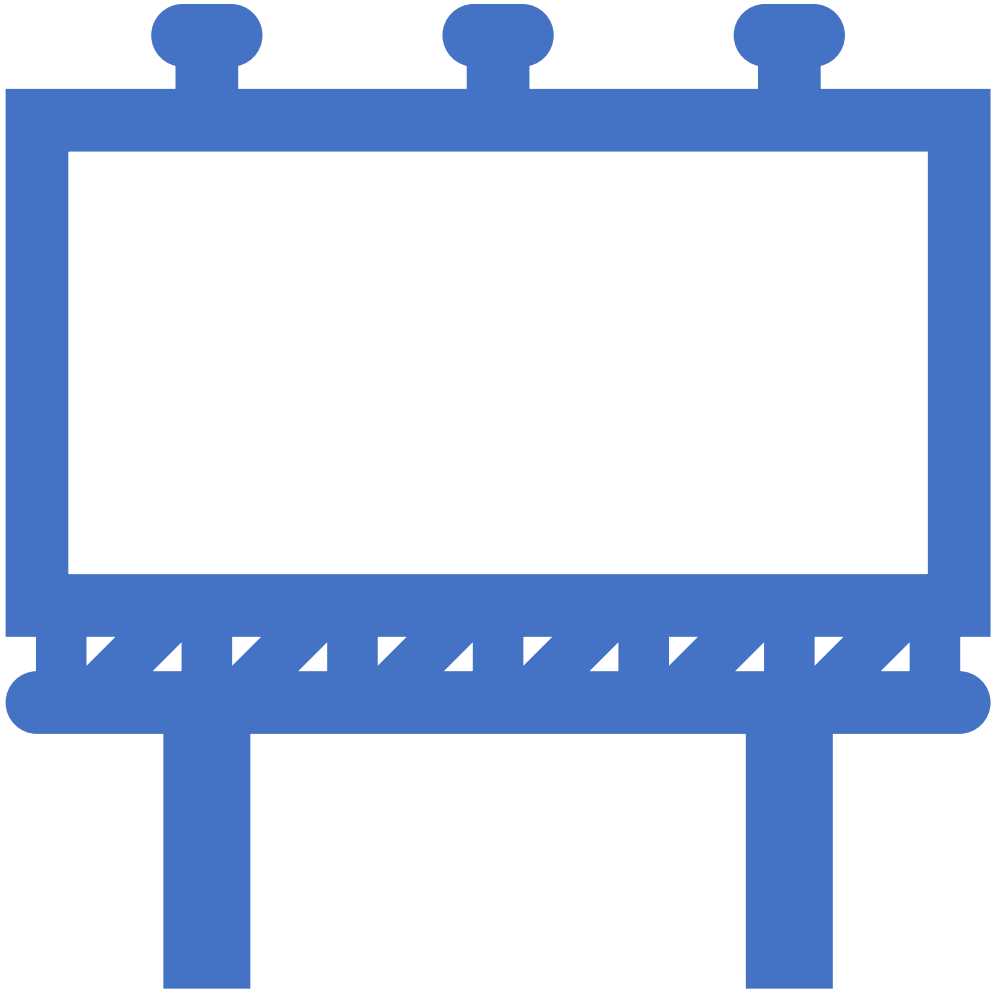
NFTs, the Metaverse, and Handbags

Martin Schwimmer

Leason Ellis

March 30, 2022

CIPLA



NEXT GEN INVESTING

These millennial creators are making 6 figures selling NFTs: 'It changed the trajectory of my career and my life'

Published Wed, May 12 2021•1:58 PM EDT • Updated Thu, May 13 2021•12:02 PM EDT

Taylor Locke
@ITSTAYLORLOCKE

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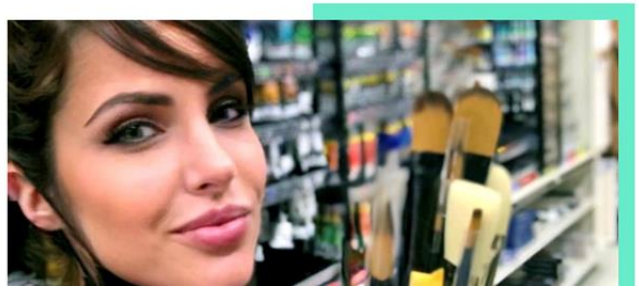

NEXT GEN INVESTING

'I had $10 in my bank account': This 36-year-old went from living paycheck to paycheck to making over $109,000 selling NFTs

Published Wed, Feb 2 2022•11:00 AM EST • Updated Wed, Feb 2 2022•3:39 PM EST

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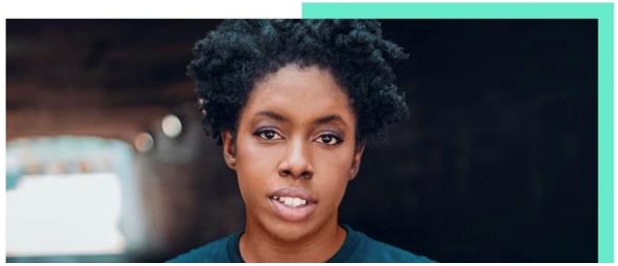

NEWS

Meet 12-year-old Benyamin Ahmed who made $1 million creating NFTs

By Rikki Schlott

February 3, 2022 | 10:46am | Updated

TIME

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BUSINESS

Teen Artists Are Making Millions on NFTs. How Are They Doing It?

NFT // News

‘I have been hacked’: collector loses more than $2m of NFTs overnight

NFT... WTF? What You Need to Know About Non-Fungible Tokens

The popularity of NFTs is skyrocketing. The craze, which has taken the art and

VENTURE TECH HUMOUR & WEIRD

Seriously though, WTF is an NFT and why do I care?

Guest Author | Jan 28 2022, 3:17 pm

The Drum Marketing can change the world.

Modern Marketing Agency Business Creativity Media Work & Wellbeing Digital Trans

OPINION

WTF are NFTs? And why are they currently so important?

THE BALANCE ▶ INVESTING

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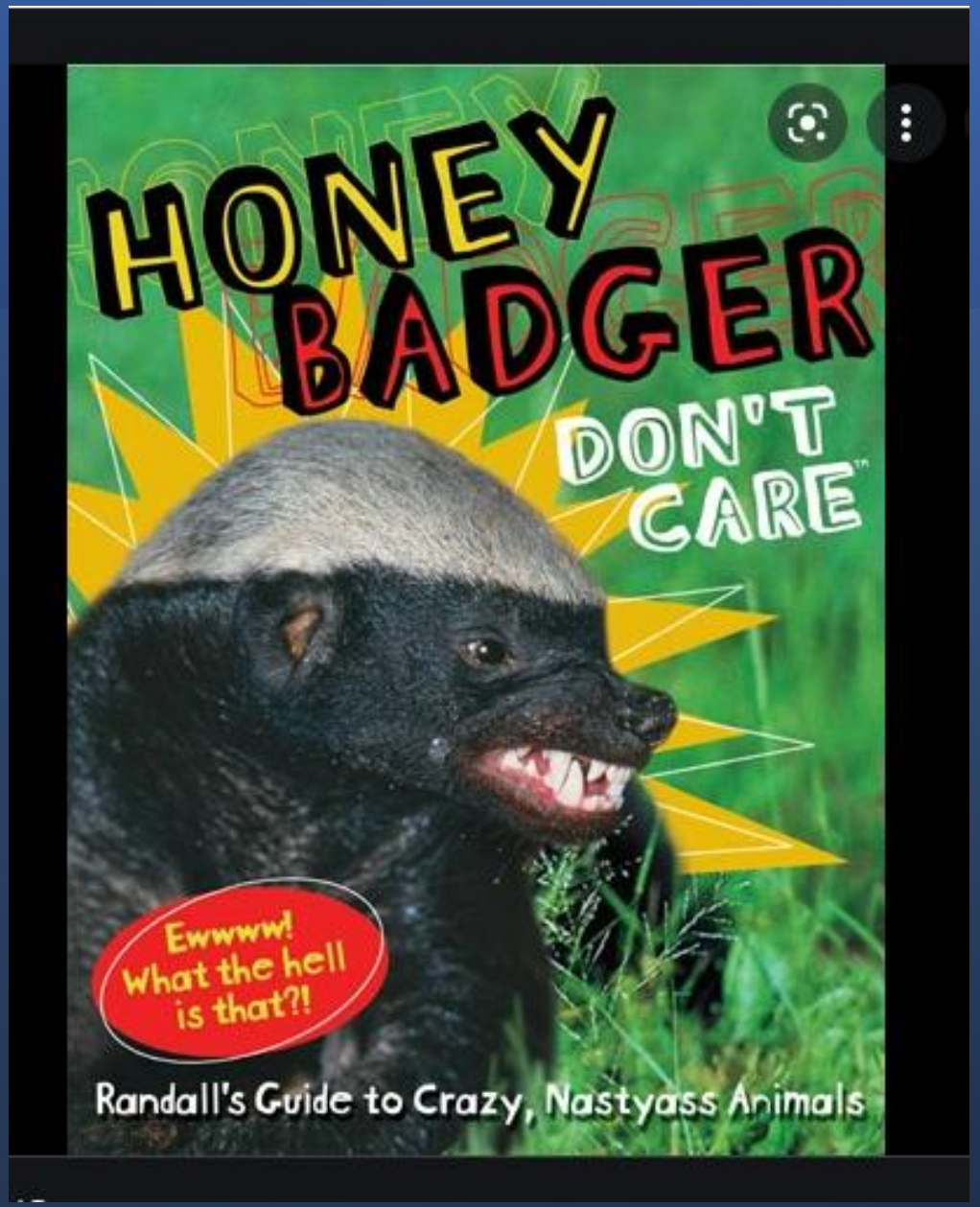
Blockchain, NFT, WTF?

Why You Should Pay Attention to Blockchain and NFTs

BY MRINALINI KRISHNA | Updated November 13, 2021

REVIEWED BY THOMAS J. CATALANO


HONEY BADGER
DON'T CARE™
Ewwww! What the hell is that?!
Randall's Guide to Crazy, Nastyass Animals

Trademark Infringement Checklist

- Does this plaintiff have standing?
- How did it acquire trademark rights?
- What is its priority date?
- Is the trademark distinctive?
- Is the subject matter protectable?
- What is this defendant's relation to the act?
- How did defendant make trademark use?
- Was the use in US commerce?
- How does the use cause a likelihood of confusion?
- Confusion as to what?
- How does the confusion proximately harm plaintiff?
- What remedies are sought?

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The Promise of Blockchain

Tonight's Agenda

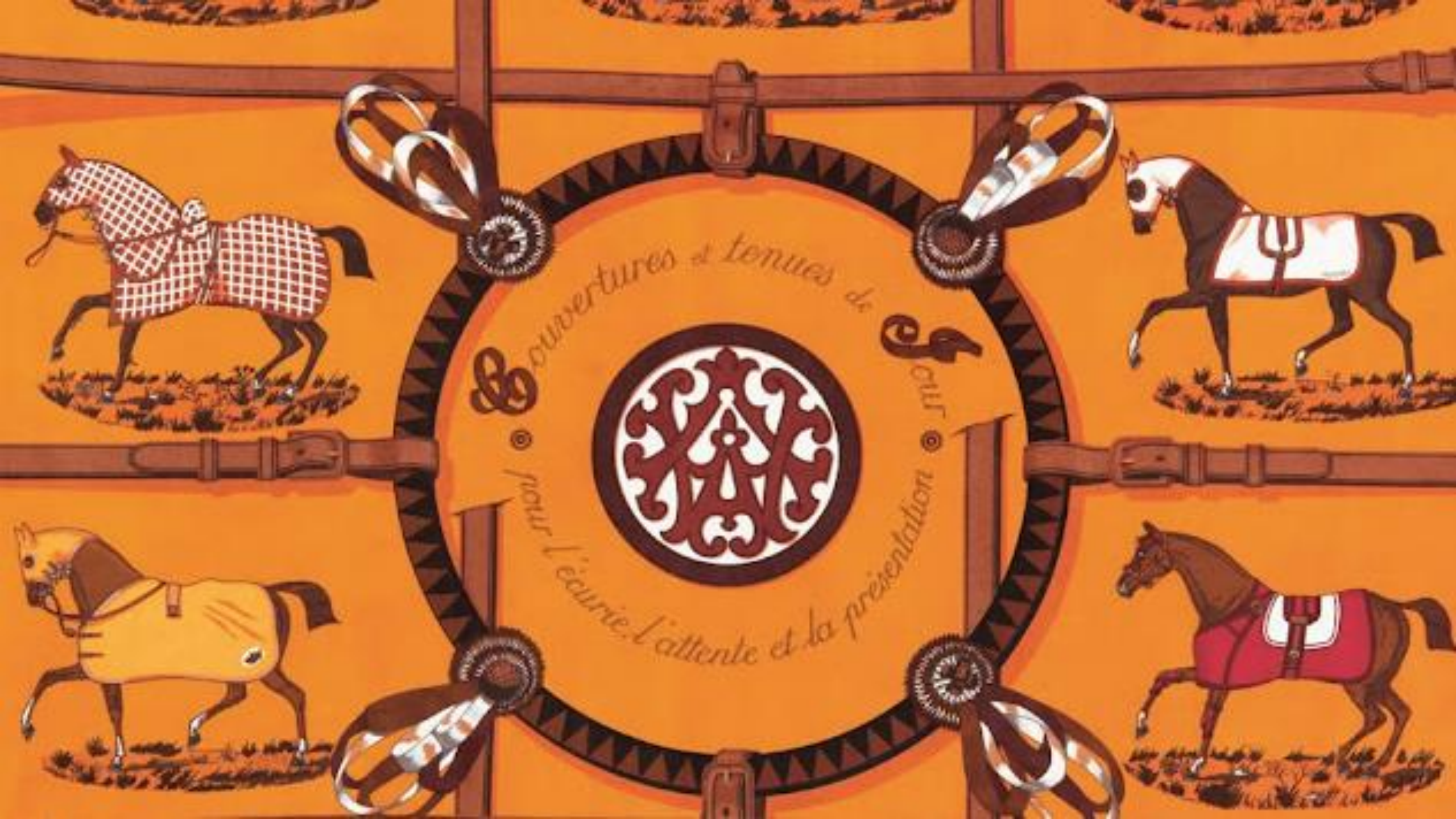
- Intro to NFTs
- Facts in the Hermes v Rothschild SDNY case
- Discussion of the Rogers test (Artistic relevance)
- Application of the Artistic Relevance test to NFTs

Takeaways

- Lots of reference stuff on NFTs
- Advise clients on selling NFTs without violating third-party rights
- Advise clients on protecting their brands

FACTS IN HERMES v ROTHSCHILD

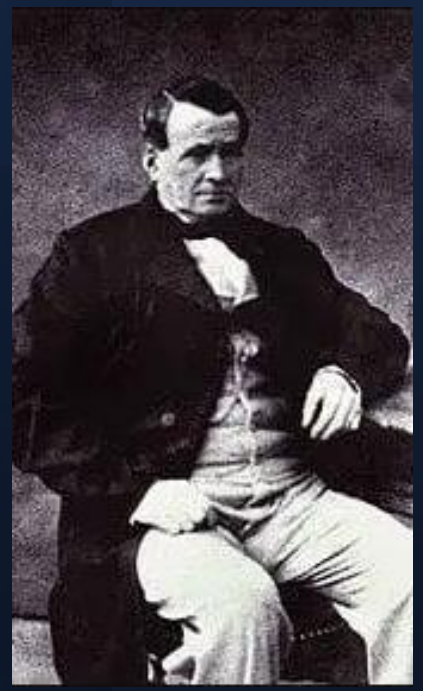
Our story begins in 1837 in Paris


couvertures et tenues de cour
pour l'écurie, l'attente et la présentation

HERMÈS

PARIS

1981 or so: Jane Birkin carries a wicker basket onto a plane



Birkin Bags

Ads · Shop birkin bags

Free 3-day

Hermes Birkin Sellier Bag...

$40,965.00

Rebag

Special offer

Hermès Menthe Swift...

$25,800.00

Used

Sotheby's

Free 3-day

Hermes Birkin Handbag Ciel...

$12,395.00

Rebag

Special offer

HERMES Swift Birkin 35...

$9,710.00

Used

Fashionphile

Free 3-day

Hermes Birkin Handbag...

$13,640.00

Rebag

Special offer

https://www.hermes.com › story › 106191-birkin

The Birkin | Hermès USA

This is the miracle of the **Birkin** Cargo. Multi-pocketed and multi-practical, this soft and lightweight **bag** is inspired by military clothing. The ingenious ...

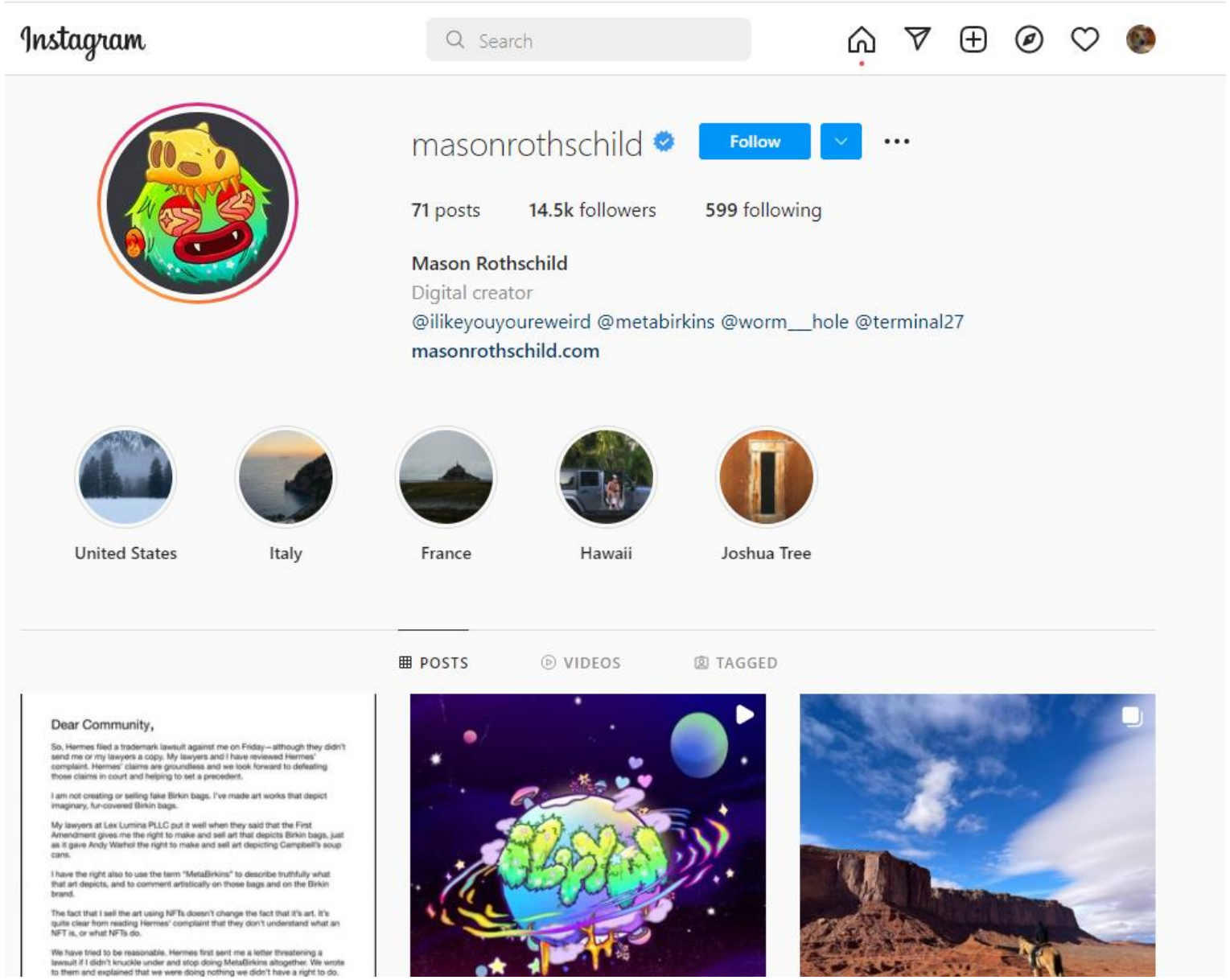
You've visited this page 4 times. Last visit: 2/9/22

It's not a bag.
It's a Birkin.

Birkin Bag reg’d trade dress

- “The mark consists of the configuration of a handbag, having rectangular sides a rectangular bottom, and a dimpled triangular profile. The top of the bag consists of a rectangular flap having three protruding lobes, between which are two keyhole-shaped openings that surround the base of the handles. Over the flap is a horizontal rectangular strap having an opening to receive a padlock eye. A lock in the shape of a padlock forms the clasp for the bag at the center of the strap. The broken lines in the drawing represent the location of the handles and are not part of the mark.”

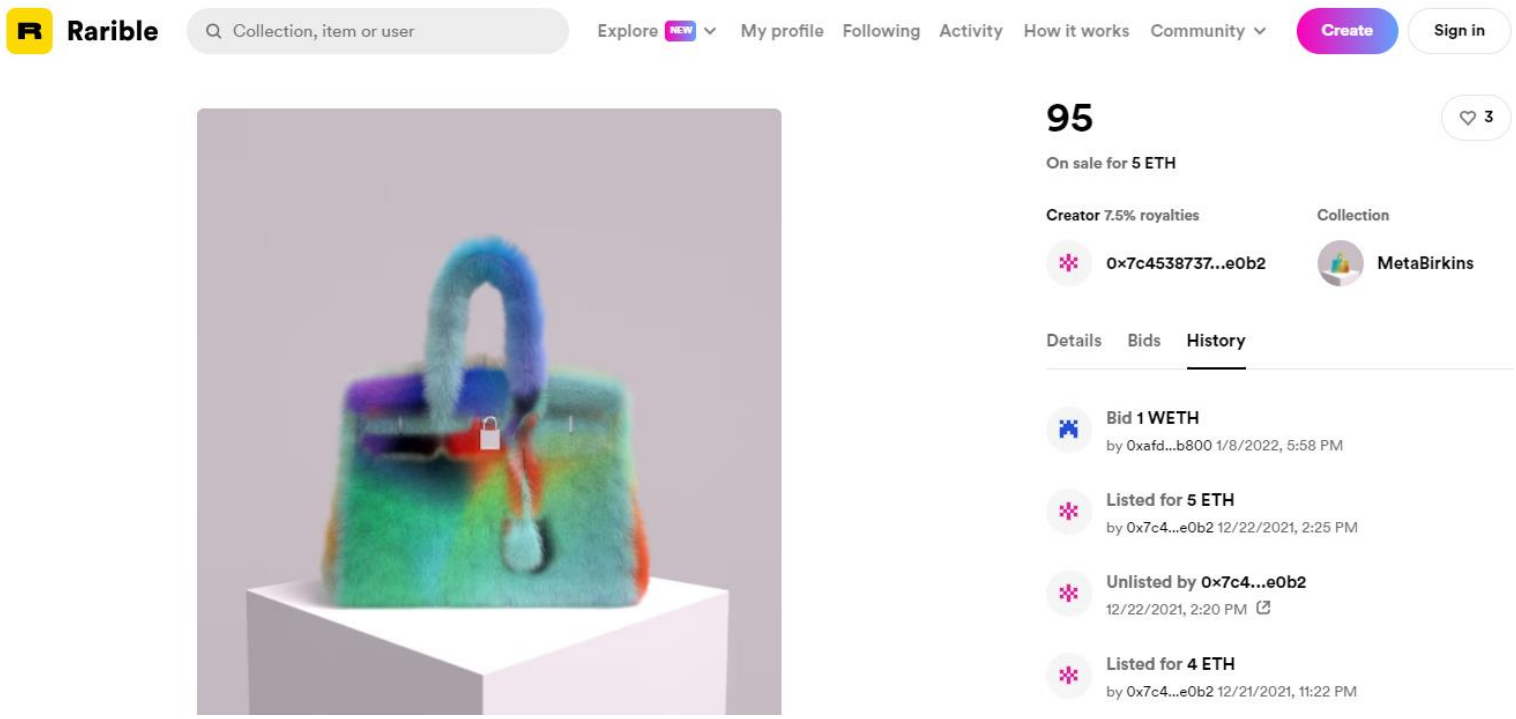
Mason Rothschild



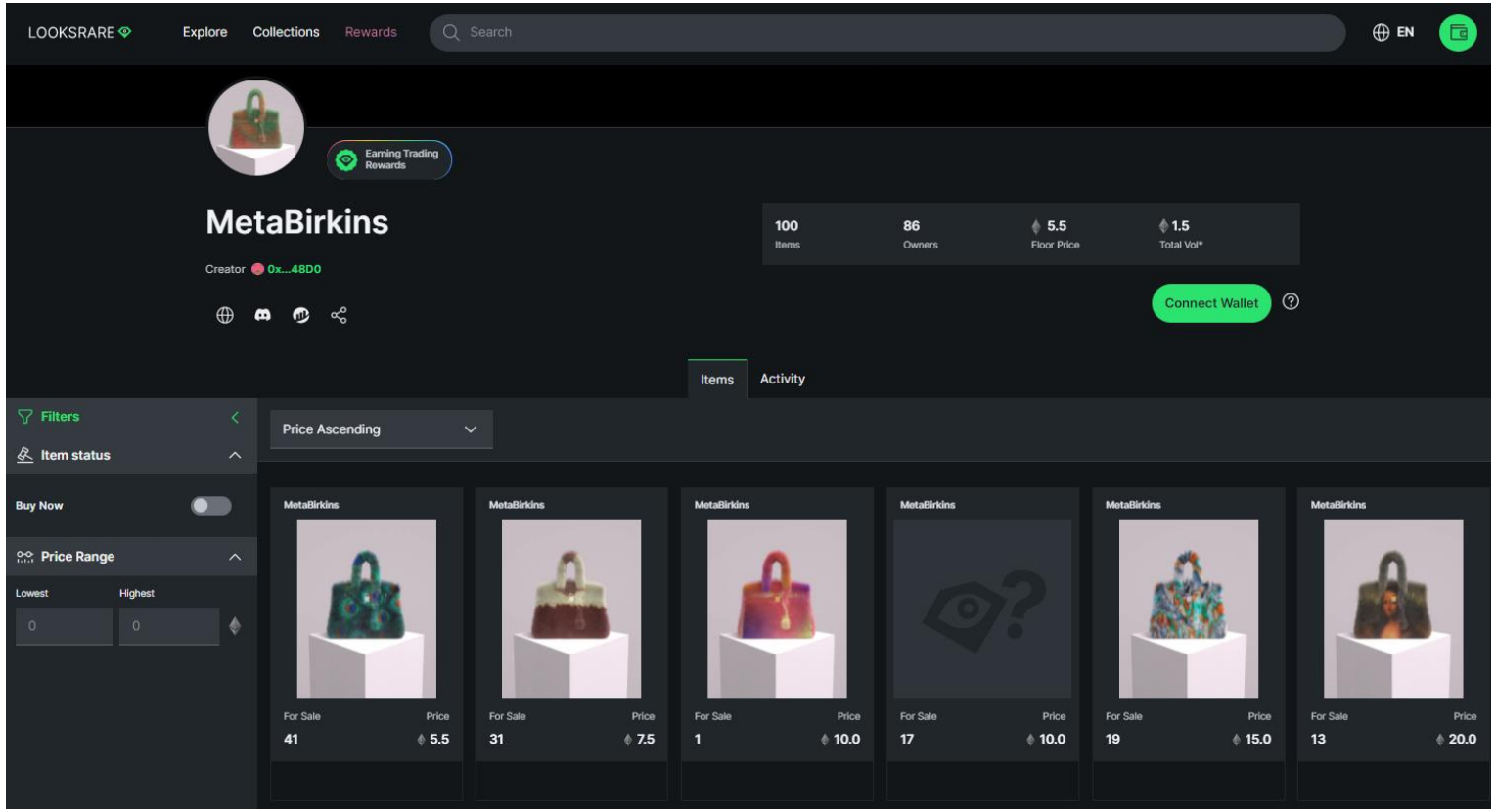
NOT
YOUR
MOTHER'S
BIRKIN
MetaBirkins

MetaBirkins Twitter

MetaBirkins Rarible Listing



MetaBirkins LookRare Listing



MetaBirkins IG Listing

Instagram

Search

metabirkins

Follow

41 posts 20.2k followers 1 following

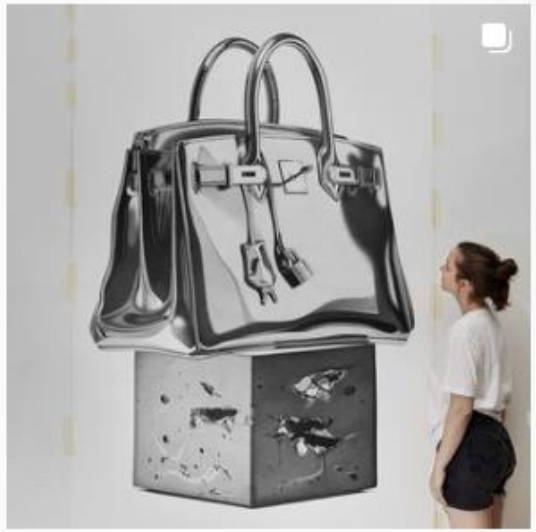
MetaBirkins

Digital creator

A digital art project by @masonrothschild living on the Ethereum blockchain. Feat. @voguebusiness, @forbes, @bof, @elleusa, @hypebeast, @highsnobiety.

looksrare.org/collections/0x566b73997F96c1076f7cF9e2C4576Bd08b1A3750

POSTS VIDEOS TAGGED



Dear Community,

So, Hermes filed a trademark lawsuit against me on Friday—although they didn't send me or my lawyers a copy. My lawyers and I have reviewed Hermes' complaint. Hermes' claims are groundless and we look forward to defeating those claims in court and helping to set a precedent.

I am not creating or selling fake Birkin bags. I've made art works that depict imaginary, fur-covered Birkin bags.

My lawyers at Lex Lumina PLLC put it well when they said that the First Amendment gives me the right to make and sell art that depicts Birkin bags, just as it gave Andy Warhol the right to make and sell art depicting Campbell's soup cans.

I have the right also to use the term "MetaBirkins" to describe truthfully what that art depicts, and to comment artistically on those bags and on the Birkin brand.

The fact that I sell the art using NFTs doesn't change the fact that it's art. It's quite clear from reading Hermes' complaint that they don't understand what an NFT is, or what NFTs do.

We have tried to be reasonable. Hermes first sent me a letter threatening a lawsuit if I didn't knuckle under and stop doing MetaBirkins altogether. We wrote to them and explained that we were doing nothing we didn't have a right to do. We told them that we believed that the dispute could be resolved through an informal conversation between me and an Hermes representative. Hermes chose instead to break off negotiations and sue me.

I hope Hermes understands that I won't be intimidated.

Hermes v Rothschild Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMÈS INTERNATIONAL and HERMÈS OF PARIS, INC., Plaintiffs, -against- MASON ROTHSCHILD, Defendant.	CIVIL ACTION NO. 22 CV _____ **COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiffs Hermès International and Hermès of Paris, Inc. ("Hermès"), through its attorneys Baker & Hostetler LLP, for its Complaint against Defendant Mason Rothschild ("Defendant") alleges and states as follows:

NATURE OF THE CASE

1. As Defendant stated in a recent interview with Yahoo Finance: "There's nothing more iconic than the Hermès Birkin bag." Defendant is a digital speculator who is seeking to get rich quick by appropriating the brand METABIRKINS for use in creating, marketing, selling, and facilitating the exchange of digital assets known as non-fungible tokens ("NFTs"). Defendant's

Rothschild Open Letter to Hermes

Dear Hermès,

So, I got your cease & desist letter. While I am sorry if you were insulted by my art, as an artist, I will not apologize for creating it.

Now, as you are aware, the First Amendment gives me every right to create art based on my interpretations of the world around me. There are countless examples of artists who reference the world and the products and cultural artifacts in it. With that understanding, MetaBirkins is a playful abstraction of an existing fashion-culture landmark. I re-interpreted the form, materiality and name of a known cultural touchpoint. MetaBirkins are also a commentary on fashion's history of animal cruelty, and its current embrace of fur-free initiatives and alternative textiles. My aim is always to create additive art projects that contribute positively to the culture.

When it comes to art, selling my MetaBirkins as NFTs is akin to selling them as physical art prints. It should not be my job to educate you on advancements in the world and the culture of art. Art is art.

There is a moving tide of innovation and evolution, and it is your role as a fashion powerhouse to amplify young creatives and artists rather than stomp them out. Your actions can help determine the future of art in the Metaverse.

You can be a part of an incredible movement.

Rothschild Letter to Community

Dear Community,

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Topics for Discussion

- Intro to NFTs
- Intro to possibility relevant theories
  - Artistic relevance
  - Initial Interest Confusion
  - Dastar – confusion as to attribution/source

Satoshi Nakamoto white paper Oct 31, 2008

“To understand the power of blockchain systems, and the things they can do, it is important to distinguish between three things that are commonly muddled up, namely the bitcoin currency, the specific blockchain that underpins it and the idea of blockchains in general.”

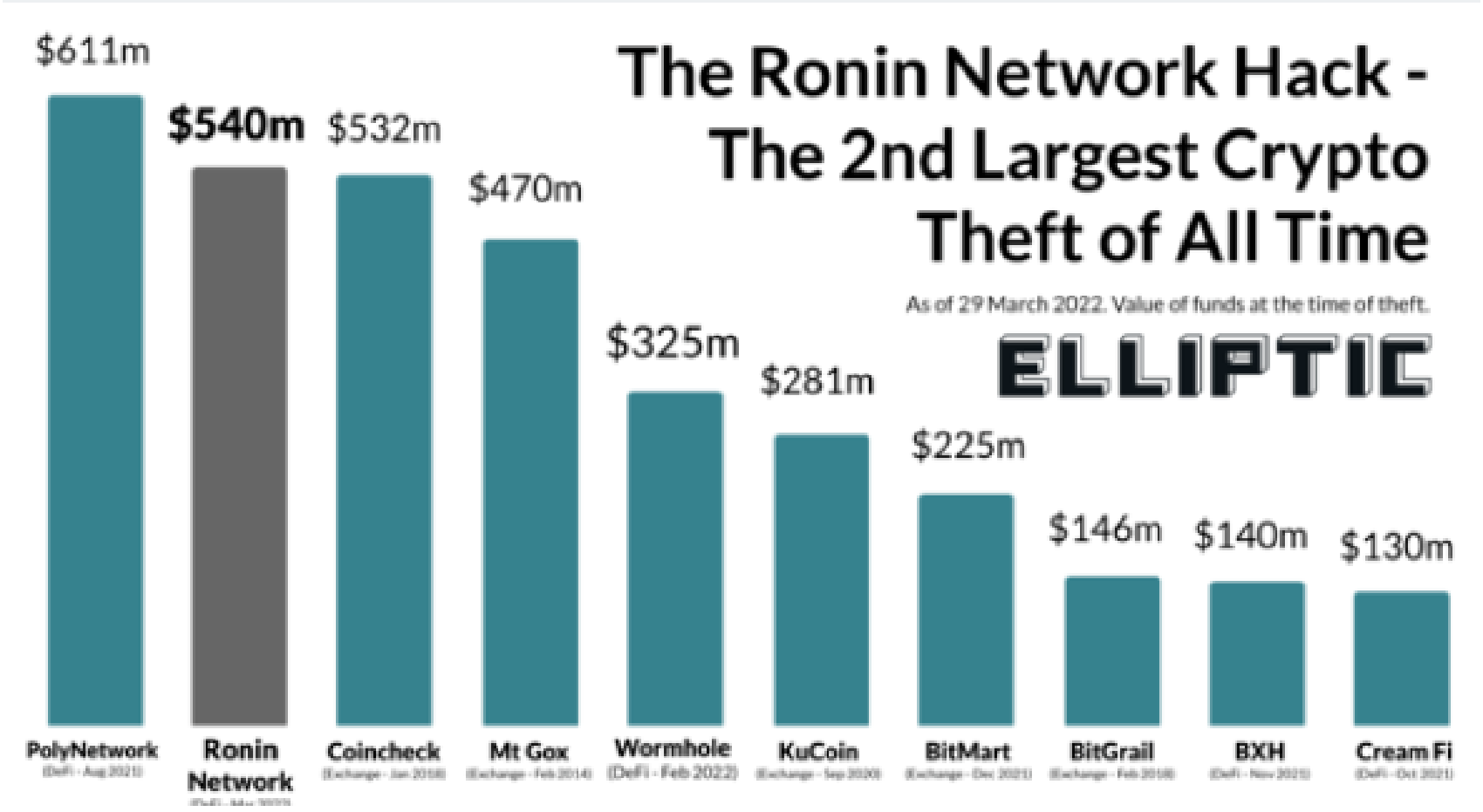
The Trust Machine, THE ECONOMIST, Oct. 31, 2015

Source: https://www.economist.com/leaders/2015/10/31/th

From Satoshi's white paper:

- We propose a solution to the double-spending problem using a peer-to-peer network. The network timestamps transactions by hashing them into an ongoing chain of hash-based proof-of-work, forming a record that cannot be changed without redoing the proof-of-work. The longest chain not only serves as proof of the sequence of events witnessed, but proof that it came from the largest pool of CPU power.

Safe, Really Safe



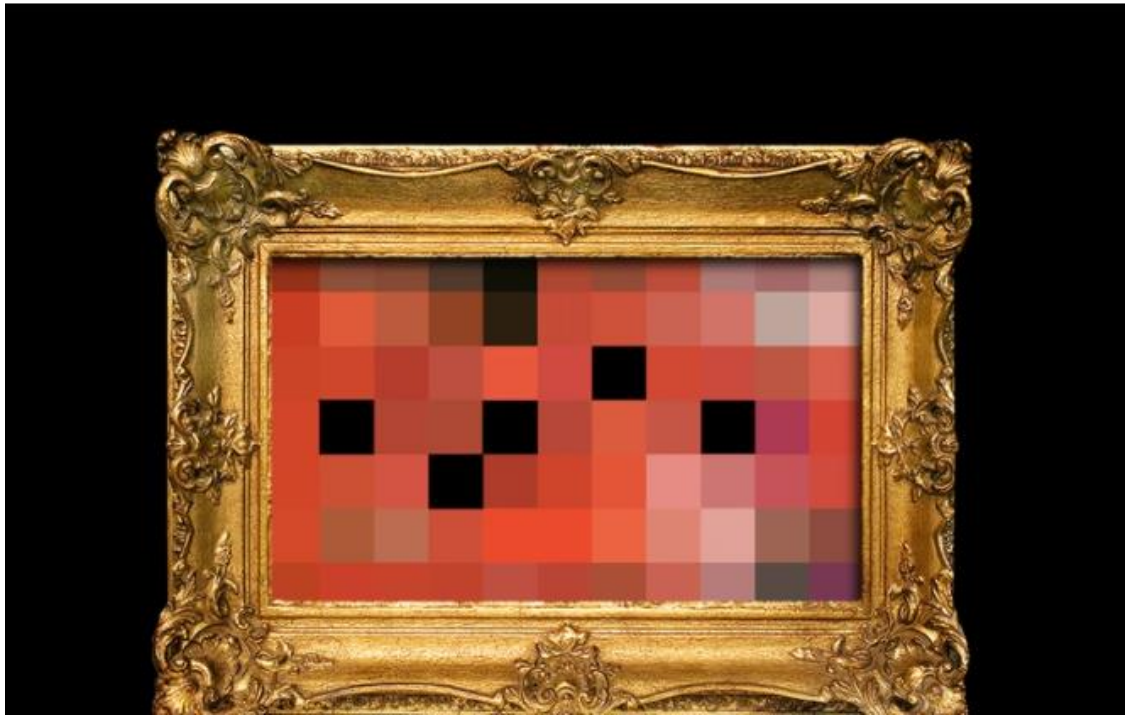
Intro to NFTs: Prior Art by Anil Dash

The Atlantic

NFTs Weren't Supposed to End Like This

When we invented non-fungible tokens, we were trying to protect artists. But tech-world opportunism has struck again.

By Anil Dash



What is a NFT?

A NFT is a one-of-a–kind digital file

- Heraclitus, c. 535-475 BC

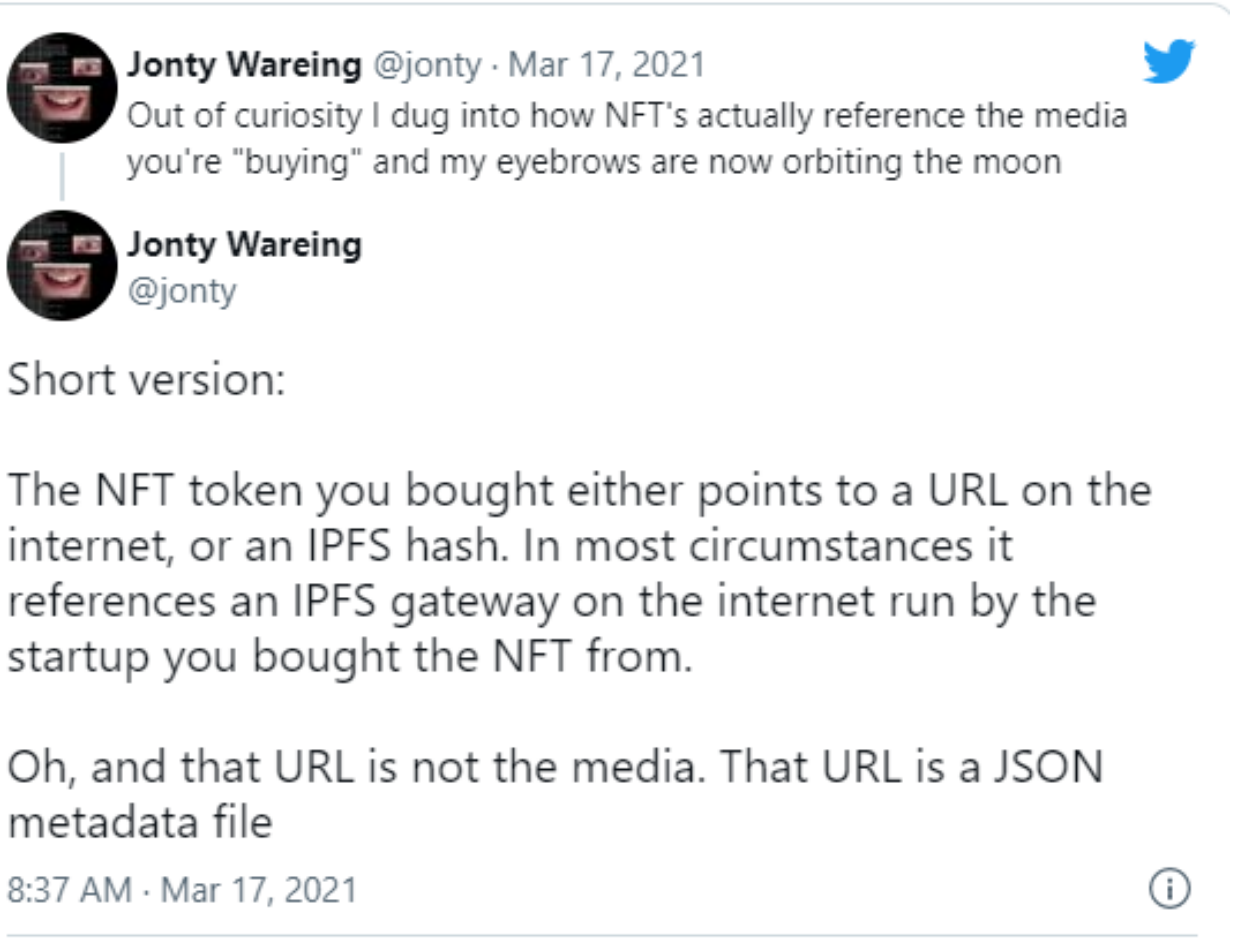
A NFT is not the digital file but the file on the blockchain that stores information about the digital file

Intro to NFTs: Definitions

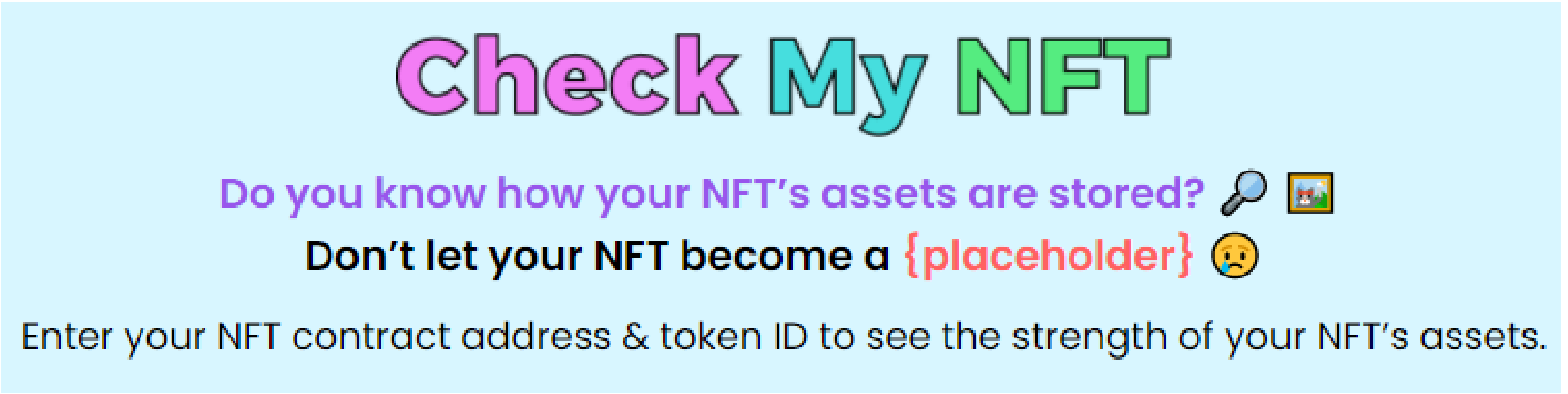
- Essential the same, or similar technology used for cryptocurrencies like bitcoin and ether is used to guarantee the uniqueness of each NFT and to prove who owns it.

- They're like any other collector's item, like a painting or a vintage action figure, but instead of buying a physical item, you're instead paying for a file and proof that you own the original copy.

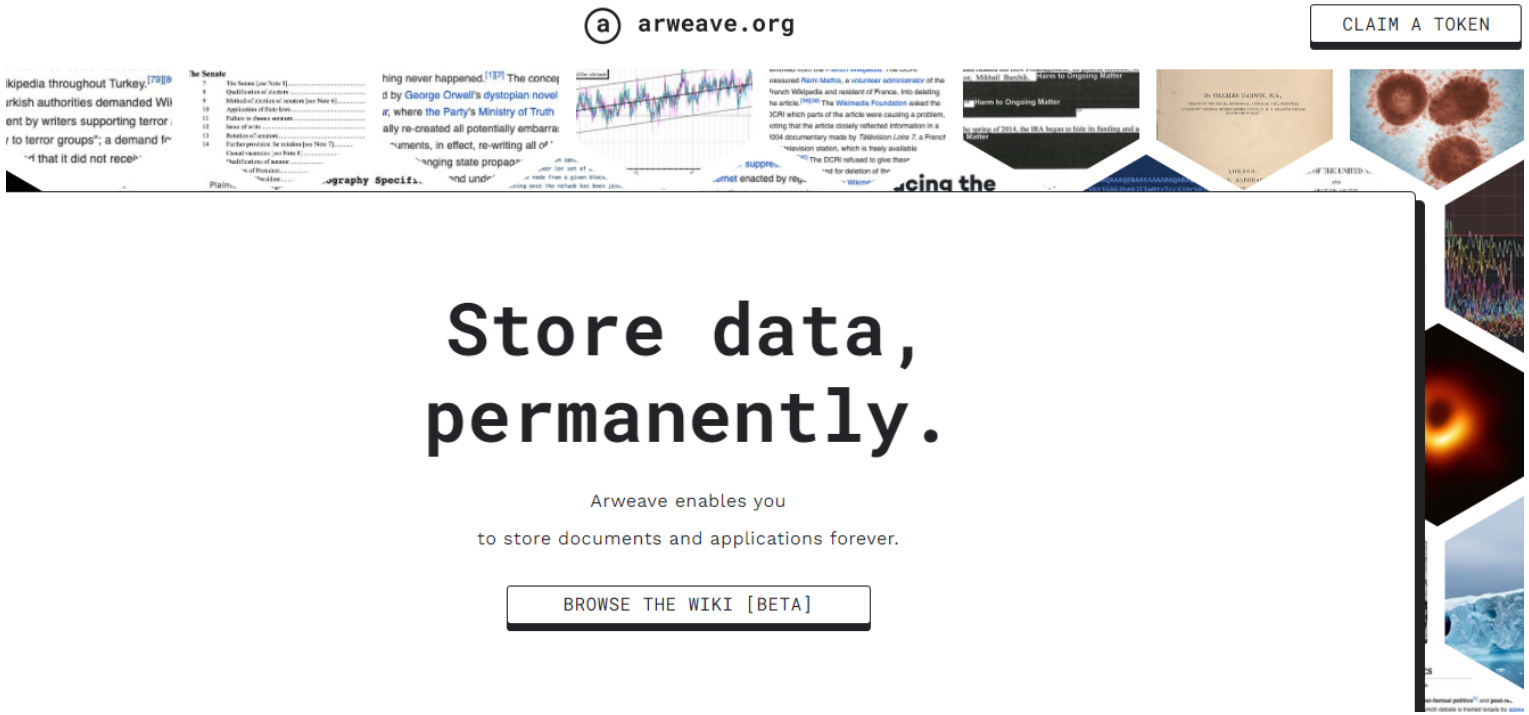
Intro to NFTs – How Do They Work



What Are NTFs: Check My NTF



Permanent Storage Services for NFTs



Introduction to legal issues relating to NFTs

quinn emanuel trial lawyers
quinn emanuel urquhart & sullivan, llp

Attorneys Practice Areas

All News & Events

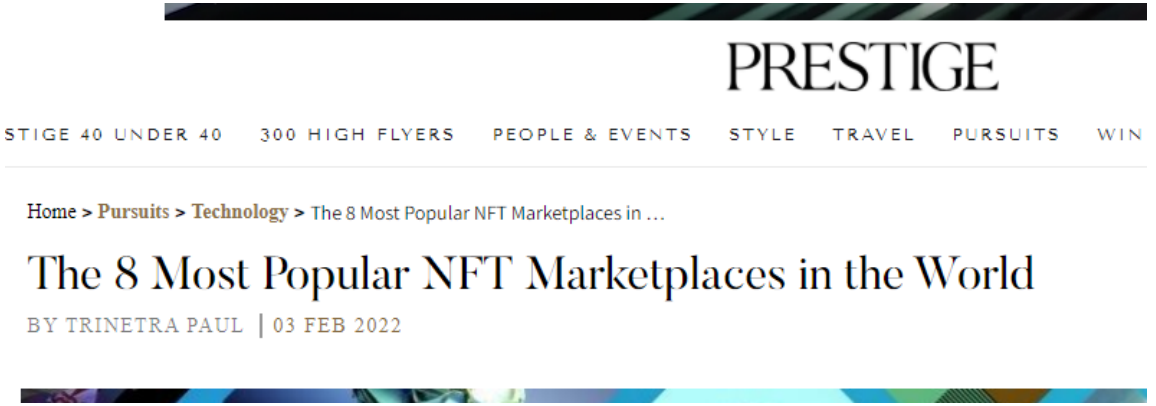
NFTs: Legal Risks from "Minting" Art and Collectibles on Blockchain

FIRM MEMORANDA

Our firm represents clients in some of the world's most significant disputes relating to blockchain, cryptocurrency, film, music, and artworks, and has been closely monitoring the exponential growth in the non-fungible token (NFT) art and collectibles market. This article discusses potential legal issues in the space.

What are NFTs?

NFT ECOSYSTEM



TYPES OF NFT MARKETPLACES

- Proprietary or closed – NBA TopShot
- Curated – Nifty Gateway
- Open - OpenSea

Available now on OpenSea

+ Add t

Dead Trademark Agglomeration

148	206	0.003	0.18
items	owners	floor price	volume traded

The Dead Trademark Agglomeration is the first and only NFT collection dedicated to collecting and preserving unique dead trademarks. Each NFT is based on actual historical U.S. trademark records from a past trademark registration. All information comes directly from official sources and government records. Each NFT provides a chance to stake a claim to a unique part of

Items Activity

- NFT LAWSUITS

OK then

Let’s evaluate the Hermes fact pattern (As alleged in the complaint)

Trademark Infringement Checklist

- Does this plaintiff have standing?
- How did it acquire trademark rights?
- What is its priority date?
- Is the trademark distinctive?
- Is the subject matter protectable?
- What is this defendant's relation to the act?
- How did defendant make trademark use?
- Was the use in US commerce?
- How does the use cause a likelihood of confusion?
- Confusion as to what?
- How does the confusion proximately harm plaintiff?
- What remedies are sought?

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The Asymmetry of Trademark Use Evaluation

Plaintiff

- Technical trademark use of the kind that would create a specimen accepted by the PTO

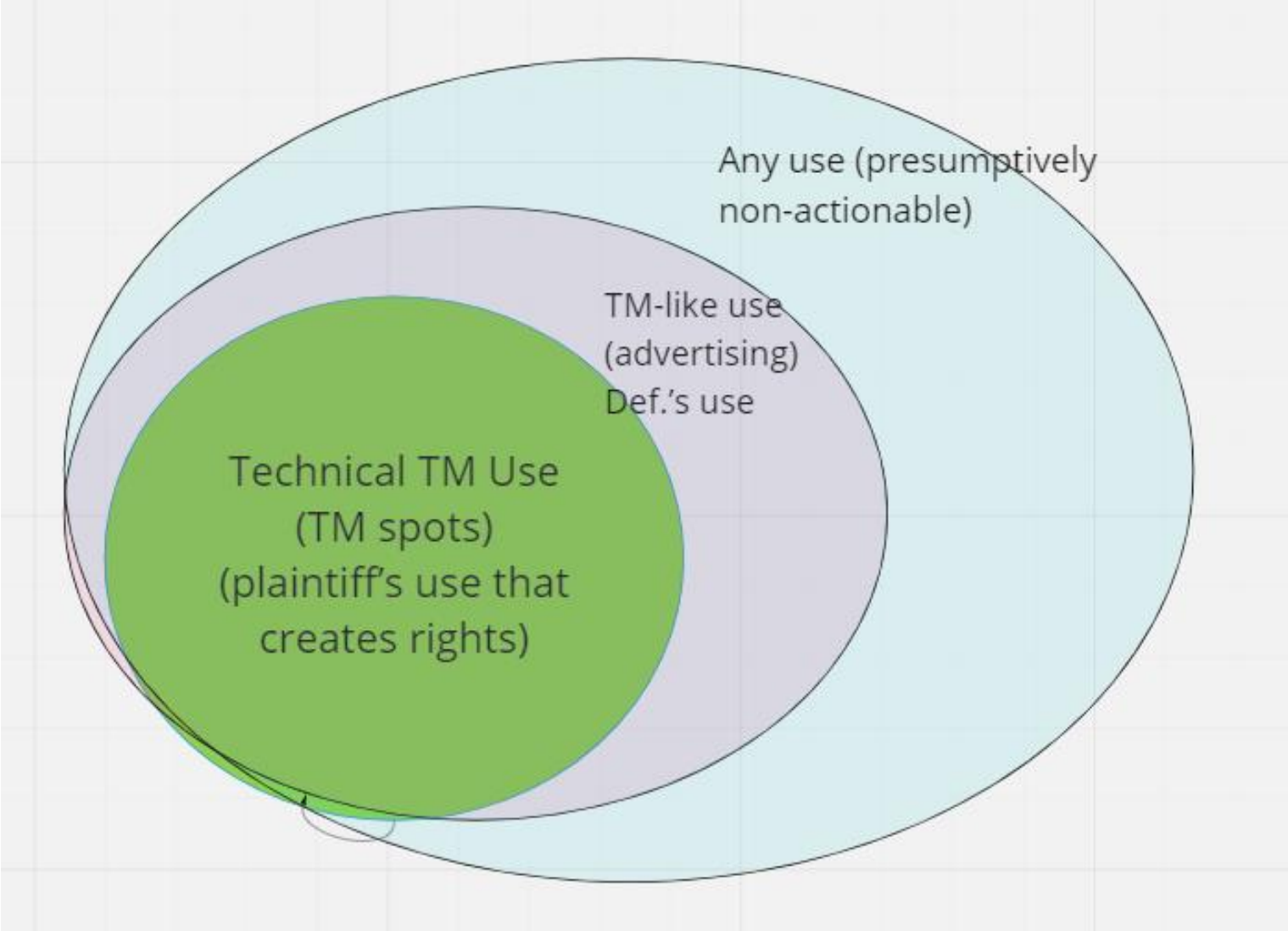
- E.g.
- Hang tags, labels, packaging
- Advertising describing services
- “upper left/shopping cart”

Defendant

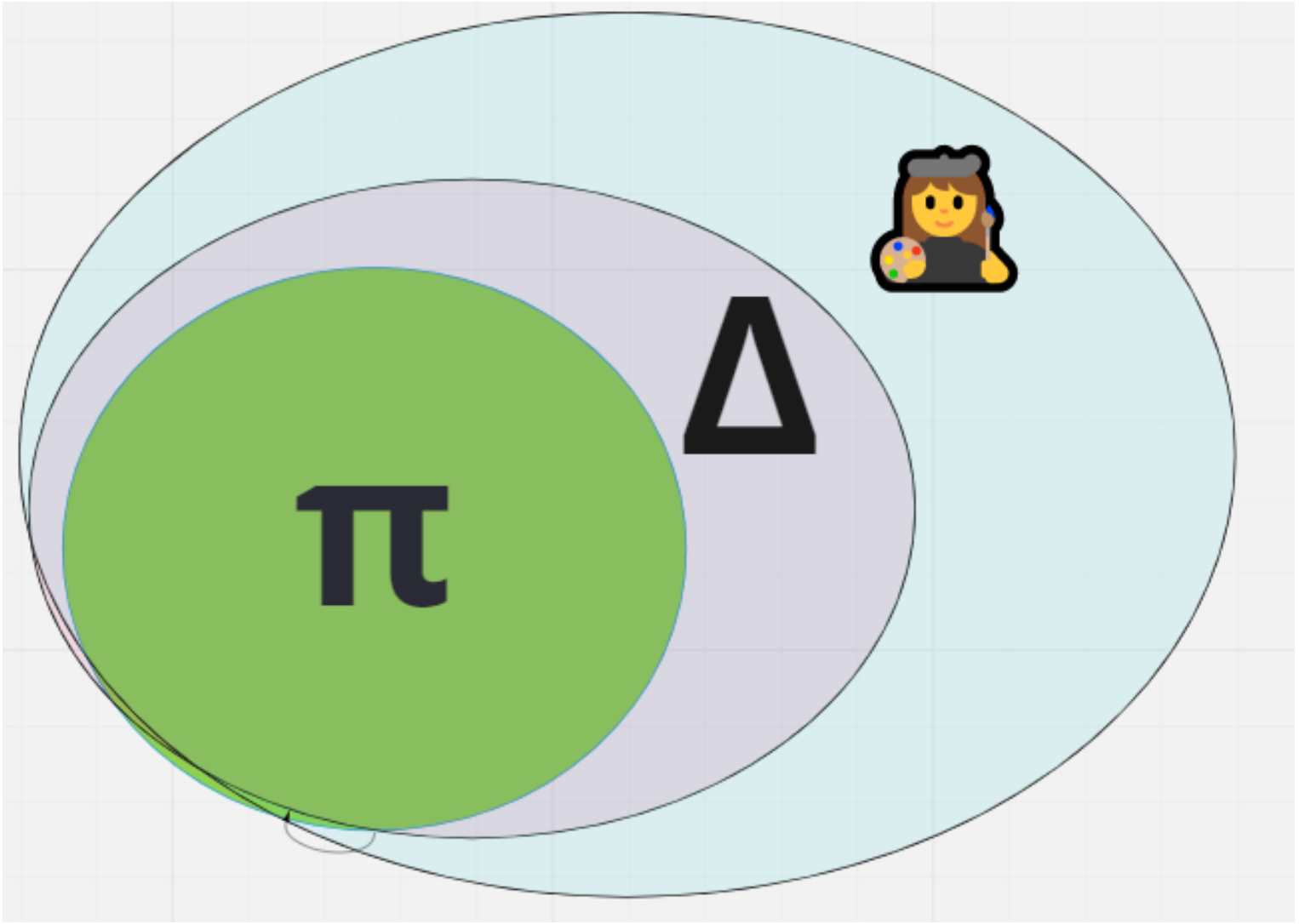
- Anything that constitutes technical use

- Penumbra (advertising, social media, “ancillary”)

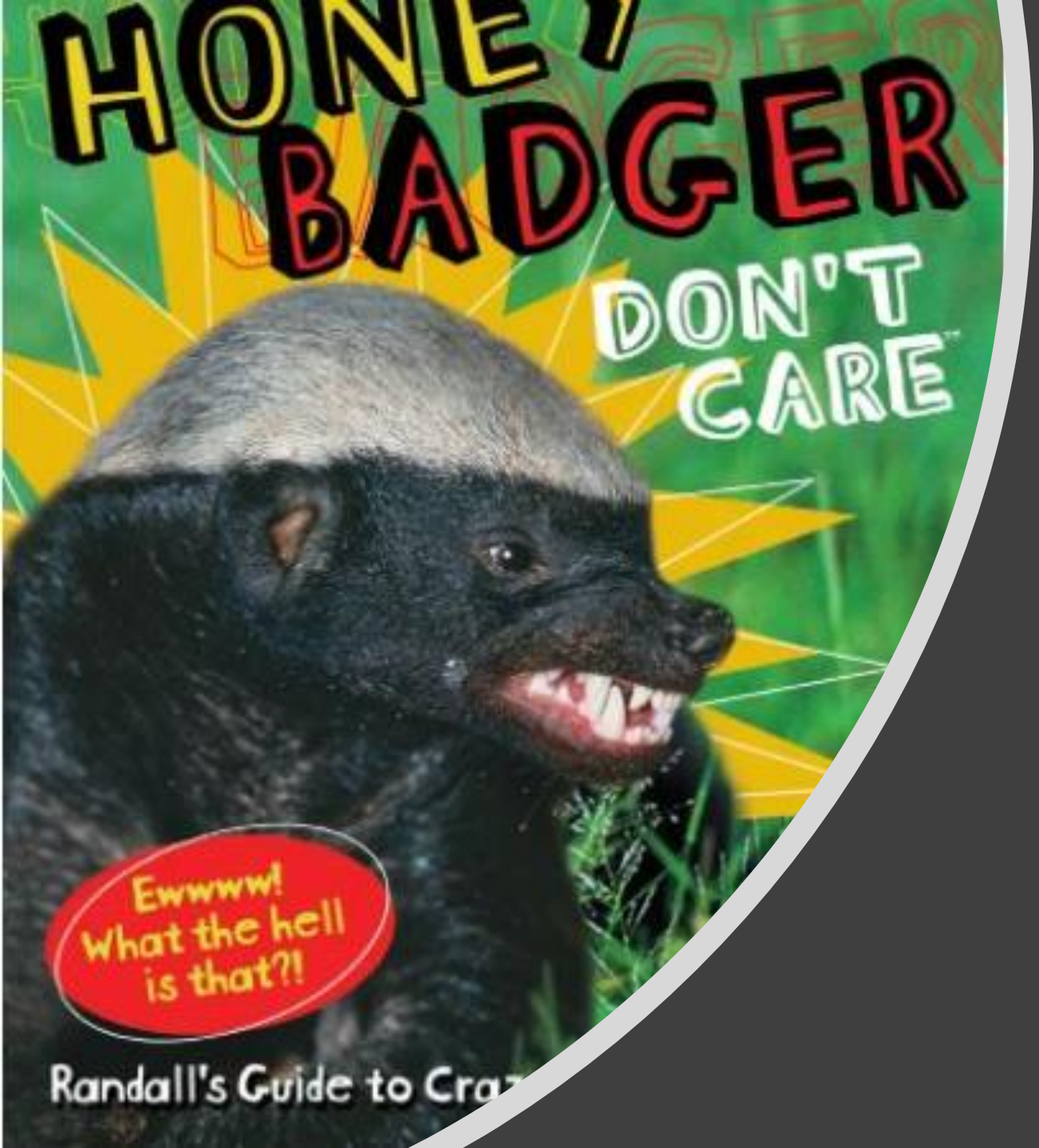
The Assymetry of Actionable Use



The closer to plaintiff-like use, the more problematic



Rogers v Grimaldi (Ginger and Fred)



Grimaldi – Gordon v Drape Creative – Ninth Circuit 2018

Expressive Works

From Arrakis to the watch party – Shop award-worthy **fan art** for the red carpet, including exclusive Dune merch.

REDBUBBLE

Search designs and products

Sell your art Login Signup

Clothing Stickers Masks Phone Cases Wall Art Home & Living Kids & Babies Accessories Stationery & Office Gifts Explore designs

Accessories

Accessories to help you accessorize like an accessorizing pro. Shop bags, hats, pouches, scarves, water bottles, pins, masks, mouse pads, and more.

Shop Accessories

Bad Spaniels – VIP v Jack Daniels – Ninth Circuit

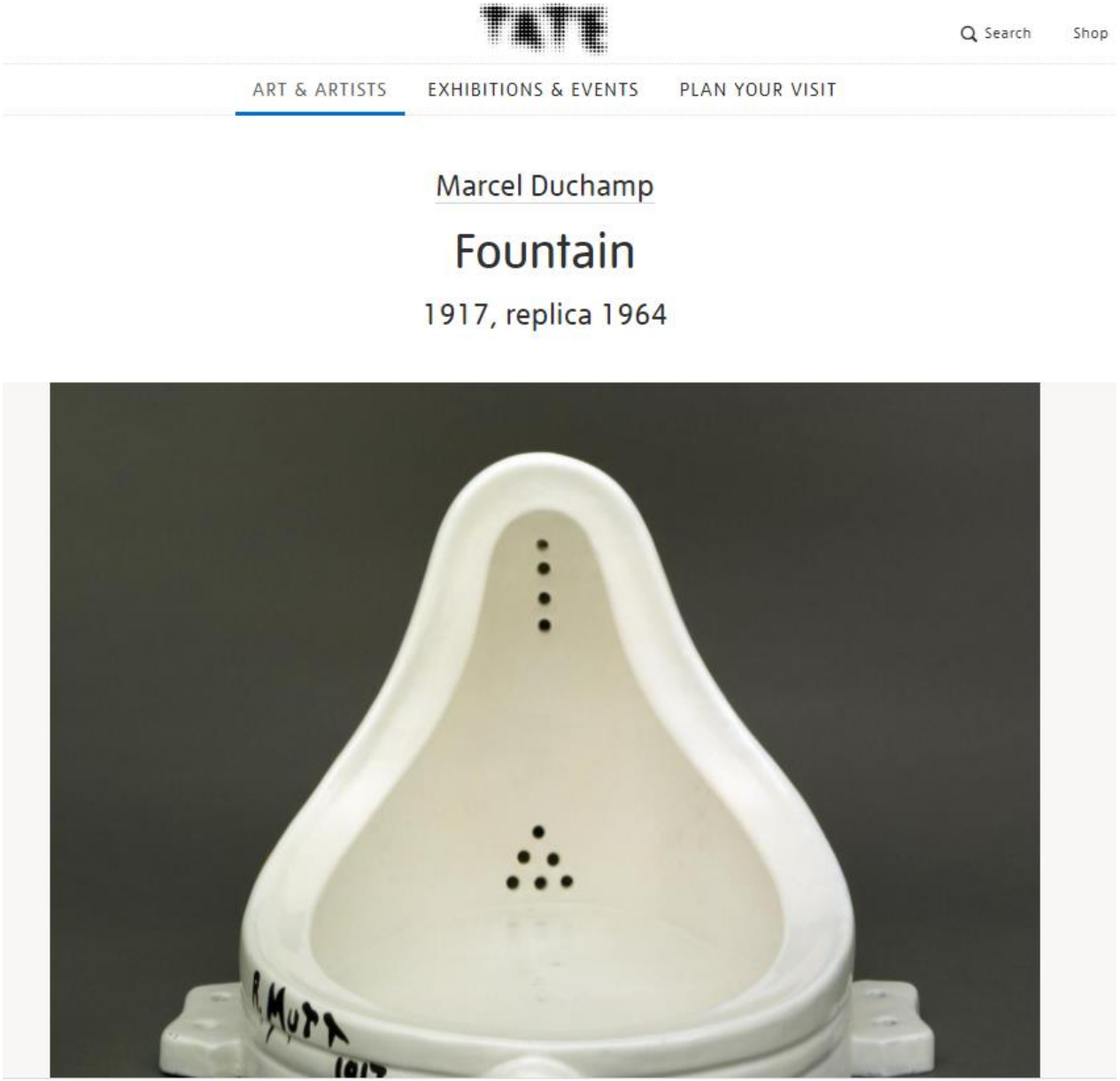
What Do You Think?

Expressive work?

Artistically Relevant?

Explicitly Misleading?

Do NFTs Recontextualize Everything?



Other Possible Theories In Evaluating These Cases

- Initial Interest Confusion
- Dastar

IIC – *Mobil Oil* – Second Circuit 1987

IIC – *Netscape v Playboy* – Ninth Circuit 2004

POTENTIAL USES FOR NFTS

This Tampa Bay home is being sold as an NFT

A Gulfport house will sell at auction next week to transfer the property rights "instantaneously" over the blockchain in a first for the region and maybe the nation.

The Promise of Blockchain

Thank You!

- Marty Schwimmer
- @trademarkblog
- schwimmer@leasonellis.com