

Eric: It was great to have Stuart Levy on The Encrypted Economy with his encyclopedic IP knowledge. I not only asked him about NFT licensing, I also asked him about things like copyleft licensing, which really doesn't intersect directly with NFT commercial use licensing, which we talk about a bunch in the podcast.

Then we delve into NFTs and associated IP issues. As an aside, I do see these fields of open-source licensing and commercial use licensing and NFT licensing all intersecting in the future as NFT start to engage more directly with open source code. I also think open-source licensing and its permutations will get more legally complex in the future since opensource doesn't

necessarily mean without restrictions. It truly dependent on the specific open source license. Now in my questioning, Stewart was extremely patient. Personally, I always appreciate it when somebody who is as accomplished as he is also shows patience and humility with others who are trying to address,

much like I was for some of these questions. In any event, I'd asked Stewart to come onto the podcast before he did his most recent Unchained podcast with Laura Shin, which was quite good. What I tried to do on this podcast is actually pick up on some of the themes from that episode and go deeper on certain points and also a bit wider on others.

So if you haven't listened to that episode and want to get a bigger picture, I encourage you to do and we'll pick up here and. Develop on what was done there. So with that, I bring a Stuart levy, the guests on today's encrypted economy podcast. Welcome to the encrypted economy, a weekly podcast, featuring discussions, exploring the business laws, regulation, security, and technologies relating to digital assets and data.

I am Eric founder of Heston. I've spent decades representing regulated exchanges, broker dealers, investment advisors, and all matter of FinTech companies. For all things, touching electronic trading with a focus on new and developing technologies. Excited to have Stuart levy on the podcast today, Stewart is an expert in intellectual property law relating to NFTs, and he is a deep background and intellectual property and technology transactions.

He's a partner at Skadden Arps, but I'll let you introduce yourself more fulsome than I have.

Stuart: Thanks Eric and thanks for having me on the podcast really glad to be here talk about the topics that we have a plan for this podcast. So hey everybody's Stu Levy, co-head of the technology transactions and IP department at Skadden Arps based in New York.

I've been working in the web three space for about seven years now. It's been most of my time for the past four and a half years. And maybe not surprisingly the last 18 months or so has been just about oil and gas.

Eric: Let's start off with talking about what a copyleft license is and how that differs from like a permissive use license.

Stuart: Okay. The way that software historically was developed and shared was that everything was shared for free. And that's an era when. Software was mostly within the realm of the academic community. And so now we're going to, we're going back a few decades. And people at MIT shared software, they had developed with people at Stanford who shared it with people at Duke who shared it with them, a university in Germany.

And there wasn't the idea that you owned software. The idea was software was a common good that academics shared what evolved of course was that with time. So if we've become commercialized and you then had proprietary licenses, you had Microsoft yet thousands of other companies who developed software and kept the code of that software proprietary.

So if you licensed a piece of software, you're not getting the human readable version, the source code version of the software, you just got the executable version, so you can run the software and you can see the software. So a programmer couldn't look at the code itself and that was.

Commercial decision to keep it proprietary. So if I want the software, you've got to go to the company that is, that owns the software and buy it or license it. So that did not sit well with some people who either for libertarian reasons or because they grew up in that academic world of software.

Not being proprietary. So it didn't sit well with them. And some of them created the concept of having what is, what became known as first free software and then open source software. And they're very similar in concept generally very different in philosophy. The idea behind free software.

Was that software should never be proprietary. Software should always be shared as a common good. No one should own it. It's just philosophically. They saw that as something that was bad and they therefore developed a license known as a copyleft license, which is a riff on copyright, which protects software and other works of authorship.

So you create this copyleft license. The idea of a copyleft license is if I license you a piece of software under a copyleft license, I'm going to give you the source code so you can see it, you can do with it, what you want, if you tweak it and make changes to it, improve it and modify it and keep it within your own enterprise.

Fine. I'm not going to tell you what to do with that, but if you then distribute that software out into the community with your improvements. You have to keep it as free software, meaning you have to give people the source code for the improvements and the changes

that you made. So that was the free software initiative the license that they created and there's a family of licenses.

Other like this is known as GPL general public license. There've been different versions of that. There are different iterations. But the idea is that software is free and needs to stay free. The open source initiative had a similar concept, but a different philosophy and the open source initiative philosophy was free.

Software is actually a good idea, not because there's philosophically something wrong with proprietary software, which is what the free software foundation describes too. But rather. If we have different people around the world with different perspectives, different backgrounds, different approaches to coding, all, looking at a piece of code almost by definition and working on that code almost by definition, that code will become better.

If you keep things in a proprietary. Universe. You've got people who are trained the same way. They work in the same, literally the same environment. They're not going to see the same bugs and errors and improvements. So software gets better if you expose it to the world, but they don't feel permissive proprietary software.

Is it necessarily a bad thing? So they created what is known as a permissive license system. They created the CA the term open source. Different from free software. Although again, they're similar and the idea of permissive software is that you also provide the source code to other people. But you're not obligated to do in other words, I can make changes. I can improvement and decide. I want to keep that proprietary. The open-source people would say, it's not a great idea. It's not good for the community, but they're not. Opposed to you doing that. So you've got out there in the world, the concept of copy, left licenses.

Which are very adamant that software should always be free, open, accessible to everybody proprietary software, inherently a bad thing, and then open source software. And those are mostly permissive kinds of licenses, which have a less antagonistic view to proprietary software. But the goal of both of them is that you should be able to see the source code of a piece of computer code.

And just to say the entire world of blockchain and web three is built on the concept of free or open source software because I'm only going to trust a blockchain based decentralized system. If I can see the source code. So if you ask me to try. A trusted third party, a bank, a financial institution to clearinghouse.

I trust that institution. I don't, I might want to see their computer code, but I don't care so much that I can't, because I trust the institution. If you're going to tell me that there's just free software out in the world, that people are using to run a decentralized platform, a defy system, whatever it might be.

I want the ability to look at the COVID. To be able to kick the tires on it and trusted before I'm going to transact on that blockchain or on that DFI platform.

Eric: And so how, and that relates specifically to copyright for software, how does that intersect with NFTs? So the way

Stuart: it intersects with NFTs is it's less, a little bit less okapi copula versus permissive license.

The way it has come up is that what some people have done when they've granted commercial rights is they have written in their own agreed. And that agreement, that terms of use that agreement allows you certain commercial rights. So maybe it allows you to do anything. Maybe it allows you to do merchandise, but not digital work.

It allows you to do anything, but create another NFT. It allows you to commercialize, but only up until a hundred thousand dollars and then you're licensed, doesn't apply, you'd have to go negotiate something, their parcel, a lot of different ways with some projects have done. I feel still the it's the distinct minority, but with some projects have done is they have done it under a creative commons license, which is a kind of open source permissive license, which basically says.

We're putting this out in the world and you can do anything you want with it. So it's a different approach towards getting to unlimited commercial usage.

Eric: Over the last 12 months or so I think a lot of the dialogue as to what constitutes and empathy has changed, there's been a lot more discussion is, Hey, you're just buying something that points to somewhere else.

And as a result you've also seen with the board apes yacht club and some of the other communities that have sprung out of that. Different licenses. At a high level, what would you say have been some of the major changes in the evolution of the way that people view the purchasing of an NFT?

Stuart: Interesting. That's a great question. So I think there are. Two components to that. One is the way that collectibles have evolved. And one is the way it just NFTs overall haven't evolved. So what I mean by that is on the collectible front. One of the things. See changes we've seen over the last year or so is the addition of providing the owners and NFT with certain commercialization rights in the work that is associated with the NFT.

But I now have certain commercial rights where historically I had no commercial rights or the right to look at the work that. Display for myself for non-commercial use to sell it. So I've got to display it to be able to sell it. So we're going to see what they're buying, but that was it that still exists in very large part, but there's definitely been a trend towards giving people the right to commercialize their NFTs in a variety of different ways.

So we'll talk about that a little bit. That's one big change, but the other big change is attaching a variety of different benefits. To NFTs. And that's been particularly interesting to the retailer community, because it allows them to interact and connect more with their fans their users, their consumers.

So I think we're seeing NFTs being used in many more in different ways than we saw. Late 20, 20, early, 20,

Eric: 21. So up until we started getting into commercial use rates, maybe the, would you say that the NFT licenses were probably more distinct from the permissive use licenses? And that may be now with some of the different utilizations of NFTs and the different rights that, that maybe there is more interesting.

Stuart: So I maybe see it a little bit differently. Cause again, I think there's two different concepts. One is the concept of what can I do with the digital work I have purchased the NFT of, and the other is putting out a side, what are the rights and benefits I get outside of my artwork? So it could be by this NFT.

Concert tickets, you get this kind of real world experience. You get access to a writer's room. There's a lot of different benefits that are a little bit separate apart from the right to commercialize the actual digital work with which the NFT is associated.

Eric: Okay. And so maybe angling back to the NFTs a little bit.

In your podcast with Laura shin, you talked about the distinction between commercial rates to the artwork versus commercial rates to use the trademarks and names. So you know where you could use the art for any purposes, but like for example, in the board apes yacht club if you bought a board apes NFT, you couldn't use the name, but you could use all the artwork or maybe you could use a derivation.

Maybe that's how some of like the The mutant apes yacht clubs started. I don't know, but maybe if you could comment on that a little bit.

Stuart: Sure. There are two distinct rights in this corner of the intellectual property world, there are other kinds of intellectual property protections as well, but there are two distinct rights in this area of intellectual property.

One is copyright rights, which protect works of authorship music digital art, video, art plays, computer software books, things like that. Works of authorship. Then there's a separate area of intellectual property law which is trademark law. And that protects the names and logos.

Some do some taglines of companies. And the idea of a trademark is that protects. You as the consumer by giving you a source of origin. So if I see a brand name on a on a piece of

on a good or service, I know the quality of that good or service. I know this company and I, have some sense of, what I'm getting.

So trademark. Protect the name or logo again, sometimes taglines have a product that designate a source of origin, like whose product or services. This copyright protects again, works with authorship. So those are two distinct rights. It's not like they come bundled together. They're two very, they're two different areas of the law.

Two different ways that you get protection. As copyright office is a trademark office. Very different. So if I give you the right to a license to use a trademark let's say of mine, that does not mean I gave you the right to use things that I have copyrighted. I just gave you the right to use my trademark.

Similarly, if I give you a license to my copyrighted works, it doesn't mean that comes along with the trademark for that work. So in a lot of cases, It doesn't so it doesn't matter so much because they're distinct. Usually if I have a trademark license from you, it's because you're giving me the license to put your logo on, t-shirts I manufacture for you or you're giving me the right to put your name on a front, a restaurant franchise I own, the copyright doesn't really come into play.

And also when you're licensing copyright works, the trademark is irrelevant. You're giving me the license to your music. Are you giving me the license? To a book and the trademark piece doesn't often enter into play and the world of NFTs, they do very often come together because there's the artwork associated with the NFT protected by copyright.

And then there's the name of the project, maybe the name of the company that issued the NFT and that's protected by trademark rights. So as an issuer of NFTs, Come to this party with two bundle of rights, I've got copyright rights of works of art. I've created by either internally. I got someone to, draw the images and I've got trademark rights in the name of my company, the name of my project.

I can, if I wanted to give you just the copyright rights. And your work that you purchased and not give you any trademark rights or I could give you both. I probably wouldn't give you a trademark rights. You're not copyright NFT world. That kind of wouldn't make sense, but I could split them up or give them to you as a package.

That's my choice. The problem, and again, I problems may be overstating it, but just the issue that's lurking out there is that for some projects they've given you the right to the copyrighted works and the right to commercialize that, but either explicitly have said, but you don't have any rights in the name.

Can't use the name or are silent on whether you have rights to use the name. So taking those one at a time, if you've explicitly told me I can't use the name of the project, that means I could use the. But I could not call it whatever the name of the project is. So if it's,

stews NFTs and they're, very well known and I'm selling, digital images of something, you can use the digital image, but you can't say on the bottom of the t-shirt or on the backpack or whatever else you might be doing.

Suzanne FTEs. Cause I said you can't use my name. Just the image you have where I'm silent on. Whether I gave you the rights to Suzanne FTS, you don't have the right. Like the default always in intellectual property laws, unless I've given you the right. You don't have the right. So you could argue they were silent.

They must've meant to provide me also with the trademark rights to what I do. They just didn't grant it or they forgot to, they didn't realize they needed to. And I feel comfortable using the name also, you're doing that considerably at your own risk, maybe you're right. Maybe they meant to grant you trademark rights as well.

Like I meant to give you the right to stews NFTs. Just forgot to put in the terms and conditions, but maybe my feeling is no, Silence means you didn't get the right. You shouldn't have assumed you had those rights and therefore you did it. And it how dare you use my trademarks without permission.

So it's an area to be aware of because a lot of projects focused very much on the creative work piece and not on the name of the project piece, the trademark pieces.

Eric: So let's say that you post it on open seeds and I'm a I'll say I'm an unsophisticated consumer and for whatever reason either it could be on another platform where I've agreed to such terms as part of registration.

So it applies across the platform or maybe even in the context of a secondary transaction, I acquired these rights, but effectively. In a scenario where maybe as a less sophisticated consumer, I understood that I had commercial rates to the copyright, but I didn't understand the distinction or the importance of the trademark.

Now, again, from a contractual perspective, I wasn't granted the rights. The question is, whether or not That use by me of those names inadvertently, where I don't, where I can argue. And maybe this is just a defense as opposed to an actual right to use them. I don't have the right to use them.

The question is how successful are you going to be in enforcing it against me? If you can't approve, if you can't prove that I actually Even understood the scope of the license.

Stuart: Yeah, no I, it's a great question. You're still have a very good case as the intellectual property owner against against a user, the fact that the user might say, oh, I didn't know.

Doesn't help them. Imagine, an interesting, analogy is I see something on the internet. I could, the clip art copy pasted put in a brochure and they all, now the owner of that work comes after me and sues me for using their art in my brochure, without their permission.

I have no leg to stand on as the brochure maker to say, Oh, you never told me I couldn't do this. I didn't know who, I'm not a lawyer. I didn't know. You can't use stuff out on the internet. You don't win the day with that. Ignorance is not is not a good defense.

You're you still have the same issues.

Eric: So I, I guess that sort of flows into one of my another point to follow up on, which is. In ensuring that the user understands what they're getting and ensuring that there is consent, particularly as it relates to commercialization rates.

What do you see as some of the challenges of not having, let's say a standardized license on the platform, allowing multiple different kinds of license, where you get a consumer who just may not be taking the time to evaluate each and every one second.

Stuart: So I guess there, there are a couple of issues that, that lurk out there.

So one is just a practical issue. Like you'd rather people know they can't do something, so they don't have to clean up the mess afterwards. Better. No, one's making unauthorized commercial uses of the mark of the work even innocently, because then you got to go and try to get it shut down

and you'd rather just cut that off at the past. Whether the terms and conditions get you there legally again, let's put that aside, this is a practical matter. Like you do face the reality that a lot of people don't look at terms and conditions, so you know, better to have it in an FAQ, in clear and big letters.

Just again, I'm thinking practically, just to stop people from doing what you don't want them to do. So you just can deal with that. On a, that's the sort of practical. On the legal side of things having people aware of, what they can do and can't do is really I've always seen it this way, more of a downstream issue for.

The holder of the NFT as they seek to commercialize their rights. So what I mean by that is if I own it NFT and I want to, and I believe I have commercialization rights. And now I want to go make hats with the artwork. There's a very good chance. The hat manufacturer isn't going to say, let me see your license that gives you the right to do this.

I'm saying it not so definitively, cause it's not a hundred percent that won't happen. In fact, it's interesting. We were just talking in our group about about a, I think it was actually a hat manufacturer. We're here in New York. And if you came to them and said, Hey, I want to make NYU hats, New York University.

I want to make NYU. They won't do it because they assume you don't have the license to that. They don't want to get in trouble with NYU. And I wouldn't assume that just because you go to a manufacturer, they're going to say, sure, we'll make whatever you want us to make. There's a chance.

They'll say, show me, you have the rights for me to make this hat for you before I make this hat. But putting that kind of area side, if you really have a vision to do something that's high value, high quality you're going to do, create some animated content. You're going to do what video you're gonna do.

Something like that. There's a really good chance that anyone you're going to be dealing with in a lot of industries, they clear rights, meaning they say before we do this, where are your rights coming from? And if you show up and say I have the commercial rights to this because I bought this NFT on a platform.

They're going to say where is the grant of rights to you that allow you to make this animated series using your character? And if you can say you can't show them sort of the chain. Here's the rights granted to me, here's where I clicked on them to agree to, an agreement that gave me those rights.

There's a reasonable chance there. That's not going to be good enough for them. Like they, they take rights clearances very seriously. And for you to say, yeah, I never clicked on anything, but there's an FAQ out there. Were they on discord? They said you can use the rights. It might be okay for you, but it might not be okay for a lot of players in industries where you might want to exploit your commercial use.

Because again, they won't be able to clear the rights to their satisfaction.

Eric: And so with regards to the grant of commercial rights and maybe taking it back to board apes, yacht club cause we're there word those commercialization rights. Is the reason that they granted it on every single NF T that they sold was simply to simplify the process for the five to 10% that would desire to commercialize those rates.

Or was there any benefit at all to the vast majority of Bored Apes Yacht Club purchasers to acquire commercial rights as well. Yeah.

Stuart: So I thought, it's not so much a legal question as it is like a real world practical question. And it's not yet clear. I think the jury is still out a little bit on this.

Like we've seen w we've heard from your clients of ours who have an Ft projects that the commercial rights piece. Is something the community, has demanded now in a lot of projects, the community and air quotes is a very, and very loudly vocal percentage of your overall community.

And they feel like you have to give us commercial rights as a community based project. We're all in this together. How dare you not give us commercial rights? So ready? The percentage of people who even care about it is a fraction of the entire community to your really good point. A lot of people don't care about it.

A lot of people are like, look, I bought this because it's cool. It's fun. I'm flexing, whatever reason people buy it from. But like I have a day job. I'm not going to start a t-shirt company or, make t-shirts and try to sell them. So you've got, again, a percentage of the whole who care.

And then as I said, on a bunch of our projects, they found that they've granted rights. And then the number of people actually are taking advantage of that is like a fraction of the fraction. So you're exactly right. And again, we're in the early stages, so maybe it evolves over time. But I think when the early stages of people actually taking advantage of that, because that's a lot harder to create a business, I'm using an image.

And then it might sound, it's one thing. Oh, it's cool. I'm going to put it on a few hats for my friends. And it's another thing to try to really create a commercial enterprise. And again, I think people realize that pretty quickly, so I'm not fully dismissive of it because like with everything in this space, we're at the very earliest stages.

But I think for now, you're not seeing that much commercialization. Th at this time,

Eric: And then w you also touched on something with regards to how the licenses passed from owner to owner. I know that was a subject of your paper, not even getting into cause I your paper makes some important distinction between actual affirmative click through versus browse through different ways of trying to ensure that there's consent in many ways.

A lot of these issues are very similar to the ones that underlie the e-sign act, and issues that we've been dealing with across like all contracts. Just how do you ensure that there's actual consent, but from a purely practical perspective what things have you actually seen in the market that accomplished particularly well, a fluid process for getting that ascent?

Not just at the initial. Primary offering of it, but like these secondary sales that then flow

Stuart: through. Yeah. So let me flush out a little bit more the first point you made and then talk about the one solution I think, exists today. That works and it's a suboptimal one.

So when when the digital world developed in web twos or e-commerce world, so one of the questions was. Can we people agree to terms and conditions on a website and is that binding right? Before. That concept didn't even exist. You had to actually sign something, with a wet ink signature.

And so once websites started proliferating, there were terms and conditions. How do you get someone, what's the equivalent of signing an agreement online. And there's, as you can imagine, a lot of different ways to do that. And as a result, a lot of different court cases about what's enforceable and what's not, and generally the way the courts have come out pretty consistently.

I think the line is pretty clear. Is that if I have an I, if I'm presented with an agreement and I've got to scroll through all the terms and then click, I agree. At the bottom, I have agreed to the terms, if that's the equivalent of signing something, I've agreed to the terms that sort of the gold standard.

And putting aside the fact that seriously is anyone reading them. People are scrolling through them as quickly as they can. It doesn't matter. I was presented with all the terms I clicked. I agreed a close second to that is I don't have to, I don't have to scroll through the terms to get to the I agree button, but it says by using our website, you agree to our terms and conditions, with.

Click here to say you agree. And I have to click on that to keep going. Courts have said that's like signing. It, then there's then a a big difference between that and what are known as browse wrap agreements, which is I never did click on anything buried at the bottom of the page. As we all know, you can scroll to the bottom.

Sometimes you have to scroll and scroll to get to the bottom of this. There is, about our products and services. There's a whole bunch of other links, but one of them is, privacy policy terms and conditions. But for me going to find them, I would have never even seen them.

No one ever made me click on anything. Courts have generally said that those are not enforceable contract. For the understandable reason that how could you have bound someone to something where they might not have even known this existed and might have never even, read it or agreed to it.

So that brings us to the world of NFTs. So in terms of what's a solution that works so. And NFTs have two lives. They have the life of the initial sale, usually very much controlled and curated by the issuer on a website, a platform, and then, out into the world, secondary sales.

So for the initial sale it, the same thing applies is if you're on any website, which is you want the initial purchaser to click on, I agree to the terms and conditions. You don't want to bear your terms and conditions on the bottom, but assuming you've done the sort of the click rap version of that.

You've now gotten that initial purchaser to agree to the terms and conditions. But as that NFT moves from wallet to wallet from platform to platform where, anyone where's the next

guy clicking on I agree to the terms and conditions, or didn't even see the terms and conditions, and that's not always so clear at all the one solution, as I said, and I am the first to concede that it's suboptimal.

If you're looking at it through the lens of a decentralized. Fully fluid web three ethos is, you know what I've been calling. It dates back to the early e-commerce days of a walled garden, which is that I can't move my NFT out of the platform. If I want to sell it, I sell it within the platform.

I want to buy. I've got to go to the platform to buy and you can't move the NFT off, off platform, but everyone who's on the platform had to click. I agree. To access and NFT to register for the platform to access whatever it is. So you now, as the issuer know that everyone who is going to hold an access, that NFT has agreed to your terms and conditions, because that's the only way to get access to the platform.

Once you get past that and you allow the NFT to travel away from the platform there really is not yet today, any solid solution that works. Universally that addresses the issue of I'm now the 17th purchaser. Where did I even know that these terms or conditions existed? Did I see them that I have to click on?

I agree. Again, as I said, there's, you could do one off solutions, but nothing yet today that works university.

Eric: I've heard, I've heard the can I haven't seen it in practice too much, this notion of whether it's disclosures or other things as well, just having another NFT attached to the NFT that you're purchasing and that NFT would include the terms or disclosures, for whatever it is.

It would be obvious that you're picking up two NFTs, whether that means you consented completely different story.

Stuart: Yeah no. I think that's right. There is a technology solution to be had here. But the other thing that, universal adoption, but for sure, almost any NFT you buy today does not have that.

So the idea would be that the only way I could see the NFT would be there as an NFT legal terms that sort of travels with it and its programs such as. I have to connect my wilds to the first NFT, to the terms and conditions. I can only get past that if I clicked. I agree. And then I can access or see the NFT that's repurchased.

There are ways to do it technologically, but in terms of universal adoption we're not there yet. And I think it would need to be some, you think about it after a, be an open source solution. But you would have, you'd probably need something for every different platform because it wouldn't be cross-platform or

Eric: you're not the beach.

You'd have to be in a T

Stuart: specific. Yeah. Maybe NFC specific. So again, I think there are ways to get there. But it's not around the corner. I think as we sit here and, may 20, 22, I think it's a little ways off till we've got some solution that, that really works. I just, add one point to that because listeners might think, okay, but commercial terms, whatever they want you to have the commercial terms, how important is it that you agree to them?

But think of, the magic is the terms and conditions have important limitations. This NFT comes with a really cool benefit. But if you'd read the initial terms and conditions, you find out, only available if you're over 21 or 21, and over, only available to residents, the continental United States are only available to residents of New York.

Yeah. There could be a whole bunch of terms and conditions in there. I bought, I buy the NFT because I really want the cool benefits it comes with. And then I go to claim the benefit. And the issuer says no, it's only 21 and over, and only if you live in these states are only four people, you are alumni of this school, whatever it is.

And now I'm out of luck because I never even saw those terms. I didn't know there were limits on what I can get and that's, I think a real, a risk issue to the ecosystem generally that we need to solve.

Eric: And getting to like where you're trying to transfer commercial rates is an open platform, like a wearable, like an open seas less something that a, someone who's looking to commercialize that NFT.

Maybe it's not as well suited to them, meaning versus a curated one, because if they want to either acquire it or they want to commercialize it, they probably want to deal with a more sophisticated community where and maybe where they. Greater ability to enforce their rights against them as well, which they could achieve in a walled garden, maybe less so in a curated platform.

And then maybe even less, I was still in an open platform or do you not see it that way?
Yeah, I

Stuart: don't, I don't know if I would divide. It seems to me. I don't know if I would divide the world that way. I really think it's between. The locked down walled garden and FTS are only available for purchase and sale.

These kinds of entities are only available purchasing sale right here versus open platforms. The fact whether the curated, not curated, the kind of community they're drawing in I don't

think really moves the needle either much or at all. It's really either, it's either closed or it's open, closed, you can control.

He has a lot of benefits to that, but a lot of negatives to that. And then, what your perspective is and open platforms benefits there, but then, some downside risk as well.

Eric: And then with regards to the wall garden versus the open platform, would you say the same is true also for collection of royalties?

I know certain platforms have actually, they have agreements where they'll observe. A royalty collection on secondary sales, has it moves across platforms, but obviously if you sell it off of that I'll call it a, what a different kind of old garden. If you sell it out of that group, then there's really no way to enforce it.

Yeah,

Stuart: no, I think that's exactly right. People are often surprised, so they will say. The biggest surprises people have in the NFT space. I think the royalty one is, high on the list, which is for all the talk about automated royalties and micro payments and all of that, royalties are not as technologically I was so I would say advanced, I don't know if that's really fair word, but may technologically adopted as people think they are.

It's still a lot of still done manually or in a semi-automated fashion. And you're exactly right that, the royalty thing once you're not in a walled garden is a little bit at risk. If you get, when you're in a walled garden, you have the benefit, again, the downsides with the benefit that.

You never have to worry about the royalty piece because there's no way someone could sell it without you getting a royalty because someone's got to sell it within your ecosystem and your ecosystem takes the royalty pain.

Eric: You think that there is any kind of movement based on what you've seen towards projects wanting to do walled gardens, like thinking how do I create a vibrant ecosystem, like open seas or referable, but do it all within a walled garden?

Stuart: Yeah, it's a great question. I think that's one of the key tension points in the world of NFTs today, which is there is a tension. Th that's not resolvable, cause it's it's, both sides have good arguments between we like a walled garden. We can control our intellectual property.

We control how people use it. We can make sure they sign up to our terms and conditions. We can lock in the royalties for sure. All benefits versus people saying, but when you're talking about, that's just creating centralized systems that this whole idea behind NFTs is

designed to Disintermediate and work around and we don't need, we don't need a blockchain if you're going a great world garden environments and both sides are right.

There's no there's no easy way to, to marry those two. As I said, they both have. Strong benefits and they stop, they both have some strong disadvantages depending on what your perspective is. And I think it's going to take some time till that tension figures its way up.

Eric: And shifting gears to maybe we're wall gardened and difference between curation and open platforms might also come to bear is the DCMA.

Stuart: DMCA

Eric: I saw you're right. I'm sorry. I what is it dyslexic or Lexic anyway, DMCA. Do you want to maybe introduce that concept and how it relates to entities?

Stuart: Yeah, of course. Glad to do. As platforms evolved as web to develop one of the concerns, very legitimately that platform providers had was great benefit to offering users, the ability to post their own content UGC user generated content. That's a great thing for platforms. That's what the internet was designed for.

But, let's be honest. Some percentage of those people are going to be posting content that they don't have the rights to either they didn't know any better or they definitely know better, but could care less. And they're posting infringing content. So the concern of platform providers was I can't offer a platform if I'm going to be liable every time someone does.

Because the platform's going to grind to a halt. Every time someone posts something. I said, okay, wait a second. Let me look at the content. Let me see if it's a clip from last night's NBA game, figure out, wait, how do you have rights to post a clip from last night's NBA game? It took more than a nanosecond to do that, fly from grinds to halt.

So the digital millennium copyright act recognizes that and says, if you are. Just a vanilla platform provider, meaning I provide this technology platform and you can post any content you want. I don't have to vet it in advance. I'm not liable for your copyright infringement if I provide a mechanism so that in my example, the NBA's shows up at my door.

And says, Hey, this guy posted clips from last night's games has no right to do so I take it down. The way it works a little bit technically is I have the obligation and I'm allowed to go back to the initial poster and say, "Hey, I took down your content because the NBA has showed up at my door and said, you have no rights to this content.""

I have to give the poster of the opportunity to say. What are you talking about? I'm not just some guy in the street. I have a license from the NBA to do this. Here's my license," I can say, okay. Yeah, the NBA made a mistake. I'm putting it back up. In both cases, needless to say that doesn't happen.

Usually the poster didn't have any rights and the work stays down. If I implement that as a process, I'm not liable for the infringing content of what people posted to my plan. That's the digital millennium copyright act. That's the way something like YouTube operates. So YouTube. Might end up having infringing content all the time.

But as long as they take down the content, when a copyright holder a music label, a movie company, a sports league, wherever it might be shows up at their door and says, there's infringing content, you need to take it down. How does that translate to the NFT space? Is that if all I have is a platform on which people can post things for sale, I'm not liable as.

The NFT platform for someone's infringing work that got posted. If just like in the case of YouTube, I take down the work when some one shows up and says, that's mine, not theirs. They couldn't post that. And, go back to the neutral poster and say, Hey, we took down your work. This person showed up, or this group entity company showed up league and said, you had no rights to it.

We'll give you one more chance to prove, you do have rights, but if not it staying. That's how I can insulate myself from liability. And that's how the BMCA applies to the world of managing.

Eric: So in your article, you noted that on open seas in January of 2022 they had indicated that 80% of free mints, which is a form of NFT where you don't pay for the gas fees when you create it, you just pay for it when it's purchased.

Or I guess the purchaser pays the gas fees. They admitted that 80% of them were plagiarized or fake collections of those free mints's that's a pretty strong argument against buying free mints's, but I guess if you're, if you don't care and it slips past the goalie, it works for the, for the purchaser, although it's feeding an infringer.

Stuart: Right.

It's a little bit of the tension between, it's a good service to have, and the reality is, The village is actors are going to take advantage of it. My feeling is that unfortunately, and, rights holders have found this, for time and memorial, malicious actors always find a way.

I don't look at that. As like the one issue, I think even if you took that away, malicious actors would find some other way if they want to sell infringing works and they'll sell infringing works. We've had some clients say, look with any new technology. There's a whole wave of new types of infringement and NFTs are unfortunately, different.

And as every new technology evolves they confront the same.

Eric: And so if you're a platform provider, how far do you have to go when you get a take-down notice to, to pursue like the resale of that NSC? I guess first to the purchaser who is operating on your platform, or even.

The purchaser or the resale by that purchaser. Yeah.

Stuart: You don't have to go from a DMC perspective again, because if I'm fumbling, in my entity and I want in, so my insulate, my company from liability, my obligation is to take it down from my platform. And if I've done that I'm done, I don't have an obligation.

The sort of conventional thinking is I don't have an obligation to now go police other, other places that might be purchaser resource. Like I have taken down from my platform. I took it down from my platform and my obligation. It was

Eric: done. The entity is really just a pointer then what is, so that, what is the DMCA takedown?

Really accomplish, if the infringer can just create another NFT and post it again.

Stuart: Yeah. Like I said, this is, the exact issue of the infringers will always find a way. It could be a problem. So I post something infringing to open, see open, he takes it down. Can't see it on open sea anymore.

I now go and do a different platform. Do the same thing again, copyright holder now gets taken now from that platform. I change it a little bit. Go back to open and post it again. It's an issue for. For companies, but it's not unique to the NFT space. It's the issue that companies have policing things on.

Nope. On on something like YouTube. There are bad actors out there. They'll keep coming back and they'll go to a different platform and they'll do it again and again. So you know, it helps because you get to take him down, but rights holders would be the first to admit it's not uh, there's a reason they have entire enforcement departments that big, big rights holders because they're, busy.

Eric: So I know you have a bit of a deadline, but I'm going to ask you one last question before I let you go, which is Solutions. What evolution have you seen in the way that this is being managed by companies?

This is probably there a new technologies, new capabilities, new ideas out there that are being implemented to prevent these sort of serial infringements to do a better job of tracking them. I know social listening obviously is like one of them, but have you seen anything that's particularly got on your interest?

Stuart: Not particularly, one, one interesting kind of technology that's out there, which is not unique to the NFT space. I think it's particularly useful in the NFT world is one of the problems with technology that finds infringing works is it's looking for, at the end of the day, right?

It's just, a series of, of pixels and digital pixels. Is, it can detect that work. Maybe it's programmed to detect slight modifications that work. But again, as I said, infringers are crafty and, they always find a way, an infringer might beat that system by changing the work pretty dramatically at the pixel level, but not enough that you're the naked, I would say.

So it looks the same to me, but under the pixel level, they've, Change, some colleagues they've done things so that it's a very different work at a pixel level. You and I would never see that it's different. And now you run this infringement program and it misses it because it looks different. It doesn't look like the same work there's technology out there to try to solve for that's being developed.

There's definitely an issue of is. Too much, like where's the right caliber that I think they're struggling with a little bit. But that's that's something I see being an interesting an interesting kind of technology out there to try to address this issue of serious.

Infringement.

Eric: Sure. There's a lot to come on that as well. I think

Stuart: that's right. I think that's right.

Eric: Stuart, thanks so much for your time today, I guess maybe before I let you go, is there anything that you think that maybe we should have covered? That's consistent with what we talked about that we've missed?

Stuart: Oh good question. What are the big issues that has existed in copyright law for some time is I'm not an infringing. If I take your work and I transform it into something else, it was going to as a transformative work where that line is like, how much do I have to do to take your work and transform it into something else?

Or have I taken your work and made some changes, but it's the same work is an issue that a lot of courts have struggled with. And the Supreme court recently took up the case involving an Andy Warhol. And it'll be sometime for winds its way through the Supreme court, and there's a decision, but we'll maybe provide some clarity into the transformative work area.

Three is relevant to NFTs. There's a lot of NFTs. Rifts on existing works that are out there. And I think there's going to be a bunch of litigation as to whether that infringed or is

transformative, therefore not infringing. And I think this Warhol case, again we're a ways off before it's actually a decision might provide some clarity in that area.

Eric: Interesting. There's certainly a lot more content being circulated out there. So a lot more work for IP lawyers like yourself. So again, thanks so much for coming on the podcast and continuing to shed light on this evolving space

Stuart: Thanks so much for having me as a great discussion. And we definitely touched on some really interesting and important issues in this.

Eric: Excellent. Thanks so much. Thank you. .