

Non-Fungible Tokens: Expressly Incorporate into Assignment Contract Terms or Get \$69 Million Burns

Alexandra Gleicher*

INTRODUCTION

On the twentieth anniversary of the film's release, a 2014 internet poll classified *Pulp Fiction* as the most definitive movie of the nineties.¹ Considering the subjective nature of movie reviews, as well as the other poll contenders that received their fair share of votes from dedicated fans, some would disagree with this ranking of the film.² Setting opinions aside, the facts speak for themselves to the tune of over \$213,000,000 in worldwide box office sales during the 1994 *Pulp Fiction* release.³ Generating an overwhelming amount of revenue and winning prestigious awards in the process, the film was an instant success that quickly became a cinema classic.⁴ In the decades that followed its initial release, the popularity of *Pulp Fiction* has endured and captured a religious follower base, explaining why many have come to classify it as a cult film.⁵ Not only impressing a stunning impact on the '90s zeitgeist in which the film was born, *Pulp Fiction* has since created its own culture with iconic scenes, characters, and quotes that are instantly recognizable by the masses.⁶ With

* J.D., New England Law | Boston (2023). I would like to thank Professor VerSteege for introducing me to the exciting area of intellectual property law. Special thanks to my family, friends, and Ellie for supporting me throughout the writing process.

¹ Stephen Marche, *20 Years Later, Pulp Fiction Defines Us Right Now*, ESQUIRE (Oct. 15, 2014), <https://perma.cc/E2NV-U8CL>.

² *See id.*

³ Complaint ¶ 17, *Miramax, LLC v. Tarantino*, No. 2:21-cv-08979 (C.D. Cal. Nov. 16, 2021) 2021 WL 5359414 [hereinafter Compl.].

⁴ *Id.*

⁵ *10 Little Known Facts About Quentin Tarantino's Cult Classic Film 'Pulp Fiction,'* GLOBAL GRIND (May 12, 2021), <https://perma.cc/D6R5-N9D5>.

⁶ James Luxford, *The Legacy of Pulp Fiction*, AM. EXPRESS ESSENTIALS, <https://perma.cc/F4P7->

the initial screenplay written by Quentin Tarantino (“Tarantino”) and the subsequent film produced by Miramax, LLC (“Miramax”), the pair received immense acclaim for their role in the creation of *Pulp Fiction*.⁷ Not only did the film deliver in the form of immediate box office success, but its ability to create a culture of its own and an eager following of fans led to an additional market for *Pulp Fiction* derivative works, independent of the big screen.⁸ Merchandise and memorabilia associated with the film, such as action figures, costumes, make-up, and clothing, continue to enjoy commercial profit nearly thirty years after the film’s initial release.⁹

With the profitability of movie memorabilia at times exceeding a film’s box office numbers, it is no surprise that Tarantino jumped at the opportunity to derive more value from his infamous screenplay by tapping into the newest, booming form of collectibles, otherwise known as non-fungible tokens (“NFTs”).¹⁰ In short, NFTs are collectible digital assets that can consist of various media including images, music, videos, or virtual objects.¹¹ Emerging during the prime of revolutionary, intangible cryptocurrencies, NFTs are similarly created, sold, and stored using a technical process that is entirely digital.¹² Just as famous works by Van Gogh or Banksy are bought as investments and collected as homage to one’s wealth, many consider NFTs to be the next step of digitizing the evolution of fine art collecting.¹³ However, the excitement of NFTs is not limited only to those who consider themselves art aficionados: celebrities, artists, and organizations have begun to market NFTs as a new medium for everyday fans to interact with their favorites and add to their collections.¹⁴

In November 2021, Tarantino decided to join in on the hysteria when a press release announced his intent to auction off several *Pulp Fiction* NFTs containing exclusive, uncut scenes from the film, images and graphics related to the film, and pages from the original script.¹⁵ This announcement sparked an immediate response from Miramax, who filed a lawsuit accusing Tarantino of trademark and copyright infringement, unfair competition, and

4WWE (last visited Jan. 3, 2023).

⁷ See Compl., *supra* note 3, ¶¶ 17–19.

⁸ See Compl., *supra* note 3, ¶ 34.

⁹ See Compl., *supra* note 3, ¶ 34.

¹⁰ Johnny Diaz, *Miramax Sues Quentin Tarantino over Planned ‘Pulp Fiction’ NFTs*, N.Y. TIMES (Nov. 17, 2021, 23:38 EST), <https://perma.cc/KE5M-M2Y6>.

¹¹ Aleksandra Jordanoska, *The Exciting World of NFTs: A Consideration of Regulatory and Financial Crime Risks*, 10 J. INT’L BANKING & FIN. L. 716 (2021).

¹² See Mitchell Clark, *NFTs, Explained*, VERGE, <https://perma.cc/3FUA-M3AW> (last updated June 6, 2022, 8:30 AM EDT).

¹³ See *id.*

¹⁴ Stitch, *NFTs Are Disrupting Collector Culture. But Fans Aren’t Buying It.*, MASHABLE (Nov. 30, 2021), <https://perma.cc/XY5W-2M97>.

¹⁵ Samantha Handler, *Miramax Hits Tarantino with Copyright Suit on ‘Pulp Fiction’ NFTs*, BLOOMBERG L. (Nov. 16, 2021, 3:28 PM), <https://perma.cc/W32K-8R6X>.

breach of contract.¹⁶ According to Miramax, Tarantino's decision to create NFTs relating to the film violated the "broad rights" of creatorship that Tarantino had assigned to Miramax back in 1993.¹⁷ The uniqueness of NFTs, at times, makes it difficult to discern which category of copyrightable work they fall into; the case will ultimately come down to the deciding court's reading of the copyright contract terms created between Tarantino and Miramax back in 1993.¹⁸

This Note will argue that the novelty of NFTs and lack of precedent dictating how courts should handle ownership issues will begin to expose contractual holes in agreements between creators and producers. This Note will illustrate the argument by using the lawsuit between Miramax and Tarantino to explain how the current contractual terms used for the assignment of rights, and more specifically copyrights, are ill-suited to handle the tidal wave of legal issues resulting from the oncoming boom of NFT media. This Note will argue that the current terms are insufficient because the uniqueness of NFTs makes it difficult to categorize them within existing types of media and, in turn, will leave contracting parties unsure about who is permitted or prohibited from making subsequent NFTs based on their initial works. This Note will further suggest additional terms specifically related to the creation of NFTs that should be integrated into all future contracts to avoid ambiguity that could result in one party losing out on millions of dollars of fan-based NFT revenue.

Part I of this Note provides a brief overview of the novelty of NFTs, the basic laws of copyright protection and contractual assignment of rights, and the arguments of both parties in the Miramax lawsuit. Part II of this Note discusses the relevance of treating the creation of NFTs as another critical bargaining point in contracts to come. Part III of this Note analyzes how previous copyright disputes led to the current assignment terms negotiated in many entertainment contracts and why these terms are inefficient and will result in NFT litigation with parties seeking clarity from the courts. Part IV of this Note argues that until a clear standard of legal treatment of NFTs develops, parties should take it upon themselves to create and implement contract terms that expressly provide for who will be permitted to create NFTs related to the content of their initial contract.

I. Background

A. *Non-Fungible Tokens Explained*

To understand the suggestion that NFTs will change contract

¹⁶ Compl., *supra* note 3, ¶ 11.

¹⁷ Diaz, *supra* note 10.

¹⁸ See generally Quentin Tarantino & Visiona Romantica Inc.'s Answer to the Complaint at ¶ 21, *Miramax, LLC v. Tarantino*, No. 2:21-cv-08979-FMO-JC (C.D. Cal. Dec. 09, 2021) [hereinafter Tarantino's Answer].

negotiations between artists and management companies, it is important to understand a general overview of cryptocurrency and the basic features that make NFTs so attractive.¹⁹ In 2008, an individual using the pseudonym “Nakamoto” released a paper on the Internet suggesting a means for online merchants to avoid transfer fees through the use of direct, virtual barter made possible by “bitcoin.”²⁰ With this abstract written proposal, the world of cryptocurrencies emerged; not even ten years later, bitcoin was being traded at a rate of over \$18,000 a coin.²¹ As suggested in the name alone, “cryptocurrency” is a form of exchange that exists entirely electronically and uses methods of encryption to serve as an independent mode of regulation.²² Unlike other forms of currency, such as the United States dollar, that are created, regulated, and distributed by the government, cryptocurrency is created by individuals and reserved exclusively within a digital, decentralized ledger, otherwise known as the “blockchain.”²³ Blockchain has become a widely favored system of recording information because of the “way that [it] makes it difficult or impossible to change, hack, or cheat the system.”²⁴ Generally, cryptocurrency consists of two broad subcategories: coins and tokens.²⁵ Albeit virtual, coins are a form of currency that is understood to share many similarities with traditional money in that they are both interchangeable, divisible, and limited in supply.²⁶ Tokens, however, are much more elusive as they exist in a variety of forms where “some are used as currency[,] some provide a more specific utility (e.g., access to a product)[,] and some resemble financial instruments.”²⁷

NFTs, a popular form of the token subcategory mentioned above, are digital assets that have taken the investment world by storm.²⁸ Only similar to coin in the sense that both are stored on the virtual blockchain ledger, NFTs create a league of their own and diverge from both crypto and

¹⁹ See generally Brad M. Kahn et al., *The Need for Clarity Regarding the Classification and Valuation of Cryptocurrency in Bankruptcy Cases*, 17 PRATT’S J. OF BANKR. L. 228, 229 (2021).

²⁰ See Jack J. Longley, Note, *The Crypto-Currency Act of 2020: Evaluating First Steps Toward Clarifying the Digital-Asset Regulatory Landscape*, 54 SUFFOLK U. L. REV. 549, 549, 552 (2021).

²¹ See J. Scott Colesanti, *Sorry, They Were on Mute: The SEC’s “Token Proposal 2.0” as Blueprint for Regulatory Response to Cryptocurrency*, 3 CORP. & BUS. L.J. 1, 4 (2022).

²² See Kahn et al., *supra* note 19, at 229.

²³ Kahn et al., *supra* note 19, at 229.

²⁴ *What is Blockchain?*, EUROMONEY LEARNING, <https://perma.cc/5R55-U2ZT> (last visited Jan. 3, 2023) (“Each block in the chain contains a number of transactions, and every time a new transaction occurs on the blockchain, a record of that transaction is added to every participant’s ledger.”).

²⁵ Kahn et al., *supra* note 19, at 229–30.

²⁶ Longley, *supra* note 20, at 558.

²⁷ Roee Sarel, *Property Rights in Cryptocurrencies: A Law and Economics Perspective*, 22 N.C. J.L. & TECH. 389, 390–91 (2021).

²⁸ See Colesanti, *supra* note 21, at 47.

traditional currency in that each token is unique and not interchangeable.²⁹ More similar to physical property whose worth may vary depending on its level of uniqueness, such as a piece of land situated near a body of water, a painting created by an up-and-coming artist, or a rare trading card for a new star athlete, each NFT contains unique information that makes it different from any other, and thus not mutually interchangeable.³⁰ Because of this quality, NFTs have quickly become the hottest form of collectible digital assets generally viewed as investments that are expected to appreciate in value over time.³¹ With these digital certificates of authenticity being accompanied by a growing range of digital media, including art, music videos, songs, memes, and domain names, NFTs have become increasingly popular because of the level of creativity they allow creators to display.³²

However, facilitation of creativity is just one aspect of why content creators favor the use of NFTs as the focus of their new projects.³³ Digital creators have found a major upside in the level of security provided by the process of NFT creation, storage, and resale within the virtual blockchain.³⁴ While digital art circulating before the creation of NFTs was largely susceptible to copying and illegal pirating, making it nearly impossible for creators to enjoy the full proceeds of their popular works or for users to determine the authenticity of media, the use of blockchain technology has offered a solution.³⁵ Now, because of blockchain technology, each NFT not only appears as a unique piece of digital artwork to the naked eye, but also contains a thread of underlying unique information including “creator or source identification, current and previous ownership identification, information representing the [NFT’s] authenticity, and information required to sell the NFT in a marketplace or auction.”³⁶ Thus, because each NFT contains its own unique code, purchasers can now find assurance in the authenticity of the digital asset they have acquired.³⁷ However, perhaps the most appealing feature for many creators is the new found ability to receive additional proceeds for their work long after the transfer of its initial sale.³⁸

²⁹ Kahn et al., *supra* note 19, at 231.

³⁰ Diana Qiao, *This is Not a Game: Blockchain Regulation and Its Application to Video Games*, 40 N. Ill. U. L. REV. 176, 186–87 (2020).

³¹ *See id.* at 187.

³² *See* Arthur Brown, *The 9 Different Types of NFTs, MAKE USE OF*, <https://perma.cc/923X-BYPR> (last updated Apr. 30, 2022).

³³ *See* Brandon Kochkodin, *What’s an NFT? It’s What Makes GIFs Worth Big Bucks*, BLOOMBERG, <https://perma.cc/PPV6-A7LQ> (last updated Oct. 29, 2021, 4:44 PM EDT).

³⁴ *See* RM Partners L. LLC, *NFTs and Their Intellectual Property Implications: Part I*, RM PARTNERS L. (Apr. 13, 2021), <https://perma.cc/CZ88-E9ZH>.

³⁵ *See id.*

³⁶ *Id.*

³⁷ *See id.*

³⁸ *See* Kochkodin, *supra* note 33.

By using “smart contracts,” an address embedded in the NFT itself that assigns ownership rights and manages the transferability of the NFT, artists have the option to include provisions about resale royalties in the subsequent sale of their works.³⁹ While resale royalties are difficult to monitor in the tangible art world due to the private nature of most sales, the public nature of blockchain allows anyone to track the chain of a NFT’s title and makes it easy for creators to benefit from their works on the secondary market.⁴⁰ Considering the attractiveness of creative freedom and continued profits for creators, along with a reputation as the hottest new form of digital investments for buyers, it is no surprise that NFTs are in the spotlight and set to become the focus of many new contracts.⁴¹

B. *Copyright Protection for NFTs and Assignment by Contract*

With the discussion of NFTs growing more prominent every day, legal professionals have questioned how these revolutionary digital assets will be governed by the traditional laws of intellectual property.⁴² While patent and trademark protection is certainly a topic of interest for some, the artistic features of NFTs have steered the conversation towards the question of copyright protection.⁴³ Under the Copyright Act of 1976 (“Copyright Act”), copyright protection is afforded to “original works of authorship fixed in any tangible medium of expression”⁴⁴ In short, a creator establishes copyright protection in an original work at the moment they take an idea and express it in a medium; examples include taking a photograph, writing song lyrics, or painting a picture.⁴⁵ While Article I, § 8, cl. 8 of the United States Constitution requires that copyright protection only be afforded to works that are original, caselaw has clarified that originality in the copyright context does not require novelty, but rather elements of “independent creation plus a modicum of creativity.”⁴⁶ From that definition of originality, it follows that even a secondary work that is created based upon another preexisting work, otherwise known as a “derivative work,” may acquire

³⁹ *Non-Fungible Tokens (NFT)*, ETHEREUM, <https://perma.cc/CR8Z-UKJP> (last visited Jan. 3, 2023).

⁴⁰ Kochkodin, *supra* note 33.

⁴¹ See generally Jazmin Goodwin, *What is an NFT? Non-Fungible Tokens Explained*, CNN, <https://perma.cc/6C2F-B82Z> (last updated Nov. 10, 2021, 3:03 PM EST).

⁴² Andres Guadamuz, *Non-Fungible Tokens (NFTs) and Copyright*, WORLD INTELL. PROP. ORG. (Dec. 2021), <https://perma.cc/Y898-C9W8>.

⁴³ See Ali Dhanani & Chris Sabbagh, *How Nonfungible Tokens Could Disrupt the Legal Landscape*, LAW360 (Mar. 22, 2021, 3:54 PM EDT), <https://perma.cc/3Y2T-476M>.

⁴⁴ 17 U.S.C. § 102 (1976).

⁴⁵ *What is Copyright?*, COPYRIGHT.GOV, <https://perma.cc/9T7A-WPVD> (last visited Jan. 3, 2023).

⁴⁶ See *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *but see* U.S. CONST. art. I, § 8.

copyright protection so long as the secondary artist independently composed the work and impressed a minimal degree of creativity upon it.⁴⁷ Accordingly, where an NFT creator produces a piece of work that meets these standards, they are automatically afforded copyright protection and may enjoy the exclusive rights of ownership.⁴⁸

Copyright owners are awarded several exclusive rights under § 106 of the Copyright Act.⁴⁹ In this discussion of NFTs, however, the most relevant exclusive rights include the following: “(1) to reproduce the copyright work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”⁵⁰ In a sense, this statute brings the law into conformity with the average creator’s expectations that they are the only one entitled to create copies or secondary works based upon their original work, and most importantly, the only one who may distribute their work to the public for sale.⁵¹ Where an NFT qualifies for copyright protection, these rights are important in the context of selling NFTs to purchasers because they ensure that the true creator is the only individual who may profit from its public sale.⁵²

Just as ownership in real property allows owners to transfer away their discrete rights to others, ownership of intellectual property is no different.⁵³ Per 17 U.S.C. § 101, a transfer of copyright ownership may be performed through “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright.”⁵⁴ Specifically, an “assignment” is the transfer of rights to a third party.⁵⁵ The impact of an assignment is significant, as the “assignor,” or initial owner, effectively transfers “all of the rights, title[,] or interest owned by the assignor in the subject assigned” to the “assignee,” or secondary owner.⁵⁶ Although an oral assignment of copyrights is possible, courts have held that it may only be given effect if later memorialized in writing.⁵⁷ Accordingly, copyright assignments most

⁴⁷ See 17 U.S.C. § 101 (1976) (referencing the definition for “derivative work”).

⁴⁸ See 17 U.S.C. § 106 (1976).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *id.*

⁵² See generally Gregory J. Chinlund & Kelley S. Gordon, *What Are the Copyright Implications of NFTs?*, REUTERS, <https://perma.cc/8NU6-9PYB> (last updated Oct. 29, 2021, 11:41 AM EDT).

⁵³ See *Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007).

⁵⁴ 17 U.S.C. § 101 (1976).

⁵⁵ TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 218 (2d ed. 2014).

⁵⁶ *Knott v. McDonald’s Corp.*, 985 F. Supp. 1222, 1225 (N.D. Cal. 1997).

⁵⁷ *Fenf, LLC v. Groupon, Inc.*, No. 19-12278, 2021 U.S. Dist. LEXIS 258636, at *12 (E.D. Mich.

commonly transpire through contracts where the assignment itself may be the entire focus of the contract or merely a minor provision amongst many others.⁵⁸ Following what some would consider the golden rule of contract drafting, assignments of rights should be written in the most unambiguous manner possible to avoid the threat of multiple interpretations and unclear intent that could lead to costly litigation.⁵⁹

C. *Miramax v. Tarantino: Battle of Rights*

Writer-director Quentin Tarantino first announced his intentions to create and sell seven secret *Pulp Fiction* NFTs in early November 2021.⁶⁰ By January 2022, the Twitter account promoting the sale, @LegendaoNFT, affirmed that the first NFT in the collection had sold for a whopping \$1.1 million.⁶¹ This sale received immense attention not only because of the overwhelming price paid for the secret NFT, but more accurately because it came as a bold act of defiance in the face of a lawsuit by Miramax.⁶² As mentioned above, Miramax quickly made their position on Tarantino's NFT announcement known by immediately filing a complaint in November in the United States District Court in California.⁶³ At the heart of its complaint for breach of contract and copyright and trademark infringement, Miramax asserted that Tarantino "granted and assigned nearly all of his rights to *Pulp Fiction*" to Miramax in a 1993 contract, including the rights necessary to lawfully create the intended *Pulp Fiction* NFTs.⁶⁴ To assess the validity of Miramax's complaint and Tarantino's subsequent answer, it is necessary to look first to the subject matter of the NFTs at issue and next to the language of the 1993 assignment agreement between the parties.⁶⁵

Unfortunately, it is impossible to give a precise answer about the exact subject matter of the *Pulp Fiction* NFTs—but that is the point.⁶⁶ While the

Feb. 16, 2021).

⁵⁸ See generally *Assignments: The Basic Law*, STIMMEL L., <https://perma.cc/W5T6-2XNH> (last visited Jan. 3, 2023) (explaining the common contractual event of assignment).

⁵⁹ See *id.* See generally STARK, *supra* note 55, ch. 21 (explaining the common causes of ambiguity in contracts and preventive drafting practices that can be used to avoid expensive litigation).

⁶⁰ Ryan Faughnder, *The 'Pulp Fiction' NFT Fight Isn't Really About NFTs*, L.A. TIMES (Nov. 23, 2021, 6:00 AM PT), <https://perma.cc/3RCY-NDLZ>.

⁶¹ Legendao.io (@LegendaoNFT), TWITTER (Jan. 24, 2022, 7:23 AM), <https://perma.cc/R559-ZWTE>.

⁶² See Ephrat Livni, *Quentin Tarantino Plans to Sell 'Pulp Fiction' NFTs, Defying a Miramax Suit.*, N.Y. TIMES (Jan. 5, 2022), <https://perma.cc/8JXS-N6F8>.

⁶³ Compl., *supra* note 3, ¶ 6.

⁶⁴ *Id.* ¶ 3.

⁶⁵ See generally Tarantino's Answer ¶ 21; Compl., *supra* note 3, ¶ 21.

⁶⁶ See *Quentin Tarantino Revealed as Iconic Artist Behind First-Ever Secret NFTs, Showcasing Never-Before-Seen Work Revealed Only to NFT Owner*, GLOBENEWSWIRE (Nov. 2, 2021, 9:00 AM ET), <https://perma.cc/7UUX-T2QH> [hereinafter GLOBENEWSWIRE].

typical NFT sale process consists of buyers accessing online marketplaces to view the digital content associated with the NFT and to eventually place bids on those that they find most appealing, Tarantino's announcement made it clear that the sale of his NFTs would deviate from the norm.⁶⁷ Evidently a man with a taste for theatrics, Tarantino partnered with SCRT Labs to develop the *Pulp Fiction* NFTs as the first-ever "secret" NFTs whose contents only become viewable to the eventual owner.⁶⁸ With that being said, eager buyers are not bidding completely in the dark as the promotional website created for the sale of the *Pulp Fiction* NFTs asserts that "[e]ach NFT in the collection consists of the original script from a single iconic scene, as well as personalized audio commentary from Quentin Tarantino himself."⁶⁹ Reiterated by subsequent interviews and other forms of promotional media, the key feature of the *Pulp Fiction* NFTs is the rare opportunity for owners to see the uncut, handwritten script that has been hidden away for twenty-five years.⁷⁰

With the primary issue in *Miramax v. Tarantino* being which party has the better claim to owning the rights necessary to create *Pulp Fiction* NFTs, a 1993 assignment agreement executed by Tarantino is a key piece of evidence.⁷¹ According to the agreement, Tarantino assigned to Miramax the:

sole and exclusive right under copyright, trademark or otherwise to distribute, exhibit and otherwise exploit all rights (other than the [Tarantino Reserved Rights]) in and to the motion picture entitled "Pulp Fiction" (the "Work") (and all elements thereof in all stages of development and production) now or hereafter known including, without limitation, the right to distribute the Work in all media now or hereafter known (theatrical, non-theatrical, all forms of television and "home video") in perpetuity, throughout the Universe, as more particularly set forth and upon and subject to the terms and conditions in [the Original Rights Agreement].⁷²

⁶⁷ See *id.* See generally Andy Rosen, *What Is a Non-Fungible Token (NFT)? Definition & What to Know Before You Buy*, NERDWALLET (May 23, 2022), <https://perma.cc/BF48-P555> (referencing how the NFT of a Grimes music video that sold on the online marketplace Nifty Gateway is still available to watch on that same platform).

⁶⁸ See GLOBENEWSWIRE, *supra* note 66.

⁶⁹ *The Tarantino NFT Collection*, TARANTINO NFTs, <https://perma.cc/3J5B-GZNB> (last visited Jan. 3, 2023).

⁷⁰ See GLOBENEWSWIRE, *supra* note 66; Taylor Dafoe, *Quentin Tarantino Is Minting Seven 'Pulp Fiction' Scenes as NFTs That Will Reveal New Secrets About the Film*, ARTNET, (Nov. 3, 2021), <https://perma.cc/BP2T-KPBW> (providing that the NFTs will "feature digitized excerpts from the original handwritten script for the film").

⁷¹ See Dominic Patten, *Quentin Tarantino & Miramax 'Pulp Fiction' NFT Legal Dust-Up Ends; Director & Studio Look Forward to "Future Projects,"* DEADLINE, <https://perma.cc/GJY5-NTVB> (last updated Sept. 8, 2022, 1:16 PM).

⁷² Compl., *supra* note 3, ¶ 26.

Evident from the cumbersome language of the agreement itself, Tarantino did transfer many of his exclusive rights afforded by copyright ownership to Miramax.⁷³ However, Tarantino did not go as far as to assign away all of his rights and instead reserved rights to the “soundtrack album, music publishing, live performance, print publication (including, without limitation, screenplay publication, ‘making of’ books, comic books and novelization, in audio and electronic formats as well, as applicable), interactive media, theatrical and television sequel and remake rights, and television series and spinoff rights.”⁷⁴

Referring to this assignment in its complaint, Miramax argued that it retained the rights to all versions of the *Pulp Fiction* screenplay, including any scenes and elements that did not get incorporated into the final version of the film.⁷⁵ As the purported owner of the screenplay rights, Miramax asserted that Tarantino lacked the authority to partner with SCRT Labs and license the rights to develop and sell the *Pulp Fiction* NFTs, thus constituting a breach of the assignment agreement as well as copyright infringement.⁷⁶ In response, Tarantino denied Miramax’s allegations of breach of contract and infringement arguing instead that he was acting within his reserved rights retained in the 1993 agreement.⁷⁷ Specifically, Tarantino’s counsel argued that Tarantino’s reserved rights to “screenplay publication” gave him the authority to use NFTs as a means of publishing digital scans of the screenplay itself.⁷⁸ Based on these arguments, the case turns on the language of the assignments contract and how the Court interprets the term “screenplay publication.”⁷⁹

II. Legal Professionals Should Care About Tarantino’s NFTs

Admittedly, some may not feel particularly interested in the *Miramax v. Tarantino* outcome when it ultimately comes down to whether the millionaire writer or multi-million dollar corporation is entitled to squeeze out another couple of million dollars profit from *Pulp Fiction*.⁸⁰ However, this case is significant for the sake of the hypothetical client seeking to create NFTs and looking for reassurance that their rights to do so have not been assigned away in some pre-existing contract.⁸¹ Regardless of the verdict,

⁷³ See Compl., *supra* note 3, ¶ 26.

⁷⁴ Compl., *supra* note 3, ¶ 28.

⁷⁵ Compl., *supra* note 3, ¶ 43.

⁷⁶ See Compl., *supra* note 3, ¶ 43.

⁷⁷ See Compl., *supra* note 3, ¶ 46.

⁷⁸ See Compl., *supra* note 3, ¶¶ 45–46.

⁷⁹ See Faughnder, *supra* note 60.

⁸⁰ See Rosie Perper, *Quentin Tarantino’s First ‘Pulp Fiction’ NFT Sold for \$1.1 Million USD*, HYPEBEAST (Jan. 25, 2022), <https://perma.cc/532R-YB6R>.

⁸¹ See generally Faughnder, *supra* note 60 (referring to *Miramax v. Tarantino* as a contract dispute over rights).

Miramax v. Tarantino should serve as a wakeup call for all entertainment and intellectual property lawyers handling the rights of creators and management companies.⁸² The lesson, put simply, is that careful and adaptive contract drafting should be used to avoid the unpredictable domain of NFT litigation.⁸³

While the length of their heightened popularity is obviously undetermined, one thing is overwhelmingly clear—NFTs are the current “it” thing.⁸⁴ From a record \$69.3 million sale of a Beeple NFT in March 2021 to a “never-before-seen-or-heard” *Pulp Fiction* NFT casually selling for \$1.1 million, jaw-dropping amounts of money are being spent on NFTs every day.⁸⁵ With the average sale ranging anywhere between a couple hundred to a couple thousand dollars, consumers have proven their willingness to invest in the crypto market.⁸⁶ Feeding off the positive consumer response and anticipated profitability, some artists, celebrities, and major corporations have similarly shown their interest in the market by encouraging the excitement with announcements of new ideas and NFT projects to come.⁸⁷ With NFTs now being used for a variety of media, ranging anywhere between a video of LeBron James dunking to an entire Kings of Leon album release, the possibility of growth within the NFT market appears somewhat unlimited.⁸⁸

What comes off as an opportunistic NFT goldmine for some, instead poses a set of unique challenges for legal professionals.⁸⁹ With the NFT boom leaving even the Securities and Exchange Commission struggling to keep up with regulation, it follows that the legal system has also found it difficult to

⁸² See generally *Stranger than “Pulp Fiction,”* AMINEDDOLEH & ASSOCS. LLC (Dec. 6, 2021), <https://perma.cc/9FCU-GZH6> (explaining the influx of legal questions about NFTs and how the *Miramax* lawsuit will likely “serve as a model for future claims, both in and beyond the entertainment industry.”).

⁸³ See Elise Hansen, *NFT Craze Generates Slew of Legal Questions*, LAW360 (Apr. 2, 2021, 7:56 PM EDT), <https://perma.cc/8MQ8-3Z9N>; Kal Raustiala & Chris Sprigman, *Guest Column: Tarantino v. Miramax—Behind the NFT ‘Pulp Fiction’ Case, and Who Holds the Advantage*, HOLLYWOOD REP. (Nov. 24, 2021, 6:55 AM), <https://perma.cc/97K7-HHJG>.

⁸⁴ See Jonathan Ponciano, *NFTs Shatter Monthly Trading Record With \$4 Billion in Sales—Here’s Why They’re Still Booming Despite the Crypto Crash*, FORBES (Jan. 20, 2022, 6:30 AM EST) <https://perma.cc/LVK2-3XW6>.

⁸⁵ Scott Reyburn, *JPG File Sells for \$69 Million, as ‘NFT Mania’ Gathers Pace*, N.Y. TIMES, <https://perma.cc/E7LC-25PX> (last updated Mar. 25, 2021); *SCRT Labs Announces Triumphant Sale of First Never-Before-Seen-or-Heard Tarantino NFT for \$1.1 Million*, BUS. WIRE (Jan. 24, 2022, 7:00 AM EST), <https://perma.cc/92HW-2VPN>.

⁸⁶ See Eileen Kinsella, *Think Everyone is Getting Rich off NFTs? Most Sales Are Actually \$200 or Less, According to One Report*, ART NET (Apr. 29, 2021), <https://perma.cc/M73D-U4GX>.

⁸⁷ See Ponciano, *supra* note 84 (referring to celebrities like Britney Spears and Eminem and corporations like Nike and GameStop who have joined the NFT hype).

⁸⁸ Kochkodin, *supra* note 33.

⁸⁹ See Hansen, *supra* note 83.

answer NFT related problems.⁹⁰ In many instances, legal questions about NFTs are so novel that there is a lack of existing caselaw for attorneys to turn to for guidance.⁹¹ Furthermore, even where courts have issued opinions on cases involving cryptocurrencies, the rule of law applied varies and appears far from uniform.⁹² These circumstances raise the importance of *Miramax v. Tarantino* and the argument that lawyers should take all possible precautions to avoid the uncertainty of NFT litigation.⁹³ Accordingly, analyzing the Miramax lawsuit to determine the best way to handle contractual assignments and NFTs will be a relevant form of guidance in the face of unresolved intellectual property questions.⁹⁴

ANALYSIS

III. The Traditional Language of Contractual Assignments Will Lead to Ambiguities Over the Rights to Create Non-Fungible Tokens

A. *The Prevalence of Assignments in the Entertainment Industry and Why NFTs Will Not Comply with the Norm*

Although rights assignments have always played an important role in entertainment contracts, assignments related to the right to create NFTs will become the most significant provision for negotiating lawyers because of creators' unique ability to independently pursue NFT ventures without the support of producer funding.⁹⁵ As mentioned above, the codification of the exclusive rights held by copyright owners is significant because it ensures that the powers needed to profit off of a protected work, such as the authority to reproduce, display, and sell a copyrighted work, are solely bestowed upon the copyright owner.⁹⁶ Ironically, however, one of the most important powers in that bundle is actually the ability to forfeit some of these exclusive rights and give them away to others.⁹⁷ Indeed, the power to assign away exclusive rights is one of the most essential assets for content creators

⁹⁰ See Colesanti, *supra* note 21, at 47.

⁹¹ Richard Ong, *Hard Drive Heritage: Digital Cultural Property in the Law of Armed Conflict*, 53 COLUM. HUM. RTS. L. REV. 247, 291 (2021).

⁹² See Sarel, *supra* note 27, at 393–94.

⁹³ See *infra* Part IV.

⁹⁴ See *infra* Part III.

⁹⁵ See Thomas N. Doty, *Blockchain Will Reshape Representation of Creative Talent*, 88 UMKC L. REV. 351, 357–58 (2019).

⁹⁶ See *Talavera Hair Prods. v. Taizhou Yunsung Elec. Appliance Co.*, No. 18-CV-823 JLS (JLB), 2021 U.S. Dist. LEXIS 149179, at *32 (S.D. Cal. Aug. 6, 2021).

⁹⁷ See generally Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 35 (2010) (explaining how the copyright system in the United States is not creator-friendly and tends to encourage creators to create new works and then assign away rights to intermediaries to get the works disseminated successfully).

who possess an abundance of creative ideas, but lack the capital or support to produce them on their own.⁹⁸ The modern entertainment industry is dominated by multi-million dollar corporations, production companies, and management agencies who control nearly all forms of popular media; it is because of this culture that many talented, independent content creators struggle to succeed without commercially exploiting their works and joining forces with these larger powers to gain access to their repertoire of distribution resources.⁹⁹ In light of this relationship, it is typical for creators, such as song or film writers, to assign some of their exclusive rights to production and distribution companies in exchange for their help in creating the desired work.¹⁰⁰

Considering the inequality of bargaining power evident in the traditional creator-producer relationship, many creators are being defrauded by assignment agreements that contain an essence of unconscionability.¹⁰¹ Although courts find it difficult to give an all-purpose definition to the term “unconscionable,” many agree that unconscionability may be found in agreements where “there is an absence of meaningful choice on the part of one of the parties together with contractual terms that unreasonably favor the other party.”¹⁰² Individual creators are often put in a position where the only prospect of success lies in striking a deal with major production companies and are left with no meaningful choice but to concede with the overwhelming demands of production powerhouses to merely get their projects off the ground.¹⁰³ Take the 1993 *Pulp Fiction* assignment agreement formed between Miramax and Tarantino, for example.¹⁰⁴ Although Tarantino is now a household name and “the single most influential director of his generation,” in 1993 he was just an up-and-coming director trying to build his reputation with only one other highly criticized film under his belt.¹⁰⁵ Tarantino’s need and desire to strike a deal put

⁹⁸ See generally Doty, *supra* note 95, at 357 (discussing the creative ecosystem that makes it nearly impossible for artists to put out work without relying on record deals, production companies, cable channels, etc.).

⁹⁹ See Doty, *supra* note 95, at 357; Joseph Bien-Kahn, *American Companies That Dominate the Media Landscape*, STACKER (July 5, 2018), <https://perma.cc/3S98-WNHB>.

¹⁰⁰ See Doty, *supra* note 95, at 357.

¹⁰¹ See *Tillman v. Com. Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008). See generally Gabe Bloch, *Transformation in Publishing: Modeling the Effect of New Media*, 20 BERKELEY TECH. L.J. 647, 661–62 (2005) (referencing the lack of bargaining power between authors and publishers during contractual transactions).

¹⁰² *In re Marriage of Fults*, No. 5-17-0290, 2018 Ill. App. Unpub. LEXIS 1493, at *12 (Sept. 5, 2018); accord *Harrington v. CACV of Colorado, LLC*, 508 F. Supp. 2d 128, 139 (D. Mass. 2007).

¹⁰³ See Bloch, *supra* note 101, at 661–62.

¹⁰⁴ See, e.g., Compl., *supra* note 3, ¶¶ 19–20.

¹⁰⁵ Tom Shone, *The Glorious Bullshit of “Reservoir Dogs,” Twenty-Five Years Later*, NEW YORKER (Oct. 8, 2017), <https://perma.cc/79JP-Z2MC>; see Maria Vu, *The Incredible Story Behind Reservoir Dogs*, METAFLIX (Nov. 20, 2020), <https://perma.cc/837K-9LD2>.

Miramax in a superior bargaining position to make heightened demands; as a result, Miramax was able to secure an assignment agreement where Tarantino assigned away nearly all rights in *Pulp Fiction* in exchange for Miramax's production and marketing services.¹⁰⁶ Even though such agreements bear serious potential for abuse and unfairness, assignments between creators and producers have continued to be an indispensable part of the entertainment industry.¹⁰⁷

With the United States media and entertainment industry being worth approximately \$717 billion, it is no surprise that those working in the field carry the expectation of continuously making a profit.¹⁰⁸ For those involved in production, this begins with finding a creator with an idea, like a film writer and director, working with the creator to produce the movie, and eventually releasing the movie in public theaters or on streaming services for profit.¹⁰⁹ Although the parties involved in creation may derive substantial economic return from the film's initial release, in many instances the profitability of derivative works based on the film, such as sequels or themed merchandise, can far exceed the revenue from the initial box office sales.¹¹⁰ With a nearly unlimited potential for derivative commercial success in every work created, those in producer-like positions attempt to use assignment agreements, most commonly involving merchandising rights, to ensure that they will be entitled to ride the second wave of profits when it appears.¹¹¹ Considering the gravity of the economic interests involved, it follows that there is constant litigation over derivative rights and assignment agreements in the entertainment industry, with many cases involving infamous creators and production conglomerates going head-to-head.¹¹² In 2005, for example,

¹⁰⁶ Compl., *supra* note 3, ¶ 20.

¹⁰⁷ See Litman, *supra* note 97, at 35.

¹⁰⁸ See Brenden Czajka, *What Forms of Media Make the Most Money?*, GLOBALEDGE (Oct. 15, 2020, 10:03 AM), <https://perma.cc/BWB5-6YTH>.

¹⁰⁹ See Brandon Katz, *Every Movie Theater vs. Streaming Release is Riddled with Pros and Cons*, OBSERVER (July 8, 2021, 4:56 PM), <https://perma.cc/V2WG-HAW6>.

¹¹⁰ See, e.g., Claire Epting, *12 Movie Sequels That Outperformed the Original at the Box Office*, SCREENCRUSH (Aug. 14, 2020), <https://perma.cc/PFC5-NPUM> (listing film sequels that outperformed their original, such as *Toy Story 3*'s \$1.067 billion box office sales that triumphed over the original's \$373.6 million); Jacob Shelton, *Movies That Made More Money on Merchandising than at the Box Office*, RANKER (Sep. 23, 2021), <https://perma.cc/BT5L-QG95> (listing hit films that made more off of merchandise than box office sales, such as the *Harry Potter* movies that made \$7.7 billion in global box office sales and over \$20 billion in its merchandise franchise).

¹¹¹ See generally, e.g., *Kaufman v. Warner Bros. Ent. Inc.*, No. CV-16-02248-PHX-JAT, 2019 U.S. Dist. LEXIS 79990, at *1-2 (D. Ariz. May 13, 2019); *Blue Planet Software, Inc. v. Games Int'l, LLC*, 334 F. Supp. 2d 425, 431-35 (S.D.N.Y. 2004); Brent Lang & Matt Donnelly, *Netflix Buys 'Knives Out' Sequels for \$450 Million*, VARIETY (Mar. 31, 2021, 2:09 PM PT), <https://perma.cc/FC6J-G4BH> (displaying examples of studios who bought rights to sequels or had merchandising agreements).

¹¹² See, e.g., Ryan Faughnder, *Disney Sues Former Marvel Artists over Iron Man and Spider-Man Rights*, L.A. TIMES (Sep. 24, 2021, 1:01 PM PT), <https://perma.cc/NU6R-RWCH>.

the Marvel Comics' founding father, Stan Lee, sued the comic publishing corporation, Marvel Enterprises, over the entitlement to profits from film and television merchandising of the Marvel characters he initially created.¹¹³

The impact of these assignment agreements was even more evident in a 2014 infringement action by Warner Brothers Entertainment, where the production company asserted its rights as the legal owner of all copyrights and merchandising rights associated with the classic films *Gone with the Wind* and *Wizard of Oz* and won to the tune of \$2,570,000 in statutory damages.¹¹⁴ Learning from these cases, where contractual failures resulted in parties losing out on millions in revenue, production companies now use their superior bargaining powers to push creators to assign away most of their commercially valuable rights in an attempt to ensure that they hold the key when it comes time to profit from the next form of derivative works.¹¹⁵

This is where NFTs enter the conversation.¹¹⁶ With some already jokingly referring to them as the "Beanie Babies of the 2020s," NFTs quickly reached immense popularity as the newest "it" form of collectibles.¹¹⁷ Seeing potential for revenue far exceeding that from the sale of traditional memorabilia such as action figures or t-shirts, film studios are eager to take advantage of NFTs as the next opportunity to capitalize on popular works.¹¹⁸ Indeed, entertainment studios have already begun experimenting with NFTs and movie ticket sales by creating NFTs that serve as the tickets themselves, or by offering NFT "freebies" to the first thousands of consumers who buy advance tickets for a film's release.¹¹⁹ Accordingly, NFTs are primed to become the next notch on the belt of producers in the entertainment industry and a critical point of assignment agreements.¹²⁰

With that being said, the rights required to create NFTs may not be forfeited by creators and acquired by producers as smoothly as other creator-producer assignments of the past.¹²¹ Unlike the rights to create and sell merchandise based on a work, which an individual creator may be more inclined to assign to a producer in exchange for royalties due to the

¹¹³ Lee v. Marvel Enters., Inc., 386 F. Supp. 2d 235, 237–38 (S.D.N.Y. 2005).

¹¹⁴ Warner Bros. Ent., Inc. v. Dave Grossman Creations, Inc., 13 F. Supp. 3d 963, 964, 972 (E.D. Mo. 2014).

¹¹⁵ See *id.*; Lee, 386 F. Supp. 2d at 237–38.

¹¹⁶ See Faughnder, *supra* note 60.

¹¹⁷ Rik Nieu, *NFTs Are the New Beanie Babies*, RIKNIEU (Oct. 14, 2021), <https://perma.cc/VQ3T-APUE> (analogizing the Beanie Babies collectable toys craze in the 1990s to the current NFT boom).

¹¹⁸ See *NFTs in Film and TV: How Hollywood is Embracing NFTs*, PROJECT CASTING (Dec. 7, 2021), <https://perma.cc/P7EM-HHWL>.

¹¹⁹ *Id.*; J. Fingas, *AMC and Sony Will Hand Out NFTs to 'Spider-Man' Advance Ticket Buyers*, ENGADGET (Nov. 28, 2021), <https://perma.cc/TW9D-E6VN>.

¹²⁰ See generally Faughnder, *supra* note 60.

¹²¹ See Doty, *supra* note 95, at 351.

staggering amount of capital required to pursue the merchandise venue on their own, the rights to create NFTs will not be forfeited so easily.¹²² This distinction stems from the nature of blockchain technology and the relative ease with which NFTs can be created and distributed to the public, effectively removing the institutional “middlemen” from the creative process.¹²³ Unlike other creative projects whose economic success depends largely upon the capital and network of resources provided by production conglomerates, artists can successfully create and sell NFTs to the public after paying the trivial sales platform registration fees.¹²⁴ With blockchain features that automatically record NFT consumer interactions, public sales, and future royalties, creators no longer need the resources associated with production companies to profit from their intellectual property.¹²⁵ In the creator-friendly environment facilitated by blockchain, artists may not be as willing to succumb to the requests of powerful production companies and assign away any of the exclusive ownership rights required to create NFTs based on their original works.¹²⁶ Because of this potential shift in the creator-producer power dynamic created by the commercial popularity and overall accessibility of NFT-derivative works, legal professionals must pay significant attention to entertainment assignment provisions and retain the NFT copyrights their client desires.¹²⁷

B. *Coverage of the Exclusive Rights Required to Create NFTs in Current Assignment Provisions is Questionable*

The contract terms typically used in entertainment assignment agreements are unsuitable and problematic for the assignment of rights to create NFTs because they largely consist of incompatible copyright terms.¹²⁸ Understanding the language typically included in these agreements and the type of rights most commonly contracted for is key to fully appreciate this argument.¹²⁹ As discussed above, where the bargaining power in the creator-producer relationship is completely disproportionate, producers may take an all-or-nothing approach and require creators to assign all of their exclusive rights in the copyrightable work in exchange for nominal royalties

¹²² Doty, *supra* note 95, at 357–58.

¹²³ See Steven C. Beer & Kathryne E. Badura, *The New Renaissance: A Breakthrough Time for Artists*, 1 BERKELEY J. ENT. & SPORTS L. 66, 67–69 (2012).

¹²⁴ Doty, *supra* note 95, at 357; see Mitchell Clark, *How To Create an NFT — And Why You May Not Want To*, VERGE, <https://perma.cc/TJJ3-5WLT> (last updated Jun. 6, 2022, 8:00 AM EST) [hereinafter Clark, *How To*].

¹²⁵ Doty, *supra* note 95, at 358.

¹²⁶ Doty, *supra* note 95, at 351.

¹²⁷ See Doty, *supra* note 95, at 352.

¹²⁸ See Amineddoleh & Associates LLC, *supra* note 82.

¹²⁹ See *Entertainment Law: Intellectual Property*, JRANK, <https://perma.cc/X4T6-F3EX> (last visited Jan. 3, 2023).

and the producer's services.¹³⁰ In other cases, producers may take a more selective approach and negotiate only for the rights they deem valuable and necessary to create and profit from works based upon the artist's original work.¹³¹ In the latter situation, parties commonly ensure that assignment agreements make express mention of who owns exclusive merchandising and marketing rights, not only in the work as a whole, but possibly in its underlying elements as well.¹³² Take the 1993 rights agreement between Miramax and Tarantino for example, where Miramax secured "all rights (including all copyrights and trademarks) in and to [*Pulp Fiction*]" but allowed Tarantino to retain rights to seemingly insignificant elements such as the film's "soundtrack album, music publishing, live performance, [etc.] . . ."¹³³

Over time, assignment agreements in the entertainment industry came to utilize language that corresponds with the Copyright Act and commonly make express references to the exclusive rights of copyright owners.¹³⁴ This tendency to use copyright language in assignment agreements makes current provisions ill-suited to handle issues related to NFTs because the copyright terms create ambiguities and uncertainties regarding whether one party has retained or assigned the rights required to create NFTs.¹³⁵ For starters, copyright language in NFT assignment agreements is problematic because there is no clear, uniform body of law governing NFTs.¹³⁶ In fact, the lawsuit between Miramax and Tarantino "is notable because it marks the first opportunity for a federal court to opine on intellectual property rights in the NFT context."¹³⁷ Bearing that fun fact in mind, it follows that court opinions have not been much help in clarifying how NFTs align with copyright terms.¹³⁸ As disputes surrounding the rights to create NFTs arise and the ambiguous copyright language of assignment provisions proves to be overwhelmingly wrong in the NFT context, parties are without an

¹³⁰ See, e.g., Eden Arielle Gordon, *Before Taylor Swift: 6 Artists Who Were Screwed over by Their Labels*, POPDUST (July 6, 2019), <https://perma.cc/MG64-Q3AZ> (listing examples of music icons who "lost millions in legal battles over faulty contracts that they signed as teen[s]").

¹³¹ See JRank, *supra* note 129.

¹³² See generally *Baisden v. I'm Ready Prods.*, No. 4:08-CV-00451, 2010 U.S. Dist. LEXIS 99366, at *26–27 (S.D. Tex. Sep. 22, 2010) (providing the contractual language at the heart of an author-producer rights dispute); *Halicki v. Carroll Shelby Int'l*, No. CV 07-06859 SJO (PJWx), 2009 U.S. Dist. LEXIS 138833, at *10–11 (C.D. Cal. May 6, 2009) (giving an example of how underlying elements of a work, such as characters featured in a film, can be the subject of marketing and merchandising rights agreements).

¹³³ Compl., *supra* note 3, ¶¶ 20–21.

¹³⁴ See, e.g., *Baisden*, 2010 U.S. Dist. LEXIS at *26–27; Compl., *supra* note 3, ¶¶ 20–21.

¹³⁵ See *Amineddoleh & Associates LLC*, *supra* note 82.

¹³⁶ See Daniel Dubin & H. James Abe, '*Pulp Fiction*' NFT Lawsuit Presents New IP Battleground, LAW360 (Dec. 20, 2021, 4:34 PM EST), <https://perma.cc/2PNU-NFDM>.

¹³⁷ *Id.*

¹³⁸ See *id.*

abundance of caselaw to follow and instead are left trying to come up with creative or novel arguments.¹³⁹

The Miramax lawsuit offers a prime example of the impending issues and ambiguities that will arise from using normative copyright language in rights assignments, specifically in the context of NFTs, and the extent to which attorneys will try to stretch the bounds of these terms in an attempt to make NFTs fit within them.¹⁴⁰ Tarantino responded to Miramax's allegations of breach of contract and infringement by clinging to the language of the 1993 assignment agreement and justifying his *Pulp Fiction* NFT venture under his reserved right to "screenplay publication."¹⁴¹ As defined in § 101 of the Copyright Act, "publication" means the "distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."¹⁴² Per Tarantino's argument, publicly selling secret *Pulp Fiction* NFTs that consist primarily of images of his handwritten screenplay constitutes a form of screenplay publication and, as such, is a right that is solely under his control.¹⁴³ Although the definition does not make reference to the exact number of copies that must be sold to qualify as a publication, Miramax's argument rests on the fact that each NFT sale is merely a one-time transaction that does not constitute a publication in the copyright context.¹⁴⁴ Instead, Miramax would stand to benefit from the argument that the NFTs, which have been heavily advertised as the ultimate *Pulp Fiction* fan memorabilia, are more similar to merchandise and thus fall within the broad rights that Miramax was granted back in 1993.¹⁴⁵ With little authority on the subject matter of the implications of copyright law upon NFTs, disputes about NFTs and assignment agreements written primarily in copyright terms will continue to be an issue that baffles attorneys and courts alike.¹⁴⁶

Presenting yet another issue for legal professionals attempting to properly navigate transactions involving NFTs and rights assignments, courts that have spoken on the topic of NFTs have produced largely inconsistent judgments and "have led to fragmentation and confusion in the legal treatment of digital assets . . ."¹⁴⁷ Considering the quickness of technological innovation and underlying complexities of cryptocurrencies,

¹³⁹ Ameddoleh & Associates LLC, *supra* note 82.

¹⁴⁰ See Compl., *supra* note 3, ¶¶ 20–21; Ameddoleh & Associates LLC, *supra* note 82.

¹⁴¹ See Tarantino's Answer, *supra* note 18, ¶ 1 ("As Miramax knows well, Tarantino has every right to publish portions of his original handwritten screenplay for *Pulp Fiction*, a personal creative treasure that he has kept private for decades.").

¹⁴² 17 U.S.C. § 101 (1976).

¹⁴³ See Tarantino's Answer, *supra* note 18, ¶¶ 1–2.

¹⁴⁴ § 101; Ameddoleh & Associates LLC, *supra* note 82.

¹⁴⁵ See Faughnder, *supra* note 60.

¹⁴⁶ See Dhanani & Sabbagh, *supra* note 43.

¹⁴⁷ João Marinotti, *Tangibility as Technology*, 37 GA. ST. U. L. REV. 671, 674 (2021).

it is no surprise that legal professionals, who typically are not astute in the fields of technology or finance, are ill-suited to make consistent decisions regarding the governance of NFTs.¹⁴⁸ This unpredictability of decisions involving cryptocurrencies is especially prevalent in the context of remedies where “courts drastically diverge on the type of remedy that is available for individuals whose rights in a cryptocurrency are infringed.”¹⁴⁹ Specifically, some courts have applied property rules, which allow for injunctions and the enforcement of property rights against infringing third parties; others found it more appropriate to use liability rules, which make the infringer liable for damages.¹⁵⁰ With a lack of uniform regulations, courts are without sufficient guidelines on how to treat disputes involving cryptocurrencies such as NFTs.¹⁵¹

As illustrated above, there is no shortage of legal issues and uncertainties that are beginning to trouble parties dealing with NFTs.¹⁵² After recognizing problems ranging from the broad varying legal treatment of NFTs within courts to the specific lack of clarity regarding the interplay between NFTs and copyrights, it follows that parties must now question whether the terms of their own current assignment agreements will be enough to adequately protect the rights required to create NFTs.¹⁵³ By shedding light on the serious ambiguities that result from copyright terms used in assignment provisions, *Miramax v. Tarantino* stands as an important warning for those in the entertainment industry that NFT-related assignment disputes are impending and their resolution is largely unclear.¹⁵⁴ Contract drafters attempting to retain NFT-related rights according to their parties’ desires must understand these issues in order to analyze the shortcomings of their own provisions and to avoid contractual failures that could end up costing their clients millions of dollars in NFT revenue.¹⁵⁵

IV. Assignment Agreements Should Be Drafted with Express Reference to Non-Fungible Tokens to Avoid Ambiguities and Subsequent Litigation

A. Added Protection from Added Terms

Facing this heightened level of uncertainty surrounding the tribunal

¹⁴⁸ *See id.*

¹⁴⁹ Sarel, *supra* note 27, at 393–94.

¹⁵⁰ Sarel, *supra* note 27, at 391–92.

¹⁵¹ *See generally* NFTs: Key U.S. Legal Considerations for an Emerging Asset Class, JONES DAY (Apr. 2021), <https://perma.cc/Q47U-KVUL> (“To date, no state regulator with oversight of virtual currency or money transmission has issued guidance directly about NFTs.”).

¹⁵² *See supra* Part III.

¹⁵³ *See* Marinotti, *supra* note 147, at 674; Dhanani & Sabbagh, *supra* note 43.

¹⁵⁴ *See* Dubin & Abe, *supra* note 136.

¹⁵⁵ *See* Marinotti, *supra* note 147, at 674; Dhanani & Sabbagh, *supra* note 43.

treatment of NFTs, legal professionals must fashion their own solutions in the form of taking necessary drafting precautions to ensure that their crypto-related contracts do not become the subject of litigation.¹⁵⁶ As explained above, a significant issue arises where assignment agreements between creators and producers utilize traditional terms related to copyright law.¹⁵⁷ With questions about how copyright terms apply to NFTs going largely unanswered, such assignment agreements will inevitably lead to contractual ambiguities and “[d]isputes over contractual meaning [that] are more likely to end up in litigation.”¹⁵⁸ Invoking perhaps the most important overarching principle of contract law, contract drafters should avoid ambiguities at all costs and evaluate the possibility of various interpretations of the language used in their agreements.¹⁵⁹ Specifically speaking in the context of assignment agreements between creators and producers, there are a few strategies that drafters should use to ensure that their party retains the rights required to legally create NFTs based upon an original, creative work—if so desired.¹⁶⁰

First, drafters can negate any claims of ambiguity or uncertainty by expressly referring to the cryptocurrency by its official title of non-fungible tokens or NFTs.¹⁶¹ Just as most entertainment assignment agreements make explicit mention of merchandising rights, at times even going as far as to list items such as sweatshirts or mugs to provide common examples of merchandise, NFTs should be treated no differently.¹⁶² Next, this express reference to NFTs should be paired with an equally explicit representation regarding which party owns the rights required to create the purported NFTs and distribute them for sale.¹⁶³ By drafting assignment agreements with precise provisions relating to NFTs, parties will avoid the confusion and unpredictability that results from trying to accurately describe NFTs in copyright terms.¹⁶⁴ That is not to say that the inclusion of copyright terms and language pertaining to the exclusive rights of ownership in all

¹⁵⁶ See Marinotti, *supra* note 147, at 674; Dhanani & Sabbagh, *supra* note 43.

¹⁵⁷ See *supra* Part III.

¹⁵⁸ Joshua M. Silverstein, *Contract Interpretation and the Parol Evidence Rule: Toward Conceptual Clarification*, 24 CHAP. L. REV. 89, 93 (2020).

¹⁵⁹ See STARK, *supra* note 55, ch. 21.

¹⁶⁰ See generally Kathryn Goldman, *NFTs and Publishing Contracts*, CREATIVE L. CTR., <https://perma.cc/GPU7-RWPB> (last visited Jan. 3, 2023) (discussing the strategies that creators can use to maintain the rights to their work, specifically in the context of authors and book publishing companies).

¹⁶¹ See Dubin & Abe, *supra* note 136.

¹⁶² See *Baisden v. I'm Ready Prods.*, No. 4:08-CV-00451, 2010 U.S. Dist. LEXIS 99366, at *26 (S.D. Tex. Sept. 22, 2010).

¹⁶³ See, e.g., *id.* (offering an example of explicit contractual language: “[t]he Parties agree that Producer owns exclusive merchandising rights . . .”).

¹⁶⁴ See Goldman, *supra* note 160 (“Would that language encompass the right to mint and sell NFTs? That is the question.”).

assignment agreements will create a “patent ambiguity” that is so “obvious, gross, [or] glaring” that no party in their right mind would purposely include it in their agreement.¹⁶⁵ On the contrary, copyright language will be sufficient for most entertainment-related assignments and will only lead to non-obvious “latent ambiguities” that are discovered when attempting to apply these inadequate terms in the context of NFTs.¹⁶⁶ With the law still widely unclear about how NFTs fit within the world of copyrights, contract drafters should use express language when discussing NFT assignments to avoid being left with no choice but to spin creative arguments about how copyright terms like “screenplay publication” can apply to NFTs.¹⁶⁷

Additionally, express reference to NFTs by their official title may be beneficial for providing rights to create future forms or subcategories of NFTs that have not yet been popularized or even invented.¹⁶⁸ At this time, it is fair to say that NFTs are digital assets that certify and record the ownership of digital items, primarily seen in the form of artwork or collectibles.¹⁶⁹ However, NFT creators have already shown their desire to break virtual boundaries and experiment with the different uses for NFTs.¹⁷⁰ As mentioned above, film studios have already tried to give this digital asset a more real-world, redeemable purpose by associating it with movie ticket sales.¹⁷¹ With talk of future NFTs being created for physical items, it is only a matter of time before the already confusing definition and description of NFTs requires a rework.¹⁷² To this point, merely asserting ownership rights over the ability to create and sell digital assets or any other limited description of NFTs without making express mention of NFTs may still result in contractual ambiguities.¹⁷³ To ensure that your party’s desired rights in regard to NFTs remain certain, regardless of how much the nature or understanding of NFTs may change in the future, the best practice is to make explicit reference to the tokens by name.¹⁷⁴

¹⁶⁵ H&M Moving, Inc. v. United States, 499 F.2d 660, 671 (Ct. Cl. 1974).

¹⁶⁶ See Blue Tech Inc. v. United States, 155 Fed. Cl. 229, 244 (2021) (defining a latent ambiguity as “neither glaring nor substantial nor patently obvious”).

¹⁶⁷ See Tarantino’s Answer, *supra* note 18, ¶¶ 1–2; Dubin & Abe, *supra* note 136.

¹⁶⁸ See generally Jeremy M. Evans, *Practice Tips: A Primer on Digitalizing Sports Collectibles*, 44 L.A. LAW., Nov. 2021, at 10, 10 (referencing areas such as fashion and music where NFTs are already expanding into and acknowledging the seemingly endless opportunities for digital collectibles).

¹⁶⁹ Gary P. Kohn, *NFTs and the Law*, 44 L.A. LAW., Nov. 2021, at 18, 18.

¹⁷⁰ Diego Geroni, *Understanding the Different Types of NFTs*, 101 BLOCKCHAINS (Aug. 31, 2021), <https://perma.cc/FRG3-35BF>.

¹⁷¹ Jessica Bursztynsky, *AMC, Sony Offering NFTs to People Who Purchase Advance Spider-Man Tickets*, CNBC (Nov. 28, 2021, 5:22 PM EST), <https://perma.cc/UE2N-J9TH>.

¹⁷² See Geroni, *supra* note 170.

¹⁷³ See Dubin & Abe, *supra* note 136.

¹⁷⁴ See Dubin & Abe, *supra* note 136.

B. Forward-Facing Language

For contract drafters tasked with ensuring that their party retains the rights to create NFTs while simultaneously seeking to avoid ambiguities that could lead to litigation, including language about future NFT technology within proposed assignment provisions is an efficient solution.¹⁷⁵ As a strategy frequently invoked in contracts between creators and producers, modern assignment provisions already attempt to bring unknown advancements in technology within reach of current contract terms by including “forward-looking language that takes into account new technologies.”¹⁷⁶ Indeed, even Miramax made it a point to argue in its complaint that while Tarantino’s reserved rights “do not contain forward-looking language,” the broad rights assigned to Miramax did in the form of the following language, “all rights . . . now or hereafter known . . . in all media now or hereafter known”¹⁷⁷ While some may believe that such language alone is enough to account for the rights associated with NFTs, as it can obviously be argued that cryptocurrency is a new technology, the uncertainties surrounding NFT classification and governance could lead this language alone to be interpreted as insufficient to assure that NFTs will be appropriately accounted for in the average assignment provision.¹⁷⁸ Following the argument applied above, drafters should avoid any possibility of ambiguities and multiple interpretations that could land their NFT contracts in the hands of indecisive courts and instead should be sure to include express mention of NFT technology within these forward-facing phrases.¹⁷⁹ By crafting the future language in the context of NFTs, drafters will also ensure that any technological developments within the NFT field—which have yet to be created or discovered—will also be accounted for by current contractual terms.¹⁸⁰

CONCLUSION

It is far too late for many big-name creators and production entities that have pre-existing assignment agreements with terms that have already been drafted and executed. In those cases, the subsequent issues that will arise, specifically relating to the rights required to create derivative NFTs, will likely result in costly litigation once both parties realize the copyright language used in their assignment provisions opened the door for multiple

¹⁷⁵ See Joe Flint, *Quentin Tarantino’s ‘Pulp Fiction’ NFT Battle with Miramax Heats Up*, WALL ST. J. (Jan. 13, 2020, 12:12 PM ET), <https://perma.cc/K454-LXY6>.

¹⁷⁶ *Id.*

¹⁷⁷ Compl., *supra* note 3, ¶ 22.

¹⁷⁸ See generally Flint, *supra* note 175 (discussing the uncertainty about whether traditional forward-looking language is enough to account for NFT technology).

¹⁷⁹ See generally STARK, *supra* note 55, ch. 21.

¹⁸⁰ See Dubin & Abe, *supra* note 136.

interpretations and ambiguities. With the law surrounding the interplay between NFTs and copyrights remaining largely unknown and the legal treatment of NFTs being equally as uncertain, lawyers will be left to create novel arguments with no predictable answer as to how their litigation will resolve. In the end, one side will emerge victorious and become the rightful owner of the rights to create the desired NFTs, while the other will be forced to explain to their client how vague drafting cost them millions of dollars. While the future may be bleak and erratic for those like Miramax and Tarantino, who have already found themselves caught in this battle, future contract drafters should avoid these issues altogether by using the effective drafting strategies discussed in this Note. Drafters should expressly mention NFTs within assignment provisions and deviate from solely using inadequate copyright terms to discuss creators' exclusive rights to ensure that their transactions involving NFT rights escape the perils associated with ambiguous contract drafting and undecided NFT law.

* * * *