2022

# How to Sell NFTs Without Really Trying

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JSEL Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

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Something is happening and we don't know what it is. Suddenly last summer, the internet went nuts for "non-fungible tokens" or "NFTs." In a matter of months, NFT sales swelled from a sleepy slough of the blockchain to a thundering cataract that shows no sign of slaking. Special NFTs sell for millions of dollars, and some are even securitized. It's a big business that's only getting bigger.

But no one seems to know why. Objectively, NFTs are useless, meaningless, and worthless. So why are people willing to pay millions of dollars for them, even begging for the opportunity? Maybe it doesn't matter. If the market says NFTs are valuable, who are we to doubt it? Still, I'm curious. Why are people buying NFTs, and what accounts for their value?

## What is an NFT Anyway?

An NFT is just an encrypted unit of data stored on a digital ledger. While most NFTs are stored on the Ethereum blockchain, they can be stored on any digital ledger, and NFTs exist on other ledgers. NFTs are called "tokens" because they exist on the ledger of a digital currency but represent something other than a quantity of that currency, and they are "non-fungible" because they are unique and not substitutes for each other.

In theory, an NFT can consist of any kind or quantity of data. So, you could make an NFT of a text, image, or sound file. But encrypting and decrypting the data in an NFT requires considerable computing power. The more data an NFT contains, the more expensive it becomes to create and transfer. So, in practice, NFTs normally consist of as little data as possible, usually just a cryptographic hash of a URL.

Of course, NFTs are typically associated with a work of authorship, often a digital image, and the URL in an NFT is usually the address of a

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webpage that identifies the work associated with it. Accordingly, it's common to describe an NFT as an NFT "of" the work associated with it. But in reality, there's no fundamental relationship between an NFT and the work nominally associated with it. An NFT is an NFT of a work only because the creator of the NFT says it is. The owner of a work can create an NFT and provide that ownership of the NFT constitutes ownership of the work. But they can also provide that ownership of the NFT doesn't constitute ownership of the work. And a person can even create an NFT and associate it with a work they don't own, in which case ownership of the NFT is simply irrelevant to ownership of the work. Sometimes, an NFT is just an NFT, nothing more.

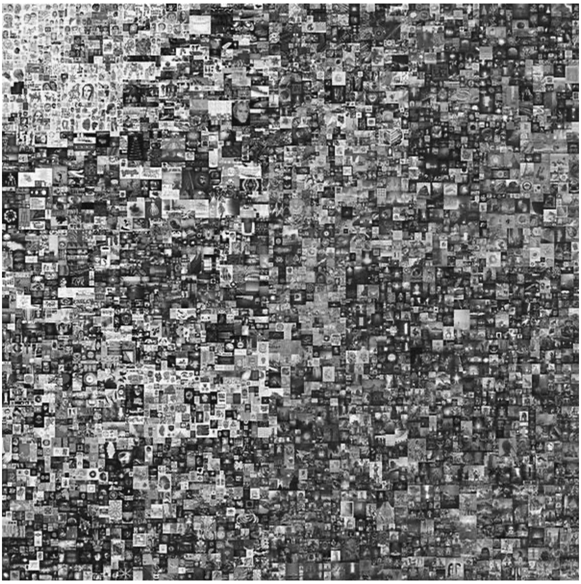
So, NFTs are peculiar, at least in part because they seem like a solution in search of a problem. After all, they were invented in order to provide indisputable proof of ownership of works of art. But all they can ever prove is ownership of the NFT, and even that is subject to property law, not to mention the costs, complications, and risks they introduce. Creating and transacting in NFTs is costly, transferring NFTs is complicated, and there is always the risk of inadvertently destroying or losing the NFT. Why bother when you can just transact in the work of art directly?

## A Potted History of NFTs

Everything about NFTs is confusing, except their origin. Kevin McCoy and Anil Dash arguably invented NFTs in 2014 at the Seven on Seven conference in New York City, when they presented a Namecoin blockchain marker linked to an animated TIF file created by McCoy.[1] But NFTs didn't start to catch on until 2017 when Larva Labs released CryptoPunks, which

[1] *See* Anil Dash, *NFTs Weren't Supposed to End Like This*, The Atlantic (Apr. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/04/nfts-werent-supposed-end-like/618488/ [https://perma.cc/CPQ6-CE5P]; *see also* Bijan Stephen, *Go Read this Story on the Real History of NFTs*, The Verge (Apr. 2, 2021, 1:44 PM), https://www.theverge.com/2021/4/2/22364240/nft-blockchain-artist-hackathon-kevin-mccoy-anil-dash [https://perma.cc/MFS7-C7XJ]. In 2021, McCoy "preserved" the original NFT by creating a new NFT, which he titled *Quantum* (2014-21), and sold at auction for almost $1.5 million. Kevin McCoy, *Quantum (2014-21)*, Sotheby's, https://www.sothebys.com/en/buy/auction/2021/natively-digital-a-curated-nft-sale-2/quantum (last visited Oct. 24, 2021). Some people argue the blockchain entries created by McCoy and Dash were not actually NFTs because they weren't permanent.

enabled users to buy and sell NFTs of 8-bit digital cartoon characters.[2] The founders of Larva Labs created 10,000 CryptoPunks NFTs, each corresponding to a unique character with a unique combination of elements or "traits." The NFTs were free, and all of them were claimed in a couple of days. Before long, CryptoPunks NFTs were selling for thousands of dollars, and people gradually began investing millions of dollars in NFTs of various kinds, from virtual sneakers to sports highlights.



BEEPLE, *EVERYDAYS: THE FIRST 5000 DAYS*

And then, in 2021, the NFT market exploded. All of a sudden, everyone was selling NFTs of everything imaginable, and demand was seemingly insatiable. Grimes sold about $6 million of assorted NFTs,[3] Chris Torres

[2] *See* Chloe Cornish, *CryptoKitties, CryptoPunks and the Birth of a Cottage Industry*, FIN. TIMES (June 5, 2018), https://www.ft.com/content/f9c1422a-47c9-11e8-8c77-ff51caedcde6 [https://perma.cc/NL4D-XTP3].

[3] *See* Jacob Kastrenakes, *Grimes Sold $6 Million Worth of Digital Art as NFTs*, THE VERGE (Mar. 1, 2021, 6:06 PM), https://www.theverge.com/2021/3/1/22308075/grimes-nft-6-million-sales-nifty-gateway-warnymph [https://perma.cc/SB5X-QDT4].

sold an NFT of a Nyan Cat GIF for $600,000,[4] Mike "Beeple" Winkelmann sold an NFT of his digital artwork *Everydays: The First 5000 Days* at Christie's for $69.3 million,[5] Jack Dorsey sold an NFT of his first tweet for $2.5 million,[6] and Kevin Roose sold an NFT of his *New York Times* column about NFTs for $558,000.[7] But the undisputed leaders of the NFT marketplace are the CryptoPunks and Bored Ape Yacht Club collections, examples of which sell for over a million dollars each.

Within months, an entire NFT financial ecosystem emerged. Inevitably, the owners of valuable NFTs decided to "securitize" them by selling off shares in the form of NFTs. While NFTs may be non-fungible, nothing says they're non-divisible, and NFT market participants are definitely more inclined to ask forgiveness than permission. Before long, NFT "index funds" emerged, offering smaller investors the opportunity to invest in "blue chip" NFTs by buying NFTs of a carefully selected, weighted portfolio of NFTs.[8] It's only a matter of time before someone introduces NFT derivatives, if they haven't already.

What happened? Who knows. For some reason, a lot of people were suddenly willing to pay a lot of money for nothing. Because that's what an NFT is, nothing. Buying an NFT of a work doesn't make you the copyright owner of the work. Buying an NFT of a work doesn't make you the owner of a particular copy of the work, whatever that means in the case of digital

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4 *See* Erin Griffith, *Why an Animated Flying Cat with a Pop-Tart Body Sold for Almost $600,000*, N.Y. Times (May 27, 2021), https://www.nytimes.com/2021/02/22/business/nft-nba-top-shot-crypto.html [https://perma.cc/3HZD-A9LV].

5 *See* Josie Thaddeus-Johns, *What Are NFTs, Anyway? One Just Sold for $69 Million*, N.Y. Times (Oct. 4, 2021), https://www.nytimes.com/2021/03/11/arts/design/what-is-an-nft.html [https://perma.cc/LX9L-EKM8]; *see also* Jacob Kastrenakes, *Beeple Sold an NFT for $69 million*, The Verge (Mar. 11, 2021, 10:09 AM), https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million [https://perma.cc/9P55-S4VE].

6 *See* Jay Peters, *Please Do Not Give Billionaire Jack Dorsey Money for His Tweet*, The Verge (Mar. 5, 2021, 7:38 PM), https://www.theverge.com/2021/3/5/22316320/jack-dorsey-original-tweet-nft-cent-valuables [https://perma.cc/KM79-S9AL]; *see also* Kate Knibbs, *The Next Frontier of the NFT Gold Rush: Your Tweets*, Wired (Mar. 10, 2021, 7:00 AM), https://www.wired.com/story/nft-art-market-tweets/ [https://perma.cc/SV2A-3MVK].

7 *See* Kevin Roose, *Why Did Someone Pay $560,000 for a Picture of My Column?*, N.Y. Times (Aug. 12, 2021), https://www.nytimes.com/2021/03/26/technology/nft-sale.html [https://perma.cc/AK8Q-Z8VF]; *see also* Kevin Roose, *Buy This Column on the Blockchain!*, N.Y. Times (June 30, 2021), https://www.nytimes.com/2021/03/24/technology/nft-column-blockchain.html [https://perma.cc/PG8A-7FDY];

8 *See, e.g.*, NFTX, https://nftx.io/ (last visited Dec. 16, 2021).

works. Hell, buying an NFT of a work doesn't even guarantee a permanent association with the work. All you get when you buy an NFT is the NFT.

Maybe. Or maybe you get something more, albeit something intangible, indefinite, even ineffable. Maybe you get clout, whatever that means. Maybe you get an aesthetic experience. Or maybe you get something else entirely. Who knows?

## Follow Your Nose, It Always Knows

In any case, for some reason, an awful lot of people are powerfully attracted to NFTs. Obviously, a considerable part of their attraction is the potential for enormous windfall profits. Many NFT investors have made enormous amounts of money. A few have even purchased popular NFTs, and then immediately resold them for 10 or even 100 times the purchase price. Understandably, stories like these are catnip for people looking to make a quick buck. Already, Twitter and Discord are teeming with people promoting NFTs, looking to buy NFTs, and offering advice about investing in NFTs.

From the outside, the logic of the NFT market is baffling. Some high-value NFTs are associated with famous artists or famous people. So, NFTs sold by popular digital artists like Beeple or celebrities like Jack Dorsey can be quite valuable. Other high-value NFTs are associated with popular memes, like Doge or Nyan Cat. But many of the most popular NFTs are collections of randomly generated 8-bit images. Specifically, CryptoPunks are the mainstay of the high-end NFT market. Why did these NFTs catch on and become valuable? Who knows. Maybe the NFT market just needed something to value, and they were available. Or maybe they tapped into the aesthetic sensibilities of NFT investors. Regardless, a universe of so-called "blue chip" NFTs has already coalesced, and the market is crowded with investors chasing the next CryptoPunk or Bored Ape and deriding projects that don't measure up.[9]

But maybe something else is happening at the same time, something more complicated than a mere economic bubble. Sure, everyone wants to make a buck. But NFTs aren't necessarily tulips or Beanie Babies, as much as people love to make the comparison. They are art, or at least they claim to represent ownership of art, and the NFT market is an art market, despite its peculiarities. Sure, owning an NFT doesn't amount to owning a work of art

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[9] *See* Adam, *The Ultimate Guide to Blue-Chip NFT Investing*, BLOCKWICH (Nov. 13, 2021), https://www.blockwich.com/articles/blue-chip-nft-investing-guide [https://perma.cc/AFG2-VK6V].

in the legal sense. But it does in the economic sense, and that's what really matters.

Sure, the owner of an NFT doesn't "really" own the work it identifies, in the legal sense of exclusive rights to use it. But so what? They don't want those rights. They only want and need the exclusive right to be recognized as its owner and the ability to transfer that ownership. If anything, the reproduction and distribution of the work they "own" only increases the value of their NFT, by increasing the prestige of ownership.

You could be forgiven for thinking that sounds an awful lot like the art market. After all, art collectors don't own and don't want or need the copyright in the works they buy. The value of owning a work of art isn't in controlling the reproduction and distribution of images of the work, it's in transferring ownership of the work itself. NFTs are exactly the same. The more people admire the work an NFT represents, the more valuable the NFT becomes.

Even better, while the NFT market poses many risks, fraud isn't one of them. When you buy an NFT, you get an NFT, no matter what. And the NFT you buy is always, necessarily, the NFT you bargained to get. It can't be any other way; the technology simply precludes the possibility of counterfeits, in the conventional sense. Of course, the NFT you bought might not be worth anything. But as they say, past performance is no guarantee of future returns. And after all, you knowingly bought bragging rights to a JPEG.

Of course, it's possible for people to sell NFTs of works they don't actually own. But so what? When you buy the NFT, you aren't buying those rights. You're just buying a nominal relationship to the work. Defective title doesn't necessarily make a defective NFT. If the market thinks the NFT is cool, it doesn't matter who owns the work it represents.

The beauty and horror of the NFT market is that of an art market without objects. Everyone always thought the art market relied on the aura of authenticity. The NFT market suggests that maybe the only thing that ever mattered was the aura of ownership, and authenticity was just a means to an end. Reification for the win!

Why not? The art market was always inefficient, and always benefitted collectors more than artists. The NFT market isn't perfect, but maybe it's an improvement? Barriers to entry are low. Anyone with basic computer skills can create and sell NFTs. Intermediaries are largely unnecessary. Artists used to depend on gallery owners, which created agency problems. The NFT market renders galleries largely obsolete. And transaction costs are low. One of the biggest problems with the art market is the cost of storing and selling art. The NFT market largely eliminates those costs and enables an astonishingly robust secondary market. For better or worse, we have never had so much information about what art collectors actually like and want.

For my part, I'm most excited about the NFT market finally dematerializing art and making it possible for anyone to launch a career as a conceptual artist. Sure, most NFTs represent pretty conventional pictorial works. But NFTs are actually the perfect medium for conceptual art. Think about it. The big problem with conceptual art is that there's nothing to own. Of course, conceptual artists came up with lots of clever workarounds, but it was still awkward. NFTs solved the problem by making conventional ownership irrelevant. When you buy an NFT, all you're getting is the concept of ownership anyway, so why not own the concept of owning conceptual art? Kismet.

But enough of all that. I'm here to tell you how NFTs kickstarted my career as a conceptual artist. I never thought it would happen to me, but it did. And here's how.

## Observing the Elephant

I discovered conceptual art as a teenager. It was the early 90s, and I was a Berkeley undergraduate studying film history and philosophy. What a cliché. Anyway, one of my professors introduced me to Fluxus and I was hooked.[10] All I wanted to do was make esoteric movies and write gnomic poems. So, when I graduated, I immediately enrolled in the Master of Fine Arts program at the San Francisco Art Institute where I did more of the same. Then, I made my way to New York City, where I spent several years making movies, showing movies, and writing about movies. It was a time.

Like most artists, I eventually went to law school and worked at a white shoe law firm representing investment banks. For the most part, it was fine, albeit less fun than movies. But one thing always bothered me. The more I learned about securities, the more they sounded like conceptual art. Or rather, the more the securities market sounded like the market for conceptual art.

Securities are usually stocks and bonds. But almost anything can be a security if you sell it in the right way. According to the Supreme Court, a "security" is just "an investment of money in a common enterprise with profits to come solely from the efforts of others."[11] Stocks and bonds are securities because they are investments in companies, and investors expect to profit if the company profits. But buying an orange grove can also be a security if you expect someone else to manage it and send you the profits.

Art usually isn't a security, even though it's often a risky investment.[12] When you buy art, you get an object, typically a painting or sculpture. Just like any other kind of property, if the art increases in value, you profit, and if it doesn't, you don't. Sure, investing in art is a way of investing in an artist's career, and collectors certainly hope artists will become celebrities. But you're still buying an object, not a percentage of the artist's profits, and the value of the object depends on many different factors, not just the artist's celebrity.

What about conceptual art? According to Sol LeWitt's iconic description, "In conceptual art the idea or concept is the most important aspect of

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[10] Fluxus was a 20th century conceptual art movement, founded by George Maciunas and others.

[11] SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946).

[12] *Cf.* Brian L. Frye, *New Art for the People: Art Funds & Financial Technology*, 93 Chi.-Kent L. Rev. 113 (2018) (describing the art market as "largely a black box").

the work" and "the execution is a perfunctory affair."[13] For example, LeWitt's wall drawings consist of his instructions on how to create a drawing, not any particular execution of those instructions, which is merely a record of the work, not the work itself. Similarly, Yoko Ono's *Grapefruit* consists of recipes for an epiphany, and Robert Rauschenberg's *Portrait of Iris Clert* consists of a telegram reading, "This is a portrait of Iris Clert if I say so." The object gradually fades away, until nothing but art remains.

Anyway, eliminating the object makes conceptual art look a lot more like a security. What do you get when you buy conceptual art? Well, nothing, really.[14] Just the artist's promise to endorse your ownership. You really are just investing in the artist's career, hoping to cash in on their celebrity. Hell, conceptual artists even provide certificates of ownership as if they're selling stock.

I was troubled. I spent my days helping companies register for IPOs, and my nights wondering why no one bothered to register conceptual art. I had a hard time seeing the difference. Sure, there was a lot less money at stake. But conceptual art could still be pretty pricey! As far as I could tell, it just never occurred to anyone that selling conceptual art looked an awful lot like selling unregistered securities.

Many years later, I found myself teaching law, rather than practicing it. But I couldn't stop thinking about conceptual art. I tried to write a conventional law review article, but it always felt a little hollow. And then it came to me. I couldn't just tell people that conceptual art looks like securities. I had to show them. So, I created a work of conceptual art designed to violate the securities laws and wrote a law review article explaining how it worked. I even conscripted the SEC as my stooge.

## Trolling the SEC

I titled the work of conceptual art I created "SEC No-Action Letter Request," because that's what it was, at least nominally. The work consisted of sending a no-action letter request to the SEC, proposing to sell a work of conceptual art titled "SEC No-Action Letter Request" in an edition of fifty for $10,000 per edition, and asking the SEC to agree that the proposal as described would not constitute the sale of an unregistered security. However, the letter also explained why the proposal would constitute the sale of

[13] Sol LeWitt, *Paragraphs on Conceptual Art*, 5(10) Artforum 79 (Summer 1967), https://www.artforum.com/print/196706/paragraphs-on-conceptual-art-36719 [https://perma.cc/6BKR-SCRN].

[14] *See* Guy A. Rub, *Owning Nothingness: Between the Legal and the Social Norms of the Art World*, 2019 BYU L. Rev. 1147 (2020).

an unregistered security and urged the SEC to deny the no-action letter request.[15] And I wrote an accompanying article, explaining in greater detail why my proposal violated the securities laws.

On December 10, 2019, I posted my article *SEC No-Action Letter Request* to SSRN and announced it on Twitter.[16] Apparently, someone sent it to Matt Levine, who writes the popular Money Stuff column for Bloomberg News. Levine is notoriously skeptical of cryptocurrency evangelism and the metaphysics of securities regulation, so my article caught his attention, and he discussed it in his December 13, 2019 column.[17]

Unsurprisingly, Levine was skeptical that offering to sell editions of a tongue-in-cheek work of conceptual art designed to troll the SEC could actually constitute the sale of an unregistered security. His response to my argument that I had created an unregistered security was "I don't think any of that is true."[18] But he followed his dismissal with a caveat:

> Still! There is a basic element of truth to it, which is that:
>
> 1. people buy lots of different intangible things hoping that they will increase in price;
> 2. some of them are securities and some of them aren't; and
> 3. even experienced lawyers can be unsure which is which.
>
> In particular lots of cryptocurrency tokens are arguably securities and arguably not. In fact some meaningful number of cryptocurrency tokens are *also conceptual art*, and if you are buying them it is not clear whether you are speculating on a currency, or speculating on a security, or speculating on art, or just paying for an aesthetic experience.
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> Also it is a pleasing artifact of financial capitalism to think, like, "art is a subset of securities law." Why not! "Everything is securities fraud," I often say, but I mean "everything" in a narrow sense, something like "all bad behavior by a public company is also securities fraud." But what if *everything* is securities fraud? What if all of human culture is just an "investment in a common enterprise with the expectation of profits from the

[15] As a matter of convention, SEC no-action letter requests generally do not argue that the proposal they describe would constitute the sale of an unregistered security. Several people have observed that I may have submitted the first "SEC action letter request."

[16] Brian L. Frye (@brianlfrye), TWITTER, (Dec. 9, 2019, 7:14 PM), https://twitter.com/brianlfrye/status/1204192533145890817 [https://perma.cc/W5NS-XY5L].

[17] *See* Matt Levine, *It's Hard to Get Rid of the IPO: Also Parody Videos and Conceptual Art*, BLOOMBERG OP., (Dec. 13, 2019, 12:17 PM), https://www.bloomberg.com/opinion/articles/2019-12-13/it-s-hard-to-get-rid-of-the-ipo [https://perma.cc/Y4C8-3P5L].

[18] *Id.*

> efforts of others," which is almost the famous *Howey* definition of a "security" in U.S. law? What if every time we interact, hoping to get something out of it, hoping to make our lives better through our shared humanity, we are participating in an unregistered offering of securities? Seems reasonable really.[19]

Of course, Levine was right. If conceptual art can be a security, then anything can be a security, if you look at it in the right way, and if everything is a security, then does it really mean anything anymore?

But Levine wasn't my only naysayer. ArtNet News also reported on my article and consulted with several lawyers and law professors, who were similarly skeptical of my argument, albeit all for different reasons.[20] Joan Kee argued that conceptual art doesn't satisfy the *Howey* test, because collectors aren't primarily interested in profit.[21] John Berton agreed, observing that no one would buy an edition of *SEC No-Action Letter Request* expecting to profit.[22] And Amy Goldrich opined that conceptual art collectors are more like hobbyists than investors.[23]

Again, probably all true! More or less, anyway. And yet, there's an odd element of desperation to these rebuttals. Sure, conceptual art collectors participate in the art market and care about the aesthetic value of the works they purchase. But they also care about making a good investment, and the better part of making a good investment in art is knowing there's a reasonable likelihood you'll be able to sell whatever it is you bought for more than you paid for it.

Conceptual art is no exception. At the time, everyone was talking about Maurizio Cattelan's work *Comedian*, which consists of a banana duct taped to the wall.[24] Cattelan created the work in an edition of three, and sold two editions at Art Basel Miami Beach for $120,000 each.[25] Now, I'm

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19 *Id.* (emphasis in original).

20 *See* Brian Boucher, *Some People Think Cattelan's Banana Is Genius. This Law Professor Thinks It's Illegal*, ArtNet News, (Dec. 13, 2019), https://news.artnet.com/art-world/cattelan-banana-basel-illegal-1732932 [https://perma.cc/M8HQ-Z28R].

21 *See id.*

22 *See id.*

23 *See id.*

24 Maurizio Cattelan, Comedian (2019).

25 Billy and Beatrice Cox bought one edition and Sarah Andelman purchased the other. *See* Christy Kuesel, *The Buyers of Two Editions of Maurizio Cattelan's Banana Artwork Were Revealed*, Artsy (Dec. 10, 2019, 12:50 PM), https://www.artsy.net/news/artsy-editorial-buyers-two-editions-maurizio-cattelans-banana-artwork-revealed [https://perma.cc/H2AS-RMBA]. An edition of *Comedian* was later donated to the Guggenheim Museum. *See Cattelan's Notorious Banana Finds a Home at the*

sure Cattelan's collectors were impressed by his willingness to thumb his nose at the art world establishment and create a work of conceptual art that rejected conventional assumptions about artistic merit, blah blah blah. But no one—literally no one—invests $120,000 in the concept of taping a banana to the wall as a joke unless they think it's got legs. Maybe they hope to resell it, maybe it's just a loss leader for their collection, but there's always an angle.

Of course, Cattelan's collectors weren't planning to flip his work and generate an immediate profit, although they probably could have. The cost of the work was probably immaterial to them. But they knew there was a strong potential for profit, just like any other promising art investment.

Was anyone planning to invest in *SEC No-Action Letter Request* with the expectation of turning a profit? I wish! But honestly, as an objection, it misses the entire point of the conceptual artwork, which is to propose an imaginary transaction that would be illegal if it could be realized.

Only Levine got the point. When the SEC decides that an offering is a security subject to regulation under the securities laws, it isn't making an observation about the ontological status of the offering. It is merely stating that the offering in question is the kind of offering that the SEC will regulate. The concept of a "security" doesn't exist in the abstract. A security is just the kind of thing the SEC has decided it regulates.

For better or worse, the Supreme Court's definition of a "security" is sufficiently inchoate that anything can be a security, if the SEC wants it to be. But that isn't what the SEC wants. The SEC wants to regulate the kinds of things it understands to be securities. If it's structured like a security, and marketed like a security, and sold like a security, then the SEC will probably think it's a security and decide to regulate it. But if it isn't, it won't. And conceptual art definitely isn't the kind of thing the SEC wants to regulate.

Anyway, I was delighted by the critical responses. As Oscar Wilde famously observed, the only thing worse than being talked about is not being talked about. Most legal scholarship is forgotten before it's published. At least people were paying attention. It is far better to be dismissed than ignored.

So, I revised my essay to respond to my critics. Thank goodness for interminably long academic publishing calendars. The article wasn't formally published until almost two years after I initially distributed it, giving me plenty of time to make changes.

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*Guggenheim*, ART NEWSPAPER, (Sept. 18, 2020), https://www.theartnewspaper.com/blog/cattelan-s-notorious-banana-finds-a-home-at-the-guggenheim [https://perma.cc/TQ2R-Q93U].

In a nutshell, I cheerfully acknowledged the futility of my project and implausibility of the SEC regulating conceptual art. That was never the point. I wrote the article to observe the formal similarities of investing in securities and conceptual art, to ask what we could learn from those similarities, and to suggest that it tells us something fundamental about the nature of our concept of a security. My critics had only helped me make those points more powerfully, by illustrating just how uncomfortable a comparison I had proposed.

But I still had to create the art. On January 1, 2020, I filed a no-action letter request with the SEC, proposing to sell editions of the work of conceptual art *SEC No-Action Letter Request* and asking the SEC to find that my proposal did not constitute the sale of an unregistered security. I also briefly explained why I believed that my proposal did constitute the sale of an unregistered security, attached my article, and encouraged the SEC to deny my no-action letter request.[26]

The SEC website acknowledged my submission of a no-action letter request and promised a telephone call from an agency representative, but no one ever called. Eventually, I submitted a FOIA request, asking for any records associated with my no-action letter request.[27] The SEC acknowledged receipt of my request.[28] A few months later, it responded to my FOIA request by invoking the deliberative process privilege and refused to produce any records.[29]

The artwork was complete. I had submitted a no-action letter request to the SEC. As I expected, the SEC refused to respond. Even better, it refused to explain why it refused to respond, or even produce any record of its deliberative process. What more could a conceptual artist possibly want? It was perfect.

To celebrate, I mailed a certificate of ownership to anybody who asked for one. In the article and no-action letter request, I stipulated that I would create an edition of 50 and sell each edition for $10,000. Instead, I created about 200 certificates, and numbered them 1 to 200 of 50. What's more, I gave them away for free. In the Fluxus mail art tradition, I figured the best

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[26] *See* Brian L. Frye, *SEC No-Action Letter Request*, 54 Creighton L. Rev. 537, 554 (2021) (Appendix A, Letter from Brian L. Frye to SEC, Jan. 1, 2000).

[27] E-mail from SEC to Brian L. Frye (Nov. 16, 2020 11:02 A.M.) (on file with author).

[28] E-mail from SEC to Brian L. Frye (Nov. 16, 2020 11:02 A.M.) (on file with author).

[29] E-mail from SEC to Brian L. Frye (Mar. 10, 2021 2:36 P.M.) (on file with author).

way to know who appreciated the work was to let them ask for a copy. After all, you can't put a price tag on a concept. Or can you?

In any case, I heard through the grapevine that a lot of people liked the work and found it a provocative intervention into securities law theory and practice. Law professors assigned it to their students, attorneys used it in CLEs, and bankers found it amusing. Apparently, it even made the rounds at the SEC, even if they'll never admit it.

## Stranger Than Fiction

For my part, I moved on to other projects. *SEC No-Action Letter Request* was my first foray into creating works of conceptual art in the medium of legal scholarship, but there was no way it'd be the last. I found it too exhilarating. All my life, I'd wanted to be a conceptual artist, and I'd finally found my promised medium, almost virgin territory and ripe for cultivation.

> **Plagiarism Piece 1**
> Pay an essay mill to write an article explaining why plagiarism is wrong.
> Submit the article for publication under your own name.
>
> Brian L. Frye, Plagiarism Piece 1.[30]

Among other things, I created a collection of works of conceptual art in the form of legal scholarships that I titled *Deodand*.[31] It was modeled on Yoko Ono's book *Grapefruit* and consisted of a brief introductory essay reflecting on the nature of legal scholarship, followed by 46 "pieces," or short descriptions of allegorical activities intended to provoke reflection on the creation, publication, and evaluation of legal scholarship. Many of the pieces described ways of plagiarizing legal scholarship, and many of the pieces were themselves plagiarized from works of legal scholarship they obliquely described.

> **Conceptual Art Piece 1**
> Create a work of conceptual art.
> Offer to sell it to anyone who wants it.
> Argue that selling it is illegal.
>
> Brian L. Frye, Conceptual Art Piece 1.[32]

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[30] Brian L. Frye, *Plagiarism Piece 1, Deodand: How to Do Things with Legal Scholarship,* OpenSea, https://opensea.io/assets/0x495f947276749ce646f68ac8c248420045cb7b5e/86968975984154595632209176507398447769455665707409153213706287459332920442881 (last visited Oct. 24, 2021).

[31] Brian L. Frye, *Deodand*, 44 Seattle Univ. L. Rev. SUpra 55 (2021).

[32] Brian L. Frye, *Conceptual Art Piece 1, Deodand: How to Do Things with Legal Scholarship,* OpenSea, https://opensea.io/assets/0x495f947276749ce646f68ac

Then came NFTs. Suddenly, people were paying millions of dollars to invest in nominal ownership of digital images. It looked suspiciously like the internet had lost its mind. A bunch of people were fighting for the right to own nothing. Everyone in the legal academy was confused, and I was no exception. But maybe I was confused in a different way, because I was pretty sure NFTs were important, I just didn't know why.

What I did know was that in 2019, people laughed at my observation that conceptual art can satisfy the Supreme Court's definition of a security. They ridiculed my argument that *SEC No-Action Letter Request* was an unregistered security. And they dismissed the idea that anyone would invest in conceptual art hoping to profit. They assumed I was just another law professor making a purely theoretical argument unmoored from the real world, pushing concepts past their breaking point into absurdity.

Well, who's laughing now? NFTs are formally identical to conceptual art, even if most of the people creating and investing in NFTs don't realize it. When you buy conceptual art, all you get is the willingness of the art market to recognize you as the owner of the work. Exactly the same is true of NFTs. When you buy an NFT of a work, all you get is the willingness of the NFT marketplace to recognize you as the owner of the work. But in both cases, that's all you need. Sure, the law doesn't necessarily recognize your ownership of the work. But who cares, if the market disagrees?

Of course, conceptual art isn't necessarily a security. Sometimes, you're buying a dematerialized object but an object, nonetheless. Or rather, you're buying the right to compel the author of a dematerialized object to ratify your ownership of it. NFTs can be the same, essentially a tradeable token representing ownership of a particular work. When NFTs are actually non-fungible, they function like unique digital objects, not securities. Just like different works of conceptual art have different prices, different NFTs have different prices, because the NFT market doesn't see them as perfect substitutes.

But that isn't necessarily true of all works of conceptual art or all NFTs. If there are multiple editions of the same work of conceptual art, then those editions are fungible with each other. Likewise, if there are multiple NFTs of the same work, those NFTs are fungible with each other, just not with NFTs of different works. When conceptual art editions or NFTs are fungible with each other, they can be securities, because they are effectively ownership shares in a joint enterprise. If you take a work of conceptual art and divide it into identical editions or NFTs, what are the shares but para-

8c248420045cb7b5e/86968975984154595632209176507398447769455665707409153213706287501114362298369 (last visited Nov. 8, 2021).

digmatic securities? The value of an edition or NFT is always a function of the artist's success in promoting the work it represents.

## Through the Looking-Glass

Anyway, the explosive market for NFTs irrefutably demonstrated that the critics of *SEC No-Action Letter Request* were comically wrong. Samuel Johnson would have been proud.[33] It's all well and good to say something will never happen, until it does. It was plausible to assume that people would never actually invest in conceptual art expecting to profit, until lo and behold they did. Go figure. But what next?

Obviously, I had to start making NFTs. But what kind of NFTs should I make and why? After all, plenty of people were already making NFTs. Most of them were just looking for a way to sell their art and saw NFTs as the main chance. For some, it was a eureka moment. They saw what the NFT market really wanted and went all in, making stupid money. Others didn't really get it, creating NFTs of work no one wanted to own. And a few used NFTs to monetize their celebrity, whether they realized it or not, selling NFTs that really just provided access to their platform.

I knew I had to do something different. But what? Everyone was making NFTs of things: artwork, music, newspaper articles, tweets, you name it. Some of them were successful and some of them weren't. But I found it all unsatisfying. NFTs were the most conceptual medium I'd ever encountered. Surely they deserved conceptual content. And nothing is more conceptual than reflexivity. So, I decided to become an "NFT artist" and make NFTs about NFTs.

What does that even mean? NFTs typically purport to convey ownership of a work, often a digital image. Of course, they don't really convey ownership of that work, but it doesn't matter, so long as the NFT marketplace is willing to accept the fiction of ownership. Sure, the owner of an NFT actually owns nothing, but if you can exchange nothing for money, who cares?

So I decided to create NFTs of nothing. After all, if NFTs depend on pretending to convey something while actually conveying nothing, what is

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33 James Boswell, The Life of Samuel Johnson 333 (Oxford Univ. Press 1998) (1791) ("After we came out of the church, we stood talking for some time together of Bishop Berkeley's ingenious sophistry to prove the non-existence of matter, and that every thing in the universe is merely ideal. I observed, that though we are satisfied his doctrine is not true, it is impossible to refute it. I never shall forget the alacrity with which Johnson answered, striking his foot with mighty force against a large stone, till he rebounded from it, 'I refute it thus.'").

funnier than an NFT that explicitly conveys nothing? Nothing does nothing like conceptual art, so I figured I'd use NFTs as a medium for doing conceptual art.

Of course, my own understanding of the NFT market was purely theoretical. I knew more or less how the technology worked. And I was well aware that intellectual property law had next to nothing to say about NFTs. But I didn't have the first clue how the NFT market actually worked in practice, or what investors wanted. What better way to learn than by participating?

## Theory Into Praxis

The first step was figuring out how to create an NFT. Like any sophisticated professional, I started by Googling the phrase, "How do I create an NFT?" Google suggested several different NFT marketplaces, including OpenSea and Mintable. OpenSea looked bigger and more popular, so I started there.

Creating an NFT on OpenSea was relatively easy but required a number of steps. First, I had to acquire some cryptocurrency and a cryptocurrency wallet to hold it. I created a Coinbase account, connected it to my bank account, and purchased about $100 in bitcoin. Next, I created a MetaMask wallet and connected it to my Coinbase account. Now, I was ready to go. I connected my MetaMask wallet to my new OpenSea account and got started creating my first NFT.

What would it be? I decided to create an NFT titled "SEC No-Action Letter Request #2: The #NFT," which was an NFT of the concept of creating an NFT of the work of conceptual art "SEC No-Action Letter Request." I provided the following description of the NFT:

> The purchase of this NFT constitutes ownership of 1 edition of the work of conceptual art "SEC No-Action Letter Request 2: The #NFT," which consists of the idea of selling NFTs for a work of conceptual art titled "SEC No-Action Letter Request 2: The #NFT." The purchase of this NFT does not constitute ownership of anything other than 1 edition of the work of conceptual art conveyed. Specifically, it does not constitute ownership of the digital image file illustrating this offering, the description of the work of conceptual art titled "SEC No-Action Letter Request 2: The #NFT," or any other work of authorship fixed in a tangible medium.
>
> "SEC No-Action Letter Request 2: The #NFT" is the "sequel" to the work of conceptual art "SEC No-Action Letter Request," which consists of selling editions of a work of conceptual art titled "SEC No-Action Letter Request," which consists of sending a no-action letter request to the SEC,

> asking it for a letter ruling holding that selling editions of a work of conceptual art titled "SEC No-Action Letter Request" does not violate the securities laws.

OpenSea expected me to associate an image with the NFT, so I uploaded a picture of one of the *SEC No-Action Letter Request* certificates. I clicked save and was delighted to see my new NFT spring into existence. Who knew creating conceptual NFT art could be so easy!

Not so fast. Soon after creating the NFT of "SEC No-Action Letter Request 2: The #NFT," I got an offer to buy it for 0.01 ETH. Awesome. It cost me nothing to create the NFT and the NFT conveyed nothing, so I was happy to sell it for nothing. Whatever 0.01 ETH was, it was more than nothing, so the price was right.

But wait. When I went to accept the offer, I realized that I'd lose money on the transaction. Sure, I'd get 0.01 ETH, which was about $30. But first I had to "mint" the NFT by placing it on the Ethereum blockchain. And that would require a "gas fee" of about $90.

Ok, time to learn. I had assumed that selling NFTs meant getting something for nothing. But I was wrong. I thought an NFT was just a unique collection of data. No. It's a unique collection of data on a digital ledger, in this case the Ethereum blockchain. And putting data on a blockchain isn't free. It requires computing energy, which costs money. This was my first lesson about how NFTs actually work. I thought I knew everything already, but I was wrong.

What is a gas fee, anyway? Every transaction on a "proof of work" blockchain has to be verified by "miners" using computers to solve equations. "Gas" is the cost of solving those equations. Part of the gas fee reflects the fixed cost of running the computers that solve the equations. But most of the gas fee depends on demand and network congestion. The more transactions to verify, the more congested the network, and the more expensive the gas fee. Essentially, the gas fee is whatever it costs to convince a miner to "verify" or execute your transaction at any particular moment.[34]

Anyway, gas fees made OpenSea look pretty unattractive. I wanted to create and sell NFTs because they looked like a delightful medium for conceptual art. But I was only in it for the lulz, and I wasn't too keen on paying for them. So I started casting about for alternatives, and noticed Mintable, which offered the option of minting "gasless" NFTs.

Perfect. Using Mintable, I could create and mint as many NFTs as I liked for free. Like any other art form, conceptual art requires practice, espe-

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[34] *See Gas and Fees,* ETHEREUM (Sept. 29, 2021), https://ethereum.org/en/developers/docs/gas/ [https://perma.cc/A9EX-55ZE].

cially when you're adapting it to a new medium. I needed the freedom to create and mint NFTs willy-nilly, without worrying about how much it would cost. I wanted to see what they looked like when I made them, how they worked, and what people found interesting.

I started by creating an NFT of the Brooklyn Bridge, subtitled "I have a bridge to sell you" and illustrated by a stock photo of the Brooklyn Bridge.[35] The point was to show that you can sell an NFT of anything you like, because what you are really selling is the NFT, not whatever the NFT represents. So, why not sell the Brooklyn Bridge? It's been sold so many times before. When someone bought my NFT for $100, I was absolutely delighted. I felt like a true 21st century grifter. George C. Parker would have been envious. I got paid, and my mark walked away happy with a work of conceptual art. May they resell it for a handsome profit.

Success in business is the ultimate muse. I immediately got to work creating more NFTs. Among other things, I reflected on what made *Brooklyn Bridge* successful. And I realized that I had no idea. It was a mildly amusing spoof on NFTs, questioning their legitimacy by comparing them to a legendary scam. Of course, I intended it as the highest praise. Maybe people got the joke?

I figured I'd create more NFTs reflecting on the nature of the medium. So the obvious next choice was my essay, "NFTs & the Death of Art."[36] In the essay, I observed that NFTs have no actual connection to the works they purport to represent but argued that NFTs might still be good for art, if they enabled the art market to ignore art. Everyone knows the art market only cares about price. Art is already an afterthought, an irrelevance, an inconvenience. Everything would be so much easier if the art market could just dispense with art, and trade only its value. NFTs could make that possible, by liberating art from its value and enabling people who care about money to focus on the art of investing. As Warhol observed, "good business is the best art."[37] Why pollute it with artworks when it could be purified by the blockchain?

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[35] *See* Brian L. Frye, *Brooklyn Bridge*, MINTABLE, https://mintable.app/collectibles/item/Brooklyn-Bridge-I-have-a-bridge-to-sell-you/EDju7z5Kuhh0M-o [https://perma.cc/RN8U-37FC] (last visited Dec. 17, 2021); *see also* Brian L. Frye (@brianlfrye), TWITTER, (June 1, 2021, 2:27 PM), https://twitter.com/brianlfrye/status/1399794706486280194 [https://perma.cc/8LQ6-XGFK].

[36] Brian L. Frye, *NFTs & the Death of Art*, SSRN (Apr. 19, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3829399 (unpublished).

[37] ANDY WARHOL, THE PHILOSOPHY OF ANDY WARHOL (FROM A TO B AND BACK AGAIN) 92 (1975).

So I created an NFT of my essay, which I subtitled "NFTs are silly & pointless, please buy this one" and illustrated with a screenshot of the essay's SSRN page.[38] Soon afterward, someone bought the NFT for $30. Again, I was delighted. I felt like I was beginning to get the hang of the medium, and money for nothing is always a nice bonus. To the moon!

Next, I created an NFT of Conceptual Art, which I subtitled "How to Succeed in Art Without Really Trying," and illustrated with a photo of Piero Manzoni's work of conceptual art *Artist's Shit*.[39] I described the NFT as follows:

> This is an NFT in the concept of conceptual art. Ownership of this NFT consists of the right to claim ownership of an NFT in the concept of conceptual art. As Sol LeWitt famously explained:
>
> "In conceptual art the idea or concept is the most important aspect of the work. When an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. The idea becomes a machine that makes the art." Sol LeWitt, Paragraphs on Conceptual Art, Artforum, June 1967.
>
> That & two bits'll buy you a cup of coffee.

Once again, my NFT sold, this time for $25, and I started getting a little cocky. Selling conceptual art can really go to your head, especially because it feels like such a racket. The works cost nothing but a few minutes of clicking and typing to produce, but people were willing to pay for them. What's not to love?

Finally, I created an NFT of the Public Domain, which I subtitled "Non-rival NFTs" and illustrated with a drawing of the Worm Ouroboros.[40] I also provided the following description:

> This NFT consists of the concept of creating NFTs distributed for free in unlimited quantities. After all, an NFT can have an infinite number of editions and the marginal cost of distributing an NFT is effectively zero. Like love, an NFT is something if you give it away.

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[38] Brian L. Frye, *NFTs & the Death of Art*, MINTABLE, https://mintable.app/art/item/NFTs—the-Death-of-Art-NFTs-are-silly—pointless-please-buy-this-one/bcfNWidxfdiIsxg [https://perma.cc/MGS3-5NCX] (last visited Dec. 17, 2021).

[39] Brian L. Frye, *Conceptual Art*, MINTABLE, https://mintable.app/art/item/Conceptual-Art-How-to-Succeed-in-Art-Without-Really-Trying/s1L1UUeuxxIi1PJ [https://perma.cc/V8ZY-GB7M] (last visited Dec. 17, 2021).

[40] Brian L. Frye, *The Public Domain*, MINTABLE, https://mintable.app/art/item/The-Public-Domain-Non-Rival-NFTs/6znrHUlWm9FZAQh [https://perma.cc/Z2PQ-P38T] (last visited Dec. 17, 2021).

I sold my NFT of the Public Domain for $28.02, which seems a little low given how many works it includes. But then again, everyone else got them for even less.

I was already pleased with my foray into NFT creation. I'd created and sold four NFTs on Mintable, which felt like success. And I was getting a handle on the nature of the medium and what made it interesting. I figured I'd create more NFTs, by the by, as the mood struck me.

## THE MAIN CHANCE

And then it happened. In September 2021, I got a Twitter direct message from Sam Hart, a prominent collector of conceptual art NFTs.[41] He expressed his admiration for my OpenSea NFT "SEC No-Action Letter Request 2: The #NFT" and offered to buy it for 0.5 ETH. I was stunned. That was about $2000, way more than the gas fee for creating the NFT, and more importantly, way more than I ever thought anyone would ever pay for one of my NFTs.

Obviously, I immediately accepted the offer. But it got me thinking. I like conceptual art and I like money. They are the epitome of two great tastes that go great together. Money gets people talking about conceptual art and conceptual art makes money interesting. If one collector was interested in my conceptual art NFTs, there might be more. I had a limitless supply of conceptual art to sell. And the best time to test the market for my product was right after making a notable sale.

So, that night, I informed my wife that I would be coming to bed late, because I had to make some art. I decided the best—well, the most convenient, anyway—subject matter for my first collection of NFTs was my article *Deodand*. After all, it was already written, the article explained the works of art it contained, and they would be easy to transform into NFTs.

What did I do? First, I created an NFT collection titled *Deodand: How to Do Things With Legal Scholarship*.[42] Then, I took a screenshot of each of the 46 "pieces" included in Deodand. I used each screenshot to create an NFT of the piece it represented. And I provided the following description:

> This is an NFT of the work of conceptual art titled [whatever], which was originally published in the article Brian L. Frye, Deodand, 44 Seattle University Law Review SUpra 55 (2021). Ownership of this NFT constitutes

[41] Hxrts (@hxrts), OPENSEA, https://opensea.io/hxrts (last visited Oct. 24, 2021).

[42] Brian L. Frye, *Deodand: How to Do Things with Legal Scholarship*, OPENSEA, https://opensea.io/collection/deodand (last visited Oct. 24, 2021).

ownership of the exclusive right to perform the work of conceptual art it identifies, to the extent that the author of the work can convey such a right.

And on the 47th NFT I rested, my Ctrl-C and Ctrl-V fingers weary.

The next morning, I awoke to an offer to purchase "Plagiarism Piece 1" for 0.5 ETH.[43] Of course, I accepted. But that was only the beginning. A trickle of offers became a flood, and before long, I could hardly keep up. Before I knew it, I'd sold all 46 NFTs. In honor of selling out the IPO of my first NFT collection, I created a special 47th NFT, which I titled "Efficient Market Piece."[44]

**Efficient Market Piece**

Create a derivatives market for NFTs.
Allow NFT skeptics to participate.
Observe whether they short NFTs.
Draw the appropriate conclusions.

Brian L. Frye, Efficient Market Piece.[45]

It sold shortly after I posted it.

In only a few days, I'd sold 47 NFTs for a total of about 10 ETH or approximately $35,000. I had no idea what had happened, but I loved it. I'd created an NFT collection as a joke, a spoof on the concept of NFTs, and somehow it worked. People liked my NFTs and wanted to buy them. In spite of myself, I was an NFT artist, whether I liked it or not. And I had to figure out what that meant.

## Lessons Learned

Luckily, I had my collectors and other NFT traders, who helped me understand the NFT market at least a little better. I thought NFTs were just meaningless data arbitrarily used as an asset. Wrong. The NFT market sees owning an NFT as a kind of ownership of the work it represents, even if the law doesn't. I thought NFT collectors were just financial speculators. Wrong. Their investment decisions also reflect their aesthetic preferences. I

[43] *See Plagiarism Piece 1*, *supra* note 30.

[44] Brian L. Frye, *Efficient Market Piece, Deodand: How to Do Things with Legal Scholarship,* OpenSea, https://opensea.io/assets/0x495f947276749ce646f68ac8c248420045cb7b5e/86968975984154595632209176507398447769455665707409153213706287511009966948353 (last visited Oct. 24, 2021).

[45] *Id.*

thought the NFT market was just a bubble or scam. Wrong. Something new is happening, it just isn't clear what.

NFTs aren't just meaningless data. While NFTs have no formal legal connection to the works they represent, the perception of a relationship is critical to the value of an NFT. Nothing is stopping you from creating an NFT of anything you like, whether or not it belongs to you. After all, I created an NFT of the Brooklyn Bridge, which I didn't own, any more than George C. Parker did. But the NFT market looks askance at people creating NFTs of works they didn't create or otherwise control. More importantly, it refuses to value them. And there isn't much point in creating an NFT no one wants. Not only doesn't it have any actual connection to the work it purports to represent, but also no one thinks it does, which is even worse.

NFT collectors aren't philistines. While NFT collectors want to buy works they think will appreciate in value, their primary heuristic is aesthetic appeal. They buy NFTs they think are cool, and NFTs become popular because a lot of people think they're cool. My collectors told me they invested in my *Deodand* NFTs because they were different from other NFTs they'd seen. When other NFT collectors compared them to the *Loot* NFTs, because the images were similar collections of words, my collectors pointed out that the substance of the works was different. I was pleasantly surprised to see the level of engagement with my NFTs as works of art, and the extent to which aesthetic appreciation was driving investment decisions.

The NFT market isn't just a boondoggle. Sure, it's wildly speculative, relentlessly hyped, and incoherent. So there are boondoggle elements. But there's more. Everyone was mystified by the NFT market when it was created but assumed it would soon peter out and die. No dice. Everyone was surprised when the NFT market took off but assumed it would soon implode. Nope. And everyone was nonplussed when the NFT market continued to grow but assumed it would soon collapse. Again no. At some point, you have to update your priors to reflect experience. I think it's about time. The NFT market we have today might not be the NFT market we have in the future. But I think it's pretty clear that NFTs are more than just a fad. Billions of dollars say as much.

Not only did my collectors help me understand the NFT market as a whole, but they also gave me specific advice about how to succeed as an NFT creator. First, they admired the NFTs I'd created, but warned me not to create too many. NFT collectors value scarcity: #rare and #scarce are ubiquitous tags. And they dislike it when artists create too many NFTs. Unsurprisingly, they don't want to see their investment diluted by similar works flooding the market. I took this advice to heart.

Second, they advised me not to sell all of the NFTs in my *Deodand* collection, but to keep some for myself, so I could cash in when they became more valuable. Gotta admit, I was flattered by their certainty that the NFTs would increase in value. But I'm more of a bird-in-the-hand person and was happy to take whatever was offered for my NFTs in the IPO. After all, it didn't cost me anything to create them—other than years of idle conceptualizing—and I could always create more. So I sold every NFT in the collection. If my collectors make a fortune on them in the future, I couldn't be happier. They deserve every penny.

Anyway, think about it, the NFT market is a market for unique things with no inherent value that people value both financially and aesthetically. It sounds an awful lot like the conventional art market. So it's no wonder the conventional art market co-opted it so quickly. Everyone else made fun of NFTs, while Sothebys laughed all the way to the bank. Sure, there's no art object anymore, at least in the traditional sense of something you can hang on the wall. But who cares? NFT collectors live online. They don't want a painting; they want a sexy profile picture.

Kal Raustiala and Chris Sprigman observed that NFTs are just "virtual Veblen goods."[46] They were probably right. But maybe that's enough? After all, Veblen goods have proven quite persistent. The conventional art market is Veblen goods all the way down but shows no signs of waning. Art is a convenient investment that also increases your status. What's not to love? NFTs are the same, just for a slightly different market.

If anything, the money makes the aesthetics fun, and the aesthetics make the money meaningful. The art market isn't gambling. It's investing in our cultural heritage. And if you happen to make a boatload of money in the bargain, all the better, right? It's no secret that no one cares about art that isn't immensely valuable. Is it even art if people don't want to buy it? As always, the medium is the message.

There is one intriguing difference between the NFT market and the conventional art market: the NFT market has an exceptionally liquid secondary market. For better or worse, the conventional art market is highly illiquid and opaque. Many art collectors find it frustrating, but for some, it could well be part of the appeal. In any case, collectors generally aren't supposed to sell works by living artists without permission, in order to manage supply, and can get blackballed if they do. The overwhelming majority of

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[46] Kal Raustiala & Christopher Jon Sprigman, *The One Redeeming Quality of NFTs Might Not Even Exist*, SLATE (Apr. 14, 2021), https://slate.com/technology/2021/04/nfts-digital-art-authenticity-problem.html [https://perma.cc/3F9B-2XXD].

works have no value on the secondary market, and only a tiny fraction of works changes hands every year.

The NFT market couldn't be more different. The secondary market is astonishingly robust and active. Collectors offer NFTs for sale immediately after buying them, and NFTs can change hands in short succession. More importantly, NFT creators encourage it, because the existence of a secondary market for an NFT is proof of its value. Even as I was selling the NFTs from my *Deodand* collection, buyers were putting their NFTs on the secondary market. And they sold! Everyone was delighted to see interest in the collection increasing, especially me.

## A New Troll

After the unexpected success of my *Deodand* collection, I knew I needed to create and sell another collection. How else to keep the buzz going? I reflected on the admonitions not to dilute the rarity of the NFTs I'd already sold. Not a problem. I had no interest in creating more of the same. I'd tapped out that particular work but wanted to create something new. And I knew what it had to be. I would use NFTs to prove the point I made in *SEC No-Action Letter Request*.

It was perfect. In *SEC No-Action Letter Request*, I argued that my proposal to sell a work of conceptual art constituted the sale of an unregistered security, because it satisfied all the doctrinal criteria. But my critics scoffed that no one would actually buy the editions I was selling with the expectation of making a profit. Of course, that's a terrible, irrelevant argument. But it's also false. And NFTs would help me prove it.

I created a new NFT collection titled "SEC No-Action Letter Request 3: Securitized NFTs," illustrated by a "corporate seal" for "Securities Art, Inc.," a photo of a ticker tape, and an old etching of tulips. The collection consisted of 50 NFTs, each of which was an "edition" of the work of conceptual art "SEC No-Action Letter Request 3: Securitized NFTs," numbered 1/50 to 50/50. I provided the following description of the NFTs:

> The work of conceptual art "SEC No-Action Letter Request 3: Securitized NFTs" consists of the submission of a no-action letter request to the SEC, proposing to sell the work of conceptual art "SEC No-Action Letter Request 3: Securitized NFTs" to the public in the form of 50 NFTs. The no-action letter request will ask the SEC to agree that my proposal does not constitute the sale of an unregistered security and to agree that the SEC will not recommend any enforcement action in connection with the sales.
>
> The work of conceptual art "SEC No-Action Letter Request 3: Securitized NFTs" exists in a limited edition of 50. Ownership of this NFT comprises ownership of one edition of the work, and constitutes ownership of 2% of the work. Ownership of this NFT does not constitute ownership of any other property interest of any kind, tangible or intangible.

On September 4, 2021, I submitted a no-action letter request to the SEC for *SEC No-Action Letter Request 3: Securitized NFTs*.[47] In the no-action letter request, I explained my proposal to sell the work of conceptual art *SEC No-Action Letter Request 3: Securitized NFTs*, and observed that it was identical to my previous proposal to sell the work of conceptual art *SEC No-Action Letter Request*, except this time I proposed to sell NFTs rather than certificates. I observed that I had already sold NFTs of works of conceptual art for considerable amounts of money, and that people were reselling those NFTs on the secondary market. And I informed the SEC that, in light of its refusal to respond in any way to my previous no-action letter request, or explain the reason for its refusal to respond, I would assume that it did not object to my proposal, unless I heard otherwise.

When I submitted my no-action letter request, the SEC website told me to expect a phone call from an SEC examiner. I waited by the telephone, but no one ever called. After about a week, a reliable source informed me that the SEC would never respond to my no-action letter request, that it couldn't respond to my no-action letter request, because I was posing existential questions it had no interest in contemplating, let alone answering.

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[47] Brian L. Frye, *SEC No-Action Letter Request 3: Securitized NFTs*, SSRN (Sept. 13, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3917699 (unpublished).

Wonderful! I released the *SEC No-Action Letter Request 3: Securitized NFTs* collection for sale, (relatively) secure in the belief that it wouldn't get me in trouble. I didn't know what to expect. After all, it was yet another peculiar NFT project, and I'd just sold out the *Deodand* collection. But demand was strong. The collection sold out almost immediately, for about five ETH, or approximately $15,000.

## Key Takeaways

What have I learned from my NFT odyssey so far? Mostly how much I don't know and how much I don't understand. I came into NFTs thinking they were a big joke. But the joke was on me. The more I poked fun at the medium and the market, the more it humbled my ability to make sense of it.

Do I have a theory of NFTs? No. And I think it's premature. All I can do is make some observations, based on my experiences creating and selling NFTs, and thinking about the NFT market.

- The NFT market resembles the art market in some ways, but not in others. It can be helpful to analogize between the two, but it's a mistake to assume they are the same or work in the same way.
- One key similarity is that the art market and the NFT market both depend on brands, not works. The markets value "authenticity," not control. Both markets inevitably implicate copyright ownership, but only incidentally. What they really value is goodwill.
- Another key similarity is the nexus of aesthetics and speculation. We are accustomed to the art market, so we take it for granted. But it is every bit as strange, and every bit as inevitable, as the NFT market. Is it a market for Veblen goods? Sure. But maybe Veblen goods are useful, and not just for managing social status.
- There is a logic to the demand for NFTs—there has to be a logic to the demand for NFTs!—but no one knows what it is yet. It may be more basic than is comfortable to realize. Maybe markets are looking for a new medium of value, and are willing to accept just about anything, so long as people can agree on it. Can we have a Doge economy? Why not? Dumber things have happened.

Anyway, I suspect this is the second article of many on NFTs. In the meantime, we've only just begun.