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To Mint or Not to Mint: Non-fungible Tokens and the Right of Publicity

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NOTES

TO MINT OR NOT TO MINT: NON-FUNGIBLE TOKENS AND THE RIGHT OF PUBLICITY

Hannah Bobek*

Non-fungible tokens (NFTs) allow for authentication and ownership of digital assets, which are notable features in the virtual world given the infiniteness of internet content. The emergence of this novel technology, however, has raised challenges, especially regarding enforcement of the right of publicity. This Note addresses how litigators have approached right of publicity violations arising from NFTs and how courts might respond to future violations that this technology is capable of facilitating. Legal scholars and commentators argue that certain features of NFTs pose pronounced threats to the right of publicity, namely the technology’s novelty, democratized nature, anonymization of creators, transferability across platforms, and immutability. To combat these threats, this Note proposes that rights owners should enter into right of publicity license agreements; that NFT platforms should strengthen their terms of service and develop higher barriers of entry for users; and, finally, that courts should order that infringing NFTs be “burned.”

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INTRODUCTION

The right of publicity, a legal recognition that every person’s identity has intrinsic economic value, is a fairly new development in the law.¹ Simply put, the right of publicity is the right of every individual to license and “control the commercial use of identity.”² More than thirty states in the United States recognize this right, which is wholly a creature of state law that is regulated under state common law, statute, or both.³ As a result, the right of publicity and the scope of its protections vary from state to state.

In general, the right of publicity triggers liability for the unauthorized use of a person’s “name, likeness, or other indicia of personal identity” for commercial purposes.⁴ Other elements of identity that states protect in addition to name and likeness include images, voice, mannerisms, demeanor, and even identifying objects, among others.⁵

Even though the right of publicity protects every individual’s identity, most right of publicity cases involve well-known figures.⁶ Celebrities and athletes raise right of publicity claims more often than others because of the fiscal benefit that associating their likeness with products and services brings to companies.⁷ With novel technologies, it has become easier to

1. See 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 4:20 (2d ed. 2023); THOMAS PHILLIP BOGGESS V, *Cause of Action for an Infringement of the Right of Publicity*, in *CAUSES OF ACTION SECOND SERIES* § 7 (2d ed. 2023).

2. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:3.

3. See *id.* § 1:2.

4. *Right of Publicity*, INT’L TRADEMARK ASS’N, <https://www.inta.org/topics/right-of-publicity/> [<https://perma.cc/3UTX-DX5P>] (last visited Oct. 6, 2023).

5. See 1 MCCARTHY & SCHECHTER, *supra* note 1, §§ 4:47, 4:56, 4:59, 4:84.

6. See *id.* § 4:1.

7. See *id.* § 4:8.

misappropriate celebrities' identities and to do so in more deceptive ways that most courts and legislatures have not anticipated.⁸ A prominent example of such unanticipated developments involves non-fungible token (NFT) technology.

NFTs entered the world stage in 2021 when digital artist Beeple sold an NFT of his digital artwork for approximately \$69 million.⁹ An NFT, created through a process called minting, "is a unique set of data . . . that can represent ownership of, or other rights in or to, another asset."¹⁰ There is seemingly no end to the digital assets that can be "tokenized"; several examples are music, videos, art, illustrations, virtual avatars, photographs, and sports memorabilia.¹¹

Each NFT "certifies that a digital asset . . . is unique and thus not interchangeable, hence the 'non-fungible' designation."¹² In essence, NFTs are "authentication devices."¹³ "[N]o two NFTs are the same" by virtue of their unique identifying data, and each NFT can represent only one digital asset.¹⁴ An NFT generally "does not contain the media file for the associated asset."¹⁵ Rather, "the NFT is simply the underlying code written to evidence an associated asset's existence . . ."¹⁶ An NFT is traded and sold on a blockchain, which "provides a [digital] ledger," or a digital wallet, "to store and record" such transactions.¹⁷

Celebrities and athletes are riding the NFT wave, and, as a result, the right of publicity is becoming increasingly relevant to NFTs.¹⁸ NFT technology has turned into a popular medium to sell assets that bear the likeness of well-known figures.¹⁹ Celebrities and athletes have entered deals with NFT platforms to create and sell NFT collections that implicate various aspects of

8. See *infra* Part II.C.

9. See Rebecca Carroll, Note, *NFTs: The Latest Technology Challenging Copyright Law's Relevance Within a Decentralized System*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 979, 980 (2022).

10. Megan E. Noh, Sarah C. Odenkirk & Yayoi Shionoiri, *GM! Time to Wake Up and Address Copyright and Other Legal Issues Impacting Visual Art NFTs*, 45 COLUM. J.L. & ARTS 315, 316 (2022).

11. See *id.* at 316–17; see Robin Conti & John Schmidt, *What Is an NFT?: Non-Fungible Tokens Explained*, FORBES (Mar. 17, 2023, 12:57 AM), <https://www.forbes.com/advisor/investing/cryptocurrency/nft-non-fungible-token/> [https://perma.cc/N8BL-ANWU].

12. Mark Conrad, *Non-Fungible Tokens, Sports, and Intellectual Property Law Issues: A Case Study Applying Copyright, Trademark, and Right of Publicity Law to a Non-traditional Ownership Vehicle*, 32 J. LEGAL ASPECTS SPORT 132, 133 (2022).

13. *Id.*

14. *Id.*

15. Noh et al., *supra* note 10, at 317–18.

16. *Id.*

17. Carroll, *supra* note 9, at 987.

18. See Nicolette Salmi, *13 Celebrities Who Have Joined the NFT Crypto Art Craze*, L'OFFICIEL (Nov. 27, 2022), <https://www.lofficielusa.com/pop-culture/celebrities-on-the-crypto-art-craze> [https://perma.cc/ST5S-9QAK].

19. See *id.*

their identity.²⁰ Some examples include NFT sports cards and memorabilia that feature images and videos of professional athletes during notable moments in their careers;²¹ NFT avatars that display celebrities' likenesses through their facial characteristics, clothing, and physical attributes;²² and NFTs that attach to recordings of live musical performances.²³

On the face of these deals, NFT technology merely serves as a new "distribution channel" to sell content that features celebrities' and athletes' likenesses.²⁴ Well-known figures have long been embroiled in right of publicity cases stemming from third parties' unauthorized use of their likenesses, for example, on sports cards, in video games, on products, and in television shows.²⁵ One perspective is that NFTs are simply a new medium that people can use to monetize their likeness and leverage their right of publicity.²⁶ The host of risks that NFTs raise for the right of publicity, however, are novel.²⁷

Litigation concerning allegedly infringing uses of identity via NFTs and advertisements for NFTs has already begun to play out.²⁸ The U.S. District Court for the Central District of California, notably, ruled in favor of a defendant who sold photographs of a celebrity as NFTs, allegedly without the rights owner's consent.²⁹ The use of NFT technology to exploit another's likeness is problematic in light of the novel and more insidious issues that infringing NFTs can create for rights owners who are the subjects of these NFTs.³⁰ This Note explores the heightened challenges that using NFTs to facilitate such infringement can create for right of publicity enforcement, including the anonymity of NFT transactions; the democratized nature of minting NFTs for virtually every internet user; the enhanced risk of copyfraud of works that feature rights owners' likenesses; and the

20. See, e.g., *Most Valuable Athlete NFTs*, DIBBS (June 29, 2022), <https://dibbs.io/blog/athlete-nfts/> [<https://perma.cc/WG8B-RXMA>]; *3,333 Steve Aoki NFT Avatars Join the Sandbox*, NFT PLAZAS (July 23, 2022), <https://nftplazas.com/3333-steve-aoki-nft-avatars-join-the-sandbox/> [<https://perma.cc/45MV-U2EM>]; *Genies Celeb Avatars Launches NFT Fashion Marketplace*, LEDGER INSIGHTS (Aug. 31, 2022), <https://www.ledgerinsights.com/nft-genies-celebrity-avatars-fashion/> [<https://perma.cc/CT5Y-PJX5>]; Stephen Katte, *Sony Music Files Trademark Application for NFT-Authenticated Music*, COINTELEGRAPH (Sept. 8, 2022), <https://cointelegraph.com/news/sony-music-files-trademark-application-for-nft-authenticated-music> [<https://perma.cc/JNF5-W6UW>].

21. See *Most Valuable Athlete NFTs*, *supra* note 20.

22. See *3,333 Steve Aoki NFT Avatars Join the Sandbox*, *supra* note 20.

23. See Katte, *supra* note 20.

24. See Noh et al., *supra* note 10, at 317–18.

25. See 1 MCCARTHY & SCHECHTER, *supra* note 1, §§ 4:1, 4:8.

26. See Noh et al., *supra* note 10, at 317.

27. See *infra* Part II.C.

28. See generally *Notorious B.I.G., LLC v. Yes. Snowboards*, No. CV19-01946, 2022 WL 2784808 (C.D. Cal. June 3, 2022); Bill Donahue, *Lil Yachty Sues NFT Seller for 'Blatant' Use of His Name and Image to Earn Millions*, BILLBOARD (Jan. 28, 2022), <https://www.billboard.com/business/legal/lil-yachty-nft-seller-lawsuit-opulus-trademark-1235024467/> [<https://perma.cc/CA7T-EEN9>].

29. See *Notorious B.I.G., LLC*, 2022 WL 2784808, at *13.

30. See *infra* Part II.C.

transferability of NFTs across platforms.³¹ These threats are especially troublesome given “the present patchwork” of right of publicity laws in the United States³²; courts’ disparate treatment of the right of publicity across the country raises significant uncertainty as to the application of the right to NFTs.

Part I of this Note provides an overview of the right of publicity. Next, Part I discusses NFTs and blockchain technology and the application of the right of publicity to NFTs. Part II examines right of publicity cases that arose from NFT-related infringement. Part II then details the harms that legal scholars and commentators proffer that NFTs pose for the right of publicity. Acknowledging these harms, Part III discusses the problematic implications that infringing NFTs create for likeness rights. Part III then recommends enforcement measures that rights owners, NFT platforms, and courts should take against infringers to protect the right of publicity.

I. THE RIGHT OF PUBLICITY AND NFTS

The right of publicity protects celebrities and noncelebrities alike, but right of publicity cases more often involve well-known figures because their likeness is more recognizable than that of noncelebrities.³³ The use of celebrities’ likenesses in connection with advertising is more likely to attract consumers’ attention and motivate people to buy products and services.³⁴ In turn, sellers leverage this advertising opportunity to obtain greater commercial benefit, causing “most . . . right of publicity decisions [to] involve well-known plaintiffs.”³⁵ This Note focuses on the use of celebrities’ and athletes’ likenesses via NFTs and advertisements for NFTs. Part I.A explains the right of publicity. Part I.B discusses NFTs and blockchains and their connection to the right of publicity.

A. *The Right of Publicity*

The right of publicity “is the inherent right of every human being to control the commercial use of his or her identity.”³⁶ The right protects individuals against unauthorized uses of their identity and allows for recovery of court damages if the right is violated.³⁷ The term “right of publicity” was coined by Judge Jerome Frank in *Halean Laboratories, Inc. v. Topps Chewing Gum, Inc.*³⁸ In defining this right, Judge Frank outlined its dual purpose: “to prevent commercial use of identity and the corresponding right to grant an

31. *See id.*

32. INT’L TRADEMARK ASS’N, U.S. FEDERAL RIGHT OF PUBLICITY 4 (1998), <https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/U.S.-Federal-Right-of-Publicity-03.03.1998.pdf> [<https://perma.cc/P4T9-LJXG>].

33. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:8.

34. *See id.*

35. *Id.* § 4:1.

36. *Id.* § 1:3.

37. *See id.*

38. 202 F.2d 866 (2d Cir. 1953).

exclusive privilege to one firm.”³⁹ From there, the right of publicity developed as a distinct state right across the country.⁴⁰

The right of publicity is not recognized under federal law.⁴¹ Rather, the right of publicity is protected under state law through common law and statutes.⁴² More than thirty U.S. states recognize the right for living persons.⁴³ Approximately twenty of those states also recognize a postmortem right of publicity “in the identity of a deceased person.”⁴⁴ In these states, the right “is descendible property” and usually “has a postmortem duration.”⁴⁵

Under the Third Restatement of Unfair Competition, a plaintiff must prove the following elements to establish a prima facie case for liability⁴⁶: “[(1) Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant’s use; and [(2) Defendant’s use is likely to cause damage to the commercial value of that persona.”⁴⁷ The key to this test is identifiability.⁴⁸ A plaintiff must prove that the use identifies the plaintiff.⁴⁹ Courts and statutes recognize several uses of identity that can trigger liability.⁵⁰ Name and likeness have traditionally been recognized as ways to identify someone.⁵¹ However, other identifying characteristics that may trigger liability include voice, picture, photograph, video, and “performing style and other indicia.”⁵² According to the U.S. Court of Appeals for the Ninth Circuit, “[i]t is not important *how* the defendant has appropriated the plaintiff’s identity, but *whether* the defendant has done so.”⁵³ Many courts have recognized infringement due to the use of a combination of someone’s features that together identify the person.⁵⁴

Part I.A.1 explains the elements of identity that the right of publicity protects. Next, Part I.A.2 discusses a commonly invoked defense in right of publicity cases and the tests that courts use to analyze this defense.

39. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 1:26.

40. *See id.* § 1:2.

41. *See id.*

42. *See id.*

43. *See id.*

44. *Id.*

45. 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 9:17 (2d ed. 2023).

46. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 3:2; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (Am. L. Inst. 1995).

47. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 3:2.

48. *See id.* § 3:10.

49. *See id.*

50. *See id.* § 4:46.

51. *See id.*

52. *Id.*

53. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992).

54. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:46.

1. What the Right of Publicity Protects

One of the most obvious ways a person can be identified is by name.⁵⁵ A plaintiff can prove infringement if the plaintiff goes by a recognizable stage name or first name, such as Beyoncé or Cher.⁵⁶ Furthermore, some individuals change names over the course of their lives, and someone else may want to monetize their original names.⁵⁷ However, “mere name-sameness alone,” or the fact that the plaintiff has the same name as the one commercialized, typically does not constitute right of publicity infringement without the use of other elements of the plaintiff’s identity.⁵⁸ Ultimately, “the context of use of a name” is paramount in cases that primarily involve identification by name.⁵⁹

The unauthorized use of a photograph or video that identifies someone may also trigger liability.⁶⁰ “[S]uch identifiable photographs may not be used for commercial advertising.”⁶¹ In fact, several courts “have held, usually without discussion of . . . identifiability, that unpermitted use of a picture alone can be an invasion of . . . the right of publicity.”⁶² Furthermore, associating another’s “name or other identifying characteristics” with the image makes the likelihood of triggering liability much greater.⁶³ An image or video that references a person’s signature and distinct gestures, demeanor, or mannerisms can also identify a person.⁶⁴

Moreover, the right of publicity governs uses that involve voice imitations or “sound-alike[s].”⁶⁵ Several right of publicity statutes explicitly protect the unpermitted use of another’s voice.⁶⁶ Courts have also recognized that the right of publicity protects one’s interest in their voice at common law.⁶⁷ For example, the Ninth Circuit has held that “a voice is as distinctive and personal

55. *See id.* § 4:48.

56. *See id.*

57. *See id.* The Ninth Circuit held a defendant liable for monetizing a basketball player’s former name in an advertisement, even though the athlete had abandoned his name ten years prior. *See Abdul-Jabbar v. Gen. Motors Corp.*, 75 F.3d 1391, 1400 (9th Cir. 1996), *amended and superseded on denial of reh’g by* 85 F.3d 407 (9th Cir. 1996).

58. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:49.

59. *Id.* § 4:51; *see* BOGCESS, *supra* note 1, § 7.

60. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:60.

61. *Id.* § 4:59.

62. *Id.* § 4:60.

63. *Id.*

64. *See* BOGCESS, *supra* note 1, § 8; IND. CODE § 32-36-1-7 (2023) (providing that likeness encompasses “gestures” and “mannerisms”); CAL. CIV. CODE § 3344(b) (West 2023) (protecting broadly against infringement in photographs and videos).

65. BOGCESS, *supra* note 1, § 10; 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:78.

66. *See* CAL. CIV. CODE § 3344.1 (West 2023); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2000); S.D. CODIFIED LAWS § 21-64-1 (2023); 42 PA. CONS. STAT. § 8316(e) (2023).

67. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:78; BOGCESS, *supra* note 1, § 10; *Midler v. Ford Motor Co.*, 849 F.2d 460, 460 (9th Cir. 1988) (holding that plaintiff, a singer, had a claim for right of publicity infringement when someone imitated her voice in an advertisement); *Prima v. Darden Rests., Inc.*, 78 F. Supp. 2d 337, 350 (D.N.J. 2000) (upholding a right of publicity claim against a defendant using another’s voice in an advertisement that imitated a singer’s voice).

as a face.”⁶⁸ The U.S. District Court for the District of New Jersey also extended right of publicity protection to a plaintiff when an advertisement played a “sound-alike voice” that sang a song connected to the rights owner.⁶⁹ Some courts, however, have been more reluctant to find liability over such uses.⁷⁰

Similarly, look-alike cases, in which a defendant uses a look-alike version of the rights owner, can also trigger liability.⁷¹ “If the obvious effect is to attract attention to the advertisement though [sic] use of the celebrity’s persona, then identification and liability is triggered.”⁷² For example, the New York County Supreme Court held that a fashion house identified plaintiff Jacqueline Kennedy Onassis in an advertisement that featured a “look-alike” model dressed to depict Onassis “by using the persona of plaintiff . . . that viewers would instantly identify” and, therefore, infringed on her right of publicity.⁷³ Following this case, the U.S. District Court for the Middle District of Tennessee found that a poster used to advertise a concert which featured Beatles look-alikes in look-alike poses constituted infringement.⁷⁴

Identification of a person through a role they portrayed in a movie or show, or through objects closely associated with them, are two other uses that can trigger liability.⁷⁵

2. First Amendment Balancing Tests

However, “like all legal rights . . . [the right of publicity] is not absolute.”⁷⁶ The First Amendment of the U.S. Constitution is commonly invoked as a defense against right of publicity claims and has defeated these claims in many cases.⁷⁷ The First Amendment protects different types of speech.⁷⁸ In the context of right of publicity cases, uses of identity fall on a spectrum of

68. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:74 (quoting *Midler*, 849 F.2d at 463).

69. *Id.* § 4:78 (citing *Prima*, 78 F. Supp. 2d at 350).

70. *See id.* § 4:76; *Romantics v. Activision Pub., Inc.*, 574 F. Supp. 2d 758, 764 (E.D. Mich. 2008) (holding that Michigan “never has recognized . . . a right of publicity in the sound of a voice, even if distinctive”); *Miller v. Universal Pictures Co.*, 201 N.Y.S.2d 632, 634 (App. Div. 1960) (finding no property interest in “sound” when a studio orchestra “meticulously imitated” a singer’s voice as heard in sound recordings featuring the singer).

71. *See Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 263 (Sup. Ct. 1984) (holding that the use of a model who was a “look-a-like” of a former First Lady of the United States misappropriated her likeness); *Presley’s Est. v. Russen*, 513 F. Supp. 1339, 1349, 1361 (D.N.J. 1981) (holding that deceased singer Elvis Presley’s estate “demonstrated a likelihood of success on the merits of its right of publicity claim with respect to the defendant’s live stage production” in which the defendant imitated Presley).

72. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:63.

73. *Id.* (citing *Onassis*, 472 N.Y.S.2d at 261).

74. *See Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342, 349 (M.D. Tenn. 1993). A court in New Jersey reached a similar conclusion over a photograph that featured an Elvis Presley impersonator. *Presley’s Est.*, 513 F. Supp. at 1349.

75. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, §§ 4:68, 4:84.

76. *Id.* § 1:3.

77. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:22.

78. *See* U.S. CONST. amend. I; BOGGESS, *supra* note 1, § 19.

speech, ranging from commercial to noncommercial speech.⁷⁹ Uses for advertising or selling goods, products, merchandise, and services constitute commercial speech.⁸⁰ Commercial speech receives the lowest level of constitutional protection “because its purpose is to promote the sale of goods.”⁸¹ Alternatively, “[n]oncommercial speech is given greater [First Amendment] protection . . . because it is more likely to deal with the dissemination of information.”⁸²

“[W]here the speech is purely commercial, the right of publicity will often trump [] free speech claim[s] . . .”⁸³ However, there is not always a bright line as to whether a use is purely commercial or purely noncommercial.⁸⁴ This is the case when a use involves mixed forms of speech, such as artwork that derives commercial value from depicting another’s likeness that nonetheless contains communicative elements that implicate free speech rights.⁸⁵

The medium used can play a “crucial” role in determining the outcomes of cases in which the First Amendment is invoked.⁸⁶ For example, if a use occurs on products like T-shirts, a court would likely strike down any free speech defense because T-shirts are “traditional ‘merchandise’” and “not the normal [media]” to express views or make a political statement.⁸⁷ Beyond “traditional ‘merchandise’” or pure advertising, the answer is less clear.⁸⁸ However, whether a use is commercial or noncommercial, courts must balance defendants’ free speech rights with plaintiffs’ right of publicity claims to determine the prevailing party for “every challenged use” they encounter.⁸⁹

In addition to the two-prong infringement test set forth in the Third Restatement, plaintiffs must prove that “the use in question was for a commercial purpose.”⁹⁰ This requirement differentiates uses for commercial purposes, which are typically subject to liability, from uses in artistic and expressive contexts, which are afforded heightened protection under free speech doctrines.⁹¹ To determine which side a use falls on, courts have developed tests to determine whether uses that occur in artistic or expressive media, such as video games, books, movies, cartoons, and artworks, deserve immunity.⁹² Most courts follow one of two tests⁹³: the test developed in

79. See BOGESS, *supra* note 1, §§ 20, 22.

80. See 1 MCCARTHY & SCHECHTER, *supra* note 1, § 3:2.

81. BOGESS, *supra* note 1, §§ 19–20.

82. BOGESS, *supra* note 1, § 22.

83. *Id.* § 19.

84. See 2 MCCARTHY & SCHECHTER, *supra* note 45, §§ 7:2, 8:19.

85. See *id.* § 7:2; BOGESS, *supra* note 1, § 19.

86. 2 MCCARTHY & SCHECHTER, *supra* note 45, § 7:22.

87. *Id.* §§ 7:22, 7:24.

88. *Id.* § 7:24.

89. *Id.* § 8:41.

90. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 3:2.

91. See *id.*

92. 2 MCCARTHY & SCHECHTER, *supra* note 45, §§ 8:71–8:73.

93. A third free speech balancing test is Missouri’s predominant use test. See generally *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003). However, the test is primarily used

Rogers v. Grimaldi,⁹⁴ known as the *Rogers* test, and the transformative use test.⁹⁵ Part I.A.2.a explains the *Rogers* test. Part I.A.2.b discusses the transformative use test.

a. The Rogers Test

Courts have historically used the *Rogers* test “to balance free speech policies with traditional trademark infringement claims.”⁹⁶ Now, some courts have extended the test to cases that involve right of publicity infringement.⁹⁷ These courts only apply the test to uses in artistic or expressive works.⁹⁸ In *Rogers*, the U.S. Court of Appeals for the Second Circuit set forth the two-part test: an “accused use in an expressive work will be immune as creative free speech unless (1) it has ‘no artistic relevance’ to the underlying work or, if there is artistic relevance; (2) the use ‘explicitly misleads as to the source or the content of the work.’”⁹⁹

This test establishes an extremely low bar in favor of defendants.¹⁰⁰ Under the first prong, the level of artistic relevance of the plaintiff’s likeness to the work “merely must be above zero.”¹⁰¹ Under the second prong, courts require “obvious and express” confusion rather than “subtle and implied” confusion as to the plaintiff’s endorsement.¹⁰² Expressive uses that courts

only by Missouri courts. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:23. Therefore, for the purposes of this Note, the predominant use test will not be addressed.

94. 875 F.2d 994 (2d Cir. 1989).

95. *See generally* Winter v. DC Comics, 69 P.3d 473 (Cal. 2003).

96. 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:71.

97. *See id.*

98. *See id.*

99. *Id.* (quoting *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989)).

100. *See id.*

101. *Id.* (quoting *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008)).

102. *Id.*

have analyzed under the *Rogers* test include video game avatars,¹⁰³ cartoon characters,¹⁰⁴ action figures,¹⁰⁵ songs,¹⁰⁶ books,¹⁰⁷ and video footage.¹⁰⁸

b. The Transformative Use Test

Most courts follow California's transformative use test¹⁰⁹ set forth in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*¹¹⁰ Like the *Rogers* test, uses must be expressive or artistic to warrant First Amendment immunity.¹¹¹ The "key" to the transformative use test is whether an expressive or artistic use "in a nonadvertising setting" transforms a plaintiff's identity to a sufficient degree.¹¹² Transformative depictions "in a nonadvertising setting are immunized by the First Amendment; 'non-transformative' [depictions] are not."¹¹³

In *Comedy III Productions, Inc.*, the Supreme Court of California created the following five-factor free speech balancing test that requires courts to determine whether: (1) "the celebrity likeness is one of the 'raw materials' from which an original work is synthesized" or "the celebrity is the very sum and substance of the work"; (2) the work "has become primarily the defendant's own expression rather than the celebrity's likeness"; (3) "the literal and imitative or the creative elements predominate in the work"; (4) "the marketability and economic value of the work derive primarily from the fame of the celebrity"; and (5) "an artist's skill and talent is manifestly

103. See *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1240, 1243, 1245 (9th Cir. 2013) (finding that an avatar that depicted a former football player's "team affiliation[], playing position[], age[], height[], weight[], ability level[], and other attributes" in a video game was artistically relevant to the game because the manufacturer "prides itself on the realism of the games").

104. See *K & K Prods., Inc. v. Walt Disney Studios Motion Pictures*, No. 2:20-CV-1753, 2021 WL 4394787, at *7 (D. Nev. Sept. 23, 2021) (finding that the use of a well-known stuntman's likeness in a cartoon character and action figures was protected by the First Amendment because the character is integrally related to the movie's plot and neither use misled consumers to believe that the stuntman endorses the film or action figures).

105. See *id.*

106. See *Romantics v. Activision Pub., Inc.*, 574 F. Supp. 2d 758, 769–70 (E.D. Mich. 2008) (finding that a video game's use of singers' voices in songs related to the video game because players pretend that they are in a rock band and that such use did not mislead consumers).

107. See *Matthews v. Wozencraft*, 15 F.3d 432, 438–40 (5th Cir. 1994) (finding that the use of "[t]he narrative of an individual's life, standing alone" in a book, which used real events from the plaintiff's life, did not fall under the protection of the right of publicity "so long as it is not simply a disguised commercial advertisement for the sale of goods or services").

108. See *Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 442–44 (S.D.N.Y. 2019) (finding that the use of videos of a singer in a movie and during the movie's marketing and promotion was artistically relevant to depicting the singer and did not mislead viewers as to endorsement).

109. See 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:23.

110. 21 P.3d 797 (Cal. 2001).

111. See 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:72.

112. *Id.*

113. *Id.*

subordinated to the overall goal of creating a conventional portrait of a celebrity.”¹¹⁴

Courts have applied the transformative use test to T-shirts,¹¹⁵ prints,¹¹⁶ birthday cards,¹¹⁷ artworks, photography, and comic books.¹¹⁸ Additionally, as technologies have developed and created more ways to depict celebrity likeness, the test has been applied to assess unauthorized depictions via video game avatars.¹¹⁹ Video games receive the same heightened First Amendment protection as books and movies.¹²⁰ Thus, uses of celebrity likeness in video games have given rise to many notable court decisions under this test.¹²¹

With the emergence of new technologies, the range of media in which the right of publicity is implicated is growing and now encompasses the NFT space.¹²² The right of publicity has become particularly relevant to NFTs as

114. *Comedy III Prods., Inc.*, 21 P.3d at 809–10; see 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:72.

115. See *Cornette v. Graver*, 473 F. Supp. 3d 437, 474–75 (W.D. Pa. 2020) (finding that defendant’s use of a wrestler’s likeness on T-shirts was protected by the First Amendment because the “sum and substance” of the shirts is the creator’s criticism of the wrestler rather than the wrestler’s likeness).

116. See *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (finding that an artist’s sale of prints of his painting of golf player Tiger Woods did not infringe on Woods’ right of publicity, upon applying both the *Rogers* test and the transformative use test, because the work “consists of a collage of images in addition to Woods’s image which are combined to describe . . . a historic event in sports history,” making the work sufficiently transformative in the court’s view).

117. See *Hilton v. Hallmark Cards*, 599 F.3d 894, 912–13 (9th Cir. 2010) (upholding denial of defendant’s motion to dismiss when the defendant depicted an image of a celebrity on a birthday card in a setting similar to a scene in which the celebrity appeared on a television show).

118. See 2 MCCARTHY & SCHECHTER, *supra* note 45, §§ 8:72–8:73.

119. See *id.* § 8:73.

120. See *id.* (citing *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011)) (holding that video games qualify for First Amendment protection).

121. Compare *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 613 (Ct. App. 2006) (finding that a video game avatar’s depiction of a singer’s “facial features, [] clothing, hair color and style, and use of certain catch phrases” was sufficiently transformative because the avatar wears different hairstyles and costumes, performs different dance moves, and appears in outer space, unlike the real singer), with *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 409 (Ct. App. 2011) (finding that video game avatars infringed on a music group’s right of publicity when the publisher made “computer-generated recreations of the real band members, painstakingly designed to mimic their likeness”); compare *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013) (finding that a video game avatar infringed on a former football player’s right of publicity when the avatar paralleled the real athlete’s unique height, weight, skin tone, and build and played the sport that the actual athlete played), with *Hamilton v. Speight*, 827 F. App’x 238, 240 (3d Cir. 2020) (finding that a video game avatar that played a fictionalized version of football and shared a similar skin tone, facial features, hairstyle, build, voice, and costume with a football player and wrestler was transformative because the avatar “fights a fantastic breed of creatures in a fictional world” and serves in the military, whereas the plaintiff did not).

122. See, e.g., *The Players’ Lounge*, PLAYERS’ LOUNGE, <https://www.theplayerslounge.io/> [<https://perma.cc/QW6D-73JV>] (last visited Oct. 6, 2023) (selling NFT avatars in video game depicting real-life athletes that players can represent and play as); see also Salmi, *supra* note 18 (listing examples of NFTs that feature videos and images of celebrities).

uses of the technology to support NFT avatars bearing celebrities' likenesses in video games have exploded.¹²³

B. NFT and Blockchain Technology

An NFT is a unique set of identifying code that authenticates a digital asset.¹²⁴ “Its ‘non-fungible’ nature distinguishes an NFT from other digital assets.”¹²⁵ A non-fungible item is unique and cannot be readily exchanged for another item of the same value.¹²⁶ An example of a non-fungible asset is a painting. Like a painting, each NFT is unique, one-of-a-kind, and “has its own value.”¹²⁷ Unlike fungible assets, no single NFT can be replaced by any other NFT.¹²⁸ On the other hand, a fungible item “can be easily exchanged for another item or value because each [item] is equivalent.”¹²⁹ A dollar bill is an example of a fungible asset.¹³⁰ If someone borrows a dollar bill from a lender, they can pay the lender back with a different dollar bill, “and the lender would be receiving the same value in return.”¹³¹

NFTs “tokenize” digital content, which makes the content that is tokenized unique too.¹³² NFTs can tokenize anything, such as digital art, avatars, video game wearables,¹³³ digital fashion accessories,¹³⁴ and music.¹³⁵

Others can still copy the digital content that underlies the NFT, though.¹³⁶ Take an NFT that depicts artwork, for example. Someone could recreate the artwork, tokenize the copycat artwork, and even take a screenshot of the original NFT and share it across social media. However, “[an] NFT makes it easy to determine that the copy is not the original.”¹³⁷ When creators use

123. See, e.g., *The Players' Lounge*, *supra* note 122; Eli Tan, *Metaverse Goes Hollywood with Universal Music Group Avatar Partnership*, COINDESK, <https://www.coindesk.com/business/2021/12/09/metaverse-goes-hollywood-with-universal-music-group-avatar-partnership/> [https://perma.cc/92FY-MDTK] (May 11, 2023, 3:02 PM).

124. See An P. Doan, Mark W. Rasmussen, Joshua B. Sterling & Harriet Territt, *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, FINTECH L. REP., May–June 2021.

125. *Id.*

126. See Chris Bennett & Cody Koblinsky, *Non-Fungible Tokens: Emerging Issues in the Emerging Marketplace*, CYBERSPACE LAW., May 2021.

127. *Id.*

128. See *id.*

129. *Id.*

130. See Carol R. Goforth, *How Nifty! But Are NFTs Securities, Commodities, or Something Else?*, 90 UMKC L. REV. 775, 775 n.2 (2022).

131. Bennett & Koblinsky, *supra* note 126.

132. *Id.*

133. See Elizabeth Howcroft, *Crypto Fashion: Why People Pay Real Money for Virtual Clothes*, REUTERS (Aug. 12, 2021, 6:23 AM), <https://www.reuters.com/business/finance/crypto-fashion-why-people-pay-real-money-virtual-clothes-2021-08-12/> [https://perma.cc/CXN8-T9FD].

134. See Complaint & Request for Jury Trial at 16–22, Nike, Inc. v. StockX LLC, No. 22-CV-983 (S.D.N.Y. Feb. 3, 2022), ECF No. 1 (alleging unauthorized use of Nike's marks to sell digital collectible images of Nike-branded shoes as NFTs, which grant exclusive access to real-life promotions and benefits).

135. See Conti & Schmidt, *supra* note 11.

136. See Bennett & Koblinsky, *supra* note 126.

137. *Id.*

NFTs to tokenize content through a process called minting, it certifies the content “as a one-of-a-kind copy.”¹³⁸ “At its essence, NFTs bring unique assets into the digital space and make ownership of that asset verifiable.”¹³⁹ There are generally three key players in these transactions: creators, buyers, and platforms that host NFT transactions.¹⁴⁰

When an NFT is minted, “its data is turned into a digital form that exists on a blockchain with unique digital information which will distinguish it from other NFTs.”¹⁴¹ A blockchain is a “list[] that record[s] a series of events or transactions.”¹⁴² After someone sells an NFT on a blockchain, the transaction’s data is recorded on its host blockchain and “constitutes a link in the chain.”¹⁴³ All subsequent transactions are then added as new links to the chain, connecting each transaction to the prior one.¹⁴⁴ Two important features of blockchains are that (1) they are immutable, and (2) the transactions taking place on blockchains and the corresponding data entered to record the transactions are irreversible.¹⁴⁵ Their immutable nature means that NFT transactions cannot be changed or modified and cannot be undone.¹⁴⁶ Blockchains are also “typically open and anyone can view the history of the transactions for a digital asset themselves.”¹⁴⁷ “These properties prevent assets on a blockchain from being pirated, stolen, or destroyed”¹⁴⁸

Creators can sell their work and content as NFTs directly to sellers or on a platform.¹⁴⁹ When someone buys an NFT, they typically do not buy the underlying content attached to the NFT.¹⁵⁰ Rather, they purchase the metadata—the code “that describe[s] the corresponding assets to which [NFTs] are bound”—that each NFT contains.¹⁵¹ Blockchains record the transactions, making the buyers the owners of the NFTs¹⁵² and storing their proof of ownership.¹⁵³

The intellectual property rights in the content or work underlying the NFT usually remain with the creator.¹⁵⁴ Buyers can show others that they purchased a unique NFT, but they generally cannot commercialize the NFT’s underlying work in any way by, for example, making and selling copies of

138. *Id.*

139. Doan et al., *supra* note 124.

140. *See* Bennett & Koblinsky, *supra* note 126.

141. *Id.*

142. *Id.*

143. *Id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *Id.*

148. *Id.* Most NFTs and NFT transactions are hosted on the Ethereum blockchain. *See* Doan et al., *supra* note 124.

149. *See* Bennett & Koblinsky, *supra* note 126.

150. *See id.*

151. Doan et al., *supra* note 124.

152. *See* Bennett & Koblinsky, *supra* note 126.

153. *See id.*

154. *See id.*

the content.¹⁵⁵ The creator or initial seller of an NFT dictates what rights, if any, the buyer receives in the underlying content.¹⁵⁶

Several NFT marketplaces, such as OpenSea, Rarible, Nifty Gateway, and SuperRare, host NFT transactions and facilitate NFT sales.¹⁵⁷ These NFT platforms have created a secondary NFT market that allows buyers to resell NFTs unless creators eliminate or restrict this right.¹⁵⁸ The platforms' terms of service regulate both creators and buyers and can manage the rights associated with such transfers.¹⁵⁹

The attraction to and demand for NFTs is driven by their perceived uniqueness and scarcity—"the two most important attributes that make NFT art valuable."¹⁶⁰ The concepts of uniqueness and scarcity on the internet are novel because digital content is "almost always infinite in supply."¹⁶¹ Creators are thus exploring this unique opportunity to monetize content in ways never seen before in the digital world.¹⁶² Buyers are drawn to NFTs "as a way to support their favorite artists, actors, musicians, and athletes" who create or endorse NFTs.¹⁶³ However, "bad actors" have leveraged the technology to make significant profits through infringing and fraudulent NFT sales at the expense of others' rights, raising significant risks and uncertainty as to the implications of NFTs for the protection of the right of publicity.¹⁶⁴

Due to the rise of NFTs, the right of publicity is growing in relevance, especially for celebrities and athletes. Well-known personalities have been depicted in the content underlying NFTs through the tokenization of their voices,¹⁶⁵ photographs and videos that display rights owners,¹⁶⁶ and video game avatars that resemble rights owners.¹⁶⁷ Some celebrities have advocated for the right of publicity as an avenue for people with valuable

155. *See id.*

156. *See* Doan et al., *supra* note 124.

157. *See* David Rodeck, *Top NFT Marketplaces of August 2023*, FORBES ADVISOR (Aug. 1, 2023, 7:50 AM), <https://www.forbes.com/advisor/investing/cryptocurrency/best-nft-marketplaces/> [<https://perma.cc/DBD9-KPAD>]; Bennett & Koblinsky, *supra* note 126.

158. *See* Rodeck, *supra* note 157.

159. *See* Doan et al., *supra* note 124; Bennett & Koblinsky, *supra* note 126.

160. Bennett & Koblinsky, *supra* note 126.

161. Conti & Schmidt, *supra* note 11.

162. *See* Bennett & Koblinsky, *supra* note 126.

163. Daniel S. Cohen, Clifford C. Histed, Stephen M. Humenik, Jeremy M. McLaughlin, Jonathan M. Miner, Anthony R.G. Nolan, Judith Rinearson, Mark H. Wittow & Daniel Charles (DC) V. Wolf, *The Coming Blockchain Revolution in Consumption of Digital Art and Music: The Thinking Lawyer's Guide to Non-fungible Tokens (NFTs)*, CYBERSPACE LAW., July 2021.

164. *Id.*

165. *See* Benjamin James, *Death Row's Blockchain Ambitions Take Shape as Snoop Dogg Manager Joins Gala Music Advisory Board*, BILLBOARD (Oct. 6, 2022), <https://www.billboard.com/pro/death-row-nft-label-metaverse-gala-music-partnership/> [<https://perma.cc/L6Y8-W82V>].

166. *See* Salmi, *supra* note 18; Steff Yotka, *Want to Sleep with Kate?: The Supermodel Kate Moss Gets into the NFT Art Market with Three New Video Works*, VOGUE (Apr. 9, 2021), <https://www.vogue.com/article/kate-moss-nft-videos> [<https://perma.cc/9GV2-X3J4>].

167. *See, e.g.,* *Most Valuable Athlete NFTs*, *supra* note 20; *Genies Celeb Avatars Launches NFT Fashion Marketplace*, *supra* note 20.

identities to leverage their control over the use and licensing of their likenesses online via NFTs.¹⁶⁸ However, NFT-driven right of publicity infringement and litigation is already underway.¹⁶⁹ Though the infringing uses that have occurred or that could potentially arise in the NFT space are not necessarily novel, the obstacles that such unauthorized uses create with respect to rights owners' enforcement of their likeness rights are. Part II discusses right of publicity litigation that has arisen from NFTs and other foreseeable ways that NFTs could be used to infringe on the right of publicity.

II. THE RIGHT OF PUBLICITY IN A DIGITAL WORLD

Because the right of publicity protection is state-governed, courts and legislatures have articulated different limits for this right.¹⁷⁰ With the explosion of NFTs that bear a likeness to well-known figures, the threat of right of publicity infringement when an NFT serves as the vehicle for such infringement has become more acute. Part II.A highlights how the right of publicity has been featured in cases arising from NFT technology. Next, Part II.B explores how courts might apply the right of publicity to infringement stemming from artistic or expressive NFTs.

A. Rights Owners Versus NFT Minters

In addition to establishing a prima facie case for right of publicity infringement, plaintiffs must prove that their identity was used for a commercial purpose.¹⁷¹ In pure advertising contexts, in which an infringer uses another's identity primarily to promote and sell a product or service, the right of publicity often prevails because courts and legislatures deem advertisements commercial speech and afford such speech the lowest level of constitutional protection.¹⁷² Right of publicity infringement is especially likely to trigger liability when an advertisement uses a picture of someone without their consent because a picture is a "self-evident" way to identify an individual.¹⁷³ Furthermore, the unauthorized use of another's name in addition to their image makes it even easier for a plaintiff to prove

168. See Kate Dwyer, *Emily Ratajkowski Is Selling an NFT at Christie's*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/04/23/style/emily-ratajkowski-nft-christies.html> [<https://perma.cc/7H36-L2YL>].

169. See Blake Brittain, *Jay-Z Label Settles Lawsuit over 'Reasonable Doubt' NFT*, REUTERS (June 13, 2022), <https://www.reuters.com/legal/litigation/jay-z-label-settles-lawsuit-over-reasonable-doubt-nft-2022-06-13/> [<https://perma.cc/42SH-WVE2>]; Joseph Genest, *Genies Wants Everyone to Become an Avatar Builder*, HIGHSNOBIETY (Oct. 16, 2022), <https://www.highsnobiety.com/p/genies-akash-nigam-interview-nft/> [<https://perma.cc/7D8W-3LM6>]; *The Sandbox Avatar*, SANDBOX, <https://www.sandbox.game/en/create/avatar/> [<https://perma.cc/FL93-4CLM>] (last visited Oct. 6, 2023). See generally *Notorious B.I.G., LLC v. Yes. Snowboards*, No. CV19-01946, 2022 WL 2784808 (C.D. Cal. June 3, 2022); Donahue, *supra* note 28.

170. See 1 MCCARTHY & SCHECHTER, *supra* note 1, §§ 1:3, 6:2–6:3, 6:4–6:5.

171. See *id.* § 3:2.

172. See BOGGESS, *supra* note 1, §§ 19–20.

173. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:60.

identifiability.¹⁷⁴ This issue is already playing out in a right of publicity case that arose from an NFT-related use.¹⁷⁵

First, Part II.A.1 discusses a lawsuit concerning alleged right of publicity infringement that arose in a purely commercial context against an NFT company. Then, Part II.A.2 explores an NFT-related lawsuit that highlights a conflict between copyright law and the right of publicity.

1. Pure Advertising Uses

In 2022, celebrity rapper Lil Yachty sued NFT seller Opulous; Ditto Music; and Lee Parsons, the founder of Opulous and Ditto Music, in the U.S. District Court for the Central District of California for infringing on his right of publicity under California common and statutory law through advertisements that “raise[d] substantial venture capital funds” totaling more than \$6.5 million.¹⁷⁶ In his complaint, Lil Yachty alleged that Opulous, without the rapper’s consent, “published numerous commercial advertisements and promotions” that connect Lil Yachty to the launch of NFT collectables.¹⁷⁷ Parsons launched an advertising campaign across social media on his account and on Opulous’s and Ditto Music’s accounts that announced the release of the Lil Yachty NFT Collection and that used pictures of Lil Yachty in these advertisements.¹⁷⁸ According to the complaint, the defendants planned to sell Lil Yachty’s copyrighted music using NFTs on the Opulous platform.¹⁷⁹

The defendants also made statements connecting Lil Yachty to the collaboration, including “Parsons says that Opulous plans to launch a series of these exclusive music NFT drops with ‘major artists’—led by Lil Yachty . . . ,” and “kicking things off with a series of unmissable NFT drops led by world-famous artists including Lil Yachty”¹⁸⁰ Lil Yachty asserted that he met with Parsons in “a general introductory meeting” to discuss the project but that “no agreement or deal terms for [Lil Yachty’s] involvement was ever reached.”¹⁸¹ The defendants then, according to the complaint, falsely claimed that Lil Yachty consented to the use of his name and image in connection with the Lil Yachty NFT Collection and “raised \$6.5 million in funding” by leveraging the media attention Opulous gained from its representations about Lil Yachty’s involvement.¹⁸²

This case is a prime example of an NFT-related right of publicity lawsuit that concerns an unauthorized use in a pure advertising context. If Lil Yachty, as his complaint alleged, did not consent to Opulous using his name

174. *See id.*

175. *See generally* Complaint & Demand for Jury Trial, *McCullum v. Opulous*, No. 22-CV-00587 (C.D. Cal. Jan. 27, 2022), ECF No. 1.

176. *Id.* at 3.

177. *Id.*

178. *See id.* at 30–45.

179. *See id.* at 8.

180. *Id.* at 8, 15, 32.

181. *Id.* at 7.

182. *Id.* at 3, 14.

and image to promote the NFT collection at issue, the right of publicity will likely protect Lil Yachty's identity.¹⁸³ The defendants presented Lil Yachty's name and image next to various social media advertisements and claimed that he was involved in the project in press releases.¹⁸⁴ The unpermitted use of pictures of Lil Yachty in advertisements, on its own, is sufficient to establish unauthorized identification.¹⁸⁵ The additional use of his name in the title of the NFT collection allows for further identification.¹⁸⁶

Additionally, a court would likely recognize that the defendants used Lil Yachty's name and image for a commercial purpose.¹⁸⁷ Advertisements, as previously discussed, constitute commercial speech, receiving the lowest level of First Amendment protection.¹⁸⁸ The defendants' advertisements are purely commercial speech because they focus on "imploring the audience to buy" their offerings—the Lil Yachty NFTs.¹⁸⁹ Their promotions likely are not sufficiently artistic or expressive in any way that might warrant heightened protection and merely constitute social media advertisements.¹⁹⁰ Therefore, if the defendants' use is proven unauthorized, a court would likely find that the defendants infringed Lil Yachty's right of publicity, given the defendants' obvious use of the performer's name and image to advertise his endorsement of the NFTs in order to sell them.¹⁹¹

Furthermore, Lil Yachty's case is significantly strengthened by the fact that Opulous raised more than \$6.5 million specifically to support its goal of selling NFTs that feature popular artists like Lil Yachty.¹⁹² If Opulous had sold NFTs featuring Lil Yachty's songs without his consent, the rapper could have also argued that the unauthorized sale of recordings of his voice took advantage of yet another aspect of his identity.¹⁹³ Although future NFT-related right of publicity cases may primarily concern infringement for commercial purposes like the case here, other current NFT litigation raises thornier right of publicity issues, one of which is the preemption of right of publicity claims under copyright law.

183. *See id.* at 8, 14; 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:60 (explaining that the use of a rights owner's picture and name makes "proof of identification that much easier for plaintiff" for purposes of establishing right of publicity infringement).

184. Complaint & Demand for Jury Trial, *supra* note 175, at 31–33, 39.

185. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:60.

186. *See id.*

187. *See id.*

188. *See* BOGGESS, *supra* note 1, § 19.

189. *Id.*

190. *See id.*; 2 MCCARTHY & SCHECHTER, *supra* note 45, § 7:3 (commenting that the fact that an advertisement constitutes "commercial speech . . . hardly ever, almost never" justifies an unpermitted use of identity).

191. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:60. *See generally* Complaint & Demand for Jury Trial, *supra* note 175.

192. *See id.* at 41–45.

193. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:74.

2. Copyright Law's Conflict with the Right of Publicity

Outside of uses that occur primarily for commercial purposes, whether a plaintiff has an enforceable right of publicity claim is not always so clear. As discussed above, unauthorized uses of another's picture in advertising often trigger right of publicity infringement.¹⁹⁴ However, when a photographer takes someone's picture and monetizes the picture without the consent of the person photographed, the photographer's copyright in the photograph may preempt the rights owner's right of publicity claim.¹⁹⁵

The Copyright Act of 1976¹⁹⁶ is a federal statute that protects all "original works of authorship fixed in any tangible medium of expression."¹⁹⁷ Works of authorship include, among other types of works, "pictorial, graphic and sculptural works," such as photographs, and "sound recordings," such as music.¹⁹⁸ A copyright "giv[es] the copyright owner the right to exclude others from certain uses of the protected work."¹⁹⁹

If a person's likeness is used in a copyrighted work, a conflict can arise over whether the right of publicity or the copyright prevails.²⁰⁰ Some courts have recognized that when a rights owner's likeness is used in a copyrighted work and the rights owner's assertion of the state law right of publicity "places an impediment on the use of that image," the copyright claim defeats the right of publicity.²⁰¹ "When human identity is used commercially without permission in advertising or on goods, the right of publicity is not preempted by federal copyright law."²⁰² However, "when the right of publicity is asserted . . . [over] a performance used without permission in an expressive, non-advertising use, then federal copyright law will preempt a state-based right of publicity claim."²⁰³

Thus, defendants who face right of publicity lawsuits due to their unauthorized commercialization of photographs that feature rights owners "often argue that the right of a publicity claim is preempted by copyright law because the image was captured in a copyrighted work."²⁰⁴ A growing number of courts are recognizing this defense when the rights owner authorized the photograph.²⁰⁵ Copyright preemption has been recognized in cases in which "the only use the defendant is charged with is copying or selling the image itself with no use in advertising and no use to enhance a

194. *See id.* § 4:60.

195. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 11:53.

196. Pub L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S.C.).

197. 17 U.S.C. § 102(a).

198. *Id.*

199. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 5:39.

200. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 11:46.

201. *Id.* § 11:49.

202. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 5:38.

203. *Id.*

204. MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 3:96 (2021).

205. *See id.*

separate product.”²⁰⁶ This conflict between a subject’s right of publicity and a photographer’s copyright took centerstage in the NFT space in *Notorious B.I.G., LLC v. Yes. Snowboards*.²⁰⁷

Notorious B.I.G., whose likeness was at issue in this case, is a rapper who passed away in 1997.²⁰⁸ The plaintiff was Notorious B.I.G., LLC, the company that is the successor-in-interest to Notorious B.I.G.’s estate and that is enforcing its postmortem right of publicity.²⁰⁹ One of the originally named defendants, Chi Modu, passed away during litigation, and his widow, Sophia A. Modu, was substituted as a defendant.²¹⁰ Chi Modu was a photographer, “well-known for photographing popular hip hop artists in the 1990s, including [Notorious B.I.G.]”²¹¹ In an ongoing legal battle in California, where courts recognize copyright preemption as a valid defense, Notorious B.I.G., LLC sued Chi Modu for printing and selling photographs of Notorious B.I.G. on snowboards, shower curtains, skateboards, and posters without the company’s consent.²¹² Notorious B.I.G., LLC then amended its complaint to sue Chi and Sophia Modu for selling and continuing “to receive commission revenue for re-sales of NFTs bearing [Notorious B.I.G.’s] image.”²¹³ The Modus argued that the Copyright Act preempted the plaintiff’s right of publicity claim.²¹⁴

The court agreed that the sale of Notorious B.I.G.’s photograph as NFTs preempted the estate’s right of publicity claim.²¹⁵ It held that the NFTs “relate to the display and distribution of the copyrighted works themselves, without a connection to other merchandise or advertising.”²¹⁶ The court found that the defendant’s distribution of the photographs as NFTs for profit did not change its analysis because “[c]opyright holders are allowed to commercially exploit their copyrights.”²¹⁷

The court there drew a distinction between NFTs and other merchandise that Chi Modu used to display the photographs.²¹⁸ Unlike the NFTs, the court held that the “use of [the rapper’s] image to promote and sell [shower curtains and skateboards] constitute[ed] an ‘exploitation of his likeness on an unrelated product’ for that purpose, which extends beyond ‘control of the artistic work itself.’”²¹⁹ Thus, the court permitted Notorious B.I.G., LLC to proceed with its claims as to the shower curtains and skateboards but denied

206. 2 MCCARTHY & SCHECHTER, *supra* note 45, § 11:53.

207. No. CV19-01946, 2022 WL 2784808 (C.D. Cal. June 3, 2022).

208. *See id.* at *1.

209. *See id.* at *2.

210. *See id.* at *1.

211. *Id.*

212. *See id.*

213. *See id.* at *3.

214. *See id.* at *4.

215. *See id.* at *5.

216. *Id.*

217. *Id.* (quoting *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1016 n.9 (9th Cir. 2017)).

218. *See id.* at *5.

219. *Id.* (quoting *Maloney*, 853 F.3d at 1019).

the plaintiff's preliminary injunction motion as to the defendant's sale of the photographs as NFTs.²²⁰

In doing so, the court rejected Notorious B.I.G., LLC's argument "that the NFTs are 'not copies'" of the photographs on the basis that an NFT is unique digital data that cannot be exchanged or replicated and "serves as a 'digital representation of an underlying asset.'"²²¹ The court responded: "[A]s Plaintiff concedes, an NFT is a 'digital representation' of the underlying asset, i.e., the photographs at issue. Thus, . . . it is assumed that the NFTs fall within the subject matter of the Copyright Act . . ." ²²² The court equated the digital sale of photographs as NFTs with other uses that the court has previously recognized as protected under the Copyright Act—including sales of photographs as posters and prints—and found that copyright law similarly protects the use of NFTs to sell photographs.²²³ The court, therefore, permitted the defendant to continue selling photographs of Notorious B.I.G. as NFTs.²²⁴

Like photographs, cases that concern uses of others' voices in recorded songs can also trigger competing right of publicity and copyright preemption claims.²²⁵ An increasing number of courts are holding that the Copyright Act preempts right of publicity claims when the "reproduction . . . of [a] recording [is] in an expressive, non-advertising use."²²⁶ Another NFT case implicating the right of publicity and copyright law, which has since been settled, involved the use of rapper Jay-Z's name and likeness in an attempt to sell the copyright to Jay-Z's debut album as an NFT.²²⁷ The case also demonstrated the potential for NFTs to be used to exploit Jay-Z's voice.²²⁸

Jay-Z's former label Roc-A-Fella Records, Inc. ("Roc-A-Fella Records") sued one of the label's co-owners, Damon Dash, in the U.S. District Court for the Southern District of New York (SDNY) for attempting to sell the copyright to Jay-Z's first album *Reasonable Doubt* as an NFT on NFT platform SuperFarm.²²⁹ Roc-A-Fella Records's complaint stated that Dash did not own any copyrights in the album and, therefore, "ha[d] no right to sell *Reasonable Doubt*" as an NFT.²³⁰ SuperFarm released an advertisement announcing that "the auction of Damon's ownership of the copyright to Jay-Z's first album . . . w[ould] prove ownership of the album's copyright, transferring the rights to all future revenue generated by the album from

220. *See id.* at *13.

221. *Id.* at *5 n.3.

222. *Id.*

223. *See id.* at *5.

224. *See id.* at *12–13.

225. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 11:55.

226. *Id.* § 11:51.

227. *See* Complaint & Demand for Jury Trial at 1, Roc-A-Fella Records, Inc. v. Damon Dash, No. 21-CV-5411 (S.D.N.Y. June 18, 2021), ECF No. 1. *See generally* Brittain, *supra* note 169.

228. *See* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 4:74; 2 MCCARTHY & SCHECHTER, *supra* note 45, § 11:54.

229. *See* Complaint & Demand for Jury Trial, *supra* note 227, at 1, 6–7.

230. *Id.* at 8.

Damon Dash to the auction winner.”²³¹ When Roc-A-Fella Records informed SuperFarm that “the sale was improper” in a letter, SuperFarm canceled the auction.²³²

In Roc-A-Fella Records’s letter, the label’s counsel explained Jay-Z’s enforceable right of publicity, which SuperFarm infringed, in commercial contexts: “Jay-Z has the rights to the use of his name and likeness . . . which cannot be exploited in the commercial manner reflected in the SuperFarm marketing materials, and for which damages have already been sustained.”²³³ According to Roc-A-Fella Records’s complaint, SuperFarm not only used Jay-Z’s name in connection with his album but also in connection with Jay-Z’s “major accomplishments” in the course of promoting the NFT auction.²³⁴

As previously discussed, when an advertisement uses another’s name and likeness without their consent for purely commercial purposes—like SuperFarm’s announcement, which used Jay-Z’s name, his connection to the album, and his major career accomplishments for the sole purpose of selling an NFT—the right of publicity will “almost always prevail[.]”²³⁵ Neither SuperFarm nor Dash has any right to use Jay-Z’s identity to help sell his album as an NFT during the promotion of its auction because such advertising is “a clearly commercial use” of Jay-Z’s identity for no other reason than to encourage consumers to buy merchandise.²³⁶

Furthermore, the potential sale of the album’s copyright as an NFT implicates a crucial interest that the right of publicity protects: the right to grant limited permissions to third parties to use one’s identity and choose the exclusive parties that are permitted to do so.²³⁷ Roc-A-Fella Records’s complaint asserted that Jay-Z exercised this right in a contract governing the rights that he granted to the label to use his name and likeness to promote the *Reasonable Doubt* album.²³⁸

If Dash had successfully sold the copyright to Jay-Z’s album on SuperFarm or another NFT platform, however, then Dash and the NFT platform would have undercut this vital right of publicity interest of which Jay-Z is entitled the protection. Furthermore, the sale of the album’s copyright as an NFT could have given rise to endless derivative uses of Jay-Z’s voice recordings by the buyer; these uses might extend beyond the scope of the NFT and the buyer’s individual use of the recordings, such as granting advertisers the right to use the music to sell products, permitting

231. *Id.* at 6–7. However, Dash continued trying to find other platforms on which to sell the copyright, according to Roc-A-Fella Records’s complaint. *See id.* at 7.

232. *Id.*

233. *Id.* at 31; *see* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 7:2 (explaining that “commercial speech doctrine will only rarely immunize uses which would otherwise be an infringement of the right of publicity”).

234. Complaint & Demand for Jury Trial, *supra* note 227, at 7.

235. 2 MCCARTHY & SCHECHTER, *supra* note 45, § 7:3.

236. *Id.*

237. *See id.* § 10:15.

238. *See* Complaint & Demand for Jury Trial, *supra* note 227, at 13–14.

others to use the recordings in other songs, or licensing the music for films, videos, or other recorded content. This would undermine any right that Jay-Z has to select who can commercialize his voice and to define how these parties can monetize his voice.²³⁹

If a right of publicity claim arose over the use of Jay-Z's voice as heard in his music in a copyrightable medium, such as in another song, due to the sale of the album's copyright as an NFT, a possible defense is copyright preemption.²⁴⁰ The outcome would turn on whether the use occurs "in an expressive, non-advertising medium," which would shield the unauthorized use from liability, or "to advertise goods or services," in which case a court would uphold the right of publicity.²⁴¹ When copyright preemption does not apply, however, courts generally follow one of two tests to determine whether an expressive or artistic use warrants immunity from liability for right of publicity infringement²⁴²: the *Rogers* test²⁴³ and the transformative use test.²⁴⁴

B. An Old Play on a New Stage: The Right of Publicity and First Amendment Defenses

Courts use tests derived from the First Amendment to decide whether an unauthorized use of another's likeness in an artistic and expressive context is shielded from liability for right of publicity infringement.²⁴⁵ With the emergence of NFT avatars that commonly depict artistic representations of celebrities, the issue of whether the right of publicity would protect the rights owner in these circumstances becomes more pressing.²⁴⁶ NFTs often depict bizarre or unusual versions of celebrities, which are the uses that are more likely to overcome right of publicity claims than literal celebrity depictions.²⁴⁷ For example, digital artist Beeple has sold NFTs that feature Tesla CEO Elon Musk riding an animal with weapons emerging from it, rapper Kanye West's head with wires coming out of it, and former U.S.

239. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 2:2 (explaining a rationale for right of publicity protection on the basis that the identifiable aspects of a person are their property).

240. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 11:55.

241. *Id.* § 11:55.

242. *See* discussion *supra* Part I.A.2.

243. *See generally* *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

244. *See generally* *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

245. *See* discussion *supra* Part I.A.2; 2 MCCARTHY & SCHECHTER, *supra* note 45, §§ 8:71–8:72.

246. *See, e.g., The Players' Lounge, supra* note 122; Robert Hoogendoorn, *12 Avatar NFT Projects with Gaming Use Cases*, PLAY TO EARN (Oct. 11, 2021), <https://www.playtoearn.online/2021/10/11/avatar-nft-projects-with-gaming-use-cases/> [<https://perma.cc/KBL6-R536>]; *11,111 JADU AVAs Crash-Landed on Planet Earth September 7th*, JADU, <https://jadu.ar/avas> [<https://perma.cc/H6BY-HFAZ>] (last visited Oct. 6, 2023).

247. *See In re NCAA Student-Athlete Name & Licensing Litig.*, 724 F.3d 1268, 1274 (9th Cir. 2013).

President Donald J. Trump fighting U.S. President Joe Biden in a boxing ring.²⁴⁸

Under the *Rogers* test and the transformative use test, an unauthorized use will not overcome a right of publicity claim if the use was primarily for a “commercial purpose” rather than an artistic or expressive purpose.²⁴⁹ Many NFTs have sold for exorbitant prices;²⁵⁰ Beeple, for example, sold an NFT of his digital work for \$69 million.²⁵¹ Celebrities have made tens to hundreds of thousands of dollars by selling NFTs featuring their likenesses in the forms of images, videos, and avatars.²⁵² NFTs can generate significantly higher profits than other media used to depict celebrities’ likenesses, such as posters and prints.²⁵³ Thus, due to NFTs’ “pecuniary” advantages, courts may find that unpermitted uses of NFTs to exhibit others’ likenesses are primarily commercial, thereby rendering these uses undeserving of First Amendment protection despite the artistic or expressive content they display.²⁵⁴

The medium in which the unauthorized use occurs is “crucial.”²⁵⁵ A First Amendment defense in a case in which the defendant uses another’s image, for example, to speak on a social issue in a medium that courts traditionally recognize as commercial, such as coffee mugs and T-shirts, “rings somewhat hollow” because such places are “not the normal [media] for ‘speech’ on public issues.”²⁵⁶ Courts may liken the unauthorized use of another’s likeness to sell NFTs to commercial uses on coffee mugs and T-shirts, in which case the right of publicity would prevail.²⁵⁷ On the other hand, courts may find that NFTs that contain artistic or expressive elements are deserving of the same First Amendment protections afforded to artistic works like paintings and drawings.²⁵⁸

Two uses of celebrity identity as NFT avatars, both of which implicate courts’ First Amendment tests, have emerged: (1) NFTs that depict celebrities as avatars in images and (2) NFTs that depict celebrities as video game avatars for in-game use. Part II.B.1 analyzes the former use under the *Rogers* test. Part II.B.2 analyzes the latter use under the transformative use test.

248. See 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/SY9P-UTM2>].

249. 1 MCCARTHY & SCHECHTER, *supra* note 1, § 3:2; see 2 MCCARTHY & SCHECHTER, *supra* note 45, §§ 8:71–8:72.

250. See Jacob Kastrenakes, *Beeple Sold an NFT for \$69 Million*, *VERGE* (Mar. 11, 2021, 10:09 AM), <https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million> [<https://perma.cc/NH9P-NATG>].

251. *See id.*

252. *See Salmi, supra* note 18.

253. *See id.*

254. Conrad, *supra* note 12, at 150; see 1 MCCARTHY & SCHECHTER, *supra* note 1, § 3:2; see 2 MCCARTHY & SCHECHTER, *supra* note 45, §§ 8:71–8:72.

255. 2 MCCARTHY & SCHECHTER, *supra* note 45, § 7:22.

256. *Id.*

257. *See id.*

258. *See id.*

1. Applying the *Rogers* Test

In *Hermès International v. Rothschild*,²⁵⁹ SDNY found that artistic NFTs warrant the same First Amendment protection as other artistic uses under the *Rogers* test.²⁶⁰ Fashion brand Hermès International (“Hermès”), raising trademark infringement claims, sued Mason Rothschild for creating and selling NFTs of “digital images of faux-fur-covered versions of the luxury Birkin handbags” that Hermès sells.²⁶¹ New York courts, as seen in this case, apply the *Rogers* test in trademark cases in which the contested work is artistic or expressive.²⁶² As previously discussed, some courts, including those in New York, apply the *Rogers* test to artistic and expressive content in right of publicity infringement cases, too.²⁶³ Therefore, the *Hermès International* court’s application of the test demonstrates how the defense might apply to cases in which an artistic NFT infringes on another’s right of publicity.²⁶⁴

Here, SDNY agreed with Rothschild’s argument that the *Rogers* test applies here “[b]ecause Rothschild is selling digital images of handbags that could constitute a form of artistic expression.”²⁶⁵ The court rejected Hermès’s argument that First Amendment protection does not extend to NFTs, holding that the test “is not inapplicable simply because Rothschild sells the images.”²⁶⁶ The court found that “Rothschild’s use of NFTs to authenticate the images [does not] change the application of” the *Rogers* test: “[U]sing NFTs to authenticate an image . . . does not make the image a commodity without First Amendment protection any more than selling numbered copies of physical paintings would make the paintings commodities for purposes of” the *Rogers* test.²⁶⁷

The *Rogers* test establishes a low threshold for a defendant to overcome if the court recognizes the defendant’s work as artistic and non-commercial.²⁶⁸ In *Hermès International*, however, SDNY found that Hermès’s complaint contained “sufficient factual allegations that the use . . . is not artistically relevant and . . . is explicitly misleading as to the source or content of the work” because Rothschild titled the NFTs “MetaBirkins,” which consumers

259. 603 F. Supp. 3d 98 (S.D.N.Y. 2022). After the district court’s instruction to a jury that NFTs could be afforded First Amendment protection, the jury returned a verdict in favor of Hermès and found that, according to the district court, Rothschild’s NFTs misled consumers as to the source of the NFTs. *Hermès Int’l v. Rothschild*, No. 22-CV-384, 2023 WL 4145518, at *1, *4 (S.D.N.Y. June 23, 2023).

260. *See Hermès Int’l*, 603 F. Supp. 3d at 103–04.

261. *Id.* at 100.

262. *See id.* at 102–03.

263. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:71.

264. *Hermès Int’l*, 603 F. Supp. 3d at 103–04.

265. *Id.* at 104.

266. *Id.*

267. *Id.*

268. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:71; discussion *supra* Part I.A.2.

and media publications believed to be a partnership with Hermès.²⁶⁹ Thus, the court denied Rothschild's motion to dismiss.²⁷⁰

In a case that involves right of publicity infringement via NFTs, a court may agree with the *Hermès International* court's First Amendment analysis.²⁷¹ In *Parks v. LaFace Records*,²⁷² the court reached a similar conclusion in a case concerning the use of the name of civil rights activist Rosa Parks in a song titled "Rosa Parks." The court held that "reasonable people could find that [Rosa Parks's] name was appropriated solely because of the vastly increased marketing power of a product bearing the name of a national heroine."²⁷³ Many celebrities have worked with NFT platforms to create and sell digital depictions of themselves as NFT avatars.²⁷⁴ If an NFT platform depicts a celebrity's characteristics on an NFT avatar and associates the celebrity's name with the marketing of that NFT, without his or her consent, a court may liken the use to that in the *Parks* case.²⁷⁵ Similar to the *Parks* case, such a court could further find that the platform's First Amendment defense fails on the basis that the platform used the celebrity's name and characteristics merely to attract buyers and to falsely convey to consumers that the celebrity endorses the project.²⁷⁶

Alternatively, when an NFT avatar does not closely resemble the subject and does not identify the subject by name, and is thus less likely to mislead buyers, a court may find that the NFT creator is immunized from liability under the *Rogers* test.²⁷⁷ In *Brown v. Electronic Arts*,²⁷⁸ the court found that an avatar designed to mirror a real football player's likeness in a football video game using the player's attributes—including "team affiliation[], playing position[], age[], height[], weight[], ability level[], and other attributes"—was still artistically relevant because the game manufacturer prided itself on the game's realism and did not suggest that the plaintiff endorsed the use of his likeness.²⁷⁹

An example of an NFT company that similarly creates sports avatars is The Players' Lounge.²⁸⁰ The NFT platform partnered with football players at the University of Georgia (UGA) to launch a collection of NFT avatars that depict digital cartoon images of the UGA's bulldog mascot as football players.²⁸¹ If the NFT platform represented the NFT avatars as specific

269. *Hermès Int'l*, 603 F. Supp. 3d at 105.

270. *See id.* at 107.

271. *See id.* at 100.

272. 329 F.3d 437 (6th Cir. 2003).

273. *Id.* at 454.

274. *See Salmi, supra* note 18.

275. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:71.

276. *See id.*

277. *See id.*

278. 724 F.3d 1235 (9th Cir. 2013).

279. *Id.* at 1240.

280. *See The Players' Lounge, supra* note 122.

281. *See* Kristi Dosh, *Former UGA Football Players Create NFTs to Benefit Current Players*, FORBES (Dec. 28, 2021, 5:13 PM), <https://www.forbes.com/sites/kristidosh/2021/12/28/former-uga-football-players-create-nfts-to-benefit-current-players/?sh=2442f2c15163> [<https://perma.cc/JML5-YCWF>].

football players without their consent by matching the real athletes' jersey numbers, school affiliations, and biographical information without identifying their names, like the game manufacturer in *Brown*, a court may similarly rule in favor of the NFT creator under the *Rogers* test.²⁸² In such a case, the platform's uses of the football players could merit First Amendment protection under the two prongs of the test by (1) establishing artistic relevance as to the platform's creative development of game characters that advance the platform's purpose of connecting sports fans with their favorite teams and (2) distancing itself from misleading consumers by depicting the football players as dogs that do not have identifiable names.²⁸³

The *Hermès International* court also applied the *Rogers* test to situations in which NFTs appear in the metaverse, which is "a simulated digital environment" designed "to create spaces for rich user interaction that mimics the real world."²⁸⁴ An SDNY court found that the *Rogers* test "might not apply . . . if the NFTs were attached to a digital file of a virtually wearable Birkin handbag . . . that allows the NFT owners to interact in the metaverse."²⁸⁵ Many video games exist in the metaverse, where people enter digital games as their online avatars and interact with other users' avatars in real time.²⁸⁶ NFTs have reached games in the metaverse in the form of playable NFT avatars, whereby people buy NFTs that represent avatars for in-game use.²⁸⁷

Notably, marketplaces have created NFT avatars that bear celebrities' likenesses, with some platforms allowing users to buy these avatars and present themselves as celebrity avatars in the platforms' games.²⁸⁸ Some NFT avatars are transferable across virtual worlds, and NFT gaming companies have even created virtual spaces where people can upload NFT avatars that they bought from different marketplaces to interact in one space.²⁸⁹ How the *Hermès International* court would apply its analysis

282. See *Brown*, 724 F.3d at 1243–47.

283. See, e.g., *K & K Prods., Inc. v. Walt Disney Studios Motion Pictures*, No. 20-CV-1753, 2021 WL 4394787, at *5 (D. Nev. Sept. 23, 2021) (finding that defendant's cartoon character and action figures did not mislead consumers as to plaintiff's endorsement because the character had a different name and appearance from the plaintiff).

284. See John Morrow & James Dority, *Trademark Law, NFTs and the Metaverse*, WESTLAW TODAY (June 29, 2022), <https://today.westlaw.com/Document/I6ed47754f7d711ec9f24ec7b211d8087/View/FullText.html> [<https://perma.cc/VZ3R-6HUG>].

285. *Hermès Int'l*, 603 F. Supp. 3d at 104 n.3.

286. See Morrow & Dority, *supra* note 284; Geri Mileva, *Top 10 Metaverse Games to Immerse Yourself Into (2023)*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/top-metaverse-games/> [<https://perma.cc/D8CJ-9A9D>] (Mar. 15, 2023).

287. See Hoogendoorn, *supra* note 246.

288. See, e.g., *WPT Ambassadors Steve Aoki & Brad Owen Headline Poker Heroes NFT Project*, WPT GLOBAL (May 12, 2022), <https://www.worldpokertour.com/news/wpt-ambassadors-steve-aoki-brad-owen-headline-poker-heroes-nft-project/> [<https://perma.cc/A53N-65XC>]; 3,333 *Steve Aoki NFT Avatars Join the Sandbox*, *supra* note 20; Tan, *supra* note 123.

289. See, e.g., *CloneX*, RTFKT, <https://clonex.rtfkt.com/> [<https://perma.cc/MWG6-AQ2X>] (last visited Oct. 6, 2023); *Introducing NFT All Stars Level 1*, GEENEE, <https://geenee.ar/nft-all-stars-game/> [<https://perma.cc/M6YA-5RBF>] (last visited Oct. 6, 2023); *Interoperability*

regarding the metaverse to an NFT avatar that depicts a celebrity without their consent in the metaverse, rather than an NFT of a virtual accessory, is an issue that has yet to be encountered.²⁹⁰ However, “almost all courts” apply the transformative use test in cases in which a game features a celebrity as an avatar without the celebrity’s consent.²⁹¹ Therefore, the next section discusses how the right of publicity might apply to unauthorized uses of identity in the form of NFT video game avatars under the transformative use test.

2. Applying the Transformative Use Test

Video games constitute “expressive free speech, receiving the same type of First Amendment protection as books and motion pictures.”²⁹² Therefore, when a plaintiff argues that a video game infringes on their right of publicity, courts must apply a First Amendment analysis.²⁹³ Under the transformative use test, “if the accused use . . . ‘transforms’ the plaintiff’s identity to a sufficient degree, then it is likely to be immunized from liability for right of publicity infringement.”²⁹⁴

Courts protect the right of publicity when video game avatars create “literal, conventional depictions” of another’s likeness.²⁹⁵ For example, the court in *No Doubt v. Activision Publishing, Inc.*²⁹⁶ protected a music group’s right of publicity when video game avatars depicted “computer-generated recreations of the real band members, painstakingly designed to mimic their likeness” and “perform[ed] rock songs.”²⁹⁷ Moreover, the court rejected the video game publisher’s argument that the avatars contained sufficient transformative elements because they appeared in outer space and other settings containing “creative elements.”²⁹⁸ Similarly, “the Third and Ninth circuits, in almost identical cases” against the same defendant, found that the right of publicity protected plaintiffs when the video game avatars matched the plaintiffs’ hair colors, skin tones, hair styles, weight, height, and biographical characteristics, and—like the plaintiffs at that time—played football in college football stadiums.²⁹⁹

Therefore, in a state where courts apply the transformative use test, a court would likely find that an unauthorized “realistic depiction” of a celebrity as

Overview, SANDBOX, <https://sandboxgame.gitbook.io/production/interoperability/interoperability-overview> [<https://perma.cc/T5LJ-C4UR>] (last visited Oct. 6, 2023).

290. See *Hermès Int’l v. Rothschild*, 603 F. Supp. 3d 98, 104 n.3 (S.D.N.Y. 2022).

291. 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:73.

292. *Id.* (citing *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011)).

293. See *id.*

294. *Id.* § 8:72.

295. *In re NCAA Student-Athlete Name & Licensing Litig.*, 724 F.3d 1268, 1274 (9th Cir. 2013) (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001)).

296. 122 Cal. Rptr. 3d 397 (Ct. App. 2011).

297. *No Doubt*, 122 Cal. Rptr. 3d at 409–11.

298. *Id.* at 411.

299. 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:73; see also *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146, 166 (3d Cir. 2013); *In re NCAA Student-Athlete Name & Licensing Litig.*, 724 F.3d at 1276–79.

an NFT avatar, through similar facial and physical characteristics and identifying contextual circumstances, violates their right of publicity.³⁰⁰ For example, if a metaverse game designed for users to sing and perform concerts—like the game in *No Doubt*—sells NFT avatars that closely depict real-life singers and their characteristics (such as their clothes, skin tone, hair, and facial features), the right of publicity would likely protect the singers because the avatars “take[] the form of a literal depiction” of their features and mimic their profession.³⁰¹ Furthermore, in *No Doubt*, users’ ability to manipulate the avatars to perform songs that the real band members did not sing and to perform such songs “at fanciful venues including outer space” did not change the court’s analysis; the avatars infringed on the music group’s right of publicity because the avatars did the same “activity by which the band achieved and maintains its fame.”³⁰² Therefore, when an NFT avatar closely depicting a personality’s likeness through their facial and physical features and through the actions for which the personality is known—even if the NFT avatar’s settings are outlandish and unrealistic—the court’s analysis would likely be the same as that of the *No Doubt* court.³⁰³

In contrast to *No Doubt*, the California Second District Court of Appeal in *Kirby v. Sega of America, Inc.*³⁰⁴ found that an avatar that “resemble[d]” a singer and that was “sufficiently reminiscent enough of [the singer’s] features and personal style to suggest imitation”—because of the avatar’s similarly red hair, red lips, face and eye shape, figure, and catch phrases—nonetheless transformed her identity and defeated her right of publicity.³⁰⁵ The court held that the avatar’s “typical hairstyle,” “primary costume,” dance moves, and setting “as a space-age reporter in the 25th century” differed sufficiently from the real singer.³⁰⁶ Similarly, in *Hamilton v. Speight*,³⁰⁷ the U.S. Court of Appeals for the Third Circuit found that a video game’s use of a football player’s identity as an avatar was sufficiently different from the plaintiff’s identity to defeat his right of publicity claim—even though the avatar shared the plaintiff’s skin color, facial features, hairstyle, build, voice, and costume

300. *Hart*, 717 F.3d at 168.

301. *No Doubt*, 122 Cal. Rptr. 3d at 407 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001)). Such a game in the metaverse may exist soon. Music label Universal Music Group and individual celebrities have partnered with NFT company Genies to launch NFT avatars of singers in the metaverse. See Dean Takahashi, *Genies Raises \$150M at over \$1B Valuation for Metaverse Avatars*, VENTUREBEAT (Apr. 12, 2022, 7:01 AM), <https://venturebeat.com/games/genies-raises-150m-at-over-1b-valuation-for-metaverse-avatars/> [<https://perma.cc/8FWH-4G32>]. Their virtual identities will “be used as stand-ins for them at online events,” which will likely be concerts in the metaverse. *Id.*; see Harry Chen, *Virtual Concert in the Metaverse: The Future of the Musical Industry*, EVENTX (July 20, 2022), <https://www.eventx.io/blog/virtual-concert-in-the-metaverse-the-future-of-the-musical-industry> [<https://perma.cc/RPY7-MYWT>].

302. *No Doubt*, 122 Cal. Rptr. 3d at 411.

303. See *id.*

304. 50 Cal. Rptr. 3d 607 (Ct. App. 2006).

305. *Id.* at 613.

306. *Id.* at 616.

307. 827 F. App’x 238 (3d Cir. 2020).

and played a fictionalized version of football.³⁰⁸ Furthermore, in *Mitchell v. The Cartoon Network, Inc.*,³⁰⁹ the U.S. District Court for the District of New Jersey found that a cartoon character did not violate a well-known gamer's right of publicity even though the character and the plaintiff both had "long black hair and a beard," a similar backstory as video game record holders, and a similar personality because the character "appear[ed] as a non-human creature, a giant floating head with no body from outer space."³¹⁰

NFT avatars more often resemble the outlandish characters protected under First Amendment analysis in *Hamilton* and *Mitchell*.³¹¹ They often depict nonhuman creatures, such as aliens, zombies, and walking rabbits.³¹² Furthermore, many NFT platforms' avatars that appear more human-like are nonetheless unrealistic human representations.³¹³ For example, the metaverse game "The Sandbox" sold thousands of pixelated NFT avatars of musician Steve Aoki.³¹⁴ Once someone buys an Aoki NFT, they can play and interact with others as Aoki's virtual identity.³¹⁵ However, each avatar exhibits unique characteristics that differ significantly from the real Aoki's characteristics.³¹⁶ Whereas the real Aoki has long brown hair, the Aoki avatars wear various hairstyles, from tall, spiky blonde hair with a ring of flowers to long, rainbow-colored hair with horns.³¹⁷ Also, many Aoki avatars have colorful, nonhuman skin tones and other nonhuman characteristics; moreover, each avatar's outfit, many of which do not match the real Aoki's style, is vastly different from the next.³¹⁸

If The Sandbox released and sold these NFTs without Aoki's consent, a court might find that such uses sufficiently transform Aoki's identity due to the outlandish characteristics described above.³¹⁹ Furthermore, the Third Circuit has held that "[i]t remains an open question . . . whether right of publicity claims can extend into . . . pixelated [avatar] representations."³²⁰ Therefore, the fact that an avatar is pixelated, as is the case with Aoki's avatars, may render the rights owner's likeness less identifiable and thus more likely to prevail over a rights owner's right of publicity.³²¹ Some avatars, however, resemble the musician more realistically by wearing Aoki's long brown hair, signature clothing, and headphones, which may

308. *See id.* at 240 (holding that whereas the avatar "[fought] a fantastic breed of creatures in a fictional world" and served in the military, the plaintiff did neither).

309. No. CV 15-5668, 2015 WL 12839135 (D.N.J. Nov. 20, 2015).

310. *Id.* at *5.

311. *See Hamilton*, 827 F. App'x at 240; *Mitchell*, 2015 WL 12839135, at *5; Hoogendoorn, *supra* note 246.

312. *See* Hoogendoorn, *supra* note 246.

313. *See, e.g., Steve Aoki Avatars*, OPENSEA, <https://opensea.io/collection/steve-aoki-avatars> [<https://perma.cc/4VJS-LAUW>] (last visited Oct. 6, 2023).

314. *See id.*

315. *See id.*

316. *See id.*

317. *See id.*

318. *See id.*

319. *See id.*

320. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 n.38 (3d Cir. 2013).

321. *See id.*

mean that some avatars in the collection would not sufficiently transform his identity to defeat his publicity rights, whereas others would.³²²

Furthermore, whether the right of publicity protects rights owners against unauthorized uses in video games may turn on setting.³²³ The Third Circuit has held that when the creative elements of a video game external to the depiction of the plaintiff “affect the use or meaning of [the plaintiff’s] identity” significantly, the court would credit these elements as transforming the subject’s identity.³²⁴ Unlike many video games courts have previously considered in right of publicity cases—in which a plaintiff’s avatar could only represent, for example, a football player on a football field or a performer in a band—games in the metaverse are often not confined to a single digital landscape or end goal.³²⁵ Rather, games in the metaverse are marked by users’ enhanced control over their gaming experiences and ability to determine their avatars’ overall “existence.”³²⁶ This new era of gaming has been ushered in by many NFT companies’ vision to achieve interoperability—the ability to interact across virtual worlds and platforms—in the metaverse.³²⁷ The NFT gaming world is already realizing this goal.

A CloneX, for example, is an NFT avatar that exists in the form of a 3D file.³²⁸ Players can upload the file to various platforms, granting them access to play as the NFT avatar in different gaming environments.³²⁹ With this new technology that enables NFT owners to place their avatars in countless virtual worlds that the NFT owners themselves can design from scratch, it is unclear whether the right of publicity would be protected in such situations in which players can significantly transform the environment and actions of a potentially infringing avatar. A court may find that these novel gaming functions “imbue[] [the unauthorized use] with some added creativity beyond . . . a ‘merely trivial variation,’” thereby transforming the NFT avatar

322. See *Steve Aoki Avatars*, *supra* note 313.

323. See *Hart*, 717 F.3d at 169.

324. *Id.*

325. See, e.g., *CloneX*, *supra* note 289; *Introducing NFT All Stars Level 1*, *supra* note 289; *Interoperability Overview*, *supra* note 289.

326. Isaiah Richards, *Metaverse: Already Existing in Video Games?: MMORPGs Resemble the Digital World; What’s Different?*, *TECH TIMES* (Jan. 11, 2022), <https://www.techtimes.com/articles/270347/20220111/metaverse-already-existing-video-games-mmorpgs-resemble-digital-world-what.htm> [<https://perma.cc/N6HG-JYT2>].

327. See Sophie Goossens & John P. Feldman, *Gaming in the Metaverse—An NFT-Powered Revolution?*, *INTELL. PROP. & TECH. L.J.*, Nov.–Dec. 2021, at *4; Ash Koosha, *The Future of the Metaverse Hinges on Interoperability*, *FAST CO.* (Oct. 11, 2022), <https://www.fastcompany.com/90794333/the-future-of-the-metaverse-hinges-on-interoperability> [<https://perma.cc/4VVJ-MECJ>].

328. See *CloneX*, *supra* note 289. Another example of the NFT gaming world’s move toward interoperability is NFT All Stars Level 1. *Introducing NFT All Stars Level 1*, *supra* note 289. It is a game developed by several metaverse gaming companies that allows anyone who owns an NFT avatar from any of the participating companies to place their avatar on top of their existing environment and interact with other NFT avatars in the vicinity in real time. See *id.*

329. See *CloneX*, *supra* note 289; *Introducing NFT All Stars Level 1*, *supra* note 289.

significantly.³³⁰ The next section highlights the “pronounced” harms arising from NFTs that legal scholars have contemplated with respect to right of publicity infringement.³³¹

C. Precedented Uses, Novel Harms

One legal scholar, Professor Mark Conrad, has acknowledged that although the issues facing rights owners “are not new, their application in the world of cyber-creations pose[s] interesting and potentially difficult . . . challenges.”³³² Specifically, Professor Conrad discussed the conflict between the right of publicity and the First Amendment in the context of NFTs.³³³ Professor Conrad writes that this conflict “has only become more acute” with the rise of NFTs because of their novelty and the fact that courts will have to apply constitutional and common law “principles to a technology barely half a decade old.”³³⁴ Analyzing a case study of an artist who minted an NFT of her painting featuring well-known boxers, Professor Conrad commented that one could argue that the “pecuniary” nature of NFTs makes their primary purpose commercial “no matter how ‘transformative’ the work is.”³³⁵ However, he also notes that “it is likely that the design . . . would escape a right of publicity claim” because the underlying work is artistic.³³⁶ Other legal scholars have made similar observations.³³⁷ They note that although “the commercial nature of NFTs cuts against” First Amendment arguments, “the more an NFT contains an expressive . . . depiction of an individual, the more likely that the First Amendment defense will apply” to the NFT.³³⁸

Another legal commentator, Professor Stacey M. Lantagne, has addressed the conflict between copyright law and the right of publicity in the NFT space.³³⁹ Professor Lantagne explains that people whose images have gone viral on the internet and celebrities who are subject to unwelcome paparazzi photographs generally cannot stop the circulation of their images by the photographer because, as the copyright holder, the photographer “has

330. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 169 (3d Cir. 2013) (quoting *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003)).

331. Ghaith Mahmood, Tara McCortney & Nima Mohebbi, *NFTs and the Right of Publicity: Assessing the Legal Risks*, JD SUPRA (Aug. 16, 2021), <https://www.jdsupra.com/legalnews/nfts-and-the-right-of-publicity-9050692/> [<https://perma.cc/7JTL-R7WH>].

332. Conrad, *supra* note 12, at 152.

333. *See id.* at 147.

334. *Id.* at 147–48.

335. *Id.* at 150.

336. *Id.*

337. *See, e.g.*, Anthony J. Dreyer & David M. Lamb, *Can I Mint an NFT with That?: Avoiding Right of Publicity and Trademark Litigation Risks in the Brave New World of NFTs*, WESTLAW TODAY (June 2, 2021), <https://today.westlaw.com/Document/150a657bcb1ca11ebbea4f0dc9fb69570/View/FullText.html> [<https://perma.cc/8SVT-KFDM>].

338. *Id.*

339. *See* Stacey M. Lantagne, *Of Disaster Girl and Everyday: How NFTs Invite Challenging Copyright Assumptions Around Creator Support*, 13 HARV. J. SPORTS & ENT. L. 265, 276–80 (2022).

exclusive rights over reproduction and distribution.”³⁴⁰ According to Professor Lantagne, this limits the photographed individual’s ability to assert their rights over uses of their likeness “that copyright law does not recognize” in these situations, such as commercializing the photograph or even sharing it on social media.³⁴¹ Professor Lantagne notes that “[c]ourts favor the copyright holder’s right to publicize a photograph over the subject’s right to block it.”³⁴² Professor Lantagne writes further that NFTs mark a shift in the powers of rights owners because “[a]nyone can mint an NFT,” so anyone who is the subject of a photograph can create and monetize NFTs of themselves.³⁴³

Commentators have asserted that the issues that can arise from right of publicity violations are amplified when an NFT is the channel for the infringement.³⁴⁴ One reason attributed to the “pronounced [risk] with respect to NFTs” is “[t]he democratized nature of NFTs.”³⁴⁵ Anyone can create NFTs of anything—“no legal expertise required.”³⁴⁶ People may, therefore, “be tempted to associate an existing image of an individual with an NFT as a quick way to make money.”³⁴⁷ This issue is exacerbated by the fact that the NFTs that garner the most attention “are often those that appear to have required little effort to create but sell for a staggering profit . . . especially because viral images are popular choices for NFTs.”³⁴⁸

Another growing concern that NFT infringement raises is the anonymity of blockchain transactions.³⁴⁹ “NFT owners are often practically untraceable due to the anonymous nature of online crypto identities”³⁵⁰ One author posits that “copyfraud,” which arises when someone who does not own the copyright in a work misrepresents that they are the copyright holder, “is especially problematic [with respect to NFTs] due to the anonymity features of the blockchain,” making “it difficult to verify” the copyright holder of the underlying work.³⁵¹ Copyfraud is further complicated and may give rise to right of publicity infringement when the copyfraud involves the sale of the copyright to a work that implicates another’s likeness, as seen with Jay-Z in

340. *Id.* at 277.

341. *Id.*

342. *Id.*

343. *Id.* at 278.

344. *See* Mahmood et al., *supra* note 331.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *See* Peter Willsey, Vincent Badolato, Haroon Mian & Jason Sobel, *NFT Litigation: Shaping IP Rights in the Metaverse*, WESTLAW TODAY (July 12, 2022), <https://today.westlaw.com/Document/I4dec7758020811ed9f24ec7b211d8087/View/FullText.html> [<https://perma.cc/3Q7X-8GCH>]; *NFTs and Intellectual Property*, REUTERS: PRAC. L.: J. (Aug. 30, 2022), <https://www.reuters.com/practical-law-the-journal/transactional/nfts-intellectual-property-2023-02-01/> [<https://perma.cc/6DLK-A7EJ>]; Lynne Lewis, Jane Owen, Hamish Fraser & Rohit Dighe, *Non-Fungible Tokens and Copyright Law*, INTELL. PROP. & TECH. L.J. 18, Sept. 2021, at 19.

350. Noh et al., *supra* note 10, at 325.

351. Lewis et al., *supra* note 349, at 19.

*Roc-A-Fella Records, Inc.*³⁵² The concern that blockchain's anonymity will prevent rights owners from seeking redress has also been discussed with regard to "metaverse-specific" NFTs.³⁵³ One article highlights that the development of digital content "by anonymized avatars" will render identification of and enforcement against creators "increasingly difficult" in the metaverse.³⁵⁴

Moreover, scholars have written that even if aggrieved parties identify the infringers, blockchain transactions' immutability poses another obstacle for rights owners seeking redress.³⁵⁵ "When an NFT becomes 'minted,' it lives on a blockchain forever."³⁵⁶ If someone creates and sells an infringing NFT, that "consumer . . . [is] eternally recorded as the sole purchaser and owner of" the NFT.³⁵⁷ An article has noted that rights owners "will [] face uncertainty resolving the dispute[s] given the irreversible nature of blockchain transactions."³⁵⁸ Further, blockchains' immutability makes "the application of common law principles to NFT transactions . . . largely unknown."³⁵⁹ A standard remedy in right of publicity cases is a permanent injunction, which prevents the defendant "from continuing its infringement."³⁶⁰ However, in the context of NFTs, this form of relief is difficult to apply to assets that live online "eternally" and cannot be destroyed.³⁶¹

Finally, scholars have acknowledged the risks that NFTs' transferability (onto a different marketplace or platform than where they were initially sold) pose in terms of the "applicability of license terms to downstream purchasers."³⁶² They wrote that one of the strengths of NFTs is their ability to be transferred and sold outside of their original marketplaces to secondary buyers.³⁶³ For example, as this Note previously discussed, transferability is a common feature among NFT gaming platforms, many of which allow users to move their NFT avatars across gaming platforms and environments.³⁶⁴ However, these scholars also posit that "[i]n these situations, a future purchaser may not be aware of the license terms and restrictions," such as

352. See generally Complaint & Demand for Jury Trial, *supra* note 227.

353. *NFTs and Intellectual Property*, *supra* note 349.

354. *Id.*

355. See *id.*

356. Laura Ganoza & Ashley Koley, *From Gamers to the Runway*, LANDSLIDE, Mar.–Apr. 2022, at 21.

357. *Id.*

358. *NFTs and Intellectual Property*, *supra* note 349.

359. *Id.*

360. 2 MCCARTHY & SCHECHTER, *supra* note 45, § 11:22.

361. Ganoza & Koley, *supra* note 356, at 21; see *NFTs and Intellectual Property*, *supra* note 349.

362. ANDREW BEATTY, ALEXANDER C. DRYLEWSKI, EYTAN FISCH, MANA GHAEMMAGHAMI, NATHAN GIESSELMAN, STUART LEVI, DANIEL MICHAEL, BAO NGUYEN & ANITA OH, AM. L. INST. CONTINUING LEGAL EDUC., CRYPTOCURRENCY FRAUD: WHAT BANKING BUSINESS AND SECURITIES LAWYERS NEED TO KNOW (2022).

363. See *id.*

364. See discussion *supra* Part II.B.2.

those that govern name and likeness, “that attach to the associated work.”³⁶⁵ Furthermore, they state that “[i]ncluding a link to the license terms [in] the metadata of the NFT,” as many NFT marketplaces and creators do, may be unlikely to resolve the problem of inapplicable license terms because “the purchaser may not look at the metadata before making a purchase.”³⁶⁶ The scholars conclude that in the event that the purchaser does look at the metadata of the NFT that they are purchasing, this still may not prevent infringement because “the NFT [transaction] may not include a step where the purchaser manifests their assent to the terms.”³⁶⁷

Part III presents several measures that rights owners, NFT platforms, and courts should take to disincentivize and restrict the creation of NFTs that infringe on the right of publicity.³⁶⁸

III. REGULATION BY RIGHTS OWNERS, NFT MARKETPLACES, AND COURTS

This Note agrees with the commentators who have argued that NFTs pose a growing threat for the right of publicity. Professor Conrad correctly observed that the use of NFTs as a conduit to infringe on another’s right of publicity produces novel and complicated implications for the enforcement of this right.³⁶⁹ In terms of the conflict between the First Amendment and the right of publicity, the fact that courts will have to apply decades-old constitutional and common law principles to NFT technology that gained worldwide attention only as of 2021 creates much of the uncertainty

365. Beatty et al., *supra* note 362.

366. *Id.*

367. *Id.*

368. *See infra* Part III; Anthonia Isichei, *OpenSea Blacklisted \$27M Worth of NFTs, Including BAYC and MAYC: Report*, CRYPTO POTATO (July 7, 2022), <https://cryptopotato.com/opensea-blacklisted-27m-worth-of-nfts-including-bayc-and-mayc-report/> [<https://perma.cc/EB5Y-ZZKP>] (highlighting an NFT marketplace that banned NFTs valued at more than \$27 million in response to reports that the NFTs were stolen); Jabari Young, *NBA Union Executive Leads Talks to Help Players Make More Money from NFTs*, CNBC (May 4, 2021, 12:59 PM), <https://www.cnbc.com/2021/05/04/nba-union-executive-leads-talks-to-help-players-make-more-money-from-nfts.html> [<https://perma.cc/SDH6-MR8R>] (explaining that the National Basketball League entered into negotiations with an NFT creator that places images and videos of basketball players on NFTs to “redo a licensing agreement” that would protect the players’ likeness rights); James G. Gatto, *NFT License Breakdown: Exploring Different Marketplaces and Associated License Issues*, NAT’L L. REV. (Sept. 21, 2021), <https://www.natlawreview.com/article/nft-license-breakdown-exploring-different-marketplaces-and-associated-license-issues> [<https://perma.cc/5MYZ-RBY5>] (explaining the differences among open, curated, and proprietary marketplaces in connection with selling NFTs and the fact that the terms of NFT marketplaces “often do not fully address the protections needed by the owners of the IP in the underlying digital asset associated with the NFT”); 1 GREGORY J. BATTERSBY & CHARLES W. GRIMES, *MULTIMEDIA AND TECHNOLOGY LICENSING AGREEMENTS* § 4:81 (2022); *China’s First Court Ruling on NFT Art Theft Holds Marketplace Accountable*, YAHOO FINANCE (Apr. 25, 2022), <https://finance.yahoo.com/news/chinas-first-court-ruling-nft-093000697.html> [<https://perma.cc/QJP4-WJH7>] (describing how a court in China held an NFT marketplace liable for permitting a user on the marketplace to create an NFT using a stolen work by ordering the court to, in effect, delete the NFT).

369. *See* Conrad, *supra* note 12, at 152.

associated with respect to these novel applications.³⁷⁰ As some legal scholars have acknowledged, when an NFT features an unauthorized use of identity that is expressive or artistic, courts are likely to protect the use under the First Amendment over the right of publicity.³⁷¹ An SDNY court has already recognized free speech protection for artistic NFTs, at least in the case of infringing trademark uses.³⁷² However, courts' traditional applications of right of publicity law to such a novel technology do not contemplate the heightened risks that NFTs create for the right of publicity over other more traditional avenues of infringement.³⁷³ These harms are especially "pronounced" given that more and more NFTs that depict rights owners' likenesses represent content that courts have historically considered expressive, including NFTs that represent celebrity avatars.³⁷⁴

Cases in which video game manufacturers were the alleged infringers have generally involved games that were confined solely to the content that the manufacturers provided and created for the games and that did not allow for the importation of any third-party content into the games.³⁷⁵ The gaming world today, however, looks different. NFT gaming companies often grant users the ability to build their entire gaming experience, including creating NFT avatars from scratch and equipping them with any trait that they can imagine, designing their avatars' clothing, and inventing digital worlds from the ground up.³⁷⁶ Simultaneously, these platforms are realizing a vision of interoperability by allowing NFT avatars to exist in multiple virtual worlds and interact with NFT avatars from other digital universes.³⁷⁷ With the high degree of interactivity and control that users have over nearly every aspect of their gaming experiences, courts are more likely to uphold infringing uses in these situations as expressive and to favor infringers.³⁷⁸

Upholding such unauthorized uses exacerbates the previously discussed harms due to the fact that users' NFT avatars interact with other avatars in real time. During these real-time interactions, NFT users can, therefore, make any number of representations to other users as an avatar that they design to resemble a celebrity, such as hosting concerts and other events in the metaverse as that celebrity avatar.³⁷⁹ These features raise the question of how the right of publicity would apply to such novel uses, given NFT owners' control over their avatars; this control allows owners to design their avatars in ways that are sufficiently transformative and just as quickly redesign and use them in ways that violate another individual's right of

370. *See id.* at 148.

371. *See* Mahmood et al., *supra* note 331; Conrad, *supra* note 12, at 152.

372. *See* Hermès Int'l v. Rothschild, 603 F. Supp. 3d 98, 103–04 (S.D.N.Y. 2022).

373. *See* Mahmood et al., *supra* note 331.

374. *Id.*

375. *See* 2 MCCARTHY & SCHECHTER, *supra* note 45, § 8:73.

376. *See* Genest, *supra* note 169; *The Sandbox Avatar*, *supra* note 169.

377. *See Interoperability Overview*, *supra* note 289.

378. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 169 (3d Cir. 2013) (holding that creative elements in a game besides an avatar's resemblance of a rights owner's likeness may transform that use).

379. *See* Howcroft, *supra* note 133; Chen, *supra* note 301.

publicity.³⁸⁰ This could become a more complicated issue as companies begin to sell NFT avatars that depict celebrities directly to gamers, such as the Aoki avatars, which may allow gamers to use and monetize the avatars in a manner that is outside the scope of the NFTs' licenses.³⁸¹

Additionally, it is not uncommon for NFT avatar collections and celebrity NFT collections, more generally, to consist of thousands of distinct and unique versions of celebrities, like the Aoki avatars.³⁸² In the case of the Aoki avatar collection, whereas some avatars resemble the musician, other avatars do not, which would make "an undertaking" to determine which NFTs violate the subject's right of publicity "time-consuming and potentially prohibitively expensive."³⁸³ Even if certain uses were found to infringe on the subject's right of publicity, however, avatars' transferability across platforms and NFTs' enduring life spans could make it impossible to determine who is at fault and how to enforce traditional right of publicity remedies. This is especially true should a court order remove the infringing NFTs after they have already been sold and belong to thousands of NFT owners.³⁸⁴

Furthermore, the competing interests of copyright holders and rights owners has created inadequacies in the protection of likeness rights that NFT technology only exacerbates.³⁸⁵ Scholars and celebrities have advocated for rights owners to use NFTs to reclaim their control over their likenesses, especially when their image has been captured in a photograph that someone else may have a copyright interest in.³⁸⁶ Professor Lantagne attributes this potential "power shift" in favor of rights owners to NFTs' accessibility and "low barrier of entry."³⁸⁷ However, this is the technology's "promise and [its] complication."³⁸⁸ Although Professor Lantagne argues that NFTs have given "a wider ambit of control" to the subjects of photographs, she admitted that the copyright implications in this "split-rights conflict between subject and copyright holder" are "not exactly clear."³⁸⁹ However, as seen in *Notorious B.I.G., LLC*, courts could increasingly continue to favor copyright preemption defenses over right of publicity claims when the contested use occurs via an NFT that displays a copyrighted photograph.³⁹⁰ "The publicity . . . rights of these subjects often play second fiddle to the copyright holder's copyright rights."³⁹¹ If other courts follow the lead of the *Notorious B.I.G., LLC* court by favoring defendants' copyrights over subjects' rights of

380. See Morrow & Dority, *supra* note 284.

381. *Steve Aoki Avatars*, *supra* note 313.

382. *See id.*

383. Noh et al., *supra* note 10, at 324.

384. *See supra* Part III.C.

385. *See supra* Part II.A.2.

386. See Lantagne, *supra* note 339, at 278; Mahmood et al., *supra* note 331.

387. Mahmood et al., *supra* note 331.

388. *Id.*

389. Lantagne, *supra* note 339, at 279, 281.

390. *See generally* *Notorious B.I.G., LLC v. Yes. Snowboards*, No. CV19-01946, 2022 WL 2784808 (C.D. Cal. June 3, 2022).

391. Lantagne, *supra* note 339, at 277.

publicity in the NFT space, rights owners may not only be at risk of copyright infringement merely by exercising their likeness rights in selling photographs of themselves as NFTs, but may also be prevented from asserting their rights of publicity altogether against copyright holders who sell unauthorized images of them as NFTs.³⁹²

Professor Lantagne also highlights that NFTs place power in the hands of rights owners because “[a]nyone can mint an NFT of anything they want,” allowing subjects to monetize their images rather than the copyright holders.³⁹³ However, the “democratize[d]” and anonymous nature of NFT transactions makes copyfraud of such photographs more troublesome and difficult to stop.³⁹⁴ Take the alleged copyfraud in *Roc-A-Fella Records, Inc.*, for example.³⁹⁵ There, the person accused of attempting to sell the copyright, Dash, was made abundantly clear.³⁹⁶ However, if an internet user misrepresents that they are the copyright holder of a work that depicts another person’s likeness, and that user is “untraceable” and anonymous (as are most NFT owners), then the fraudulent sale of such a copyright could open the gates to “downstream purchasers” that make any number of derivative uses of the rights owner’s likeness based on these false claims.³⁹⁷ Rights owners may be unable to seek any legal recourse for the harms that arise from these fraudulent transactions because they occur between anonymous users, which is particularly problematic given that this is true of many NFT sales.³⁹⁸

As NFTs make the sale of digital assets more accessible to all internet users, this means that the technology is also more accessible to bad actors. This section discusses how rights owners, NFT platforms, and courts can prevent infringing uses by bad actors before the harms discussed above can invade the NFT marketplace. Part III.A suggests that all celebrities who sell NFTs featuring their likenesses should execute right of publicity license agreements. Next, Part III.B recommends that NFT platforms should explicitly identify the rights that NFT buyers receive in the underlying works and the conduct that is impermissible on their platforms in their terms of service. Part III.C argues that platforms should set higher barriers of entry for user-created content; flag or blacklist suspicious and infringing content; and limit or remove bad actors’ access to their accounts. Finally, Part III.D addresses a novel remedy that courts should enforce against infringing content.

A. Right of Publicity License Agreements

First, right of publicity license agreements are necessary to protect rights owners in the course of selling NFTs that depict their likeness, with specific

392. See generally Notorious B.I.G., LLC, 2022 WL 2784808.

393. Lantagne, *supra* note 339, at 278.

394. Lewis et al., *supra* note 349, at 19.

395. See generally Complaint & Demand for Jury Trial, *supra* note 227.

396. See *id.* at 1.

397. Noh et al., *supra* note 10, at 325; Beatty et al., *supra* note 362.

398. See Noh et al., *supra* note 10, at 325.

terms applying to each NFT project.³⁹⁹ Celebrities and athletes often engage in right of publicity license agreements, allowing those who have valuable identities to control the rights granted to third parties in connection with the monetization of their likenesses.⁴⁰⁰ In these agreements, rights owners often define whether buyers acquire rights to display, copy, sell, store, use, or commercialize merchandise displaying their likeness and, if such rights are granted, the circumstances in which buyers can exercise these rights.⁴⁰¹

Right of publicity license agreements have already been enforced in deals with companies that have created NFTs representing rights owners' likenesses and should become commonplace in the NFT space.⁴⁰² Notably, the National Basketball Association (NBA) and NFT company Dapper Labs entered into group license agreements that set forth the scope of NBA players' name, image, and likeness rights in connection with the company's sale of NFTs that display images and videos of the players.⁴⁰³ By implementing these agreements, individual rights owners and groups like the NBA that are charged with protecting their members' likeness rights can prohibit NFT marketplaces from granting buyers certain rights in the underlying content, set forth how much rights owners must be compensated, and require that rights owners receive a percentage of the NFT's sale price each time the NFT is resold.⁴⁰⁴

Rights owners should clearly articulate the rights that NFT owners obtain, if any, in the content underlying the NFTs that feature their likenesses in the following ways: "(1) incorporating a notice of rights in the data fields and descriptions included in the NFT metadata; and (2) having separate written documentation that applies to the NFT project."⁴⁰⁵ In situations in which rights owners only include a link to the publicity terms and restrictions in the NFT metadata, issues may arise from purchasers failing to "look at the metadata before making a purchase" or from the process failing to "include a step where the purchaser[s] manifest[] their assent to the terms."⁴⁰⁶ Therefore, rights owners should ensure that they execute "separate written" right of publicity license agreements in all NFT transactions, even if the NFT metadata includes the same terms.⁴⁰⁷

As a best practice to prevent infringing uses of their likenesses, rights owners should explicitly limit or otherwise eliminate any rights NFT buyers acquire in the reproduction, creation of derivative works, or commercialization of the underlying works beyond reselling the NFTs. Furthermore, in cases in which rights owners are entitled to royalties, rights owners should incorporate these terms in the NFT code and program the

399. See Noh et al., *supra* note 10, at 334–35.

400. See *id.*

401. See Gatto, *supra* note 368.

402. See Young, *supra* note 368.

403. See *id.*

404. See 1 BATTERSBY & GRIMES, *supra* note 368, § 4:81.

405. Noh et al., *supra* note 10, at 321.

406. Beatty et al., *supra* note 362.

407. Noh et al., *supra* note 10, at 321.

NFTs to trigger automatic payments to rights owners upon resales of the NFTs.⁴⁰⁸ Rights owners should carefully review their license agreements to determine whether the agreements contain any language that could grant NFT buyers certain rights over their likenesses that the rights owners do not want buyers to receive and fix or eliminate such conflicting language before executing the agreements.⁴⁰⁹

B. Terms of Service

In addition to NFT-specific contractual terms, NFT marketplaces should create terms of service for their platforms that identify the rights that NFT buyers acquire upon first purchase and the rights associated with resales of NFTs.⁴¹⁰ In the case of any marketplace that works with a celebrity to create NFTs that bear their likeness, the dealings between the celebrity and the platform will dictate the terms that cover the NFT owners' rights in the underlying content. These platforms should strongly enforce the terms that they settle on with these celebrities among buyers and unambiguously explain these rights in their terms of service and community guidelines.⁴¹¹

Further, secondary marketplaces—which host NFT resales—should include in their terms of service that buyers should consult with the marketplaces or the individual NFT creators who originally sold the asset if the buyer needs to determine whether the NFT confers certain rights to the buyer.⁴¹² Marketplaces should make these policies clear to buyers—and buyers should fully understand them—“[b]efore finalizing any transaction or rights transfer” involving NFTs.⁴¹³ “A detailed review of terms and conditions of the NFT transaction and rights being transferred before the sale can significantly reduce the risk of litigation.”⁴¹⁴

C. Higher Barriers to Entry

As NFTs present additional opportunities for right of publicity infringement to arise, NFT platforms that allow users to create and mint their own content should monitor their users closely. This is especially true for open marketplaces, which allow anyone to mint their own NFTs and resell NFTs from other marketplaces.⁴¹⁵ Such marketplaces often allow user-created NFTs to be sold as soon as they are minted.⁴¹⁶ To prevent infringing content from entering the marketplace, marketplaces should review NFTs before allowing them to be uploaded to their platforms and reject any NFTs that violate another's right of publicity.⁴¹⁷ Open

408. *See id.* at 321; *NFTs and Intellectual Property*, *supra* note 349.

409. *See Dreyer & Lamb*, *supra* note 337.

410. *NFTs and Intellectual Property*, *supra* note 349.

411. *See id.*; Gatto, *supra* note 368.

412. *See NFTs and Intellectual Property*, *supra* note 349; Gatto, *supra* note 368.

413. *NFTs and Intellectual Property*, *supra* note 349.

414. *Id.*

415. *See Gatto*, *supra* note 368.

416. *See id.*

417. *See id.*

marketplaces should do so by requiring any person who wishes to sell or resell an NFT that implicates the right of publicity, such as sports collectibles or celebrity avatars, to make certain representations to the platforms.

Marketplaces that host NFTs created by internet users and NFTs transferred from other platforms should mimic curated marketplaces, which review and approve user-created NFTs before they enter their platforms, to ensure that the underlying content is not fraudulent.⁴¹⁸ Examples of such marketplaces that carefully vet applicants' NFTs include SuperRare, KnownOrigin, Nifty Gateway, and MakersPlace.⁴¹⁹ In a situation involving a user who mints an NFT bearing someone's likeness and claims that they are the person depicted in the NFT, marketplaces should verify that the user truly is the person whose likeness is depicted, especially when the user claims to be a well-known personality. In a situation involving third-party sellers, marketplaces should verify that third parties who claim to have a license to create and sell NFTs that bear rights owners' likenesses have the right to do so based on contractual terms with the rights owners. Marketplaces should also confirm that third parties that resell these NFTs on platforms outside the marketplaces on which they were originally sold have the right to do so based on the terms of those marketplaces or the terms governing the particular NFTs. Marketplaces can also prevent right of publicity infringement by aligning their policies that govern NFT creation with those of proprietary marketplaces, which "typically only offer NFTs created by the marketplace operator."⁴²⁰ Top Shot, Vee Friends, and Bored Ape Yacht Club are a few examples of these marketplaces.⁴²¹

There are also several ways that platforms can limit and remove infringing content after it has been minted. First, NFT platforms should continuously monitor the NFTs that users upload to their platforms and enforce a reporting system that allows users to report suspicious content.⁴²² Second, when a suspicious NFT is reported and under review, marketplaces should flag the asset to put others on notice.⁴²³ This would deter some people from buying the flagged NFT while it is under review if the NFT owner tries to sell it. Finally, once a platform discovers a potentially violative NFT, it can limit, suspend, or terminate users' access to accounts on which the flagged content appears as the platform sees fit. NFT marketplaces should also block NFTs that marketplaces conclude are infringing, which prevents owners from selling or trading them thereafter.⁴²⁴

418. *See id.*

419. *See id.*

420. *Id.*

421. *See id.*

422. *See* Isichei, *supra* note 368.

423. *See id.*

424. *See* Willsey et al., *supra* note 349; Isichei, *supra* note 368.

D. Burning as a Remedy and Court Enforcement

Finally, if a lawsuit arises over an alleged infringing NFT and the infringer loses at trial, one of the remedies available to the rights owner should include a court order that the infringer “burn[]” the NFT.⁴²⁵ This would alleviate much of the uncertainty that the immutability of NFT transactions raises for rights owners.⁴²⁶ Burning is the process of sending an NFT to “an eater address,” which “cannot be used for transactions” and is, thus, “virtually equivalent to deletion.”⁴²⁷ Only the owner of the NFT can perform this function.⁴²⁸ If someone creates an NFT and sells it, the buyer is the only person who can burn the NFT.⁴²⁹ Therefore, a court order that an infringing NFT be burned is particularly necessary when a marketplace or user continues to misappropriate a rights owner’s identity and the removal of the infringing content would be impossible under traditional court remedies.⁴³⁰ A court in China, the Hangzhou Internet Court, has already enforced burning as a remedy against an NFT platform that hosted an infringing NFT after a user minted the NFT from stolen artwork.⁴³¹

Scholars have questioned burning as an adequate solution to combat NFT infringement because of the uncertainty of who would require the owner to burn the NFT⁴³² and the difficulty of identifying creators on the blockchain.⁴³³ However, as to the first concern, the copyright infringement case that was heard before the Hangzhou Internet Court demonstrates that courts are best positioned to order the burning of infringing content, thereby providing a viable legal tool for rights owners against a technology that is otherwise indestructible.⁴³⁴ Furthermore, as to the second concern, several other international courts have intervened in cases arising from NFTs and granted plaintiffs injunctions to address the unique complications that the anonymity of blockchain transactions can create.⁴³⁵

A court in Singapore, for example, granted an injunction to freeze an unknown defendant’s assets globally, preventing them from “further transferring the NFT” at issue, “and permitted service on the [defendant] via social media and the Ethereum platform.”⁴³⁶ Another court in England “granted an injunction to” halt the transfer of NFTs held on six private

425. Noh et al., *supra* note 10, at 325 (citing 17 U.S.C. § 503) (providing destruction of infringing copies as a remedy under the Copyright Act); *see* Willsey et al., *supra* note 349.

426. *NFTs and Intellectual Property*, *supra* note 349.

427. *China’s First Court Ruling on NFT Art Theft Holds Marketplace Accountable*, *supra* note 368.

428. *See id.*

429. *See id.*

430. *See* Noh et al., *supra* note 10, at 321.

431. *China’s First Court Ruling on NFT Art Theft Holds Marketplace Accountable*, *supra* note 368.

432. *See* Willsey et al., *supra* note 349.

433. *See* Noh et al., *supra* note 10, at 325.

434. *China’s First Court Ruling on NFT Art Theft Holds Marketplace Accountable*, *supra* note 368.

435. *NFTs and Intellectual Property*, *supra* note 349.

436. *Id.* In this case, the defendant was only known by his account name. *Id.*

accounts across different cryptocurrency exchanges and to compel these exchanges to reveal certain information about the unidentified account holders.⁴³⁷ The court even “permitted the plaintiff to effect service by alternate means including email and airdropping an NFT linked to service documents into the defendant’s crypto wallets.”⁴³⁸ Therefore, by enforcing these novel injunctions and “methods of service in the uncertain NFT environment,” U.S. courts can similarly provide legal mechanisms for rights owners to identify and hold anonymous users accountable.⁴³⁹

CONCLUSION

NFT technology poses novel issues for enforcing the right of publicity. Using NFTs to infringe on another’s right of publicity generates more pronounced complications for rights owners seeking redress for these harms. The difficulty of enforcing the right of publicity in the NFT marketplace stems from NFTs’ uniquely democratized nature, NFT transactions’ widespread anonymization and irreversibility, and contractual terms’ uncertain applicability to secondary buyers. Three main actors, however, can eliminate such threats from the marketplace. First, rights owners should execute right of publicity license agreements during NFT transactions. Second, companies that facilitate NFT transactions should strictly prohibit the creation of infringing content in their terms of service and raise barriers to minting NFTs. Finally, courts should recognize the shortcomings of traditional common law remedies with respect to NFT transactions and order that infringing NFTs be burned.

437. *Id.*

438. *Id.*

439. *Id.*