

# Los Angeles Lawyer

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*On the Cover*

## NFTs and the Law

Los Angeles lawyer  
Gary P. Kohn  
explains legal  
issues that  
may arise in the  
extraordinary world  
of non-fungible  
tokens, particularly  
regarding Ricardian  
and Smart Contracts  
*page 18*

### Closing Argument

“Bill’s Story”: A Homeless  
Vietnam Veteran  
*page 52*

EARN MCLE CREDIT

## Patent Cases Jurisdiction

*page 24*

PLUS

## Sports Collectibles Digitalization

*page 10*

## Viral Choreography IP Protection

*page 14*



# Contents

## FEATURES

18

### NFTs and the Law

By Gary P. Kohn

In an art market where a single non-fungible token recently sold for nearly \$70 million, NFTs are more than a fad, making their legal issues, from copyright and securities assignment in divorce to blockchain contracts that may displace traditional agreements, front and center for discussion

24

### A Federal Case in a State Court

By C. Wook Pak and Jeffrey G. Sheldon

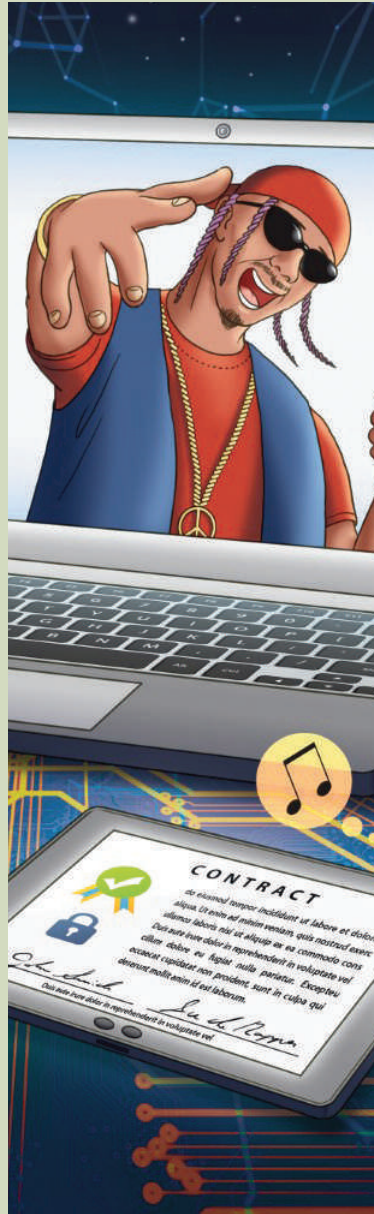
Despite overwhelming statutory and procedural mandates of federal jurisdiction over patent disputes, the case of *Warsaw Orthopedic, Inc. v. Sasso*, a dispute over royalty payments for a patented invention, ended up being tried in a state court

Plus: Earn MCLE credit. MCLE Test No. 303 appears on page 27.

## SPECIAL SECTION

30

### Semiannual Guide to Expert Witnesses



## DEPARTMENTS

7

### President's Page

LACBA's Veterans Legal Services Project Is Here to Serve Veterans of Afghanistan and Other Conflicts

By Brad Pauley

8

### Barristers Tips

Guidance for Issuing Public Statements on Behalf of Clients

By Diana Sanders

10

### Practice Tips

A Primer on Digitalizing Sports Collectibles

By Jeremy M. Evans

14

### Practice Tips

Choreography Copyrights on Moves Published on Social Media et al.

By Laura Isaacson

48

### By the Book

*Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights*

Reviewed by Stephen F. Rohde

52

### Closing Argument

The Story of "Bill," One Homeless Vietnam Veteran Client

By Naris Khalatian

by Jeremy M. Evans

## Practice Tips

# A Primer on Digitalizing Sports Collectibles

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**N**on-fungible tokens (NFTs) have been all the craze of 2021. NFTs are digital assets that are sold, bought, and traded on digital platforms, which are backed by blockchain technology to ensure their authenticity. Before 2021, only a small portion of the public might recognize the name or the acronym NFT. However, the pandemic that caused so many things to convert to digital and go online also led to collectibles normally reserved for homes, museums, and shoe boxes to find a virtual home as well.

First, a little background on what NFTs are from two sources.<sup>1</sup> An NFT is backed by blockchain technology to confirm its source and authenticity. An NFT is a digital version of traditionally copyrightable material. However, the artwork, audio, video, video game, or creative work is owned and controlled by the person(s)/entity that holds the digital receipt (e.g., the proof of ownership) whereas the physical original (if it exists) is retained by the owner.

Blockchain technology, the source behind the NFT authenticity guarantee, is like the sequence of every human's Deoxyribonucleic acid (DNA) chain or strand. The differ-

ences in sequences between humans is an astronomical number just as NFTs can represent the amount of artwork in the history of the world that has been and will be created. However, if you remove one part in the chain of the DNA (a nucleotide from a gene), it alters the outcome, the balance of the account, and output of proteins and appearance of genes. Similarly, if a part of the NFT chain of ownership is altered, the entire digital receipt is compromised.

The beauty of a digital collectible is that it can really be anything—especially since the only requirement is that an NFT is a digital picture of an original item owned by someone—or literally a digital original that has no physical counterpart. The cost for blockchain technology is the largest expense. The market for NFTs is ever expanding because people who own the originals of things are finding

that selling a single copy or multiple digital copies can be very profitable, but it also offers the opportunity to share a piece of art (or any collectible) with another. For example, it could be a digital picture of a moment during a National Basketball Association game, but the NBA still retains the copyright to the broadcast and licenses the game to a network or streamer, or an individual owner of the NFT.

NFTs are foremost an opportunity to profit from existing things but they are also a unique way to share something and for that special someone to hold ownership over it. As such, NFTs are now expanding into fashion and music. In fashion, Graphics Interchange Format (GIFs) sold as NFTs can be used to promote a new clothing line or style. In music, a digital music stock market will allow for music fans and investors to own a piece of the music



and retain royalties, but blockchain technology can also remove the middleman to give artists direct contact with their listeners. This also means artists will get paid directly and not through a licensing body, agency, or platform, etc. Indeed, “Albums as artwork and digital listening as NFTs to be sold have become a thing.”<sup>2</sup>

### The Fanatics Story

In the past, several well-known brands existed in the sports collectibles world: Topps, Majestic, Panini, Upper Deck, Fleece, Donruss/Leaf, and more. Even Post and Kraft cereal brands issued sports card collectibles. Nonetheless, even though the popularity of collecting sports trading cards waned in the mid-2000s, it saw a resurgence during the pandemic as people cleaned their attics and garages.<sup>3</sup> That pandemic-fueled popularity and some good fortune led to Majestic’s<sup>4</sup> getting bought by Fanatics.<sup>5</sup> The good fortune occurred when Under Armour did not want to supply Major League Baseball’s (MLB) uniforms; instead, Nike and Majestic entered to become the official supplier of MLB uniforms.

Of course, Majestic was purchased by Fanatics and when the opportunity arose, Fanatics won the bid to become the official card sponsor of MLB with an agreement from the MLB Players Association (MLBPA), replacing Topps.<sup>6</sup> The MLB and the MLBPA’s decision to replace Topps is important because it means that an established brand—maybe the most well-known in sports collectibles—is no longer a partner with a major American professional sports league. The MLB deal with Topps dates back to 1951, and it has been exclusive since 2009. The current MLB/Topps deal runs through 2025, when it will be replaced by Fanatics. The loss of a major partner-client in Major League Baseball also meant that Topps ended its pursuit of an initial public offering (IPO)<sup>7</sup> through a special-purpose acquisition company (SPAC).

The question going forward is whether Fanatics will continue its recent dominance in the sports memorabilia world through additional acquisitions and/or product offerings. If it is to be acquisitions, why should it not purchase another card company like Topps and continue to promote the well-known brand, but take its profits as well? If it is product growth, Fanatics will have to create a trading card profile, but it has four years to make good on that promise to Major League Baseball. Needless to

say, the participants in the sports collectibles and trading card industry are getting smaller. Whether that is good for collectors or in general is yet to be seen.

Another area for Fanatics growth and that of the sports collectibles industry is with NFTs. Fanatics, as an online and brick-and-mortar retailer, sells officially licensed sportswear, products, equipment, and merchandise and counts as clients over 150 college and professional franchises. It has relationships with all five major American sports leagues (NBA, National Football League (NFL), National Hockey League, MLB, and Major League Soccer) in addition to National Association for Stock Car Auto Racing, Professional Golfers’ Association of America, Ultimate Fighting Championship, the United States Olympics Team, and the Paris Saint-Germain soccer team. To say that Fanatics has moved into an area of market dominance would be an understatement.

NFT introduction and expansion makes a lot of sense for the Fanatics brand for multiple reasons: Initially, 1) “Social media and internet searches have made images too easily accessible”; 2) “The need to diversify assets, revenue-making, and social media engagement opportunities”; and 3) “The acceleration of the move to digital, away from paper and plastic.”<sup>8</sup>

Google Images are the easiest way for every consumer to see images of anything—and it is free. Secondly, social media literally digitizes the user’s life for all to see. These two make everything, including life itself and collectibles, more easily viewable. What makes traditional printed and produced sports collectibles valuable is that they are rare and rarely seen. Social media and Internet searches have changed that. NFTs create the opportunity to monetize digital images through e-commerce.

Fanatics is in the business of making a profit and that requires diversifying assets to create revenue-making opportunities beyond what can be searched on the Internet or on social media for free. NFTs tokenize a digital asset, and what better way to tokenize something that is already meant to be a token, i.e., a trading card or any other piece of licensed merchandise. The move to digitalization with the help of blockchain technology means that assets like sports collectibles can be easily verified, owned, and traded.

Lastly, the entire world has moved closer to digital and away from physical production. Digital collectibles are just

the next product to make the move online. The digitalization of physical assets also means that more people get to see the images and it takes things out of shoe boxes and onto platforms like OpenSea for sale. If anyone has a doubt about the value of digital collectibles as NFTs, consider that the market for the value of something is only what a willing buyer is willing to pay. Everyone values things differently, and it is clear that the market for NFTs and digital collectibles has grown exponentially.

### NIL Revenue Opportunities

Just as NFTs have grown beyond sports collectibles and into art, fashion, and music, there is further opportunity for sports collectibles due to name, image, and likeness (NIL) revenue opportunities for high school and college athletes.<sup>9</sup> The Pacific-Twelve (PAC-12) athletic conference has already granted its student-athletes the right to use images from broadcasted games for NIL purposes. Thus, these images could be turned into NFTs to be sold for a profit as trading cards or digital photographs. With Fanatics’ 150 college and professional brands as clients, the transition seems effortless.

If the stock market is about betting on the success or value of something in the future, then sports betting will give sports further engagement into viewership and collectibles because fans have a larger stake in the outcome. Whether the increased relationship between sports betting and sports brands is a good idea is another question.<sup>10</sup>

An example of how easy it is for a top athlete to enter into an influencer deal with a brand is Twitter’s partnership with Opendorse and associated brands.<sup>11</sup> The distribution platform Twitter has pre-negotiated brand partnerships, and all the athlete has to do is sign up on Opendorse to start the process. If a product can be sold on Instagram or TikTok, so can an NFT or digital collectible. Even traditional collectibles are an option when one considers that EA Sports will relaunch its National Collegiate Athletic Association video game.

As athletes continue their pursuit of content, the possibilities are endless when it comes to digital collectibles, and Fanatics can be there to swoop up the industry without much current competition. The entertainment, media, and sports industries are truly in the golden age of content powered by social media, digitalization, and new markets once prohibited from existing at all or side-by-side

(e.g., NIL, sports betting). Social media and online platforms are the catalyst for the development of NFTs fueled by the pandemic and rush to digital.

It is also true that brands like Topps and Panini can expand their portfolios and products and get into digital collectibles. Unfortunately, the nature of the collectibles industry is one of trusted brands and established ideas so it might take a while to adapt to a new interest like NFTs. One thing is certain, the business world is one of efficiency, and collectors might be able to review, share, buy, and sell collectibles much easier if they were at least digitized, if not sold as NFTs.

Major League Baseball has already established leadership in the digital collectibles space by signing a long-term agreement with Candy Digital to launch NFTs.<sup>12</sup> Furthermore, because Topps is still the official partner of MLB until 2025, the company has launched NFT trading cards.<sup>13</sup> Seventy-five thousand NFTs were issued and will sell for between \$5 and \$100 dollars each depending on standard- or premium pack-level.<sup>14</sup> One can assume that if NFTs are still popular in 2025 when Fanatics takes over from Topps, it will also issue NFTs (and possibly under the Topps brand if it decides to purchase the company).

The NFT market quadrupled in size from 2019 to 2020, to \$250 million dollars.<sup>15</sup> The NFT market by the second quarter of 2021 grew to \$2.5 billion dollars.<sup>16</sup> During the first half of 2021, the most popular digital NFTs are sports and collectibles.<sup>17</sup>

The NBA cannot be overlooked here because it was NBA Top Shot that essentially launched the digital sports collectible/NFT market with much fanfare. Although, NBA Top Shot is less about trading cards and more about digital moments—like Los Angeles Lakers' star forward LeBron James's Top Shot moment that sold for hundreds of thousands of dollars. As a cautionary tale, however, \$230 million dollars exchanged hands for the first phase of Top Shot digital trading cards,<sup>18</sup> but the second phase dropped by half in sales (likely because of too many collectibles on the market where scarcity is highly valued).<sup>19</sup> Panini has also entered the NFT race by introducing the first of their kind, Ultimate Fighting Championship NFT trading cards.<sup>20</sup>

In an interesting twist, Panini also released NFT trading cards for MLB players but without MLB or MLB team

logos since MLB is exclusively signed to Topps through 2025.<sup>21</sup> However, the MLBPA brokered a separate deal with Panini to release MLB player cards in 2021. Upon a recent Sunday release, there was \$100,000 in sales, and individual cards sold for anywhere between \$15 and \$200 dollars.<sup>22</sup>

In terms of college athletics and NIL, Panini has partnered with OneTeam Partners to issue college athlete trading cards.<sup>23</sup> OneTeam is a joint venture between the NFL Players Association and the MLBPA along with RedBird Capital, a major force behind many of the SPAC deals in 2020-2021. "Panini has plans to make cards for college players across football, men's and women's basketball, baseball and Olympic sports. The Panini Instant trading card platform will also extend to include college athletes."<sup>24</sup>

On the international scene, Sorare, the global fantasy soccer platform, has raised \$680 million in an effort to grow its fantasy NFTs, pursue NFTs with the global soccer leagues, and seek opportunities stateside.<sup>25</sup> It is certain that there will be other startups and NFT opportunities in sports and the entertainment industry. Music NFTs are possibly just the beginning.

Hollywood Director Steve Spielberg's film *Ready Player One* may be a glimpse of the metaverse to come, specifically in terms of NFTs. Is it too much to think that one could trade, buy, sell, or earn an NFT using cryptocurrency while in a virtual or augmented reality? Not too far off considering how everything continues a push to digital.

Peloton prides itself on creating a healthy and fun exercise experience with mixed digital/physical elements. Other exercise companies are looking at ways to create digital environments that help the environment—like digital rowing. Time will tell whether human behavior changes, once outside experiences in major cities become normalized and whether normalization is a mixture of digital and physical.

### The Future

Stephen F. Austin State University in Nacogdoches, Texas, was the first college to issue an NFT.<sup>26</sup> The copyright, contract, privacy, security law, and money issues created by NFTs are substantial, e.g., the agreement between copyright owner and the owner of the digital copy, the terms of service and agreement with the blockchain technology platform, and the protection of digital assets and privacy. The money is substantial enough to create an

entirely new market for consumption of sports collectibles.

It is entirely possible to see NFTs enter the entertainment/Hollywood space as well, for example, issuing an NFT/digital collectible to promote an upcoming release of a feature film or television series while utilizing the actors and other creative players with large social media followings to promote the digital asset for a percentage of the promotion—or a donation to charity. Behind-the-scenes photos, action shots, or movie posters could all be issued as collectibles. The market is endless as long as there is a willing buyer.

With collectibles, to each his or her own. As Chef Yotam Ottolenghi once said, "One man's trash is another man's treasure, and the by-product from one food can be perfect for making another." Many physical collectibles end up in closets, drawers, attics, and garages, only to be found months, years, and generations later. Often, the value of the lost item is much more valuable with time. Although most food is quickly perishable and not reusable, NFTs are treasure to some, and not so much to others. Indeed, the value and beauty is in the eye of the beholder.

Physical collectibles can also be reissued as digital assets and NFTs. The new industries of NFTs, NIL, and sports betting will clearly be keeping attorneys, agents, collectors, supporting parties and platforms, and talent busy in the days and years to come. It is advisable to be prepared to know and understand the nuances and uncertainty. ■

<sup>1</sup> Jeremy M. Evans, *What are NFTs?*, Sports Radio America (Mar. 28, 2021), <https://sportsradioamerica.com/2021/03/28/what-are-nfts/> [hereinafter Evans I]; Jeremy M. Evans, *NFTs: The Digital Original of Things*, Sports Radio America (Aug. 29, 2021), <https://sportsradioamerica.com/2021/08/29/nfts-the-digital-original-of-things/> [hereinafter Evans II].

<sup>2</sup> Evans II, *supra* note 1.

<sup>3</sup> Nate Schwartz, *Sports card collecting is having a historic boom right now and here's why*, DESERET NEWS, May 16, 2021, available at <https://www.deseret.com/entertainment/2021/5/16/22334507/sports-card-collecting-boom-explained-nft-future>.

<sup>4</sup> Eben Novy-Williams, *Nike Lands Major League Baseball Jersey Rights in 10-Year Deal*, BLOOMBERG, Jan. 25, 2019, available at <https://www.bloomberg.com/news/articles/2019-01-25/nike-lands-major-league-baseball-jersey-rights-in-10-year-deal>.

<sup>5</sup> Dan O'Shea, *Fanatics buys Majestic months after winning deal to replace it as MLB partner*, Retail Dive (Apr. 4, 2017), <https://www.retaildive.com/news/fanatics-buys-majestic-months-after-winning-deal-to-replace-it-as-mlb-partn/439749>.

<sup>6</sup> Keith Reichard, *70 years of tradition gone: MLB, players dump Topps for Fanatics*, Ballpark Digest (Aug. 26, 2021), <https://ballparkdigest.com/2021/08>

126/70-years-of-tradition-gone-mlb-players-dump-topps-for-fanatics/.

<sup>7</sup> Matt Grossman, *Topps SPAC Merger Unwinds Amid MLB Contract Action*, Market Watch (Aug. 20, 2021), <https://www.marketwatch.com/story/topps-spac-merger-unwinds-amid-mlb-contract-action-271629460261>.

<sup>8</sup> Id.; Evans I, *supra* note 1.

<sup>9</sup> Jeremy M. Evans, *Rewarding Student Players*, L.A. LAWYER, Apr. 2020, available at <https://www.cslegal.com/assets/files/los-angeles-lawyer-april-2020-jme.pdf>.

<sup>10</sup> Id.

<sup>11</sup> Ross Dellenger, *Twitter, Opendorse Partnership to Facilitate Video Sponsorships for College Athletes*, SPORTS ILLUSTRATED, June 3, 2021, available at <https://www.si.com/college/2021/06/03/twitter-opendorse-ncaa-athletes-video-sponsorships>.

<sup>12</sup> Andrew Cohen, *MLB to Launch NFTs With Fanatics-Owned Candy Digital*, Sport Techie (June 2, 2021), <https://sporttechie.com/mlb-to-launch-nfts-with-fanatics-owned-candy-digital>.

<sup>13</sup> Andrew Cohen, *Topps Partners With WAX to Launch MLB NFTs*, Sport Techie (Apr. 13, 2021), <https://sporttechie.com/topps-partners-with-wax-to-launch-mlb-nfts>.

<sup>14</sup> Id.

<sup>15</sup> Turner Wright, *Sports collectible NFTs will have 'tremendous value created,' says Fanatics chair*, Coin-telegraph (Mar. 3, 2021), <https://cointelegraph.com/news/sports-collectible-nfts-will-have-tremendous-value-created-says-fanatics-chair>.

<sup>16</sup> Elizabeth Howcraft, *NFT sales volume surges to \$2.5 bln in 2021 first half*, REUTERS (July 5, 2021), <https://www.reuters.com/technology/nft-sales-volume-surges-25-bln-2021-first-half-2021-07-05/>.

<sup>17</sup> Id.

<sup>18</sup> Jabari Young, *People have spent more than \$230 million buying and trading digital collectibles of NBA highlights*, CNBC (Feb. 8, 2021), <https://www.cnbc.com/2021/02/28/230-million-dollars-spent-on-nba-top-shot.html>.

<sup>19</sup> Jared Johnson, *NBA Top Shot: Series 2 Ends with a Whimper*, Yahoo (Aug. 7, 2021) <https://www.yahoo.com/now/nba-top-shot-series-2-172335183.html>.

<sup>20</sup> Announcement: UFC and Panini America to deliver first-ever UFC NFT Trading Cards, UFC (Aug. 4, 2021), <https://www.ufc.com/news/ufc-and-panini-america-deliver-first-ever-ufc-nft-trading-cards> (last accessed 9/22/2021).

<sup>21</sup> Ed Scimia, *Sports NFTs: Panini Releases Baseball Sets on Blockchain, NBA Top Shot Market Rebounds*, Online Gambling (Aug. 24, 2021) <https://www.onlinegambling.com/news/panini-baseball-nfts-released-nba-top-shot-market-rebounds/>.

<sup>22</sup> Id.

<sup>23</sup> Andrew Cohen, *Panini to Make College Athlete NFTs, Trading Cards Through Licensing Deal With OneTeam Partners*, Sport Techie (July 27, 2021), <https://www.sporttechie.com/panini-to-make-college-athlete-nfts-trading-cards-through-licensing-deal-with-oneteam-partners>.

<sup>24</sup> Id.


<sup>25</sup> Romain Dillet, *Sorare raises \$680 million for its fantasy sports NFT game*, TechCrunch (Sept. 20, 2021), <https://techcrunch.com/2021/09/20/sorare-raises-680-million-for-its-fantasy-sports-nft-game/>.

<sup>26</sup> Jeremy M. Evans, host, *30 Minutes of Fame w/ Wally Crittenden, Assistant Athletic Director at Stephen F. Austin State University, discussing NFT, NIL, Blockchain, and Monetization in College Sports*, Bleav in Sports Law (Apr. 5, 2021), <https://bleav.com/podcast-show/bleav-in-sports-law/> via Spotify.



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