



## **Cryptocurrency & Cryptic Copyright**

**Interview with  
Paul Sweeting**

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**KENNEALLY:** With their indifferent, detached expressions, the 10,000 members of the Bored Ape Yacht Club look, well, bored. But there is great excitement in the billion-dollar market for these digital images, which were launched in April 2021 and count singers Justin Bieber and Madonna among their celebrity owners. When actor Seth Green paid \$200,000 to purchase Bored Ape NFT #8398, aka Fred Simian, the deal included licensing rights, and Green created a television show to feature Fred. Then just weeks ago, Fred went missing.

Welcome to Copyright Clearance Center's podcast series. I'm Christopher Kenneally for Velocity of Content.

In the past week, Green revealed that Fred Simian is home, but the strange, twisted tale of a Bored Ape has many more turns left, involving copyright law, cryptocurrency, and blockchain code. To unravel this virtual riddle wrapped in a mystery inside an enigma, Paul Sweeting, editor of rightstech.com and co-chair of the RightsTech Summit, joins me from Washington. Welcome back to the program, Paul.

**SWEETING:** Good to be back, Chris.

**KENNEALLY:** It's good to have you help me out with this very interesting topic, but let's say a couple of things. First of all, I'm fond of telling people that when it comes to copyright, if you're confused, you're beginning to understand the problem. And we're about to show people what we mean. But when it comes right down to it, the mathematics with copyright is first-grade stuff compared to the theory of relativity that is cryptocurrency and NFTs. So while neither one of us is either a lawyer or a coder, we're going to do our best to help people understand the issues here and to explain why they should care.

It's important to state as well that along with Wall Street and other traditional stock markets around the world, the cryptocurrency market right now is fighting with bears and losing, too. NFTs commonly used to trade digital artworks have fallen far from the heights of 2021, when the BAYC, the Bored Ape Yacht Club, debuted.



So, Paul Sweeting, what accounts for the great success of these NFTs, and what do buyers acquire when purchasing what amounts to code? How secure are the values in an NFT?

SWEETING: Well, your question sort of puts your finger on the problem. It's not clear what you actually purchase when you purchase an NFT. An NFT is a bit of a code that is cryptographically linked to an asset of some kind – in the case of Bored Ape Yacht Club, JPEG images of these cartoon apes. There are, I think, 10,000 of them that were created. What you are really buying at a sort of fundamental sense is a bit of encrypted code.

But Bored Ape Yacht Club – Yuga Labs, the company that created them, went a step further than many other NFT sellers did by purporting to convey certain rights to the purchaser of a Bored Ape. The terms and conditions posted on the Yuga Labs website says that you own the artwork. You own the ape completely. And it purports, again, to convey certain usage rights. You are entitled to make commercial usage of your ape and the image of your ape, which is somewhat unusual in the NFT world. It's a big part of why Bored Apes are so valuable compared to other NFTs – or regarded as more valuable than other NFTs – because that commercial use license has allowed a whole ecosystem of spinoff products, merchandise. People have started restaurants based on the image of their ape. And those commercial use rights have turned out to be very valuable. It's a big part of why prices for Bored Apes are higher than many other NFTs.

KENNEALLY: Right. NFTs, Paul Sweeting, are non-fungible tokens, and as you say, they're commonly used in the art world. The tie to the blockchain is that it kind of locks down the image and the ownership of it, so that whenever it is transferred or assigned, there is a chain that follows it. This then allows for a kind of verification of ownership – verification of authenticity. But as you say, it is the commercialization of the Bored Apes that really has made the difference. It's made a difference to the tune of \$2 billion.

SWEETING: Yeah. An NFT lives on a blockchain, and because it lives on a blockchain, every entry, every transaction that happens to it is time-stamped and immutably stored on the blockchain. So you have sort of a perfect chain of custody. If you claim to own an NFT, there is an immutable cryptographic receipt, basically, testifying to your ownership of that asset.

You referenced the case of Seth Green. The issue there is what else besides that receipt of ownership do you really possess? What happened in the case of Green was he had purchased this ape, and he was exploiting the commercial use license. He was creating an animated series – I guess it was going to be on a streaming platform – called White Horse Tavern, which is a famous tavern in Lower Manhattan. And this character, Fred Simian, was going to be essentially the star of the show.



And he lost the NFT. He lost his possession of the NFT in a phishing scam. He apparently clicked on something he shouldn't have clicked on, and it enabled someone to take possession of that particular token, which was then resold through one of the exchanges. I believe it was OpenSea, one of the big NFT exchanges, and was purchased by someone known only by their online handle, DarkWing – I think that's what it is. He thought he had no choice but to stop his TV series project, because it was unclear whether he still had those commercial rights.

Therein lies the dilemma when it comes to NFTs and copyright. The terms and conditions from Yuga Labs say you have these commercial rights to that image. If you lose the image, do you lose those commercial rights along with it? It's not really clear. It's not an issue that has been litigated to where there are established court precedents about this, and where it fits within a statutory scheme of copyright is still very ambiguous.

There's sort of a great irony in the Seth Green case, in that it's the purported conveyance of commercial use rights that makes Bored Apes so valuable. But it's that same purported conveyance that's created the ambiguity that has now stopped this animated project in its tracks.

**KENNEALLY:** There are a lot of lessons here for everyone – lessons about cryptocurrency, lessons about copyright – in this story. I guess the first lesson is don't click on something unless you know exactly who it's from. (laughter) But then the other lesson is that a licensing deal is a licensing deal. It does not convey copyright. And there is an important distinction there, one that legal scholar James Grimmelman has pointed out is an important one. US copyright law establishes a really high threshold for transferring ownership of copyright. The ownership of the image and the licensing rights is one thing. But the copyright – it's a separate matter.

**SWEETING:** Yes. And again, it's not entirely clear from the terms and conditions of the Bored Apes what is actually being conveyed. The way it's phrased in the T&C is that this is an unlimited license to make commercial use of the image. That would imply that the ownership of the IP still remains with Yuga Labs. But in some manner, those usage rights were associated with or connected with the possession of the image itself, or so it appeared. When Fred Simian was abducted, and Mr. Green no longer had possession of the asset, it did not appear as if he was the actual owner of the copyright that would have grounds for bringing some sort of legal action, because what he seemed to have was simply a usage license. So it's all a big morass at this point.

And it's an issue that is going to get increasingly important and increasingly significant to this burgeoning business of buying, selling, and trading NFTs, which doesn't seem to be going away. The market has, obviously, if anyone's looked at their 401(k) recently – I



don't advise it – but it's not a pretty picture out there, and the crypto world is certainly not exempt from that. It's faring pretty poorly at the moment. That's likely to hurt the trading value of NFTs. But the phenomenon, if you want to call it that, of NFTs doesn't seem to be going away anytime soon. So at some point, these issues are going to have to get resolved.

As a matter of fact, just last week, Senators Thom Tillis of North Carolina and Patrick Leahy of Vermont, who are, respectively, the ranking member and the chair of the IP subcommittee in the Senate, sent a letter to the heads of the US Patent and Trademark Office and to the US Copyright Office asking them to jointly conduct a study into the IP, intellectual property, implications of NFTs and whether a transaction involving an NFT is an effective way of conveying intellectual property rights, whether that's copyright, patent, or something else. This would just be a preliminary study, I guess, but that's an indication that IP policymakers are now starting to pay attention to this. The letter doesn't reference the Seth Green situation specifically, but it clearly has it in mind based on the types of questions that the senators asked the agency heads to address.

KENNEALLY: Well, it's not just senators asking questions. I think a lot of people are.

They talk about smart contracts when it comes to blockchain, and you point out, Paul Sweeting, that that really is not what it sounds like. It implies something very complicated, but it is simply a digital receipt. And it is that kind of digital receipt that really does raise other questions with the Seth Green problem, in that, as you say, the image – the Bored Ape Fred Simian – was abducted in a phishing scheme, and then it was sold to someone who claimed to be an innocent bystander. But doesn't the blockchain sort of test that question as well? Because the blockchain should have showed that next purchaser where the image had been before. And that would have tipped them off to a problem.

SWEETING: Yes, it should or could have. But part of the problem – and you referenced it in your question – is what exactly is a smart contract?

The purported license of usage rights was conveyed by means of a blockchain smart contract, and the terms and conditions say that your ownership of this ape and these rights that we are extending to you is entirely mediated by a smart contract on the Ethereum blockchain. Well, a smart contract isn't really a contract. So it's unclear – a smart contract is simply a bit of self-executing code. It's not the equivalent of a contract of sale or a license contract that is written down by lawyers and signed by both parties and notarized. So when you purchase a Bored Ape, and it purports to convey you these rights, it's not at all clear that a smart contract can do that in a legal sense that the courts would recognize. That was part of the problem that Seth Green faced here. What is his standing? What



would have been his standing to bring some sort of legal action, when it wasn't clear that he actually possessed these rights, because it was done via smart contract?

We're talking about it in the context of Bored Apes, but there are going to be a lot of types of commerce transacted via NFT going forward. It seems inevitable. You're going to see real estate being bought and sold via NFT. You're already seeing it, actually. The same issues are going to arise there – is what is the nature of a transaction based on a smart contract? What aspect of property, whether intellectual or otherwise, can actually be legally conveyed via smart contract? These are not trivial issues. Bored Apes – it's a JPEG image. It may seem sort of trivial. But the issues that are being raised here are certainly nontrivial.

KENNEALLY: A few years ago, a handshake agreement might have been enough for an NFT project worth only a few thousand dollars. But now that these are going for six figures, I guess the question is, is it time to get it in writing?

SWEETING: Well, it's always better to get a deal in writing than via a handshake, particularly if there are going to be subsequent transactions based on whatever the asset is. Because you and I may have a handshake deal on something, but if one of us then goes on to engage in subsequent transactions, what is the basis on which we could have trust in that additional party? So it's always better to get things written down. But the whole point of blockchain and NFTs and smart contracts is to automate processes around transactions, and we're only just beginning to wrestle with – what does that mean in a legal sense?

KENNEALLY: That's a great place to end all this, because as much as these developments in cryptocurrency, blockchain, NFTs are attempting to bring code and law as close together as possible, they're still not there, and it's an important point to be mindful of.

SWEETING: Yeah. There was a famous book written by Lawrence Lessig – he's an attorney, but also a sort of early philosopher of the internet – called *Code is Law*. That sort of became a meme in the internet world that code is law. But as we saw with the Seth Green case, except when it isn't. (laughter)

KENNEALLY: (laughter) Well, Paul Sweeting, we appreciate you helping us understand the issue and giving us an opportunity on Velocity of Content to talk about something we never imagined we would, which is the Bored Ape Yacht Club. Paul Sweeting with RightsTech and the RightsTech Summit, thank you so much for joining me today on the program and discussing this.

SWEETING: It's been my pleasure, Chris. And of course, we're going to be addressing some of these issues at the RightsTech Summit, which is coming up in September.



KENNEALLY: That's all for now. Our producer is Jeremy Brieske of Burst Marketing. I'm Christopher Kenneally. Thanks for joining us on Velocity of Content from CCC.

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