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Caging the Bored Ape: How the FTC's Expanded Anti-Monopoly Authority Can Tame "NFTS" for Web 3.0

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CAGING THE BORED APE: HOW THE FTC'S EXPANDED ANTI-MONOPOLY AUTHORITY CAN TAME "NFTS" FOR WEB 3.0

J. SCOTT COLESANTI*

ABSTRACT

Non-Fungible Tokens, or "NFTs," ballooned into a 40-billion-dollar industry in under a decade. Their creators include artists, corporations, entrepreneurs, fraudsters—and even Donald Trump. While NFT owners and traders could be any of us, the parties running the marketplaces are hidden. NFT regulators have yet to be identified. Most alarmingly, the dominant NFT marketplaces are dangerously centralized. Accordingly, the publicized tales of exorbitant or manipulated NFT prices and frequent related scams abound. Meanwhile cryptocurrency—the technology enabling the life of an NFT—remains beset with, at best, theoretical models for effective regulation a full generation after its emergence.

To propose a rational start to NFT regulation, the author—a former regulator—tackles the basics: NFT design, "minting," opening for purchase and trading, and ultimate repose in the digital wallets of purchasers. Specific legal ills occasioned by each step of the process are described. In turn, the apparent choices for NFT regulator are examined. To be sure, the eager lethargy exhibited by investment regulators confronting virtual currencies has proven rule adoption to be a quixotic dream. Thus, the author suggests that the storied FTC, the agency with the heart and the mission, be chosen as the force to slow market consolidation and counter anti-competitive practices cementing in the country's vastest NFT marketplaces. Such remedy (enabled by the FTC's revision of its antitrust mission late last year) would temper the rampant loosing of NFTs on all unbridled marketplaces until more ill

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ramifications can be catalogued and comprehended. Further, the proposed resolution of “trust-busting type” oversight is not only amply supported by the recent FTC successes but also greatly aligned with the idyllic hopes of the budding “WEB 3.0” world. Namely, if the latest incarnation of interactive cyberspace is to truly “shatter the monopolies on who controls information”, the first step is to ensure that the interrupter itself is not a monopoly.

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INTRODUCTION: EVEN MORE TOKENS WITHOUT TURNSTILES

A. The Unwelcome Present

“WEB 3.0” reimagines the range of activity on a state-of-the-art internet.¹ The latest incarnation of cyberspace promises entrepreneurs more freedom from regulators and broader connectivity between similarly minded individuals.² Users everywhere have the ability, through Web 3.0, to eagerly dabble in the Pandora’s box that is decentralized finance.³ Indeed, the pursuit of the limitless dream spawned a generation ago by the anonymous founder(s) of “Bitcoin”⁴ remains vibrant.⁵ Meanwhile, internet fraud and cybersecurity concerns continue to plague sophisticated economies, which, in turn, struggle with gauging the ideal amount of oversight for cryptocurrency.⁶

¹ INNOVATION CONSULTING GRP., *Web 3.0: A Quantum Leap Into The Future*, LINKEDIN (July 15, 2023), <https://www.linkedin.com/pulse/web-30-quantum-leap-future-innovation-consulting-group-icg/> [<https://perma.cc/KGQ6-QQSK>].

² See *id.*; John Bogna, *What Is Web3 and How Will It Work?*, PCMAG (Feb. 15, 2022), <https://www.pcmag.com/how-to/what-is-web3-and-how-will-it-work> [<https://perma.cc/2VZW-U9T9>] (describing “WEB 3.0” as the trendy adaptation of the Internet, having succeeded earlier iterations, “WEB 1” (i.e., information displaying) and “WEB 2” (i.e., an interactive Internet)). Significantly, the parties defining WEB 3.0 often stand to benefit financially from further adoption of WEB 3.0; in this case, Gavin Wood, a co-founder of the Ethereum cryptocurrency.

³ See Bogna, *supra* note 2; Merav Ozair, *Decentralized Finance (DeFi) is the Future*, NASDAQ (Nov. 9, 2022), <https://www.nasdaq.com/articles/decentralized-finance-defi-is-the-future> [<https://perma.cc/95Z8-ACTG>].

⁴ See Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, SSRN (Aug. 21, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440802 [<https://perma.cc/86DK-7L69>]; see also Michael Adams, *Who Is Satoshi Nakamoto?*, <https://www.forbes.com/advisor/investing/cryptocurrency/who-is-satoshi-nakamoto/> [<https://perma.cc/N286-AHSA>] (detailing the continued mystery surrounding Nakamoto’s true identity).

⁵ See Ozair, *supra* note 3.

⁶ See Daniel Araya, *The Challenges of Cryptocurrency Regulation*, THE REGUL. REV. (Oct. 9, 2018), <http://www.theregview.org/2018/10/09/araya-challenges-cryptocurrency-regulation> [<https://perma.cc/47H5-ET3T>]; see, e.g., Faith Karimi, *This ‘Cryptoqueen’ Scammed Investors Out of \$4 Billion, the FBI Says. Then She Boarded a Plane and Disappeared*, CNN BUS. (Jan. 22, 2023), <https://www.cnn.com/2023/01/22/business/ruja-ignatova-cryptoqueen-fbi-most-wanted-cec/> [<https://perma.cc/X7DH-ZAVA>] (“[Cryptocurrency] is a largely unregulated and highly volatile industry.”); see generally *A CFTC Primer on Virtual Currencies*, CFTC (2017), https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labcfrc_primercryptocurrencies100417.pdf [<https://perma.cc/D35N>].

Concurrently, a vast, worldwide market has blossomed for crypto's attractive but sometimes lewd cousin: Non-Fungible Tokens ("NFTs").⁷ Rumored to be expensive, nearly inscrutable, and most definitely ubiquitous, NFTs pose a novel twist on consumer and investor threats.⁸ Specifically, the curious (and sometimes outright humorous) digital asset can manifest as a collectible, investment, logo, or simply as a conduit to online gaming and other digital activities.⁹ Less whimsical is the consumer threat, as thefts of NFTs have harmed the sophisticated and unsophisticated alike.¹⁰

NFTs are often individually owned digital images or recordings, such as a series of drawings by an artist.¹¹ Like other emerging digital trends over the past 15 years, NFTs stress peer-to-peer business relationships and leverage a decentralized ledger to produce novel, metaphorical coins and tokens.¹² Like many other alt-currencies, NFTs are not tangible goods and are made possible through Blockchain technology.¹³ Further, in keeping

-LM6N] (defining cryptocurrency, also known as "virtual currency," as "a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.").

⁷ See Daniel Castro, *NFTs: US Policies and Priorities in 2023*, INFO. TECH. INNOVATION FOUND. 3–5 (Apr. 24, 2023), <https://www2.itif.org/2023-nft-policies-priorities.pdf> [<https://perma.cc/J9C7-7C4H>]; Esat Dedezade, *13 of the Biggest NFT Marketplaces*, DECRYPT (Sept. 20, 2021), <https://decrypt.co/80595/best-nft-marketplaces> [<https://perma.cc/3QC5-Z2VN>].

⁸ Araya, *supra* note 6.

⁹ See Castro, *supra* note 7, at 5–9; see, e.g., *This Guy Paid \$6 million for a Digital Goose Owned by a Failed Crypto Fund*, WASH. POST (June 22, 2023), <https://www.washingtonpost.com/business/2023/06/22/goose-nft-crypto-sothebys/> [<https://perma.cc/64SJ-STPA>].

¹⁰ Taylor Locke, *\$100 Million in NFT Thefts Over Last Year Jumped Mid-'Crypto Winter'*, FORTUNE CRYPTO (Aug. 24, 2022), <https://fortune.com/crypto/2022/08/24/100-million-worth-of-nfts-stolen-crypto-winter-elliptic/> [<https://perma.cc/JD39-FTHD>].

¹¹ Rakesh Sharma, *Non-Fungible Token (NFT): What It Means and How It Works*, INVESTOPEDIA (Apr. 6, 2023), <https://www.investopedia.com/non-fungible-tokens-nft-5115211> [<https://perma.cc/XWJ2-JRPD>].

¹² See Brian L. Frye, *How to Sell NFTs Without Really Trying*, 13 HARV. J. SPORTS & ENT. L. 113, 113–14 (2022) ("NFTs are called 'tokens' because they exist on the ledger of a digital currency but represent something other than a quantity of that currency, and they are "non-fungible" because they are unique and not substitutes for each other.").

¹³ Mitchell Clark, *NFTs, Explained*, THE VERGE (June 5, 2022), <https://www.theverge.com/22310188/nft-faq> [<https://perma.cc/9BDW-5CKF>].

with the cyber-centric times, these techno savvy products—whether intended for personal enjoyment or financial turnover, or a little of both—are initially auctioned off on internet marketplaces in completely unregulated fashion.¹⁴

The unique and singular nature of NFTs complicates the inevitable questions informing adequate regulation; whereas many people can own a digital currency (such as Bitcoin), the appeal of an NFT is its sole ownership.¹⁵ Like cryptocurrency, NFTs are not tied to any fiat currency.¹⁶ These products lure many through their apparent uniqueness, although third parties often create similar alternatives and forgers sell copies of the original.¹⁷ If the industry seems hopelessly oxymoronic, it has at least been consistent, as paradoxes have attended NFTs since their creation.¹⁸

B. Brief History and Breadth

The first NFT was created and transferred in 2014.¹⁹ By the end of 2021, the market was valued at over \$41 billion.²⁰

¹⁴ See Araya, *supra* note 6; James Howell, *How Do Auctions Work For NFTS?*, 101 BLOCKCHAINS (Jan. 5, 2023), <https://101blockchains.com/how-do-nft-auctions-work/> [<https://perma.cc/R5TL-S2N5>].

¹⁵ See Frye, *supra* note 12, at 113–14; see Sharma, *supra* note 11.

¹⁶ James Chen, *Fiat Money: What It Is, How It Works, Example, Pros & Cons*, INVESTOPEDIA (July 5, 2023), <https://www.investopedia.com/terms/f/fiat-money.asp> [<https://perma.cc/8XQ4-2LM5>] (stating that “Fiat currency” is legal tender tied to a sovereign nation).

¹⁷ See Ade Hennis, *How to Verify NFT Authenticity—Fake NFT Sold for More Than \$300,000*, MARKET REALIST (Sept. 1, 2021), <https://marketrealist.com/p/how-to-verify-nft-authenticity/> [<https://perma.cc/382M-ZNPM>] (suggesting that the NFT purchaser’s sole means of discovering a fake is to check the seller’s social media profiles and other marketplaces for advertised offers).

¹⁸ Jonathan Zittrain & Will Marks, *What Critics Don’t Understand About NFTs*, ATLANTIC (Apr. 7, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/nfts-show-value-owning-unownable/618525/> [<https://perma.cc/M8ER-E3V3>].

¹⁹ Wallace Ludel, *Sotheby’s and Artist Kevin McCoy Sued Over Sale of Early NFT*, ART NEWSPAPER (Feb. 4, 2022), <https://www.theartnewspaper.com/2022/02/04/sothebys-kevin-mccoy-lawsuit-quantum-nft> [<https://perma.cc/W6RH-Z23X>].

²⁰ Natasha Dailey, *NFTs Ballooned to a \$41 Billion Market in 2021 and Are Catching Up to the Total Size of the Global Fine Art Market*, MARKETS INSIDER (January 6, 2022), <https://markets.businessinsider.com/news/current-cies/nft-market-41-billion-nearing-fine-art-market-size-2022-1> [<https://perma.cc/UP8M-T2C5>]; see Robyn Conti, *What Is An NFT? Non-Fungible Tokens*

Given their ease of creation, popularity, and varied uses, it is difficult to precisely number how many NFTs exist,²¹ but a ballpark accounting across 15 marketplaces indicates there are millions of transactions between market participants each month.²² While there is no single centralized or government-endorsed marketplace, OpenSea has consistently been the leading marketer platform for listing NFTs and facilitating transactions.²³ OpenSea's historically dominant market share has only recently declined, but the platform still consistently handles in excess of 35% of all NFT trading volume.²⁴

At one end of the creative spectrum, ersatz collectibles from established companies garner popular attention in conventional forums.²⁵ Nike is selling pictures of its products,²⁶ and

Explained, FORBES ADVISOR (May 13, 2022), <https://www.forbes.com/advisor/investing/cryptocurrency/nft-non-fungible-token/> [<https://perma.cc/5USJ-63YE>].

²¹ Thomas McGovern, *How Many NFTs Are There in the World in 2023?*, EARTHWEB (June 5, 2023), <https://earthweb.com/how-many-nfts-are-there-in-the-world/> [<https://perma.cc/39HP-RXK9>].

²² See Jacquelyn Melinek, *OpenSea Polygon NFT Sales on Track to Hit 2.2M by End of January*, BLOCKWORKS (Jan. 5, 2022), <https://blockworks.co/news/opensea-polygon-nft-sales-on-track-to-hit-2-2m-by-end-of-january> [<https://perma.cc/MP95-YRAS>]; Jason Wise, *NFT Statistics 2023: Market Size, Growth, Sales & Trends*, EARTHWEB, <https://earthweb.com/nft-statistics/> [<https://perma.cc/3B8E-Z7ZJ>].

²³ John Lee Quigley & John Gilbert, *The Top 8 NFT Marketplaces—Where to Buy NFTs*, BLOCKWORKS (Jan. 2, 2023), <https://blockworks.co/news/your-guide-to-nft-platforms> [<https://perma.cc/9J3V-86T8>].

²⁴ See Dedezade, *supra* note 7 (describing OpenSea as “the original peer-to-peer NFT marketplace, and far away the largest . . . [I]t has a total trading volume of over \$6.5 billion.”); Quigley & Gilbert, *supra* note 23 (stating that OpenSea is the “largest [NFT] marketplace, with more than a million registered users”); see also Andrew Hayward, *Did Blur Really Crash the NFT Market?*, YAHOO FIN. (July 5, 2023), <https://finance.yahoo.com/news/did-blur-really-crash-nft-221940765.html> [<https://perma.cc/9ME2-UKUX>] (noting certain new marketplaces have occasionally taken over the lead in terms of trading volume, but such incursions have tended to end disastrously); Julia Ng, *Top NFT Marketplaces by Market Share & Trading Volume*, COINGECKO, <https://www.coingecko.com/research/publications/market-share-nft-marketplaces> [<https://perma.cc/H37L-WAFZ>] (detailing markets shares as of May 29, 2023).

²⁵ See Sal Barry, *A Collecting Evolution: Two Lines of NFTs Enter The NHL World*, HOCKEY NEWS (July 11, 2023), <https://thehockeynews.com/news/a-collecting-evolution-two-lines-of-nfts-enter-the-nhl-world> [<https://perma.cc/JFN9-EG92>].

²⁶ Stephen Katte, *Nifty News: Nike Unveils NFT Platform, Steve Jobs' Sandals Sell for \$200K and More*, COINTELEGRAPH (Nov. 15, 2022), <https://coin>

Mattel is offering digital versions of famed toys.²⁷ Social issues such as the war in the Ukraine have inspired semi-charitable NFTs.²⁸ Politicians have found a market for NFTs, with Donald Trump successfully completing an NFT money grab of nearly \$4 million in just a few days.²⁹

At the other end of the spectrum are often tawdry creations³⁰ that attract online financial speculators. This specific variation of the craze can be said to have largely prodded the NFT movement.³¹ In response, startup entrepreneurs seeing an opportunity to raise capital pay middlemen to quickly and easily create NFTs for the entity to gain exposure through the latest digital asset fad.³²

The digital cartoons pervasive across the NFT marketplaces were popularized by a series of images comprising the “Bored Ape Yacht Club.”³³ More extreme NFTs have followed,

telegraph.com/news/nifty-news-nike-unveils-nft-platform-steve-jobs-sandals-sell-for-200k-and-more [https://perma.cc/N94A-9CA2].

²⁷ Gregory Schmidt, *Mattel Joins the NFT Frenzy with Hot Wheels Digital Art*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/06/17/business/mattel-nft-hot-wheels.html> [https://perma.cc/J9LL-9SLK].

²⁸ Sophie Mellor, *Ukraine Launches an NFT ‘Museum of War’ to Help Fund the Fight Against Russia*, FORTUNE (Mar. 29, 2022), <https://fortune.com/2022/03/29/ukraine-selling-nfts-war-bonds-meta-history-museum/> [https://perma.cc/FRX7-H6NQ].

²⁹ See Kayla Gallagher, *Trump Sells Out of His NFT ‘Trading Cards’ Depicting Him As a Hero, Raking in Over \$1 Million: Report*, INSIDER (Dec. 16, 2022, 1:33 PM), <https://www.businessinsider.com/trump-rakes-in-1-million-selling-nft-trading-cards-of-himself-report-2022-12> [https://perma.cc/QC49-TEDV]; Brenden Rearick, *No Chump Change: Trump Made \$3.9 Million From His NFT Collection*, INVESTORPLACE (Dec. 20, 2022, 2:12 PM), <https://investorplace.com/2022/12/no-chump-change-trump-nfts-made-3-9-million-from-his-nft-collection/> [https://perma.cc/8TSA-ZZKK].

³⁰ See, e.g., Andrew Hayward, *Author Tim Ferriss Tops NFT Sales Charts with ‘Cockpunch’*, DECRYPT (Dec. 7, 2022), <https://decrypt.co/116682/author-tim-ferriss-tops-nft-sales-charts-with-cockpunch> [https://perma.cc/GW2Z-T4WK].

³¹ Zittrain & Marks, *supra* note 18.

³² Jex Exmundo, *Rarible Unveils NFT Marketplace Builder That’s 100% Free*, NFT NOW (Jan. 18, 2023), <https://nftnow.com/news/rarible-unveils-nft-marketplace-builder-thats-100-free/> [https://perma.cc/JLS8-JEFB]; see Brian Nibley, *Simple Guide to Buying, Selling, and Making NFTs*, SOFI (Sept. 27, 2022), <https://www.sofi.com/learn/content/how-to-create-buy-sell-nfts/> [https://perma.cc/BW8D-U9BK].

³³ See Daniel van Boom, *Bored Ape Yacht Club NFTs Explained*, CNET (Aug. 11, 2022, 7:43 PM), <https://www.cnet.com/culture/internet/bored-ape-yacht>

featuring obscure drawings of man or beast, attracting attention as though at the fore of an art revolution; sadly, the names of these obtuse creations often bely any form of skill or purpose and are often downright offensive.³⁴

Regardless of their common stylistic manifestations or unlikely social utility, NFTs have grabbed the attention of both journalists and scholars because of their outlandish prices and spectacular attendant disasters.³⁵ For example, pop singer and omnipresent celebrity Justin Bieber is routinely mocked for his “investment” in one of the seminal “Bored Ape” images; the purchase subsequently plummeted 95% in price, to the seeming delight of many.³⁶ Moreover, the rapid rise of NFTs has lured hackers and thieves, separately generating noteworthy headlines of enormous thefts from laymen and industry influencers alike.³⁷

-club-nfts-explained/ [https://perma.cc/NT47-WFLR]; Bored Ape Yacht Club, BAYC (2021), https://boredapeyachtclub.com/ [https://perma.cc/N23L-H6ML] (offering membership through ownership of one of approximately 10,000 “Bored Ape” NFTs).

³⁴ See, e.g., OPENSEA, https://opensea.io/ [https://perma.cc/4WJ9-MZ39] (listing popularly traded NFTs including “RETHARDS” and “Deadfellaz”).

³⁵ See Kimberly A. Houser & John T. Holden, *Navigating the Non-Fungible Token*, 2022 UTAH L. REV. 891, 892–93 (2022); see, e.g., Jeff Kauflin, *Why Jack Dorsey’s First-Tweet NFT Plummeted 99% in Value in a Year*, FORBES (Apr. 14, 2022, 5:32 PM), https://www.forbes.com/sites/jeffkauflin/2022/04/14/why-jack-dorseys-first-tweet-nft-plummeted-99-in-value-in-a-year/ [https://perma.cc/W9AV-P2LF]; Anderson Mendes, *Celebrity NFTs: Neymar, Eminem, Madonna, and Logan Paul Lose Millions*, BE(IN)CRYPTO (Oct. 17, 2022, 2:11 PM), https://beincrypto.com/celebrity-nfts-neymar-eminem-madonna-logan-paul/ [https://perma.cc/6PGB-F6QH].

³⁶ Andrew Hayward, *Justin Bieber Paid \$1.3 Million for a Bored Ape NFT. It’s Now Worth \$69K*, DECRYPT (Nov. 16, 2022), https://staging.decrypt.co/114718/justin-bieber-bored-ape-nft-now-69k [https://perma.cc/LQ7W-GEBF]; see Cheyenne DeVon, *Justin Bieber’s Bored Ape NFT Was Valued at \$1.3 Million in 2022—Now It’s Only Worth Around \$60,000*, CNBC: MAKE IT (July 7, 2023), https://www.cnbc.com/2023/07/07/justin-biebers-bored-ape-nft-has-lost-95-percent-of-its-value-since-2022.html [https://perma.cc/JMD8-XCS5].

³⁷ See, e.g., Phil Rosen, *Hackers Swipe \$360,000 Worth of Bored Ape Yacht Club NFTs in the 3rd Attack on Yuga Labs Since April*, YAHOO! FIN. (June 6, 2022), https://finance.yahoo.com/news/hackers-swipe-360-000-worth-134825609.html [https://perma.cc/2N67-GJCF]; Adele Ioana, *NFT Influencer Hacked For \$1 Million of NFTs, but Some Call It Karma*, NFT EVENING (Sept. 28, 2022), https://nftevening.com/nft-influencer-hacked-f00or-1-million-of-nfts-but-some

Thus, perhaps predictably, legal observers have foreseen the unavoidable plea for government intervention³⁸—and although the technology itself is still morphing, even its staunchest practitioners face a steep learning curve.³⁹

C. *The Troubled Start to Oversight*

To be sure, promoters of NFTs never promised more than a modicum of transparency.⁴⁰ Further, even before the “crypto winter” of mid-2022, the NFT marketplace was loudly questioned and troubled.⁴¹ Add to these daunting truisms an innate dependency upon the continued health of the larger cryptocurrency phenomena and one sees an industry that is hazardously volatile at best.⁴²

By mid-2023, transactions between those sophisticated enough to “trade” on the NFT market had slowed.⁴³ In turn among unsophisticated, laymen purchasers, the results have

-call-it-karma/ [https://perma.cc/MS7H-P9KS]; James Morales, *Bored Ape NFTs Worth \$135K Stolen by Prolific Phishing Thief*, BE(IN)CRYPTO (July 1, 2023), https://beincrypto.com/bayc-stolen-nft-phishing-thief/ [https://perma.cc/2HZU-JFAB].

³⁸ See Matt Levine, *Don't Insider Trade NFTs*, BLOOMBERG (June 2, 2022, 12:30 PM), https://www.bloomberg.com/opinion/articles/2022-06-02/don-t-insider-trade-nfts#xj4y7vzkg [https://perma.cc/U63B-YRGT]; see also Araya, *supra* note 6.

³⁹ See Bogna, *supra* note 2.

⁴⁰ See Jesselyn Cook, *Celebrity-Endorsed NFTs Leave Investors Financially Crippled*, NBC NEWS (May 22, 2022, 6:00 AM), https://www.nbcnews.com/business/business-news/celebrity-endorsed-nfts-leave-investors-financially-crippled-rcna27705 [https://perma.cc/BBC6-TRB7].

⁴¹ See Robert Baggs, *The OpenSea Debacle: Why NFT Creators and Collectors Must Demand Better*, NFT INSIDER (Feb. 22, 2022), https://nftinsider.io/openssea-debacle/ [https://perma.cc/FA88-GLZV].

⁴² See Hayward, *supra* note 24 (detailing how the emergence of Blur, an alternative platform to OpenSea, has highlighted the interrelationship between broader trends in the crypto and NFT markets).

⁴³ Andrew Hayward, *Bag Fumble of the Century: Biggest Ls in NFTs in 2022*, DECRYPT (Dec. 26, 2022), https://decrypt.co/117259/biggest-ls-nfts-2022 [https://perma.cc/5DGR-YP4Z] (noting “spectacular losses, mistakes, and questionable choices”); see Jamie Redman, *NFT Sales Continue to Decline, with ETH-Based NFTs Seeing a 20% Drop in the Past Week*, BITCOIN.COM (Dec. 31, 2022), https://news.bitcoin.com/nft-sales-continue-to-decline-with-eth-based-nfts-seeing-a-20-drop-in-the-past-week/ [https://perma.cc/7G6S-FY9Z].

been devastating and well-publicized.⁴⁴ Most significantly, the everyman dream of instant entry into the thrilling WEB 3.0 world⁴⁵ is now guarded by a monopoly still writing the rules of the realm.⁴⁶ One marketplace and several of its imitators have dominated the market for NFT transactions, and their stewardship has seen the nascent business riddled with losses and suspicion.⁴⁷ Further, there also persists a robust academic debate on the fundamental questions of what exactly ownership of an NFT actually grants.⁴⁸

⁴⁴ See Cook, *supra* note 40 (“With little regulation, some influencers are stepping in to call out their peers.”) (The referenced minimal regulation refers to generic FTC rules encouraging influencer disclosures); see also *Disclosures 101 for Social Media Influencers*, FTC (Nov. 2019), <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers> [https://perma.cc/D3BW-NFK8].

⁴⁵ A challenge for researcher and student alike is the dependence upon assertive proponents of the internet and its latest updates. For example, an industry trade group perhaps quixotically defines WEB 3.0 as “[A] decentralized blockchain protocol . . . will enable individuals to connect to an internet where they can own and be properly compensated for their time and data, eclipsing an exploitative and unjust web, where giant, centralized repositories are the only ones that own and profit from it.” Charles Silver, *What Is Web 3.0?*, FORBES (Jan. 6, 2020, 1:00 PM), <https://www.forbes.com/sites/forbes-techcouncil/2020/01/06/what-is-web-3-0/?sh=55839d5e58df> [https://perma.cc/D69S-23F7].

⁴⁶ See Alexander Pitkevish, *The Web 3.0 Paradigm Shift: A More Homogenous, Decentralized and Democratized Internet*, FAST MODE (Sept. 19, 2022), <https://www.thefastmode.com/expert-opinion/27580-the-web-3-0-paradigm-shift-a-more-homogenous-decentralized-and-democratized-internet> [https://perma.cc/3JKR-HA97].

⁴⁷ See Ezra Reguerra, *New NFT Private Auction Scam Threatens OpenSea Users*, COINTELEGRAPH (Dec. 23, 2022), <https://cointelegraph.com/news/new-nft-private-auction-scam-threatens-opensea-users> [https://perma.cc/NY7F-D3W6]; see also Heidi MacDonald, *Shocker: NFT Companies Backing off on Paying Royalties*, COMICSBEAT (Dec. 8, 2022, 4:30 PM), <https://www.comicsbeat.com/shocker-nft-companies-backing-off-on-paying-royalties/> [https://perma.cc/NF4K-HU26].

⁴⁸ See Joshua A.T. Fairfield, *Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property*, 97 IND. L.J. 1261, 1278–82 (2022); Joao Marinotti, *Possessing Intangibles*, 116 NW. U. L. REV. 1227, 1234–36 (2022) [hereinafter Marinotti, *Possessing Intangibles*]; Juliet M. Morgingiello & Christopher K. Odinet, *The Property Law of Tokens*, 74 FLA. L. REV. 607, 633–39 (2022); Houser & Holden, *supra* note 35, at 911–15; John Koetsier, *NFTs Are Experiences*,

Still, the specter of an enormous market collapse keeps the regulatory debate alive.⁴⁹ While some commentators have noted the dangers and rushed to suggest the application of existing regulatory frameworks to NFTs,⁵⁰ and several regulators have even announced inquiries into NFT issues,⁵¹ it has been aptly noted that definitive legal guidance is still a long way off.⁵² Likewise, cybersecurity for non-fungible tokens seems theoretical at best.⁵³

The cost of designing and creating a digital asset available as an NFT races lower everyday.⁵⁴ While the often vulgar nature of many NFTs prompts some to relegate the budding industry to a juvenile, fad status, this market still demands attention.⁵⁵ Stated bluntly, while it may be hard to stir public alarm and regulatory

Not Things, FORBES (June 16, 2021, 2:58 PM), <https://www.forbes.com/sites/johnkoetsier/2021/06/16/nfts-are-experiences-not-things/> [<https://perma.cc/SHY6-AEYM>] (“Crypto whales and collectors are paying millions for the tiniest smidgen of the meaning of the word ‘ownership’ we’ve ever known: someone, somewhere, owns a \$69 million dollar piece of digital art which you, I, or anyone else can view online, download, store, print, and enjoy.”).

⁴⁹ See Zinya Salfiti, *FTX Customers Who Lost All Their Money When the Exchange Collapsed Should Blame the SEC, Mark Cuban Says*, BUS. INSIDER (July 5, 2023, 5:51 PM), <https://www.businessinsider.in/cryptocurrency/news/ftx-customers-who-lost-all-their-money-when-the-exchange-collapsed-should-blame-the-sec-mark-cuban-says/articleshow/101518471.cms> [<https://perma.cc/83DG-XTGA>] (opining that the famed watchdog agency failed in its mission to regulate cryptocurrency, and that it chose to “litigate” rather than “regulate”).

⁵⁰ See Levine, *supra* note 38.

⁵¹ See, e.g., James Gatto, *NFT Regulatory Issues—a 2022 Review and 2023 Preview*, LEXOLOGY (Jan. 17, 2023), <https://www.lexology.com/library/detail.aspx?g=0848ff28-93cc-46f9-b8bf-a441db1d3e58> [<https://perma.cc/3D9D-HVSD>] (“[D]espite written requests, the SEC has not issued specific guidance on the applicability of securities laws to NFTs.”).

⁵² Sumeet Chugani et al., *The Notorious NFT: Consumer Protection Issues Raised by Non-Fungible Tokens (NFTs)*, THOMPSON REUTERS: PRACTICAL LAW (Apr. 15, 2021), <https://uk.practicallaw.thomsonreuters.com/w-030-4989>.

⁵³ See Andrada Fiscutean, *10 NFT and Cryptocurrency Security Risks That CISOs Must Navigate*, CSO (Apr. 11, 2022), <https://www.csoonline.com/article/572441/10-security-concerns-cisos-should-have-about-nfts-and-cryptocurrency.html> [<https://perma.cc/6JH3-CPVF>].

⁵⁴ See, e.g., *Free No-Code NFT Generator*, NFT EXPORT, <https://nftexport.io/> [<https://perma.cc/9T42-YYVB>].

⁵⁵ See, e.g., Hayward, *supra* note 30.

attention for an industry that boasts overpriced products named “Cryptopunks”⁵⁶ or “Cat Town Official,”⁵⁷ it is necessary.

D. The Best Lit Path Ahead

As the saying goes, the greatest trick the devil ever pulled was convincing us that he does not exist.⁵⁸ If rational minds can agree that this curious phenomenon poses a threat, sooner or later some government agency will have to step up.⁵⁹ The usual short list of commercial regulators seems helpful; however, the Securities and Exchange Commission (“SEC”) is locked in a pitched battle over the crypto industry as a whole,⁶⁰ and the Commodity Futures Trading Commission (“CFTC”) has proven to possess competing commitments to growing and containing digital assetization.⁶¹ Separately, states appear poised only to mimic federal regulation,⁶² and busy criminal authorities (although possessing powerful tools for extreme cases of deliberate malfeasance) cannot possibly singularly contain a market measured in billions of dollars.⁶³

⁵⁶ See *CryptoPunks*, LARVA LABS, <https://www.larvalabs.com/cryptopunks> [<https://perma.cc/39BV-7NEH>].

⁵⁷ See OPENSEA, <https://opensea.io/assets> [<https://perma.cc/TYK8-A46G>].

⁵⁸ THE USUAL SUSPECTS (Polygram 1995) (quoting the fictional yet notoriously villainous Keyser Soze, as he—spoiler alert—duplicates a police detective seeking the whereabouts of none other than Keyser Soze).

⁵⁹ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-105346, BLOCKCHAIN IN FINANCE: LEGISLATIVE AND REGULATORY ACTIONS ARE NEEDED TO ENSURE COMPREHENSIVE OVERSIGHT OF CRYPTO ASSETS 1–2 (2023).

⁶⁰ See Samuel Blink & Kevin Gildea, *The Ripple Effect: SEC’s Battle Vs. Crypto Gains Some Clarity*, JD SUPRA (July 19, 2023), <https://www.jdsupra.com/legalnews/the-ripple-effect-sec-s-battle-vs-8040640/> [<https://perma.cc/6UA4-3K8P>].

⁶¹ See, e.g., *A CFTC Primer on Virtual Currencies*, supra note 6 (noting that “[r]esponsible innovation is market-enhancing.”).

⁶² See Jason Gottlieb, *State by State Cryptocurrency Laws and Regulations*, BLOOMBERG LAW (May 26, 2022), <https://pro.bloomberglaw.com/brief/cryptocurrency-laws-and-regulations-by-state/> [<https://perma.cc/D96W-W8GE>].

⁶³ See Shane T. Stansbury, *Cryptocurrency and the Limits of Criminal Prosecution*, DUKE FIN. ECON. CTR.: FINREG BLOG (Apr. 6, 2022), <https://sites.duke.edu/thefinregblog/2022/04/06/cryptocurrency-and-the-limits-of-criminal-prosecution%EF%BF%BC/> [<https://perma.cc/6TZH-XJKX>]; see also *Understanding the Role of Digital Assets in Illicit Finance: Hearing Before the S.*

The Federal Trade Commission (“FTC”) thus emerges as the regulator of choice. Over 100 years old,⁶⁴ the agency benefits from a clear enabling act⁶⁵ and a rich body of precedent. As of mid-2023, the FTC is enjoying newfound popularity as the most intrepid federal watchdog.⁶⁶ The increasingly suspicious workings of NFTs and their decentralized, novel, and unregulated marketplaces may soon come to light as court rulings expose controversies constructed by the cyber architects of WEB 3.0.⁶⁷

Fortuitously, the FTC reasserted its anti-monopoly authority in 2022, underscoring the choice of that storied agency as the champion in this battle.⁶⁸ That reiteration focuses more upon

Comm. On Banking, Hous., and Urb. Affs. 117th Cong. (2022) (written testimony of Shane T. Stansbury).

⁶⁴ See *Our History*, FTC, <https://www.ftc.gov/about-ftc/history> [<https://perma.cc/7A58-VX3Q>]. The FTC website proudly details the agency’s creation as successor to the federal agency created in 1903 by trust-busting President Theodore Roosevelt.

⁶⁵ See 15 U.S.C. § 45(a)(1) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”); see also *Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices*, THE FED. RESERVE EXAMINATION MANUAL (July 2008), <https://www.federalreserve.gov/boarddocs/supmanual/lcch/200806/ftca.pdf> [<https://perma.cc/LG8R-XE4M>].

⁶⁶ See Andrea Hsu, *Millions of Workers Are Subject to Noncompete Agreements. They Could Soon Be Banned*, NPR (Jan. 5, 2023, 3:13 PM), <https://www.npr.org/2023/01/05/1147138052/workers-noncompete-agreements-ftc-lina-khan-ban> [<https://perma.cc/ZN6A-FDA6>]; see also Yong Yea, *Epic Games Fined \$520 Million by FTC for Deceptive Monetization & Violating Children Privacy Laws*, YOUTUBE (Dec. 23, 2022), <https://www.youtube.com/watch?v=6eUigivI5o8>; Cristina Ianzito, *Publishers Clearing House to Pay Consumers \$18.5M for Misleading Business Practices, FTC Says*, AARP (June 29, 2023), <https://www.aarp.org/money/scams-fraud/info-2023/pch-ftc-complaint.html> [<https://perma.cc/GTN9-WGKA>]. But see Brian Albrecht, *The FTC’s Misguided Case Against Meta*, DISPATCH (Dec. 23, 2022), <https://thedispatch.com/article/the-ftcs-misguided-case-against-meta/> [<https://perma.cc/8G6X-C8TS>] (describing the agency’s unsuccessful attempts to rein in Mark Zuckerberg).

⁶⁷ See Sander Lutz, *Yuga Labs Lawsuit Against Bored Ape ‘Troll’ May Have Just Opened a Can of Worms*, DECRYPT (Jan. 9, 2023), <https://decrypt.co/118747/yuga-labs-bored-ape-lawsuit-can-of-worms> [<https://perma.cc/Q5G8-T3DD>] (“Leaders of the company behind the Bored Ape Yacht Club will have to be deposed by a vocal controversial critic after a federal judge’s ruling.”).

⁶⁸ See *FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition/Policy Statement*, FTC (Nov. 10, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforce>

entities hindering entrance to a field than highlighting consumer deception or potentially harmful mergers. Thus, to make the case for such immediate government regulation enabled and enforced by the Federal Trade Commission, this Article includes the subsequent three parts.

Part I addresses the practical aspects of the creation and sale of NFTs. After dividing the NFT market into three discernible groups, the origination and trading processes are shown to be both largely clandestine and highly lucrative.⁶⁹

Thereafter, Part II examines the existing regulatory framework, which regrettably does little to prevent fraud or other forms of abuse. The “victims” perhaps most requiring more governed disclosures are partners on NFT platforms and creation vehicles who could not possibly understand the complete financial picture in the terra incognita of NFT creation.⁷⁰ Surprisingly, a good deal of law potentially governs an industry straddling the application of trademark, copyright, securities, and other market regulations. However, sporadic civil litigation and a lack of regulatory initiative have not proven to be up to the task of matching apples to apples.⁷¹

All of which indicates a need for government regulatory leadership.⁷² Accordingly, Part III proposes that a sole federal agency, the FTC, adopt the cause of ensuring competitive competition in the NFT marketplace—in part to spare the weight from the other federal agencies locked in internecine warfare over the regulation of the larger universe of cryptocurrency.⁷³ Further, the FTC is encouraged to utilize its anti-monopoly authority (as opposed to its equally important consumer protection mission) because of the broad latitude unquestionably accorded

ment-law-banning-unfair-methods-competition [https://perma.cc/DU8R-AY8F] (renewing the “agency’s commitment to exercising full legal authority against companies that use unfair tactics to gain advantage instead of competing on the merits”).

⁶⁹ See *infra* Sections I.B.1–3 & Section I.C.

⁷⁰ See *supra* notes 43–46 and accompanying text; see also *infra* Part II (discussing how the lack of NFT regulations hurts victims of NFT-related crimes).

⁷¹ See *infra* Part II.

⁷² See *infra* Part III.

⁷³ See *infra* Part III.

regulation of anti-competitive practices.⁷⁴ This application of its anti-monopoly oversight follows the agency's decision to broaden and reassert its enforcement authority late in 2022.⁷⁵

The Article concludes with a summary analysis of the market dynamics and limited regulatory response to the growth of the NFT industry. It suggests specific steps necessary to counter the unbearable heaviness of being in the NFT age.

Overall, the Article surveys laws and markets up through the fall of 2023 to explain NFTs, summarizes developing legal issues, and suggests the FTC serve as the seminal regulator. In turn, that storied federal agency is urged to take on a very specific role in view of its expanded anti-monopoly authority.

I. BACKGROUND: "AUTHENTICATING" CREATIONS, AND THE HOTSPOT OF CHOICE

A. A Departure From Crypto

NFTs are similar to cryptocurrency, except when they are not.⁷⁶ For example, both crypto⁷⁷ and NFTs are decentralized

⁷⁴ See *infra* Part III.

⁷⁵ See, e.g., John Wilkerson, *With the FTC's More Expansive Approach, PBMs Are in the Crosshairs*, STATNEWS (Jan. 13, 2023), <https://www.statnews.com/2023/01/13/ftc-more-expansive-approach-pbm-crosshairs/> [<https://perma.cc/Z5AS-HTUA>] ("The FTC has for years allowed mergers and business tactics that lower prices for consumers, even if they put small companies out of business. Now, under Chair Lina Khan, the agency is focused more on protecting competitors, especially small and medium businesses.")

⁷⁶ See Andrew Lisa, *NFT vs. Crypto: What Is the Difference?*, NASDAQ (June 29, 2022, 9:30 AM), <https://www.nasdaq.com/articles/nft-vs.-crypto:-what-is-the-difference>.

⁷⁷ As used in this Article, "crypto" (short for "cryptocurrency") denotes open source, public alt-currency that has manifested in thousands of digital coins or tokens. Cryptocurrency as a concept belies universal definition; one sturdy description of its synonym "virtual currency" provides as follows:

[A] digital representation of value that can be digitally traded and functions as: (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status (i.e., when tendered to a creditor, is a valid and legal offer of payment) in any jurisdiction. It is not issued or guaranteed by any jurisdiction, and fulfils the above functions only by agreement within the community of users of the virtual currency. Virtual currency is distinguished from fiat currency

and beyond government control, and grew from the technology underpinning the emergence of a non-fiat currency: Bitcoin.⁷⁸ The groundbreaking token's prominence was tied to a theoretical payment system idealistically designed to bypass nations and banks.⁷⁹ To effectuate this utopia, Bitcoins were “mined” by its creator, at

(a.k.a. “real currency,” “real money,” or “national currency”), which is the coin and paper money of a country that is designated as its legal tender; circulates; and is customarily used and accepted as a medium of exchange in the issuing country. It is distinct from e-money, which is a digital representation of fiat currency used to electronically transfer value denominated in fiat currency.

Virtual Currencies, Key Definitions and Potential AML/CFT Risks, FIN. ACTION TASK FORCE (June 2014), <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf> [<https://perma.cc/Y986-WL5B>].

Crypto remains an investment phenomena, belying its original mission of serving as an alt-currency. See SEC Chairman Gary Gensler, *Remarks Before the Aspen Forum*, SEC (Aug. 3, 2021), <https://www.sec.gov/news/speech/gensler-aspen-security-forum-2021-08-03> [<https://perma.cc/7CU7-CZRA>] (“We also haven’t seen crypto used much as a medium of exchange. To the extent that it is used as such, it’s often to skirt our laws with respect to anti-money laundering, sanctions, and tax collection.”). Cryptocurrency has long been subject to speculation as fodder for Congressional action, but no final measure has been adopted by the national legislature. See, e.g., Jason Brett, *Congress Has Now Introduced 32 Crypto and Blockchain Bills*, FORBES (Apr. 28, 2020, 12:03 AM), <https://www.forbes.com/sites/jasonbrett/2020/04/28/congress-has-introduced-32-crypto-and-blockchain-bills-for-consideration-in-2019-2020/> [<https://perma.cc/RX77-MN3U>].

Closely related is the notion of Blockchain, which serves as the digital ledger enabling the creation, trading, and recording of digital transactions. Blockchain is easier to define: “Blockchain is a shared, immutable ledger that facilitates the process of recording transactions and tracking assets in a business network. An asset can be tangible (a house, car, cash, land) or intangible (intellectual property, patents, copyrights, branding).” *What Is Blockchain Technology?*, IBM, <https://www.ibm.com/topics/blockchain> [<https://perma.cc/2B3F-8B7J>]. In the battle between entrepreneur and regulator, Blockchain is neutral; further, as a public record of trading, it can actually enhance regulatory efforts. See, e.g., Complaint at 5, SEC v. Braga, NO. 2:22-CV-01563 (W.D. Wash. Nov. 3, 2022), <https://www.sec.gov/files/litigation/complaints/2022/comp-pr2002-201-braga.pdf> [<https://perma.cc/F8B6-T27G>] (“Among other evidence, blockchain analysis reveals that, in reality, Trade Coin Club operated in a manner consistent with a Ponzi scheme . . .”).

⁷⁸ See *supra* note 77.

⁷⁹ See Nakamoto, *supra* note 4.

least to the tally of approximately 5% of the maximum envisioned; and when other technocrats took up the devastatingly difficult process, a secondary market emerged.⁸⁰ Over time, Wall Street bought in, and the price of an individual Bitcoin skyrocketed.⁸¹ Other coins followed in imitation, but very few enjoyed parallel success.⁸² Nonetheless, the allure of cryptocurrency remains its democratic market: anyone can either “mine” or alternatively buy Bitcoin or other cryptocurrencies via “exchanges” or “brokers” who operate in cyberspace every second of the year.⁸³

Conversely, NFTs manifest unique purchase opportunities of individualized assets.⁸⁴ They have been described by experts as “digitized scarcity,”⁸⁵ and likened to owning one’s own cyber copy of a priceless work of art.⁸⁶

⁸⁰ Julie Pinkerton, *The History of Bitcoin, the First Cryptocurrency*, U.S. NEWS (Aug. 7, 2023, 2:18 PM), <https://money.usnews.com/investing/articles/the-history-of-bitcoin>.

⁸¹ Arguably, crypto was guaranteed endurance when Wall Street titans signaled their commitment thereto in 2019. See Matt Egan, *Jamie Dimon Hated Bitcoin. Now JPMorgan Is Getting Ahead of the Crypto Revolution*, CNN (Feb. 15, 2019, 7:26 AM), <https://www.cnn.com/2019/02/15/investing/jpmorgan-bitcoin-crypto-jamie-dimon/index.html> [<https://perma.cc/ER6A-MNMJ>] (detailing the creation by JPMorgan of the first investment bank “stable coin,” or digital asset equating to a U.S. dollar). Ironically, Dimon has been an outspoken critic of crypto in more recent years. See Phil Rosen, *Jamie Dimon Says Cryptocurrencies Are Like ‘Pet Rocks’ and Blasts the Industry as a Complete Sideshow*, BUSINESS INSIDER (Dec. 6, 2022, 10:11 AM), <https://www.businessinsider.com/jamie-dimon-crypto-tokens-ftx-exchange-pet-rocks-markets-economics-2022-12> [<https://perma.cc/4CWR-YXYQ>] (noting Dimon’s sarcastic comparison of digital coins to the short-lived consumer fad of the 1970s).

⁸² *Compare Ethereum USD (ETH-USD)*, YAHOO FIN., <https://finance.yahoo.com/quote/ETH-USD/history/> [<https://perma.cc/Q3ZA-LVPC>] (detailing a rise from \$0 to almost \$1500 between 2017 and 2018) *with XRP Price Index and Chart*, COINDESK, <https://www.coindesk.com/price/xrp/> (last visited Nov. 3, 2023) (detailing a modest rise from approximately 75 cents to almost \$1.50 between 2019 and 2022).

⁸³ See Matt Hussey, *How to Invest in Cryptocurrencies: The Basics*, DECRYPT (Jan. 20, 2021), <https://decrypt.co/resources/how-to-invest-in-cryptocurrencies-the-basics> [<https://perma.cc/G4GC-78PR>].

⁸⁴ See *What Makes NFTs Unique?*, LCX (June 2, 2023), <https://www.lcx.com/what-makes-nfts-unique/> [<https://perma.cc/HZ2L-2JQG>].

⁸⁵ See Conti, *supra* note 20 (quoting Arry Yu, chairman of a Blockchain council).

⁸⁶ See Gargi Chaudhuri & James Masella, *Are NFTs Securities? Analysis of the NBA Top Shot Litigation and Other NFT-Related Actions*, JD SUPRA

Even obscure NFTs can occasionally come to the market at remarkably high prices.⁸⁷ As a class, their sheer volume and versatile uses results in an estimated average worth of (at best) approximately \$900 each.⁸⁸ With no officially designated marketplace, NFTs are simply considered to be a personal asset capable of transfer.⁸⁹

While crypto purchasers have fallen neatly into two camps, investors and users of the alt-currency,⁹⁰ NFT users and purchasers have evidenced at least five rationales: (1) artists seeking to expand viewership; (2) traders seeking to earn profits from “flipping”; (3) established businesses availing a new advertising market; (4) gamers utilizing the unique tokens to enhance the experience; and (5) conspicuous consumers/celebrities purchasing for reasons that are dubious.⁹¹ These five rationales have met with varying ebbs and flows.⁹²

For example, the NFT art market perhaps reached an early crescendo in its history in the fall of 2021.⁹³ At that time, the famed Christie’s Auction House announced that its sales of NFTs had surpassed \$100 million, including a prior sale of a single collection of digital artwork for \$69 million (from a digital artist whose prior collection sold for approximately \$770,000).⁹⁴

(Mar. 30, 2022), <https://www.jdsupra.com/legalnews/are-nfts-securities-analysis-of-the-nba-2972108/> [<https://perma.cc/FU4X-VLJK>] (“Many analogize it to fine art collecting; each piece of art is an asset that can be tied to some amount of monetary value. But no two pieces of art are the same.”).

⁸⁷ See Danielle Letenyi, *10 Super Weird NFTs You Have to See to Believe*, FIN. BUZZ (APR. 3, 2003), <https://financebuzz.com/weird-nfts> [<https://perma.cc/HJ5U-TQH4>].

⁸⁸ Oyinloye Bosun, *What Is the Average Cost of an NFT?*, YAHOO! (Nov. 27, 2021), <https://www.yahoo.com/video/average-cost-nft-093007608.html> [<https://perma.cc/P3PG-XYLJ>].

⁸⁹ See Clark, *supra* note 13.

⁹⁰ See Gensler, *supra* note 77.

⁹¹ See Fairfield, *supra* note 48, at 1268–78.

⁹² See generally Natalee, *The Struggle of NFTs in the Face of Shifting Crypto Trends and High Gas Fees*, NFT CULTURE, <https://www.nftculture.com/nft-news/the-struggle-of-nfts-in-the-face-of-shifting-crypto-trends-and-high-gas-fees/> [<https://perma.cc/V3WQ-H9UK>].

⁹³ Ryan Browne, *Trading in NFTs Spiked 21,000% to More Than \$17 billion in 2021, Report Says*, CNBC (Mar. 10, 2022, 1:00 PM), <https://www.cnbc.com/2022/03/10/trading-in-nfts-spiked-21000percent-to-top-17-billion-in-2021-report.html> [<https://perma.cc/CT35-ZXWM>].

⁹⁴ See Press Release, Christie’s, *Christie’s Surpasses \$100 Million In NFT Sales* (September 28, 2021), <https://www.christies.com/presscenter/pdf/10210>

In other sectors, toy manufacturers recognized the potential value in digitally assetizing and memorializing popular childhood playthings.⁹⁵ And the ubiquitous “metaverse”—an alternative life awaiting all of us in cyberspace⁹⁶—swiftly emerged as another home for NFTs and fuels the growing desire for all to join the craze.⁹⁷ While the future uses of NFTs may be difficult to predict, at least its journey from idea to market can be catalogued.⁹⁸

B. *The NFT Process, From A to Z*

The originator (and putative first owner) of an NFT must initially create a unique design.⁹⁹ This step alone invites controversy,

/Christie’s%20Surpasses%20\$100M%20in%20NFT%20Sales_RELEASE_9-28-2021_10210_1.pdf [https://perma.cc/59W4-QH5F]; Mickey Rapkin, ‘Beeple Mania’: *How Mike Winkelmann Makes Millions Selling Pixels*, ESQUIRE (Feb. 17, 2021), <https://www.esquire.com/entertainment/a35500985/who-is-beeple-mike-winkelmann-nft-interview/> [https://perma.cc/7SK7-895Y] (noting the record-setting digital artwork, “Everydays: The First 5,000 Days” by Beeple, had sold in March 2021; Who Is Beeple?).

⁹⁵ *Mattel Creations Launches Digital Collectibles Marketplace*, MATTEL (Nov. 21, 2022), <https://corporate.mattel.com/news/mattel-creations-launches-digital-collectibles-marketplace> [https://perma.cc/B57L-EG3E].

⁹⁶ The Metaverse is defined as “a digital reality that combines aspects of social media, online gaming, augmented reality (AR) virtual reality (VR), and cryptocurrencies to allow users to interact virtually.” Jean Folger, *What Does Metaverse Mean and How Does This Virtual World Work?*, INVESTOPEDIA, <https://www.investopedia.com/metaverse-definition-5206578> [https://perma.cc/G6KH-TLLC]. See also Riaz Pirmohamed, *The Metaverse: When Is Real Estate No Longer Real?*, CLIFFORD CHANCE (Oct. 2022), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/09/the-metaverse-when-is-real-estate-no-longer-real.pdf> [https://perma.cc/8Q6A-CABQ] (stating that virtual real estate has grown significantly in the last two years). “Bloomberg estimates that the Metaverse may become an \$800 billion USD market opportunity by 2024.” Levan Nanobashvili, *If the Metaverse is Built Will Copyright Challenges Come?*, 21 UIC REV. INTELL. PROP. L., 215, 218 (2022).

⁹⁷ See Jon M. Garon, *Legal Implications of a Ubiquitous Metaverse and WEB3 Future*, 106 MARQ. L. REV. 163, 180–82 (2022); see, e.g., Kevin Helms, *Financial Giant Fidelity Files for Crypto, NFT, and Metaverse Products*, BITCOIN.COM (Dec. 30, 2022), <https://news.bitcoin.com/financial-giant-fidelity-files-trade-marks-for-crypto-nft-and-metaverse-products-2/> [https://perma.cc/FAD7-MSMK].

⁹⁸ See generally Andrew Steinwold, *The History of Non-Fungible Tokens (NFTs)*, MEDIUM (Oct. 7, 2019), <https://medium.com/@Andrew.Steinwold/the-history-of-non-fungible-tokens-nfts-f362ca57ae10> [https://perma.cc/KBS3-HMTY].

⁹⁹ Jeff Link, *NFT Design and Art: What It Is, How It Works and Where It’s Headed*, BUILT IN, <https://builtin.com/design-ux/nfts-graphic-design-prices> [https://perma.cc/8A7X-KDLC].

as it is not yet clear if such craftsmanship requires protection traditionally attending intellectual property.¹⁰⁰ As stated earlier, designs can range from money grabs for existing images to truly unique art,¹⁰¹ and vary from the elegant to the solely commercial,¹⁰² to the just plain puerile.¹⁰³ Fortunately, the process of an NFT traveling from inspiration to public purchase and trading is mercifully susceptible to a three-part analysis.¹⁰⁴

1. *The Creators (“Minters”)*

First, NFTs must be designed by individuals with, at the very least, a bare bones knowledge of digitalization (e.g., possessing a design, some crypto, and a digital wallet).¹⁰⁵ These

¹⁰⁰ See Michael D. Murray, *NFT Ownership and Copyrights*, 56 IND. L. REV. 367, 379–85 (2023); see, e.g., Shanti Escalante-De Mattei, *Yuga Labs Says It Does Not Have Copyright Registration of Bored Ape Images*, in *New Court Documents*, ARTNEWS (Jan. 26, 2023), <https://www.artnews.com/art-news/news/yuga-labs-copyright-registration-bored-ape-yacht-club-nfts-1234655279/> [<https://perma.cc/WM9W-XWU6>]. But see *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1272 (2023) (holding that a noneducational use of an allegedly “transformed” image nonetheless violated the Copyright Act, and thus paving the way for copyright suits against NFT creators utilizing copyrighted works) (“Although new expression may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive of the [commercial use] factor.”).

¹⁰¹ See, e.g., Chloe Weiner, *Beeple JPG File Sells for \$69 Million, Setting Crypto Art Record*, NPR (Mar. 11, 2021, 2:48 PM), <https://www.npr.org/2021/03/11/976141522/beeple-jpg-file-sells-for-69-million-setting-crypto-art-record> [<https://perma.cc/EH4D-SCK8>].

¹⁰² See, e.g., HOT WHEELS, <https://hotwheelsnftg.io/> [<https://perma.cc/MP9C-YPKH>] (creating NFTs representing Mattel toy race cars from its past).

¹⁰³ See Kirk Miller, *The Most Ridiculous Items Turned Into Tradeable NFTs*, INSIDEHOOK (Mar. 22, 2021, 12:43 PM), https://www.insidehook.com/daily_brief/art/nft-most-ridiculous-items [<https://perma.cc/G8G7-43VF>] (offering a glimpse at a few silly and nonsensical NFTs).

¹⁰⁴ See Conti, *supra* note 20.

¹⁰⁵ “A digital wallet refers to software, an electronic device, or an online service that enables individuals or businesses to make transactions electronically.” *Digital Wallet*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/cryptocurrency/digital-wallet/> [<https://perma.cc/YPK9-Z69J>] (last updated May 15, 2023) noting that similar to an “app,” a “digital wallet” allows any of us to own or store crypto). See, e.g., Jeremy Hill, *Voyager Account Holders Likely Won’t Get All Their Crypto Back*, BLOOMBERG (July 6, 2022, 11:00 AM), <https://www.bloomberg.com/news/articles/2022-07-06/voyager-account-holders-likely-won-t-get-all-their-crypto-back> [<https://perma.cc/CGZ6-R5KA>] (remarking

designers—either on their own or with the help of commonly advertised middlemen—“mint”¹⁰⁶ the image or sound, converting the image to a token capable of residing on and being accounted for on a Blockchain.¹⁰⁷ Collectively, the designers and converters form a group called “Minters”.¹⁰⁸ The Minters essentially prepare the NFT, ensuring a unique identifier on the digital ledger is associated with and other code is applied to the prior form of a picture or recording, for inclusion in the cyberworld.¹⁰⁹

The creation of an NFT simultaneously spawns a revenue stream that continues in perpetuity. More specifically, in designing the unique code identifying an NFT, Minters include “royalties” triggered by successive sales.¹¹⁰ These royalties are enabled via “smart contracts” built into the unique code.¹¹¹ Hence the eagerness to create an NFT as a successful token shall provide some form of compensation for the Minters each and every time it subsequently is traded.¹¹² Sadly for lawyers and law students,

that problems from custody nonetheless arise when crypto providers or lenders in bankruptcy assert possession of the digital wallet).

¹⁰⁶ Samuel Becker, *What Does Minting an NFT Mean?*, SOFI (Sept. 9, 2022), <https://www.sofi.com/learn/content/what-is-nft-minting/> [<https://perma.cc/BU72-N83A>]. *See also* How to Create an NFT? Everything You Need To Know, NASHVILLE FILM INST., <https://www.nfi.edu/how-to-create-an-nft/> [<https://perma.cc/UP58-UP89>].

¹⁰⁷ *See* OPENSEA, *supra* note 57, A Blockchain is a decentralized digital ledger that enables crypto and NFTs and related digitized products. *See also* Nico, *How to Make an NFT in 14 Lines of Code*, FREECODECAMP (Oct. 14, 2021), <https://www.freecodecamp.org/news/how-to-make-an-nft/> [<https://perma.cc/6WLM-LBGE>] (positing that while such coding of “meta data” sounds formidable, the process is becoming amazingly accessible to computer beginners).

¹⁰⁸ *See* Becker, *supra* note 106.

¹⁰⁹ *See id.*

¹¹⁰ *See* Alex Gomez, *What Are NFT Royalties? (Here’s How It Works)*, CYBER SCRILLA (Jan. 10, 2023), <https://cyberscrilla.com/nft-royalties-what-are-they-and-how-do-they-work/> [<https://perma.cc/BTQ6-MP7N>].

¹¹¹ “Smart contracts” enable the rapid sale and recordation of digital assets. The technological advance is defined as “self-executing contract[s] with the terms of the agreement between buyer and seller being directly written into lines of code. The code and the agreements contained therein exist across a distributed, decentralized blockchain network. The code controls the execution, and transactions are trackable and irreversible.” Jake Frankenfeld, *What are Smart Contracts on the Blockchain and How They Work*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/smart-contracts.asp> [<https://perma.cc/7LYG-RJUQ>] (updated May 31, 2023).

¹¹² *See* Gomez, *supra* note 110.

the notions of royalty termination (and even NFT termination, for that matter) are still a far way off in this budding revenue-sharing process.¹¹³ However, the spreading practicalities of profit generation are solidly empirical.¹¹⁴

2. *The Marketers*

Minters next seek to place the NFT on a public marketplace, run by “Marketers.”¹¹⁵ In common parlance, the Marketer “authenticates” that an NFT’s code of origination is unique through its acceptance of metadata.¹¹⁶ To be sure, the “uniqueness” is oxymoronic: copies of the individually owned NFT are often plastered in many public spots,¹¹⁷ and even when hidden by the owner, NFTs are often part of vast sets of similar images.¹¹⁸ Most importantly, the Marketer does not, and perhaps cannot, assure anyone that this unique NFT has not been authenticated elsewhere (i.e., on another Blockchain).¹¹⁹ Further, the Marketplace can add its own stamp to the equation by including metadata that triggers payment to the marketplace every time the NFT is traded.¹²⁰ Accordingly, unlike other examples of commerce in

¹¹³ “NFTs use links to direct you to somewhere else where the art and any details about it are being stored. And as anyone who has browsed the internet before should know, links can and do die. So what happens if your NFT breaks down and points to nothing?” Jacob Kastrenakes, *Your Million-Dollar NFT Can Break Tomorrow if You’re Not Careful*, THE VERGE (Mar. 25, 2021, 11:55 AM), <https://www.theverge.com/2021/3/25/22349242/nft-metadata-explained-art-crypto-urls-links-ipfs> [<https://perma.cc/8DG4-XUDK>].

¹¹⁴ *Don’t Miss These NFT Marketplace Metrics*, LITEFLOW (Apr. 19, 2023), <https://liteflow.com/blog/nft-marketplace-metrics/> [<https://perma.cc/476L-C2WP>].

¹¹⁵ See Becker, *supra* note 106.

¹¹⁶ See Kastrenakes, *supra* note 113. Some Marketplaces can also assist creators with Minting.

¹¹⁷ Ivan Mehta, *Meta Now Lets You Post Your NFTs on Both Facebook and Instagram*, TECHCRUNCH (Aug. 30, 2022, 4:00 AM), <https://techcrunch.com/2022/08/30/meta-now-lets-you-post-your-nfts-on-both-facebook-and-instagram/> [<https://perma.cc/459S-VLH2>].

¹¹⁸ See Van Boom, *supra* note 33 and accompanying text.

¹¹⁹ Eric Ravenscraft, *NFTs Don’t Work the Way You Might Think They Do*, WIRED (Mar. 12, 2022, 8:00 AM), <https://www.wired.com/story/nfts-dont-work-the-way-you-think-they-do/> [<https://perma.cc/8LBV-S68E>].

¹²⁰ See Nitesh Kumar, *How Do NFT Marketplaces Make Money? The Ultimate Guide*, ANALYTICS INSIGHT (June 10, 2023), <https://www.analyticsinsight>

creative design, NFTs provide royalties to two distinct groups: the Minters and the Marketers.¹²¹

Over the last few years, a very short list of Marketers has emerged.¹²² Atop that list is OpenSea, self-described as the world's largest NFT marketplace.¹²³ Open and accessible every day and every hour, OpenSea serves as the gold standard for an incessant NFT auction market amidst growing user unrest.¹²⁴ Indeed, this kingpin marketplace itself provides the most enduring explanation of the entire process.¹²⁵

.net/how-do-nft-marketplaces-make-money-the-ultimate-guide/ [https://perma.cc/3JV6-M4U7].

¹²¹ See Abu Hena Mostofa Kamal, *How Do NFT Marketplaces Make Money (08 Ways to Generate Money)*, BDTASK, <https://www.bdtask.com/blog/how-do-nft-marketplaces-make-money> [https://perma.cc/57A4-HMMJ] (last updated July 27, 2023).

¹²² See generally Daniela Rivera-Herrera, *10 Best NFT Marketplaces*, NASDAQ (Oct. 27, 2022, 2:27 PM), <https://www.nasdaq.com/articles/10-best-nft-marketplaces> [https://perma.cc/M2DE-XZS6].

¹²³ See *What Is an NFT?*, OPENSEA (Sept. 8, 2023) [hereinafter *What Is an NFT?*], <https://opensea.io/learn/what-are-nfts> [https://perma.cc/KGX5-VFS4].

¹²⁴ See *id.*

¹²⁵ OpenSea provides educational materials for learning about how NFTs operate and describe how blockchains preserve records of ownership and authenticity:

When someone creates, transfers, buys, sells, or otherwise does something with an NFT, that all gets recorded on the blockchain. This is what enables authentication.

This record serves as a permanent statement of authenticity that can be viewed or accessed by anyone. Today, when you buy a piece of art or a collector's item, it typically comes with a paper certificate of authenticity, which you must then keep track of forever. It is easily forgotten, lost or destroyed, creating a very fragile system for authenticity. Blockchain's offer a simple and more secure solution to this long-standing issue of proving authenticity.

Let's say you want to buy a piece of artwork from [online artist] Tyler Hobbs. With NFTs, you can see the entire history of that piece, all the past owners, every sale, all the way back to Hobbs' original creation of the piece. Without NFTs, you wouldn't know if you were buying the real piece or just a really good fake.

Id.

Most importantly, OpenSea and its chief rival, by requiring all listed NFTs to be based upon the Ethereum Blockchain, influence the Ether market.¹²⁶ That influence is considerable.¹²⁷ Additionally, the Marketer not only sets a participating royalty rate, but also imposes “gas fees”¹²⁸ and singularly “holds” the NFT once it is listed for auction.¹²⁹

As NFT trading has expanded, the process of allocating royalties and fees has continued to evolve in ways that continue to limit transparency and Minter access to complete transaction information.¹³⁰ In short, Marketers may or may not share their own royalties with Minters, and different Marketers waver on that distributive decision.¹³¹ What is certain is that the Minters using Marketers are unhappy because specific marketplaces are or are not wed to a royalty model, and royalties are being set without input.¹³²

¹²⁶ See *Rarible vs OpenSea NFT Marketplace Comparison. Which One Is Better?*, NFT’S STREET (Aug. 6, 2021), <https://www.nftstreet.com/rarible-vs-opensea/> [<https://perma.cc/8TFV-NAFB>].

¹²⁷ See Andrew Hayward, *OpenSea Hits Record \$5B in Monthly Sales as Ethereum NFT Market Swells*, DECRYPT (Feb. 1, 2022), <https://decrypt.co/91748/opensea-record-5b-ethereum-nft-market-swells> [<https://perma.cc/P7ED-8YZ3>] (showing OpenSea’s performance is tied to Ethereum performance).

¹²⁸ “Gas fees,” mystically attributed to the Blockchain, are rarely disclosed upfront and can be considerable. In short, after an NFT changes hands, a cost is deducted from the transaction for use of the Blockchain. “Gas fees” can be thought of as (hidden) charges for using a Blockchain of choice. See David Schwartz, *What Are Gas Fees?*, COINMARKETCAP (2021), <https://coinmarketcap.com/alexandria/article/what-are-gas-fees> [<https://perma.cc/99JM-6TSA>].

¹²⁹ See, e.g., Ezra Reguerra, *NFT Collector Sues OpenSea for Locking Account After Being Scammed*, COINTELEGRAPH (Jan. 26, 2023), <https://cointelegraph.com/news/nft-collector-sues-opensea-for-locking-account-after-being-scammed> [<https://perma.cc/QK9K-AC5T>].

¹³⁰ See Alex Gomez, *How to Check NFT Royalties on Opensea In 2023 (3 Quick Steps)*, CYBER SCRILLA (Feb. 27, 2023), <https://cyberscrilla.com/check-nft-royalty-fees-opensea/> [<https://perma.cc/8GBL-JAZP>].

¹³¹ Abdulrasaq Ariwoola, *A Guide to Marketplaces That Honor NFT Creator Royalties*, NFT PLAZAS (May 20, 2023), <https://nftplazas.com/nft-creator-royalties-marketplaces/> [<https://perma.cc/3T35-AW5E>].

¹³² Andrew Hayward, *Another NFT Marketplace Goes Zero Royalties in ‘Race to the Bottom’*, DECRYPT (Oct. 27, 2022), <https://decrypt.co/113021/nft-marketplace-looksrare-zero-royalties> [<https://perma.cc/37ZK-T8TU>].

It is axiomatic that unregulated promises of royalties are a fragile business model, at best.¹³³ While the industry has come to accept a division of royalties between the Minter and the Marketer, that division is too opaque to inspire a hunt among experts.¹³⁴ Most importantly, the unfettered use of the present legal “blank slate” by the leading marketplaces often inures benefits to all those affiliated with Ethereum (i.e., the Blockchain mainly used to record NFTs).¹³⁵ That dominance is so overwhelming as to inspire envy from the greatest robber barons in history.¹³⁶

3. *The Traders*

Finally, the “Traders,” those buying and selling NFTs comprise the third and final group within the schematic.¹³⁷ These actors work from fluctuating prices listed by the Marketers

¹³³ Heidi MacDonald, *Shocker: NFT Companies Backing off on Paying Royalties*, THE BEAT (Dec. 8, 2022, 4:30 PM), <https://www.comicsbeat.com/shocker-nft-companies-backing-off-on-paying-royalties/> [https://perma.cc/XV8X-LHP2]. See also Oluwapelumi Adejumo, *Mark Cuban Slams OpenSea’s Optional NFT Royalties As Industry Misstep*, CRYPTOSLATE (August 18, 2023, 8:30 PM), <https://cryptoslate.com/mark-cuban-slams-openseas-optional-nft-royalties-as-industry-misstep/> [https://perma.cc/7Z3F-9FWQ] (“OpenSea will stop enforcing [Minter] royalty fees on secondary sales by the end of this month.”).

¹³⁴ Christian Heidorn, *Solved: How to See Royalties on OpenSea Easily*, TOKENIZED (Jan. 5, 2023), <https://tokenizedhq.com/how-to-see-royalties-on-open-sea/> [https://perma.cc/WQ8P-H2K8] (“Perhaps you’ve searched all over OpenSea already and simply can’t figure out how to see royalties on OpenSea? No need to worry, because you’re clearly not alone with this problem and OpenSea hasn’t bothered to make it easy for us.”).

¹³⁵ Chugani et al., *supra* note 52; see also NFT’S STREET, *supra* note 126.

¹³⁶ Christian Heidorn, *8 Crazy OpenSea Statistics You Should Know in 2023*, TOKENIZED (Aug. 12, 2023), <https://tokenizedhq.com/opensea-statistics/> [https://perma.cc/5F27-RTHJ] (discussing OpenSea’s dominance in the NFT market); Jamie Redman, *Opensea’s Record-Breaking Monthly NFT Volume Captures More Than \$1.5 Billion*, BITCOIN.COM (Aug. 23, 2021), <https://news.bitcoin.com/openseas-record-breaking-monthly-nft-volume-captures-more-than-1-5-billion/> [https://perma.cc/SDG8-4BK6].

¹³⁷ Chris Marcus, *NFT Audience Insights: Who Buys NFTs and Why?*, COLORMATICS (Dec. 2021), <https://www.colormatics.com/article/nft-audience-insights-whos-buying-nfts-and-why/> [https://perma.cc/EV34-LPFM]; Ivan Cryptoslav, *The Ultimate Guide to NFT Royalties and NFT Marketplaces in 2023*, COINMARKETCAP, <https://coinmarketcap.com/alexandria/article/the-ultimate-guide-to-nft-royalties-and-nft-marketplaces> [https://perma.cc/AGN8-YH9H] (opining that royalties are set by creators and range from 3% to 10%).

much in the same way a stock exchange lists stocks.¹³⁸ At present, while multiple Marketers exist, one entity effectively controls the trading industry and sets the standards;¹³⁹ rare is the occasion when a Minter seeks to control both the creation and trading process.¹⁴⁰

Of course, once purchased, the tales of NFT cybertheft are legion.¹⁴¹ Additionally, disclosures of touting by celebrities, who received payment to tout, inevitably tarnish the deal.¹⁴² Consumer groups loudly comment on the issue that laymen greatly resent not knowing of paid endorsements.¹⁴³ Significantly, the

¹³⁸ OPENSEA, <https://opensea.io/> [<https://perma.cc/4WJ9-MZ39>] (presenting a menu of various NFTs available on the marketplace).

¹³⁹ See *What Is an NFT?*, *supra* note 123.

¹⁴⁰ See Kevin Helms, *Financial Giant Fidelity Files for Crypto, NFT, and Metaverse Products*, BITCOIN.COM (Dec. 30, 2022), <https://news.bitcoin.com/financial-giant-fidelity-files-trademarks-for-crypto-nft-and-metaverse-products-2/> [<https://perma.cc/84H2-PKSG>].

¹⁴¹ Vladislav Sopov, *Scam Alert: Your NFTs and Crypto Wallet Can Be Drained With This E-Mail*, U TODAY (Jan. 21, 2023, 12:34 PM), <https://u.today/scam-alert-your-nfts-and-crypto-wallet-can-be-drained-with-this-email> [<https://perma.cc/MGQ4-XLD2>].

¹⁴² Winston Cho, *Celebrity Promoters Sued Over Bored Ape NFT Endorsements*, HOLLYWOOD REPORTER (Dec. 9, 2022, 3:45 PM), <https://www.hollywoodreporter.com/business/business-news/celebrity-promoters-sued-over-bored-ape-nft-endorsements-1235279115/> [<https://perma.cc/2NAF-G6VL>]; Keegan Kelly, *Alleged Crypto Bro Jimmy Fallon Didn't Disclose His Financial Stake While Hawking 'Bored Ape' NFTs on 'The Tonight Show,'* CRACKED (Jan. 26, 2023), https://www.cracked.com/article_36744_alleged-crypto-bro-jimmy-fallon-didnt-disclose-his-financial-stake-while-hawking-bored-ape-nfts-on-the-tonight-show.html [<https://perma.cc/5GB5-RPY2>]. Interestingly, branding an NFT a “security” would instantly subject such non-disclosing celebrities to liability under the securities laws. See 15 U.S.C. § 77(q)(b); 73 Cong. Ch. 38 (1933), 48 Stat. 74; John Black, Securities Act Release No. 7885 (Sept. 6, 2000), <https://www.sec.gov/litigation/admin/33-7885> [<https://perma.cc/C6U3-XMTC>] (noting that it has been unlawful, since 1933, “for any person to tout a stock without disclosing the nature and substance of any consideration, whether present or future, direct or indirect, received from an issuer, underwriter or dealer.”). But see Jerry W. Markham, *Securities and Exchange Commission vs. Kim Kardashian, Cryptocurrencies and the “Major Questions Doctrine,”* 14 WM. & MARY BUS. L. REV. 515 (2023).

¹⁴³ Jason Nelson, *Consumer Group Demands Snoop Dogg, Paris Hilton, Other Celebs Disclose NFT Connections*, DECRYPT (Aug. 8, 2022), <https://decrypt.co/107019/consumer-watch-dog-demands-snoop-dogg-tom-brady-paris-hilton-and-other-celebrities-disclose-nft-connection> [<https://perma.cc/KT8J-SEE2>]. Under federal securities law, paid endorsers must disclose remuneration for their endorsement of securities. See *supra* note 142.

link between NFT fraud and overarching cryptocurrency fraud is seamless.¹⁴⁴

C. Scorecard of Resultant Ills

Nevertheless, despite spreading news of legal uncertainties, monopoly, theft, and losses, creators¹⁴⁵ and purchasers keep lining up.¹⁴⁶ One would be hard-pressed to find someone who is not captivated by the different interests, values, and assets available through NFT ownership.¹⁴⁷ Collectively, the headlines disclose a trio of significant threats occasioned by an unregulated NFT market: (1) the hoodwinking of the ill-informed; (2) the unjust and unequal enrichment of collaborative entrepreneurs; and (3) the de facto dominance of the market by one or more exchange-like platforms.¹⁴⁸

These vulnerabilities have been well-cataloged.¹⁴⁹ Indeed, the media's coverage of even sophisticated minters and collectors suffering catastrophic thefts and mishaps have become commonplace.¹⁵⁰ There are also notoriously hidden charges (e.g., "gas fees") for all Minters apart from costs associated with joining a marketplace.¹⁵¹ Even if transferring or holding the NFT can be

¹⁴⁴ Christian Martinez, *Six Indicted in Cryptocurrency and NFT Fraud Schemes That Netted More than \$130 Million*, L.A. TIMES (July 2, 2022, 6:00 AM), <https://www.latimes.com/california/story/2022-07-02/six-indicted-in-cryptocurrency-and-nft-fraud-schemes> [<https://perma.cc/E7CX-RC5Y>].

¹⁴⁵ See, e.g., Cam Thompson, *German Intelligence Agency Releases NFT Collection to Recruit Talent*, COINDESK (June 21, 2023, 11:38 AM), <https://www.coindesk.com/web3/2023/06/21/german-intelligence-agency-releases-nft-collection-to-recruit-talent/> [<https://perma.cc/R4G8-XMUJ>]; Zhiyuan Sun, *Japan's Largest Airline Launches NFT Marketplace*, COINTELEGRAPH (May 30, 2023), <https://cointelegraph.com/news/japan-s-largest-airline-launches-nft-marketplace> [<https://perma.cc/A5CG-RJ55>].

¹⁴⁶ See Mendes, *supra* note 35.

¹⁴⁷ Samantha Ibrahim, *Farrah Fawcett's Iconic, Red Swimsuit Poster to Be Auctioned off as Limited-Edition NFT*, N.Y. POST (Feb. 2, 2022, 1:53 PM), <https://nypost.com/2022/02/02/farrah-fawcetts-red-swimsuit-poster-to-be-sold-as-nft/> [<https://perma.cc/JS53-NNAS>].

¹⁴⁸ See Mendes, *supra* note 35.

¹⁴⁹ Black, *supra* note 142; Heidorn, *supra* note 136.

¹⁵⁰ See, e.g., Katie Wickens, *NFT God's 'Entire Digital Livelihood' Drained After Clicking Fake OBS Link*, PC GAMER (Jan. 18, 2023), <https://www.pcgamer.com/nft-gods-entire-digital-livelihood-drained-after-clicking-fake-obs-link/> [<https://perma.cc/M4HZ-8QPZ>].

¹⁵¹ Schwartz, *supra* note 128.

done without incident or undisclosed surcharge, the uncertainty surrounding royalties displays that this group serves as the most likely victims of uninformed commerce.¹⁵²

Additionally, concerned parties all yield to the standards and dominance of a short list of Marketers.¹⁵³ The exorbitant market share alone, maintained by the leading Marketers, calls out for reform.¹⁵⁴ Further, fledgling Marketers seeking a share of the industry lead will predictably decrease incentives and revenues by avoiding royalties altogether.¹⁵⁵

Finally, the Traders take unacceptable risks in trading on unregulated marketplaces.¹⁵⁶ To wit, a Marketer cannot guarantee uniqueness; simply put, while a Marketer such as OpenSea requires a unique code for its “authentication” process, such requirement merely ensures that a product is distinct from others of its included assets.¹⁵⁷ More noteworthy still is the extreme volatility of novel NFTs. This is demonstrated by the now commonplace tales of tokens coming to market at inscrutably high prices only to plummet.¹⁵⁸ One NFT trading platform may simply be a part of another, and be the potential for price fixing, manipulation, and insider trading abound.¹⁵⁹

In sum, ironically, originality inspires the NFT asset, destined to become part of a marketplace governed by a sole Marketer.¹⁶⁰ As everyone from aspiring artists to tech entrepreneurs

¹⁵² Heidorn, *supra* note 134.

¹⁵³ *Id.* See also Hayward, *supra* note 24.

¹⁵⁴ *Id.*

¹⁵⁵ See Hayward, *supra* note 132. *But see* Cryptoslav, *supra* note 137.

¹⁵⁶ Mendes, *supra* note 35; Marcus, *supra* note 137; Rachel Greene, *Across Real Life, the Metaverse, and the Blockchain, Theft Will Not Prevail as the Legal Community Encompasses New Technology*, 60 HOUS. LAWYER 18 (2022).

¹⁵⁷ Tiffany Behnam, *How Are NFTs Authenticated?*, PASTEL (Jan. 4, 2022), <https://pastel.network/how-are-nfts-authenticated/> [<https://perma.cc/Y74R-9TZZ>] (“OpenSea, the largest NFT marketplace, offers no assurances that an NFT is original. The buyer must do their own research.”).

¹⁵⁸ Newton Gitonga, *Jack Dorsey’s First-Ever Tweet NFT That Sold for \$2.9M Ends up with a Top Bid of Just \$96*, ZYCRYPTO (Oct. 17, 2022), <https://zycrypto.com/jack-dorseys-first-ever-tweet-nft-that-sold-for-2-9m-ends-up-with-a-top-bid-of-just-96/> [<https://perma.cc/Q7Y2-JDAX>].

¹⁵⁹ See *supra* notes 98–101 and accompanying text.

¹⁶⁰ Cryptoslav, *supra* note 137.

have raced to join the NFT industry,¹⁶¹ the horror of NFTs incontrovertibly resides in its unimpeded pathways to non-disclosure and fraud.¹⁶²

Amidst this cauldron of NFT woes, the season's leading Marketer in the nascent NFT marketplace possesses a de facto monopoly that inures foremost to Marketer benefit; to a lesser and unpredictable extent, that showrunner benefits Minters and Traders.¹⁶³ Accordingly, the prevalence of NFTs has translated into more Marketers seeking to operate "exchanges," but these platforms remain hot spots for predatory practices and inequality.¹⁶⁴ Simply put, Minters are herded towards an extremely short list of consistently profitable Marketers; in turn, these Marketers unilaterally set royalty rates and fees in processes that are opaque and clandestine. Accordingly, these platforms appear to be the best location for initial regulation and thus inform the ensuing legal discussion of where and when the means to realize market parity shall arrive.

II. CORRESPONDING LEGAL ISSUES: ALL ROADS POINT TO THE MOST FEARLESS AGENCY

The dual bonanza of accessible NFT creation and speculative trading has spawned a wide variety of legal issues.¹⁶⁵ Minters,

¹⁶¹ Heather Jones, *Laws in the Metaverse: Digital Assets*, O'FLAHERTY LAW (Dec. 23, 2022), <https://www.oflaherty-law.com/learn-about-law/laws-in-the-metaverse-digital-assets> [<https://perma.cc/9LZY-RYTK>]. *But see* Greene, *supra* note 156.

¹⁶² Grant Fondo et al., *FinCEN Issues Report Addressing NFTs*, GOODWIN (Feb. 17, 2022), <https://www.digitalcurrencyperspectives.com/2022/02/17/fin-cen-issues-report-addressing-nfts/> [<https://perma.cc/66TG-7LMU>] (noting the government's warning that NFTs—which are often overvalued—are susceptible to money laundering); *Fraud/Non-Disclosure*, ENSBERG LAW GROUP, <https://www.businessrealestateattorneyensberg.com/business-litigation/fraud-non-disclosure/> [<https://perma.cc/2VUD-B4G3>].

¹⁶³ Compare Andrew Hayward, *Why OpenSea Is Sticking With NFT Creator Royalties*, DECRYPT (Nov. 22, 2022), <https://decrypt.co/115382/why-open-sea-nft-creator-royalties> [<https://perma.cc/X7YN-ZF95>], with Andrew Hayward, *OpenSea Again Changes Course on NFT Royalties After More Creator Pushback*, DECRYPT (Dec. 8, 2022), <https://decrypt.co/116768/opensea-changes-nft-royalties-creator-pushbac> [<https://perma.cc/DRZ7-YZYE>].

¹⁶⁴ Hayward, *supra* note 132.

¹⁶⁵ See Houser & Holde, *supra* note 35, at 893–95; see also Dep't of Treasury, *Study of the Facilitation of Money Laundering and Terror Finance Through*

Marketers, and Traders must navigate an unregulated maze without any accompanying hints of legal resolution.¹⁶⁶ Congress has not legislated in the NFT field, and no federal agency has proposed rules.¹⁶⁷ The IRS has essentially equated NFTs with collectibles, thus ensuring that profits from transactions therein do not avoid reporting (i.e., the capital gains regulations apply).¹⁶⁸ The Treasury Department, through its enforcement arm of FINCen, has repeatedly focused upon warnings about the likelihood of NFTs playing a role in money laundering.¹⁶⁹

Many existing legal regimes theoretically apply to NFT market activity, and a short list of civil cases serves as a harbinger of battles to come.¹⁷⁰ Yet, as leading legal observers note (from their research on NFT creation, royalties, and trading) despite all

the Trade in Works of Art (February 2022), https://home.treasury.gov/system/files/136/Treasury_Study_WoA.pdf [<https://perma.cc/EK74-3U76>] (“[A]n NFT’s transactional value is dependent on a single exchange between a buyer and a seller, and the value fluctuates subjectively.”).

¹⁶⁶ See Castro, *supra* note 7, at 9–17.

¹⁶⁷ See KRISTEN E. BUSCH, CONG. RSCH. SERV., R47189, NON-FUNGIBLE TOKENS (NFTs), 12–20 (2022); Joao Marinotti, *A Law Professor Explains Why NFTs Don’t Protect Digital Ownership*, NFTNOW (Nov. 24, 2022) [hereinafter Marinotti, *Law Professor Explains*], <https://nftnow.com/features/a-law-professor-explains-why-nfts-dont-protect-digital-ownership/> [<https://perma.cc/2H29-YCGL>].

¹⁶⁸ *Digital Assets*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/digital-assets> [<https://perma.cc/8RAT-2CAV>] (expressly including NFTs as “property”); see also Rahul Nambiampurath, *IRS Adds NFTs in Tax Guidance Draft*, INVESTOPEDIA (Oct. 19, 2022), <https://www.investopedia.com/irs-adds-nfts-in-tax-guidance-draft-6752856> [<https://perma.cc/9LEX-3CV3>] (“The Internal Revenue Service tweaked its annual tax instructions to account for non-fungible tokens (NFTs), replacing the term ‘virtual currency’ with ‘digital assets,’ which includes NFTs.”).

¹⁶⁹ Dep’t of Treasury, *supra* note 165; see also Fondo et al., *supra* note 162 (noting the government’s warning that NFTs—which are often overvalued—are susceptible to money laundering).

¹⁷⁰ Hilary McDonnell & Hanna Miller, *NFT Update: 5 Recent Lawsuits Show a Glimpse into Future Legal Battles Involving NFTs*, HUGHES HUBBARD & REED (Apr. 13, 2022), <https://www.hhrartlaw.com/2022/04/nft-update-5-recent-lawsuits-show-a-glimpse-into-future-legal-battles-involving-nfts> [<https://perma.cc/ZW4H-3EM9>]; see also Vivienne Chow, *A Group of Collectors Is Suing Sotheby’s Over Its ‘Misleading’ Marketing of Bored Ape Yacht Club NFTS*,” ARTNET NEWS (Aug. 15, 2023), <https://news.artnet.com/art-world/collectors-sue-sothebys-bored-ape-yacht-club-nfts-2349974> [<https://perma.cc/ER6D-HFA4>].

the new vocabulary, one term is conspicuously absent: “owner.”¹⁷¹ Stated otherwise, while theories and lawsuits may abound, no one is sure if creating an NFT, minting an NFT, or purchasing an NFT creates ownership.¹⁷² This obscurity (intentional or not) initially clouds any legal analysis of the proper legal fit for the abuses occasioned by the NFT craze.¹⁷³ Upon closer inspection, most earmarked solutions still fail, as is discussed below.

A. *The Intellectual Property Fix*

Perhaps nowhere is a body of law more readily misapplied than in rewarding the urge to overlap trademark or copyright law with budding NFT regulation.¹⁷⁴ Where people mint trademarked logos or copyrighted creations without authorization, a strong case for damages appears logical.¹⁷⁵ However, whether the act of minting an original NFT creates protection by trademark or copyright law has yet to receive appellate court review.¹⁷⁶ Further,

¹⁷¹ See Marinotti, *Law Professor Explains*, *supra* note 167; Fairfield, *supra* note 48, at 1290–93.

¹⁷² See Marinotti, *Law Professor Explains*, *supra* note 167.

¹⁷³ *Id.* See also Marinotti, *Possessing Intangibles*, *supra* note 48, at 1234–36.

¹⁷⁴ See Emily Dieli, *Tarantino v. Miramax: the Rise of NFTs and Their Copyright Implications*, 2022 B.C. INTELL. PROP. & TECH. F. 1 (2022); Mary Kate Brennan et al., *Demystifying NFTs and Intellectual Property: Trademark and Copyright Concerns*, REUTERS (June 17, 2022, 9:15 AM), <https://www.reuters.com/legal/legalindustry/demystifying-nfts-intellectual-property-trademark-copyright-concerns-2022-06-17/> [<https://perma.cc/868X-YS23>]; Isaiah Poritz, *Hermes Defeats MetaBirkins in the First NFT Trademark Trial(1)*, BLOOMBERG LAW (Feb. 8, 2023, 10:55 AM), <https://news.bloomberglaw.com/ip-law/hermes-gets-win-over-metabirkins-in-first-nft-trademark-trial> [<https://perma.cc/WQ7K-U6Q5>].

¹⁷⁵ See Poritz, *supra* note 174. The case, in which a digital artist defended under the First Amendment his NFTs picturing famed handbags, was called “the first NFT trademark case.” A Manhattan jury found in favor of the trademark holder against the NFT creator, who had digitized pictures of the famed handbags. Yet, the civil case for damages (which was grounded in trademark dilution and Internet “squatting”) answers but a fraction of the questions remaining (e.g., whether the trademark must be registered; whether all Circuits agree; whether transformative uses removes liability). See *Hermes Int’l v. Rothschild*, No. 22-CV-384 (JSR), 2023 WL 4145518 (S.D.N.Y. June 23, 2023) (appeal filed).

¹⁷⁶ Poritz, *supra* note 174.

neither the trademark nor copyright area of law readily applies as long as ownership of digital wallets is up for debate.¹⁷⁷ Moreover, it is nearly impossible to conclude whether the artist who creates both a traditional piece of art and its NFT counterpart creates one asset or two, leading some reputable artisans to solve the quandary in a personal and dramatic fashion.¹⁷⁸

In 2023, the Supreme Court resolved a number of cases centering on the potential infringement where a protected work is altered by a second party for commercial purposes.¹⁷⁹ These cases centered on, among other things, the varied uses of a trademarked item as a “parody.”¹⁸⁰ As appealing as a determination from the high court appears, the express issue of NFT formation was not under consideration.¹⁸¹ Further, even the strictest of rulings for the trademark or copyright owner would only serve as deterrence to a small fraction of NFT Minters; likewise, whether potential liability would extend to Marketers, those who list or advertise NFTs created by others, has yet to be plumbed.¹⁸²

Moreover, while some Minters have gone the extra mile and trademarked their creations, this conservatism is not the rule; the Bored Ape originators who helped spur the NFT craze have publicly confessed that they do not hold copyright registrations

¹⁷⁷ Marinotti, *Law Professor Explains*, *supra* note 167.

¹⁷⁸ Trisha Sengupta, *Artist Damien Hirst Burns Thousands of His Paintings. Here's Why*, HINDUSTAN TIMES (Oct. 13, 2022, 2:21 PM), <https://www.hindustantimes.com/trending/artist-damien-hirst-burns-thousands-of-his-paintings-here-s-why-101665647755053.html> [<https://perma.cc/3A5Q-S23T>].

¹⁷⁹ See generally Jennifer M. Mikulina & Eleanor B. Atkins, *2023 IP Outlook: Trademark and Copyright Supreme Court Update*, MCDERMOTT WILL & EMERY (Feb. 2, 2023), <https://www.mwe.com/insights/2023-ip-outlook-trade-mark-and-copyright-supreme-court-update/> [<https://perma.cc/DQW9-HLW5>].

¹⁸⁰ *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140 (2023) (weighing a First Amendment parody defense where a dog toy company sold “Silly Squeakers” fashioned after the Jack Daniels whiskey bottle). See Mikulina & Atkins, *supra* note 179, at 3 (“[T]his case may help clarify whether NFTs (and other types of digital art) are independent works protected via the fair use doctrine or if they require a license from the original copyright holder.”).

¹⁸¹ See Mikulina & Atkins, *supra* note 179.

¹⁸² Isaiah Poritz, *'A Lot of Gray' for NFT Artists Despite MetaBirkins Jury Verdict*, BLOOMBERG LAW (Feb. 10, 2023, 4:55 AM), <https://news.bloomberglaw.com/ip-law/a-lot-of-gray-for-nft-artists-despite-metabirkins-jury-verdict> [<https://perma.cc/PF7W-888B>].

for their minted works, and the intellectual property (“IP”) protection such a step might afford.¹⁸³ The cure for this IP uncertainty seems to be the holder of a copyright or trademark simply creating their own marketplace.¹⁸⁴ It bears noting that there is scant evidence of NFT creators having the means to take their NFT from creation to market on their own, once again raising the question of whether the cementing creation process shall continue to divide royalties and call true ownership into question.¹⁸⁵ Therefore, for a number of reasons, the IP fix, while provocative in a karmic sense, does little to remedy the ills discussed in this Article.¹⁸⁶

B. The Securities Regulation Fix

The instinct among some regulators and legal observers is to lump NFTs together with cryptocurrency.¹⁸⁷ Indeed, such categorization is appealing because both are relatively new, exist in cyberspace, integrate equally novel decentralized ledgers, and attract millions of the uninitiated.¹⁸⁸ Even their creation seems to stem from the same WEB 3.0 vocabulary.¹⁸⁹

Further, as is the case with digital tokens and coins, the SEC reach shall be enhanced by its tried-and-true mechanism of disciplining securities “marketers” (i.e., exchanges).¹⁹⁰ This angle

¹⁸³ Shanti Escalante-De Mattei, *Yuga Says It Does Not Have Copyright Registration of Bored Ape Images, in New Court Documents*, ARTNEWS (Jan. 26, 2023, 1:36 PM), <https://www.artnews.com/art-news/news/yuga-labs-copy-right-registration-bored-ape-yacht-club-nfts-1234655279/> [https://perma.cc/DN93-8M6M].

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., Emma Roth, *Nike is Still Trying to Make NFTs Happen With .Swoosh*, VERGE (Nov. 14, 2022, 6:51 PM), <https://www.theverge.com/2022/11/14/23458863/nike-nfts-happen-dot-swoosh-sneakers-crypto> [https://perma.cc/QJQ8-RNGY].

¹⁸⁶ See Marinotti, *Law Professor Explains*, *supra* note 167.

¹⁸⁷ See Castro, *supra* note 7, at 3–4, 13–17.

¹⁸⁸ *Id.*

¹⁸⁹ Compare STATE OF MISSOURI, Order to Cease and Desist and Show Cause Why Restitution, Civil Penalties, and Costs Should Not be Imposed, *In re Virtual Mining, Corp.*, No. AP-14-09, at 3 (discussing “mining”), with Becker, *supra* note 106 (discussing “minting”).

¹⁹⁰ See, e.g., *In re Zachary Coburn*, Exchange Act Release No. 84553, Admin. Proc. No. 3-18888 (Nov. 8, 2018) (Order Instituting Cease-and-Desist

is immeasurably aided by the salient nature of any NFT collapse.¹⁹¹ Separately, the potential for manipulation and “insider trading” of NFTs is alarmingly boundless.¹⁹² Legal experts have well chronicled the errs of sales timed to game the public’s awareness of relevant NFT information.¹⁹³ Accordingly, the federal securities laws are part of many discussions of what regulation befits NFTs.¹⁹⁴

The SEC, which cannot seem to be able to say “no” to a new challenge, has already announced its intention to investigate NFT sales as possible securities transactions.¹⁹⁵ Buoyed by the interlocking nature of NFTs, sponsored digital coins, and Blockchain-enabled assets, this initiative could possibly gain in traction.¹⁹⁶ Predictably, the battle shall ebb and flow with the

Proceedings) (disciplining the operator of a crypto trading platform listing Ether-related tokens in violation of SEC Rule 3b-16). *See also* Rhodilee Jean Dolor, *FTX Will Delist Crypto Assets in the US That It Deems Might Be Securities, According to CEO Sam Bankman-Fried*, THE DAILY HODL (Oct. 21, 2022), <https://dailyhodl.com/2022/10/21/ftx-will-delist-crypto-assets-in-the-us-that-it-deems-might-be-securities-according-to-ceo-sam-bankman-fried/> [<https://perma.cc/5HJW-P5JQ>]; RSE Markets, Inc., No. 3-21526 (Sec. Exch. Comm’n July 12, 2023) (charging a platform matching crypto buyers and sellers with operation of an unregistered exchange in violation of SEC Rule 3b-16).

¹⁹¹ Hayward, *supra* note 36.

¹⁹² Stuart D. Levi et al., *‘Insider Trading’ and NFTs: What Should Companies Be Doing?* SKADDEN (June 16, 2022), <https://www.skadden.com/insights/publications/2022/06/insider-trading-and-nfts> [<https://perma.cc/S7HV-2EA9>].

¹⁹³ *Id.*

¹⁹⁴ *See* Andrea Gordon et al., *How to Keep Up With DOJ and SEC Regulation of NFTs*, EVERSHEDES SUTHERLAND (Nov. 21, 2022), <https://us.eversheds-sutherland.com/NewsCommentary/Articles/254808/How-to-Keep-Up-With-DOJ-and-SEC-Regulation-of-NFTs> [<https://perma.cc/64X2-KAPM>].

¹⁹⁵ *See SEC Targets Bored Ape NFTs as Possible Securities*, PYMNTS (Oct. 11, 2022), <https://www.pymnts.com/nfts/2022/sec-targets-bored-ape-nfts-as-possible-securities/> [<https://perma.cc/R347-TXWT>]; SEC, STRATEGIC PLAN FOR FISCAL YEARS 2022–2026, at 11 (detailing the SEC’s most recent strategic plan, which references only the most bland of outcomes regarding newer digital assets). Specifically, “[f]uture market volatility driven by market or external events such as the pandemic, the evolution of markets without subsequent strengthening of agency authorities, and the rapid growth in crypto assets all represent evolutionary risks.” *Id.*

¹⁹⁶ Nitish Pahwa, *The Feds Think Bored Ape Yacht Club Was Up to Some Monkey Business*, SLATE (Oct. 12, 2022, 4:18 PM), <https://slate.com/technology/2022/10/bored-ape-yacht-club-yuga-labs-sec-crypto-nfts-apecoin.html> [<https://perma.cc/6L26-DR7Y>]; Stefania Palma & Patrick Temple-West, *SEC Must*

predispositions of the Commissioners.¹⁹⁷ Still one could still argue that the Securities and Exchange Commission is more poised to implement regulation over NFTs.¹⁹⁸ The Commission has brought dozens of digital asset cases in the past decade, and its Chairman (who taught crypto classes at MIT) possesses an unwavering commitment to reigning in crypto excesses.¹⁹⁹ Moreover, the specific ill of celebrity endorsement of securities for fees without disclosure is routinely punished by the SEC to eye-catching results.²⁰⁰

1. *Complicated Remedy*

However, upon inspection, SEC actions against both pre-eminent and ersatz crypto “exchanges” have been enabled either through the promoter’s registering of the arrangement with the SEC, or in the presence of a specific SEC Rule.²⁰¹ Broader SEC regulation of crypto arrangements in general, has proceeded in discretionary and unscripted fashion.²⁰² Pivotal to all of these cases is the allegation of the presence of a “security” in an arrangement involving crypto.²⁰³

To achieve jurisdiction over novel, widely varying crypto arrangements, the world’s most active securities regulator relies upon a 77-year-old case in which the Supreme Court first interpreted

Clarify Which NFTs Will Be Regulated, Says Commissioner, FIN. TIMES (Oct. 17, 2022), <https://financialpost.com/financial-times/sec-must-clarify-which-nfts-will-be-regulated-says-commissioner> [<https://perma.cc/SZT4-277V>].

¹⁹⁷ Comm’r Hester M. Peirce, *Remarks Before the Digital Assets at Duke Conference*, SEC (Jan. 20, 2023).

¹⁹⁸ See Palma & Temple-West, *supra* note 196.

¹⁹⁹ See *Biography: Chair Gary Gensler*, SEC, <https://www.sec.gov/about/commissioners/gary-gensler> [<https://perma.cc/W6MG-5LNY>].

²⁰⁰ See, e.g., Press Release, SEC, *SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security* (Oct. 3, 2022) (fining the millionaire celebrity \$1.26 million for violating Section 17(b) of the Securities Act by not disclosing monies earned for touting an Ethereum product on social media).

²⁰¹ SEC v. Binance Holdings Ltd., Civil Action No. 1:23-cv-01599 (2023).

²⁰² Michael Selig, *What if Regulators Wrote Rules for Crypto?*, COINDESK (Jan. 23, 2023, 10:04 AM), <https://www.coindesk.com/consensus-magazine/2023/01/23/sec-cftc-crypto-markets/> [<https://permac.cc/224H-LNV9>].

²⁰³ See Wayne Duggan & Michael Adams, *How Does the SEC Regulate Crypto*, FORBES ADVISOR (June 30, 2023, 9:41 AM), <https://www.forbes.com/advisor/investing/cryptocurrency/sec-crypto-regulation/> [<https://perma.cc/WE4T-CT2T>].

the statutory term of “investment contract.”²⁰⁴ That analysis famously evaluates the passivity of the putative investor and has often found securities law a good fit for unconventional arrangements.²⁰⁵ The continuing, eponymous “*Howey* Test” consistently examines transactions using the means of interstate commerce for the presence of four facts: (1) an investment of money (2) in a common enterprise (3) with the expectation of profits (4) derived from the significant efforts of others.²⁰⁶ With the nearly unflagging

²⁰⁴ See *SEC v. Howey*, 328 U.S. 293, 300 (1946); The Securities Act of 1933, 15 U.S.C. § 77(b) (including a healthy list of instruments equating with “security”, including “stock”, “note”, “bond”, “investment contract,” and others).

²⁰⁵ *Howey*, 328 U.S. at 300 (1946). See, e.g., *SEC v. Aqua Sonics*, 687 F.2d 577, 577 (2d Cir. 1982) (franchise agreement); *SEC v. Turner*, 474 F.2d 476, 477 (9th Cir. 1973) (Ponzi scheme); *SEC v. Edwards*, 540 U.S. 389, 392 (2004) (pay phone sale-and-leaseback agreements); and *SEC v. SG Ltd.*, 265 F.3d 42, 44 (1st Cir. 2001) (sustaining Complaint centering on virtual gaming). Private plaintiffs have added considerably to the litany of successful *Howey* applications to unconventional arrangements. See, e.g., *Teague v. Bakker*, 35 F.3d 978, 981–82 (4th Cir. 1994) (hotel time share interests); *Koch v. Hankins*, 928 F.2d 1471, 1472 (9th Cir. 1991) (general partnership interest); *Marini v. Adamo*, 812 F. Supp. 2d 243, 248 (E.D.N.Y. 2011) (rare coins); *Landreth Timber Co., v. Landreth*, 471 U.S. 681, 683–84 (1985) (assets of a lumber mill); *Halloway v. Peat Marwick, Mitchell & Co.*, 879 F.2d 772, 772 (10th Cir. 1989) (financial instruments); *Reves v. Ernst & Young*, 507 U.S. 170, 175 (1993) (farm cooperative demand notes). Criminal cases have also benefitted from the generous path cut by the *Howey* Test. See, e.g., *United States v. Leonard*, 529 F.3d 83, 86 (2d Cir. 2008) (LLC interests). *But see* *United States v. Jones*, 450 F.2d 523, 523 (5th Cir. 1971) (refusing to define airline voucher arrangements as securities).

A pending New York class action filed by purchasers of the NBA’s “Top Shot” NFTs implicates the *Howey* Test; the allegations here center on authorized usages of NBA highlight snippets offering unregistered securities. See *Are NFTs Securities? Analysis of the NBA Top Shot Litigation and Other NFT Related Actions*, PATTERSON BELKNAP (Mar. 29, 2022), <https://www.pbwt.com/securities-enforcement-litigation-insider/are-nfts-securities-analysis-of-the-nba-top-shot-litigation-and-other-nft-related-actions> [https://perma.cc/5EMY-5WLB]. In late February 2023, a judge sustained the lawsuit while noting that, under certain circumstances, NFTs could act as securities. Andrew Hayward, *NBA Top Shot NFTs Are ‘Plausibly’ Securities, Judge Rules in Dapper Labs Lawsuit*, DECRYPT (Feb. 22, 2023), <https://decrypt.co/121938/nba-top-shot-nfts-securities-dapper-labs-lawsuit> [https://perma.cc/4V4N-ALZ4].

²⁰⁶ See, e.g., *Turner*, 474 F.2d at 481. These four factual determinations can, on occasion, be phrased as three. E.g., *S.E.C v. Life Partners*, 102 F.3d 587, 588 (D.C. Cir. 1996).

support of federal courts, this elastic standard has brought countless unconventional financial arrangements within the reach of the federal securities laws.²⁰⁷ Likewise, since 2015, dozens of crypto arrangements have been formally branded “securities” for purposes of SEC jurisdiction.²⁰⁸

Such a standard would ostensibly ensnare a few NFT arrangements as “securities,” thus opening the door for SEC jurisdiction, and, in turn, opening up the panoply of securities laws remedies for the aggrieved NFT market participant.²⁰⁹ For example, the *Howey* Test is ostensibly met whenever Traders pay money to purchase NFTs, as part of a Minter’s ongoing enterprise, with the expectation of profits to be generated (at least in part) by the efforts of the Minter and the Marketer.²¹⁰ And meeting the *Howey* Test triggers registration with the SEC and the attendant preparation of disclosure documents.²¹¹ Nonetheless, further analysis poses problems.

2. Unlikely Investment Contracts

Even the expansive *Howey* Test has been qualified on occasion in significant manner, notably in the context of other crypto offerings.²¹² Stated in the most general of terms, to raise the *Howey* Test question is to almost presume that the putative “investor” is passive and in need of regulatory assistance.²¹³ The parties to an NFT transaction bely such uniform classification and exhibit motivations that range wildly (as well as an expertise

²⁰⁷ J. Scott Colesanti, *Sorry, They Were On Mute: The SEC’s ‘Token Proposal 2.0’ as Blueprint for Regulatory Response to Cryptocurrency*, 3 Corp. & Bus. L.J. 1, 8 (2022).

²⁰⁸ See, e.g., *In re Munchee Inc.*, Securities Act Release No. 10445, Admin. Proc. No. 3-18304 (Dec. 11, 2017) (Order Instituting Cease-and-Desist Proceedings).

²⁰⁹ William K. Pao et al., *Howey Should Think About NFTs and Securities Laws*, O’MELVENY (Sept. 29, 2022), <https://www.omm.com/resources/alerts-and-publications/alerts/howey-should-think-about-nfts-and-securities-laws/> [https://perma.cc/EG69-4LVC].

²¹⁰ *Id.*

²¹¹ Lauren Au, *Fractionalization to Securitization: How the SEC May Regulate the Emerging Assets of NFTs*, 96 S. CAL. L. REV. 253, 290–95 (2023).

²¹² Order, SEC v. Ripple Labs, No. 1:20-cv-10832-AT-SN, 1, 11 (S.D.N.Y. July 14, 2023).

²¹³ *Id.* at 13.

few of us possess).²¹⁴ For these reasons alone, the SEC expansion of its aggressive crypto jurisdiction seems ill advised.²¹⁵

In terms of more specific application of the *Howey* Test, element two (i.e., common enterprise), requires that the arrangement as offered require the efforts of promoter and investor (i.e., the Minter and Trader) to rise and fall together; if the Promoter makes money when the Trader does not, such “broad vertical commonality” fails in many jurisdictions.²¹⁶

Likewise, problematic element four of the *Howey* Test (i.e., requiring that the promoter provide the dominant efforts in the financial arrangement) is very difficult to establish where “investments” such as crypto or NFTs rise and fall unpredictably as the result of market fluctuations.²¹⁷ Simply put, NFTs—which incarnate in varied forms and are purchased for varied reasons—are alternatively valued in the hundreds of thousands of dollars or pennies for reasons unknown, thus belying any steerage by an alleged promoter or Minter.²¹⁸

Moreover, the SEC claim for crypto jurisdiction—openly eschewing Congressional intervention²¹⁹—has primarily resulted

²¹⁴ See generally Crypto Assets and Cyber Enforcement Actions, SEC, <https://www.sec.gov/spotlight/cybersecurity-enforcement-actions> [<https://perma.cc/7TU8-L43L>].

²¹⁵ See, e.g., SEC v. Ripple Labs, No. 20 CIV. 10832 (AT), 2023 WL 4507900, at *2 (S.D.N.Y. July 13, 2023) (granting summary judgment in favor of the crypto issuer after applying *Howey* to “programmatically” sales of digital coins through platforms to retail consumers).

²¹⁶ See, e.g., *Marini v. Adamo*, 812 F. Supp. 2d 243 (E.D.N.Y. 2011) (clarifying, in a case involving the sale of collectible coins, that the Second Circuit does not accept broad vertical commonality in satisfaction of *Howey* element number two). See also *How to Assess the Value of an NFT?*, BINANCE BLOG (July 15, 2021), <https://www.binance.com/en/blog/nft/how-to-assess-the-value-of-an-nft-421499824684902357> [<https://perma.cc/HU2W-BETP>] (“The three key factors to consider when evaluating the intrinsic value of an NFT are rarity, utility, and tangibility. The value of an NFT also differs for short- or long-term holding, depending on the asset the NFT represents.”).

²¹⁷ @Rains, *How Often Do NFTs Pass the Howey Test?*, HACKERNOON (Jan. 13, 2023), <https://hackernoon.com/how-often-do-nfts-pass-the-howey-test> [<https://perma.cc/GN4E-LUHU>].

²¹⁸ *Id.*

²¹⁹ Compare Chelsea Cox, *Cryptocurrency Firms Need to ‘Come into Compliance’ With Existing Rules, SEC Chair Gary Gensler Says*, CNBC (Dec. 7, 2022, 3:09 PM), <https://www.cnbc.com/2022/12/07/sec-chair-gary-gensler-cryp>

in uncontested, settled cases.²²⁰ One case, involving a well-heeled defendant possessing the proceeds of an online offering that garnered over a billion dollars in proceeds resulted in protracted litigation for over two years.²²¹ The resolution of that case this past summer was equally dissatisfying to both the SEC and the crypto issuer, as the split decision of a District Court branded one digital coin arrangement a “security” for purposes of the federal securities laws and its three companion arrangements beyond the reach of the Commission.²²²

tocurrency-firms-need-to-come-into-compliance-.html [https://perma.cc/ADA9-JRA2], with Arijit Sarkar, *US Senator Bill Seeks to Cushion Crypto Exchanges From SEC Enforcement Actions*, COINTELEGRAPH (Oct. 1, 2022), https://coin-telegraph.com/news/us-senator-bill-seeks-to-cushion-crypto-exchanges-from-sec-enforcement-actions [https://perma.cc/5SKN-4AG4].

²²⁰ See *supra* note 214 (detailing scores of actions filed against crypto issuers for selling unregistered securities, nearly all of which were settled without trial). When the SEC has trained its sights on NFT issuers, with recent enforcement actions resulting in settlements in August and September 2023, the Commission has failed to achieve a consensus in its approach towards Minters, let alone Marketers. See Comm’rs Hester M. Peirce & Mark T. Uyeda, *Collecting Enforcement Actions: Statement on Stoner Cats 2, LLC*, SEC (Sept. 13, 2023) (“We respectfully dissent from the Commission’s second non-fungible token (NFT) settlement, as we did from the first.”).

²²¹ See Complaint at 1, *SEC v. Ripple Labs, Inc.*, No. 1:20-cv-10832-AT-SN (Dec. 2020); Press Release, SEC, *SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering* (Dec. 2020). The *Ripple* case, universally regarded as crucial to the SEC’s assertion of broad *Howey* Test application, proceeded on a theory used routinely by the SEC which alleges that unregistered digital coins equated to investment contracts because the offeror pooled proceeds and promised profits based upon the offeror’s efforts. See also Complaint at 1, *SEC v. LBRY, Inc.*, No. 1:21-cv-00260 (D.N.H. Mar. 2021); Ekta Mourya, *SEC v. Ripple Lawsuit Update: Remittance Network Ripple Scores Another Small Win in Court*, FXSTREET (Dec. 22, 2022, 7:22 PM), https://www.fxstreet.com/cryptocurrencies/news/sec-v-ripple-lawsuit-update-remittance-network-ripple-scores-another-small-win-in-court-case-202212220628 [https://perma.cc/HKS6-VUSQ]. The *Ripple* decision of mid-2023 evoked loud criticism for its prolonging of the *Howey* debate. See Crystal Kim, *Judge Splits the Difference in SEC v. Ripple Decision*, AXIOS (July 13, 2023), https://www.axios.com/2023/07/13/sec-ripple-decision [https://perma.cc/4UYL-JPEP].

²²² See Order, *SEC v. Ripple Labs*, No. 1:20-cv-10832-AT-SN (S.D.N.Y. July 14, 2023). Further, a pointed SEC settlement weeks later involving an issuer of NFTs evoked strong dissent from two SEC Commissioners, who stated their

Finally, a primary challenge in overlaying securities law lies in the tendency for securities regulations to turn a blind eye to sophisticated buyers.²²³ Indeed, whole bodies of precedent have grown around exemptions from securities regulation intended to keep the securities laws focused upon sheepish victims (as opposed to the well-heeled).²²⁴ Simply put, it gains little to initially require registration of all NFTs as securities if appreciable duties of registration can be nullified by exemptions in cases of offerings aimed at the affluent.²²⁵

Most importantly, the fundamental issue of whether the SEC *should* assert jurisdiction over digital products has not been resolved despite nearly a decade debate.²²⁶ Strikingly, one of the five Commissioners of that intrepid agency has consistently lobbied against such exercises and extensions of jurisdiction, contributing in part to the continuing stalemate.²²⁷ Finally, the application of SEC jurisdiction would place the costly and timely burden of registration of NFTs upon the Minters,²²⁸ the parties least culpable in the status quo structuring of the NFT market.²²⁹

fear that “any attempt to use this enforcement action as precedent [will be] fraught with difficulty.” Comm’rs. Hester M. Peirce & Mark T. Uyeda, *NFTs and the SEC: Statement on Impact Theory, LLC*, SEC (Aug. 28, 2023).

²²³ See Andrew Vollmer, *Abandon the Concept of Accredited Investors in Private Securities Offerings*, 49 SEC. REGUL. L. J. 5 (2021).

²²⁴ See, e.g., Regulation D, SEC Rule 501, 17 C.F.R. § 230.501(a)(2022) (defining “accredited investors”—primarily based upon them holding more than \$1 million in assets—for the purpose of exempting securities issuers from the obligation to deliver written information on an offering of securities).

²²⁵ *Id.*

²²⁶ Comm’r Caroline Crenshaw, *Digital Asset Securities—Common Goals and a Bridge to Better Outcomes*, SEC (Oct. 12, 2021).

²²⁷ Cheyenne Ligon, *SEC Commissioner Hester Pierce Says Washington Doesn’t Need a New Crypto Regulator*, COINDESK (Dec. 30, 2021, 11:30 AM), <https://www.coindesk.com/policy/2021/12/30/sec-commissioner-hester-peirce-says-washington-doesnt-need-a-new-crypto-regulator/> [<https://perma.cc/QQR2-CFK9>] (highlighting that the Commission may mistakenly attempt to assert authority over NFTs).

²²⁸ 15 U.S.C. § 77e.

²²⁹ Alexander C. Drylewski & Stuart D. Levi, *Navigating the Uncharted Legal Territory of NFTs*, SKADDEN (Sept. 22, 2022), <https://www.skadden.com/insights/publications/2022/09/the-informed-board/navigating-the-uncharted-legal-territory-of-nfts> [<https://perma.cc/L2Z3-F6GZ>].

C. The Commodities Regulation Fix

Separately, the Commodity Futures Trading Commission, may facially present a solid choice to regulate the market for NFTs.²³⁰ Noteworthy here is the 2015 *Cabbage Tech* decision, in which a federal judge declared Bitcoin to be a commodity, and thus squarely within the jurisdictional reach of the CFTC.²³¹ However, the agency empowered as the chief commodities regulator has moved slowly to pursue further enforcement action targeting digital assets.²³² The agency has instead adopted a “wait and see” approach, emphasizing information gathering while embracing the tone and message crypto entrepreneurs rather than the concern of regulators and victims.²³³

More pointedly, the CFTC has come under fire for its cozy relationship with Sam Bankman-Fried, a notorious crypto industry leader, casting doubt upon its independence.²³⁴ Namely, as FTX’s collapse has played out, critics have openly questioned

²³⁰ Comm’r Caroline D. Pham, *Keynote Address by Commissioner Caroline D. Pham at the 18th NASDAQ Technology of the Future Conference—Reimagining Tomorrow’s Markets*, CFTC (June 28, 2022).

²³¹ CFTC v. McDonnell, 287 F. Supp. 3d 213, 217 (E.D.N.Y. 2018).

²³² *Digital Assets Primer*, CFTC, 24 (Dec. 2020), <https://www.cftc.gov/digitalassets/index.htm> [<https://perma.cc/T93K-X4LY>].

²³³ See, e.g., Pham, *supra* note 230 (“Some foresee the Metaverse, Web3, crypto assets, non-fungible tokens (NFTs), and portable digital identity and ownership enabling a seamless convergence of our physical and digital lives—creating unified, virtual communities where people can work, play, relax, transact, and socialize.”).

²³⁴ Tory Newmyer & Peter Whoriskey, *Why the CFTC was Sam Bankman-Fried’s Favorite Washington Agency*, WASH. POST (Nov. 28, 2022, 6:00 AM), <https://www.washingtonpost.com/business/2022/11/28/sam-bankman-fried-ftx-cftc/> [<https://perma.cc/PK4K-WH3U>] (“[T]he capital is looking anew at [Bankman-Fried’s] courtship of Washington and why he sought to build ties with [CFTC Chairman] Benham and the agency he leads”); Chelsey Cox, *Former FTX CEO Bankman-Fried Met With Top Officials at the CFTC More Than 10 Times Over the Past 14 Months, Says Chairman Rostin Benham*, CNBC (Dec. 1, 2022, 3:00 PM), <https://www.cnbc.com/2022/12/01/former-ftx-ceo-sam-bankman-fried-met-multiple-times-with-cftc.html> [<https://perma.cc/BCD7-TDFT>]; Gamza Khanzadaev, *Ripple Rival Stellar Becomes CFTC’s Blockchain and Digital Assets Advisor*, U.TODAY (Jan. 20, 2023, 1:18 PM), <https://u.today/ripple-rival-stellar-becomes-cftcs-blockchain-and-digital-assets-advisor> [<https://perma.cc/7Q6F-5YUX>].

whether the agency is too willing to engage with the crypto industry leaders and its eager lobbyists.²³⁵

Further, when it comes to crypto, the CFTC has delayed both rule-making and precise admonition.²³⁶ Also noteworthy is that the CFTC enabling statute expressly states that the CFTC's reach must not “supersede or limit” SEC jurisdiction.²³⁷ Simply put, the CFTC may need the SEC to engage in rule-making first. Consequentially, while occasional CFTC headlines trumpet fraud cases against Bitcoin titans,²³⁸ the agency appears to carve an identity focused upon a lighter touch for the modern “investor”²³⁹—such distinction would leave unprotected the royalty seekers and other victims of under-competitive and exploitative NFT marketers.²⁴⁰

D. The Criminal Law Fix

As the tales of bold cybertheft proliferate, there is undoubtedly the temptation to push any NFT problem under the watchful eyes and into the arresting hands of the mightiest criminal regulator.²⁴¹ Such cause gains luster as tales of crime

²³⁵ Michelle Price, *Analysis: U.S. Crypto Lobbyists Court Democrats in Fresh Legislative Push*, REUTERS (July 10, 2023, 6:20 AM), <https://www.reuters.com/technology/us-crypto-lobbyists-court-democrats-fresh-legislative-push-2023-07-10/> [<https://perma.cc/GCU2-YXQA>].

²³⁶ David Hundeyin, *CFTC Does Not Regulate Retail Crypto Markets: Chairman Chris Giancarlo*, CCN (Mar. 4, 2021, 4:05 PM), <https://www.ccn.com/cftc-does-not-regulate-retail-crypto-markets-chairman-chris-giancarlo/> [<https://perma.cc/Q43K-SLH7>].

²³⁷ 7 U.S.C. § 2(a)(1)(A).

²³⁸ See, e.g., Robert Crea et al., *Cryptocurrency Exchange Traded Products: If, When and How*, 25 INV. LAW. 5, 9 (2018).

²³⁹ Alys Key, *CFTC Commissioner Wants Two-Tier Crypto Rules for Retail Investors and Millionaires*, DECRYPT (Dec. 1, 2022), <https://decrypt.co/116141/cftc-commissioner-wants-two-tier-crypto-rules-retail-investors-millionaires> [<https://perma.cc/H7Y4-84EJ>].

²⁴⁰ See BUSCH, *supra* note 167, at 18.

²⁴¹ Gordon et al., *supra* note 194; *DOJ Asks Congress for Tools to Limit NFT Money-Laundering Risk*, PYMNTS (Sept. 22, 2022), <https://www.pymnts.com/news/security-and-risk/2022/doj-asks-congress-for-tools-to-limit-nft-money-laundering-risk/> [<https://perma.cc/X6RR-CKBZ>].

abound in the wild WEB 3.0 world.²⁴² Moreover, sometimes NFTs are simply created and marketed to traders, with the minters never having the intention of sustaining the promoted project, a fraudulent scheme known in the industry as a “rug pull.”²⁴³ And, to their credit, federal prosecutors have responded.²⁴⁴

More specifically, the Department of Justice has acted upon evidence of outright deception enabled by the mere utterance of “NFTs”. Such actions readily respond to violations of the mail and wire fraud statutes.²⁴⁵ As summarized by a U.S. Attorney in a publicized 2022 case:

NFTs have been around for several years, but recently mainstream interest has skyrocketed. Where there is money to be made, fraudsters will look for ways to steal it. As we allege, [defendants] promised investors the benefits of the Frosties NFTs, but when it sold out, they pulled the rug out from under the victims, almost immediately shutting down the website and transferring the money. Our job as prosecutors and law enforcement is to protect investors from swindlers looking for a payday.²⁴⁶

²⁴² Kate Irwin, *Nike’s RTFKT COO Loses His NFTs in Massive ‘Hack’*, DECRYPT (Jan. 3, 2023), <https://decrypt.co/118318/nikes-rtfkt-coo-loses-his-nfts-in-massive-hack> [<https://perma.cc/BL2C-7YW6>] (reporting how the company officer “was hacked by a ‘clever phisher’” who poached his NFT).

²⁴³ See Jorge Jimenez, *‘Mutant Ape Planet’ NFT Developer Accused of \$2.9 Million Rug Pull*, PC GAMER (Jan. 9, 2023), <https://www.pcgamer.com/mutant-ape-planet-nft-developer-accused-of-dollar29-million-rug-pull/> [<https://perma.cc/HFS3-BJ2M>].

²⁴⁴ Press Release, U.S. Dep’t of Just., Justice Department Announces Enforcement Action Charging Six Individuals with Cryptocurrency Fraud Offenses in Cases Involving Over \$100 Million in Intended Losses (June 30, 2022), <https://www.justice.gov/opa/pr/justice-department-announces-enforcement-action-charging-six-individuals-cryptocurrency-fraud> [<https://perma.cc/638T-WTEL>]; Press Release, U.S. Att’y’s Off., E.D.N.Y., Non-Fungible Token (NFT) Developer Charged in Multi-Million Dollar International Fraud Scheme (Jan. 5, 2023), <https://www.justice.gov/usao-edny/pr/non-fungible-token-nft-developer-charged-multi-million-dollar-international-fraud> [<https://perma.cc/X2HN-W52G>].

²⁴⁵ 18 U.S.C. §§ 1343, 1341.

²⁴⁶ See Press Release, U.S. Att’y’s Off., S.D.N.Y., Two Defendants Charged In Non-Fungible Token (“NFT”) Fraud And Money Laundering Scheme (Mar. 24, 2022), <https://www.justice.gov/usao-sdny/pr/two-defendants-charged-non-fungible-token-nft-fraud-and-money-laundering-scheme-0> [<https://perma.cc/7GK7-RFL8>] (describing action based upon, among other things, the wire fraud statute).

Yet, the criminal law response is, at best, derivative; DOJ cases—as impressive as they may be—rely upon generalized statutes fashioned long ago, which are only starting to be re-evaluated in the context of digital assets.²⁴⁷ Any attempt to expand such already broad reach relies upon notions of particularized fraud reworked by federal administrative agencies.²⁴⁸ Thus, the comfort gleaned from the U.S. Attorney adapting to confront fraud and theft in yet another pocket of cyberspace is a cautionary reminder that government agency appointees need to be the pioneers in maintaining order in any cyber field.²⁴⁹

Further, criminal enforcement—while persistently capturing national headlines—is by necessity spread over areas of drug-related offenses, violent crimes, unique violations, and white-collar transgressions; such a limitless scope ensures that no single market or goal will be routinely surveyed.²⁵⁰ Of greatest

²⁴⁷ Exec. Order No. 14067, 87 Fed. Reg. 14143 (Mar. 9, 2022).

²⁴⁸ See, e.g., Press Release, U.S. Att’y’s Off., S.D.N.Y., Three Charged in First Ever Cryptocurrency Insider Trading Tipping Scheme (July 21, 2022), <https://www.justice.gov/usao-sdny/pr/three-charged-first-ever-cryptocurrency-insider-trading-tipping-scheme> [<https://perma.cc/XP74-DMYY>] (alleging insider trading by the executives of a cryptocurrency exchange based upon, inter alia, the untested application of SEC Rule 10b-5). One of the named defendants pled guilty and was sentenced to 10 months of incarceration. Luc Cohen, *Ex-Coinbase Manager’s Brother Sentenced to 10 Months in Insider Trading Case*, REUTERS (Jan. 10, 2023, 2:16 PM), <https://www.reuters.com/legal/ex-coinbase-managers-brother-sentenced-10-months-insider-trading-case-2023-01-10/> [<https://perma.cc/JWX6-G7NW>]. Another defendant was found guilty after trial upon the same theory. Tanaya Macheel et al., *Bitcoin Rises, and Ex-OpenSea Manager Found Guilty in NFT Insider Trading Case: CNBC Crypto World*, CNBC (May 4, 2023, 3:00 PM), <https://www.cnbc.com/video/2023/05/04/bitcoin-rises-ex-opensea-manager-found-guilty-nft-insider-trading-cnbc-crypto-world.html> [<https://perma.cc/4JGE-QKR5>]; Tom Blackstone, *Jury Convicts Former OpenSea Manager in NFT-Insider Trading Case*, COINTELEGRAPH (May 4, 2023), <https://cointelegraph.com/news/jury-convicts-former-open-sea-manager-in-nft-insider-trading-case> [<https://perma.cc/G6U8-WUV2>].

²⁴⁹ U.S. Dep’t of Just., *The Report of the Attorney General Pursuant to Section 5(B)(III) of Executive Order 14067: The Role of Law Enforcement in Detecting, Investigating, and Prosecuting Criminal Activity Related to Digital Assets*, 5 (2022), <https://www.justice.gov/d9/2022-12/The%20Report%20of%20the%20Attorney%20General%20Pursuant%20to%20Section.pdf> [<https://perma.cc/4UKZ-UR3U>].

²⁵⁰ U.S. Dep’t of Just., *Just. Manual* § 9-27.230 (2023).

significance, the Biden administration has implemented a policy emphasizing both lenity and conservation of resources via reliance upon administrative and other alternatives.²⁵¹

E. The State Law Fix

The 2022 version of the Uniform Commercial Code (“UCC”) potentially addresses one of the problems of the status quo NFT market.²⁵² Namely, proposed Section 12-105 provides the means by which ownership of NFT transactions is legitimized.²⁵³ The influential Code has sought to proactively address commerce in digital assets and has responded quickly to the budding industry.²⁵⁴

²⁵¹ The Garland Memo states in relevant part as follows:

In determining whether adequate alternatives to federal prosecution are available, the prosecutor should consider whether the person is subject to effective prosecution by state, local, territorial, or Tribal authorities, [Justice department Manual cite omitted], or whether there exists an adequate non-criminal alternative to prosecution The latter may include federal or state civil or administrative remedies, or pretrial diversion Every district should develop an appropriate pretrial diversion policy.

Merrick B. Garland, Att’y Gen., Memorandum for All Federal Prosecutors, 2 (Dec. 16, 2022), <https://www.justice.gov/media/1265326/dl?inline> [<https://perma.cc/33SZ-4YEJ>].

²⁵² Joseph Cioffi et al., *Perfecting Digital Assets: There’s No Control Without Power*, REUTERS (May 19, 2023, 11:17 AM), <https://www.reuters.com/legal/transactional/perfecting-digital-assets-theres-no-control-without-power-2023-05-19/> [<https://perma.cc/7S25-2HY9>].

²⁵³ Eric S. Rein, *The UCC’s Proposed Article 12: Controllable Electronic Records*, HMB LEGAL COUNSEL (Oct. 11, 2022), <https://www.hmblaw.com/blog/the-uccs-proposed-article-12-controllable-electronic-records/> [<https://perma.cc/UQ8K-7B7B>].

²⁵⁴ See *NFTs and Other Digital Assets: States Begin to Adopt UCC Amendments That Will Enable Transactions in Developing Technologies*, COVINGTON & BURLING LLP (Nov. 1, 2022), <https://www.cov.com/en/news-and-insights/insights/2022/11/nfts-and-other-digital-assets-states-begin-to-adopt-ucc-amendments-that-will-enable-transactions-in-developing-technologies> [<https://perma.cc/U3MW-792P>] (“Recognizing the imperfect fit between existing law [sic] and the new technologies, the Uniform Commercial Code . . . has been updated to expressly address transactions involving digital assets like NFTs. These changes are expected to provide greater certainty and enable the growth of commercial transactions involving digital assets.”).

Indeed, guidance for the states is necessary, as many local governments have already recognized the marketing potential of a soft touch for digital asset transactions.²⁵⁵ However, the proposed UCC amendment—which does not expressly mention NFTs²⁵⁶ or the digital record of a transaction (e.g., a digital wallet in sole possession of a holder)²⁵⁷—creates more questions than it answers. As the bankruptcies of mid-2022 involving “crypto lenders” have demonstrated, custody of a digital asset held in a digital wallet is in the eyes of the beholder.²⁵⁸ The amended UCC fails to remedy the deleterious conflicts between Minter and Marketer implicated in these custodial disputes.²⁵⁹ Additionally, state regulators, although occasionally obtaining impressive outcomes, are continually beset by lack of resources and often compelled to separate jurisdictions to join forces.²⁶⁰

Overall, whether it be due to the difficulties in pinpointing NFT ownership or otherwise, the scorecard of potential regulators is actually thin.²⁶¹ The SEC’s intervention—premised upon litigation—is somewhat unpredictable and glaringly resisted from

²⁵⁵ See David Yaffe-Bellany, *The Rise of the Crypto Mayors*, N.Y. TIMES (Jan. 25, 2022), <https://www.nytimes.com/2022/01/25/business/crypto-mayors.html> [<https://perma.cc/7HHS-LZJY>].

²⁵⁶ In fact, proposed UCC Section 12-105 arguably excludes NFTs by referencing exclusive control of “virtual currency.” Rein, *supra* note 253.

²⁵⁷ See *id.*

²⁵⁸ See Jessica Liou & John Marinelli, *Crypto Bankruptcies Shed Light on Who Owns Assets for Recovery*, BLOOMBERG LAW (Jan. 27, 2023), <https://news.bloomberglaw.com/us-law-week/crypto-bankruptcies-shed-light-on-who-owns-assets-for-recovery> [<https://perma.cc/99DV-8QNL>].

²⁵⁹ See *id.*

²⁶⁰ See, e.g., Paige Tortorelli et al., *Five U.S. States Order Halt to NFT Sales by Metaverse Casino With Russia Ties*, CNBC (May 11, 2022, 10:58 AM), <https://www.cnbc.com/2022/05/11/five-us-states-order-halt-to-nft-sales-by-metaverse-casino-with-alleged-russia-ties.html> [<https://perma.cc/4FQ4-HDML>] (noting both a steep learning curve for state regulators and the concomitant expectation that such authorities will continue to evolve their approach to align with that of their federal counterparts).

²⁶¹ See Houser & Holden, *supra* note 35, at 938–39; see also *The Regulatory Considerations of NFTs in the United States*, COINTELEGRAPH, <https://cointelgraph.com/learn/the-regulatory-considerations-of-nfts-in-the-united-states> [<https://perma.cc/C9HB-J3NT>].

within.²⁶² The CFTC is focused on serving a technology-driven market.²⁶³ The DOJ does what it can when it can, and the states seek further guidance from federal agencies.²⁶⁴ The result, at times, is an NFT market that even established businesses crave to join and then leave.²⁶⁵ Such reality means that the largest and most reputable NFT Minters are incentivized to enter the maze, find the game not worth the candle, and depart.²⁶⁶

Fraud and deception permeate a vast NFT market.²⁶⁷ The heavy lifting for Marketers, it would thus appear, would be prioritizing transparency on their marketplaces to entice reputable Minters to join forums at reasonable cost and with an expectation of fairness.²⁶⁸ Concomitantly, the heavy lifting for the regulators

²⁶² Alison Frankel, *Sorry Crypto World, but SEC Isn't Backing Down on Regulation by Enforcement*, REUTERS (Feb. 8, 2023, 4:59 PM), <https://www.reuters.com/legal/sorry-crypto-world-sec-isnt-backing-down-regulation-by-enforcement-2023-02-08/> [<https://perma.cc/B39R-Y952>].

²⁶³ Press Release, CFTC, CFTC Division of Enforcement Creates Two New Task Forces (June 29, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8736-23> [<https://perma.cc/8X22-EUWH>]; Press Release, CFTC, Chairman Benham Announces Technology and Customer Outreach Reorganization (July 26, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8563-22> [<https://perma.cc/CWQ3-W89S>].

²⁶⁴ See Castro, *supra* note 7, at 14–19.

²⁶⁵ Ian Thomas, *Fanatics is Divesting its 60% Stake in NFT Company Candy Digital*, CNBC (Jan. 4, 2023, 4:18 PM), <https://www.cnbc.com/2023/01/04/fanatics-is-divesting-its-60percent-stake-in-nft-company-candy-digital.html> [<https://perma.cc/EKF9-3MT4>].

²⁶⁶ Jay Peters, *Meta Gives Up on NFTs for Facebook and Instagram*, VERGE (Mar. 13, 2023, 6:03 PM), <https://www.theverge.com/2023/3/13/23638572/instagram-nft-meta-facebook-quits-digital-collectibles> [<https://perma.cc/5AN3-QWMJ>]; *CNN Cancels NFT Project: A Look at the Other Shelved NFT Collections in Recent Years*, CNBC TV (Oct. 11, 2022, 4:17 PM), <https://www.cnbc.com/cryptocurrency/cnn-cancels-nft-project-a-look-at-the-other-shelved-nft-collections-in-recent-years-14916861.htm> [<https://perma.cc/W7XA-Y2Z6>].

²⁶⁷ David Yaffe-Bellany, *Theft, Fraud and Lawsuits at the World's Biggest NFT Marketplace*, N.Y. TIMES (June 6, 2022), <https://www.nytimes.com/2022/06/06/technology/nft-opensea-theft-fraud.html> [<https://perma.cc/H2KR-ARGY>]; Jacklin Kwan, *An Artist Died. Then Thieves Made NFTs of Her Work*, WIRED (July 28, 2021, 6:00 AM), <https://www.wired.co.uk/article/nft-fraud-qinni-art> [<https://perma.cc/DN3S-XQYW>].

²⁶⁸ Naveen Joshi, *7 Risks Investors Need to Know Before Jumping Head-first Into the NFT Bandwagon*, FORBES (Apr. 24, 2022, 8:30 PM), <https://www.forbes.com/sites/naveenjoshi/2022/04/24/7-risks-investors-need-to-know-be>

would appear to be overseeing Marketers across the NFT industry while curtailing their monopolistic impulses.²⁶⁹ One such agency, the FTC, is poised for such seminal work, for a strong variety of rationales.²⁷⁰

III. PROPOSED RESOLUTION: ACTIONS BY THE STORIED AGENCY WITH THE WILL AND THE TOOLS

The undeniable inclination is to wait until the NFT bonanza reaches epic proportions, thus triggering a response from Congress.²⁷¹ Indeed, such eager lethargy has characterized the nation's approach to cryptocurrency since 2015.²⁷² Further, the pro-crypto lobby has proven to be formidably equipped to stall any uniform, federal response to the oversight of digital assetization.²⁷³ There is no reason to believe that Congress could adopt statutes thwarting NFT practices without encountering similar deeply pocketed and entrenched opposition.²⁷⁴ It is readily

fore-jumping-headfirst-into-the-nft-bandwagon/?sh=515b235e489d [https://perma.cc/44Q7-GG85]; Joanna Glasner, *NFT Startups Are Not So Alluring to Investors Lately*, CRUNCHBASE (Nov. 18, 2022), https://news.crunchbase.com/web3/nft-startups-investment-down-yuga-labs-opensea/ [https://perma.cc/2BQX-3X9V]; Leor Shimron, *NFT Market Meltdown: How Can Investors Best Position Themselves?*, FORBES (July 11, 2023, 8:03 AM), https://www.forbes.com/sites/leorshimron/2023/07/11/nft-market-meltdown-how-can-investors-best-position-themselves/?sh=41d00a265821 [https://perma.cc/6YK7-GKFB].

²⁶⁹ See *NFT's (Non-Fungible Tokens)—Risks, Regulation and the Law*, RAHMAN RAVELLI, https://www.rahmanravelli.co.uk/expertise/nfts-non-fungible-tokens-risks-regulation-and-the-law/ [https://perma.cc/PDM4-8TRH].

²⁷⁰ See BUSCH, *supra* note 167, at 12–13.

²⁷¹ *Id.* at 2.

²⁷² See generally J. Scott Colesanti, *Trotting Out the White Horse: How the S.E.C. Can Handle Bitcoin's Threat to American Investors*, 65 SYRACUSE L. REV. 1, 7 (2015).

²⁷³ Cryptocurrency has long been subject to speculation as fodder for Congressional action, but no final measure has been adopted by the national legislature. See, e.g., Jason Brett, *Congress Has Now Introduced 32 Crypto and Blockchain Bills*, FORBES (Apr. 28, 2020, 12:03 AM), https://www.forbes.com/sites/jasonbrett/2020/04/28/congress-has-introduced-32-crypto-and-blockchain-bills-for-consideration-in-2019-2020/?sh=784af9e21d61 [https://perma.cc/SZ43-7PAE] (describing a variety of Bills largely aimed at shielding the industry from the SEC).

²⁷⁴ See Hailey Fuchs, *NFTs Move to Influence Congress, Even if Lawmakers have No Clue What They Are*, POLITICO (Jan. 5, 2022, 10:25 AM), https://

observed that the calls for the federal government to stay on the sidelines and watch WEB 3.0 grow have proven to be peculiarly varied and steadfast—even including academia in the lobbying efforts.²⁷⁵

And yet, the fact remains that billions of dollars and a million digital products are being actively herded into either a single or very short list of marketplaces.²⁷⁶ Those marketplaces are new, seemingly boundless, minimally understood, and growing in unchecked fashion.²⁷⁷ To the extent that marketplace data can be studied, it supports a de facto monopoly.²⁷⁸ For over a hundred years, one independent regulatory commission has been tasked with halting monopolies.²⁷⁹ Moreover, such agency's recent agenda is strikingly bold and activist.²⁸⁰

A. FTC: Tradition and Weapons

The Federal Trade Commission was created in 1914 at the reported insistence of President Woodrow Wilson.²⁸¹ Its enabling

www.politico.com/news/2022/01/05/fads-crypto-lobbying-politics-526538 [https://perma.cc/H23K-RFGU].

²⁷⁵ See Derek Andersen, *Crypto Lobbyists Up 180% Since 2018, With Andrew Yang Joining the Charge*, COINTELEGRAPH (Mar. 10, 2022), <https://cointelegraph.com/news/crypto-lobbyists-up-180-since-2018-with-andrew-yang-joining-the-charge> [https://perma.cc/4HQD-L85X].

²⁷⁶ See Matthieu Nadini et al., *Mapping the NFT Trade Revolution: Market Trends, Trade Networks, and Visual Features*, 11 SCIENTIFIC REP. 1, 2 (2021).

²⁷⁷ See *supra* notes 22–24 and accompanying text.

²⁷⁸ See BIXIN VENTURES, *The Road Ahead for the NFT Marketplaces*, MEDIUM (Dec. 15, 2022), <https://bixinventures.medium.com/the-road-ahead-for-the-nft-marketplaces-12b139a545a6> [https://perma.cc/DCW6-RSMS]; see also James J. Bernstein, *Consensus's Consolidation Conundrum*, 18 WASH. J.L. TECH. & ARTS 25, 35, n.79 (2023).

²⁷⁹ See Alexandra Twin, *Antitrust Laws: What They Are, How They Work, Major Examples*, INVESTOPEDIA, <https://www.investopedia.com/terms/a/antitrust.asp> [https://perma.cc/SJD8-ENNN] (updated Jan. 31, 2023).

²⁸⁰ See Bernstein, *supra* note 278; see also Olga V. Mack, *What Do You Need to Know When It Comes to NFTs and the Law?*, ABOVE THE LAW (July 18, 2022), <https://abovethelaw.com/legal-innovation-center/2022/07/18/what-do-you-need-to-know-when-it-comes-to-nfts-and-the-law/> [https://perma.cc/2PKQ-RDCN]; FTC, STRATEGIC PLAN FOR FISCAL YEARS 2022–2026 [hereinafter FTC, STRATEGIC PLAN], https://www.ftc.gov/system/files/ftc_gov/pdf/fy-2022-2026-ftc-strategic-plan.pdf [https://perma.cc/U2FC-QKBR].

²⁸¹ See Marc Davis, *A Short History of the US Federal Trade Commission (FTC)*, INVESTOPEDIA (October 31, 2022), <https://www.investopedia.com/articles/financial-theory/10/the-us-federal-trade-commission.asp> [https://perma.cc/

Act authorizes actions both in federal court and of an administrative nature.²⁸² The Commission opened its doors in 1915; it has long advertised its dual mission to protect consumers (“Consumer Mission”) and to promote fair competition (“Fair Competition Mission;” collectively, “the Missions”).²⁸³

Similar to other New Deal creations, five Commissioners govern the agency, with no more than three from either of the political parties.²⁸⁴ One could theorize that the agency was designed for consistency; since its creation, Commissioners have been appointed to seven-year terms; by comparison, the SEC Commissioners serve five-year terms.²⁸⁵ Since 1989, only 27 people have served as FTC Commissioners.²⁸⁶

At year-end of 2022, the FTC boasted 13 offices and approximately 1,100 employees.²⁸⁷ In recent times, the agency has admirably wed itself to a five-year plan that expressly foresees issues with digital products.²⁸⁸ In terms of rule-making, the FTC

/DCT8-WU2B] (“Since its establishment in 1914 by President Woodrow Wilson, the Federal Trade Commission (FTC) has been protecting consumers, investors and businesses from anti-competitive practices such as monopolies, monopolistic mergers, price-fixing, bid-rigging, fraudulent and or deceptive advertising, and unfounded product claims.”).

²⁸² 15 U.S.C. § 45 (authorizing an action); 15 U.S.C. § 53(b) (authorizing damages claims); notably, the Supreme Court held in 2021 that the FTC cannot seek restitution or damages in federal court without first succeeding internally in the administrative hearing. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1347–48, 1352 (2021). *See also* Thomas A. Donovan, *FTC Act Gives No Authority to Bypass Cease-and-Desist Orders*, NAT’L L. REV. (May 11, 2021), <https://www.natlawreview.com/article/supreme-court-holds-ftc-act-gives-no-authority-to-bypass-administrative-cease-and> [<https://perma.cc/EA4X-L4P3>].

²⁸³ *See* FTC, *Our History*, <https://www.ftc.gov/about-ftc/history> [<https://perma.cc/SR8H-PS23>].

²⁸⁴ *See* FTC, *Former Commissioners*, <https://www.ftc.gov/about-ftc/commissioners-staff/former-commissioners> [<https://perma.cc/3VWN-ASZB>].

²⁸⁵ *See id.*

²⁸⁶ *See id.*

²⁸⁷ *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, *Federal Trade Commission*, <https://www.eeoc.gov/federal-sector/federal-trade-commission-ftc-0> [<https://perma.cc/GEM4-TXWB>].

²⁸⁸ *See* FTC, STRATEGIC PLAN, *supra* note 280. (Effective since 1946, the Administrative Procedure Act (“APA”) sets minimal standards for federal agencies); 5 U.S.C. ch. 5, subch. I § 500 et seq. (2018). For example, Section 553 (which governs rule-making), mandates that agencies proposing new

would appear as active a “legislative” body as any party could imagine.²⁸⁹ While currently possessing a modest budget of approximately \$430 million,²⁹⁰ the agency was selected by the White House in 2021 to partner with the DOJ in combating unfair labor practices and to stir employment.²⁹¹

The White House directive was not ignored, and in late 2022, the FTC shocked businesses, announcing its intention to ban employee “non-compete clauses” nationally.²⁹² The unprecedented move from the seemingly fearless agency, if brought to fruition, would affect an estimated 30 million employees.²⁹³

B. Weapon of Choice: Section 5 of the Enabling Act

The FTC’s enabling statute created options not provided by the prior antitrust laws²⁹⁴:

Unlike the Sherman and Clayton acts, the [Federal Trade Commission Act] allows an accused party to enter into a consent agreement with the FTC in which the party does not admit guilt but agrees never to engage in the questionable behaviour (sic) in the future. The [Act] also gives the FTC the

regulations “notice” the public at large and provide for at least a 30-day “comment period” for informal responses from anyone.

²⁸⁹ Since 2019, the FTC has published approximately 250 rules for Comment, and drawn nearly 100,000 Comments in response. See REGULATIONS.GOV, <https://www.regulations.gov/search/docket> [<https://perma.cc/WB3Y-H56M>].

²⁹⁰ See FTC, BUDGET & STRATEGY, <http://www.ftc.gov/about-ftc/budget-strategy> [<https://perma.cc/BJE9-MQHJ>].

²⁹¹ White House, Statement, FACT SHEET: Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> [<https://perma.cc/L43Y-DRWT>]. That Order also called upon the FTC “to enforce the antitrust laws vigorously” amidst recognition that “the law allows them to challenge prior bad mergers that past Administrations did not previously challenge . . .” *Id.*

²⁹² See FTC, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition> [<https://perma.cc/TJ9U-D9MF>].

²⁹³ See Jessica Dickler, *Proposed Ban on Noncompete Clauses Could Affect Every Business in the Country,* Says Attorney—What That Means for You, CNBC (Jan. 11, 2023, 10:29 AM), <https://www.cnbc.com/2023/01/11/what-the-proposed-ban-on-noncompete-clauses-means-for-you.html#> [<https://perma.cc/ZS7W-E9WP>].

²⁹⁴ See 15 U.S.C. §§ 41–58.

power to issue cease-and-desist orders, which are enforceable by petition to a U.S. appellate court. Failure by a defendant party to act in accordance with the consent decree or cease-and-desist order can result in a finding of contempt and criminal referral to the U.S. Department of Justice . . .²⁹⁵

Noteworthy in this regard is the FTC's effectively unlimited statutory authority to investigate any person or corporation.²⁹⁶ A possible "golden age" for the government's regulation of monopolies may have manifested between 1950–1980.²⁹⁷ As these seminal cases evidence, the regulation of anti-competitive practices in America is divided between enforcement by the DOJ,²⁹⁸ enforcement by private citizens,²⁹⁹ and enforcement by the FTC.³⁰⁰ Nonetheless, in the past two years, the FTC has proven to be an active regulator of anti-competitive behavior all by itself.³⁰¹

C. Present State

In 2023, it is readily apparent that the FTC is dauntless in creatively pursuing unpopular wrongdoers.³⁰² To be sure, the

²⁹⁵ *Federal Trade Commission Act*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/money/topic/Federal-Trade-Commission-Act> [<https://perma.cc/LW2C-5REF>].

²⁹⁶ 15 U.S.C. § 46(a).

²⁹⁷ *See, e.g.*, *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1344 (D.D.C. 1981) (refusing to dismiss the government's landmark case while utilizing a standard examining for (1) the possession of monopoly power and (2) the maintenance of that power). Previously, the DOJ had succeeded in charging Standard Oil based upon a showing that the Sherman Act was violated where a de facto monopoly resulted due to ownership of "a substantial number of outlets and a substantial amount of products, whether considered comparatively or not." *Standard Oil Co. of California v. United States*, 337 U.S. 293, 298 (1949).

²⁹⁸ *See Standard Oil Co.*, 337 U.S. at 294.

²⁹⁹ *See, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2147 (2021) (striking down a number of NCAA rules on college student "amateurism").

³⁰⁰ *See* FTC, ENFORCEMENT, <https://www.ftc.gov/enforcement> [<https://perma.cc/W9EY-VJBR>].

³⁰¹ *See* FTC, FTC RESTORES RIGOROUS ENFORCEMENT OF LAW BANNING UNFAIR METHODS OF COMPETITION (Nov. 10, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition> [<https://perma.cc/S4LW-TJ5Z>].

³⁰² *See* FTC, FTC BUREAU OF CONSUMER PROTECTION ISSUES CRIMINAL LIAISON UNIT REPORT DETAILING EFFORTS TO ENSURE WRONGDOERS FACE

FTC can readily settle for undisclosed fees by online merchants under its Consumer Mission.³⁰³ Whatever the precise charge, the FTC flies where angels dare not tread.³⁰⁴ More practically, the FTC uses its Section 5 authority to advance both Missions, matching case facts to the statutory standards as the need may arise.³⁰⁵ Simply put, the FTC can effortlessly intertwine its Consumer and Competition Missions to address alarming facts; the court (either internal or external) is then asked to find “uncompetitive practices” in fulfillment of the statute.³⁰⁶ Such methodology avoids the requirements of matching antitrust behavior to the dictates of specific rules.³⁰⁷

An emblematic example is the November 2022 case of DK Automation.³⁰⁸ There, the agency charged promoters of passive, online Amazon business ventures with numerous Section 5 violations.³⁰⁹ One charge (“Count Two”) simply alleged “unfairness”

ACCOUNTABILITY (Jan. 30, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftcs-bureau-consumer-protection-issues-criminal-liaison-unit-report-detailing-efforts-ensure> [<https://perma.cc/LH3C-GF7C>].

³⁰³ See, e.g., Complaint at 23, *FTC v. LendingClub Corp.* (N.D. Cal. April 25, 2018) (No. 3:18-cv-02454), https://www.ftc.gov/system/files/documents/cases/lending_club_complaint.pdf [<https://perma.cc/BYF2-D486>]:

Although Defendant tells consumers that its loans contain “No hidden fees,” Defendant nevertheless charges consumers an up-front fee that is not clearly and conspicuously disclosed. This fee is calculated as a percentage—on average, approximately 5 percent—of the consumer’s requested loan amount, and often amounts to more than a thousand dollars.

³⁰⁴ See Rachel S. Brass et al., *FTC Announces Broader Vision Of Its Section 5 Authority To Address Unfair Methods Of Competition*, GIBSON DUNN (Nov. 14, 2022), <https://www.gibsondunn.com/wp-content/uploads/2022/11/ftc-announces-broader-vision-of-its-section-5-authority-to-address-unfair-methods-of-competition2.pdf> [<https://perma.cc/M2TK-82DY>].

³⁰⁵ See *id.*

³⁰⁶ See *id.*

³⁰⁷ Other agencies are not so unencumbered. The SEC, for example, similarly enabled by a statute promising “fairness” and outlawing “fraud,” needs to satisfy the evolving, common law elements of Rule 10b-5 to prove insider trading in most cases. See Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *United States v. O’Hagan*, 521 U.S. 642, 650–52 (1997).

³⁰⁸ See generally Complaint, *FTC v. DK Automation* (S.D. Fla. 2022) (No. 1:22-cv-23760), https://www.ftc.gov/system/files/ftc_gov/pdf/DK-Automation-Complaint.pdf [<https://perma.cc/UPN3-CZMC>].

³⁰⁹ *Id.* at 2.

to both consumers and competition.³¹⁰ A larger survey of litigation initiated since 2020 readily earns the agency the label of a successfully active enforcer of both of the Missions:

- In 2020, the agency used its “anti-monopoly” power (i.e., Fair Competition Mission) to ensnare perhaps the most hated entrepreneur in America when it successfully charged drug company CEO Martin Shkreli.³¹¹
- In 2021, the FTC sued Meta (i.e., the new incarnation of Facebook) for uncompetitive behavior. In its Complaint, the FTC made use of the Sherman Act to seek the halt of, inter alia, business practices at the popular social media platform. That Complaint highlighted user constraints implemented by Facebook in efforts to “deter and suppress competitive threats” as delineated below:

Anticompetitive Conditioning. In addition to its strategy of acquiring competitive threats to its personal social networking monopoly, Facebook has, over many years, announced and enforced anticompetitive conditions on access to its valuable platform interconnections, such as the application programming interfaces (“APIs”) that it makes available to third-party software applications.³¹²

Of course, the more daring action against Meta lodged by the FTC sought to block its acquisition of a popular exercise app.³¹³

³¹⁰ *Id.* at 32.

³¹¹ *See* Opinion and Order at 91, *FTC v. Martin Shkreli* (S.D.N.Y. 2022) (No. 1:20-cv-00706) (citing *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 98 (2d Cir. 1998)), https://www.ftc.gov/system/files/documents/cases/865_2022.01.14_opinion_and_order.pdf [<https://perma.cc/AQ3J-CUPW>] (“While market share is not the functional equivalent of monopoly power, it nevertheless is highly relevant to the determination of monopoly power.”).

³¹² Complaint for Injunctive and Other Equitable Relief at 7, *FTC v. Facebook, Inc.* (D.D.C. 2021) (No.: 1:20-cv-03590), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf [<https://perma.cc/N33B-W7QN>].

³¹³ Complaint for a Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act at 14,

To wit, in July 2022, the FTC sued Meta to halt its merger with the Peloton holding company.³¹⁴ The FTC relied upon Section 13(b) of the FTC Act,³¹⁵ which authorizes the pursuit of a preliminary injunction; the substantive law flowed from both Section 5 of the FTC Act and Section 7 of the Clayton Act, which outlaws mergers where the result “may be substantially to lessen competition or tend to create a monopoly.”³¹⁶ Tellingly, the ambitious case (seeking an injunction of a merger from a federal court judge) was described by the Commission as follows:

Meta is a potential entrant in the virtual reality dedicated fitness app market with the required resources and a reasonable probability of building its own virtual reality app to compete in the space. But instead of entering, it chose to try buying Supernatural. Meta’s independent entry would increase consumer choice, increase innovation, spur additional competition to attract the best employees, and yield other competitive benefits. Meta’s acquisition of Within, on the other hand, would eliminate the prospect of such entry, dampening future innovation and competitive rivalry.³¹⁷

Commentators applauded the FTC’s prospective action to block a monopoly before it cemented.³¹⁸

FTC v. Meta Platforms, Inc. (N.D. Cal. 2022) (3:22-cv-04325), https://www.ftc.gov/system/files/ftc_gov/pdf/2210040_Meta_Within_TRO_Complaint.pdf [<https://perma.cc/WS5U-VUXD>].

³¹⁴ *Id.* at 2.

³¹⁵ Complaint for a Temporary Restraining Order at 2, FTC v. Meta (2022) (3:22-cv-04325).

³¹⁶ 15 U.S.C. § 13(a).

³¹⁷ See Press Release, FTC, FTC Seeks to Block Virtual Reality Giant Meta’s Acquisition of Popular App Creator Within (July 27, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within> [<https://perma.cc/4DCV-8A88>].

³¹⁸ See, e.g., Mark MacCarthy, *FTC’s Case Against Meta’s Acquisition of Within Seeks to Shape the Emerging VR Market*, BROOKINGS (Aug. 4, 2022), <https://www.brookings.edu/articles/ftcs-case-against-metas-acquisition-of-within-seeks-to-shape-the-emerging-vr-market> [<https://perma.cc/LW3M3-69B4>]. The case was ultimately dropped from active litigation in February 2023. *In re Meta Platforms, Inc.*, FTC Docket No. 9411 (2023) (complaint dismissed).

- Also in 2022, the FTC successfully targeted “bait-and-switch” practices in the automotive industry,³¹⁹ and the agency announced new standards which shall warn companies bereft of protocols for data breaches.³²⁰

These actions by the present, intrepid FTC, signaled both a variety of concerns and a willingness to join the Missions.³²¹ Concurrently, the Fair Competition Mission would get even stronger.³²²

D. End of Year 2022 Reinvigoration

In late 2022 the FTC leapt forward when it rescinded its 2015 guidance which had restricted the agency’s exercise of its authority to challenge anti-competitive business practices.³²³ FTC Commissioner Slaughter announced, “[W]e want to send a signal that today’s FTC is ready to take on the challenge of the modern economy.”³²⁴ The bold revision was seen as promising more aggressive enforcement efforts that would expand notions potentially limited by “classic” antitrust law.³²⁵

³¹⁹ See Nico Demattia, *FTC Advances Its Fight Against Bait-and-Switch Dealership Pricing*, DRIVE (Nov. 13, 2022, 6:07 PM), <https://www.thedrive.com/news/ftc-advances-its-fight-against-bait-and-switch-dealership-pricing> [<https://perma.cc/Q9TA-2U7S>].

³²⁰ Duane Pozza et al., *FTC Releases Detailed Information Security Requirements and Proposes Breach Notification for Financial Institutions*, WILEY (Oct. 29, 2022), <https://www.wiley.law/alert-FTC-Releases-Detailed-Information-Security-Requirements-and-Proposes-Breach-Notification-for-Financial-Institutions> [<https://perma.cc/5AFR-P5XT>].

³²¹ See *supra* note 283 and accompanying text.

³²² See *id.*

³²³ See Press Release, FTC, *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act> [<https://perma.cc/FPA3-PC8K>].

³²⁴ See Russell Brandom, *Federal Trade Commission Expands Antitrust Powers in Chain Lina Khan’s First Open Proceeding*, VERGE (July 1, 2021, 1:16 PM), <https://www.theverge.com/2021/7/1/22559131/ftc-open-meeting-anti-trust-chair-lina-khan-sherman-act-powers> [<https://perma.cc/W6RC-SPMZ>].

³²⁵ See *id.*

Subsequently, in December 2022, the activist FTC issued its replacement guidance.³²⁶ The new principles clarified three key points: (1) unfair practices may be present without proof of actual injury; (2) unfair practices as envisioned under the FTC Act could exist outside the context of a merger; and (3) the new guidance was supported by at least a dozen Supreme Court cases.³²⁷ Thus, the present FTC principles governing fair competition outlaw conduct as follows:

- Conduct that violates the spirit of the antitrust laws. This includes conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a “gap” in those laws;
- Fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office’s full examination of patent applications;
- De facto tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market; and
- Conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market.³²⁸

Additionally, the updated guidance clarified that the anti-trust laws do not ordinarily support private causes of action (i.e., strengthening the need for an active FTC) and that “[i]n crafting Section 5, Congress recognized that unfair methods of competition

³²⁶ See FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [<https://perma.cc/5MCH-TK6E>].

³²⁷ *Id.*

³²⁸ *Id.* at 13–14.

may take myriad forms and hence that different types of evidence can demonstrate a tendency to interfere with competitive conditions.”³²⁹

Separately, the agency has often anticipated a role in WEB 3.0, as is stated early and repeatedly in the FTC’s most recent five-year plan:

To fulfill its goal of protecting the public, the FTC must identify consumer protection issues and trends in the fast-changing, increasingly global marketplace. The agency strives to understand the issues affecting the public, including any newly emerging methods of fraud, so that it can target its enforcement, education, and advocacy on those areas where the public suffers the most harm.³³⁰

Accordingly, given the FTC’s activist approach,³³¹ support from the White House, public backing,³³² applicable statutory tools,³³³ recent revision of its anti-competitive authority,³³⁴ and the truisms of the digital economy,³³⁵ the FTC stands as the

³²⁹ *Id.* at 9.

³³⁰ *See id.* at 12–13 (defending consumers as commensurate with its legislative mission).

³³¹ *See* Robert Reich, *The FTC is Back to Being the Activist US Agency Progressives Sought in 1914*, GUARDIAN (Jan. 12, 2023, 6:00 PM), <https://www.theguardian.com/commentisfree/2023/jan/12/ftc-non-compete-agreements-biden-chair> [<https://perma.cc/AG2F-VSGJ>].

³³² Diego Lasarte, *The FTC May Ban Non-Compete Clauses. Here’s What Workers Think About That*, QUARTZ (Jan. 19, 2023), <https://qz.com/public-comment-on-the-ftc-non-compete-ban-1850005519> [<https://perma.cc/7Q5K-AFTS>] (noting public support for the proposed ban: “In the meantime, the FTC’s website has posted public submissions from American workers explaining what the ban would mean to them. A selection of the responses so far makes pretty clear where workers stand on the issue.”).

³³³ *See* Lauren Johnson & Duane Pozza, *The FTC Is Targeting Crypto Too—With a Significant New Enforcement Action*, JD SUPRA (July 21, 2023), <https://www.jdsupra.com/legalnews/the-ftc-is-targeting-crypto-too-with-a-9740039/> [<https://perma.cc/P52S-4BRF>].

³³⁴ *See* Press Release, FTC, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines> [<https://perma.cc/2BC7-38DA>].

³³⁵ *See* Terrell McSweeney, *FTC 2.0: Keeping Pace With Online Platforms*, 32 BERKELEY TECH. L.J. 1028, 1041–42 (2017) (discussing the role and power of platforms in the digital economy); *see also* Tom Wheeler, *Are the FTC’s*

regulator of choice to monitor, oversee, and impose rules on the unwieldy NFT market.³³⁶ In turn, for reasons discussed earlier, such regulation should target both market education and anti-competitive practices by dominant Marketers.³³⁷ Indeed, courts consistently approve FTC enforcement actions pursuant to its Unfair Competition authority under the Sherman Act.³³⁸ To provide even more notice to the nascent NFT industry, two initial steps under the FTC's newly reasserted anti-monopoly authority are thus proposed below.

E. Two-Prong Solution

In view of its indomitable will and specific new authority, the FTC is poised to prevent the calamity of an NFT market collapse affecting millions.³³⁹ Such prevention can best be offered through dual actions: (1) a consumer advisory for marketplace entrants, and (2) a cease-and-desist order against dominant marketplaces.

1. Consumer Advisory

A potential advisory opinion³⁴⁰ for the FTC website could look like this:

Tools Strong Enough for Digital Challenges?, BROOKINGS (May 10, 2023), <https://www.brookings.edu/articles/are-the-ftcs-tools-strong-enough-for-digital-challenges/> [<https://perma.cc/WK8H-2HQH>].

³³⁶ See *supra* note 301 and accompanying text.

³³⁷ See Will Gottsegen, *OpenSea Scandal Shows Need for More NFT Regulation*, COINDESK (May 11, 2023, 2:21 PM), <https://www.coindesk.com/policy/2021/09/20/opensea-scandal-shows-need-for-more-nft-regulation/> [<https://perma.cc/Y7HW-GZWG>].

³³⁸ See, e.g., *FTC v. Surescripts, LLC*, 2023 WL 2707866 (D.C. Cir. March 30, 2023) (granting partial summary judgment for the FTC on its claim against a health information technology company of monopolization under the Sherman Act while noting that dominance of 60% of the market can suffice within the jurisdiction).

³³⁹ See, e.g., *FTC, Crypto Platform Celsius Feels the Heat From FTC Lawsuits Alleging Unfair and Deceptive Practices* (2023), <https://www.ftc.gov/business-guidance/blog/2023/07/crypto-platform-celsius-feels-heat-ftc-lawsuit-alleging-unfair-deceptive-practices> [<https://perma.cc/6YT7-RMLN>].

³⁴⁰ See generally CONSUMER FIN. PROT. BUREAU, *Risk to Consumers Posed by Virtual Currencies*, at 1–2 (2014), <https://files.consumerfinance.gov/f/201408>

First-time creators and purchasers of NFTs should note that the phenomena presents novel challenges and risks, including, but not limited to, those detailed below:

- NFTs are not backed by a central bank and are not insured;
- NFTs are dependent upon virtual currencies, which are highly volatile;
- NFTs can be hacked or stolen with little or no recourse;
- There is no way to reverse a virtual currency transaction;
- Undisclosed “gas fees” and “royalty payments” (which can continue into perpetuity) often attend dealings with NFT marketplaces; and
- NFT marketplaces are not recognized or regulated exchanges.³⁴¹

Such public statement would be a start to more formal guidance and rule-making while signaling that the FTC has taken up the cause.³⁴²

2. Cease-and-Desist Action

Additionally, given the glaring consolidation of the NFT industry, litigation is needed.³⁴³ Recall that OpenSea alone lists over one million NFTs, with only a small fraction of those

[_cfpb_consumer-advisory_virtual-currencies.pdf](https://perma.cc/DGA9-98KC) [https://perma.cc/DGA9-98KC] (advising consumers about risks associated with virtual currencies).

³⁴¹ See STATE OF MISSOURI, *supra* note 189. These bullet points were largely inspired by a Complaint brought against a virtual Bitcoin mining company by the Missouri Secretary of State in 2014.

³⁴² Chugani et al., *supra* note 52.

³⁴³ See generally *Cryptocurrency Suits Could Provide Road Map for Litigation Against NFT Marketplaces Exchanges*, MAYER BROWN (May 11, 2022), <https://www.mayerbrown.com/en/news/2022/05/cryptocurrency-suits-could-provide-road-map-for-litigation-against-nft-marketplaces-exchanges> [https://perma.cc/L45S-PNRT] (discussing how suits against cryptocurrencies can help provide a roadmap for attorneys with clients dealing with NFTs).

reflected in its “rankings.”³⁴⁴ Further, that marketplace is steadily characterized as hosting the largest discernible percentage of trading volume (even when conservatively estimated in the vicinity of storied dominance figures).³⁴⁵

Moreover, internet marketers offer assistance in designing a new NFT for under \$100³⁴⁶ (with more complete “launches”, including a website ranging up to \$10,000).³⁴⁷ Further, OpenSea shields details on the royalty process, imposes vague “gas fees,” and feeds one Blockchain and its accompanying coin to the detriment of competitors.³⁴⁸

The FTC leveraged the tried-and-true legal basis found in Section 5 of the FTC Act in its attempt to preserve competition, limit Meta’s expansion towards dominance in VR, and halt its 2022 acquisition of Within.³⁴⁹ The agency’s Complaint expressly stated:

As Meta fully recognizes, network effects on a digital platform can cause the platform to become more powerful—and its rivals weaker and less able to seriously compete as it gains more user, contents, and developers. The acquisition of new users, content and developers each feed into one another, creating a self-reinforcing style that extends the company’s early lead.³⁵⁰

Certainly many of the concerns about consolidation and anti-competitive practices that informed the Agency’s recent action targeting Meta, are seen in the dominance of certain NFT Marketers, and should attract the regulator’s attention. OpenSea (or its replacement as top Marketer), with its (1) grossly consolidated market share, (2) exclusion of NFTs not wed to Ether, (3) hidden “gas fees,” and (4) uncertain royalties, presents a similar case for

³⁴⁴ See OPENSEA, *Collection Stats*, <https://opensea.io/rankings> (last visited Nov. 3, 2023).

³⁴⁵ See Andrew Beattie, *A History of U.S. Monopolies*, INVESTOPEDIA (Sept. 11, 2022), <https://www.investopedia.com/insights/history-of-us-monopolies/> [<https://perma.cc/MHA8-SZNT>].

³⁴⁶ *Nail Your NFTs With Experts*, FIVERR., <https://www.fiverr.com/content/NFT> (last visited Nov. 3, 2023).

³⁴⁷ MOONCLUB, <https://moonclub.ai/web3-website-development> (last visited Nov. 3, 2023).

³⁴⁸ See *supra* note 128 and accompanying text.

³⁴⁹ Complaint at 8, *FTC v. Meta* (3:22-cv-04325) (2022).

³⁵⁰ *Id.* at 4.

the lawyers in the FTC's famed Anti-Competition Unit.³⁵¹ Certainly, enterprises as consolidated as the present Marketers have been sued by the FTC for far less.³⁵² Regardless if the agency should win or lose, a case brought under the broad dictates of Section 5 of the FTC Act ensures that unsavory practices will be halted, or at least dragged into the light.³⁵³

Accordingly, in view of the FTC's activist approach and enhanced anti-competitive guidance, the request for an injunction—against whatever Marketer enjoys the monopoly at the moment—could use the following language:

[MARKETPLACE] has attained dominance of the market, denied entry to persons seeking basic knowledge about such entry, and unilaterally set standards for royalties.

Further, [MARKETPLACE] has set and imposed hidden fees of an incalculable nature which are made clear and borne only after upon entrance into the NFT market through [MARKETPLACE].

Such practices violate the spirit of the antitrust laws by causing potential harm similar to an antitrust violation, if not by literal transgressions, by falling into a "gap" in those laws.

Further, such conduct in conjunction with other acts and practices cumulatively may tend to undermine competitive conditions in the market.

The FTC's enhanced authority to advance its Fair Competition Mission justifies pursuing cease-and-desist orders targeting NFT marketers on the internet. Indeed, any FTC case would likely only become stronger upon formal investigation and service of subpoenas. Stated more globally, the FTC is presently the most fearless policy maker among the independent regulatory commissions. A brief survey of the litigation pursued, policies proposed and regulations adopted by the agency since 2020 readily demonstrates its reputation as an intrepid government watchdog.³⁵⁴ In view of the FTC's restatement of its guiding principles, it is

³⁵¹ See Schwartz, *supra* note 128 and accompanying text; see *supra* note 163 and accompanying text; see also *supra* note 190.

³⁵² See Diane Bartz & Anirban Sen, *US Regulators Unveil Antitrust Roadmap With Big Tech in Crosshairs*, REUTERS (July 19, 2023, 8:33 PM), <https://www.reuters.com/markets/deals/us-antitrust-enforcers-tackle-digital-platforms-new-merger-guidelines-2023-07-19/> [<https://perma.cc/ZH79-6URT>].

³⁵³ See *supra* note 328 and accompanying text.

³⁵⁴ See *supra* notes 302–30 and accompanying text.

submitted that the agency is the best choice for cabining the ills documented already in the eccentric, yet opaque, field of NFT creation and purveyance.

CONCLUSION: OF APES, CAGES, AND THE MIXED
BLESSING THAT IS WEB 3.0

A. The Recap

The barriers to entry in the budding NFT industry are virtually nonexistent.³⁵⁵ Even enthusiastic participants in the new Web 3.0 world have sounded the alarm, albeit in generic fashion.³⁵⁶ Before NFT practices become further entrenched, some customary standards on competition must be reiterated.³⁵⁷

The Introduction herein presented a new conundrum thriving in 2023: the lure of NFTs as an unregulated industry taking root as its overarching industry (i.e., cryptocurrency) still evades meaningful regulation.³⁵⁸

Part I more specifically addressed the status quo. The NFT industry, while troubled by infighting,³⁵⁹ is not departing.³⁶⁰ Indeed, with each new mishap, more intermediaries appear to be poised to enter the fray.³⁶¹

³⁵⁵ See *supra* notes 19–39 and accompanying text (explaining how the barrier to entry in the NFT field is virtually nonexistent).

³⁵⁶ See generally Duana Pozza & Tyler Bridegan, *Crypto and Web3 Under Consumer Protection Scrutiny*, JD SUPRA (Oct. 11, 2022), <https://www.jdsupra.com/legalnews/crypto-and-web3-under-consumer-3176791/> [<https://perma.cc/C5HC-YCSK>].

³⁵⁷ See *supra* note 328 and accompanying text (reviewing how the FTC can reinforce customary standards on competition).

³⁵⁸ See *supra* notes 7–18 and accompanying text (detailing the lure of NFTs).

³⁵⁹ See, e.g., Levi Winslow, *YouTuber: Logan Paul's NFT 'Game' Is a Big Crypto Scam*, KOTAKU (Dec. 28, 2022), <https://kotaku.com/logan-paul-crypto-zoo-blockchain-scam-youtube-nft-crypto-1849935953> [<https://perma.cc/4TGS-BFJE>].

³⁶⁰ See Yusuf Berkan Altun, *NFTs: The Fad That Is Here to Stay*, FORBES (Nov. 8, 2021, 7:00 AM), <https://www.forbes.com/sites/forbestechcouncil/2021/11/08/nfts-the-fad-that-is-here-to-stay/?sh=6243df0b23a0> [<https://perma.cc/P6C2-ALQB>].

³⁶¹ See, e.g., Eli Tan, *Tax-Loss Harvesting Platform Unsellable is Building The World's Largest Collection of Worthless NFTs*, COINDESK (Dec. 31, 2022, 2:00 PM), <https://www.coindesk.com/web3/2022/12/31/tax-loss-harvesting-platform-unsellable-is-building-the-worlds-largest-collection-of-worthless-nfts/>

Part II raised and refuted a number of potential agencies and legal authorities as rational champions of NFT regulatory enforcement, while also stressing the futility of assigning NFTs to dogma (i.e., the UCC) or criminal authorities (i.e., the DOJ). First and foremost, the SEC seems a proper fit.³⁶² However, many NFTs lack the elemental features of securities, are not utilized as investments, and the stock market regulator's position on cryptocurrency regulation has not found sturdy legal footing.³⁶³ Meanwhile, the CFTC has much explaining to do for its apparent willing acquiescence to the policy priorities of crypto lenders and exchanges before certain market leaders' epic downfall in the summer of 2022.³⁶⁴ As federal agencies circle the wagons, the states are awaiting clear cues from an agency with issue expertise, budget resources, and subpoena power.

To be sure, WEB 3.0 has already fulfilled a promise of accessibility.³⁶⁵ Yet, the layman is being misled by new entrepreneurs encouraging purchases of the supposed unique NFT assets, and regulators have noticed.³⁶⁶ Accordingly, Part III of this Article selected the Federal Trade Commission as the watchdog of choice. Apart from the dangers of continued regulatory inaction, the FTC has seen a rebirth as the regulator of the moment.³⁶⁷ The agency with roots to trust-busting times has been peerless in the past 24 months, consistently embracing challenges under both

[<https://perma.cc/LXJ9-YJFD>] (“The platform has so far purchased over 9,300 no-longer valuable NFTs that previous owners can count as losses to reduce taxable capital gains”). The author did not encounter any authority opining whether Minters—who join in NFT profits—may similarly join in their tax losses.

³⁶² See *supra* Section II.B.

³⁶³ See Au, *supra* note 211.

³⁶⁴ See Newmyer & Whoriskey, *supra* note 234.

³⁶⁵ See Silver, *supra* note 45.

³⁶⁶ See, e.g., *Credit Karma Misleading Customers, FTC Says*, NEWS 9.COM (Jan. 25, 2023, 9:51 AM), <https://www.news9.com/story/63d150ba1ffd587e3f48daaa/credit-karma-misled-customers-ftc-says> [<https://perma.cc/6YUN-5DCN>]; see also *Howey Should Think About NFTs and Securities Laws*, O'MELVENY (Sept. 29, 2022), <https://www.omm.com/resources/alerts-and-publications/alerts/howey-should-think-about-nfts-and-securities-laws/> [<https://perma.cc/B5XS-8EKC>].

³⁶⁷ See *1933–1953*, FED. TRADE COMM'N, <https://www.ftc.gov/reports/ftc100-bibliography/1933-1953> [<https://perma.cc/K4RT-2B6Y>] (noting that the FTC, which predated the creation of the SEC by a year, actually served as the nation's first federal securities regulator); see also *supra* notes 334–36 and accompanying text.

its consumer protection and anti-monopoly authority.³⁶⁸ Notably, the FTC is succeeding at enforcing antitrust statutes while concomitantly persisting in protecting consumers; further, the FTC fears not treading on turf arguably owned by its ally agencies.³⁶⁹

B. The Paradoxical Bored Ape

Like the swelled digital assets that came before, any downturn in NFT usage shall succeed mainly in prompting new NFT players and markets.³⁷⁰ While the crypto winter of mid-2022 amply demonstrated that all digital assets are interrelated, that crisis did not end the Leviathan industry,³⁷¹ so shall the NFT industry (earning, during one recent time period, by conservative estimate, \$50 million a month) learn to adapt.³⁷² Moreover,

³⁶⁸ See *supra* notes 331–36 and accompanying text. See, e.g., Breck Dumas, *Credit Karma, HomeAdvisor Push Back After FTC Orders Both to Pay Millions*, FOX BUSINESS (Jan. 23, 2023, 6:58 PM), <https://www.foxbusiness.com/politics/credit-karma-homeadvisor-push-back-ftc-orders-pay-millions> [<https://perma.cc/2ERZ-8BZF>]; see also Q.AI, *Judge Rules Against FTC in Microsoft Activision Case, but They've Already Filed an Appeal*, FORBES (July 13, 2023, 9:13 AM), <https://www.forbes.com/sites/qai/2023/07/13/judge-rules-against-ftc-in-microsoft-activision-case-but-theyve-already-filed-an-appeal/?sh=3b75ea7b4a65> [<https://perma.cc/YH27-VE36>] (explaining that while the FTC was cautioned by a federal court judge in July 2023, who dismissed a motion to enjoin the Microsoft-Activision merger, the authority highlighted in the present Article focuses on enjoining anti-competitive practices, not upon blocking mergers).

³⁶⁹ See Deiter Holger, *FTC Weighs Stiff Penalties on Deceptive 'Green' Marketing*, WALL ST. J. (Jan. 12, 2023, 12:03 PM), <https://www.wsj.com/articles/ftc-weighs-stiff-penalties-on-deceptive-green-marketing-11673485112> [<https://perma.cc/G3QB-52WZ>] (noting that the agency is “seeking comment on potential revisions to its guidelines on environmental marketing claims” even as the SEC is proposing that public companies and hedge funds drastically enhance environmental reporting to investors).

³⁷⁰ See, e.g., Alex Wilhelm, *Can Gaming Resurrect the NFT Market? OpenSea Thinks So*, TECHCRUNCH (Nov. 17, 2022, 3:56 PM), <https://techcrunch.com/2022/11/17/can-gaming-resurrect-the-nft-market-opensea-thinks-so/> [<https://perma.cc/VK7Z-559Z>].

³⁷¹ See Sean Michael Kerner, *What Is Crypto Winter? Everything You Need to Know*, TECHTARGET (June 9, 2023), <https://www.techtargget.com/whatis/feature/Crypto-winter-explained-Everything-you-need-to-know#> [<https://perma.cc/E6KQ-XGJ6>].

³⁷² See, e.g., Godfrey Benjamin, *OpenSea Rival Blur Launches NFT Perpetual Loan Protocol*, COINGAPE (May 1, 2023, 11:13 PM), <https://coingape.com/opensea-rival-blur-launches-nft-perpetual-loan-protocol/amp/> [<https://perma.cc/UXS7-GPSB>] (describing the margin loan-like feature created by an NFT marketplace seeking to gain more market share).

while the victims of the specific crime of NFT theft range from the uninitiated to the titans themselves,³⁷³ the public's appetite for NFTs is likely to persist and even grow.³⁷⁴ Further, with aplomb and ease, the art world itself may simply incorporate notable "tokens" into its worldwide collection.³⁷⁵ Stated otherwise, the reports of the demise of NFTs are premature.

Additionally, the well-funded NFT lobby is savvy enough to distinguish the faddish elements of NFTs from its more durable utilities, thus ensuring that the industry shall survive.³⁷⁶ Meanwhile, NFTs are used by some established businesses as just another means of delivery,³⁷⁷ further enhancing the need for rules and business certainty. Inevitably, the industry's defenders

³⁷³ See, e.g., Ioana, *supra* note 37; Eli Tan, *Hackers Steal Bill Murray's Crypto After \$185K NFT Charity Auction*, COINDESK (Sept. 2, 2022, 2:50 PM), <https://www.coindesk.com/business/2022/09/02/hacker-steals-bill-murrays-crypto-after-185k-nft-charity-auction/> [<https://perma.cc/MCW9-RVXD>] ("Hours after closing of Bill Murray's NFT auction that raised 119.2 ETH (around \$185,000) for charity Thursday, a hacker stole the funds . . ."); *BAYC Holder Gets Scammed Hours After Buying NFT*, COINGAPE (Aug. 23, 2022), <https://coingape.com/web-stories/bayc-owner-gets-scammed-hours-after-buying-nft/> [<https://perma.cc/KBB9-MGXM>]; see also Jimenez, *supra* note 243 (describing the "rug pull" as a deliberate abandonment of an NFT project once it is sold).

³⁷⁴ See Jamie Redman, *NFT Sales Soar: January 2023 Reaches Nearly \$1 Billion in 30 Days With 41% Increase*, BITCOIN.COM (Feb. 1, 2023), <https://news.bitcoin.com/nft-sales-soar-january-2023-reaches-nearly-1-billion-in-30-days-with-41-increase/> [<https://perma.cc/TBL3-RP33>].

³⁷⁵ See Farah Nayeri, *NFTs, on the Decline Elsewhere, Are Embraced by Some Museums*, N.Y. TIMES (Nov. 30, 2022), <https://www.nytimes.com/2022/11/30/arts/design/nfts-museums.html> [<https://perma.cc/9MV7-YEL9>].

³⁷⁶ See Christina Criddle & Joshua Gabert-Dyon, *NFT Creators Diversify into Real-World Assets to Generate New Revenues*, FIN. TIMES (Dec. 27, 2022), <https://www.ft.com/content/69da37d1-11de-430f-8a86-ea51bd2ae82b> [<https://perma.cc/S4SZ-HTR6>]; see also Andrew Asmakov, *NFT Marketplace OpenSea Confirms Ban on Cuban Artists*, DECRYPT, <https://decrypt.co/117869/nft-marketplace-opensea-confirms-ban-on-cuban-artists> [<https://perma.cc/88EH-8X58>] (explaining how even dated and jingoistic political maneuvers have been employed by the NFT industry) ("OpenSea says its's enforcing U.S. policy by booting from its NFT marketplace Cuban and other NFT artists from sanctioned countries.").

³⁷⁷ See Sam Bourgi, *Iconic Brands Including Nike, Gucci Have Made \$260M off NFT Sales*, COINTELEGRAPH (Aug. 23, 2022), <https://cointelegraph.com/news/iconic-brands-including-nike-gucci-have-made-260m-off-nft-sales> [<https://perma.cc/2L6L-Y56K>]; Arun Sundararajan, *How Your Brand Should Use NFTs*, HARV. BUS. REV. (Feb. 28, 2022), <https://hbr.org/2022/02/how-your-brand-should-use-nfts> [<https://perma.cc/VXX4-2HX5>].

will embrace charity and social works,³⁷⁸ a public relations strategy utilized so very well by Wall Street for decades.³⁷⁹ Undoubtedly, the ills will begin to spread as basic questions like, “Who may terminate the NFT?”, and such inquiries will come back to haunt.³⁸⁰

It bears noting that the remedy proposed herein may be the measured alternative to what some states are already considering, namely, an outright ban of public NFT sales.³⁸¹

Instilling fear of the FTC’s anti-monopoly authority in the NFT market can push back against the ambitions and anti-competitive intuitions of the industry’s entrepreneurs and architects. Further, that fear directly inspires dominant players towards compromising and coordinating with regulators.³⁸² The European blueprint already exists.³⁸³ The storied FTC in recent times has

³⁷⁸ See Orella Hernandez, *6 Projects Using NFTs for Social Good*, BLOCKWORKS (Dec. 24, 2022, 4:00 PM), <https://blockworks.co/news/nfts-for-social-good> [<https://perma.cc/8YZ5-C86R>].

³⁷⁹ See Nick Baumann, *Apparently We’ve Forgotten Who the Milkens Are*, MOTHER JONES (Aug. 18, 2011), <https://www.motherjones.com/politics/2011/08/lowell-milken-institute-ucla/> [<https://perma.cc/F7D4-PEEN>] (using the example of Lowell Milken, who was banned for life from the securities industry last century and is now perhaps best known for the ethics institute bearing his name on the campus of UCLA).

³⁸⁰ See Thomas A. Magnani & Benjamin G. Danieli, *Non-fungible Token (NFT) Purchase and License Agreement*, ARNOLD & PORTER (Jan. 3, 2023), <https://www.arnoldporter.com/en/perspectives/publications/2023/01/nft-purchase-and-license-agreement> [<https://perma.cc/RMD3-Y77L>].

³⁸¹ See, e.g., Paige Tortorelli, *Four U.S. States Order a Metaverse Casino to Halt Sales of NFTs*, CNBC (Oct. 20, 2022, 11:00 AM), <https://www.cnn.com/2022/10/20/four-us-states-order-a-metaverse-casino-to-halt-sale-of-nfts.html> [<https://perma.cc/HYG7-AMB2>].

³⁸² See Tiyashi Datta et al., *Microsoft Says it Offered FTC a Consent Decree on Call of Duty*, REUTERS (Dec. 13, 2022, 5:51 PM), <https://www.reuters.com/markets/deals/microsoft-says-it-offered-agree-ftc-consent-decree-call-duty-games-2022-12-13/> [<https://perma.cc/SW7L-29S9>]; see also *Brief—U.S. FTC Says It Secured Agreements Requiring Epic Games to Pay Over \$520 Million in Relief Over Allegations*, REUTERS (Dec. 19, 2022, 9:14 AM), <https://www.reuters.com/article/brief-us-ftc-says-it-secured-agreements-idUSFWN3391KV> [<https://perma.cc/R8YU-P9WM>].

³⁸³ See Adam Satariano, *Amazon and E.U. Reach Deal to End Antitrust Investigation*, N.Y. TIMES (Dec. 20, 2022), <https://www.nytimes.com/2022/12/20/technology/amazon-european-union-antitrust.html> [<https://perma.cc>

succeeded in preserving prior victories,³⁸⁴ blazing new law to the delight of the citizenry,³⁸⁵ displaying political savvy,³⁸⁶ and arguably showing itself to be above the politicking that has cast doubt upon the resolve of other federal regulatory agencies.³⁸⁷

As for technology, the proponents of the latest incarnation of the Internet—dubbed “Web 3.0” have promised unprecedented artistic and commercial freedom. When it comes to NFTs, thus far a monopoly has served as a portal to this brave new world.³⁸⁸ The Federal Trade Commission, with its glorious past and active present, is the sheriff of choice for this third incarnation of a beastly Internet we cannot seem to instinctively live within or without.

[/H78L-AGQX]; Paul Sawers, *Meta Abused Its Dominant Market Position to Benefit Facebook Marketplace, EU's Initial Findings Show*, TECHCRUNCH (Dec. 19, 2022, 8:23 AM), <https://techcrunch.com/2022/12/19/meta-abused-its-dominant-market-position-to-benefit-facebook-marketplace-eus-initial-findings-show/> [https://perma.cc/GZT3-C3BN]; Ryan Browne, *Meta Could Face \$11.8 Billion Fine as EU Charges Tech Giant With Breaching Antitrust Rules*, CNBC (Dec. 19, 2022, 11:04 AM), <https://www.cnbc.com/2022/12/19/meta-could-face-11point8-billion-fine-as-eu-charges-it-with-antitrust-breach.html> [https://perma.cc/G9PA-JZES].

³⁸⁴ See Dan Mangan, *FTC Asks Judge to Hold ‘Pharma Bro’ Martin Shkreli in Contempt of Court for Forming New Drug Firm*, CNBC (Jan. 20, 2023, 12:18 PM), <https://www.cnbc.com/2023/01/20/ftc-asks-judge-to-hold-martin-shkreli-in-contempt-of-court-for-forming-new-drug-firm.html> [https://perma.cc/4NJJ-D9J3] (describing the convicted felon’s failure to provide the FTC with information determinative of his potential violation of a previous order banning him from working in the pharmaceutical industry).

³⁸⁵ See Victor W. Hwang, *The FTC’s Proposed Ban on Noncompete Agreements Matches What Voters Want*, HILL (Jan. 28, 2023, 7:00 AM), <https://thehill.com/opinion/finance/3832308-the-ftcs-proposed-ban-on-noncompete-agreements-matches-what-voters-want/> [https://perma.cc/FAU3-S9UK].

³⁸⁶ See Leah Nylen, *US Filed Microsoft-Activision Suit to Head off EU Settlement*, BLOOMBERG NEWS (Jan. 25, 2023, 6:41 PM), <https://www.bloomberg.com/news/articles/2023-01-25/lina-khan-s-ftc-sued-microsoft-over-activision-deal-to-head-off-eu-settlement?> [https://perma.cc/RC33-NXS3].

³⁸⁷ See Julie Brill, Comm’r, FTC, Westchester/Southern Connecticut Chapter (WESFACCA) Lunchtime Keynote Talk: The Role of the Commissioner at the FTC (Mar. 16, 2011) at 4–5, <https://bit.ly/3h7k6XP>. (discussing how the FTC composition removes it from political pressure).

³⁸⁸ See Russell Brandom, *How One Company Took Over the NFT Trade*, VERGE (Feb. 2, 2022, 11:19 AM), <https://www.theverge.com/2022/2/2/22914081/open-sea-nft-marketplace-web3-fundraising-finzer-a16z> [https://perma.cc/9S2U-YAXM].