

# Art in the Time of NFTs: Navigating the Challenges and Role of NFTs in Artists' Reclamation of Control over their Publicity Rights

Bo Hyun Kim

---

*Bo Hyun Kim is a third year student at Handong International Law School in South Korea where she is studying US and international law. She has published articles on emerging technologies and, most recently, contributed a chapter on NFTs and the Metaverse in a legal handbook on Esports law and practice (pending publication).*

---

I see NFTs as a way to innovate, empower others and push the boundaries of how artists interact with their fans. I see NFTs...as the future of the creator economy... NFTs are democratising art.

— Paris Hilton<sup>1</sup>

## Introduction

This year marks the 25<sup>th</sup> anniversary of Jay-Z's debut album, *Reasonable Doubt*.<sup>2</sup> The 1996 album jump-started the Brooklyn-born rapper's career from a fledgling artist to a business mogul, who became the first to be declared a hip-hop billionaire by *Forbes* magazine.<sup>3</sup> Hailed by fans as his 'rawest and most vulnerable work', Jay-Z's first album recently spotlighted novel legal challenges with regard to ownership and regulation of the emerging asset class of non-fungible tokens (NFTs).<sup>4</sup>

Since 1994, when Jay-Z was first introduced to Damon 'Dame' Dash, a young music executive from Harlem, the now-estranged pair went from selling CDs out of the trunk of Jay-Z's car to co-founding *Roc-A-Fella Records, Inc* ('RAF, Inc.').<sup>5</sup> However, twenty-seven years after their first encounter, they now find themselves embroiled in a lawsuit centred on Dash's alleged attempt to auction off the copyright for *Reasonable Doubt* as an NFT.<sup>6</sup> The suit is replete with implications for current and prospective NFT market participants, especially for those in the arts and entertainment industry, ranging from artists and promoters to developers. While NFTs present challenges due to the absence of guidelines, they may, with the development of certain legal and regulatory contours, herald the beginning of a new normal that would allow artists to better control and monetise their work.

Against this backdrop, this article explores the principal legal issues that arise in the NFT space, specifically those related to the arts and entertainment industry. First, this article provides an overview of NFTs, including examples that illustrate how artists use them. Second, it examines the ongoing *Roc-A-Fella Records, Inc. v. Dash* lawsuit<sup>7</sup> and its practical implications. Third, this article argues that

1 Paris Hilton, 'I'm Excited About NFTs—You Should Be Too' (*Paris Hilton*, 8 April 2021) <<https://parishilton.com/nft/>> accessed 25 October 2021.

2 Sotheby's, 'Heir to the Throne: An NFT in Celebration of JAY-Z's Reasonable Doubt 25th Anniversary by Derrick Adams' (*Sotheby's*, 2 July 2021) <<https://www.sothebys.com/en/digital-catalogues/heir-to-the-throne>> accessed 25 October 2021.

3 Zack O'Malley Greenburg, 'Artist, Icon, Billionaire: How Jay-Z Created His \$1 Billion Fortune' (*Forbes*, 3 June 2010) <<https://www.forbes.com/sites/zackomalleygreenburg/2019/06/03/jay-z-billionaire-worth/?sh=7bf3f7d53a5f>> accessed 25 October 2021.

4 Chris Richardson, 'Jay-Z', *100 Entertainers Who Changed America: An Encyclopaedia of Pop Culture Luminaries* (2013) 289.

5 Asondra Hunter, 'Rockin' On A Roc-A Fella' (*Yahoo Music*, 5 January 1999) <<https://web.archive.org/web/20070609232211/http://music.yahoo.com/read/interview/12048673>> accessed 25 October 2021.

6 A.D. Amorosi, 'In Lawsuit Over Jay-Z NFT Auction, Damon Dash and Roc-A-Fella Dispute What's at Stake, Beyond a 'Reasonable Doubt'' (*Variety*, 21 June 2021), <<https://variety.com/2021/music/news/damon-dash-jay-z-lawsuit-rock-a-fella-records-1235001534/amp/>> accessed 25 October 2021.

7 Complaint, *Roc-A-Fella Records, Inc. v. Damon Dash* (Southern District of New York 2021) (No. 1:21-cv-5411), <<https://fingfx.thomsonreuters.com/gfx/legaldocs/xegpbrrwvwpq/IP%20JAYZ%20COPYRIGHT%20>

despite the associated challenges, if utilised properly NFTs may serve as a medium through which artists and public figures may relinquish control over the usage of their name, image, and likeness.

## A Brief Overview of NFTs

A non-fungible token (NFT) is a digital unit of value stored on a digital ledger where each unit represents a unique digital item ranging from artwork and collectibles, to even tokenised versions of real-world assets such as real estate.<sup>8</sup> One of the primary attributes of NFTs that distinguishes them from other cryptocurrencies like Bitcoins is their uniqueness.<sup>9</sup> NFTs are unique because no two NFTs are interchangeable. Each NFT contains unalterable, permanent metadata describing the asset that it represents while certifying its authenticity.<sup>10</sup>

The uniqueness of NFTs may provide artists and entertainers with a vehicle to not only enhance fan interaction, but also build highly engaged communities. Indeed, minting and issuing NFTs allows artists to provide their fans with unique experiences, engaging with them in novel ways in the digital age. By reverse token, NFTs democratise public access to art and entertainment by allowing them to participate without having exclusive invite-only tickets or retaining the services of an art consultant for a hefty fee. For instance, in early 2021, Kings of Leon, the four-time Grammy -winning American rock band, released their new album, *When You See Yourself* as NFTs, becoming the first band to release an album as an NFT.<sup>11</sup> Each NFT was unique in that token holders received a limited-edition 'Golden Eye' vinyl and exclusive artwork, along with tickets to four front-row seats to a show of each Kings of Leon tour for life.<sup>12</sup> Through the NFT sales, Kings of Leon reportedly raised \$2 million, where over \$500,000 was donated to a fund through which musicians have been supporting the industry throughout the COVID-19 pandemic.<sup>13</sup>

NFTs are also characterised by their indivisibility, unlike other types of cryptocurrencies.<sup>14</sup> Under smart contracts implementing ERC-721, the current industry standard for minting NFTs, certain terms in executing functions via NFTs such as assignment of ownership and management of transferability are defined in a network, as in a regular contract.<sup>15</sup> An NFT holder's rights to the work depend on the terms embedded in the NFT through the smart contract, and these terms are automatically enforced when the programmed conditions are met.<sup>16</sup> For instance, NFT royalties may be automatically paid out

complaint.pdf>.

8 Nir Kshetri, *Blockchain and Supply Chain Management* (Elsevier 2021) 23.

9 Ramakrishnan Raman and Benson Edwin Raj, *Enabling Blockchain Technology for Secure Networking and Communications* (Adel Ben Manouer and Lamia Chaari Fourati eds, IGI Global 2021) 92.

10 *ibid.*

11 Samantha Hissong, 'Kings of Leon Will Be the First Band to Release an Album as an NFT' (*Rolling Stone*, 3 March 2021) <<https://www.rollingstone.com/pro/news/kings-of-leon-when-you-see-yourself-album-nft-crypto-1135192/>> accessed 28 October 2021.

12 Sam Moore, 'Kings Of Leon have generated \$2million from NFT sales of their new album' (*NME*, 12 March 2021) <<https://www.nme.com/news/music/kings-of-leon-have-generated-2million-from-nft-sales-of-their-new-album-2899349>> accessed 28 October 2021.

13 *ibid.*

14 Kshetri (n8) 24.

15 Ethereum, 'Non-fungible tokens (NFT)' (*Ethereum*, 6 March 2021) <<https://ethereum.org/en/nft/#:~:text=NFTs%20are%20minted%20through%20smart,the%20NFT%20is%20being%20managed>> accessed 29 October 2021.

16 *ibid.*

to the original creator once the coded terms of the smart contract are fulfilled upon a secondary sale transaction.<sup>17</sup> Accordingly, if an NFT contract is designed to trigger such an automated resale royalty payment mechanism, the artist would retain the right to future resale royalties and more control over his work.

This is best illustrated through the digital artist Beeple's sale of *Everydays*, a collage of images that Beeple created and shared online every day since 2007. *Everydays* was sold for a record-breaking price of \$69.3 million at Christie's, rendering the preeminent auction house the first amongst its counterparts to offer a purely digital work with a unique NFT.<sup>18</sup> Notably, the artwork is known as the most expensive NFT to date.<sup>19</sup> Due to an automatic 10% resale royalty executed through an NFT platform called Nifty Gateway, Beeple reportedly gained more through the resale of his artwork compared to the price he received from the original sale.<sup>20</sup> Hence, creators that mint NFTs may benefit from implementing a custom creator share percentage for each subsequent resale to receive royalties, so long as they ensure that their work is resold within the platform.<sup>21</sup>

Another important attribute is its interoperability, which allows NFTs to be traded and purchased in different distributed ledger technologies with relative ease.<sup>22</sup> The interoperability of NFTs between different platform chains allows the original creator of the digitised item to receive a steady source of income each time the NFT is sold in the secondary market, without an agent or distributor who would charge commission fees.<sup>23</sup>

Meanwhile, the value of NFTs corresponds to fluctuations in market supply and demand because their value lies not in the intrinsic nature of the token itself, but rather in the value assigned by those who deem it valuable.<sup>24</sup> Indeed, the prices of NFTs vary widely. To illustrate, *CryptoPunks*—the 24x24 pixel, 8-bit-style avatars—first created by software developers in 2017, were valued at a mere \$1-\$34 each when they were initially released.<sup>25</sup> However, their values have risen considerably over the years; a *CryptoPunk* owner

17 Cyberscrilla, 'NFT Royalties: What Are They and How Do They Work?' (*Cyberscrilla*) <<https://cyberscrilla.com/nft-royalties-what-are-they-and-how-do-they-work/>> accessed 30 October 2021.

18 Christie's, '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>> accessed 30 October 2021.

19 Lynnae Williams, 'The 5 Most Expensive NFTs—And Why They Cost So Much' (*MakeUseOf*, 7 September 2021), <<https://www.makeuseof.com/most-expensive-nfts-why-they-cost-so-much/>> accessed 30 October 2021.

20 Grace Kay and Brittany Chang, 'A digital artist known for his satirical work is breaking sales records, making over \$10 million on 2 crypto-art piece' (*Business Insider*, 5 March 2021), <<https://www.businessinsider.com/art-nft-beeple-blockchain-pieces-sell-for-millions-2021-3>> accessed 30 October 2021.

21 Evan Vischi, 'The NFT resale dilemma: How can creators make sure they keep getting paid?' (*Medium*, 24 April 2021), <<https://blog.tatum.io/the-nft-resale-dilemma-how-can-creators-make-sure-they-keep-getting-paid-e929c96a6599>> accessed 30 October 2021.

22 Raman and Raj (n 9) 93.

23 Cybrscrilla (n 18).

24 Maria L. Murphy, CPA, 'NFTs come with big valuation challenges' (*Journal of Accountancy*, 16 July 2021), <<https://www.journalofaccountancy.com/news/2021/jul/nft-nonfungible-token-valuation-challenges.html>> accessed 30 October 2021.

25 Katie Rees, 'What Is a CryptoPunk and Why Are They Worth So Much?' (*MakeUseOf*, 26 August 2021), <<https://www.makeuseof.com/what-is-a-cryptopunk-why-are-they-worth-so-much/>> accessed 30 October 2021.

is reported to have been offered \$9.5 million for his *CryptoPunk*.<sup>26</sup> This reflects a positive correlation between the value of NFTs and their increased public perception and popularity.<sup>27</sup> Furthermore, appreciation of CryptoPunks' value proves not only the prestigious status that accompanies the ownership of rare NFTs, but also NFTs' potential to become lucrative investment opportunities.<sup>28</sup>

### ***Roc-A-Fella Records v. Dash: A Case Study of the Legal Challenges Surrounding NFTs***

The case study of *Roc-A-Fella Records v. Dash* shows that there are unresolved problems in the nascent terrain of NFTs. On June 18, 2021, RAF, Inc. filed a lawsuit against Damon Dash in the US District Court of the Southern District of New York.<sup>29</sup> RAF, Inc. sought to enjoin the latter from selling any interest in *Reasonable Doubt* and requested that the court enter a judgement declaring, amongst others, that (i) RAF, Inc. owns all the rights to *Reasonable Doubt*, including its copyright; and that (ii) Dash must transfer to RAF, Inc., any NFT in his possession, custody, or control reflecting rights to *Reasonable Doubt*.<sup>30</sup>

The complaint alleged that Dash, an owner of a 1/3 equity interest in RAF, Inc. along with Jay-Z and Kareem Burke, attempted to steal *Reasonable Doubt*, a company asset, mint it as an NFT, and auction his purported interest in the copyright on the album.<sup>31</sup> According to RAF, Inc., however, Dash as a minority shareholder of the record label did not actually hold any individual ownership interest in the album.<sup>32</sup> This is because the copyright, and all rights, title, and interests to and in *Reasonable Doubt*—including the right to sell, reproduce, distribute, advertise, and exploit the album without limitation—all belong to RAF, Inc.<sup>33</sup> Stated simply in the words of RAF, Inc.'s attorneys, 'Dash can't sell what he doesn't own'.<sup>34</sup>

Despite his non-existent property interest in the album, Dash is alleged to have knowingly and intentionally breached his fiduciary duty and duty of loyalty by leveraging his position as a shareholder to entice bidders and proceed with the sales of the corporation's asset.<sup>35</sup> In support of its argument, RAF, Inc. quoted language from the auction announcement on an NFT platform called SuperFarm containing representations that Dash is auctioning off '[his] ownership of the copyright to Jay-Z's first album Reasonable Doubt'.<sup>36</sup> The announcement boldly stated that 'the newly minted NFT will prove ownership of the album's copyright, transferring the rights to all future revenue generated by the album from Damon Dash to the auction winner'.<sup>37</sup>

Moreover, it elaborated that 'thanks to the magic of the...blockchain technology...[the auction] will set a precedent for how artistically created value and ownership can be proven, transferred, and

monetised seamlessly through a public blockchain'.<sup>38</sup> According to RAF, Inc., Dash had not only stolen the copyright to *Reasonable Doubt* by minting it as an NFT and offering it for sale, but also refused to stop his actions despite warnings from RAF, Inc.<sup>39</sup> Rather, he proceeded to search for another venue to consummate the transaction after SuperFarm decided to cancel the auction upon RAF, Inc.'s request.<sup>40</sup>

On June 21, 2021, three days after filing the complaint, RAF, Inc. argued for and obtained a temporary restraining order barring Dash from minting and issuing *Reasonable Doubt* as an NFT.<sup>41</sup> In response, Dash filed a Memorandum in Opposition of RAF, Inc.'s Order to Show Cause, in which he refuted any claims that he attempted to auction off' or 'otherwise sell off' the *Reasonable Doubt* copyright.<sup>42</sup> Dash contended that RAF, Inc. erroneously relied on SuperFarm's internal memo in claiming that he represented to SuperFarm that he owned 100% of the copyright, or that he wanted to mint an NFT based on the copyright. Further, he claimed 'nothing was ever minted!'<sup>43</sup> and that he was attempting to sell his 1/3 interest in RAF, Inc. as an NFT that he later planned to create, as opposed to a specific copyright interest in the album.<sup>44</sup> Thus, Dash claimed there was no basis for the court to grant a preliminary injunction, as he was merely exercising his right to freely transfer his lawfully owned 1/3 interest in RAF, Inc.<sup>45</sup>

Thereafter, Dash successfully convinced RAF, Inc. and Southern District of New York Judge John Cronan to limit the preliminary injunction to the sale of *Reasonable Doubt*.<sup>46</sup> Specifically, the parties agreed to include explicit language in the court order not to prevent Dash from disposing of his 1/3 ownership interest in RAF, Inc. in any way to the extent compliant with applicable laws.<sup>47</sup> Meanwhile, both parties have engaged in their own NFT transactions outside of the suit. Dash began an auction for his share of RAF, Inc., with a starting bid of \$10 million, in which the winner would receive a commemorative NFT representing a certificate of ownership.<sup>48</sup> Likewise, Jay-Z proceeded to sell his own NFT that celebrates the 25th anniversary of *Reasonable Doubt* through Sotheby's for the price of \$138,600.<sup>49</sup>

38 *ibid*.

39 *ibid* [42]-[43].

40 *ibid* [27].

41 Blake Brittain, 'Jay-Z label Roc-A-Fella blocks co-founder's 'Reasonable Doubt' NFT auction' (*Reuters*, 23 June 2021), <<https://www.reuters.com/legal/transactional/jay-z-label-roc-a-fella-blocks-co-founders-reasonable-doubt-nft-auction-2021-06-22/>> accessed 2 November 2021.

42 Memorandum of Law in Opposition of Plaintiff's Order to Show Cause and in Support of Defendant Damon Dash's Motion to Disqualify Plaintiff's Counsel, *Roc-A-Fella Records, Inc. v. Damon Dash* (Southern District of New York 2021) (No. 1:21-cv-5411), II.B., <<https://www.thetmca.com/files/2021/07/Rockafella-v-Dash-Response.pdf>>.

43 *ibid* [I].

44 *ibid* [II.D]- [III].

45 *ibid* [I-III].

46 Stipulation and Order, *Roc-A-Fella Records, Inc. v. Damon Dash* (Southern District of New York 2021)(No. 1:21-cv-5411), <<https://www.thetmca.com/files/2021/07/Rockafella-v-Dash-Amended-Order.pdf>>.

47 *ibid* 1.

48 Chris Dolmetsch and Bloomberg, 'Jay-Z's legal dispute with Damon Dash hits the NFT space' (*Fortune*, 17 September 2021), <<https://fortune.com/2021/09/16/jay-z-damon-dash-roc-a-fella-nft-lawsuit/>> accessed 5 November 2021.

49 Sotheby's, '[JAY-Z]; Derrick Adams [artist]. Heir to the Throne, 2021' (*Sotheby's*, 25 June 2021), <https://www.sothebys.com/en/buy/auction/2021/jay-z-x-derrick-adams-heir-to-the-throne-an-nft/heir-to-the-throne> accessed 5 November 2021.

26 MK Manoylov, 'CryptoPunk owner declines a \$9.5 million bid for his rare NFT' (*The Block*, 15 October 2021), <<https://www.theblockcrypto.com/linked/120873/cryptopunk-owner-declines-a-9-5-million-bid-for-his-rare-nft>> accessed 30 October 2021.

27 Williams (n 20).

28 *ibid*.

29 *Dash* (n 7).

30 *ibid* [11].

31 *ibid* [B.22], [C.23].

32 *ibid*.

33 *ibid* [B.21].

34 *ibid* [6].

35 *ibid* [34]-[36].

36 *ibid*. [C.24].

37 *ibid*.

## Legal Implications of the *Roc-A-Fella Records, Inc. v. Dash* Case

While the case is ongoing, the high-profile NFT case involving the industry's moguls brings to the forefront a myriad of issues that courts have only recently begun to grapple with. First, the above case sheds light on the risks involved in minting and selling an NFT based on an underlying work over which its creator, promoter, or seller does not own the copyright. The proprietary issues presented by the process of minting NFTs is two-fold. Creators should be alerted to the fact that only the owner of the copyright (or one operating with the copyright owner's permission to do so) in the underlying work may engage in the act of minting an NFT.<sup>50</sup> Otherwise, minting the NFT risks a copyright infringement, and potential, additional infringements arising from its promotion and sale.<sup>51</sup>

Indeed, RAF, Inc. based its argument on this very issue, claiming that Dash was not entitled to mint and sell the *Reasonable Doubt* NFT because it was RAF, Inc., not Dash, that owned the album and its underlying proprietary rights. In fact, the *Dash* case is not the first precedent in this regard. In April 2021, an NFT of a Jean-Michel Basquiat drawing was withdrawn from a planned auction on the OpenSea platform after the late artist's estate intervened, confirming that no license or rights were conveyed to the seller, and that the estate owned the copyright in the artwork.<sup>52</sup> Although it did not lead to litigation because the NFT was subsequently removed from sale, the Basquiat incident reiterates the need for clear guidance on proprietary rights associated with NFTs and for the implementation of best practices in this regard when NFT transactions are concerned.

Likewise, purchasers should conduct reasonable due diligence before purchasing an NFT so as to preclude incurring liability and legal risks.<sup>53</sup> The following is a non-exhaustive list of factors that purchasers may consider prior to an NFT acquisition: whether the artist is indeed the original author of the work at issue; whether the NFT platform through which the purchase will be made, provides any IP warranties; and the scope of license for an NFT holder.<sup>54</sup> Another ancillary issue in relation to this is a common misconception harboured by many purchasers that they are entitled to intellectual property rights to the underlying work upon acquiring an NFT. However, this is not necessarily true because the rights governing the use and resale of an NFT that are conferred to a purchaser depends on the smart contract associated with each NFT.<sup>55</sup> Accordingly, purchasers should be advised to scrutinise the

specific terms governing the smart contracts contained within each token to determine whether certain intellectual property rights (e.g. copyright) are transferred upon its sale.<sup>56</sup>

Secondly, the *RAF, Inc.* case raises questions about the regulation of the offers and sales of NFTs under the US federal securities law framework. By arguing instead that he intended to sell 1/3 of his shares of RAF, Inc. in the form of an NFT as opposed to the copyright to *Reasonable Doubt*, Dash risks subjecting himself to the US securities laws. That is, Dash's claim gives rise to whether an NFT would constitute an 'investment contract' and thus, a 'security' subject to regulation by the US Securities and Exchange Commission ('SEC').<sup>57</sup> Whether an instrument constitutes a security is determined under the Supreme Court's *Howey* test.<sup>58</sup> *Howey* involves a four-part test under which all of the following four factors must be present for an instrument to constitute a security: (1) an investment of money (2) in a common enterprise (3) with a reasonable expectation of profits (4) to be derived solely from the efforts of others.<sup>59</sup> Moreover, the *Howey* Court stated that the foregoing test embodies a flexible principle where form would be disregarded for substance while placing emphasis on economic reality.<sup>60</sup> In other words, it is 'immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise'.<sup>61</sup> This means that depending on the facts and circumstances, any instrument may be deemed a security for purposes of the *Howey* test.

If Dash's sale of his equity interest as an NFT falls within the purview of the federal securities law, he would be subject to the registration requirements of the Securities Act of 1933<sup>62</sup> and the disclosure requirements of the Securities Exchange Act of 1934,<sup>63</sup> the non-compliance of which will constitute an unregistered sale of securities. There has been increasing public demand for the SEC to offer specific guidance regarding this matter. Most notably, in April 2021, a registered broker-dealer sent a petition to the SEC requesting the publication of a concept release surrounding the regulation of NFTs.<sup>64</sup> However, the SEC has yet to issue any guidance on NFTs.

Nevertheless, creators and issuers of NFTs should be aware of the flurry of lawsuits that give rise to the question of whether such NFTs constitute a security and thus trigger the application of the SEC's general analytical framework for the broader issue of digital assets to NFTs. In the 2019 'Framework for 'Investment Contract' Analysis of Digital Assets' ('Framework') published by the SEC's Strategic Hub for Innovation and Financial Technology, the SEC explicitly included language cautioning potential issuers: 'If you are considering...engaging in the offer, sale, or distribution of a digital asset, you need to consider whether federal securities laws apply'.<sup>65</sup>

50 Harsch Khandelwal, 'Minting, distributing and selling NFTs must involve copyright law' (*Coin Telegraph*, 22 August 2021), <<https://cointelegraph.com/news/minting-distributing-and-selling-nfts-must-involve-copyright-law>> accessed 5 November 2021.

51 *ibid.*

52 Anny Shaw, 'Basquiat NFT withdrawn from auction after artist's estate intervenes' (*The Art Newspaper*, 28 April 2021), <<https://www.theartnewspaper.com/2021/04/28/basquiat-nft-withdrawn-from-auction-after-artists-estate-intervenes>> accessed 5 November 2021.

53 Georgina Adam, 'But is it legal? The baffling world of NFT copyright and ownership issues' (*The Art Newspaper*, 6 April 2021), <<https://www.theartnewspaper.com/2021/04/06/but-is-it-legal-the-baffling-world-of-nft-copyright-and-ownership-issues>> accessed 6 November 2021.

54 *ibid.*

55 Margaret Taylor, 'Digital assets: surging popularity of NFTs raises important legal questions' (*International Bar Association*, 5 August 2021), <<https://www.ibanet.org/surging-popularity-of-NFTs-raises-important-legal-questions>> accessed 6 November 2021.

56 *ibid.*

57 *Securities and Exchange Commission v. W. J. Howey Co.*, 328 U.S. 293 (1946).

58 *ibid.*

59 *ibid.* 301.

60 *ibid.* 299.

61 *ibid.*

62 15 U.S. Code § 77a.

63 15 U.S. Code § 78a.

64 Vicent R Molinari, *Rulemaking Regarding Non-Fungible Tokens, (Sustainable Holdings*, 12 April 2021), <<https://www.sec.gov/rules/petitions/2021/petn4-771.pdf>> accessed 10 November 2021.

65 U.S. Securities and Exchange Commission, *Framework for 'Investment Contract' Analysis of Digital Assets* (2019), <[https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#\\_edn1](https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_edn1) [hereinafter, 'the framework']> accessed 10 November 2021.

The Framework echoes the language from the Supreme Court's *Howey* test. It urges entities and individuals engaged in the offers and sales of digital assets to examine the relevant transactions in determining the applicability of the federal securities laws because the applicability of *Howey* to digital assets is a fact-specific inquiry.<sup>66</sup>

The applicability of the Framework recently became the centre of a class action suit filed in the Supreme Court of New York (later removed to the Southern District of New York) in May, 2021.<sup>67</sup> There, purchasers of NFTs depicting video clips of highlights from NBA basketball games alleged that the NFTs promoted, offered, and sold by Dapper Labs, Inc., a Canada-based blockchain-focused technology company, were unregistered securities under the Framework.<sup>68</sup> While the suit is still pending, the case serves as a warning to industry professionals, the trajectory of which should be closely monitored.

Moreover, earlier this year, SEC commissioner Hester Peirce—a pro-crypto member of the SEC also dubbed as 'crypto mom'—specifically warned against selling fractionalised NFTs.<sup>69</sup> Fractionalised NFTs refer to NFTs that can be split into smaller pieces and sold to multiple purchasers for partial ownership interest, risking the likelihood of being deemed as securities.<sup>70</sup> Dash's proposed offering of his equity interest in RAF, Inc. as NFTs may raise red flags with financial regulators. This is because such an offering would involve a large number of purchasers to invest sums of money to gain the NFT, with the expectation of profits from a fractional ownership of a highly valuable record company. Furthermore, depending on the promotional activities and the structure of the transaction, the purchasers' profits may be deemed to derive from the entrepreneurial efforts of Dash or a third-party NFT platform. Thus, issuers and developers of digital assets should remain alert to future developments in this regard. That way, such issuers and developers may preclude any potential disputes and penalties resulting from their failure to exercise care in offering and selling these innovative assets, which may unintentionally be characterised as investment products.

### NFTs as a Potential Medium for Artists and Public Figures in Regaining Authority over their Publicity Rights

Although NFTs pose certain challenges, the technology may—if properly and ethically utilised—be channelled to inspire and empower creators and entertainers. As a novel response to the long-standing problems in the digital terrain arising from the easy dissemination and exploitation of digital images by third parties without consent, public figures are now embracing NFTs as a medium of regaining authority over the usage of their name, image, and likeness. NFTs not only allow them to reclaim control over their appropriated digital identities, but also allow them to receive rightful compensation for its usage and distribution. The exploitation of

<sup>66</sup> *Howey* (n 58).

<sup>67</sup> Complaint, *Friel v. Dapper Labs, Inc., et al.*, (Supreme Court of the State of New York 2021) (No. 653134/2021) <<https://www.scribd.com/document/507902520/Jeeun-Friel-v-Dapper-Labs-Complaint>>.

<sup>68</sup> *ibid.*

<sup>69</sup> Sophie Kiderlin, 'The SEC's 'Crypto Mom' Hester Peirce says selling fractionalized NFTs could be illegal' (*Business Insider*, 26 March 2021), <<https://markets.businessinsider.com/news/currencies/sec-crypto-mom-hester-peirce-selling-nft-fragments-illegal-2021-3>> accessed 13 November 2021.

<sup>70</sup> *ibid.*

name, image, and likeness and lack of control over the commercial use of identity is especially prevalent amongst celebrities, owing to the fact that celebrities voluntarily make themselves public figures.<sup>71</sup> There is currently a relative dearth of case law regarding the commercial exploitation of publicity rights in the US, rendering disputes surrounding publicity rights unpredictable. Moreover, there is a lack of clarity regarding the current state of law due to varied interpretations and statutes on publicity rights because there are no federal statutes recognising the right of publicity, while state laws lack uniformity as statutes differ across jurisdictions.<sup>72</sup>

The economic and emotional ramifications arising from the unauthorised use of name, image, and likeness were recently brought to the forefront by American model and actress Emily Ratajkowski. In an effort to reclaim her image wrested from her for the profit of another, Ratajkowski recently minted an NFT named 'Buying Myself Back: A Model for Redistribution' that was auctioned at Christie's for \$175,000.<sup>73</sup> Upon discovering that a photo she had publicly posted on Instagram had been printed on a large canvas and sold as part of a collection released by artist Richard Prince, Ratajkowski decided to mint an NFT consisting of a photo of herself posing in front of Prince's artwork.<sup>74</sup> In vocalising her decision to do so, she pointed out the ironical loss of commercial control over her image as a public figure: 'as somebody who has built a career off of sharing my image, so many times—even though that's my livelihood—it's taken from me and then somebody else profits off of it'.<sup>75</sup> However, through her recent NFT sale, she not only regained partial possession of her own image, but also revealed she would receive 'an undisclosed cut' of the profits of each resale.<sup>76</sup> Commenting on the potential that NFTs carry, she expressed her hopes to set a precedent for others to 'have ongoing authority over their image and to receive rightful compensation for its usage and distribution'.<sup>77</sup>

Despite the benefits conferred by NFTs in repossessing digital identities in the age of social media, a fatal drawback of this budding technology is the risk of counterfeiting. If NFTs are minted with false information or the core code underlying the NFT is stolen, original creators of the NFTs may incur difficulties in tracing or exercising effective control over unauthentic or identical products.<sup>78</sup> Likewise, purchasers may be misled as to the authenticity or value of their tokens.<sup>79</sup> Indeed, a counterfeit NFT of the renowned British graffiti artist, Banksy, was recently sold for \$900,000 on OpenSea (the world's largest NFT platform), reigniting concerns

<sup>71</sup> Peter A. Carfagna, *Representing the Professional Athlete* (3<sup>rd</sup> edn, West Academic Publishing 2018) 153.

<sup>72</sup> *ibid.* 156.

<sup>73</sup> Christie's, 'Emily Ratajkowski (B. 1991)' (*Christie's*, 25 April 2021), <<https://www.christies.com/en/lot/lot-6317722>> accessed 15 November 2021.

<sup>74</sup> Emily Kirkpatrick, 'Emily Ratajkowski Is Auctioning Off an NFT Called 'Buying Myself Back'' (*Vanity Fair*, 23 April 2021), <<https://www.vanityfair.com/style/2021/04/emily-ratajkowski-nft-buying-myself-back-richard-prince-instagram-painting-new-portraits-christies>> accessed 15 November 2021.

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> Rachel King, 'Emily Ratajkowski on ownership, consent, and the #FreeBritney movement' (*Fortune*, 25 June 2021), <<https://fortune.com/2021/06/24/emily-ratajkowski-book-nft-social-media/>> accessed 17 November 2021.

<sup>78</sup> Incopro, 'Brand Protection & NFTs: Scams, Fakes & How to Mitigate Risks' (*Incopro*) <<https://www.incoproip.com/nft-fakes-scams-brand-protection/>> accessed 17 November 2021.

<sup>79</sup> *ibid.*

over counterfeit NFTs.<sup>80</sup> Counterfeiting issues are exacerbated by the fact that many blockchain platforms currently allow virtually anyone to mint their own NFTs. It remains to be seen whether such platforms will impose internal control systems to mitigate such risks and whether they will be subject to external regulations with the evolving use of NFTs.

## Conclusion

The NFT market has seen a stunning growth trajectory, surging to a record-high of \$10.7 billion in sales volume in the third quarter of 2021.<sup>81</sup> The numbers mark an eightfold increase from \$1.3 billion in the previous quarter.<sup>82</sup> Such an explosive growth was catalysed in part by the COVID-19 pandemic.<sup>83</sup> The pandemic led to shifts in business models such as remote working and digitalisation of work products, as well as an unprecedented increase in online spending as a substitute for traditional off-line consumption.<sup>84</sup> In line with such developments, creators and artists have also tapped into the NFT space to use the technology to their benefit. Some industry professionals and commentators have dubbed the current state as 'a golden opportunity...for digital entertainers'.<sup>85</sup> Indeed, NFTs may be a boon to many creators and artists, restoring autonomy by means of exercising greater control of distribution and resale royalties, provided that the smart contracts stipulate the exact terms of resale mechanisms, and such resales are made within the same marketplace as discussed above.

However, this golden age is not without its shadows. Indeed, in the words of Gary DeWaal, a former trial lawyer with the US Commodity Futures Trading Commission, 'this whole industry...suffers from a paucity of clear regulation, and as a result folks are sort of left on their own to figure it out the best they can'.<sup>86</sup> As such, due to an absence of clear regulatory guidance, pending cases should be closely monitored because they may serve as meaningful guideposts in providing regulatory clarity regarding NFT regulation. Meanwhile, to preclude significant adverse legal consequences and regulatory risks, market participants should conduct due diligence prior to any issuance or transaction involving an NFT. Furthermore, the rights and terms of the transaction in the underlying smart contract should be clearly drafted so acquirers of NFTs may fully avail themselves of its protections and benefits by limiting the grant of proprietary rights and stipulating terms for automated royalty payments, amongst others.

80 Anny Shaw, 'Banksy-Style NFTs have sold for \$900,000—but are they the real deal and does it even matter?' (*The Art Newspaper*, 22 February 2021), <<https://www.theartnewspaper.com/2021/02/22/banksy-style-nfts-have-sold-for-dollar900000but-are-they-the-real-deal-and-does-it-even-matter>> accessed 20 November 2021.

81 Elizabeth Howcroft, 'NFT sales surge to \$10.7 bln in Q3 as crypto asset frenzy hits new highs' (*Reuters*, 5 October 2021), <<https://www.reuters.com/technology/nft-sales-surge-107-bln-q3-crypto-asset-frenzy-hits-new-highs-2021-10-04/>> accessed 20 November 2021.

82 *ibid.*

83 Arushi Chawla, 'NFT: Creating Buzz in Digital Ecosystem' (*Counterpoint*, 16 June 2021), <<https://www.counterpointresearch.com/nft-creating-buzz-in-digital-ecosystem/>> accessed 21 November 2021.

84 *ibid.*

85 Jordan Lintz, 'The Future of NFTs: Digital Entertainment At Its Finest' (*Forbes*, 19 November 2021), <<https://www.forbes.com/sites/forbesbusinesscouncil/2021/11/19/the-future-of-nfts-digital-entertainment-at-its-finest/>> accessed 21 November 2021.

86 Dolmetsch and Bloomberg (n 49).