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b. Indefinite Terms for NFTs

The lack of a limited term for NFTs may present a problem if they are used to effectively extend the term of an expired copyright and deprive the public of use of the work in the public domain. This raises a more complex issue, but one that is unlikely to result in preemption.

First, there should be no preemption based simply on selling an NFT for an associated artwork whose copyright has expired—as long as the public can freely use the artwork in the public domain. In this situation, selling the NFT is analogous to selling a Picasso painting whose copyright has expired.<sup>500</sup> Selling the Picasso painting is not preempted by copyright law after the copyright expired, even if the Picasso painting commands great value. The same should hold true with the sale of an NFT for an artwork whose copyright expired. The public's enjoyment of the Picasso is not impaired by the sale.

More difficult is the issue raised by the collection of NFT resale royalties after the copyright has expired. In *Kimble v. Marvel Entertainment*, applying *stare decisis* based on its prior precedent, the Supreme Court held the Constitution's requirement of a limited term for patents preempted a license requiring royalties to use a patented invention after its patent expired.<sup>501</sup> However, a typical scenario with NFTs is distinguishable from *Kimble*. A copyrighted work whose term expires would fall into the public domain, even if it is associated with an NFT with an unlimited term.<sup>502</sup> Once in the public domain, the work is free for everyone to copy and exploit.<sup>503</sup> Unlike the situation in *Kimble* in which the patent licensee had to continue to pay royalties to use the invention (a Spider-

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497. *See id.* at 70–72.

498. *Id.* at 72.

499. *See id.* at 65, 72.

500. *See Picasso: Works Entering the Public Domain in 2019*, ART STORY, <https://www.theartstory.org/blog/picasso-works-entering-the-public-domain-in-2019/> (last visited Mar. 3, 2023) [<https://perma.cc/WK9C-FAGN>].

501. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 465 (2015); *Brulotte v. Thys Co.*, 379 U.S. 29, 32–33 (1964).

502. *See supra* Subsection III.C.8.b.

503. *See supra* notes 167–72 and accompanying text.

Man toy) after the patent expired,<sup>504</sup> a buyer of an NFT does not have to pay royalties to use the work of authorship after the copyright expired.<sup>505</sup> The NFT is just the virtual token; it is not the artwork associated with the NFT. Just as any member of the public, the buyer can make unlimited uses of the artwork in the public domain without any payment of royalties. A resale royalty is collected only in the sale of the NFT.<sup>506</sup> For example, imagine the Picasso estate sold NFTs for Picasso's artworks whose copyrights had expired. As long as the public, including the NFT owners who are subject to the license, can freely exploit the Picasso artworks without any payment, there is no conflict with the limited term of copyright. That's what distinguishes this situation from *Kimble*, where the licensee had to continue to pay royalties simply to use the invention. But, here, the resale royalty for the NFT sale does not diminish the public's enjoyment of the artworks in the public domain.

### B. *Skepticism of NFTs*

NFTs have evoked much skepticism. It goes beyond the scope of this Article to address all the various criticisms, but let me address two: the charges that NFTs are scams and that they do not provide meaningful ownership in anything of value.

A common attack on NFTs is that they are scams, shell games, Ponzi schemes, or some other word that denotes fraud or suspicious activity.<sup>507</sup> To understand this criticism, we must untangle two different charges: first, that NFTs can be used to scam people, and second, that NFTs are inherently scams. The first charge no doubt has some validity. Borrowing Justice Holmes' phrase, "bad men" have created and sold NFTs without the rights to the associated artwork or tricked people to believe a "roadmap" of future development for the NFT ecosystem only to get "rugged" by the NFT creators, who disappear into the night with the money.<sup>508</sup> Of course, our current copyright, patent, and trademark systems are not immune from scams and predatory tactics and trolling.<sup>509</sup> No one

504. See *Kimble*, 576 U.S. at 449.

505. See *supra* notes 167–72 and accompanying text.

506. See Kent, *supra* note 356.

507. See Samantha Hisson, *NFT Scams Are Everywhere. Here's How to Avoid Them*, ROLLING STONE (Jan. 24, 2022), <https://www.rollingstone.com/culture/culture-features/nft-crypto-scams-how-to-not-get-scamed-1286614/> [<https://perma.cc/ZXK7-Z7H8>].

508. See *id.*; Tim Copeland, *Supposed 17-year-old Artist Sells \$138,000 Worth of Fake NFTs and Disappears*, BLOCK (Sept. 30, 2021, 11:38 AM), <https://www.theblockcrypto.com/post/119150/supposed-17-year-old-artist-sells-138000-worth-of-fake-nfts-and-disappears> [<https://perma.cc/6WAQ-4B2Q>]; OpenSea (@opensea), TWITTER (Jan. 27, 2022, 5:26 PM), <https://twitter.com/opensea/status/1486843201352716289?s=20&t=H9gU6wR000oLct6ED3RLqQ> [<https://perma.cc/29FB-Q6F6>].

509. See Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 571, 576–79 (2018); Stefan Lederer, *The Growing Problem of U.S. Patent Trolls, and What Should Happen Next*, FORBES (July 22, 2021, 7:20 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/07/22/the-growing-problem-of-us-patent-trolls-and-what-should-happen-next/> [<https://perma.cc/PH8W-62HE>]; Beth Kowitz, *China Is Flooding the U.S. with Trademark Applications and No One Is Sure Why*, FORTUNE (July 1, 2021, 8:00 AM), <https://fortune.com/2021/07/01/china-us-trademark-applications-uspto/> [<https://perma.cc/5VKH-ZFZR>]; Lisa Bollinger Gehman, *USPTO Sanctions Chinese Law Firm for Fraud and Terminates More*

seriously contends that such scams and frauds mean we should put an end to all copyrights, patents, and trademarks. Nor should the concern about scams in some NFTs mean that we should put an end to all NFTs. It's a non sequitur. The proper response is not to ban the technology of NFTs, but instead, to prosecute the wrongdoers. The Department of Justice has already begun to do so, indicting several NFT creators for alleged "rug pulls" in launching NFT projects with promises of future perks, only to abscond with the money from the NFT sales.<sup>510</sup>

The second charge of scams is even broader and more categorical. It charges that all NFTs are inherently scams or suspect—meaning that it's not just some bad apples among NFTs, but the fruit itself should be forbidden. Related to this charge, I believe, is a notion that ownership in a virtual token is not truly giving NFT buyers anything of real value (*i.e.*, the scarcity or uniqueness is artificially constructed on blockchain).<sup>511</sup>

What these critics miss, however, is that NFTs have already created a new type of virtual ownership that many businesses and people already value. In a free market, people decide for themselves the price they are willing to buy or sell an item. As Milton Friedman and Rose Friedman explained in their book *Free to Choose*: "Adam Smith's key insight was that both parties to an exchange can benefit and that, *so long as cooperation is strictly voluntary*, no exchange will take place unless both parties do benefit."<sup>512</sup> In other words, we let the market decide whether something has any value—and, if so, what value. Critics might respond that NFTs are different from other consumer items because they are virtual abstractions of something else. That is true to some extent, but we have no shortage of financial contracts and instruments that are abstractions of something else. A stock is an abstract ownership interest in a company.<sup>513</sup> The whole class of derivatives are abstract ownership interests in various financial assets and arrangements.<sup>514</sup> Given the pervasive trading of abstract ownership interests in the financial markets, it's unclear why NFTs should be viewed as inherently suspect. The fact that \$27 billion worth of NFTs exchanged hands in 2021 alone<sup>515</sup>—

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than 15,000 US Trademark Applications, JD SUPRA (Dec. 23, 2021), <https://www.jdsupra.com/legalnews/uspto-sanctions-chinese-law-firm-for-5857642/> [<https://perma.cc/K7UH-BJ6X>].

510. See Sander Lutz, *DOJ Files Charges Against Alleged Mutant Ape Planet NFT Rug Pull*, DECRYPT (Jan. 5, 2023), <https://decrypt.co/118530/doj-charges-mutant-ape-planet-nft-rug-pull> [<https://perma.cc/5F38-NFZZ>].

511. See, e.g., Christie Smythe, *The Backlash Against NFTs: Why One Artist Says They're a "Classic Ponzi Scheme"*, BUS. OF BUS. (Dec. 12, 2021, 5:52 PM), <https://www.businessofbusiness.com/articles/the-backlash-against-nfts-one-artist-says-theyre-a-classic-ponzi-scheme-fraud-theft-crypto/> [<https://perma.cc/E83D-PDCZ>] (quoting artist Eriana Ura-Smith: "My initial impression of NFTs were that the idea of creating artificial scarcity for an infinitely replicable product was a fool's errand at best, and an obvious scam at worst. Nothing I have learned about them in my extensive research since has disabused me of that notion.").

512. See MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* 1–2 (1980) (emphasis added).

513. See Adam Hayes, *Stocks: What They Are, Main Types, How They Differ from Bonds*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/stock.asp> (July 6, 2022) [<https://perma.cc/59YK-X4QU>].

514. See Jason Fernando, *Derivatives: Types, Considerations, and Pros and Cons*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/derivative.asp> (July 15, 2022) [<https://perma.cc/Z2AH-8BP7>].

515. Nat Rubio-Licht, *NFT Sales Reached \$27 Billion this Year*, PROTOCOL (Dec. 6, 2021), <https://www.protocol.com/bulletins/nft-sales-2021> [<https://perma.cc/2PVB-XPWD>].



without the sky falling—should allay some of these concerns. Many big businesses, ranging from Adidas to Budweiser to Chipotle to the Gap to Lamborghini to Mattel to McDonald’s to the NBA to Nike to Ralph Lauren to Robert Mondavi to Starbucks to Taco Bell to Walmart to Walt Disney, are selling or developing NFTs.<sup>516</sup> Disney CEO Robert Iger even predicted “an explosion of things being created, traded, collected in NFTs.”<sup>517</sup>

This business development reflects the ways in which our lives are becoming more virtual—which will only accelerate with the release of eyewear and headsets for virtual and mixed reality from Apple, Samsung, and other tech companies.<sup>518</sup>

The utility and legitimacy of NFTs for artistic works are evident in the acquisitions, exhibitions, and sales of NFTs by leading art institutions around the world, including the Centre Pompidou in Paris, the Museum of Modern Art in New York City, the Los Angeles County Museum of Art, and the State Hermitage Museum in Russia.<sup>519</sup> No one accuses these art institutions of engaging in Ponzi schemes to deceive the public. As the leading art institutions acquire NFTs for their permanent collections, many others will follow suit.

## V. CONCLUSION

This Article is the first to elaborate a theory of decentralized intellectual property to explain the phenomenon of NFTs. Like the current movement to adopt decentralized finance, De-IP utilizes blockchain technology to provide an alternative, decentralized way to engage in activities that have traditionally been

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516. See Nftjedi, *List of Businesses Adopting or Developing NFTs*, NOUNFT (Feb. 1, 2022), <https://nounft.com/2022/02/01/list-of-businesses-adopting-or-developing-nfts/> [<https://perma.cc/PAH8-2QLU>]; Kate Irwin, *Starbucks Polygon NFTs Are Already Selling for Thousands*, DECRYPT (Feb. 16, 2023), <https://decrypt.co/121552/starbucks-polygon-nfts-already-selling-thousands> [[perma.cc/AL4P-2XE6](https://perma.cc/AL4P-2XE6)]; *Starbucks Brewing Revolutionary Web3 Experience for its Starbucks Rewards Members*, STARBUCKS (Sept. 12, 2022), <https://stories.starbucks.com/press/2022/starbucks-brewing-revolutionary-web3-experience-for-its-starbucks-rewards-members/> [[perma.cc/A6UG-KVKX](https://perma.cc/A6UG-KVKX)]; Chris Katje, *NFT Possibilities For Disney Are ‘Extraordinary’: How Bob Iger’s Return Could Propel Web3 Growth*, BENZINGA (Nov. 21, 2022, 11:08 AM), <https://www.benzinga.com/markets/cryptocurrency/22/11/29807443/nft-possibilities-for-disney-are-extraordinary-how-bob-igers-return-could-propel-web3-grow> [[perma.cc/9Y5N-PGGF](https://perma.cc/9Y5N-PGGF)].

517. Stephen Graves, *Former Disney CEO Bob Iger Predicts NFT ‘Explosion’*, DECRYPT (Feb. 1, 2022), <https://decrypt.co/91661/former-disney-ceo-bob-iger-predicts-nft-explosion> [[perma.cc/63NG-WPLJ](https://perma.cc/63NG-WPLJ)].

518. See Scott Stein, *Apple’s AR/VR Headset: What to Expect in 2023*, CNET (Jan. 26, 2023, 5:00 AM), <https://www.cnet.com/tech/computing/apple-ar-vr-headset-rumors-m2-2022/> [[perma.cc/64BX-QU6V](https://perma.cc/64BX-QU6V)].

519. See Dorian Batycka, *Paris’s Centre Pompidou Breaks New Ground by Acquiring 18 NFTs*, ART NEWSPAPER (Feb. 14, 2023), <https://www.theartnewspaper.com/2023/02/14/pariss-centre-pompidou-breaks-new-ground-by-acquiring-18-nfts> [[perma.cc/G5C6-NSWR](https://perma.cc/G5C6-NSWR)]; Kelly Crow, *\$70 Million in Art at MoMA to Be Sold to Extend Museum’s Digital Reach*, WALL ST. J. (Sept. 13, 2022, 9:00 PM), <https://www.wsj.com/articles/70-million-in-art-at-moma-to-be-sold-to-extend-museums-digital-reach-11663117201> [[perma.cc/5UQN-CBF9](https://perma.cc/5UQN-CBF9)]; Cam Thompson, *NFT Influencer Cozomo de’ Medici Donates 22 Digital Artworks to LACMA*, COINDESK (Feb. 13, 2023, 3:37 PM), <https://www.coindesk.com/web3/2023/02/13/nft-influencer-cozomo-de-medici-donates-22-digital-artworks-to-lacma/> [<https://perma.cc/6TQX-KCR9>]; Scott Reyburn, *Museums Are Cashing In on NFTs*, N.Y. TIMES (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/arts/design/museums-nfts.html> [<https://perma.cc/8Z8U-3M8E>].

governed by a highly centralized regulatory system, typically involving the government and dominant intermediaries. The primary vehicle for De-IP is a new technology called the non-fungible token, which consists of a computer program called a smart-contract that authenticates a virtual token on blockchain and a content license that sets forth the use and ownership rights (if any) that the NFT buyer receives.<sup>520</sup> Although critics may object that De-IP does not adequately consider the public interest in how the copyright system should be reformed, both republican theory of deliberation and the ongoing public debate on social media and via decentralized autonomous organizations allay such concerns.<sup>521</sup> Indeed, a decentralized approach may be not only better for deliberation by people but also more responsive to the needs of individual authors and the public.

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520. *See supra* notes 28–34 and accompanying text.

521. *See supra* Part IV.