

NFTS RESCUE RESALE ROYALTIES?

THE WONDERFULLY COMPLICATED ABILITY OF NFT SMART CONTRACTS TO ALLOW RESALE ROYALTY RIGHTS

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I. Introduction

Resale royalty rights (also known by the French phrase, *droit de suite* or “right of continuation” rights) give artists a right to participate in the proceeds realized from the resale of their works.¹ According to DuBoff, “[w]hile copyright laws give the creator of a work the right to control reproduction of the work, many visual artists do not benefit as directly as print authors do from this aspect of copyright protection.”² Unlike print authors, who derive their primary economic return on a literary work through the sale of multiple copies, visual artists receive most of their economic returns from the sale of the original works they create.³ DuBoff states that “[r]oyalties paid to artists upon the resale of their works put visual artists on a more equal footing with print authors by giving artists the right to participate in any exploitive use of their creation and by recognizing that increases in the value of art are most often based on the artists’ on-going labors.”⁴

Artists across the globe have had the ability to receive resale royalty rights by means of contract and covenant and often by national law⁵ and international law.⁶ Nevertheless, American artists and art enthusiasts might be excused in their ignorance of the global resale royalty situation because in the United States (and many other countries), resale royalty rights have never caught on, with exception of the State of California, and even California’s law was hounded out of existence by a series of lawsuits that ultimately declared the law to be incompatible with United States copyright law.⁷

Congress has not acted to provide for artists’ resale royalties, and bold and valiant state efforts like California’s have failed.⁸ But the void in legal initiatives has been filled by a technological innovation: Non-fungible tokens (NFTs) with smart contracts that seek to allow resale royalty payments on every resale of

¹ LEONARD D. DUBOFF ET AL., ART LAW IN A NUTSHELL 120 (6th ed. 2021).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See Eleonara Chielli, *Changes to the Artist’s Resale Right regime in Italy*, THE INSTITUTE OF ART & LAW (Jul. 10, 2019), <https://ial.uk.com/changes-to-the-artists-resale-right-regime-in-italy/> [<https://perma.cc/PH6A-5A4J>].

⁶ See Directive 2001/84/EC, of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, 2001 O.J. (L 272) 4.

⁷ The California Resale Royalty Act was killed by the Copyright Act’s preemptive power over state law. See *Estate of Graham v. Sotheby’s, Inc.*, 178 F. Supp. 3d 974 (C.D. Cal. 2016), *aff’d in part, rev’d in part and remanded sub nom.* See also *Close v. Sotheby’s, Inc.*, 894 F.3d 1061 (9th Cir. 2018).

⁸ Randy Kennedy, *California Resale Royalty Act Clashes with Federal Law*, N.Y. TIMES (Jul. 11, 2018), <https://www.nytimes.com/2018/07/11/arts/design/art-royalties-ruling-california-circuit-court.html> [<https://perma.cc/HM8F-LSTH>].

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NFTs. NFTs have made the calculation and payment of a resale royalty a built-in option that can be programmed into the NFT's smart contract.⁹

To explain how this works, one should first understand the workings of NFTs:

- NFTs are a cryptography tool defined and operated by a “smart contract.” A smart contract is a small bit of code that makes up a simple computer program that runs the operation of an NFT.¹⁰
- Smart contracts use blockchain technology¹¹ to verify and record the existence and ownership of digital assets and physical three-dimensional¹² assets.¹³ Smart contracts can be programmed (coded) to pay a resale royalty to the creator of the NFT if the smart contract receives the proper input indicating that a resale has taken place.¹⁴
- NFTs are not artworks.¹⁵ An NFT records the creation and ownership of an asset that could be an artwork.
- An NFT owner owns the smart contract that defines and operates the functions of the NFT.¹⁶ The smart contract creates a registry entry on the blockchain that is understood in the NFT industry and crypto community to represent proof of ownership of the asset linked to the

⁹ Pratin Vallabhaneni & Adam Chernichaw, *How do NFT royalties work?*, TALKS ON LAW (Joel Cohen mod., Jun. 18, 2021), <https://www.talksonlaw.com/briefs/how-do-nft-royalties-work>.

¹⁰ IBM, *What are smart contracts on blockchain?*, <https://www.ibm.com/topics/smart-contracts> (last visited Apr. 6, 2022). Smart contracts are often written in the Solidity programming language because that is a language specially adapted for use on Ethereum, the most popular blockchain for NFTs. See *Solidity*, <https://docs.soliditylang.org/en/v0.8.13/> (last visited Apr. 6, 2022).

¹¹ IBM, *What is Blockchain Technology?*, <https://www.ibm.com/topics/what-is-blockchain> (last visited May 23, 2022).

¹² I am using the term “physical three-dimensional” assets instead of “real-world” assets because I do not want to suggest that NFTs are not real and not in the world. NFTs and all other aspects of blockchains are very much real and very much making a difference in the world.

¹³ See Liquid, *What is Blockchain Technology?—Blockchain—a very special kind of distributed database with consensus*, <https://blog.liquid.com/what-is-blockchain-technology> (last visited Mar. 30, 2022)

¹⁴ Vallabhaneni & Chernichaw, *supra* note 10.

¹⁵ Mitchell Clark, *NFTs, Explained*, THE VERGE (updated June 6, 2022, 8:30 AM EDT), <https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq>.

¹⁶ IBM, *supra* note 11.

NFT, whether that be an artwork, a piece of real estate, or other asset.¹⁷

- An NFT does not automatically provide ownership or control of the copyright to the artwork linked to the NFT nor does it automatically guaranty the right to possession and control of the artwork linked to the NFT.¹⁸

Each of these concepts deserves to be unpacked to understand the role NFTs can play with resale royalties.

II. Tokens On a Blockchain

Breaking down the term “non-fungible token” itself helps define its place within the greater world of blockchains. A “token” is an asset encrypted into the blocks on a blockchain.¹⁹ The process of creating a token is often called “minting” the token.²⁰ A blockchain is the background architecture onto which a token is encrypted to make an immutable record of the existence and ownership of a digital asset such as an artwork.²¹ Blockchains are built by cryptography in a process called *hash encryption* through which transactions recording the creation, ownership, and transfers of a variety of tokens are encrypted into the blocks on

¹⁷ Dominic Chalmers et al., *Beyond the Bubble: Will NFTs and Digital Proof of Ownership Empower Creative Industry Entrepreneurs?*, 17 J. BUS. VENTURING INSIGHTS 2 (Feb. 2022) <https://doi.org/10.1016/j.jbvi.2022.e00309>.

¹⁸ See Harrison Jordan, *No, NFTs Aren't Copyrights*, TECHCRUNCH (Jun. 16, 2021, 10:15 AM CDT), <https://techcrunch.com/2021/06/16/no-nfts-arent-copyrights/> [<https://perma.cc/PQ85-TAUY>].

¹⁹ Jake Frankenfield, *Crypto Tokens*, Investopedia (May 20, 2022), <https://www.investopedia.com/terms/c/crypto-token.asp>.

²⁰ See *Minting Crypto-What is Minting Crypto?*, Corp. Fin. Inst., <https://corporatefinanceinstitute.com/resources/knowledge/data-analysis/minting-crypto/> (last visited Apr. 2, 2022). Sometimes the process is called “mining” if the token is a unit of cryptocurrency, e.g., mining a bitcoin. In other contexts it is called “forging.” See *What is crypto staking and how does it work?*, N26 (Feb. 16, 2022), <https://n26.com/en-eu/blog/what-is-staking-crypto/>; *Proof of Stake: Crypto Staking vs. Crypto Minting*, MyCointainer, <https://www.mycointainer.com/insight/proof-of-stake-crypto-staking-vs-crypto-minting/> (last visited Apr. 2, 2022).

²¹ See Stephen J. Bigelow, *Blockchain: An Immutable Ledger to Replace the Database*, TECHTARGET (Sept. 9, 2021), <https://www.techtargget.com/searchitoperations/tip/Blockchain-An-immutable-ledger-to-replace-the-database> [<https://perma.cc/KQZ4-TGNG>].

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the chain.²² The blockchain serves as a public ledger of the records of creation, transfer, and ownership of the tokens recorded on the blockchain.²³

Tokens can be fungible, meaning a fungible token can be exchanged one for one with any other token of its kind.²⁴ A perfect example of a fungible token is a unit of cryptocurrency, such as one bitcoin on the Bitcoin blockchain²⁵ or one unit of ether on the Ethereum blockchain.²⁶ One bitcoin can be exchanged for any other bitcoin.²⁷ They are fungible and have the same value.

But tokens also can be non-fungible—the example being an NFT which represents a unique asset that is not the equivalent of any other asset or token.²⁸ An NFT that records the existence and ownership of a work of art cannot be presumed to be worth the same or exchangeable for any other NFT in the same way that one 30X40” oil painting will not be presumed to be exchangeable for another 30X40” oil painting.

In this discussion it is critical to understand that the NFT is not the artwork and it does not become the artwork. Rather, the NFT records the existence and ownership of the artwork onto the blockchain, and because no two NFTs are the same, and no two blockchain registrations can be the same, the tokenized asset linked to the NFT also can be considered unique and nonfungible.²⁹

NFT registration makes a digital asset
unique and non-fungible because the NFT itself
is unique and non-fungible.

²² See Lucian Constantin, *Hashing explained: Why it is your best bet to protect stored passwords*, CSOnline (Jan. 31, 2021), <https://www.csoonline.com/article/3602698/ hashing-explained-why-its-your-best-bet-to-protect-stored-passwords.html>; Jake Frankenfield, *Hash definition*, Investopedia (Jan. 13, 2022), <https://www.investopedia.com/terms/h/hash.asp>; Adam Hayes, *Target Hash definition*, Investopedia (Jun. 29, 2021), <https://www.investopedia.com/terms/t/target-hash.asp>.

²³ See Bigelow, *supra* note 22.

²⁴ *Fungible vs Nonfungible Tokens: What Is the Difference?*, COINTELEGRAPH, <https://cointelegraph.com/nonfungible-tokens-for-beginners/fungible-vs-nonfungible-tokens-what-is-the-difference> [<https://perma.cc/YPN6-2ECM>] (last visited May 23, 2022).

²⁵ *Id.*

²⁶ *Id.*

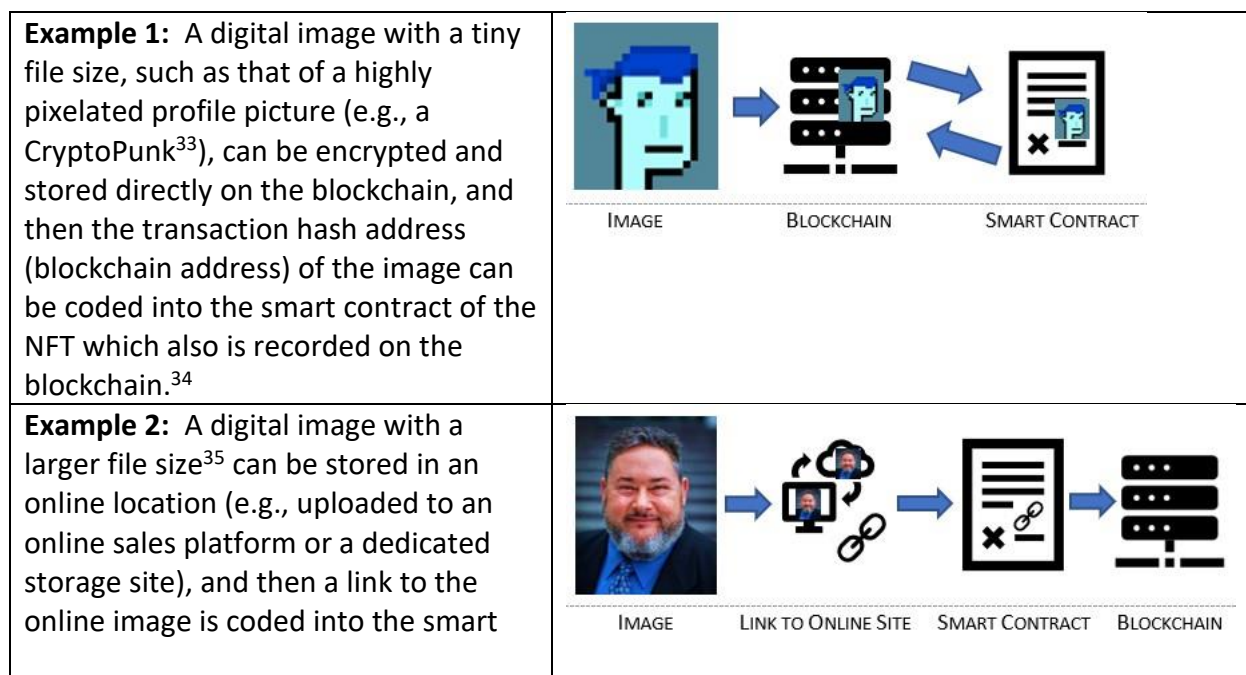
²⁷ *How does bitcoin exchange work?*, BITCOIN.COM, <https://www.bitcoin.com/get-started/how-bitcoin-exchange-works/> (last visited Mar. 22, 2023) [<https://perma.cc/U7FG-3J6J>].

²⁸ Clark, *supra* note 16.

²⁹ See Rakesh Sharma, *Non-Fungible Token (NFT): What It Means and How It Works*, INVESTOPEDIA (Jan. 28, 2023), <https://www.investopedia.com/non-fungible-tokens-nft-5115211> [<https://perma.cc/EJ76-UW5Y>].

This is an exciting development for digital artworks because previously claiming ownership of a digital file such as a .jpeg image felt like a hollow boast when the asset often could be found in many places on the internet and copied just as easily. The NFT makes a unique registration which makes the tokenized digital artwork a unique asset.³⁰ There may be other, similar artworks in existence, and some may even be registered by NFTs on a blockchain, but each creation of an NFT makes a unique record on the blockchain of a unique asset.³¹

Artworks become “tokenized,”³² or linked to a non-fungible token, in a variety of ways, but the three most common ways are the following:



³⁰ *Id.*

³¹ *Id.*

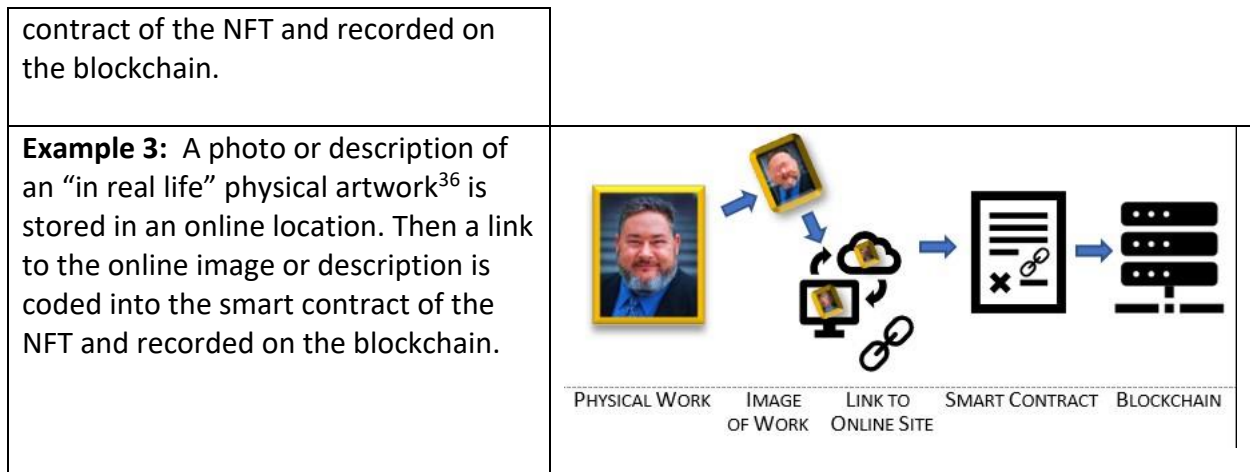
³² *Id.*

³³ Michael D. Murray, Three cropped and revised thumbnail-sized images of Larva Labs, CryptoPunk #5822 (2017), from OpenSea listing for CryptoPunk #5822. *CryptoPunk #5822*, OPENSEA, <https://opensea.io/assets/0xb47e3cd837ddf8e4c57f05d70ab865de6e193bbb/5822> (last visited Apr. 13, 2022) [<https://perma.cc/M4VX-UVRR>].

³⁴ As noted here, the best examples of NFT art that are encrypted and stored on a blockchain are CryptoPunks which are hash encoded and stored on the Ethereum blockchain. *On-chain Cryptopunks*, LARVA LABS, <https://www.larvalabs.com/blog/2021-8-18-18-0/on-chain-cryptopunks> (last visited Jun. 15, 2022) [<https://perma.cc/WBY5-CYQZ>]. See also ETHERSCAN, <https://etherscan.io/address/0x16f5a35647d6f03d5d3da7b35409d65ba03af3b2#code> (last visited Mar. 22, 2023) [<https://perma.cc/RRG5-4RL3>].

³⁵ *Michael Murray*, UK ROSENBERG COLLEGE OF LAW, <https://law.uky.edu/people/michael-murray> (last visited Mar. 22, 2023) [<https://perma.cc/3L5M-4XEC>].

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In the case of **Example 3** from the chart above, the chart does not mention whether the physical three-dimensional artwork itself is being offered for sale to the buyer. In truth, some buyers may not want possession of the physical work.³⁷ In such a case, buying the NFT is just buying the blockchain registration listing the purchaser as “owner” of the artwork, as if one bought a deed of ownership and certificate of authenticity for a baseball card without ever taking possession of the card. But if the physical work is being offered for sale, then instructions about whether and how the physical work would be claimed, and in the absence of a transfer of possession, the terms for storage, protection, and insurance for the physical asset, should be provided either in the metadata of the smart contract itself or in the listing description of the NFT on the NFT exchange.

III. The Mechanism of Smart Contracts That Pay Resale Royalties

The specific coding of smart contracts to allow for the payment of resale royalties is a procedure that is beyond the technological expertise of the author,

³⁶ *Id.*

³⁷ The artist Damien Hirst created an NFT art series, *The Currency*, linked to physical works of art (sheets of paper with painted dots on them) that asked each purchaser after one year’s time to make an election to either keep the NFT and order Hirst to destroy the original artwork, or to “burn” the NFT (which means to send it to an address on the blockchain where no one has access to the smart contract of the NFT) and receive and keep the physical artwork. See Caroline Goldstein, *Damien Hirst’s NFT Initiative, Which Asks Buyers to Choose Between a Digital Token and IRL Art, Has Already Generated \$25 Million*, ARTNET NEWS (Aug. 25, 2021), <https://news.artnet.com/market/damien-hirst-nft-update-2002582> [<https://perma.cc/NCJ4-PYCQ>]. “Burning” destroys an NFT by “sending a token to an un-spendable address that no one can access.” Alex White-Gomez, *What Happens When You ‘Burn’ an NFT?*, ONE37PM (Sept. 16, 2022, 4:30 PM), <https://www.one37pm.com/nft/burn-nft> [<https://perma.cc/FG2U-SWHA>].

but some NFT exchanges, such as OpenSea,³⁸ have automated the process. On OpenSea, considered to be the most popular site in 2022 for minting, selling, and trading NFTs,³⁹ there is a step in the setup of your OpenSea listing account where you can set the resale royalty percentage for all of the NFTs you will mint under that account.⁴⁰ You can set the royalty percentage to be as low as “zero” and as high as 10%.⁴¹ Setting a resale royalty percentage of zero and thereby foregoing the royalty altogether is not necessarily a foolish bargain because the resale royalty rate will be viewed as a tax (a transaction cost) on future profits from the resale of the NFT, and thus setting the rate too high will be a drag on resales as potential buyers and sellers may balk at this tax.⁴²

Smart contracts merely *allow* for the payment of a royalty to the original minter on the resale of the NFT—they do not guarantee it.⁴³ This is because there are ways around a resale royalty payout. First, the triggering mechanism for a resale royalty payout is dependent on the blockchain standard used, and it may even be dependent on the marketplace platform used.⁴⁴ What this means is, NFT owners have the capability to move their NFT from the original minting platform's architecture to an off-platform wallet and then sell the NFT on a marketplace platform that does not use the original minting platform's architecture and smart contract protocols (for example, in a marketplace platform on another blockchain).⁴⁵ Such a transaction will not “notify” the original smart contract of the NFT on the original blockchain that a resale took place and

³⁸ See OPENSEA, <https://opensea.io/> (last visited Mar. 6, 2023) [<https://perma.cc/72DY-XPFX>].

³⁹ *Best NFT Marketplace: Buy Sell Crypto ART & NFTs in 2022*, THE ISLAND NOW, <https://theislandnow.com/best-nft-marketplace/> (Jan. 12, 2023, 3:57 AM) [<https://perma.cc/5YP4-72CK>]; see also Jessica Klein, *OpenSea, the World's Hottest NFT Startup, Gained 500,000 Users in 1 Year. Its Founders Went from Broke to Billionaires in That Same Time. Now They're Struggling to Keep it From Going Off the Rails.*, FORTUNE (Mar. 30, 2022, 4:20 PM), <https://fortune.com/longform/opensea-nfts-eth-ethereum-crypto-marketplace-founders/> [<https://perma.cc/T6GV-H3T4>].

⁴⁰ See Jose Oramas, *How to Mint Your First NFT on OpenSea? A Step-by-Step Guide*, CRYPTOPOTATO (Dec. 29, 2021, 5:02 PM), <https://cryptopotato.com/how-to-mint-nft-opensea-guide/> [<https://perma.cc/L8WQ-6BVF>].

⁴¹ See *id.*

⁴² See Andy Storey, *Do NFT Creators Get Royalties? 8 Things to Know*, POSTER GRIND (Dec. 18, 2021), <https://postergrind.com/do-nft-creators-get-royalties-8-things-to-know/> [<https://perma.cc/J27L-KGRB>].

⁴³ See *id.*; see also Katarina Feder, *Can I Earn Royalties Anytime Someone Resells My NFT? + Other Artists' Rights Questions, Answered*, ARTNET NEWS (Dec. 21, 2021), <https://news.artnet.com/opinion/royalty-nft-other-artists-rights-questions-answered-2052319> [<https://perma.cc/BTS6-D8YK>]; James Beck, *Can NFTs Crack Royalties And Give More Value to Artists?*, CONSENSYS (Mar. 2, 2021), <https://consensus.net/blog/blockchain-explained/can-nfts-crack-royalties-and-give-more-value-to-artists/> [<https://perma.cc/2AGU-UMHP>]. *this is fn 44

⁴⁴ See Storey, *supra* note 43; see also Feder, *supra* note 44; Beck, *supra* note 44.

⁴⁵ See Vallabhaneni & Chernichaw, *supra* note 10; Feder, *supra* note 44; Storey, *supra* note 43.

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therefore the smart contract will not order a payout of the resale royalty.⁴⁶ This limitation should be acknowledged because neither the smart contract nor the NFT being resold is sitting on a cache of money to pay the royalty from. The smart contract must be tied into the resale payment process itself so that at some point in the process it can calculate the amount of currency the reseller received and automatically calculate and transfer a set percentage of that sum to the wallet address of the creator of the NFT. It's all very nifty, but this process will not occur if the resale takes place on a different exchange on a different blockchain or in an "off chain" transaction discussed below.

Second, NFTs also can be transferred without the use of a marketplace platform through a simple wallet to wallet transfer—referred to as taking the transaction "off chain"⁴⁷—and again, this would not "notify" the NFT's smart contract that a "resale" took place so that the smart contract can order a payout of the resale royalty.⁴⁸ The original minter of the NFT could periodically use a chain explorer and do an accounting of the contract addresses of all of their NFTs that were sold and see if any show transfers for which no resale royalty was paid. For those transfers, the original minter could contact the transferor and transferee to try to determine if that transfer was in fact a sale and purchase event that should have triggered the payment of a resale royalty; but at this point, all the original minter can do is ask the transferor and transferee to live up to terms and pay the royalty associated with the NFT. The original minter has no leverage; the NFT is already transferred, someone new owns the private key, the transfer was carried out using the rules coded into the blockchain ecosystem, and code is law.⁴⁹ It is theoretically possible that the reseller could voluntarily send the resale royalty percentage to the NFT creator as a gesture of good will and good citizenship in the crypto and NFT community, but whether this selfless act ever occurs is beyond the authors' knowledge.

A third problem is that over time, the platform architectures will evolve, and new smart contract protocols will be developed and used, but the NFTs

⁴⁶ Reese, *How Are NFTs Stored? On-Chain, Off-Chain and Decentralized Storage*, DECRYPT (Aug. 25, 2022) <https://decrypt.co/resources/how-are-nfts-stored-on-chain-off-chain-and-decentralized-storage> [<https://perma.cc/DE5P-8RJX>].

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Olga V. Mack, 'Code Is Law': Should Software Developers Protect Our Freedoms?, ABOVE THE LAW (Aug. 12, 2019), <https://abovethelaw.com/2019/08/code-is-law-should-software-developers-protect-our-freedoms/> [<https://perma.cc/Q692-SZQU>]; Emily Nicolle, *Massive Crypto Hacks Test 'Code is Law' Ethos*, BLOOMBERG (Mar. 31, 2022) <https://www.bloomberg.com/news/newsletters/2022-03-31/crypto-code-is-law-until-a-600-million-hack-bloomberg-crypto> [<https://perma.cc/DZ9U-MMDL>].

already sold will be stuck with the same protocol used when it was minted. Remember that blockchains are immutable and you cannot edit an existing smart contract that is encrypted on a blockchain even if that smart contract's protocol becomes obsolete.⁵⁰ So, if you are satisfied with listing and selling your NFT on OpenSea on the Ethereum blockchain, and are willing to stay hopeful that others will also resell your NFT on OpenSea, then you should be fine on collecting the resale royalties when and if you have resales.

IV. Will NFT Smart Contracts that order the payment of resale royalties be preempted by the Copyright Act?

It is possible that the same parties or others with the same interests will raise the same arguments against the use and enforcement of NFT resale royalty smart contracts that were used to defeat the California Resale Royalty Statute.⁵¹ The main difference here is that the California statute was a fiat proclamation of California law, and its terms could not be waived or contracted around.⁵² The state law was held to be an interference with part of copyright law's first sale rights and distribution rights under 17 U.S.C. §§ 106(3) and 109(a).⁵³ The statute terms could not be avoided, and thus it imposed a change in the distribution rights distribution and first-sale limitations, and this brought the law within the scope of the copyright act's preemption power over state laws.⁵⁴ The Ninth Circuit said: "the CRRA [California Resale Royalty Act] is designed precisely to alter the first sale doctrine by affording artists a right to at least some measure of payment on every sale after the first. At the same time, the CRRA also restricts the federal distribution right by forbidding artists from fully alienating copies of their artwork. In effect, the CRRA creates an inalienable restraint on alienation."⁵⁵ This alteration and interference with 17 U.S.C. §§ 106(3) and 109(a) rights is what doomed the California statute.

Sales and purchases of NFTs and their terms and conditions are ultimately controlled by contract law.⁵⁶ The contract law setting does not come from the name smart "contract," because that term is largely a misnomer. Smart contracts

⁵⁰ Josh Stark, *Making Sense of Blockchain Smart Contracts*, COINDESK (Sep. 11, 2021), <https://www.coindesk.com/markets/2016/06/04/making-sense-of-blockchain-smart-contracts/> [<https://perma.cc/VK77-E8G9>].

⁵¹ See DUBOFF et al., *supra* note 2.

⁵² *Id.*

⁵³ 17 U.S.C. § 106(3); 17 U.S.C § 109(a).

⁵⁴ *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1070 (9th Cir. 2018).

⁵⁵ *Id.* at 1071.

⁵⁶ David Hoppe, *Mint Conditions: NFT Artist Agreements*, GAMMA LAW (Aug. 26, 2022), <https://gammalaw.com/mint-conditions-nft-artist-agreements/#:~:text=An%20NFT%20artist%20agreement%20is,work%20in%20exchange%20for%20compensation> [perma.cc/P4RW-43B8].

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are not very smart—they do things automatically by their code, not creatively.⁵⁷ The code works in an “If X, then Y” manner: “If resale, then pay the resale royalty percentage to the creator.” The part that is a normal contract is that the NFT is offered for sale with a listing of its terms and conditions, and some or all of these terms can be coded into the smart contract itself.⁵⁸ The fact that there is an “adhesion” contract or “clickwrap” nature to an NFT’s sales terms is explained because NFT transactions are supposed to be paperless, negotiation-free, and “trustless.” With the peculiar use of the term “trustless” in the blockchain and crypto community meaning there is no trust needed because the code will take care of everything.⁵⁹ But ultimately the terms of the sale are still contract terms.

Basic contract terms of purchase and sale should not be preempted by the Copyright Act just because they deviate from the default provisions of copyright law. The Ninth Circuit recognized this when it said in *Close*, “Plaintiffs have misunderstood the difference between a law that permits an act and a law that compels an act. Federal copyright law protects the first sale only and permits (by not forbidding) purely private arrangements between an artist and a first purchaser with respect to subsequent sales. The CRRA, however, is a restraint on contract because the artist and the purchaser cannot contract around the *droit de suite* [right of continuation, meaning the resale royalty right]. . . . The availability of a right to future payments through a private contract has no bearing on whether the legislative prescription of such a right is preempted by federal law.”⁶⁰

All NFT traders should know these ground rules. A purchaser that buys an NFT should know that it might have a resale royalty percentage associated with it, especially if it is purchased on OpenSea, the biggest sales and resales platform in the NFT business. A quick check of an NFT’s listing or its smart-contract coding could confirm this. If the resale terms are not desired, the NFT purchaser *could* seek a bargained-for exchange in which the seller would mint and sell the NFT without the resale-royalty coding in the smart contract. This act would violate the

⁵⁷ Isaiah Poritz, *Caked Ape Lawsuits Show Need for Clear Contracts in NFT Art*, BLOOMBERG L. (Mar. 31, 2022), <https://news.bloomberglaw.com/ip-law/caked-ape-lawsuits-show-need-for-clear-contracts-in-nft-art> [perma.cc/QH2F-N5YU].

⁵⁸ Jake Frankenfield, *What are Smart Contracts on the Blockchain and How They Work*, INVESTOPEDIA (Feb. 9, 2023), <https://www.investopedia.com/terms/s/smart-contracts.asp#:~:text=Smart%20contracts%20are%20code%20written,parties%20to%20trust%20e ach%20other> [perma.cc/8XUW-NTT8].

⁵⁹ *What Does Trustless Mean?*, CRYPTOPEDIA (Jun. 28, 2022), <https://www.gemini.com/en-US/cryptopedia/trustless-meaning-blockchain-non-custodial-smart-contracts> [perma.cc/MLA2-LPMB].

⁶⁰ *Close*, 984 F.3d at 1071.

conduct code and ethos of the crypto community regarding paperless, negotiation-free, and trustless transactions,⁶¹ but it is *possible*.

Contracts change the conditions and enforcement of copyrights all the time. One ready example is licenses that change how the 17 U.S.C. § 106 rights are owned or controlled.⁶² A downstream resale royalty payment that is a contract term of the sale of an NFT may be construed as a running covenant and an encumbrance (a tax) on resales of the NFT; but, if such terms are permissible in contract law, and if the purchaser agrees to the sale under those terms, then this does not create rights that overlap or eliminate the operation of copyright's distribution and first sale doctrine.⁶³

V. Concluding Observations

Resale royalty rights have traditionally been viewed with some skepticism, even within the arts community,⁶⁴ because only a few top name, top selling, and top earning artists have ever truly benefitted from multiple resales of their works that would generate the resale royalty. For the numbers to matter, there must be regular resales of the works, hopefully at higher and higher prices; but, much of art is bought, held, yet not resold on a regular basis.

Two major longitudinal studies⁶⁵ concluded that only a small number of artists would ever receive an appreciable amount of resale royalty.⁶⁶ For Wu, the more comprehensive of the two studies, only 0.15% of the 233,000 artists in the study had resales of over \$1,000 in value from which royalties might have been derived over the study's 51 months.⁶⁷ Of that group, five artists (Willem De Kooning, Jasper Johns, Roy Lichtenstein, Frank Stella, and Robert Rauschenberg) accounted for 55% of the resales.⁶⁸ That's great news if your name is Willem De Kooning, Jasper Johns, Roy Lichtenstein, Frank Stella, or Robert Rauschenberg, but not so great news if it is not.

⁶¹ John Gilbert & Ornella Hernandez, *How NFT Royalties Work – and Sometimes Don't*, BLOCKWORKS (Nov. 4, 2022), <https://blockworks.co/news/nft-royalties-sometimes-they-work-sometimes-they-dont> [perma.cc/QHSS-33WX].

⁶² See Michael D. Murray, *Transfers and Licensing of Copyrights to NFT Purchasers*, 6 STAN. J. OF BLOCKCHAIN L. & POL. 119 (2023).

⁶³ See *Close*, 894 F.3d at 1071.

⁶⁴ See, e.g., Laurel Wickersham Salisbury, *It's Not That Easy: Artist Resale Royalty Rights and The ART Act*, CTR. FOR ART L. (Jul. 1, 2019), <https://itsartlaw.org/2019/07/01/its-not-that-easy-artist-resale-royalty-rights-and-the-art-act/> [https://perma.cc/LTX9-SXZH], Herbert I. Lazerow, *Art Resale Royalty Options*, 63 J. COPR. SOC'Y USA 201, 202–05 (2016).

⁶⁵ Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-up Study*, 46 J. COPR. SOC'Y USA 531 (1998–1999); Tom R. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPR. SOC'Y USA 146 (1980).

⁶⁶ See note 154, *supra*.

⁶⁷ Wu, 46 J. COPR. SOC'Y USA at 543.

⁶⁸ *Id.*

*NFTS Rescue Resale Royalties?
The Wonderfully Complicated Ability of NFT Smart Contracts to Allow Resale
Royalty Rights*

In 2013, the United States Copyright Office reexamined the arguments and evidence in favor of and against the right and agreed that a resale royalty right might only provide a significant benefit to a small number of artists; the Office nevertheless recommended to Congress that it should investigate the topic.⁶⁹ In addition, when Brexit gave the United Kingdom the chance to walk away from the resale royalty requirement of the European Union's directive 2001/84/EC, the United Kingdom decided to keep it, declaring in January 2021 that, "The Artist's Resale Right has provided an essential income for thousands of artists and artists' estates for nearly 14 years in the UK."⁷⁰

The NFT market of 2021-2022 has gone on a rollercoaster ride with rapid sales and frequent resales of NFTs followed by stagnation and a chilling effect from the current Crypto Winter.⁷¹ As the art NFT market matures and hopefully endures through the current stagnation, people will likely return to a more traditional pattern of buying and holding art NFTs, which will dampen the expectation of a continuing stream of passive income from NFTs that have been sold.

⁶⁹ U.S. COPYRIGHT OFFICE, *Resale Royalties: An Updated Analysis* 65–66, 68 (Dec. 2013), <https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>.

⁷⁰ Artists' Collecting Society, *How does Brexit affect the Artist's Resale Right?* (Jan. 20, 2021), <https://artistscollectingsociety.org/news/how-does-brexit-affect-the-artists-resale-right/#>.

⁷¹ The first "Crypto Winter" Recession was in 2014, the second began in 2017 and continued through 2019, and the current one began in May 2022 with the collapse of Terra, the second largest defi ecosystem, and continues through the date of this writing in August 2022. See Jack Denton, *A Crypto Winter Is Setting In. Why the Outlook Is Different This Time*, BARRON'S (Jun. 30, 2022), <https://www.barrons.com/articles/bitcoin-prices-outlook-crypto-winter-51656533501>; DappRadar, *Contrasting The 2022 Market Crash To 2018's Crypto Winter*, THE DEFIANT (May 26, 2022), <https://thedefiant.io/dappradar-winter-is-coming/>.