

Wilhelm Gilliéron

AVOCATS



Auteur: Wilhelm Gilliéron Avocats | Le : 29 November 2021

Art and NFTs: a question of copyright? really?

On November 17th, Quentin Tarantino was in the news; not because he had declared to give up his job as a director to turn to writing with the recent publication of "Once upon a time in Hollywood", but for another reason: [the sale of unpublished scenes from "Pulp Fiction" in the](#) form of handwritten scripts, accompanied by unpublished commentaries by the director in the form of NFT. Tarantino did not hesitate to dedicate a website to this: www.tarantinonfts.com.

Let us first remember that NFTs (*Non Fungible Tokens*) are cryptographic tokens based on blockchain technology that allow any type of content to be integrated into it and, by the same token, guarantee its authenticity and uniqueness, since only the person with the key is able to access the content to which the NFT is attached.

While the scope of NFTs is likely to be widespread, it is primarily in the realm of art that they have become popular. [On March 11, 2021](#), digital artist Mike Winkelmann, known as Beeple, auctioned his work entitled "Everyday: The First 5000 Days" through Christie's using the NFT process. Offered for USD 100, the work generated 353 bids, which culminated in the astronomical sum of USD 60.25 million. This amount makes Beeple the third most expensive artist to have sold a work in his lifetime, leaving the artist, stunned, to write on his Twitter account: "*Holy fuck*".

The phenomenon cannot fail to raise questions, not to say challenges, on the sociological, if not psychological, levels, areas which do not, however, fall within my competence and on which I will leave it to the experts to give their opinion.

From a legal point of view, and without going into details here, the situation is, in truth, just as challenging.

To acquire an NFT is first and foremost to acquire the unique and exclusive right to access the content represented by that NFT. On the other hand, the seller is free to grant only the rights he wishes on the work itself. The only certainty for the purchaser of an NFT is that no other person than him will be able to access the said NFT and the content attached to it, giving him the happiness of being the only one to be able to consult the linked content on his screen (and above all to speculate in reality on an increase in the market value of this access, and even of its content).

On the other hand, the author may prohibit the buyer from publishing the work, sharing it or making any commercial use whatsoever, by allowing access for private purposes only. Some go so far as to [authorize commercial use up to a certain amount, for example an amount equivalent to USD 100,000 per year](#), which can be easily controlled through the use of *smart contracts*.

In other words, it is in the buyer's best interest to consider what he or she is really acquiring and the extent of the rights resulting from such an acquisition. To do this, it is in the buyer's interest to read the general conditions of sale very carefully. In reality, the sale does not in itself amount to a transfer of copyright in the work in question, as anyone might believe.

This is the place to remind you that when you buy a book or a movie theatre ticket, or even a movie available in *streaming* on a content delivery platform, what you are buying is the right to access this work and to consume it, either by reading it or by watching it. My assumption is that you never imagine that, through such a "purchase", you actually become the owner of the copyright on the work itself integrated into the said medium. Contrary to popular belief, acquiring an NFT is therefore no different, except for the fact that this right of access is unique.

In other words, discussions about the role of the NFTs are wrongly framed in the public debate as a copyright discussion. Certainly, in many cases, as Beeple's work demonstrates, the content attached to the NFT will be a copyrighted work. However, this is not necessarily the case and, in the end, it does not really matter. In reality, what the purchaser acquires through the acquisition of an NFT is an exclusive right of access. The value of the NFT does not depend on the protectability of the linked content, but rather on the market value of the right of access and the rights granted to the linked content, which depends on the terms of use.

But back to Quentin Tarantino; his willingness to sell certain unreleased portions of "Pulp Fiction" as an NFT did not please Miramax, to say the least. While Miramax considers that it holds the copyright on the work because of an assignment clause, Tarantino argues that he had contractually reserved the rights to publish the screenplay in print format, and that the publication of these unpublished handwritten scripts for sale as NFTs would fall under this reservation. Unsurprisingly, Miramax does not see things this way, and

considers that the single sale of NFTs cannot be considered as a printed publication of the script. Matter of construction of contractual clauses written at a different time, the scope of which will have to be interpreted 27 years later. Having shortly reviewed the complaint, I find personally find it hard to see how Quentin Tarantino could convince the Court, given a particularly broad assignment clause covering (unsurprisingly) the technologies to come

Source : <https://www.wg-avocats.ch/en/news/intellectual-property/art-nfts-copyright/>