

NFTs, between Opportunities and Absence of Legislation: A Study on the Effect of the Rulings of the OpenSea Case

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Abstract : The development of the blockchain has been a major innovation in the technology field. It opened the door to the creation of novel cyberassets and currencies. In more recent times, the non-fungible tokens have started to be at the centre of media attention. Their popularity has been increasing since 2021, and they represent the latest in the world of distributed ledger technologies and cryptocurrencies. It seems more and more likely that NFTs will play a more important role in our online interactions. They are indeed increasingly taking part in the arts and technology sectors. Their impact on society and the market is still very difficult to define, but it is very likely that there will be a turning point in the world of digital assets. There are some examples of their peculiar behaviour and effect in our contemporary tech-market: the former CEO of the famous social media site Twitter sold an NFT of his first tweet for around £2,1 million (\$2,5 million), or the National Basketball Association has created a platform to sale unique moment and memorabilia from the history of basketball through the non-fungible token technology. Their growth, as imaginable, paved the way for civil disputes, mostly regarding their position under the current intellectual property law in each jurisdiction. In April 2022, the High Court of England and Wales ruled in the OpenSea case that non-fungible tokens can be considered properties. The judge, indeed, concluded that the cryptoasset had all the indicia of property under common law (National Provincial Bank v. Ainsworth). The research has demonstrated that the ruling of the High Court is not providing enough answers to the dilemma of whether minting an NFT is a violation or not of intellectual property and/or property rights. Indeed, if, on the one hand, the technology follows the framework set by the case law (e.g., the 4 criteria of Ainsworth), on the other hand, the question that arises is what is effectively protected and owned by both the creator and the purchaser. Then the question that arises is whether a person has ownership of the cryptographed code, that it is indeed definable, identifiable, intangible, distinct, and has a degree of permanence, or what is attached to this block-chain, hence even a physical object or piece of art. Indeed, a simple code would not have any financial importance if it were not attached to something that is widely recognised as valuable. This was demonstrated first through the analysis of the expectations of intellectual property law. Then, after having laid the foundation, the paper examined the OpenSea case, and finally, it analysed whether the expectations were met or not.

Keywords : technology, technology law, digital law, cryptoassets, NFTs, NFT, property law, intellectual property law, copyright law

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