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What legal framework for NFTs? Overview of the analysis of the French Higher Council for Literary and Artistic Property

Given the extensive development of NFTs (“Non-Fungible Tokens”, *Jeton Non Fongibles* or “JNFs” in French), it had become urgent to assess the current legal situation and then to propose solutions or at least avenues of reflection to control their expansion, while respecting copyright and related rights (also known as neighboring rights).

This mission was entrusted to the Higher Council for Literary and Artistic Property which presented its report on the subject on July 12, 2022.

The French Higher Council for Literary and Artistic Property (*Conseil supérieur de la propriété littéraire et artistique*, also known by its acronym “CSPLA”) is a consultation and dialogue body in charge of advising the French Minister of Culture in this field. However, it is also intended to allow the various stakeholders in this industry (authors, artists and performers, publishers, producers but also users) to exchange views on the issues that emerge due to the development of new technologies.

In this context, the CSPLA has been given the task of assessing the legal situation regarding NFTs. It is true that the highly speculative nature of this new market raises the question of how it should be regulated so that the relationships between its stakeholders remain sound. And the French State would not look kindly on an announced loss of control, as the use of cryptocurrencies for the marketing of NFTs already shows a desire to

move away from the banking framework. The CSPLA has, therefore, issued a report, presented on **July 12, 2022**, after having conducted *“about sixty hearings with field stakeholders, the French Ministry of Culture, art market professionals, collective management organizations, companies, professional federations, associations and artists”*.

While NFTs have the advantage of offering good prospects for the development of intellectual works and, above all, of the conditions for exploiting such works, it is necessary to ensure that such conditions and the related transactions do not prejudice the holders of copyrights and related rights. It was, therefore, important to assess the current situation and to propose solutions or at least avenues for reflection.

The first challenge was to characterize an NFT. *“In concrete terms, the acquisition of a Non-Fungible Token (“JNF” in French, “NFT” in English) corresponds to the acquisition of a token registered on the blockchain and associated with a “smart contract”, which points to a digital file (image, sound, video, etc.).”* Its legal characterization is not easy. It is not to be confused with the work of art that it refers to, nor to be assimilated to a certificate of authenticity thereof (in the absence of third-party auditor). The holder of an NFT does not have the intellectual property rights in the work covered by the NFT, unless otherwise contractually agreed upon. Therefore, in principle, he/she may not exploit said digital work, just like the owner of a physical work (painting, drawing, sculpture...), nor can he/she prohibit a third party from doing so. Moreover, the NFT cannot prevent the application of the *droit de suite* (i.e., artist’s resale right) attached to some intellectual works.

The CSPLA proposes *“considering it as a title of ownership in the token registered on the blockchain, to which other rights can be associated on the digital file to which it points, the purpose, nature and extent of which vary according to the will of its issuer, as expressed by the technical and possibly legal choices associated with the smart contract.”*

This implies a contractual link between parties and, therefore, their agreement on the terms and conditions of transmission of the NFT, which is not facilitated by the anonymity specific to this market or rather the use of pseudonyms on the blockchain. One can also question the ability of the parties to read and understand the content of the contract due to the computer language used (even if the defects of consent are a way to rebalance the forces involved).

It should be recalled that in order to create an NFT, the physical work must be reproduced in a digital format and that the agreement of the holder of the intellectual property rights (economic and moral rights) in the work is required. In this respect, the question of the distortion that may constitute an infringement of the author’s moral rights raises questions. Would the mere association of a digital reproduction of the work with an NFT be sufficient or would it require a real modification of the work such as a poor-quality digitization for example?

One can also wonder about the exhaustion of rights with respect to NFTs. According to the CSPLA, *“several elements suggest that the exhaustion of the distribution right does not apply to the sale of NFTs: A NFT is indeed an element coded in computer language that does not correspond to the protected work, nor to the*

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physical embodiment of the digital file that contains it, nor does it constitute its tangible and material medium.” It would thus be a communication to the public, which is not subject to exhaustion of rights.

In terms of copyright infringement, the NFT market creates obstacles to legal action by the owner of the infringed rights, including with respect to the determination of the territorially competent court. There is no territorialization of NFTs and even if reference is made to the general terms and conditions of the relevant NFT marketplace, it may be feared that a foreign and distant jurisdiction will be designated.

Finally, one way to ensure the protection of intellectual property would be to make NFT marketplaces accountable. In this respect, it is suggested that the provisions governing online content sharing service providers within the meaning of Article 17 of Directive 2019/790 on copyright and related rights in the digital single market be applied to them.

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