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Abstract

Some digital creations produced by the media are now treated as works of art through NFTs, whereas in the past they were not (videos, images, GIFs, video game elements, etc.). Music and film are no longer the only media products to achieve the highly prized status of works of art. This democratisation of artworks through NFTs is taking place on an empirical basis, and NFT technology is of definite interest to lawyers, although copyright law seems difficult to apply to it as it stands, and the creation of a possible legal resale right for its creator's benefit seems tricky.

Keywords: Media, NFT, Art, Blockchain, Digital.

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Digital productions from new media

Paradoxically, it is precisely when the media is being confronted with citizens' mistrust that some of its productions are being considered works of art through NFTs, when previously they were not.

The Ethereum blockchain's contribution in this area is unequalled. Unlike the very first blockchain from the Bitcoin protocol, it allows for the creation of decentralised applications (Dapps) based on smart contracts that allow for the exchange of tokens. Smart contracts are the result of computer code that responds to crude conditions, where if an event provided for in the code occurs, then the contract is automatically executed. Such transactions take place on platforms, such as OpenSea, Foundation, Rarible, SurRare and Coinbase NFT, through digital platforms, of which Metamask is one example. Some transactions can result in a token that can act as a currency or any other role that we might want to give it.

Tokens issues by a blockchain are differentiated by the properties given to them. ERC721 is a non-fungible token that represents a digital object assigned unique characteristics, such as a serial number, a name, character characteristics or game objects. These kinds of unique tokens (NFTs) stand out by the fact that they cannot be replicated or subdivided. These tokens offer rarity, traceability and non-replicability and are called NFTs.

Since January 2023, NFTs can be created via a second-layer protocol based on Bitcoin, with the experimental BRC-20 token standard. Since then, Bitcoin has been ranked second in the non-fungible tokens ("ordinals") market, behind Ethereum and ahead of Solana. In practice, this involves numbering each Satoshi (the smallest unit of Bitcoin) starting with index zero and going in the order in which the coins are mined. This numbering is called an "ordinal number". The Satoshi can be "inscribed" with content, transforming it into an NFT.

"Tokenisation" refers to the creation of a token that acts as a digital representation of an asset on a blockchain. The more a digital object is seen and shared, the more valuable it becomes. Certain media elements, such as video game elements, lines of code, and images, are concerned by a new form of commodification through NFTs. Some platforms, such as Artrade, are developing an application to allow users to create, purchase, reference, view and store NFTs. But to be listed, each artist has to have a minimal number of followers on Instagram or Twitter! Art is no longer seen as something private to be admired at home, but as something public and shared on screens and the walls of museums. Cultural practice has been quick to make use of NFTs, thereby changing the traditional field of art and media.

Art's empirical extension to a variety of digital creations

In 2021, the Uffizi Gallery turned some of its works of art into NFTs to compensate for a portion of lost revenue caused by the health crisis. These works of art, digitised by Cinello and called DAWs (Digital Art Works), were numbered, authenticated, protected by patents and backed by NFTs. The Italian government ultimately withdrew this option in 2022. The Hermitage Museum also offered some of its works as NFTs. For each painting, two NFTs were issued: one was kept by the museum and the other sold on Binance. In February 2023,

the Centre Pompidou announced that it had acquired a series of 18 NFTs by 13 French and international artists: Aaajiao, Emilie Brout and Maxime Marion, Claude Closky, Fred Forest, John Gerrard, Agnieszka Kurant, Jonas Lund, Larva Labs, Jill Magid, Sarah Meyohas, Robness, Rafael Rozendaal, and John F. Simon Jr.

Many contemporary artists, including Neil Beloufa, Julien Gachadoat, Shepard Fairey, Urs Fisher, Damien Hirst, Jenny Holzer, Kaws, Albertine Meunier and Takashi Murakami, have incorporated NFT into their artistic approach, usually by detaching it from any tangible medium. This can be explained by the fact that tokens may lend credibility to digital culture. Even beyond artistic creations, nearly everything that can be seen or heard in digital format (code, images, GIFs, videos, or video game elements) can be turned into an NFT. NFTs can reify what was previously purely intangible. It allows us to create rarity in a digital world where copying is standard by authenticating certain virtual assets and creating a market for used goods. Whereas Web3 involves copying and requires it to be accepted, NFTs restore a form of uniqueness to some of these elements. Benjamin Walter described this change as early as 1936: *"a reproduced work of art becomes a reproduction of a work of art intended to be reproduced"*.

The first tweet by the founder of Twitter sold for \$2.5 million, the source code of the Internet was symbolically sold by Tim Berners-Lee and, in March 2022, the NFT of Nelson Mandela's arrest warrant was sold for over \$130,000. Anil Dash and Kevin McCoy created the very first "Quantum" NFT in 2004, but it was a sale at Christie's in 2021 for \$69.3 million, paid for in the Ethereum cryptocurrency, that made the biggest impression. The sale of "The First 5,000 Days" by Mark Winkelmann (aka Beeple), a virtually unknown artist, made him one of the three most expensive living artists, even though the same work had already been on sale online for a fortnight at a price of \$100. What's more, thanks to NFTs, geographically remote artists such as Squirterer, who lives in the Philippines, are able to make a name for themselves. In 2017, Larva Labs created CryptoPunks, then game publisher Dapper Labs developed CryptoKitties, and NBA Top Shot went on to turn videos of basketball matches into NFTs. The Bored Ape Yacht Club (BAYC), which started out as simple collector's items, became membership cards that gave access, for example, to a collaborative graffiti board or private parties at SXSW.

"Minting an NFT" means associating a real or virtual object with a token. The NFT from Kurant's Sentimentite series donated to the Centre Pompidou can be exchanged for a physical twin (a sculpture). In 2015, for example, artist Sarah Meyohas created a Bitchcoin with an attached certificate that could be exchanged for one of her physical works. Another new development is that some artists sell their works in fractions, so that the medium is divided up and the work thus created may have a tangible counterpart that may or may not disappear. Artist Pascal Boyart, aka PBOY, created several NFTs that correspond to parts of his physical works. The Underground Sistine Chapel is a fresco inspired by the Sistine Chapel, created in a place destined to disappear and transformed into an NFT owned by collectors. In a similar approach, Damien Hirst sold 10,000 abstract paintings that required buyers to choose between the NFT and the painting. 4,851 buyers opted for the NFT, and the corresponding paintings were burnt and destroyed. This is also the approach taken by Artessere, a company based in Liechtenstein, a country whose legislation is favourable to blockchains, allowing buyers to purchase a share in a virtually divided painting, each piece being associated with an NFT. This craze is of interest to legal experts.

NFT's benefits for lawyers

This technology has a number of legal uses. In painting, it can be used to tackle counterfeiters such as John Myatt and John Drewe, who are capable not only of producing a fake but also of falsifying the documents used to authenticate it. Until now, the large number of people and practices involved has made it difficult to establish an indisputable artistic origin. With NFTs, only the artist can establish the authorship of a work with certainty. In this way, NFTs could prevent lawsuits such as the one brought by the artist Peter Doig against a stubborn collector who claimed that he was the original artist of a painting. NFTs make it easier to determine who owns a work, but they do not necessarily identify an intellectual work protected by copyright. With many works of art being reproduced illegally in NFT form, crypto-counterfeiting seems unstoppable at the moment.

Under French law, a creative work is protected solely by virtue of being created, and the author must prove they were the first to create the work in order to be able to demonstrate to a judge (using a Solau envelope, a bailiff's report or an administrative filing) that a third party has infringed their rights. Some authentication services are based on private blockchains (such as BlockchainyourIP or Ipocamp), which protect works as soon as they are registered, however complete they may be, using a time-stamping process that guarantees their authenticity from that date. We can therefore be sure of the authorship of a script, a drawing, a film, and so on. In France, the issue of blockchain-based digital proof is still being debated, but Italian legislation explicitly recognises blockchain-based electronic time stamping.

In the metaverses, like Decentraland and The Sandbox, the smallest plots of land and player-created objects are intended to be bought and sold as NFTs, and the buyer should remain the owner even if the game publisher goes bankrupt. Peter Molyneux created the game Legacy as a metaverse through the blockchain. In practice, NFTs are replacing the old transaction certification performed by the game's publisher. The future of video gaming will undoubtedly lie in the ability to transfer an NFT from one game to another, but game creators are not all in favour of interoperability between virtual worlds. However, in February 2023 Sony filed for a patent that would make its NFTs transferable between different games and consoles. In legal terms, NFTs can therefore be used to recognise a *sui generis* property right. They can also be used for funding.

Niels Juul, the film producer who founded NFT Studios, has just announced the first film to be entirely financed by NFTs, *A Wing and a Prayer*. The company is due to launch 10,000 NFTs, which will entitle their holders to benefits such as a share of profits, meetings with the stars and tickets to the premiere. However, *Plush*, a proposed animated film using NFTs, turned out to be a scam. On a more serious note, Claude Lelouch also sponsored the launch of Klapcoins as part of an ICO (Initial Coin Offering) to help fund a film.

In 2021, Tarantino announced that he was auctioning seven uncut scenes from Pulp Fiction as secret NFTs on OpenSea. What made these NFTs so attractive was that each of them was described as containing unique and unknown content. This new content was to include the first (uncut) handwritten scripts of Pulp Fiction and exclusive commentary from Tarantino. Miramax took Tarantino to court until a settlement was reached in 2022.

For lawyers, blockchains can also be seen as a tool for reducing the role of collective management bodies, such as authors' and publishers' societies (e.g. SACEM, SACD), performing artists' societies (e.g. SPEDIDAM) or producers' societies (e.g. SCPP). Singer Imogen Heap worked with the Ujo music platform for the song Tiny Human, and users were

able to buy licences to download, distribute, remix and synchronise the song. The band Muse released their latest album as an NFT. Moreover, it could be helpful to create a centralised database for music and, while the collection of ISRC and ISWC codes has always failed, blockchain may be able to accomplish this. Mediachain, Spotify's blockchain acquired in 2017, aims to allow works to be registered and have their circulation traced. Filmchain is similar, relying on the Ethereum blockchain to collect and automatically allocate film revenue. Finally, Blokur and Guts Tickets use blockchain technology to search for fake concert tickets and the secondary market.

In France, blockchain's legal recognition has been limited to cash vouchers and transfer of ownership of financial securities. Recently, Law 2019-486 of 22 May 2019, called the Pacte Law, created a legal framework for initial coin offerings (ICOs), the ability to request approval from the AMF – optional but essential for public promotion – and the approval of digital asset service providers (now CASPs in the MiCA regulation). Tokens are defined therein as "any intangible asset representing, in digital form, one or more rights that may be issued, recorded, stored or transferred by means of a shared electronic recording device that allows the owner to be identified, directly or indirectly" (Art. L.552-2 of the French Monetary and Financial Code (CMF)). Article L.54-10-1 of the CMF distinguishes between cryptocurrencies and tokens (digital assets). According to the texts, there are digital asset tokens (L.552-2 CMF), financial instrument tokens (L.211-1 CMF) and cash voucher tokens (L.223-1 CMF). Non-fungible tokens (NFT), however, are not quite tokens as defined in the CMF. Furthermore, the Markets in Crypto-Assets (MiCA) regulation of 20 April 2023 does not cover NFTs. NFTs thus seem to be excluded from current French legislation and the future European standard. Moreover, applying copyright to NFTs constitutes a real challenge.

The challenges in applying copyright to NFTs

Tangible property rights apply to the medium of the work, while intellectual property rights apply to the creative work, an intangible creation incorporated into the medium. "Intangible property (...) is independent of ownership of the tangible object" (Art. L.111-3 para. 1 of the French Code of Intellectual Property). The French Code of Intellectual Property (CPI) favours the notion of "work of the mind" over that of "work of art" and sets out a non-exhaustive list of creations that can be qualified as such (Art. L.112-2 CPI). To qualify, the creation must be affixed to a medium and be original. Most NFTs are stored on external servers and not on the blockchain. These servers are what come closest to a medium. This medium's address is stored in the NFT and recorded on the blockchain.

The condition of originality is fulfilled when an intellectual contribution specific to the author can be identified in the work. A "derivative" work is a protectable, original intellectual work. This is the case for translations, adaptations, transformations, anthology arrangements, collections of works or databases. Supposing that NFTs could be considered as works of arts, could they be considered as derivative works, given that they are files that represent the work of another? Without an intellectual contribution, it would seem not. The French General Tax Code, while not defining the concept of a work of art, also provides a restrictive list of "categories of assets likely to qualify as works of art". This article excludes "the use of any process whatsoever which makes it possible to replace, in whole or in part, this human intervention". Digital works are currently excluded. Thus, even if the code of the token and the represented work of art were considered to be inseparable, the whole would not be recognised as a work of art from a tax law perspective. But there is a clear separation between the NFT and the underlying work: the NFT is simply a means of accessing the digital file of the work.

Furthermore, for some the token creation process, unlike the digital file to which it refers, requires no originality since it is created according to a standardised computer protocol, ERC-721. In this regard, the lack of originality in the lines of code would deprive NFTs of the status of an intellectual work. NFTs are technically standardised tokens published under an open-source licence that presents no originality in itself. At most, there is the matter of its role as a medium for the work of art.

Digital works have no specific value in that they can be reproduced infinitely at little cost, whilst NFTs can give them value by using a medium to make them unique. From this point of view, NFTs would simply be a medium for digital works, and only if the NFTs are native works, i.e. if the work in question is an original incorporated into the NFT by its author, can the NFT be conceived of as a medium.

But the outcome would be different if the work were original, programmed by a smart contract and recorded in an NFT by its creator. Certain artists are such creators, like Primavera de Filippi: she used a smart contract on the Ethereum blockchain to create "Plantoids", the botanical equivalent of androids: new, autonomous forms of life capable of self-reproducing. The same goes for the native NFTs created by Albertine Meunier that use AI to create images that she then turns into NFTs.

Therefore, it is possible that copyright would apply to NFTs as a medium for virtual objects that will be created in the metaverses. Digital files transformed into NFTs can be protected by copyright if they fulfil the condition for originality. However, whether or not the NFT can be considered a work of art depends on whether it is a native work, meaning original and incorporated, integrated into the NFT from the start without a tangible counterpart. So, there is not just one type of NFT: NFTs have a polymorphic quality given the many possibilities available when they are created.

In this respect, the CSPLA report proposes that this legal curiosity should be likened to an intangible movable asset, which would correspond to a title of ownership recorded on the token and to which the rights relating to the attached underlying asset would be associated. Furthermore, NFTs can take into account different statuses of ownership, as demonstrated by Injective's initiative that turned Banksy's destroyed work "Morons" into an NFT that sold for \$380,000. The artist Lund has also donated a work to the Centre Pompidou entitled "Smart Burn Contract-Hoarder" (2021), an artwork based on a code that self-destructs if the written instructions are not followed.

NFTs' polymorphism means that, on the one hand, there would be ownership of the token and, on the other, different rights to the underlying work. In this sense, ownership of the underlying work would not necessarily be acquired and would depend on the will and powers of the NFT's creator and the author of the work (who may be the same person). In any case, NFTs create a form of ownership in the broad sense of the term. In 2022, English judges recognised a right of ownership over NFTs. The potential creation of a right of resale for NFTs also contributes to its fascination.

The prospect of resale rights for NFTs

For traditional works of art, the work's value lies in its medium. Resale rights allow the artist to obtain a percentage of the price of sale when the work is sold by a professional. This is to compensate for the low income from reproduction and representation rights. When a work of art is sold, in fact only the work's tangible property is transferred. The buyer cannot claim any copyright.

There are more than eighty laws on resale rights around the world with wide disparities in how they are collected and managed, individually or collectively. In Europe, Directive 2001/84/EC of 21 September 2001 harmonised resale rights, but Member States remain free to set the rate of the first bracket at 4% or 5% (Art. 4), to choose the minimum sale price above which sales are subject to resale rights (Art. 3), and to decide whether or not to exempt resale transactions where the seller acquired the work directly from the creator less than three years before the resale and the resale price does not exceed €10,000 (Art. 1). In France, Article L. 122-8 of the Code of Intellectual Property provides for resale rights for plastic works on an audiovisual or digital medium within the limit of twelve copies (within the meaning of Art. R122-3 f). Resale rights apply each time the work is sold by an art market professional for at least €750, allowing the artist to receive a percentage (between 0.25 et 4%) of the sale price excluding tax, up to a limit of €12,500. On 15 November 2022, SCEM signed a partnership contract with Pianity to ensure fair compensation is paid to rightsholders on the sale of NFTs of musical works, a contractual resale right. This contractual resale right is more similar to the American royalty mechanism than a true resale right.

If recognised, this mechanism would allow native NFT creators to receive compensation when their work is sold on, provided this work is sold by an art market professional, the sale takes place within French territory, and is subject to VAT (Art. L.122-8 and R.122-2 CPI). Since Law 2022-267 of 28 February 2022, France has allowed auction houses to organise auctions of "intangible movable property". Creators are now able to track the various transfers of ownership of their work using smart contracts. It is technically possible to arrange for a commission to be deducted automatically each time the NFT is sold on. NFT creators would like to see this new form of resale rights freed from any obligation to sell through an art market professional. To this end, the platforms have developed a smart contract technical standard, EIP-2981, which allows information relating to the sale to be read whilst the transfer of funds must be carried out independently.

Conclusion

Media are dissolving into a vast whole in which technology, trade and creativity are forging new relationships. If Europe is not careful, the French cultural exception will be undermined by this English-speaking audiovisual space, bringing with it common law and a new mass culture. It is quite possible that American law will disrupt various national and European laws. For now, a certain number of marketplaces are only compensating NFT creators if the smart contracts used are their own or compatible with their own.

It is difficult to know whether NFTs symbolise the excesses of a consumerist society that has pushed commoditisation to the extreme, or the democratisation of culture in the widest sense of the term, as intended by André Malraux. Information, entertainment and culture are merging. Is the commoditisation of media inevitable? In any case, the legal framework of Web3 must not evade European law and, for this, the law must adapt to these new technologies. For now, NFTs are not a work of art and not subject to resale rights in France or Europe.

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