

Intellectual Property Rights and Distributed Ledger Technology with a focus on art NFTs and tokenized physical artworks ¹

ABSTRACT

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, aims to provide an overview over Intellectual Property Rights and Distributed Ledger Technology with a focus on IP issues relating to art NFTs and tokenized physical art works.

Applications based on Distributed Ledger Technology such as NFTs bring about many legal questions among which are traditional as well as new questions regarding IP rights, particularly copyright law.

The application of existing laws to NFTs raises interesting questions also in areas outside of IP law (e.g. ownership), harmonization of which would likely support the further development of business models in that area. For example, it is difficult to subsume tokens under the notions and rules of property law according to the understanding in many European countries. In addition, the private international law principle of *lex rei sitae* fails when it comes to distributed ledgers. Due to the values at stake, it seems necessary to protect NFTs similarly to ownership, as court cases abroad show.

As sometimes small technical details can make a difference in the legal assessment of a DLT application, it is important that definitions which might be used for eventual regulation are very carefully forged. An example for this is the upcoming MiCA regulation and its definition of "crypto-assets", which might, under certain circumstances, also have an impact on specific types of NFTs.

The opportunities that NFTs bring with them are manifold:

NFTs bring about the opportunity to give digital artworks a uniqueness and thus a value.

NFTs bring about new opportunities of exploitation to artists.

NFTs/smart contracts bring about the opportunity to fully automate resale royalties for secondary sales.

Although certain phases in the minting process seem to be neutral from a copyright perspective and an NFT is not identical to a work, but only represents it, it is clear that the creation and offer of an NFT representing a work under copyright law in most cases constitutes a reproduction as well as a making available subject to the prior consent of the copyright holder. The trade of NFTs on NFT marketplaces brings about the classical mass copyright infringement risks related to any marketplace. However, the enforcement of certain claims such as desist or destroy claims might be difficult, due to the technical nature of NFTs related to the immutable nature of the blockchain.

¹ Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/737709/IPOL_STU\(2022\)737709_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/737709/IPOL_STU(2022)737709_EN.pdf)



There remain certain grey areas in copyright law relating to NFTs, in particular as far as NFTs representing physical artworks are concerned:

Is the reproduction of a work used for the offer of a tokenized physical artwork covered by eventual copyright limitations according to some national copyright laws applicable when a physical artwork is sold (limitation concerning catalogue images, Article 5 (3) lit. j InfoSoc Directive)?

Does droit de suite apply when an NFT representing a physical artwork is sold?

Regarding such grey areas it can be said that a harmonized approach might support the growth of NFT-related businesses within the European Union.

Apart from the opportunities relating to NFTs, Distributed Ledger Technology creates potential further opportunities in the fields of rights management, combat against piracy and IP registration:

One of the opportunities of distributed ledger technology not only for the art sector, but for any field involving intellectual property is that rightsholdership, as well as licences, can be made transparent and accessible for all users of a blockchain. This might facilitate chain of title researches and might make the work of collecting societies more efficient. The precondition is, however, that rightsholdership is scrutinized at an entry point.

In addition, DLT creates opportunities in the fight against piracy. Certain marketplaces already use DLT in order to authenticate luxury goods.

The preliminary findings of this Study in relation to the Union IPR regime can be summarized as follows:

The Study finds that in order to support DLT applications like NFTs, the intellectual property law regime is not primarily the key, but – at least as far as certain types of NFTs are concerned - rather the legal regime related to banking regulation, tax regulation or, more specifically, crypto-regulation dealing with crypto-currencies and other crypto assets.

The question of intellectual property protection - or of intellectual property infringement - of a specific content that is tokenized, hence connected to a distributed ledger, although providing for new challenges, is legally very similar to the questions raised since the early times of the internet.

Despite the finding that, if someone tokenises a digital work that was created by someone else, copyright infringement will not be established for the tokenisation itself if an “off-chain” minting is concerned, in most cases the creation of the source which precedes the actual minting, will constitute a reproduction. In addition, the online display of the work as a token, even in thumbnail form, may constitute a copyright infringement, if the author did not give its prior consent. Therefore, as a conclusion, NFTs minted without the consent of the author of the underlying work, as a general rule, are violating the author’s copyright, if the underlying falls under copyright law.

As a consequence, most NFT marketplaces pragmatically provide for a notice-and-take-down functionality.

In addition, copyright law provides for remedies.

Therefore, it can be said that despite some grey areas, the EU intellectual property regime as it stands does provide rightsholders with the material rights and claims to defend against infringements relating to NFTs. Nevertheless, one has to point out that the national laws of the EU member states are not fully harmonized. Due to that, IP issues relating to NFTs might slightly differ from one EU member state to another.

All in all, the biggest challenge for trademark and copyright holders is the detection and enforcement of infringements, for which the application of artificial intelligence/upload filters – if possible on a self-regulation, voluntary basis – might be useful. Without such tools, the detection of infringements would face serious obstacles.

In the area of enforcement, the decentralized nature of DLT provokes questions regarding the applicable law, jurisdiction and competent authorities. Also, from a practical point of view, enforcement is difficult in cases, in which the identity of the infringer is unknown. This is another argument for technical solutions preventing any infringement in the first place.

As shown above, even though NFTs open up the possibility for authors to sell their works directly to the public and to provide for further royalty payments in the smart contract, there will still be a need for CMO's. There is a potential that the CMO's work can be facilitated through DLT, if an initial instance on a European level verifies the true authorship to a work before its rights status can be written on the blockchain. Only if such initial instance is provided for, the advantages of distributed ledger technology regarding authenticity and immutability can be seriously used.

Also, it is important to understand that the buyer of an NFT, identical to the purchase of an artwork in the real world, as a principle, does not acquire any copyright in the tokenised work on which the NFT is based, and will not be entitled to use the underlying work in any way other than the free uses/limitations to copyright law that are currently in place, without the permission of the copyright holders and without paying royalties.

As a conclusion, it can be said:

It is possible to apply the Union IPR Regime in the context of NFTs.

However, the fact that the Union IPR Regime is not fully harmonized, will likely lead to diverging situation in different member states in certain situations.

As far as enforcement is concerned, it is in the own interest of NFT marketplaces to provide for mechanisms that prevent the offering of infringing NFTs. It will be important for the European legislator to observe what kind of self-regulating mechanisms they will come up with and how effective they will be.

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This document is available on the internet at: www.europarl.europa.eu/supporting-analyses

PE 737.709

IP/C/JURI/2022-023

Print ISBN 978-92-848-0116-9 | doi: 10.2861/804341 | QA-04-23-002-EN-C
PDF ISBN 978-92-848-0122-0 | doi: 10.2861/381143 | QA- 04-23-002-EN-N