

NFTs: License to Own?

Jeremy Freeman¹ and Mr. Cross[#]

¹Bronxville High School, Bronxville, NY, USA

[#]Advisor

In July 2021, the average price of an NFT from “Bored Ape Yacht Club” reached \$20,000. Investment experts, famous artists, and monetary fundamentalists were outraged that someone would pay thousands of dollars for what is essentially a computer drawing of a monkey with an amusing outfit. Two months later, the average price hit \$100,000.

NFTs were created in 2017, with creators following cryptocurrencies into the relatively new and seemingly limitless market of speculative digital currency. Intended as a way for artists to copyright and sell their work online, it quickly became evident that NFTs were - much like the modern art business - being used as a method of money laundering and degenerative investing. Even so, in the past couple years NFTs have gained enormous traction, going from a source of derision and memes to an established global market that handles billions of dollars in assets.

Perhaps the most interesting thing about NFTs is the fact that no matter how hard people try to explain them, somehow nobody seems to really understand what they are. NFT stands for Non-Fungible Token, which is basically a fancy way of naming a digital tag that proves ownership of an asset. Much like how a deed proves that someone owns a house, having an NFT proves ownership of a specific version of a picture, video, or file on the internet. Here’s the kicker: each NFT is the only “official” copy of said file, making NFTs valuable primarily because of scarcity - they are one of a kind.

But what do NFT owners actually own when they buy these digital assets? Well, they certainly do not own exclusive rights to the image itself. Unlike real artwork, which can never be truly copied, two clicks on a computer can create an exact replica of any digital asset. This means millions of people have access to the same picture that investors or collectors spent thousands to buy, and the owners have no way of stopping them from viewing or even using it themselves. Instead, what is purchased is the metadata, a specific link that identifies that file as the “official” version of the asset. Theoretically, buyers also sometimes own the copyright to the asset, meaning people can not use the file for their own commercial purposes. However, these digital copyright rules are still very convoluted, and are so difficult to enforce that they are pretty much inconsequential in terms of actually defending NFT ownership rights. So, if buyers do not have exclusive control and usage of the picture, can we even say that they actually own the NFTs they purchase?

To answer that, one must first understand what it means to own something. According to John Locke’s *Two Treatises on Government*, the most important aspect of owning something is “That labor put a distinction between them and common. That added something to them more than Nature ... and so they became his private right,” (Locke 116). Following this definition, it is evident that NFTs cannot be owned, except maybe by the original artist of a piece. To simply purchase a digital picture is not to add one’s labor to it, meaning someone can not really own an NFT unless they drew it themselves. However, Locke’s philosophy does include the idea that money, if agreed upon as a means of exchange, can count as a legitimate way of measuring one’s labor. If a farmer labors to grow crops, and then sells those crops to someone who will use them in exchange for an agreed-upon currency, then anything they buy with said currency is a legitimately owned item due to its roots in the farmer’s labor. Following this logic, NFT ownership is legitimate, as long as it is lawfully bought from the artist or a legitimate previous owner.

This reasoning for the legitimacy of currency and ownership is shared by Robert Nozick, who analyzes Locke’s arguments and essentially claims that private ownership is not only legitimate but inherently necessary

to a civilized society. However, like Locke, Nozick discusses the provision that private ownership should have “enough and as good left in common for others,” (Nozick Sect 6). At first glance, this provision has no effect on NFT ownership, since as discussed before, infinite copies of a digital asset can be created with little to no effort. These versions are “as good” as the version being privatized by the purchase of an NFT, except for the fact that they theoretically can not be used for commercial purposes. However, is it really “as good” if the asset is unusable for any practical use? To use Locke’s own rhetoric, NFTs would be akin to a farmer harvesting bananas from a local forest. The forest is common ground, but by putting in the labor to harvest the bananas, the farmer stakes his claim to them and is free to eat or sell them as he pleases. He is careful to leave more than enough for others to use, but in some fashion, he makes it illegal for bananas - except for the ones he himself owns - to be sold on the market. So, he has left enough in common for the use of others, but barred the remaining products from being used commercially. Yes, these bananas are exactly the same as the ones the original farmer owns. But if they can not be used for anything other than personal enjoyment, are they truly “as good” as the bananas harvested by the farmer? Locke would likely say otherwise. However, at the end of the day, the philosophical arguments of historical figures do not really apply to the modern world. Today, individuals and corporations can stake claim to pretty much anything, and even the most basic human resources are sold to the highest bidder. Everything people use costs money, and it matters little whether these individual and corporate owners “leave enough for the next guy.” Locke’s theories no longer apply to the modern world, and his ideas have little consequence on what is considered “legitimate” ownership. That being said, when people buy NFTs, are they actually getting anything for their money?

Well, legally speaking, yes. Undoubtedly, buyers own the rights to the specific version of the digital picture/asset that they have purchased. They are the only ones with access to that version of the asset, though since that could be said for any copy privately stored on a computer, this does not mean much. They also own the digital token that confirms rightful ownership of the NFT. Essentially, this means they own a link that proves they are the “true owner” of that digital asset. Some NFTs also come with intellectual property rights to the underlying asset, though depending on which NFT was purchased, this may or may not be the case. According to a paper by Joshua Caswell and Leigh E. Furtado, “Only one person (or a set number of people) owns the token, but others may own the intellectual property rights to the content behind the token, and many additional people may own digital copies,” (Caswell/Furtado Sect. 4). Once again, we are struck with ambiguous definitions and a lack of definitive answers to our questions. Do NFT buyers own exclusive rights to their digital assets? Maybe. Can they regulate the use of these files that they paid thousands or even millions for? Maybe. There is little to no way of knowing, as most NFT auction platforms do not bother putting the immense legal documents on their pages, leaving customers to bid without knowing exactly what they will get from the purchase. Until these basic questions can be fully answered, it is hard to say that buyers actually own anything tangible when they purchase NFTs.

Despite what people think, most NFTs do not come without intellectual property rights, making them essentially worthless for a number of reasons. Not only are buyers paying for something that they do not even get complete control of, but they also have no ability to sue if someone were to resell a copy of the exact same digital asset. According to Katie Rees, “if someone wanted to take a screenshot of the NFT you own and upload that screenshot elsewhere, they are entirely within their rights to do so. On top of this, you have no legal rights if someone wants to copy the NFT you’ve bought and sell it as their own,” (Rees Sect. 3). If an NFT does not come with intellectual ownership rights, not only can it be copied by anyone with a functioning computer, but those copies can be resold in a way that devalues both its uniqueness and integrity. There are those who argue that these possibilities are part of the risk assumed with any digital asset and that people reselling different copies of the NFT will not devalue the original token. However, at a fundamental level, the idea that people actually “own” something that is not only instantly replicable by anyone in the world but can be duplicated and commercially sold without the current owner’s consent is ludicrous.

Even if NFTs do come with intellectual ownership rights to the digital asset, what exactly does this even entail? Can individuals only not use the asset in commercial endeavors, or is just copying the file considered digital theft? According to Eamon Barrett, a professional IP lawyer, if the copyright protections for an NFT are valid, “Right-clicking and making a copy without a license to do so is a copyright infringement ... Let’s call it a theft,” (Barrett Sect. 2). According to Barrett, the intellectual property rights for NFTs mean even copying the digital asset around which the token is based could be considered theft. However, Barrett also acknowledges that copying an NFT does nothing to devalue the original asset, making it an essentially harmless crime. In reality, replicating the viewable asset of an NFT is no more stealing than taking a picture of some famous artwork. Yes, the photographer now has a copy that they can look at or use for their own purposes. However, with no rights to use it commercially, the photo is essentially worthless and has no impact on the original work’s value, which is the same with NFTs. Because of this, it is almost certain that NFT protections will never extend to the point where they consider simply copying the digital file as theft.

So what does the law say about this? Well, once again, nothing conclusive. So far, no official statement has been released by a governmental body to explain whether NFT copying is considered digital theft. At the end of the day though, it does not matter what the law says, because in practice there is no way to track and punish infringements of these laws. The greatest and worst thing about the internet is that it is completely anonymous, which allows people to “steal” a digital asset with essentially zero chance of getting caught. If copying an NFT were deemed to be illegal, it would make no real difference, since the authorities would never find the random person halfway across the world who clicked Control-C Control-V on their computer. Even for full-blown NFT theft, where someone hacks an account and transfers the actual token somewhere else, governmental bodies warn that there is essentially no way to recover stolen assets. According to the Manhattan District Attorney’s Office, “However, because of the nature of blockchain transactions, if an NFT is compromised or stolen, it may not be recoverable by the rightful owner,” (manhattanda.org Sect 2). Here, the Distinct Attorney of a major US city is basically admitting that while the government recognizes the right to NFT ownership, they can do next to nothing in the case of NFT theft. If an account is hacked, or if a buyer gives their password to the wrong person, there is next to no chance of retrieving the stolen assets. Also, because NFTs are inherently uncopyable, there is no way to get a replacement for the digital asset in the way that home insurance could replace a stolen TV or other physical objects.

With no legal protection for NFT ownership, it is easy to see why many people do not trust digital tokens. While buyers do technically “own” an NFT, the legal protections for this ownership are essentially nonexistent. Basically, NFT ownership rights are equivalent to having ownership of a singular dollar, with an accompanying contract to prove that the person lawfully obtained it. Yes, the government recognizes the owners’ right to that dollar. However, if that dollar were to get stolen, or perhaps misplaced, there would be no way to track it and no help from the government in doing so. Much like the owner of that singular dollar, NFT owners must take full responsibility for their asset, knowing that there is almost no chance of retrieval if it is ever lost.

Despite all these shortcomings, the fact remains that investors own something when they purchase an NFT, and the government acknowledges this by attempting to tax NFT transactions. According to an article by Lisa M. Blum and Benjamin P. Foster, “Fungible tokens like Bitcoins are indistinguishable from each other and could not be considered collectibles. The 28% rate for capital gains on sales of collectibles, however, may well extend to some or all NFTs, given their unique nature and similarity to physical collectibles,” (Blum/Foster Sect. 3). So, NFTs are considered by the government to be collectibles, much like any antique, gem, art piece, or interestingly, alcohol. While it may only be so they can take a cut of inflated NFT profits, the government seems to recognize the legitimacy of NFT ownership in the same category as more established sentimental industries. It is quite fitting that profits from NFTs are taxed in the same brackets as other items whose value comes not from their practical use, but purely from their aesthetics, rarity, and arbitrary values. However, Blum and Foster also point out that if proper documentation is provided, NFT profits can be written off as investments

and taxed in a lower percentage bracket. So, the government recognizes that NFTs can be lawfully owned, but even they can not decide which category the digital assets should fall under. It seems that ownership of an NFT is defined as possession of an antiquities object, but if owners can prove plausible speculation, it can be treated like any other investment. So, is an NFT an object or an investment? Well, it's both - or it's neither - it's all subjective.

Another issue with NFTs is their moral ambiguity, and the fact that the haphazard digital contracts people are purchasing may not even be legitimate in the first place. In late 2021, Disney used Stan Lee's Twitter to advertise a new line of Stan Lee and Marvel NFTs. Marvel fans were outraged that Disney was using their idol to sell digitized tokens post-mortem. However, when the NFTs eventually went online, the minimum bid immediately jumped to \$30,000, and Disney would go on to make millions off of these auctions without Lee or his families' permission.

Believe it or not, this was actually one of the "better" cases of NFT fraud, as it was technically not fraud at all. While everyone can agree that using a dead figure to advertise corny and money-grabbing NFTs is morally wrong, at least Disney owned the rights to those digital assets. In many cases, however, the people selling NFTs have no right to be doing so at all. As Andrew Guadamuz, lecturer at the University of Sussex points out, "Anything that can be digitized can be turned into an NFT; the original work is only needed in the first step of the process to create the unique combination of the tokenID and the contract address. So, in principle, NFTs have very little to do with copyright," (Guadamuz Sect. 3). In order to create an NFT, people do not need to prove that they own the original work, which essentially means that anyone can pirate unknown artwork and turn it into NFTs worth thousands. While the original artist may sue for intellectual theft if they discover their work is being pirated, the lengthy nature of this process could allow the NFT to be bought and sold dozens of times before it is removed. When the token finally is removed, the final buyer owns a worthless asset, and they have basically wasted thousands of dollars on what is a void contract. The original criminal is not punished, and the only one who suffers is the ordinary person that just wanted to collect or invest in NFTs. So, even if buyers are "given" intellectual rights to a digital asset when they purchase an NFT, in most cases, they can not be sure if these rights were ever legitimate in the first place

Overall, NFTs are a stupid investment for a number of reasons. Not only is it an extremely volatile market, whose value is born entirely out of arbitrary antiquity, but investors may not even be buying the actual digital asset that the token seems to entail. In fact, investors can not even be sure whether they actually own the asset they are spending thousands on. There is no way to tell if the seller has legitimate authorization to sell the asset in the first place, as the anonymous shuffling of NFTs makes it impossible to track them back to their original source. For safe and legitimate NFT purchases, one pretty much has to stick with major companies and brands, as that is the only real way to make sure that the seller has full access to the rights they are promising to give.

Even if an investor is sticking to major brands, the anonymity and pirate-friendly nature of the internet makes it trivially easy for someone to copy and resell an NFT, regardless of copyright protections. While one might think that the law would protect investors, this is rarely the case. Theoretically, owning the copyright laws that come with a valid NFT should make it impossible for someone to duplicate and sell or use the copied digital asset. However, one only has to look at movies to see that piracy laws have little to no effect in deterring digital theft. Every year, there are 2.2 billion views of pirated movies in the US alone, with pirated videos getting a total of 230 billion views worldwide every year. Given that there are around 8 billion people in the world, and that around 87% of the population has access to electricity, this means that the average individual with electricity access watches around 33 pirates movies or videos per year. This is not even considering the fact that only around 65% of people have internet access, making the numbers even higher for internet users. If our copyright laws can not protect against the theft of high-end movies that cost millions to make, how can someone expect it to protect digital assets that are only valuable due to their rarity?

Today, many people make fun of NFTs for their ability to inflate the value of a basic image from pennies to thousands or even millions of dollars. Cartoonists such as D3vd satirize this by depicting people attempting to pay for expansive transactions with pictures of houses or other common objects, which is not too far off from the truth. However, overinflated prices and values that have no correlation to quality are possibly the least concerning things about these tokens. NFTs are weak investments of a purely speculative nature, which have pretty much no real legal backing to their existence. If people are ok with simply owning a link to a digital contract for an asset, with the knowledge that they have no control over its use and that copies could be produced and sold without their consent, then that is perfectly fine. However, many investors believe that they are receiving much more than this when they purchase an NFT, which helps contribute to the inflated prices and ridiculously high demand. Until people understand that NFTs are unprotected assets of arbitrary value, these tokens will forever be a scam used to profit exorbitantly off of the ignorance of others.

So, do NFT owners get anything when they purchase these digital assets? Yes, they get something that they own when they win these digital auctions. However, they can really only be said to control the specific link to that specific version of the digital asset, and nothing more. The idea that NFTs could be the wave of the future for artists and creators to profit off of their work is nice, but unless digital theft can somehow be curtailed, it is entirely unrealistic. In the end, NFT buyers do get something when they purchase these digital assets. They get a specific link, for a specific version, of a specific asset. The asset can be replicated infinitely, and there is no way to protect the legal rights of the owners. Despite what the NFT “gurus” might try to convince people, they are not truly buying a valuable asset. They are buying a link. A link; nothing more.

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