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NOTES

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Kevin D. Brum[*]

INTRODUCTION

The non-fungible token ("NFT") is a type of digital asset with a unique identifier that is usually associated with an image. An NFT cannot be copied or reproduced, and records of NFT transactions are stored on the blockchain.[1] NFTs are a recent innovation and have swept the world by storm.[2] NFT sales tripled from 2019 to 2020 and DappRadar—the premier platform for hosting decentralized NFT portfolio management applications[3]—estimates that NFT sales hit twenty-five billion dollars in 2021.[4] Many NFTs appear to be artistic works and, either individually or in a collection, can be given away for free, sold for a few dollars, or sold for millions.

Not long after the NFT craze began, various individuals and organizations created NFTs to either gain internet popularity or to raise

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[1] Rakesh Sharma, *Non-Fungible Token (NFT): What It Means and How It Works*, INVESTOPEDIA (June 22, 2022), https://www.investopedia.com/non-fungible-tokens-nft-5115211.

[2] Sam Dean, *$69 Million for Digital Art? The NFT Craze Explained*, L.A. TIMES (Mar. 11, 2021, 10:34 AM), https://www.latimes.com/business/technology/story/2021-03-11/nft-explainer-crypto-trading-collectible.

[3] DAPPRADAR, *About Us,* https://dappradar.com/about-us (last visited Oct. 23, 2022).

[4] Elizabeth Howcroft, *NFT Sales Hit $25 Billion in 2021, but Growth Shows Signs of Slowing*, REUTERS (Jan. 11, 2022, 3:50 PM), https://www.reuters.com/markets/europe/nft-sales-hit-25-billion-2021-growth-shows-signs-slowing-2022-01-10/. Ryan Duffy, *The NFT Market Tripled Last Year, and It's Gaining Even More Momentum in 2021*, EMERGING TECH BREW (Feb. 22, 2021), https://www.morningbrew.com/emerging-tech/stories/2021/02/22/nft-market-tripled-last-year-gaining-even-momentum-2021.

money.[5] The success of NFTs also drew the attention of some unscrupulous individuals and scammers—such as the adult actress Lana Rhoades who made headlines after raising $1.5 million in Ethereum for a series of planned NFTs and subsequently disappearing from the project,[6] in what has been termed a "rug pull" scam.[7] While federal authorities have begun cracking down on these kinds of activities,[8] there has also been a rise in NFT "heists."[9] In one case, thieves used social engineering to attain users' login credentials on OpenSea—a popular NFT trading platform—and stole NFTs collectively worth over $1.7 million.[10]

Given NFTs have visual representations, these high-profile thefts have left many wondering how, if at all, American art theft law applies to the theft of NFTs. In addition, due to the international nature of the internet, some have wondered whether international law governing stolen and illegally exported artwork could apply to NFT theft. These legal questions are the subject of this note.

Part I will cover the unique properties of NFTs and how they interact with modern notions of property law and severability. Part II will discuss art theft, NFT theft, different legal regimes governing restitution

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[5] These ranged from video game companies like Electronic Arts and Ubisoft to the National Basketball Association (NBA). Andrew King, *Where Game Companies Stand on NFTs*, GAMESPOT (Feb. 4, 2022, 8:47 AM), https://www.gamespot.com/articles/where-game-companies-stand-on-nfts/1100-6500331/.
Jeff John Roberts, *Want to Own Kawhi's Jump Shot? NBA and CryptoKitties Maker Launch Digital Collectibles*, FORTUNE (July 31, 2019, 2:00 PM), https://fortune.com/2019/07/31/nba-top-shots-blockchain-collectibles/.

[6] Jeffery Gogo, *Porn Star Lana Rhoades Makes Off with $1.5M in Apparent NFT Scam*, BEINCRYPTO (Feb. 24, 2022, 5:30 PM), https://beincrypto.com/porn-star-lana-rhoades-makes-off-with-1-5m-in-apparent-nft-scam/. After disappearing from the internet for several weeks, Rhoades made her return to the NFT project a mere 12 hours after the FBI made headlines by arresting two other NFT rug pullers. @l337m45732, *Lana Rhoades' NFT Scam is Back from the Dead*, LEOFINANCE https://leofinance.io/@l337m45732/lana-rhoades-nft-scam-is-back-from-the-dead (last visited Oct. 27, 2022).

[7] Amiah Taylor, *Watch Out for the 'Rug Pull' Crypto Scam That's Tricking Investors Out of Millions*, FORTUNE (Mar. 3, 2022, 12:36 AM), https://fortune.com/2022/03/02/crypto-scam-rug-pull-what-is-it/. ("Rug pulls are a lucrative scam in which a crypto developer promotes a new project—usually a new token—to investors, and then disappears with tens of millions or even hundreds of millions of dollars. This particular type of fraud accounted for $2.8 billion in lost money for victims, or 37% of all cryptocurrency scam revenue in 2021.").

[8] Adi Robertson, *Two Men Arrested for $1.1 Million NFT 'Rug Pull' Scam*, VERGE (Mar. 24, 2022), https://www.theverge.com/2022/3/24/22995107/us-arrest-charges-crypto-nft-rug-pull-frosties-ethan-nguyen-andre-llacuna.

[9] *Infra* note 10.

[10] Russell Brandom, *$1.7 Million in NFTs Stolen in Apparent Phishing Attack on OpenSea Users*, VERGE (Feb. 20, 2022, 9:37 AM), https://www.theverge.com/2022/2/20/22943228/opensea-phishing-hack-smart-contract-bug-stolen-nft.

of stolen property, including the patchwork of international and domestic laws governing the theft of art. Part III will examine the different categories of art classification in U.S. and International Law. Part IV will analyze how NFTs might fit within different legal definitions of art. Lastly, Part V will theorize how NFTs interact with laws governing theft and restitution.

I. BACKGROUND

A. The Non-Fungible Token

NFT stands for "non-fungible token," and, as the name suggests, an NFT is a digital asset (a "token") with unique information (metadata) that is incapable of being copied on the same blockchain.[11] The blockchain is a decentralized network that uses the power of multiple connected computers to track and verify transactions. There are different blockchains for different cryptocurrencies, but most NFTs are tracked using the Ethereum cryptocurrency blockchain.[12] NFTs can be represented by anything: a tweet, an animated GIF, a comic book, etc.[13] While the token can be represented by anything, sometimes purchasing an NFT conveys *no* rights to the visual depiction associated with it.

NFTs can be best analogized to trading cards. For example: a Michael Jordan basketball card bears both Jordan's picture and a unique serial number. Two Michael Jordan basketball cards look identical but have different serial numbers. While a Michael Jordan *baseball* card might have an identical serial number to Jordan's *basketball* card, they are distinct because they are from different sports. Applying NFTs to this analogy: the physical card is the token, the picture is the token's visual representation (hereinafter "visrep"), and each sport is a blockchain. The owner of the card has a right to the card itself: they are free to sell, trade, give away, destroy, or display the card. However, purchasing a Michael

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[11] Dean, *supra* note 2. Identical NFTs can be "minted" on more than one blockchain. Multiple NFTs can be minted that, while unique, can use the same visual representation.

[12] Mitchell Clark, *NFTs, Explained*, VERGE (June 6, 2022, 8:30 AM), https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq.

[13] Taylor Locke, *Jack Dorsey Sells His First Tweet Ever as an NFT for over $2.9 Million*, CNBC (Mar. 24, 2021, 2:10 PM), https://www.cnbc.com/2021/03/22/jack-dorsey-sells-his-first-tweet-ever-as-an-nft-for-over-2point9-million.html. Grace Kay, *'Nyan Cat' flying Pop-Tart Meme Sells for Nearly $600,000 as One-of-a-Kind Crypto Art*, BUS. INSIDER (Feb. 23, 2021, 1:51 PM), https://www.businessinsider.com/ethereum-nft-meme-art-nyan-cat-sells-for-300-eth-2021-2?r=US&IR=T. Emily Zogbi, *Xenoglyphs to Become the First NFT Collectible Comic*, CBR (Mar. 20, 2021), https://www.cbr.com/xenoglyphs-nft-comic/.

Jordan trading card conveys no right to the picture of Michael Jordan. The card's owner cannot license or reproduce the image.

A key difference between trading cards and NFTs lies in their respective fungibility. Fungibility is the idea that a particular object is interchangeable with another, similar object. For example, two identical trading cards in identical condition are interchangeable and, therefore, fungible, even if they have a unique serial number. This is not true for NFTs. An NFT may be *perceived* as more or less valuable based on its visrep. However—unlike a trading card—a token's uniqueness doesn't come from its appearance, but from its metadata. Even two, apparently identical NFTs are not interchangeable, thus, they are non-fungible. Because NFTs are non-fungible, each NFT is individually subject to market forces of supply and demand.[14] As the token itself is as unattractive as the serial number on a blank trading card, market forces usually respond to perceived value around the visrep and the NFT's creator. NBA "Top Shot Moments" offer a concrete example for some of these abstract ideas.

The National Basketball Association (NBA) has the right to broadcast and record NBA basketball games. After the NFT boom began, the NBA took clips of the "game[s'] epic highlights from the most incredible basketball stars," and called them "NBA Top Shot Moments," or "Moments" for short.[15] NBA Top Shot minted NFTs with these short video clips and included information about the player making the "top shot," and the game associated with it. Essentially, Moments are digital trading cards which have a video as their visrep instead of a still image.[16] The NBA Top Shot Terms of Use describe the value attached to these Moments as follows:

> The value of each Moment is inherently subjective, in the same way the value of other collectibles is inherently subjective. Moments have no inherent or intrinsic value. Some collectors might prefer to have a Moment featuring a certain NBA player, while another might prefer an equivalent Moment featuring a different NBA player. Each NBA player can have more than one Moment associated

[14] As some NFTs are part of collections from the same creator, perceived value of the collection and the creator can inflate or deflate the market value of an NFT.

[15] *What Are Moment™ NFTs?*, NBA TOP SHOT, https://support.nbatopshot.com/hc/en-us/articles/4404116274451-What-are-Moment-NFTs-. (last visited Jan. 7, 2023).

[16] This is an analogy that NBA Top Shot seems to embrace as they use card packs and other terms and imagery that are generally associated with the trading card world. *See id.*

> with them, and those Moments will each have different characteristics.[17]

Buying an NBA "Top Shot Moment" NFT does not confer unfettered rights to the "Top Shot Moment" upon the buyer.[18] While the owner can "swap [the] Moment, sell it, burn it, exchange it, upgrade it or give it away to the extent that such uses are made available in the [application]"[19] NBA Top Shot retains all the hallmarks of property ownership.[20] A Moment owner cannot license, modify, commercialize, or use the Moment in any form except for one's sole personal non-commercial use.[21]

While it may initially seem odd that one could or would want to own an object without being able to exploit it, this is common in trading cards and in the art world at large. There are entire markets and industries centered solely on usage rights.[22] This is particularly true in the digital world. Traditionally, digital art was seen as inherently fungible because it can be copied flawlessly with a few clicks. Thus, much of the law surrounding digital artwork relates to intellectual property. The non-fungibility of NFTs complicates things because they challenge the traditional view that all digital assets are inherently fungible.

Given the unique nature of NFTs and the law surrounding them, it is tempting to view the token as separate from its visrep. Legally, this would offer a simple solution to questions of whether NFTs are art and whether art theft law could apply to NFTs; that answer would be "no" to both. As a token is no more artistic than a serial number, the token is highly unlikely to be considered art. Not only would that answer end the discussion of this topic here, but such an answer also misunderstands how a token and its visrep are inseparably tied.[23] Much like a trading card, it would be effectively impossible to remove the image of Michael Jordan off the trading card without damaging the card. Likewise, in the realm of the internet, the only way to separate a visrep from an NFT is to

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[17] *Terms of Use: Sec. 2(iii)*, NBA TOP SHOT, Sec. 2(iii) (Aug. 31, 2022), https://nbatopshot.com/terms ("Subjectivity of Moments").
[18] *See id.* at Sec. 4(iv), 4(vi) ("Restrictions on Ownership").
[19] *Id.* at Sec. 4(i) ("Ownership of the Moment").
[20] They retain the right to use the moment continually. *See id.* at Sec. 4. ("Ownership, License, and Ownership Restrictions").
[21] *Id.*
[22] Prime examples of these kinds of markets include photographs, digital artwork, and fonts—all of which can, and many do, distinguish between personal and commercial use.
[23] *Can You Edit an NFT After It Has Been Minted?*, ASSETMANTLE (May 9, 2022), https://blog.assetmantle.one/2022/05/09/can-you-edit-an-nft-after-it-has-been-minted/.

"burn" the NFT—in other words, destroy it entirely.[24] While a buyer's rights to a token's visrep might change depending on the transaction, a token and its visrep are as inseparable as a U.S. quarter is from George Washington's portrait—the only way to separate the two is to melt the quarter. Therefore, this note will proceed on the theoretical understanding that a token and its visrep, while different, are inseparable components of a single object.

B. Severability & the Blackstone-Hohfeld Spectrum of Property

When conceptualizing property, two major frameworks come to the forefront: Blackstone's and Hohfeld & Honoré's. Blackstone believed that property entailed the right to exclusive use, whereas Hohfeld & Honoré argued that property could be conceived of as a "bundle" of rights that can be modified to fit one's needs. Hohfeld and Honoré won the debate in modern property law, and, as a result, bundle theory has prevailed. Consequentially, art law is intertwined with Hohfeld and Honoré's Bundle Theory.

In the art context, the most common severable rights are title, possession, and exploitation.[25] Often, a private individual will agree to have artwork from their collection exhibited at a museum. They may also choose to grant the museum exclusive rights to take photographs and to produce merchandise based on the exhibited piece. The owner is vested with title, while the museum is vested with possession and exploitation, albeit temporarily. In legal disputes between titleholders and possessors, titleholders come out victorious as they are often considered the original owners.[26] Though it is important to note that the unique nature of art law has also led to the creation of other rights that do not exist for other personal property, including the "right to display."[27]

Using basic ideas surrounding property rights, one can conceive of NFTs on a spectrum (hereinafter "Blackstone-Hohfeld Spectrum"). On the "Blackstonian" side of the Spectrum, an NFT can convey full title and

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[24] *Id.* Obviously, it is possible to screenshot or record a token's visrep without destroying the NFT. However this is duplication of the visrep, rather than removal of the visrep from the token.

[25] Title can best be described as ownership. Possession is self-explanatory. Exploitation encapsulates *inter alia* use, derivative use, and intellectual property rights.

[26] *Clarke, Hunt Cook and Newsquare v. The Association for the Creation of the Vincent Van Gogh Foundation – Arles* (2010). NORMAN PALMER, ART, ADVENTURE AND ADVOCACY 77 (2015) (A painting by Francis Bacon was loaned to the Van Gogh Foundation, when the owner attempted to secure the return of the painting, the Foundation attempted to block the return on the basis that, *inter alia*, it had the right to display the painting. This argument failed to persuade the French court.).

[27] PALMER, *supra* note 26, at 77.

exclusive use to the token's visrep (hereinafter "Blackstone NFTs").[28] On the "Hohfeldian" side of the Spectrum, an NFT conveys almost no rights to the token's visrep (hereinafter "Hohfeld NFTs").[29] Most NFTs exist somewhere in the middle of the Spectrum. NFTs on either side of the Spectrum pose theoretical difficulties in interacting with art and property law and the internet.[30]

A Blackstone NFT purchase is a straightforward transaction: the buyer receives the NFT and exclusive rights to its visrep. Yet, Blackstone NFTs buck our notions of digital ownership. Due to the nature of the internet, while a token cannot be copied, its visrep can. Enforcing copyright over any visual medium on the internet poses feasibility challenges. While Blackstone NFTs convey exclusive use, there is nothing stopping another NFT creator from copying or screenshotting a Blackstone NFT's visrep and creating a new NFT with that same visrep. There's no clear answer on what recourse, if any, a copyright holder has when an NFT creator makes and sells a new NFT using a copyrighted visrep. Even if they pose enforcement challenges, Blackstone NFTs are easier to conceive of than Hohfeld NFTs because they grant full ownership of the token with exclusive rights to its visrep.

Unfortunately, Hohfeld NFTs are more difficult to grasp, because they lack one of the primary hallmarks of property ownership: exclusive use, and thus, the right to exploit. Consider the following hypothetical: in a bid to raise funds for the national parks, the federal government auctioned off illusory "deeds" to the national parks. The "deedholders" are allowed to display or transfer the "deed" but they do not receive any special privileges or additional rights to the national park. While the "deedholder" technically now "owns" the national park, they are prevented from exercising any authority over the land. Many would question what, if any, value is to be gained by owning land that one cannot exploit. However, if the government actually auctioned off illusory "deeds" to famous national parks—such as Yellowstone, Yosemite, or Joshua Tree—it is easy to believe that some people would buy them, purely to say that they "own" a national park. In this analogy, the "deed" is the Hohfeld token, the national park is the visrep, and the federal government is the creator of the NFT.

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[28] Named after Sir William Blackstone and his formulation of property rights: the right to exclusive use.

[29] Named after Wesley Hohfeld and A.M. Honoré for their formulation of property rights: a bundle of rights.

[30] How copyright works with non-fungibility and digital ownership is a worthy topic of study, but beyond the scope of this note.

For some individuals, the allure of owning something—a star,[31] an acre on the moon,[32] a lordship[33]—even without the ability to use it, is a novelty worth paying for. Clearly, there is some idiosyncratic value that certain individuals place on these certificates of ownership alone. When thinking of Hohfeld NFTs in this frame of mind, purchasing one seems more reasonable. One could imagine a future where NFTs may be displayed in someone's online, virtual reality gallery that others can enter and appreciate. In such a future, the limited "right to display" an NFT's visrep—especially one worth millions of dollars—is a status symbol; not too different from some art today, particularly modern art,[34] regardless of whether someone can screenshot or otherwise copy the visrep.

To summarize, on one side of the Blackstone-Hohfeld Spectrum, Blackstone NFTs convey all three property rights (title, possession, and exploitation) to the token's visrep,[35] while on the other side of the Spectrum, Hohfeld NFTs leave out all but the "right to display" the token's visrep.[36] Regardless of which end of the spectrum an NFT is at, the purchase of an NFT always grants the buyer full rights to the *token*.

II. THEFT

Though art theft has advanced and adapted to the modern era, art theft is nothing new; it stretches back into antiquity.[37] High-profile heists

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[31] *Buy a Star in the Sky*, COSMONOVA, https://cosmonova.org/ (last visited Oct. 23, 2022).

[32] *Buy Land on the Moon*, LUNAREMBASSY, https://lunarembassy.com/product/buy-land-on-the-moon/ (last visited Oct. 23, 2022).

[33] *Become a Lord, Lady, Baron, or Baroness*, SEALAND, https://sealandgov.org/shop/become-a-lord-lady-baron-or-baroness/ (last visited Oct. 23, 2022).

[34] Modern art is a particularly apt comparison as certain people crave uniqueness compared to effectively fungible "ordinary" luxury goods (such as sports cars, mansions, etc.). Lorenzo Pereira, *New Status Symbols: Big Art*, WIDEWALLS (Apr. 28, 2015), https://www.widewalls.ch/magazine/new-status-symbols-big-art ("[B]illionaires are looking for possessing something unique, something that will be a topic of gossips or discussions. They want unique, expensive things that no one else could have - not because of its price, but because of its uniqueness.").

[35] While an NFT cannot be replicated, in the sense that no two NFTs are perfectly identical given the Blockchain, this paper presumes that the owner of a Blackstone NFT can create subsequent NFTs using the same image. Ultimately this is a creature of copyright, which is beyond the scope of this note.

[36] Exploring what it means to "possess" something digitally is difficult when the object one "possesses" can be replicated by a third party with even temporary access to the data. One could conceive of this as having a right of "non-exclusive" possession; meaning one is in a *group* of individuals allowed to possess an image.

[37] Annabelle Steffes-Halmer, *Looted Art, from Antiquity to Present-Day*, DEUTSCHE WELLE (May 21, 2021), https://p.dw.com/p/3tiWa; *See also* Petrus C. van Duyne, Lena Louwe, and Melvin Soudijn, *Money, Art, and Laundering: Coming to Grips with the Risks, in* CULTURAL PROPERTY CRIME: AN ANALYSIS OF CONTEMPORARY PERSPECTIVES AND TRENDS 79 (Joris D. Kila & Marc Balcells eds. 2014) ("[S]ince time

have captured the attention of authorities and the public, such as the infamous Isabella Stewart Gardner Museum theft in 1990, where thirteen pieces, including Rembrandt's famous *The Storm on the Sea of Galilee*, were stolen.[38] What often goes unnoticed is the approximately 52 percent of art thefts from private homes,[39] perhaps most analogous to the theft of NFTs from personal digital wallets.

When thieves steal an art piece or object of cultural heritage,[40] they face a serious problem: converting it to money. Thieves may be in possession of artwork worth millions of dollars, but finding a buyer and selling it without getting caught[41] (or ransoming the piece back to the original owners—often dubbed "artnapping"), is arguably as difficult as the heist itself.[42]

There is little controversy at law when a thief takes possession of an object they do not have title to and ransoms it back to the original owner. Problems arise when the thief succeeds in offloading the artwork to another individual (bona fide buyer), especially when the transactions occur internationally.

A. NFT Theft

One might think it's easy to track down an NFT thief due to the nature of blockchain technology. However, the reality is that, while the Ethereum Blockchain is publicly available to browse, it is not as easy to analyze. Even when one is just looking to track down a specific transaction from one wallet to another, browsing the transaction history of a singular wallet can be difficult. If the stolen NFT is worth millions of

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immemorial, objects of art have been stolen by individuals as well as by states.") (citing CHARNEY ET AL., THE JOURNAL OF ART CRIME: SPRING (2009)).

[38] *The Theft*, ISABELLA STEWART GARDNER MUSEUM, https://www.gardnermuseum.org/about/theft-story (last visited Apr. 4, 2022). The FBI ranks the Isabella Steward Gardner Museum theft second in a list of top ten art crimes. *Art Crime*, FBI, https://www.fbi.gov/investigate/violent-crime/art-theft (last visited Nov. 3, 2022).

[39] *Theft and Forgery in the World of Art*, PRINTERINKS https://www.printerinks.com/theft-and-forgery-in-the-world-of-art.html (last visited Apr. 4, 2022).

[40] There are different laws governing objects of cultural heritage that, if discussed would go beyond the scope of this paper, thus, going forward, this paper shall focus solely on art.

[41] Duncan Chappell & Kenneth Polk, *The Peculiar Problem of Art Theft*, *in* CONTEMPORARY PERSPECTIVES ON THE DETECTION, INVESTIGATION AND PROSECUTION OF ART CRIME 38, 40-43 (Duncan Chappell & Saskia Hufnagel, eds., 2014) [hereinafter Chappell & Polk: The Peculiar Problem].

[42] Henri Neuendorf, *Mysterious Thief Surfaces and Demands Ransom for Klimt Painting Stolen in 1997*, ARTNET NEWS (Nov. 5, 2015) https://news.artnet.com/art-world/ransom-stolen-klimt-painting-356045.

dollars, an owner probably wouldn't hesitate to put in the effort and resources to track it down.

To combat the blockchain's ability to track them down, thieves have adapted. Some NFT and crypto thieves use services designed to effectively anonymize transactions. These criminals currently use two popular methods to throw off authorities. One method, called "mixing," works by creating a whirlwind of transactions between a source wallet and destination wallet.[43] By "mixing," there are so many transactions between wallets in randomized sequences and at random times that the stolen assets become incredibly difficult, if not impossible, to track down. The most infamous service that does this is Samourai's Whirlpool.[44]

Another service thieves have used is Tornado Cash.[45] Tornado Cash is an online service that launders cryptocurrency.[46] In fact, Tornado Cash was recently used to try and launder approximately $600 million in cryptocurrency related to NFT gaming.[47] Tornado Cash works similar to how early banks operated;[48] users "deposit" an amount into the service and receive a receipt with a unique key.[49] The user wait as long as they like and then, when they are ready to receive the funds in a clean wallet, the user enters the unique key and the funds are transferred, minus a fee.[50]

As the tainted wallet and clean wallet never come into direct contact with each other, the transactions cannot be effectively traced. Thus, the only real way to trace the transaction is by looking at the amount of crypto transferred to find patterns and similarities linking the funds to a recent theft. Yet, a Tornado Cash user can split the crypto into multiple transactions, mitigating the effectiveness of some of these methods. Tornado Cash's process has the effect of "washing" the crypto. While this may seem less applicable to NFT theft because Tornado Cash

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[43] JP Buntix, *3 Reasons to Pay Attention to Samourai Wallet's Whirlpool for Bitcoin Privacy*, CRYPTOMODE (June 28, 2021), https://cryptomode.com/3-reasons-to-pay-attention-to-samourai-wallets-whirlpool-for-bitcoin-privacy/.

[44] *Id.*

[45] *See, e.g.*, Robertson, *supra* note 8.

[46] *Id.*

[47] David Gealogo, *How over $600+ Million Worth of NFT Got Stolen in Axie Infinity Hack*, CRYPTO GAMING (Mar. 31, 2022), https://www.esports.net/news/axie-infinity-hacked-over-600-million-worth-of-nft-stolen/.

[48] Both the Knights Templar and the Tang Dynasty used similar methods that would allow people to deposit money in one place, carry a letter of credit or key with them, and withdraw it in another place or at another time. Tim Harford, *The Warrior Monks Who Invented Banking*, BBC NEWS (Jan. 30, 2017), https://www.bbc.co.uk/news/business-38499883.

[49] *How Tornado Cash Works,* TORNADO CASH, https://tornado.cash/ (last visited May 2, 2022).

[50] *Id.*

relies on the fungibility of cryptocurrencies,[51] it is easy to envision criminals using both services in conjunction. While Tornado Cash has been made unavailable in the United States, it is still available in other countries, and therefore, until the service is permanently discontinued, it remains an asset for criminals.[52]

B. Nemo Dat Versus Good Faith Buyer

Theft has existed in every culture since time immemorial. It is unsurprising that different legal systems came to different conclusions on who should hold title when a thief succeeds in selling stolen property to a bona fide buyer who was unaware of the theft. Though rules vary from state to state, in Western European jurisprudence, two different systems emerged to settle these disputes—largely based on whether a country followed the civil or common law. Civil law countries favor the circulation of property and thus, over time, have adopted a regime that provides greater protection to bona fide buyers.[53] In these jurisdictions, original owners have no legal right to the return of their stolen property if a bona fide buyer purchased the stolen property in good faith and exercised due diligence to ensure that it was not stolen (hereinafter "Good Faith Buyer Rule/Jurisdiction"). In contrast, common law countries such as the United States and the U.K., adhere to the rule of *nemo dat quod habet* (hereinafter "*Nemo Dat* Rule/Jurisdiction"). Translated from Latin, *nemo dat quod habet* literally means "no one

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[51] If a unique token can be tracked between wallets, it effectively would provide the same service as Samourai's Whirlpool, thus defeating the extra layer of anonymity.

[52] In August of 2022, the U.S. Treasury Department Office of Foreign Asset Control officially sanctioned Tornado Cash. Press Release, U.S. Dep't of the Treasury, U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash (Aug. 8, 2022), U.S. DEPT. OF TREASURY, U.S. TREASURY SANCTIONS NOTORIOUS VIRTUAL CURRENCY MIXER TORNADO CASH, (Aug. 8, 2022), https://home.treasury.gov/news/press-releases/jy0916. The Office of Foreign Asset Control referenced a $60 million civil penalty issued in 2020 by the Financial Crimes Enforcement Network for similar misconduct. *Id.* FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP'T. OF TREASURY, NUMBER 2020-2, ASSESSMENT OF CIVIL PENALTY IN THE MATTER OF LARRY DEAN HARMON (2020), https://www.fincen.gov/sites/default/files/enforcement_action/2020-10-19/HarmonHelix%20Assessment%20and%20SoF_508_101920.pdf (assessment of civil penalty). In an announcement on its website, the Treasury Department stated that Tornado Cash had been used to launder approximately $7 billion in virtual currency since its founding in 2019, including laundering $455 million stolen by North Korea's state-sponsored hacking group, known as the Lazarus Group. U.S. DEP'T. OF TREASURY, *supra* note 52 (press release).

[53] *See, e.g.*, Guido Carducci, *The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions and EU Regulations*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE, 68, 90 (Barbara T. Hoffman ed., 2006).

gives what he does not have."[54] Under the *Nemo Dat* Rule, because a thief cannot take title to an object from its original owner, the thief is incapable of transferring title to a bona fide buyer, regardless of the circumstances.[55]

To illustrate the differences between these systems, consider the following hypothetical: a burglar steals a ring from someone's home in the middle of the night. After making his getaway, the thief trips and injures his ankle. In the morning, the thief puts on an ankle brace and goes to a pawn shop to sell the ring. The merchant asks how the thief came by the ring and asks why he wants to sell it. The thief claims the ring belonged to his late grandfather and, while it holds great sentimental value, he needs to sell it to pay for his medical expenses. The merchant notices the thief's injured ankle and does not see anything inherently suspicious about him. The ring is a plain gold wedding band with no uniquely identifiable features, making it virtually impossible to run the ring through a stolen property registry. Ultimately, the merchant purchases the ring. The next day, the original owner of the ring arrives at the pawn shop and presents conclusive evidence showing that he is the owner and provides incontrovertible proof that the ring was stolen.

If the events described above occurred in France (a Good Faith Buyer Jurisdiction) the merchant purchased the ring in good faith and did their due diligence, therefore, the merchant legally owns the ring and the original owner has no right to its return. Neither does the original owner have a right to be compensated by the merchant; this is because it was the thief, not the merchant, who wronged the original owner.

However, if these events occurred in the U.K. (a *Nemo Dat* Jurisdiction), the circumstances of the sale—the merchant's good faith and due diligence—are irrelevant. The thief possessed the ring, but he never owned it and thus, he was legally incapable of transferring ownership to someone else. Consequently, the original owner has legal ownership and the ring must be returned. The merchant has no right to be compensated by the ring's owner because it was the thief, not the ring's owner, who wronged the merchant.

As one can infer from the issues presented by the hypothetical, in Good Faith Buyer Jurisdictions litigation over stolen objects revolves around the bona fide buyer's due diligence and good faith or lack thereof. However, who bears the burden of proving or refuting good faith and due

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[54] *Legal Maxims*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("*Nemo dat quod habet*. No one gives what he does not have; no one transfers (a right) that he does not possess. According to this maxim, no one gives a better title to property than he himself possesses. A variation of this maxim is *Nemo dat qui non habet* (no one gives who does not have).").

[55] *See, e.g.*, Carducci, *supra* note 53, at 76.

diligence varies depending on the state.[56] In *Nemo Dat* Jurisdictions, transferring title to a stolen object is a legal impossibility; thus, litigation hinges on whether the object was stolen or not. If the object was stolen, the bona fide buyer is strictly liable.

While strict liability is the general rule in *Nemo Dat* Jurisdictions, there are some affirmative defenses that a bona fide buyer can raise to acquire title to stolen property: the statute of repose,[57] if one exists and has tolled,[58] or the equitable doctrine of laches.[59] However, for a bona fide buyer to assert either of these defenses not only must they show that laches or the statute of repose applies, additionally, the bona fide buyer must also prove that they purchased the stolen object in good faith *and* exercised due diligence to determine that the object was not stolen.[60] While this may sound similar to the Good Faith Buyer Rule, the burden of proof is inverted. In Good Faith Buyer Jurisdictions the original owner bears the burden of proving that the bona fide buyer did *not* purchase in good faith or did *not* exercise due diligence. When asserting an affirmative defense in a *Nemo Dat* Jurisdiction, the bona fide buyer bears the burden of proving that the affirmative defense applies, that they exercised due diligence, *and* that they purchased in good faith.[61]

While one would hope, due to its cultural value, that art would be treated differently from other forms of personal property, prior to the nineteenth and twentieth centuries, most countries did not consider art to be legally unique. Therefore, rules governing the transfer and return

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[56] PALMER, *supra* note 26, at 11.

[57] Kenneth Polk & Duncan Chappell, *Art Theft and Time Limits for Recovery: Do the Facts of the Crime Fit the Limits of the Law?*, *in* CULTURAL PROPERTY CRIME: AN OVERVIEW OF ANALYSIS OF CONTEMPORARY PERSPECTIVES AND TRENDS 3 (Joris D. Kila, Marc Balcells eds. 2014) (The doctrine of *nemo dat* has been around since 1623 and still applies in art law.) [hereinafter Polk & Chappell: Art Theft].
(The statute of repose in the United States is generally six years, however, when the statute of repose tolls varies by state.).

[58] "[T]he states (especially New York and California ["where most of the actions regarding art recover in the United States are lodged"] have '. . . developed limitation of action principles which strongly favor original owners and property rights.' In these two states in particular . . .. the legal statutes provide that the time limitation clock does not start to run until the 'dispossessed owner' either comes into possession of knowledge about the whereabouts of the previously stolen object (as in California) or takes some action regarding these objects (as in New York)." *Id.* at 11.

[59] Barbara T. Hoffman, *International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE (Saskia Hufnagel, Duncan Chappell eds., 2014) 169, 172. (The doctrine of laches holds that, even in cases of international art theft, if an entity did not exercise due diligence to try and return the items, they may forfeit title). Greek Orthodox Patriarchate of Jerusalem v. Christie's Inc., No. 98 Civ. 7664 (S.D.N.Y. 1999) (granting summary judgement to Christie's because the Patriarchate did not take action soon enough, the fact that they were a monastery with infrequent access to the internet was irrelevant).

[60] Polk & Chappell: Art Theft, *supra* note 57, at 10.

[61] *Id.*

of stolen objects also applied to art.[62] There has been movement in the last two centuries to provide exceptions to traditional property law for art, however many states continue to rely upon these foundational concepts of property ownership when issues of stolen art arise. As the world has become more interconnected, and recognition of art's unique value has increased, there have been several attempts to create a specialized framework for the transfer of stolen art on the national and international level with limited success.

C. The UNESCO & UNIDROIT Conventions

The United Nations Educational, Scientific and Cultural Organization ("UNESCO") recognized the need for a unified standard to deal with the international transport of stolen art and artifacts. Thus, in 1970, UNESCO published the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter "UNESCO Convention").[63] The bulk of the UNESCO Convention concerns state requests for the return of cultural heritage items, particularly art of prominence.

The Convention laid out three variations on the illegitimate movement of art: illegal export (smuggling "national treasure[s]" out of the country of origin); illicit excavation (removing objects from places that a country regards as national property—such as tombs or other archaeological sites);[64] and "simple theft,"[65] (the kind of art thievery behind the disappearance of *The Storm on the Sea of Galilee*). The UNESCO Convention provided no distinction between illegal export, illicit excavation and simple theft; rather, the Convention used the umbrella term "illicit" to cover all three practices. As the topic of this note surrounds digital artwork, discussion of international law shall be confined to discussing the illegal export/import and "simple theft" of artwork.

The importance of the UNESCO Convention in prompting special legal designations for art cannot be overstated. As mentioned earlier, many countries did not exempt artwork from their legal regimes governing the transfer of stolen property. While the UNESCO

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[62] Polk & Chappell: Art Theft, *supra* note 57, at 3.
[63] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S 231 [hereinafter UNESCO Convention].
[64] Several countries, Mexico being a prime example, consider all tombs and pre-Columbian artifacts as belonging to the state, thus even undiscovered works are considered state property and removing them from the country is considered theft. *See, e.g.*, United States v. McClain, 551 F.2d 52 (5th Cir. 1977); United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974).
[65]Hoffman, *supra* note 59, at 90.

Convention has gained widespread acceptance,[66] the Convention also had some major issues. For one, it recognized art traffic as illicit *only* if the trafficked artwork had been officially designated by a signatory state as "cultural property" *and* if the art fit within certain categories—albeit, quite broad and extensive categories.[67]

The United States and the United Kingdom, unlike some other large western countries, do not have a system of artwork classification, meaning any artwork illegally exported from the United States or the United Kingdom automatically fails one of the required elements for protection under the UNESCO Convention.[68] Another major issue with the UNESCO Convention is the lack of rights for individual owners of stolen artwork. Under the Convention, individuals who are victims of art theft are essentially at the mercy of their government's willingness to consider their stolen art as worthy of protection.

The UNESCO Convention's issues became glaringly obvious after several important court cases. These cases had the same theme: when determining who holds title to stolen artwork, *Nemo Dat* Jurisdictions apply *lex situs*—the law of the country where the art was sold by the thief to a bona fide buyer.[69]

In one infamous British case, *Winkworth v. Christie Manson and Woods Ltd* (1980), a collection of Japanese artwork called *netsuke* were stolen from Winkworth's home in England.[70] The *netsuke* were transported to Italy where they were sold to the Marchese Paolo Da Pozzo (the bona fide buyer).[71] Da Pozzo put the items on auction through Christie's (a popular auctioneer) and Winkworth sued, seeking an injunction and restitution.[72] The English court, applying conflict of law principles, found that because the sale took place in Italy, Italian law applied.[73] Crucially, Italy was a Good Faith Buyer Jurisdiction.[74] Consequently, the English court found that Da Pozzo purchased in good faith and exercised due diligence under Italian law; thus, Christie's won the lawsuit and Winkworth was left with nothing.

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[66] As of the writing of this note, the UNESCO Convention has been ratified by 141 countries. *See* UNESCO Convention, *supra* note 63.
[67] UNESCO Convention *supra* note 63, at Art. I.
[68] The United States does have a growing body of law recognizing American Indian artifacts and artwork as cultural pieces, however this appears to remain almost exclusive to American Indian artifacts. FBI *infra* note 128.
[69] PALMER, *supra* note 26, at 12.
[70] *Case Summary: Winkworth v. Christie Manson and Woods Ltd.*, INT'L FOUNDATION FOR ART & RESEARCH, https://www.ifar.org/case_summary.php?docid=1192827443 (last visited Oct. 23, 2022). Winkworth v Christie Manson and Woods Ltd. (1980) 1 Ch 496, (QB).
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

Another seminal case in international art theft litigation was *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*[75] The case operated under similar conflict of law principles as *Winkworth*. In *Goldberg* several mosaics stolen from the Greek Church in Cyprus were sold to art dealers based in Indiana, but the sale itself was performed at a "freeport" in Switzerland.[76] Similar to their English counterparts, the American court used conflict of law principles and found that *lex situs* applied.[77] Switzerland is a Good Faith Buyer Jurisdiction.[78] However, the court found that the freeport was a mere fleeting transport area, therefore, the law of the bona fide buyer's home—the State of Indiana—applied.[79] As Indiana is a *Nemo Dat* Jurisdiction, the mosaics were ordered to be returned.[80]

The events of *Autocephalous Greek-Orthodox Church* occurred after the United States implemented several individual articles of the UNESCO Convention in 1983.[81] While it may seem that the UNESCO Convention would have made the litigation conclusive without reaching for *lex situs*, the Government of Cyprus—where the mosaics had been stolen—never requested the mosaics be returned. As a result, Autocephalous Greek Orthodox Church was forced to pursue the mosaics through pre-UNESCO litigation in the United States.

After several years, it was clear that having no set international standard for questions of restitution left *individuals* vulnerable and also failed to take into account that some of the largest art markets (the United States and the U.K.) had no official system of art classification. Consequently, in 1983 UNESCO held a specialist meeting to determine the impact of the UNESCO Convention.[82] This expert panel concluded that the International Institute for the Unification of Private Law (UNIDROIT) should coordinate to unify national laws, partially because criminals were exploiting different legal regimes (Good Faith versus *Nemo Dat*) to successfully offload stolen art.[83] In fact, there were several

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[75] Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990).
[76] *Id.*
[77] *Id.*
[78] *Swiss to Crack Down on Stolen Art*, FORBES (July 30, 2002, 12:01 AM) https://www.forbes.com/2002/07/30/0730hot.html?sh=67fd75b4ac30.
[79] *Id.*
[80] *Id.*
[81] Which, it should be noted, only partially implemented the UNESCO Convention; specifically Articles 7 and 9 "on a piecemeal bilateral basis." PALMER, *supra* note 26, at 12.
[82] Lyndel V. Prott, *UNESCO's Influence on the Development of International Criminal Law, in* CONTEMPORARY PERSPECTIVES ON THE DETECTION, INVESTIGATION AND PROSECUTION OF ART CRIME: AUSTRALASIAN, EUROPEAN AND NORTH AMERICAN PERSPECTIVES 143 (Saskia Hufnagel, Duncan Chappell, eds. 2014).
[83] *Id.*

prominent civil law lawyers—such as the legal counsel for the French Museums, Professor Jean Catelain—who pointed out that the Good Faith Buyer Rule aided art thieves.[84] Professor Catelain even suggested that the Good Faith Buyer Rule was inappropriate for determining the ownership of art and other objects of cultural heritage.[85]

Thus, in the 1990's, UNIDROIT convened in Rome to attempt to remedy the UNESCO Convention's issues. The product of these efforts was the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter "UNIDROIT Convention").[86] The UNIDROIT Convention recognized a legal difference between illegally exported and stolen artwork.[87] The UNIDROIT Convention also harmonized Good Faith Buyer and *Nemo Dat* rules by requiring that all signatories adopt *Nemo Dat* rules when it came to questions of ownership,[88] but required fair compensation for good faith bona fide buyers that exercised due diligence before purchasing.[89] Furthermore, the UNIDROIT Convention stated that a party is entitled to restitution of their stolen artwork if they make a claim within three years of finding the location of a stolen object.[90] However, claims were subject to a fifty year statute of repose, and signatories had the option of imposing an *absolute* statute of repose of seventy-five years.[91]

Additionally, the UNIDROIT Convention provided better guidance to courts on which factors they should consider when determining whether a bona fide buyer exercised good faith and due diligence. Some of these factors were: the behavior of the transacting parties, the price paid, whether the seller consulted registries of stolen

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[84] Professor Catelain wrote "genuinely effective protection of the property concerned is impossible without total abolition of protection for purchasers . . . . If the legitimate owner is to be obliged to pay back the purchase price, recovery will often be impossible. Again, this would constitute indirect protection only of the final purchaser but also of all those through whose hands the object has passed." LYNDEL V. PROTT, COMMENTARY ON THE UNIDROIT CONVENTION 30 (1997). He was not the only civil law lawyer to see these problems; criticisms of the Good Faith Buyer Rule from civil lawyers began as far back as 1904. *Id.*

[85] *Id.*

[86] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, U.N.I.D.R.O.I.T.

[87] *Id.* Even though it made this distinction it left the definitional section on stolen art broader the sections on illegally exported art. This was done out of a fear that states would be over inclusive in what they deemed to be illegally exported art, thus leading to an outsized response from the host country.

[88] *Id.* at Art. 3(1) ("The possessor of a cultural object which has been stolen shall return it").

[89] Prott, *supra* note 82, at 143.

[90] UNIDROIT Convention, *supra* note 86, at Ch. II, Art. 3, Sec. 3–5.

[91] *Id.*

items, and any other relevant information and documentation that a buyer could reasonably have obtained.[92]

However, the great strides made by the UNIDROIT Convention came at a cost: many countries were unwilling to conform to the UNIDROIT Convention's sweeping changes. As a result, the UNIDROIT Convention has far fewer signatories than the UNESCO Convention (at the time of this note, the UNIDROIT Convention has 52 signatories compared to the UNESCO Convention's 141). Worse still, several major art market countries—including the United States and the United Kingdom—have refused to sign the UNIDROIT Convention.

While the lack of participation from the U.S. and the U.K. poses difficulties for some owners seeking restitution, there are a few mitigating factors that should be mentioned. First, both the U.S. and the U.K. are *Nemo Dat* jurisdictions. Thus, one of the most significant aspects of the UNIDROIT Convention—adopting a *Nemo Dat* standard for ownership—is not as crucial. Though, without the UNIDROIT Convention, ordinary conflict of law principles still apply, meaning courts will continue using *lex situs* to settle questions of ownership. While this poses an obstacle, one would hope that courts applying *lex situs* would take into account whether a country was a signatory of the UNIDROIT Convention. Unfortunately, common law jurisdictions *exclusively* apply the *domestic* law of the *lex situs* country, not that country's private international law, meaning courts applying *lex situs* do not consider whether a country is a signatory of the UNIDROIT Convention.[93] Even though Italy is currently a signatory of the UNIDROIT Convention, if the events in *Winkworth* occurred today, common law courts would reach the same conclusion: the Good Faith Buyer Rule applies. It is possible that this loophole could be resolved by signatories passing UNIDROIT Convention implementation legislation and incorporating it into that country's domestic law,[94] but it is unclear

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[92] *Id.*

[93] "The English High Court[,] having accepted that France was lex situs, held that it was to French domestic law, and not to French private international law, that the court should look [at] to determine the effect of the law of France on original title." PALMER, *supra* note 26, at 14 (citing Government of the Islamic Republic of Iran v. Berend (2007) (QBD)). This is referred to as the doctrine of *renvoi*. It should be noted that *renvoi* doctrine differs in the United States, In Re Schneider's Estate, 96 N.Y.S.2d 652 (1950), thus, it is possible that U.S. courts would apply different rules for UNIDROIT countries.

[94] It is interesting to note that, if *Winkworth* were litigated today, English Courts would still apply Italian law, but because Italy implemented the UNIDROIT Convention into its domestic law in 2000, the English Court would apply the *Nemo Dat* rule as required by UNIDROIT. *Practical Operation of the 1995 UNIDROIT Convention: Italy*, UNIDROIT, https://www.unidroit.org/english/conventions/1995culturalproperty/1meet-120619/answquest-ef/italy.pdf (last visited Mar. 6, 2023).

whether common law courts would consider implementation legislation to be private international law or domestic law.

The second mitigating factor is that the UNIDROIT Convention does not require reciprocity to apply. This means that citizens in the United States or the United Kingdom can independently seek restitution under the UNIDROIT Convention from a signatory state, even though their home countries are not signatories. This is particularly important as both the United States and the United Kingdom have a large art market, and as *Nemo Dat* jurisdictions, they are susceptible to having their art stolen and exported to Good Faith Buyer Jurisdictions.

Neither the UNESCO Convention nor the UNIDROIT Convention are ideal solutions to the growing problem of international art theft. While the UNESCO Convention was a good start, its reliance on state-backed claims and designations excluded key countries and precluded individual claims. The UNESCO Convention also failed to harmonize the *Nemo Dat* and Good Faith Buyer rules. While the UNIDROIT Convention remedied many of these issues, its lack of adoption poses serious issues for enforcement—particularly in countries which apply *lex situs* to settle ownership disputes.

D. Implications for International Criminal Law

Both the UNESCO and UNIDROIT Conventions, despite largely dealing with restitution and procedural measures to recover art, also had a significant impact on the criminal law.[95] Especially in art law, civil and criminal law intertwine to form what many would describe as a seamless web.[96]

While UNESCO has little enforcement power on its own, signatory states have passed legislation that conforms to the UNESCO Convention's principles and creates penalties for engaging in the illicit trade of art.[97] However, the wide latitude which allowed the UNESCO Convention to become so broadly adopted has caused subsequent issues. Different interpretations of the UNESCO Convention among signatories has led to inconsistent enforcement.[98] Some nations, for example, while implementing the UNESCO Convention, failed to adopt criminal sanctions for breach of the Convention's principles.[99]

However, some international bodies have picked up the slack. Despite UNESCO's lack of punitive power,[100] organizations with criminal

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[95] Prott, *supra* note 82, at 135.
[96] *Id.*
[97] *Id.*
[98] *See id.*
[99] *Id.*
[100] *Id.* at 136.

jurisdiction, such as the International Criminal Court, have begun punishing criminals who engage in illicit trade of art under the UNESCO Convention.[101] Furthermore, other treaties have incorporated the Convention's standards—including treaties of mutual legal assistance—which go hand-in-hand with improved extradition and enforcement.[102]

While significant international criminal sanctions in art law do not kick in until armed conflict,[103] the UNESCO Convention established civil sanctions that, while not directly targeting criminal activity, certainly had a significant impact on it.[104] For example, the UNESCO Convention requires signatories subject art dealers to penal or administrative sanctions if they fail to maintain a registry recording each item's origin, name, supplier information, description, and price.[105] The record-keeping requirement not only aids law enforcement in tracking theft, it also gives authorities the power to go after unscrupulous art dealers who fail to keep accurate records.[106]

UNESCO also takes an active role in attempting to deter the illicit art trade through educational resources.[107] UNESCO actively collaborates with Interpol and works with the International Council of Museums (ICOM) to publish lists of stolen and endangered art.[108] UNESCO has pursued regional workshops in partnership with Interpol and ICOM to educate dealers and push for greater enforcement.[109]

Turning to a concrete example of the criminal consequences of the UNIDROIT Convention, its examination of due diligence for buyers has led to several prosecutions in the art world. In one case, the prosecution of an art merchant named Giacomo Medici brought down an international web of stolen art and artifacts, and Medici himself was convicted and sentenced to ten years in prison.[110] Generally speaking though, international criminal sanctions are rare.

E. U.S. Art Theft

As mentioned prior, the United States is not a signatory of the UNIDROIT Convention. The United States, while currently a signatory of the UNESCO Convention, did not pass implementation legislation until 1983; even then, it only assented to Article 7(b) (prohibiting the

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[101] Prott, *supra* note 82, at 135.
[102] *Id.* at 136.
[103] *See id.* at 136–41.
[104] *Id.* at 143.
[105] UNESCO Convention, *supra* note 63, at Art. 10(a).
[106] Prott, *supra* note 82, at 141.
[107] *Id.* at 146.
[108] *Id.* at 147.
[109] *Id.* at 147.
[110] *Id.* at 143, n.20.

import of stolen cultural property) and Article 9 (agreeing to take on a concerted effort to prevent pillaging and looting of archaeological sites).[111] Instead, the U.S. relies on a patchwork of state laws and federal statutes that draw no distinction between property and works of art. the U.S.'s current system is characteristic of the pre-nineteenth century understanding of art: that artwork was indistinguishable from other kinds of property.[112]

The primary mode of federal prosecution in art theft cases was, and still is, the National Stolen Property Act.[113] Passed by Congress in 1934, The National Stolen Property Act (hereinafter "NSPA") established a broad offense for transport and sale of stolen "goods" worth more than $5,000,[114] $100,000 when adjusted for inflation.[115] The senatorial debate was motivated and dominated by concerns over the growth of organized crime.[116] Though art, particularly stolen art, has been used as a money-laundering mechanism,[117] it appears that this was either unknown to the senators debating the bill, or the senators felt it was unnecessary to address. Regardless, there was no mention of artwork on the Senate floor.[118]

The first federal prosecution for stolen art under the NSPA came nearly thirty years later in *United States v. Hurley*.[119] In *Hurley*, the

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[111] *Id.* at 143, n. 20. PALMER, *supra* note 26, at 12. UNESCO Convention, *supra* note 63, at Art. 7(b), Art. 9.

[112] The United States passed the Antiquities Act in 1906, 16 U.S.C.A. §§ 431-33 (West 1993), which made it a crime to export antiquities without a license, however, this was later ruled unconstitutional. LEONARD D. DUBOFF & CHRISTIE O. KING, ART LAW IN A NUTSHELL, 21-22 (3d ed. 2000).

[113] National Stolen Property Act, 18 U.S.C. § 2314 (1934).

[114] *Id.* § 2314(1).

[115] *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/data/inflation_calculator.htm (last visited May 2, 2022) (selecting May 1934 as the initial date, inputting $5,000, and selecting the date of the month of this paper's creation, April 2022, then pressing calculate).

[116] The law was passed as a way to extend the National Stolen Motor Vehicles Act as it was observed organized crime had begun trafficking in other stolen goods. 78 CONG. REC. 448 (1934) (statement of Sen. Royal S. Copeland), https://www.govinfo.gov/content/pkg/GPO-CRECB-1934-pt1-v78/pdf/GPO-CRECB-1934-pt1-v78-7-1.pdf.

[117] Duyne et al., *supra* note 37, at 80-81 ("A new relationship between art, crime, and money has come into being with criminalization of money laundering . . . . According to Nelson (2009), examples of art used for laundering abound . . . . In this regard they are put in line with other traders of valuable objects such as jewellers[sic] and car dealers . . . . In the literature on organized crime and money laundering, art hardly plays a role.").

[118] *Id.*

[119] United States v. Hurley, 281 F. Supp. 443 (D. Conn. 1968). As property is largely state law, there were likely many cases prosecuting art theft as property theft on the state level, however when it comes to the context of the internet, federal law applies—especially in cases of international transit.

Defendants burglarized a private home and stole several paintings.[120] They moved the paintings from Massachusetts to Connecticut.[121] Unable to offload the famous paintings, the Defendants placed them in the homes of relatives.[122] Under U.S. law at the time, it didn't matter whether the thieves stole *The Storm on the Sea of Galilee* or a large number of objects collectively worth over $5,000, the NSPA applied in either case. The NSPA has been amended to expand the broad term of stolen "goods" to include money, securities, and other assets, but again, no specific designation for artwork exists.

Before implementing parts of the UNESCO Convention, the U.S. had no statute explicitly prohibiting the import and export of stolen art. Still, the U.S. has no statute explicitly prohibiting the *export* of illegally stolen art.[123] Rather, the U.S. relies upon the broad applicability of the NSPA. Under the NSPA, art that is illegally exported from another country but legally imported into the U.S. is still considered "stolen," even if the art had not *actually* been stolen.[124] The United States also has provisions in some bilateral treaties with foreign countries, such as Mexico, that allow extradition for crimes against cultural property—including theft.[125]

In a landmark case applying this standard, *United States v. Hollinshead*,[126] an art dealer in Guatemala acquired pre-Columbian artifacts and exported them to the United States under suspicious circumstances. Guatemala, like Mexico, had designated all cultural artifacts, even undiscovered ones, as state property.[127] It is illegal to export these artifacts without a license.[128] The court found that the NSPA applied because the cultural objects were considered stolen under Guatemalan law and transported across international borders illicitly.[129]

Several other laws have been applied to art theft,[130] though only two sections of the U.S. Code explicitly prohibit theft and illegal trafficking in art and cultural artifacts: Theft of Major Artwork, and

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[120] *Id.* at 445.
[121] *Id.*
[122] *Id.*
[123] Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (1983).
[124] United States v. McClain (McClain I), 551 F.2d 52, (5th Cir. 1977).
[125] DUBOFF & KING, *supra* note 112, at 17.
[126] United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974).
[127] *Id.* It should be noted that it was lack of recognition of these kinds of laws that was a major motivator behind the UNESCO Convention.
[128] *Id.*
[129] *Id.* at 1155–56.
[130] *Art Theft*, FBI, https://www.fbi.gov/investigate/violent-crime/art-theft (archival link: https://web.archive.org/web/20220425165519/https://www.fbi.gov/investigate/violent-crime/art-theft) (last visited May 2, 2022).

Illegal Trafficking in Native American Human Remains and Cultural Items.[131] Therefore, only the NSPA and Theft of Major Artwork apply to non-American-Indian cultural items.

The Theft of Major Artwork (hereinafter "ToMA"), as the title suggests, attempts to distinguish *major* works of art from "standard" art classified as stolen under the NSPA. ToMA retains the $5,000 threshold established in the NSPA, but *only* for objects that are over one hundred years old.[132] However, there is no age requirement for art and cultural items that are worth over $100,000.[133]

There are, however, additional requirements for ToMA to apply. One of the elements requires that the artwork be stolen from a museum. The U.S. Code defines a museum as:

> [An] organized and permanent institution the activities of which affect interstate or foreign commerce . . . situated in the United States . . . established for an essentially educational or aesthetic purpose; has a professional staff; and owns, utilizes, and cares for tangible objects that are exhibited to the public on a regular schedule.[134]

By such a definition, a person's private collection would not qualify as a museum. Even if a thief steals "major artwork" (as defined by ToMA) from someone's home, ToMA does not apply. Additionally, by definition, ToMA only covers museums situated in the U.S. Thus, a thief who steals the *Mona Lisa* and exports it to the United States is not prosecutable under ToMA.

III. DEFINING ART

Having explained the various laws governing the theft of art both internationally and in the United States, this note now turns to what constitutes art.

A. U.S. Definitions

Courts and lawmakers have grappled with the question of what qualifies as artistic work for centuries. Different courts and different areas of the law have come to different conclusions on what art is, and

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[131] 18 U.S.C. § 668 (1996).
[132] 18 U.S.C. § 668(a)(2) (1996).
[133] *Id.*
[134] 18 U.S.C. § 668(a)(1) (1996).

some of these conclusions have changed over time to become more inclusive.

One definition for art comes from U.S. customs law.[135] In disputes over tariff exemptions, "[c]ourts have focused on the appearance of the object" when questioning whether an item is art.[136] Reflecting the evolution of property ideas around artwork, early U.S. cases from the late nineteenth century restricted the term "art" solely to the fine arts.[137] The fine arts were distinguished from mechanical or industrial pieces; pieces that many would categorize as artwork today.[138] For example, in *United States v. Perry*,[139] the U.S. Supreme Court held that stained glass windows with images of saints could not enter duty-free as art.[140] While the Court acknowledged the beauty of the pieces, it drew a line between (fine) art and "decorative" elements for industrial and mechanical purposes.[141] The Court defined art as being "intended solely for ornamental purposes . . . including painting in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone, or bronze."[142] The definition excluded, inter alia, "[m]inor objects of art, intended also for ornamental purposes, [which] are susceptible [to] an indefinite reproduction of the original."[143]

It was not until the innovation of abstract art that things changed, culminating in Congress amending the tariff laws in 1958.[144] These 1958 amendments expanded the definition of art to include work "in other media," beyond the media listed in the customs definition.[145] This directive evolved with the adoption of the Harmonized Schedule in 1988. "The Harmonized Schedule incorporate[d] international established product definitions to which all major U.S. trading partners subscribe."[146] This definition still excluded some forms of what may be considered art though, such as "articles made by stenciling, photocopying, or other mechanical processes, or . . . painted or decorated manufactured articles, such as vases, cups, plates, screens, cases, trays, chests, etc."[147] Furthermore, the definition excluded castings and art

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[135] DUBOFF & KING, *supra* note 112, at 1–7.
[136] *Id.* at 1.
[137] *Id.* at 1–2.
[138] *Id.*
[139] United States v. Perry, 146 U.S. 71 (1892).
[140] DUBOFF & KING, *supra* note 112, at 2 (citing United States v. Perry, 146 U.S. 71 (1892)).
[141] *Id.* (citing United States v. Perry, 146 U.S. 71 (1892)).
[142] *Id.* (citing United States v. Perry, 146 U.S. 71 (1892)).
[143] *Id.*
[144] *Id.* at 2–3.
[145] *Id.*
[146] *Id.*
[147] *Id.* at 4.

prints, only including prints that were made by hand.[148] The new definition allowed duty-free entry for commercial lines of limited edition sculptures as art, but only for the first ten pieces.[149]

As odd as it may sound, the creator of the artwork is also crucial in determining whether something is art or not in U.S. customs law.[150] Artwork can only be considered art if it was created by an "artist," not merely an "artisan."[151] The elements that show the difference between an artist and an artisan vary, but generally, it is said that an artist works from their own inspiration and skill, whereas the artisan—such as an artist's assistant—recreates or mimics an artist's work and therefore, is not working from their own inspiration.[152] This distinction appears to not apply to original paintings by hand; original paintings enjoy special treatment,[153] possibly because paintings by hand have been grandfathered in as "fine art."[154]

The final requirement for an object to be considered art is a lack of utility; whatever the piece is, it *cannot* be an item of utility nor made for commercial use. Most courts have taken a conservative stance on this point, holding that an object with *any* functional elements, cannot be art.[155] This is why objects like vases and cups, despite being artistic works, are excluded—they are utilitarian in nature—unless their size and dimension make it clear they're meant purely for ornamental purposes.[156]

In summary, when looking at U.S. Customs law, art is defined as: (1) an original object, (2) created by hand, (3) by an artist, (4) through his or her own inspiration and skill, (5) which cannot be used for utilitarian or commercial purposes. This definition (hereinafter "Customs Definition") has several flaws. Even though certain objects of utilitarian value are not considered art by the Customs Definition, intellectual property protects art, regardless of utility or commercial use.

To illustrate the discontinuity between these two areas of the law, consider gift wrapping paper. Wrapping paper can include some unique designs. These designs are protected by copyright and/or trademark. Yet, when wrapping paper arrives at a U.S. port, it is not considered "art" due to its utilitarian and commercial nature. This was a similar line of reasoning behind the U.S. Supreme Court's decision in *Bleistein v.*

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[148] *Id.*
[149] The Harmonized Schedule expanded this to twelve. *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.* at 5.
[153] *Id.*
[154] *Id.* at 2.
[155] *Id.* at 5-6.
[156] *Id.*

Donaldson Lithographing Co.[157] In *Bleistein* the Supreme Court ruled that advertising illustrations, despite their commercial nature, are still protected by copyright as art.[158]

While the Customs Definition is flawed and underinclusive, it is the closest U.S. law gets to a definition of art. When looking at other areas of the law there is no litmus test: "[t]hings have been categorized as art if: (1) they sell; (2) creators (or others) offer them for sale as art; or (3) paradoxically, they are designated as art."[159] Thus judicial decisions attempting to create a formula have been scarce, with courts opting for a "know it when they see it" approach.[160] However, this has only really been used to draw a line between legitimate artistic expression and obscenity;[161] thus, it may not be instructive as to how a court would define artwork. Likewise, copyright litigation yields equally vague definitions. Courts have found that "[a]n object is art 'if it appears to be within the historical and ordinary conception of the term art.'"[162] Yet, courts have generally rejected attempts at standardless subjective definitions.[163] There is no clear definition of what art is or what art can be beyond the idea that there must be a limit or standard somewhere.

B. International Definitions

As explained earlier, there are two major conventions governing the illicit movement of artwork: the UNESCO Convention[164] and the UNIDROIT Convention.[165] Both have definitions and standards for what can be considered art.

While the UNESCO Convention restricts its applicability to items designated as art by signatory states, it does offer definitional elements to explain what it may consider to be "property of artistic interest;" these include:

> pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by

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[157] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).
[158] *Id.*
[159] ALEXANDRA DARRABY, 1 DARRABY ON ART LAW § 1:7 (2021).
[160] *Id.* at § 1:8 (citing Jacobellis v. State of Ohio, 378 U.S. 184 (1964) (Stewart, J. concurring)).
[161] *Id.*
[162] *Id.* (citing Rosenthal v. Stein, 205 F.2d 633, 635 (9th Cir. 1953)).
[163] *Id.* (citing Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd,* 960 F.2d 134 (11th Cir. 1992)).
[164] UNESCO Convention *supra* note 63.
[165] UNIDROIT Convention *supra* note 86. For ease of reading, this note shall focus solely on art and omit the provisions and areas of the Convention that concern cultural artifacts.

> hand . . . original works of statuary art and sculpture in any material; . . . original engravings, prints and lithographs; . . . original artistic assemblages and montages in any material.[166]

This list (hereinafter "UNESCO List") gives broad definitions for art. These definitions can afford to be broad because art requires state designation to be protected. This assuages concerns that the definition is over-inclusive.

The UNIDROIT Convention lists: "cultural objects are those which . . . are of importance for . . . art . . . and belong to one of the categories listed in the Annex to this Convention."[167] The UNIDROIT Annex restates the UNESCO List verbatim.[168] While the UNIDROIT Convention does not have state designation of artwork as a limiting principle, it does have a "limiting" principle: for an object to be protected it must be "of importance for . . . art."[169] One can speculate that this would be interpreted to mean that the artwork must be of importance to the field of art—perhaps some kind of seminal work that began an art movement or a magnum opus by some great artist. Currently, there are no clear answers one way or the other.

While this hardly seems to be limiting at all, it may be a tacit acknowledgement that any attempt to define art will be underinclusive in some way. Having established national and international definitions for art, this note now turns to the question of how NFTs may be considered art.

IV. CLASSIFYING NFTS

There are different definitions for art in both U.S. and International law. It is easy to imagine that NFTs could fit into a broad, vague category of art because an NFT can be represented by anything visual. The question is how NFTs might fit into the definitions of art explained in Part III.

A. NFTs Under U.S. Customs

For an object to be artwork according to the U.S. Customs Definition, it must be (1) an original object; (2) created by hand; (3) by

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[166] UNESCO Convention, *supra* note 63, at Art. 1(g)(i-iv).
[167] UNIDROIT Convention, *supra* note 86, at Art. 2.
[168] *See id.* UNESCO Convention, *supra* note 63, at Art. 1.
[169] UNIDROIT Convention, *supra* note 86, at Art. 1.

an artist; (4) through his or her own inspiration and skill; (5) which cannot be used for utilitarian or commercial purposes.

Regarding originality, Hohfeld NFTs would almost certainly fail. Just as a trading card is not an original piece of art, neither is a Hohfeld NFT. Many Blackstone NFTs also seem to fail the originality element too. Many NFTs are in collections that are procedurally generated or are variations of the same exact design (NFT "bored apes" are a prime example of this).[170] There are, however, some original Blackstone NFT visreps that aren't variations of the same exact design. Those NFTs would pass the originality element.

Assuming that a Blackstone NFT is an original piece, it might fail the second element—being made by hand. As all NFTs require a computer for their creation, the question becomes whether or not being made by someone on a computer qualifies as being made by hand. The Harmonized Schedule was passed only five years after the invention of the modern internet and two years before the world wide web,[171] it did not anticipate the proliferation of the internet or the use of computers to create unique artwork. One of the categories excluded from being considered art are objects made by a mechanical device.[172] Currently, there is no case law on the question of whether computers are mechanical devices. It is difficult to believe, given the inherent differences between mechanical devices and digital devices, that computers would be categorized as mechanical devices. It is possible that NFTs created by an individual—as opposed to being procedural or AI-generated—would likely pass the "handmade" element. For similar reasons, it is possible that many original NFTs, created by an individual, would pass the fourth element of the customs definition: something made through his or her own inspiration and skill.

Even if an NFT satisfies the elements above, the "made by an artist" element would likely prove fatal. Given the strict definition of "artist," it is doubtful whether most NFTs would qualify as being made "by an artist" rather than an "artisan" or an "amateur;"[173] this would certainly exclude any procedural or AI-generated NFTs as well.

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[170] As an aside, the Bored Ape Yacht Club was hacked recently, resulting in the theft of many NFTs. Rich Stanton, *NFT Bored Ape marketplace gets hacked, people lose 'millions' in ape pictures*, PC GAMERS (Apr. 26, 2022) https://www.pcgamer.com/nft-bored-ape-marketplace-gets-hacked-people-lose-millions-in-ape-pictures/.

[171] While the internet was invented in the 1960s, the TCP/IP (IP address) wasn't invented until 1983, while the Harmonized Schedule was passed in 1988. *A Brief History of the Internet*, ONLINE LIBR. LEARNING CTR., https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml (last visited Mar. 6, 2023). The world wide web wasn't invented until two years after the Harmonized Schedule. *Id.*

[172] DUBOFF & KING, *supra* note 112, at 4.

[173] This is assuming that there is some framework to define what an NFT artist is and how to differentiate them from a digital artist.

Assuming an NFT passed the artist creation requirement, the fifth and final element—that the objects cannot be used for utilitarian or commercial purposes—may pose issues. While NFTs could probably get passed the utility exclusion, the noncommercial requirement may be problematic. Many NFTs are created to be sold, some in large collections, this might qualify as commercial activity.

In summary, while the U.S. Customs Definition would be fatal to the vast majority of NFTs—including all Hohfeld NFTs—it is possible to imagine that some Blackstone NFTs may pass muster under the Customs Definition.

B. Visrep Classification

Moving away from the Customs Definition, there is an alternative, simpler classification that could answer the question of whether NFTs are art or not. In Part I, this note analogized NFTs to trading cards. Asking whether NFTs are art is similar to asking whether trading cards are art. There are two primary reasons why this question is difficult: first, the token and its visrep are inseparable parts of one object; second, visreps range drastically in format—comic books, GIFs, tweets, etc. Given the variety of different visreps, it seems simplest to adopt a system of categorization based purely on whether the visrep is art (hereinafter "Visrep Classification"). To use the trading card analogy: if the photo of Michael Jordan on his trading card is art, then the whole trading card is, likewise, art. Just as a comic book is considered art, an NFT that uses a comic book as its visrep is also art. Inversely, because Jack Dorsey's first tweet is not art, the NFT of Jack Dorsey's tweet is also not art.

Superficially, Visrep Classification seems like a panacea, but there are serious issues with this system. First and foremost, Visrep Classification equates the token with its visrep. As explained in Part I, a token and its visrep are not the same, they are inseparable elements of one object. Each token is unique, visreps are not necessarily unique and they can be duplicated and placed on a new token. Second, Visrep Classification punts the issue of whether an NFT is art back down to whether the visrep is art; a question that, as demonstrated by legal attempts to define art, is vague.

Despite its flaws, if courts adopt Visrep Classification as the primary mode of NFT classification, it is certainly possible that NFTs could be categorized as art under U.S. copyright law. As stated earlier, under U.S. copyright law, "[a]n object is art 'if it appears to be within the historical and ordinary conception of the term art.'"[174] Determining

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[174] DARRABY, *supra* note 159, at § 1:8.[175] *Id.* at § 1:7.[176] The UNESCO and UNIDROIT Conventions focus on who is the rightful owner of the artwork after it has been stolen

whether a particular NFT is art would be an ordinary case of art litigation. It is even more likely that NFTs could be categorized as art when one looks to the broader definitions for artwork. To reiterate, courts have found objects to be artistic works if "(1) they sell; (2) creators (or others) offer them for sale as art; or (3) paradoxically, they are designated as art."[175]

Yet, this does not end an NFT art analysis. As elaborated earlier, the unique nature of NFTs and the complex relationship between a token and its visrep means that an NFT art inquiry would involve two steps. First, one would ask whether an NFT was a Blackstone or a Hohfeld NFT. If the NFT is sufficiently "Blackstonian" then courts would proceed to step two of the analysis: whether the visrep is art or not. However, if the NFT is sufficiently "Hohfeldian" courts may be tempted to default to traditional notions of digital property ownership; that is to say, courts might decide that regardless of whether the token is non-fungible, because the visrep is fungible, it is not "original art" but a mere reproduction. Courts may conclude that because a Hohfeld NFT conveys no rights to the visrep beyond the right to display, a Hohfeld NFT is no more artwork than a single copy of a Michael Jordan trading card; or, as stated earlier, courts may default to traditional notions of digital ownership and decide that these NFTs, like most digital assets are inherently fungible.

In summary, if courts were to adopt Visrep Classification, despite its flaws, Blackstone NFTs may be considered artistic works while Hohfeld NFTs face larger obstacles. However, if courts rejected Visrep Classification, NFTs would face an uphill battle for recognition as art.

C. NFTs under International Definitions of Art

The internet is largely international; NFTs and NFT theft are, likewise, international. Whether NFTs can be protected under conventions governing stolen artwork depends on whether NFTs can fit into international definitions of art. Similar to U.S. Law, Blackstone NFTs seem to have a far better chance at recognition than Hohfeld NFTs. International law recognizes the right to title of an original artwork.[176]

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and resold. While the UNIDROIT Convention provides some monetary restitution for a good faith bona fide buyer of a stolen piece, it does not officially recognize a right of possession.

[175] *Id.* at § 1:7.[176] The UNESCO and UNIDROIT Conventions focus on who is the rightful owner of the artwork after it has been stolen and resold. While the UNIDROIT Convention provides some monetary restitution for a good faith bona fide buyer of a stolen piece, it does not officially recognize a right of possession.

[176] The UNESCO and UNIDROIT Conventions focus on who is the rightful owner of the artwork after it has been stolen and resold. While the UNIDROIT Convention

Hohfeld NFTs do not convey title to their visrep, and therefore, are likely unprotected by international art theft law. Thus, only NFTs on the Blackstone side of the spectrum would be in the running for art law protection.

The UNESCO Convention does not offer a solution. Currently, no country has designated an NFT as part of their cultural heritage. Hypothetically, even if a country were to designate an NFT as part of their cultural heritage, it is unclear whether the UNESCO List would encompass *digital* artwork. As odd as this may sound, there is nothing that would explicitly prohibit a country from recognizing something digital as protected artwork. This is a case where Visrep Classification, for all its flaws, would aid in protecting Blackstone NFTs.

The UNESCO Convention provides protections for "pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding . . . manufactured articles decorated by hand)."[177] For original NFTs, one could argue that the language "produced entirely by hand on any support and in any material" could cover using computers (as a "support") to create digital (the medium/"material") artwork.[178] Albeit, this may be stretching the definition too far. This definition would probably exclude procedurally generated collections, such as "bored apes," as it could be argued that the means of generating highly similar images only to be differentiated with handcrafted details, would qualify under the "manufactured articles decorated by hand" exception.

Yet, even these collections might be salvageable under the UNESCO List. The UNESCO List protects "original artistic assemblages and montages in any material."[179] While the originality element is up for debate, one could argue that, because these NFTs are part of a collection, it is a kind of montage or assemblage.

Additionally, there are other ways NFTs might be classified that protect them under the UNESCO Convention even if they aren't considered art. For example, the UNESCO Convention also covers "rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections."[180] This could form the protection for NFT comic books and NFT documents.

While this ends the analysis of NFTs under the Conventions as artwork, it would be remiss to not discuss how NFTs could fall under the other subcategories of cultural artifacts; a classification that would not

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provides some monetary restitution for a good faith bona fide buyer of a stolen piece, it does not officially recognize a right of possession.

[177] UNESCO Convention, *supra* note 63, at Art. 1(g)(i).

[178] *Id.*

[179] *Id.* at Art. 1(g)(iv).

[180] *Id.* at Art. 1(h).

even require resorting to a token's visrep. The UNESCO Convention permits protection for "property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance."[181] While it's not exactly clear from the drafting how important a thinker, scientist, or artist would have to be; theoretically, it could offer protection to both Hohfeld and Blackstone NFTs as their relevance could relate more to the token itself or the token's creator rather than its visrep. The UNESCO Convention also allows protection for "archives, including sound, photographic and cinematographic archives."[182] One could make the argument that the way NFTs are traded and tracked effectively on the blockchain creates an "archive" of ownership, though admittedly, this is less persuasive as really it is the blockchain that keeps track, not the NFT itself.

As the UNIDROIT Convention uses the same list as the UNESCO Convention,[183] the points made above could easily apply to the UNIDROIT Convention. As discussed earlier, though, the UNIDROIT Convention does not limit its applicability to artwork and objects designated by states, rather it limits its applicability to objects that "are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed [in the UNESCO List]."[184] One may argue that certain NFTs are of importance to history, art, and/or (computer) science, but it is doubtful that they would all be significant.

Therefore, while NFTs can be protected as objects of cultural importance, whether NFTs can be classified as art comes down to how one conceptualizes NFTs: a token with a severable visual representation, or the token tied inexorably to its visual representation. The former categorization seems far more legally persuasive, given nothing would stop someone from minting two NFTs and assigning them identical visual representations—even though the tokens themselves are different. However, the latter conceptualization—that the token and visrep are inexorably tied—is more technically persuasive, as there is no way to strip an NFT of its visrep, and might be protected under art theft law. On the other hand, if one adopts the position that the token and its visrep are separate objects, then it seems simple to dismiss arguments that art theft law should apply. For the sake of analysis, this note shall now presume that NFTs are considered art.

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[181] *Id.* at Art. 1(a).
[182] *Id.* at Art. 1(j).
[183] UNIDROIT Convention, *supra* note 86, at Annex *compare with* UNESCO Convention, *supra* note 63, at Art. 1.
[184] UNIDROIT Convention, *supra* note 86, at Art. 2.

V. THEFT & RESTITUTION

Presuming that NFTs are categorized as art, the next question is how this would impact the criminal law and the laws governing restitution.

A. Theft

Due to the interstate and international nature of the internet, federal and international law applies whenever an NFT is stolen. The NSPA, as pointed out earlier, has been amended to prohibit the transfer of stolen securities, money, goods, etc.[185] Under U.S. law, (regardless of whether NFTs are art or not) NFT theft is prosecutable under the NSPA.

The only specific art crime statute that the United States has is the ToMA. It is difficult to picture an NFT theft being prosecuted under ToMA. Similar to the very first conviction for art theft under the NSPA,[186] thieves have stolen NFTs from both private individuals and websites, but none from museums. ToMA requires that a museum be the target of the theft, and it defines exactly what a museum is—categories that are virtually impossible for anyone who is not extraordinarily wealthy to satisfy. However, it is possible that NFT theft could qualify for prosecution under ToMA in one narrow circumstance: if thieves stole an NFT from a museum. Given NFTs' increase in popularity, it is reasonable to assume that at some point a U.S. museum would acquire an NFT. If a thief stole that NFT, then that might satisfy the prima facie case for ToMA, with only one foreseeable issue: tangibility. Recall the definition of a museum in the U.S. Code:

> [An] organized and permanent institution the activities of which affect interstate or foreign commerce . . . established for an essentially educational or aesthetic purpose; has a professional staff; and owns, utilizes, and cares for *tangible objects* that are exhibited to the public on a regular schedule.[187]

While this might initially seem to pose some difficulty for NFTs, the definition doesn't specify that the *stolen* object be tangible, only that the establishment owns, utilizes, and care for tangible objects. In other words, an establishment must own, utilize, and care for tangible objects to be considered a museum, but the stolen artwork does not have to be

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[185] 18 U.S.C. §§ 2314 et seq.
[186] United States v. Hurley, 281 F. Supp. 443 (D. Conn. 1968)..
[187] 18 U.S.C § 668(a)(1).

among those tangible objects. By this logic, it is possible that an NFT stolen from a U.S. museum might fall under ToMA.

When it comes to international law, NFTs would only be recognized as stolen under the UNESCO Convention if a state designates them as art or an object of cultural heritage. The United States, as mentioned beforehand, does not have a system of classification nearly as robust as other countries—even then, most of that classification revolves around American Indian artifacts.[188] Thus, it is highly unlikely there would be a movement in the United States to designate stolen NFTs as objects of cultural heritage. Regardless, it is disputable whether NFTs would qualify as an object of cultural heritage. Similar reasoning would apply when trying to apply the UNIDROIT Convention to NFTs.

Ultimately, whether NFTs are actually art, the international conventions would only aid in the prosecution of criminals if dealers, in buying NFTs, considered them artwork and adhered to the same international requirements that recently led to the conviction of Medici and the downfall of the web of international art theft in Italy. Otherwise, without state designation, there is little hope that NFTs on either side of the Blackstone-Hohfeld Spectrum can be protected.

B. Restitution

While the question of whether NFTs are art does not have much of an effect on criminal prosecution in the United States, it has wide-reaching implications when it comes to international restitution. Ultimately, similar to traditional art theft, the only way for thieves to make money is either by "artnapping" or offloading the NFT to a bona fide buyer.[189]

If NFTs are not art, then, regardless of international conventions on the illicit movement of art, straightforward conflict of law principles apply. This poses difficulties when applying these treaties to NFTs, especially if thieves use services such as Samurai's Whirlpool. If an NFT can bounce between digital wallets in multiple countries, the question is how courts can accurately determine *lex situs*. Countries may have different ways to resolve this under conflict of law principles, but it would be neither easy nor pleasant to navigate the various jurisdictions the NFT touched on its way to a bona fide buyer.

A cleaner answer to this question appears if one looks to *Autocephalous Greek-Orthodox Church*.[190] One could categorize wherever an NFT transaction takes place as a "fleeting transport area,"

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[188] FBI, *supra* note 130.
[189] Chappell & Polk: The Peculiar Problem, *supra* note 41; Neuendorf, *supra* note 42.
[190] Autocephalous Greek-Orthodox Church, 917 F.2d 278 (7th Cir. 1990).

similar to the Swiss freeport where the Defendants in *Autocephalous* bought the stolen mosaics.[191] Thus, a court applying conflict of law principles could ignore the various jurisdictions the stolen NFT passed through and just use the bona fide buyer's home jurisdiction. Unfortunately, this approach would also leave NFT owners open to the same pitfalls as *Winkworth*; if the bona fide buyer exercised due diligence, purchased in good faith, and is in a Good Faith Buyer jurisdiction, then the original owner has no recourse. The only way to avoid application of *lex situs* in a common law country is to sue the bona fide buyer in the buyer's own country—but only if the buyer's country is a signatory of the UNIDROIT Convention. Assuming the original owner is successful, they'll still need to compensate the bona fide buyer. If an NFT is worth millions of dollars, the cost of that compensation may be prohibitive.

Given the nature of NFTs, questions arise about what constitutes good faith and due diligence. In traditional art transactions, bona fide buyers exercised due diligence by checking stolen art registries and other available resources. While lists of famous stolen NFTs are available online,[192] there are currently no widely retained registries of all stolen NFTs—given how easy it is to create NFTs, it may be impossible to ever have a registry of all stolen NFTs—still, it is one step a bona fide buyer could take. As many NFTs have a single image as their visrep, one can imagine performing a reverse image search[193] to scan registries of stolen NFTs. Due to the simplicity of these steps, courts could construe them as the bare minimum for due diligence.

If a bona fide buyer finds no record of the stolen NFT on those registries or through a reverse image search, the buyer can turn to the blockchain. Unlike traditional art, where provenance is not always clear and where art does not have a unique serial number, NFTs do. The entire transaction history for an NFT is on the blockchain. While services like Samurai's Whirlpool may "mix" the NFT, throwing off the original owner's efforts to track it down, a buyer might look at the number and frequency of transactions and immediately be tipped off that something was wrong. While there may be no concrete way to guarantee that an NFT is not stolen—barring an extensive search through the blockchain—there

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[191] *Id.* at 282.

[192] Rebecca Moody, *Worldwide NFT Heists Tracker*, COMPARITECH (Nov. 1, 2022), https://www.comparitech.com/blog/vpn-privacy/nft-heists/.

[193] A reverse image search is a process by which a search engine can take an image and search the web for similar looking images. Matt Golowczynski, *Google Reverse Image Search: Everything You Need to Know*, SMARTFRAME (Nov. 13, 2020), https://smartframe.io/blog/google-reverse-image-search-everything-you-need-to-know/. There are limitations to this technology, for example, reverse image searches—as the name suggests—only work on images and only images that are sufficiently similar.

are certain steps a buyer can take to try and ensure an NFT wasn't stolen. Additionally, stolen NFTs bear certain hallmarks—such as being transferred between many different wallets—that can give buyers an idea of whether an NFT was stolen.

While courts may be tempted to impose a full transaction history search on any prospective NFT purchase as the bare minimum for due diligence, there are two issues with such an approach. The first issue is precisely how far back a bona fide buyer must go to satisfy due diligence. While performing this task might be easier today because NFTs are a new innovation, it will become far more difficult as the blockchain's size balloons and NFTs continue to proliferate. The second issue is whether performing a blockchain search might be too much to ask for non-sophisticated parties especially, as stated previously, because the size of the blockchain grows and the number of NFTs increase.

Continuing with the presumption that NFTs are art, the UNIDROIT Convention not only provides a safety net to original owners but also provides guidance on the factors courts should examine when determining whether a bona fide buyer did their due diligence. Those factors included: the behavior of the transacting parties, the price paid, whether the seller consulted registries of stolen items, and any other relevant information and documentation that a buyer could reasonably have obtained.[194] The last factor—information that a buyer could reasonably have obtained—at least offers some limiting principle the blockchain search. The question shifts from whether a buyer must search the blockchain at all, to how reasonably far the buyer must go in searching the blockchain.

Courts would look at the totality of the circumstances and, hopefully, understanding the complexity of the blockchain, would not expect a bona fide buyer to perform a full forensics work-up before purchasing an NFT, but to do at least some research into where the NFT originated from. On the other hand, perhaps courts would view due diligence differently depending on the cost of the NFT and the sophistication or resources available to the bona fide buyer.

So far, this section has concerned the duties of the bona fide buyer, yet, even in *Nemo Dat* Jurisdictions, the original owner also has duties and responsibilities if they seek to retain ownership. The question of a blockchain search and sophistication of parties is perhaps equally true to original owners when faced with the doctrine of laches and statutes of repose. The owner of a stolen NFT can track down the stolen art full stop, though it is made far more difficult if the NFT is mixed through a service like Samurai's Whirlpool. Original owners have a duty to try and track down their property and to seek restitution. Much like adverse

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[194] *Id.*

possession,[195] failure to assert one's rights is a sure way to lose them. In the context of original owners, courts have found that lack of sophistication is insufficient to defeat a laches defense. In *Greek Orthodox Patriarchate of Jerusalem v. Christie's Inc.*,[196] the court found *inter alia* it was irrelevant to the doctrine of laches that the plaintiff was a monastery with very limited resources to conduct research. Thus, it would seem that a laches defense could hold against an NFT owner who claimed lack of sophistication and resources is what prevented them from tracking their NFT on the blockchain.

Statutes of Repose would also likely cut against an NFT owner. An NFT can easily be lost in the blockchain until the Statue of Repose expires, though admittedly, this could take many years. A patient enough thief however, may take their chances and perpetually mix the NFT until the statute of repose has expired, then sell it to a bona fide buyer. However, there is some hope that these strategies might be futile depending on when exactly the statute of repose tolls and expires.

If it is possible for an original owner to connect the digital wallet address of a bona fide buyer with a specific country or physical location, then the UNIDROIT Convention would aid the original owner in restitution. However, if the country in question is not a signatory of the UNESCO Convention or if the originating country is a common law country applying *lex situs* to a Good Faith Buyer jurisdiction, the original owner would face additional difficulties in recovering their NFTs. Furthermore, due to the digital nature of the artwork, there is nothing stopping a thief from "exporting" the artwork to a wallet address based in a different country to avoid having to return it.

CONCLUSION

It is only recently that NFT theft has raised the question of how to tackle non-fungible goods in a digital world. Indeed, the idea that anything digital could be truly non-fungible is groundbreaking. With the rise of non-fungibile digital assets, it appears that there may be a spot open in the legal lexicon for *digital* art theft, yet the art world—still struggling to adapt to the growing illicit international trade in *physical* art—seems a poor place to look for protection. Not only do attempts to categorize NFTs as art pose theoretical difficulties in art classification that would preclude most NFTs, but their ability to be fluidly transported across borders poses issues for any legal regime that ties legal rights to the NFT's presence in any particular jurisdiction.

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[195] *Adverse Possession*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[196] Greek Orthodox Patriarchate of Jerusalem v. Christie's Inc., 1999 U.S. Dist. LEXIS 13257, 30-34 (S.D.N.Y. 1999).

Whatever the future may hold, NFTs, if they do fit within the scope of art law, do so uncomfortably. As a new technology, it appears that NFTs must either rely on the centuries-old laws of stolen property ownership or the emerging laws governing digital assets. Consequently, NFT owners are at the mercy of the same courts that decided *Winkworth* and the same civil law jurisdictions that favor circulation of property over the original owner's right to title. Until there is some legislative or international initiative to create special laws governing NFTs—which seems unlikely given how long and controversial efforts to create special rules governing traditional art and cultural artifacts—NFTs will continue being treated like any other stolen asset but, as the length of this note demonstrates, NFTs appear to be in a league of their own. While current U.S. law and international conventions struggle to comport with this vision of the future, given the high value of NFTs, it would be worth implementing specific legislation that addresses ownership, theft, and restitution of non-fungible digital assets in both the domestic and international context.