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Crypto Enters the Courtroom: Bored Ape Yacht Club NFT finds itself in court

BY ALEXANDER AUFRICHTIG/ON APRIL 13, 2022



Photo by Bermix Studio from *Unsplash*

What if I told you that a digital portrait of an animated ape is claimed to be worth millions of dollars? Now, what if I told you that this digital portrait was stolen and then resold at a fraction of the price? This scenario has become a strange reality in the world of NFTs (non-fungible tokens).¹ NFTs are peculiar but in certain respects they are considered to be the “evolution of fine art collecting, only with digital art.”² Similar to other forms of art, NFT artists that are renowned all over the world can have their works sold for millions. A collection of NFTs known as the Bored Ape Yacht Club are widely considered to be one of the highly coveted NFTs as their minimum floor price on OpenSea, a marketplace for NFTs, is 92 ETH (approximately \$247,000.00).³

Recently, a previous owner of a Bored Ape, Timothy McKimmy, filed a lawsuit against OpenSea claiming, among other things, negligence and breach of fiduciary duty.⁴ McKimmy alleges that he is the rightful owner of Bored Ape #3475, that his NFT was stolen and then resold to another individual on OpenSea, and that OpenSea’s “security vulnerability allowed

an outside party to illegally enter through OpenSea's code and access Plaintiff's NFT wallet" to then list and sell the NFT at a fraction of the value (.01 ETH).⁵ If the facts alleged are taken as true, then the question remains as to who will bear the burden for Timothy McKimmy's loss.

Some view NFTs as simply another form of property and stand by the idea that "[i]t doesn't matter if it's a car or a Bored Ape NFT; if you can prove ownership, it belongs to you, and stolen property can be retrieved."⁶ It may very well be the case that judges apply the same property and negligence principles that have existed before the rise of NFTs. In the instant case the plaintiff will have to prove the elements of negligence: "(1) duty owed by defendant to plaintiff; (2) Breach of that duty; (3) Proximate cause of the plaintiff's damages by defendant's breach; and (4) Damages."⁷ If the plaintiff can prove, among other things, that OpenSea failed to exercise reasonable care, failed to take measures to protect users, failed to address security vulnerabilities and failed to notify users, then the plaintiff might successfully recover.⁸ It helps the plaintiff that the NFT itself wasn't actually stolen from the blockchain because the NFT doesn't exist on the blockchain.⁹ Rather, the blockchain contains metadata about the NFT and perhaps where to find it however, "your NFT — the digital asset itself — includes a link that points to the metadata, which lives elsewhere online."¹⁰ Thus, there is no implication that the blockchain is somehow defective but rather, the claim is reduced to how OpenSea's security vulnerabilities created a breach of data that allowed access into the plaintiff's crypto wallet, where the actual NFT existed.

Nevertheless, there is still a concern that OpenSea will prevail given the nature of standard vendor agreement contracts. These contracts "exclude consequential damages and cap direct damages."¹¹ Furthermore, in most cases, "all damages flowing from a data breach of the data holder will be considered consequential damages and barred by a standard provision disclaiming all liability for consequential damages."¹² The issue with damages in this case is that it will be difficult to determine the fair market value of the Bored Ape Yacht Club NFT. The plaintiff claims that his specific NFT "has a rarity score of 138.52 and a rarity rank of #1392" and is therefore worth somewhere in the realm of millions of dollars.¹³ Beyond the claimed value, the NFT doubles as a membership card to the Bored Ape Yacht Club community and grants access to members-only benefits, the value of which is arguably incalculable.¹⁴ To further complicate the fair market value, NFTs are minted at a fraction of their value on the secondary market and not all Bored Ape NFTs are worth the same amount, as indicated by floor price and rarity. In consideration of all factors, the question of fair market value for the seemingly new realm of NFTs will be a question for judges.

Legal issues in the crypto world are just getting started across many different facets of law: Timothy McKimmy is suing OpenSea for negligence, Hermes has sued the creators of MetaBirkin NFT for trademark infringement,¹⁵ and the SpiceDAO purchased an original copy of Dune for \$3 million USD thinking they had a copyright in the work.¹⁶ As the crypto world solidifies its place in the world, it must also realize that the "the long arm of the law extends into the digital realm."¹⁷

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2. Id.
3. Bored Ape Yacht Club, OpenSea, [https://opensea.io/collection/boredapeyachtclub?search\[sortAscending\]=true&search\[sortBy\]=PRICE&search\[toggles\]\[0\]=BUY_NOW](https://opensea.io/collection/boredapeyachtclub?search[sortAscending]=true&search[sortBy]=PRICE&search[toggles][0]=BUY_NOW) (last visited Mar. 16, 2022); See also, What is a floor price?, OpenSea, <https://support.opensea.io/hc/en-us/articles/4405171313171-What-is-a-floor-price-> (last visited Mar. 16, 2022).
4. Complaint at 4-5, McKimmy v. OpenSea, No. 4:22CV00545 (2022).
5. Id.
6. Gavin Lucas, Bored Ape Owner Files \$1M Lawsuit vs OpenSea Over 'Stolen' NFT, Coingeek (Feb. 24, 2022), <https://coingeek.com/bored-ape-owner-files-1m-lawsuit-vs-opensea-over-stolen-nft/>.
7. Mark Courtois, Negligence, Funderburk Funderburk Courtois, LLP (2014), [https://www.texaslegalbrains.com/texas-causes-of-action/negligence#:~:text=See%20State%20Bar%20of%20Texas,%3B%20and%20\(4\)%20Damages.](https://www.texaslegalbrains.com/texas-causes-of-action/negligence#:~:text=See%20State%20Bar%20of%20Texas,%3B%20and%20(4)%20Damages.)
8. Complaint, supra note 4, at 4-5.
9. See Eric Khun, NFT Misconception: JPEG aren't on the Blockchain, Eric Khun (Oct. 31, 2021), <https://erickhun.com/posts/nft-misconception-image-arent-on-blockchains/>.
10. Id.
11. Who is Liable When a Data Breach Occurs?, Thompson Reuters, [https://legal.thomsonreuters.com/en/insights/articles/data-breach-liability.#:~:text=In%20a%20cloud%20environment%2C%20under,data%20holder%20\(cloud%20provider\).](https://legal.thomsonreuters.com/en/insights/articles/data-breach-liability.#:~:text=In%20a%20cloud%20environment%2C%20under,data%20holder%20(cloud%20provider).) (last visited Mar. 16, 2022).
12. Id.
13. Complaint, supra note 4, at 3.
14. Bored Ape Yacht Club, supra note 3.
15. See Tora Northman, The Metabirkin vs. Hermès Saga Continues, High Snobiety, <https://www.highsnobiety.com/p/hermes-metabirkin-nft/> (last updated Feb. 10, 2022).
16. See Gavin Lucas, SpiceDAO \$3M Dune Book purchase shows just how naive 'crypto bros' really are, Coingeek (Jan. 24, 2022), <https://coingeek.com/spicedao-3m-dune-book-purchase-shows-just-how-naive-crypto-bros-really-are/>.
17. Lucas, supra note 5.