

PUT ON THE SPOT: DAMIEN HIRST'S THE CURRENCY AND THE FUTURE OF NFTS

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ABSTRACT

In 2021, artist Damien Hirst completed his latest project. *The Currency* invites purchasers to elect between owning the physical artwork or a non-fungible token (NFT) of the artwork. The catch is that whichever is not chosen will be destroyed: choose the physical artwork, and the NFT is sent to oblivion; choose the NFT, and the original physical artwork is burned. Through a deep dive into *The Currency's* Terms of Service, existing market behaviour and the nature of NFTs, this paper argues that purchasers are not disadvantaged if they choose the NFT. On the contrary, it may even be financially sound to do so. Yet, more importantly, *The Currency* comes at a time where commentators are skeptical about the demand for NFTs and view the exponential growth of the NFT market as setting the stage for a bubble ready to pop. In this context, *The Currency* not only sets a useful precedent for future NFT digital art projects, but also gives hope for the long stay of NFTs in the art world.

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I. INTRODUCTION

Which would you rather own: a physical artwork or a virtual token that represents that artwork? This is the question that artist Damien Hirst forces purchasers of his latest art collection, *The Currency*, to confront.

Non-fungible tokens (NFTs) have taken the art world by storm. Yet, the legal regime surrounding NFTs is still shrouded by a cloud of uncertainty. In particular, there are doubts about what rights an NFT holder actually has and what exactly they are buying. *The Currency* thus provides an apt opportunity to compare the rights an NFT holder would have and the rights the owner of a physical artwork would have.

This paper argues that the successful purchasers of *The Currency* should choose to keep the NFT instead of claiming its corresponding physical artwork. In so concluding, it argues that *The Currency* proves the viability of using NFTs to sell digital art and provides a good model for doing so. **Part I** explains some of the problems with physical and digital art, what an NFT is and renowned artist's Damian Hirst's latest project, *The Currency*. **Part II** examines the notion of ownership and compares the legal rights that an NFT holder and an owner of a physical artwork from *The Currency* would have. **Part III** considers the economic value of the Hirst NFTs and the physical Hirsts. **Part IV** explores the additional value of NFTs in guaranteeing the authenticity of the artwork and its potential use in the Metaverse. Finally, **Part V** analyzes the viability of digital art sales through NFTs and concludes that purchasers should choose the NFT.

A. *Physical and Digital Artworks*

In the art world, at least in relation to physical artworks, the 'original' copy of the artwork is prized. Regardless of the numerous images of the *Mona Lisa* available online or replicas that are indistinguishable from the original to the untrained eye, millions flock to the Louvre each year to see the one and only original painting in all its 'original' glory.

The authenticity of an artwork also has serious implications for its value. An artwork that was purchased for millions on the assumption that it was an original can suddenly be significantly devalued if it turns out to just be a good forgery. No matter the artistic merit of the forgery, it will never command the same price as the original. Given the importance of authenticity, it is unsurprising that millions are spent each year verifying the provenance of an artwork. As seen, one primary challenge in the ownership of physical artworks is the provenance risk.

Ownership of digital artworks, on the other hand, faces a different problem altogether. The rise of the personal computer has made the creation and appreciation of digital art accessible.¹ However, it is hard to 'own' a digital artwork because it is impossible for the 'owner' to exclude others from also having a copy of the artwork once they have been allowed to view it. Perfect copies of a digital artwork can be easily created. Digital artworks can be readily duplicated in the same way any file on a computer can be duplicated. Coupled with the open internet, once a digital artwork has been uploaded on the internet, anyone is free to view, download and make a copy of that artwork. Each copy is just as good as the 'original'. In fact,

¹ Grant Taylor, *The Soulless Usurper: Reception and Criticism of Early Computer Art*, in *MAINFRAME EXPERIMENTALISM* 17, 32 (Hannah Higgins & Douglas Kahn eds., 2012).

in the context of digital art, the concept of the ‘original’ artwork is meaningless. The ubiquitous digital artwork can thus be said to be ‘owned’ by everyone and no one at the same time. This subverts the usual premium placed on owning the ‘original’ copy of a physical artwork.

B. *NFTs*

This is where NFTs are useful in plugging the gaps in the art world. NFTs are unique tokens that are stored on a blockchain. They can be collected and exchanged by account holders. On their own, NFTs are just strings of code that can be deployed for any use, but they are commonly used to facilitate the purchase of digital art – an artist mints their digital artwork as an NFT on a blockchain and the purchaser of the digital artwork is then transferred the NFT. The NFT thus represents the purchaser’s ‘ownership’ of the digital artwork. It is worth stressing that the NFT itself is not the digital artwork but is more akin to a certificate of authenticity that would accompany a physical artwork. The precise relationship between NFTs and digital artworks will be explored further later.

NFTs have the potential to disrupt the art world because they guarantee authenticity and enable exclusive ownership. Firstly, NFTs can address the problem of verifying the provenance of an artwork. NFTs and their transaction history are stored on decentralized ledgers known as blockchains. The blockchain records every single NFT transaction from when the NFT was first minted to its current ownership. These records are publicly accessible for anyone to see and verify the provenance of the NFT. Given that the transaction history and ownership of an NFT is accurately recorded on the blockchain, the problem that purchasers of physical artworks face of verifying authenticity and ownership is eliminated.

Secondly, NFTs enable the ‘ownership’ of digital artworks because they are unique tokens, unlike digital art. There can only be one of each NFT. Most NFTs are based on the ERC-721 standard² which was developed in 2018.³ Unlike the ERC-20 standard, ERC-721 has additional functions to ensure that tokens based on it are distinctly non-fungible and unique.⁴ Therefore, even though there may be duplicates of the underlying digital art, there can only be one original NFT associated with the digital art.⁵ The holder of this NFT is often considered the ‘owner’ of the digital artwork and ‘ownership’ of the digital artwork can be transferred by transferring the NFT.

Given the benefits of NFTs, their use in digital art has become increasingly popular. In December 2020, the NFT market was estimated at \$12 million but exploded to \$340 million by February 2021.⁶ In March 2021, Christie’s became the first-ever major auction house to sell

² William Entriken, Dieter Shirley, Jacob Evans & Nastassia Sachs, *EIP-721: Non-Fungible Token Standard*, no. 721, ETHEREUM IMPROVEMENT PROPOSALS (Jan. 24, 2018), <https://eips.ethereum.org/EIPS/eip-721>.

³ *Non-fungible tokens*, ETHEREUM, <https://ethereum.org/en/nft/> (last visited Mar. 23, 2022).

⁴ Entriken, *supra* note 2.

⁵ ETHEREUM, *supra* note 3. While it is possible to mint new NFTs based on a digital artwork that has previously been minted, the blockchain allows users to discern which NFT is the original NFT.

⁶ Usman W. Chohan, *Non-Fungible Tokens: Blockchains, Scarcity, and Value*, CRITICAL BLOCKCHAIN RESEARCH INITIATIVE 1, 1 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3822743.

an NFT of a digital image. Beeple's "Everydays – The First 5000 Days" was sold for \$69 million.⁷ From auctioneers to collectors, the art world is starting to take NFTs seriously.

C. *Damien Hirst's The Currency*

Not to be left behind is British Artist, Damien Hirst. Damien Hirst is a world-renowned contemporary artist, known to push the boundaries of art. His spot paintings are some of his most recognizable works. By 2011, he had already created over 1,000 spot paintings.⁸ However, that is dwarfed by his latest project, *The Currency*, which comprises 10,000 A4-sized spot paintings.

When Damien Hirst first started on *The Currency*, he wanted to know if his spot paintings could be used as currency. Taking the lead from paper currency, each spot painting has a watermark, hologram, signature and microdot to verify its authenticity.⁹

Each painting is also minted as an NFT on the Palm blockchain, "a token-powered ecosystem for NFTs connected to Ethereum".¹⁰ Additionally, a machine-learning algorithm was used to analyze each artwork for its attributes (e.g. colors, overlaps, density etc.).¹¹ The rarity of each artwork's attributes is published online alongside each artwork.

In July 2021, the public was invited to buy a spot painting for \$2,000.¹² Each successful buyer would be allocated a painting and sent the corresponding NFT. However, buyers would not be sent the physical painting. Instead, all the physical paintings would be stored in a vault in the United Kingdom. This is the twist of *The Currency* – buyers have one year to decide if they want to keep the NFT or to exchange it for the physical artwork, but they cannot have both. Whichever they do not choose will then be burned after a year. The physical painting will literally be burned; the NFT, which cannot be erased, will be burned by sending it to an inaccessible address thereby removing it from circulation.¹³

The Currency is thus an "experiment in belief"¹⁴ to determine whether purchasers will put their faith in the digital or the physical.¹⁵ This puts the viability of NFTs in the art world to the test. As July 2022 approaches, this paper argues that purchasers should choose the Hirst NFT over the physical Hirst.

⁷ 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>.

⁸ *Spot Paintings*, DAMIEN HIRST (2012), <https://web.archive.org/web/20211030232505/https://www.damienhirst.com/texts1/series/spots>.

⁹ *The Currency*, HENI NFT, <https://currency.nft.heni.com/info> (last visited May 30, 2022).

¹⁰ *Id.*

¹¹ *Id.*

¹² Scott Reyburn, *Damien Hirst and the Art of the Deal*, N.Y. TIMES (Jan. 21, 2022), <https://www.nytimes.com/2022/01/21/arts/design/damien-hirst-nft.html>.

¹³ *What Is Burning An NFT? A Complete Guide and Explanation*, NFTEXPLAINED.INFO, <https://nftexplained.info/what-is-burning-an-nft-a-complete-guide-and-explanation/> (last visited Feb. 26, 2022).

¹⁴ Sarah Meyohas, *Damien Hirst's 'The Currency' Is Just Like Money, but Is It Good Art?*, COINDESK (Oct. 19, 2021, 5:46 PM), <https://www.coindesk.com/tech/2021/09/15/damien-hirsts-the-currency-is-just-like-money-but-is-it-good-art/>.

¹⁵ *Id.*

II. OWNERSHIP AND A COLLECTOR'S LEGAL RIGHTS

A. *Physical Hirst*

We begin first by examining the legal rights a purchaser would acquire if he were to give up the Hirst NFT in favor of the physical Hirst. A purchaser of any physical work of art becomes the owner of the artwork. Generally, under common law personal property law, ownership of an item gives the owner the ability to use, exclude others from using, transfer, or even destroy the item.¹⁶ However, in the context of art ownership, it is inaccurate to say that the owner of the artwork can do whatever he wishes with it. On the contrary, there are still some restrictions as to what the owner of an artwork can do.

The first limitation on the owner's rights is the rights of the copyright holder. This arises because of the distinction between a physical, tangible copy of the work and the copyright over the work. Purchasing a physical artwork typically entails acquiring ownership over the physical copy of the artwork, but not over its copyright. This means that the art owner cannot, *inter alia*, reproduce the copyrighted work, distribute additional copies of the work, or prepare derivative works based on the work.¹⁷ These rights (e.g. reproduction rights, distribution rights) remain with the copyright holder, which is usually the artist unless he also sells the copyright alongside the work. An important exception to the copyright holder's rights is the first sale doctrine which limits the copyright holder's distribution right. This exception permits a lawful purchaser of a physical copy of the artwork to sell his copy of the artwork without the copyright holder's permission.¹⁸ The copyright holder also cannot impose any restrictions on the sale of the artwork.

The second limitation on the owner's rights is the rights of the artist. These rights belong with the artist regardless of whether the copy of the art or the copyright is owned by someone else. The artist's rights are protected by the Visual Artists Rights Act (VARA)¹⁹ and also the Artist's Authorship Rights Act²⁰ in New York. VARA was enacted in 1990 after the United States became party to the Berne Convention.²¹ VARA implemented parts of the Berne Convention, including the moral rights of attribution and of integrity.²² These rights are generally protected unless they have been waived in writing by the artist.²³

The right of attribution means that the artist can determine whether they want their name attached to an artwork.²⁴ If the work is modified in such a way prejudices the artist's reputation, the artist can prevent the owner from using their name in relation to the artwork.²⁵

¹⁶ DUNCAN SHEEHAN, *THE PRINCIPLES OF PERSONAL PROPERTY LAW* 6 (2d ed. 2017).

¹⁷ 17 U.S.C. § 106.

¹⁸ 17 U.S.C. § 109(a).

¹⁹ Visual Artists Rights Act of 1990 § 603, 17 U.S.C. § 106A.

²⁰ N.Y. ARTS AND CULTURAL AFFS. L., § 14.03 (2012).

²¹ COPYRIGHT OFFICE, LIBRARY OF CONGRESS, *WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS* (Oct. 24, 1996), <https://www.copyright.gov/reports/exsum.html>.

²² *Id.*

²³ 17 U.S.C. § 106A(e)(1).

²⁴ *See* 17 U.S.C. § 106A(a)(1)-(2).

²⁵ 17 U.S.C. § 106A(a)(2).

The right of integrity means that the artist has the right “to prevent any intentional distortion, mutilation, or other modification of [their] work which would be prejudicial to their honor or reputation.”²⁶

Another aspect of the right to integrity means that the artist can also prevent the destruction of a work if it is of a recognized stature.²⁷ A work of recognized stature is one of “high quality, status, or caliber” that has been acknowledged as such by the “artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts.”²⁸ In *Castillo v. G&M Realty*, a landlord, without the permission of the aerosol artists, painted over aerosol art that was painted on the side of his building.²⁹ As a consequence of destroying their art, the landlord had to compensate the aerosol artists with \$6.75 million.³⁰ This landmark case signaled America’s commitment to protecting the moral rights of an artist.

An artwork by a highly regarded artist is likely to meet this standard regardless of the quality of the particular work.³¹ Therefore, a physical Hirst will likely meet this standard and cannot be destroyed.

One might wonder why an owner would ever want to destroy or mutilate a physical Hirst artwork after spending a considerable sum of money to purchase the work. However, that is exactly what a Brooklyn-based art collector, MSCHF, did.³² MSCHF purchased one of Hirst’s spot paintings, cut out each spot and sold the spots separately. They also sold the leftover canvas, which they entitled “88 Holes.” The result is MSCHF turned a profit of \$273,155 after purchasing the original Hirst painting for \$30,485.³³ Thus, mutilating or destroying an artwork can be a profitable venture.

That being said, it remains an open question whether the mutilation or destruction of an artwork for the purpose of creating new art is prohibited under VARA. While Hirst has not objected to MSCHF’s project, if he did, MSCHF might be able to claim fair use.³⁴ Fair use is an affirmative defense to the moral rights embodied in VARA and permits the use of copyright work without the copyright holder’s consent in certain circumstances.³⁵

Finally, it is worth noting that some states also recognize the artist’s economic rights, including the right of an artist to claim part of the proceeds realized from the resale of their work. Such rights are protected under French law and California state law.³⁶ However, such rights are not recognized under VARA and New York state law.

Therefore, if the purchaser were to claim the physical Hirst, he would relinquish his rights in the Hirst NFT for the rights to the physical copy of the Hirst artwork. This means that

²⁶ 17 U.S.C. § 106A(a)(3)(A).

²⁷ 17 U.S.C. § 106A(a)(3)(B).

²⁸ *Castillo v. G.M. Realty L.P.*, 950 F.3d 155, 166 (2d Cir. 2020).

²⁹ *Id.*

³⁰ *Id.* at 171.

³¹ *Id.*

³² SEVERED SPOTS, <https://severedspots.com/> (last visited Dec. 6, 2021).

³³ *Id.*

³⁴ Amelia Brankov, *Brooklyn Collective Buys Damien Hirst “Spot” Work, and Then Cuts Out and Sells the 88 Spots at a Profit!*, LEXOLOGY (May 1, 2020), <https://www.lexology.com/library/detail.aspx?g=3b2021f0-c2e2-42fa-a8c3-b650ab9422b9>.

³⁵ 17 U.S.C. § 107.

³⁶ LEONARD D. DUBOFF, CHRISTY A. KING & MICHAEL D. MURRAY, *ART LAW IN A NUTSHELL* 392-96 (6th ed. 2021).

the purchaser would be entitled to do what he wishes to the physical Hirst subject to the copyright holder's and the artist's rights. He can transfer or sell the physical Hirst to a third party. He can display the physical Hirst in his home or in public, loan the physical Hirst to a museum for a fee or take out a collateral loan. However, he cannot make copies of the physical Hirst without the consent of the copyright holder. Neither can he mutilate or destroy the physical Hirst without the consent of Damien Hirst unless he is sure that he falls within the fair use exception.

B. *Hirst NFT*

Let us now turn to the right a purchaser has in the Hirst NFT. Before we do so, we must first understand the concept of 'ownership' over digital assets.

1. *Rights in Digital Assets Generally*

Traditionally, personal property law has rarely been applied to digital assets. Instead, digital assets have largely been understood as falling under licensing laws. In *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010), the Ninth Circuit held that the purchase of software was a license. A rare example where the courts found the purchase of a digital asset was a sale was in *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011), where the Ninth Circuit held that the purchase of music on a CD constituted a sale.

The distinction between a sale and a license is crucial because a licensor can impose significant restrictions on the licensee's use of the licensed good.³⁷ Most digital assets are 'sold' with a long list of terms and conditions that tend to label the transaction as a license and impose significant restraints on the receiver's ability to transfer and use the asset.³⁸ This occurs even when the transaction has been labelled a sale on the customers' site.³⁹ To give an example, when one 'buys' an e-book on a Kindle, one agrees that they are merely licensing the book.⁴⁰ This license is subject to a long list of restrictions. For instance, if one were to post a "threatening, defamatory, ... or objectionable" product review, the books that one purchased can be confiscated.⁴¹

In contrast, the law does not recognize servitudes on personal property.⁴² Once the good has been sold, the seller cannot impose any restrictions on subsequent purchasers who it does not have privity of contract with. As discussed earlier, this is known as the first sale doctrine. For instance, in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908), the copyright holder could not impose limitations on a subsequent book retailer regarding the retail price of the book. The copyright holder purported to do so by stating in the book that its retail price is one dollar net and that selling the book for less would be an infringement of the copyright. The book

³⁷ Joshua Fairfield, *Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property*, IND. L. J. (forthcoming) (manuscript at 84), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821102.

³⁸ Lawrence J. Trautman, *Visual Art and Non-Fungible Tokens*, 50 HOFSTRA L. REV. (forthcoming) (manuscript at 64), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814087; AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 123–25 (2018).

³⁹ Trautman, *supra* note 38, at 64.

⁴⁰ Fairfield, *supra* note 37, at 65.

⁴¹ PERZANOWSKI, *supra* note 38, at 4.

⁴² *Id.* at 16–17.

retailer purchased the books wholesale from a third party and thus, had no privity of contract with the copyright holder. The Court held that the retailer was not bound by the limitation on the retail price and could sell the book at whatever price it wanted.

2. *Rights in the Hirst NFT*

Currently, it is unclear how NFTs will be recognized under the law. Some academics have argued that NFTs should be regulated by the personal property law regime.⁴³ However, assuming NFTs will be treated like any other digital asset, then it is unlikely that a categorical approach to classifying all NFTs as personal property will be taken. Instead, the courts are likely to apply their usual test on a case-by-case basis to determine whether the specific transaction was a sale or a license. Under this test, courts like the Ninth Circuit have considered three factors:⁴⁴

1. Whether parties called the transaction a sale or a license;
2. Whether the license restricted the licensee's ability to transfer the asset; and
3. Whether the purported license imposed other restrictions on the use of the asset.

Therefore, following the Ninth Circuit's framework, whether the purchase of the Hirst NFT was a sale or a license would largely turn on the Terms of Service of The Currency. The Currency's Terms of Service⁴⁵ are accessible on the website of HENI, an international art services business collaborating with Damien Hirst on The Currency.⁴⁶ Generally, the Terms of Service establish that the purchase of the Hirst NFT is a sale and not a license. First, the transaction is termed a sale and references to ownership of the Hirst NFT are made throughout the agreement:

- Clause 3 refers to “the sale of NFTs covered by this Terms of Service.”⁴⁷
- Clause 4.13 states that “[t]itle to the Hirst NFT passes to [the purchaser] once [their] purchase is complete and then converts to title to the Artwork when the Hirst NFT is redeemed ... and the Artwork is withdrawn from the Vault.”⁴⁸
- Clause 8.3 states that “[The purchaser] acknowledge[s] that [their] purchase of a Hirst NFT means [they] have full ownership rights in the Hirst NFT itself, including the right to store, sell and transfer your Hirst NFT.”⁴⁹

For comparison, TIME Magazine's TIMEPieces project⁵⁰ terms the agreement as a “Licensing Agreement.”⁵¹

⁴³ See generally Fairfield, *supra* note 37; Trautman, *supra* note 38.

⁴⁴ Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010); UMG Recordings v. Augusto, 628 F.3d 1175 (9th Cir. 2011).

⁴⁵ *Terms of Service - The Currency*, HENI NFT, <https://currency.nft.heni.com/terms-of-service-currency> (last visited Dec. 6, 2021); *Terms of Service - The Marketplace*, HENI NFT, <https://currency.nft.heni.com/terms-of-service> (last visited Dec. 6, 2021).

⁴⁶ HENI, <https://currency.nft.heni.com/about-us> (last visited May 30, 2022).

⁴⁷ *Terms of Service - The Currency*, *supra* note 45, at § 3.

⁴⁸ *Id.* at § 4.13.

⁴⁹ *Id.* at § 8.3.

⁵⁰ TIMEPIECES, <https://nft.time.com/> (last visited Dec. 6, 2021).

⁵¹ *TIMEPieces License Agreement*, TIME, https://time.com/privacy/timepieces_license_agreement.html (last visited Dec. 6, 2021).

Second, the purchaser's ability to transfer the Hirst NFT is not restricted. The Terms of Service permits the sale and transfer of the Hirst NFTs to third parties without the consent of HENI or Damien Hirst.⁵² Even the platform on which the Hirst NFT can be sold and transferred can be changed.⁵³ The initial purchase from HENI must be conducted on the HENI website using the digital wallet, MetaMask⁵⁴ and is transferred to the purchaser on the Palm blockchain.⁵⁵ However, as to subsequent sales and transfers, the purchaser is permitted to "sell, trade, or distribute [their] Hirst NFT on any secondary marketplaces, platforms or exchanges operated by third parties that support Hirst NFTs," as per Clause 6.1.⁵⁶ The Hirst NFT may thus be sold on another marketplace such as Nifty's⁵⁷ or OpenSea.⁵⁸ One consequence of this is that the purchaser can move the Hirst NFT across the bridge from the Palm blockchain to the Ethereum blockchain.

In contrast, the TIMEPieces agreement is more restrictive in this sense and provides that a purchaser only owns a TIMEPiece NFT if the license was purchased directly from TIME or on an "Approved Marketplace," which is limited to the OpenSea marketplace.⁵⁹

The Hirst Terms of Service may be read in contrast with other terms of service that impose additional restrictions on the manner in which an NFT can be transferred. For instance, the Terms of Service for DapperLab's NBA Top Shot imposes restrictions on the manner in which their NFTs (i.e. Top Shot Moments) can be transferred. Ownership of the Moments will only be recognized if it is purchased through a "legitimate source and not any of the Category B Prohibited Activities."⁶⁰ DapperLab states that it will not "seize, freeze, or otherwise modify the ownership of any Moment" if it has been obtained through a "legitimate source."⁶¹ On the other hand, if DapperLab reasonably believes a user is engaged in any of the Category B Prohibited Activities, they have the right to *inter alia* "**immediately confiscate any moments (including their underlying NFTs)** that were purchased or acquired as the result of such activities" at their "**absolute and sole discretion.**"⁶² These Category B Prohibited Activities include various fraudulent activities,⁶³ and also include creating user accounts by automated means⁶⁴ and the use of bots on the app.⁶⁵

⁵² *Terms of Service - The Currency*, *supra* note 45, at § 8.3; *Terms of Service - The Marketplace*, *supra* note 45, at § 13.3.

⁵³ *Terms of Service - The Currency*, *supra* note 45, at § 6.1; *Terms of Service - The Marketplace*, *supra* note 45, at § 12.1.

⁵⁴ *Terms of Service - The Currency*, *supra* note 45, at § 4.1.

⁵⁵ *Terms of Service - The Currency*, *supra* note 45, at § 3.

⁵⁶ *Terms of Service - The Currency*, *supra* note 45, at § 6.1

⁵⁷ *Heni*, NIFTY'S, <https://niftys.com/heni> (last visited Dec. 6, 2021).

⁵⁸ *Damien Hirst - The Currency*, OPENSEA, <https://opensea.io/collection/thecurrency> (last visited Dec. 6, 2021).

⁵⁹ *TIMEPieces License Agreement*, *supra* note 51, at § 1.

⁶⁰ *Terms of Use*, § 4, TOP SHOT (last updated Feb. 2, 2022), <https://nbatopshot.com/terms>.

⁶¹ *Id.* at § 4(i).

⁶² *Id.* at § 5 (emphasis added).

⁶³ For example, § 5(i)(b)(5) prohibits "acquiring Moments through inappropriate or illegal means (including, among other things, using a stolen credit card, or a payment mechanism that you do not have the right to use, or purchasing a Moment and then attempting to charge the cost back to your payment method while still maintaining ownership or control of the Moment or selling, gifting or trading the Moment to someone else)." *Id.* at § 5(i)(b)(5).

⁶⁴ *Id.* at § 5(i)(b)(1).

⁶⁵ *Id.* at § 5(i)(b)(3).

The only restriction on the transfer of the Hirst NFT is that any secondary marketplace it is sold on “must include terms of use that limit the acquiror’s rights in the Hirst NFT in a manner that is consistent with clauses 13.7 and 13.8.”⁶⁶

The third and final factor that makes the purchase of the Hirst NFT more similar to a sale than a license is the lack of restrictions on the use of the digital asset. The purchaser’s use of the Hirst NFT is relatively unrestricted. Here, it is important to understand the relationship between the Hirst NFT and the digital artwork associated with the NFT. To some extent, this is similar to the copy-copyright distinction of the physical Hirst.

While there are practically no restrictions on the transfer and use of the Hirst NFT, the rights acquired in the digital artwork are significantly limited. These rights are restricted to the rights to copy and display the digital work for his own personal enjoyment,⁶⁷ to promote the sale or trade of the Hirst NFT⁶⁸ and to brag about their purchase of the Hirst NFT on social media and digital platforms.⁶⁹ However, the Terms of Service make clear that the purchaser has no right to use the digital artwork for commercial purpose and profit from the digital artwork. Instead, these rights remain with HENI and Damien Hirst.⁷⁰ In contrast, under DapperLab’s popular CryptoKitties NFT project, the purchaser of a CryptoKitty NFT is able to commercialize the digital art associated with the purchased CryptoKitty NFT as long as annual gross revenue is limited to \$100,000 each year.⁷¹ These restrictions on the use of the digital artwork purport to apply equally to subsequent purchasers of the Hirst NFT.⁷²

Insofar as we can identify the Hirst NFT and the digital artwork as two separate digital assets, then the restriction imposed on the use of the digital artwork should not affect the characterization of the NFT purchase as a sale or a license. That being said, it would not be accurate to understand the NFT and its associated digital artwork as completely separate and distinct digital assets. The relationship between the two is more nuanced.

A large part of an NFT’s value lies in the artwork that it is associated with. While the string of code that makes up every NFT is also unique, most people do not buy an NFT for the underlying code but for its association with a unique artwork. The owner of the NFT might enjoy a particular artwork or the attributes of that artwork might be especially rare in the collection. Therefore, to the extent that the artwork associated with the NFT can be modified by the developer after it has been purchased, it should constitute a restriction on the purchaser’s use of the NFT.

The connection between the NFT and the associated artwork depends on the NFT’s code. In the case of Larva Lab’s Autoglyphs, the artwork itself is stored with the NFT on the blockchain.⁷³ However, this is rare. In most instances, the associated artwork is too large to be

⁶⁶ *Terms of Service - The Currency*, *supra* note 45, at § 6.1, (note: the reference to clauses 13.7 and 13.8 is likely to be a typo in the Terms of Service – The Currency and likely refers to clauses 8.7 and 8.8 instead); *Terms of Service - The Marketplace*, *supra* note 45, at § 12.1.

⁶⁷ *Terms of Service - The Currency*, *supra* note 45, at § 8.3.

⁶⁸ *Id.* at § 8.7.

⁶⁹ *Id.*

⁷⁰ *Terms of Service - The Currency*, *supra* note 45, at § 8.6.

⁷¹ *CryptoKitties Terms of Use*, §3.C.ii, CRYPTOKITTIES (last updated Nov. 15, 2018), <https://www.cryptokitties.co/terms-of-use>.

⁷² *Terms of Service - The Marketplace*, *supra* note 45, at § 13.10; *Terms of Service - The Currency*, *supra* note 45, at § 6.1.

⁷³ *Autoglyphs*, LARVA LABS, <https://larvalabs.com/autoglyphs> (last visited Dec. 6, 2021).

efficiently stored on the blockchain.⁷⁴ Instead, it is stored off-chain and the address it is stored at is part of the NFT's metadata.⁷⁵ The associated artwork can either be stored on a centralized server or on a decentralized file system like the InterPlanetary File System ("IPFS").⁷⁶ A part of the NFT's code, known as the token URI, then contains the link to an address where the associated artwork can be found.⁷⁷

In most instances, the token URI (i.e. the address) cannot be modified once the NFT has been minted.⁷⁸ However, this does not necessarily mean that the artwork associated with the NFT cannot be modified. Whether the digital artwork is stored on a centralized server or on a decentralized file system is crucial. If the digital artwork is stored on a centralized server, the owner of the server can always change or remove the artwork. Alternatively, if a domain holder fails to maintain the domain, the link may become broken and the NFT holder may see an error 404 message instead of the associated artwork.⁷⁹ A code developer or an artist who is concerned about retaining control over their intellectual property will likely be the domain holder and/or control the centralized server. Alternatively, avant-garde artists have pulled off public stunts where they destroy their own artworks – think Banksy's shredding of "Girl with Balloon" at a live auction at Sotheby's.⁸⁰ An artist may decide to change or remove the associated artwork stored on the centralized server as a prank or a commentary on art. Therefore, where the associated artwork is stored on a centralized server, the NFT owner might be at the mercy of the developer or the artist to protect the value of their NFT.

In contrast, where the digital artwork is stored on a decentralized file system, the associated artwork has a quality of persistence and can be viewed as long as there is at least one copy of the artwork on the decentralized network.⁸¹ Therefore if the NFT holder were to put a *copy* of the digital artwork into an IPFS instance they control, then they can ensure that the address linked to their NFT will always lead to the digital artwork.⁸² In order to do so, however, the NFT holder will need to have some license over the digital artwork so that they can maintain a copy of the artwork on their IPFS instance without infringing on the digital artwork's copyright.

⁷⁴ *Basic Guide to NFTs and IPFS*, CLUB NFT <https://www.clubnft.com/blog/basic-guide-to-nfts-and-ipfs> (last visited Mar. 28, 2022).

⁷⁵ Jacob Kastrenakes, *Your Million-Dollar NFT Can Break Tomorrow If You're Not Careful*, THE VERGE (Mar. 25, 2021, 11:55 AM), <https://www.theverge.com/2021/3/25/22349242/nft-metadata-explained-art-crypto-urls-links-ipfs>.

⁷⁶ *Basic Guide to NFTs and IPFS*, *supra* note 74.

⁷⁷ *Id.*

⁷⁸ Dipanjan Das, Priyanka Bose, Nicola Ruaro, Christopher Kruegel, and Giovanni Vigna, *Understanding Security Issues in the NFT Ecosystem*, ACM CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY (2022), at 8, <https://arxiv.org/pdf/2111.08893.pdf>.

⁷⁹ Jason Bailey, *Back Up Your NFT Art Or It Could Disappear*, ARTNOME (Oct. 28, 2021), <https://www.artnome.com/news/2021/10/27/back-up-your-nft-art-or-it-could-disappear>.

⁸⁰ Emma Bowman, *'We Just Got Banksy-ed': 'Girl With Balloon' Sells For \$1.4M Before Self-Destructing*, NPR (Oct. 6, 2018), <https://www.npr.org/2018/10/06/655252676/we-just-got-banksy-ed-girl-with-balloon-sells-for-1-4m-before-self-destructing>.

⁸¹ Brady Dale, *It's an NFT Boom. Do You Know Where Your Digital Art Lives?*, COINDESK (Sept. 14, 2021, 9:47 AM), <https://www.coindesk.com/tech/2021/02/23/its-an-nft-boom-do-you-know-where-your-digital-art-lives/>.

⁸² Kyle Tut, *Who Is Responsible for NFT Data?*, MEDIUM (Apr. 6, 2020), <https://medium.com/pinata/who-is-responsible-for-nft-data-99fb4e8147e4>.

In the case of *The Currency*, it is fair to say that the use of the Hirst NFT is relatively unrestricted because the digital artwork is stored on a decentralized server. The Terms of Service make clear that the associated digital artwork of the Hirst NFT is not stored on the Palm blockchain.⁸³ Instead, the smart contracts for the Hirst NFTs show that their token URIs are to IPFS addresses.⁸⁴ Therefore, as long as the purchaser maintains a copy of the artwork on the IPFS network, which they are allowed to do under the limited license they are granted over the digital artwork,⁸⁵ their Hirst NFT will be data persistent.

To conclude, under the Ninth Circuit's test, the purchase of the Hirst NFT would be considered a sale. In fact, as alluded to above, the entire transaction involves two digital assets – the Hirst NFT and the digital artwork. The transaction is most accurately understood as a sale of the Hirst NFT and a limited license to use the digital artwork.

It should be stressed that not every transaction involving an NFT is automatically a sale. Many transactions would turn on their specific terms. As illustrated above, the terms of service and agreements for NFT transactions can vary significantly in terms of the extent of restrictions they impose on the purchaser. Where the restrictions go so far as to prevent the NFT from being freely transferred or sold, like when the marketplace caps the ability to earn based on the NFT's appreciation in value,⁸⁶ it might be harder to find that there has been a sale of the NFT.

C. A Comparison

Having considered the purchaser's rights in the Hirst NFT and the right they could acquire in the physical Hirst, we now compare the two. The following table summarizes the respective rights:

	Physical Hirst	Digital Hirst Artwork	Hirst NFT
Right to Transfer	Yes	N/A	Yes
Right to Display	Yes	Yes for Hirst NFT holders, but only for personal use	Yes
Right to Copy	No	Yes for Hirst NFT holders, but only for personal use	N/A
Right to Modify	No, unless falling under a VARA exception such as fair use	No	N/A

⁸³ *Terms of Service - The Currency*, *supra* note 45, at § 3.

⁸⁴ Keying in any associated artwork number in the token URI field of the 'The Currency' smart contract produces only IPFS links. *See, TheCurrency*, PALM, <https://explorer.palm.io/token/0xaaDc2D4261199ce24A4B0a57370c4FCf43BB60aa/read-contract> (last visited Dec. 6, 2021).

⁸⁵ *Terms of Service - The Currency*, *supra* note 45, at § 8.7; *Terms of Service - The Marketplace*, *supra* note 45, at § 13.7.

⁸⁶ Trautman, *supra* note 38, at 65.

Right to Destroy	No, unless falling under a VARA exception such as fair use	N/A	N/A (an NFT can only be 'destroyed' by sending it to an inaccessible account)
Right to Exclude	Yes	No	Yes

The main differences between the physical Hirst and the Hirst NFT are the rights to display, copy, modify, and destroy. From these differences, two key points of comparison arise – the extent to which the purchaser can commercialize their chosen work and the extent to which their chosen work can be manipulated by the purchaser and others.

The first key point of comparison is the extent to which the purchaser can commercialize their chosen work. In relation to the physical Hirst, the purchaser would be able to commercialize their artwork by loaning it out to museums or collecting a fee from the general public to view the artwork. In relation to the Hirst NFT, the purchaser can legally profit off displaying the code of their NFT, but it is practically impossible for them to do so. This is because the code is already publicly available on the Palm and Ethereum blockchains.⁸⁷ Moreover, it is unlikely that anyone would want to pay to view some code.

Regardless of which option they choose, a purchaser would not be able to charge a fee to view the digital artwork because that would violate the Terms of Service.⁸⁸ In any event, the digital artwork is already publicly available to view online. However, this may have more implications for the Hirst NFT holder as they may not be able to display it in an NFT museum for a fee because that could constitute commercializing the digital artwork. Finally, the purchaser would still be able to profit from whatever capital gain is made off the physical Hirst or the Hirst NFT. It is also possible that the purchaser can use the physical Hirst or Hirst NFT as collateral for a bank loan.

The second point of comparison is the extent to which the chosen artwork can be manipulated by the purchaser, by the developer, and by the artist. The physical Hirst can be modified by the purchaser once they are in possession of it. The only restriction is that the purchaser cannot violate the artist's moral rights as provided under VARA unless a defense applies.⁸⁹ Thus, a purchaser may be able to follow in the footsteps of MSCHF and cut out each spot on their artwork to sell if they so wish. In contrast, the purchaser is not able to modify the Hirst NFT they have acquired. This inability is why NFTs can prove provenance and ownership. The nature of the blockchain means that what has been recorded is relatively immutable.⁹⁰ This also means that the purchaser cannot change the digital artwork associated with the Hirst NFT by changing the token URI attached to their Hirst NFT and linking it to a modified artwork

⁸⁷ *The Currency*, PALM, <https://explorer.palm.io/address/0xaaDc2D4261199ce24A4B0a57370c4FCf43BB60aa/contracts> (last visited Dec. 6, 2021); *Contract 0xaaDc2D4261199ce24A4B0a57370c4FCf43BB60aa*, ETHERSCAN, <https://etherscan.io/address/0xaadc2d4261199ce24a4b0a57370c4fcf43bb60aa#code> (last visited Dec. 28, 2022).

⁸⁸ *Terms of Service - The Currency*, *supra* note 45, at § 8.6.

⁸⁹ *See supra* pp. 8-9.

⁹⁰ *See supra* pp. 8-9.

instead.⁹¹ In any event, it would be contrary to the licensing agreement to even modify the digital artwork.⁹²

Moreover, the Hirst NFT is to some extent subject to the manipulation of the HENI or third parties even though the digital artwork is stored on the IPFS. Unless the purchaser also puts a copy of the digital artwork on an IPFS instance they control, there is a possibility that the digital artwork may not load if no one is actively maintaining the file at the time. For instance, NFTs by major artists such as Grimes, deadmau5 and Steve Aoki have failed to load at times because no one was actively hosting the files.⁹³ At the time of writing, the associated artworks for the Hirst NFTs were available on the IPFS.⁹⁴ The Terms of Service are unclear as to whether HENI is obliged to maintain the file on the IPFS or if this responsibility falls on the purchaser.⁹⁵ However, even if the purchaser was required to keep the file on the IPFS, this is not an extraordinary burden. In fact, it has been compared to the need for a purchaser to maintain and preserve physical assets.⁹⁶

The preceding discussion highlights the subtle differences in rights that the owner of a physical Hirst has compared to a Hirst NFT holder in their respective chosen assets. These differences are unlikely to be significant to a purchaser looking to profit from their purchase. Firstly, the purchaser's primary source of profit will likely be the capital gain from the physical Hirst or the Hirst NFT. Secondly, unless the purchaser is an artist looking to make derivative art from the physical painting, it is unlikely that they would want to take the risk and modify a valuable artwork into which they have invested a considerable sum of money.

Perhaps the most important distinction, however, is not the differences in what *rights* purchasers have, but in *what* they have rights over. This is where the distinction between an NFT and its associated digital artwork is pertinent again. The Hirst NFT holder can have as many rights in their NFT as the owner of a physical Hirst would have. However, unlike the owner of the physical Hirst, who can properly be said to be the owner of an artwork, the holder of a Hirst NFT is not really the owner of any artwork – they are simply the owner of an NFT, which is a different asset altogether.

Oftentimes this distinction is blurred in an NFT transaction – such transactions are typically marketed as a sale of the digital artwork, but this is usually a misnomer. The rights associated with a digital artwork are its copyright and possibly the artist's moral rights.⁹⁷ The only way a digital artwork can be “sold” is if its copyright is sold to the purchaser. This is usually not the case in NFT transactions and only a limited license to use the digital artwork is granted to the purchaser. What is sold to the purchaser is the NFT which contains an address

⁹¹ *TheCurrency*, PALM, Contract Source Code line 871, <https://explorer.palm.io/address/0xaaDc2D4261199ce24A4B0a57370c4FCf43BB60aa/contracts> (last visited Apr. 4, 2022).

⁹² *Terms of Service - The Currency*, *supra* note 45, at § 8.8; *Terms of Service - The Marketplace*, *supra* note 45, at §§ 9.1, 13.8.

⁹³ Kastrenakes, *supra* note 75.

⁹⁴ *TheCurrency*, *supra* note 84.

⁹⁵ *Terms of Service - The Currency*, *supra* note 45, at § 8.4; *Terms of Service - The Marketplace*, *supra* note 45, at § 13.4 (provides that HENI is “not responsible or liable if the Digital Artwork becomes inaccessible to you for any reason, or for any modifications or changes to the Digital Artwork that someone other than us may make, including the deletion of the Digital Artwork”).

⁹⁶ Tut, *supra* note 82.

⁹⁷ Kristina Mucinskas, *Moral Rights and Digital Art: Revitalizing the Visual Artists' Rights Act?*, 2005 U. ILL. J.L. TECH. & POL'Y 291, 292-93 (2005).

(in the code's token URI) to where a copy of the digital artwork can be found. The NFT holder might be considered the "owner" of the digital artwork to a layperson, but legally speaking, they are not. The real "owner" of the digital artwork is the person who controls most of the rights in that digital artwork and that is the copyright holder.

III. ECONOMIC VALUE

Having clarified what rights a purchaser would have in certain assets, we now turn to compare the economic values of the Hirst NFT and the physical Hirst. Simply because the purchaser of a Hirst NFT is not the owner of an artwork does not mean that the asset that they own (i.e. the NFT) has no economic value. In fact, the Hirst NFT can have just as much, if not more, value as an artwork. In this section, I compare the past prices of Hirst's other artworks and the current prices of the Hirst NFTs to understand the likely economic potential of the physical Hirst and the Hirst NFT.

In 2013, the *New York Times* published an article stating that in the preceding 10 years Hirst's spot paintings have been sold for anything between \$53,000 to \$1,700,000.⁹⁸ MyArtBroker suggests that most of the sales of Hirst's works have in the last 10 years have been under \$10,000.⁹⁹ At the time of writing, it appears that few purchasers have placed their faith in the physical Hirst, exchanging only 395 out of 10,000 Hirst NFTs for the physical Hirst.¹⁰⁰ In comparison, at the time of writing, the average price of a Hirst NFT is \$26,524,¹⁰¹ with the lowest sale price at \$4,300 and the highest sale price at \$175,371.¹⁰² There have also only been 2,822 total sales of the Hirst NFT,¹⁰³ which suggests that the supply of Hirst NFTs is limited and most purchasers have simply opted to hold their NFTs.

However, it is important to caveat that the Hirst NFTs are currently sold within the redemption period.¹⁰⁴ This means that any Hirst NFT holder can choose to redeem the token for the physical artwork. In a way, this is comparable to the gold standard which maintained the value of currency by pegging it to a fixed amount of gold.¹⁰⁵ A more modern comparison is to the Tether token ("USDT") which has a fixed exchange rate of 1 USDT to 1 USD and is allegedly "backed 100% by Tether's reserves."¹⁰⁶ In the case of *The Currency*, the physical Hirsts act as the "reserves" that back the Hirst NFTs. It is at least worth questioning whether the current sale prices of the Hirst NFTs are valuable because their value is pegged to the physical Hirsts. It remains to be seen whether the Hirst NFT will devalue after the redemption period when the NFT is no longer backed by the "reserves" of the physical Hirsts. If the gold standard is anything to go by, eliminating the reserves is unlikely to affect the viability of *The Currency* (pun intended).

⁹⁸ Amanda Cox, *Damien Hirst's Spot Prices*, N.Y. TIMES (June 11, 2013) <https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/12/arts/design/Damien-Hirsts-Spot-Prices.html>.

⁹⁹ *A Buyer's Guide To Damien Hirst Prints*, MYARTBROKER (Aug. 2021) <https://www.myartbroker.com/artist/damien-hirst/a-buyers-guide-to-damien-hirst/#:~:text=Over%20the%20last%20ten%20years,that%20of%20his%20original%20paintings.>

¹⁰⁰ *Tender Sales*, HENI NFT, <https://currency.nft.heni.com/stats> (last visited Dec. 6, 2021).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *The Currency*, *supra* note 9.

¹⁰⁵ Michael D. Bordo, *The Classical Gold Standard: Some Lessons for Today*, 63 FED. RESERVE BANK OF ST. LOUIS REV. 2, 2 (1981).

¹⁰⁶ TETHER, <https://tether.to/en/how-it-works> (last visited Dec. 6, 2021).

Another important consideration for purchasers is the liquidity of the Hirst NFTs as compared to the physical Hirsts. One of the usual warnings given to first-time investors in art is that as assets they are illiquid.¹⁰⁷ This is partly due to the exclusivity of the art market. Currently, sales of physical artworks are heavily facilitated by established institutions in the art world such as art dealers, auction houses, or art galleries. This creates a high barrier to entry to the art market for both buyers and sellers. Even with the creation of “art-tech platforms,” the predominant view is still that art should be exclusive.¹⁰⁸ For instance, Artvisor, an online platform for art investors to purchase physical artworks, is invite-only in order to preserve the exclusivity of the art world.¹⁰⁹ In contrast, NFTs are readily transacted on online marketplaces with low to no barriers to entry. NFT transactions can happen instantaneously and sellers can use online marketplaces to facilitate their own auctions. While NFTs are not as liquid as cryptocurrencies, they appear to have more liquidity than physical artworks.

While the sale price of the physical Hirsts and the Hirst NFTs will ultimately depend on market conditions and how many purchasers choose either option, the current prices of the Hirst NFTs suggest that there is a significant demand for the Hirst NFTs. There is no indication that purchasers are missing out on any capital gains by retaining the Hirst NFT rather than claiming the physical Hirst. In fact, the prices of the Hirst NFTs appear to be outperforming other physical Hirst works in the past 10 years.

IV. SPECIAL FEATURES OF NFTS

The analysis thus far suggests that the Hirst NFT and the physical Hirst are at least comparable in terms of their purchasers’ legal rights and their economic potential. This final section suggests the additional functionalities inherent to the NFT technology tip the scales in favor of the Hirst NFT.

First, many have recognized the value of blockchain technology in overcoming provenance risk associated with physical artworks.¹¹⁰ When it comes to physical artworks, purchasers are often concerned with the authenticity of the artwork and the seller’s legitimacy. In order for purchasers to safely realize any profits from the artwork, it must be verifiable as an original and its seller must have good title to the artwork. Thus, a significant sum of money is spent verifying the provenance of the artwork. In contrast, NFTs eliminate any form of provenance risk because the entire history of the NFT is stored on the blockchain – from when the NFT was first minted to when the current seller took title. Therefore, while the owners of the physical Hirst may have to incur costs to prove the provenance of the physical Hirst when they sell the artwork in the future, the owners of the Hirst NFT will never have to worry about such an issue. To some extent, this may be minimized by the inclusion of the watermark, hologram, and microdot on the physical Hirst, but a good fake could just as well imitate these elements too. The practical implication of this is that there is a lower transaction cost associated with selling a Hirst NFT than selling a physical Hirst. Moreover, the fact that there is no need

¹⁰⁷ MELANIE GERLIS, *ART AS AN INVESTMENT? A SURVEY OF COMPARATIVE ASSETS* 16 (2014).

¹⁰⁸ Chiara Piancatelli, Marta Massi & Paul Harrison, *Has Art Lost Its Aura? How Reintermediation and Decoupling Have Changed the Rules of the Art Game: The Case of Artvisor*, 22 INT’L J. ARTS MGMT. 34, 46 (2020).

¹⁰⁹ *Id.* at 41.

¹¹⁰ Amy Whitaker, *Art and Blockchain: A Primer, History, and Taxonomy of Blockchain Use Cases in the Arts*, 8 ARTIVATE 21, 32 (2019).

to spend time verifying the provenance of the NFT means that Hirst NFT transactions are likely to be quicker and more efficient than that of the physical Hirsts, thereby contributing to their liquidity.

Second, NFT owners may receive additional perks as a result of the hype and novelty around NFTs. Given the current excitement surrounding NFTs, artists are interested in engaging with the holders of their NFTs. In the case of *The Currency*, Damien Hirst released a second collection of 10,000 NFTs entitled “Great Expectations” that are loosely based on the album cover art that he made for Drake.¹¹¹ On Thanksgiving 2021, the Great Expectations NFTs were airdropped for free to *The Currency* NFT holders. At the time of writing, there have been 365 sales of the Great Expectations NFT averaging at \$6,908.¹¹² Had any of the Hirst NFT holders opted to claim the physical Hirst instead, they might not have received this \$6,908 Thanksgiving present from Damien Hirst.

Third, given the tremendous potential of the metaverse, the Hirst NFT could eventually become an even more valuable and useful asset. The concept of the metaverse – a centralized virtual world parallel to the physical world¹¹³ – has been around since Neal Stephenson's 1992 science fiction novel, *Snow Crash*. However, the development of blockchain technology and NFTs suggests that the metaverse might soon be a (virtual) reality. Blockchain-based games, such as *Decentraland*¹¹⁴ and *Axie Infinity*,¹¹⁵ are strong proofs of concept for a metaverse that would operate in parallel to the physical world. In the context of the art market, *Decentraland* even has a *Voltaire Art District* which houses multiple virtual art galleries including London-based auction house *Sotheby's*.¹¹⁶ Against the backdrop of a developing metaverse, the Hirst NFT is set to become increasingly useful.

V. CONCLUSION

Skeptics of crypto assets often tout that such assets have no intrinsic value.¹¹⁷ That may be true to some extent considering that an NFT holder does not actually own any artwork. However, neither an NFT nor a physical artwork has any intrinsic value. The value of both have always depended on the subjective value that society imputes on them.

When confronted with the choice of selecting between a physical artwork and an NFT, I argue that it would be sensible to choose the NFT. As between the physical Hirst and the Hirst NFT, the legal rights and economic potential are comparable. However, what gives the Hirst NFT the edge is that, unlike the physical Hirst, it comes with the allure of owning a piece of

¹¹¹ Andrew Hayward, *Damien Hirst Turns His Drake Album Art into 10,000 Ethereum NFTs*, DECRYPT (Nov. 26, 2021), <https://decrypt.co/87035/damien-hirst-turns-his-drake-album-art-into-10000-ethereum-nfts>.

¹¹² *Sales Overview*, HENI NFT, <https://ge.nft.heni.com/stats> (last visited Dec. 6, 2021).

¹¹³ Peter Allen Clark, *The Metaverse Has Already Arrived. Here's What That Actually Means*, TIME (Nov. 15, 2021, 12:00 PM), <https://time.com/6116826/what-is-the-metaverse/>.

¹¹⁴ *Decentraland (MANA): A Virtual World Built on Ethereum*, CRYPTOPEDIA (updated Mar. 10, 2022), <https://www.gemini.com/cryptopedia/decentraland-defi-ethereum-based#section-decentraland-background>.

¹¹⁵ *Axie Infinity (AXS): An NFT Gaming Metaverse*, CRYPTOPEDIA (updated Dec. 23, 2021), <https://www.gemini.com/cryptopedia/axie-infinity-game-axie-marketplace-axie-nft>.

¹¹⁶ *Sotheby's opens a virtual gallery in Decentraland*, DECENTRALAND (June 4, 2021), <https://decentraland.org/blog/announcements/sotheby-s-opens-a-virtual-gallery-in-decentraland/>.

¹¹⁷ Sophie Bearman, *As bitcoin's price plunges, skeptics say the cryptocurrency has no value. Here's one argument for why they're wrong*, CNBC (updated Jan. 17, 2018, 3:44 PM), <https://www.cnn.com/2018/01/16/skeptics-say-bitcoin-has-no-value-heres-why-theyre-wrong.html>.

the new technological frontier. The technology behind NFTs not only eliminates provenance risk, but also holds the potential for future use in the metaverse. Moreover, the ownership of NFTs can create relationships between the NFT owner and the artist as well as among the community of NFT owners through Discord servers.¹¹⁸ This creates a new dimension to the enjoyment of the artwork.

There is no doubt that anyone who purchased the Hirst NFT at its original \$2,000 price stands to make a profit regardless of whether they eventually choose to keep the Hirst NFT or claim the physical Hirst. And setting aside the investment value, the final and possibly most significant consideration is the purchaser's hedonistic enjoyment of owning an artwork.¹¹⁹ As with any artistic endeavor, the pleasure of enjoying art should ultimately be at the heart of making decisions about the artwork. For purchasers that long to own a traditional Hirst painting, this might be a decisive consideration to exchange the Hirst NFT for the physical Hirst. However, in a project like *The Currency*, all the purchasers are a part of a larger Hirst artwork and their participation in the piece by owning a Hirst NFT might be just as pleasurable.

While this paper has focused on *The Currency*, the conclusions drawn are equally relevant to other NFT digital art projects. As highlighted in the discussion above, the legal rights acquired by an NFT purchaser largely depend on the terms of the agreement. If artists are serious about selling NFTs as a means of profiting off their digital artwork, then *The Currency's* Terms of Service provide a useful baseline that sets the minimum standard to do so. Imposing any more restrictive conditions on the use and transfer of NFTs undermines the purchaser's ownership in an NFT. In the long run, this could discredit the use of NFTs in relation to digital artworks and devalue the NFTs. It is in the art world's interest to avoid imposing unnecessarily restrictive conditions on a purchaser's use and transfer of NFTs.

At present, *The Currency* sends a strong signal that the art world – both artists and collectors – is ready to take on NFTs. This is the first-time that a world-renowned artist, who typically creates physical artworks, has taken the step to feature NFTs so prominently in a project. Likewise, purchasers as of this writing also appear inclined to retain the Hirst NFT – with only a small minority choosing to exchange the Hirst NFT for the physical Hirst. The art world should ride the momentum *The Currency* created and continue to create new NFT projects.

In an interview about *The Currency*, Damien Hirst said “it should be an equal problem to burn an NFT or to burn a piece of paper, but I have a much harder problem burning the piece of paper than I do the NFTs.”¹²⁰ Unfortunately for him, I think it is quite likely that he will find himself burning a large portion of his physical Hirst paintings come July 22, 2022.

¹¹⁸ *Heni*, DISCORD, <https://discord.com/invite/HENI> (last visited Dec. 6, 2021).

¹¹⁹ Terry Nguyen, *The value of NFTs, explained by an expert*, VOX (Mar. 31, 2021, 9:30 AM), <https://www.vox.com/the-goods/22358262/value-of-nfts-behavioral-expert>.

¹²⁰ Lucy Howie, *NFTs & Damien Hirst: The Digital vs The Physical*, MYARTBROKER, <https://www.myartbroker.com/artist-damien-hirst/articles/nfts-damien-hirst> (last visited Mar. 28, 2022).