

**NBA Top Shot: *The Illusion of Ownership and the Purchase of Restrictions.***

**Introduction**

In October of 2020, a Vancouver-based blockchain company, Dapper Labs (“Dapper”), with the backing of the National Basketball Association (“NBA”), launched NBA Top Shot (“Top Shot”) to the public. Put simply, Top Shot allows users to collect, display, and trade non-fungible tokens (“NFTs”) with accompanying virtual highlights called “Moments”. Each Moment consists of a short video highlight from the NBA, such as a Zion Williamson dunk or a Stephen Curry 3-pointer. Moments can be acquired either by buying a pack directly from Dapper or by purchasing them from other users on Top Shot’s exclusive Marketplace.

Since the start of 2021, Top Shot has exploded both in popularity and the amount of money that users are spending on the website. To demonstrate, there were just over \$49 million in total transactions on the website from October to early February.<sup>1</sup> Compare that to February 21, which saw more than \$47 million in sales in just 24 hours.<sup>2</sup> Towards the end of March, more than \$370 million has been spent on the Marketplace alone, with millions more spent on packs.<sup>3</sup> The value of an NFT/Moment can vary drastically depending on the player, type of play, serial number, and the limited nature of some releases. While many Moments will sell for less than ten

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<sup>1</sup> Shaker Samman, *What’s All the Fuss About NBA Top Shot?*, SPORTS ILLUSTRATED (March 17, 2021), <https://www.si.com/nba/2021/03/17/nba-top-shot-crypto-daily-cover>

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

dollars on the Marketplace, others, like a Cosmic Series 1 LeBron James dunk, have sold for \$208,000.<sup>4</sup>

The hype around Top Shot can be attributed to two factors. First, nobody wants to be late to the party. With the website still in “beta” mode, many collectors believe that Top Shot is still in its infancy, and that the Moments being purchased today are the equivalent of purchasing the very first trading cards to ever be manufactured. Imagine, for instance, having the opportunity to purchase the first Babe Ruth card ever made. The second factor is society’s relatively recent fascination with blockchain technology after the emergence of Bitcoin. Since Top Shot is hosted on the blockchain, the purchase of an NFT/Moment is recorded on a digital ledger or record book that authenticates your purchase and is impossible to counterfeit.<sup>5</sup> This combination of a new form of collectible delivered through a new and credible technology makes Top Shot appealing to a large audience.

There are, of course, many skeptics who question the value or purpose of “owning” a video that can be viewed for free elsewhere, such as on YouTube or Instagram. This skepticism begs the question: what does a person actually own when they buy a Moment? The remainder of this article addresses the ownership rights that attach when someone buys a Moment and asserts that the purchase of a Moment is no less than the grant of a virtual easement, and actually leaves the buyer in a worse position with respect to his or her rights than a member of the general public.

## **I. Are Moments Just Like Playing Cards?**

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<sup>4</sup> Gabriel Fernandez, *NBA Top Shot: Everything you need to know about ‘next level collectibles’ and what it means for the league*, CBS SPORTS (March 2, 2021), <https://www.cbssports.com/nba/news/nba-top-shot-everything-you-need-to-know-about-next-level-collectibles-and-what-it-means-for-the-league/>

<sup>5</sup> Shira Ovide, *What is a Blockchain? Is it Hype?*, THE NEW YORK TIMES (January 27, 2021), (<https://www.nytimes.com/2021/01/26/technology/what-is-blockchain.html>)

The most common analogy that collectors and proponents of Top Shot use when trying to explain Moments to others is that they are like a digital trading card. Even Mark Cuban, owner of the Dallas Mavericks and an early supporter of the project, has compared the Top Shot model to the old-school model of playing cards.<sup>6</sup> This analogy, however, is misguided when analyzed alongside traditional principles of the Copyright Act and the First Sale Doctrine.

Section 109 of the Copyright Act, more commonly known as the First Sale Doctrine, codifies an exhaustion principle within copyright law.<sup>7</sup> The section focuses primarily on the right to distribute and, to a lesser extent, the right to display works.<sup>8</sup> The doctrine indicates that if there is intellectual property that has been legally embodied within a tangible copy, a buyer of that copy can lawfully sell it even though it contains a copyrighted expression.<sup>9</sup> The original copyright holder, usually the creator of the work, can still continue to exercise their other rights<sup>10</sup> with respect to the underlying work, but they have “exhausted” their exclusive right to claim an interest for a royalty upon sale or distribution to another person.<sup>11</sup>

To illustrate this concept, imagine a person enters Barnes & Noble and buys a copy of a book. The author or publisher of the book, while still owning the underlying copyright in the work, does not have the right to tell the buyer that he cannot resell the copy to a friend when he is finished reading it. The author’s interest in that copy has been exhausted after the first sale.

This state of affairs shows the difference between a tangible playing card and an intangible NFT or Moment. There is a significant difference between owning a tangible copy of

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<sup>6</sup> Jabari Young, *People have spent more than \$230 million buying and trading digital collectibles of NBA highlights*, CNBC (February 28, 2021), <https://www.cnbc.com/2021/02/28/230-million-dollars-spent-on-nba-top-shot.html>

<sup>7</sup> Copyright Act of 1976, 17 U.S.C. § 109 (2012) [hereinafter *Copyright Act*].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Copyright Act*, *supra* note 7, § 106.

<sup>11</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 524 (2013).

something that embodies an underlying intellectual property work and owning an NFT. Ownership of an NFT, by itself, does not give someone any association with the work, unless by assignment or contract. Moreover, it is not an embodiment of the work that it purports to represent. An NFT is merely an emblem of title to something else. That “something else” is crucial for Top Shot collectors to understand, since that is ultimately what they are paying for when they buy a Moment.

## II. What Do Collectors Actually Own?

According to the Top Shot Terms of Use, when a collector buys a Moment, Dapper and the NBA grants that collector a “world-wide, non-exclusive, non-transferable, royalty-free license to use, copy, and display the Art. . . .”<sup>12</sup> Put more plainly, collectors are purchasing an NFT with an accompanying license to use, copy, and display the associated highlight. The value of an NFT without the associated highlight is unclear, but it is inarguably less than it is with it. The language of the Terms of Use accordingly introduces several ambiguities.

First, the Copyright Act identifies six rights that copyright owners possess.<sup>13</sup> They are the right to reproduce; distribute; perform; display; to create derivative works; and to transmit digital audio recordings.<sup>14</sup> The “right to use” as described in the Terms of Use is not a recognized right under the Copyright Act. It is thus unclear what a license to “use” a Moment entails.

Second, the showing of a video such as a Moment is typically associated with the right to perform, not the right to display. In *American Broadcasting Companies, Inc. v. Aereo, Inc.*, the Supreme Court held that an audiovisual work is “performed” when the work’s images are shown

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<sup>12</sup> Terms of Use, NBA TOP SHOT, <https://nbatopshot.com/terms> (last visited March 25, 2021) (summarizing ownership, licensing, and restrictions) [hereinafter *Terms of Use*].

<sup>13</sup> *Copyright Act*, *supra* note 7, § 106.

<sup>14</sup> *Id.*

and/or its sounds are made audible.<sup>15</sup> The Court went on to note that a work is publicly performed when it is communicated to individuals who do not legally own or possess the underlying copyrighted work.<sup>16</sup> Since Moments in this context are shown and their sounds are made audible, they are most likely performed, not displayed. Although the Terms of Use may purport to grant a buyer the right to *perform* the Moments, the use of the word “display” creates additional confusion because that right is normally associated with a graphic work.

Third, the Terms of Use also state that the license is non-exclusive.<sup>17</sup> Although some Moments are limited edition and there are a set number of serial numbers issued for specific series’, what happens if Dapper and the NBA were to issue that same Moment from a different camera angle in Series B? This would technically not be the same Moment, but such a release would likely impact the value of the original. For instance, if LeBron James makes a buzzer-beater 3-pointer to win the NBA Finals, the first series that Top Shot releases will be in high demand. However, such a highlight would carry significant monetary value, and the release of a subsequent series with different camera angles could lessen the value of the original.

Lastly, and perhaps most importantly, the Terms of Use go on to state that the license is “solely” for personal, non-commercial use or as part of a marketplace that permits the purchase and sale of the Moments.<sup>18</sup> Although “personal use” is not defined in the Terms of Use, it most likely means that a buyer is able to watch the Moments themselves or display them to a small group of friends, but cannot monetize them in any way other than by sale on the Top Shot Marketplace.<sup>19</sup> This restriction on ownership for personal use only creates uncertainty when

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<sup>15</sup> *Am. Broad. Companies, Inc., v. Aereo, Inc.*, 573 U.S. 431, 445 (2014).

<sup>16</sup> *Id.* at 448.

<sup>17</sup> *Terms of Use*, *supra* note 12.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

considering that Moments are technically available to view and be widely shared by the general public.

### **III. Are Collectors Paying their Rights Away?**

The restrictions on ownership found within the Top Shot Terms of Use raise the question of whether a buyer of a Moment pays for less rights than a member of the public. Under the doctrine of “fair use”, an author of a copyrighted work consents to the reasonable use of her work by another person.<sup>20</sup> This consent, as the Supreme Court noted in *Harper & Row Publishers v. Nation Enterprises*, has been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of the useful arts.<sup>21</sup> Fair use is essentially a claim of permissible use of a copyrighted work for certain limited purposes and can be raised as an affirmative defense to infringement.<sup>22</sup> Under section 107 of the Copyright Act, use of a copyrighted work can be permissible for purposes such as criticism; commentary; news reporting; teaching; scholarship; or research.<sup>23</sup>

In 1994, the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* addressed the concept of parody in the fair use analysis.<sup>24</sup> The case involved the song “Oh, Pretty Woman”, which was written by Roy Orbison and William Dees who later assigned their rights in the song to Acuff-Rose Music.<sup>25</sup> Twenty-five years after that song was written, Luther Campbell and the music group 2 Live Crew wrote another song titled “Pretty Woman”.<sup>26</sup> By making this song, the group intended to satirize the original work by replacing Orbison’s lyrics with comical lyrics of their

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<sup>20</sup> *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 561.

<sup>23</sup> *Copyright Act*, *supra* note 7.

<sup>24</sup> *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 594 (1994).

<sup>25</sup> *Id.* at 572.

<sup>26</sup> *Id.*

own.<sup>27</sup> According to the statute, the Court noted, there are four factors that are considered when evaluating fair use: (1) the purpose and character of the work; (2) the nature of the copyrighted work; (3) the portion used in relation to the copyrighted work as a whole; and (4) the effect on the potential market for the copyrighted work.<sup>28</sup> Despite the commercial purpose of the song, the Court found that 2 Live Crew's parodical version constituted fair use under the Copyright Act.<sup>29</sup> This case was a critical turning point in fair use analysis as it allowed for the commercial dissemination of a copyrighted work by someone other than the copyright holder for purposes of parody.

In the context of sports, the *Campbell* case had important implications. These implications were highlighted just two years later in the Tenth Circuit case of *Cardtoons L.C. v. Major League Baseball Players Ass'n*.<sup>30</sup> Cardtoons was a company that manufactured and sold parody playing cards featuring cartoon depictions of Major League Baseball players.<sup>31</sup> For instance, they sold cards featuring characters such as "Ken Spiffy, Jr." of the "Mari-Nerds", parodying Ken Griffey, Jr., and "Egotisticky Henderson" of the "Pathetics", parodying Ricky Henderson.<sup>32</sup> The Tenth Circuit, relying on the *Campbell* opinion and free speech principles, held that the cards were an important form of social commentary given the high profile nature of the card's subjects and affirmed the district court's grant of a declaratory judgment for Cardtoons.<sup>33</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 574.

<sup>29</sup> *Id.* at 594.

<sup>30</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10<sup>th</sup> Cir. 1996).

<sup>31</sup> *Id.* at 962.

<sup>32</sup> *Id.* at 963.

<sup>33</sup> *Id.* at 976.

These two cases illustrate the fact that a member of the general public is able to use copyrighted material for limited purposes such as that of a parody. Moreover, there is an even greater likelihood that a court will find fair use when the subjects are of public interest, such as professional athletes.<sup>34</sup> Unlike physical trading cards, which have a finite number of production, there is no limitation on the access of Moments. Because they are accessible through dozens of other mediums and they depict high profile subjects, the general public is technically able to use these Moments for parody or criticism purposes.

Under the Top Shot Terms of Use, a collector who buys a Moment agrees that they will only use that Moment, which is freely accessible to an infinite number of people, for personal use or to trade on the NBA's own marketplace.<sup>35</sup> The restrictions on ownership explicitly state that a buyer is unable to "utilize the Art for your Purchased Moment for your or any third party's commercial benefit."<sup>36</sup> If a member of the general public is able to use these audiovisual clips for parody or criticism, and *Campbell* informs that they are able to commercialize such works, then agreeing to the Top Shot Terms of Use, which limits the owner to personal use only, leaves the "owner" in a worse position than a member of the general public with respect to their rights in that Moment.<sup>37</sup> The relevant provisions in the Terms of Use are vague, ambiguous, and arguably restrict an owner's rights. By purchasing an NFT and agreeing to the terms of the license to limit use, a collector finds herself unable to create certain works that a non-owner could create.

#### **IV. Conclusion: What are Collectors Paying for?**

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<sup>34</sup> *Id.* at 973.

<sup>35</sup> *Terms of Use*, *supra* note 12.

<sup>36</sup> *Id.*

<sup>37</sup> *Campbell*, *supra* note 24, at 593.



As mentioned, blockchains are databases that track the ownership of a certain thing (in this case an NFT) in a transparent, public-facing way. They are ledgers that allow anybody to see who owns the NFT, how many are available, and what the owner paid for the particular NFT. This is loosely similar to the traditional requirements of recording the sale or transfer of real property at the county courthouse. However, the records in the county courthouse accompany a physical thing – that is, the home that you have the right to exclude others from. Excluding access to Moments is not only impossible, but not even expected. Consequently, buyers of Moments are paying for three things.

First, they are paying for NFTs with accompanying non-exclusive, revocable licenses to “use, copy, or display” the highlights.<sup>38</sup> Although unclear, the value of the NFTs absent the accompanying licenses are likely minimal. This structure is a form of virtual easement, where Dapper and the NBA allow collectors to look at and share highlights with friends but not utilize them in ways that members of the public may be able to.

Second, collectors are paying for the assurance that their ownership in the underlying NFT is recorded. As mentioned, blockchain technology allows for the transparent and safe recording of purchase and ownership in an item. Top Shot provides a platform for users to flaunt their “ownership” in NFTs and accompanying Moments.

Finally, collectors are paying for a new type of relationship with the NBA and its players. Although many collectors are driven solely by money, most are also fans, and Top Shot offers a new, exciting way to get closer to the game and “own” a piece of the action. Top Shot will undoubtedly be successful so long as fans continue to buy in to its perceived value. However, the idea of true ownership of a given Moment may be illusory.

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<sup>38</sup> *Terms of Use*, *supra* note 12.