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ARTICLE

“I WANT MY NFT”: *MONEY FOR NOTHING* FOR  
INTELLECTUAL PROPERTY RIGHTS IN THE  
MODERN-DAY NON-FUNGIBLE  
TOKEN TRANSACTION

*Timothy T. Hsieh\**

Now look at them yo-yos, that's the way you do it  
You play the guitar on the MTV  
That ain't workin', that's the way you do it  
Money for nothin' and your chicks for free  
Now that ain't workin', that's the way you do it  
Lemme tell ya, them guys ain't dumb  
Maybe get a blister on your little finger  
Maybe get a blister on your thumb . . .

—Lyrics to *Money for Nothing* by Dire Straits

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## INTRODUCTION

Non-fungible tokens (“NFTs”) have been experiencing a renaissance lately, something that has become part of the global mainstream.<sup>1</sup> Yet that initial excitement and fad period may have seen its time come and go because in September 2023, an article was published in *Rolling Stone* proclaiming as its title “*Your NFTs Are Actually – Finally – Totally Worthless.*”<sup>2</sup> However, this all begs the question: what exactly is an NFT in the first place? You may have been hearing that term bandied about recently, as the popularity of NFTs have undergone an explosion in contemporary news and media coverage. In short, this trendy, tech-savvy TLA (or three letter acronym) stands for “non-fungible token.” Specifically, a non-divisible segment of a blockchain—essentially software code—that cannot be exchanged or traded (think driver’s license or an “authenticity certification” of some sort stating that you own a particular piece of a blockchain). Each non-fungible token corresponds to its own unique blockchain address as well, meaning that the ownership of a purchased NFT can be readily and easily ascertained. As a result, an NFT can be a digital file that takes the form of anything from an animated image to a legal document—like a patent or contract to a song, a movie, an event ticket or even a domain name.<sup>3</sup>

Depending on who you ask, NFTs may have been around since 2012 when a paper authored by Meni Rosenfield introduced the concept of “Colored Coins” for Bitcoin, or 2014 when a digital artist named Kevin McCoy minted the first official NFT known as “Quantum” on the Namecoin blockchain.<sup>4</sup> It may have been 2015 when “Terra Nullius,” the first NFT on the Ethereum (“ETH”) blockchain, was minted in August; or when Etheria, the first NFT project, was launched and shown at

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1. Timothy T. Hsieh, *NFTs: More Than Just A Fad*, *In Brief Magazine*, IN BRIEF MAGAZINE, Fall 2022, at 15-17.

2. Miles Klee, *Your NFTs Are Actually – Finally – Totally Worthless*, *ROLLING STONE* (Sept. 20, 2023), <https://www.rollingstone.com/culture/culture-news/nfts-worthless-researchers-find-1234828767/> [<https://perma.cc/S925-8TKA>].

3. Rakesh Sharma, *Non-Fungible Token (NFT): What It Means and How It Works*, *INVESTOPEDIA* (Jan. 28, 2024), <https://www.investopedia.com/non-fungible-tokens-nft-5115211> [<https://perma.cc/HV5J-A927>].

4. Henry Alexiades, *Where do NFTs actually come from? A short history of non-fungible tokens*, *ALT. PRESS* (Nov. 30, 2021), <https://www.altpress.com/meta/history-of-nfts-non-funfible-tokens/> [<https://perma.cc/83SF-373N>].

DEVCON 1 in London in October.<sup>5</sup> It may have even been 2017 when American studio Larva Labs first developed its “CryptoPunks” series.<sup>6</sup> But the real “watershed moment” that brought NFTs into the mainstream was the \$69,000,000 sale of Digital Artist Beeple’s “Everydays: The First 5000 Days” at a Christie’s auction.<sup>7</sup>

Ever since that milestone, NFTs have rocketed into the modern pop-culture consciousness at a breakneck pace. NFTs manifest themselves in everything from Saturday Night Live music videos,<sup>8</sup> to news regarding celebrities purchasing ludicrously priced “Bored Apes,”<sup>9</sup> to a 420-time surge at the United States Patent and Trademark Office (“USPTO”) in trademark filings related to NFTs,<sup>10</sup> to various popular NFT games such as “Crypto Kitties” and “Axie Infinity” allowing users to profit with “[p]lay-to-[e]arn” business models<sup>11</sup> to movie merchandising and NFT

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5. Alex White-Gomez, *The Definitive Timeline of Early NFTs on Ethereum*, ONE37PM (Dec. 29, 2021), <https://www.one37pm.com/nft/the-definitive-timeline-of-early-nfts-on-ethereum> [<https://perma.cc/W2NW-JNSS>]; *Non-fungible token*, WIKIPEDIA (Mar. 2, 2024), [https://en.wikipedia.org/wiki/Non-fungible\\_token](https://en.wikipedia.org/wiki/Non-fungible_token) [<https://perma.cc/727J-2QQ3>].

6. Alex Nelson, *NFT meaning: crypto art tech explained, what is a nonfungible token, where to buy them – and best marketplace*, NAT’L WORLD (Mar. 12, 2021, 11:52 AM), <https://www.nationalworld.com/lifestyle/money/nft-meaning-crypto-art-tech-explained-what-is-a-non-fungible-token-where-to-buy-them-and-best-marketplace-3163733> (“Their history dates back to 2017, when American studio Larva Labs developed CryptoPunks, a series of collectable digital characters traded through NFTs, which serve as a good starting point in getting your head around the technology. There are 10,000 unique CryptoPunks to collect. But being digital commodities, the ability to make copies which could be traded freely – thus reducing their value – is easy.”).

7. Jacob Kastrenakes, *Beeple sold an NFT for \$69 million*, THE VERGE (Mar. 11, 2021, 9:09 AM), <https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million> [<https://perma.cc/E37W-BV5E>].

8. Jazmin Goodwin, *Still not sure what NFTs are? ‘SNL’ explains with Eminem parody*, CNN BUSINESS (Mar. 29, 2021, 5:45 PM), <https://www.cnn.com/2021/03/28/media/nfts-snl-saturday-night-live/index.html> [<https://perma.cc/U4YF-8CJP>].

9. Kate Knibbs, *How Did the Bored Ape Yacht Club Get So Popular?*, WIRED (Feb. 8, 2022, 7:00 AM), <https://www.wired.com/story/celebrity-nfts/>.

10. Lachlan Keller, *US NFT trademarks increase by 420-fold in 2021: report*, YAHOO (Feb. 16, 2022), <https://www.yahoo.com/video/us-nft-trademarks-increase-420-013254677.html> (outlining the mad rush to trademark anything related to the Metaverse, Web 3.0 or NFTs).

11. *Axie Infinity and Crypto Kitties: What is the Future for NFT Games*, TECHDEE (Jan. 7, 2022) <https://www.techdee.com/axie-infinity-and-crypto-kitties/> [<https://perma.cc/T4XW-MBBU>].

“tie-ins.”<sup>12</sup> Eventually, platforms like OpenSea and Coinbase thrived by allowing users to auction and purchase NFTs via cryptocurrency wallet transactions—essentially only allowing this “collector culture” to form around an artifact that intersects with industries as diverse as sports and entertainment with technology and art.<sup>13</sup>

In an interview with Keanu Reeves during the release of *The Matrix Resurrections*, a reporter from *The Verge* asked him to opine on the recent NFT phenomenon.<sup>14</sup> He didn’t seem to understand what the commotion was all about, and ended his comments with the remark that “they are completely reproducible” before erupting into a gleeful cackle.<sup>15</sup> Reeves’ observation sums up the primary quandary involving intellectual property (“IP”) and NFTs: the fact that you do not own any of the IP of the NFTs you purchase, although many (of the legally un-initiated) think that they do. Essentially, as astutely pointed out by Scott Alan Burroughs, you do not obtain the underlying IP of an NFT purchase “due to two fundamental tenets of copyright law . . . first . . . the purchase or obtainment of an object – physical or digital – does not give the buyer any copyrights [or other IP] in that object” and “second . . . that ownership of a copyright [and some other forms of IP are] only transferred when an author signs a written contract that says so.”<sup>16</sup>

Burroughs went on to provide an excellent analogy to understanding NFTs and the unique relationship they have to their underlying IP:

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12. Chris Lindahl, *If Snoop Dogg, Reese Witherspoon, and McDonald’s Can Do NFTs, So Will You*, INDIEWIRE (Feb. 22, 2022, 10:00 AM), <https://www.indiewire.com/2022/02/nfts-in-film-tv-what-they-are-1234696393/> [https://perma.cc/2NC6-XL7Q].

13. See Eli Tan, *Coinbase NFT Marketplace Goes Live. Can It Rival OpenSea?*, COINDESK (Apr. 20, 2022, 8:00 AM), <https://www.coindesk.com/business/2022/04/20/coinbase-nft-marketplace-goes-live-can-it-rival-opensea/> [https://perma.cc/7WKA-ZCCW].

14. Dani Di Placido, *Keanu Reeves Thinks NFTs Are A Joke*, FORBES (Dec. 2021, 3:18 PM), <https://www.forbes.com/sites/danidiplacido/2021/12/11/keanu-reeves-thinks-nfts-are-a-joke/> [https://perma.cc/54ED-P96L].

15. *Id.*

16. Scott Alan Burroughs, *NFTs And Copyright: What You See Is Not What You Get*, ABOVE THE LAW (Feb. 18, 2022, 2:46 PM), <https://abovethelaw.com.cdn.ampproject.org/c/s/abovethelaw.com/2022/02/nfts-and-copyright-what-you-see-is-not-what-you-get/?amp=1>.

It helps to think of NFTs as digital baseball cards, those QFTs (quasi-fungible tokens) whose value for the most part peaked in the 1990s. While-your 1989 Upper Deck Ken Griffey Jr. rookie card was not one-of-a-kind, it was (in theory) available only in limited quantities and thus valuable. And while owning the card had its benefits, the holder had no right to make copies of it or stop others from using the photograph on the card. The same is true with an NFT. If I sold you an NFT associated with a drawing I made of Griffey, you would certainly be in a position to mock my inability to accurately render facial proportions, but you would not be in a position to do anything with that drawing other than hold it or trade it.<sup>17</sup>

This fundamental lack of understanding that underlying IP rights are not transferred during an NFT transaction has led to recent fiascos such as the (predominantly IP) lawsuit involving Quentin Tarantino’s attempted sale of NFTs involving his films *Reservoir Dogs* and *Pulp Fiction*,<sup>18</sup> and how “Crypto Bro” purchasers of a *Dune* book NFT thought that they were able to produce a *Dune* animated series as a result of the NFT acquisition.<sup>19</sup> As Harvard Law Professor Rebecca Tushnet points out, “the [NFT] purchaser acquires whatever the art world thinks they have acquired [because] [t]hey definitely do not own the copyright to the underlying work unless it is explicitly transferred [and] [a]ny licensing would have to happen separately[.]”<sup>20</sup> Hence, the comparison between the NFT scene and the art world is apt.

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17. *Id.*

18. Kal Raustiala & Chris Sprigman, *Guest Column: Tarantino vs. Miramax — Behind the NFT ‘Pulp Fiction’ Case, and Who Holds the Advantage*, HOLLYWOOD REP. (Nov. 24, 2021, 6:55 AM), <https://www.hollywoodreporter.com/business/digital/tarantino-miramax-pulp-fiction-nft-1235052378/> [<https://perma.cc/3H9G-HTVB>]; Alexander Fewtrell, *NFTs and litigation: Miramax v. Tarantino*, LEWIS SILKIN (Sept. 5, 2022), <https://brands.lewissilkin.com/post/102hwgp/nfts-and-litigation-miramax-v-tarantino> [<https://perma.cc/2K9M-4XSD>].

19. Adrienne Westenfeld, *The Saga of the Dune Crypto Bros And Their Very Pricey Mistake Is At Its End*, ESQUIRE (July 28, 2022, 8:24 AM), <https://www.esquire.com/entertainment/books/a38815538/dune-crypto-nft-sale-mistake-explained/> [<https://perma.cc/3AMZ-VN6D>].

20. Courtney Majocha, *Memes for Sale? Making sense of NFTs*, HARV. L. TODAY (May 19, 2021), <https://today.law.harvard.edu/memes-for-sale-making-sense-of-nfts/> [<https://perma.cc/R64B-S88R>].

To illustrate this conflict between IP laws and the lack of laws involving NFTs, take for example an NFT initiative currently known as “Meta Ghouls” from José Scott and Tony Romero, certainly a *cause célèbre* in being Oklahoma’s first and so far only NFT collective.<sup>21</sup> However, upon a simple Google search of that term, one is immediately brought to a competing NFT collection with the same name that looks different and has no official affiliation with the Oklahoman version—and the issue is that neither party can bring any action against the other due to the belief that usage of a brand in the NFT space can replace actual trademark registration.

Therefore, we have a situation where NFT purchasers are paying “money for nothing” because they are not acquiring any of the underlying IP rights to whatever NFT they purchased, and NFT makers are able to make “money for nothing” by digitizing “art” of questionable quality to sell them for inordinate amounts.<sup>22</sup> As a result, how do we solve this quandary? Are both the buyer and seller essentially paying for and making a lot of money by trafficking nothing? One potential solution that I propose in this paper is to integrate other self-executing blockchain technology such as smart contracts whenever an NFT transaction occurs where IP is relevant. For example, there is an initiative to treat a form of IP—specifically patents—as NFTs by encoding data such as licensing and litigation history, assignment history, patent prosecution history and other information that updates in real-time whenever infringement or negotiation occurs via a smart contract.<sup>23</sup> Thus, for transactions where IP rights are important, similar smart contract technology can be employed

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21. Meta Ghouls, <https://metaghoul.io> (on file with author); METAGHOULS LINKR.BIO, <https://linkr.bio/metaghoul/> [<https://perma.cc/7SZ5-YQ4A>]; @metaghoul\_1, TWITTER, [https://twitter.com/metaghoul\\_1](https://twitter.com/metaghoul_1) [<https://perma.cc/AQ75-LT9J>]; The Center for Creativity Channel, *Tony Romero y José Scott – Temas en Tulsa*, YOUTUBE (Mar. 7, 2022), [https://www.youtube.com/watch?app=desktop&v=\\_Svk9WN7NiQ](https://www.youtube.com/watch?app=desktop&v=_Svk9WN7NiQ) [<https://perma.cc/9K5X-37HB>].

22. See Amy Francombe, *Why Does NFT Art Look So Bad?*, VICE (Feb. 1, 2022, 3:15 AM), <https://www.vice.com/en/article/qjzb5m/why-does-nft-art-look-so-bad> [<https://perma.cc/Y4T9-VQH2>].

23. Seyed Mojtaba Hosseini Bamakan et al., *Patents and intellectual property assets as non-fungible tokens; key technologies and challenges*, NATURE (Feb. 9, 2022), <https://www.nature.com/articles/s41598-022-05920-6> [<https://perma.cc/5TJR-8MGP>]; see *IPwe and IBM Seek to Transform Corporate Patents With Next Generation NFTs Using IBM Blockchain*, IBM (Apr. 20, 2021), <https://newsroom.ibm.com/2021-04-20-IPwe-and-IBM-Seek-to-Transform-Corporate-Patents-With-Next-Generation-NFTs-Using-IBM-Blockchain> [<https://perma.cc/AM32-DC5B>].

in order to automatically encode IP rights, to satisfy at least the second fundamental tenet of copyright law described above.

The law of NFTs is currently in a state of constant flux as well as evolution, with the first official criminal matter involving NFTs (as well as money laundering and wire fraud) reported by the Department of Justice in March.<sup>24</sup> With *The Wall Street Journal* recently reporting in May of 2022 that “the NFT market is collapsing,”<sup>25</sup> it may be the right time to slow down and properly analyze this burgeoning market for what it is, in order to fashion laws and policy to properly regulate this constantly and rapidly changing space—something proven now to be certainly more than just a fad. Part of this paper also attempts to determine what exactly an NFT is, based on a series of recent trademark infringement cases: *Nike Inc. v. StockX*, the Hermes “MetaBirkin” case, and a Lil Yachty case.<sup>26</sup>

Each of the above-described cases involve issues of first impression before federal courts because they implicate some question that will further uncover what an NFT truly is. For example, in *Nike v. StockX*, the “first sale doctrine” under trademark law is analyzed to determine if an NFT bearing Nike’s trademarks is more than just a “voucher” for a shoe.<sup>27</sup> The MetaBirkin case also involves the question of whether or not free speech or First Amendment issues (possibly involving fair use) enter the NFT conversation.<sup>28</sup> *McCollum v. Opulous*, the Lil Yachty case, also raises the questions of whether NFTs can infringe not only trademarks but tradenames.<sup>29</sup>

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24. Press Release, U.S. Attorney’s Office, Southern District of New York, *Two Defendants Charged In Non-Fungible Token (“NFT”) Fraud And Money Laundering Scheme*, (Mar. 24, 2022), <https://www.justice.gov/usao-sdny/pr/two-defendants-charged-non-fungible-token-nft-fraud-and-money-laundering-scheme-0> [<https://perma.cc/WZ3W-96YZ>].

25. Paul Vigna, *NFT Sales are Flatlining*, WALL ST. J. (May 3, 2022, 7:15 AM), <https://www.wsj.com/articles/nft-sales-are-flatlining-11651552616>.

26. See *Nike, Inc. v. StockX LLC*, 22-CV-0983(VEC), 2023 WL 3091671 (S.D.N.Y. Apr. 26, 2023); *Hermès International v. Rothschild*, 22-cv-384(JSR), 2023 WL 4145518 (S.D.N.Y. June 23, 2023); *McCollum v. Opulous*, No. CV 22-00587-MWF(MARx), 2022 WL 17218072 (C.D. Cal. Aug. 3, 2022).

27. Andrew Rossow, *The Nike v. StockX Lawsuit Could Determine What Type of NFTs Can Be Created*, NFT NOW (May 26, 2022), <https://nftnow.com/features/the-nike-v-stockx-lawsuit-could-determine-what-type-of-nfts-can-be-created/>.

28. Maya Ernest, *The Hermès and MetaBirkins lawsuit could set legal precedents for NFTs*, INPUT (July 28, 2022), <https://www.inputmag.com/style/hermes-metabirkin-nft-lawsuit-legal-precendent-potential> [<https://perma.cc/T2R6-4C3S>].

29. Bill Donahue, *Lil Yachty Sues NFT Seller For ‘Blatant’ Use of His Name And Image to Earn Millions*, BILLBOARD (Jan. 28, 2022),

Accordingly, there are a variety of interesting issues to discuss in terms of reaching a consensus of how to solve the above-described “Money for Nothing” problem. Part I of this paper will focus on an overview of NFTs and the lack of IP rights associated with NFTs, or the “NFT IP Conundrum.” This section will include a discussion of how NFTs are being defined with respect to a series of trademark cases, copyright law and patent law, which is covered in other literature as well as forthcoming papers from the author. Part II will then outline the current marketplace of NFT trading platforms and the “Money for Nothing” problem that exists where a mismatch or imbalance is created between consumer understanding of what they are wanting to purchase from an NFT and what is actually really being purchased. Part III will finally discuss potential solutions to the “Money for Nothing” problem—e.g., NFTs embedded with smart contracts that automatically embed IP rights upon sale, stronger educational initiatives involving NFTs or the creation of platforms (or integration of rules and policies on existing platforms) that will facilitate the ideal transfer of IP rights for NFT transactions.

### I. AN OVERVIEW OF NFTS & IP

As explained in the introduction, there is much initial confusion involving what NFTs represent, what IP represents and what IP (if anything) NFTs actually represent. As Professor Runhua Wang, Professor Jyh-An Lee, and Professor Jingwen Liu argue, the existing IP system stands as the most suitable regulatory framework for governing the evolving market of NFTs, compared to other regimes based in personal property or sales laws.<sup>30</sup> How NFTs represent the four main types of IP in the United States—patents, trademarks, copyrights and trade secrets—and how those main four types of IP may represent NFTs will be discussed in turn based on the particular form of IP. In addition, the analysis framework utilized by Professor Christa Laser in looking at the IP of blockchain and

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<https://www.billboard.com/business/legal/lil-yachty-nft-seller-lawsuit-opulus-trademark-1235024467/> [<https://perma.cc/PWR5-MN2Y>].

30. Runhua Wang et al., 61 *AM. BUS. L.J.* 31, 31 (2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4475077](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4475077) [<https://perma.cc/4LEK-X874>] (“Compared to personal property or sales law, IP laws can more effectively address challenges such as tragedies of the commons and anticommons in the NFT market . . . . Moreover, the IP regimes, with both static and dynamic institutional designs, can effectively balance various policy concerns, such as innovation, fair competition, and consumer protection, which alternative proposals struggle to provide.”).



NFT technology, and how blockchain and NFTs can represent IP, will be adopted.<sup>31</sup>

### A. Patents

#### *Patents as NFTs*

The end product of patent prosecution is a United States patent document listing the patent number, which can also take the form of a digital file such as a PDF file readable via Adobe Acrobat. Such a digital file can also be minted or transformed into an NFT.<sup>32</sup> For example, in April of 2021, IBM and IPwe announced a partnership project aiming to represent patents as NFTs, and to “create the infrastructure for representing patents as NFTs and storing the records on a blockchain network” furthering the “tokenization” of IP to “help position patents to be more easily sold, traded, commercialized or otherwise monetized and bring new liquidity to this asset class for investors and innovators.”<sup>33</sup> Also, around May of 2021, Jack Fonss and his consulting company True Return Systems LLC auctioned an NFT version of U.S. Patent No. 10,025,797 on the NFT marketplace OpenSea where bidding for the patent started around \$7,500,000.<sup>34</sup> As of April 2022, when it still had not been purchased, it was listed for 1,250 ETH, approximately \$3,700,000.<sup>35</sup> Advantages of using an NFT to represent a patent include the ability to integrate within the NFT prosecution file histories, ownership rights, licensing rights,

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31. Christa J. Laser, *Legal Issues in Blockchain, Cryptocurrency, and Non-Fungible Tokens (NFTs)*, 102 NEB. L. REV. 101, 131-36 (2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4591858](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591858) [<https://perma.cc/J63A-Y9K6>] (see particularly the section headers entitled *Patents on Blockchain* and *Blockchain for Patents*).

32. See IBM, *supra* note 23.

33. *Id.*; see Seyed Mojtaba Hosseini Bamakan et al., *supra* note 23 (“For a patent to publish as an NFT in the blockchain, it must have a digitalized format. This level is the ‘filling step’ in traditional patent registering. An application could be designed in the application layer to allow users to enter different patent information online.”).

34. Matthew Frankle, *Matthew Franle in Bloomberg Law: ‘The Trendy, Hot NFT Market Has a New Entrant: Patents’*, HAYNES & BOONE (May 11, 2021), <https://www.haynesboone.com/news/articles/matthew-frankle-in-bloomberg-law> [<https://perma.cc/L5L3-ER75>].

35. Sarah J. Ring, *NFTs: The Future of Managing Patent Assets?*, PORTER HEDGES (Apr. 28, 2022), <https://www.porterhedges.com/patent-litigation-law-blog/nfts-the-future-of-managing-patent-assets> [<https://perma.cc/4548-P3WU>].

litigation histories and patent family and prior art data, making it easier to raise litigation funds, automate royalty collection methods and keep records of revenues—all tokenizing patent assets in order to make them “more easily [able to be] sold, traded, commercialized, or otherwise monetized.”<sup>36</sup> Moreover, the NFT for the ‘797 patent also includes a self-executing smart contract that automatically grants the buyer all rights in the patent, including the ability to sue for patent infringement.<sup>37</sup> However, as a result of this development, there has been criticism from commentators questioning the duplicative redundancy of using NFTs to represent patents while the USPTO already keeps public records of such documents.<sup>38</sup> Additional concerns include spurring more meritless lawsuits from non-practicing entities (“NPEs”) because allowing fractional ownership in a patent NFT provides these NPEs with a way to raise capital for litigation, confidentiality of transactions and royalty streams, and potential violations of securities laws and anti-money-laundering regulations.<sup>39</sup>

#### *NFTs as Patents*

The technology behind NFTs has also been the subject of many patent applications filed with the USPTO. The companies leading the pack for patent application filings pertaining to NFT-related technologies include Nike, eBay, Sony, Meta, Snap and The Walt Disney Company.<sup>40</sup> Also, as a result of a study from FiftyOne Ventures founder Marc Baumann, over 1,500 NFT-related patent applications were filed by the previously-listed companies and more, such as Formula One, Fidelity Investments, FICO, Fujitsu and even German gummy bear manufacturer Haribo.<sup>41</sup> However,

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36. *Id.*; Michael Fainberg et al., *Rejuvenating Patent Monetization Using NFTs*, ARENTFOX SCHIFF (Aug. 13, 2021), <https://www.afslaw.com/perspectives/alerts/rejuvenating-patent-monetization-using-nfts> [https://perma.cc/LEA9-VZJQ].

37. Tyler Boyce, *Patents Joining The Hot NFT Market?*, WINSTON & STRAWN LLP (Nov. 3, 2021), <https://www.winston.com/en/blogs-and-podcasts/the-playbook/patents-joining-the-hot-nft-market> [https://perma.cc/VM85-XB6R].

38. *Id.*

39. *Id.*

40. *A Deep Dive into Big Brands Innovating with NFT Patents*, NFT PLAZAS (Sept. 21, 2023), <https://nftplazas.com/nft-patents/> [https://perma.cc/HAP7-PZVH].

41. *Id.*; Shalini Nagarajan, *These 5 Companies Have Filed Web3 or NFT Patents*, BLOCKWORKS (May 6, 2023, 2:00 PM), <https://blockworks.co/news/web3-patents-companies-filing> [https://perma.cc/T8QU-GNAM].

because the technologies surrounding NFTs may involve the abstract ideas typically associated with FinTech, there may be challenges in arguing subject matter eligibility to overcome the requirements under 35 U.S.C. § 101.<sup>42</sup>

### B. Trademarks

#### *Trademarks as/in NFTs*

Trademarks also may be present in NFTs, which raises the question of whether or not the NFT includes the actual trademark so that possession of the NFT would include possession of the trademark. However, should NFTs be treated as trademarks? Professor Andrew Michaels addressed how and why the “likelihood of confusion” standard for trademarks should be applied to the trademark-based aspects of NFTs.<sup>43</sup> In his study, Professor Michaels asserts that courts should generally consider whether the alleged confusion would likely increase the amount that consumers would pay for the product at issue, which pertains particularly to NFTs because their value is almost always based on “clout.”<sup>44</sup> However, because trademarks may be distinct from an NFT or identified separately, there may not be any need to treat NFTs as trademarks. In the cases of *Nike Inc. v. StockX* and the MetaBirkin case of *Hermes v. Rothschild*, trademark infringement was at issue because the NFTs integrated trademarked logos or designs.<sup>45</sup> In a case against Opolous, the rapper Lil Yachty alleged

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42. Eric L. Sopher & Matthew Horton, *Patenting Strategies For Nonfungible Token Technology*, FOLEY (Mar. 25, 2021), <https://www.foley.com/insights/publications/2021/03/patenting-strategies-nonfungible-token-technology/> [<https://perma.cc/4VRV-RPH7>]; 35 U.S.C. § 101 (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”).

43. Andrew C. Michaels, *Confusion in Trademarked NFTs*, 7 STAN. J. BLOCKCHAIN L. & POL’Y 1, 1 (2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4493148](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4493148) [<https://perma.cc/Z4UT-ABQ2>].

44. *Id.* at 4.

45. See *Nike, Inc. v. StockX LLC*, 22-CV-0983(VEC), 2023 WL 3091671 (S.D.N.Y. Apr. 26, 2023); see also *Hermes International v. Rothschild*, 22-cv-384(JSR), 2023 WL 4145518 (S.D.N.Y. June 23, 2023); Lorraine Tay & Pin-Ping Oh, *Trouble in NFT Paradise – Lessons for Brand Owners*, BIRD & BIRD (June 6, 2022), <https://www.twobirds.com/en/insights/2022/singapore/trouble-in-nft-paradise> [<https://perma.cc/CSB2-248S>].

trademark infringement because the NFTs that Opulous released “maliciously” used his name and likeness.<sup>46</sup> However, in all of those cases there may have been a way to draw a line between where the trademark ended and where the NFT began. In cases where the NFT is merely a trademarked logo, there might be more of a question involving whether NFTs should be treated as allegedly infringing articles that can infringe registered marks under trademark law, or something else (for example, maybe a parody of a trademarked logo which may be protected under fair use). At the end of the day, NFTs are products that can be purchased, so whether mark holders can successfully sue makers of NFTs that use trademarks is an issue that is continuing to be developed in the courts.

### *NFTs as/in/for Trademarks*

There is also currently a large market to use NFTs to promote brands—for example, fashion companies are releasing NFTs to “allow customers to choose the color or pattern of a digital fashion item,”—and brands can release NFTs to represent rare digital items from exclusive collections.<sup>47</sup> Luxury watch company Jacob & Co. also recently engaged in an “NFT Watch Auction” where the highest bidder would receive an NFT digital rendering of a Jacob & Co watch on a hard drive.<sup>48</sup> Also, while 2021 and 2022 led to a surge in trademark filings involving NFTs from top companies,<sup>49</sup> an article from *The Block* proclaimed that “NFT-related trademarks saw [a] parabolic decline after March 2022” but “[d]espite the steady decline, NFT-related trademarks filed to the USPTO in 2022 were more than triple those filed in 2021.”<sup>50</sup> Among the NFT-

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46. Samantha Dorisca, *Lil Yachty Settles Lawsuit With NFT Platform That Raised \$6.5M In Venture Capital Funds Using His Likeness*, AFROTECH (Apr. 12, 2023), <https://afrotech.com/lil-yachtys-infridngement-lawsuit-against-opulous-settled/> [<https://perma.cc/FM25-HJQD>].

47. Manikandan, *How NFTs Are Revolutionizing the Fashion Industry*, VAKIL SEARCH (Sept. 8, 2023), <https://vakilsearch.com/blog/how-nfts-are-revolutionizing-the-fashion-industry/> [<https://perma.cc/UFD6-728P>].

48. Danny Parisi, *Beyond the hype: How NFTs stand to benefit fashion brands*, GLOSSY (Mar. 4, 2021), <https://www.glossy.co/fashion/beyond-the-hype-nfts-stand-to-benefit-fashion-brands-in-the-future/> [<https://perma.cc/EZN6-UMCH>].

49. *See NFT Trademark Filings Soared More than 20,000% Last Year*, META NEWS (Jan. 15, 2023), <https://metanews.com/nft-trademark-filings-soars-more-than-20000/> [<https://perma.cc/AF34-65HK>].

50. MK Manoylov, *NFT-related trademarks saw parabolic decline after March 2022*, THE BLOCK (Jan. 5, 2023, 11:19 AM), <https://www.theblock.co/post/199462/nft-related->

related trademark filings included marks for “Ring Pop,” “Mars Attacks,” “Garbage Pail Kids,” and “Bazooka” from The Topps Company, “Funko” from Funko LLC, “Upper Deck” from The Upper Deck Company and “Entertainment Weekly” from Entertainment Weekly—all marks in the context of NFTs and Web 3.0 or the Metaverse.<sup>51</sup>

### C. Copyrights

Perhaps the largest area of overlap of IP and NFTs occurs in the copyright space, primarily due to the vast majority of NFTs being images or art.<sup>52</sup> Moreover, NFTs can also be films or digital videos, computer programs and even law review or newspaper articles—all things that are protected by copyrights. However, purchasing an NFT does not mean purchasing the copyright of the work expressed by or in that NFT primarily because a purchaser is only buying a digital token representing ownership of a particular piece of blockchain.<sup>53</sup> In other words, the transfer of the copyright of an underlying copyrightable work in the NFT does not automatically occur to the NFT purchaser unless such a transfer is specifically contracted for.<sup>54</sup> Put in yet another way, as James Grimmelman, Yan Ji and Tyler Kell have stated: “Ownership of an NFT can be used to give the owner substantial control over a creative work, but that control is not automatic” and “[c]opyright law does not give an NFT owner any rights unless the creator takes affirmative steps to make sure that it does.”<sup>55</sup>

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trademarks-fall [https://perma.cc/T7QM-TTTP].

51. Josh Gerben, *Comprehensive List of NFT Trademark Filings*, GERBEN (Oct. 22, 2021), <https://www.gerbenlaw.com/blog/comprehensive-list-of-nft-trademark-filings/> [https://perma.cc/ZKG5-6AFP].

52. See Francombe, *supra* note 22.

53. Alex Macura, *NFTs & Copyright: What Do You Own?*, SEARCH ENGINE J. (May, 19, 2023), <https://www.searchenginejournal.com/nft-copyright/481280/> [https://perma.cc/5WY4-WRVD].

54. Ashli Weiss & Melodi Özer, *NFTs: What You Need to Know to Protect Copyrights*, BPP (2022), <https://bpp.msu.edu/magazine/nfts-what-you-need-to-know-to-protect-copyrights-june2022/> [https://perma.cc/8JFN-V6E6] (“As mentioned above, purchasing an NFT does not mean that the copyright of the underlying creative content automatically transfers to the owner of the NFT. However, the transfer of copyright ownership is possible as long as it is expressly determined in the contract between parties (see, 17 U.S.C. §204 (a)).”).

55. Cam Thompson, *NFTs and Intellectual Property: What Do You Actually Own?*, COINDESK (Oct. 14, 2022, 2:06 PM), <https://www.coindesk.com/learn/nfts-and-intellectual-property-what-do-you-actually-own/>

Apparently, this is not something readily understood. For instance, as mentioned previously, a group known as Spice DAO bought an NFT of a pitchbook for Alejandro Jodorowsky's adaptation of Frank Herbert's *Dune* thinking they purchased the underlying copyrights to adapt Herbert's novel, but they did not.<sup>56</sup> Litigation between Quentin Tarantino and Miramax arose over *Pulp Fiction* NFTs and the IP that those NFTs contained (high-resolution scans of his screenplay for the film).<sup>57</sup> Countless NFTs feature stolen art.<sup>58</sup> As one article on *The Verge* points out as further example of this fundamental lack of understanding: "'Right-clickers' save JPEG copies of the artwork from popular NFTs. The owners of those NFTs say this is copyright infringement. Only one of the two can be right."<sup>59</sup> Moreover, in a "particularly tragic example, [a man named] Andy Williams created an NFT of TV video footage depicting his daughter's murder" and he was "apparently advised that creating an NFT would give him enough of a copyright in the footage to have it removed from sites like Facebook and YouTube[,] yet "copyright doesn't work that way — the television station that filmed the footage owns the copyright, and minting an NFT doesn't change that."<sup>60</sup> Finally, the Director of Blockchain at *Associated Press* asserted that minting NFTs from their photographs would simplify the process of taking down unauthorized copies; however, copyrights originate from copyright law, or 17 U.S.C. § 102 which states that such copyrightable subject matter has to be fixed in a tangible medium of expression.<sup>61</sup> This means that the photograph itself and not the blockchain would be copyrighted, actually complicating the Digital Millennium Copyright Act ("DMCA")

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[<https://perma.cc/6VG8-QDJM>] (quoting James Grimmelmann et al., *Copyright Vulnerabilities in NFTs*, MEDIUM (Mar. 21, 2022), <https://medium.com/initc3org/copyright-vulnerabilities-in-nfts-317e02d8ae26>) (stating "very few of [NFT Projects] take all of the necessary steps needed to make NFT copyrights behave the way that community members expect.").

56. Westenfeld, *supra* note 19.

57. Adi Robertson, *Miramax sues Quentin Tarantino over Pulp Fiction NFTs*, THE VERGE (Nov. 17, 2021, 10:49 AM), <https://www.theverge.com/2021/11/17/22787216/miramax-pulp-fiction-quentin-tarantino-nft-lawsuit> [<https://perma.cc/S4CS-52XC>].

58. James Grimmelmann et al., *The tangled truth about NFTs and copyright*, THE VERGE (June 8, 2022, 7:30 AM), <https://www.theverge.com/23139793/nft-crypto-copyright-ownership-primer-cornell-ic3> [<https://perma.cc/YKD2-T6DS>].

59. *Id.*

60. *Id.*

61. *Id.*

takedown-notice process.<sup>62</sup> Such rampant confusion led the United States Copyright Office to conduct a study involving NFTs and IP policy governing their use.<sup>63</sup> It remains to be seen whether or not these studies or scenarios have educated NFT purchasers about how copyrights are properly tied to NFTs.

#### D. Trade Secrets

Although trade secrets should be kept confidential and NFTs are publicly auctioned for purchase, there is low possibility that trade secrets can be represented by NFTs on a blockchain, especially due to blockchain being a transparent asset record for public viewing.<sup>64</sup> Nonetheless, there have been lawsuits involving NFT companies or platforms and invocations of the Defend Trade Secrets Act. For instance, in May of 2022,

NFT wallet company Banq, Inc., filed suit in the United States District Court for the District of Nevada . . . against three former high level executives—specifically the Chief Executive Officer, Chief Technology Officer, and the Chief Product Officer—asserting, among other tort claims, violations of the Nevada Uniform Trade Secrets Act (“NUTSA”), which is consistent with both other states that have adopted the Uniform Trade Secrets Act, and the Defend Trade Secrets Act (“DTSA”). The complaint alleges that the executives stole confidential, trade secret information before resigning employment with Banq, Inc. to launch two rival NFT platforms—Fortress NFT and Planet NFT.<sup>65</sup>

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62. *Id.*

63. *Non-Fungible Token Study*, COPYRIGHT.GOV, <https://www.copyright.gov/policy/nft-study/> [<https://perma.cc/M8MZ-5D8U>].

64. Jared Ronis, *Blockchain: The World's Least Private Diary*, WILSON CENTER (Oct. 27, 2023), <https://www.wilsoncenter.org/article/blockchain-worlds-least-private-diary> [<https://perma.cc/Y3QU-TX3K>] (explaining under the header of “The Transparent Nature of Blockchain Transactions[:] At its core, blockchain technology is a public ledger of transactions. Each transaction is visible to every network participant, offering a high degree of transparency. This transparency is a key attribute which renders blockchain a reliable and secure technology. It facilitates transaction verification, thwarts double-spending, and curbs fraud. That said, this transparency also implies that every recorded transaction is available for public scrutiny.”).

65. Michael D. Wexler & Robyn E. Marsh, *NFT Company Seeks to Avail Itself of Trade*

Therefore, although trade secrets cannot technically be represented by NFTs or blockchain, there are likely several lawsuits brewing alleging the theft of trade secrets pertaining to blockchain or NFT technology.

## II. “MONEY FOR NOTHING”: THE IP-NFT CONUNDRUM

The lyrics underlying the Dire Straits song *Money for Nothing* are spoken from the perspective of two working-class appliance movers (at least according to the 3D computer animated music video) watching rock music videos and complaining about what they observe after Sting croons in a falsetto chorus, “*I want my MTV.*”<sup>66</sup> The song, from the point of view of these movers, continues to state:

Now look at them yo-yos, that’s the way you do it  
 You play the guitar on the MTV  
 That ain’t working, that’s the way you do it  
 Money for nothing and your chicks for free . . .  
 Lemme tell ya, them guys ain’t dumb  
 Maybe get a blister on your little finger  
 Maybe get a blister on your thumb.<sup>67</sup>

This can be analogized to news stories that have emerged in the past three years featuring twelve-year-old NFT creators making millions of dollars from their “Weird Whales” and “Long Neckie” NFTs,<sup>68</sup> NFT purchasers going into a frenzy buying hand-drawn VeeFriends NFTs<sup>69</sup> and

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*Secret Protections*, LEXOLOGY (June 13, 2022), <https://www.lexology.com/library/detail.aspx?g=ea0975a8-b43e-4e5e-87c8-e8a60a4f1f29> [<https://perma.cc/9F5Y-XCHQ>].

66. *Money for Nothing (song)*, WIKIPEDIA (Mar. 11, 2024), [https://en.wikipedia.org/wiki/Money\\_for\\_Nothing\\_\(song\)](https://en.wikipedia.org/wiki/Money_for_Nothing_(song)) [<https://perma.cc/R5EZ-GKUS>] (the title of this paper being a reference to this chorus).

67. DIRE STRAITS, *Money for Nothing*, on BROTHERS IN ARMS (Warner Bros. Records 1985) <https://genius.com/Dire-straits-money-for-nothing-lyrics> [<https://perma.cc/T4QT-LPLW>].

68. Rikki Schlott, *Meet 12-year-old Benjamin Ahmed who made \$1 million creating NFTs*, N.Y. POST (Feb. 3, 2022, 12:20 PM), <https://nypost.com/2022/02/03/meet-the-12-year-old-boy-who-became-a-millionaire-off-nfts/> [<https://perma.cc/Y8LB-85BR>]; Mark Spoonauer, *This 12-year-old has made nearly \$6 million with NFTs – and she’s just getting started*, TOM’S GUIDE (Dec. 28, 2021), <https://www.tomsguide.com/news/this-12-year-old-has-made-nearly-dollar6-million-with-nfts-and-shes-just-getting-started>.

69. Jason Nelson, *Gary Vaynerchuk Hand-Drawn VeeFriends Doodles Sell For*



celebrities coughing up exorbitant amounts to purchase “Bored Ape” NFTs.<sup>70</sup> Yet all NFT collections require seemingly minimal work to draw and mint, or “[t]hat ain’t working, that’s the way you do it / [m]oney for nothing . . . Lemme tell ya, them guys ain’t dumb.”<sup>71</sup>

In other words, this dilemma can be summed up as the “IP-NFT Conundrum” because money is being earned for essentially nothing. On the NFT-creator side, substantial amounts of money may be made for creating NFTs that arguably do not take any work. On the NFT-purchaser side, substantial amounts of money are being paid to purchase essentially “nothing,” especially when purchasers are deluded into thinking they are acquiring the underlying IP in an NFT. Examples of this include Spice DAO buying a *Dune* pitchbook NFT thinking that they bought the copyright to adapt *Dune*,<sup>72</sup> whether the MetaBirkin or Nike shoe StockX NFTs infringe on trademarks,<sup>73</sup> the redundancies in record-keeping that occur when a patent NFT is bought—when in fact they are not getting any IP at all. This phenomenon also occurs because NFTs have valuation paralleling their estimation from the art world.

As Professor Brian Frye argues in his paper *The Uncanny Token*, even though “NFTs are blockchain entries that represent ‘ownership’ of an artwork, typically a digital image...[a]n NFT represents the price of an artwork, nothing more and nothing less. The thrill is gone when you turn the magic ticket into a claim check.”<sup>74</sup> This is essentially the exchange of “money for nothing” because the only thing purchasers are getting is a certificate of ownership (very much like a driver’s license or diploma) establishing that the purchaser owns a piece of a blockchain. In other words, they are not getting the actual IP “art” underlying what that certificate represents. Moreover, as mentioned above, the ability to acquire “money for nothing” is being demonstrated by NFT artists or creators who

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*\$1.26M*, DECRYPT (Oct. 2, 2021), <https://decrypt.co/82474/gary-vaynerchuk-hand-drawn-doodle-nfts-sell-for-1-26m>.

70. Sam Dunn, *The All-Star Owners of the Bored Ape Yacht Club*, BOARDROOM (July 5, 2023), <https://boardroom.tv/bored-ape-nft-celebrity-owners/> [<https://perma.cc/X8WD-MWSG>].

71. DIRE STRAITS, *supra* note 67.

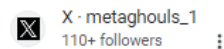
72. Westenfeld, *supra* note 19.

73. See *Hermes International v. Rothschild*, 22-cv-384(JSR), 2023 WL 4145518 (S.D.N.Y. June 23, 2023); *Nike, Inc. v. StockX LLC*, 22-CV-0983(VEC), 2023 WL 3091671 (S.D.N.Y. Apr. 26, 2023).

74. Brian L. Frye, *The Uncanny Token* (Apr. 10, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4413881](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4413881) [<https://perma.cc/W5QZ-YD6B>].

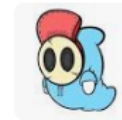
do not do anything particularly creative, innovative or groundbreaking (for example, poor art<sup>75</sup>) and even worse, steal the copyrighted designs and art from artists already out there.

The confusion as to whether or not proper IP infringement occurs in NFTs can be seen by a local Oklahoma example. The “MetaGhouls” NFT collection from Tony Romero and José Scott originating out of Oklahoma City was released roughly around December 2021, and no underlying trademark was acquired or registered for that name, permitting another NFT collection also named “Meta Ghouls” to exist.<sup>76</sup>



metaghoul\_1.0

The First Ghoul Community •Going from to Meta Heaven •1400 exclusive Ghouls  
•Minting 2/2/2022.



Meta Ghouls

Oct 30, 2023 – 5000 Unique ghouls haunting the metaverse on October 30th.



Moreover, although traces of that other “Meta Ghouls” NFT collection may have disappeared, there is currently an NFT collection known as “MetaGoblins” available for purchase on OpenSea.<sup>77</sup> The company behind MetaGoblins is also known as “MetaBlaze” which may also cause some likelihood of confusion with respect to the Oklahoman “MetaGhouls” NFT collection.<sup>78</sup> Moreover, there may have been trademark litigation suits surrounding the mark “Meta” such as Meta Platforms (formerly Facebook) being sued for a tech company known as Mechbyte.<sup>79</sup> However,

75. See Francombe, *supra* note 22.

76. Compare @metaghoul\_1.0, TWITTER, [https://twitter.com/metaghoul\\_1](https://twitter.com/metaghoul_1) [<https://perma.cc/4ET6-J23F>], with NFT CATCHER, Meta Ghouls, <https://www.nftcatcher.io/drops/meta-ghouls> (on file with author).

77. OPENSEA, *MetaGoblins*, <https://opensea.io/collection/metablaze-metagoblins>; see also METABLAZE, *MetaGoblin NFT*, <https://metablaze.gitbook.io/docs/nft-collections/metagoblin-nft> [<https://perma.cc/33RL-HY29>] (a company also known as “MetaBlaze” producing such NFTs).

78. MetaBlaze (MBLZ), *MetaGoblin NFT Story Revealed: The Upcoming NFT Project You Need to Know About!*, METABLAZE, <https://metablaze.gitbook.io/docs> [<https://perma.cc/9XKJ-FZY9>].

79. Blake Brittain, *Meta Platforms hit with US trademark lawsuit from tech company Metabyte*, REUTERS (Sept. 22, 2023, 7:41 PM),

due to Meta recently ending support for NFTs on Facebook and Instagram, will that be considered a more open trademark landscape with respect to NFTs and the word “Meta,” or an empty one with little to no activity?<sup>80</sup>

This NFT-IP-Conundrum can also be seen manifested in the various platforms or marketplaces where NFTs are bought and sold. For example, OpenSea tops the list of the most popular platforms or marketplaces to sell NFTs, followed by Rarible, Binance, Nifty Gateway and SuperRare.<sup>81</sup>

Moreover, specialized marketplaces like NBA Top Shot allow you to purchase NFTs encapsulating replayable moments in NBA history taking the form of video clips, play highlights and art—which is similar to an updated, digitized-blockchain version of tradable basketball cards.<sup>82</sup> On these platforms, NFTs can also be purchased with cryptocurrencies such as ETH, Solana, Polygon, Avalanche, BNB, Bitcoin, DAI and USDC.<sup>83</sup> NFT consumers and users click over to these NFT marketplaces and exchange cryptocurrency for their desired NFTs; once purchased they can display their NFTs on wallets or pages, like Mark Cuban’s public NFT page at Lazy.com where other NFT admirers can click over to observe.<sup>84</sup> Additionally, on these platforms there may exist some IP provisions. For example, on OpenSea and Nifty Gateway, copyright holders can submit takedown notices under the DMCA if they think any of their copyrighted work is being infringed—however, a takedown that is successful only results in removal of displayed images or art on the website of the NFT marketplace, not the original platform that the NFT may be stored on (which would have to be removed separately).<sup>85</sup>

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<https://www.reuters.com/legal/litigation/meta-platforms-hit-with-us-trademark-lawsuit-tech-company-metabyte-2023-09-22/>.

80. Jay Peters, *Meta gives up on NFTs for Facebook and Instagram*, THE VERGE (Mar. 13, 2023 5:03 PM) <https://www.theverge.com/2023/3/13/23638572/instagram-nft-meta-facebook-quits-digital-collectibles> [<https://perma.cc/QS68-JQEK>].

81. David Rodeck, *Top NFT Marketplaces of February 2024*, FORBES ADVISOR (Feb. 1, 2024, 10:03 AM), <https://www.forbes.com/advisor/investing/cryptocurrency/best-nft-marketplaces/> [<https://perma.cc/AP47-EXE6>].

82. *Id.*

83. *Id.*

84. @mcuban, LAZY, <https://lazy.com/mcuban> (last visited Apr. 21, 2024).

85. Stuart Levi et al., *Copyrights, Professional Perspective – NFTs Raise Novel and Traditional IP and Contract Issues*, BLOOMBERG L. (Mar. 2021), <https://www.bloomberglaw.com/external/document/XQB4C3000000/copyrights-professional-perspective-nfts-raise-novel-and-traditi> [<https://perma.cc/AKA5-ZRSV>] (“The IPFS file storage system, for example, includes its own DMCA take-down process.”).

Nonetheless, removing an NFT from the actual NFT itself will likely be very difficult, if not impossible, due to the immutable nature of blockchains. As a result, IP-rights holders may only be able to take solace that an NFT pointing to a copyrighted or other work protected by IP will have minor value.<sup>86</sup> Locating the entity or individual who minted an NFT infringing on IP may also be challenging due to how blockchain only includes alphanumeric addresses of blockchain participants and how that individual may be anywhere globally.<sup>87</sup> Moreover, under the terms and conditions at SuperRare, an NFT artist is required to refund the NFT purchaser or SuperRare the amount of the entire portion of the Ether cryptocurrency received from the sale of the purchased NFT due to the successful DMCA takedown request.<sup>88</sup> As a result, many peripheral problems arise due to this IP-NFT Conundrum that can be stemmed if rigorous IP policies can be put into place.

### III. PROPOSED SOLUTIONS

This final section will outline proposed solutions to address the above-described IP-NFT Conundrum, which would include, for instance: (1) self-executing smart contracts that activate upon purchase of an NFT to either assert underlying IP rights or not, (2) disclaimers on platforms where NFTs are purchased clarifying that IP rights are not acquired when NFTs are purchased, (3) educational efforts appearing on these platforms informing consumers and users which IP rights are not purchased and how IP rights may be purchased, if contracted for, (4) creation of separate markets that do sell IP in the form of NFTs and (5) the creation of platforms (or integration of rules and policies on existing platforms) that will facilitate the ideal transfer of IP rights for NFT transactions.

#### A. Self-Executing Smart Contracts

A special type of NFT known as an “[a]utonomous NFT” includes a built-in self-executing smart contract.<sup>89</sup> As a result, a self-executing smart

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86. *Id.*

87. *Id.*

88. *Id.*

89. Alexandra Wilson, *Autonomous NFTs: The Rise of Self-Executing NFTs*, MEDIUM (Oct. 28, 2023), <https://medium.com/coinmonks/autonomous-nfts-the-rise-of-self-executing-nfts-436d5ddf86d>.

contract could initiate its operation when an NFT is purchased, thereby protecting any underlying IP asset displayed or contained in an NFT. Furthermore, an underlying smart contract could provide terms that would specifically and explicitly contract for the transfer of IP (copyrights, trademarks or patents) whenever an NFT would be purchased—thereby solving the problem of the IP-NFT Conundrum by making it clear that a transfer of IP rights is being contracted for and agreed upon between the NFT purchaser and the NFT creator. Currently, Molecule Docs provides an “IP-NFT legal structure” that is a “hybrid legal-smart contract structure [that] enables on-chain registration and management of IP and R&D data rights” by combining and executing two contracts: a Research Agreement and an Assignment Agreement that assigns the Research Agreement to the owner of an NFT.<sup>90</sup> IP-NFTs are also NFTs representing legally binding IP, and there are several guides describing how such technology can be implemented by developers.<sup>91</sup> Thus, similar technology can be utilized in order to embed or integrate self-executing smart contracts that not only transfer the relevant underlying IP rights but also automate royalty payments to NFT creators and artists whenever the NFT is sold or resold.<sup>92</sup>

### B. Disclaimers

Disclaimer language can also be created to inform NFT purchasers and NFT creators that the IP underlying an NFT is not actually transferred unless specifically contracted for (for example, via a self-executing smart contract as described above). For instance, language can be added before an NFT purchase is made or during checkout to ensure that users and consumers realize that none of the IP rights seen or viewable in an NFT are transferred when they buy that NFT. The practice described above of a DMCA policy might be effective as part of that disclaimer as well in that

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90. *IP-NFT legal structure*, MOLECULE DOCS, <https://docs.molecule.to/documentation/ip-nfts/ip-nft-legal-structure> [https://perma.cc/6XG3-Z5Q6]; see also *What Is Molecule?*, MOLECULE DOCS, <https://docs.molecule.to/documentation/introduction/readme> [https://perma.cc/3M7J-5QTM].

91. Stefan Adolf, *IP-NFTs: Everything you need to know as a developer*, MEDIUM (Jan. 18, 2023), <https://medium.com/molecule-blog/ip-nfts-everything-you-need-to-know-as-a-developer-2cdfd5d9116e>.

92. *NFTs and Intellectual Property Rights (IP): A Legal Analysis of industry problems and prospects*, NFTMETRIA (Sept. 25, 2023), <https://nftmetria.com/nft-market/nfts-ip-rights/> [https://perma.cc/6QSY-SAR8].

making users aware of a DMCA takedown may deter the posting of NFTs that infringe IP. However, to be effective, part of the disclaimer would have to also include the educational efforts that are further mentioned below.

### *C. Enhanced Educational Efforts*

There can also be enhanced efforts to educate the NFT community on the realities of the interplay between IP rights and NFT minting or purchasing. For instance, high-production-quality videos or presentations can be produced that can be placed on the front pages of user profiles when they log into OpenSea or any of the other leading NFT marketplace platforms. NFT purchasers or users of these platforms may also be required to sit through a tutorial video before making NFT purchases to ensure that they know that they are not acquiring the underlying IP rights in an NFT—unless they specifically contract for that transfer of IP perhaps via the same type of self-executing smart contract as mentioned above. In addition, short articles should be disseminated on leading NFT and crypto blogs like Cointelegraph, CoinDesk, and the blogs on NFT marketplace platforms like OpenSea and Rarible. Finally, legal resources like casebooks or online legal guides on NFTs and IP should be published and made readily available to NFT consumers, NFT makers and attorneys active in the NFT space in order to fully educate the entire NFT community on the true scenario of IP legal rights in the context of NFTs.

### *D. Creation of Separate Markets*

Separate markets of specialized NFTs—such as IP-NFTs—can be created in order to foster a sophisticated consumer and creator base. Another example of a specialized NFT market would be the NFT marketplace platform of NBA Top Shot because such a platform caters specifically to NBA fans. Additional markets should exist for baseball card collectors, Magic card enthusiasts and many other similar hobbyist communities. Such separate and distinct markets may also be created for NFTs of certain types of IP (such as patents and the patent document “as an NFT” described above). There can also be specialized markets focused on fashion apparel NFTs (that embody trademarks), films or anime properties as NFTs (just like the Quentin Tarantino *Pulp Fiction* NFTs) and groups dedicated to hybrids between those various forms of IP and

NFTs. What also is promising about these specialized markets is the ability to fashion custom policies and disclaimers that make it very difficult to conflate the transfer of IP rights with the purchase of NFTs. As a result, less reliance on educational materials can be effectuated.

#### *E. Creation of IP Policies, Rules or Platforms for NFTs*

Last, there should be the creation of specific IP policies or rules on existing NFT marketplace platforms. These policies should be in addition to, as well as an extension of, existing policies such as the DMCA Takedown Policies and Procedures available on OpenSea, Nifty Gateway and Super Rare. Suggested or proposed IP policies can include a requirement to establish a contract or smart contract if underlying IP is desired to be transferred, or a contract or smart contract promising to remove any infringing IP from the base platform the NFT is hosted on. Other IP policies could include warranties that whatever NFTs that are being purchased do not infringe on any currently existing IP out there. Further, there can be separate IP policies applied to the specific IP-NFTs that can be the subject of entirely different markets, as mentioned above. The advantage of building such distinct and uniquely independent markets selling very specialized NFTs is that new rules and policies—especially pertaining to IP—can be promulgated and likely followed. Accordingly, there will be no resistance or hesitation to follow such IP policies because they will be implemented at the “ground floor” of when that NFT marketplace or platform will be utilized and accessed.

### CONCLUSION

As seen above, various forms of IP can be represented as NFTs and some aspects of NFTs can be represented by IP. However, there is rampant consumer confusion as to whether IP rights are actually purchased when NFTs are purchased (because they are not). This is known as the IP-NFT Conundrum, which is something that this paper illustrates through the lyrics to the Dire Straits song *Money for Nothing*. As a result, this paper proposes solutions such as self-executing smart contracts that specifically transfer IP rights, disclaimers on NFT marketplace platforms, enhanced educational efforts, the creation of separate markets that do sell IP as NFTs and the creation of platforms or integration of rules and policies on existing NFT marketplace platforms.

As shown below, the lyrics to Dire Straits' "Money for Nothing"<sup>93</sup> establish, annotated for the NFT era illustrate a problem that can be solved with creative legal thinking:

Listen here  
Now that ain't workin' that's the way you do it  
You [mint] th[at] [blockchain] on the [NFT]  
That ain't workin', that's the way you do it  
Money for nothin' and your [clicks] for free  
Money for nothin', [clicks] for free  
Get your money for nothin' and your [clicks] for free  
Ooh, money for nothin', [clicks] for free  
Money for nothin', [clicks] for free (money, money, money)  
Money for nothin', [clicks] for free  
Get your money for nothin', get your [clicks] for free  
Get your money for nothin' and the [clicks] for free  
Get your money for nothin' and the [clicks] for free  
Look at that, look at that  
Get your money for nothin' (I want my, I want my)  
[Clicks] for free (I want my [NFT])  
Money for nothin', [clicks] for free (I want my, I want my, I want  
my [NFT])  
Get your money for nothin' (I want my, I want my)  
And the [clicks] for free (I want my [NFT])  
Get your money for nothin' (I want my, I want my)  
And the [clicks] for free (I want my [NFT])  
Easy, easy money for nothin' (I want my, I want my)  
Easy, easy chicks for free (I want my [NFT])  
Easy, easy money for nothin' (I want my, I want my)  
[Clicks] for free (I want my [NFT])  
That ain't workin'  
Money for nothing, [clicks] for free  
Money for nothing, [clicks] for free

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93. DIRE STRAITS, *supra* note 67.