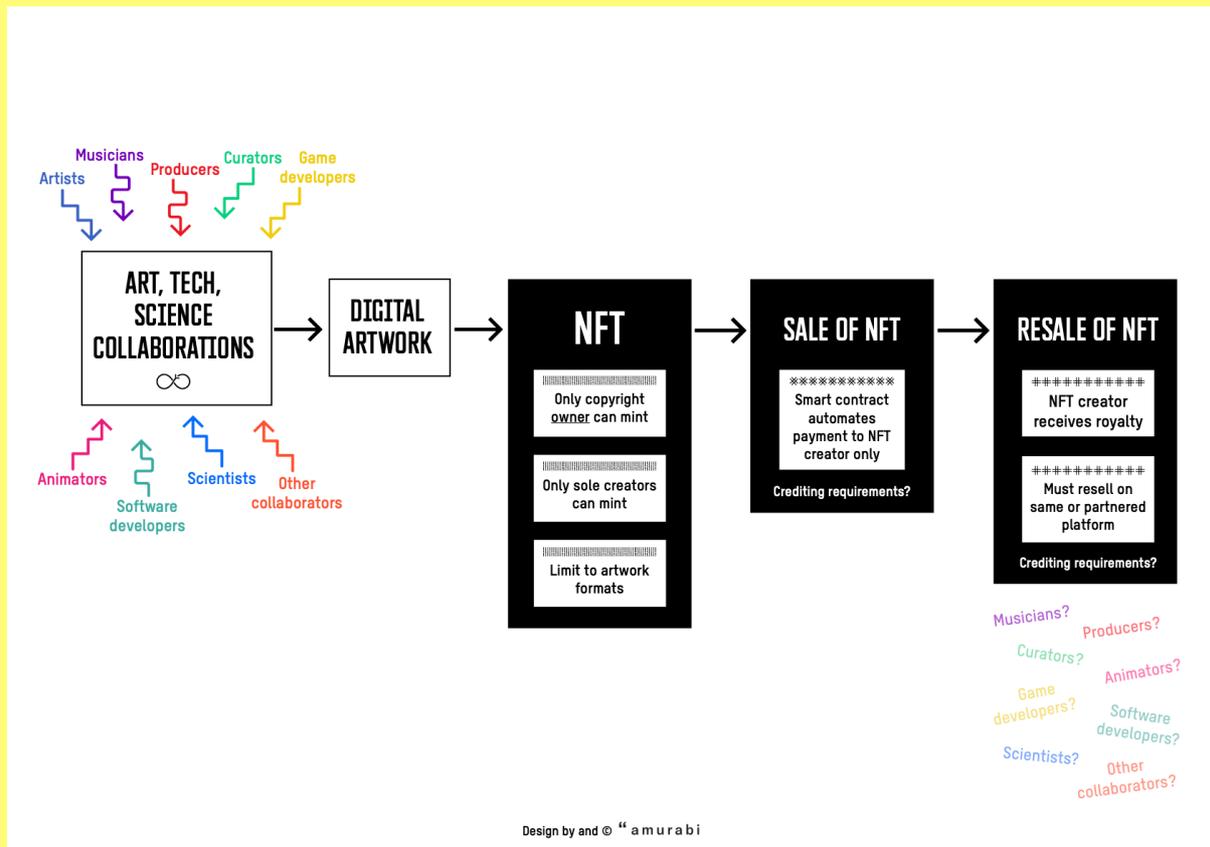


The Legal Ambiguities of Art Collaborations and their Compatibility with NFTs

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Since early 2019, the Serpentine's [Legal Lab](#) has been conducting research on the legal issues experienced when collaborating across art, science and technology. The work is part of the Arts Technologies R&D platform, which proposes critical and interdisciplinary perspectives on advanced technologies through artistic interventions. Through this research we have identified certain misconceptions and gaps in legal knowledge around the ownership and rights to creative outputs that are produced through collaborative processes.

While these findings are the subject of our soon-to-be published Legal Lab Report,² here I examine the more specific question of how collaborations across art and technology are treated from a legal perspective during the minting, selling and reselling of NFTs. This is a pertinent issue that needs to be addressed. As the dust settles on the hype of recent months, caused predominantly by million-dollar purchase prices, now is the time to identify and address whether and to what degree, NFT platforms accommodate the many forms of contemporary art practice. To that end, in this paper I consider how art that is created using multiple authors is treated by the 'T&Cs' of such platforms.³ Website T&Cs, otherwise known as terms and conditions of use, are generally designed as a contract between the website owner and the website user. They set out the terms on which the website can be used, or interacted with, and are typically found in the footer section of a website homepage, so as to be available to all users. To ground this examination, I also consider the factual details of a dispute between an artist and a 3D-modeller over the copyright ownership and sale proceeds of 'the world's first NFT House'.⁴ This dispute is the first broadly publicised example of the tensions between NFTs in their current form and cross-disciplinary collaborations, and is an early warning sign of what is to come.

² The Legal Lab is publishing a report on the legal issues experienced when collaborating across art, science and technology. The findings are based on responses received from over 250 artists, technologists, cultural institutions, funders, academics and lawyers, as well as 30 in-depth interviews. The report is produced in collaboration with [Amurabi](#), with input from the Legal Lab's Advisory Panel.

³ The website terms of service reviewed for this paper are Nifty Gateway, Open Sea, MakersPlace, SuperRare, Foundation and Feral File. At the time of writing, other art NFT platforms such as Rarible, Hic et Nunc and Folia did not have publicly available terms of service on their websites.

⁴ See for example, <https://www.surface-mag.com/articles/crypto-nft-house-fraud/> and <https://www.dezeen.com/2021/03/26/mars-house-fraud-3d-visualiser-nft/>.

Collaborative Authorship and the Minting Process

At the time of writing, the existing platforms for minting art NFTs have primarily been designed to support works that have been created by a singular author. For example, SuperRare requires approved artists who are ‘Whitelisted’ and granted permission to mint ‘Superare Items’ to ‘only mint works that they personally created’.⁵ When applied in practice, this requirement can be somewhat limiting. For example, consider a scenario where an artist commissions a CGI animator to create an animation based on their instructions. It is unclear whether the product of such a collaboration would be considered a personal creation of the artist, such that SuperRare would permit the artist to mint the work. The SuperRare Copyright and Community Guidelines thoughtfully address ‘Works Made for Hire’ by encouraging artists to consider whether their contribution forms part of an employment or ‘works made for hire’ arrangement, but they have not been drafted to capture the common scenario of the artist being the person ‘doing the hiring’, so to speak.

This singular author approach is at odds with many artworks that involve advanced technologies like VR, XR, machine learning, robotics to name a few, in their creation or as part of their presentation. Through the Legal Lab’s research, we have come to understand that one of the primary reasons why artists collaborate with individuals or organisations from other disciplines is to realise projects they would not have the ability to make on their own. However, because of the nature of the T&Cs, including a guarantee from the artist that they are the sole author and owner of the work, the existing NFT platforms do not appear to have the scope at present to accommodate such forms of collaborative practice. This is reinforced by the SuperRare Copyright and Community Guidelines, for example, which provide that ‘As an Artist, you can improve on your own reputation and add value to the SuperRare community by following these guidelines: Mint only original, non-infringing works *that you actually*

⁵ SuperRare Terms of Service: <https://www.notion.so/SuperRare-Terms-of-Service-075a82773af34aab99dde323f5aa044e>. The SuperRare Copyright Community Guidelines and Policies also expressly address joint works, noting that ‘Currently, SuperRare does not facilitate the joint-minting of digital artworks and expects its Artists to work with each other in sharing profits received from jointly created works. SuperRare is working on ways to increase the flexibility and modularity of its market mechanics and aims to support these types of features in the future.’ See: <https://www.notion.so/SuperRare-Copyright-Community-Guidelines-and-Policies-63a40f925a57471aabdc0b0f5>.

and personally created.' If these guidelines are followed, then the status of digital artworks that involve the contribution of more than one person is uncertain. This would appear to be the case even if, from a legal perspective, the artist completes their due diligence by arranging for all of the copy-rights that attach to the work to be assigned to them, including the rights to reproduce and otherwise exploit the copyright in the work.

The T&Cs of other platforms maintain similar, limited assumptions about the nature of the production of an artwork. Foundation provides that 'The Creator owns all legal right, title, and interest in all intellectual property rights underlying the Digital Artwork minted by the Creator on the Platform, including but not limited to copyrights and trademarks. As the copyright owner, the Creator has the right to reproduce, prepare derivative Digital Artwork, distribute, and display or perform the Digital Atwork.'⁶ But what if an NFT creator has been granted by a collaborator a licence (in plain English, permission) to 'reproduce, prepare derivative Digital Artwork, [and] distribute' the artwork? Why is sole ownership and an exclusive legal right, title and interest in all intellectual property rights expected of the NFT creator? From the point of view of the platform, it is understandable that they may wish to reduce the risk of being on the receiving end of copyright infringement claims. However, I would query whether such stringent expectations are necessary to effectively reduce that risk. A more inclusive understanding of creators and the varied nature of producing digital artwork should be accommodated.

Distributing Payments for Collaborators and the First Sale Process

The first sale of an NFT from the NFT creator to a buyer also raises a number of legal ambiguities. One of the main areas of focus in recent legal explainers on NFTs has been the question of ownership, and how to categorise what exactly is

⁶ Foundation Terms of Service: <https://foundation.app/terms>.

purchased when one buys an NFT.⁷ Generally, a purchaser of an NFT does not obtain the legal title to the digital file of the artwork. The purchaser becomes the owner of the legal title to a chain of letters and numbers, which in most cases uses the ERC-721 standard and includes certain parameters, such as a parameter pointing to where the digital file of the artwork is stored and a parameter pointing to who should receive the sale proceeds when a transaction occurs, hence the concept of the ‘smart’ contract.⁸ That chain of numbers, with its ERC-721 standard and parameters, is registered to a specific block in the blockchain on which the NFT platform is built when a sale or purchase occurs. Most NFT platforms generally design the parameters for their NFT’s so that the person who minted the NFT will automatically receive the sale proceeds, minus a commission that is taken by the

⁷ See, for example, Georgina Adam, ‘But is it legal? The baffling world of NFT copyright and ownership issues’, *The Art Newspaper*, 6 April 2021, <https://www.theartnewspaper.com/analysis/but-is-it-legal-the-baffling-world-of-nft-copyright-and-ownership-questions>; Luke Heemsbergen, ‘NFTs Explained: What They Are and Why They Are Selling for Millions of Dollars’, *The Fashion Law*, 11 March 2021, <https://www.thefashionlaw.com/nfts-explained-what-they-are-and-why-they-are-selling-for-millions-of-dollars/>; Preston Byrne, ‘5 Legal Considerations When Dealing in NFTs’, *Coindesk*, 16 March 2021, <https://www.coindesk.com/5-legal-considerations-when-dealing-in-nfts>. More in-depth legal analyses are Andrez Guadamuz, ‘Copyfraud and copyright infringement in NFTs’, *Technollama* blog, 14 March 2021, <https://www.technollama.co.uk/copyfraud-and-copyright-infringement-in-nfts>; Eleonora Rosati, ‘Copyright & NFTs of Digital Artworks’, *The IP Kat*, 23 March 2021, <https://ipkitten.blogspot.com/2021/03/guest-post-copyright-nfts-of-digital.html>, Daniel S. Cohen, Clifford C. Histed et al, ‘The Coming Blockchain Revolution in Consumption of Digital Art and Music: The Thinking Lawyer’s Guide to Non-Fungible Tokens (NFTs)’, *K&L Gates* blog, 25 March 2021, <https://www.klgates.com/The-Coming-Blockchain-Revolution-in-Consumption-of-Digital-Art-and-Music-The-Thinking-Lawyers-Guide-to-Non-Fungible-Tokens-NFTs-3-25-2021>. See also above-mentioned podcast discussion. For earlier pioneering legal commentary published prior to 2021 in the art, law and NFT space see, e.g. Cynthia Gayton’s LinkedIn articles published between 2017 and 2019, including ‘Tokens, Branding and Digital Assets’, <https://www.linkedin.com/pulse/tokens-branding-digital-assets-cynthia-gayton>, published 20 June 2017, ‘Smart Contracts, Cryptocurrency and Taxes – For Artists’, <https://www.linkedin.com/pulse/smart-contracts-cryptocurrency-taxes-artists-cynthia-gayton>, published 24 October 2017; ‘Crypto Assets and the Arts: What I’ll be thinking about in 2018’, <https://www.linkedin.com/pulse/crypto-assets-arts-what-ill-thinking-2018-cynthia-gayton/>, published 3 January 2018; ‘Blockchain and Cryptocurrency Year in Review – CryptoArt, CryptoMusic, IP and Contracts’ <https://www.linkedin.com/pulse/blockchain-cryptocurrency-year-review-cryptoart-ip-contracts>, published 31 December 2018; Mina Krzysnik, ‘Non-Fungible Tokens – From a Legal Perspective’, *ALTCOIN Magazine*, 26 February 2019, <https://medium.com/the-capital/non-fungible-tokens-from-a-legal-perspective-51de03ea0b06>; Tonya M. Evans, ‘Cryptokitties, Cryptography, and Copyright’, *AIPLA Quarterly Journal* 47, no. 2 (Spring 2019): 219-266; Thomas N. Doty, ‘Blockchain Will Reshape Representation of Creative Talent’, *UMKC Law Review* 88, no. 2 (Winter 2019): 351–64; Katya Fisher, ‘Once upon a Time in NFT: Blockchain, Copyright, and the Right of First Sale Doctrine’, *Cardozo Arts & Entertainment Law Journal* 37, no. 3 (2019): 629–34.

⁸ Another line of legal questioning around smart contracts is: how ‘smart’ are they? Notwithstanding its name, a smart contract may not necessarily be enforceable as a legally binding contract in a court of law. In order to be enforceable in a court of law, the smart contract must fulfill the requirements of contract formation, which can differ from jurisdiction to jurisdiction. The enforceability of a smart contract in a court of law has not, to our knowledge, been tested in a court of law to date.

platform.⁹ At the time of writing, the smart contracts integrated into the Nifty Gateway, OpenSea, Rarible, Foundation, SuperRare and Feral File do not provide for a third party such as a collaborator to receive a portion of the sale automatically.

The difficulties with these smart contract limitations have recently come to light in a widely publicised dispute involving the sale of an NFT house by artist Krista Kim on the SuperRare platform. As part of the creation of Mars House, Kim engaged a 3D-modeller to create visualisations of the house, and commissioned musician Jeff Schroeder of The Smashing Pumpkins to produce a soundtrack to accompany the visual elements. Kim minted the digital file of Mars House using SuperRare in February 2021. The NFT sold to an anonymous buyer for 288 Ether (at the time of sale this equated to USD \$514,558) in March 2021. The description of the NFT included the conditions of purchase that 'The collector agrees to own one copy of Mars House NFT on a single Metaverse platform. The collector is required to register Mars House NFT ownership with Krista Kim Studio Inc.' and that 'Krista Kim Studio Inc. retains ownership of Mars House NFT copyright. All rights reserved. All reproductions of Mars House (NFT) in both digital and physical formats, are restricted.'¹⁰ The 3D-modeller described the sale as a 'fraud', adding that 'I have created the project with my own hands, combined with her direction. I do possess the full intellectual property.'¹¹ Like many disputes surrounding transactions involving art that occur through more 'traditional' industry sales streams, these varying expectations of collaborators tend to be brought to light only when a transaction involving the artwork is about to, or already has, occurred.

Royalties and Conditions of Sale in the Resale Process

⁹ The commission fee paid to the NFT platform varies substantially from platform to platform and is generally addressed in the T&Cs. For example, Foundation takes a commission of 15% of the total initial sale on the platform, while Feral File takes a commission of 33% percent. The enforceability of a smart contract in a court of law has not, to our knowledge, been tested in a court of law to date. It is also important to note that once someone purchases the NFT, there is no obligation on the owner to retain any of the parameters, which could technically be rewritten if the owner chooses to.

¹⁰ See listing on SuperRare: <https://superrare.co/artwork-v2/mars-house-21383>.

¹¹ Tom Ravenscroft, 'Dispute breaks out over ownership of world's first NFT house', *Dezeen*, 26 March 2021, <https://www.dezeen.com/2021/03/26/mars-house-fraud-3d-visualiser-nft/>.

When it comes to the secondary or further resale of an NFT, legal commentary has primarily centred on the payment of a royalty component to the NFT creator. While a resale royalty is a legislated requirement in more than 70 countries, including in the EU,¹² the UK, Russia, Brazil and Australia (but notably not the US),¹³ one of the key benefits touted by many NFT platforms is that the payment of a royalty is automated as part of the transaction. At the time of writing, a number of the more established NFT platforms such as Nifty Gateway, OpenSea and Rarible have built the payment of a resale royalty into their smart contracts, but have not expressly addressed the resale royalty component in their T&Cs. In this respect, the T&Cs of a platform like SuperRare offer a useful point of difference, since they expressly address the automated collection and disbursement of fees by the smart contracts they use.¹⁴

Along with royalty considerations, the resale of an NFT also raises issues regarding the distribution of copyright licence rights. Another interesting aspect of the NFT house sale was the condition Kim imposed on the first buyer that ‘If/when Mars House is resold, the collector is required to delete all Mars House NFT 3D file(s) from his/her Metaverse, and provide verification of deletion to Krista Kim Studio Inc. before new 3D files are transferred to the new owner by the artist.’¹⁵ Here, the transferring of the digital file(s) to the purchaser as part of the transaction so that the purchaser can benefit from the personal use of the artwork is additional to the transfer of the NFT to the purchaser. In some instances, the T&Cs may also specify how such a transferred digital file may be distributed by an initial or secondary purchaser. Importantly, all T&Cs also specify how the digital file can be used by the platform itself. For example, Foundation provides that:

¹² The Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art required that EU countries implement legislation providing for resale royalties to visual artists by 1 January 2006.

¹³ The resale right was introduced in the UK with the Artist Resale Right Regulations 2006. Commentary on whether the right should be revoked post-Brexit includes Ivan Macquisten, ‘Should post-Brexit UK Get Rid of the Artist’s Resale Right?’, *The Art Newspaper*, 27 January 2021, <https://www.theartnewspaper.com/comment/artist-resale-right-comment>.

¹⁴ The SuperRare T&Cs state: ‘The User agrees and understands that all fees, commissions, and royalties are transferred, processed, or initiated directly through one or more of the Smart Contracts on the Ethereum blockchain network’, and ‘The User consents to the automated collection and disbursement to Artists of royalties for Secondary Market sales of SuperRare Items.’

¹⁵ See listing on SuperRare: <https://superrare.co/artwork-v2/mars-house-21383>.

The Creator hereby acknowledges, understands, and agrees that launching a Digital Artwork on Foundation constitutes an express and affirmative grant to Foundation, its affiliates and successors a non-exclusive, world-wide, assignable, sublicensable, perpetual, and royalty-free license to make copies of, display, perform, reproduce, and distribute the Digital Artwork on any media whether now known or later discovered for the broad purpose of operating, promoting, sharing, developing, marketing, and advertising the Platform, or any other purpose related to Foundation.

The scope of this permission to distribute – the use of the Digital Artwork being for any purpose related to Foundation – is very broad. Similarly, the rights that Foundation gains, including the right to transfer to others their licence to the Digital Artwork for a fee that the NFT creator will not receive, is also very broad. The language itself bears some resemblance to the copyright licences granted by users to social media platforms. For Instagram, for example, the following permission is granted from the user to the platform:

When you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings).

The downside of the NFT platform royalty payment initiatives is that, similar to the minting process, the automatic royalty payments have primarily been designed to support works that have been created by a singular author. This leaves us with the question: in the case of a collaborative work, is there an obligation on the NFT creator to distribute that royalty to the other collaborators? At the time of writing, such an obligation has not been built into any of the T&Cs.

Moral Rights and the Crediting of Author Collaborators

Another legal ambiguity arising during the resale and distribution phase of the NFT relates to moral rights. As a minimum standard set by the Berne Convention for the Protection of Literary and Artistic Works, the moral right to claim authorship of a copyright-protected work has been legislated for in most jurisdictions.¹⁶ Unlike copyrights, moral rights are not transferable and remain with the person(s) who in the eyes of the law of a relevant jurisdiction, are the authors of the work. In other words, the moral rights to a work, or at least a part of a work, could be claimed by someone in the collaborative project in addition to the ‘artist’, like the CGI animator, for example. Therefore, when the purchaser of an NFT uses the digital artwork file in accordance with the scope of permissions they have been granted, they may be legally obligated to attribute the CGI animator as the author of the work, irrespective of whether the CGI animator is the NFT creator, or is not claiming to be the ‘artist’ of the project. In addition to any such applicable legal requirements, through the Legal Lab’s research we have also come to understand that crediting the contributors to a creative project is an important component of collaborative practice. For example, a technologist who has contributed to the work of an artist may want to be credited by future users of the work, particularly where they feel that they have not been remunerated in the same way that they would have had they been engaged by a tech company, for example. When an NFT is sold and resold, are the crediting expectations of collaborators made apparent to those involved in the transaction? Through their T&Cs the NFT platforms have tended to limit their liability (at least to the extent permitted by law) in relation to legal claims made against them, and this could potentially extend to the non-attribution of co-authors of a work by a purchaser. More could be done by the NFT platforms to standardise the crediting of authors and even co-authors using their T&Cs and the other material made available through their website.

What Next?

¹⁶ For a full text version and useful summary of the Berne Convention for the Protection of Literary and Artistic Works, see the World Intellectual Property Organization (WIPO)’s resources on WIPO-administered Treaties, <https://www.wipo.int/treaties/en/ip/berne/>.

Collaborative practices, particularly those at the intersection of art and technology, are at the heart of the future art ecosystem. Therefore, it is important for artists and their collaborators to discuss, plan and agree on what rights they have to their collaborative projects. The platforms that support the minting, sale and resale of NFTs have enormous potential to strengthen the infrastructure of the digital art market. This potential could be tapped into with the design and implementation of T&Cs that are more art-friendly, artist-friendly, user-friendly and consistent.

By facilitating and encouraging the NFT process, NFT platforms have a responsibility to take more proactive steps to understand and address the legal ambiguities of collaboration. If these steps are not taken, and disputes around the rights and ownership of NFTs grow, NFT platforms will risk breaking the trust of their users, and therefore their reputations. As with any online platform, the relationship of trust with the user, and the social obligation to take care of the user via the content they share, is crucial to their longevity.

As the next wave of NFT intermediary platforms arrives, as well as the first wave of NFT vaults, some more considered attempts to build rights for artists into the NFT process are underway. For example, K21 by Kanon, a closed-end art vault of 21 curated NFT artworks, 'brings museological best practices for the documentation and preservation of digitally based art on-chain through KSPEC, Kanon's open-source protocol for extending the ERC-721 NFT standard. KSPEC allows for complex artworks, their provenance, their curatorial context, and the artist's identity and intent to be preserved indefinitely and transparently. K21 will be the first KSPEC compliant NFT collection.'¹⁷ Extending the ERC-721 NFT standard to account for the artist's identity is one such way in which works that have been created by artists together with collaborators can be better supported by the NFT process.

The Gnosis Safe Multisig is a new multi-signature wallet whose platform 'allows co-owners to set granular signatory rights' and 'allows artists to split profits from their collaborative work' through a cryptographically enforced governance mechanism. All

¹⁷ See the Kanon 'lite' paper at <https://docsend.com/view/ukxh9eqentdfas6i>.

wallet signatories must approve a transaction before it can occur.¹⁸ Another soon-to-be launched NFT intermediary platform, BC/A or blockchain.art will allow artists and their representing galleries to incorporate the terms of sale for specific works in the BC/A smart contract system.¹⁹ These considerations – of the multiple players who work together to create, sell and distribute art – hold greater promise for supporting collaborative practice in the future.

To stay up to date with the Serpentine Legal Lab, please subscribe to Serpentine R&D Platform -- [Future Art Ecosystems newsletter](#).

The contents of this article are not legal advice and should not be considered as such. If you require legal advice in the area of art and tech (or otherwise) we can recommend a suitable lawyer in your jurisdiction. Get in touch with us at legallab@serpentinegalleries.org.

¹⁸ See Kei Kreutler, 'Inventories, Not Identities: Why multisigs are the future of online accounts', Gnosis, 1 April 2021, <https://blog.gnosis.pm/inventories-not-identities-7da9a4ec5a3e>. See also the Cargo platform, which allows NFT creators to set up split payments and royalties for individual NFT sales with up to 15 different Ethereum wallet addresses, <https://docs.cargo.build>.

¹⁹ <https://blockchain.art>. Although out of the scope of this paper, another innovative NFT proposition is CXIP, which allows artists to mint their (US) copyright registrations: <https://cxip.medium.com/cxip-copyright-registrations-as-nfts-6a04e9d1d198>.