

Why the hype around NFTs should not make us lose sight of the legal issues in terms of copyrights

A first-of-its-kind museum has been opened in Seattle allowing visitors to be able to physically view digital art minted in NFTs on large display screens.

Temps de lecture : minute

9 July 2022

If the Seattle NFT Museum is the first place to be entirely dedicated to art NFTs, several exhibitions around the world have already offered the chance to view NFTs recreated as physical reproductions of the original works.

This return of a physical dimension in a dematerialised universe once again raises the question of the scope of the rights to the artwork that the owner of a NFT can claim.

What do you own when you buy an art NFT?

NFTs are cryptographic tools issued and managed on a blockchain (most commonly Ethereum) to create a unique, non-fungible digital asset.

The French monetary and financial Code defines a token as follows: “ *any intangible asset representing, in digital form, one or more rights that can be issued, registered, stored or transferred by means of a shared electronic recoding device making it possible to identify, directly or indirectly, the owner of said property*” (article L.552-2).

Indeed, tokenization makes it possible to register a title deed in a decentralized system without an intermediary, preventing the falsification of transactions and allowing the identification of the owner of the token due to a cryptographic process.

Using the blockchain thus allows an immutable ledger of ownership to be kept of the NFT.

The history of transactions carried out on the token can be followed by all users of the blockchain, guaranteeing optimal traceability, all operations being stored in the NFT smart contract.

The smart contract, which is not a contract in a legal sense but a program that runs on the blockchain, encodes metadata such as the address of the assigned owner of the token data, the specific number of the token (tokenId), the token name, an URL with a link to the underlying work, the identification of the original creator of the token...

In this context, it raises a crucial legal question related to the nature of the link between the artwork and the token: is the token itself a work, a new material support of the work, or only a certification tool?

In the case of tokenisation of digital artworks, the NFT generally only contains a link (an URL) to the asset being represented, which can be stored on a blockchain or off-chain, such as on a website.

However, it is also technically possible to include an entire data set of an artwork in an NFT. But considering the energy consumption and high costs of such an NFT, most tokens are only metadata files that have been encoded without reproducing the artwork itself.

If NFTs are not including a reproduction of the artworks but only metadata with several pieces of information and an URL to a digital file, they should not be considered as reproductions of the works.

An NFT is simply lines of codes and not a substantial reproduction of the work, thus many copyright law authors consider that it would not infringe the artist's rights.

In this respect, the Court of Justice of the European Union has already stated that hyperlinks, which redirect internet users to protected works which are already freely available online, do not infringe copyright of those works (CJEU, *Svensson and Others v Retriever Sverige AB*, C466/12).

However, if the underlying artwork is not already freely available online and has not been communicated to the public on the internet by the rights holders, it could constitute a copyright infringement.

Indeed, in the above mentioned decision, the Court made an important observation, specifying that the solution would have been different – and therefore that the authorisation of the holders would have been required – if the hyperlink had made it possible to circumvent the restriction measures put in place by the site where the protected work was published, if the work initially published was no longer accessible, or if it was accessible only to a restricted public.

By deduction, this solution also would have been different if the URL did not link to a website where the artwork was already published and made accessible to the public.

The crucial point is to determine if, under these circumstances, the association of an NFT with a digital artwork downloaded by the buyer, or accessible on a website, could constitute a copyright infringement.

Does the digital copy of an artwork constitute a potential copyright infringement?

Even if we consider that there is no reproduction of the artwork in the NFT, which is purely and simply a title having an independent existence and value, there is necessarily a new form of exploitation of the artwork when a digital copy of it is made.

A commonplace argument for the non-infringement of digital copies of an artwork is that anyone can screenshot an artwork on the internet and save it on one's computer.

This hypothesis should be distinguished from that of a subsequent commercial exploitation of the digital copy of the work.

Indeed, under French and European law, there are exceptions to the exclusive rights granted to the owner of the intellectual property rights of a work (article L.122-5 of the French Intellectual Property Code, Directive 2001/29/EC of the European Parliament and of the Council of 22nd of May 2001 on the harmonization of certain aspects of copyright and related rights in the information society).

The private use and for nonprofit representations limited to the immediate family and copies or reproductions exclusively for the private use of the copyist are permissible without the authorisation of the owner of the rights.

However, these exceptions should not apply for a commercial use of the digital copy associated which will be sold with the minting of an NFT.

From authors rights and copyright law perspectives, NFTs raise thus several open questions that the first case law decisions will have to clarify

In the US, the first cases regarding NFTs and copyright are already piling up, such as the dispute between Miramax and Quentin Tarantino before the Central District Court of California for copyright infringement after Tarantino announced his intention to auction exclusive scenes of Pulp Fiction in NFTs.

In France, 20 artists' estates, including those of the Picasso, Magritte, Le Corbusier, Yves Klein or Miro families, called for an official tribune for the growing NFT market to be built "with respect" to copyright.

Similar complaints have been reported for trademark infringement. Hermes has already sued a digital artist for copying its Birkin handbag through non-fungible tokens before the Southern District of New York, it therefore seems to be only a matter of time until such cases are brought before French courts.

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