb.com/en/insights/publications/2021/07/a-look-ahead-the-nft-craze> [https://perma.cc/8U87-X3W7].

113. Gregory J. Chinlund & Kelley S. Gordon, *What Are the Copyright Implications of NFTs?*, REUTERS (Oct. 29, 2021, 10:41 AM), <https://www.reuters.com/legal/transactional/what-are-copyright-implications-nfts-2021-10-29/> [https://perma.cc/GBM7-J5BY].

114. See generally *id.*

115. Catherine Zhu & Louis Lehot, *A Legal Guide to Launching an NFT Marketplace*, 38 No. 22 WESTLAW J. COMP. & INT. 02, (April 2, 2021).

116. Dinusha Mendis, *When You Buy An NFT, You Don't Completely own It – Here's Why*, THE CONVERSATION (Aug. 24, 2021, 5:28 AM), <https://theconversation.com/when-you-buy-an-nft-you-dont-completely-own-it-heres-why-166445> [https://perma.cc/6GUU-KTYE].

117. Insight on *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, JONES DAY (Apr. 2021), <https://www.jonesday.com/en/insights/2021/04/nfts-key-us-legal-considerations-for-an-emerging-asset-class> [https://perma.cc/PQM3-4SC3].

118. Chinlund & Gordon, *supra* note 107.

The work itself might also violate copyright law, even if it is a new authentic artwork created with an NFT in mind (as discussed in Section II *supra*).¹¹⁹ An artist may create a work based on the work of another artist without realizing that copyright infringement has occurred.¹²⁰ If the artist contracts with an auction house or even sells their own NFT independently on a platform and the artwork is deemed to be in violation of copyright law (i.e., that it cannot meet the fair use defense), then what becomes of the associated NFT? This question remains to be seen, as there are transaction costs associated with an NFT (“gas”), and it is therefore uncertain as to who, if anyone, will receive damages for the NFT and whether the NFT itself will be considered part of the copyright infringement.¹²¹ So, while new works created with an NFT in mind might alleviate the issues of authenticity and provenance (especially one created with an accompanying digital file), the authentic artwork might still violate copyright law and the association with an NFT might further complicate the issue of damages.¹²²

Therefore, the issue of copyright infringement is unalleviated by NFTs.¹²³ The buyer of an NFT may assume they hold the copyrights to the underlying asset, or the underlying asset itself, even if authentic, but may still violate copyright law.¹²⁴ Furthermore, there is not enough established precedent surrounding this new technology to make reasonable predictions.¹²⁵

119. Mendis, *supra* note 110.

120. Jonathan Schmalfeld, *Copyright Violations Could Crash the NFT Party*, *FOR-TUNE* (Aug. 4, 2021, 5:00 AM), <https://fortune.com/2021/08/04/nfts-copyright-violations-penalties-non-fungible-tokens-collectibles-nfttorney-jonathan-schmalfeld/> [<https://perma.cc/FG7U-UMQP>].

121. *NFT Risks and Opportunities in the IP, Advertising, and Brand Management Spaces*, *CROWELL* (Apr. 16, 2021), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/NFT-Risks-and-Opportunities-in-the-IP-Advertising-and-Brand-Management-Spaces> [<https://perma.cc/6H7J-KSJQ>].

122. Chinlund & Gordon, *supra* note 107.

123. *Id.*

124. English et al., *supra* note 90.

125. See e.g., Blake Brittain, *Jay-Z Label Rock-A-Fella Blocks Co-Founders ‘Reasonable Doubt’ NFT Auction*, *REUTERS* (June 22, 2021), <https://www.reuters.com/legal/transactional/jay-z-label-roc-a-fella-blocks-co-founders-reasonable-doubt-nft-auction-2021-06-22/> [<https://perma.cc/95QC-Q9RC>] (injunction was filed (and granted) to Rock-A-Fella Records Inc. stating that the NFT seller did not own the underlying copyright in Jay-Z’s album “Reasonable Doubt” to be able to sell the NFT, but rather, that the company owned the copyrights to the album. Seller argued that he was selling his interest in the company and not trying to sell the copyrights. The court did not address whether interests could be sold in this manner).

As mentioned, nations may have differing ideas of ownership and placing NFTs in the mix generates more controversy.¹²⁶ This emphasizes why NFTs will not solve title issues surrounding antiquities, older artworks, and cultural objects.¹²⁷ For example, if the Afo-A-Kom or the *Russian Schoolroom* painting came into the hands of an auction house and were legally auctioned off with an accompanying NFT, what would happen if the buyer was later forced to return the artwork or cultural object to its place of origin? The buyer has arguably paid part of the transaction costs associated with the NFT, but it is uncertain whether the nation would even consider the NFT and if the NFT would become obsolete.¹²⁸

While it is difficult to undermine the authenticity of an NFT, NFTs will also not eliminate the issues surrounding art fraud and crime.¹²⁹ If a bad actor creates an NFT to accompany an artwork that turns out to be a forgery or a fake, the advantage of an NFT to track the ownership and movement of the artwork will not do much good.¹³⁰ NFTs may arguably allow a fraudster to take *more* advantage of the NFT, because of the use of smart contracts.¹³¹

A critical distinction between smart contracts and other forms of electronic agreements is enforcement, because once the software determines the necessary condition has occurred, performance is automatic.¹³² Therefore, smart contracts make performance unavoidable despite any outside variables that are in play.¹³³ The contract would have to be undone “ex post” resulting in additional transaction costs and inconveniences.¹³⁴ If somebody does not

126. JONES DAY, *supra* note 111.

127. See Ngangura, *supra* note 102.

128. Diego Ballon Ossio et al., *Non-Fungible Tokens: The Global Legal Impact*, CLIFFORD CHANCE (June 21, 2021), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/non-fungible-tokens-the-global-legal-impact.pdf> [https://perma.cc/8H2J-R5S4].

129. English et al., *supra* note 90.

130. Andrew Wang, *The NFT Scammers Are Here*, THE VERGE (Sept. 21, 2021, 10:00 AM), <https://www.theverge.com/22683766/nft-scams-theft-social-engineering-opensea-community-recovery> [https://perma.cc/5CUN-J4G5].

131. Shanti Escalante-De Mattei, *Can the Weaknesses of NFT Technology Be Fixed?*, ARTNEWS (July 29, 2021, 4:14 PM), <https://www.artnews.com/art-news/news/nfts-broken-technology-1234600107/> [https://perma.cc/3WFA-TZX9].

132. Werbach & Cornell, *supra* note 39, at 348 (“The distinctive aspect of smart contracts is not they make enforcement easier, it is that they make enforcement unavoidable. In order to do so, they change the nature of the contract itself.”).

133. *Id.* at 331.

134. *Id.* at 349-50 (“Because the exchange of value is entirely contained in the smart contract environment, there is no need to look anywhere else . . . The smart contract has the entire life of the contract immutably embedded into its code, which leave no room for a separate written agreement to specify the parties’

have proper ownership of the underlying work or it turns out to be inauthentic, the NFT transaction will go ahead and execute anyway.¹³⁵ Forgers may continue to earn automatic commissions on pieces that are forgeries before the truth is known.¹³⁶ Due to the lack of central authority surrounding blockchain transactions, a bad actor could very easily conduct transactions quickly and continue to do so regardless of borders.¹³⁷

Additionally, bad actors can take advantage by stealing a private key.¹³⁸ Once an NFT key is lost, it is lost forever.¹³⁹ The key is the unique password that gives the NFT owner their exclusive access to the NFT attached to the digital wallet, and if the key is shared or stolen because of hacking, then the bad actor or cybercriminal becomes the new owner.¹⁴⁰ A caveat here is that the key holder would have to have access to the physical work to be able to resell the artwork associated with the NFT¹⁴¹ (however, if they were a forger, they could have a duplicate created to go along with the stolen NFT).¹⁴²

Stolen keys may also have consequences on an owner's ability to bring a claim, because if a private key is stolen it may affect the discovery rule, which states that the cause of action to bring a private claim starts when the owner knew or should have known a valuable piece of art was missing or stolen.¹⁴³ If the wallet of an NFT owner is hacked and the private key is stolen, it is uncertain whether this will affect statute .

While NFT's may help resolve some of the issues surrounding provenance, title, and authenticity, there are still those issues such as copyright and fraud that NFTs may complicate and exacerbate. It is also clear that associating a physical artwork with an NFT could be more likely to benefit new artworks created with the NFT in mind than it is with existing artworks, antiquities, and cultural objects. This does not mean that NFTs associated with these existing works should be completely overlooked.

intent. If a court concludes that some writing better reflects the parties' meeting of the minds, it would be powerless to invalidate the smart contract; it would have to find some way to reverse the transfer of value ex post.").

135. *See generally id.* at 373.

136. *See Wang, supra* note 124.

137. *See generally* Werbach & Cornell, *supra* note 39 at 377.

138. *See Griffin, supra* note 20.

139. *See generally id.*

140. *Id.*

141. *See generally* Zhu & Lehot, *supra* note 109.

142. *See* Kelly Crow, *Scammers and Hackers See New Frontier in NFT Art*, WALL ST. J. (Aug. 27, 2021, 7:13 AM), <https://www.wsj.com/articles/scammers-see-new-frontier-in-nft-art-11629896400> [<https://perma.cc/VQ69-BW8L>].

143. *O'Keefe v. Snyder*, 83 N.J 478, 491 (1980).

IV. CONCLUSION

Law surrounding artificial intelligence often lags behind technological development. NFTs may create advantages for tracking art's provenance, establishing title, authenticity, and create new financial benefits for artists via smart contracting. Still, some of the same problems persist surrounding original title, authenticity, as well as copyright infringement. Additionally, NFTs create a layer of complexity to these issues, especially for existing art, artifacts, and cultural objects. Despite the complexity, new artists who intend to create NFTs along with their traditional artwork may benefit the most. This development in technology may influence how auction houses and artists contract and how traditional art is bought and sold in the future.