

LIBRARY OF CONGRESS

IN THE MATTER OF:)
)
 UNITED STATES COPYRIGHT OFFICE)
 NON-FUNGIBLE TOKENS STUDY)
)

Remote Meeting
 Suite 206
 Heritage Reporting Corporation
 1220 L Street, N.W.
 Washington, D.C.

Tuesday,
 January 31, 2023

The parties met remotely, pursuant to notice, at
 10:02 a.m.

PARTICIPANTS:

SHIRA PERLMUTTER, Register of Copyrights and
 Director, U.S. Copyright Office
 ANDREW FOGLIA, U.S. Copyright Office
 JENÉE IYER, U.S. Copyright Office
 BRANDY KARL, U.S. Copyright Office
 DAVID WELKOWITZ, U.S. Copyright Office
 ANN CHAITOVITZ, U.S. Patent and Trademark Office
 NEIL GRAHAM, U.S. Patent and Trademark Office
 ANDREW MOORE, U.S. Patent and Trademark Office

Panelists, Session 1:

JAMES GATTO, American Intellectual Property Law
 Association
 KEVIN MADIGAN, Copyright Alliance
 JAMES GRIMMELMANN, Cornell Law School
 HILLARY BRILL, Decentralized Future Council
 MARTA BELCHER, Filecoin Foundation
 JOHN STROHM, Frost Brown Todd
 ALFRED STEINER, Meister & Steiner
 JOSEPH GRATZ, Morrison & Foerster
 ABBY NORTH, North Music Group
 MEGAN NOH, Pryor Cashman
 DOV GREENBAUM, Reichman University (IDC) Herzliya;
 Yale University

Panelists, Session 2:

GEORGE JOHNSON, Songwriter
 YAYOI SHIONOIRI, City Lights Law
 KAT WALSH, Creative Commons
 VICKIE NAUMAN, CrossBorderWorks
 STEVE KRAUSE, Dapper Labs
 SHEKINAH APEDO, Deadfellaz
 JEREMY GOLDMAN, Frankfurt Kurnit Klein & Selz
 JORDAN BROMLEY, Manatt, Phelps & Phillips
 ASHLEY JOYCE, National Music Publishers'
 Association
 TONYA EVANS, Penn State Dickinson Law
 JEFF SEDLIK, PLUS Coalition
 UMAIR KAZI, The Authors Guild

Panelists, Session 3:

EMILIO CAZARES, Contributor to the SuperRare
 Ecosystem
 RICHARD JAMES BURGESS, A2IM
 ALTHEA ERICKSON, Center for Cultural Innovation
 SARAH ODENKIRK, Cowan DeBaets Abrahams & Sheppard
 EDWARD LEE, IIT Chicago-Kent College of Law; Nou
 NFT
 JEAN-MARC DELTORN, Center for International
 Intellectual Property Studies, University of
 Strasbourg
 KAYVAN GHAFARI, MakersPlace
 DAN SCHMERIN, Metaversal
 JOSH HURVITZ, NVG
 GINA MOON, OpenSea
 CESAR FISHMAN, Pex
 SUSAN CHERTKOF, Recording Industry Association of
 America

Panelists, Session 4:

AARTHI ANAND, Cahill Gordon & Reindel
 STEPHEN KELLY, Cypress
 DANIEL URIBE, GenoBank.io
 JEFF GLUCK, Gluck Law Firm
 JENNIFER PARISER, Motion Picture Association
 MICHAEL LEWAN, Recording Academy
 ZACHARY L. CATANZARO, St. Thomas University,
 College of Law

Open Microphone Public Participants:

RYAN WRIGHT
MIKE-CHARLES NAHOUNOU
ELIANA TORRES
ASH KERNEN
KOFI MENSAH
KEVIN MADIGAN

P R O C E E D I N G S

(10:02 a.m.)

1
2
3 MR. FOGLIA: All right. Thank you for
4 joining us today, everyone. We at the Copyright
5 Office and the U.S. Patent and Trademark Office look
6 forward to a robust discussion today on non-fungible
7 tokens and copyrights. I am Andrew Foglia, Deputy
8 Director of the Office of Policy and International
9 Affairs at the U.S. Copyright Office. I am joined
10 today by colleagues from both the U.S. Copyright
11 Office and the U.S. Patent and Trademark Office who
12 will serve as moderators for today's sessions.

13 At this time, it is my pleasure to introduce
14 Shira Perlmutter, Register of Copyrights and Director
15 of the U.S. Copyright Office, for opening remarks.

16 Over to you, Shira.

17 MS. PERLMUTTER: Well, good morning,
18 everyone. On behalf of the Copyright Office, let me
19 welcome you to this roundtable to explore the
20 copyright issues arising from the use of non-fungible
21 tokens. This study is in response to a request by
22 Former Senator Patrick Leahy and Senator Tom Tillis,
23 who asked both of our offices to address a series of
24 questions related to NFTs' current and future uses and
25 the intellectual property challenges that they

1 present.

2 So this is the third and final roundtable as
3 the Trademark and Patent events were both held last
4 week. Our ability to better understand emerging
5 technologies has always benefitted from strong public
6 participation. This is likely to be all the more true
7 of NFTs. Although the relevant technology has existed
8 for nearly a decade, its wider adoption is more
9 recent. The use of NFTs across a range of creative
10 fields has raised many questions about how they
11 intersect with copyright law.

12 The Copyright Office has long played a role
13 in advising Congress on the effect of emerging
14 technologies, and way back in the 1960s, you may not
15 be aware of this, but the Copyright Office considered
16 whether copyright could vest in expressive works
17 created with a computer. And we concluded then that
18 the answer was, yes, it could, but only if human
19 authorship was present.

20 Now, of course, this issue has arisen again
21 with current technological developments, and we're all
22 seeing reports almost every day on the rapid evolution
23 of artificial intelligence.

24 The office held public seminars in 2020 and
25 2021 on AI and machine learning. And in a letter that

1 Director Vidal at the PTO and I sent to the Senate
2 together late last year, we noted that our offices are
3 both very actively involved in AI issues. And the
4 Copyright Office is now working on three separate
5 fronts: First, we're examining issues of the
6 copyrightability of works created using AI, and that
7 includes looking at our registration practices as well
8 as being involved in ongoing litigation; second, we're
9 planning a series of events to gather more information
10 on AI technologies and their uses; and third, we're
11 going to issue a notice of inquiry asking for comment
12 on copyright and AI issues later this year.

13 So we will be sharing more details about all
14 of these in the coming months. But today, of course,
15 we are turning our focus specifically to NFTs and
16 copyright, and I look forward to a very enlightening
17 discussion. So let me now turn the proceedings back
18 over to Andrew.

19 MR. FOGLIA: Thank you, Register Perlmutter.

20 As I said earlier, my name is Andrew Foglia.
21 With me today to moderate this first panel is Ann
22 Chaitovitz, Senior Copyright Attorney from the United
23 States Patent and Trademark Office. This first
24 session, NFT Technological Processes, will focus on
25 copyright considerations and the technological

1 processes associated with NFTs.

2 A few Zoom housekeeping notes before we
3 begin. First, we are recording the session today.
4 The recording will be available on the Copyright
5 Office's website on the NFT study page and on the U.S.
6 PTO's NFT study page. The transcription function is
7 activated on Zoom. If you are a panelist for another
8 panel but are not on this session, please keep your
9 camera turned off and your mic on mute. We ask that
10 the panelists for this session turn their cameras on.

11 As a reminder, if anyone viewing this
12 session would like to speak at the open mic session
13 later, Session 4 this afternoon, the web form to
14 request a speaking slot will be open until 1:30 p.m.
15 Eastern Time. That form is on the Copyright Office's
16 landing page for this policy study.

17 We will endeavor to have everyone who wishes
18 to speak be able to participate, but if the volume is
19 overwhelming, it's possible that we will run out of
20 open mic time. Please remember also that the deadline
21 for comments, written comments, for this study is
22 February 3.

23 We informed the participants of the format
24 of each session today. This session will start with a
25 brief introduction and a short opening statement by

1 each participant if they desire. We request that
2 these statements be limited to three minutes, and the
3 moderators will be watching the time. After those
4 introductions, we will have a moderated discussion.
5 The moderator questions, which panelists have received
6 in advance, are intended only as prompts for that
7 discussion. We may not ask all the questions that we
8 shared in advance, and we may ask follow-up questions
9 that we did not share in advance.

10 We will begin in order as listed on the
11 agenda, so, James Gatto, would you like to begin?

12 MR. GATTO: Yes. Thank you, Andrew. And
13 thank you for doing this study. I think this is a
14 really important thing for the offices to be doing.

15 My name is James Gatto, and I'm honored to
16 have this opportunity to share some views on the
17 important IP issues with NFTs, which are near and dear
18 to my heart. I'm a partner in the D.C. office of
19 Sheppard Mullin, where I formed and co-lead our firm's
20 60-plus person blockchain team. I've been involved
21 with IP since 1984 when I started as a patent
22 examiner. I joined my first law firm in '86, and for
23 over 35 years now, I've been working with innovative
24 technology companies to protect, monetize, and enforce
25 their IP, handle IP and technology agreements and

1 technology-related regulatory issues.

2 I had the good fortune of becoming involved
3 with blockchain technology in 2012 when a client
4 became general counsel to the Bitcoin Foundation. The
5 last 10 years, I've been immersed in the technology,
6 and I'm fascinated by and passionate about the
7 business opportunities and legal challenges that it
8 brings. I believe that blockchain will be more
9 impactful than the internet, and the use of NFTs and
10 related technologies will result in tokenization of
11 all types of physical and digital assets and other
12 entitlements across many industries.

13 I currently co-lead the blockchain and NFT
14 subcommittee of the American Intellectual Property Law
15 Association on whose behalf I am here today. I'm also
16 honored to have been recognized as a Cryptocurrency,
17 Blockchain, and Fintech Trailblazer by the National
18 Law Journal and as a thought leader on blockchain and
19 cryptocurrencies by the National Law Review. Given
20 the limited time available for preliminary remarks, I
21 will just raise some high-level issues in which I
22 think the joint study may wish to focus. Additional
23 information on these issues will be in the written
24 comments and hopefully in our panel discussion today.

25 Some of the many issues that I think should

1 be considered are as follows: First, there needs to
2 be a revised definition of NFTs. NFTs do not
3 necessarily authenticate an asset. Additionally, for
4 at least some NFT projects, for example, the Merge,
5 NFTs may effectively be substituted or subdivided.
6 Thus, in defining NFTs, inaccurate or unnecessary
7 limitations should be avoided.

8 The study should consider the lack of
9 clarity with respect to the rights conveyed to the
10 purchaser of an NFT. I recommend NFT issuers use an
11 NFT owners agreement to clearly articulate the rights
12 and limitations that each purchaser receives, and each
13 purchaser should formally accept that agreement to
14 form a legally binding contract, as with other online
15 agreements.

16 The study should consider enhancements to
17 the DMCA to cover the various ways digital assets are
18 stored, including, for example, on decentralized
19 storage systems, where digital assets are stored on
20 different nodes under the control of different
21 entities such that a single takedown notice may not be
22 effective.

23 The study should consider NFT resale
24 royalties, including the interplay between artist
25 royalty rights and the first sale doctrine to ensure

1 creators who issue NFTs can participate in the resale
2 of their NFTs.

3 The study should further consider whether
4 NFTs are merely a form of title to some rights in a
5 digital asset or are themselves a separate digital
6 asset, which is an issue currently pending in the
7 lawsuit between Nike and StockX.

8 Lastly, I think the study should consider
9 whether airdropping NFTs or other tokens to a wallet
10 can provide effective service of process or other
11 legal notice, as was recently done in the LCX case.

12 Thank you, and I look forward to the panel
13 discussion.

14 MR. FOGLIA: Thanks, Jim.

15 Kevin Madigan?

16 MR. MADIGAN: Sure. Thanks, Andrew. And
17 thanks to the Copyright Office for hosting this
18 roundtable. I'm Kevin Madigan. I'm with the
19 Copyright Alliance. So our members, who represent,
20 you know, copyright owners of all stripes, from
21 individual artists to companies to large organizations
22 in the creative industries, you know, they all believe
23 that NFTs represent opportunities to, you know,
24 distribute and commercialize copyrighted works in new
25 and innovative ways while also reaching new audiences

1 and increasing engagement among fans.

2 But I will say that in preparing our
3 comments for this study, I also heard about the
4 experiences of many creators who have encountered
5 problems with NFT-related infringement and fraudulent
6 activity, which I think has a lot to do with sort of
7 the lack of safeguards at the minting and listing
8 stages that can ensure that those uploading and
9 offering NFTs for sale in marketplaces are authorized
10 to do so.

11 So I look forward to talking about sort of
12 these challenges related to permission and
13 authorization, as well as the opportunities and how
14 NFT technology implicates copyright interests.
15 Thanks.

16 MR. FOGLIA: Thanks to you.

17 Next, we'll have opening remarks from James
18 Grimmelmann.

19 MR. GRIMMELMANN: Good morning and thank
20 you. I'm a professor at Cornell Law School and
21 Cornell Tech, and I'd like to make one point at a high
22 level of inspection, it may seem obvious, but I think
23 it's important not to lose sight of, and that's that
24 one promise of blockchain is it's a perfect paper
25 trail, but all paper trails can fail. Only sometimes

1 is this because of the technical failures in the
2 recordkeeping system itself, which is what blockchain
3 tries to solve. More often, it's because the
4 information the parties attempt to record never
5 corresponded to reality in the first place. I'm
6 thinking of cases involving forgery, fraud, duress, or
7 mistake, or cases in which a transactional formality
8 fails. If a transactional form is used enough times,
9 everything that can go wrong with it eventually will.

10 So the transfer of an NFT by entering a
11 smart contract transaction on a blockchain is a kind
12 of paper trail, and all paper trails can fail. Some
13 intended NFT transfers will not go through, and some
14 NFT owners will lose control of their NFTs without
15 giving what we think of as legally valid consent.

16 So, if the state of copyright ownership or
17 licensing is tied to ownership of an NFT, one of two
18 propositions will have to be true. Either the legal
19 system will need some mechanism to correct the
20 blockchain when its records are in error, or some
21 copyright owners will lose control of their works
22 through preventable forgery, fraud, duress, or
23 mistake. It's sometimes said that the advantage of a
24 blockchain is that on-chain records are immutable and
25 authoritative, but that's precisely why I am skeptical

1 of copyright in the blockchain space.

2 To quote Douglas Adams, "The major
3 difference between a thing that might go wrong and a
4 thing that cannot possibly go wrong is that when a
5 thing that cannot possibly go wrong goes wrong, it
6 usually turns out to be impossible to get at and
7 repair."

8 MR. FOGLIA: Thank you.

9 Next, we will have opening remarks from
10 Hillary Brill. You're still on mute, Hillary.
11 Hillary, you're still on mute.

12 MS. BRILL: Apologies. Hello. Thank you so
13 much for having me here today. My name is Hillary
14 Brill, and I am the technology advisor for the
15 Decentralized Future Council. I have also taught and
16 continue to teach copyright law at Georgetown Law
17 Center and technology policy as well. I've worked for
18 the IP and tech industry in a variety of different
19 capacities, working on Capitol Hill, working in-house,
20 working for a law firm, and I currently work with
21 public interests and industry clients on IP issues and
22 tech. So thank you for having me here today on the
23 exciting issue of NFT and IP.

24 I'm here specifically for the Decentralized
25 Future Council, which centers its advocacy on issues

1 related to blockchain use beyond cryptocurrency,
2 issues like today that have been overlooked in public
3 discourse on decentralized technologies.

4 The DFC aims to educate regulators and
5 articulate the public interest potential for
6 decentralized technologies to enhance commerce,
7 communications, and democracy more equitably. The
8 potential for NFTs is far greater than our
9 conversation today, which will center on content
10 owners, entertainment, and the gaming industry, and,
11 accordingly, any study or regulation of NFTs should
12 consider potential effects on the public interest.

13 There are NFTs being used today in
14 responsible and good purposes and good uses, and we
15 know them from raising funds for the Ukrainian effort,
16 for charities and other needs, you name it. So NFTs
17 are positive outside of this world and have a good
18 effect on public interests, but additionally,
19 supporting artists in a way that the NFTs have been
20 enabling for artists to use a new economy, a new
21 platform, it also helps the public interest with
22 having new creative works and new opportunities to use
23 them.

24 At the same time, there is confusion on IP
25 rights that are granted by NFTs, so education,

1 education, education is essential here. And I am
2 hoping that the Copyright Office after its study will
3 explain some of the basic rights that confer with an
4 NFT sale that I hope we talk about today and I know
5 will be in the comments as well, similar to basic
6 guidelines that you have throughout your copyright
7 website. And I also want to focus that today's
8 discussion is nothing new and we heard that in our
9 opening remarks that these issues have been going
10 around the new technologies and how do our existing
11 legal frameworks work with them.

12 Whatever IP rights existed before NFTs still
13 remain in effect. Copyright law still applies to all
14 of these works at issue. It's not clear at all if
15 there's a need for new laws, just education first,
16 proper enforcement, and then consider what we need.
17 So, again, thank you so much for having me here. The
18 DFC recommends regulators support NFTs in a manner
19 that promotes innovation and responsible use in all
20 areas of use. So thank you. I look forward to being
21 here, listening to everyone.

22 MR. FOGLIA: Thank you.

23 Next, we will hear from Marta Belcher.

24 MS. BELCHER: Hi there. I'm Marta Belcher.
25 I'm the president of the Filecoin Foundation and also

1 the general counsel of Protocol Labs. I'm also a
2 former copyright litigator. The open source
3 technology that I work on is a decentralized storage
4 network where more than 114 million NFTs are currently
5 stored when you actually go down to the storage layer.

6 Decentralized storage is critical
7 infrastructure for NFTs. To oversimplify a bit, when
8 you buy an NFT, what you're buying is that a ledger
9 says that you're the owner of a file and that file is
10 located at such-and-such URL. So, if you go to that
11 URL and there's nothing there, then you've spent a lot
12 of money on, you know, a 404 page.

13 With traditional centralized storage, that's
14 actually something that happens all the time by
15 accident. So let's say you buy an NFT on a platform
16 and it's using Amazon Web Services, which is a
17 centralized storage network, and that platform then
18 goes out of business and stops paying its AWS bill.
19 That is actually something that happens all the time,
20 including very publicly recently when a major exchange
21 went bankrupt and suddenly all the NFTs on that
22 platform disappeared. That's because, in centralized
23 storage systems, you're looking for a particular file
24 in a particular place in the world and hoping it's
25 still there, and often it's not.

1 With decentralized storage systems, every
2 piece of content has a particular content ID, and that
3 piece of content can be stored in multiple places, and
4 when you look for a particular content ID, you can
5 pull that content from multiple places, not just one
6 server. So you don't have all your eggs in one
7 basket.

8 But, at the same time, these decentralized
9 systems can actually make it also easier to block
10 infringing content because, when you block a content
11 ID from being retrieved, it blocks that content from
12 being retrieved from anywhere, so you don't need to go
13 to multiple places where it's stored, which is the
14 case with centralized systems. So thank you so much
15 for having me, and I look forward to answering your
16 questions.

17 MR. FOGLIA: Thanks, Marta.

18 Next, we will hear from John Strohm.

19 MR. STROHM: Hello, I'm John Strohm. I'm a
20 partner at Frost Brown Todd in the national office.
21 And, first, just for the record, I want to say that
22 the opinions I express here are my own, not those of
23 my firm, my colleagues, or our clients. My own
24 background, I was a professional musician into my 30s.
25 I was in a band called The Lemonheads, toured the

1 world and made records, until I became a lawyer to
2 address the rights and challenges of creators, of
3 people who are creating content and building careers
4 in that content or creating art, rather. And, also, I
5 was a record executive for a number of years at
6 Concord. I ran Rounder Records.

7 And I recently returned to law practice, and
8 I was attracted to this space, I guess what we're
9 calling Web3, because I saw these NFTs and blockchain
10 technology as an opportunity for creators to be able
11 to exercise greater control and have more autonomy
12 with their work and not be relying necessarily on
13 platforms that sort of prescribe the business models
14 that creators would be subject to.

15 And it's my opinion that the values of the
16 space, whether it's decentralization or transparency
17 or interoperability or even permissionlessness, are
18 not incompatible with our copyright laws and that, you
19 know, there is a way for creators to be able to enjoy
20 the autonomy and the opportunities to engage with
21 fans, to control the dissemination and derivative
22 works of their works and to build careers while still
23 enforcing copyright law.

24 And I think this is a really good time to be
25 having this discussion because we're sort of coming

1 out of a very chaotic period with a lot of fraud and
2 opportunistic platforms that disrespect the laws of
3 creators. And I've learned from representing
4 technology clients that there's a lot of, a big
5 education gap in terms of people's understanding of
6 copyright law and copyright licensing. And I'm
7 encouraged, including some examples in the marketplace
8 of ideas, that there's a way to have a licensing
9 framework that's accessible that follows the digital
10 asset and can create a lot more certainty and ensure
11 artists the ability and creators the ability to have
12 control over their work and not end up with another
13 centralized platform like we have in the past. Thank
14 you.

15 MR. FOGLIA: Thanks.

16 Next, we will hear from Alfred Steiner.

17 MR. STEINER: Hi, everyone. I'd like to
18 thank the Copyright Office for inviting me to speak
19 today. I'm an artist and a lawyer operating both in
20 the real space in terms of an artist and in the NFT
21 space. And in the last couple years, following the
22 Bepple's sale at Christie's, I've been pulled into
23 this space both by clients because I've been a
24 technology transactions lawyer and an intellectual
25 copyright and trademark lawyer for over 20 years and

1 also by my artist friends who have asked me what's
2 going on with this and how can you help me.

3 So I work for a firm, a two-person firm with
4 my partner, Gabriel Meister, called Meister and
5 Steiner, and I'm particularly interested today in
6 talking about the creation of copyright or whether a
7 copyright is created in some of the processes that
8 we've seen develop or become popular in the last
9 couple of years, including the auto-assembly of works
10 based on a template and a number of preexisting works,
11 often called traits or attributes, and also the
12 creation of works or what may be expressive works from
13 code, which, of course, is itself, no doubt,
14 expressive, but when there's a randomized element
15 involved that is capable of creating a lot of
16 particular works, to what extent are those particular
17 works or should those particular works be covered by
18 copyright.

19 And I'm also interested in questions
20 regarding transfer of copyright based on NFT
21 transactions. For example, should the signing of a
22 smart wallet signature constitute a written signature
23 for purposes of the Copyright Act?

24 I also think it's important to note, and
25 other people have alluded to this or maybe even

1 addressed it exactly, but blockchain talks in terms of
2 ownership. You know, for NFTs, there's an owner of
3 function in smart contracts, an ERC-721 contract that
4 you can query to see who is the "owner." And, again,
5 I use that in quotes because it's really not about
6 ownership at all. It's really about possession
7 because the law can and will certainly disagree with
8 what the blockchain says about who owns a particular
9 asset because, as we know, people get hacked all the
10 time, and to say otherwise would suggest that hackers,
11 you know, take ownership or a good legal title to NFTs
12 they've hacked.

13 So I look forward to discussing all these
14 things with you. Thanks again.

15 MR. FOGLIA: Thank you.

16 I will now invite Joseph Gratz to give
17 opening remarks.

18 MR. GRATZ: Good morning. My name is Joe
19 Gratz. I'm a technology and copyright litigator at
20 Morrison & Foerster in San Francisco. I'm here today
21 on my own behalf, and thank you so much for inviting
22 me to participate.

23 The point I want to make is that the
24 Copyright Act and its amendments were written to be
25 technology neutral and to accommodate new

1 technologies, and the point that I want to make is
2 it's working pretty well at least from the point of
3 view of what is happening physically with NFTs. The
4 traditional copyright principles and existing
5 statutory provisions deal pretty well with many of the
6 issues that arise, and that becomes clear when we look
7 at what is physically happening when an NFT is minted
8 or transferred or viewed or whatever, and that's where
9 we always start with thinking about copyright from a
10 litigation point of view.

11 There are, I think, three parts to think
12 about from the point of view of thinking about what's
13 happening and what might be happening that implicates
14 106 rights in each of those places.

15 First is the ERC-721 smart contract itself
16 that constitutes the NFT, and that doesn't ordinarily
17 contain anything or can't tell you anything other than
18 who owns it and the location of a place where metadata
19 can be found. And those things themselves are not
20 ordinarily going to be or contain copyrightable
21 authorship in and of themselves, just as references.

22 Then there's the metadata to which that
23 refers, and that can be stored in a particular place,
24 either centralized or decentralized storage, but that
25 itself just consists of a title, which, as we know, is

1 not itself copyrightable, and another location
2 pointing usually here to an image, which is stored yet
3 somewhere else.

4 And then we get to the image. The image is
5 stored somewhere. It's an image that can be retrieved
6 from a location on the internet. And we know how to
7 deal with that. We've been dealing with that for many
8 years. I mean, if it's an infringing image, the
9 person who uploaded it is engaged in direct copyright
10 infringement, right?

11 The service providers involved in hosting
12 that image, whether they be centralized or
13 decentralized, have the ordinary 512 safe harbors, and
14 those ordinary 512 safe harbors sort of function
15 normally in this environment because what is happening
16 is there is an image at a location on the internet
17 that's been stored by somebody and it may be
18 infringing or it may be not infringing. The 512(c)
19 safe harbor operates with respect to infringement by
20 reason of the storage and the direction of the user of
21 infringing material, and the 512(b) caching safe
22 harbor works with respect to service providers who
23 make that content more available, for example, in the
24 context of decentralized storage networks.

25 And so, overall, in short, the point that I

1 want to make is NFTs involve storing expressive works
2 on servers accessible over the internet, and there is
3 nothing that weird about it from a copyright
4 infringement litigation point of view, and copyright
5 already has the tools and statutory limitations and
6 exceptions to understand and address it.

7 MR. FOGLIA: Thanks, Joe.

8 I will turn now to Abby North.

9 MS. NORTH: Good morning. Thanks so much
10 for including me in this. I think I might be the one,
11 if not the only, one of the only non-lawyers among
12 this group. I started as a musician, as a composer,
13 made my way over to rights management on both the
14 composition and sound recording side, have been very
15 involved in advocacy groups, including IFR, which is
16 the Alliance for Artists and Rights Holders. I'm on
17 the board of the Association of Independent Music
18 Publishers, and, also, I am on the advisory board of
19 SONA, the Songwriters of North America, and with them
20 have participated in a variety of advocacy issues.

21 This one is important because one of my
22 other focuses has been on metadata specifically. I
23 have created technology for music works registration
24 and common works registration. I've built royalty
25 processing tools. You know, I live and breathe

1 identifiers and metadata.

2 Some of the comments that have already been
3 made kind of echo what I would be saying. One of them
4 was Marta talked about associating the assets at all
5 servers and every server having a content ID. We need
6 to be able to have that content ID. We need to be
7 able to keep that identifier, those identifiers, not
8 just with the server but with the asset itself, with
9 the sound recording, because the only way for us to
10 identify a composition is really with that sound
11 recording that embeds the composition. So the more
12 identifiers we actually keep with the file itself, the
13 audio file itself, in addition to at the server level,
14 that's really important.

15 The DMC issues that have come up are really
16 important. When we deal with rights management
17 takedowns at, let's say, a YouTube, the kind of whack-
18 a-mole concept is just insidious. And so I think it
19 was James who said that, you know, when it's taken
20 down at one decentralized server, that takedown has to
21 be effective at all of the servers. We as rights
22 managers, we can't be chasing every single server.

23 Another issue, I guess my primary issues are
24 also so the identifier remaining with the file, the
25 education part of this because what we see quite a bit

1 is people -- not just the platforms, the platforms
2 don't always understand their requirements to adhere
3 to copyright law, but also, when somebody purchases an
4 NFT and they don't understand -- they don't even
5 understand the difference between a composition and a
6 sound recording, let alone what rights they have
7 acquired with this NFT.

8 I think the Copyright Office needs to have a
9 very, very participatory role in education, as I said,
10 both at the platform level and with the buyers. And
11 then I think, with regard to smart contracts, one of
12 the fears is that bad actors can enter this ecosystem
13 right from the very beginning and that infringement
14 can take place right at the point of creation of the
15 smart contract. So we need some kind of regulation
16 and policing mechanisms to prevent that from happening
17 right at inception. Thank you.

18 MR. FOGLIA: Thank you.

19 We will now hear an opening statement from
20 Megan Noh.

21 MS. NOH: Good morning, and thank you so
22 much to the Copyright Office, to Andrew and to Jenee
23 for organizing this event, and for the opportunity to
24 participate today. It's an honor to be in
25 conversation with the other esteemed participants of

1 this session.

2 My name is Megan Noh, and I'm an art lawyer
3 with nearly two decades of experience both in business
4 and legal roles in the art industry, including as in-
5 house counsel for an international auction house,
6 outside IP and moral rights counsel to a major museum,
7 transactional counsel to numerous Art News Top 200
8 Collectors, and counsel on IP and contract matters for
9 some of the world's leading digital artists, as well
10 as a number of prominent traditional media artists.

11 I currently co-chair the art law group at
12 Pryor Cashman in New York City, although the views I
13 share here today are my own and do not necessarily
14 represent those of the firm. And I also teach art law
15 at Columbia Law School. As a result of my work
16 representing the interests of this cross-section of
17 industry stakeholders, as well as my experience on
18 copyright and artist rights issues in particular, I've
19 been actively engaged with legal aspects of NFT
20 projects and the NFT marketplace since 2020, so going
21 on four years now, which they say in Web3 time is a
22 couple of decades.

23 In particular, my work has focused on the
24 power of the blockchain to address market equity
25 issues faced by artists, including through technology

1 aimed at capturing resale royalties, as well as
2 friction points arising in the context of the so-
3 called traditional art world's adoption of this
4 technology, and the impact of current marketplace
5 practice and transactional models, including the use
6 of varied and inconsistent licensing schemes on the
7 intellectual property rights of creators on the one
8 hand and purchasers on the other.

9 I very much look forward to the discussion
10 here today unpacking the Copyright Office's thoughtful
11 and important questions, in particular, around the
12 application of Section 109(c)'s first sale doctrine as
13 it may pertain to the default statutory rights or lack
14 thereof that are enjoyed by owners and custodians of
15 digital art works associated with NFTs and thinking
16 about whether that current statutory language could or
17 should be amended to better track the reality of this
18 technology and media landscape today. Thank you so
19 much.

20 MR. FOGLIA: Thank you.

21 And now we will hear from Dov Greenbaum.

22 MR. GREENBAUM: Hi, I want to thank everyone
23 at the Copyright Office for putting this great event
24 together. This is clearly a timely event. There is
25 an increase in ongoing NFT IP litigation with big

1 names like Hermes and Nike, Yuga Labs and others, and,
2 hopefully, what we'll discuss here today can actually
3 be relevant perhaps to some of those cases.

4 While I'm an attorney licensed in California
5 and the USPTO, I'm currently a law professor at
6 Reichman University in Israel, focusing on the
7 intersection between law and technology. The academic
8 instances I direct that look specifically at the
9 ethical, legal, and social considerations of law and
10 technology and emerging technologies have been
11 involved in blockchain and Web3.0 now for many, many
12 years.

13 Some NFT-related issues that I'm personally
14 interested in, and I want to apologize in advance if
15 I'm speaking too quickly, relate to how NFTs exhaust
16 the copyright rights of underlying works, whether or
17 not a smart contract embedded within an NFT can
18 effectuate ownership transfer and exclusive licensing
19 for that underlying work, whether an NFT infringes on
20 the right of publicity of an artist whose work is
21 associated with an NFT. As copyright allows for
22 rights attaching to illegal activities, does a hacking
23 of a crypto wallet transfer the rights associated with
24 that NFT? Probably that happened with Bored Apes and
25 Seth Green.

1 I'm also interested in what rights pass
2 through the transfer of NFTs downstream to follow-on
3 purchasers, what rights remain with those people that
4 have sold their NFTs downstream. Can tokenization of
5 copyright work in light of independent rights assigned
6 to co-owners, can you ever really tokenize copyright
7 works? Is there a marketplace for that? What
8 copyright rights, if any, prevent people from minting
9 unauthorized NFTs? And perhaps finally, is the
10 creation of an unauthorized NFT fair use or de minimis
11 use and therefore defensible under copyright law?

12 So those are just some of the issues that I
13 think are very relevant to the intersection of NFTs
14 and copyright law. So thank you.

15 MR. FOGLIA: Thank you.

16 We will shift now to moderated discussion.
17 Ann and I will ask questions. We'll invite you to use
18 the Raise Hand function, and I will call on you in my
19 best estimate of when I see the hand go up.

20 So let's start with something at least
21 reasonably close to the beginning, focusing on the
22 creation or minting of an NFT associated with a
23 copyrighted work, what steps in that process might
24 implicate a copyright owner's exclusive rights?

25 Thanks.

1 James, I think I see you first.

2 MR. GATTO: Yes. So I think, first, it's
3 important to note that there's many different ERC
4 standards. So, even on the Ethereum network, you have
5 ERC 721, ERC 1155 and 998 and likely others. And you
6 have different blockchains that are NFT-focused, like
7 Flow, WAX, Solana, and others. And so I think the
8 first thing I would say is that it's important to be
9 careful about generalizing because everything is fact-
10 specific, but with that said, there's also different
11 ways in which the assets associated with the minting
12 of a token that represents the asset can occur. In
13 some cases, if you're using generative art, for
14 example, the process may kind of be one overall
15 process. And so, if you're creating works as part of
16 the minting process, then I think traditional
17 copyright law applies.

18 And we've touched on this, if it's AI-
19 generated, the works may or may not be copyrightable
20 depending on the level of human authorship, et cetera.
21 So I think a big part of this is that in most cases,
22 if we look at ERC 721 to simplify it, in many cases,
23 when you mint a token, the asset may already be stored
24 somewhere else, and when you mint the token as part of
25 that process, you input various metadata, including

1 identification of the asset, where it's stored, and
2 that can be a URL, a URI, or, as Marta said, it could
3 be a CID. And so, again, depending on where the
4 storage is, that part of the process may vary. You
5 can put in resale royalty and other metadata.

6 And what you're creating in the minting
7 process typically is the token, right, unless you're
8 also minting or creating the art at the same time.
9 And so, in many cases, all you're doing with the
10 minting is generating a token ID that gets associated
11 with a wallet ID that represents whatever the
12 ownership is or whatever the rights are. And so, if
13 the asset is already somewhere else, then the minting
14 process really doesn't change that very much. If the
15 asset is part of that, then I think the traditional
16 copyright laws should apply.

17 MR. FOGLIA: Thanks.

18 Dov?

19 MR. GREENBAUM: Sure. Well, I think there's
20 a long line of cases from the Ninth Circuit that
21 essentially says that simply linking, so if you're
22 using a standard just linking the work in the
23 underlying code, regardless of how you link it, that's
24 clearly not a copyright violation. Of course, deep
25 linking may be different, so depending on where the

1 particular copyright work sits, deep linking may be a
2 copyright violation. It may be a right of
3 communication, I think. Whether or not that right
4 really exists, I think I've seen some commentators
5 suggest that there may be a right of communication
6 associated with deep links.

7 If you're actually creating a hash of the
8 underlying image or the underlying work, that could be
9 considered a derivative right under copyright law.
10 Again, I don't know if that's clear or not. That
11 remains to be seen. Otherwise, you know, just the
12 minting process itself doesn't seem to -- particularly
13 if you're just linking to a publicly available work
14 that sits somewhere else, I don't see why just the
15 minting process itself would be a copyright violation.

16 MR. FOGLIA: Thanks.

17 Kevin?

18 MR. MADIGAN: Yeah, thanks. So I guess we
19 all would agree that NFTs typically don't, you know,
20 house the associated work or digital file but, you
21 know, instead point to a location or a link usually
22 not on the blockchain but on a server somewhere else,
23 but, you know, just because the NFT doesn't house the
24 work doesn't mean there aren't occasions for the right
25 of the copyright owner of the associated work, you

1 know.

2 So, for example, if the minter is the same
3 person who uploads an infringing copy of a work online
4 in a different location, even if the NFT itself
5 doesn't house that work but points to or links to it,
6 that person could still be liable for direct
7 infringement, but even if the infringing work already
8 exists online somewhere and then a different person
9 comes along and mints an NFT that links to it, you
10 know, there's still questions of contributory
11 liability if they knowingly link to that infringing
12 copy. So I would just say determining what rights are
13 implicated, it really depends on what the minted NFT
14 consists of or links to, and simply because a
15 copyrighted work isn't part of a resulting NFT doesn't
16 mean there aren't rights implications.

17 MR. FOGLIA: All right. Thank you.

18 Hillary?

19 MS. BRILL: Thank you. And I'm going to add
20 because a lot of people said different aspects of what
21 is a copyright violation from actually minting an NFT,
22 I want to actually look at what people think that
23 they're necessarily minting or what people think
24 they're getting for the NFT during the minting
25 process. And I think someone mentioned it earlier,

1 right when you actually mint the NFT is when you put
2 in the specific smart contract that decides what
3 rights the actual creator of the work is giving to the
4 person that is actually using the NFT or purchasing
5 the NFT. So, even though the NFT is separate
6 generally from the access to the work, that NFT is
7 code that says what exclusive rights are being given,
8 if any, to the actual work.

9 There may be no rights given, but there
10 actually may be rights given, and there is a
11 conversation and discussion of making sure that users
12 know what rights are being given and also that the
13 creators know what they're doing. And there's
14 different ways of doing that. I know you have another
15 panel, I think it's the next one, the Creative
16 Commons, for example, is being looked to and used as
17 an open rights opportunity for someone to put into
18 their smart contracts.

19 There are content owners that want to just
20 allow access to it. There are content owners that
21 want the actual content to be used in every possible
22 way. The most possibly infamous or just well-known,
23 Bored Yacht Ape Club, they actually allow you to use
24 their Bored Ape in all sorts of things, and now
25 there's a fast-food restaurant that opened up with the

1 Bored Ape. So I think it's important to explain also
2 that in the minting process, that's where you can
3 grant exclusive rights, not just where a potential
4 violation can and cannot be or cannot occur, which I
5 think is important to this study and necessary.

6 MR. FOGLIA: Thank you.

7 Megan?

8 MS. NOH: Having addressed a lot of what I
9 wanted to address, which is this concept that even
10 where the creation of a token simply includes a URI
11 referencing an asset that exists elsewhere,
12 oftentimes, and this has become more prevalent as more
13 artist-friendly NFT marketplaces have developed a sort
14 of self-minting protocol that make it easy for an
15 artist to create an NFT through just a couple of
16 clicks, it's common for that person to be uploading
17 the asset to a server at that time and then, once the
18 token is created, we have to, of course, think about
19 how it's being displayed in a platform.

20 And, typically, that involves calling
21 through a function, you know, an echo display of a
22 thumbnail version or, you know, a reduced resolution
23 version of the asset, so the asset, if it's, you know,
24 an infringement for the person who's minting the token
25 to be tying a token to this asset in the first place,

1 even where the token itself only contains a link, by
2 virtue of this creation and marketing process, there
3 are going to be a number of other uses that are
4 potentially implicated.

5 So, to the point that Hillary was just
6 making, I want to point out that although it is, of
7 course, possible to include different kinds of
8 permissions within the metadata of a token, right now,
9 there is no uniform way for marketplaces to read that
10 as metadata, and so there are some very serious
11 questions that arise about what purchasers understand
12 in terms of the rights that they receive. And, again,
13 that's just a lack of consistency or uniformity in the
14 marketplace. We have some project websites for
15 different NFT projects that establish the terms and
16 conditions in the, you know, the licensing scheme for
17 the project in the website terms and conditions, but
18 then, when that token is trading in a marketplace,
19 it's completely divorced from that language.

20 So I think that that's a question that we'll
21 address later in the panel, but just because Hillary
22 brought that up, I wanted to echo that my basic answer
23 on the question of what does minting implicate in
24 terms of someone else's rights is that, I guess,
25 consistent with our first respondent on that question,

1 it really depends on the nature of the platform and
2 the minting process at issue.

3 MR. FOGLIA: Thanks.

4 Alfred.

5 MR. STEINER: Thank you. I'm echoing some
6 comments that have already been made. I agree. I
7 think that there's a bit of a consensus here. Well, I
8 don't know. If an NFT is minted and all that happens
9 is a pointer is generated to an asset that's already
10 stored somewhere, I don't think copyright is
11 implicated at all, and that's my take.

12 If the work is actually generated in
13 connection with the minting, then I think copyright
14 law applies, as James Gatto said, although I don't
15 think it's necessarily all that clear when code is
16 generating screen displays based on randomized input,
17 for example, you know, whether the resulting output
18 has copyright or, if so, to what extent. And the same
19 would apply if a work was auto-assembled upon minting
20 in the same manner.

21 The other thing I think is worth asking is
22 when a rights holder upon minting says in writing that
23 they're transferring the artwork related to the NFT to
24 the NFT owner. In this context, there is no physical
25 object, so is a transfer of the artwork a transfer of

1 the copyright in the artwork? There's no physical,
2 you know, copy distinction here. There's just one
3 thing. So I think that's an interesting question.

4 It's also worth pointing out, I don't know
5 if anyone's mentioned this, but metadata is almost
6 never stored on chain, almost never. It can certainly
7 be done. It's not difficult at all. And, in fact,
8 it's possible to include the rights grants, whether
9 it's a license or a transfer, in each NFT on chain,
10 and, you know, I'm happy to point people to examples
11 of that if anyone is interested. So, yeah, those are
12 my comments. Thank you very much.

13 MR. FOGLIA: And we'll go back to James and
14 then Dov.

15 MR. GATTO: So I wanted to just touch on, I
16 think, a really important issue that Hillary raised
17 and Megan commented on, and that is the transfer of
18 rights or the articulation of the rights that are
19 granted with an NFT, and I agree a hundred percent
20 it's important that it be clear. I also agree that in
21 many cases, it's not clear and it's a significant
22 problem. I maybe slightly disagree with Hillary in
23 that smart contracts, as pretty much all of us knows,
24 that they're not typically a contract. They're not
25 necessarily in agreement. They're typically code.

1 There are some exceptions where they could be, but,
2 for the most part, they're not.

3 So I think from the standpoint of just
4 thinking about online contracting in general, while it
5 is maybe advantageous to include an articulation of
6 the rights in the smart contract or the metadata, I
7 don't think that that is legally sufficient to form a
8 binding contract if there's not affirmative
9 acceptance.

10 Now not to say you couldn't maybe build that
11 in, but what we typically use is a separate NFT owner
12 agreement that's presented to the purchaser and the
13 purchaser affirmatively accepts it at the time of
14 purchase, just like with other online contracts. And
15 if you have that binding agreement, I think it's more
16 likely that a court will find that to be enforceable.
17 Most purchasers are not going to look at the metadata,
18 so they may not have noticed. If that's the mechanism
19 you're using to articulate the rights, you know, a lot
20 of purchasers can say, I never saw it, never agreed to
21 it, and you have this uncertainty with respect to the
22 unenforceability of those terms.

23 I think the other issue that's related to
24 that that goes beyond the minting, and that is the
25 resale of an NFT. So, even if you as the issuer

1 require the initial purchaser, you present an NFT
2 owner agreement and they affirmatively accept it, the
3 resale of where that NFT is resold is not so much in
4 your control for the most part, and so how do you have
5 a binding agreement on a subsequent purchaser?

6 There's companies that are working on
7 technology to build technology into the NFT ecosystem
8 to facilitate that, companies like MINTangible and
9 Monax Labs that are trying to automate the process of
10 ensuring the NFT owner agreement is presented on each
11 sale and resale, and I think that would be something
12 that would be beneficial to look at in connection with
13 this study. Are there technologies that can help
14 facilitate what we all agree is a problem of how do
15 you articulate and ensure a binding agreement with
16 respect to the rights associated with an NFT?

17 MR. FOGLIA: Thanks.

18 Dov, do you want to go ahead?

19 MR. GREENBAUM: Sure. Just to follow up on
20 what James said with regard to smart contracts, I
21 think it should be noted that there are some rights,
22 specifically exclusive rights, under copyright law
23 that have to be passed only through written signed
24 documents. Whether or not a smart contract can
25 effectuate that remains to be seen.

1 With regard to what Hillary said regarding
2 Yuga Labs and their Bored Apes, if you read actually
3 the terms and conditions that Yuga Lab puts out, it
4 looks totally lacking in legalese, doesn't mention
5 copyright even once, and it's really unclear from
6 these sorts of things, from these terms and conditions
7 what exactly they are offering. So particularly in
8 the case of Yuga Labs, they offer you the world, and
9 whether or not they're actually offering you the world
10 remains to be seen.

11 With regard to what Megan said with regard
12 to whether or not a thumbnail might be an infringement
13 if it goes up on, let's say, a site like Open Sea, if
14 a thumbnail goes up of the unauthorized minted image,
15 I think, and, again, I think it remains to be seen,
16 but there is, you know, the Perfect 10 line of case
17 law that seems to suggest that there may be fair use
18 rights that may be transformative in creating a
19 thumbnail depending on multiple conditions.

20 And then I think just in general, the
21 minting process, if you look at Yuga Labs and their
22 ongoing litigation with this Ripps guy, whether or
23 not, you know, Bored Apes really is a neo-Nazi, alt-
24 right sort of conspiracy, which is what Ripps claims,
25 they actually recently claimed that they are not in

1 any way suing him on copyright grounds, and I think,
2 to some degree I think, commentators have suggested
3 that because the Bored Apes group doesn't think that
4 they actually have any copyrights or any legitimate
5 copyrights to their actual Bored Apes for their minted
6 NFT, for whatever reason, whether or not it's because
7 of AI or something else, but it was interesting to see
8 that they totally, they sort of really pushed
9 themselves away from any sort of copyright litigation
10 with regard to the Ripps guy. So I just wanted to
11 leave it at that, so thank you.

12 MR. FOGLIA: Thank you.

13 Joe?

14 MR. GRATZ: One thing that we keep sort of
15 circling back around to is this problem that
16 downstream purchasers of an NFT may or may not be in
17 privity with the creator, right? They may or may not
18 be the original purchaser, and there may or may not be
19 any opportunity for them to directly deal or contract
20 with the person who originally minted the NFT. There
21 are some, as James mentioned, attempts to try and make
22 that happen or at least make it more likely, but what
23 I just want to touch on is that copyright has a couple
24 of doctrines that deal with this in the existing world
25 that may have a role to play.

1 The first and most important of those is
2 implied license, that is, that we can take from
3 conduct what the rights are as long as those rights
4 aren't, as Dov says, rights that can only be
5 transferred by assigned writing, and that can be just
6 about any scope of non-exclusive license to just about
7 any work or set of works. And, obviously, what will
8 be the right answer in any particular situation, what
9 is, in fact, implied by conduct may change, what is,
10 in fact, implied by what people are doing with respect
11 to a smart contract can change. But that, I think,
12 has an important role to play in sort of forming the
13 default rule where there is not privity and where
14 there is not a contract.

15 The other is, of course, 109 -- whose first
16 sale, whose application here is, I think, pretty
17 uncertain, but I think in light of how the smart
18 contracts work and in light of the application of
19 implied licenses in that context may just not matter
20 because the smart contract says the original seller's
21 intent is written down that you can pass this on and
22 what happens if there's an electronic droit de suite
23 or whatever. So I think implied license is the place
24 where we can get some of these answers.

25 MR. FOGLIA: Thanks.

1 Professor Grimmelmann?

2 MR. GRIMMELMANN: Yeah. I think I'd like to
3 pick up exactly where Joe left off, which is with the
4 difficulty of connecting legal consequences to
5 transactions that take place on a blockchain. So the
6 terms of service have been mentioned. There's
7 absolutely no guarantee that any person downstream has
8 been to the website, has agreed to the standard we
9 would treat as required for agreement. There's no way
10 to ensure that that happens. If you want legal
11 consequences to follow, it's going to have to happen
12 on chain.

13 And this is actually quite difficult because
14 it's also difficult to ensure that anybody who
15 interacts with a smart contract has thereby intended
16 to have legal consequences in the way that we would
17 need to have legal consequences flow from signing a
18 contract. It might just be that if something is
19 airdropped into my wallet; it has arrived at me and I
20 have taken no act that could constitute assent to any
21 terms imposed on me.

22 This problem also comes up for transferors
23 downstream. If I receive an NFT and I transfer it on
24 to someone else, it is not at all clear that there's
25 anything we can do in legal terms that will require me

1 thereby to grant a license or transfer any copyright
2 rights to the person who receives it from me.

3 Now it is possible to create technical
4 mechanisms that indicate that a person has intended by
5 taking some action on a smart contract to agree to
6 legal consequences, but we cannot guarantee that when
7 those actions are taken, the person who caused them to
8 be taken actually intended them. It could've been an
9 account hack or somebody who didn't have a legal right
10 to do so acting without authority.

11 So this is an example of the misalignment
12 between technical records and legal consequences I
13 mentioned earlier. It's pretty much the only
14 copyright form that I can see that might successfully
15 piggyback on a blockchain transfer of NFTs or other
16 assets would be a unilateral license granted by a
17 copyright owner to whoever has possession of the NFT
18 at some future time. Within that structure, it works
19 for granting licenses, but it's not clear that you can
20 do anything to require reciprocal obligations from the
21 possessor.

22 MR. FOGLIA: Thanks.

23 Kevin?

24 MR. MADIGAN: Yeah. I just wanted to return
25 quickly to something Dov raised about sort of

1 thumbnail images and display in the Perfect Ten case.
2 You know, I understand that some want to compare NFT
3 displays to thumbnail images, like those that were
4 found not to be infringing in cases like Perfect 10,
5 but I would just point out that Perfect 10 found the
6 thumbnail images were a sort of highly beneficial
7 public function because they improved access to
8 information on the internet. And I'm not really sure
9 the same could be said of a purely commercial NFT
10 marketplace where sort of the public benefit is not as
11 clear.

12 So I'm not sure that if, you know, the four-
13 factor analysis would result in the same finding of
14 fair use as the thumbnails in Perfect 10. You know,
15 if there's sort of a wholesale unauthorized display of
16 a copyrighted work, that's really just meant to
17 facilitate a sale on an online marketplace. So I just
18 don't think that's sort of the same as Perfect 10.
19 Thanks.

20 MR. FOGLIA: Thanks.

21 Abby and then Megan, and then we're going to
22 add in a new question. So go ahead, Abby.

23 MS. NORTH: I just wanted to raise
24 something. We keep talking about a copyright owner,
25 but I think we're ignoring the fact that, like,

1 particularly like if it's a composition, there could
2 be 15 copyright owners. There could be more than
3 that. So there's a deep requirement for technical
4 measures to have an underlying rights agreement that
5 never leaves the smart contract.

6 There's always going to be -- like, if we
7 have 15 publishers, we're going to see transfer of
8 rights among these 15 publishers to other publishers,
9 to other parties, and we need to be able to keep track
10 of who owns what and what rights they have conveyed.

11 MR. FOGLIA: Thanks.

12 Megan?

13 MS. NOH: I love that we're thinking about
14 all of these questions around enforceability of the
15 licensing terms and assent and what happens
16 downstream, and I think that's super important, and I
17 think this panel is going to get to that in some of
18 the other questions.

19 But I just want to come back to the actual
20 first question that was posed around minting and what
21 rights that implicates, and in coming back to that, I
22 want to think about something that James said actually
23 in his introductory remarks, which is that there's no
24 independent oversight or diligence being exercised by
25 anybody at the stage of minting. The platforms are

1 not looking at the JPEG that somebody might be
2 uploading or referencing with their token and
3 independently determining whether there's an
4 infringement there. They're not looking at whether
5 the name of the person who's minting the token matches
6 the name of, you know, who might this asset be
7 attributed to elsewhere on the internet.

8 Most of the platforms do have some kind of
9 general representations and warranties that they
10 require from minters as part of their terms and
11 conditions that a minter would be accepting by using
12 the platform. But I'm not sure that, you know, a lot
13 of people who are minting tokens are really going
14 through all of that fine print and aware of what
15 representations and warranties they're making.

16 And there's a huge variance even in those
17 minter-side platform terms and conditions as well, to
18 the point where I've seen one platform say not just
19 you represent and warrant that any asset you may be
20 tokenizing is yours and you have exclusive rights in
21 it, but I've seen that platform contemplate or maybe,
22 minter, you're representing that it's a fair use,
23 right, which is like a judicial determination. I'm
24 not sure how we could be accepting that as a
25 representation and warranty from a minter.

1 So I just want to think about, you know, on
2 the minting side, because there's multiple stages of a
3 token's lifetime in the marketplace, there are real
4 issues even there. Whether the solutions are
5 technology-oriented, the use of AI to try to determine
6 whether an image that's being tokenized has been used
7 before or whether there are legal solutions, I'm not
8 sure. But, when we're talking about the rights that
9 are implicated by minting, I think what we're talking
10 about is whether the minter is infringing someone
11 else's rights by using their asset, and I want to
12 point out that the marketplaces are not perhaps
13 adequately addressing that.

14 MR. FOGLIA: Thanks.

15 I'm going to throw it over now to Ann for
16 another question. If you want to elaborate on your
17 comments from the previous question or anything anyone
18 else said or a comment, just hold that thought and you
19 can weave it into your response to Ann's question.
20 Thanks.

21 Ann?

22 MS. CHAITOVITZ: Yeah. Thank you. This
23 conversation is really interesting, and we have some
24 additional questions about NFT storage and things, but
25 you've already been addressing a lot of them, but I

1 know some of you may be waiting because you know you
2 got the prepared questions. So I just wanted to throw
3 them all out there now so that we can have the
4 comprehensive conversation.

5 So we had four questions about NFT storage.
6 I'm going to ask them altogether so you can just
7 answer them in the context of this discussion. All of
8 them, I believe, many of you have already addressed,
9 but I'm going to ask in case others of you have things
10 to say too.

11 First is how are copyrighted works that are
12 associated with NFTs stored or maintained and does it
13 make a difference from a copyright perspective
14 whether, when an NFT is minted, the work is stored on
15 the chain, on the actual blockchain, or off chain and
16 sold separately, stored separately on an existing
17 external hosting service and only identified by
18 metadata in the pointer on the blockchain?

19 How is that similar to or different from
20 other works in the online landscape and what does that
21 mean from a copyright law perspective? And the final
22 question is, what copyright rights and exceptions or
23 limitations, such as first sale or fair use, which a
24 couple of you have already mentioned, are implicated?

25 So I'm now going to throw it back to you

1 guys. Raise your hands and just kind of work those
2 questions into the chain if some of you were waiting
3 for that. Thank you.

4 Okay. Well, Marta, you were the first hand
5 I saw.

6 MS. BELCHER: Okay, great. Fantastic. So,
7 in terms of storage, I would sort of think of it as
8 three different ways that you can actually store NFTs.
9 So the first way you mentioned is storing on chain.
10 That's something that doesn't happen all that often.
11 So the vast majority of cases when you buy an NFT,
12 basically, there's a ledger that says you're the owner
13 of a file and that file is at such-and-such URL. It's
14 possible that instead the entire image can be stored
15 on that ledger, but even just having a simple JPEG
16 stored on a blockchain ledger is just a lot of data
17 for a blockchain, so it ends up being typically
18 prohibitively expensive and that's because, when you
19 put something on a blockchain, it's not just like
20 saving it in a database.

21 All that data on the blockchain actually has
22 to be computationally verified, and so that's very
23 computationally intensive and actually, you know, has
24 a lot of, you know, electricity and other costs
25 associated with it. So putting an actual JPEG onto a

1 blockchain, while it can be done, it typically ends up
2 being prohibitively expensive in order to add it to
3 the blockchain and verify it. So that actually is
4 something that is relatively rare.

5 So, instead, what happens is you just buy an
6 NFT, and what that means is the ledger is pointing, is
7 saying that you are an owner of the file, and then it
8 says that that file is over here, and it either has a
9 URL or it has a content ID or hash of the content.
10 So, if it has the URL, that would be the sort of
11 second way of storing it, which would be using sort of
12 traditional centralized storage. So maybe it's
13 literally just pointing to a file that is on some
14 Amazon Web Services storage somewhere. And I already
15 talked about sort of why that's not ideal because, if
16 a platform goes out of business or goes bankrupt or
17 just time passes and it stops paying its AWS bill,
18 then that becomes an error message.

19 So, instead, the third way of storing NFTs,
20 which is what happens in the vast majority of cases,
21 is that instead the ledger points to a content ID and
22 that content ID is a hash or like a numerical
23 representation of that particular piece of content,
24 and it can also be a hash of that particular piece of
25 content plus the metadata, right? So that can also be

1 incorporated into the content ID.

2 And what happens is, if you change even a
3 single pixel in that particular piece of content, then
4 what happens is the content ID is completely
5 different. And so it actually has a lot of benefits
6 in general. First of all, because you can store it in
7 multiple places so you don't have all your eggs in one
8 basket. Second of all, because one of the things
9 that's very interesting about content IDs is, when you
10 go to retrieve a content ID, if you are blocking that
11 content ID, then it's not going to retrieve it from
12 any of those multiple places it's stored. So, in many
13 ways, it actually alleviates the whack-a-mole problem.

14 MS. CHAITOVITZ: Okay. Thank you so much.

15 And, James Gatto, I think I saw your hand
16 next.

17 MR. GATTO: Okay. Thanks. Yeah, so I think
18 Marta did a great job of talking about the various
19 alternatives on storage. I want to just raise another
20 issue that I think is interesting and it kind of
21 relates to this topic, even though it may be slightly
22 tangential, and that is, when we talk about the
23 digital asset associated with an NFT, we talk about it
24 as if it's a static thing and it can be, but there's
25 many types of NFTs that have digital assets that are

1 more complex.

2 So there are dynamic NFTs where the metadata
3 and/or asset can actually change over time, and that
4 change can be a series of set images that change. So
5 one example is, in the context of games, you may have
6 a newbie avatar that's represented by an NFT, and as
7 you level up, the metadata changes to reflect that
8 you've leveled up and the avatar may change to show an
9 image that's different, that possesses some
10 characteristic of whatever that leveling up is. And
11 that can be a preset image, so the question is where
12 are those images stored. It may be more than one
13 image. So that's kind of one use case, I think, that
14 may take this conversation to an additional dimension.

15 Another aspect is that there can be
16 programmable art, and so the image, even though it may
17 be the same base image, you can use programmability in
18 the smart contract, and based on data or other
19 conditions, the asset can actually change. There's
20 some interesting programmable art that's used with
21 NFTs.

22 You also have layered art, which I think is
23 also very interesting. So there's a client called
24 Async that does layered NFTs with music and art. And
25 what a layered NFT is, is that there is a masterwork

1 and there's an NFT for the masterwork, but there's
2 separate layers, just like in other types of art or
3 music you have different tracks, for example. You can
4 have NFTs that represent each of the layers. And
5 those layers may be separately owned by an NFT owner
6 but collectively make up the overall masterwork that
7 has a single NFT.

8 So I only throw it out there again to say
9 that there's a lot of variations out there, and I
10 think that these issues can get more complex if we go
11 beyond a static image. I mean, they're sometimes hard
12 enough with just a static image, but we have a lot
13 more to deal with than just that.

14 MS. CHAITOVITZ: Thank you so much.

15 And Alfred Steiner and then John Strohm.

16 Alfred?

17 MR. STEINER: Sorry. Sorry about that. I
18 was on mute.

19 MS. CHAITOVITZ: I do that all the time.

20 MR. STEINER: So there are three ways,
21 obviously, that have been gone over, you know, people
22 have discussed. NFT can be stored on chain, and a
23 JPEG is not a good solution, but vector graphics,
24 Scalable Vector Graphics or SVGs is a good solution.
25 A lot of people have used those to good effect.

1 The other thing that's important to note,
2 and James was getting to this in a sense, but more
3 broadly, the NFT is not just -- the smart contract is
4 not necessarily just a smart contract address and the
5 token ID and what it points to or the pointer. It's
6 also all of the logic contained in the smart contract
7 as it pertains to each token.

8 So the token is kind of like the tip of the
9 iceberg and all that coded logic that's in the smart
10 contract, which contains all the stuff that James was
11 talking about, like, you know, layering or things that
12 would update or change the metadata, that's all a part
13 of the NFT and it's not being engaged that much at the
14 moment. And it also raises another point with respect
15 to the smart contract itself, which, I mean, that's a
16 copyrightable work, it's code, tends not to be --
17 almost all of them are licensed under the MIT license,
18 which it's very permissive. But, you know, I think
19 that down the road we may see people who deploy smart
20 contracts being a little more proprietary about it.

21 The other thing I wanted to just mention is
22 with respect to storing on distributed systems like
23 the InterPlanetary File System, for example, I think,
24 you know, this is a question that I have really, but
25 my understanding is, if you wanted to take something

1 down from the InterPlanetary File System, you would
2 have to disable all pinning services or all people
3 that are pinning a particular content ID.

4 So Open Sea might block a content ID, but as
5 long as there's one person that's pinning it, it's
6 still going to be available. So I don't think really
7 any of this matters that much with respect to
8 copyright law and how it applies, other than
9 enforcement. And I think a number of panelists have
10 made this point already, but, you know, courts can't
11 do anything at all really with respect to what is on
12 the blockchain, other than coerce parties who still
13 have control of an asset or a smart contract, so
14 coerce them through, you know, fear of jail,
15 imprisonment, seizure of other assets. But that's the
16 only thing they can do now, unless there's some
17 governmental back end that's built into the
18 blockchain, you know, later down the line.

19 So thank you.

20 MS. CHAITOVITZ: Great. Thank you so much.

21 So now John and then Marta.

22 MR. STROHM: Hello, Ann. Thank you so much.

23 So I'm interested in drilling down a little bit on
24 something that Marta brought up in terms of metadata
25 and how metadata travels with subsequent sales of

1 NFTs, and specifically, one thing that I think is a
2 great functionality potentially of NFTs is smart
3 contracts that dictate royalties that apply to
4 subsequent sales for creators and the enforceability of
5 those. And James raised the possibility that
6 licenses, you know, may not even apply to subsequent
7 purchasers, but I'm interested from a technical
8 standpoint in how you can assure that the metadata
9 will travel, you know, whether it's across chains or
10 from subsequent sales, with the NFT. It seems like
11 having a standard for that is critical to, you know,
12 the enforceability of royalty provisions, and I don't
13 have any solutions, but it's something that I'm very
14 interested in what members of the panel might think
15 about that.

16 MS. CHAITOVITZ: Thanks so much.

17 And, Marta, I'll throw that to you now and
18 then Kevin next.

19 MS. BELCHER: Sure. So I just wanted to
20 respond to the two things that have come up involving
21 IPFS and other distributed systems. So just to answer
22 the last sort of comment regarding metadata, so the
23 way that it works is you can put two pieces of content
24 together into a particular content ID and you can sort
25 of put whatever those things are together. So it can

1 be the content itself, plus whatever metadata you
2 want, all becomes one piece of content ID.

3 And if you remove that metadata, it's a
4 different content ID. And so that is sort of the
5 answer to how you do metadata that travels.
6 Obviously, it's possible for people to have a content
7 ID that doesn't include metadata, say you generate a
8 content ID without metadata, but, you know, that's the
9 same problem that you have just in general with people
10 not including metadata, but, technically speaking,
11 it's not only possible, but once you actually have the
12 content ID that includes the metadata plus the content
13 itself, it's not actually possible to remove it
14 without changing the content ID entirely.

15 In answer to the point that Alfred Steiner
16 had made, so that is actually a misconception.
17 There's a misconception about IPFS that it, you know,
18 creates a whack-a-mole problem by having it, you know,
19 in many different places. So what actually happens in
20 reality is, when you're viewing content on IPFS, you
21 view it through a gateway. It's more complicated than
22 this, but you can think of it as like a browser
23 almost. And what happens is, when you send a takedown
24 notice, you send it to the particular gateway, and
25 that gateway then blocks that content ID.

1 And what's so great about that is it means
2 no matter where it's stored, if it's stored in a
3 million places or one place, you can't view it through
4 that gateway because it's a particular content ID. So
5 it actually makes the whack-a-mole problem a lot less
6 of a problem than you would see with sort of
7 traditional technologies.

8 MS. CHAITOVITZ: Thanks. Sorry. Thanks so
9 much.

10 Kevin and then Hillary.

11 MR. MADIGAN: Yeah, thanks. So I actually
12 had a follow-up sort of on the whack-a-mole thing and
13 something, Marta, you mentioned earlier in your
14 introductory remarks, which was that, you know, it's
15 actually easier on a decentralized network to block or
16 remove an NFT that may point to infringing content,
17 but I was sort of under the understanding that because
18 of these multiple points of authority in a
19 decentralized network, it would be more difficult to
20 sort of coordinate among those authority points to
21 have an NFT's metadata removed or altered, you know,
22 rather than a centralized network that would really
23 require sort of like one person or entity to remove or
24 alter what resides in that network. So I was hoping
25 maybe you could just maybe expand a little bit on

1 that.

2 MS. CHAITOVITZ: Okay. So, Marta, you can
3 answer, and then I'll go to you, Hillary.

4 MS. BELCHER: Sure. Yes, absolutely. So
5 there are multiple gateways, but there sort of are
6 typically, you know, sort of the big ones that folks
7 use. And the gateways actually tend to coordinate.
8 So there's a company called Murmuration Labs that
9 creates open source software. It's run by the former
10 general counsel and head of content policy for Medium,
11 Alex Feerst. And they've actually created a bunch of
12 software that sits on top of our technology that
13 basically allows any gateway to create block lists.
14 And so there are block lists that are curated. So,
15 for example, there's a block list that is coordinated
16 with NIK MIK (phonetic) for that kind of content. And
17 different gateways can actually subscribe to different
18 block lists. And so that is how multiple gateways end
19 up coordinating on the content they take.

20 MS. CHAITOVITZ: Thanks so much.

21 And so now Hillary and then Dov. Did we
22 just lose Hillary?

23 MR. FOGLIA: Hillary, your mic is muted
24 right now.

25 MS. BRILL: Thank you. And I don't mean to

1 disrupt the back-and-forth that's going on because I
2 think that's an important conversation, but I think
3 it's unfortunate to be at the end of this whole
4 conversation and not at least address a little bit
5 more the conversation about fair use and first sale,
6 particularly from our perspective, which is thinking
7 about the public interest impact of NFTs. Any
8 discussion of NFTs should take in consideration the
9 fact that they either are helping or hurting both fair
10 use and digital first sale.

11 And digital first sale has been for
12 different industries a mecca for an opportunity to
13 quantify art or quantify music, and copyright law has
14 been interpreted in a way to make that impossible in
15 different ways until what people think now NFTs enable
16 people to do. The idea of actually being able to
17 resell a digital first sale is so essential, not just
18 because we are now looking at digital artwork, but
19 similar to our analog types of protection with first
20 sale has now become a hybrid with software included
21 and with people moving away from hard books to digital
22 books, so the idea of being able to buy and resell
23 something in a digital file is so essential, and if
24 NFTs are an opportunity to do that in a proper way, we
25 don't want to lose sight of that.

1 Also, we don't want that to also stop the
2 resale. There have already been publishers that have
3 publicly said we're going to use NFTs so that
4 textbooks can be resold and we get more money every
5 time they're resold. That may or may not be a good
6 thing, but that completely gets rid of the analog
7 option of textbooks, which I know as a professor and
8 other professors or students definitely appreciate
9 buying and reselling textbooks. It's a complicated
10 issue with lots of people involved, but it's important
11 to discuss.

12 Also, fair use. Fair use doesn't change.
13 None of these copyright law concepts or basic tenets
14 change with this new technology, but we don't want
15 fair use to be limited or hampered because of new
16 technologies, and that is something to consider with
17 NFTs, will it block off access to certain information?
18 Will it be used as another type of DRM or way to close
19 off information? Or will it actually allow
20 information to be on more of a decentralized server
21 and give out more access to it?

22 So I just want to throw that out there as
23 important issues to consider when we discuss NFTs, IP,
24 and impact on public interest.

25 MS. CHAITOVITZ: Thanks so much.

1 So I see five hands right now, Dov, Alfred,
2 Megan, James, and Kevin. And I think we're going to
3 try and end this discussion or this question at 11:30.
4 So, if you can keep your answers to two minutes, that
5 would be great.

6 So, Alfred, you're next and then Megan.

7 MR. STEINER: Yeah, I wanted to follow up on
8 my point about IPFS, and I guess my point there is
9 there are a lot of gateways, there are some 80
10 gateways or something like that, so I don't think it
11 completely eliminates the whack-a-mole problem, and
12 that's, I guess, what I was getting at, so thank you.

13 MS. CHAITOVITZ: Thank you.

14 Megan, and then James.

15 MS. NOH: May I ask for clarification? You
16 said you're going to end this question at 11:30. Will
17 we still be moving on to discuss first sale and fair
18 use, or should I respond to that?

19 MS. CHAITOVITZ: No, that's part of this
20 one.

21 MS. NOH: Okay.

22 MS. CHAITOVITZ: After that, we'll do
23 closing comments and then move to the next panel.

24 MS. NOH: Thank you. And thanks to Hillary
25 for bringing that up. It's obviously an issue that's

1 important in the visual arts space. And just to
2 expand upon that point, under Section 109 and settled
3 case law that's applicable to physical copyrighted
4 works, for example, Stern v. Lavender, the owner of a
5 copy of a copyrighted work is permitted to dispose of
6 it, and the display of the image of that copyrighted
7 work, i.e., another copy, is considered a fair use in
8 support of that first sale right.

9 The language of 109(c), however, it doesn't
10 clearly track digital copies, so it's calling into
11 question the right of the owner of a verifiably
12 authorized copy of a digital work, which is, you know,
13 what we have as a result of NFTs verifying proper
14 purchase. And I take all of James's points earlier on
15 that there can be theft and abuse and instances where
16 an NFT is hacked, but the purpose of an NFT in the
17 visual digital art context is to confirm that the
18 owner of the NFT has an authorized copy of the digital
19 work, but that owner isn't necessarily clearly getting
20 the right to display it publicly or to enjoy Stern v.
21 Lavender precedent of displaying an image of it in
22 connection with resale.

23 So we talked about marketplace issues on the
24 minter side and reps and warrantees being required
25 from the person who mints an asset or tokenizes an

1 asset. We should also be talking, and we did a little
2 bit at the top of this panel, talk about the lack of
3 consistency with respect to purchasing side licensing
4 schemes. The marketplace seems to have developed a
5 basic consensus that the purchaser of an NFT should be
6 getting some personal display right, but you see a
7 huge variance with some marketplaces acknowledging
8 that that means that the purchaser should be able to
9 display their NFT-related artwork in virtual museums,
10 digital metaverse spaces, interactive environments.

11 And then you look at traditional auction
12 house buyer-side terms and conditions when an NFT is
13 included in a traditional auction with traditional
14 media artworks and you see really no mention of those
15 things at all. So, you know, in thinking about a
16 potential clarification of Section 109, we again want
17 to be thinking about whether we can place the
18 purchasers of digital works much more clearly on the
19 same footing as the pretty uncontroversial rights we
20 recognize a purchaser of a physical painting or
21 sculpture to be getting. Thank you.

22 MS. CHAITOVITZ: Thank you.

23 James and then Kevin.

24 MR. GATTO: I think that some of the points
25 that Hillary and Megan made are critical, and I just

1 want to underscore them and add kind of one or two
2 thoughts to it with respect to first sale. I am a big
3 proponent of and think that we should ensure that
4 artists can acquire a resale royalty in connection
5 with assets sold through NFTs. I think some of the
6 issues that have been touched on but just to expand on
7 is that historically there's been some cases,
8 including the ReDigi case, that refuse to extend the
9 first sale doctrine to digital assets.

10 And in that case, in short, part of it was
11 the rationale why it wasn't applied by the court was
12 that in order, in that case, to make a transfer of a
13 digital work, you had to make a copy of it. Even if
14 the owner agreed to eliminate their original copy,
15 they were still making a copy to transfer it. I think
16 one of the interesting things about NFTs is you don't
17 need to do that because, as we've talked about, the
18 digital asset resides somewhere else and the transfer
19 occurs not even by physically transferring a token but
20 really just reassociating the token ID with a new
21 wallet ID. Nothing is moved; no copies are made. So
22 I think, from the standpoint of the, you know,
23 jurisprudence around the applicability of first sale
24 doctrine to digital assets, that's an important point
25 to keep in mind and I think is beneficial for artists.

1 But I think the other issue that's really
2 important, and this comes back to some of the things
3 we've talked about, is, you know, when you say you're
4 selling an NFT, what are you selling, right? So, in
5 my view, one interpretation is you're selling the
6 token, but you may only have a license to the digital
7 asset, and if you only have a license, the question
8 is, under the copyright statute as currently written,
9 does the first sale doctrine apply if it's only a
10 license to the asset? And I think that's the issue or
11 one of the issues that should be focused on in
12 connection with this study as to whether or not that
13 doctrine should be revisited if the goal would be to
14 ensure and eliminate issues with respect to the
15 ability for artists to collect resale royalties with
16 NFTs.

17 MS. CHAITOVITZ: Thank you so much, James.
18 And Kevin and then Dov.

19 MR. MADIGAN: Yeah, thanks. I guess just to
20 sort of follow up with something that James just
21 hinted at when we're talking about first sale, you
22 know, because the NFT is simply the digital contract
23 governing the sale of the work and not the work
24 itself, you know, the first sale doctrine would likely
25 have no effect on the transfer of the sale of the NFT

1 itself.

2 Now, with that said, if the NFT includes the
3 option to download a digital work, like an MP3, you
4 know, there's been cases involving the transfer of
5 digital download codes where courts have made clear
6 that the first sale doctrine does not apply to those
7 download codes or give the purchaser an option to
8 create a copy in the future. So, if the NFT grants
9 the purchaser an option to download a copy of a work,
10 then the subsequent transfer would likely not be
11 covered by the first sale doctrine.

12 And then just quickly on fair use, you know,
13 fair use is a case-by-case determination and it would
14 depend on the specific circumstances, and we don't
15 really see anything inherently novel about NFTs or the
16 surrounding technology that requires a change to the
17 application of the four-factor test.

18 And I'd just finally point out that the NFT
19 space is really dominated by commercial sales. You
20 know, there may be some other uses, but there doesn't
21 seem to be a lot of activity dedicated for what we
22 traditionally think about when we think about fair
23 use, whether that's nonprofit educational purposes or
24 criticism, news reporting, research, all that stuff.
25 You know, it's more dominated by commercial sales,

1 but, you know, just say ultimately we think it should
2 remain, you know, as a case-by-case specific
3 application of fair use.

4 MR. FOGLIA: So we have 10 minutes left in
5 this session, so, at this point, we would like to
6 invite panelists to make any final closing remarks.
7 Those of you who have been waiting to respond to
8 previous remarks, please feel free to weave in your
9 answers. Separately, as we mentioned was probably
10 going to be the case, we did not get to all the
11 questions we shared with you, so we welcome panelists
12 to address any topics you were hoping we would ask you
13 about.

14 And with that, I will go back to Ann. Who
15 had their hand up first of the people who are waiting?

16 MS. CHAITOVITZ: It was Dov and then I
17 thought it was Marta, but now her hand is down.

18 MR. FOGLIA: Okay. We're going to start
19 with Dov and then we'll go to James. Again, because
20 we only have 10 minutes, let's try to keep closing
21 remarks to under a minute if possible for each of you.
22 Thanks.

23 MR. GREENBAUM: Sure. I just want to sort
24 of echo what everyone else has said, and that is that
25 we can't really make any bright-line rules for first

1 sale doctrine and NFTs. Like many have said before
2 me, an NFT is simply a token. Whether or not that
3 includes any sort of transfer of any sort of rights
4 with regard to the underlying artwork really depends
5 on the specific transaction itself, and so, by itself,
6 there's no reason to assume one way or the other that
7 an NFT would have any sort of implication with regard
8 to the first sale doctrine.

9 With regard to fair use, I really think
10 that, you know, you look at NBA Top Shot and I can't
11 imagine why, you know, more people don't take
12 advantage of that because, you know, they were taking
13 seconds from hour-long videos and monetizing it like
14 crazy. I don't know why more people didn't act on
15 perhaps the ability to use a fair use version of that
16 video.

17 And then, finally, I'm really interested,
18 and I brought it up to the panel and all, with regard
19 to the Seth Green case, I think I mentioned it in my
20 opening remarks and that was that with the transfer of
21 the crypto wallet to a second party, whether or not
22 that actually transfers the copyright rights along
23 with the wallet.

24 We know, for example, that you can get
25 copyrights from illegal activities. You know, the

1 classic example, I think, is child pornography. A
2 child pornographer has copyright rights in their
3 illegal activities. And so the question is, does the
4 thief or the purported thief of Seth Green's wallet
5 also gain the copyright rights associated with that
6 token that he got through the wallet? So thank you
7 very much for, again, hosting this amazing roundtable.

8 MR. FOGLIA: Thanks.

9 James?

10 MR. GATTO: Yeah. I'll make three points
11 very quickly. One of them is just Dov's that the
12 technological complexity and diversity is very
13 important here, that it may not be possible to draw
14 bright-line rules.

15 The second is Joe's point from his opening
16 remarks that the Copyright Law Act currently has a
17 bunch of rules that are written to be technology
18 neutral, and so dealing with that diversity, dealing
19 directly with that diversity rather than trying to
20 make general statements about NFTs overall may be
21 useful.

22 And the third, piggybacking off of something
23 else that Dov just said, is that, of course, we're
24 very used to copyright interacting with property law
25 for physical personal property. That's Section 109.

1 What is at stake here and what may be causing a lot of
2 complexity is that the property law of intangibles is
3 changing, not the intellectual property law but the
4 property law about ownership of things that are not
5 localized in one place, and so we're trying to
6 navigate both of those transitions at once.

7 MR. FOGLIA: Thank you.

8 Abby?

9 MS. NORTH: Thank you. We've been talking
10 so much about legal and technological aspects, and I
11 just wanted to bring it back to songwriters need to be
12 protected. Music artists, performers need to be
13 protected. We can't solely look at the impact on
14 public interest. We also have to look at the needs of
15 the creators.

16 Secondly, education. I know we already
17 talked about it a little bit, but I just want to
18 reiterate we've seen with sort of digital aggregators,
19 right, music aggregators that those DIY uploaders,
20 they make claims to rights they don't control and that
21 information related to that practice leads to the
22 propagation of metadata that's incorrect around the
23 world to all of the performance rights organizations,
24 to all of the reproduction and the mechanical rights
25 organizations.

1 And from a rights management perspective, it
2 is so difficult to clean it up. So I would ask that
3 we look at the technological processes that could be
4 implemented to make sure that from the point of
5 inception that the ownership is accurate, the metadata
6 is accurate, and then we can hopefully prevent
7 downstream problems.

8 MR. FOGLIA: Thanks.

9 James?

10 MR. GATTO: Thank you. Yes, I want to just
11 touch on one issue that I mentioned in my opening that
12 we didn't really get to, and that is the question of
13 whether NFTs are merely evidence of some form of
14 ownership of some rights in a digital asset or some
15 other asset or they're a separate digital asset in and
16 of themselves. As I mentioned, there's a case pending
17 between Nike and StockX that that issue is pending.

18 And I want to just kind of throw out a fact
19 scenario where I think this could be important. So,
20 when you think about right of publicity, if I am a
21 photographer and I take a picture of a celebrity in
22 public and I properly take it, I own the copyright in
23 that image and probably can make an NFT of that image
24 if all I'm doing effectively is selling the image and
25 the NFT just represents those rights.

1 However, if the NFT is deemed to be actually
2 a separate digital asset, then the question arises
3 whether I'm using the image of the celebrity to
4 promote that digital asset and sell it, in which case
5 it could constitute a violation of right of publicity.
6 So I think there's many interesting issues like that
7 that go to some of the fundamental aspects of how NFTs
8 will be treated, and I personally think that in some
9 cases, it may depend on how the NFT is structured and
10 what it represents, but I just think it's another
11 interesting issue that maybe could be considered in
12 connection with this study.

13 MR. FOGLIA: Thanks.

14 Marta?

15 MS. BELCHER: Hi there. I just wanted to
16 sort of underscore this point about the takedowns on
17 IPFS. I think the analogy there is really analogizing
18 to browsers and imagining that you can block content
19 on particular browsers and no one using that browser
20 can use it. And I think it's a good analogy because,
21 much like with gateways, as Alfred said, there are 85
22 gateways, of which only 25 are active and of which
23 only a few actually have the vast majority of users,
24 right?

25 So I think it's a good analogy to analogize

1 to browsers. And you can see how when you compare it
2 to an internet where you have to do literally
3 thousands -- you know, this thing can just come back
4 up, come back down, come back up, come back down on
5 any number of websites versus being able to block at
6 the browser level, where no matter how many websites
7 it's up on, if you're using that browser, you can't
8 see it. You can see why that makes it a lot easier.
9 So I just wanted to address that general misconception
10 about IPFS.

11 MR. FOGLIA: Thank you.

12 John and then Joe.

13 MR. STEINER: Thank you. I just wanted to,
14 first off, echo Abby's statement about protecting the
15 rights of creators and the need for education, and
16 it's my great hope that there will be more certainty
17 in the future in terms of licensing. I like the
18 direction of a16z, there can't be evil licensing
19 framework, where it sort of streamlines the sort of
20 range of rights for creators, and, you know, I hope we
21 can continue to move in that direction where there's
22 an industry standard for how we license copyrighted
23 materials and NFTs.

24 MR. FOGLIA: Thanks.

25 Joe?

1 MR. GRATZ: So just a couple of comments on
2 a couple of items. First, on first sale, first sale
3 in 109 at least in my view doesn't really have a role
4 to play because there's no distribution of a copy; 109
5 is only a defense to the 106(3) right, and there's no
6 act implicating 106(3) here. You don't need 109
7 because, as James says, there's no distribution.
8 There's just the changing of the ownership of a token
9 just by changing the response to the who's the owner
10 question when somebody asks the smart contract.

11 Second, some smart contracts let artists
12 write their own rules that stick with the token and
13 have inexorable technical consequences, whether or not
14 they legally bind to the downstream purchaser or have
15 any legal significance, and I think that's both
16 interesting and a little bit beside the copyright
17 point. One example of that is resale rights that are
18 enforced on chain without resale royalty rights, which
19 are not part of U.S. copyright law, which you can do
20 using an NFT. Previously, you could only really do
21 this as a U.S. artist with U.S. buyers in the context
22 of conceptual artwork, where you can say, well, this
23 isn't the real artwork if you didn't pay me the
24 royalty, like Alfred's piece that does that. This
25 brings that to a broader community without needing any

1 change in law, which is sort of cool.

2 Finally, I want to return to technology
3 neutrality and note that almost none of the really
4 interesting things about NFTs directly implicate
5 copyright law, right? The resale royalty stuff
6 doesn't directly implicate copyright law. The things
7 that implicate copyright law are the most boring
8 things about NFTs, like storing the JPEG on a web
9 server.

10 MR. FOGLIA: Thank you.

11 Megan?

12 MS. NOH: Sure. I wanted to speak to just a
13 nuance that I perceive with something that Kevin said
14 a moment ago. I think that NFTs for visual art are
15 often meant to transfer title to the artwork itself,
16 and that goes to something that James said a few
17 moments ago about really changing practices with
18 respect to the ownership of intangibles, but where we
19 have an artist who intends for the NFT to act as a
20 certificate of title and transfer ownership to the
21 associated artwork, obviously, that's going to
22 potentially implicate the purchaser's first sale
23 rights.

24 So coming back to 109 for a moment, what are
25 the policy reasons that we care about this?

1 Potentially changing what 109's language currently
2 reads like and having it better track digital works
3 would create a baseline in the marketplace to mitigate
4 the lack of certainty about rights transfers and
5 assents and enforceability and all of those other
6 issues that we have observed today.

7 We generally also consider public display to
8 be something that enhances scholarship. It enables
9 institutional adoption. And all of those things are
10 appropriate for what is not just an important
11 development in media technology but really more
12 broadly in the course of art history, right?

13 I really hope that the subsequent panels
14 address resale royalty issues, which I know are
15 important to John and other members of this panel and
16 are so critical in the absence of a federal droit de
17 suite in this country.

18 And, finally, I was glad to hear other
19 members of this panel, including Alfred, observe that
20 additional challenges ahead of us include questions
21 about copyrightability, authorship, and fixation,
22 where we're considering developments like works, the
23 composition of which is aided by an algorithm or code-
24 generated work or work that's interactive with a
25 purchaser or has dynamic states. So I'm very happy to

1 hear that the Copyright Office will also be studying
2 those important issues in a separate study. Thanks so
3 much.

4 MR. FOGLIA: Thanks, Megan.

5 Alfred? Alfred, you're still muted.

6 MR. STEINER: Sorry. Joseph was suggesting,
7 and I agree, that the issues that NFTs raise that
8 engage copyright directly tend to be boring, but the
9 works that NFTs have popularized, auto-assembled
10 workspace on templates where traits are combined or
11 generative artwork where there's a piece of code that
12 through a bit of randomness generates, you know, a
13 massive output of potential images, like, those
14 questions, I think, are very interesting and still, I
15 don't think, decided.

16 I mean, another one would be can an
17 algorithm -- if I write an algorithm that chooses
18 which traits go together, is that enough so that in
19 each of 10,000 or a billion outputs from an auto-
20 assembled series of artworks each one has human
21 authorship? The Seth Green case, to me, as I think
22 Dov mentioned, to me, if you're a thief, you're not
23 going to get any license. You don't get good title to
24 anything. So, to me, that's not that complicated of a
25 question.

1 And then, finally, on first sale, I think
2 I'm with Joseph that I really don't see how it
3 applies. If you own an NFT, you don't have a
4 particular copy. But that doesn't mean it couldn't be
5 revised if it raises problems in this context, but I
6 just don't see it, I'm not sure if it raises problems.

7 MR. FOGLIA: Thank you. We are over time,
8 so we'd like to thank each of you for participating in
9 this session. For those of you who will be joining us
10 for the next session, we're actually taking a quick
11 break. We will be back at noon at this exact same
12 Zoom link. Thanks very much, everyone.

13 (Whereupon, a brief recess was taken.)

14 MS. IYER: Well, thank you all for joining
15 us again today. My name is Jenée Iyer. I'm counsel
16 of Policy and International Affairs at the U.S.
17 Copyright Office, and I'm joined today by my
18 colleague, Neil Graham, Senior Copyright Attorney in
19 the Office of Policy and International Affairs in the
20 USPTO, and we look forward to a robust discussion on
21 the Session 2 topic, Uses of NFTs in the Creative
22 Sector, which, as the name suggests, will consider
23 opportunities and challenges arising from the use of
24 NFTs in the creative sector.

25 So a few Zoom housekeeping points before we

1 get started. We are recording this session. The
2 recording will be available on the Copyright Office's
3 website on the NFT study page, and the USPTO study
4 will also direct you to that site. The transcription
5 function is activated as well. If you are a panelist
6 on another panel but are not a panelist for this
7 particular panel, please keep your camera off and your
8 mic on mute. And we ask that panelists for this
9 session please turn their videos on.

10 As a reminder, if anyone viewing this
11 session would like to speak at the open mic in Session
12 4 this afternoon, the web form to request a speaking
13 spot will be open until 2:15 p.m. Eastern Standard
14 Time. So that form is on the Copyright Office's
15 landing page for this policy study. We will endeavor
16 to have everyone who requests to speak participate,
17 but if the volume is overwhelming for the time, it's
18 possible we will run out of time for open mic.
19 Remember also that the deadline for public written
20 comments in this docket is February 3.

21 So we have informed the panelists of the
22 format of each session, and the format for this
23 session will start with a brief introduction and a
24 short statement by each participant if they so desire.
25 We request that the statements be limited to three

1 minutes, and the moderators will be watching the time.
2 After these introductions, we will have a moderated
3 discussion to facilitate the conversation among the
4 participants, and the moderator questions, which the
5 panelists have received in advance, are intended as
6 prompts for discussion, and we may not get through all
7 of the questions today.

8 So, with introductions, we will begin with
9 the order as stated on the agenda. And, George
10 Johnson, would you like to go first?

11 MR. JOHNSON: Hi, everybody. My name is
12 George Johnson, and I'm a singer-songwriter and spent
13 25 years in Nashville, Tennessee, right on Music Row,
14 and I watched it go from 4,000 published songwriters
15 to 400, and I contribute that to the compulsory
16 license and also certain lobbyists and the three major
17 record companies hacking the system. And I've
18 participated in four rate proceedings, SDARS III, Web
19 IV, Phonorecords III, and currently in Phonorecords
20 IV. And I was able, without an attorney, by myself
21 pretty much, to change the 9.1 cents mechanical to 12
22 cents. I got it indexed for inflation. And then,
23 because of that and the judge's ruling for no static
24 rates, I definitely helped get the 15.1 percent
25 streaming increased to 15.35 by forcing the labels,

1 NMPA, RIAA, to increase it. And what I've learned is
2 that these record companies, there's three record
3 companies, Warner Brothers, Sony, and Universal, and
4 they've basically hacked the Copyright Office.
5 They've hacked the law and to their advantage. And so
6 they've stopped our sales, and it seems like every
7 time I look inside the Copyright Act, they've written
8 something for the past 20 years to make sure that, you
9 know, it's the most anti-competitive thing I've ever
10 seen.

11 So my concern is mainly for the download for
12 the song and will that be hacked, will that be taken
13 over by the three record companies to make sure that
14 all their competitors, the millions of American
15 copyright owners who are supposed to have an exclusive
16 right, that, you know, that won't be taken away.

17 And I'll read one quote here from the former
18 register, Ralph Oman, and he wrote a quote on a book
19 about the nature of copyright, which is a natural
20 right, and I think we've lost that at the Copyright
21 Office and in general, but he says, "The nature of an
22 exclusive private property right, or is it a limited
23 right to be doled out stingily, riddled with
24 exceptions and limitations, to be given away free of
25 charge." And when you look at streaming at .0012

1 cents, you look at the way that downloads are given
2 away, those are the exceptions and limitations. And
3 I've fought as hard as I can to get those back. So
4 I'd just like to see, especially on song downloads,
5 that they aren't put under a compulsory license and
6 that we really concentrate on the exclusive rights of
7 the individual creator and whether it be for any kind
8 of artwork, and that's it. Thank you.

9 MS. IYER: Thank you.

10 Yayoi?

11 MS. SHIONOIRI: I'm honored to be here. And
12 thank you so much to Jenee, herself an expert in
13 blockchain; Neil, and their teams at their offices for
14 having me. My name is Yayoi Shionoiri, and I'm an art
15 lawyer who has practiced law at the intersection of
16 fine arts for over two decades. I've supported fine
17 artists from a legal and business perspective by
18 working in-house at artist studios, currently with the
19 Chris Burden Estate and the Nancy Rubins Studio, as
20 well as supported other stakeholders in the art world,
21 including museums, such as the Guggenheim, and art
22 tech startups, such as Artsy, Startbahn, and
23 Collection.

24 Regarding my work in the digital art NFT
25 space, I'm entering my fourth year of 100king and

1 learning both as an active participant in NFT
2 projects, as well as undertaking legal research and
3 providing legal advice.

4 In my introductory remarks, I'd like to make
5 two points. First, again, in the digital art NFT
6 realm, I'm very specifically interested in NFT as a
7 vehicle or format to effectuate legal design,
8 particularly to assure royalty rights when NFTs are
9 resold on a secondary market.

10 The idea of royalty rights is something that
11 has been attempted to be effective in the United
12 States at various points in time, both at the federal
13 and at certain state levels, but it is yet to become
14 widespread or common. While there are practical
15 challenges, it's been really exciting to see code in
16 the form of various smart contracts allow for resale
17 royalty rights to be automatically coded and triggered
18 upon transactions occurring on the blockchain.

19 From there, in turn, it's been great to see
20 behavioral change as well. Some stakeholders in the
21 in real life art market are changing or adapting their
22 behaviors to acknowledge the significance of being
23 able to provide resale royalties to artists on
24 secondary sales.

25 Second, the NFT community in the digital art

1 world does not yet have best practices that
2 articulates what IP rights are associated with a
3 digital art NFT or continue to travel with that NFT as
4 it exchanges hands. We generally believe that
5 plurality is great for the marketplace of ideas, but
6 it can provoke confusion, especially if there is no
7 default standard from which different forms of
8 licensing can then provide alternatives.

9 That there is no statutory default in the
10 Copyright Act regarding the first sale doctrine for
11 NFTs was mentioned in Panel 1 with a varying degree of
12 opinions. However, vis-a-vis digital art NFTs, it is
13 my view that under Section 109 there is no clarity on
14 the first sale rights of owners of digital artworks,
15 the statutory default about how owners can reproduce,
16 adapt, publish, perform, and display digital works,
17 which is the full life cycle of what a collector might
18 like to do with their digital art NFTs. And from
19 here, I will yield the floor and look forward to our
20 time together. Thanks.

21 MS. IYER: Thank you.

22 Kat Walsh?

23 MS. WALSH: I'm Kat Walsh, General Counsel
24 at Creative Commons. It's great to be here, and thank
25 you for having me on this panel. Creative Commons is

1 a nonprofit organization that helps overcome legal
2 obstacles to the sharing of knowledge and creativity
3 to address the world's most pressing challenges. We
4 promote not just sharing but better sharing of
5 knowledge and cultural works.

6 In order to achieve our mission, we provide
7 the Creative Commons licenses and public domain tools
8 that give every person and organization in the world a
9 free, simple, and standardized way to grant copyright
10 permissions for creative and academic works, to ensure
11 proper attribution, and to allow others to copy,
12 distribute, and to make use of these works. These
13 licenses offer a suite of choices that depend on the
14 artist's individual choice and needs that support the
15 creation and sharing.

16 There are currently over two billion CC
17 licensed works, including Wikipedia, works of cultural
18 institutions, and works of knowledge. We see open
19 licensing as a way to promote the sharing of knowledge
20 and creativity and NFTs as one way that those in our
21 community are sharing those works without relying on
22 restrictive copyright as the only way to support their
23 creations. We see a lot of opportunity in the ability
24 to separate ownership of a token, ownership of a work
25 from ownership of the copyright and ownership of the

1 ability to share those works.

2 We support a purchase that allow creators
3 the ability to explore individual models that support
4 both the sharing and remixing of culture and gaining
5 the economic rewards for the creator that copyright is
6 intended to protect.

7 Thank you. I yield the floor.

8 MS. IYER: Thank you.

9 Vickie Nauman?

10 MS. NAUMAN: Thank you so much for having us
11 here. My name is Vickie Nauman. I run a music
12 technology consulting business called
13 CrossBorderWorks. So I work with both early-stage
14 companies, leading-edge technology, as well as large
15 enterprises. And most of the common things that I
16 work on is tech companies that want to use music in
17 their products, and so I help them figure out business
18 models, how to license music, what the risks are, who
19 the partnerships are. I also now work with a number
20 of music companies who want to do more with
21 technology.

22 So I'm truly sitting in between these two
23 sectors. I've worked in music, in digital music,
24 since the very first disruption, and I've seen many,
25 many ups and downs in the last -- that was in 1999, so

1 many ups and downs over the last 23 years. And I
2 believe, in very general words, that we are at the
3 early stages of fundamental changes of how we engage
4 with information online, how we communicate with other
5 people, and how we work with technology and the
6 internet. This change is underway, and it will
7 probably become more apparent in the next three to
8 five years, but I think the entire transformation will
9 probably take decades. It's a combination of AI and
10 the suite of Web3 technologies that are really driving
11 and at the core of this change.

12 We're still in a really early stage and it's
13 going to be volatile in many ways like it was in the
14 early 2000s, when there were spectacular failures of
15 companies and jaw-dropping amounts of money that was
16 raised and lost, so I'm not fazed by any of the
17 volatility of what we have. But, once again, I work
18 in music, and so music is at the forefront of this
19 disruption, and these companies see music as a way of
20 emerging platforms attracting users and getting music
21 and innovation, you know, in the spotlight with their
22 tools and technology.

23 And at the core, while the music business is
24 growing again, which is fantastic, we still have
25 troubles and we still have problems in our Web2 world

1 that we have not solved around getting money to flow
2 to the right people, fairness in deals, and just many
3 other small problems related to data and licensing.
4 So I think that many artists are really seeing Web3 as
5 a new way of expressing themselves, of making money
6 and engaging with fans, partially because the models
7 don't work now; partially because artists are just
8 naturally drawn to new ways of creative expression.

9 And the traditional industry of labels and
10 publishers, I have to say that they are responding
11 much better now than they did 20 years ago. And, you
12 know, 20 years ago, when we had disruption, they
13 wanted to just shut everything down, you know, and put
14 the genie back in the bottle, the toothpaste back in
15 the tube, shut the technologies down. And I'm not
16 seeing that now. I see that labels, publishers,
17 performing rights organizations and the artists they
18 represent are all trying to understand these new
19 technologies, in particular, with NFTs. But we have
20 wide-ranging confusion in this space and there's a
21 lack of any kind of best practices.

22 And with music specifically, there are a lot
23 of problems around music rights. Who gets what share?
24 What rights are implicated? How do we track the music
25 and all of the fundamentals that we've taken 20 years

1 to build in Web2 that are not perfect, but at least we
2 do have some norms. And, you know, I'm really happy
3 to be here today because I really want to try to help
4 companies legally use music, come up with fair deals,
5 but I think that there are many struggles right now,
6 and what I want to avoid is things getting slowed down
7 so that we don't have the innovation or that companies
8 go down the ask for forgiveness path, which almost
9 never ends up well. So thank you for having me, and
10 I'll turn it back over to you.

11 MS. IYER: Thank you.

12 And Steve?

13 MR. KRAUSE: Thanks, Jenee. My name is
14 Steve Krause. I'm Senior Vice President and Deputy GC
15 at Dapper Labs. Thanks very much for having this
16 roundtable. I appreciate the opportunity to join the
17 conversation.

18 Dapper was the first mainstream NFT
19 platform, starting in 2017 when it released
20 CryptoKitties, the first successful game featuring
21 digital collectible NFTs. We now partner with some of
22 the world's biggest brands to create digital
23 collectibles, including NBA Top Shot, a platform
24 authorized by the NBA that allows fans to collect,
25 trade, and sell unique NBA video moments with

1 authenticity and ownership guaranteed by the
2 blockchain. We have similar platforms and
3 partnerships with a variety of other tier one rights-
4 holders worldwide.

5 We at Dapper believe that the blockchain and
6 Web3 technology should be safe, secure, and accessible
7 for everyone. An important part of this is ensuring
8 that creators and consumers each clearly understand
9 the rights being conveyed with their NFTs. With that
10 in mind, all of our products and partnerships provide
11 easily accessible and clearly worded NFT licenses that
12 protect the rights of content creators while also
13 ensuring that consumers are aware of those rights
14 before they buy.

15 While these agreements are legally
16 sufficient and enforceable, we also feel that the NFT
17 creator community writ large can do more to increase
18 consumer awareness and standardize NFT license terms
19 across the industry. It seems clear to us that the
20 current lack of license standards for NFTs is a
21 barrier to broad-scale interest and adoption.

22 The good news is that we already have great
23 models for open source template licenses for digital
24 content. I was happy to see Kat Walsh participating
25 in today's roundtable. CC has done so much to make

1 the licensing of digital content easy for both
2 creators and consumers. We're looking to build on
3 their foundations and have been working to develop a
4 set of simple, community-driven, open source template
5 licenses that content creators can apply to their NFTs
6 on creation and that would stay with them throughout
7 the NFT's life cycle.

8 In addition to including the more common
9 license types, like personal use, commercialization,
10 et cetera, our engagement with our creator communities
11 suggest that these licenses can be expanded to include
12 other benefits unique to NFTs, including things like
13 voting rights, which give NFT holders the ability to
14 vote on certain decisions related to licensed content,
15 or additional experience or content rights which allow
16 NFTs to convey added benefits to whoever owns them.

17 We feel strongly that any standardized
18 license rights implemented across the industry should
19 be clear and simple, be presented to consumers for
20 review prior to purchase, and allow creators to
21 flexibly mix and match the rights they want to convey.
22 We expect other rights use cases to develop over time,
23 and as they do, we'll update our license templates and
24 our continued efforts to protect rights-holders and
25 ensure that consumers clearly understand what they're

1 getting before they buy.

2 I look forward to expanding on this and
3 other topics during the conversation. Thank you very
4 much for inviting me.

5 MS. IYER: Thank you.

6 And Shekinah?

7 MS. APEDO: Hi. My name is Shekinah Apedo.
8 I'm the General Counsel for Deadfellaz NFT Project and
9 the former general counsel for Artifact, which was
10 acquired by Nike in 2021. Yeah, what I do on a day-
11 to-day basis would be transactional law, so just
12 basically working with a lot of contracts, helping
13 with negotiating different deals with my clients. And
14 I would say, you know, when I think of Artifact and
15 when I think of Deadfellaz, you know, these were two
16 teams of creators, they were artists at heart who had
17 a dream, and with that dream, they want to put their
18 art into the world, and with the technology of NFTs,
19 they were able to do that on a large scale.

20 Obviously, like I said, Artifact, acquired
21 by Nike, now has the opportunity, you know, to live
22 out that dream and share their digital sneakers, their
23 digital collectibles, and also now physical apparel,
24 share it with the world and put it into the hands, you
25 know, of those they wanted to.

1 When I think of Deadfellaz and the work that
2 we've done, we've collaborated with the Chicago Bulls.
3 We've collaborated with Wrangler Jeans. We've
4 collaborated with Draft Kings, with Gilson Snowboards
5 and, you know, just to see that -- for the artist, you
6 know, to see their art, you know, in different mediums
7 and displayed in different industries, again, it's
8 another dream come true.

9 And so I would say that the NFT technology,
10 it's all about empowering the artist. It's about
11 empowering and strengthening the creator economy and
12 putting power back into the artists' hands. And I
13 think, you know, Steve kind of touched on this as well
14 and so did George, you know, touch on this, where, you
15 know, the corporations, your industries, your music
16 labels, you know, what have you, have had, my
17 goodness, such a monopoly, you know, on the creations
18 of others. And so I see and we see NFT technology,
19 smart contracts as a tool that's going to empower
20 artists and see more diverse art, you know, in the
21 world. Thank you.

22 MS. IYER: Thank you.

23 And Jeremy?

24 MR. GOLDMAN: Hi. I'm Jeremy Goldman. I'm
25 a partner and co-chair of the blockchain technology

1 group at Frankfurt Kurnit. I've been practicing at
2 the intersection of copyright and technology law for
3 15 years, and I love copyright, and I even have -- I
4 have a suit on, but I have a copyright symbol tattoo
5 to prove it. Why do I love copyright? Because
6 copyright's prime directive is to kind of just --
7 beautifully laid out, it's to promote creativity, and
8 I strongly believe that NFTs have shown that same
9 potential.

10 That's why two years ago I made a decision
11 to become an IP NFT lawyer, a title that I admittedly
12 made up. And since then, I've been fortunate to
13 represent some of the leading NFT projects, including
14 some of the folks that are here and have been
15 mentioned here. And I've been helping clients
16 leverage this new technology to launch original
17 content, to license IP to communities of thousands,
18 develop some of those licenses that Steve is talking
19 about, develop centralized IP marketplaces and more.
20 And today I want to talk about three topics.

21 And can I just say when this panel came out,
22 I tweeted, "Is anyone else more excited about this
23 panel than me?" And people told me no. They also
24 said, you know, you probably have to get a life,
25 Jeremy. But I imagine some of the other folks on this

1 panel were very excited as well.

2 All right. So number one, I want to
3 advocate for sensible policy around NFTs. Although
4 digital tokens have many potential applications, non-
5 fungible tokens, thus far, primarily have been
6 vehicles for the creation, distribution, and
7 exploitation of works of authorship. We're very lucky
8 because the government has an office that specializes
9 in works of authorship and intellectual property, and
10 it's not the Securities and Exchange Commission,
11 right? It's the Copyright Office of the U.S.A.

12 And, undoubtedly, there's a strong need for
13 consumer protection around NFTs and digital tokens,
14 but we have folks like the FTC and the DOJ that can
15 take care of that. So I want to be smart about
16 regulating NFTs so that we can let this IP coup
17 flourish. And on this policy point, I'm going to
18 refer to Diana Stern's fantastic article recently
19 published on Coindesk, and so I'm sort of echoing
20 those sentiments.

21 Number two, I want to share where I believe
22 NFTs fit in the rubric of existing copyright law, and
23 that is this: NFTs, in my opinion, substitute for the
24 material object that embodies digital works. What do
25 I mean by this? The Copyright Act, as many of the

1 folks here know, distinguishes between the copyright
2 on the one hand and the material object in which a
3 work is embodied on the other. When an artist sells a
4 painting, the artist sells the material object but
5 keeps the copyright.

6 The problem is that digital works are not
7 material objects. Courts treat them that way, but
8 it's a terrible fit, including because the first sale
9 doctrine's application to a particular copy of a work
10 makes no sense when applied to digital files. This is
11 a repeat theme, as Ms. Shionoiri astutely observed
12 already. NFTs, I believe, solve this problem by
13 creating a new way to own and sell digital works.
14 NFTs substitute for the material object that digital
15 technology rendered obsolete. When a collector buys
16 an NFT associated with a piece of digital art, the
17 collector receives the same rights and privileges as a
18 company that purchased a physical work of art.

19 I believe that conceptualizing and treating
20 NFTs as the new material object under copyright law
21 and potentially modifying the law to match that will
22 prevent a lot of mischief and help bring some of the
23 understanding that Steve was talking about.

24 Finally, I want to raise a more practical
25 issue. Many NFT projects, including so-called PFP

1 projects, involve collections of characters or other
2 digital artworks that are created by combining various
3 traits and other elements and layering them together,
4 and questions have been raised as to whether these
5 collections should qualify for copyright protection.
6 Of course, they should. The threshold for creativity
7 is extremely low. If a simple fabric pattern of stars
8 and clouds is copyrightable, surely these far richer
9 artistic expressions should qualify.

10 I've also seen questions about human
11 authorship. It's true that the artists behind these
12 collections frequently use a computer script to help
13 automate the layering process, but humans, not
14 computers, perform the lion's share of the work and
15 ignite the creative spark that births copyright.
16 These collections are conceived not by generative AI
17 but by the imagination and hands of human artists. It
18 would be a mistake to deny copyright protection to
19 these human-created works of authorship.

20 Unfortunately, and this is my last point,
21 the copyright registration system is not optimized for
22 these types of collections. There's no intuitive way
23 to group register a collection of digital art. It
24 would be greatly appreciated by me, by my clients and
25 the industry if the Copyright Office would go ahead

1 and fix that. Thank you very much, and I yield the
2 floor.

3 MS. IYER: Thank you.

4 And Jordan?

5 MR. BROMLEY: Well, I don't know how to
6 follow that, but I will say I am pretty excited to be
7 here too, and it's nice to see some familiar faces on
8 this panel. My name is Jordan Bromley. I'm the
9 leader of Manatt Entertainment. We have over a
10 hundred lawyers working daily on entertainment
11 matters. We've been doing it for over 45 years. I
12 also sit on the Board of Directors and am a kind of
13 relentless advocate for music artists' rights. I sit
14 on the board of Music Artists Coalition, so our job is
15 to promote the creator, the music creator, without any
16 kind of hesitation or reservation or conflict.

17 I will say that when the NFT boom hit the
18 music industry, we were three of the top 10 drops in
19 2021, so we very quickly got up to speed on what an
20 NFT was and helped create kind of licensing models for
21 the music business. To Vickie's point, it's all over
22 the place. You start with what the NFT is, and I
23 think the first thing for everyone, you know,
24 listening in or watching to understand is an NFT could
25 be anything. It is a container, it is a ledger, it is

1 a list on the blockchain. And so that comes with --
2 you know, there are pros and cons. So I'm excited to
3 be here. I look forward to the conversation, and I
4 will yield the floor.

5 MS. IYER: Thank you.

6 And Ashley?

7 MS. JOYCE: Hi. Thank you for having me.
8 My name is Ashley Joyce. I'm with the National Music
9 Publishers' Association, and we're the trade
10 association that represents American music publishers
11 and their songwriting partners. We work to protect
12 and advance their copyrights and to help them exploit
13 their copyrights to the extent they can, and that's
14 where we're very excited about the NFT marketplace.
15 However, we do have concerns. A lot of those I'm sure
16 you share as well with regard to piracy and
17 infringement and accountability and with regard to
18 what NFT platforms can actually accomplish.

19 So here are our main concerns. I just have
20 three that I'm going to highlight right now. First,
21 we would love to see NFT platforms and sellers involve
22 all rights-holders with respect to music. This means
23 ensuring that music publishers and songwriters are at
24 the table when NFT deals are done. A songwriter and a
25 music publisher owns the rights to a musical

1 composition, meaning the lyrics and the musical notes
2 of a song, and the artist and label owner administer
3 the rights to the sound recording. Both copyrights
4 need to be cleared.

5 Further, we also need to better understand
6 the licensing schemes that are at play. Section 115
7 of the U.S. Copyright Act, which concerns compulsory
8 mechanical licenses, we can't imagine when this would
9 apply to an NFT deal. There are master, sync,
10 reproduction, graphic, performance, and derivative
11 work rights that need to be cleared in NFT deals just
12 to name a few. And it would be great if NFT platforms
13 and their lawyers and their sellers that are educated
14 on that engage the right music licensing copyright
15 counsel in those deals.

16 Finally, we would love to see more
17 transparency and education among NFT platforms.
18 Steve, it was great to hear that Dapper Labs, you
19 know, engages with licensing with regard to all NFT
20 deals. Legal terms that can accompany all NFT sales
21 would be fantastic for encouraging transparency and
22 education with regard to deals involving music.

23 You know, specifics with regard to how
24 platforms can be more transparent would include this:
25 being more specific about how music will be stored and

1 how infringement and piracy will be addressed, what
2 tracking capabilities platforms have via smart
3 contracts or otherwise regarding ownership splits,
4 royalty payments on and off platform.

5 And also, there needs to be better
6 information and transparency on how metadata and
7 information and ownership will be vetted with regard
8 to NFT deals and how that will be stored on the
9 immutable blockchain. We see a lot of problems with
10 regard to kind of what Vickie pointed out, with how
11 metadata and inaccurate information will be handled
12 when it is entered into the blockchain.

13 We can't emphasize enough how legal terms
14 should always accompany any NFT sale to clarify what
15 is being sold and what rights are being conveyed. And
16 if we can accomplish and fix some of these problems,
17 we would be ecstatic. And we do hope this NFT
18 ecosystem thrives but, you know, always to enhance and
19 protect and promote the real creators. Thank you.

20 MS. IYER: Thank you.

21 Tonya?

22 MS. EVANS: Good afternoon where I am, and
23 good morning, evening, wherever you are. I'm a
24 tenured professor of law at Penn State Dickinson Law
25 School and a co-hire at the Penn State Institute for

1 Computational and Data Sciences, author of a
2 forthcoming book, *Digital Money Demystified*, from
3 Broad Book Press.

4 I'm a crypto policy and education
5 consultant, host of the podcast, "Tech Intersect," and
6 also pretty prolific in this space for law review
7 articles, the first of which was, "CryptoKitties,
8 Cryptography, and Copyright," shout out to Steve
9 Krause, where I explored for the first time back in
10 2018, 2019, the really important and seminal work of
11 CryptoKitties not just for adorable kittens but also
12 for the importance of a licensing scheme and what it
13 might look like in the future for ERC-721s at the
14 time.

15 My point of view is really coming at this to
16 ensure that the disintermediative impact of crypto
17 assets on the financial market can have a similar
18 impact from the power and the potential and the
19 creative side. And so what I'll be discussing today
20 are two of the more recent articles, "The Genesis of
21 Creative Justice: How to Disintermediate Creativity,"
22 and, "De-gentrified Black Genius: Blockchain
23 Copyright and the Disintermediation of Creativity."
24 Essentially and in sum, that title, that moniker,
25 gentrifying our genius, comes from actor and activist

1 Jesse Williams, who portrayed Dr. Avery on "Grey's
2 Anatomy." In 2016, during his BET Awards acceptance
3 speech, he used the phrase, "To condemn the insidious
4 process of misappropriating artistic productions of
5 black creators, in particular, as inventors and
6 innovatives." And although creatives are really
7 inspired to create simply to express their creative
8 spark, obviously, the framers of the Constitution
9 created copyright, the copyright regime, through a
10 lens of economic incentives.

11 And the reality that black artists in the
12 United States historically have received less
13 protection or, in some cases, no protection for their
14 work has severely undermined the intended economic
15 benefits to the creator and the benefit to progress to
16 society as a whole, and importantly, during the period
17 of enslavement, black people were regarded as property
18 and, therefore, legally incapable of creating or
19 owning property of their own, and the loss of
20 generational wealth is obviously incalculable.

21 Often, poor economic conditions,
22 discriminatory practices, misappropriation, certainly
23 unscrupulous representation across the board have all
24 led to unconscionable deals that have left even the
25 most prolific and successful artists destitute,

1 indebted, with no attribution compensation through a
2 deal. So what I hope to explore from my point of view
3 is really leveling the playing field.

4 A final point in my writing focused on how
5 might -- and I know this may not be popular with some
6 of the larger interests, but automating termination
7 rights as a matter of reclamation of copyright would
8 be a really interesting way to explore this and to
9 level the playing field, particularly with respect to
10 negotiations neutralizing the impact of predatory and
11 discriminatory practices when seeking gatekeepers and
12 the like. Aspirational, to be sure, but attainable
13 via decentralized autonomous copyright termination.

14 And with that, I yield back, Jenee, and to
15 all of the folks, this is an outstanding panel, so I
16 am trying to contain myself and not totally geek out,
17 but others came before me and they were excited, so I
18 will let you know I am equally excited and thank you.

19 MS. IYER: Thank you.

20 Umair?

21 MR. KAZI: Hi. Thank you, everyone, and I'm
22 grateful to the Copyright Office for inviting me to
23 participate in this roundtable. My name is Umair
24 Kazi. I'm the Director of Policy and Advocacy at The
25 Authors Guild, the oldest and largest membership

1 organization of authors in the United States. We
2 currently have over 13,000 author members that include
3 novelists in all genres, categories, nonfiction
4 writers, journalists, historians, poets, scholars,
5 recently published authors, as well as independently
6 published and self-published authors.

7 And the Guild's advocacy and policy platform
8 is focused on helping authors survive in the business
9 of writing and responding to pressures that drive down
10 writer earnings. We've been an active stakeholder in
11 various copyright policy fora for a long time and
12 served as the author community's representative before
13 Congress and federal agencies, most importantly, the
14 Copyright Office.

15 The purpose, mainly, I'm here today to kind
16 of listen and learn because the application of NFTs in
17 writing and publishing isn't as advanced as it is in
18 some of the other creative industries like music and
19 visual art. That being said, there is a lot of
20 interest from the writing community, especially
21 writers who work in robust fan-driven communities and
22 genres, like romance, mystery, thriller and fantasy,
23 to understand how NFTs could be used for purposes of
24 fan engagement and just expanding the range of
25 possibilities for using and enhancing their work.

1 There's some obvious ways where NFTs can be
2 used to benefit authors. Like other creators, authors
3 can use NFTs to produce digital collectibles, limited
4 edition copies, and special content that only NFT
5 owners can access, bundling with other kind of
6 experiences. I was having a conversation with a
7 friend of mine who's a rare bookseller and he
8 mentioned how there's possible application of NFTs to
9 indicate ownership of first drafts because a lot of
10 writers -- I mean, I don't know anyone who writes by
11 hand anymore. I hope they do. I hope that continues,
12 but even sort of, you know, for the estates to, down
13 the line, auction a first draft of a novel, a document
14 file and authenticate it.

15 There are already some examples of authors
16 using NFTs. Margaret Atwood sold a poetry collection
17 with the Codex Protocol. Neil Gaiman sold an NFT of a
18 short story that's on the SuperRare platform. And
19 J.K. Rowling, you know, unsurprisingly, has launched
20 her own sort of NFT platform called the Wizarding
21 World, and that provides fans to purchase digital
22 collectibles, including rare books and illustrations,
23 et cetera.

24 I think this is going to kind of -- this
25 idea or this theme is going to be developed as this

1 roundtable continues, but in my thinking of the NFT
2 marketplace and because authors and publishers are not
3 currently as active in that marketplace, in a way, the
4 integrity and the youthfulness of that marketplace
5 will kind of depend on how many legitimate, you know,
6 -- and copyright holders, how many legitimate owners
7 of the intellectual property are actually the ones
8 minting NFTs because if, say, authors never
9 participate in the NFT marketplace, then it leaves
10 open the potential that people will just be minting
11 NFTs based on books and characters and, you know,
12 monetizing that, and the author would have no
13 inclination or indication that that's happening.

14 MS. IYER: Thank you very much. I'm going
15 to interject for just one moment.

16 MR. KAZI: Okay. Yeah. Yeah, I can give a
17 statement in the comments.

18 MS. IYER: We're going to move on. Thank
19 you, and we look forward to hearing more as the
20 roundtables go on.

21 And, Jeff, would you like to introduce as
22 well?

23 MR. SEDLIK: Sure. My name is Jeff Sedlik.
24 I'm a professor at the Art Center College of Design,
25 and I'm also the CEO of the PLUS Coalition, and PLUS

1 is a nonprofit organization that serves as the global
2 standards body for the licensing of visual works. All
3 of my comments today will concern or be focused on
4 visual works.

5 And for visual artists, their ability to
6 create new works depends on copyright. Perhaps there
7 are exceptions, and we know there are exceptions,
8 artists who have trust funds or are enshrined in
9 academia, like me, and artists who have full-time jobs
10 or who are lucky enough to be supported by partners or
11 what have you. But those artists who wish to focus on
12 the creation of their works, their ability to continue
13 to create new works for the most part depends on
14 copyright. So I share Jeremy's passion for copyright,
15 and I always have. Although I do not have a copyright
16 tattoo, I am very interested in the concept of tattoos
17 and copyright, as some of you might know.

18 One of the issues with NFTs, and I'm
19 generally supportive of NFTs and see my fellow artists
20 earning revenue, much-needed revenue to support the
21 creation of their works through NFTs, is rampant
22 infringement. There's infringement on all the
23 platforms. I'm a photographer myself. I can go on
24 any platform right now and find infringements of my
25 works, and many of those infringements are copies of

1 photographs that are turned into derivative works or
2 that are derivative works where someone will take a
3 photograph and just use a Photoshop filter to
4 posterize it or remove the color or add a layer or
5 what have you.

6 And, certainly, there are fair use issues
7 and the possibility of fair use exceptions, but many
8 of the copies that I see on the NFT platforms are
9 simply minor adjustments to photographs that are then
10 placed as derivative works on these platforms, and as
11 a result, those smart contracts are invalid. And on
12 top of that, there is a lot of confusion on both
13 sides, both by the sellers and the buyers, as to the
14 rights that they're granting and receiving and what
15 they have the right to do.

16 There can be, for example, conflicts with
17 exclusive licenses that already exist and people then
18 take a work, put it up as an NFT, and then, perhaps
19 through the rights that they grant, it ends up getting
20 used in a manner that conflicts with an already
21 granted perpetual exclusive license or a time-based or
22 a territory-based exclusive license. There are third-
23 party rights as well that can be infringed, such as
24 was mentioned earlier today, right of publicity
25 issues. There's currently some litigation around

1 right of publicity with celebrities appearing in NFTs.

2 And one of my primary concerns is that
3 market pressure is gradually forcing artists to
4 release more and more rights, and it's inevitable, and
5 you can see this coming, the licenses on the platforms
6 are getting broader and broader or the expectation of
7 them are getting broader and broader, all the way to
8 the point where we will see, I'm sure, platforms that
9 only offer an assignment of copyright as an option
10 with an NFT. And, in addition, you know, Professor
11 Evans mentioned copyright termination, and that is a
12 concern with NFTs, where the NFT is licensed and then
13 35 years later, you know, what happens.

14 And, lastly, you know, there has been a lot
15 of talk about no copies being distributed with
16 association with NFTs. And we should all consider
17 that there are copies distributed. Every time a work
18 is displayed on the web, a copy is transmitted to the
19 person who's receiving it. It's in their browser
20 cache. It can be perceived. It can be viewed. It
21 can be copied. It can be further distributed. It's
22 there, a digital copy, on millions of machines from
23 people who have viewed the work. And I'll stop there
24 and let us get going.

25 MS. IYER: Okay. Well, thank you all again

1 for introducing yourselves and welcome again. So, to
2 begin the discussion, we'll start with a question that
3 many of you touched on during your introductions,
4 which is, what opportunities and challenges do you see
5 arising from the use of NFTs in the creative sector?
6 And, with that, we will open the floor to everyone,
7 and, again, I know many of you touched on this in the
8 opening, so you're welcome to kind of revisit some of
9 those ideas or continue thoughts in that direction if
10 you'd like to.

11 MR. BROMLEY: Yeah, I've got one on the
12 music side. And, oh, sorry, I saw that people are
13 raising hands. Is that what we're supposed to do?

14 MS. IYER: Why don't you continue and we'll
15 move to hands after that, please. Thank you.

16 MR. BROMLEY: Okay. Sorry. I'll raise my
17 hand next time. With music, as Vickie mentioned, it's
18 kind of the canary in the coal mine on a lot of new
19 technologies. I would say that, you know, echoing
20 Jeremy's sentiment, we don't want this regulated.
21 This should be artist-linked transactions. That's the
22 challenge, is making sure that we can get a licensing
23 regime in place, but it all really depends on what it
24 is. It's really important to go back to what this NFT
25 is and how music is embodied in the NFT. You have to

1 do the brass tacks of the what before the how.

2 I will also say there's a huge opportunity
3 in ticketing, a huge opportunity in ticketing to
4 control the secondary market. I know we're seeing a
5 lot of heat on the Senate side and the House side on
6 the Swifties throughout the world. I feel that the
7 secondary market is driving a conversation while
8 reaping the benefits of grossly marking up ticket
9 prices for artists that they don't participate in.
10 NFTs, you're allowed to control secondary resale
11 prices and participate in the benefits. It seems like
12 a total no-brainer. And those are my comments. Thank
13 you.

14 MS. IYER: Thank you.

15 Steve?

16 MR. KRAUSE: Thanks, Jenee. Yeah, I think
17 opportunities first and then challenge, right? So two
18 opportunities I would highlight. One is obvious, I
19 guess, is new revenue streams from existing
20 intellectual property. This is something that folks,
21 you know, are finding, like NBA Top Shots is a great
22 example, right? You've got an existing video of a
23 game and now they can actually -- you know, they can
24 further monetize those experiences. And there are
25 plenty of opportunities for smaller artists as well to

1 further monetize their existing intellectual property
2 and encourages the creation of additional intellectual
3 property.

4 One of the other opportunities is fan
5 engagement. I'm a big Bruce Springsteen fan, yeah.
6 Bruce Springsteen has no idea who I am, but with the
7 use of NFTs as a way of tracking and managing and
8 encouraging community, right, by adding additional
9 rights as part of these NFTs that are distributed, the
10 right to have additional experiences, additional
11 content for the holders, the right to vote on what my
12 song list or set list ought to be for tomorrow night,
13 you know, these types of things are unique
14 opportunities for artists to be able to connect with
15 their fans, right, in a new and interesting way.

16 And I want to put that out there because,
17 really, I mean, I'm a performing artist myself. I've
18 even won an award, a songwriter award in Australia for
19 some reason, and, you know, folks, my friends in the
20 music world came up to me when the NFT stuff was
21 booming and they said, well, can I be a millionaire.
22 I said, do you have a fan base, right? What it's all
23 about is a new opportunity to use art to connect with
24 your community and to build community. That, I think,
25 is one of the primary benefits of NFTs.

1 As for the challenge, I think that people
2 have been hitting it on the head, right? The
3 challenge is that folks -- well, there's two, but the
4 big one that I'll focus on is that folks don't know
5 what they're getting, right? We at Dapper make a real
6 point of making sure everybody is aware of what we're
7 getting, and it's a little easier for us because we're
8 working with tier one intellectual properties, right?

9 But the work that we're doing to develop our
10 licensing model that we're going to open source and
11 share with the world is to allow for a standard
12 template of license templates that sort of fit the NFT
13 world and to create a set of badges, like Kat Walsh
14 and Creative Commons have done, that tack along with
15 the license, that show so that when a badge appears on
16 the NFT, folks who see it are aware that this thing
17 has a license associated with it. You can click on
18 the badge. It'll take you right to the site, have a
19 little pop-up that shows what rights you get in your
20 NFT. So these are solvable challenges, but they are
21 challenges.

22 MS. IYER: Thank you.

23 Yayoi?

24 MS. SHIONOIRI: Thanks for that. And,
25 again, speaking regarding digital art NFTs,

1 conceptually speaking, for the art world, digital art
2 NFTs made real the idea that you don't need to own
3 something tangible for you to still have something
4 unique, something that Jeremy already kind of
5 mentioned, right? The difficulty of this idea
6 becoming mainstream was really reflected in the
7 naysayers to NFTs. At the beginning of the bubble,
8 these naysayers often made fun of people who were
9 willing to buy expensive digital art NFTs, saying that
10 these NFT collectors were paying a lot of money for
11 JPEGs that could easily be copied, so where is the
12 value?

13 Less people now, I think, make this argument
14 because it's become more accepted that NFTs are non-
15 fungible, in spite of the fact that the underlying
16 asset which is connected to the token can be
17 replicated. And I think that's one of the more
18 interesting concepts that will relate itself on the
19 traditional art world and its market. And, in turn,
20 digital art NFTs have helped to change the way that
21 creators and collectors think about underlying
22 copyright to these assets, and I imagine we will
23 discuss this further as we think about licensing.

24 In terms of opportunities, from a policy
25 perspective, again, related to the art world, there

1 are two main avenues of opportunities. One, as others
2 have mentioned, it allows for artistic and creative
3 innovation in the digital realm, meaning a new format
4 for exploration within the larger genre of new media
5 art, internet art, and digital art. And two, there's
6 an opportunity to expand the community of individuals
7 who consider themselves to be part of the art world
8 both on the supply and demand sides.

9 Challenges, repeating what many of you have
10 already said, opportunities provided by tools used in
11 the wrong way can, of course, be hugely problematic.
12 From a copyright perspective regarding digital art
13 NFTs, unfortunately, the possibility for infringement
14 through unlawful reproduction or adaptation and sales
15 of work that have infringing elements is quite common,
16 as mentioned by Jeff. And so it seems to be that what
17 we might need is better need for guardrails, most
18 likely at the industry level, to better protect
19 original creators from bad actors. Thank you.

20 MS. IYER: Thank you.

21 Vickie?

22 MS. NAUMAN: In my work, I think a lot about
23 business models, and I think it's really important for
24 everyone who's looking at this space to understand the
25 business models of music and what we have now versus

1 Web3. In our current world, we basically have
2 catalog-centric business models that require Spotify,
3 Apple, Youtube, social media companies to license
4 everything from everyone.

5 Web3 business models are very much around
6 the artists, so they're very artist-centric, and
7 artists are kind of coming into this, and I mentioned
8 this in my opening statements, but I want to go into
9 just a little bit more detail here because I think
10 it's really critical to how this can evolve for music,
11 is artists come into this for three reasons: creative
12 expression, new forms of creativity, oftentimes a
13 bundle of goods, mix of services, maybe access to
14 ticketing, access to the artist, meet and greets.
15 Maybe there's audiovisual. Maybe there's an owned
16 good. Is it like a download? What is this?
17 Sometimes the artist initiatives don't have any sound
18 recording at all, it's just really about their brand.

19 And the other thing about Web3 is that it
20 sometimes is challenging the very core of what we
21 think of as a song. We think of a song now as a
22 composition that's been fixed into a recording and
23 then it is released out in the supply chain and able
24 to be listened to in its entirety. And Web3 is very
25 much more about songs and music and media constantly

1 evolving, possibly co-creation with end users, and
2 these things challenge a lot of the issues that we
3 have around copyright and licensing.

4 The second real motivation is fan
5 engagement, and we have a long history now of artists
6 and fans only being able to reach each other through
7 third-party platforms. And so this is something that
8 I think is seen as being very liberating and very
9 tribal. And music is very tribal, bringing a subset
10 of your fans together, engaging with them directly.
11 It's a huge draw.

12 And, of course, monetization, creating value
13 with the end user around this, selling --
14 reintroducing scarcity, selling scarce goods, access
15 to tickets, lots and lots of different ways to create
16 value with the users, so this is all the opportunity.
17 It sounds really great, but what we have are a lot of
18 conflicts around how and what rights are needed.

19 In these artist-centric models, we need a
20 constellation of rights around the artist, artist
21 name, image, and likeness. Who owns that? Who
22 controls that? The sound recording and the
23 publishing? This is often -- sometimes it's kind of a
24 hybrid of what I would think of as the synchronization
25 model, but it's very, very muddy. And what we're

1 already seeing is artists who may be signed to major
2 labels or major publishers going into the NFT
3 platforms and repping and warranting that they're
4 bringing all of their rights into the table and
5 they're not. And, you know, we've had a period of
6 time where labels and publishers are kind of looking
7 the other way, but I think that's coming to a close.
8 And so we need to come up with different ways of
9 licensing and bringing these things to market legally.

10 And as another complexity around these tiny
11 deals, you know, little artist-centric models versus
12 full catalog deals, is that I don't see, because each
13 of these are so different, I don't see labels,
14 publishers, PROs, all the different stakeholders
15 coming to consensus anytime soon because they don't
16 need to. People had to come to a consensus for
17 Spotify and Apple Music and YouTube because it was a
18 massive platform and everyone needed to agree on the
19 same functionality. And we're at this early stage.

20 And I think this is actually a good thing.
21 You know, we need new business models in music and so
22 we need the time to experiment, but at the core, and
23 this is my last comment here, is at the core of all of
24 these models in music is always the question of how do
25 you divide the pie. How much do the labels get? How

1 much do the publishers get? Is there a performance
2 right? How much does the artist get?

3 And we have a situation right now where
4 music publishers are oftentimes being brought into the
5 conversation very, very late. And I talk to many NFT
6 companies who have done a deal with an artist's
7 management company or a label, and I'm explaining to
8 them that they only have half of the copyright and
9 that they need the publishing, and they're looking at
10 me, saying things like we believe we're in a post-
11 copyright world and not really wanting to understand
12 that you are, for all the advantages of music, you are
13 entering into a very, very complicated world in which
14 you are squarely in copyright land.

15 And on the other side of the publishers not
16 wanting to necessarily set precedents and being a
17 little bit afraid of doing something that they will
18 regret later, on the other side, we have labels who
19 are actively seeing opportunities for promoting their
20 artists and wanting to set precedents. And I think
21 that one thing that is missing out of all of this is
22 that in the Web2 models, the artist kind of passively
23 comes along with their label and their publishing
24 licensing to broad platforms. But, in Web3, these are
25 artist-driven and they're very artist-centric. And I

1 believe that the artist does need to have a share of
2 the revenue that's above and beyond what the sound
3 recording or the publishing might garner because it is
4 the artist's brand and it's the artist's fans and the
5 artist is doing all the activity to pull people into
6 these worlds.

7 And we don't have a norm around that, but it
8 really is an artist name, image, and likeness rights.
9 And this is something that I think, you know, it
10 garners having their own share of the pie, but we're
11 in a stage right now where, you know, we just have a
12 lot of muddiness around this, but I think that we have
13 to think about this not only with labels, publishers,
14 and PROs as traditional stakeholders but some way to
15 continue to incentivize the artists and having some
16 direct compensation to them as well.

17 MS. IYER: Thank you.

18 And so I see we have five, possibly six,
19 persons with hands raised. So I'm going to request
20 everyone kind of keep the examples to a minute or two
21 so we'll have some time to move on to our next
22 questions. So Jeremy?

23 MR. GOLDMAN: Yeah. So I always like to pin
24 everything to the constitutional directive of
25 promoting progress of science and the arts because I

1 think that's what we should be driving towards, this
2 is a Copyright Office thing. So I want to focus on an
3 opportunity that is a very gray area but I think
4 should be less gray area, and that is using NFTs to
5 fund-raise for IP projects. And, you know, people
6 are, you know, doing crowd funding using NFTs, and
7 it's very uncertain whether this is a security and
8 whether this runs into other problems. And I think
9 that we should try to clear that up because I think
10 there's a tremendous opportunity to fund independent
11 film, to fund music, to fund influencers and creators
12 and independent creators around the world using non-
13 fungible tokens as a way to fund that project and then
14 potentially use tokens to share in the revenue and
15 royalties that are distributed out to the people that
16 help support those people.

17 And, you know, Congress did something with
18 the Jobs Act, they did a crowd funding regulation to
19 help with that. I think there should be something
20 specifically for intellectual property, and I think
21 tokens are the way to do that. The challenges, and
22 I'll just focus on that, but the challenges are
23 always, you know, I think, regulatory. I think
24 there's a lot of uncertainty about whether that would
25 constitute a security, and I think we should clear

1 that up, and I go back to my initial comments about
2 smarter policy would encourage people to use these
3 tools and have just clearer regulations around it to
4 protect consumers.

5 The other point I want to make in terms of
6 the challenge, which I think will come up probably on
7 some other panels, goes around enforceability of all
8 these licensing terms that people are talking about.
9 Part of that is a technical solution, and part of that
10 might be some sort of regulatory solution, but it's
11 pretty easy to have terms of service click through
12 when you're minting something, when you're in the
13 initial checkout. It's sort of an industry-wide issue
14 that when you have this secondary market for tokens,
15 those terms sort of like, they're like a fart in the
16 wind, you know? They're just gone. And I think that
17 people have tried different ways creatively to get
18 around that, but I think that we need an industry
19 solution and potentially some regulatory solutions to
20 help enforce those terms. Thank you.

21 MS. IYER: Thank you.

22 Kat?

23 MS. WALSH: Yeah. One of the opportunities
24 that I see is the ability to separate the rights and
25 exclusive ownership of the work from exclusive rights

1 under copyright. And I like that Steve brought up in
2 his example some of the things that happen along with
3 NFT sales. On that platform, it's not just right to
4 copy and distribute the works but like access to
5 experiences, access to forums, things that have
6 nothing to do with the copying and distribution of the
7 works themselves.

8 And I'll say I am a copyright nerd, I think
9 a similar level of nerdiness to Jeremy, although I do
10 not have a tattoo. But I've been practicing copyright
11 for almost all of my time as a lawyer. But I don't
12 love copyright itself. Like, it's hard to love
13 copyright itself. It's a tradeoff, like what we love
14 about copyright is not what it does directly but what
15 it enables others to do. And what we love about
16 copyright is that it enables people to create that
17 work and also share that work. And what we're seeing
18 at CC is people using the technology of NFTs and the
19 concept of ownership that they create to share those
20 works even more liberally than they would have
21 otherwise while keeping some of that right.

22 You know, copyright, as an economic right,
23 is designed to allow artists to get some benefit from
24 holding some sort of exclusive rights, and the
25 tradeoff is that the work of art itself is restricted.

1 It can't be part of the cultural conversation. It
2 can't be remixed. It can't be shared without that
3 exclusive permission, which the artist is incentivized
4 to hold onto because, otherwise, they're not going to
5 be able to make more works.

6 What we're seeing from the artists selling
7 the tokens and from people finding value in buying
8 those tokens, even if it doesn't mean they get the
9 copyright along with it, is that those works can be
10 part of the creative conversation. Those works can be
11 shared virally. They can create communities around
12 them without needing to be restrictive in order to
13 enforce some sort of economic benefit. And these are
14 the sort of things that the standardized Creative
15 Commons licenses are designed to allow, where people
16 are getting their economic needs met in some other
17 ways. They can share some of the exclusive rights
18 that they don't need. This is some of the things that
19 the NFT technologies are allowing people to do by
20 sharing things like experiences, access, merchandise,
21 things that are not related to just the right to copy
22 and distribute the work.

23 They don't have to make that tradeoff. They
24 don't have to love copyright. They can get benefits
25 some other way. And I do see the challenges many

1 others have brought up as being education that people
2 don't know, both on the creator side, what it is that
3 they're giving away, they really need to be educated,
4 especially the platforms can help with that by making
5 it easy to understand, and the purchasers do not
6 always know what they're getting. We've seen many
7 notable examples of people confusing the ownership of
8 a token for ownership of exclusive rights in the work.

9 This isn't unique to NFTs. This has
10 happened in physical media and other digital media,
11 but with every new technological advancement and every
12 advancement in media, we need to continue making that
13 education because it's always been counterintuitive
14 and, with the technology being confusing and
15 complicated, even more so.

16 MS. IYER: Thank you.

17 And Professor Evans?

18 MS. EVANS: Hi, thanks. Two quick points.
19 One, the issues of persistence of the associated asset
20 with the non-fungible token and also determining the
21 appropriate rights-holder, which has come up several
22 times, but I align it a lot with some of my work
23 around orphan works and perhaps having a more
24 efficient means of connecting people and organizations
25 and companies who actually want to know who to reach

1 out to in order to determine the appropriate rights-
2 holder for purposes of securing rights is a mess.

3 And as was mentioned earlier, I believe
4 Vickie, I can think of countless projects, I think we
5 all know them, early on, where, like, just trying to
6 identify the minimal viable data, remember those
7 projects. And the various stakeholders couldn't
8 coalesce around a collaborative as opposed to a
9 hypercompetitive model, even for the basic
10 information. And so they were all fantastic ideas
11 that never saw the light of day. I'm hoping that as
12 this technology matures the inevitable realities of
13 having some base layer of collaboration is essential
14 in order to really achieve the promise of economics.

15 And that kind of leads me to also some
16 thoughts around the issues of persistence when I think
17 about notice and takedown, which is hugely problematic
18 for all of these exchanges and, obviously, the
19 persistence -- not only, obviously, because the token
20 data, the transactional data, the metadata is on
21 chain, but almost always, for various reasons, either
22 the size of a file or the cost of gas, it's just
23 prohibitive in many different ways to have the
24 connected asset or experience somehow on chain.

25 But having persistence issues and the

1 inability to do notice and takedown effectively,
2 that's inextricably linked to the economic benefits of
3 exploitation over the duration of the copyright term.
4 So, in both of those areas, there's promise, but some
5 very practical and important considerations from a
6 technology point of view in order to really realize
7 the full benefits that come with 106 rights. And with
8 that, I'll stop.

9 MS. IYER: Thank you.

10 And we're going to go Ashley, Jeff, Jordan,
11 and then Shekinah. If I could ask you each to kind of
12 keep comments to maybe one or two minutes as we're
13 looking forward to turning it over to Neil for our
14 next question after Shekinah. So Ashley?

15 MS. JOYCE: And this will be quick. I just
16 wanted to raise something that Jeff mentioned about
17 infringement. I mean, it is rampant and I just think,
18 you know, while there are all these opportunities in
19 the NFT space, sales happen very quickly, oftentimes
20 before rights-holders are even aware, and so that's a
21 big concern, even with regard to takedowns, you know,
22 aside from the fact that buyers and sellers are often
23 anonymous and then you have decentralized platforms or
24 storage options for the assets and then you're not
25 sure how to get them down. You know, there's also a

1 question, I think, as to whether or not NFT platforms
2 are DMCA-compliant. I would argue many of them are
3 not. They're not even eligible for safe harbor
4 protection, and I think there needs to be pressure
5 there to make sure that they are more favorable to
6 rights-holders to remove infringing content and
7 expeditiously. So I just want to raise that because I
8 think the Web3 world actually poses more challenges
9 with regard to DMCA takedowns than the Web2 world.

10 MS. IYER: Thank you.

11 And Jeff?

12 MR. SEDLIK: Thanks. I see many
13 opportunities for my fellow artists with NFTs. I've
14 seen especially during the bubble some of my peers
15 made significant additional revenue. One photographer
16 whose works sell for between \$500 and \$1,000 for a
17 beautiful fine art tangible print sold an NFT for
18 \$14,000. It's the most she's ever received for any of
19 her works. And those sorts of opportunities have
20 leveled out somewhat, but as the market matures and
21 changes and evolves, there will be additional
22 opportunities, and I'm excited about that because NFTs
23 are another way that artists can monetize their works
24 and be able to support themselves and afford to create
25 new works.

1 Some of the challenges I mentioned in my
2 opening statement, I won't really repeat them here,
3 but I'm particularly concerned with the impact on non-
4 exclusive licenses or the impact of an exclusive
5 license. So, when you issue a license for an NFT,
6 that's typically a non-exclusive license, except with
7 respect to the creation of the NFT itself. But it can
8 conflict with past licenses that are not NFT licenses,
9 territorially, time-based licenses, media-based
10 licenses, et cetera. It can also prevent or eliminate
11 future opportunities for issuing exclusive licenses if
12 there's this ongoing NFT licensing in the background.

13 I also see that -- I've seen NFTs being
14 used, I suppose you would call it commercially or in a
15 commercial manner, so somebody buys an NFT and they
16 choose to post a blog post about it or what have you
17 and display the NFT on a blog, and there's either
18 monetization on that blog through advertising that
19 goes to the NFT owner or there's third-party
20 monetization with web ads or ads on the platform that
21 are generating revenue for somebody based on the
22 display and distribution and reproduction of that NFT.

23 Lastly, I don't think that many artists
24 fully understand the impact of the clause in the NFT
25 platform contracts in which they indemnify and hold

1 harmless the NFT platform from third-party liability,
2 which would include liability for infringement that
3 might occur within their work. In other words, let's
4 say they've comprised their work of multiple works or
5 they picture something like a person's likeness, there
6 can be significant liability there that the artist
7 might not be aware of.

8 MS. IYER: Thank you.

9 Jordan?

10 MR. BROMLEY: Real quick, I would like to
11 echo Vickie's comment that at least on the music side,
12 that the artist -- I mean, if there does become some
13 sort of kind of centralized model for this, which I
14 would kind of also caution against due to the fact
15 that music is used in so many ways in NFT drops, but
16 if there is a way to create a bucket into which a
17 certain type of music fits into a model, the creator
18 deserves a large share of that.

19 What we've found on a practical basis with
20 our NFT drops in music is that the name of the artist
21 backing the NFT was what drove those sales. We also
22 found that the artist's fan base weren't the ones
23 buying NFTs. It was mainly those that did really well
24 in crypto over that period of time that were looking
25 for something else to resell and gamble on.

1 So it's an entirely different market of
2 people that are using the artist's name as another
3 table to play at in their gambling spree. We'll see
4 if, you know, the next round -- you know, it's cooled
5 off substantially since the crypto crash, but we'll
6 see in the next round if more fans come online in the
7 NFT purchasing in music. But, for now, we've had a
8 bit of a valley in terms of kind of catching up and
9 having great panels like these and deciding, you know,
10 how we are more organized and efficient in the process
11 when it heats up again.

12 MS. IYER: Thank you.

13 Shekinah?

14 MS. APEDO: Yeah, no. Yeah, I'll definitely
15 make this quick. I mean, I would say one of the new
16 challenges, and I think most will agree, you know, is
17 the new crop of AI collaborative artists, you know,
18 that are popping up with an NFT. I think there's
19 certainly a lack of education and understanding for
20 those artists, you know, when it comes to copyright
21 law, but as technology is moving very quickly, often,
22 you know, outpacing the law, like, I would hope that,
23 you know, the law would evolve and there would be some
24 type of balance with the potential of AI being used as
25 a tool with creating art.

1 MS. IYER: Thank you. And before I turn to
2 Neil, I want to ask just a very quick follow-up
3 question to Jeremy. In 30 seconds or less, if you
4 could expand on your point on crowd funding and that
5 train of potential use. We can also come back to it
6 because he may be frozen.

7 So then, Neil, I'll go ahead and turn the
8 next question over to you.

9 MR. GRAHAM: Thanks, Jenee, and hello,
10 everybody. Our next question is Question 2, what
11 opportunities and challenges do you see arising from
12 the use of NFTs in connection with a rights-holder's
13 ability to monetize and manage their copyright
14 ownership share or royalties? There's obviously some
15 overlap with the previous question, but this question
16 has a slightly narrower or sharper focus on resale
17 royalties as well as royalty returns where the NFT
18 purchaser has a fractional interest in the income
19 stream generated by a work, such as a sound recording
20 copyright.

21 If you could keep your answers short if
22 possible because we have a few more questions before
23 this session ends at 1:30, although we can certainly
24 go a few minutes after that. Any takers? Jordan?

25 MR. BROMLEY: So I feel like I'm talking a

1 lot. Look, I think there, you know, it's a beautiful
2 ability for music artists to have another royalty
3 stream. You know, we are well used to having
4 royalties. Music artists have royalties in a variety
5 of licenses. And I want to also underscore ticketing.
6 This is the one way that you can control a secondary
7 market and receive the benefit of resales of your
8 tickets. So I think that is a major opportunity that
9 has not been realized, and I'd love to see the
10 progression of that in the future. Thank you.

11 MR. GRAHAM: Thank you.

12 I saw Yayoi next and then Vickie and then
13 Ashley.

14 MS. SHIONOIRI: Thanks for that. So, as I
15 mentioned in my intro, smart contracts can allow for
16 resale royalties automatically encoded. Sellers on
17 marketplaces can code a designated fee into each
18 resale sale, most cases being between 5 to 10 percent
19 of the purchase price for digital art NFTs. But there
20 was a brief moment in the winter of 2022 where some
21 marketplaces temporarily defaulted to waiving the
22 royalty fee or even made it optional. But,
23 thankfully, with creator push-back, it seems like the
24 default for marketplaces is to keep the idea of
25 royalty rights alive.

1 However, royalty payments are enforceable on
2 a marketplace level, and it is always possible to take
3 the negotiation of a transaction off chain. So I
4 think it's interesting to think about interoperability
5 among marketplaces for the enforcement of royalty
6 rights going forward. It's a goal that a lot of
7 people in Web3 communities have, but at least as I see
8 it, it hasn't yet become practically widespread.

9 To touch very briefly on fractional NFTs, of
10 course, it is possible to split ERC-721 into multiple
11 fractions in the form of ERC-20 tokens based on
12 instructions provided by the NFT owner. From a
13 digital art NFT perspective, it lowers the barrier to
14 entry if you only need a relatively smaller amount of
15 crypto to buy an NFT. But a fractional share
16 ownership of copyright in an underlying image may not
17 be super helpful in the long run, depending upon what
18 the ultimate NFT owner wants to do. Thank you.

19 MR. GRAHAM: Thank you.

20 Vickie?

21 MS. NAUMAN: I think the opportunity here is
22 really to scale in light of artist-centric models to
23 the mass market. The user experience with Web3 is
24 pretty clunky. With a lot of these, you know, get a
25 MetaMask if you can, open it, you know, put crypto in

1 it, you know, attach that to a platform, buy some
2 things, shut your wallet because of security reasons,
3 manage multiple wallets. It's really, really not mass
4 market yet. I think it will get there in the same way
5 that in the early 2000s a lot of the things that we
6 were operating with were also very clunky, but I think
7 all of these things will evolve.

8 But I think, if we think about if you're an
9 independent artist and you own everything, you own
10 your sound recording, you write a hundred percent of
11 your songs, you're in a great position to use Web3
12 tools. You can build a community. You can get
13 investment of your songs. You can fractionalize your
14 rights. You can collect directly from your fans. But
15 most popular artists with really big dedicated fan
16 bases, they are signed to either a label or a
17 publisher or both, and that's where we get into a
18 tangle. Traditional rights-holders of labels and
19 publishers have always kind of led these business
20 licensing conversations on behalf of their artists or
21 their repertoire, and now we're kind of flipping this
22 equation where many rights-holders are finding
23 themselves needing to follow their artists, and the
24 artists want to do X and the artists want to do Y.

25 Some artists want to even take their

1 writer's share and their performer's share and
2 fractionalize the pieces that they own, leaving the
3 publisher's share and the label's share intact but
4 take their own and do whatever they want with it, and
5 this is challenging the industry in an enormous way
6 because, you know, there's usually a collaborative
7 process around the creation and release of an album,
8 but then that's done, and then the artists are really
9 on their own for touring, and the label and the
10 publishers are on their own from licensing.

11 But it's forcing. It's forcing these
12 issues, it's forcing a more collaborative discussion,
13 and it's also forcing labels and publishers to think
14 about not only how they could set precedents in the
15 market with potential licensees but how they set
16 precedents internally with their artists and, you
17 know, who should have the wallet. It challenges how
18 the money flows, what metadata is being used, what is
19 the share between label, publisher, and artist, and
20 how is a resale split, and so I think these things are
21 really, really active issues, and a lot of it is again
22 borne out of these artist-centric versus catalog-
23 centric models. Thank you.

24 MR. GRAHAM: Thank you.

25 Ashley, I think you were next.

1 MS. JOYCE: You know, Vickie had mentioned
2 this with kind of getting all the rights-holders at
3 the table together at the same time. I just want to
4 reiterate that, but I also want to mention, I mean,
5 there are over 250 just music NFT platforms out there,
6 and so, when it comes down to fractionalized rights
7 and kind of, you know, distribution of copyright
8 interests, one question I just want to raise is what
9 happens when the copyright outlives the platform, and
10 so I think there's this misconception generally that
11 NFT platforms can kind of handle royalty distributions
12 ongoing in perpetuity.

13 But I think there really needs to be a
14 conversation about what happens if that platform goes
15 under, you know, what's going to happen to the revenue
16 streams down onward, and how do you memorialize that
17 perhaps in a legal document that can accompany the NFT
18 to clarify those rights with everyone at the table,
19 you know, post-NFT platform life cycle?

20 MR. GRAHAM: Thank you.

21 I think Steve was next and then Jeff.

22 MR. KRAUSE: Sure. Thanks. So I think one
23 thing that's important to note is that not all
24 marketplaces are the same, right? I mean, you know,
25 Dapper addresses the secondary royalty issue by

1 creating official marketplaces where it serves as the
2 IP licensee, the NFT creator, and the primary NFT
3 seller, along with having the secondary marketplace.
4 All that makes it far easier for us to ensure that
5 creator royalties from secondary sales are paid,
6 right? For example, with NFL ALL DAY, Dapper
7 designates creator royalties to be automatically split
8 and paid to wallets controlled by Dapper, the NFL, the
9 NFL Players Association, right?

10 So we encourage -- other folks have spoken
11 about the technical hurdles involved with ensuring
12 that secondary marketplaces recognize and pay
13 secondary royalties, so I don't have to go into that,
14 but what I would say is that we encourage creators to
15 publicly support those marketplaces that honor those
16 payments and that that hopefully will continue.

17 MR. GRAHAM: Thank you.

18 I believe Professor Evans's hand was up a
19 little earlier, so we'll go to her and then to Jeff.

20 MS. EVANS: Thanks. A quick point about
21 this cross-platform issue regarding the payment of
22 royalties, and this may also be accurate on other
23 smart contracts' platforms, but at least ERC-2981's
24 interesting royalties standard that as long as the
25 platform honors it, there's the ability to track by

1 address as opposed by platforms. I haven't heard a
2 lot of discussion about it recently. I need to even
3 spend some more time with it, but I remember writing
4 some short pieces of a standardized way to retrieve
5 royalty payment information for NFTs, and that would
6 enable universal support for royalty payments across
7 platforms, and so let's keep that in the conversation
8 as well. Thank you.

9 MR. GRAHAM: Great. Thank you very much.
10 Jeff?

11 MR. SADLIK: Yeah, thank you. So, with
12 respect to visual works, where there's no statutory
13 framework for distribution of royalties, you know,
14 we're talking about artist-centric models here, but,
15 really, who would get those royalties? Is it the
16 artist or is it the copyright owner? During the
17 bubble, there were moneyed interests going around and
18 buying out entire collections of visual works from
19 artists. I know this because I manage the licensing
20 for deceased visual artists' works, and a number of
21 artists sold their life's work or their families or
22 their estates sold the life's work of the artist for
23 substantial sums, but are they mentioned? Are they
24 connected to any NFT offering by the new copyright
25 owner is the question, and, certainly, in the EU,

1 there's always a connection to the copyright owner
2 with respect to royalties, but here in the U.S. not so
3 much. And just quickly, I'm also very concerned about
4 fractional interests in NFTs and what might develop in
5 terms of those being deemed securities and what
6 complications arise from that in terms of liabilities.

7 MR. GRAHAM: Excellent. Thank you for those
8 answers. I'm going to turn the floor back over to
9 Jenee.

10 MS. IYER: Thank you, Neil. Thank you,
11 everyone. And being mindful that we have some, you
12 know, key questions we're still hoping to get to, but
13 we're also running towards time, so I hope everyone
14 will indulge us a little bit if we run over. We'll
15 try and be respectful of the time that you have, but
16 we'd also like to make sure we can ask some of these
17 questions that we have remaining.

18 So, because we've already touched on
19 licensing a little bit, our third question as far as
20 what types of licensing practices that are occurring
21 in the context of NFTs and if there are any best
22 practices emerging, I'd like to see if we can kind of
23 keep about five minutes of discussion on those
24 questions. We have touched upon it in various
25 contexts but that we'll have some time to still touch

1 on the fourth and fifth questions that we're hoping to
2 pose. So if anybody would like to give us a quick
3 rundown of some of the licensing practices that are
4 occurring, any best practices. Again, I know we've
5 already kind of touched on it a little bit today, but
6 there are also some persons who have a keen interest
7 in this area I know, so, Steve?

8 MR. KRAUSE: Yeah, I mean, at the risk of
9 beating that dead horse I suppose, right? This is
10 stuff that we take very seriously at Dapper and that
11 we have been -- not only do we have our own licensing
12 models and clear end-user license agreements on our
13 sites, but we are working actively on sort of an open
14 source model that will allow for anyone to be able to
15 leverage, mix and match -- if you're a creator, to mix
16 and match the rights you want to give that reflects
17 the type of things that NFTs are truly unique for,
18 things like voting rights, content rights, experience
19 rights, all of the unique elements that make NFTs so
20 cool, quite frankly, and a mechanism and a badging
21 system that will allow end users to see what rights
22 they are going to get before they buy. This is
23 absolutely critical to the success of the industry,
24 and we want to do our part to make sure that happens.

25 MS. IYER: Thank you.

1 And, Vickie?

2 MS. NAUMAN: Yeah, I think, you know, I have
3 talked a lot about this, so like Steve, I don't want
4 to beat a dead horse here, but I do think that what we
5 are all doing in this space right now is we're looking
6 at existing models of what we have now is an NFT, a
7 personal copy, you know, that something is going from,
8 you know, a marketplace into a person's personal
9 collection. Therefore, is it kind of like a download?
10 Maybe it is. Maybe it's like a high-priced download,
11 but then I think, you know, we have to further
12 challenge these things and say maybe that's the norm
13 and maybe that's the structure, but I don't think the
14 split between the publishers and labels for a download
15 model is necessarily right for the NFT.

16 Same thing, background music, is music
17 that's being heard in the background, if it's a truly
18 decentralized world and we can't really track. We're
19 back to P-to-P, which is how we started this whole
20 thing in 1999 with Napster, and we have a P-to-P
21 system and decentralized system and we can't track it.
22 How would a public performance right be implicated?
23 And so synchronization is a huge part of this if
24 there's audiovisual, and so I think that there are
25 things that we can look at, norms and laws around the

1 world, but we have to modify them enough so that the
2 shares and the representative split between label,
3 publishing, and then the artist him or herself, I
4 think that we can morph some of these models, but we
5 can look and draw upon some existing licensing
6 structures.

7 MS. IYER: Thank you.

8 Kat?

9 MS. WALSH: The main thing that I see
10 happening as a best practice first of all is just IP
11 terms being included in NFT licenses at all, which was
12 not as prevalent in the beginning and I think is now
13 widely understood as something that should be done as
14 a best practice. Otherwise, it's left ambiguous.

15 The second thing is standardized license
16 terms so that both the creators and the re-users don't
17 need to become familiarized with a new set of terms
18 every time they want to use a different platform.

19 The third thing I see is standardized
20 licenses that already exist. At Creative Commons,
21 we've already seen people trying to integrate CC
22 licensing into their NFT platforms that give creators
23 a standardized set of choices that already work with
24 other sets of content.

25 And, finally, we've also seen the use of our

1 public domain tools. There was a popular hashtag,
2 CC0Summer, for the people who do want to release all
3 of their rights, but the ease of reuse, the not
4 locking in to any particular platform I think has been
5 a good development.

6 MS. IYER: Thank you.

7 And lastly on this question, Ashley?

8 MS. JOYCE: Sure. I just want to, you know,
9 note that NFTs are very unique in what they are.
10 They're unique in and of themselves. Each one offers
11 a different experience, and so, while we do have, you
12 know, traditional licensing schemes, I would just
13 argue that, again, each NFT is different and the
14 rights-holders at issue have to be involved, and they
15 are the ones who can best determine which licensing
16 scheme should apply. Again, I think sync is up there,
17 performance, you know, with how the music is used
18 within an NFT sale, so I just want to mention, though,
19 that every single one is unique, and that should be
20 negotiated directly with the rights-holders.

21 MS. IYER: Thank you. And I am going to
22 turn over to Neil, and I see, Jeff, your hand is
23 raised, so I'll be opening it up in the next question.

24 MR. SADLIK: Were you calling on me?

25 MS. IYER: I'm going to turn it over to Neil

1 for the next question. If you'd like to be the first
2 on the next question, and then you could finish your
3 thought to this question.

4 Neil?

5 MR. GRAHAM: Okay. Thank you. This has
6 already been touched on by a number of speakers, but
7 we'd appreciate your further thoughts. There have
8 been reports of members of the public purchasing NFTs
9 with the mistaken belief that they would then be able
10 to do things that the copyright owner controls. Do
11 you think the public is aware of the copyright rights
12 that they do or do not obtain to the underlying work
13 when they purchase an NFT? What are some ways that
14 you would suggest to make this clear? I guess we're
15 going to Jeff first. Is that okay?

16 MR. SADLIK: I'll take it. So one concern
17 would be that -- well, first of all, I don't think
18 either the buyers or the sellers fully understand the
19 rights that they're offering or granting or that
20 they're receiving, and I mentioned that in my opening
21 statement. I think that the platforms and perhaps the
22 Copyright Office and industry, each industry, could do
23 a better job of educating the public on those topics,
24 and I think that oftentimes the buyer really believes
25 that they've got some broad rights to make use of the

1 work.

2 Oh, I will add that the platforms, I
3 believe, in my experience through the PLUS Coalition,
4 are somewhat resistant to the standardization of
5 licensing terms because they really view their
6 particular licensing packages as proprietary and as
7 giving them a market advantage in the way that they
8 approach both the people who are offering NFTs and the
9 people who are buying them, and that's what we've seen
10 so far.

11 MR. GRAHAM: Okay. Thank you.

12 I think Shekinah was next.

13 MS. APEDO: Yeah, and I noticed Jeff hit on
14 a lot of the points that I was going make, so, yeah,
15 you know, I would say that, yeah, right now, anyone --
16 well, not anyone, but most people within the NFT,
17 like, realm or consumer realm, you know, certainly
18 think if they buy the NFT they own the NFT, and, you
19 know, I think it more so - I wouldn't more so rely on
20 the platforms because they are, you know, for-profit
21 businesses, but I think it's the communication of the
22 creators, you know, to communicate, like, clear
23 communication of what the creators own, you know, if
24 it's a base model, you know, if there's a character,
25 like, do you own the traits?

1 You know, just really breaking down, like,
2 and talk about logos and what's separate, the
3 collection's name, and so I think it's the creators of
4 those that are selling that clear communication
5 certainly needs to happen. Would love to see whether
6 it's the Copyright Office or just bar associations,
7 you know, around the U.S., you know, do creator
8 workshops, you know, pro bono, you know, workshops for
9 artists, you know, to educate on how to simply
10 communicate some of this stuff.

11 I mean, obviously, you want them to hire us
12 lawyers, but I, you know, want to continue to see the
13 empowerment of artists and just their understanding on
14 just the simple -- I won't say simple, but just the
15 plain or the main definitions of what copyright law is
16 and what licensing, you know, is and how they should
17 be communicating that to those, you know, that they're
18 selling to.

19 MR. GRAHAM: Okay. Thank you.

20 Yayoi?

21 MS. SHIONOIRI: Yes, consumer literacy in
22 the art world and in the digital art NFT community has
23 improved, but, of course, it can always be better. In
24 the fine art world, a collector generally knows that
25 there's a difference between ownership of a piece of

1 artwork as physical property on the one hand and the
2 copyright underlying that artwork on the other, namely
3 that just because a collector has physical ownership
4 of an artwork, the collector doesn't also
5 automatically receive the copyright unless it's been
6 explicitly transferred or granted.

7 In the digital art NFT world, as others have
8 mentioned in this panel and in other panels,
9 purchasers of NFTs do not often go to the relevant Ts
10 and Cs where license language may exist, whether on
11 the marketplace or through a project-specific site, to
12 figure out what rights they receive upon purchase of
13 an NFT. In both the fine art world and the digital
14 art NFT world, though, one of the distinctions that I
15 think we need to make is that certain transfers of
16 rights require a meeting of the minds, i.e. evidenced
17 by some sort of mutual agreement, and certain
18 transfers require a clear articulation by the creator,
19 i.e. the transferor, and for licenses it's the latter.

20 And it's super exciting to see in this space
21 CC0 being utilized by many community projects as well
22 as hearing from Steve that Dapper Labs is attempting
23 to create open source licensing templates to help
24 standardize all of that. In any case, continued
25 discussion and analysis as the ecosystem continues to

1 change is definitely needed. Plus one to what
2 Shekinah said. The education of stakeholders,
3 including creators and collectors, is critical, and I
4 do think the Copyright Office can play a big role in
5 awareness-raising within the community. Thank you.

6 MR. GRAHAM: Thank you.

7 I'm going to go with Steve next and then
8 Professor Evans and then Umair and then Kat. I'm
9 doing the best I can. I'm not sure I get everyone
10 correctly, but that's the order.

11 MR. KRAUSE: Thank you. So one of the
12 things that's interesting about your question, Neil,
13 is that when you walk into a store, a toy store, and
14 buy an Olaf plush toy from the movie "Frozen," right,
15 no one wonders if they -- everybody thinks they own
16 the plush toy, right? There's no question, though, in
17 their minds can they take a picture of Olaf, put it on
18 a T-shirt and sell it. Nobody thinks that by going
19 and buying the Olaf plush toy at the store gives them
20 that right. It's a fascinating conversation about the
21 difference between physical goods and digital goods,
22 right? And so I say that just to sort of highlight
23 the context of the question, which conceptually is so
24 clear to people in the physical world.

25 The way that we at Dapper have been thinking

1 about this in terms of solving for the problem of
2 education and making sure that buyers know what it is
3 they're getting is the badging concept that I've
4 mentioned before, but like the MPAA does, when you go
5 to see a movie, there isn't a government regulation
6 that says that this is the thing that has to go on it,
7 but the MPAA themselves have said, look, we are going
8 to solve for this problem where we don't want underage
9 kids going and seeing an inappropriate film.

10 In the same vein, we're going to create this
11 badging mechanism similar to what Creative Commons has
12 been doing for years, right, which by attaching it on
13 or next to the NFT basically tells any potential buyer
14 all the way through its life cycle this thing has a
15 license, and when they hover over it, it shows them
16 what the rights are, so there's hopefully greater
17 clarity on that point.

18 MR. GRAHAM: Great. Thank you.

19 Professor Evans?

20 MS. EVANS: We talk a lot about creators,
21 collectors, investors/speculators needing robust
22 education, and the professor in me also believes in
23 consequences, and so I believe a robust education
24 initiative and certainly the funding for that. I also
25 teach administrative law, so that's a whole other

1 separate topic, but the minting and marketplace
2 platforms, I spent quite a bit of time going over
3 probably 10 or 15 different platforms, and their own
4 language, it was clear that they did not go to a
5 lawyer, and if they did, the lawyer had no idea about
6 copyright, trademark, patents, the language or the
7 absence thereof.

8 The only thing worse than the absence of
9 language was the poorly worded language that showed
10 that they didn't know what they were doing, so there's
11 a lot of education to absolutely go around. And final
12 point, it makes me think about just in the entire
13 ecosystem it's kind of like as entrepreneurs moving
14 fast, breaking things, apologizing later. Some of
15 that comes from the ethos and spirit of the crypto
16 ecosystem, the cyber punk manifesto, the attempt to
17 operate outside of legal systems, but what we know
18 from heavily regulated industry just because people
19 wish to operate outside doesn't make all of the
20 regulations and the existing legal framework go away.
21 And some things work well. Some things need to be
22 tweaked. Some things may need a sui generis approach,
23 but it will require education and consequences.

24 MR. GRAHAM: Great. Thank you.

25 The next speaker I have is Umair and then

1 Kat and then George. If you could keep your remarks
2 on the brief side because we're 10 minutes past our
3 official closing time but interested to hear what you
4 have to say. Umair?

5 MS. IYER: Umair had to drop away.

6 MR. GRAHAM: Okay. Then let's go to Kat.

7 MS. WALSH: Sure. I'm going to echo
8 everybody else's point about education, which then the
9 Copyright Office could also play a role in this that's
10 important. I'm going to counter Steve's point about
11 nobody being confused when they buy a Frozen doll and
12 expecting to own the rights. I did content moderation
13 at Wikipedia for several years, and I can guarantee
14 you that there are many things about like where people
15 were actually confused because of the non-
16 intuitiveness.

17 Similarly, at CC, we run remix contests for
18 public domain material quite often, and quite often we
19 have to reject a lot of entries because people don't
20 understand the difference between availability to the
21 public and public domain, so I just want to emphasize
22 that this is not a new thing in this space. I think a
23 lot of the language about unique ownership gives
24 people a lot of confusion about that. That needs to
25 be countered with education, and one thing I think

1 that can help is a lot of standardized terms and
2 standardized language for referring to those terms so
3 that people have a more easy way of understanding what
4 it is exactly that they're getting.

5 MR. GRAHAM: Thank you.

6 George?

7 MR. JOHNSON: Yeah, I just wanted to say
8 about a year ago I met an art dealer from New York,
9 and she said she would never ever touch an NFT, that
10 it's a whole different thing, and someone explained it
11 to her NFTs were more like trading baseball cards, and
12 that's great, but, right now, I would never ever buy
13 an NFT because there's so much scam going on with
14 crypto, you know, you got Sam Bankman fraud, that guy.
15 There's so many crypto places out there, there's so
16 many NFT places out there that seem like they're just
17 stealing copyrights.

18 And so there's no security there, there's no
19 real foundation, and I think what the guy from Dapper
20 there was saying is great, Steve, and to have some
21 kind of badge, that there is some kind of security,
22 but, you know, just make sure that the Copyright
23 Office protects the individual creators. Make sure we
24 can charge whatever we want for a song, for an
25 artwork, that the powers that be, the three labels or

1 lawyers, aren't just taking over this space, which
2 they have for streaming. They've destroyed the music
3 business with streaming even though they claim they've
4 saved it. No, they haven't.

5 So, as a creator, like, you know, I love
6 this panel here. I came here to just really get an
7 education, but I don't want to create NFTs. It sounds
8 like a real pain in the ass, so, you know, let's
9 simplify it and let's make it fun for us because, you
10 know, when you create, you want to have some fun. You
11 want to do something. You want to say, hey, I'm going
12 to have some success here with what I'm doing. I'm
13 going to make some money on it.

14 Right now, I don't see any way of making any
15 money, and it's going to be 10, 20 years before
16 there's some standardized way to making money, so
17 let's make it easy for us and let's make it fun for us
18 creators and let's just not take it over so five
19 companies can run it, you know, like they do for
20 streaming, for Spotify, Google, Amazon. You know,
21 they own it, so let's not have that happen, and let's
22 make it easy for creators. Let's make it standardized
23 and the Copyright Office protect our exclusive rights,
24 and that's what I'd like to see. Otherwise, you know,
25 it's just going to be a bunch of people scamming each

1 other, and we got to stop that if we want to make it a
2 real thing, and that's it.

3 MR. GRAHAM: Thank you for your comments.

4 Jenee, over to you.

5 MS. IYER: Thank you, and thank you all for
6 hanging with us a little bit as we've gone over time.
7 We appreciate that. I do want to ask one final
8 question, and that is, do NFTs present unique
9 opportunities or challenges for artists and creators
10 for underrepresented groups? So do you want to have
11 the opportunity to discuss it? And, again, thank you
12 for hanging with us as we've run over time a little
13 bit. We appreciate that. Yayoi?

14 MS. SHIONOIRI: Yeah, unfortunately,
15 particularly at the height of the bubbly craze in 2020
16 and 2021, the digital art NFT world had already
17 started to replicate many of the skewed gender and
18 non-diverse aspects of the traditional art world. In
19 terms of the supply side, for example, on Nifty
20 Gateway across tracking almost two years worth of
21 sales up to November 2021, Art Tactic noted that male-
22 presenting artists accounted for 77 percent of tracked
23 sales while female-presenting artists accounted for
24 just 16 percent.

25 This is unfortunately replicated on the

1 demand side too. For example, in PFP projects like
2 the Crypto Punks, there's been some data that shows
3 that female-presenting avatars were sold for less than
4 male-presenting ones and darker-skinned avatars were
5 sold for less than lighter-skinned ones.

6 Unfortunately, this data is even replicated
7 in projects that are attempting to be more conscious
8 of these gender and diversity biases, but in a true
9 utopic idea of decent Web3, I think we all believe and
10 wish that text should be more gender-blind, allow for
11 more diversity and allow for more equality and equity.

12 We've seen some incredible artists like
13 female-presenting artists like Sarah Meyohas, Sarah
14 Friend, and Rachel Rossin, as well as someone like
15 FEWOCIOUS, who identifies as a transgender young
16 person, use this technology to self-actualize and
17 express their creativity and in doing so reap economic
18 benefits for themselves and in turn promote the useful
19 arts, which is, yes, again, the point of the Copyright
20 Act, and the question really becomes how to effect
21 that and how to effect that continually, and, again, I
22 think one of the most important things that we can do
23 is help increase the pipeline on the supply side,
24 which is really about providing access to and
25 education about this technology. Thank you.

1 MS. IYER: Thank you.

2 Professor Evans?

3 MS. EVANS: Yeah, I'm really excited about
4 this topic, as you know, given a lot of my work, and
5 full disclosure, I'm an investor in Black NFT Art, not
6 just in the common sense but literally the educational
7 pipeline that is really supporting black creatives in
8 particular to mint their first NFT, all of the
9 education that we've talked about. I think of new
10 crypto art galleries emerging like One Off to help on-
11 board black artists and curate their artwork into new
12 digital first exhibitions.

13 I know personally folks who not only have
14 given new life to their existing work but maybe just
15 working in the digital space and actually making quite
16 a bit of money, and the reason is not just because of
17 the art itself and the potential for secondary market
18 or downstream micro-payments as a result of smart
19 contracts but also the unique aspects from a tax
20 perspective of the token itself that is taxed as a
21 capital asset and enjoying gains and losses if they're
22 being paid in ETH, for example.

23 That is a game changer because generational
24 wealth is never built on incomes, it's taxed at a
25 higher rate, but on capital assets, assets that are

1 out there working so that others can create. So the
2 idea of being a creative but also owning something
3 that has the potential to go up as well as down in
4 terms of capital gains and losses is very empowering.
5 Obviously, you have to pay attention to the attendant
6 risks, but that is an important aspect particularly
7 for systemically marginalized populations.

8 MS. IYER: So, Vickie, I'm going to ask you
9 to make the last comment, and then if you could keep
10 your comments to one minute, and, Professor Evans, I
11 couldn't tell if your video froze or if you were able
12 to -- you're concluded. Okay. It's not frozen. All
13 right. A few people have frozen or dropped away, so I
14 just wanted to verify. So, Vickie, if you could keep
15 your comments to one minute or under, and then we'll
16 go ahead and close out the session, and, again, thank
17 you all for sticking through as we ran a little over
18 time today.

19 MS. NAUMAN: Yeah, I think that with Web3
20 and decentralized technologies, one of the core
21 differences between the economy that we have now and
22 this is that, you know, everything that we do now
23 requires scale, and so, if you are a musical artist
24 and your music is either not being promoted by your
25 label or you got dropped by your label or you're going

1 independent and you're not getting hundreds of
2 millions of streams, you will probably not make hardly
3 any money, but in Web3, if you have a niche community,
4 if you have loyal fans, you can bring them in, and
5 niches, tribes, and small communities are really set
6 to monetize in a completely different way because it's
7 around engagement.

8 And so I think there can be opportunities
9 for artists who have not been able to find their way,
10 whether they're part of an underrepresented group or
11 they just didn't get the right model or placement
12 inside of these services, but I think there's the
13 potential there for people of all different sizes and
14 scales to be able to monetize their art if they have
15 loyal fans.

16 MS. IYER: Thank you very much, and thank
17 you again to all of our panelists for participating in
18 today's session. For those of you who will be joining
19 the next session, we invite you to take a brief break.
20 We will return at 2:15 p.m. Eastern Standard Time with
21 our next panel on the same site, and as a general
22 reminder, the web form sign-up to participate during
23 open mic will also close at 2:15. So thank you all
24 again, and enjoy the rest of your afternoon.

25 (Whereupon, a brief recess was taken.)

1 MR. WELKOWITZ: All right. Welcome back.
2 Thank you for coming today. My name is David
3 Welkowitz. I'm an attorney advisor at the U.S.
4 Copyright Office in the Office of General Counsel.
5 I'm joined today by my colleague, Andrew Moore, who is
6 an attorney advisor with the USPTO. We look forward
7 to a very robust discussion as we've had in the last
8 couple of panels. In this Session 3, we're going to
9 be discussing NFTs and IP management and enforcement,
10 which will focus on NFT-related challenges and
11 opportunities regarding IP portfolio management and
12 copyright enforcement.

13 Before we start, just a few Zoom
14 housekeeping points to remember. We are recording
15 this session today. The recording will be available
16 on the Copyright Office's website on the NFT study
17 landing page or it will be available through the
18 landing page, and the USPTO's NFT study page will
19 direct you to that site. The transcription function
20 is activated as well. If you're a panelist for
21 another panel, say Session 4 or from a previous panel,
22 but you're not a panelist for this particular session,
23 we ask that you please keep your camera off and your
24 microphone off, but we ask that the panelists for this
25 session, and I see that all already have done that,

1 have their cameras on and when you're speaking have
2 your microphone on.

3 I just want to remind people that we have a
4 session to follow this, and at the end of that
5 session, there will be an open mic session. I hope
6 that those of you who wanted to be heard in the open
7 mic session have signed up. Hopefully, we'll be able
8 to give everyone a chance to speak. I hope you will
9 understand that if we are overwhelmed with requests we
10 may not be able to have everybody in the open mic
11 session that wants to speak. Please also remember
12 that the deadline for written comments to be submitted
13 is February 3 for this docket.

14 We've informed the participants of the
15 format of this session. As in the previous sessions,
16 the format of this session will start with a brief
17 introduction of each of the participants and a brief
18 statement by each participant. We ask that the brief
19 statements be limited to three minutes, which we as
20 the moderators will be watching. After these
21 introductions, we will have a moderated discussion to
22 facilitate the conversation among the participants.
23 The moderator questions, which the panelists have
24 received in advance, are intended only as prompts for
25 that discussion, and we're sorry if we don't get to

1 all of the questions. We may not simply have the time
2 for all of that.

3 So, without further ado, let's begin with
4 the introductions in the order that they are in the
5 agenda. Emilio Cazares, would you please begin?

6 MR. CAZARES: Yes, and thank you for the
7 time. Thank you, everyone, for joining this excellent
8 discussion. My name is Emilio Cazares. I am a former
9 in-house counsel for SuperRare Labs, the company
10 behind the Super dial and the Super network. I am
11 here today participating as an independent contributor
12 to the SuperRare dial and as a member of the ecosystem
13 and a former representative of SuperRare Labs.

14 I come to you as an engineer and as an NFT-
15 focused licensing attorney. My specialization is in
16 the area of trying to marry the label semantics of the
17 NFT space onto the protocol-enabled functionality of
18 the NFT space, which I think is a great, great, great
19 opportunity for incredible advancements in the rights
20 of creators and the rights of collectors and curators
21 and the publishers. It's a pleasure to be here.
22 Please excuse my baby crying in the background, and
23 thank you all for your time.

24 MR. WELKOWITZ: Thank you.

25 Next is Richard James Burgess. I think

1 you're still muted, Mr. Burgess. Sorry, you're still
2 muted. There you go.

3 MR. BURGESS: Hello. Thank you to the
4 Copyright Office for doing this study. We really
5 appreciate it. So I'm the President and CEO of the
6 American Association of Independent Music, A2IM, and
7 the majority of my career I've spent as a musician,
8 producer, and songwriter, so I've lived my life based
9 on copyright law. I have a keen interest in the value
10 of copyrights with relation to creators. I'm here in
11 my capacity with A2IM. We represent hundreds of
12 independent record labels who are interested in
13 preserving and improving the value of their copyrights
14 being returned to them and their artists.

15 Independent labels and their artist partners
16 are interested in NFTs because they hold the promise
17 to build a deeper connection with fans, develop new
18 offerings like exclusive rights to listen to a new
19 release sooner or to access exclusive recorded music
20 by attending a concert. NFTs hold the potential for
21 artists with niche fan bases to make a living without
22 having to achieve massive scale. The models of the
23 past 20 years have not worked well for the vast
24 majority of music creators, and the hope is that these
25 new models will reverse that trend.

1 The current centralized platforms that allow
2 for digital consumption of music, namely the market
3 dominant streaming platforms, go to great lengths to
4 minimize payments for music and devalue our product.
5 If NFTs were to do nothing but add a new pathway for
6 the value of music to return to 1990s levels, it would
7 be a very good thing for recorded music creators, the
8 labels that support them, and, indeed, our entire
9 culture.

10 One of the biggest challenges stemming from
11 NFTs is the separation of the NFT itself from the
12 digital asset that can infringe the copyright of one
13 of our members. As a result, if an NFT listing is
14 taken down, it doesn't remove the asset itself, and
15 once an asset or access to it is sold, we have a new
16 problem, which is that there's no readily available
17 mechanism to ensure that a seller of an NFT
18 relinquishes access to the digital asset.

19 For rights-holders, the same limitations
20 with the DMCA are in play as with the rest of the
21 internet ecosystem. If you send a notice, the
22 specific listing will come down at least on one
23 popular NFT marketplace, but there's nothing to stop
24 the same seller from minting a new NFT immediately
25 tied to the same infringing content, and when a

1 listing is taken down, it doesn't remove the
2 infringing content or kill the link to access that
3 content.

4 The majority of independent labels are
5 unable to effectively protect their copyrights using
6 the notice and takedown system as it exists. One
7 suggestion is that NFT marketplaces should implement
8 policies to suspend or terminate the accounts of
9 repeat listers of NFTs tied to infringing content.
10 Thank you for the opportunity to participate in this
11 roundtable.

12 MR. WELKOWITZ: Thank you.

13 Next up, Althea Erickson.

14 MS. ERICKSON: Hi there. My name's Althea
15 Erickson, and I lead the Sol Center for Liberated
16 Work, which is a research advocacy and policy program
17 at the Center for Cultural Innovation. We're focused
18 on expanding social and economic protections for arts
19 workers and those working in the broader gig economy,
20 and our work is really deeply rooted in the Center for
21 Cultural Innovation's mission to support individuals
22 in the arts, whether they're artists, culture bearers,
23 creative entrepreneurs, to realize greater self-
24 determination.

25 Across our various programs, we support over

1 16,000 individuals in the arts and are deeply familiar
2 with the struggles that they face every day to secure
3 the protections that they need. In particular, we
4 serve many folks from marginalized communities,
5 including BIPOC folks, disabled folks and immigrants,
6 and, basically, we follow our community where they go,
7 which is why when we started seeing lots of black and
8 brown artists moving into the blockchain space, we
9 started building our own expertise in this area.

10 So we recently worked with a firm, Goodsnik
11 Goodsnik & Keker, to explore some of the legal
12 challenges that artists face on the blockchain. Not
13 surprisingly, intellectual property issues came up a
14 lot. After all, right, artists' economic security
15 really depends on their ability to own and control
16 their IP rights. High level, I think we found a few
17 things, first that artists really need better tools to
18 understand and influence the ways that NFT marketplace
19 terms impact their IP rights, including the ability to
20 assess the terms, determine licenses, as well as
21 choose or change platforms. Second, there's
22 significant legal uncertainty regarding the ways that
23 copyright law and contract law overlap on the
24 blockchain, which creates copyright management and
25 enforcement challenges for creators and

1 inconsistencies in enforcement.

2 Also, as Richard mentioned and is the case
3 off the blockchain, small creators need education,
4 technical assistance to help them protect and manage
5 their IP on the blockchain in particular, I think,
6 given high barriers to informed entry in the market
7 and lack of trusted advisors, especially within
8 marginalized communities.

9 And then lastly, you know, while the
10 blockchain offers ways for small creators to support
11 themselves via direct payments and resale royalties,
12 which came up a lot in the last panel, we also worry
13 about overdependence on too few platforms that could
14 potentially use their market power to strip artists of
15 ownership, rights to reproduce, trademark, et cetera.

16 So those are some of the things that are
17 coming up for the artists that we speak with and
18 support, and we really thank you for the opportunity
19 to join this roundtable today. Thanks.

20 MR. WELKOWITZ: Thank you.

21 Next, Sarah Odenkirk.

22 MS. ODENKIRK: Hi. Thank you very much to
23 the Copyright Office for hosting these roundtable
24 conversations and to all the moderators for your work
25 organizing these sessions. I'm very honored to be in

1 conversation with my colleagues here today. As you
2 just mentioned, David, my name is Sarah Conley
3 Odenkirk, and I've been in private practice for almost
4 three decades in the area of fine art and visual art
5 in public spaces. My comments here today are my own
6 and do not necessarily reflect the opinion of my firm
7 or any clients.

8 I am a partner at the law firm of Cowan
9 DeBaets Abrahams & Sheppard and co-chair of the Art
10 Law and NFT Practice Group. Additionally, I'm an
11 adjunct professor of art law at the University of
12 Southern California Gould School of Law, and over the
13 last couple of years, I've frequently presented and
14 written about the nexus of art and NFTs. Most
15 recently, I did contribute to the letter submitted on
16 behalf of the ABA's section of intellectual property
17 in response to the Patent and Trademark Office and
18 Copyright Office's notice of inquiry initiating this
19 joint study regarding issues of IP law and policy
20 associated with NFTs.

21 Initially, I became interested in blockchain
22 and NFTs in 2017 as a tool for conceptual artists to
23 package and sell work and quickly saw the potential
24 for greater rights management opportunities and an
25 avenue for better ensuring creator rights through

1 blockchain mechanisms. In May of 2021, I collaborated
2 with artist Nancy Baker Cahill on a complex project
3 called Contract Killers in which we in part explore
4 the deficiencies of the unfortunately termed smart
5 contract underlying NFTs and the ways in which the
6 current NFT structure fails to provide a reliable
7 means for enforcing artist rights, among other things.

8 Given the inability two years ago to
9 implement a mechanism for requiring mutual agreement,
10 our solution was to attach a clearly articulated set
11 of writings to the NFT containing a carrot rather than
12 a stick inviting people to voluntarily comply in
13 exchange for a reward of an additional NFT. This
14 project has continued to have legs as one of the
15 original projects exploring these contractual and
16 enforcement challenges largely because, despite
17 advances in technology and the realization that real
18 contracts must be better integrated, the issues raised
19 have not yet been fully resolved.

20 While contracting around current laws'
21 deficiencies works, without having a consistent and
22 current foundation in the copyright law, we are all at
23 a disadvantage in serving our clients and growing
24 these cutting-edge opportunities. In general, it's
25 important to recognize that NFTs are really packaging

1 and can represent objects, assets, utilities, access,
2 or identity. Each of these uses needs to be treated
3 differently as their individual purpose and function
4 will determine which set of laws most appropriately
5 applies and how remedies will be meted out.

6 I believe some of the answers lie in
7 revisiting copyright law and some lie in developing
8 market-specific trade associations and the development
9 of clear standards and protocols to be implemented at
10 the marketplace level. I look forward to addressing
11 the questions posed for today and discussing ways in
12 which revising and supplementing copyright law might
13 best serve the evolving marketplace and new
14 innovations that blockchain technology has made
15 possible. Thank you.

16 MR. WELKOWITZ: Thank you.

17 Edward Lee?

18 MR. LEE: Thank you, David, and thank you to
19 all of the attendees. I'm Ed Lee, a law professor
20 from Chicago Kent College of Law. I'm also the
21 founder of the website NOUNFT.com, where I track the
22 latest developments in NFTs, especially from the
23 perspective of IP. Now I believe NFTs are being used
24 today as a new form of Decentralized Intellectual
25 Property, or DIP for short, analogous to the movement

1 in DEFI, or Decentralized Finance. I explain my
2 theory at much greater length in my book *Creators Take*
3 *Control* and a law review article, both of which are
4 coming out at the end of March of this year.

5 Now, before today's roundtable discussion,
6 I'd like to emphasize three quick points related to
7 the enforcement of IP. First, NFTs are rapidly
8 developing. They can change in a blink of an eye, and
9 we've already seen this from 2021 to today. The best
10 policy may be to wait and study it more, to collect
11 more data, including on DMCA notice and takedowns, as
12 well as the so-called use cases that businesses are
13 making with NFTs, which seem to be growing by the day.

14 The second point is that the current market
15 for NFTs is fairly skeptical of big brands. The most
16 successful NFT producers are either Web3 startups or
17 individual artists. The big brands that have had
18 success in Web3, the NBA, Anheuser Busch, and Nike,
19 have partnered with or outright acquired Web3
20 startups. Now this poses a challenge for big
21 businesses seeking to adopt NFTs, but it also serves
22 at least for the time being as a natural defense to
23 infringement due to, well, the lack of popularity of
24 NFTs coming from big brands.

25 Third, when we think of IP enforcement, I

1 think it's crucial to understand the clear divide
2 between copyright and trademark. Trademark owners
3 risk losing their rights by not leasing their
4 trademarks, including in the metaverse. There's a
5 trial going on right now in the Southern District of
6 New York involving Hermes International against Mason
7 Rothschild which reflects this part of the law. By
8 contrast, copyright owners don't have to police their
9 works, something that the scholar Tim Wu called
10 tolerated use, and I think that's important for
11 understanding enforcement that the two different areas
12 of law may propel the IP owner in different
13 directions.

14 Finally, there's, I think, a philosophical
15 divide that is worth noting between what I call 20th
16 century enforcement through cease-and-desist letters,
17 notice and takedown, and litigation versus 21st
18 century enforcement in Web3, which favors
19 decentralization and greater permissiveness in sharing
20 digital content, so-called JPEGs, because they don't
21 substitute for the NFTs which are authenticated on
22 blockchain. Just to use one simple example, there's
23 more value in owning the authentic Doodles NFT versus
24 any knockoff of the Doodles NFT. That authenticity of
25 NFTs is in itself a form of enforcement of

1 intellectual property. And with that, I will turn it
2 back over to our moderator.

3 MR. WELKOWITZ: Thank you.

4 Next, Jean-Marc Deltorn.

5 MR. DELTORN: Thank you so much, David, and
6 thanks to the Copyright Office for initiating this
7 discussion and to the panelists for sharing their
8 insight and experience, as well as to the participants
9 and the audience for their time. My name is Jean-Marc
10 Deltorn. In the past 20 years, I've held a variety of
11 positions in Europe, in European institutions dealing
12 with intellectual property and now a member of the
13 European Observatory on Emerging Technology as part of
14 the European Union Intellectual Property Office and a
15 professor of law and digital technologies at CEIPI,
16 which is the Center for International Intellectual
17 Property Studies at the University of Strasbourg in
18 France.

19 So CEIPI's a leading institution in Europe
20 for education and research in IP, and as such, CEIPI's
21 in direct contact with a range of stakeholders in the
22 EU in the field of NFT, including artists and
23 producers. So today I'd like to give a slight
24 international perspective on what's happening in
25 Europe with a brief outline of the regulatory

1 landscape in the EU in relation to NFT enforcement at
2 least in its ongoing development.

3 So one of the points I'd like to highlight
4 relates first to the regulation of platforms, and
5 various issues raised in the previous panels today
6 have led to questions to question the role of
7 platforms in relation to the minting and distribution
8 of protected works and to consider the responsibility
9 in light of existing copyright-related regulations,
10 which applies also in Europe, of course. One point
11 that is being investigated in the EU is whether it
12 would be possible to regulate these NFT platforms in a
13 manner similar or inspired by the more traditional
14 content-sharing platforms that are being currently
15 subject to the EU copyright Digital Single Market, DSM
16 directive as we call it.

17 And in particular, these directives are in
18 Article 17 that subjects online content sharing
19 service providers to specific obligations with regard
20 to copyright works shared on these platforms, and this
21 provision aims to ensure that copyright-infringing
22 content is not uploaded essentially, which includes,
23 for example, positive obligation to seek authorization
24 from the rights-holder for any such upload, so if such
25 obligations are not complied with, the providers could

1 be held liable for copyright infringement. The
2 question, of course, is whether Article 17 of this DSM
3 directive does apply or not to NFT resale platform,
4 and this is actually a subject of discussion.

5 So that's one of the points I'd like to
6 address today, but, actually, we are inching towards
7 actually some more of the NFT platforms in this
8 particular - (technical interference) trend and any
9 redress for NFT producers and owners is the reason to
10 introduce proposals for an EU regulation on marketed
11 crypto assets, and while the current regulation does
12 not specifically cover NFTs, which may be part of a
13 future dedicated law, legal uncertainties remain of a
14 large collection of or series of NFTs issued, which
15 could potentially fall under this text.

16 And if that's so, NFTs choosing large batch
17 may be considered fungible, in which case they will
18 receive the same treatment as any other
19 cryptocurrencies, which means that EU entities wishing
20 to put an NFT collection or even a fractional NFT up
21 for sale will fall under the umbrella of crypto asset
22 service providers and will need to receive express
23 authorization from the EU before offering up that
24 service to the public. So this is, of course, an
25 interesting legislative process ongoing, but we expect

1 it to go to Parliament in April this year, so these
2 are the points I'd like to address today. Thank you.

3 MR. WELKOWITZ: Thank you.

4 Next, Kayvan Ghafferi.

5 MR. GHAFFERI: Hi, everyone. My name is
6 Kayvan Ghafferi. I'm general counsel of MakersPlace,
7 a curated NFT marketplace for digital art.
8 MakersPlace was launched in 2018, and it utilizes
9 block chain technology to facilitate the sale of
10 authentic original digital artwork and sharing rarity
11 and ownership for both creators and collectors. In
12 addition to some of our peers on this call,
13 MakersPlace has helped kind of catapult digital art
14 and NFTs on the global stage with the historic sale of
15 Beeple's "Everydays: The First 5000 Days" for \$69.3
16 million in partnership with Christie's Auction House
17 in March of 2021.

18 Our mission is simple: to enable a vibrant
19 future for digital creativity. There are a variety of
20 copyright-related issues in the NFT space that are
21 important to consider, and I applaud the Copyright
22 Office and those who are participating on this panel
23 for taking steps to learn more about this space and
24 technology, but like my peers before me, I come to you
25 as an NFT attorney, an art collector, and a supporter

1 of all creators.

2 I believe NFTs can indeed unlock incredible
3 advancements in rights management and remove
4 roadblocks from creators around the world to sell
5 their work on a global stage, and I firmly believe
6 that any discussion will require education on what
7 aspect of the NFT are we discussing. Is it the smart
8 contract? The underlying visual asset? What protocol
9 and how is that protocol being implicated, and who is
10 responsible for any of these issues? Is it the artist
11 minting the NFT? Is it the marketplace or protocol
12 that's providing a service to the artist to mint the
13 NFT, or is it the collector or someone else? We have
14 to start thinking about these issues in these buckets
15 in order to make informed decisions on how to really
16 think about copyright issues or IP issues more broadly
17 in the NFT space, and thank you.

18 MR. WELKOWITZ: Thank you.

19 Next, we have Dan Schmerin.

20 MR. SCHMERIN: Thanks. I'm Dan Schmerin,
21 co-founder of Metaversal. To achieve our mission of
22 building the world's most impactful community in Web3,
23 we found and fund Web3 native intellectual property.
24 Web3 is all about community. It's also enabling
25 shared decentralized ownership in ways that were not

1 feasible in years past. There's really three points
2 that I want to highlight.

3 First, the need for simplicity and greater
4 ease of use. Many of these panels are dominated by
5 attorneys, they're not dominated by independent
6 creators, and so the question before us is whether,
7 with your leadership, we can take the existing
8 framework and adapt 21st century improvements to
9 streamline and simplify various provisions so they
10 actually help rather than hinder innovation,
11 community-building, and decentralized ownership.

12 And the answer isn't just greater education
13 for the masses to understand a very complex system of
14 copyright and trademark protection that's been cobbled
15 together over the decades. This is an opportunity to
16 fundamentally rethink how creators are best served and
17 whether traditional copyright protections are actually
18 protecting the people, those who don't necessarily
19 have the resources that legacy corporations and large
20 IP or content owners may enjoy.

21 Second point is about the need for growing
22 collaboration, and the CCO and Creative Commons
23 license is a perfect example of this trend. Some of
24 you have already touched on this, that the future not
25 only lies with independent creators but really lies

1 with the communities that form around them. Said
2 differently, community is the currency of power. We
3 have an affinity for CCO because it jump-starts
4 nameability by actively, not just passively, inviting
5 the creation of derivative works, and I think we can
6 all acknowledge that there is a fundamental shift
7 taking place around how IP is being developed. It's
8 less about me as an individual and more about the
9 presentation of an idea or some initial content that
10 forms the basis for something greater altogether.

11 And the final piece is around continuing to
12 foster innovation. I'll highlight some of the time
13 that we've spent building a media 3 license for a
14 project which is soon to be released called Omega
15 Runner. The reason I highlight that is that our team
16 has gone to great lengths to develop an innovative
17 license associated with this project that we believe
18 is more robust than most of the licenses in this
19 space.

20 Its purpose, to be clear, is not simply to
21 gate-keep. It is really designed to ensure that
22 holders understand exactly what they are licensed to
23 use, and if we ever want to integrate their work into
24 our main storyline, we would license it from them.
25 Think about that. It keeps their work safe and we

1 believe ultimately should become best practice across
2 the NFT ecosystem. I'm happy to dive into that
3 further as we go on. Thanks.

4 MR. WELKOWITZ: Thank you.

5 Next, Josh Hurvitz, and, Josh, if you have
6 the ability to turn on your camera, that would be
7 helpful.

8 MR. HURVITZ: David, thanks so much for
9 recognizing me. I'm here on behalf of an organization
10 that has another speaker, so feel free to pass me
11 over.

12 MR. WELKOWITZ: Oh, okay. Well, that's
13 fine. Then we'll move on to Gina Moon.

14 MS. MOON: Perfect timing right when I was
15 starting to cough, but I'm Gina Moon. I'm the general
16 counsel of OpenSea, one of the leading NFT explorers
17 and Web3 marketplaces. Thank you for having us here.
18 We are very happy to be sharing some of the
19 opportunities we see in the space with the copyright
20 regime in NFTs. At OpenSea, we've seen NFTs enable
21 artists and creators to better connect with their fans
22 and supporters, and we've also seen the potential of
23 NFTs to modernize everything from ticket sales to
24 tracking of DMV vehicle registrations.

25 But we also recognize that the promise of

1 NFTs won't be fully realized or durable if existing
2 NFT enthusiasts or new entrants to the space can't
3 tell the difference between authentic items or
4 fraudulent items, so that's why we've invested very
5 heavily in building out our operations and systems to
6 not only manage the DMCA process from IP rights-
7 holders but also to proactively combat copy mints and
8 fakes in this space, and so, while the DMCA process
9 has been very key for a platform like OpenSea and our
10 ability to help rights-holders protect their IP, the
11 transparent immutable nature of the blockchain has
12 definitely created an opportunity for more innovation
13 in IP management and also buyer empowerment, which a
14 lot of the speakers before have mentioned.

15 So, for example, not only does a blockchain
16 provide sort of a content ID system that isn't tied to
17 just one proprietary platform for rights-holders, it
18 also provides access and information for buyers so
19 they themselves can make informed decisions regarding
20 authenticity and provenance of NFTs they'd like to
21 own. As another example, NFT metadata provides a
22 really interesting surface area that can be used to
23 not only standardize IP licenses but also make sure
24 there's more clarity in what rights someone might or
25 might not be receiving when they're purchasing a

1 particular NFT.

2 So very happy to be here today and
3 definitely love to help the Copyright Office in any
4 way we can, as well as have conversations with
5 panelists on how we can help develop new ideas, how we
6 can leverage NFTs to tackle some of these age-old IP
7 challenges and also encourage more democratization of
8 information available through blockchain technology.
9 Thank you.

10 MR. WELKOWITZ: Thank you.

11 Next, Cesar Fishman.

12 MR. FISHMAN: Hi, everyone. Great to see
13 you all. I'll try to not be repetitive of what many
14 of you have already said that I fully agree with. I'm
15 the head of business affairs for Pex. We're a content
16 identification and content management company. Since
17 we were founded in 2014, we've seen incredible growth
18 in the virtual creator economy, both which has come
19 with a lot of good and some bad.

20 I think that there in the world of NFTs and
21 NFT marketplaces there are big opportunities to unlock
22 incredible value, which is, you know, many of the
23 things that have already been talked about during
24 these introductions, but, you know, while the scale of
25 the current big NFT marketplaces is staggering,

1 there's tens of thousands of unique sellers
2 representing many tens of millions of dollars in
3 transactions monthly, and, obviously, that's also come
4 with massive spam and fraud and copyright infringement
5 which both affects obviously buyers who are spending
6 considerable sums sometimes on NFTs but also the
7 trustworthiness of platforms or marketplaces.

8 At Pex, we've heard from a number of NFT
9 marketplaces about how our technology can help ensure
10 that an NFT being sold or traded on their platform is
11 the real thing. Obviously, there's a huge incentive
12 for platforms to make sure that the real thing gets
13 traded on their networks, and, really, the biggest
14 opportunity that we see is one of aligned interests
15 between these marketplaces who need to ensure
16 consumers that they can deliver uniqueness, which is
17 sought after in an NFT, and the rights-holders who
18 have a meaningful track record with voluntary
19 initiatives that curb infringement, so on and so
20 forth. So I'll pass it on to the next person, and I'm
21 excited to dive into these topics and into this
22 discussion. Thanks.

23 MR. WELKOWITZ: Thank you.

24 And, finally, Susan Chertkof.

25 MS. CHERTKOF: Hi, thank you. On behalf of

1 the RIAA, we thank the Copyright Office and the U.S.
2 Patent and Trademark Office for their work on this
3 study. The RIAA is the trade organization that
4 supports and promotes the creative and commercial
5 vitality of music labels in the United States. The
6 music industry invests in, uses, and drives emerging
7 technologies, such as NFT-enabled projects that help
8 fans discover and engage with music and the artist
9 behind that music. NFTs present new opportunities
10 that can benefit everyone, including recording
11 artists, labels, and music fans. For example, as
12 already mentioned, they provide new revenue streams
13 for music creators and provide fan-driven digital
14 collectibles and fan loyalty experiences.

15 However, NFTs, like other emerging
16 technologies, pose a number of IP challenges. These
17 include education and communication challenges. The
18 education challenges have been talked about a lot in
19 the prior panels. NFT sellers and marketplaces must
20 ensure that they know and communicate to buyers
21 adequate information about which IP rights are
22 conveyed and which are reserved when offering NFTs and
23 any associated digital assets.

24 There are rights acquisition challenges.
25 Sellers must ensure that they acquire all IP rights

1 necessary to sell and market the assets associated
2 with an NFT. In the music space, that includes
3 licenses for sound recordings and underlying musical
4 compositions and any attendant work. If there are
5 references to the recording artist, trademark
6 authorizations and publicity rights may also be
7 necessary.

8 Last but not least, there's enforcement
9 challenges, which is the subject of this panel. NFT
10 sellers have infringed copyrights in our members'
11 sound recordings and cover art. They've infringed the
12 trademarks in band names and logos and made
13 unauthorized use of the names and likenesses of major
14 label recording artists. Some of the specific
15 enforcement challenges include the following: NFT
16 ecosystems are both decentralized and
17 multijurisdictional. It is difficult to identify an
18 NFT seller because their identity is often shielded.
19 The NFT and the associated digital asset are
20 frequently stored separately. Many NFT platforms do
21 not offer adequate tools for rights-holders to
22 identify and notice infringements at scale, and even
23 when platforms do respond to takedown notices, the
24 takedown is typically limited to the NFT, not the
25 underlying digital asset, and like in other online

1 settings, takedown rarely means stay down.

2 To address these concerns, we recommend that
3 NFT marketplaces implement the following voluntary
4 practices: Implement reasonable know-your-customer
5 diligence, including disclosure of the seller; use
6 effective content recognition solutions to proactively
7 identify and take mitigating action against
8 potentially infringing audio or audiovisual-based
9 NFTs; and develop and adopt notice and takedown
10 procedures for NFTs associated with infringing digital
11 assets, such as trusted notifier policies, the ability
12 to accept notices at scale, and practices designed so
13 that repeat infringers cannot offer NFTs under a
14 different account.

15 In spite of all these challenges, we do not
16 see a present need for changes in copyright law that
17 are unique to NFTs. We do, however, reiterate the
18 legal deficiencies that we have identified previously
19 regarding online infringement and the DMCA. Thank
20 you.

21 MR. WELKOWITZ: Thank you, and thank all of
22 you for introducing yourselves. As we move to the
23 questions, I just want to remind you to please use the
24 Raise Hand feature so that we can recognize you when
25 you'd like to speak. We'll start with the first

1 question. Are there any notable IP management
2 opportunities or challenges uniquely associated with
3 NFTs, in particular, in the copyright space? Sarah?
4 Sarah Odenkirk.

5 MS. ODENKIRK: Thank you. So I have two
6 points to make here, one regarding rights management
7 and the other regarding identity and privacy concerns,
8 and as a number of people both in this panel and in
9 previous panels have already talked about, there is a
10 tremendous need to clarify what rights travel with
11 ownership versus what rights are contractually
12 granted, and this must be addressed from both a
13 management and an enforcement perspective.

14 Some of this comes with consumer education,
15 which we've talked about a lot already, and some of
16 this comes with clearer language within the copyright
17 law, and then, with regard to NFTs, we have this
18 unique ability to create a clear set of rights that
19 travel with the NFT itself by associating specific
20 articulations to the NFT. At some point, the
21 technology will evolve to allow for more of this to
22 happen fully on chain. That's not really my realm,
23 but however this is standardized, it's probably best
24 handled at least in part through marketplace players
25 in conjunction with the Copyright Office providing

1 some additional guidance, if not clarification, within
2 the law itself.

3 The second issue that I just want to touch
4 on briefly has to do with identity and privacy
5 concerns. Issues of anonymity and pseudonymity are
6 certainly problematic in terms of enforcement in the
7 NFT space, but they offer an opportunity to revisit
8 this issue both from a traditional registration
9 standpoint as well as within the Web3 ecosystem.
10 Doing so will certainly help balance First Amendment
11 and privacy issues that are critical considerations in
12 the NFT space as well, and one tech solution that
13 might offer some opportunities could be the tokenizing
14 of identities. There are already a number of
15 businesses within the space that are providing this
16 type of service, and I think taking a look at these
17 mechanisms might be very helpful.

18 Establishing a standard method for
19 controlling access to true identities through
20 tokenized identities in appropriate circumstances,
21 probably subject to court order, could prove much more
22 efficient than taking various platforms, publishers,
23 or manufacturers to court for the sole purpose of
24 unmasking an infringer's identify. This could also
25 change the dynamic between rights-holders and

1 distribution platforms of any sort where the
2 distribution platforms are no longer viewed as an
3 obstacle between the rights-holders and their ability
4 to seek justice.

5 This is not to say that distribution
6 platforms won't still potentially be liable for ways
7 in which they contribute to infringement, but it would
8 eliminate one substantial obstacle in pursuing
9 litigation.

10 MR. WELKOWITZ: Thank you.

11 Ed Lee?

12 MR. LEE: Yes, I'm going to just focus on
13 the opportunity, and Dan has already mentioned a part
14 of this thread in terms of collaboration. I have
15 conducted an empirical study of the top 25 NFT
16 projects. I'll be posting a pre-print draft shortly.
17 The substantial majority of the top 25 NFT projects
18 have adopted a license that grants commercial rights
19 to the buyers of the NFTs. Two of them adopt the CCO
20 license that Dan was referring to, and that signals
21 how these so-called Web3 startups are viewing the NFT
22 as a way to engage with their owners of the NFTs in a
23 community and in collaboration.

24 And I characterize this as decentralized
25 collaboration. By owning the NFT, you are granted a

1 commercial license to make derivative works of let's
2 say a Doodles character. They have a limited
3 commercial license for their project, so that is a
4 clear opportunity that the leading startups are
5 adopting, and, you know, we'll have to see how it pans
6 out, but I think it's an exciting innovative approach.

7 MR. WELKOWITZ: Thank you.

8 All right. Althea Erickson?

9 MS. ERICKSON: Yeah, I just want to
10 reiterate, I think, some of what Dan was saying around
11 how, you know, most of the folks that we represent are
12 not IP lawyers or representatives of, you know, trade
13 associations. Our groups are independent artists, and
14 they face really high barriers to informed entry into
15 the NFT markets and opportunities on the blockchain to
16 avoid being scammed, experiencing flawed smart
17 contracts, misunderstandings about their IP rights or
18 ownerships or other pitfalls.

19 And I think, in our experience, creators
20 really face a pretty steep learning curve to
21 understanding the technology that's behind NFTs and
22 often lack access to reliable support from those who
23 do, especially in BIPOC and other marginalized
24 communities, so we see a big need at the beginning
25 from a management perspective for technical assistance

1 providers to access, like, templates and roadmaps,
2 legal advice, I think, more consistent and clearer
3 tools in order to ease entry into the technology
4 itself.

5 I think, secondly, we see a lot of creatives
6 struggling to identify NFT platforms that align with
7 their priorities for managing their own intellectual
8 property. So most creatives, I think, are drawn to
9 NFTs, as we've talked about a lot, as a means for
10 greater self-determination both in terms of economic
11 opportunities and control over the channels of viewing
12 and interacting with their artwork, but we see that
13 terms of service for NFT platforms vary widely and
14 creatives are choosing platforms based on a bunch of
15 different factors, right, cost, user basis, collector
16 basis, license terms, smart contract capabilities, but
17 each platform really binds creatives to different
18 license terms and conditions that potentially apply in
19 perpetuity to the digital assets that are tied to an
20 NFT minted on their platform, and that creates
21 challenges.

22 We think really given the high stakes tied
23 to these decisions that policymakers might consider
24 requiring marketplaces to make clear and transparent
25 disclosures regarding the various factors that

1 creatives are considering when choosing a platform,
2 also supporting the creation of a set of standard
3 license agreements, and I know that came up a lot in
4 the last panel discussion, or even setting minimum
5 required standards that are really focused on
6 protecting creative rights. Thanks.

7 MR. WELKOWITZ: Thank you.

8 Emilio Cazares?

9 MR. CAZARES: Yes, thank you. Briefly on
10 the IP management possibilities. Now, obviously, NFT
11 technology allows there to be pretty clear mapping
12 between ownership and assets in terms of there's a
13 token ID that links a referenceable asset and it has
14 an identifiable owner whether or not that owner is
15 anonymous or not, but, clearly, there's an advantage
16 to starting to get in the practice at least from a
17 corporate perspective in indexing IP on a distributed
18 ledger like Ethereum to the extent that you want the
19 outside world to understand the licensing activity
20 around your own portfolio.

21 So, like, in the traditional world of paper-
22 based licensing, there could be a lot of unknown value
23 that hides between the off-chain world whereas, in an
24 on-chain environment, to the extent that standards can
25 develop that support protocol-enabled forms of

1 licensing, the outside world, who could be
2 speculators, who could be investors, who could be
3 shareholders in a company, can have greater access to
4 data surrounding the engagement with the underlying
5 IP, which I think changes the game in terms of
6 understanding how to value intellectual property.

7 In the NFT space currently, you see a
8 remarkable trend towards artist tendencies to over-
9 include their rights, in my opinion, where they attach
10 commercial rights to things, and then you just kind of
11 have these lofty rights that exist in the world, but
12 there's no real way of understanding the feedback of,
13 like, how those rights were used and how those rights
14 actually map onto the artist's intent around granting
15 that initial license.

16 So the real opportunity here which , I
17 think, is a combination of clever lawyering amongst
18 artists and communities to create sensible licensing
19 arrangements but also standardization in how to take
20 specific codified terms that are embedded into NFT
21 metadata and understanding how to exhaust those rights
22 in a way that creates a state change in the blockchain
23 so that the world can understand and see that there's
24 a feedback mechanism between the license itself and
25 the licensing activity, which I think will not only do

1 wonders in terms of discovery and understanding which
2 content is the best content depending on who you are,
3 but it also, I think, has a radical potential to
4 create new strategies around IP monetization, IP
5 acquisition, IP valuation.

6 Especially, and this is kind of like an end
7 state where I imagine tribunals and courts and
8 jurisdictions around the world who can participate in
9 attesting to the ownership of IP, so, for example, if
10 the Copyright Office could support some type of
11 mapping between registrations and on-chain assets.
12 Once you begin to see the governments actually play a
13 role in identifying or authenticating IP or, for
14 example, in the case of patents, identifying, you
15 know, when a patent has received a judgment against it
16 that renders it invalid, these types of state changes
17 eventually can act as data inputs that inform the
18 quality or title of that IP.

19 So, for example, when a company's wanting to
20 sell an entire portfolio, that is a transaction that,
21 you know, could be a few clicks of a button rather
22 than having to hire, you know, a hundred attorneys to
23 do corporate due diligence to evaluate the state of a
24 given portfolio. So just to conclude that point, I
25 think there's a lot of potential in just the

1 management of intellectual property and understanding
2 its use in the real world, but it does require a big
3 standardization effort amongst IP holders and
4 particularly I think marketplaces and creators in the
5 NFT space now.

6 MR. WELKOWITZ: Thank you.

7 Susan Chertkof?

8 MS. CHERTKOF: Thank you. So, on the
9 challenges side, we just wanted to highlight some
10 questions about whether smart contracts are actually
11 robust enough to deal with all the different rights
12 issues that need to be addressed in any sort of
13 copyright licensing context. There's territorial
14 issues. In the music space, you have sometimes
15 multiple owners that need to be addressed. There's
16 different rights that may or may not be licensed or
17 reserved. There's termination issues. And so we just
18 question at least at present whether a smart contract
19 can really cover all those distinct issues.

20 MR. WELKOWITZ: Thank you.

21 Gina Moon?

22 MS. MOON: Yeah, I think to that point, the
23 way the technology is currently, it's in a nascent
24 stage where this is why we want to see more
25 standardization in terms of metadata information

1 that's shared is, in the short term, people could
2 leverage information you put in the metadata. It
3 would be kind of simple and easy to understand, sort
4 of like a nutrition label of, like, what rights or
5 what restrictions there might be with a particular
6 NFT, and that standardization could be leveraged by
7 marketplaces like OpenSea, by rights-holders, and also
8 understood by users potentially.

9 Separately one opportunity I'm going to
10 state, it's very obvious to everyone on the panel is
11 just the NFTs provide a way that we have a
12 pseudonymous but persistent identification system for
13 infringing content, so one thing at OpenSea is we'll
14 receive a DMCA request, you know, the rights-holder
15 has gone to the effort to put it together. We go to
16 the effort to identify sort of the token ID where that
17 item is.

18 There definitely could be more collaboration
19 across industry, across this ecosystem so that we
20 could leverage the fact that there is this sort of
21 unified ID system because, currently, my understanding
22 is a lot of rights-holders have to go to different
23 platforms one by one when that is something that was
24 very required in Web2 because there wasn't this
25 identification system. Now, on Web3, there's

1 definitely work, I think, that the Copyright Office
2 and the industry can do together to make it a little
3 bit more efficient once someone does the work to
4 identify an infringing piece of work that needs to
5 come down.

6 MR. WELKOWITZ: Thank you.

7 Cesar Fishman?

8 MR. FISHMAN: Thanks. Yeah, I wanted to
9 respond quickly to, I guess, Gina's comments, then
10 Emilio's comments. I think that, you know, there
11 is -- you know, certainly, this is a nascent
12 technology, but there are certainly many legacy
13 technologies that could be used and leveraged to make
14 sure that the uniqueness of an NFT of a person who's
15 using OpenSea or any other marketplace can be certain
16 that what they're buying is unique and actual.

17 I know that there's, you know, these
18 anonymous identifiers for the NFT itself, but, you
19 know, you can quite easily mint various NFTs that all
20 represent the same piece of art, right, and each one
21 of those minted NFTs would have a different
22 identifier, and a legacy technology like
23 fingerprinting or crawling or any of these things
24 could help mitigate that across all of these
25 platforms.

1 So even though, yes, it is a nascent
2 technology and then eventually, as time progresses,
3 maybe this can be done on chain in different ways, you
4 know, I think that there are voluntary initiatives
5 that many marketplaces can take to make sure that
6 there isn't a misrepresentation, not that OpenSea or
7 any other marketplace is unwilling or doesn't want to
8 do these things, but more so that, you know, it can be
9 done and it can actually be done with technology
10 that's existed for at least a decade.

11 So, you know, there is a lot to learn by
12 these nascent technologies of, you know, what has been
13 done past across many other platforms on how to keep
14 IP protected, not that, you know, it's ever done
15 perfectly well or to the happiness of any rights-
16 holder, but, you know, quite well enough where it
17 would make a difference, so anyway, yeah.

18 MR. WELKOWITZ: Thank you.

19 Dan Schmerin?

20 MR. SCHMERIN: Just two points to follow up.
21 So first, I like Gina's analogy to nutrition labels.
22 We talk internally about cigarette warning labels,
23 right, that it should be clear and robust that buyers
24 are informed in easy eighth-grade-style verbiage as
25 opposed to, you know, beset by legalese that even five

1 lawyers in a single room can't agree on what the
2 meaning is and it has to be adjudicated in courts.
3 That is sub-optimal.

4 And so I come back to the importance of us
5 recognizing that this is a generational shift now
6 bringing individuals to the fore as opposed to
7 corporations, and so we need to cater to that level of
8 understanding and make this process as seamless as it
9 can be. So I applaud initiatives like the one we saw
10 just a few months ago from a16z around there can't be
11 evil licenses. They aren't perfect, but it is a
12 demonstration of what we heard earlier today, the need
13 for greater standardization and to create a simple
14 framework that everyone can then put their heads
15 around as opposed to greater and greater
16 customization.

17 MR. WELKOWITZ: Thanks.

18 Kayvan Ghafferi?

19 MR. GHAFFERI: Thank you, and this is more
20 comments or follow-ups on some of the comments made
21 previously from others on this panel, and I think one
22 overarching theme that's important to recognize with
23 these conversations is how new and nascent this
24 technology is and how, you know, the industry's
25 maturing at a pretty rapid rate and trying to

1 understand, digest, marinate all these new innovations
2 and navigate, you know.

3 But, to respond to some comments regarding,
4 like, territorial issues and whether metadata can or
5 should be updated, I think one thing that's important
6 to recognize is, you know, with a smart contract,
7 there are capabilities at present where different
8 rights-holders or different creators can actually be
9 listed as the creator of the particular NFT. And so,
10 if you had, for example, a music NFT, you could
11 actually list out each of those individuals on the NFT
12 and allocate their royalty stream based on any pre-
13 existing licensing agreements, and that's something
14 that's pretty special about the smart contract
15 technology.

16 Moreover, in terms of monitoring or managing
17 for purposes of, like, IP monitoring, one beautiful
18 thing about, you know, blockchains is that they are
19 public ledgers, and they are easily scanable and
20 analyzable in order to understand who the purchaser is
21 even if there's an anonymous wallet at the front.

22 You know, RIAA is very familiar with certain
23 technologies like Markmonitor, which helps them with
24 piracy and other aspects of their ecosystem, and I
25 believe that there are similar companies like

1 Chainalysis who do an incredible amount of work
2 identifying wallets and trying to identify the
3 identities behind those wallets, and so I think, in
4 many ways, while this is a nascent technology, the
5 publicness of the information contained on blockchains
6 provides a unique opportunity for these third-party
7 companies to help with IP management in similar ways.

8 And to, you know, Ms. Moon's point about
9 more collaboration between marketplaces, I fully agree
10 with that. I think, given the nascent industry, it is
11 important to have collaboration, but one thing I would
12 just caution the industry as a whole is, you know, we
13 can't just label everything an infringement because a
14 copyright holder claimed that that is an infringement
15 and therefore tag it everywhere, right? You know, the
16 whole DMCA process, which is a pretty robust process,
17 allows and affords the creator of the allegedly
18 copyrighted work to challenge and file a DMCA counter
19 notice, and I think that process needs to play out
20 before it becomes an ecosystem-wide flagging of a
21 particular NFT for potential infringement purposes.

22 And so those are just things that I kind of
23 wanted to respond to on the panel. Thank you.

24 MR. WELKOWITZ: Thank you.

25 And, Gina Moon, I'm going to give you the

1 last word on this question.

2 MS. MOON: I thought you were going to be
3 like you don't get to go another time, so I'm going to
4 skip you, which would have been fair, but the one
5 other thing I would say is we've noticed from the
6 platform perspective is there's sort of two worlds
7 that you're dealing with when you're dealing with
8 rights-holder management. One are the people that are
9 on chain already, so, like, very well-known Web3
10 brands that are on chain that have their NFTs on chain
11 in a way from an IP protection standpoint when you
12 start thinking about fingerprinting or starting to
13 think about trying to detect duplicates and likely
14 counterfeits.

15 That's a much easier world in a way to work
16 with because they're on chain and it's easier for fans
17 and supporters to identify what's authentic by looking
18 at the provenance that's provided on the blockchain.
19 It's a different sort of regime when you're dealing
20 with rights-holders that may not be on chain yet,
21 right, so they have to send you sort of reference sets
22 or information separately from the blockchain for you
23 as a platform to kind of try to do proactive scanning
24 and finding if there's other duplicates that might be
25 counterfeits.

1 It's kind of an obvious point, but that's
2 just something we've definitely seen at OpenSea, but a
3 lot of times when we're talking to rights-holders, one
4 of our answers is, if you actually want to make sure
5 people know what's authentic and what is from your
6 brand or your label or, you know, your work, being on
7 blockchain is actually a good way to do it because you
8 can be the definitive source of that item, and you
9 could show, like, you know, Gina's NFTs, I'm actually
10 on chain. People know that that's an authentic
11 address that belongs to that collection, and that can
12 do a lot for user understanding of, like, what's
13 authentic or not. It becomes more challenging when
14 counterfeits are on the blockchain, but the rights-
15 holder isn't there yet.

16 MR. WELKOWITZ: Thank you.

17 I'm going to turn it over to Andrew Moore
18 now for the next question.

19 MR. MOORE: Hi, everyone, and thank you. So
20 our next question is a two-part question, and I know
21 some of you spoke already on the copyright enforcement
22 challenges in your opening statements, but to the
23 extent that you haven't spoke on that or have anything
24 responsive to the other parts of the question, we'd
25 love to hear that. So the next question is, what

1 copyright enforcement challenges or opportunities are
2 associated with the rise of NFTs? And are existing
3 counterfeit remedies appropriate or adequate for
4 addressing concerns related to NFTs? Mr. Burgess?

5 MR. BURGESS: One of the biggest challenges
6 is the separation of the NFT itself and the digital
7 asset that can infringe the copyright of one of our
8 members, and so, if an NFT listing is taken down, I
9 know this is probably obvious to everyone on the
10 panel, but it doesn't remove the asset itself, and
11 once an asset or access to it's sold, you know, we've
12 got this other problem, which is that there's no
13 readily available mechanism to ensure that the seller
14 of an NFT relinquishes access to the digital asset.

15 And, you know, this is an area, you know,
16 where we really need some education, as many people
17 have said on the various different panels. I mean,
18 you know, the true identity of the seller is another
19 issue, and, you know, we think there are real
20 enforcement opportunities in the NFT space because the
21 end user of an NFT marketplace, the buyers, have the
22 same incentives as the rights-holders to make sure the
23 NFTs they buy are unique, but, by definition,
24 infringing NFTs cannot be unique.

25 So the major NFT marketplaces should follow

1 the lead of other platforms and take steps like
2 developing trusted notifier programs, building out
3 mechanisms for rights-holders to search marketplaces
4 at scale, and technologies that work pre-upload or
5 pre-listing to cut off NFTs tied to works identified
6 by rights-holders.

7 MR. MOORE: Thank you.

8 Mr. Fishman?

9 MR. FISHMAN: Yeah. So, you know, we've
10 advocated for this in the past and we've said that
11 generally the DMCA needs to be amended and to put
12 teeth into section 512(I) of the DMCA so that
13 platform's liability is tethered -- to tether
14 platform's liability shield in adopting, facilitating,
15 or at least not hindering the use of standard
16 technical measures or technical measures generally. I
17 think these need to include web crawling and
18 fingerprinting technology.

19 I also think that the current system of
20 sending notices in the NFT marketplace space is
21 probably even less effective than it is regarding
22 other types of platforms for a few reasons. The
23 marketplaces that do respond to DMCA notices, they do
24 so only by taking down a listing that references an
25 infringing work, and then there's no proactive steps

1 taken to prevent another listing referencing the same
2 infringing work or even the same infringing digital
3 file.

4 Second, at this stage, there really isn't a
5 Facebook, YouTube, or TikTok of the NFT marketplace
6 world, so market shares and the consumer value
7 propositions of each one are still evolving, so a bad-
8 acting NFT minter or lister can simply move, you know,
9 from outlet to outlet, which, you know, kind of
10 requires there to be broad cooperation between at
11 least all of the major players as they start emerging.

12 And then a third reason is that once an NFT
13 is sold and access to the underlying infringing
14 digital asset changes hands, there is insufficient
15 protections in place to prevent the new owner of the
16 NFT from making use of the digital asset in another
17 infringing context, so this all kind of like folds
18 into itself and multiplies.

19 You know, I was really interested listening
20 to the last panel, especially at the close, where I
21 think it was Professor Evans who mentioned, you know,
22 the capital asset value of NFTs and creating
23 generational wealth, and I love that, and I hope that
24 that does emerge, you know, from the technology, but I
25 think that in order to facilitate that for artists, in

1 order to facilitate that for creators, this needs to
2 be a world that is more closely monitored and
3 regulated and protected so that those artists can
4 benefit and not just get absolutely killed, you know,
5 the way that artists have been killed out for years
6 also.

7 MR. MOORE: Thank you.

8 Ms. Moon?

9 MS. MOON: Yeah, I think one of the points I
10 have for, like, pre-upload or discussions around that
11 is the way that not all marketplaces work, but in this
12 ecosystem, I think we all know, like, a lot of users
13 can just go interact directly and they deploy their
14 own smart contracts, and the NFTs as well as the
15 content associated with those NFTs through links is
16 deployed separately from any NFT marketplace.

17 So there is sort of a question on how you
18 would actually intervene in that way ahead of time
19 because there won't be a singular platform that you
20 would go to to say here's a reference set of
21 infringing material. Don't allow upload for any of
22 that material because there's many blockchains and the
23 blockchains are vast.

24 A lot of times, the way that we think about
25 it at OpenSea as well is not only are you doing a

1 traditional takedown procedure, but there's also, if
2 nobody sees it, which is sort of more of the Google
3 search approach as opposed to like a Facebook
4 approach, if nobody sees it at all, there is harm
5 still arguably that the content is up there, but no
6 one is actually looking at it.

7 So there's other kind of enforcement
8 mechanisms as well that I think you can do by sort of
9 making sure the authentic pieces are up at top like
10 Google search might do in this space that would be
11 interesting to work with and again thinking about how
12 you can go -- I think people are thinking about this
13 root issue of where the content is actually getting
14 uploaded to the blockchain or where it's being hosted
15 and whether there are sort of solutions to get at it
16 on that level as opposed to sort of downstream at a
17 marketplace level or an explorer level where they're
18 displaying content that's on the blockchain.

19 MR. MOORE: Thank you.

20 Mr. Cazares?

21 MR. CAZARES: Yes, echoing those points and,
22 obviously, we're all probably familiar with the fact
23 that, you know, there's redundancy in the way that
24 these assets are stored, and a platform doesn't
25 necessarily have any ability to prevent downstream

1 IPFS notes from emerging. In many ways, I think that
2 people, would-be enforcers or rights-holders, I think,
3 definitely need to be cautious in the approach of just
4 like let's take everything down. I mean, at
5 SuperRare, the DMCA complaints that I primarily deal
6 with are very -- let's just say from an infringer
7 perspective always like you don't really know.

8 It's a question mark. You know that you
9 have to comply with the DMCA, of course, and things
10 have to be taken down, but there's always that fair
11 use argument. There's always like a high quality
12 reason why this artist minted the content in the first
13 place, which obviously is a platform we're agnostic
14 to, but that being said, there's a lot of rights-
15 holders that are like overzealous in the willingness
16 to shut everything down, which I think runs against
17 the value proposition of NFTs in the first place in
18 terms of having a permanent referenceable set of IP.

19 So I would caution against any type of,
20 like, regulatory positioning that motivated rights-
21 holders to be able to expedite takedowns across the
22 whole ecosystem, and I think that generally, based on
23 my experience as a DMCA agent in this space, that the
24 takedown doesn't do anything. You know, like, it's a
25 cosmetic gesture to stay in formal compliance with the

1 DMCA, but at the very end, anyone familiar with the
2 protocol can move these assets and can still sell and
3 trade and transfer and sell them on another
4 marketplace, and a DMCA notice kind of just acts as a
5 warning, hey, sell your infringing asset now because
6 they're coming for you.

7 So there's kind of like this inconsistent
8 reality in what the DMCA is supposed to do and what it
9 actually results in in the NFT space, and it's awkward
10 and incongruent, and I would say that regulators ought
11 to consider disclosure regimes as preferable to
12 takedown regimes, so marketplaces like SuperRare, for
13 example, would perhaps not be required to take down
14 and restrict access to any IPFS notes and instead be
15 required to make disclosures about whether or not IP
16 infringement allegations have been made against a
17 particular piece and perhaps limit that piece's
18 ability to be transferred through a UI.

19 But dealing with the reality that if it's
20 truly like a non-custodial smart contract ecosystem is
21 that there wouldn't be anything that a platform could
22 do to actually restrict that transfer, so maybe a
23 disclosure regime is preferable to a takedown regime
24 just because a takedown regime, I think, in the end
25 state is just fighting with the physics of the

1 blockchain and it's going to result in high legal
2 costs and incongruent outcomes for both creators and
3 collectors and rights-holders.

4 MR. MOORE: Thank you.

5 Ms. Odenkirk?

6 MS. ODENKIRK: Just to tag on a little bit
7 to what Emilio was just saying, I think that it would
8 be helpful for the law to have a little bit more
9 guidance that doesn't require that we get to a
10 takedown regime and that there are some additional
11 guardrails there that make it clear, for instance, you
12 know, what rights transfer with the actual sale of the
13 NFT. So, for instance, in previous panels, a couple
14 of my colleagues have referenced Section 109 of the
15 copyright law, which addresses exceptions to the
16 exclusive right of display belonging to the copyright
17 owner.

18 The exceptions as they're currently written
19 fail to provide adequate guidance both on the
20 blockchain as well as, you know, within the internet
21 technology realm as well, and so clarifying the way in
22 which 109 principles apply to current technological
23 abilities to display and transmit content would be a
24 much-needed foundation onto which we could layer more
25 nuanced contractual agreements, so, for instance, this

1 could have a meaningful impact on the way in which
2 museums acquire or show NFT artwork or how collectors
3 manage their NFT collections before we even get to,
4 you know, the question of lawsuits.

5 Another issue would be, and this is, like, I
6 guess, jumping to some more procedural questions that
7 we have to deal with, is that there are challenges
8 that are not necessarily limited to copyright-related
9 actions that have to do with civil procedure
10 requirements, such as service of process, and this is
11 something that we also find to be somewhat challenging
12 in this space, again, referencing back to my earlier
13 comments about anonymity.

14 Service of process through wallets is
15 something that has been established as a legitimate
16 way of notifying defendants of pending actions, and
17 one of the earlier panelists mentioned something about
18 companies that are very competent in figuring out the
19 identities behind the wallets, but in the event that
20 that's something that cannot be easily tracked down,
21 there are these mechanisms that have been approved.
22 The problem is there that it's based on local rules of
23 civil procedure and not a federal standard, so it
24 might be worth re-examining some of the federal
25 procedures that would address alternative ways of

1 serving legal notices in cases where service is
2 otherwise challenging or impossible, but we do know
3 that there's a crypto wallet that's in use by the
4 target of legal action.

5 MR. MOORE: Thank you. And I do want to
6 note that we are running a little bit short on time,
7 so if we can keep our answers brief, that would be
8 appreciated. Mr. Schmerin, go next. Thank you.

9 MR. SCHMERIN: I would just say that, you
10 know, Section 504 of the Copyright Act is something
11 that ought to concern a lot of folks as they explore
12 the NFT ecosystem, this idea that the sale of an
13 infringing work, even if done by a completely innocent
14 actor who unknowingly violated somebody else's
15 copyright, makes that seller automatically liable for
16 actual damages that can range up to \$30,000.

17 It again brings back the question of what's
18 the practicality given the proliferation of digital
19 assets and these digital works of content, so trying
20 to apply an old rule set to something when we were
21 living in a world of relative scarcity to now a
22 digital ecosystem which is a world of abundance, and
23 does that still jive?

24 MR. MOORE: Thanks.

25 Ms. Erickson?

1 MS. ERICKSON: Yeah, I just wanted to sort
2 of reinforce the point I think that Sarah raised,
3 which is, when it comes to enforcing your rights, you
4 really need to manage them first and have means to do
5 that, and so I think that, you know, the ability to
6 affirmatively choose license standards and also make
7 sure those licenses are binding over downstream resale
8 of the works regardless of the marketplace is a
9 particular challenge that comes up over and over again
10 when we think about enforcement and also making sure
11 that both the initial and secondary buyers are aware
12 of and affirmatively agree to be bound by those terms.

13 And I know sometimes creatives put that
14 information in the metadata or in the description box,
15 but I think, over time, there's a lot of uncertainty
16 about whether that will hold up over time and that
17 then creates uncertainty for the creatives in terms of
18 enforcement. Thanks.

19 MR. MOORE: Thanks.

20 Ms. Chertkof?

21 MS. CHERTKOF: Thanks. I just wanted to
22 respond quickly to Emilio, who was pointing out, you
23 know, weaknesses with the notice and takedown system,
24 and, you know, everyone who's been in this space for
25 any length of time knows there's no silver bullet to

1 enforcement, but just because there's work-arounds or
2 no enforcement mechanism is perfect doesn't mean that
3 it's not worth trying to enforce or worth making some
4 sort of inroads against unauthorized uses. That said,
5 we do look forward to working with others in this
6 space as the space grows to find effective tools and
7 remedies to deal with infringement.

8 MR. MOORE: Thanks. I see we have two folks
9 up who already spoke I think on this question. We do
10 only have 10 minutes left in this panel, so I'm going
11 to skip ahead to the next question, and if we have
12 extra time, I can come back to you on this. Does that
13 work for you guys? All right. I'm going to pass it
14 back over to David.

15 MR. WELKOWITZ: Thanks, Andrew.

16 In the interest of time, I'm going to skip
17 over to the last question, which is what international
18 trends governing NFTs may be applicable to U.S.
19 copyright law? So, if anyone would like to comment on
20 that, please feel free. Professor Lee?

21 MR. LEE: Well, you know, I think, as the
22 markets and businesses develop, you know, the
23 aspiration of many is that NFTs become mainstream.
24 One of the countries where NFT interest is growing is
25 China. Even though crypto is not permitted, NFTs are.

1 They've already had a case in which an NFT marketplace
2 was held responsible for their user's copyright
3 infringement, so I think one issue that, you know,
4 arises is, to the extent that, you know, a marketplace
5 like OpenSea just to use them as an example becomes
6 international and the market expands, encompassing,
7 you know, the EU and parts of Asia, which ISP safe
8 harbor or rules, you know, should apply.

9 And I think that's, you know, potentially a
10 huge issue that is lurking out there, and I think
11 Jean-Marc was the one who was referring to the Article
12 17 of the EU DSM. I mean, if that applies, that would
13 be adding a whole set of other requirements for ISPs.
14 So I think that is one of the big lurking questions as
15 the market expands and becomes global is how would a
16 marketplace deal with that.

17 MR. WELKOWITZ: If I could just ask a
18 follow-up question, Lee, for those who may not be
19 familiar with the DSM, if you could just explain very
20 briefly Article 17?

21 MR. LEE: Well, I think this is probably
22 Jean-Marc's specialty. I don't know if I'm going to
23 defer to him or not, but --

24 MR. DELTORN: Sure. Sorry. I'm just trying
25 to raise my hand, right? Okay. That's cool. Thanks

1 a lot. Yeah, Article 17 is part of a broad range of
2 regulations, about the single market directive, and,
3 essentially, Article 17 subjects online content-
4 sharing service providers to a range of obligations
5 with regard to copyrighted works shared on their
6 platforms, so it means that in particular but not
7 exclusively the provision tries to ensure that
8 copyright-infringing content basically doesn't pop up
9 from the onset on the platform, and it means that, you
10 know, it forces platforms to ensure that they seek
11 authorization from the rights-holders for any upload
12 and puts, of course, a lot of constraints if they
13 don't so that they would be held liable for copyright
14 infringement, as was said before.

15 And I think just to come back to the
16 original question, what I sense from the EU, European
17 perspective, is that there is a strong push to put
18 more and more responsibility on platforms and at the
19 moment we are trying to find analogy essentially
20 between what has been done with this Article 17 when
21 there's plenty of limitations there, it's not exactly
22 easy to apply because, of course, there are exceptions
23 in Europe in particular to copyright and it's not easy
24 at all to automate these processes, but still there is
25 a tendency to trying to see if there were the

1 analogies between this Article 17 of the Digital
2 Single Market directive and whether it could apply to
3 the NFT via the sale of platforms.

4 It's tempting to consider, but there's
5 plenty of caveats in the too confusing practice, so
6 it's still an open question, and it's not clear yet at
7 least as far as I know whether a platform dedicated to
8 the minting and sale of virtual assets in terms of
9 NFTs would fall under the categories of the entities
10 targeted by the DSM directive.

11 That being said, there's sort of a global,
12 as I mentioned before, global push, so what we see is
13 even though we don't have any related case, though,
14 with the EU to support this particular interpretation
15 linking Article 17 of the DSM directive with the
16 responsibility of NFT platforms communicating
17 copyright protected works to the public.

18 This appears in line with a global EU trend
19 towards increased obligation on platforms, and what I
20 would like to say is that it is further highlighted in
21 the forthcoming EU Digital Service Act regulation
22 because that particular regulation requires platforms
23 at large to equip themselves with a series of
24 mechanisms enabling users to report legal content, and
25 there's an Article 14 to do so, as well as mechanism

1 for handling complaints regarding illegal content
2 already posted in this Article 17.

3 So I think that's where the EU regulation
4 stands, but there's a global motion, so I would expect
5 that in the forthcoming I would say dedicated law
6 regarding the regulation of NFTs we will see appearing
7 such type of constraints on certain platforms.

8 MR. WELKOWITZ: Thank you.

9 Sorry, Ms. Odenkirk, I didn't mean to cut
10 into your time, but now you're on.

11 MS. ODENKIRK: No, that's okay. What Jean-
12 Marc had to say was certainly much more informative
13 than what I have to say at this point, which is that,
14 you know, I do think that it's really important to pay
15 attention to what's happening internationally, but we
16 do have country-based laws or, you know, the EU
17 geographically -- otherwise geographically-based laws.
18 We have a global marketplace that's been developed
19 through NFTs and through the digital marketplace that
20 has to somehow reconcile with a lot of the things that
21 are happening in other countries, so as we are coming
22 up with ways to navigate that, we can look to other
23 countries and other systems to see what they've done.
24 Certainly, it's very helpful when there have been
25 successes but failures as well.

1 And I know that Sweden is currently deep in
2 exploring their ability to use blockchain for things
3 like property records as well as in financial
4 transactions, and I think that their reports on that
5 are supposed to be out in the next few months, so we
6 should have some more indication in terms of how that
7 experiment has gone for them, but then also thinking
8 about things like the GDPR and how that system has
9 developed and has really become something that we have
10 to consider when we're drafting documentation in the
11 United States as well.

12 And the problem there for where that
13 application is that it's a centralized system, and now
14 we're talking about decentralizing identity, and so
15 how do those things work together? And I will say too
16 you that on several projects that I've worked on we've
17 had to give a great deal of consideration to terms
18 within the terms of service on a platform because of
19 the concern that, you know, items may be purchased in
20 countries where, for instance, they might not
21 recognize the way that we want to resolve disputes or
22 it may be seen as overreaching in one jurisdiction and
23 not in another.

24 So taking a look at those international
25 issues is definitely a very complex challenge that we

1 all have when approaching this. The technology is
2 definitely complex as well and allows for
3 disseminating information to people and users all over
4 the world, so we are going to have to really face
5 these enforcement challenges and the lack of harmony
6 that currently exists within the international
7 context.

8 MR. WELKOWITZ: Thank you.

9 Cesar, I'm going to give you the last word
10 on this question and then turn it over to my
11 colleague, Andrew Moore.

12 MR. FISHMAN: Oh, boy. What an honor. So,
13 you know, really quickly, Jean-Marc's in-a-nutshell-
14 explanation of Article 17 was fantastic, so I greatly
15 appreciate it. I think that, you know, as he said in
16 his opening remarks, I think it's, you know, to be
17 determined to see if an NFT platform would fall under
18 the definition of an OCSSP, an Online Content Sharing
19 Service Provider. Did I get that right? I think so.

20 So my point is that, you know, Article 17 is
21 something that we at Pex have looked it pretty
22 extensively and developed products specifically to
23 help platforms navigate it. We're anxiously waiting
24 to see how courts begin to interpret it across the
25 European Union.

1 One of the things that I want to say is
2 that, you know, before we even got to the
3 international question, there were a few people on the
4 panel that talked about the need for a pre-upload sort
5 of review as NFTs kind of get minted and created and
6 put on these platforms.

7 As I understand it, you know, Article 17 has
8 kind of like a takedown, stay down sort of aspect to
9 it where pre-upload review would be pretty much
10 necessary for a platform to fully abide by it, so, you
11 know, while there might be arguments on both sides of
12 whether or not an NFT platform is an OCSSP, the talk
13 of pre-upload review as things get minted and
14 published kind of goes hand in hand with what I
15 understand to be the intent of the EU Parliament in
16 passing Article 17, that there is a review process
17 after a rights-holder has, you know, gone through the
18 steps to say, hey, this is my content, proven it's
19 their content and said I don't want it to appear on an
20 OCSSP.

21 So, you know, there is certainly a lot of
22 analog let's say in the dicta, right, behind one or
23 the other regardless of whether or not NFT platforms
24 are OCSSPs, and, you know, we'll find that out later,
25 but it's certainly something to explore in terms of

1 meeting those requirements, and I think, if NFT
2 marketplaces are exploring pre-upload review and
3 figuring out how that might work on their platforms to
4 ensure uniqueness and uphold the value of each one of
5 the NFTs that get traded on their platforms, you know,
6 they might consider not even getting to the question
7 of whether or not they are OCSSPs because, if they
8 have pre-upload review, they are de facto
9 participating under and abiding by Article 17. So I
10 will take Jean-Marc smiling and shaking his head up
11 and down as approval of what I've just said, and I'll
12 leave it there, so thanks.

13 MR. WELKOWITZ: Thank you.

14 I'm going to turn it over to my colleague,
15 Andrew Moore, for a last question.

16 MR. MOORE: I think we have about four
17 minutes left, right? And I'd ask Ms. Moon and Mr.
18 Cazares to hold their thoughts on the previous
19 question. If either of you still have anything you'd
20 like to add, please go ahead and do so now. Ms. Moon?

21 MS. MOON: Yeah. So mine was more on the
22 point that someone had made about acceptance of kind
23 of terms or licenses on the front end, so through a
24 marketplace, and one of the biggest takeaways I've had
25 in this space is that we really want to leverage the

1 technology and what it offers, so I do actually think
2 we're going to need to see a paradigm shift with
3 respect to, like, user acceptance of terms and
4 licenses to actually creating this expectation because
5 NFT metadata allows there to be a standardized place
6 where that will live.

7 And so, in a new world where you'd want to
8 be not beholden to any one platform, the whole concept
9 of decentralization, you'd like to be able to go
10 anywhere, you would actually want to have a world in
11 which it could be an enforceable license or set of
12 terms if it surfaced on the NFT, which would mean in
13 the metadata, you know, probably linked out to another
14 kind of hosting provider because, if you actually
15 require the marketplaces like OpenSea to have
16 enforceable, you know, click through terms, then
17 you'll live in a world where you're still beholden to
18 specific platforms.

19 So, really, in this whole space, I think a
20 lot of this conversation is about really capturing
21 what the technology can offer, and there are things
22 that it offers that we don't have available in Web2,
23 and so thinking about how that should change or the
24 paradigms of what we think about basic things like
25 terms and license acceptances, I think, is an

1 important conversation to have.

2 MR. MOORE: Thank you.

3 Mr. Cazares, do you want to close the
4 session out?

5 MR. CAZARES: Sure. Thank you for the
6 opportunity. Also echoing Ms. Moon's points on kind
7 of trying to translate the legal functions that we're
8 used to on-chain so that they're less platform-
9 dependent, but the thought I was holding myself
10 earlier on were relating to DMCA takedowns and
11 disputes generally. I just want to briefly highlight
12 that in the spirit of leveraging the technology, there
13 is a radical opportunity for new forms of dispute
14 resolution specifically with respect to intellectual
15 property infringement, so in the case of -- like, I'll
16 give a case of a fan art, for example.

17 It's like a lot of big brands waste a lot of
18 time and energy trying to censor the creative efforts
19 of people who obviously revere that brand or that
20 enterprise, and there's an unfortunate outcome where
21 everyone has to be, you know, swept out and taken
22 down, so to speak, but blockchain and smart contracts
23 allow for a way for effectively rights-holders to
24 attach liens on the assets as a result of a
25 settlement, so, for example, like, I could overnight

1 just turn all of my infringing fan artists into a new
2 outsourced way of content creation, only now the money
3 is coming directly in my account because of the
4 efforts of this community of fan artists.

5 And that's a way of trying to demonstrate
6 that the technology actually affords a new way to come
7 to efficient settlements as to the use of IP that
8 encourages sharing and openness around it rather than,
9 I guess, trying to come in and take everything down
10 and then try to, like, figure out an NFT strategy
11 after the fact. I think brands are well positioned to
12 try to embrace the content creators and to use the
13 technology to afford efficient settlement in
14 preference to traditional legal action complaints and
15 lawsuits and legal costs.

16 MR. WELKOWITZ: Thank you, and thank you all
17 for your comments. They were very helpful. We're
18 going to take a short break. We'll reconvene at 4:00
19 with a panel on reflections, followed by an open mic
20 session, so we'll reconvene here at this spot at 4:00.

21 (Whereupon, a brief recess was taken.)

22 MS. KARL: Thanks so much again for joining
23 us today. I'm Brandy Karl, Assistant General Counsel
24 in the U.S. Copyright Office. With me today is my
25 colleague, Ann Chaitovitz, Senior Copyright Attorney

1 in the Office of Policy and International Affairs at
2 the USPTO. We are looking forward to the reflections
3 and public input in this fourth session for today's
4 roundtable.

5 We do have a few Zoom housekeeping points
6 before we get started today. We are recording this
7 session. The recording will be available on the
8 Copyright Office's website on the NFT study page and
9 the USPTO's NFT study page will also direct you to
10 that site. The transcription function is activated in
11 Zoom. If you're a panelist for another panel but not
12 a panelist for this panel, please keep your camera
13 turned off and your mic on mute, and if the panelists
14 for this session can turn on their video.

15 We have informed the participants of the
16 formats of each session. This session will open 30
17 minutes of reflection time for the panelists where we
18 invite each one to give a brief introduction and to
19 share their thoughts on today's session and any other
20 insights related to copyright and NFTs. We request
21 that these reflections be limited to four minutes. As
22 time permits, we'll then open the floor for the
23 panelists to respond to one other's reflections. The
24 Offices will not be posing prepared questions.

25 Following the 30 minutes of panelist

1 reflection time, there will be 30 minutes of open
2 microphone time for the public, and panelists are
3 invited to remain present in the session during this
4 time to continue the conversation.

5 We will begin in the order as stated on the
6 agenda. Aarthi, would you like to begin?

7 MS. ANAND: Sure. Hi, I'm Aarthi, counsel
8 at Cahill Gordon, where I specialize in IP and head
9 the IP team. I've advised on substantial NFT
10 transactions both involving individual NFT sales and
11 purchases, as well as advising corporate clients
12 looking to set up NFT platforms, so I have been in the
13 weeds helping clients address the IP issues posed by
14 NFTs, and I have about 20 years of experience. I have
15 published extensively in copyright and NFTs, and
16 previously I was a Rhodes Scholar who studied law at
17 Oxford, NYU, and India. I wanted to take this
18 opportunity to thank the Office for setting up this
19 very insightful conversation on this very important
20 topic as well as for inviting us to join you.

21 What I wanted to talk about were essentially
22 three points. There's been lots of discussions in
23 prior sessions about smart contracts, licensing, and
24 the underlying technology, but what I wanted to do is
25 I wanted us to step back and look at the philosophical

1 question on, how do we approach copyright protection
2 for NFTs? Far more importantly, who would have the
3 right to mint NFTs?

4 For example, on January 20, 2009, President
5 Obama was sworn in. There is a photographer who
6 captures a moment of the inauguration that's published
7 in the newspaper. Fast-forward to 2023, who would
8 have the right to mint that NFT? Would it be
9 President Barack Obama because it involves his image,
10 or would it be the photographer who clicked the
11 picture, or would it be the publisher, or could you
12 and I, any third party, have the right to mint this
13 NFT?

14 And this is no longer an academic discussion
15 because we have this moment where Banksy was an
16 artist. He painted a picture. People bought the
17 picture, burned that picture, recorded the burning and
18 minted and sold the NFT. This begs the question,
19 would copyright countenance protection for an NFT if
20 it involved burning of or destruction of an underlying
21 work?

22 The second issue I wanted to bring up to us
23 is it's very important for us to clarify the copyright
24 protection for NFTs now because, if we fail to do so,
25 private parties will define it for us. In prior

1 sessions, there was extensive discussion on multiple
2 cases, such as Yuga Labs, but one issue that may have
3 receded to the background is post-Hermes sues Birkin
4 where parties were looking at both trademark and
5 copyright infringement and another counterparty
6 brought up the fair use defense. Parties are now like
7 in Yuga Labs choosing not to risk copyright
8 infringement because the concern then is that fair use
9 will be used as a defense, so instead the lawsuits are
10 involving only trademark infringement. Ergo, if we
11 fail to define the copyright protection for NFTs,
12 private parties will essentially define it for us, so
13 it's important for us to address this.

14 The third issue I wanted to bring up was the
15 ability to distinguish between when copyright would
16 protect NFTs for creative works and when NFTs are
17 being utilized purely as applications and so may not
18 be protectable under copyright law. To give an
19 example, in prior sessions, we discussed extensively
20 the music, art items are minted into NFTs, but NFTs
21 are also utilized for a number of applications. For
22 example, NFTs are utilized to track ownership and
23 transfer of title deeds in real estate and sneakers,
24 so it is important that when we're crafting a
25 copyright law that concerns NFTs, we should also

1 distinguish between when NFTs are utilized as
2 applications and hence may not be protectable as a
3 creative work and situations in which NFTs will
4 actually be protectable under copyright law.

5 And the last point I wanted to make before
6 we step back was the issue about international
7 protection. It's not just the United States, right?
8 A number of other jurisdictions are addressing IP
9 protection for NFTs, and we need to be aware and be
10 lock-step with it. For example, a recent Singapore
11 court has decided that NFTs would constitute property.
12 Both the UK and New York have allowed the utilization
13 of NFTs in order to issue summons. Third, the UK is
14 considering protecting NFTs. The EU has already
15 recognized NFTs under trademarks.

16 So it's really why is it important? We
17 don't want to create an IP law that disadvantages
18 creators and companies in the United States as opposed
19 to creators and companies elsewhere, so it's important
20 for us to be aware of these international developments
21 around copyright protection for NFTs even as we craft
22 a U.S. law to address this issue, and on that note,
23 I'm happy to turn it over.

24 MS. KARL: Thank you so much, Aarthi.

25 MS. CHAITOVITZ: Thank you so much.

1 And, Stephen Kelly, we will ask you to go
2 next.

3 MR. KELLY: Thank you so much, Ms.
4 Chaitovitz. Hi, my name is Steve Kelly. I'm an
5 attorney here in Los Angeles. I work with a lot of
6 DAO incorporators and specifically a lot of entities
7 creating NFTs through their business. Just briefly
8 introducing myself, you know, I'm very always struck
9 by trying to understand the practicality obviously of
10 what my clients are trying to do. Very few of them
11 understand what the U.S. Copyright Office does.

12 Very few -- even more of them, very few, you
13 know, understand a lot of what we've been talking
14 about here today, and, you know, what it really
15 strikes me as coming back to is that, you know,
16 copyright rules that most of us here are very familiar
17 with just don't seem to fit into the square peg of
18 this new kind of digital asset that we're all trying
19 to deal with. This is not, you know, a painting that
20 I wrote that I sold to someone, right, that I can just
21 serve them if they infringe my copyright. I could
22 just go serve that person with a lawsuit saying you're
23 infringing my copyright or sending them a DMCA notice.
24 I can't do that because wallets are anonymous.

25 And then, when you talk about it from a

1 regulatory perspective, you can't really do that in
2 the same way either because what? Are you going to go
3 after the platforms and tell them they've got to do
4 all the enforcement of this even though some of these
5 transactions don't even occur on the same platform or
6 there are multiple different platforms they can go to
7 to sell these things.

8 So, with all that kind of, you know,
9 practicality is I've really appreciated everyone's
10 thoughts on it, and it's more the sense of do we just
11 need to solve those individual problems that now a
12 digital asset that's been created that that can solve
13 and then, you know, just kind of rely on what we've
14 already figured out because, if anything, you know, I
15 try not to give strong opinions on things I don't have
16 strong, you know, understanding of, and I certainly
17 today realize that. So thank you very much, Ms.
18 Chaitovitz.

19 MS. KARL: Next, we have Daniel.

20 MR. URIBE: Hello, everybody. Thanks very
21 much. Can you hear me well? Thank you very much. So
22 my name is Daniel Uribe. I am the CEO and co-founder
23 of GenoBank. I'm very honored to be this day with
24 you. Very briefly, in 2017, I was already involved
25 with blockchain, but my son was diagnosed with a rare

1 disease, and while known, it has no cure to date, but
2 there's a lot of faith in the new gene therapies and
3 those can be developed by researchers if we calibrate
4 with biosamples and biodata, but what does anything
5 about what I just said has to do with copyright?

6 Well, it's because, in 2020, I partner with
7 William Entriken, the lead author of the ERC-721, he's
8 considered like the father of the framework of the
9 Non-Fungible Tokens, and we created what we called a
10 biosample consent token to encode the data privacy
11 rights for human biosamples in research, so,
12 basically, it's a framework that encodes privacy laws
13 but not necessarily copyright laws.

14 So we wrote the paper. We were peer-
15 reviewed. Our paper is called "Privacy Laws, Genomic
16 Data, and NFTs," right, and we were published by the
17 British Blockchain Association and it's one of the
18 building blocks of decentralized science, right, as we
19 know it where decentralized science is obviously a
20 movement that looks to empower the patients, empowers
21 independent researchers and give access to data. So
22 how can we balance this?

23 So today we just want to open the
24 conversation in a very kind of different conversation
25 about the use of NFTs, biosamples ,or medical images

1 or data sets because we use what we call patient side
2 encrypted bio NFTs, right, because they not only
3 represent consent in an immutable way in a
4 decentralized network as a blockchain, so this is a
5 way to globally establish how a person might publish
6 and share with other ones that it's a proof of consent
7 that has worldwide value because, obviously, the
8 pandemic just shows that there's lack of a system
9 where we can cooperate among countries in the bio-
10 informatics and bio-banking space.

11 Now what I want to open the discussion or
12 just invite you is how can we combine the data privacy
13 laws and the copyright kind of rights so these could
14 be maybe dissonant or it could be something that is
15 not related, but there are three things that privacy
16 laws do not consider in order for patients to leverage
17 their bio assets, right? Basically, it's the
18 monetization aspect. So today companies, what they do
19 is they aggregate this data. They produce new
20 datasets. They create IP and it's sold, and the
21 problem is that patients today do not have a proper
22 mechanism to participate on that value that is created
23 by doing this.

24 So we propose very quickly a five-point new
25 framework that could conceptually try to create a

1 conversation which is access, integrity, and
2 transparency, right? That data subjects have the
3 right to access their information, the control over
4 the data. Data subjects have the right to control the
5 distribution of their medical and genomics data.
6 Verification and correction, data subjects have the
7 right to request the accurate or incomplete medical
8 and genomics data, the deletion and erasure, right?

9 Data subjects should have the right to
10 request that their medical and genomic data could be
11 deleted. Portability, data subjects have the right to
12 receive and own and have access to their own data, and
13 finally a copyright protection. This is kind of a
14 novelty conversation we want to bring to the table.
15 Data subjects should have the right to protect their
16 medical and genomic information as their original work
17 or something similar, to control the use and
18 distribution of their data through copyright
19 protections or similar protections.

20 Bio NFTs, as we call it, should be also
21 considered as bio IP NFTs that can be used to
22 represent the copyrights and controlled distribution
23 of the data based on a patient.

24 So, basically, this very brief moment I just
25 want to introduce myself and open the discussion that

1 not only NFTs can be useful for the visual artists or
2 musics or so whatever. We also have all the medical
3 and genomic space. Thank you very much.

4 MS. KARL: Thank you, Daniel. Thank you,
5 Daniel.

6 MS. CHAITOVITZ: Thank you.

7 We'll now call on Jeff Gluck. Jeff, are you
8 there?

9 MR. GLUCK: I'm here.

10 MS. CHAITOVITZ: Awesome.

11 MR. GLUCK: Thank you for the opportunity to
12 participate in this today. I'm Jeff Gluck. I've been
13 a copyright litigator for about 15 years. I've mostly
14 focused my practice around street art and graffiti
15 art, a medium that also experience some IP confusion
16 at times and reminds me a lot of what we're now
17 experiencing around IP in this new NFT space.

18 Several year ago, I founded a Web3 software
19 company to build tools that help creators and bring
20 about more interoperability and mass adoption for
21 Web3. We developed an ERC-721-compliant smart
22 contract that enforces on-chain cross-market royalties
23 for creators. We developed and patented a process
24 that enables creators to launch NFTs across multiple
25 blockchains simultaneously and natively, and we also

1 designed an automation process that hooks into the
2 U.S. Copyright office and empowers creators to file a
3 copyright application in a few clicks and receive an
4 NFT that represents their application. The decision
5 in Fourth Estate in 2019 requiring creators to
6 register their copyrights before they can legally
7 enforce their rights against an infringer presented a
8 big disadvantage for creators.

9 The Copyright Office portal is designed for
10 lawyers, not artists, and creators typically have an
11 impossible time trying to register their work without
12 needing to hire and pay a lawyer. We were able to
13 leverage blockchain and NFTs to address that pain
14 point while still complying with Web2 legal
15 requirements in terms of the Copyright Office and the
16 requisite standards.

17 I do believe that we tend to overcomplicate
18 the IP issues around NFTs at times. The tech is new,
19 the terminology is new, but, ultimately, the same
20 simple fundamental rules apply and there are still
21 just as many, if not more, infringements on
22 marketplaces like Etsy and eBay and stock photo sites
23 like iStock as there are in NFT marketplaces. If you
24 don't have the rights to sell an original work of art
25 on a poster or a T-shirt or any other physical product

1 in your Etsy shop or license it out on iStock or
2 Getty, then chances are you can't issue it and sell it
3 as a digital reproduction of that image in the form of
4 a non-fungible token on OpenSea.

5 And, historically, if you think about it,
6 there really has never been anything in place other
7 than the threat of litigation to prevent anyone from
8 infringing anything, so sometimes I question whether
9 it's warranted to spend so much time working to
10 prevent infringements and discussing infringements in
11 Web3 when we haven't even done that yet really for
12 Web2. The Obama question that was asked at the
13 beginning of this session, reframe that just in terms
14 of a pre-NFT, pre-Web3 question, and you'll arrive at
15 the right answer in terms of who the proper IP holder
16 would be. You know, I don't believe that this new
17 technology changes the fundamental analysis of who the
18 rights-holder is.

19 Something else in the NFT space that seems
20 to be overlooked but Cesar touched on it earlier is
21 that NFT marketplaces can't hide behind safe harbor
22 protection if they curate and play an active role in
23 selecting the art on their platforms, which most of
24 them do, and, further, if the NFT marketplaces are
25 using their own technology to mint the NFTs, create

1 the NFTs for the creators, then they're participating,
2 even aiding the infringement.

3 So it's definitely a lot of fascinating
4 issues and things to think about. Some really
5 incredibly brilliant thoughts and speakers today, and
6 I'm happy to have been here and look forward to seeing
7 all the advancements that will certainly come in the
8 space.

9 MS. CHAITOVITZ: Thank you.

10 MS. KARL: Up next is Jennifer.

11 MS. PARISER: Thanks very much, and thanks
12 to the Copyright Office and the USPTO for holding
13 these sessions and providing me and all of these great
14 speakers on these fascinating topics. So, as I
15 understand the purpose of this particular panel, it's
16 to sort of help you think about these issues,
17 consolidate some thoughts, wrap up and think about
18 what the government can and should do in this space,
19 so I'm going to try to do that, although it is hard.

20 So, first of all, there are a lot of very
21 interesting issues around NFTs. There's a lot of
22 great opportunities and challenges. They represent
23 new ways to monetize existing intellectual property
24 assets, to bring in artists into the flow of royalties
25 downstream that they have not previously enjoyed. It

1 can spur fan engagement with artists and all sorts of
2 other things. These super-interesting, intricate
3 issues are not copyright matters. The copyright law
4 does not actually have very much to say at all about
5 NFTs or any other those really interesting business
6 issues that people went through.

7 NFTs are like a deed to real property. They
8 are not themselves real property, and there might be
9 issues around the legality of that deed or whether it
10 is properly housed in the local, you know, town's
11 clerk's office's register and better ways for people
12 to access it and transfer it and so on and so forth,
13 and that can get super intricate, but at no point does
14 it implicate real property.

15 So, in the same way, we have to resist the
16 urge to think about NFTs as having the same issues
17 that the underlying artistic work has. Just because
18 NFTs are associated with copyrighted works doesn't
19 mean they themselves implicate copyright law.

20 We need also to resist the temptation to
21 morph copyright law in line with consumer
22 expectations. Consumers may expect NFTs to be a copy
23 of the underlying work, but they are not, and if we
24 start to treat NFTs as copies of the underlying work,
25 that's the road to peril. We need to actually remind

1 and educate consumers and platforms what rights they
2 are getting and what they are not getting, and,
3 generally speaking, they are not getting any of the
4 106 copyright rights.

5 And I think the most important thing that
6 the Copyright Office can do is assist platforms in
7 helping them articulate terms and conditions that make
8 clear that people are, generally speaking, there are
9 exceptions, generally speaking, not getting any
10 copyright interest in the underlying work.

11 Finally, the one area where copyright law
12 does have something to say about NFTs is in the
13 prosecution of counterfeit ones of which there are
14 unfortunately lots. In my work for the Motion Picture
15 Association and my prior work in the content
16 protection and intellectual property space, I have
17 seen copyrighted content become infringed and pirated
18 in every way known to man. It is a very intractable
19 problem, and, unfortunately, NFTs represent yet
20 another opportunity for copyrighted works to be
21 infringed by the minting of counterfeit NFTs.

22 That is an area where the DMCA does have
23 something to say. We need to figure out what
24 liability platforms have. It is not merely when they
25 curate content. It is when they make counterfeit NFTs

1 available at all, and we need to figure out how to
2 deal with those issues.

3 That said, I don't think we need to change
4 copyright law at all. The copyright law as it exists
5 today is adequate to handle the needs of the small
6 number of copyright issues presented by NFTs.

7 MS. KARL: Thank you, Jennifer.

8 MS. CHAITOVITZ: Thank you.

9 And, Michael Lewan, you will be -- nope,
10 second to last speaker on this panel.

11 MR. LEWAN: Thanks, and hey, Ann. Hey,
12 everyone. Michael Lewan with the Recording Academy.
13 I'm Senior Director of Advocacy and Public Policy
14 based in Washington, D.C. The Recording Academy is
15 one of the leading trade associations representing
16 individual music makers, so our membership are the
17 individual artists and songwriters, composers,
18 producers, engineers. Had a great relationship with
19 the Copyright Office and the Patent and Trade Office
20 over the years ensuring that the laws and regulations
21 of the United States protect creativity, protect the
22 creator, and ensuring that the systems are working for
23 fair compensation and fair treatment of their
24 creativity.

25 We're excited to be here today to talk about

1 non-fungible tokens, and it's been great to listen to
2 many other panelists throughout the day and hear, you
3 know, I echo a lot of what's been already said during
4 this last 24 minutes, so I don't want to rehash
5 everything, but it should come as no surprise that,
6 you know, music is one of the early adopters and
7 pioneers of the NFT space. I think since basically
8 the creation of time music has been at the forefront
9 of the technological revolution. Certainly, in the
10 digital space, you know, music was an early adopter in
11 Web1, Web2, and we are some of the test cases here in
12 Web3.

13 NFTs present tremendous opportunities for
14 creators. Certainly, not all of the Academy members
15 have adapted to the NFT world. Some might have tested
16 it out and some really went, you know, all in on NFTs
17 over the last couple years, so even at the Academy we
18 don't have one consensus piece and viewpoint on it as
19 it's so new. But, you know, you can see it on a wide
20 range of spectrum as being the underlying
21 infrastructure to create a whole new ecosystem where
22 the creator is more firmly in the center of their
23 content and have a more direct pipeline to the
24 consumer and all that might promise to do on both the
25 front end and the back end or just simply a fading fad

1 that has been discussed, you know, at length earlier
2 today.

3 But, as we look ahead, you know, working
4 with the Copyright Office and the Patent and Trade
5 Office, we always want, you know, both offices to be
6 mindful of always keeping the creator firmly in the
7 center of these discussions, particularly when we're
8 making and considering new rules and regulations or
9 recommending new laws to Congress.

10 As was just said, we believe the DMCA is
11 technically equipped to address infringement in the
12 NFT space, although there are some serious questions
13 and concerns about the infringement, particularly when
14 it comes to a more decentralized platform and, you
15 know, really who is at fault for infringement of an
16 NFT that, you know, intersects with music or musicians
17 or even just sort of the artist's right to know who is
18 behind the minting of an NFT. I think it was said
19 earlier you can't really unmint an NFT. Once that
20 bell has rung, it's rung. You might be able to
21 deplatform it, file a 512 notice.

22 You can't really get rid of it, so this is
23 definitely not unique, you know, we see the same sort
24 of stuff happening with user-generated content
25 platforms like YouTube that are, you know, rife with

1 512 notices and issues with management there, but it
2 is definitely something that the Academy and our
3 members are concerned about, are grateful to work with
4 both offices as we chart a new path in this Web3
5 space. So thanks for having me.

6 MS. CHAITOVITZ: Thank you.

7 MS. KARL: Thank you so much.

8 And our final panelist for today's
9 reflections session is Zachary.

10 MR. CATANZARO: Good afternoon. My name is
11 Zachary Catanzaro. I am an Assistant Professor of Law
12 at St. Thomas University College of Law. I'm also the
13 Academic Chair of the Florida Bar's Digital Asset and
14 Blockchain Task Force, a group that I've been working
15 with for a number of years now advising the
16 legislators in Tallahassee on what to do and not to do
17 in this space, and I suppose it's both my pleasure and
18 misfortune to go last because the panelists have just
19 been so wonderful today, and I don't want to echo any
20 sentiments that I've heard today, but it has been
21 great hearing the various perspectives from other
22 academics, members of the industry and other
23 stakeholders today.

24 So I guess I want to wrap up by really
25 bringing some of the focus back to the overall

1 question, the overarching question that always exists
2 in copyright law, and that's what are we really trying
3 to do with copyright law? We're trying to enrich the
4 public by getting art into their hands, and I think I
5 would agree with Jennifer's sentiment that this
6 technology is not copyright in and of itself. NFTs
7 are a DRM technology, something that the DMCA took a
8 lot of interest in, that the Copyright Office took
9 quite a considerable look at in preparing the DMCA
10 report a number of years ago.

11 And this technology is so novel not because
12 of its decentralized nature or immutability or one of
13 the other wonderful characteristics you've heard about
14 today, but it's so interesting and fascinating to me
15 because it is a way of tethering digital assets in a
16 manner that creates what? Non-fungibility in those
17 assets. It creates scarcity in something that is
18 otherwise really copyable, a scourge that has really
19 affected many content industries, players in the movie
20 industry and the music industry and the like, that
21 scourge of piracy that has really dampened the
22 competitive marketplace for a lot of creative works.

23 But we also need to always consider the
24 other side of the calculus. It is ultimately the
25 public that should be benefitting from these works.

1 Too heavy of a hand in regulating in this space could
2 stop novel new and entertaining ways of getting new
3 art, new concepts, new content out into members of the
4 public, and I think one of the main problems that
5 we're seeing in this space is that a lot of companies
6 that are selling legitimately minted NFTs, they are
7 the author or have acquired 106 rights from the owner
8 pursuant to the written requirements in the Copyright
9 Act, are making promises to the public beyond what
10 they're actually giving to the purchaser in their
11 terms of use.

12 I've looked at a number of smart contract
13 contract languages where the marketing says you're
14 going to own this NFT, but then you dig into the terms
15 of the licensing agreement, and the licensing
16 agreement carves out a number of exceptions that it
17 doesn't mean that they're really acquiring anything.

18 So there are some counterbalancing interests
19 that I think are important and we need to keep in mind
20 that ultimately it's important for us as the
21 stakeholders, the members of the community to be out
22 there looking out for the interests of the public, to
23 make sure that when the movie industry is coming out
24 with great new movies for us to watch that the public
25 is being protected in terms of what they're actually

1 purchasing, and if companies are promising free
2 inalienability of these works using NFTs, it's really
3 incumbent on the laws to reflect that.

4 MS. CHAITOVITZ: Thank you so much. I want
5 to thank all of our speakers for all these helpful
6 reflections, and I now want -- and we're, like, right
7 on time to the minute. I now want to open the mic for
8 anyone else that has comments. Please try to limit
9 your comments to two minutes at least until everybody
10 has spoken. Our speakers for this reflection are
11 invited to stay on camera. I have a list of those
12 people who have signed up saying they wanted to speak.
13 Ryan Wright has requested to comment, and he's first
14 on the list. So, Ryan, you can go first. Please
15 unmute yourself. Ryan, are you here? Okay. Going
16 once. Going twice. Ryan?

17 MS. KARL: There he is right there. Can you
18 unmute? Oh, you muted yourself again.

19 MR. WRIGHT: There we go. Can you hear me?

20 MS. KARL: Yes.

21 MR. WRIGHT: Okay. I had some questions.
22 We're working on making chest and radiology images in
23 NFTs, so we have proprietary information that are
24 biomarkers in there that could be HIPAA compliance
25 issues with continuing legislation on privacy and the

1 CCPA and CPRA and the GBPR, so we're trying to work
2 out the privacy issues within the health insurance
3 industry about how to incorporate radiology images as
4 NFTs.

5 I know a lot of people have been talking
6 about the art process of it, but NFTs have much more
7 uses than art and pictures, but it does have use for
8 radiology pictures, and it has use for several other
9 types of diagnostic imaging that a lot of medical
10 institutions take advantage of or are able to make a
11 lot of money off of at this point. So we are working
12 on trying to get that situation to a head, and I don't
13 know if that is more in line with the subcommittee
14 that's going into the AI in trademark patent, but that
15 is something that we are looking for with blockchain
16 and healthcare today. So that is my contribution. I
17 just thought maybe I would put that in there, and,
18 hopefully, maybe somebody had something to say about
19 that.

20 MS. CHAITOVITZ: Well, thank you for sharing
21 those thoughts with us. This is just an information-
22 gathering day right now. There will be a report
23 eventually sent to Congress.

24 MS. KARL: Yes.

25 MR. WRIGHT: Okay. Great. Thank you.

1 MS. KARL: So I'm going to ask for our next
2 participant, Rafeal Ciraz from Lepo. It looks like
3 they are not online.

4 Christopher Kane from UCSC.

5 MS. CHAITOVITZ: Christopher, are you here?
6 I don't see you here.

7 MS. KARL: Okay. I will go to next Tenara
8 Lequa.

9 MS. CHAITOVITZ: And I don't see Tenara here
10 either.

11 MS. KARL: Okay. Mike Charles Nahounou.

12 MS. CHAITOVITZ: I don't see him online
13 either.

14 MS. KARL: They are online.

15 MR. NAHOUNOU: Hello, how are you?

16 MS. CHAITOVITZ: Oh, here he is. Yes.
17 Sorry.

18 MS. KARL: All right. Thank you.

19 MR. NAHOUNOU: This is the first time I saw
20 something pop up, so I was like, okay, I don't know
21 how I'm supposed to accept, but I know you're pushed
22 for time, but thank you guys so much for having this.
23 I'm very excited. My name is Mike Charles. I'm from
24 Connecticut, Hartford, Connecticut. I'm a musician.
25 Actually, they call me Satoshi of music because I was

1 the first to actually tokenize and sell music NFT, so
2 I've been in music for about 20 years, so everything
3 about IP is so great. I think it's important for us
4 to look at smart contract enforceability which is
5 really beholden to the actual wallets. It's not
6 actual people. It's the technology. They have this
7 thing called code is law. It's loyal to the wallets.

8 And then the term called IRL or In Real Life
9 contract enforceability, that's for the people, and
10 somewhere between, you know, you have the Web2 world
11 and then you have the Web3 world. I'm of the belief
12 that you need them both, right? You can even add Web2
13 plus Web3. Now you have a Web5, right? You need on
14 ramps for both because we have for musicians, we have
15 Spotify, we have Apple Music, we have YouTube where
16 consumers or music collectors, they themselves are
17 already in the habit of consuming, not really thinking
18 about cost, but it's not profitable for the artist.

19 But then you have the blockchain-enabled
20 systems where they have to participate. There is a
21 bit of a curve, a learning curve, but once they get
22 past that learning curve, they can participate and
23 then go direct, kind of direct to consumer, direct to
24 I like to even say community, direct to community, and
25 then you really start talking about the full, you

1 know, there's a concept in law called 360 models, 360
2 deals where you now start to - where record labels
3 usually get monies off of the merch and things like
4 that.

5 And then you start talking that was a really
6 fascinating use case, by the way, the gentleman, I'm
7 sorry, his name, with the imaging, but just, you know,
8 when you talk about 1991 with Stuart Haber and his
9 partner came up with the original blockchain, they
10 talked about time stamping a digital document and that
11 document, when you look at that white paper, that
12 particular white paper back then -- I was what? Ten
13 years old then -- but they talked about pretty much
14 everything, not just music or art but photographs,
15 everything. You could think of poetry, anything that
16 now can be represented in a digital form, so now
17 you're talking about poetry and now I'm of the belief
18 that when you merge musicians and actual traditional
19 art and graphic design, everything like that, all that
20 is is merging a JPEG or, you know, like Beeples.

21 Somebody mentioned Beeples today on whatever
22 it was, a PNG file or a bitmap file or a JPEG file,
23 it's valued about 70 million. Just imagine if there
24 was a body of music attached to it. That was without
25 music. How much more value does a 70 million value

1 transaction with music, which we already know have
2 value, and then how does it come in with the Salvator
3 Mundi that sold for half a billion dollars I believe
4 in 2019, which is physical art. That's IRL. So the
5 opportunities surrounding how art has expanded and how
6 collaboration is optimized where now you can share
7 royalties on a graphic design artist.

8 You can share royalties on the engineer or
9 audio engineer who made that and who I always think is
10 undervalued who made that engineering sonic decision
11 to make that 808 boom more than that. It made that,
12 you know, all the creators in the creative process can
13 now participate in a new model where, you know, record
14 labels, of course, they get disintermediated, but they
15 can still work with the community because the dollars
16 aren't going anywhere. So I'll land my plane on that.
17 Thank you guys for your time.

18 MS. KARL: Thank you so much.

19 MS. CHAITOVITZ: Thank you.

20 And Eliana Torres? Great. Unmute yourself,
21 please. Perfect.

22 MS. TORRES: Hi, yeah, my only comment is in
23 regards to the incongruent treatment of NFTs from the
24 Copyright Office to the Trademark Office. So the
25 Trademark Office classifies NFTs as downloadable

1 assets that authenticate certain goods or services,
2 and the Copyright Office in the -- well, most of the
3 panelists have this idea that it's either on chain or
4 off chain linked to the NFT token itself, and that
5 would give the copyright rights to it. So the
6 treatment of the Copyright Office seems to be that
7 it's not downloadable, so it's just an asset that's
8 linked to a token, and by you purchasing the token,
9 there's no downloadable function of it.

10 However, the Trademark Office is noting that
11 as a downloadable asset, so, to me, there's an
12 incongruity as how it's being treated and defined,
13 and I think that if we're going to work jointly, the
14 two offices are going to work jointly in how the
15 future is going to accommodate NFTs, I think that the
16 definition and the treatment should be somewhat at
17 least close to the same.

18 MS. CHAITOVITZ: Thank you so much.

19 MS. KARL: Thank you.

20 Our next speaker from the public is Ash
21 Kernen.

22 MR. KERNEN: Yeah, hi. Good afternoon,
23 guys. Thank you so much for hosting this. I'm a
24 practicing IP and entertainment attorney focusing at
25 the intersection of culture and blockchain. I just

1 want to briefly make three points.

2 I first wanted to put an exclamation point
3 on an ask briefly made earlier by Jeremy in an earlier
4 panel and that is the prudence of creating a new group
5 registration option for NFT collections, setting aside
6 for a moment the debate around the copyrightability of
7 generative collections where that copyrightability is
8 not in doubt in the vein of the Graham or the Groof
9 that were created specifically with the music and
10 photography industry pattern and practice in mind.

11 You know, I feel the Office should give
12 serious contemplation or consideration to creating an
13 industry-specific group registration for NFT
14 collections or, I guess, I should say more
15 specifically the artworks associated therewith that
16 recognizes and accommodates the peculiarities of NFTs
17 and among them specifically the high number of works
18 that are often included and unique identifiers that
19 the smart contract address.

20 Secondly, just additionally speaking of, you
21 know, clarity as to whether or not AI-assisted group
22 compilations should be eligible for copyright is
23 desperately needed, be that entitlement to full
24 protection or possibly a newly designated class of
25 thinly protected works.

1 And then, finally but relatedly, there's
2 this unique issue regarding enforcement and standing,
3 and that's the dependence on the copyright holder to
4 bring suit on behalf of the NFT holder. The problem
5 is particularly acute for those that have been granted
6 commercial rights.

7 I'd suggest that there may be room for a new
8 limited right that would bestow standing on the NFT
9 holder to bring an enforcement action for
10 infringements of their particular NFT in those limited
11 scenarios where exclusive licensee standing is
12 frustrated by a reservation of rights from the actual
13 copyright holder, and while, you know, I appreciate
14 this may be the purview of Congress, and we still have
15 the issue of registration in the first instance, to
16 the extent a first stop administrative copyright
17 claims board like-tribunal could accommodate these
18 low-level holder infringement disputes, I think it
19 would go a long way to removing that costly and,
20 frankly, numerically burdensome burden on -- off the
21 holder and moving it over to the -- excuse me -- the
22 copyright holder and moving it over to the NFT owner,
23 who has a much more acute and contemporaneous interest
24 in seeing that enforcement action through. Appreciate
25 it. Thank you very much for your time.

1 MS. KARL: Thank you.

2 MS. CHAITOVITZ: And so I don't think the
3 next two people who have signed up are online, though
4 I'm going to call their name in case they're here
5 under a different name. So the first one is Session
6 Cruz. Is Session Cruz online?

7 (No response.)

8 MS. CHAITOVITZ: Okay. The next person we
9 have is Max Carmen. Is Max Carmen on the line?

10 (No response.)

11 MS. CHAITOVITZ: Okay. The next one is Kofi
12 Mensah, and I see you online, Kofi, so just unmute
13 yourself.

14 MR. MENSAH: Hi, how are you? Thanks for
15 giving me the time. Once again, my name is Kofi. I'm
16 a founder of Sagos Distro. We are a creative agency
17 and a media site company. We started off two years
18 ago with distribution technology we launched and now
19 working on our NFT marketplace, so regards to NFTs and
20 Web3, basically, with us, it has provided us an
21 additional revenue stream apart from the traditional
22 for the past 10 years. Based out of New York, we
23 currently have a team here and a team in Africa and
24 Asia, and blockchain technology has provided us the
25 opportunity not only to be able to release old catalog

1 data by 10 years ago and making a revenue with the old
2 catalog that we had in NFTs and Web3, but it has also
3 allowed us the opportunity to train new artists and
4 new technology interns who are now exploring other
5 avenues when it comes to technology. So we see the
6 use cases growing exponentially the next couple of
7 years, and we are glad to join this panel, and we're
8 looking forward to learn some more.

9 MS. CHAITOVITZ: Thank you.

10 MS. KARL: Thank you.

11 The same I believe is true of the next
12 several panelists, participants. Margaret Cleary?
13 Alexander Model? Rafael Wartheimer? If you are on
14 here, let us know. Otherwise, we are moving to I
15 believe our final participant, which is Kevin Madigan
16 from the Copyright Alliance. Kevin?

17 MR. MADIGAN: Hi, can you hear me?

18 MS. KARL: Yes.

19 MR. MADIGAN: I would just say, if there are
20 others who haven't participated today, I'm happy to
21 yield my time, but if I'm the last, I'll go ahead. So
22 I just wanted to -- one thing that I didn't have the
23 opportunity to raise during my session when we were
24 talking about sort of other technical features of NFTs
25 that could be a challenge to copyright owners, you

1 know, I just wanted to make the point that, you know,
2 when we're talking about DMCA takedown notices, you
3 know, copyright owners may be able to have listings
4 removed from or delisted from the marketplace.

5 But identifying the source of infringement
6 through the use of a 512(h) subpoena, you know, would
7 be difficult, if not impossible, given the sort of
8 anonymous nature of the creation of NFTs. You know,
9 NFTs are stored in blockchain networks but also in
10 owners' virtual wallets, which can store material
11 associated with NFTs like digital works of visual
12 arts, and, you know, a DMCA takedown notice or a
13 512(h) subpoena can be sent to the digital wallet's
14 service provider, which may have the ability to remove
15 the NFT that incorporates infringing material but not
16 likely if it's a private virtual wallet, and so I
17 think it's something to consider, you know, just to
18 sort of talk about another challenge faced by
19 copyright owners is the inability to use the DMCA's
20 512(h) subpoena powers.

21 MS. KARL: Thank you, Kevin.

22 So now we would like to invite if we have
23 any of our reflections panelists who want to respond
24 to any of the public comment or to each other?
25 Nobody? Oh, it looks like Jennifer and Stephen, so

1 they were trying to raise their hands, okay, so how
2 about Jennifer and then Stephen.

3 MR. KELLY: I'll defer to Jennifer here.

4 MS. KARL: All right.

5 MS. PARISER: Yeah, just a really brief
6 comment in response to one of the public comments
7 about creating a new right to bring a lawsuit by the
8 NFT owner that is different from a copyright owner.
9 I'm just having a hard time imagining a scenario in
10 which the owner of an NFT is given some right on which
11 they could sue that the copyright owner is blocking
12 because, if the NFT owner has a right they want to
13 enforce, they would have gotten it from the copyright
14 owner, and so they should then have the copyright
15 interest on which they could sue.

16 So I'm just having a real hard time figuring
17 out why we need a new right to have the NFT owner
18 enjoy whatever it is they have been granted in the
19 initial instance, so I'm sort of once again in this
20 place where I feel like, in the very limited scenarios
21 in which copyright law is actually implicated, it
22 isn't already sufficient to do what it needs to do
23 here.

24 MR. KERNEN: May I respond to that as the
25 person who brought that up? I'd like to.

1 MS. KARL: Oh, yeah.

2 MR. KERNEN: Yeah. Thank you. I appreciate
3 the feedback. Yeah, so --

4 MS. PARISER: I don't have permission to
5 allow you to respond.

6 MR. KERNEN: I'm sorry. Yeah, no, let me
7 wait. I'll wait out. Is it okay?

8 MS. KARL: Yeah, can we do one minute
9 because we also want to get to --

10 MR. KERNEN: Oh, yeah, absolutely. Yeah,
11 just let me just elaborate or paint the picture.
12 Let's just use a for example. Let's take a Yuga
13 license, right, which in and of itself has problems,
14 but these are obviously highly valuable assets that
15 are being licensed out all the time. They're being
16 sub-licensed out based upon the commercial rights
17 granted to them, but there's a real question of
18 whether or not in any given instance if that
19 particular ape has been infringed upon in that
20 commercial downstream licensing scheme, whether the
21 holder of the NFT actually has standing to go into
22 court and try to enforce their sort of commercial
23 rights.

24 Ostensibly, they don't because, number one,
25 Yuga, and, again, we can get into this debate about

1 their particular license, but, at best, it's a non-
2 exclusive grant because Yuga reserves the rights to
3 those particular images themselves, so I think really
4 what I was just trying to beg is this thought process
5 around, you know, how does somebody who pays all this
6 copious amount of money for these images and are
7 granted commercial rights, how do they actually
8 enforce them if Yuga -- it doesn't pay them. They
9 have 10,000 different iterations that they might be
10 drug into court for, and it's expensive, and they may
11 or may not have an interest in enforcing that, but,
12 certainly, the holder does, and so that is really the
13 question which I'm begging. Maybe the solution I
14 proposed is not the right one, but it's certainly an
15 issue that we've bandied about.

16 MS. KARL: Thank you, Ash.

17 Stephen?

18 MR. KELLY: Yeah. No, I'm glad I deferred
19 there because I was actually going to reply to that
20 same issue Jennifer just raised there as well as Mr.
21 Kernen. I can also see, like, that situation seems so
22 ripe for, you know, some more additional policymaking
23 maybe within the ERC-721 protocol itself or with a
24 platform's licensing schemes or with, you know, the
25 ability of NFT holders and how the actual platform and

1 the metadata can be enforced downstream because the
2 issue that Mr. Kernen's bringing up about the
3 enforcement of that, right, is based on the fact that,
4 like look, these are all non-exclusive license. How
5 do I ever enforce or do something like that?

6 Well, I mean, isn't that the issue of the
7 thing that you bought? I feel like that's so much
8 more ripeness around, you know, there being a common
9 standard throughout the industry that someone could
10 actually enforce that, that, you know, people who buy
11 NFTs, but all of that, I can't imagine how that exists
12 within the realm of, I think, what Ms. Pariser -- I'm
13 sorry if I butchered that -- was talking about is like
14 how does that in any way fall within the scheme of
15 what, you know, while brilliant and amazing regulators
16 they are, what the U.S. Copyright Office does? It
17 doesn't really do that.

18 These are tech and business-related
19 problems, and, you know, I appreciate that, you know,
20 Mr. Kernen's comment at the end there that that's one
21 solution. I just find from a, you know, finding
22 effective regulation and finding a solution people can
23 live with, I just don't think the U.S. Copyright
24 Office is the place that does that. So please go
25 ahead.

1 MS. KARL: Thank you, Stephen.

2 Aarthi?

3 MS. ANAND: I'm going to make three quick
4 points. One is it was interesting to hear the various
5 speakers talk about, like, certain applications of
6 NFTs beyond creative works, so it goes back to the
7 point of when the Copyright Office is submitting the
8 report to Congress it may be helpful to distinguish
9 between when NFTs involve creative works and when they
10 don't.

11 Second is our panels have been talking
12 about, like, terms of use, and a prior panel covered
13 this quite extensively. And I know we are emphasizing
14 Yuga Labs, but there are a number of platforms that
15 offer terms of use, and several of them contain reps,
16 warrantees, and indemnities which require the minter
17 to provide a rep and warrantee that they own the IP
18 rights in connection with the underlying work and that
19 when transferring it to the buyer, they'll indemnify
20 the buyer and they'll indemnify the platform in case
21 the platform is sued.

22 And the last piece I want to point out is
23 Tarantino v. Miramax, so what's happening is that was
24 an exact example in which Tarantino and Miramax fought
25 over who could have the right to mint the NFT. Why is

1 this important? Because they've entered into an out-
2 of-court settlement, and so we don't know how they
3 sliced and diced the rights. That's why in my view
4 it's important for the U.S. Copyright Office to
5 provide clarification on it so that private parties
6 are not determining the way the law folds.

7 MS. KARL: Thank you. I think, with that,
8 unless we have anymore, we are going to wrap up for
9 today. We really appreciate everyone's participation
10 in today's session and in all the sessions. It's been
11 a really thoughtful and lively discussion around a
12 very important and timely topic. So we do want to
13 remind everyone, if you would like to share your
14 insights or perspective in writing on IP issues and
15 NFTs that is over patents, trademarks, and copyrights,
16 comments may be submitted on regulations.gov through
17 February 3, and thanks again for your participation.
18 Have a great evening.

19 (Whereupon, at 4:54 p.m., the roundtable in
20 the above-entitled matter adjourned.)

21 //

22 //

23 //

24 //

25 //

REPORTER'S CERTIFICATE

CASE TITLE: Copyright Office NFTs Study

HEARING DATE: January 31, 2023

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Library of Congress.

Date: January 31, 2023



LaShonne Robinson
Official Reporter
Heritage Reporting Corporation
Suite 206
1220 L Street, N.W.
Washington, D.C. 20005-4018