



Of Disaster Girl and Everyday: How NFTs Invite Challenging Copyright Assumptions Around Creator Support

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ABSTRACT

Most of the successful monetization of internet fame through memes has historically occurred through offline merchandising: books, T-shirts, and other sponsorships. However, the rise of NFTs has created an entirely new revenue stream around memes. The little girl in the Disaster Girl meme sold an NFT of the meme's famous photograph for over \$400,000. She was shocked when she learned that NFTs could provide a way to capitalize on her internet fame.

Previous legal analyses of memes have understood monetization within the traditional copyright structure of licensing and assumed that copyright holders would seek to restrict the meme's use on the internet without consent or payment. NFTs have stepped outside the traditional underpinnings of copyright to reimagine how owning and monetizing creativity work in two important ways: (1) Where copyright law would compensate only the photographer and leave the subject of the meme with no intellectual property rights, NFTs view the subject of the meme as the "owner" entitled to compensation; and (2) NFTs do not seek to control reproduction and distri-

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bution of the meme, but rather encourage such behavior to increase the value of the underlying meme.

Since the invention of the internet, legal commentators and creative stakeholders have endlessly debated whether and to what extent copyright law should be adjusted for the internet. The rise of NFTs has answered those questions by moving away from the traditional legal understanding of where value lies in favor of endorsing the internet's understanding of value: that there can be value in virality, and that value can be recognized outside of the law's definition of copyright-holder. This Article examines the NFT phenomenon's departure from copyright norms and concludes that NFTs present an opportunity to reconsider how we think about ownership and scarcity in valuing creativity.

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I. INTRODUCTION

Non-fungible tokens, or NFTs, have taken the world by storm. Last year, sales of NFTs increased by over 21,000% over the previous year.¹ Despite the seeming ubiquity of these new assets, much confusion exists as to what they are, not least among the people purchasing them. As the government struggles to decide how to regulate NFTs,² online communities are trading them and developing their own understandings of what NFTs are.

This Article focuses on a small subculture within the NFT economy: the auctioning of meme NFTs. Most of the successful monetization of internet fame through memes has historically occurred through offline merchandising, such as books, T-shirts, and other sponsorships.³ However, the rise of NFTs has created an entirely new revenue stream around memes. For instance, the little girl who appears in the Disaster Girl meme sold an NFT of the meme's famous photograph for over \$400,000.⁴ She was shocked when she learned that NFT's could give her a way to capitalize on her internet fame.⁵

Prior to the rise of NFTs, legal analyses of memes understood possible monetization within the traditional copyright structure of licensing, whereby those wishing to use the meme would request authorization from its owner in exchange for a fee.⁶ By conditioning use of a creative work on the copyright holder's permission, licensing operates from a starting point of

¹ See Marco Quiroz-Gutierrez, *Bored Apes and CryptoPunks Help Jolt NFT Market to over 21,000% Growth and \$17.6 Billion in Sales Last Year*, FORTUNE (Mar. 10, 2022, 2:42 AM), <https://perma.cc/H6TN-6LA4>.

² See Jessica Rizzo, *The Dune NFT Fiasco Is the Least of Crypto's Legal Worries*, WIRED (Jan. 19, 2022, 7:00 AM), <https://perma.cc/HTB3-ARQD>.

³ Taylor Lorenz, *Memes Are Becoming Harder to Monetize*, THE ATLANTIC (May 31, 2018), <https://perma.cc/HR7G-LL3E>.

⁴ Nicole Lyn Pesce, *'Disaster Girl' Makes over \$430,000 Selling the NFT of Her Meme*, MARKETWATCH (Apr. 30, 2021, 10:30 AM), <https://perma.cc/ND8H-WT4S>.

⁵ *Id.*

⁶ See, e.g., Terrica Carrington, Note, *Grumpy Cat or Copy Cat? Memetic Marketing in the Digital Age*, 7 GEO. MASON J. INT'L COM. L. 139, 158 (2016) (analyzing the market of memes as one of licensed advertising); David Tan, *Digital Memes, Fair Use, and the First Amendment*, 24 J. INTERNET L. 1, 26 (2021) (analyzing the monetization of a meme through licensed merchandising); Cathay Y. N. Smith & Stacey Lantagne, *Copyright & Memes: The Fight for Success Kid*, 110 GEO. L.J. ONLINE 142, 158 (2021) (discussing generally the alleged infringement of a meme commercially exploited through licensing fees); see also *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 975-76 (C.D. Cal. 2019) (discussing the market of the meme in question as licensing opportunities); *Griner v. King*, No. 21-CV-4024 CJW-MAR, 2021 WL

enforced scarcity.⁷ Therefore, in the pre-NFT paradigm, licensing a meme presupposed the ability to restrict its presence absent consent and/or payment. Because memes were – and are – defined by their virality online,⁸ they could only realistically be restricted in the offline world, so this was mainly where they were licensed.

NFTs, however, have stepped outside the traditional underpinnings of copyright law to reimagine how ownership and monetizing creativity work in two important ways: (1) Where copyright law would compensate only the photographer and leave the subject of the meme with no intellectual property rights, NFTs view the subject of the meme as the “owner” entitled to compensation; and (2) NFTs do not seek to control any reproduction or distribution of the meme, but rather encourage such behavior as to increase the value of the underlying meme.

Since the invention of the internet, legal commentators and creative stakeholders have endlessly debated whether and to what extent copyright law should be adjusted for the internet.⁹ The rise of NFTs has answered those questions by moving away from the traditional legal understanding of where the value of a creative work lies and instead endorsing the internet’s understanding of value: giving meme ownership to the subject of the meme and recognizing that the value of the meme rests in its unrestricted proliferation online. So, in the auctions of meme NFTs like Bad Luck Brian and Disaster Girl, the people depicted in the memes minted the NFTs and initiated the auctions, not the people who took their famous photographs.¹⁰ The popularity of a given meme also seems to increase the value of the meme’s

5106047, at *1 (N.D. Iowa W. Div. Oct. 20, 2021) (discussing the market of the meme in question as licensing opportunities).

⁷ See Kevin Roose, *Buy This Column on the Blockchain!*, N.Y. TIMES (June 30, 2021), <https://perma.cc/J4KZ-RF94>.

⁸ See Taylor Locke, *Elon Musk Reposted this 28-Year-Old’s Meme—and Then It Sold as an NFT for Nearly \$20,000 in Just 2 Days*, CNBC (Oct. 22, 2021, 5:38 PM), <https://perma.cc/66VN-96WZ> (“[M]emes are permissionless”) [hereinafter “Elon Musk”].

⁹ See, e.g., Robert L. Shaver, *Copyright Law in the Digital Age*, 49 ADVOCATE 17 (2006); Susanna Monseau, *Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbor, Secondary Liability and Fair Use*, 12 J. MARSHALL REV. INTELL. PROP. L. 70, 75 (2012); Marketa Trimble, *The Multiplicity of Copyright Laus on the Internet*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 3 39 (2015); Brad Frazer, *Recent Developments in Internet Law*, 50 ADVOCATE 26 (2007); Lateef Mtima, *Whom the Gods Would Destroy: Why Congress Prioritized Copyright Protection over Internet Privacy in Passing the Digital Millennium Copyright Act*, 61 RUTGERS L. REV. 627 (2009).

¹⁰ See Zach Sweat, *Scumbag Steve NFT Sells at Auction for Over \$57,000*, KNOW YOUR MEME NEWS (Mar. 15, 2021, 6:38 PM), <https://perma.cc/4GMK-A525> (listing

NFT.¹¹ For instance, when Elon Musk tweeted out Eva Beylin's meme, the increased virality helped her sell the NFT for almost \$20,000.¹² Their divergence means that no one knows what to do with copyright and NFTs – and that makes them exciting.

This Article examines the NFT phenomenon's departure from copyright norms and assesses whether its evaluation of ownership and remuneration has any lessons for the future of digital copyright law. It specifically focuses on how NFTs have treated memes to provide insight into how communities around NFTs understand their value. Part II begins with an examination of the historical challenges around monetizing memes and how memes have been licensed in the offline world. Part III turns to the development of NFTs, discussing what they are and how they have been used. Part IV analysis the ways in which NFTs challenge our traditional thinking around copyright, particularly questions of ownership and scarcity. Finally, Part V imagines how we might accept NFTs' invitation to rethink how we support creativity.

II. MONETIZING MEMES

One of the most challenging questions to answer about the copyrightability of memes is definitional: what qualifies as a meme in the first place?¹³ There is no single, agreed-upon definition. “Even websites dedicated to keeping a scholarly historical record of memes, like Know Your Meme, do not define the term.”¹⁴ Some people use the word “meme” to refer to a “specific subset of internet behavior that involves pasting captions onto other people's photos. The catalog on Know Your Meme . . . include[s] basic caption manipulation as well as viral sensations with more complicated histories.”¹⁵ Merriam-Webster defines the term as “an amusing or interesting item (such as a captioned picture or video) or genre of items

meme NFTs being “sold by their creators or the individuals seen in the memes themselves”); Pesce, *supra* note 4.

¹¹ See 7 *Classic NFT Memes that Sold for A Lot of Money*, NFTICALLY (Feb. 16, 2022), <https://perma.cc/2G68-JKQW> (praising NFT memes because “[m]emes are an important part of internet culture”).

¹² See “Elon Musk”, *supra* note 8.

¹³ See Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. RICH. L. REV. 387, 389 (2018).

¹⁴ *Id.*

¹⁵ Lantagne, *supra* note 13, at 389.

that is spread widely online especially through social media.”¹⁶ The Wikipedia entry of “meme” defines it as “a concept that spreads rapidly from person to person via the Internet, typically as a form of humor.”¹⁷ A consistent quality of everything deemed a meme is replicability.¹⁸ A meme, at heart, *must* be replicated.

This has made the monetization of memes online challenging. Traditional copyright law considers monetization a quality of scarcity: people will pay to obtain something they cannot get anywhere else.¹⁹ Since a meme is the opposite of scarce, finding a way to monetize meme-dom flummoxed many. For most of the history of the internet, the owner of a meme who wanted to make money from it had to license the meme in “traditional” ways by putting it into the tangible physical world. This “fixed” the meme according to how copyright law traditionally viewed a creative work: as intellectual property physically embodied in a book, or a board game, or a calendar.²⁰ So, the owner of Grumpy Cat made money with books and stuffed animals.²¹ The owner of Success Kid licensed the image for use in advertising.²²

This offline merchandising was easier for some people to accomplish than others. To license a meme, one had to own the copyright of the underlying work, such as the photograph, that became the meme. Copyright ownership attaches to the creator of a work, so the owner of a photograph is the photographer. Accordingly, licensing a meme of one’s pet could be straightforward from a copyright perspective. Memes that were people’s children, for better or worse, were also easy to monetize, as in Success Kid: the parent who took the photograph could license the meme of their child. But even if one held the copyright to a meme, identifying a monetary stream could be difficult because it was difficult to chase down users to demand money online where the meme was replicating quickly, and it was equally difficult to

¹⁶ *Meme*, MERRIAM-WEBSTER, <https://perma.cc/5UVS-NKWR> (last accessed Apr. 10, 2022).

¹⁷ *Meme*, WIKIPEDIA, <https://perma.cc/JD4M-9JE6> (last accessed Apr. 10, 2022).

¹⁸ *See id.*

¹⁹ *See* Roose, *supra* note 7.

²⁰ *See* 17 U.S.C.A. § 102.

²¹ *See* Colleen Nika, *Grumpy Cat Stuffed Animals – Spread the Disapproval This Holiday Season*, REFINERY29 (Dec. 8, 2013, 6:30 PM), <https://perma.cc/V7CJ-F63A>.

²² *See* Harry Ainsworth, *Where Is the Boy from the ‘Success Kid’ Meme Now?*, THE TAB, <https://perma.cc/GC8E-TK9C> (last accessed Mar. 13, 2022).

convince people to pay money for the meme in an offline context where it was outside of its natural milieu.²³

If it was difficult to monetize your meme fame as a copyright holder, it was much more difficult when a photo or video clip taken of you went viral. There, the person in the photograph or video clip is not the copyright holder; the photographer is.²⁴ Because they were not the copyright holders, people appearing in memes lacked substantial control over the meme, because they did not even hold the traditional offline rights exclusively held by a copyright owner, such as the right to distribute copies and prepare derivative works.²⁵ As Part VI will explore in more depth, we might call this type of meme a “split-rights” meme, because the underlying photograph or video’s copyright belongs to one entity, while the person depicted in the photograph possesses separate publicity and privacy rights.²⁶ While a person may attempt to block a copyright holder’s licensing of a photo based on publicity or privacy rights in certain very limited circumstances,²⁷ these rights do not give a subject the right to demand licensing of the photo.²⁸ The copyright holder exclusively controls whether it should be licensed.²⁹ The two interest-holders might not agree on monetizing the meme.

Of course, memes can and have been monetized and exploited without the permission of either the copyright holder or subject. For instance, Sweet Brown, the subject of the “Ain’t Nobody Got Time for That” video meme, sued over a remix of the meme being sold for profit on iTunes.³⁰ (The case was eventually dismissed without prejudice due to her failure to prosecute.³¹) Antoine Dodson, the subject of the “Bed Intruder” meme, similarly

²³ See Kalhan Rosenblatt, *A Meme Gold Rush? Classic Viral Images Are Selling as NFTs for Thousands of Dollars*, NBC NEWS (Apr. 29, 2021, 5:39 PM), <https://perma.cc/KC68-VL78> (“As far as it goes with becoming a meme, it’s very difficult to monetize that. We’ve spoken to numerous people who have become memes and have had a lot of difficulty making money off their creations.”).

²⁴ See Lantagne, *supra* note 13, at 400-01.

²⁵ See 17 U.S.C. § 106.

²⁶ See Lantagne, *supra* note 13, at 390.

²⁷ See, e.g., *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021).

²⁸ See Joshua Azriel, *Photographers Sue Celebrities for Copyright Infringement*, 24 J. INTERNET L. 3, 7 (2020).

²⁹ Licensing under normal circumstances would doubtless implicate one of the rights, such as distributing the photograph or copying the photograph, that belongs exclusively to the copyright holder, *not* to the person depicted in the photograph. See 17 U.S.C. § 106.

³⁰ See Megan Rose Dickey, *‘Ain’t Nobody Got Time for That’ Viral-Video Star Does Have Time to Sue Apple*, BUS. INSIDER (Mar. 12, 2013, 11:22 AM), <https://perma.cc/5ZNT-UAD2>.

³¹ *Wilkins v. Citicasters Co.*, No. 5:13-cv-00026 (W.D. Okla. Sept. 23, 2013).

had his viral news interview remixed into a for-profit song.³² By and large, the people who populate our memes have struggled to find ways to convert that fame into money.

III. THE ARRIVAL OF NON-FUNGIBLE TOKENS

Non-fungible tokens, or NFTs, are “authenticated digital assets.”³³ In some ways NFTs resemble cryptocurrency because they depend on the same authentication procedure “through a decentralized system of nodes.”³⁴ However, each bitcoin is designed to be interchangeable with other bitcoins³⁵ in the same way that each dollar bill is designed to be interchangeable with other dollar bills.³⁶ Conversely, each NFT is guaranteed to be unique (hence, non-fungible).³⁷ If you own the NFT for a particular photograph of a kitten, what you really own is a token saying that you own that kitten photograph.³⁸ There may be other versions of the kitten photograph on the internet over which you have no ownership. Your NFT merely states that you own a particular version, which is sometimes termed the “authentic” or “original” version of the photograph.³⁹

It is important to be precise regarding what NFT ownership confers. The person who owns an NFT attached to a photograph usually does not own the copyright of the photograph — only the NFT that has been linked to that particular digital copy of the otherwise generally available photo-

³² See *MEMES, Part 7: Dead Giveaway*, ENDLESS THREAD (Nov. 5, 2021), <https://perma.cc/NR83-BV9K>.

³³ 26 No. 4 Cyberspace Lawyer NL 1.

³⁴ *Id.*

³⁵ See Rosenblatt, *supra* note 23.

³⁶ See Oscar Holland, *How NFTs Are Fueling a Digital Art Boom*, CNN (Mar. 10, 2021), <https://perma.cc/KB64-R7VW>.

³⁷ See 26 No. 6 Cyberspace Lawyer NL 1; Nicholas O'Donnell, *No, You Probably Can't Sell Your Basquiat as an NFT*, APOLLO (May 12, 2021), <https://perma.cc/X9DV-YRXX>.

³⁸ The actual usefulness of NFTs in establishing ownership of art has been challenged. See James David (@jamesdavid), TWITTER (Aug. 14, 2021) <https://twitter.com/jamesdavid/status/1426664478200930310> (“[I]f an NFT relies on a domain that expires the image can be lost.”); Brian L. Frye (@brianlfrye), TWITTER (Aug. 14, 2021, 5:25 PM), <https://twitter.com/brianlfrye/status/1426656132664229889> (“No matter what anyone says, it has nothing but a nominal connection to any artwork it purports to represent. An ‘NFT of an artwork’ is like a dollar bill ‘of George W.’”).

³⁹ See 26 No. 6 Cyberspace Lawyer NL 1 (“[W]hile you own the token with code linked to the provably unique image or other work, others may have copies of the underlying work. But only you can own that token.”).

graph.⁴⁰ NFTs themselves do not contain any content other than acting as a “token[. . .] that . . . refer[s] to works of digital art by linking to them.”⁴¹ “All [an NFT] is, is a URL saying ‘Look at this place on the internet.’”⁴²

On the one hand, owning an NFT can be compared to owning a copy of a book. Buying a book in a bookstore does not give the purchaser a copyright in the book; rather, it provides them with rights only to that particular copy. Everyone else can freely access other copies of that book in their own bookstores and libraries. A cryptocurrency group recently learned this the hard way when it bought a copy of a book in the belief that owning the copy gave them adaptation rights.⁴³

On the other hand, however, buying an NFT cannot be compared to buying a book, because it does not actually convey any object at all, digital or physical.⁴⁴ Buying a book provides you with a copy of the book to take home and read. Even buying a digital copy of a book provides you with a digital item, according to certain terms of use. An NFT, by contrast, is more like the receipt you get at a coat check or a valet. It tells people that you own something located somewhere. That thing, however, is not in your possession and could disappear, in the way that your coat might disappear from a coat room, or your car might get lost at a valet.⁴⁵ In the real world, this might be unlikely, but not impossible. In the digital world, scams that might deprive you of your digital coat or car seem far more likely.⁴⁶

NFTs are often associated with digital artwork.⁴⁷ For instance, the artist Beeple sold an NFT for his digital art piece “Everydays: The First 5000 Days” for \$69 million.⁴⁸ The NFT market has come down somewhat from

⁴⁰ See, e.g., Roose, *supra* note 7 (“Our lawyers want me to note that the NFT does not include the copyright to the article or any reproduction or syndication rights.”).

⁴¹ Rizzo, *supra* note 2. See also Kevin Collier, *NFT Art Sales Are Booming. Just Without Some Artists’ Permission*, NBC NEWS (Jan. 10, 2022, 3:53 PM), <https://perma.cc/R2YV-6LBH> (“NFTs are not art themselves but rather digital deeds.”). This means that if the property referred to in the NFT disappears, the owner of the NFT could end up with the equivalent of a broken link. See Rizzo, *supra* note 2.

⁴² Collier, *supra* note 41.

⁴³ Adrienne Westenfeld, *The Crypto Bros Who Thought They Bought the Dune Rights Feel Misunderstood*, ESQUIRE (Mar. 1, 2022), <https://perma.cc/7XGD-N8HH>. The group later insisted it did not think it bought the copyright, although this argument has been called “somewhat implausibl[e].” Rizzo, *supra* note 2.

⁴⁴ See Rizzo, *supra* note 2.

⁴⁵ See *id.*

⁴⁶ See Edward Ongweso Jr., *The NFT Ecosystem Is a Complete Disaster*, VICE (Feb. 1, 2022, 1:43 PM), <https://perma.cc/GL6P-8C9V>.

⁴⁷ See 26 No. 4 Cyberspace Lawyer NL 1.

⁴⁸ See 26 No. 6 Cyberspace Lawyer NL 1; 26 No. 4 Cyberspace Lawyer NL 1; Danny Nelson, *Quarterback Patrick Mahomes Joins Gronk in NFL Blitz of NFT Mania*,

that high-water mark,⁴⁹ but well-known art auction houses like Christie's run NFT auctions as they would run auctions for any other kind of fine art.⁵⁰

But NFTs are more than just digital artwork. Anything can become an NFT. The limit is your imagination.⁵¹ The *New York Times* made an NFT of a column about NFTs.⁵² Jack Dorsey made an NFT of the first-ever tweet.⁵³ A group of authors decided to sell NFTs in a new series of fantasy stories and, apparently, their accompanying fanfiction (and then backed off when there was a backlash to the idea).⁵⁴ You can buy NFTs for basketball highlight videos.⁵⁵ You can buy an NFT racehorse.⁵⁶ Digital NFT marketplaces are recording monthly sales in the billions of dollars.⁵⁷

You can also buy NFTs for memes. Matt Furie, the creator of Pepe the Frog, has been on a long march to recapture some meaningful control of his creation. In that effort, he sold an early NFT of a Homer Simpson Pepe for nearly \$40,000⁵⁸ and an NFT of an early Pepe cartoon for around \$1 million.⁵⁹ A series of unauthorized "counterfeit" Pepees called "Sad Frogs" netted \$4 million in sales, charging around \$450 a frog.⁶⁰ And the creator of the Nyan Cat GIF made nearly \$600,000 auctioning off an NFT.⁶¹ Those

COINDESK (Sept. 14, 2021, 8:26 AM), <https://perma.cc/YG7A-Z9DT>; Jacqui Palumbo, *First NFT Artwork at Auction Sells for Staggering \$69 Million*, CNN (Mar. 12, 2021), <https://perma.cc/6TK9-RSK3>; O'Donnell, *supra* note 37; Roose, *supra* note 7; Rizzo, *supra* note 2.

⁴⁹ See Raisa Bruner, *Teen Artists Are Making Millions on NFTs. How Are They Doing It?*, TIME (Sept. 7, 2021, 4:54 PM), <https://perma.cc/MH3J-P4HG>.

⁵⁰ See Taylor Dafoe, *Artist Dread Scott's First NFT Is a Video of a White Man atop an Auction Block. He's Taking It Straight to Christie's*, ARTNET NEWS (Sept. 14, 2021), <https://perma.cc/D3Y8-6SXB>.

⁵¹ See Ongweso, *supra* note 46 ("[T]he explicit goal here is to turn every inch of our physical world—and any digital world—into a place where nearly every experience and thing is quantified, commodified, and privatized.").

⁵² See Roose, *supra* note 7.

⁵³ See Will Gottsegen, *Jack Dorsey: Proceeds from Tweet NFT Will Go to Africa Relief Charity*, DECRYPT (Mar. 9, 2021), <https://perma.cc/4NGL-XGZB>.

⁵⁴ See Heloise Wood, *YA Authors Shelve NFT Story After Social Media Backlash*, THE BOOKSELLER (Oct. 25, 2021), <https://perma.cc/FE24-9P57>.

⁵⁵ See Roose, *supra* note 7.

⁵⁶ See Taylor Lorenz, *Digital Horses Are the Talk of the Crypto World*, N.Y. TIMES (May 12, 2021), <https://perma.cc/LPD2-CGBX>.

⁵⁷ See Bruner, *supra* note 49.

⁵⁸ Rosenblatt, *supra* note 23.

⁵⁹ See Ekin Genc, *Pepe the Frog's Creator Nuked a \$4 Million NFT Collection over Copyright*, VICE (Aug. 20, 2021, 9:00 AM), <https://perma.cc/M2L4-CYV3> [hereinafter "Pepe"].

⁶⁰ See *id.*

⁶¹ See Holland, *supra* note 36; Rosenblatt, *supra* note 23.

already successful in the NFT space have focused on memes as a potentially huge boon for creators. For example, in 2021, twelve-year-old coder and successful NFT creator Benjamin Ahmed said, “I think memes have significant value . . . [and] play a big part in this space.”⁶² NFTically, “a venture that helps brands, creators and artists to setup and launch their NFT marketplace,” highlighted NFT memes as “here to stay” because they “depict ownership of human emotion on the digital medium.”⁶³

IV. NFTS, MEMES, AND COPYRIGHT LAW

The set-up of meme NFTs pushes against the assumptions of copyright law in two ways. First, discussions of NFT meme auctions assume that the subject of the meme, rather than the copyright holder, has the right to auction off the meme NFT. Second, NFT auctions embrace virality instead of scarcity, so memes that are more widespread and recognizable are considered more valuable.

Before the rise of NFTs, the people depicted in memes often sought compensation under copyright law theories.⁶⁴ They frequently assumed that, as the meme’s subject, they had some legal right to control the meme and receive compensation for its use. As Part II established, this is a persistent misconception.

As we saw in Part II, many memes are “split-rights” situations. There *is* a copyright holder who created the underlying work depicted in the meme, but this is not the person depicted in the meme who is often referred to as “the meme” themselves. Take a popular meme like Disaster Girl.⁶⁵ Disaster Girl depicts a four-year-old child, caught in the moment of smiling in a devious way at a camera, while a house burns down in the background. The image is often interpreted as the little girl reveling in the catastrophe occurring behind her.⁶⁶ Because she did not take the photograph, Disaster Girl has only a privacy and publicity right in the meme, meaning she has a limited right to control the use of her image to be exploited, tempered by generous First Amendment considerations in favor of permitting the public

⁶² Taylor Locke, *This 12-Year-Old Coder Is Set to Earn Over \$400,000 After About 2 Months Selling NFTs*, CNBC (Sept. 1, 2021 1:29 PM), <https://perma.cc/LUJ8-YX96> [hereinafter “12-Year-Old Coder”].

⁶³ 7 *Classic Memes*, *supra* note 11.

⁶⁴ See Lantagne, *supra* note 13, at 402.

⁶⁵ See Disaster Girl, KNOW YOUR MEME, <https://perma.cc/JEC5-JWSH> (last accessed Mar. 13, 2022).

⁶⁶ See *id.*

access to items in the public interest (including, arguably, memes).⁶⁷ This publicity right interest might be enough to block licensing of the meme for use in connection with product advertising. But generally, it would not be sufficient to suppress circulation of the meme, because the copyright holder has exclusive rights over reproduction and distribution.⁶⁸ Moreover, Disaster Girl's publicity right would not allow her to license the meme traditionally for commercial exploitation, since traditional licensing would require reproduction and distribution of the photograph.⁶⁹

Confusion over how the rights in a photograph are divided is not limited to memes. There has been a rash of litigations in the past few years involving paparazzi photographers suing the celebrities depicted in their photographs for reposting them on social media.⁷⁰ This is another split-rights situation, and the interests of the copyright holder and the subject may not align. Moreover, the person depicted in the photograph feels that they may have some inherent right over their likeness – for instance, to post the photograph on their social media – that copyright law does not recognize. The publicity and privacy rights of these subjects often play second fiddle to the copyright holder's copyright rights. Courts favor the copyright holder's right to publicize a photograph over the subject's right to block it. For example, a federal district court in California said in a 2015 decision:

Since Plaintiffs do not identify any use of their likenesses not wholly contained within the photographs, Plaintiffs' claims seek to prevent Defendant from distributing the copyrighted work itself Accepting Plaintiffs' interpretation without separating the likeness from the work would destroy copyright holders' ability to exercise their exclusive rights under the Copyright Act, effectively giving the subject of every photograph veto power over the artist's rights under the Copyright Act and destroying the exclusivity of rights the Copyright Act aims to protect.⁷¹

⁶⁷ 6 RUDOLF CALLMAN, CALLMAN ON UNFAIR COMPETITION § 22:34. (4th ed. 2010).

⁶⁸ See 17 U.S.C. § 106.

⁶⁹ See *id.*

⁷⁰ See Charles Trepany, *Liam Hemsworth, Ariana Grande and More: Celebs Sued by Paparazzi over Copyright*, USA TODAY (Dec. 16, 2019), <https://perma.cc/K239-ABAN>.

⁷¹ *Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1137–38 (C.D. Cal. 2015), *aff'd*, 853 F.3d 1004 (9th Cir. 2017); see also *In re Jackson*, 972 F.3d 25, 40 (2d Cir. 2020).

Or, to put it in non-legal terms: “[D]espite being the unwilling subject of the photograph, I could not control what happened to it.”⁷² The paparazzi cases show that the photographer’s desire to hide a photograph trumps the subject’s ability to publicize it.⁷³

The subject’s lack of legal rights also explains why the phenomenon of “revenge porn” demanded a new statutory regime. Under copyright law, unless the subject of explicit photographs took them, that person could not control their dissemination. Recognizing the harm done to people depicted in revenge porn, many states addressed the problem by passing a statute giving greater power to the subjects of revenge-porn photographs to prevent their use.⁷⁴

NFTs echo this power shift toward subjects in a less harmful context. Anyone can mint an NFT of anything they want.⁷⁵ So, if the subject of a meme wants to auction that meme as an NFT, that person can mint the NFT and run the auction, as occurred with Disaster Girl,⁷⁶ Bad Luck Brian,⁷⁷ and Scumbag Steve.⁷⁸ Because they minted and auctioned the NFT, they receive the money — not the photograph’s copyright holder. Although NFTs were originally touted by some commentators as “a powerful tool to protect artists’ rights,” in the meme context it is not the artists but the subjects who are benefitting.⁷⁹ NBC News has reported that “[A]n influx of viral celebrities featured in classic memes have minted and sold their images as NFTs”⁸⁰ Know Your Meme concurred that meme NFTs are being successfully auctioned by the people depicted in them.⁸¹ Commentators say purchasing an NFT is analogous to getting an autograph from a famous

⁷² Emily Ratajkowski, *Buying Myself Back*, THE CUT (Sept. 15, 2020), <https://perma.cc/4BDF-NWMQ>.

⁷³ In those cases, the paparazzi does not entirely wish to hide the photographs, but they do want to block the subject from publicizing them.

⁷⁴ See Christian Nisttáhu, *Fifty States of Gray: A Comparative Analysis of ‘Revenge-Porn’ Legislation Throughout the United States and Texas’s Relationship Privacy Act*, 50 TEX. TECH L. REV. 333, 348 (2018).

⁷⁵ See Nicholas Rossolillo, *A Complete Guide to Minting NFTs (Using OpenSea as an Example)*, MOTLEY FOOL (Mar. 7, 2022), <https://perma.cc/E2XR-YXD3> (detailing the process with no requirement of proof of ownership over the file being minted).

⁷⁶ See Zoë Roth Sells ‘Disaster Girl’ Meme as NFT for \$500,000, BBC NEWS (Apr. 30, 2021), <https://perma.cc/7HBA-QJQK>.

⁷⁷ See Rosenblatt, *supra* note 23.

⁷⁸ See Sweat, *supra* note 10.

⁷⁹ See Clifford C. Histed, *The Coming Blockchain Revolution in Consumption of Digital Art and Music: The Thinking Lawyer’s Guide to Non-Fungible Tokens (NFTs)*, K&L GATES (Mar. 25, 2021), <https://perma.cc/KP2A-AEED>.

⁸⁰ See Rosenblatt, *supra* note 23.

⁸¹ See SWEAT, *supra* note 10

person.⁸² For meme NFTs, that famous person is the person depicted in the meme, not the person who took their photograph.

Accordingly, Zoë Roth, the subject of the Disaster Girl meme, sold her NFT for over \$400,000 in 2021.⁸³ She commented that she was excited to finally have a means to capitalize on her fame as a meme.⁸⁴ Similarly, Scumbag Steve, a meme of a young man interpreted to be a “scumbag” based on his clothing and facial expression,⁸⁵ sold his NFT for \$57,000.⁸⁶ After the success of the meme’s NFT auction, a commentator tweeted that Scumbag Steve was “finally get[ting] rewarded for having his face plastered as a meme for a very long time.”⁸⁷ The real Scumbag Steve, a man named Blake Boston, agreed that he was “grateful” for the money raised.⁸⁸ “Anything’s better than \$0,” he said.⁸⁹ The subject of Overly Attached Girlfriend sold the NFT for about \$411,000,⁹⁰ and the subject of Bad Luck Brian sold his for around \$36,000.⁹¹

It is not exactly clear what the copyright implications of these NFT auctions are. For Disaster Girl and Scumbag Steve, the subjects’ parents took the photographs, avoiding a split-rights conflict between subject and copyright holder.⁹² While Overly Attached Girlfriend was the copyright holder of her meme, Bad Luck Brian was not. Some meme subjects who have sold NFTs may have gotten permission from the copyright holder. People have created NFTs for a wide range of works to which they have dubious copyright claims, sometimes attracting attention from the original artist.⁹³ Pepe the Frog’s original creator had a collection of “sad frogs” removed from an

⁸² See Rosenblatt, *supra* note 23; Ekin Genc, *Overly Attached Girlfriend NFT Sells for \$411,000*, DECRYPT (Apr. 4, 2021), <https://perma.cc/398F-GY22> [hereinafter “Overly Attached Girlfriend”].

⁸³ See Pesce, *supra* note 4.

⁸⁴ See *id.*

⁸⁵ Billy Baker, *Savoring Time as the Internet’s Favorite Punching Bag*, BOSTON (Nov. 24, 2011), <https://perma.cc/2923-53N3>.

⁸⁶ See Sweat, *supra* note 10.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *Blake Boston Revisits Becoming ‘Scumbag Steve’ as We Catch Up with Him for the Meme’s 10-Year Anniversary and Upcoming NFT Auction*, KNOW YOUR MEME (2021), <https://perma.cc/6DX9-22SP> [hereinafter “Blake Boston”].

⁹⁰ See “Overly Attached Girlfriend”, *supra* note 82.

⁹¹ See Rosenblatt, *supra* note 23.

⁹² See *id.*; “Blake Boston”, *supra* note 89.

⁹³ There have also been trademark disagreements. See Tanzeel Akhtar, *Nike and Hermes File Lawsuits for Trademark Infringement as Fashion Collides with NFTs*, COINDESK (Feb. 4, 2022), <https://perma.cc/V4E2-ZEHR>.

NFT marketplace for allegedly violating his copyright.⁹⁴ The Basquiat estate intervened to block an NFT auction that purported to sell the right to destroy an original Basquiat work.⁹⁵ Miramax sued Quentin Tarantino over his plans to offer *Pulp Fiction* NFTs.⁹⁶ OpenSea, “the most popular marketplace for NFTs,” found that “over 80 percent” of the works being minted on its marketplace “were plagiarized works, fake collections and spam,” and the situation has been described as “an art thievery quagmire of its own making.”⁹⁷ Complaints from digital art websites regarding fraudulent NFTs are increasing exponentially.⁹⁸

Whether or not NFTs constitute copyright infringement is not clear-cut. We do not yet have any cases or rulings on the question. One theory is that “creating the NFT in the first place may be copyright infringement” because it produces an unauthorized reproduction of the work.⁹⁹ To mint an NFT, you have to upload the file that your NFT will point back to as the “image asset.”¹⁰⁰ If you do not have the rights to make a copy of that file, then reproducing it to upload it for the purpose of minting the NFT could be considered copyright infringement in and of itself, as the copying of a copyrighted work is a right that belongs exclusively to the copyright holder to control.¹⁰¹

However, the NFT itself is arguably “irrelevant” to copyright infringement, since the NFT itself has no content within it — it is simply a receipt for a particular copy of the work.¹⁰² The uploading of the file to connect to the NFT might be copyright infringement — but that is not the NFT. Accordingly, as long as the NFT is being sold without representing that it includes any of the exclusive rights of copyright, the *minting* process of the

⁹⁴ See “Pepe”, *supra* note 59.

⁹⁵ See O’Donnell, *supra* note 37; Rizzo, *supra* note 2.

⁹⁶ Miramax, LLC v. Quentin Tarantino, Dkt. No. 2:21-cv-08979 (C.D. Cal. Nov. 16, 2021).

⁹⁷ See Ongweso, *supra* note 46.

⁹⁸ See *id.*; see also Collier, *supra* note 41 (“[T]hanks to the explosion of the NFT art market, thieves have started stealing her work at a jaw-dropping rate.”).

⁹⁹ See O’Donnell, *supra* note 37. Keith Estiler, *Cj Hendry Destroys Basquiat and Warhol Artwork in NFT Stunt*, HYPEBEAST (Apr. 16, 2021), <https://perma.cc/WFV4-RJ2S>.

¹⁰⁰ See Sumi Mudgil, *How to Mint an NFT*, ETHEREUM FOUND. (Apr. 21, 2021), <https://perma.cc/JP24-NXSA>.

¹⁰¹ See 17 U.S.C. § 106. There are exceptions which allow people to make copies without the copyright holder’s consent, such as for personal archival purposes, or for fair use. See 17 U.S.C. § 107. Such exceptions seem unlikely to apply in the explicitly commercial marketplace of NFTs.

¹⁰² Collier, *supra* note 41.

NFT might have implicated copyright but the mere sale of the NFT arguably does not violate any intellectual property law, since it does not involve a further reproduction of the file.¹⁰³ At least some of the meme NFTs appear to explicitly disclaim ownership of the copyright of the meme, attempting to disconnect the meme from copyright altogether.¹⁰⁴ At any rate, the terms of use of the NFT platform being used for many of these auctions explicitly states that the NFT's sale does not confer any copyright, that there may be other claims on the image asset connected to the NFT, and that the platform itself will not be liable for any copyright or trademark infringement connected to the NFT.¹⁰⁵

The control and compensation that the rise of NFTs has given to meme subjects raises whether a wider ambit of control could, or should, be given to the subjects of photographs more generally. Should we reconsider how the legal system traditionally values the rights of the copyright holder over the rights of those subject? The Supreme Court's first decision recognizing the photographer as the sole copyright holder of a photograph, *Burrow-Giles Lithographic Co. v. Sarony*,¹⁰⁶ took place in a world in which photography was a highly specialized and complicated profession. Photographs were scarce luxuries that those who could afford them deliberately chose to have taken. Indeed, the Court's description of the process of taking the photograph of Oscar Wilde at issue sounds more like painting a portrait: it involved "selecting and arranging the costume, draperies, and other various accessories . . . arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, [and] suggesting and evoking the desired expression."¹⁰⁷ In such an atmosphere, equating the photographer with a painter as the sole creator of the work made sense.

Today, everyone with a smartphone is a photographer, able to snap a photograph in seconds just by reaching into a pocket. The vast majority of photographs do not involve the painstaking, time-intensive process that Oscar Wilde's photographer followed in *Burrow-Giles*.¹⁰⁸ Given how radically the medium of photography has changed, perhaps the law should re-evaluate how it views the rights to a photograph. While the quick, easy, and cheap

¹⁰³ See also "Elon Musk", *supra* note 8 ("[B]ecause of the legal gray area that NFTs exist in, it's not clear whether the use of this image infringes on any potential copyright laws.").

¹⁰⁴ See Rosenblatt, *supra* note 23.

¹⁰⁵ See *Terms of Service*, FOUND. LABS (Apr. 8, 2022), <https://perma.cc/MSJ6-3LX8>.

¹⁰⁶ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

¹⁰⁷ *Id.* at 60.

¹⁰⁸ See *id.* at 54.

act of taking a photograph requires little effort for the photographer, it grants them enormous power over the person depicted in the photograph, even when it was taken without their knowledge. This was a far more unusual occurrence when photography was a time-intensive, heavily posed art.¹⁰⁹ The revenge porn situation might most starkly challenge our assumption that the person who cares most about a photograph is its taker. There, it is very clear that the person depicted in a photograph is more greatly harmed by its unfettered use than is the copyright holder. Like the NFT market's greater grant of control to the meme's subject, state laws giving revenge porn victims power over the dissemination of their photographs urge us to consider whether today's power imbalance between photographer and subject deserves legal acknowledgement.

The control and compensation that NFTs have afforded meme subjects also invites questioning whether we should worry about compensating people who become memes. Unlike athletes and celebrities, who have recourse to other revenue streams, people who become memes seldom receive any compensation.¹¹⁰ There is an argument that it is unnecessary to compensate anyone in memes. If copyright law is about granting property rights in creative output to incentivize creativity,¹¹¹ the people depicted in memes typically do not need that incentive because they generally become memes inadvertently. Very few meme subjects were consciously involved in creating their memes. Copyright law views the photographer who took the underlying meme photograph as the creator needing creative incentive, not the meme subject. Further, memes most often arise organically from the collective action of the internet, meaning no individual person requires a financial incentive to produce a meme.¹¹²

In fact, the internet has shown that people seldom need an incentive for the initial act of creativity. Social media is full of creators who post without payment. What people seem to want is to be compensated for an act of creativity that the world deems valuable *after* it has come into being. This compensation does not line up with the rewards created by copyright law. People create TikTok dances for free all the time but hope to be compen-

¹⁰⁹ Emily Ratajkowski has written movingly of her loss of control of her image and the emotions connected to her body's exploitation by photographers. See *supra* note 72.

¹¹⁰ See Nelson, *supra* note 48 (noting that NFTs are “another method to expand athletes’ personal brands”).

¹¹¹ Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 AIPLA Q.J. 219, 226 (2019) [hereinafter “Cryptokitties”].

¹¹² See Lantagne, *supra* note 13, at 412-13.

sated if one of those dances gains pervasive notoriety.¹¹³ But since copyright law does not protect individual dance moves, many viral dance moves may not be copyrightable. Moreover, copyright law provides value by creating scarcity. It incentivizes creators by letting them control reproduction and dissemination of their creative work. However, on the internet, there is little value until the creative work is uncontrollably reproduced, giving it viral fame. Therefore, to the extent copyright is meant to incentivize creativity, in the digital world it does so imperfectly. Much of the creativity of the internet exists outside of copyright law's value judgments.

The internet has accordingly exposed that our intellectual property system might understand compensation incorrectly. Our system is ineffective at making people feel compensated for creativity society deems valuable. Take, for example, the recent spate of litigation against videogames based on their use of famous dance moves performed by players' avatars. In one case, Alfonso Ribeiro sued Fortnite for copying his well-known "Carlton Dance."¹¹⁴ The Copyright Office refused to register the dance move, on the ground that it was a "simple routine" that could not be copyrighted.¹¹⁵ The Carlton Dance clearly had value for its audience because the videogame developers wanted to exploit it, but copyright law permitted that exploitation.

In another case over a video game's use of a dance routine that the Copyright Office deemed unprotectable, the rapper 2Milly bluntly noted that it appeared Black creators were disproportionately affected by appropriation of uncopyrightable work in a way that devalued their creativity. He stated that "Epic has consistently sought to exploit African-American talent in particular in Fortnite by copying their dances and movements."¹¹⁶ Black creators on TikTok went on strike in the summer of 2021, "[t]ired of not receiving credit for their creativity and original work — all while watching white influencers rewarded with millions of views performing dances they didn't create."¹¹⁷ American intellectual property law has a long history of oppressing and exploiting Black creators,¹¹⁸ from refusing to allow enslaved

¹¹³ See Cache McClay, *Why Black TikTok Creators Have Gone on Strike*, BBC NEWS (July 15, 2021), <https://perma.cc/NE5P-2RVH>.

¹¹⁴ See *Ribiero v. Take-Two Interactive Software, Inc.*, Compl., Dkt. No. 2:2018cv10417 (C.D. Cal. Dec 17, 2018).

¹¹⁵ See *Ribiero*, Mot. To Dismiss, Dkt. 2:2018cv10417 (C.D. Cal. Feb. 13, 2019).

¹¹⁶ *Baker v. Epic Games, Inc.*, Compl. 35, Dkt. No. 2:19CV00505 (C.D. Cal. Jan. 23, 2019).

¹¹⁷ Sharon Pruitt-Young, *Black TikTok Creators Are on Strike to Protest a Lack of Credit for Their Work*, NPR (July 1, 2021), <https://perma.cc/UQ4A-AZC9>.

¹¹⁸ See *id.* ("We can take any historical period and look at popular culture . . . and see the ways in which white folks who have access to mainstream capital and

people to hold patents to their inventions¹¹⁹ to letting Rock-n'-Roll labels take the work of Black artists and attribute it to white artists under the statutory compulsory licensing system.¹²⁰ Looking at the example of dance, Anthea Kraut found that “[w]ith few exceptions, the names of non-white dancers are not present, or at least not easily detectable, in official copyright archives from the first two-thirds of the twentieth century.”¹²¹ In relation to Black creators’ TikTok strike, Sarah J. Jackson described how:

Since the founding of this country, Black art forms, Black dance forms, have been appropriated, watered down, repackaged and used to make money by white folks And so, if you put it in that context of that longer history of basically stolen labor and stolen creativity, then you start to see why it matters to people and why it’s important to people to be credited for the origins of these things.¹²²

This story continues today in the digital context. The originators of popular internet content often do not receive compensation for it under our existing intellectual property system, and the brunt of this is often suffered by Black artists.¹²³ A larger reckoning with who the copyright system compensates is long overdue. In a surprising way, meme NFTs have become part of that battle by giving compensation to whom the internet values, rather than whom the law prioritizes.

mainstream media and other forms of access were drawing inspiration from the art forms and creative forms of Black folks.”).

¹¹⁹ See Brian L. Frye, *Invention of A Slave*, 68 SYRACUSE L. REV. 181, 181-82 (2018).

¹²⁰ See Neela Kartha, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!?*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 232-33 (1997); see generally K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999); Vincent R. Johnson II, *Sampling as Transformation: Re-Evaluating Copyright’s Treatment of Sampling to End Its Disproportionate Harm on Black Artists*, 70 AM. U. L. REV. F. 227 (2021).

¹²¹ ANTHEA KRAUT, CHOREOGRAPHING COPYRIGHT RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE 128 (2015) (quoted in Gia Velasquez, *No Credit Where Credit Is Due: Exploitation in Copyright*, 99 J. PAT. & TRADEMARK OFF. SOC’Y 693, 702 (2017)).

¹²² Pruitt-Young, *supra* note 117.

¹²³ See Shamira Ibrahim, *How the Internet Became a Playground for Exploiting Black Creators*, VICE, <https://perma.cc/A45A-3QQD> (last accessed May 7, 2022).

A. *Scarcity vs. Virality*

Copyright law has always had the fundamental purpose of creating scarcity.¹²⁴ When the printing press — the World Wide Web of its day — threatened to make information more accessible than ever, copyright was created to give printers the power to prevent copying.¹²⁵ The effect was to create artificial scarcity when virality threatened.¹²⁶

Copyright protections were predicated on the theory that scarcity helps create value.¹²⁷ When the online peer-to-peer music sharing network Napster was developed to make music distribution easier than ever, it proposed making all music available to its users for a monthly flat fee. This would have brought in a considerable amount of money to be divided among the stakeholders: as one commentator put it, “more money than ever dreamed of.”¹²⁸ However, the mainstream music industry clung to the idea that maintaining the scarcity of music was necessary to retain its value.¹²⁹ Artists and record labels successfully sued Napster for copyright infringement, eventually leading it to shut down.¹³⁰ The same desire for scarcity underlies the Motion Picture Association’s longstanding concern with piracy. If the movie or television show can easily be found in free or cheap unauthorized copies, then the copyright’s value falls.¹³¹

¹²⁴ See Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143, 145 (2020).

¹²⁵ See *id.* at 156.

¹²⁶ See *id.* at 146.

¹²⁷ See Roose, *supra* note 7.

¹²⁸ Michael Gowen, *Requiem for Napster*, PC WORLD, (May 18, 2002, 12:17 PM), <https://perma.cc/SU8N-G87Y>.

¹²⁹ See Stephen Dowling, *Napster Turns 20: How It Changed the Music Industry*, BBC (May 31, 2019), <https://perma.cc/Z8CH-BNR> (quoting *Rolling Stone* journalist Steve Knopper: “[The record business] sure made it unnecessarily hard for themselves for a long time.”); see also Casey Rae-Hunter, *Better Mousetraps: Licensing, Access, and Innovation in the New Music Marketplace*, 7 J. BUS. & TECH. L. 35, 40 (2012) (“The mainstream recorded music industry was slow to understand and exploit the dynamics of the emerging digital music marketplace[.]. . . [preferring a] return to the old system of scarcity and near-exclusive control of distribution.”); cf. Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 7 (2005) (suggesting that the record companies move forward with digital music by “abandon[ing]. . . the scarcity paradigm”).

¹³⁰ *This Day in History (March 6, 2001): The Death Spiral of Napster Begins*, HISTORY, <https://perma.cc/DMH5-HP66> (last visited July 11, 2022).

¹³¹ See “Cryptokitties”, *supra* note 111, at 249.

NFTs have been described as representing the ability to “create[] digital scarcity,”¹³² which heretofore has been a challenge on the internet.¹³³ One article describes the NFT phenomenon as follows: “Buyers require . . . representations to ensure that their NFT is legitimate and rare, rarity being one of the most valuable qualities of these assets.”¹³⁴ While some NFT marketplaces state that creators “may have to represent . . . that the work [in question] is scarce,”¹³⁵ in practice this requirement is nonsensical. The alleged rarity of NFTs is entirely fake. The *NFT* is rare and scarce; the work it is attached to, by contrast, can often be found in many other places in the identical form as the version linked with the NFT.¹³⁶ The same article even acknowledges this: “[W]hen an artist sells a piece of NFT art, it is not the actual underlying artwork that is being sold. Rather, it is a copy of the art, with the NFT representing ownership of the copy.”¹³⁷ All other copies of the art continue to exist, and, in the world of memes, continue to be copied and shared at will.¹³⁸

Instead of creating scarcity, NFT markets appear to prioritize virality as a source of value, especially when it comes to memes. The more viral a meme is, in the NFT meme economy, the greater the value of the meme. Ross Blum, the “Chief Operating Officer at Quidd, the world’s largest social marketplace for digital goods and media technologies,”¹³⁹ gave the following description:

But that one-of-one card potentially only has value . . . based on [] the rareness, and there is no sort of context, there is no community, there is no

¹³² Katya Fisher, *Once Upon a Time in NFT: Blockchain, Copyright, and the Right of First Sale Doctrine*, 37 *CARDOZO ARTS & ENT. L.J.* 629, 631 (2019); see also Holland, *supra* note 36.

¹³³ See Roose, *supra* note 7.

¹³⁴ Chris Bennett & Cody Koblinksky, *Non-Fungible Tokens: Emerging Issues in the Emerging Marketplace*, DLA PIPER (Mar. 30, 2021), <https://perma.cc/K4H7-T9RW>.
¹³⁵ 26 No. 4 *Cyberspace Lawyer NL* 1.

¹³⁶ See, e.g., *Dread Scott: White Male for Sale*, CRISTIN TIERNEY (2021), <https://perma.cc/SD5T-MM8H>.

¹³⁷ 26 No. 4 *Cyberspace Lawyer NL* 1.

¹³⁸ See Ross Blum et al., *Panel 1: Digital Art and Digital Collectibles*, 37 *CARDOZO ARTS & ENT. L.J.* 567, 569-70 (2019); Chris Berg, *Non-Fungible Tokens and the New Patronage Economy*, COINDESK (Mar. 22, 2021), <https://perma.cc/V6Y2-LBNE>. But see 26 No. 4 *Cyberspace Lawyer NL* 1 (“As with any collector’s item, uniqueness and scarcity are the two most important attributes that make NFT art valuable. NFT art will only attract demand if uniqueness and scarcity are guaranteed. Creators will have to make the necessary representations for buyers to trust that they are getting a one-of-a-kind product.”).

¹³⁹ Blum, *supra* note 138, at 568.

story behind it and it's just rivalries, it's not necessarily different than any other sort of unique object out there, say, your Grandma's hand-knit sweater or a rare piece of art that your friend made. But the notion that these things have value is really brought together by appearance, belonging, the interest and . . . the incentive structure of wanting to own these digital objects.¹⁴⁰

In other words, the more well-known the underlying work of an NFT is, with a community of people interested in it, the more value the NFT has. In the case of memes, if you can find the meme everywhere, then it is worth money: “[E]stablished, years-old memes seem to be the most in demand among NFT buyers.”¹⁴¹

Given that value is found in a meme's popularity, and that the copyright status of memes is frequently uncertain, the sale of a meme NFT typically does not seek to restrict access to the meme.¹⁴² For instance, the Nyan Cat GIF NFT was sold with a simple “limited, worldwide, non-assignable, non-sublicensable, royalty-free license to display the Digital Artwork.”¹⁴³ This limited right of display is what many other people around the world were already exercising when they used or reposted the GIF. The purchaser has the right to resell the NFT but otherwise is not allowed to make “commercial use” of the GIF.¹⁴⁴ Meme NFTs often do not involve granting any of the exclusive rights of copyright, because the split rights situation means the NFTs are often sold by the subject, not the copyright holder. The possessor of the NFT accordingly “cannot prevent the spread or use of the meme,”¹⁴⁵ even if a meme could be put back in its box.¹⁴⁶

But it appears that meme NFT owners do not want the ability to restrict dissemination. They usually wish to encourage further viral distribution of the meme, because creating scarcity of the meme would detract from the NFT's value.¹⁴⁷ In fact, some have seen meme NFTs as a way of reviving “dead memes,” or “meme[s] that w[ere] once popular but ha[ve] since lost

¹⁴⁰ *Id.*

¹⁴¹ Rosenblatt, *supra* note 23.

¹⁴² See “Overly Attached Girlfriend”, *supra* note 82 (“Morris cannot prevent anyone from spreading the meme, nor can the new owner of the NFT.”).

¹⁴³ *Terms of Service*, FOUND. LABS (June 26, 2021), <https://perma.cc/DQV9-XQ42>.

¹⁴⁴ *Id.*

¹⁴⁵ See Rosenblatt, *supra* note 23.

¹⁴⁶ See “Overly Attached Girlfriend”, *supra* note 82 (“[S]elling memes as NFTs will only give these creators control over their finances, not the memes themselves.”).

¹⁴⁷ This seems to be different from the holders of NFTs of other kinds of creative works, who seem to resent their creative properties proliferating elsewhere on the

[their] stature.”¹⁴⁸ An expensive NFT sale attracts attention and brings a meme back into the “spotlight.”¹⁴⁹ Again, the NFT causes the opposite of scarcity.

Some NFT meme markets try to create the impression of scarcity by taking a ubiquitous meme like Pepe the Frog¹⁵⁰ and creating spin-off “rare Pepes.”¹⁵¹ However, even these are taking advantage of the widespread viral fame of the original underlying meme. Many NFT meme buyers lean into the fact that a meme NFT only has value because it viral.¹⁵² It has been observed that shortly after a celebrity with a large online following, like Elon Musk, posts a meme on Twitter is a prime time to take advantage of the increased value brought by such exposure by quickly minting an NFT.¹⁵³

The trend toward virality in NFT markets goes against the instinct underlying copyright law for centuries. After all, who would pay for something that can be obtained for free? The obvious answer is no one. Often, when someone buys an NFT, they are not only or even mostly paying for a digital file that is freely available elsewhere. Instead, NFTs often come packaged with other perks and features.¹⁵⁴ For instance, some NFTs are sold with ongoing royalty payments or dividend streams.¹⁵⁵ Others permit further

internet. See Victor Tangermann, *Person Furious That Someone Right Click Saved Their Precious NFT*, FUTURISM (Nov. 5, 2021), <https://perma.cc/VS96-WT77>.

¹⁴⁸ See Rosenblatt, *supra* note 23.

¹⁴⁹ *Id.*

¹⁵⁰ See *Pepe the Frog*, KNOW YOUR MEME, <https://perma.cc/72CG-WWMC> (last visited Apr. 21, 2022).

¹⁵¹ See Corin Faife, *Meme Collectors Are Using the Blockchain to Keep Rare Pepes Rare*, VICE (Jan. 27, 2017), <https://perma.cc/63XY-SYQP>. Arguably, these are *bad* Pepes, because the good, useful memes are the ones everybody knows.

¹⁵² See also Rizzo, *supra* note 2 (noting that some people “are already launching NFT projects governed by Creative Commons licenses,” which, “[a]t their least restrictive, . . . allow artists to waive all rights to their work, making their images freely available to anyone to use or adapt for any purpose”).

¹⁵³ Cf. “Elon Musk”, *supra* note 8.

¹⁵⁴ See Steve Kaczynski & Scott Duke Kominers, *How NFTs Create Value*, HARV. BUS. REV. (Nov. 10, 2021), <https://perma.cc/A7VQ-L4R9> (“It’s not uncommon to see creators organize in-person meetups for their NFT holders, as many did at the recent NFT NYC conference. In other cases, having a specific NFT in your online wallet might be necessary in order to gain access to an online game, chat room, or merchandise store. And creator teams sometimes grant additional tokens to their NFT holders in ways that expand the product ecosystem: owners of a particular goat NFT, for example, were recently able to claim a free baby goat NFT that gives benefits beyond the original token; holders of a particular bear NFT, meanwhile, just received honey.”).

¹⁵⁵ 26 No. 6 Cyberspace Lawyer NL 1.

commercialization of the art connected to the NFT, such as merchandising.¹⁵⁶ Bands sell NFTs that come with vinyl albums or concert tickets.¹⁵⁷ The Red Sox auctioned an NFT “that comes with an exclusive experiential VIP package, including the opportunity to throw the ceremonial first pitch at Fenway Park, two tickets to a Red Sox home game, a stadium tour and a meet and greet with Red Sox alumni.”¹⁵⁸ As noted already, Quentin Tarantino planned to auction NFTs that would come with “previously unknown secrets” about the movie *Pulp Fiction*.¹⁵⁹ The NFT of a Basquiat drawing famously purported to include the right to destroy the one original of the physical work.¹⁶⁰ Arguably, it is those other perks and features that provide the NFT’s economic value, and the “one true original” billing is really just a red herring. While the transaction might be described as the purchase of an NFT, you are often really paying for a vinyl record or event tickets. You can hardly get more old-school than that.

However, NFTs are usually discussed as if they are not often about these physical perks. Instead, commentators have praised NFTs for “enabl[ing], for the first time, verifiable digital scarcity — an elusive technological characteristic in the world of Web 2.0.”¹⁶¹ This discussion frames NFTs in terms of their promise of owning the true original digital version of a work. But that raises the question of why such ownership is considered appealing in the first place. Why would owning an “original” with possibly millions of identical versions matter?

In one sense, this resembles the debate over art forgery.¹⁶² If a copy of a masterpiece is virtually indistinguishable from the original, who is harmed by the fact that it is *not* the original? If the value of an original piece of art lies in its originality or the fact that it was touched by a particular person, then if so, why?¹⁶³ Forgers have explicitly forced this question by releasing

¹⁵⁶ See 26 No. 4 Cyberspace Lawyer NL 1.

¹⁵⁷ See Roose, *supra* note 7.

¹⁵⁸ Thomas Harrigan, *Bid on Limited-Edition Fenway Park NFTs*, MAJOR LEAGUE BASEBALL (Aug. 9, 2021), <https://perma.cc/RWJ9-QJGL>.

¹⁵⁹ *Miramax, LLC v. Tarantino*, Compl. 1, Dkt. No. 21-cv-08979 (C.D. Cal. Nov. 16, 2021).

¹⁶⁰ See O’Donnell, *supra* note 37.

¹⁶¹ “Cryptokitties”, *supra* note 111, at 220.

¹⁶² See Blum, *supra* note 138, at 571.

¹⁶³ See, e.g., Max Horberry, *The Artist Beneath the Art Forger*, N.Y. TIMES (Feb. 21, 2020), <https://perma.cc/8YCP-G4JN> (noting that forgery “champion[s]” the idea that art has “intrinsic merit” and does not need to be deemed an original copy in order to be appreciated and have value); Kevin Wiesner, *1,000 Warhol Artworks Are on Sale for Just \$250 Each. But Only One is Real*, CNN (Oct. 25, 2021), <https://>

NFTs of their forgeries.¹⁶⁴ NFTs attack the question head-on. In the world of NFTs, you do not just get a forgery. You get a digital file identical to every other digital copy of that file. Some commentators have remarked that NFTs can “protect investors by helping establish provenance of art works”¹⁶⁵ and anticipate that they will bring about the return of the scarce and controllable world in which “everything is on blockchain and you’re not able to create [] copies anymore.”¹⁶⁶ However, at heart, NFTs ask the question of why we should care about copying when the copy and the original are indistinguishable. Is the *idea* of scarcity worth so much to us that we would pay six figures for a digital cat, just because we’re told it is unique, even if we know the same image can be found practically everywhere online?¹⁶⁷

The answer might be that it is not the scarcity, but the community, that creates the value. Those in the art space of the NFT world have acknowledged that it is not the aesthetics of the art but rather the community surrounding the art that decides its value.¹⁶⁸ Indeed, the most valuable NFTs often come with “community spaces”: access to members-only exclusive places, either on Discord servers or in real life.¹⁶⁹

Memes are primed to be commodified in a space where value is based on community. A meme, unlike an individual piece of art, definitionally relies on community to exist because it is predicated on virality. If something becomes a meme because it is replicated and shared, then memes cannot exist outside of a community. One can try to create something that *looks* like a meme, such as a photo with text overlaid, but it is not a true meme until it is replicated. Indeed, some NFT artists have noted that art bought and sold via NFTs qualitatively resembles memes because of its reliance on community.¹⁷⁰ One artist described the NFT community as “mycelium — the interconnected fungus network that forms a community in the way tree

perma.cc/6PJ5-URJQ (noting the criticism that the art industry cares more about the pointlessness of possessing an original copy than it does about “the art itself”).

¹⁶⁴ See, e.g., Sarah Cascone, *Master Forger Wolfgang Beltracchi Shows Off His Skills (and Pointed Humor) with a New NFT Collection*, ARTNET (Oct. 11, 2021), <https://perma.cc/9JUJ-X38A>.

¹⁶⁵ 26 No. 6 Cyberspace Lawyer NL 1.

¹⁶⁶ Tonya M. Evans et al., *Panel 2: Art Law and Blockchain*, 37 CARDOZO ARTS & ENT. L.J. 589, 601 (2019).

¹⁶⁷ The answer is, apparently, yes. See “Cryptokitties”, *supra* note 111, at 250.

¹⁶⁸ Cf. Bruner, *supra* note 49.

¹⁶⁹ Reply All, #185 *The Rainbow Chain*, GIMLET MEDIA (Apr. 7, 2022), <https://perma.cc/R7Y6-U7M8>; see also Larry Dvoskin, *Why Community Is the Secret to NFT Success*, ROLLING STONE (Jan. 17, 2022), <https://perma.cc/9SJK-U4TH>.

¹⁷⁰ See “12-Year-Old Coder”, *supra* note 62.

roots interconnect with each other.”¹⁷¹ Successful NFT artists use the NFT community as a substitute for the traditional model of agents or managers.¹⁷² Without that connection to community, it can be difficult to join the NFT goldrush.¹⁷³ “[N]urturing the community is exactly how you get ahead in the NFT space.”¹⁷⁴ The community aspect drives people to purchase your NFTs out of a desire to support you and belong to your digital community.¹⁷⁵

V. ENVISIONING A NEW WAY OF THINKING ABOUT CREATIVE VALUE

The huge amounts of money currently being spent on NFTs creates the idea of an exciting and unpredictable new commodity fundamentally different from traditional media. The desire to participate in this action by purchasing an NFT seems less connected to the particular file the NFT is attached to and more to the hype around the NFT market as a cash cow. This is like buying a book not because you want to read that particular book, but because you are speculating in the book’s after-market. In the first few months of 2021, more than \$2 billion was spent on NFTs.¹⁷⁶ By the third quarter of 2021, it was almost \$11 billion.¹⁷⁷

Fundamentally, however, NFTs are not new. They are a form of speculation and investment such as has existed for millennia. People buy NFTs hoping they are “good investment[s]” that “will increase in value.”¹⁷⁸ These buyers are not necessarily admirers of the underlying work, but investors. Some people have compared this to the Beanie Babies craze of the 1990s.¹⁷⁹ Others have classified it as a pyramid scheme.¹⁸⁰ At best, they are “as risky as gambling.” Some claim that “few financial professionals would recom-

¹⁷¹ See Dvoskin, *supra* note 169.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ Will Fan, *Leading in the New World of NFTs: Creating Community and Intrinsic Value*, FORBES (Jan. 6, 2022), <https://perma.cc/JXV8-LC47>.

¹⁷⁵ See *id.*

¹⁷⁶ See ANTHONY J. DREYER & DAVID M. LAMB., CAN I MINT AN NFT WITH THAT?: AVOIDING RIGHT OF PUBLICITY AND TRADEMARK LITIGATION RISKS IN THE BRAVE NEW WORLD OF NFTs (2021), available on Westlaw at 2021 WL 1850623.

¹⁷⁷ See Collier, *supra* note 41.

¹⁷⁸ 26 No. 6 Cyberspace Lawyer NL 1.

¹⁷⁹ See Roose, *supra* note 7; cf. Ongweso, *supra* note 46.

¹⁸⁰ See Jacob Kastrenakes, *I Spent Hours Waiting to Find Out What an NFT Looks Like IRL*, THE VERGE (Nov. 6, 2021), <https://perma.cc/9JJA-BCG6>.

ment” cryptocurrency in general.¹⁸¹ Critics have accused them of “being used to propose increasingly more nebulous, abstract, and unwieldy categories of objects and goods and services.”¹⁸² At some point, the speculative bubble will likely burst and the prices will sink. There will be winners and losers, and the world will move on to the next big thing.¹⁸³ Indeed, there is some indication the market may have already started to crash. Trading on the biggest NFT marketplace dropped by 80% in a single month in the spring of 2022, and on average NFT prices have declined nearly 50% from their peak a few months earlier.¹⁸⁴ The number of accounts trading in NFTs in March 2022 was about half the number doing so in November 2021.¹⁸⁵

Though they may not be a fundamentally new phenomenon, the rise of NFTs nonetheless presents an opportunity to rethink how we view creativity. In a world in which the scarcity of creative properties is increasingly challenging to manufacture, large copyright holders have spent enormous amounts of money to preserve “artificial scarcity” and therefore profits.¹⁸⁶ Some have lobbied against the proliferation of their works online¹⁸⁷ and sought more and more technological controls to try to cabin replication. Most recently, a new SMART Copyright Act has been proposed to “reduce online theft.”¹⁸⁸ In this context, NFTs have been described as the way forward for artist compensation. They have been touted as “a much-needed way” for creators to monetize their work online¹⁸⁹ and greeted as an equalizer in “copyright-intensive industries” that are often controlled by a few powerful entities.¹⁹⁰

¹⁸¹ See Alyson Krueger, *How Much Real Money Can You Make From Virtual Art?*, N.Y. TIMES (Mar. 12, 2022), <https://perma.cc/8GV8-N24L>; see also Rizzo, *supra* note 2.

¹⁸² See Ongweso, *supra* note 46 (“[T]he greatest predictor of any NFT’s value isn’t its appearance but its previous price points. None of this sounds like a functional market so much as a mad grab for profit.”).

¹⁸³ Cf. Krueger, *supra* note 181 (“[W]hat many NFT artists create or collectors invest in will be worth little or nothing in the long term.”); see also O’Donnell, *supra* note 37 (describing NFTs as “Dada-esque: it’s equivalent to presenting a poster of the *Mona Lisa* as a unique work of art”); Westenfeld, *supra* note 43 (noting that some market participants “don’t even know what they’re buying”).

¹⁸⁴ See Miles Kruppa et al., *The Great NFT Sell-Off: Has the Digital Collectibles Craze Hit its Peak?*, FIN. TIMES (Mar. 10, 2022), <https://perma.cc/NK8P-GEXU>.

¹⁸⁵ See *id.*

¹⁸⁶ See Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143, 143 (2020).

¹⁸⁷ Cf. David Nelson, Note, *Free the Music: Rethinking the Role of Copyright in an Age of Digital Distribution*, 78 S. CAL. L. REV. 559, 568 (2005).

¹⁸⁸ SMART Copyright Act of 2022, S. 3880, 117th Cong. (2022).

¹⁸⁹ 26 No. 6 Cyberspace Lawyer NL 1.

¹⁹⁰ “Cryptokitties”, *supra* note 111, at 220.

Consider, for example, NFTs' much-lauded inclusion of resale rights. Many NFTs are sold with resale rights attached. Resale rights guarantee the artist will receive a cut of any future sales, or resales, giving the artist a right to some of the value generated by their work's appreciation.¹⁹¹

[V]isual artists do not generate considerable income from the reproduction and communication rights that are available to other creators under copyright law. The artist's resale right seeks to address this financial disparity by ensuring that visual artists receive a portion of the price paid for their tangible artwork each time it is resold.¹⁹²

As Paris Hilton's team weighed in, “[B]lockchain technology will allow artists to get paid on secondary sales as well. That's never happened before and it is mindblowing how much that can change things for artists.”¹⁹³ The NFT market did not invent including resale rights in art sales. Artists including Grant Wood and Robert Rauschenberg began lobbying for it in the 1940s and 50s.¹⁹⁴ Mandatory resale rights are common in many countries,¹⁹⁵ but Congress refused to pass laws mandating them in the United States.¹⁹⁶ When California tried to pass its own statute granting artists a resale right, it was held to be pre-empted by federal law.¹⁹⁷ While artists could theoretically include resale rights in their contracts, few have done so successfully.¹⁹⁸

The resale right that failed to flourish in the offline world has become a praised feature of the NFT world. NFTs' digital contracts make the resale right easier to police than in the offline world.¹⁹⁹ However, the challenges of enforcing such contracts offline may apply with equal force to online sales.²⁰⁰

¹⁹¹ See Blum, *supra* note 138, at 582; “12-Year-Old Coder”, *supra* note 62; Holland, *supra* note 36; Pesce, *supra* note 4; Roose, *supra* note 7; Rizzo, *supra* note 2.

¹⁹² Zhao Zhao, *Fulfilling the Right to Follow: Using Blockchain to Enforce the Artist's Resale Right*, 39 *CARDOZO ARTS & ENT. L.J.* 239, 244 (2021).

¹⁹³ Team Paris, *I'm Excited About NFTs—You Should Be Too*, PARIS (Apr. 8, 2021), <https://perma.cc/KK6E-3KAM>. See also Kaczynski & Kominers, *supra* note 154 (describing NFTs as “enabl[ing] a new type of royalty contract”).

¹⁹⁴ See Rizzo, *supra* note 2; Brian L. Frye, *Equitable Resale Royalties*, 24 *J. INTELL. PROP. L.* 237, 239 (2017) [hereinafter “Resale Royalties”].

¹⁹⁵ See “Resale Royalties”, *supra* note 194, at 240; Rizzo, *supra* note 2.

¹⁹⁶ See “Resale Royalties”, *supra* note 194, at 240; Rizzo, *supra* note 2.

¹⁹⁷ See “Resale Royalties”, *supra* note 194, at 240; Rizzo, *supra* note 2.

¹⁹⁸ See “Resale Royalties”, *supra* note 194, at 249 (“Few artists ever tried to use the Projansky Contract, and even fewer successfully convinced buyers to accept it. Ironically, only artists whose artworks were already in considerable demand could insist that buyers accept the Projansky Contract . . .”); Rizzo, *supra* note 2.

¹⁹⁹ See Zhao, *supra* note 192, at 253.

²⁰⁰ See “Resale Royalties”, *supra* note 194, at 249.

It may be difficult to form enforceable contracts with future buyers that the artist has no relationship with. A resale right might also be found impermissible in the United States under the first sale doctrine, which cuts off the copyright holder's rights at the first sale of a copy of a copyrighted work, leaving subsequent sales unencumbered.²⁰¹ The digital, intangible nature of the art linked with NFTs might affect some of this analysis, but so far the implications are unknown. While these resale rights are currently part of the market vogue around NFTs, their use may therefore diminish in the future and is certainly not guaranteed.

NFTs' incorporation of resale rights is an example of how NFTs invite rethinking how we measure creative value. The prevalence and popularity of resale rights in the NFT world indicates that artists want these rights. That suggests that copyright law is out of step with how artists today think about their creative value. As discussed, NFTs offer a way to decouple value from scarcity and instead commodify value in other ways. Radically, NFTs might also be taken a step farther: the fictional middleman, represented by receiving a bit of blockchain in exchange for paying artists, could be cut out altogether so that one is directly supporting artists and creators. Given the dubious independent value of the blockchain that represents an NFT,²⁰² we can imagine a world in which we drop the pretense and directly sponsor the artist the NFT compensates. Rather than paying for an NFT of a digital file that exists all over the internet, we would simply pay the artist of the digital file as payment for the aesthetic enjoyment of the digital art without receiving anything else in return. This idea is idealistic: people like to own things, and many buy NFTs for the potential return on investment that could accompany ownership. But it is an instructive thought exercise because it challenges our understanding of what is valuable about an artistic experience. Must we create scarcity and exercise exclusive property rights to enjoy art,²⁰³ or can we find a way for the support of artists and the virality of art to exist simultaneously?

Not all creativity exists in spaces built on scarcity and ownership. In fact, much of the creativity on the internet takes place in a viral world of endless replication. The creativity on social media — a space used by billions of people — is replicated over and over as content is shared. Finding a

²⁰¹ See *id.*

²⁰² See Roose, *supra* note 7 (“There are . . . legitimate questions about what, exactly, NFT buyers are getting for their money . . .”).

²⁰³ See, e.g., Joan Westenberg, *How Music NFTs Will Rewrite the Streaming Economy*, MEDIUM (Nov. 29, 2021), <https://perma.cc/ZLP6-MWB7> (“Digital scarcity is necessary to create a unique user experience and enable fans to form longer-lasting and more profound connections with their favorite artists.”).

way to monetize content in this environment can be challenging, as people who have become memes have discovered. NFTs are a means of monetization. But maybe they could also open the door to reimagining monetization. If you are willing to pay for an essentially meaningless bit of blockchain, might you pay directly for people involved in making art, with no ownership myth attached? And could we also expand the limited way in which we think about authorship, as we already do with memes? Is there room to appreciate, in at least some circumstances, the interest of the people in the photo, which copyright would not acknowledge? So, for instance, could we have envisioned simply paying Disaster Girl because we love the meme?

Such an idea might seem absurd. But so too is paying up to millions of dollars for NFTs, which have been characterized as merely “the idea of ownership,”²⁰⁴ rather than real ownership. In the past, directly sponsoring creators by “patronizing” them was not absurd at all but one of the main ways for people to support creativity. For instance, during the Renaissance, artists like Michelangelo and Lenoardo daVinci were supported by wealthy families who sponsored their careers and gave them the ability to produce their art.²⁰⁵ Some commentators have noted that the NFT craze could be the first step in moving from ownership back to patronage.²⁰⁶ “[W]hat we are seeing with NFTs is the emergence of a new type of cultural economy built around one of the oldest forms of cultural production: patronage.”²⁰⁷ In other words, maybe we could consider supporting artists simply to support artists. The reward, as it was in the past, need not be a digital file; the reward could be the art created for us and future generations to enjoy.

Paying for creativity in support of a creative community is a growing part of the NFT world. As discussed, many of those active in the NFT space refer to it in terms of community, with the money at stake characterized as a curiosity at best.²⁰⁸ Indeed, many NFTs do not even pretend to be about anything other than access to a community. For instance, the website

²⁰⁴ See Gottsegen, *supra* note 53; see also Rizzo, *supra* note 2 (describing one NFT marketplace’s terms of service as reading that NFTs “exist only by virtue of the ownership record maintained in the Ethereum network. . . . [W]e do not guarantee that [anyone] can effect [sic] the transfer or title or right in any [NFTs]”); Kaczynski & Kominers, *supra* note 154 (“NFTs . . . giv[e] parties something they can agree represents ownership.”).

²⁰⁵ See, e.g., Victoria L. Schwartz, *The Celebrity Stock Market*, 52 U.C. DAVIS L. REV. 2033, 2046 (2019) (describing the patronage model).

²⁰⁶ See Rizzo, *supra* note 2.

²⁰⁷ Berg, *supra* note 138.

²⁰⁸ See Bruner, *supra* note 49; see also Kastrenakes, *supra* note 180 (observing that the “vibrant communities [that] have formed around” NFTs is one of the best things about them).

“Dreamverse” sells NFT tickets that give access to a party.²⁰⁹ The Bored Ape Yacht Club bills itself as a “limited NFT collection where the token itself doubles as your membership to a swamp club for the apes.”²¹⁰ This means that, for many people, NFTs function “as part of their personal identity,” with the different NFT communities possessing “different personalities.”²¹¹ As one person in the NFT space explained, “It comes down to fandom.”²¹²

The fandom comparison is apt. Paris Hilton, in a primer on NFTs, praised them for “democratizing art” and “letting creators directly engage with fans.”²¹³ She noted that “NFTs can give artists, even if they aren’t well known, the opportunity to crowdfund their work.”²¹⁴ Other observers echo this point: NFTs are “community-driven,”²¹⁵ Creators “who show up, respond to messages (NFT-related or not) and connect with individuals on a very human level make all the difference” to the success of an NFT.²¹⁶ This close interaction between creators and audience is similar to how fan communities have long operated. Fan creativity is intensely democratic, promoting “maximum inclusiveness” and allowing posting by anyone who wishes.²¹⁷ The main fanfiction archive on the internet, An Archive of Our Own, employs no algorithms, depending entirely on users’ own choices of tags and indices of popularity such as hits, comments, and “kudos” to identify what they want to read.²¹⁸ The community itself rates the fics as they desire, and fan creators constantly engage with fans through social media, fic

²⁰⁹ See, e.g., *Ticketing Options*, DREAMVERSE, <https://dreamverse.life/ticketing.html> (last accessed Mar. 12, 2022) (“Tickets to the Dreamverse Gallery are available only as NFTs, and tickets to Dreamverse Party are available as both NFTs and traditional tickets (non-NFTs).”).

²¹⁰ BAYC, BORED APE YACHT CLUB, <https://perma.cc/6WQP-XKEU> (last accessed July 13, 2022); see also Kaczynski & Kominers, *supra* note 154 (noting that the Bored Ape Yacht Club “has grown to include high-end merchandise, social events, and even an actual yacht party”).

²¹¹ Kaczynski & Kominers, *supra* note 154.

²¹² Krueger, *supra* note 181.

²¹³ See, e.g., Jeff Wilser, *‘I’m Obsessed’: Paris Hilton on NFTs, Empowering Female Creators and the Future of Art*, COINDESK (Apr. 16, 2021), <https://perma.cc/PW3V-AFNZ>.

²¹⁴ Team Paris, *supra* note 193.

²¹⁵ Elspeth Taylor, *The Next Wave of NFTs is Starting With Community First*, DECRYPT (Nov. 15, 2021), <https://perma.cc/EY2M-E3FM>.

²¹⁶ Fan, *supra* note 174.

²¹⁷ *Terms of Service*, ARCHIVE OF OUR OWN, <https://perma.cc/SK8Z-UMPL> (last accessed Mar. 13, 2022).

²¹⁸ See *Terms of Service FAQ*, ARCHIVE OF OUR OWN, <https://perma.cc/Q2SZ-AER6> (last accessed Mar. 13, 2022).

comments, Discords, and other means. Fanartists have crowdfunded their work for years without the necessity to give away NFTs to attract sponsors. For instance, an artist named Chekhov “creating comics, fanart and more!” enjoys 467 monthly patrons on Patreon, a popular crowdfunding platform for creators.²¹⁹ On the same platform, *ov_fanarts* “is creating Spooky Fan Comics,” with over 300 monthly patrons.²²⁰ On Patreon, fanartists usually give away perks like early access and bonus content²²¹ – incidentally, exactly what NFTs often use as enticements.

Fandom, like NFTs, is therefore about community at heart, not financial incentives. Stripped of their blockchain glamour, NFTs operate strikingly like a fanartist’s Patreon. “[T]he community one builds around NFTs quite literally creates those NFTs’ underlying value.”²²² This is a phenomenon fan communities know well and whole-heartedly endorse.

The dark side of NFTs has revealed exactly how quickly tools welcomed as godsend for creative compensation become manipulated into investment tools that exploit creativity without compensation.²²³ NFTs provide people with the ability to perform art theft “at a completely new scale,” on platforms that are “barely moderated.”²²⁴ While the blockchain has been heralded as unassailable, its security works only to protect sellers (and sometimes uncertainly at that).²²⁵ It offers little security to creators.²²⁶ Given the dangers of NFTs, it is worth considering whether a more straightforward way of supporting artists exists: by directly patronizing them. If you want to support an artist, you can support them in ways more varied and interesting than merely buying something. Fan communities have been finding a way to encourage creativity without scarcity for decades. If we are open to it, NFTs could be another step toward embracing this idea.

²¹⁹ *Chekhov*, PATREON, <https://perma.cc/6KBZ-4FAN> (last accessed Mar. 12, 2022).

²²⁰ *Ov_fanarts*, PATREON, <https://perma.cc/MMY3-8E26> (last accessed Mar. 12, 2022).

²²¹ *See id.*

²²² Kaczynski & Kominers, *supra* note 154.

²²³ *See Collier, supra* note 41 (“While NFT proponents tout the technology as a way to revolutionize arts patronage, the rapidly growing digital marketplaces that enable those sales have so far done little to stop that piracy.”).

²²⁴ *Id.*

²²⁵ *See Shanti Escalante-De Mattei, Thieves Steal Gallery Owner’s Multimillion-Dollar NFT Collection: ‘All My Apes Gone’, ARTNEWS* (Jan. 4, 2022), <https://perma.cc/4ULU-CWSM>.

²²⁶ *See Mitchell Clark, Photoshop Will Get a ‘Prepare as NFT’ Option Soon, THE VERGE* (Oct. 26, 2021), <https://perma.cc/5N82-U7V3> (discussing the necessity to invent new tools to try to protect creators better in the NFT marketplace).

NFTs have been hailed as a boon to artists, many of whom are enjoying massive windfalls.²²⁷ However, NFTs are not primarily about compensating artists but about creating investment opportunities. Artists are a collateral beneficiary²²⁸ and sometimes victims, given the increasing issue of fraud in the market.²²⁹ Beyond NFTs' implications for artists, the environmental impact of NFTs is devastating.²³⁰ Because of the amount of electricity used to power the blockchain on which NFTs depend, the sale of a single NFT can consume as much energy as an art studio might use in two years.²³¹ If Bitcoin, a type of cryptocurrency that also relies on the energy-gobbling blockchain, were a country, it would be "the 27th most energy-consuming country in the world."²³² And, as discussed, their justification for existence is shaky: the "one true original" gimmick is a little like "the emperor's new clothes": it falls apart upon close examination, when one realizes that the only thing being purchased is a token that points to a digital copy of a piece of art that could disappear at any time.²³³ The volatility of the NFT market can be seen as a reflection of the inarticulateness of what its value actually is.²³⁴ When it eventually collapses, artists will see their resale streams dry up.

However, what meme NFTs reveal about how copyright, authorship, and value are understood could be a boon to artists, even after the next fad arrives. NFTs ask the question of what we consider ourselves to get in exchange for supporting creators. The ownership myth of NFTs suggest a model of supporting creators we admire without expecting ownership of a

²²⁷ See, e.g., Wilser, *supra* note 213 ("It gives the creator better economics. We're definitely living in the golden age of the creator, so I can't wait to see what the future holds.").

²²⁸ Indeed, one NFT platform is consciously striving to find "collectors who appreciate the pieces" rather than "just bots who are trying to flip it on the secondary market." Eileen Kinsella, *A New NFT Venture Has an Innovative Idea: Make Buyers Prove They Know Something About an Artist Before They Bid*, ARTNET (Jan. 4, 2022), <https://perma.cc/DTC6-4U39>.

²²⁹ See Collier, *supra* note 41.

²³⁰ See Bruner, *supra* note 49; Roose, *supra* note 7; Wood, *supra* note 54.

²³¹ Gregory Barber, *NFTs Are Hot. So Is Their Effect on the Earth's Climate*, WIRED (Mar. 6, 2021), <https://perma.cc/fsl9-rt2c>.

²³² Niall McCarthy, *Bitcoin Devours More Electricity Than Many Countries*, FORBES (May 5, 2021), <https://perma.cc/QJ49-4ALA>.

²³³ See Kastrenakes, *supra* note 180 ("As I left, he followed after me to make a suggestion for my article, imploring me to 'put in something about the emperor's new clothes.'").

²³⁴ See "Cryptokitties", *supra* note 111, at 250-51 (describing the success of Cryptokitties, one of the first NFT projects, but also noting that the bottom fell out of the market fairly quickly); Bruner, *supra* note 49.

piece of their creativity in return. Perhaps more importantly, NFTs invite us to consider whether the creativity that financially supporting an artist generates in and of itself is something valuable that we get in exchange. After all, the underlying premise of the Copyright Clause of the Constitution is that there is value in creativity, period.

NFTs have allowed many people to be compensated in ways they never imagined in our existing copyright structure, and some have responded with awe and gratitude. After the sale of her meme NFT in 2021, the subject of the Overly Attached Girlfriend meme, Laina Morris, tweeted: “You guys are INSANE. Thank you to everyone who bid Truly, you have no idea how this is going to change my life. I mean it. I am so incredibly thankful and also still just BLOWN AWAY. So weird. So cool. Wtf. Thank you, internet.”²³⁵ This feels like what NFTs’ marketing wants them to be: a digital exchange that brings us closer together as humans.²³⁶ And it sounds like exactly what other creators want: “I was happy when I saw my dance all over But I wanted credit for it.”²³⁷

²³⁵ Laina Morris (@laina622), TWITTER (Apr. 3, 2021), <https://perma.cc/FH4D-WCUS>.

²³⁶ See, e.g., *BAYC*, *supra* note 210 (“The club is open! Ape in with us.”).

²³⁷ Pruitt-Young, *supra* note 117.

