The Law and the Blockchain: A Speculative Guide on NFT Classification and the Laws that Govern NFT Sales

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Abstract: Non-Fungible Tokens (NFTs) have become a hot topic, especially during the COVID-19 pandemic. With this new wave of digital assets, comes decisions about how to govern their transfer from user to user. Between common law and the Uniform Commercial Code, depending on the type of NFT that is transferred, there is a sliding scale of when common law would govern and when UCC would govern each respective transaction. In this paper, NFTs are classified into seven distinct categories and the laws that govern their transactions are discussed with examples.

Keywords: Non-Fungible Token (NFT), contract law, common law, Uniform Commercial Code, blockchain, web3, digital asset, transactions

1. Introduction

Web3, Cryptocurrency, Non-Fungible Tokens (NFTs), Decentralized Autonomous Organizations (DAOs) and Blockchain are all terms that many people have heard in recent years. Cryptocurrency gained particular notoriety during the COVID-19 Pandemic and in the following years with events such as the FTX Scandal and left people wondering how their neighbors all of a sudden are worth a million dollars because they own a digital coin with a Shiba Innu on it.

While infinite articles about the social ramifications, events, cultural changes, and infrastructure surrounding the next wave of technology can be written, the legal ramifications are a black hole of curiosity. In this article, I will predict how the courts are likely to decide which laws will govern the transactions of various categories of NFTs. Before delving into NFTs specifically, I will introduce some important concepts in Web3 that may assist in the reader’s understanding of NFTs and Web3.

1.1. What Is Web3

Web3 is an umbrella term that refers to the future of the internet [1]. Particularly, the capabilities associated with the Web2 model with the addition of an ownership and knowledge sharing component. Since the inception of the internet (Web1), the capabilities of humans with the assistance of technology have exponentially increased. The first wave of the internet was a read-write model which provided users with the ability to transfer information to one another. The landmark technological cornerstones of Web1 were e-mail, typing, and transcription. As technology rapidly developed and society learned more about the capabilities of computers and the internet, it wasn’t long before the curiosity of tech capabilities ushered in Web2. Web2 is what many people commonly know the internet as today. It is the model of reading, writing, researching, software development, online markets, etc. On the horizon is the future of the internet which introduces a creator-ownership model layered on top of the already existing Web2 space. Many concepts about Web3 are unfamiliar to regular, casual internet users and accordingly, without knowing what things are, it is even harder to explain how they work, particularly from a legal perspective. Unlike the transition of Web1 to Web2, the transition from Web2 to Web3 does not involve drastic improvements to hardware, but instead, to infrastructure and software, particularly regarding Web3’s foundation, the blockchain.
1.2. What Is the Blockchain?

The blockchain is a transportation mechanism for information, essentially like a pipeline [2]. It is an advanced communication medium for interactions within Web3. It serves as an uncontrolled and fixed public record for what I have labeled ‘tangible’ and ‘intangible’ digital assets. A ‘tangible’ digital asset would be an NFT, digital real estate, or commodities within the metaverse. ‘Intangible’ digital assets include songs, movies, or other information-based items. Both tangible and intangible assets exist digitally but may manifest in a real-world form. An example of this is if an NFT grants a person entry into a lounge or the owner of an NFT gets an accompanying exclusive article of clothing.

The blockchain has links and the links are smart contracts. A smart contract is a piece of code that reflects a transaction or agreement between two buyers of a digital asset which created the record. In turn, an asset is registered to a particular owner that will be reflected in the last block of the chain. Therefore, if a potential buyer wants to find out who owns an asset, they can access the blockchain and find out who owns an asset based on the final contract in the chain.

When a transaction is made on the blockchain, it is not instant. The blockchain has a security component that causes a lag in the transaction so that it can verify the entire blockchain’s transactions, and ensure that the person trying to transfer the asset has valid title to transfer [3].

1.3. What Is a DAO?

A decentralized autonomous organization, better known as a DAO, is the controller of a blockchain. In many respects, a DAO operates like any other business. However, the exception is that some governing standards that DAO’s operate under include a communist model where all the shareholders equally own and control company assets. If a DAO was to be liable for a tort or criminal offense, in some cases, thousands of people would be liable because their share in the organization gives them a controlling interest. This differs from a company in that it may not operate like a company. It may only be a “organized” as far as the formality required to share communal assets among the shareholders. Accordingly, if everyone in a DAO was personally liable for all of its company’s actions, then, in theory, any lawsuit would involve thousands of defendants all over the world and would create an immense cost for plaintiffs. The blockchain for a specific asset belongs to the DAO associated with that asset, but the transaction is between the buyer and seller of an asset. That means when a transaction takes place regarding an asset that buys somebody into a DAO, the seller is in essence, liquidating his share in the DAO, and the buyer is buying his way into the DAO.

1.4. What Is an NFT?

Non-fungible tokens, more commonly known as NFTs, are unique digital assets for which there is only one. Each NFT has its own unique code that cannot be replicated. There are NFT’s that are simply digital art, some provide the owner with shares in a real-world company or accompany a real-world asset, while others grant the owner access to exclusive events, lounges, and concerts. Some can even grant the owner intellectual property rights, commercial use rights, and more. They are very versatile and can be incredibly valuable.

2. What Law Governs the Transfer of NFTs?

NFT’s are usually the subject-matter of a smart contract. There are two problems with the application of contract law to smart contracts. First, these contracts can be executed by anybody anywhere in the world and not all laws are created equal. Second, the blockchain is virtually always going to be a person-to-person transaction which could make each person a casual buyer/seller to the other and can take the “merchant” component of the UCC out of the equation.

The biggest question in contracting for NFTs is how to classify them. According to the Journal of Accountancy, the SEC has classified NFTs as property whereas in the world of accounting, the most narrow classification is digital or physical [4]. These classifications are far too broad to have any meaningful conclusion on which law governs their transactions. Saying that NFTs are simply property is not enough. Some NFTs are not physical, some convey real world privileges and others can even convey real property [5]. Thus, the SEC’s classification of “property” is insufficient for the purposes of this article. In sum, I speculate that NFTs will be legally categorized, and the category will dictate the governing law. So far, I have created categories of NFTs which may help determine whether the sale of an NFT is predominantly for goods or services:

1) Digital Art (DA)
2) Digital Asset with Real World Good (DAWG),
3) Digital Asset with Access (DAWA),
4) Digital Asset with Equity (DAWE),
5) Digital Asset with Privilege (DAWP)
6) Digital Asset with Lottery (DAWL).
7) Commissioned Digital Asset (CDA)

In this section, I will break down the various types of NFTs and which law will govern each specific category.

2.1. Digital Art (DA)

For the purposes of NFT categorization, all NFTs that serve the same purpose as physical art will classify as DA NFTs. If an NFT is purely digital but allows the owner to utilize the image for commercial use or grants the owner full intellectual property (IP) rights, it will not be classified as a DA NFT, but rather a DAWP NFT. DA NFTs exist purely in a digital medium, do not manifest in any physical form, and do not grant the owner any rights other than ownership of the art.

My prediction is that DA NFTs will be governed by the same laws that govern transactions of real-world art. They will be classified as a security and regulated accordingly. During a transaction, when parties are attempting to add a block to the blockchain, the contract will be governed by the common law of contracts. The Uniform Commercial Code (UCC) is only applicable to transactions involving tangible goods and as such, I predict that the courts will find that an NFT that only exists as digital art does not serve a purpose that will manifest in any physical medium. However, I also believe that this is so only until the holder of the NFT causes manifestation in the physical world. Once the holder of an NFT creates a physical manifestation of the digital art, the next terms of the following transaction on the blockchain can convert the transaction from a common law governed transaction, to a UCC law governed transaction.

Consider the following example:

A, the creator of a DA NFT, sells their NFT to B for $100,000. This contract will be governed by common law because it does not involve tangible, movable goods and instead, a digital asset. B takes the NFT and puts it on a canvas. The next transaction B makes, attempting to sell the NFT to C, includes the NFT accompanied by an 8x16 canvas of the NFT. B has converted the NFT from a DA NFT to a DAWG NFT which will be governed by the UCC, particularly Article Two which governs sales, due to the fact that B has entered a tangible manifestation of a digital asset into the transaction.

As seen above, conversion across classes in the world of NFTs is easy to achieve. UCC 2-102 defines the scope and application of the UCC as follows:

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this

Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers [6].

Any transaction outside of the scope of the UCC is governed by common law [7]. Accordingly, any undefined terms in the UCC are supplemented by their common law definitions to supplement the defined terms in the UCC.

In sum, until such time that a party causes a DA NFT to manifest in some physical format, the sale will be governed by common law. If the seller has made a physical manifestation of a digital asset as part of the transaction, it will be a UCC governed transaction.

2.2. Digital Assets with Real World Goods (DAWG)

DAWG NFTs (DAWGS), are NFTs that exist digitally but manifest in some real-world format. For example, suppose A mints an NFT of a painting they made. If A sells the NFT to B and for buying the NFT, B also receives the physical art piece, B owns a DAWG NFT.

When deciding which law will govern these transactions, the predominant purpose test is generally applied to determine whether a transaction is predominantly for goods or services. The main speculation in this section is whether or not to classify an NFT as a good by definition of the UCC and whether or not the physical item that accompanies an NFT serves as a symbol of its holding or as part of the transaction. Even further, we must speculate on what stake each component of the deal has. If an NFT is accompanied by a physical piece of art, is the transaction for 50% digital and 50% tangible goods? Is the split 60% digital and 40% tangible good etc.?
Answering these questions is important to determine which body of law is better suited to govern this kind of transaction.

The UCC defines goods as follows:

1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty.

2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

3) There may be a sale of a part interest in existing identified goods [8].

NFTs in their digital nature are likely not classified as goods because the UCC places a heavy emphasis on goods being tangible, fungible, and movable. There is an exception for specially manufactured goods. An NFT of this kind would be a CDA NFT. Digital assets are not new to courts, but they have been particularly limited to digital manifestations of physical goods, particularly the conversion of physical stock certificates to digitized entries [9]. Now the roles are reversed. For example, pre-computers, people bought shares of stock that were physical certificates. Those pieces of paper haven’t gone anywhere but now there are digital manifestations of stock certificates that appear in your online stock portfolio.

As for the second question of how impactful the physical asset is with the digital asset in terms of proportionate importance in the transaction, I am contending that the predominant purpose test will be used to determine impact. When people are buying DAWG NFTs, if their chief motivation is the digital asset, the physical good may “sweetens the pot,” courts may be more inclined to say that the digital asset is accompanied by the physical good, and not the other way around and thus common law would govern. However, if the physical good is accompanied by a digital asset, and the chief motivation is the physical good, courts may be more inclined to hold that the UCC governs that particular transaction.

2.3. Digital Asset with Access (DAWA)

Digital Assets with Access (DAWA) are NFTs that grant the holder access to a place in the real world. Many content creators have discussed the possibility of opening a lounge or club where only holders of a specific NFT can enter. In deciding which law will govern transactions, looking at transactions for concert tickets is the most apt parallel for comparison. The law does not regard tickets (as they are here) as a good. The law regards them as a license.

In New York Skyline, Inc. v. City of New York the court was asked to decide whether the sale of helicopter tour tickets on a public sidewalk in New York requires a general vendor license which is normally required to sell goods on the public sidewalk in New York [10]. The trial court held that the city’s rationale that the laws sought to regulate the activity of sales on the sidewalk and thus ruled in favor of New York [11]. The statute in question in the case was an administrative code that stated the following: "[i]t shall be unlawful for any individual to act as a general vendor without having first obtained a license." A "general vendor" is defined as ‘[a] person who hawks, peddles, sells, leases or offers to sell or lease, at retail, goods or services... in a public space’"

The statute does not define service, nor is it to be used in conjunction with entertainment exclusively, however the city asked the court to consider the legislative intent. The court decided that the issue on appeal was more narrow then that issue, reminding the court that the issue on appeal is whether the tickets Skyline was selling are goods or services. The court ended up deciding that Skyline was selling tickets which were licenses and thus did not fit the description of goods or services.

Skyline was not selling a good or service, but rather, they were selling a license, the temporary right to be in a certain place. A license is independent from a good, and at most works in conjunction with a service. As such, common law would likely govern transactions involving DAWA NFTs.

2.4. Digital Assets with Equity (DAWE)

Digital Assets with Equity (DAWES) are NFTs that are accompanied by equity or stake in a corporation. Among the most famous is content creator Logan Paul's NFT Collection 99 Originals. 99 Originals is a compilation of 99 polaroid pictures, all minted into NFTs and sold with accompanying perks [12]. Number 68 in the series is called Partners in Prime and depicts Logan Paul with co-creator rival-turned-friend KSI. According to the description posted on OpenSea, the predominant market for buying and selling NFTs, the
holder of number 68 receives the following perks: 1% of royalty sales in Prime Hydration granted to Originals DAO upon completion of sale, holder gifted one of the first bottles of Prime off the production line, signed by LP & KSI, holder gifted 1-year free supply of Prime, and 1/99 Membership & Voting Right in Originals DAO [13]. In addition, there was in agreement attached to the NFT that served as the terms of sale for buying the NFT and buying in to the DAO that Logan Paul created in this project [14].

DAWEs are unique in that they can operate in a sense like shares of stock in two different ways. The first way is the equity or stake that you buy when you buy the NFT. In the Logan Paul NFT this would be the royalty that the owner would get from their company Prime Hydration despite not having any equity. The second way is if the NFT buys you into a DAO. If the NFT buys the buyer into a DAO, they have a stake in an organization that runs the assets under the stakeholder’s control [15]. Sometimes, DAOs have access to assets that go beyond their NFTs, such as if the DAO funds the purchase and use of a private plane or has a large equity fund [16].

DAWEs pose a unique predicament because the UCC has rules that determines whether “obligations and interests classify as securities or financial assets” and they are as follows:

1) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.
2) An “investment company security” is a security. “Investment company security” means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.
3) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this Article, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.
4) A writing that is a security certificate is governed by this Article and not by Article 3, even though it also meets the requirements of that Article. However, a negotiable instrument governed by Article 3 is a financial asset if it is held in a securities account.
5) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.
6) A commodity contract, as defined in Section 9-102(a)(15), is not a security or a financial asset. As amended in 1999 [17].

The big question that the court will face is how do we sort out what DAWEs fall into the category of a security? Are NFTs that grant equity considered securities? What if they grant equity, but don’t put the buyer into a DAO? What if they don’t grant equity but put the buyer into a DAO?

Are DAWEs That Grant Equity in a Corporation to a Buyer Considered Securities Under the UCC?

The UCC, particularly article 8-103 defines a security as: “A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.” If an NFT grants the buyer any equity interest in a company, the sale of such NFT will be governed by the UCC even if it also grants the buyer into a DAO. If there are two components of an NFT, the court will utilize the “law of the contract test” (the law chosen by the parties governs) and if the issue cannot be resolved, they will likely utilize the Restatement (Second) on Conflict of Laws to decide governing law [18]. As such if an NFT grants equity interest in a company to the buyer, the UCC will govern the sale, irrespective of whether or not buyer buys into a DAO [19].

What if the NFT Does Not Grant the Buyer Equity in a Company, but Buys Them Into a DAO?

A DAO, as discussed before is a decentralized autonomous organization. Think a company but with no officers, just shareholders [20]. If an NFT buys a buyer into a DAO, the nature of the DAO will dictate whether or not the UCC applies [21]. If the DAO operates like a corporation, such as functioning in the business sector, the court may be more inclined to apply the UCC. If a DAO engages in commercial activity and the case can be made that it is functioning as a corporation, then UCC may govern. Some DAOs however, function more like a group of people buying something to share which a court would not likely consider to be a corporation [22].

2.5. Digital Asset with Privilege (DAWP)

A digital asset with privilege (DAWP) exists when an NFT grants the buyer licensing and use rights to the
asset. An example of this is rapper Snoop Dogg’s use of Bored Ape Yacht Club art on his cannabis brand [23]. Snoop Dogg has bought multiple NFTs created by NFT collective Bored Ape Yacht Club [24]. His ownership of the NFT grants him a commercial license to use the artwork for as long as he holds the NFT. In turn, the rapper used the NFT artwork as a mascot for one of his cannabis strains which he calls “Bored Ape THC.”

In this case, the asset is multi-faceted. The first facet would be the value of the actual artwork of the NFT. The second asset is the “use rights” that the NFT grants to the holder. These rights may include commercial use, full intellectual property, content creation, and more. How then, should courts decide which components of an NFT are important enough to decide the law that governs the transaction? In a case like a DAWP, the easiest way to conduct an “applicable law analysis” is to break down each component of a transaction and then determine which component has the most stringent laws and determine whether that component is integral enough to the transaction to have that particular law govern the transaction. Let’s look at an example:

A wants to sell a Blackacre NFT to B for $100,000. The buyer of the Blackacre NFT gets the artwork depicting Blackacre, a sweatshirt with the NFT printed on it, and full commercial use rights of the picture depicted in the Blackacre NFT. The components of the transaction are the NFT itself, the sweatshirt with the print on it, the commercial use rights, and the $100,000. The contract for a DA NFT alone would be governed by common law, the contract for the sweatshirt alone would be governed by the UCC, and the commercial use rights would be governed by common law. Thus, a predominant goods/services analysis is in order. The only good in this transaction is the sweater which is a minority portion of the deal. There is no provision in the UCC that adequately describes this kind of transaction. As a result, this will be a common law governed transaction.

Let’s now look at what a UCC governed transaction may look like: A purchases Van Gogh’s Starry Night Painting from a private art collector. A decides to mint an NFT and sell the NFT to B. The terms of the deal include that the buyer of the NFT of Starry Night also receives the painting. In this case, the transaction may seem 50/50 NFT and Painting split, but for this particular transaction, the true prize would be the physical painting, and thus the UCC would govern because the predominant motivation for a buyer is likely the physical painting.

Privilege as it applies in the context of a DAWP NFT, is not a new concept. Prior to NFTs, a piece of paper or an agreement would signify that one party was granting the other commercial use rights [25]. This form of privilege as it applies to transactions, has been a bone of contention in the UCC particularly regarding software licensing agreements. There have been amendments to the UCC to include software licensing agreements within the bounds of the UCC [26]. However, with these particular kinds of licenses, the UCC and it’s Article 2 amendments are largely irrelevant. For those reasons, DAWP NFTs, being predominantly for privilege rights accompanied by artwork, would be governed by common law in their transactions.

2.6. Digital Assets with Lottery (DAWL)

Digital asset with lottery (DAWL) is an NFT that grants the buyer the digital asset to keep and the buyer is contemporaneously entered into a lottery to win more. The DAWL NFT was not originally on this list, until I received a text message at two in the morning from my colleague and friend, IMG model and Cornell trained computer scientist, Lior Cole. Lior has recently announced that she has created a model named Arii that models in virtual reality and is represented by IMG along with her creator [27]. In conjunction with the announcement, Lior minted an NFT collection of Arii’s fingerprint. Each NFT not only serves as art for the buyer but also serves as an entrance to a lottery to unlock other perks. After I bought one, I slept on the idea of including this new category of NFTs and decided to move forward.

A DAWL NFT is the virtual equivalent of buying tickets to enter a sweepstakes or buying a lottery ticket. In Collins v. Kentucky Lottery Corporation, a group of plaintiffs sued the Kentucky State Lottery for fraud, misrepresentation, breach of contract, unjust enrichment, and violation of the Kentucky Consumer Protection Act (KCPA). The Kentucky Court of Appeals noted that a chance to win money is intangible and cannot be physically moved when it is purchased [28]. In ruling for the Kentucky Lottery, the court held that the plaintiff’s claims were invalid because under the UCC, lottery tickets are not a good or service which makes the law that the lottery violated inapplicable to lottery tickets [29]. Even more, the court said that the purchase of a lottery ticket merely creates a “temporary and ephemeral association between the [lottery] and the purchaser of the ticket. Finally, the court quoted the Texas Court of Appeals, who held nearly 80 years prior that lottery tickets are unique in nature and do not qualify as a good or service.

When there is a definition in a UCC governed transaction that is ambiguous and unclear, the UCC can use common law definitions as a supplement. Accordingly, when there is a good so unique in nature that the
UCC will not accept it as a good or a service, the logical thing to do is fall back on common law, since the subject matter of the contract is outside the scope of the UCC [30]. For those reasons, the transactions of DAWL NFTs will be governed by common law because though lottery tickets may be unique in nature, ultimately, the buyer of a DAWL NFT still receives an intangible item which makes the case for common law governance.

2.7. Commissioned Digital Asset (CDA)

A commissioned digital asset (CDA) is an NFT that is produced by request. A CDA NFT can be the product of any given contract between buyers. The first kinds of CDA NFTs (“CDAs”) are likely to be created when people begin moving physical assets into the Web3 marketplace and use the NFT security advantages as a record keeper. For example, if A wants to sell his car to B, A may mint an NFT of the title to the vehicle and sell that to B as a DAWG NFT or digital representation of the sale. Another likely scenario is an artist commissioning a digital artist to mint an NFT of art that was drawn on paper. This category of NFT is likely to produce the most vague answer due to the need to evaluate each transaction on a case-by-case basis. In our car scenario, the predominant purpose is for the buyer to receive a car and the seller to receive money for the car, thus the car, being the subject of the contract, would make the transaction of the NFT of the title of the car governed by the UCC. Contrarily in the commissioned artwork scenario, the artist had already drawn the piece but was merely seeking the services of a digital creator to digitize their already existing art. A transaction of that nature would likely be governed by common law as the artist is seeking a digitizing service. Similarly, if a person commissions a digital creator to make them a piece of art as an NFT, that transaction would be governed by common law as it is for a sale of the service of making the art and less the art itself [31]. This would hold true even if it were to be accompanied by a real world good. Many would contend that since the commission of the art counts as a specially manufactured good, the UCC would govern. That assumption stems from UCC 2-201 §3a which reads as follows:

1) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

2) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller’s business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement [32].

While a commissioned NFT may satisfy the statute of frauds requirement of the UCC, the NFT itself, unless symbolic for the sale of a real world good, would be governed by common law. Even more, the code that creates the smart contract for the NFT in a UCC governed sale, already contains the written component that satisfies the statute of frauds requirement of the UCC.

The commission of artwork has been a particularly interesting topic for courts to consider. In Brand X Editions, Ltd. v Wool, the plaintiff Brand X, seeks to enforce a contract entered into with the Defendant [33]. Brand X is a printing company that utilizes a “unique proprietary mono-printing process” and Wool sought to create artwork that takes advantage of that printing process. The terms were that Wool was to create 60 prints. Forty were to be kept by Wool and 20 to be kept by Brand X. The artwork turned out to be worth more than Wool had intended, and thus he sought to renegotiate the terms of the deal after completing over half of the prints. The court held in pertinent terms as follows:

It is well established that in determining whether a contract is for goods or services, the “essence” of the agreement governs. Perlmutter v. Beth David Hosp., 308 N.Y. 100, 104 (1954); see also Marbelite Co. v. Nat’l Sign & Signal Co., 2 FedAppx 118, 120 (2d Cir 2001). “It has long been recognized that, when service predominates, and transfer of personal property is but man incidental feature of the transaction, the transaction is not deemed a sale [under the UCC].” Perlmutter, 308 N.Y. at 104. To wit, the Perlmutter Court cited favorably to a case holding that “a contract to paint a picture [is] a contract for work, labor and services rather than a sale, although the title to the canvas is actually transferred to the customer.” Id., quoting Racklin–Fagin Const. Corp. v. Villar, 156 Misc. 220 (1st Dept 1935). Likewise, in this case, the parties’ agreement was to collaborate on the creation of artwork. Wool, the artist, provided artistic vision, while Brand X, the artisan printer, leveraged its unique methods to bring Wool’s vision to life. Their combined efforts led to the creation of artwork. The parties agreed that, of the completed works to which each contributed, Wool would keep two-thirds and Brand X would keep one-third. This arrangement is not a sale. Rather, it is an agreement to divide the fruits of the parties’ joint venture. The agreement vested title in the works directly to the parties, in accord with their agreed-upon two-thirds/one-third split. Consequently, this is not a case where goods are provided in consideration for services....The very point of the parties’
agreement was to decide who gets title to the works once they were jointly created. Hence, there is no sale, since title to the works never transferred between the parties. Instead, title inures to the parties upon the creation of the works in accordance with their agreement. Consequently, the UCC’s statute of frauds does not apply because there is no sale.

As seen above, the commissioned artwork is not considered a sale of goods as governed by the UCC. As such, courts will not hold CDAs to be governed under the UCC unless they are merely digital manifestations of a predominant physical, tangible, and identifiable good.

2.8. Governing Law on the Blockchain as an Influencing Factor

One important topic for courts to consider is how the blockchain will play into the governing law of smart contracts. As discussed before, the blockchain is comprised of a string of smart contracts that lead to the current holder of a digital asset. Each of these contracts that make up the blockchain were governed by certain laws and terms. The courts may decide to take into account the governing law used in the history of an asset.

The unique thing about NFTs is that there is only one and that there is no way to replicate an NFT. The entire history of an NFT, from its minting all the way to the latest transaction could be bought and sold between hundreds of users. Courts are likely to treat the previous history of the blockchain as persuasive authority but will not bind the user to the previous law under the doctrine of freedom of contract. Binding the user to previous law would interfere with the user’s right to free enterprise and freedom of contract [34]. For those reasons, such a policy would not likely be allowed.

2.9. Decentralized Legal Control

A prominent issue of NFT transactions is deciding which law will govern in a decentralized space. Web3’s goal in the world is to promote community owned resources. This has become a problem for many governments in trying to regulate cryptocurrency.

My prediction is that users will end up deciding as part of the smart contract which law will govern the transaction. If not, I believe a new body of law will be developed for decentralized transactions, specifically those involving the buying and selling of decentralized assets using decentralized currency (or not). Until then, users may dictate which body of law will govern their contracts. The reason that this has become such an issue is because NFTs are bought and sold through unregulated currency on an unregulated market. The simple fact is that Web3 and its components are advancing much faster than the law.

3. Conclusion and Acknowledgements

This article is a speculation on the governing law of various categories of NFTs. Web3 is an immensely complicated subject and there will be plenty to speculate. In the future, I will be writing more speculative articles about Web3 and hope to become an authority in the space.

I would like to extend sincere gratitude to Lior Cole for being a tremendous inspiration and helping me get involved in this space. Lior Cole is a Cornell trained computer scientist and international model under famed modeling agency, IMG Models. Lior is currently working on various projects including a virtual reality model who she recently introduced as Arii, and a religious artificial intelligence program called Robo Rabbi. Lior has been featured in Vogue Magazine and has recently appeared on a New York Fashion Week panel discussing how fashion will seamlessly fuse into the next age of technology in Web3. Her presence in the space and her medium as a model is an incredible inspiration to young women that you can truly do it all and the only barriers are in your mind. I know she will continue to empower women in STEM and fashion for quite a while.

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Conflict of Interest

The author declares no conflict of interest.

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[6] U.C.C. § 2-102, Scope; Certain Security and Other Transactions Excluded from This Article, 1 Hawkland UCC Series § 2-102
[9] Bd. of Trustees of Univ. of Alabama v. New Life Art, Inc., 336 F. App’x 860 (11th Cir. 2009); See also Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013), holding modified by Andy Warhol Found. for the Visual Arts, Inc. v.
[15] https://opensea.io/assets/ethereum/0x1c49ed56da6be87b804bc1b8b817a259aa3132ed/68
[19] Restatement (Second) of Conflict of Laws § 187 (1971); See also Herring Gas Co. v. Magee, 22 F.3d 603 (5th Cir. 1994).
[32] U.C.C. § 2-201. Formal Requirements; Statute of Frauds, 1 Hawkland UCC Series § 2-201
[33] Brand X Editions, Ltd. v Wool, No. 652133/2013, 984 N.Y.S.2d 630, 1 (Sup Ct, Jan. 02, 2014)

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