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The Acceptance of NFTs in the Art World

BY ALISSA DONOVAN / ON NOVEMBER 22, 2022



Photo by Andrew Neel on Pexels

Since the first creation of non-fungible tokens (NFTs) in 2014,¹ some have tried to discredit this new technology as a scam undeserving of legitimate artistic consideration.² The test of time has proven otherwise, as the use of NFTs has expanded to impact numerous industries.³ Although the collapse of NFT trading volumes in September of 2022 allowed critics an “I told you so” moment,⁴ NFTs seem to be continuously expanding in both use and legitimacy from their first conception.⁵ Significantly, art museums have also made a statement: NFTs are a legitimate art form and a lucrative move for the future of art.⁶

Art museums have continued to expand into technology-based art in recent years.⁷ The turn to technology-based art has proven to be extremely lucrative for art galleries,⁸ and museums hope to similarly capitalize on the movement.⁹ The Museum of Modern Art, after struggling with a drop-off in attendance caused by the pandemic, has turned to a more digital audience.¹⁰ Some opine that the move towards technology-based art is purely for financial reasons, while others point out that museums must keep up with technology-based art in accordance with the goal of progression for the good of art and art creation.¹¹ Whatever the reason, it appears that art galleries and museums plan to continue to expand into this technology space.¹² The legal field must therefore work to adjust to these rapid changes and challenges.

There is great speculation as to what legal problems will arise as NFTs expand into the art world. Such legal questions are highlighted in the case of *Hermès Int’l v. Rothschild* where the court is faced with the question of what intellectual property laws—if any—are

extended into the “metaverse.”¹³ The dispute arose when Mason Rothschild, the defendant, created and sold a collection of digital images titled “MetaBirkins.”¹⁴ Although the defendant described these “MetaBirkin” NFTs as a tribute to the iconic Hermès Birkin bag,¹⁵ Hermès nonetheless subsequently filed suit for trademark infringement, trademark dilution, and cybersquatting.¹⁶ Rothschild filed a motion to dismiss the complaint on the basis that the MetaBirkins are “art” and therefore entitled to First Amendment protection under the Rogers Test, which works to balance the public interest in freedom of expression against the public interest in avoiding consumer confusion.¹⁷ The United States District Court for the Southern District of New York denied Rothschild’s motion to dismiss the complaint on the basis that the Polaroid factors must be utilized to determine consumer confusion, which is an analysis that requires significant factual findings.¹⁸ Such factual findings are inappropriate for the motion to dismiss stage of a case.¹⁹ While there is still much to be determined within the case, the United States District Court for the Southern District of New York answered one question definitively: First Amendment protections do apply to NFTs.²⁰ If the MetaBirkin case does not settle before trial, the case is likely to set legal precedent regarding what qualifies as artistic expression and what ownership in the metaverse means.²¹ Although the MetaBirkin case has the potential to set precedent, the ever-changing perception of what NFTs are and how they can be used will likely sculpt and alter this precedent as swiftly as the NFT market expands.

Although it seems apparent that the art world is accepting NFTs as part of the industry,²² the specifics of the coming expansions are speculative at best. The legal industry will have to remain flexible and creative in its approach to these precedent-setting legal problems to best protect the interests of consumers, artists, and museums alike.

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1. See Wallace Ludel, Sotheby’s and Artist Kevin McCoy Sues Over Sale of Early NFT, *The Art Newspaper* (Feb. 4, 2022), <https://www.theartnewspaper.com/2022/02/04/sothebys-kevin-mccoy-lawsuit-quantum-nft> [<https://perma.cc/E3K4-B79C>] (discussing the sale of what many consider the very first NFT, created by artist Kevin McCoy and sold for almost \$1.5 million).
2. See Amanda Marcotte, NFTs Aren’t Art—They’re Just the Cult of Crypto’s Latest Scam, *Salon* (Feb. 16, 2022), <https://www.salon.com/2022/02/16/nfts-arent-art-theyre-just-the-of-cryptos-latest-scam/> [<https://perma.cc/9NEB-6B4W>].
3. See Farah Nayeri, Challenges of the Future Confront the Art World, *N.Y. Times* (June 23, 2022), <https://www.nytimes.com/2022/06/23/business/art-challenges-climate-nft.html?searchResultPosition=13> [<https://perma.cc/9SF5-VRKX>] (discussing, in part, the recent crash of the NFT prices and the potential positive outcome that this will have for artists); Alex Williams, Nike Sold an NFT Sneaker for \$134,000, *N.Y. Times* (May 26, 2022), <https://www.nytimes.com/2022/05/26/style/nike-nft->

sneaker.html?searchResultPosition=12 [https://perma.cc/7VFH-WC3R] (“The market for collectible sneakers has skyrocketed in recent years. And until recently, so had the market for NFTs, or nonfungible tokens, which function as digital certificates of ownership for works of art as well as tattoo designs and virtual real estate.”).

4. See Sidhartha Shukla, NFT Trading Volumes Collapse 97% From January Peak, Bloomberg (Sept. 28, 2022), <https://www.bloomberg.com/news/articles/2022-09-28/nft-volumes-tumble-97-from-2022-highs-as-frenzy-fades-chart> [https://perma.cc/MYS7-76EQ].
5. See e.g., Aisha Malik, Instagram Will Soon Allow Select Creators to Make and Sell NFTs Directly In Its App, Tech Crunch (Nov. 2, 2022), <https://techcrunch.com/2022/11/02/instagram-allow-select-creators-make-sell-nfts-creator-updates/> [https://perma.cc/Z4CP-NLVX].
6. See Zachary Small, Even As NFTs Plummet, Digital Artists Find Museums Are Calling, N.Y. Times (Oct. 31, 2022), <https://www.nytimes.com/2022/10/31/arts/design/nfts-moma-refik-anadol-digital.html> [https://perma.cc/JAJ9-QNFC].
7. See id.
8. See Nine Legal Issues That Stand Behind NFTs, OpenGeeksLab (last visited Nov. 7, 2022), <https://opengeekslab.com/blog/legal-issues-nfts/> [https://perma.cc/28JN-TT3H] (discussing Christie’s sale of an NFT-based artwork called “Everdays: The First 5000 Days” for \$69,346,250); Elise Hansen, NFT Craze Generates Slew of Legal Questions (May 24, 2021).
9. See Zachary Small, Even As NFTs Plummet, Digital Artists Find Museums Are Calling, N.Y. Times (Oct. 31, 2022), <https://www.nytimes.com/2022/10/31/arts/design/nfts-moma-refik-anadol-digital.html> [https://perma.cc/JAJ9-QNFC].
10. See id.
11. See id.
12. See id.
13. *Hermès Int’l v. Rothschild*, 2022 U.S. Dist. LEXIS 89799 (S.D.N.Y. 2022).
14. Id. at *4.
15. Id. at *4 – 5.
16. Id. at *1.
17. Id. See also *In The Bag (For Now): Hermès Survives Motion to Dismiss in MetaBirkin NFT Lawsuit*, Crowell & Moring LLP (June 13, 2022), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/In-the-bag-for-now-Herm-s-survives-motion-to-dismiss-in-MetaBirkin-NFT-lawsuit-1630415> [https://perma.cc/699L-NA8B]. Rothschild argued for First Amendment protection under the Rogers test. The Rogers test holds that the Lanham Act for trademark infringement should only apply to artistic works where the public interest in avoiding consumer confusion outweighs the public interest of freedom of expression. The Rogers test contains two prongs: artistic relevance and explicit misleadingness.
18. *Hermès Int’l v. Rothschild*, 2022 U.S. Dist. LEXIS 89799 at *14-15 (S.D.N.Y. 2022).
19. Id.

20. Id. at 11-12. The Court stated that “because NFTs are simply code pointing to where a digital image is located for authenticating the image, using NFTs to authenticate an image and allow for traceable subsequent resale and transfer does not make the image a commodity without First Amendment protection any more than selling numbered copies of physical paintings would make.”
21. See Maya Ernest, *The Hermès and MetaBirkins Lawsuit Could Set Legal Precedents for NFTs*, Input (July 28, 2022), <https://www.inverse.com/input/style/hermes-metabirkin-nft-lawsuit-legal-precident-potential> [<https://perma.cc/7Z6L-947T>]. Maya Ernest argues that the case rests on defining whether NFTs are art (and thus entitled to First Amendment protection), or products (which can be liable for trademark and other intellectual property lawsuits).
22. See Zachary Small, *Even As NFTs Plummet, Digital Artists Find Museums Are Calling*, N.Y. Times (Oct. 31, 2022), <https://www.nytimes.com/2022/10/31/arts/design/nfts-moma-refik-anadol-digital.html> [<https://perma.cc/JAJ9-QNFC>].