

## The Busy Practitioner's Guide to Recent Journal Articles

**W**hich recent articles appearing in journals should we be familiar with? As non-fungible tokens (NFTs) continue to take the world by storm, estate planners and advisors are trying to keep pace with this relatively new asset class. We identified three NFT-themed articles that we think could be of great interest to you. The topics include: the debate over whether NFTs are intellectual

or personal property; the economics and legal issues of virtual art and NFTs; and estate planning for NFTs. We then asked our board members to review the articles for your benefit and to determine if they're "must reads." We hope you enjoy the reviews.

*Anna Sulkin, legal editor, Trusts & Estates*



REVIEW BY: **Avi Z. Kestenbaum**, partner at Meltzer, Lippe, Goldstein & Breitstone, LLP in Mineola, N.Y. and New York City and adjunct professor at Hofstra University School of Law in Hempstead, N.Y.

AUTHOR: **Joshua Fairfield**, professor of law, Washington and Lee University School of Law, Lexington, Va.

ARTICLE: **"Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property,"** *Indiana Law Journal* (forthcoming)

**B**y now, we've all heard of non-fungible tokens (NFTs), and some of us may even have personal experiences owning them or advising our clients regarding them. However, to many of us, including me, they remain mysterious, amorphous and almost make-believe, and the laws, rules and regulations surrounding them are confusing at best. The author explains the current intellectual property laws that govern NFTs and argues that NFTs are really personal property in nature due to how they're transacted. Therefore, the laws governing the sales of personal property, and not the laws that apply to intellectual property, should apply when NFTs are bought, sold or otherwise transacted. Furthermore, the author advocates that digital property in general should be governed by personal property laws and not by intellectual property laws, and this would benefit consumers and the overall marketplace for these items.

While the purpose of this article isn't to explain or clarify the history, fundamentals and essence

of NFTs, it does just that, and it does it very well. For the NFT novice, this article does a great service explaining how NFTs operate and function, and it provides many useful examples of highly publicized NFTs, such as MLB Champions, NBA Top Shop, Crypto Kitties and Axie Infinite. The author also elucidates on certain NFT exchanges such as Rarible and Super Rare. I learned a great deal about what truly makes NFTs valuable, mainly their "uniqueness" and "rivalrousness," as the article describes in a clear and easy to understand manner.

The reader also learns and begins to understand the foundations and underpinnings of the manner in which NFTs are exchanged, in terms of protecting against fraud, illegal use, duplication and copying. After all, the entire notion driving the value of an NFT is that it's a one-of-a-kind item that's "non-fungible." An NFT's uniqueness and inability to be duplicated must be very securely safeguarded and preserved or the entire NFT system is eviscerated. Additionally, it's eye-opening to learn and understand that both digital and real-world objects (cars, real estate and art) could someday be "tokenized" and turned into NFTs that can be bought and sold easily on blockchain technology, which would totally change the world and the way everyday commerce is conducted.

Among the significant legal hurdles and issues is that the law, which hasn't yet caught up to the technology and the legal system, including for such common items as Amazon Kindle and online movies, is based on fundamental intellectual property law. These items are "licensed" under the current rules and aren't bought and sold. Therefore, the buyer doesn't have total legal control over the items purchased and may be subject to substantial regulations and restrictions of the seller or of

the marketplace in which the item exists. These limitations may include issues with consumer protections, warranties, disclaimers, the legal right to sue in a U.S. court if conflicts arise and not being subject to strict arbitration provisions, sometimes under the laws of foreign jurisdictions. NFT owners don't currently have a full set of legal rights that the owner of personal property, such as an MLB baseball card or a painting, would have. The author feels strongly that shifting from intellectual property laws to the laws governing personal property would address many of these issues. This would allow both the NFT marketplace, as well as more common online items such as e-books, Google Play movies and digital art, to flourish because the owners will have more control and true legal ownership and less limitations and restrictions.

The author does an excellent job explaining the history, technology and legal framework.

This well-researched and elucidating article, which has close to 250 footnotes at last count in the draft, expounds on several legal principles. Moreover, just as important to the neophyte in this area, it cites to articles, offers explanations and analogies and is a good read in this new and rapidly developing world of NFTs. The author does an excellent job explaining the history, technology and legal framework, which is mostly understandable, even to a reader like me, who isn't well versed in this subject matter. As a mild critique, I would have liked to have seen much more (and it could just have been my lack of understanding) and very detailed elaboration of how differently NFTs would be regulated and administered if they were governed by personal property laws and how this would truly benefit the consumers and society at large. Meaning, it would really benefit and help the reader if the author pointed out in far greater detail and specificity, both what would be lost and what would be gained, the pros and the cons under the two legal systems and what complex issues could arise

from moving to a personal property legal system, as well as legally and administratively how difficult this would be to achieve. Perhaps even a chart comparing and contrasting the two governing systems for NFTs (and online items) would have helped me better appreciate and comprehend the author's thesis.



REVIEW BY: **Lawrence Lipoff**, director, Trusts & Estates, at CohnReznick LLP in New York City

AUTHOR: **Lawrence J. Trautman**, associate professor, business law and ethics at Prairie View A&M University—College of Business, in Prairie View, Texas

ARTICLE: **“Virtual Art and Non-Fungible Tokens”** 50 *Hofstra Law Review* (Winter 2022)

**V**irtual art and non-fungible tokens (NFTs), combined with the related involvement of artificial intelligence, are increasingly among the holdings of ultra-high-net-worth individuals and families, as well as desired as inheritances of and from them. This makes knowledge of the issues crucial to estate planners domestically and internationally.

Lawrence J. Trautman wrote an excellent paper providing welcome details and insights for those seeking concepts regarding the future potential of virtual art and NFTs. For purposes of this review, I was asked to comment solely as to whether the paper is helpful for estate planners, irrespective of if they have clients with virtual art and NFT holdings. Keeping in mind that the author doesn't mention estate-planning issues and presumably estate planners weren't his focus, I respectfully suggest the typical readership of *Trusts & Estates* may look to other articles on virtual art and NFT holdings in which the author focuses on estate matters.

Given the paper focuses on the future of virtual art and NFTs and doesn't address estate issues, as it was likely written for a different readership, the typical *Trusts & Estates* reader should give deep thought before developing actionable ideas for clients relating to virtual art and NFTs.