



4-17-2023

Physical Sports Needing Virtual Boundaries? An Analysis of Intellectual Property Issues Arising from Sport NFTs

Maeve Hyer

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/mslj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Other Law Commons](#)

Recommended Citation

Maeve Hyer, *Physical Sports Needing Virtual Boundaries? An Analysis of Intellectual Property Issues Arising from Sport NFTs*, 30 Jeffrey S. Moorad Sports L.J. 91 (2023).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol30/iss1/4>

This Comment is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

PHYSICAL SPORTS NEEDING VIRTUAL BOUNDARIES? AN
ANALYSIS OF INTELLECTUAL PROPERTY ISSUES
ARISING FROM SPORT NFTS

I. SKETCHING: THE INTRODUCTION

Sports have long been understood to have loyal and loving fans.¹ Sporting memorabilia generates roughly \$5.4 billion annually.² Whether player's jerseys or signed trading cards, the sports industry is no stranger to big spenders for coveted mementos from historic games.³

The metaverse is a niche concept of the tech world that recently exploded in modern society.⁴ The metaverse has implications for various aspects of the physical world.⁵ Sports are making their mark on the new platform, proving to be one of the largest categories within the metaverse.⁶ Particularly, Non-Fungible Tokens ("NFTs"), which represent ownerships of digital assets, are

1. See Judith Aquino, *There's No One More Loyal Than a Sports Fan*, TTEC, <https://www.ttec.com/articles/theres-no-one-more-loyal-sports-fan> [<https://perma.cc/NC2M-JYQ4>] (last visited Mar. 20, 2022) (finding important factor in sports fans' engagement is going mobile to engage with their fans wherever they are located).

2. See Mike Thomas, *Sports Memorabilia Market Estimated at \$5.4 Billion, but Beware of the Fakes*, SPORTSCASTING (Apr. 21, 2020), <https://www.sportscasting.com/sports-memorabilia-market-estimated-at-5-4-billion-but-beware-of-the-fakes/> [<https://perma.cc/Y2M3-84XJ>] (noting sporting memorabilia industry is susceptible to counterfeits as well).

3. See Dan Schlossberg, *Sports Memorabilia Market is Booming, But Buyers Must Protect Investments*, FORBES (Feb. 4, 2021), <https://www.forbes.com/sites/danschlossberg/2021/02/04/sports-memorabilia-market-booms-but-buyers-must-protect-investments/?sh=257eab6f125a> [<https://perma.cc/L5D8-DQX3>] (stating high-net-worth individuals are investing in or inheriting collections, with some valued at millions of dollars).

4. See Peter Allen Clark, *The Metaverse Has Already Arrived. Here's What That Actually Means*, TIME (Nov. 15, 2021), <https://time.com/6116826/what-is-the-metaverse/> [<https://perma.cc/K3TN-PGZG>] ("Interest in purely digital ownership – and the technology that proponents believe can ensure the security of persistent virtual experiences – has spiked dramatically, with non-fungible tokens (NFTs) and cryptocurrencies making headlines.").

5. See *id.* (critiquing U.S. for being sluggish in their approach to cybersecurity concerns and describing risk of artificial intelligence enabling misinformation).

6. See Khristopher J. Brooks, *Sports NFTs are Popular, but are They a Winning Investment*, CBS News (Nov. 12, 2021), <https://www.cbsnews.com/news/sports-nft-dapper-labs-nba-investment/> [<https://perma.cc/WR98-Q5CM>] (forecasting valuation of NFT market to grow to \$75 billion by 2025).

projected to have large implications for in the sports world.⁷ Sport NFTs are projected to generate more than \$2 billion in 2022.⁸ One popular sport NFT category is player highlights.⁹ The sale of limited-edition video clips and photos of these moments is extremely lucrative.¹⁰ Athletes are entering the space by selling virtually signed trading cards.¹¹ Valuations of various NFTs encompass the prestige of the athlete, the significance of the event, and the team the athlete played for.¹² In addition to athlete involvement, many professional sports associations are looking to create tickets for game entry as NFTs for fans to have a keepsake of the event.¹³ With athlete involvement and player associations having a hand in the game, NFTs are sure to stay.¹⁴

Much uncertainty surrounds the virtual world's laws, leading many to register their intellectual property within the space preemptively.¹⁵ With NFT creators using protected intellectual property in their graphic designs, the race to safeguard intellectual

7. See *NFTs Definition*, LAW INSIDER [https://www.lawinsider.com/dictionary/nfts#:~:text=NFTs%20are%20non%2Dfungible%20tokens,Object\(s\)%E2%80%9D](https://www.lawinsider.com/dictionary/nfts#:~:text=NFTs%20are%20non%2Dfungible%20tokens,Object(s)%E2%80%9D). [https://perma.cc/2ZPV-MZH9] (last visited Dec. 19, 2022) (articulating various definitions for non-fungible tokens).

8. See Ed Dixon, *Study: Sport NFTs to Generate More Than US\$2bn in 2022*, SPORTSPRO (Dec. 1, 2021), <https://www.sportspromedia.com/news/nft-non-fungible-tokens-sport-2022-sorare-deloitte-study/> [https://perma.cc/2BWB-SXZG] (noting Deloitte predicts value of NFTs to double next year, specifically with large effect on sports market).

9. See *id.* (“According to the study, the most common and lucrative application of NFTs in the sports industry will likely be the sale of limited edition video clips of sporting moments or player cards.”).

10. See *id.* (noting study considered different ownership models of balancing consumer demand, maintaining intellectual property rights, and respecting creator's rights over underlying digital assets).

11. For more information about athletes entering the NFT space, see *infra* notes 51–54, and accompanying text.

12. See Paul Lee, Theo Ajadi, Kevin Westcott, & Gillian Crossan, *From Trading Cards to Digital Video: Sports NFTs Kick Sports Memorabilia into the Digital Age*, DELOITTE (Dec. 1, 2021), <https://www2.deloitte.com/x/en/insights/industry/technology/technology-media-and-telecom-predictions/2022/sports-nfts-digital-media.html> [https://perma.cc/WR7K-CE9M] (finding highest revenue sports on metaverse will be soccer, basketball, baseball, football, and ice hockey).

13. See Kendall Baker, *Sports Tickets Meet NFTs*, AXIOS, <https://www.axios.com/sports-tickets-nfts-digital-bobbleheads-3a4d2c13-09a2-4629-9eb5-c44a736a603f.html> [https://perma.cc/ED5X-ELTY] (last visited Mar. 20, 2022) (stating NFL announced it would attach NFTs to tickets for twenty-one select games during 2021 season).

14. For more information about sports NFTs financial impact in the metaverse, see *supra* note 8 and accompanying text.

15. For more information about some potential legal precedent in the metaverse space, see *infra* notes 143–172, and accompanying text.

property rights is on.¹⁶ Leaders in the sport metaverse such as Nike and NASCAR have quickly filed trademark applications covering virtual goods with the United States Patent and Trademark Office (“USPTO”).¹⁷ The scramble for registration raises the looming question of how intellectual property will be protected on the virtual platform and, more specifically, how traditional fair use and creative expression will factor in this new world.¹⁸

Although the metaverse has broad legal considerations, this Comment seeks to illustrate the implications of intellectual property through a sports industry lens.¹⁹ Part II provides a comprehensive background of the metaverse and an NFT’s role within it.²⁰ Current intellectual property laws will then be explained.²¹ Part III will discuss the legal ramifications for infringement while evaluating defenses that may be raised.²² For intellectual property owners to safeguard their rights in this digital universe, strategic thinking and planning are required.²³ Much uncertainty surrounds this legal field; the race into the metaverse is on, and intellectual property rights, among others, are at stake.²⁴

16. For more information about the legal infringement implications for NFT creators, see *infra* notes 63–108, and accompanying text.

17. See TFL, *Branding in the Metaverse: The Future of Virtual Goods Trademarks*, THE FASHION LAW (Dec. 9, 2021), <https://www.thefashionlaw.com/branding-in-the-metaverse-the-rising-quest-for-virtual-goods-trademarks/> [<https://perma.cc/YPJ3-FCSB>] (noting another sneaker company, Converse, filed intent to use registrations for virtual goods in metaverse following Nike’s lead).

18. For more information about fair use and creative expression, see *infra* notes 67–77, and accompanying text.

19. See JSEL, *Legal Implications of NFTs in Sports*, HARV. J. OF SPORTS AND ENT. L. (Apr. 19, 2021), <https://harvardjsel.com/2021/04/legal-implications-of-nfts-in-sports/> [<https://perma.cc/JTA6-2U29>] (explaining copyright issues surrounding creation of NFTs when taken from sports broadcasting systems).

20. For more information on NFT background, see *infra* notes 25–46, and accompanying text.

21. For more information on intellectual property background, see *infra* notes 63–118, and accompanying text.

22. For more information on legal infringement analysis, see *infra* notes 119–186, and accompanying text.

23. See Gregor Pryor & Nick Breen, *Reed Smith Guide to the Metaverse*, REED SMITH LLP, <https://www.reedsmith.com/-/media/files/metaverse/guidetothemetaverse2ndedition.pdf> [<https://perma.cc/6JV9-E2P9>] (last visited Mar. 20, 2022) (“[T]hese choices are strategic and require owners of AR/VR and other metaverse-related inventions to think about the broader picture of intellectual property ownership and its associated benefits and risks.”).

24. For more information about the future of legal protection for intellectual property in the metaverse, see *infra* notes 189–192, and accompanying text.

II. DESIGNING: THE BACKGROUND

A. Defining the Metaverse and NFTs

The metaverse is a virtual-reality space where users can interact with one another on an online platform.²⁵ Some of these virtual reality spaces include multiplayer gaming, virtual worlds, and virtual workspaces, which seek to create the realities of our physical world on a virtual platform.²⁶ In this digital universe, users can interact socially and use digital assets.²⁷ During the COVID-19 pandemic, many people have adjusted to life online, increasing the popularity of the space.²⁸

Blockchain is a computer network allowing for the management and distribution of assets.²⁹ The technology allows users to collaborate with other users and share information and data without interacting with third parties.³⁰ The information stored is decentralized, so collective users retain control.³¹ Once data is entered on the blockchain, the transaction is permanently re-

25. See Brian X. Chen, *What's All the Hype About the Metaverse?*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/18/technology/personaltech/metaverse-gaming-definition.html> [<https://perma.cc/8SAT-RU47>] (stating, "It's about being within the computer rather than accessing the computer" when describing the metaverse interaction as immersive for virtual users).

26. See Jeffrey D. Neuburger, *In the Coming 'Metaverse', There May Be Excitement but There Certainly Will Be Legal Issues*, NAT'L L. REV. (Dec. 3, 2021), <https://www.natlawreview.com/article/coming-metaverse-there-may-be-excitement-there-certainly-will-be-legal-issues> [<https://perma.cc/Y5B8-FHRL>] (noting metaverse is where crypto, gaming, and capitalism collide, featuring virtual worlds where users can interact with others and play games or collaborate in virtual workspaces).

27. See *id.* ("[T]he metaverse, 'Web 3.0,' would feature a synchronous environment giving users a seamless experience across different realms . . .").

28. See Adam Simon, *How COVID-19 Is Leading US to the Metaverse, Part One*, MEDIUM (May 14, 2020), <https://medium.com/ipg-media-lab/part-1-how-covid-19-is-pushing-us-closer-to-the-metaverse-c76a46e21cd2> [<https://perma.cc/4AWG-BT3Q>] (opining that behavioral changes due to COVID-19 allowed for increased online social interactions to fill void of social distancing).

29. See Judith Alison Lee, *Blockchain 101*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/blockchain-101> [<https://perma.cc/AE8P-UWCW>] (last visited July 12, 2022) ("At its core, a blockchain is a distributed database that maintains a continuously growing list of ordered records called blocks.").

30. See *id.* ("Through the use of a peer-to-peer network and a distributed timestamping server, the different nodes on the Bitcoin network manage the blockchain database autonomously.").

31. See *id.* (describing how blocks are distributed by network to users and connected by means of chain).

corded, and other users may access the data, making online purchases transparent and secure.³²

Specifically, the allure of this platform is a decentralized financial space.³³ Physical money and other forms of cryptocurrency are “fungible.”³⁴ Fungible goods can be broken down into smaller parts or replaced by other identical items, whereas NFTs are the exact opposite.³⁵ NFTs are distinctive in representing a uniquely identifiable digital ledger stored on a blockchain.³⁶ Blockchain publicly records transactions which enables trust, security, and transparency for individuals using it.³⁷ Transparency occurs in the blockchain’s recoding of the data’s history.³⁸

NFTs are created, or “minted,” as digital assets, representing ownership over a digital or physical commodity.³⁹ They have taken over the media as these tokens auction for hundreds of thousands of dollars.⁴⁰ NFT’s first quarter sales exceeded \$2 billion.⁴¹ How-

32. *See id.* (“Once a transaction is approved and sent, it is irreversible because only the authorization of the sending party is needed to initiate the decentralized process . . .”).

33. *See id.* (stating proponents of blockchain believe it can affect fund and payment transfers, eradicating need for intermediary financial institutions).

34. *See* Robyn Conti & John Schmidt, *What is an NFT? Non-Fungible Tokens Explained*, FORBES, <https://www.forbes.com/advisor/investing/nft-non-fungible-token/> [<https://perma.cc/P6VX-FPKD>] (last updated Apr. 8, 2022, 8:36 AM) (indicating “fungible mean[s it] can be traded or exchanged for one another.”).

35. *See id.* (explaining that one dollar is always equal to another dollar and one Bitcoin is equal to another and each digital signature of NFT make it impossible for one NFT to be equal to another).

36. *See id.* (“One NBA Top Shot clip, for example, is not equal to EVERYDAYS simply because they’re both NFTs.”).

37. *See Benefits of Blockchain*, IBM, <https://www.ibm.com/topics/benefits-of-blockchain#:~:text=Blockchain%20increases%20trust%2C%20security%2C%20transparency,cost%20savings%20with%20new%20efficiencies> [<https://perma.cc/TUF3-MWVJ>] (last visited Mar. 20, 2022) (noting blockchain creates audit trail that documents digital asset every step of its journey on blockchain creating instant traceability).

38. *See id.* (“All transactions are immutability recorded, and are time-and-date stamped.”).

39. *See* Katherine Roe, Chris Whittaker, & Dan Jewell, *Non-Fungible Tokens: What are the Legal Risks*, DLA PIPER (Oct. 18, 2021), <https://www.dlapiper.com/en/us/insights/publications/2021/09/non-fungible-tokens-what-are-the-legal-risks/> [<https://perma.cc/SX7P-3Z48>] (explaining NFT and underlying asset it represents are separate assets where NFT is used as indication of ownership over underlying resource).

40. *See* Robert Frank, *NFT Sales Top \$2 Billion in First Quarter, with Twice as Many Buyers as Sellers*, CNBC (Apr. 13, 2021), <https://www.cnbc.com/2021/04/13/nft-sales-top-2-billion-in-first-quarter-with-interest-from-newcomers.html> [<https://perma.cc/7CLN-9CEZ>] (noting first quarter has 73,000 buyers for 33,000 sellers, signaling massive interest of newcomers).

41. *See id.* (stating NFT sales have more than twenty times volume of previous quarter).

ever, a critique of NFTs is that their value is somewhat arbitrary as it is set by what an individual places on it, similar to an art piece or real estate.⁴² The value placed on an NFT directly contradicts the digitization principles of open internet and access to digital assets for all users.⁴³ On the other side of the coin, advocates for NFT investment construe the valuation in terms of artistry and growing the creator economy in the digital age.⁴⁴ A key reason for consumer purchasing is the expectation of profits or leverage for obtaining assets or other forms of profit.⁴⁵ Although the valuation process is somewhat arbitrary, buyers nevertheless purchase NFTs for tens of millions of dollars.⁴⁶

One popular avenue for sports NFTs is players' highlights and virtually signed trading cards.⁴⁷ Many professional sports associations are looking into creating tickets for game entry as NFTs so fans have a keepsake of the event.⁴⁸ Current minted NFTs in sports are proving to withstand the scrutiny surrounding the uncertainty of the metaverse.⁴⁹ The most expensive sport NFT to date is of NBA star LeBron James dunking, named "Statue of Lebron," which is valued at \$21.6 million.⁵⁰ NFTs are providing platforms for not

42. See Johnathan Zittrain & Will Marks, *What Critics Don't Understand About NFTs*, THE ATLANTIC (Apr. 7, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/nfts-show-value-owning-unownable/618525/> [<https://perma.cc/H24J-MJCU>] (describing this arbitrary nature is sometimes appealing to buyers in this dynamic space due to profits they hope to receive once more individuals get into space).

43. See Terry Nguyen, *NFTs, the Digital Bits of Anything that Sell for Millions of Dollars, Explained*, VOX (Mar. 11, 2021), <https://www.vox.com/the-goods/22313936/non-fungible-tokens-crypto-explained> [<https://perma.cc/HNA6-WZ8E>] ("NFTs seem almost counterintuitive to the digital media age, in which images, videos, sounds, and text can be easily replicated and shared.").

44. See *id.* (defining creator economy as "a growing class of freelance artists and creatives who earn income by distributing and monetizing content on social platforms.").

45. See *id.* (noting emerging market for NFTs is driven by novelty and digital scarcity, with hopes of generating profit by selling NFT on secondary sites).

46. For more information about the critique of U.S. regulators not moving quickly enough for aid in valuations, see *supra* note 42, and accompanying text.

47. See Ethan Sears, *A Clear Explanation of NFTs and Their Potential Impact on Sports*, LOS ANGELES TIMES (July 15, 2021), <https://www.latimes.com/sports/story/2021-07-15/nft-role-future-of-sports> [<https://perma.cc/HL8A-6FRZ>] ("Right now, much of the intrigue comes around NFT collectibles.").

48. For more information about NFTs being used as tickets for entry, see *supra* note 13, and accompanying text.

49. See Joseph Henry, *Top 10 Most Expensive NFTs in the Field of Sports*, TECH TIMES (Aug. 1, 2021), <https://www.techtimes.com/articles/263611/20210801/top-10-expensive-nfts-field-sports.htm> [<https://perma.cc/6NQC-JBGU>] (listing highest playing sport NFTs as of Aug. 1, 2021).

50. See *id.* (noting photographer Kimani Okearch captured LeBron dunk pose).

only NBA stars but also NFL stars.⁵¹ In April of 2021, the NFL's Tom Brady debuted "Autograph," an NFT company producing and selling digital assets.⁵² Some athletes selling their merchandise on Autograph include Tiger Woods, Rob Gronkowski, and Tony Hawk.⁵³ Brady himself set records for NFT prices when he sold his rookie card as an NFT for \$2.25 million.⁵⁴

As football stars individually made their way to the platform, sporting agencies also made their way.⁵⁵ In September 2021, the NBA announced a collaboration with Dapper Labs to launch digital video collectibles.⁵⁶ The deal aims to drive fan engagement in the metaverse.⁵⁷ The partnership hopes to bring together NFL fans and heroes by purchasing NFL moments from some of the most influential games in history.⁵⁸

Naturally, as the new virtual reality grows in popularity, laws must adapt to the changing atmosphere.⁵⁹ As the metaverse is a newly emerging field, little legislation or legal guidance has been

51. See Isaiah Alonzo, *Tom Brady Debuts 'Autograph' NFT to Produce Digital Art Together with Other Athletes, Artists, and MORE*, TECH TIMES (Apr. 6, 2021), <https://www.techtimes.com/articles/258816/20210406/tom-brady-debuts-autograph-nft-produce-digital-art.htm> [<https://perma.cc/KH63-PDNH>] ("Tom Brady is joining the NFT craze and trend, as the seven-time NFL Superbowl Champion establishes 'Autograph' with Dillon Rosenblatt.").

52. See *id.* (noting Autograph will provide platform for NFTs for well-known personalities from athletes, artists, entertainment, pop-culture, fashion, and sports industries).

53. See *id.* (explaining Autograph aims to work with athletes and celebrities personally for selling NIL NFTs).

54. See *id.* (stating this price is considered most expensive in football history).

55. See Mark Galli, *Cultivating Culture Through Commoditisation: Why NFTs Present an Unparalleled Opportunity for the Sports Sectors*, LAWINSPORT (Nov. 4, 2021), <https://www.lawinsport.com/topics/item/cultivating-culture-through-commoditisation-why-nfts-present-an-unparalleled-opportunity-for-the-sports-sector#references> [<https://perma.cc/ME5T-YJMK>] (reporting valuation of NFT firm at \$7.6 billion).

56. See *id.* (stating NBA Top Shot is leading market in digital sports collectibles).

57. See *id.* (noting NBA Top Shot provides in its terms and services that 'Moment' purchased will allow user to acquire "limited license to use any 'Art' associated with the Moment.").

58. See NFL, *NFLPA and Dapper Labs Announce New NFT Deal to Create Exclusive Digital Video Highlights*, NFL (Sept. 29, 2021), <https://www.nfl.com/news/nfl-nflpa-and-dapper-labs-announce-new-nft-deal-to-create-exclusive-digital-vide> [<https://perma.cc/NPK4-TAHB>] (quoting statement from Roham Gharegozlou, CEO of Dapped Labs, "From the Hail Murray to the Minneapolis Miracle, magic happens in NFL stadiums. As a league that continually raises the bar, we are proud that the NFL and NFLPA have chosen Dapper Labs to deliver for NFL fans worldwide the Moments they've been waiting for.").

59. See Adrian Krion, *NFT Regulation Looms Large, So Let's Start With the Proper Framework*, NASDAQ (Nov. 9, 2021), <https://www.nasdaq.com/articles/nft-regulation-looms-large-so-lets-start-with-the-proper-framework> [<https://perma.cc/ZRD4->

formed on the topic.⁶⁰ The legislation that took the forefront of NFT regulation involved tax and securities laws.⁶¹ While the legislature continues to guide in this area, intellectual property laws remain the standard for evaluating infringement.⁶²

B. Intellectual Property Law

1. Copyright

Copyright law protects original works of authorship fixed in a tangible medium of expression.⁶³ The metaverse holds many copyrightable works such as software, pictorial and graphical works, and sound recordings.⁶⁴ The Digital Millennium Copyright Act (“DMCA”) provides additional safeguards to copyright owners online by circumvention of measures controlling access to copyrighted works.⁶⁵ A DMCA Takedown Notice permits copyright owners to ask website administrators to remove infringing material quickly, which removes the need for litigation.⁶⁶

VDA7] (noting governments around world have reacted differently regarding rise of digital assets).

60. *See id.* (“U.S. congressional committees and government agencies deliberated over the last three to four years trying to grasp what digital assets truly meant for the global and domestic economy.”).

61. *See* Taylor Hatmaker, *Crypto Community Slams ‘Disastrous’ New Amendment to Biden’s Big Infrastructure Bill*, TECHCRUNCH (Aug. 6, 2021), <https://techcrunch.com/2021/08/06/crypto-biden-amendment-infrastructure-bill-proof-of-work/> [<https://perma.cc/G56G-5Z4E>] (noting bipartisan infrastructure plan intended to narrow down on tax compliance with historically under-regulated digital currency).

62. For further discussion of intellectual property laws, see *infra* notes 63–118, and accompanying texts.

63. *See* 17 U.S.C. § 102 (1976) (defining subject matter statutory requirements for copyrightability).

64. *See id.* (articulating categories for works of authorship protected under Copyright Act).

65. *See The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/dmca/> [<https://perma.cc/8GST-H3Q8>] (last visited Mar. 20, 2022) (“The three main updates were (1) establishing protections for online service providers in certain situations if their users engage in copyright infringement, including by creating the notice-and-takedown system, which allows copyright owners to inform online service providers about infringing material so it can be taken down; (2) encouraging copyright owners to give greater access to their works in digital formats by providing them with legal protections against unauthorized access to their works (for example, hacking passwords or circumventing encryption); and (3) making it unlawful to provide false copyright management information (for example, names of authors and copyright owners, titles of works) or to remove or alter that type of information in certain circumstances.”).

66. *See What is the DMCA Notice and Takedown Process*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/what-is-dmca-takedown-notice-process/> [<https://perma.cc/N9S4-XGVF>] (last visited Mar. 20, 2022) (noting that there are several elements specified by copyright law that should be included by takedown notice).

A wrinkle in copyright that owners must account for is fair use.⁶⁷ The fair use defense allows for the use of copyrighted material that meets certain factors without needing permission from the owner.⁶⁸ Section 107 of the Copyright Act calls for four factors to be considered when determining whether a use is fair.⁶⁹ The factors are 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market value or value of the copyrighted work.⁷⁰

As to the first factor, courts consider whether the use is commercial and how transformative a work is.⁷¹ Transformative use creates something new from the existing work and creates a different purpose or character.⁷² A looming question in the NFT space is whether courts will consider NFTs transformative, which would heavily favor the NFT creator's use being fair.⁷³ Regarding the second factor, courts consider how artistically creative and close the work is to the core of copyright protection, meaning how unique and expressive a work is.⁷⁴ The third factor weighs the quantitative and qualitative portions used from the existing work, considering its volume and if the portions used are taken from the heart of the

67. See *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/fair-use/> [<https://perma.cc/9CUE-QZRW>] (last visited Mar. 20, 2022) (“The Fair Use Index tracks a variety of judicial decisions to help both lawyers and non-lawyers better understand the types of uses courts have previously determined to be fair-or not fair.”).

68. See *id.* (stating permission from owner may be both implied or expressed to use protected work).

69. See 17 U.S.C. § 107 (1976) (defining fair use factors used to determine copyright infringement).

70. See Daniel M. Levine, *NFTs and Their Intellectual Property Implications: Part IV-Fair Use' and Copyright Infringement*, RM PARTNERS LAW (May 19, 2021), <https://www.rmpartnerslaw.com/blog-content/nfts-and-their-intellectual-property-implications-part-iv> [<https://perma.cc/D6QX-6HD7>] (“[F]air use' defenses take on interesting twists with NFTs due to their newness . . .”).

71. See *U.S. Copyright Fair Use Index*, *supra* note 67 (noting more use is of commercial value, more it leans to not being fair, and more transformative work is, more likely it will be viewed as fair).

72. See *id.* (stating new work may not be substitute for original, rather it adds something new with different intention).

73. See Niki Shadoan, *The NFT Copyright Conundrum*, ONE37PM (Sept. 13, 2021, 4:30 PM), <https://www.one37pm.com/nft/finance/nft-copyright-conundrum> [<https://perma.cc/PRJ6-GN43>] (posing questions of whether turning something into NFT will per se be transformative and whether blockchain will transform its purpose and character).

74. See *U.S. Copyright Fair Use Index*, *supra* note 67 (explaining more creative works, such as books, movies and songs, are entitled to broader protection than factual works, such as technical articles or news).

underlying work.⁷⁵ It follows that the smaller the amount of material used, the more likely a court will favor a finding of fair use.⁷⁶ The fourth factor considers whether the existing work's market is usurped by the secondary work and whether the second work takes away from the first's economic market.⁷⁷

Copyright law does not protect ideas but rather expressions of those ideas.⁷⁸ In the landmark case *Baker v. Selden*,⁷⁹ the Supreme Court introduced the concept of idea-expression dichotomy, a fundamental theory of copyrightability.⁸⁰ A foundation of copyright law is the open expression of ideas, not the ideas themselves, giving rise to a protected interest.⁸¹ In *Bikram's Yoga College v. Evolution Yoga*,⁸² the Ninth Circuit further elaborated on this principle, explaining that the process for seeking protection of the idea, process, or system is better sought through patent.⁸³ These arguments are important for NFT creators to consider when taking inspiration or an idea from an existing work.⁸⁴

75. See *Fair Use*, COLUMBIA UNIVERSITY LIBRARY COPYRIGHT ADVISORY SERVICES, <https://copyright.columbia.edu/basics/fair-use.html#:~:text=Factor%203%3A%20The%20Amount%20or%20Substantiality%20of%20the%20Portion%20Used,-Although%20the%20law&text=A%20book%20chapter%20might%20be,also%20measured%20in%20qualitative%20terms.> [https://perma.cc/9GQN-SP8K] (last visited Dec. 19, 2022) (describing third factor as comparison of relative length of document to amount used).

76. See *id.* (noting courts may also find uses of small amounts to satisfy requirement if taken from most expressive part of work, known as 'heart of the work').

77. See *supra* note 74 (explaining courts analyze loss of licensing options and whether harm could become widespread).

78. See 17 U.S.C. § 102 (1976) (stating copyright protection does not extend to idea, rather it encompasses only expression of that idea).

79. *Baker v. Selden*, 101 U.S. 99 (1879).

80. See *id.* (finding bookkeeping system with various columns and numbers is not copyrightable due to nature of useful art).

81. See Oren Bracha, *Commentary on: Baker v. Selden (1879)*, PRIMARY SOURCES ON COPYRIGHT, https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_us_1879b [https://perma.cc/3ZXM-W4BY] (last visited Oct. 22, 2022) (explaining idea-expression dichotomy, which seeks to protect expression of idea, and not idea itself).

82. *Bikram's Yoga Coll. of India v. Evolution Yoga*, 8093 F.3d 1032 (9th Cir. 2015).

83. See Kate Lucas, *Ninth Circuit Explores Copyright's "Idea/Expression Dichotomy"*, GROSSMAN LLP (Oct. 30, 2015), <https://www.grossmanllp.com/ninth-circuit-explores-copyrights-idea-expression-dichotomy> [https://perma.cc/2RDY-3W58] (explaining Bikram's attempt to secure copyright protection for sequence of twenty-six yoga postures is idea that has not been manifested into something other than idea).

84. See *id.* (explaining that due to copyright law not protecting underlying ideas, others are free to use that idea).

2. Trademark

A trademark can be any word, phrase, symbol, design, or combination thereof which identifies the source of goods or services.⁸⁵ Trademark law seeks to promote the integrity of consumer recognition in a marketplace.⁸⁶ As people and companies expand to the metaverse, trademarks will aid their presence and recognition, allowing for seamless source identification on various platforms.⁸⁷ Trademark portfolios may be very large for some brands and therefore present a difficult challenge in monitoring infringement across multiple platforms.⁸⁸ Although registration of a trademark is not required, filing a mark with the USPTO offers multiple benefits to trademark owners.⁸⁹ Some benefits include the presumption of the validity of the mark and the right to bring a lawsuit against infringers in federal court.⁹⁰

One of the most important aspects of trademark registration is defining the scope of the trademark.⁹¹ The scope sets the parameters of what types of goods and services are protected for that

85. See *What is a Trademark?*, USPTO, <https://www.uspto.gov/trademarks/basics/what-trademark#:~:text=A%20trademark%20can%20be%20any,distinguish%20you%20from%20your%20competitors.&text=Identifies%20the%20source%20of%20your,legal%20protection%20for%20your%20brand> [<https://perma.cc/3FPW-ZSEM>] (last visited Mar. 20, 2022) (“A trademark: Identifies the source of your goods or services. Provides legal protection for your brand. Helps you guard against counterfeiting and fraud.”).

86. See *id.* (describing trademark law as means for consumers to distinguish goods and services from that of competitors, protecting consumers from false or misleading messaging and brands).

87. See Pryor, *supra* note 23 (“Trademark owners who successfully leverage the metaverse to engage in cross-promotional branding can reach a wider audience, but they must be aware of the potential liability associated with that expanded reach.”).

88. See *id.* (recommending trademark owner subscribe to watch service which monitors and tracks infringing uses across various platforms such as social media or resale sites).

89. See *Why Register Your Trademark*, USPTO, <https://www.uspto.gov/trademarks/basics/why-register-your-trademark> [<https://perma.cc/DJ7T-WS54>] (last visited Mar. 20, 2022) (stating it is owner’s choice whether or not to file federal trademark application with USPTO, but many benefits are included once registered).

90. See *id.* (noting additional protections include trademark being listed on USPTO’s database, ability to use federal trademark registration symbol, U.S. Customs and Border Protection on importation of infringing goods, and use as basis for filing trademark in another country).

91. See *Trademark Scope of Protection*, USPTO, <https://www.uspto.gov/trademarks/basics/scope-protection> [<https://perma.cc/QU96-E6V6>] (last visited Mar. 20, 2022) (stating it is critical to determine and correctly identify scope of trademark protection when analyzing infringement).

mark.⁹² For example, Villanova University is registered in International Class 41 for educational and entertainment services, among other registrations the University holds.⁹³ This allows a trademark owner to legally prevent others from using the same or a similar mark in that related goods or service scope of use.⁹⁴ Under this illustration, if a college attempted to use a name similar to Villanova University, which holds a valid trademark registration, that university may be committing trademark infringement.⁹⁵ Due to the metaverse, brands are quickly registering their digital assets and defining their scope of goods and services as downloadable virtual goods in order to be able to legally stop NFT content creators from using the mark on the metaverse.⁹⁶ Due to the metaverse defining a new scope of our universe, trademark owners do not necessarily have registrations for “virtual” goods simply because their goods are covered physically.⁹⁷ In order for a trademark owner to succeed on an infringement claim against an NFT holder, the trademark owner would need to prove that a consumer confuses the source of the NFT with that of the trademark.⁹⁸

92. *See id.* (stating trademark is not necessarily limited to one good service but may include multiple goods and services).

93. *See* VILLANOVA UNIVERSITY, Registration No.1353326 (outlining Villanova University’s trademark registration).

94. *See Trademark Scope of Protection*, *supra* note 91 (noting that during examination, USPTO may inquire whether identification owner described accurately represents goods and services used).

95. For more information about the Villanova registration, see *supra* note 93, and accompanying text.

96. *See* Sarah Dixon, *To the Metaverse and Beyond: Considerations for Trademark Owners*, THE FASHION LAW (Nov. 25, 2021), <https://www.thefashionlaw.com/to-the-metaverse-and-beyond-considerations-for-trademark-owners/> [https://perma.cc/WJ6W-KJ4D] (finding applications may be used as defensive strategy to stop infringing use with expectation marks could be used without permission of trademark owners by NFT creators).

97. For more information on how trademark registrations may be covered under the Doctrine of Natural Expansion, see *infra* note 100 and accompanying text.

98. *See* *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (stating thirteen factors are examined in any analysis of likelihood of confusion including: 1) similarity of the marks; 2) similarity and nature of the covered goods and services; 3) similarity of established trade channels, 4) conditions under which, and buyers to whom, sales are made; 5) fame of the prior mark; 6) number and nature of similar marks in use on similar goods; 7) nature and extent of actual confusion; 8) length of time during, and conditions under which, there has been concurrent use without evidence of actual confusion; 9) variety of goods on which a mark is or is not used; 10) market interference between applicant and owner of the prior mark; 11) extent to which applicant has a right to exclude others from use of its mark; 12) extent of possible confusion; and 13) any other established fact probative of the effect of use).

A provision of trademark law allows owners to extend their mark to include other goods and services that are within the natural scope of expansion with respect to the current goods and services.⁹⁹ When using this doctrine, courts look to the relatedness of the goods identified in cited registration and ask whether it would likely expand to a different good.¹⁰⁰ This doctrine normally applies in proceedings where dueling owners claim priority of use.¹⁰¹ However, questions as to whether this doctrine will apply in the metaverse are arising.¹⁰² The USPTO has yet to settle whether ownership of a product or service in the physical world indicates ownership in the metaverse.¹⁰³

C. Name, Image, and Likeness

An individual retains the right to use one's name, likeness, image, or other indicia of identity for commercial purposes.¹⁰⁴ Through this right, individuals may license the use of their name for commercial promotion.¹⁰⁵ Many opportunities arise for ath-

99. See TMEP § 1207.01(a)(v) (8th ed. Oct. 2011) (describing that during proceedings, trademark owners may demonstrate that it will expand its goods or services to another category not currently covered by their registration).

100. See Ned T. Himmelrich, 'Natural Zone of Expansion' Broadens Trademark Rights, GORDON FEINBLATT LLC (Aug. 20, 2020), <https://www.gfrlaw.com/what-we-do/insights/%E2%80%98natural-zone-expansion%E2%80%99-broadens-trademark-rights> [<https://perma.cc/6NJC-UC5Q>] ("This theory of 'natural zone of expansion' contemplates that consumers understand a connection between various goods or services, and a business that offers some items in connection with a brand is likely to be connected with the offering of similar goods or service under that brand.").

101. See *id.* ("If a mark is used in one region, the owner may also have rights in adjacent territories to which expansion seems appropriate.").

102. See Maghan McDowell, *How to Trademark the Metaverse*, VOGUE BUSINESS (Jan. 11, 2022), <https://www.voguebusiness.com/technology/how-to-trademark-the-metaverse> [<https://perma.cc/FHU3-4QNG>] ("[The metaverse] 'illustrates the risk to brands in the trademark class system as well as how the class system is adapting to change.'").

103. See *id.* (explaining ownership in physical world is different from metaverse, leading many brands to quickly register their goods in new territory as preventative measure).

104. See Restatement (Third) of Unfair Competition §46 AM. LAW. INST. (1995) (stating, "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49").

105. See Ben Natter, *Marketing NIL Rights in an NFT World*, WWL (July 30, 2021), <https://whoswholegal.com/features/marketing-nil-rights-in-an-nft-world> [<https://perma.cc/GQ66-R4AL>] (noting NIL importance in collegiate sports this past year with decision in *NCAA v. Alston*).

letes to use their name when artists mint NFTs.¹⁰⁶ NFL players Rob Gronkowski and Patrick Mahomes have released NFTs in their names, which generated millions of dollars in revenue.¹⁰⁷ Illustrated by the vast revenue the platform provides for athletes, a key consideration for those wanting a hand in the game is minting their own personal NFTs or licensing the use of their name, image and likeness (“NIL”) to digital creators.¹⁰⁸

D. First Amendment and Artistic Expression

The First Amendment embodies the protection of an individual’s artistic expression, which is fundamental to the foundation of the United States.¹⁰⁹ Although the government provides safeguards for intellectual protection, courts have found that the value of creative expression protected by the First Amendment outweighs intellectual property protection in certain circumstances.¹¹⁰ In *Rogers v. Grimaldi*,¹¹¹ the Second Circuit balanced these interests.¹¹² The *Rogers* test states, “[i]n general the Lanham Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”¹¹³ The court explained that this test will weigh in favor of artistic expression unless the use of the trademark has no artistic

106. See Phillip Bauknight and Brett Owens, *NFTs and NILs: 4 Considerations for Athletic Departments as New Opportunities for Athletes Explode*, JD SUPRA, (Mar. 15, 2022) <https://www.jdsupra.com/legalnews/nfts-and-nils-4-considerations-for-6473652/> [<https://perma.cc/PJ32-T536>] (explaining ramifications for student athletes and athletic departments when partnering with artists to create custom NFTs using athlete’s name and university’s logo).

107. See Natter, *supra* note 105 (stressing these digital collectibles are not licensed by NFL and do not contain any registered trademarks of team logos).

108. See *id.* (describing various opportunities, including unionization, for athletes to secure monetization of their NIL by either minting NFT themselves or pairing with digital artist in creating NFT through licensing channels).

109. See U.S. CONST. amend. I (limiting government restraint of speech, press, petition, assembly, and religion).

110. See *Trademarks and the First Amendment: Litigation Trends*, KIRKLAND & ELLIS (Nov. 6, 2020), <https://www.kirkland.com/publications/article/2020/11/trademarks-and-the-first-amendment> [<https://perma.cc/5E7H-E3LM>] (outlining court jurisprudence defining the standard of applicability and stating, “It is intended to ‘weigh the public interest in free expression against the public interest in avoiding consumer confusion.’ *Univ. of Ala. Board of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278 (11th Cir. 2012).”).

111. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

112. See *id.* at 997 (discussing rejected claim by legendary actress and dancer Ginger Rogers that use of her name in title of motion picture *Ginger and Fred* infringed her rights in her name).

113. See *id.* at 999 (explaining applicability of test when defendant makes threshold legal showing that alleged infringement is part of expressive works protected under First Amendment).

relevance to the underlying work or if it causes confusion to consumers as to the source of the work.¹¹⁴ Many circuits have adopted this test with the theme of protecting creative expression.¹¹⁵ As addressed in recent litigation coming from *Hermès v. Rothschild*,¹¹⁶ the court concluded that the *Rogers* test would apply when determining artistic relevancy in a trademark infringement claim in the NFT space.¹¹⁷ The court's opinion on setting a precedent for the *Rogers* test to apply in NFT infringement actions will shape future NFT litigation.¹¹⁸

III. MINTING THE NFT: LEGAL IMPLICATIONS AND ANALYSIS

A. Issues Within Copyright and Name, Image, and Likeness Law

NFT owners do not automatically grant ownership of intellectual property rights to the underlying work.¹¹⁹ NFTs are bought and sold using contract law, and the rights to the intellectual property may therefore be contracted around.¹²⁰ Intellectual property rights vest with the original creator.¹²¹ In the context of copyright law, an owner has the exclusive right to reproduce, use, distribute,

114. *See id.* (describing non-commercial speech as being vulnerable to chilling effects which confronts courts with determining what economic gains are considered non-commercial in nature).

115. *See, e.g.,* *VIP Products LLC v. Jack Daniel's Properties, Inc.*, 953 F.3d 1170 (9th Cir. 2020) (finding district court erred by not implementing *Rogers* analysis to expressive dog toy); *Univ. of Ala. Bd. of Tr. v. New Life Art, Inc.*, 683 F.3d 1266 (11th Cir. 2012) (applying *Rogers* analysis to paintings, prints and calendars, categorizing them as expressive works).

116. *Hermès Int'l v. Rothschild*, No. 22-cv-384, 2022 WL 1564597 (S.D.N.Y. Feb. 9, 2022).

117. *See Hermès Int'l v. Rothschild*, Memorandum Order, 22-cv-384 (JSR) at 8 (S.D.N.Y. May 18, 2022) (noting judge ruled *Rogers* test will apply in NFT cases for trademark infringement).

118. *See id.* at 10 (summarizing Hermès' acknowledgment of artistic aspect of some digital images sold through NFTs).

119. *See* Ling W. Kong, *The Value of Uniqueness: Non-Fungible Tokens in the Age of Name, Image and Likeness*, NAT'L L. REV. (July 9, 2021), <https://www.natlawreview.com/article/value-uniqueness-non-fungible-tokens-age-name-image-and-likeness> [<https://perma.cc/2U4G-GZHF>] (“[T]he attendant intellectual property rights such as copyright or design rights remain in effect in the underlying work and are not automatically inherent, and do not reside, in the NFTs themselves.”).

120. *See id.* (finding contract law may redirect intellectual property rights to purchaser).

121. *See* Ken Adams, “Vest” and Intellectual Property, ADAMS ON CONTRACT DRAFTING (Dec. 7, 2018), <https://www.adamsdrafting.com/vest-and-intellectual-property/> [<https://perma.cc/Q9RK-PF4W>] (stating, “IP ownership is conferred under a contract in one of two ways: A contract can establish ownership rights through language of assignment (either present assignment using language of performance . . . or because the contract otherwise meets specific requirements that result in a party owning the IP.”).

and prepare derivative works.¹²² By selling an NFT, the copyright owner does not abandon these rights but rather gives the purchaser the right to own the NFT for personal use.¹²³

Sales in the NFT space should be viewed as two categories: the primary sale and the resale of the NFT by the purchaser.¹²⁴ As many athletes pave the way with the use of their name usage in the metaverse, the opportunity for licensing deals is rising.¹²⁵ As such, NFT companies are quickly seeking to sign athletes for the use of their names.¹²⁶ NFT companies create opportunities for both the athlete and the original artist.¹²⁷ Under the Copyright Act, NFT companies must obtain permission from the copyright owner who created the work to reproduce, distribute, and prepare derivative works of the NFT.¹²⁸ This caveat provides great leverage for original artists and athletes to receive royalties on every subsequent purchase of the NFT.¹²⁹ As illustrated on an OpeanSea transaction, the NFT site listed a disclaimer on the page displaying a LeBron James NFT for sale, clarifying that the use is for non-commercial purposes.¹³⁰ The disclaimer then clarified that if the purchaser seeks other rights, they must work with LeBron James for permission.¹³¹ However, the right to use an athlete's name does not necessarily give rise to a right to use the athlete's team name, which may lead to additional licensing requirements and implications.¹³²

122. See 17 U.S.C. § 106 (1976) (explaining rights of copyright owner).

123. For more information about the copyright rights, see *infra* notes 63–84, and accompanying text.

124. See Jerome Fogel, *Negotiating NFTs for Athletes*, SPORTS LAWYERS ASS'N BLOG, <https://blog.sportslaw.org/posts/negotiating-nfts-for-athletes/> [<https://perma.cc/D92J-QZMM>] (last visited Mar. 20, 2022) (noting this split provides athletes ability to be entitled to percent of both transactions contractually).

125. See *id.* (noting Gronkowski reportedly selling 1.8 million dollars' worth of NFTs with his name used).

126. See *id.* (stating as demand for market increases, payment to athletes will increase).

127. See *id.* (finding NFT companies will often split revenue generated from transaction with athletes, and splits range from forty-five percent to ninety percent).

128. See *id.* (providing remedies for copyright infringement).

129. For more information about the potential avenue for royalties and splitting arrangements, see *infra* note 198 and accompanying text.

130. See Kong *supra* note 119 (“NFT sale page stated ‘This is the only time this particular shot will ever be listed on any exchange.’”).

131. See *id.* (stating comically, “trading for the full non-commercial rights to this creation – anything past that, you’ll have to work with LeBron. Tell him Kimani says hi.”).

132. See *Laws for College Athletes Name, Image, and Likeness Rights: 50-State Survey*, JUSTIA, <https://www.justia.com/sports-law/college-athlete-name-image-and-likeness-rights-50-state-survey/> [<https://perma.cc/S3NE-XKZP>] (last visited October

The NFL seems to be making deals of its own, partnering with Bud Light to launch an NFT collection depicting team logos on the cans.¹³³

An additional obstacle for copyright owners is fair use arguments by an alleged infringer.¹³⁴ One of the most heavily weighed factors in a fair use analysis is a transformative use.¹³⁵ Transformative use may be found when something new is added to the work with a different purpose or character and does not substitute for the original work.¹³⁶ Courts have yet to determine whether a work being used on the metaverse is considered transformative for legal purposes.¹³⁷ If a work is found to be transformative, then new copyright rights vest in the NFT.¹³⁸ The World Intellectual Property Association (“WIPO”) describes copyright implications of NFTs as confusing due to the buyer’s ownership of the underlying data in the NFT, rather than the work itself.¹³⁹ Due to the discrepancy in

2022) (noting under Maryland law, “Athletes do not have a right to use school intellectual property in NIL activities without school permission.”).

133. See ONE37pm Editors, *Bud Light Partners With NFL to Launch New NFT Collection*, ONE37PM (Oct. 3, 2022), <https://www.one37pm.com/nft/budlight-nfl-nft-collection> [<https://perma.cc/FCC4-LXB2>] (describing Bud Light’s deal with NFL to create new NFT collection depicting all 32 NFL team logos, partnering with Vayner3 on Flow blockchain).

134. See *U.S. Copyright Office Fair Use Index*, *supra* note 67 (describing fair use as “a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.”).

135. See *id.* (noting if heavier transformative nature, then more likely use will be found fair).

136. See *id.* (explaining “certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research” are found to be fair).

137. See Lisa Rosenof, *Minted NFT of Someone Else’s Artwork? A New Flavor of Copyright Infringement*, UNIV. OF CIN. L. REV. (Feb. 11, 2022), <https://uclawreview.org/2022/02/11/minted-nft-of-someone-elses-artwork-a-new-flavor-of-copyright-infringement%E2%8C%9C/#:~:text=Where%20minting%20an%20NFT%20is,act%20of%20minting%20the%20URL> [<https://perma.cc/KS6Z-QNWQ>] (stating courts will likely find infringement if defendant is merely copying underlying work and stating NFT in itself should be deemed transformative).

138. See Simon J. Frankel & Billie Mandelbaum, *What Copyright Lawyers Need to Know About NFTs*, BLOOMBERG LAW (July 16, 2021), <https://news.bloomberglaw.com/ip-law/what-copyright-lawyers-need-to-know-about-nfts> [<https://perma.cc/6Y95-TS5K>] (noting issues of digital first sale and whether selling NFT will violate copyright holder’s distribution right).

139. See Andres Guadamuz, *Non-fungible tokens (NFTs) and Copyright*, WIPO MAGAZINE (Dec. 2021) https://www.wipo.int/wipo_magazine/en/2021/04/article_0007.html [<https://perma.cc/KC3H-8R4F>] (“Most non-fungible tokens are a metadata file that has been encoded using a work that may or may not be subject to copyright protection (you could in principle create an NFT of a trademark), or it could even be a work in the public domain.”).

data versus the underlying artistic work, courts will have to analyze the complexities presented by NFTs.¹⁴⁰

B. Implications Concerning Trademark Law

Litigation is beginning in the NFT space challenging the scope of current trademark rights, and parties are filing proceedings that will carve the path for how courts will apply existing law to a completely new virtual world.¹⁴¹ The current precedent in *Rogers* serves as an important barometer for NFT creators using trademarks in their NFT creations.¹⁴² In *Hermès International v. Rothschild*, litigation in the Southern District of New York ensued for an NFT creator who claimed to be artistically commenting on the famous Birkin bag.¹⁴³ The artist created a series of NFTs depicting a Birkin bag covered in fur, claiming to be commenting on alleged animal cruelty in manufacturing the Birkin bag.¹⁴⁴ Rothschild created over 100 digital works, one depicting a fetus on a miniature Birkin bag, which Rothschild named “Baby Birkin.”¹⁴⁵ The digital images have sold for tens of thousands of dollars, with the most expensive purchase at \$42,000.¹⁴⁶ Hermès claimed the artist infringed on its trademark rights in the name Birkin and trade dress rights of the handbag; conversely, the artist claimed protection under the First Amendment and *Rogers* Test.¹⁴⁷ The defendant’s paramount argu-

140. See *id.* (noting that although many alleged copyright infringement cases concerning NFTs have been solved outside court systems, courts will soon be asked whether NFTs are infringing copyright holders’ rights).

141. For more information about litigation in the trademark space, see *infra* notes 171–172, accompanying text.

142. For more information about the *Rogers* analysis, see *supra* notes 111–118, and accompanying text.

143. See Memorandum of L. in Support of Defendant Mason Rothschild’s Motion To Dismiss The Complaint, *Hermès Int’l v. Rothschild*, (S.D.N.Y. 2022) (No. 1:22-cv-00384-AJN-GWG) [hereinafter *Defendant’s Motion to Dismiss*] at 3 (alleging “actual Birkin bags . . . are made from the tanned hides of slaughtered animals.”).

144. See *id.* at 1 (stating these depictions carry meaning and commentary on “ultra-expensive leather handbags.”).

145. See *id.* at 1–2 (describing digital image “depicting a 40-week-old fetus gestating inside of a transparent Birkin handbag.”).

146. See Mara Siegler, *Hermès Suing Artist Over Birkin Bag NFTs*, PAGE SIX STYLE (Jan. 20, 2022), <https://pagesix.com/2022/01/20/hermes-suing-artist-over-birkin-bag-nfts/#:~:text=Ro%20thschild%20has%20been%20selling%20NFTs,coveted%20on%20the%20secondary%20market> [https://perma.cc/5F94-WMJT] (noting real-life Birkin retails between \$9,000 and \$400,000).

147. See *Defendant’s Motion to Dismiss* at 8–9 (“Hermès hopes to confuse matters by emphasizing that Rothschild sells his digital artwork by way of non-fungible tokens (NFTs). But Rothschild’s art does not lose its First Amendment protection just because he sells it: almost every case in which courts have applied *Rogers*—including *Rogers*—including *Rogers* itself—has involved speech that was sold.”).

ment was that although the artist's NFTs were sold, the First Amendment favors artist commentary and freedom of expression, outweighing the need to avoid consumer confusion.¹⁴⁸ Contrastingly, Hermès claims that the artist is using the name "Birkin" as a trademark, not as expressive commentary.¹⁴⁹

Under the second prong of the *Rogers* test, trademark use must explicitly mislead consumers.¹⁵⁰ Some considerations are whether the junior user uses the mark in the same way as the senior user and whether the junior users add their expressive content to the work.¹⁵¹ Hermès has introduced evidence of actual consumer confusion, weighing heavily in favor of their legal argument.¹⁵² For example, Hermès introduced evidence of individuals who thought Hermès created these Birkin NFTs at issue, with some asking if Hermès endorsed or created the NFTs.¹⁵³ Consumer confusion destroys the value of artistic expression, and a jury will have to determine whether actual consumer confusion is present given the circumstances.¹⁵⁴ Judge Rakoff denied Rothschild's motion to dismiss.¹⁵⁵ The court ultimately left the question of explicit misleadingness to the jury, describing misleadingness as, "it induces

148. *See id.* at 9 (emphasizing First Amendment protects artistic works responding to marketplace of ideas, and Hermès may not stop Rothschild from creating fanciful artwork).

149. *See id.* at 11 (claiming Defendant's use is neither misleading nor confusing).

150. *See* John Desmarais, Trademark Law an Open-Source Casebook 629 (Barton Beebe, Version 8 2020) ("To be relevant, the evidence must relate to the nature of the behavior of the identifying material's user, not the impact of the use.").

151. *See id.* at 629–30 (describing that *Rogers* test was originally designed as balancing test weighing public interest in avoiding consumer confusion against free expression).

152. *See* Am. Compl. at 33, 34, Hermès Int'l v. Rothschild, No. 22-cv-384, 2022 WL 1564597 (S.D.N.Y. filed Jan. 14, 2022) [hereinafter Plaintiff's Complaint] (claiming customers have tweeted, among other things, "OK, I have a couple Birkins, but NFTs? This is too awesome!!!"; "Are they real bags? (Not hip to NFTS just yet)").

153. *See id.* ("[W]hat do you think about Birkins (and fashion generally) entering the metaverse?").

154. For more information about the *Rogers* analysis, see *supra* notes 111–118, and accompanying text.

155. *See* TFL, *MetaBirkins Creator Cannot Escape Hermès Trademark Suit*, Judge Says, THE FASHION LAW (May 6, 2022), <https://www.thefashionlaw.com/metabirkins-creator-cannot-escape-hermes-trademark-suit-judge-says/> [https://perma.cc/2EAY-X9BF] (stating Judge Rakoff states he will issue full opinion in due time).

members of the public to believe [the allegedly infringing use] was prepared or otherwise authorized by the plaintiffs.”¹⁵⁶

On January 30, 2023, the parties took their arguments to court for a jury trial in the Southern District of New York.¹⁵⁷ While the parties battled the applicability of trademark law and the First Amendment to NFTs, the court was posed with determining the legal precedent for cases to come.¹⁵⁸ Judge Rakoff determined that due to there being some artistic expression the *Rogers* test will apply in this case, but left the decision of whether the First Amendment protects Rothschild from liability as a question of fact for the jury.¹⁵⁹ The court instructed the jury first to determine whether Rothschild is liable for any of the three claims of trademark infringement, and if so, only then to determine whether the First Amendment should shield Rothschild from liability.¹⁶⁰ The next step from the instructions explained that the jury must determine whether Rothschild intended to mislead potential consumers into believing that Hermès was associated with the NFTs at issue.¹⁶¹ On February 8, 2023, the jury reached a verdict and found that Rothschild’s trademark infringement explicitly mislead consumers that Hermès was involved with the MetaBirkin endeavor, and awarded

156. See *Hermès Int’l v. Rothschild*, No. 22-cv-384, 2022 WL 1564597, at *5 (S.D.N.Y. Feb. 9, 2022) (alteration in original) (describing court’s jurisprudence in confusion analysis).

157. See TFL, *Hermès v. Rothschild: A Timeline of Developments in a Case Over Trademarks, NFTs*, THE FASHION LAW, (Feb. 8, 2023), <https://www.thefashionlaw.com/hermes-v-rothschild-a-timeline-of-developments-in-a-case-over-trademarks-nfts/> [<https://perma.cc/4GSZ-4AA2>] (outlining case developments in *Hermès v. Rothschild*, spanning from January 14, 2022 to February 8, 2023).

158. See *id.* (opining confusion among jury members regarding NFTs and applicable trademark rights are present).

159. See Op. and Order, *Hermès Int’l v. Rothschild*, No. 22-cv-384 (S.D.N.Y. Feb. 2, 2023) (denying “parties’ cross motions for summary judgment” and opining *Rogers v. Grimaldi* applies and genuine issues of material fact remain).

160. See The Court’s Instructions of Law to the Jury at 21, *Hermès Int’l v. Rothschild*, No. 22-cv-384 (S.D.N.Y. Feb. 7, 2023) (describing defendant’s First Amendment protection if he engaged in artistic expression and passes explicit misleadingness prong of *Rogers* two-prong test).

161. See *id.* (“Mr. Rothschild is protected from liability on any of Hermès’ claims unless Hermès proves by a preponderance of the evidence that Mr. Rothschild’s use of the Birkin mark was not just likely to confuse potential consumers but was intentionally designed to mislead potential consumers into believing that Hermès was associated with Mr. Rothschild’s MetaBirkins project. In other words, if Hermès proves that Mr. Rothschild actually intended to confuse potential customers, he has waived any First Amendment protection.”).

Hermès \$133,000 from the defendant's profits and statutory damages.¹⁶²

Another developmental case is *Nike, Inc. v. StockX LLC*.¹⁶³ Nike sued a creator for minting an NFT with Nike's trademark depicted on a sneaker.¹⁶⁴ StockX operates by reselling physical Nike shoes, which are accompanied by an NFT.¹⁶⁵ The NFT functions as a traceable digital receipt for the product's authenticity.¹⁶⁶ StockX claims to redeem the NFT in exchange for the physical shoes.¹⁶⁷ However, Nike claims in its complaint that StockX unilaterally has the right to the shoe's possession, depriving NFT owners of their alleged physical possession of the shoe.¹⁶⁸ Nike claims trademark infringement, unfair competition, trademark dilution, and injury to reputation, among others.¹⁶⁹ Nike was among the first to register its trademarks with the USPTO to cover digital goods.¹⁷⁰ In the court documents for this proceeding, Nike cites to the new registra-

162. See Verdict at 1, *Hermès Int'l v. Rothschild*, No. 22-cv-384 (S.D.N.Y. Feb. 8, 2023) (holding Mason Rothschild liable for trademark infringement, trademark dilution, and cybersquatting).

163. Complaint, *Nike, Inc. v. Stockx LLC*, No. 1:22-cv-983 (S.D.N.Y. 2022) [hereinafter *Nike's Complaint*] (explaining Nike's suit against Stockx for misappropriation of Nike's trademarks and goodwill).

164. See *id.* at 2 (describing Defendant as operator of online resale platform of various goods which provides authentication services to its customers).

165. See Arian F. Jabbarly & Robert S. Weisbein, *NFTs and Trademark Matters in the Metaverse*, NAT'L L. REV. (Mar. 31, 2022), <https://www.natlawreview.com/article/nfts-and-trademark-matters-metaverse> [<https://perma.cc/X7JK-NBB5>] (describing the StockX NFT operates as ownership without need of physical product).

166. See *id.* ("According to Nike, StockX has not activated the redemption process for NFT owners, meaning the purchase of a sneaker NFT today would not entitle the owner to the physical shoe it allegedly represents.").

167. See *id.* (stating, "[t]his is the narrative that Nike has set forth in order to support its arguments that StockX's NFT practices are misappropriating Nike's trademarks in an effort to economically gain from the goodwill of the NIKE brand.").

168. See *Nike's Complaint* at 2 ("[W]hile StockX claims that Vault NFT owners may 'redeem' the NFT and take possession of the shoes (for an additional fee), it also states that 'the redemption process is not currently available' to NFT owners.").

169. See Jabbarly, *supra* note 165 ("Separately, Nike points to what it calls 'murky terms' which permit StockX to unilaterally redeem an NFT for an 'experiential component,' which would deprive the NFT owner of ever possessing the corresponding shoe.").

170. See *US Trademark Office Responds to Nike's Early Applications for Metaverse Marks*, THE FASHION LAW (June 29, 2022), <https://www.thefashionlaw.com/us-trademark-office-responds-to-nikes-early-applications-for-metaverse-marks/> [<https://perma.cc/M25C-PUNF>] (stating examining attorneys were "requiring Nike to clarify its 'indefinite' identification of goods and/or services in connection with which it is looking to claim its rights in – and registrations for.").

tions for virtual goods.¹⁷¹ This strategic tactic begs the question of whether Nike believes the Natural Zone of Expansion Doctrine will apply.¹⁷²

C. Application to Sport: An Illustrative Example

The question of how intellectual property will apply in the metaverse remains open as cases are making their way through the courts and calling for appeals.¹⁷³ One could imagine a fan minting an NFT of their favorite MLB player depicted in his official uniform hitting a home run and performing his signature victory dance.¹⁷⁴ In this situation, various intellectual property concerns arise, including trademark, NIL, and copyright.¹⁷⁵

In order to illustrate trademark implications, the fan will need to demonstrate that First Amendment rights are at stake implementing the *Roger's* test, being that the NFT fan art meets the minimum threshold of artistic relevance and considered an expressive work.¹⁷⁶ This burden is very low and simply requires a minimal connection to the artistic message being conveyed.¹⁷⁷ Defendants in infringement proceedings will likely meet this level of persuasion

171. See *Nike, Inc. v. StockX LLC*, Case No. 22-cv-00983 (Feb. 3, 2022) at 2 (pointing to new registrations covering virtual goods of NIKE).

172. For more information about the Natural Zone of Expansion Doctrine, see *supra* note 100 and accompanying text.

173. For more information about open cases in litigation, see *supra* notes 143–172.

174. See Angelina Sanchez, *NFTs as Expressive Works? Does the US First Amendment Protect Against Trademark & Copyright Concerns*, LAW IN SPORT, (Oct. 14, 2022), https://www.lawinsport.com/topics/sports/basketball/item/nfts-as-expressive-works-does-the-us-first-amendment-protect-against-trademark-copyright-concerns?category_id=159 [<https://perma.cc/JZ8Q-NPHJ>] (noting if artist depicted player on NFT player's team could sue for trademark infringement).

175. See *id.* (describing also, “an NFT of an athlete’s winning goal or iconic post-score celebration is replicated without permission” as copyright infringement).

176. See Practical Law Intellectual Property & Technology, *Rogers Test Applies to Non-Fungible Tokens of Birkin Bags: S.D.N.Y.*, THOMAS REUTERS (May 20, 2022), <https://us.practicallaw.thomsonreuters.com/w-035-6585> [<https://perma.cc/67BY-VUUT>] (“*Rogers* test might not apply if the NFTs included digital files of virtually wearable Birkin handbags, which would be considered non-speech commercial products.”).

177. See Sean King, *Evolving Case Law on the Fair Use of Famous Trademarks in Video Games*, JD SUPRA, <https://www.jdsupra.com/post/contentViewer-Embed.aspx?fid=db290c8f-bdd7-4f49-9ea9-c438bd2090fb> [<https://perma.cc/4PFH-XW6Z>] (last visited November 7, 2022) (noting that courts interpreting *Rogers* analysis find artistic relevance as very low).

by creating new artistic work.¹⁷⁸ Cases will likely then turn to consumer confusion as to the source or sponsorship of the work.¹⁷⁹

To overcome the *Rogers*' test, a trademark owner must demonstrate that the work explicitly misleads or creates confusion as to the source or content of the work.¹⁸⁰ In this analysis, the trademark owner will likely point to their registrations of physical goods and services and assert that the zone of natural expansion doctrine protects the virtual alternative of their registration.¹⁸¹ By implementing this doctrine, the owner will have a presumption of validity and prima facie evidence of priority over the mark for that protected class.¹⁸² After this primary step is established, the owner must demonstrate consumers are confused as to the source of the NFT.¹⁸³ Owners can demonstrate this confusion through evidence of consumer surveys and evidence of actual consumer confusion.¹⁸⁴ Actual consumer confusion may be demonstrated by reported instances of individuals being confused about the source of the defendant's products due to the similarities of the parties' trademarks.¹⁸⁵

178. For more information on the *Rogers* discussion, see *supra* notes 111–118, and accompanying text.

179. See *Likelihood of Confusion*, USPTO, <https://www.uspto.gov/trademarks/search/likelihood-confusion> [<https://perma.cc/XFN7-7QBF>] (last visited Mar. 20, 2022) (noting similarity of marks in sound, appearance, commercial impression, and relatedness of goods and services could support finding that confusion is likely to occur).

180. For more information about consumer confusion factors, see *supra* note 98 and accompanying text.

181. For more information about registrations by companies, see *supra* note 17 and accompanying text.

182. See *Zone of Natural Expansion (Trademark) Law and Legal Definition*, US LEGAL, <https://definitions.uslegal.com/z/zone-of-natural-expansion-trademark/#:~:text=Zone%20of%20natural%20expansion%20is,extension%20of%20the%20prior%20use> [<https://perma.cc/G2EG-HXYQ>] (last visited Mar. 20, 2022) (explaining mark holders using mark in new territory need to make intent clear).

183. See Isaiah Poritz, *MetaBirkins NFT Suit Ripe for Rogers Trademark Test*, *Judge Says*, BLOOMBERG LAW (May 19, 2022), <https://news.bloomberglaw.com/tech-and-telecom-law/metabirkins-nft-suit-ripe-for-rogers-trademark-test-judge-says> [<https://perma.cc/XHQ8-TCUM>] (explaining courts will need to apply *Polaroid* factors to determine likelihood of confusion, which is fact-intensive).

184. See *Likelihood of Confusion*, 1207.01 TMEP (2022) (describing analysis as, “[t]he issue is not whether the respective marks themselves, or the goods or services offered under the marks, are likely to be confused but, rather, whether there is a likelihood of confusion as to the source or sponsorship of the goods or services because of the marks used thereon.”).

185. See Michael J. Allen, Comment, *The Role of Actual Confusion Evidence in Federal Trademark Infringement Litigation*, 16 CAMPBELL L. REV. 19 (1994), <https://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1268&context=clr#:~:text=Among%20these%20is%20%22actual%20confusion,similarity%20between%20the%20parties'%20trademarks> [<https://perma.cc/ZPN5-VF5S>] (stating, “[c]ourts are justified in giving great weight to credible evidence of actual confusion, for if substantial confusion as a result of the similarity of the

However, fan art will likely not confuse consumers as to the sponsorship of the NFT, but rather be used fairly in depicting the athlete.¹⁸⁶

IV. FORESIGHT: WHAT COMES NEXT?

With litigation ensuing on NFT creators' uses of protected intellectual property beginning, the courts' decisions will hold pivotal precedents in proceedings to come.¹⁸⁷ The metaverse is critically important to our modern world and is here to stay.¹⁸⁸ Despite the various risks that may accompany new technology, sports interest in NFTs should not be overlooked as the economy of online marketplaces grow.¹⁸⁹

As cases involving NFTs make their way through the courts, it is unclear how this new digital reality will affect our existing law.¹⁹⁰ As the decision in *Hermès v. Rothschild* reflects, intellectual property rights are holding steady in the metaverse, which is a huge win from trademark owners.¹⁹¹ In a similar line of reasoning, this case is a win for the larger intellectual property community, as they will make similar arguments that their existing physical ownership extends to the virtual world.¹⁹²

parties' trademarks has already occurred, it usually illustrates that future confusion is likely.”).

186. See Jonathan Bailey, *The Messy World of Fan Art and Copyright*, PLAGIARISM TODAY, (May 13, 2010) <https://www.plagiarismtoday.com/2010/05/13/the-messy-world-of-fan-art-and-copyright/> [<https://perma.cc/RQQ6-4PT8>] (stating “it is also worth noting that fan fiction and fan art can be a trademark violation as well, especially if it uses names and titles in a way that causes confusion as to whether they are official.”).

187. For more information about litigation in the trademark space, see *supra* notes 143–172, and accompanying text.

188. For more information about NFT importance, see *supra* notes 4–14 and accompanying text.

189. See Galli, *supra* note 55 (noting many NFT platforms have seen sales in hundred-million-dollar range).

190. See Lorraine Tay & Pin-Ping Oh, *With Enduring Uncertainty at Play, Lessons for Brands Looking to NFTs*, THE FASHION LAW (June 10, 2022) <https://biz.crastr.net/with-enduring-uncertainty-at-play-lessons-for-brands-looking-to-nfts/> [<https://perma.cc/YB5Z-UCA4>] (stating trademark and copyright law have taken over litigated issues regarding NFTs, and, as with other technologies, questions have arisen as to how traditional intellectual property laws will apply).

191. For more information about the decision, see *supra* note 162 and accompanying text.

192. For more information about how the court considered existing physical rights expanding to the metaverse, see *supra* note 160 and accompanying text.

Intellectual property lawyers should familiarize themselves with issues specific to digital platforms, like the DMCA.¹⁹³ To safeguard their rights, intellectual property owners should monitor the virtual platform and police for any infringing uses.¹⁹⁴ Owners should carefully craft licensing agreements to keep in mind the changing atmosphere.¹⁹⁵ Although many companies fight to register their trademark applications for virtual goods quickly, perhaps take a second look at this.¹⁹⁶ A defendant may use this fact as evidence of an admission that prior registration was insufficient to meet the threshold for expansion and cover virtual goods in the same class category.¹⁹⁷ For athletes, the opportunity to craft licensing agreements involving their NIL will become commonplace.¹⁹⁸ Copyright allows bargaining power in using an owner's protected work and royalties from NFT sales.¹⁹⁹

With the Hermès victory, trademark owners can have a sigh of relief that their trademarks may be protected in the virtual space.²⁰⁰

193. For more information about the DMCA, see *supra* notes 65–66, and accompanying text.

194. See Josh Gerben, *How to Police and Enforce Trademark Rights*, GERBEN <https://www.gerbenlaw.com/blog/how-to-police-and-enforce-trademark-rights/> [<https://perma.cc/86S8-287S>] (last visited May 17, 2022) (stating, “[i]t is your responsibility as a trademark owner to monitor your mark for potential infringement and take appropriate enforcement steps. If you do not do this, you may find that the scope of your rights within in the trademark has been narrowed by minor infringements over time.”).

195. For more information on licensing agreements, see *supra* note 104–108, and accompanying text.

196. See Deborah Lodge & Shyloah Daniel, *NFTs: New Frontiers for Trademarks*, SQUIRE PATTON BOGGS (Mar. 18, 2022), <https://www.iptechblog.com/2022/03/nfts-new-frontiers-for-trademarks/> [<https://perma.cc/KVW5-ZVV8>] (“As of March 12, 2022, the USPTO TESS Database contained 2551 trademark applications or registrations using NFT in the goods/services descriptions. Of those, only a handful have registered, but over 1400 of the applications had been filed since January 1, 2022.”).

197. See Himmelrich, *supra* note 100 (noting even if owner uses mark in one region, owner may have right to expansion in another region).

198. See Eric Fishman & Nicholas Saady, *Navigating the New Playing Field: What Athletes Need to Know When Monetizing NIL*, SPORTS BUSINESS JOURNAL (Mar. 30, 2022), <https://www.sportsbusinessjournal.com/SB-Blogs/COVID19-OpEds/2022/03/30-FishmanSaady.aspx> [<https://perma.cc/G2RQ-FPX3>] (“Athletes should consider ensuring that contracts associated with an NFT make it clear that they remain the sole owner of their IP rights, and that they are simply licensing the relevant IP to the NFT owner for a specific purpose.”)

199. See *id.* (“Athletes should also consider utilizing smart contracts to derive secondary royalties from their NFTs, which can provide a lucrative source of future income.”).

200. See Maghan McDowell, *Hermès Wins Case Against Metabirkins Over Digital NFTs, Rothschild to Appeal*, VOGUE BUSINESS (Feb. 8, 2023), <https://www.voguebusiness.com/technology/hermes-wins-case-against-metabirkins-over-digital-nfts-rothschild-to-appeal> [<https://perma.cc/7GTR-NQD4>] (describing

However, the suit is far from over, as Rothschild's publicist stated that their team is planning on appealing the jury's decision.²⁰¹ The ramifications of NFTs are expansive and will face much litigation to come.²⁰²

*Maeve Hyer**

Shermin Lakha's, founder and managing attorney of Lvlup Legal, opinion of case as landmark in how NFTs are used by artists and brands).

201. *See id.* (articulating frustrations of Rothschild's legal team to ramifications in artistic space).

202. *See* TFL, *U.S. Copyright Office, Patent and Trademark Office to Launch Joint Study of NFTs*, THE FASHION LAW (July 13, 2022), <https://www.thefashionlaw.com/u-s-copyright-office-patent-and-trademark-office-to-launch-joint-study-of-nfts/> [<https://perma.cc/Y42P-RDVG>] (describing both USPTO and Copyright Office are reviewing various considerations presented to them from Senators).

* A huge thank you to all those who had a hand in redlining this paper! I am so grateful to the amazing MSLJ team during this publication process. As far as my dedication, it is and always will be to my incredible family. I love you.