

France's historical and cultural heritage in the Metaverse? A recent auction of NFTs on 3D files of 10 iconic buildings and places in Cannes sheds light on some legal aspects

By Stefan Naumann, Esq., Hughes Hubbard & Reed LLP

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On June 21, 2022, the French auction house Artcurial auctioned off ten iconic buildings and locations of the city of Cannes as NFTs. The auction was held in person in Cannes and online, allowing bidders from the U.S. and other countries to bid.

A technical digital file with a utilitarian and commercial vocation cannot, in principle, constitute in itself an asset of major interest for national heritage as defined in the French Heritage Code.

The Artcurial auction catalog indicates that the city of Cannes has “digitized its iconic sites with a view to their insertion and commercial and cultural exploitation in the Metaverse,” and specifies that each lot is a unique piece and that “in concrete terms, it will be possible, for example, to construct buildings on the Croisette in the Metaverse, to organize events at the Palais des Festivals et des Congrès or to mount an exhibition at the Centre d’Art La Malmaison” (emphasis added).

The NFTs sold at the auction are ERC-721 standard NFTs issued in the Ethereum blockchain. They include a 3D file in jTIF format necessary to implement the buildings and sites in a virtual world.

According to Artcurial’s press release, the ten lots sold for a total of 318,616 euros to buyers identified as French (4), European (4) and international (2) collectors. The two lots with the highest bids were NFTs of the Palais des Festivals et des Congrès and of the Croisette, both of which were sold to European collectors.

A number of aspects of this auction of NFTs are notable: (i) some of the buildings rendered in 3D could be considered part of France’s historical and cultural heritage, while others, such as the Palais des Festivals et des Congrès, are still protected by the architects’

copyrights (ii) although the seller is the city of Cannes, a public authority, the French State may have the right to pre-empt some of the sales, (iii) public auctions are a regulated activity in France, and auctions of intangible personal property were prohibited before March 1, 2022, and (iv) the purchasers have acquired commercial exploitation rights of iconic buildings and places of the city of Cannes in the Metaverse.

I. Historical and cultural heritage, cultural property and right of pre-emption

The French State’s right of pre-emption applies to sales of cultural property. It is designed to allow the State to protect France’s historical and cultural heritage.

Could the State have exercised this right following the public auction of NFTs on 3D representations of iconic buildings in Cannes that were put up for auction by the city itself?

Article L. 123-1 of the French Heritage Code provides in particular that:

“The State may exercise a right of pre-emption following any public sale or private sale of cultural property (...) which has the effect of subrogating it to the successful bidder or buyer. (...) The public or ministerial officer in charge of carrying out the public sale of the cultural goods defined by decree in Council of State (...) gives notice to the administrative authority at least fifteen days in advance with all useful indications about the aforementioned properties. At the same time he informs the administrative authority of the day, hour and place of the sale. The sending of a catalog mentioning this purpose serves as notice.”

Artcurial’s general conditions of purchase at auctions of NFTs expressly provide that:

“5) Pre-emption by the French State

The French State has a right of pre-emption for works sold in accordance with the texts in force.

The exercise of this right takes place immediately after the hammer has been struck, the representative of the State then expressing the latter's wish to take the place of the last bidder, confirming the pre-emption within 15 days."

Cultural property is defined in Article L. 111-1 of the French Heritage Code as follows:

"Are national treasures:

(...)

3) properties classified as historical monuments pursuant to Book VI;

(...)

5) other properties of major interest to national heritage from the point of view of history, art, archaeology or knowledge of the French language or regional languages."

For the purpose of applying the State's right of preemption, Article R. 123-2 of the French Heritage Code defines cultural property as follows:

"Are considered as cultural property for the application of articles L. 123-1 and L. 123-2 relating to the right of pre-emption properties belonging to one of the following categories:

[...]

2° Elements of decoration coming from the dismemberment of real estate by nature or by destination ;

3° Paintings, watercolors, gouaches, pastels, drawings, collages, prints, posters and their respective matrices;

4° Positive or negative photographs, regardless of their medium and the number of images on this medium;

5° Cinematographic and audiovisual works ;

6° Original productions of statuary art or copies obtained by the same process [...];

7° Works of contemporary art not included in the categories mentioned in 3° to 6°;

(...)

13° Any other antique object not included in the categories mentioned in 1° to 12° " (emphasis added).

The French State may exercise its right of pre-emption regardless of the nationality or residence of the purchaser, whether the sale is by auction or by mutual agreement.

When a buyer wishes to export a cultural object, article L. 111-2 adds that *"the temporary or definitive export from the customs territory of cultural objects, other than national treasures, which are of historical, artistic or archaeological interest and fall into one of the categories defined by decree in the Council of State is subject to obtaining a certificate issued by the administrative authority. This certificate attests on a permanent basis that the property is not a national treasure. However, for items that are not more than 100 years old, the certificate is issued for a renewable period of 20 years."*

Article L. 123-3 of the French Heritage Code provides that:

"The State may also exercise the right of pre-emption provided for in articles L. 123-1 and L. 123-2 at the request of and on behalf of a local authority, a group of local authorities, a local public establishment, a non-profit private legal entity that owns a collection assigned to a French museum or a foundation of recognized public utility that owns an archive collection. The Bibliothèque Nationale de France may exercise this right with regard to cultural property or property likely to be included in the collections and holdings in its care."

Even if a local authority or a museum or foundation requests the implementation of the right of pre-emption, the State alone decides whether or not to exercise it.

The ability to transfer files from one virtual world to another is a core issue in the Metaverse, but not yet a reality.

For the auction of the NFTs on Cannes iconic sites, the local authority itself put the NFTs up for auction. If the French State had decided to exercise the right of pre-emption notwithstanding the authorization of the local authority, the right of pre-emption would in principle prevail over the decision of the local authority.

The auctioned NFTs include the Palais des Festivals et des Congrès built in 1977, the Croisette without buildings, the Pointe Croisette with buildings, the old port described as "a central and essential part of the city's historical heritage," the Suquet with the church of Notre Dame d'Espérance (XVIth century), the Écomusée sous-marin with its six monumental sculptures installed in 2021, the Malmaison (1863), the Île Sainte Marguerite with its nature reserve and Fort Royal (XVIIth century).

Although some of these buildings are listed in the general inventory of cultural heritage and are registered in the Mérimée database of the Ministry of Culture, they are not classified as historical monuments.

Above all, a technical digital file with a utilitarian and commercial vocation cannot, in principle, constitute in itself an asset of major interest for national heritage as defined in the French Heritage Code, nor a cultural asset within the meaning of this Code.

Such a file is also different from digital artwork, which could potentially be of major interest from the point of view of art and/or constitute a cultural asset as a work of contemporary art under the terms of Article R. 123-2 of the French Heritage Code.¹

II. Auctions are a regulated activity in France

Since the law n° 2022-267 of February 28, 2022 aiming at modernizing the regulation of the art market, article L. 320-1 of the French Commercial Code provides that *"sales by public auction of movable goods are governed by the present title subject to the specific provisions for the sale of certain intangible movable goods."*

These new provisions allow public auctions of intangible movable goods, whereas such auctions had been restricted to movable tangible goods under the former version of article L. 320-1 of the French Commercial Code. The modification allows not only public auctions of NFTs, but also of other intangible movable property such as trademarks and patents.

Artcurial's general conditions of purchase of NFTs provide for the delivery of intangible goods as follows:

*"Due to its special nature, **the NFT will never be in the possession of Artcurial SAS.***

After adjudication and payment, it will be transferred directly by the seller to the successful bidder under the control of Artcurial SAS.

(...)

*In the absence of being able to control the post-sale conservation technology, Artcurial SAS **does not guarantee the durability of the NFT, nor its possible future tax regime.**" (emphasis added).*

Artcurial's terms and conditions confirm, if need be, that the durability and accessibility of virtual files raise technical and legal issues that are not solved by NFTs and blockchain.

III. Commercial use in a virtual world

At the heart of the value of the auctioned NFTs is the possibility of the commercial use in the Metaverse of the 3D files of the buildings and sites sold with the NFTs.

In an article published in Cannes Soleil No. 227 in June 2022, the head of Pertimm, the company that created the digital files for the Cannes sites, explained that the 3D files developed by his company *"can then be integrated into the Metaverse — a set of virtual universes connected to each other and in which users can navigate, buy land, make crypto-currency transactions or implant NFTs that they own. 'The first use of our creations took place during the Cannes Film Festival, with the partnership between Brut and Epic Games, which transposed the Palace modeled by us into the famous video game Fortnite (...). It should be noted that the owners of the 11 sites in Cannes will not be able to change anything in the NFTs to preserve the image of the city, but they will be able to organize fairs and festivals, such as the one in the Palace.'"*

These explanations usefully highlight two important legal aspects of this auction of NFTs, namely that the sale of the 3D files includes rights to commercially use these files in the Metaverse, but that this commercial use comes with restrictions and must not damage the city's image.

The explanations incidentally answer the question about the very existence of the Metaverse: for the time being, the Metaverse does not exist. It is at best a set of private virtual spaces that compete with each other and are more or less connected to each other.

The ability to transfer files from one virtual world to another is a core issue in the Metaverse, but not yet a reality.

The purchaser of an NFT of an iconic place in Cannes therefore cannot for the time being freely transfer this file from World of

Warcraft to Sims, from League of Legends to Fortnite or other open multiplayer video games, or between these games and various open universes called metaverse such as The Sand Box or Decentraland. As the article quoted above indicates, the insertion of the Palais des Festivals file in the video game Fortnite required a partnership with the game publisher Epic Games.

IV. (Smart) contracts and commercial use in a virtual world

Artcurial's terms and conditions state that "under the Smart Contract in the catalog, the NFT is subject to rules of use which any successful bidder is invited to consult" (emphasis added).

The auction catalog sets out (very) specific uses for each lot.

The NFT of the Palais des Festivals et des Congrès allows the implementation in the virtual world of a gambling universe, while that of the Croisette allows the construction of houses and buildings as well as the organization of events around and on the beach.

In this context, it should be noted that the catalog expressly permits the construction of buildings in the Metaverse on the Croisette file, without specifying any restrictions on the appearance of these additions or their purpose. The NFT of the Old Port allows the transposition of sport events, the one of the Pointe Croisette the organization of events, apparently without restrictions.

The NFT of Malmaison allows the organization of exhibitions and cultural and festive events, the NFT of the Marché Forville the sale of local products in an iconic place for the art of living in Cannes (transposition of local 3D e-commerce).

Artcurial's auction catalog indicates that the NFT of the Suquet with the Church of Notre Dame d'Espérance will be a great place to celebrate weddings as well as other religious and cultural events in the Metaverse, while the NFT of the Île Sainte Marguerite and its Fort Royal provides that "both in the Metaverse and in reality, the island remains a nature reserve. It will allow for the establishment of outdoor spaces in an environmentally friendly manner" and "the creation of a restaurant and party place."

The auction catalog thus sets out the terms of the contracts linked to the NFTs, notably that the virtual commercial use as limited must not undermine the image and reputation of the physical buildings and places.

These contractual terms should be found in the electronic contracts attached to the NFTs commonly referred to as smart contracts.

By way of example, the city of Cannes has ensured the respect of the moral rights of the architect of the Palais des Festivals by including his name as the author of the architectural work in the 3D file, and by not allowing modifications of the file.

In case of violation by the purchaser, the smart contract could automatically implement the sanction provided by the contract (for example, in case of modifications of the file or parts of the file, deletion of the name of the architect, copies of the file).

The Artcurial catalog includes a Lexicon of the crypto sphere that provides for the possibility of destruction of a token or NFT by its

owner (Burn) and specifies that “this action is envisaged in the event of non-observance of the rules fixed [sic] in the Smart Contract.”

The city of Cannes thus in principle kept the possibility of stopping commercial uses of the iconic places in the virtual worlds of the Metaverse that are not in conformity with the restrictions and limitations spelled out in the auction catalog.

As the smart contract attaches to potential successive sales of NFTs, these limitations and their sanction by a Burn could apply to potential successive purchasers, but only if this clause is included in the smart contract and/or the NFT metadata.

However, the automatic application of such a radical sanction by a computer program arguably raises numerous legal questions.

Smart contracts are programs with contractual clauses that function in an automatic way in the form of “if / then” clauses. According to the description of smart contracts on the Ethereum website, these clauses operate like a vending machine: the program verifies whether the payment corresponds to the price and, if so, transfers the NFT. This mode of operation allows basic contractual operations to be carried out. Among the clauses will also be the fact that it is a unique piece.

However, this basic logic of < if ... then ... > does not allow the implementation by the smart contract of clauses relating to compliance with the limitations on commercial uses of the Cannes buildings in the Metaverse(s).

By way of example, a clause of this type in a smart contract could not provide for and control the obligation of the purchaser of the Palais des Festivals file to comply with regulations, in particular tax and gambling regulations such as regulations for the protection of minors in connection with gambling, which may be applicable to the purchaser or subsequent purchasers if they open the doors of the virtual Palais des Festivals for a casino allowing gambling in the Metaverse.

About the author



Stefan Naumann leads the intellectual property practice of **Hughes Hubbard & Reed LLP** in Paris. He is admitted to practice in France and California and is an independent neutral for the World Intellectual Property Organization, particularly for domain names. His clients include well-known entertainment, medical device, advertising, new media, publishing, personal care and manufacturing companies. His patent litigation practice covers additional industries. He can be reached at stefan.naumann@hugheshubbard.com.

The nationality of the purchaser being unknown before the sale and the place of operation being in a virtual world, what regulations are applicable is also an issue.

What about these necessarily more complex contractual terms to define, for example, the permitted or prohibited commercial uses of the digital files sold with the NFTs?

These could be included in a separate contract linked to the NFT by a link in the NFT metadata, but would not execute automatically as would the smart contract clauses. In this context, it should be remembered that an auction house’s conditions of sale and the auction catalog form part of the NFTs’ sales contract. Even if the terms are not linked to the NFT metadata, they are in the auction house’s terms and conditions of sale for NFTs and in its auction catalog.

But how can these terms be enforced if the purchaser is abroad or if the operator who breaches the terms has acquired the NFT through successive resales?

Both purchasers and the sellers of NFTs involving representations of iconic real-world buildings (museums, monuments) for commercial use in the virtual world would be well advised to ensure that the terms and conditions of the contract(s) related to the NFTs contain some of the clauses usually found in contracts for the operation of e-commerce sites, or even for the commercial operation of real-world locations (for example a shopping mall in a historic site), but also clauses relating to applicable law and jurisdiction in the event of a dispute, the transfer of obligations in the event of resale, etc.

Notes

¹ See, for example, the digital work “The First 5000 Days” by the artist Beeple sold at auction with NFT by Christie’s for \$69 million.

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