



# Regulation of NFTs and Crypto Art Trading. Influencers, Gamification, and Emerging User Protection Issues

Allegra Canepa\*

Associate Professor of Economic Law, University of Milan, Italy.

## ABSTRACT

*The work examines the design of platforms currently operating in the NFTs Art market and their relevance thanks to the algorithmic analysis of data and the offer of ancillary services.*

*Specifically, marketplaces and social media platforms will be examined and their ability to influence user choices and NFT sales prices. The analysis outlines the techniques of profiling and attribution of royalties to artists and buyers to guide users' choices, as well as the ability to influence the value and sales prices through forms of Gamification. Subsequently, the paper analyzes influencers' role and ability to encourage purchasing collections created exclusively for social media. In this context, as highlighted in the second part of this work, given the growing volume of transactions and the complex legal nature of NFTs, there are considerable risks in making conscious and informed choices by collectors—a regulation of circulation given the difficulty of applying the current legislation.*

*The absence of a specific regulation of the NFT in many countries and the possible qualification as an asset whose circulation is regulated by the e-commerce regulation can lead to uncertainty and clarity in buyers regarding the nature of the purchase made and its potential illiquidity.*

**KEYWORDS:** Digital Platforms, Crypto Art, NFTs, Regulation, Social media, Users choices

## THE DESIGN OF THE NFTS MARKET AND THE ROLE OF CRYPTO ART PLATFORMS

The growth in demand and transaction volume of Non-Fungible Tokens (NFT) recorded in recent years, which grew from less than \$1 billion to \$25 billion in 2021 alone<sup>1</sup>, has led to an increase in focus on this market and marketing platforms. Examining these aspects requires an in-depth analysis of the existing operators' nature, the supply and demand structure, and the elements that influence the definition of prices and purchasing choices. Such an analysis requires limiting the investigation to a specific market segment.

The choice adopted was to examine the Crypto Arte NFTs for the peculiarities of the goods involved, for the considerable price volatility demonstrated (in particular by some collections) and for the fluctuation of sales depending on the period considered. Indeed, between March and April 2021, 28.4 thousand NFTs were sold, and in August 2021, sales

reached 117.4 thousand, with a growth in sales value of over 100 times per year.

The trend in 2023 would seem to have changed with a decline that began in February, probably due both to the cryptocurrency crisis and to the instability generated by the Russian-Ukraine conflict, with sales recorded in progressive decline up to 7.7 thousand on the Ethereum, Ronin, and Flow blockchains<sup>2</sup>.

It is likely necessary to wait for the year-end data to get a clearer picture, given that the NFTs market has lower volatility than that of cryptocurrencies. In addition to the purposes of purchasing for financial gain at the time of the subsequent sale, there are also those of collectors.

Although the presence of auction houses such as Sotheby's and Christie's, which sold NFTs for 230 million dollars in 2021<sup>3</sup>, if we examine the sales of artistic NFTs, a platformization process is highlighted.

\* This research has been carried out within the Jean Monnet Chair in Digital Market Law (E-DSM).

1 See J. KIM, K. LOMMERS, M. BAI OUMY, *Market Making in NFTs*, 2023, Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4226987](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4226987).

2 See Statista Research Department, (2023) April, [www.statista.com/statistics/1235228/nft-art-monthly-sales-volume/](https://www.statista.com/statistics/1235228/nft-art-monthly-sales-volume/).

3 See Art Basel & UBS Report, *The Art Market 2022*, <https://www.artbasel.com/about/initiatives/theartmarket2022pdf>.



The specialized platforms in marketing NFTs record the highest volumes of sales and a growing number of active users. Currently, however, these data are not included in the total value of the art market because there are only those of traditional operators, such as an auction sale or a gallery. The availability of aggregated data on transactions makes it more difficult to reconstruct and evaluate the development of the primary market and, above all, the secondary one.

This matter is further complicated by the different nature of the marketing platforms, their methods of action, and the difficulty of guaranteeing the same certainty value and the definition of prices<sup>4</sup> as traditional auction houses.

The analysis of the ability and techniques of the platforms to determine price increases and more attractiveness on the market of some NFTs appears particularly interesting, also favouring a more rapid development of the secondary market. Such an investigation requires carefully evaluating a multiplicity of aspects, such as the presentation of the NFTs for sale and the completeness of the information, the exploitation of gaming elements, the presence of exclusive advantages recognized by the owners and finally, the ability to arouse emotional factors capable of influencing buyers' choices and prices.

The remainder of this paper is organized as follows. The second section focuses on the different types of existing platforms by distinguishing between those commercializing NFTs and those of social media and legal implications. The third and related subsections examine the marketing techniques used by these platforms with particular attention to those capable of influencing sales prices. The fourth and fifth sections identify the dual role of social media platforms in advertising and commercializing NFTs and their ability to influence users' purchasing decisions thanks to framing effects and gamification. Finally, the last section provides some concluding remarks.

## **THE TYPES OF PLATFORMS AND TRANSACTIONS OF NFTS BETWEEN E-COMMERCE AND FINANCIAL MARKETS**

Business models of NFTs marketplaces are only partially similar. So, it is helpful to distinguish between specialized platforms dedicated exclusively to NFTs (often not only artistic) and services as well as NFTs and social media because they have started the sale of NFTs collections.

Some are already active among these typologies, and others are under development (for example, in the American context). Each typology will be analyzed, including the ancillary services.

The marketplaces, such as OpenSea or SuperRare, offer marketing and realizing the NFT directly related to the

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4 See F. HORKY, C. RACHEL, J. FIDRUMUC, Price Determinants of Non-fungible Tokens in the Digital Art Market, May 2022, [www.ssrn.com](http://www.ssrn.com)

commissions recognized to the platform and the royalties recognized to the artist for sales on the secondary market<sup>5</sup>.

The platform can insert in smart contracts the royalties to the artist for some years or the entire relationship to guarantee the transfer of what is due automatically and quickly occurs. At the same time, however, if a different platform resold the NFT, the royalties will have difficulty transferring to the artist. The amount of royalties is not of exclusive interest to artists but also directly correlates with the sale price. For example, in the case of OpenSea, the percentage can be set at the artist's discretion and reach up to 10% of the value of the work. The higher the percentage, the higher the increase in the price of the work.

In some cases, such as that of SuperRare, the amount of royalties directly relates to the artist's relationship with the platform. Such a dynamic favours a lock-in of artists and their works since they must remain loyal to the platform long enough to set higher royalties. At the same time, a similar dynamic involves the artist in user loyalty pushing his followers to first and probably exclusively visit the platform to purchase his works.

The second category is platforms for which the primary services are social media or the marketing of goods. In the case of platforms for the marketing of goods, there have yet to be consolidated examples, but by recent news, Amazon is working on its marketplace to sell artistic NFTs and more. The launch of this marketplace has already been postponed several times. However, in the start-up phase, marketing should take place exclusively in the US market, with some collections of NFTs purchasable only by Amazon's general account. Like social media, this platform would use many loyal users to enter the market. It would aim to intercept the growing number of interested parties, including young people, as shown by Sotheby's data on possible buyers divided by relative age<sup>6</sup>.

This number could grow in the coming years, thanks to social media. Social media such as Twitter and Reddit<sup>7</sup> have made specific applications available and begun to market collectibles useable as profile pictures or displayed on them.

At the same time, the payment not in cryptocurrencies but

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5 See Van Haften- Schick L., A. Whitaker (2022), From the Artist's Contract to Blockchain Ledger: New Forms of Artists' Funding Using NFTs, Fractional Equity and Resale Royalties, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=384221](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=384221).

6 See M.L. KLEIN, New Buyers Prove Art Market Resiliency and More Key Insights, September 2020, <https://www.sothebys.com/en/articles/key-data-trends-from-art-auctions-during-the-pandemic>.

7 On Facebook and Instagram, exposure support of NFTs was launched in the autumn of 2022, but in March 2023, the project was abandoned to develop a monetization project for reels.

with a method stored in the account simplifies the purchase. It allows the acquisition of data on preferences and economic resources relating to this type of transaction to profile users and send personalized suggestions to facilitate the conclusion of further purchases.

The ease of access to this market, even for the youngest, makes it even more urgent to identify the regulation for user protection. A qualification of NFTs as works of art or consumer goods gives rise to the application of legislation on online commerce. To favour such an identification, Amazon would also hypothesize the sending of a good together with the NFT.

A recent Chinese jurisprudence, the Hangzhou Internet Court, has identified the existence of virtual property for collectibles and has recognized their sale as a transaction of digital goods via the Internet with, consequently, application of the regulations on electronic commerce.

This application is in line with the Announcement on the Prevention of Speculation Risks caused by Virtual Currency and the introduction of a ban on the trading of cryptocurrencies and related activities (September 2021). Such an arrangement has determined in advance a limitation of marketing to only NFTs considered digital collectibles without connection with the trend of the cryptocurrency market. Similar forecasts have contributed to a change in the design of the Chinese market with a redefinition of the marketing platforms (for example, in July 2022, Tencent's Huanhe platform ceased its activity).

One of the main problems is the availability of information on the nature of the purchase and the risks of economic loss, potentially even more significant than many financial products. The combination of high volatility and scarce information available has led to an increase in situations in which, albeit in specific cases, some countries consider financial regulations applicable.

As underlined by the European Supervisory Authorities (ESAs), precisely these characteristics can determine buyers, who are not always aware, of a "very real possibility of losing all their invested money if they buy these assets" (ESAs, 2022)<sup>8</sup>. Moreover, the NFTs market and platforms operating globally still need specific regulation, as highlighted by the Report on the Protection of the Retail Investor of April 2022. Artistic NFTs have been excluded from the application of Regulation 2023/1114 on Markets InCrypto-Assets (MICA) precisely based on characteristics of uniqueness and lower circulation, and the recent document of the Hong Kong Securities Futures Commission also seems to go in a similar direction<sup>9</sup>.

8 ESAs, EU financial regulators warn consumers on the risks of crypto-assets. ESAs 2022 15, march 2022, <https://www.esma.europa.eu/press-news/esma-news/eu-financial-regulators-warn-consumers-risks-crypto-assets>.

9 Hong Kong Securities Futures Commission, Issue Final Rules for Virtual Assets Exchange, June 2023.

In the United States, a recent ruling of US District Court in the sports field has instead identified NFT, in particular situations, as "securities"<sup>10</sup>.

Previously, on a similar assessment, in the United Kingdom, Financial Conduct Authority (FCA) proposed to apply to NFTs the same regulation envisaged for advertising financial instruments on communication and marketing<sup>11</sup>. In both cases, the financial legislation also applies to NFTs to ensure user protection.

## THE PLATFORM'S ABILITY TO INFLUENCE THE SALE PRICES OF NFTS

The platforms specialized in selling NFTs or social media can influence prices and the development of the secondary market. However, their actions are different, so it is helpful to examine them separately.

Platforms specialized have assumed the role of market makers in the NFTs market. The platform's activity is not limited to just the moment of sale but also favours the creation of a community for meeting supply and demand and the conclusion of transactions. Moreover, they added an ability to pre-select the types of artists on the market thanks to coordinated, albeit differentiated, actions towards users and artists.

Specifically, users are subject to a retention process through profiling that outlines user preferences by analyzing data on previous purchases' types and prices. Recently, some platforms have introduced attributing royalties to collectors to increase sales in the secondary market<sup>12</sup>.

In order to select emerging artists with the most excellent chance of success and to commercialize NFTs with higher prices, many platforms have introduced selection criteria for accessing the marketplace. For example, SuperRare provides an invitation system with two conditions: passing a preliminary assessment of the artistic profile, including notoriety on social media, and a marketing exclusivity clause<sup>13</sup>. This process shows considerable discretion, lack of transparency on the criteria used for the evaluation, and a precise will of the platform to select artists with

10 See case *Friel v. Dapper Labs, Inc., et al.*, United States District Court, Southern District of New York, Decision No. 1:21-cv-5837, —F.Supp. 3d—, 22 february 2023, <https://law.justia.com/cases/federal/district-courts/new-york/ny-sdce/1:2021cv05837/562991/43/>. See also FCA, PS23/7 Financial Promotion Rules for Cryptoassets, July 2023, <https://www.fca.org.uk/publications/policy-statements/ps23-6-financial-promotion-rules-cryptoassets>.

11 Financial Conduct Authority (FCA) 2022, Strengthening our financial promotion rules for high-risk investments and firms approving financial promotions, PS22/10, August, [www.fca.org.uk](https://www.fca.org.uk).

12 See Super Rare Labs Team (2021 July), <https://medium.com/superrare/the-art-royalty-revolution-6c0d13a6912a>.

13 Super Rare <https://help.superrare.com/en/collections/2817684-joining-as-an-artist>.



potential, including communicative ones, capable of having attractiveness both in the primary and secondary market.

However, there are other ways to influence sales prices.

In traditional art, criteria to define prices include the certainty of attribution to a specific author, belonging to a school, and rarity<sup>14</sup>. Recalling these parameters is helpful because, albeit with differences, the platforms also use them.

The author's celebrity influences on users' trust in the platform and the speed of sales. At the same time, inclusion in a collection known or well known to the public (think, for example, of the Bored Ape collection) with a limited number of works determines a high base price destined to grow at auction. A similar dynamic arises from the correlation between price and rarity. The greater the rarity of an object or an NFT, the higher the price those who wish to own it are willing to pay<sup>15</sup>.

Rareness can be defined as "natural" for a limited number of artworks but also "artificial". In particular, the artificial rareness guarantee that few works by an author is simultaneously for sale on the market to ensure low supply and high demand. In some NFTs, as happened in the past for many luxury goods<sup>16</sup>, it can also be generated (as in the Bored Ape collection) through a rareness in the design due to visually defined attributes with different variability in the pieces of the collection (very high for some and low for others). In the case of Bored Ape, the percentage of these attributes was communicated before marketing so that the rareness was previously known to users<sup>17</sup>. The existence of different attributes could also contribute to excluding a regulation such as MICA because uniqueness is requested in substance and not only in form (recitals 11 and 12). So uniqueness must be assessed based on the number of pieces making up the collection and the differentiation, which cannot be given only by the identification number of the artwork<sup>18</sup>.

14 See particularly F. CAPRIGLIONE, *I fondi chiusi di beni d'arte, Banca, Borsa e Titoli di credito*, 2007, p. 395.

15 See Y. LEE, *Measuring the Impact of Rarity on Price: Evidence from NBA top shot*, 2021, Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3906231](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906231).

16 See particularly J.N. KAPFERER, *Abundant rarity: the key to luxury growth*, *Business Horizons*, vol. 55, Issue 5, 2021, p. 453.

17 See W. J. SUCHOW, V. ASHRAFIMOGHARI, *The paradox of learning categories from rare examples: a case study of NFTs & The Bored Ape Yacht Club*, 2022, Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4082221](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4082221) and V. DOBRYNSKAYA, D. BIANCHI, *Buying beauty? On Rarity and returns in Non Fungible Tokens*, January 2023, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4343856](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4343856).

18 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 9.6.2023, p. 40.

The rarity and the consequent increase and ability to preserve the value can be of considerable interest both in the case of not even a physical good, as in the case of Bored Ape NFTs and when an NFT of luxury and rare good has been created. Two cases may be of interest. The first case concerned proof of their purchase as an investment<sup>19</sup> and the capacity to preserve value. The Singapore High Court issued an injunction to block the sale of a Crypto Art token used on a platform specializing in token-backed lending, the NFT, to obtain one. The transfer was blocked due to the difference between the market value of the NFT and the loan to be repaid, which would have given rise to undue enrichment<sup>20</sup>.

The second most recent concern is using a Patek Philippe luxury watch to create an NFT and obtain a loan<sup>21</sup>. The peculiarity lies in having supplied the rare watch to an escrow firm that deals with NFTs backed by physical items. The company then sent back an NFT of the watch and the NFT was entered on the DeFi lending protocol Arcade, and the user then accepted the best loan offer they could find. Following this, the NFT was sent to an escrow wallet and if the borrower fails to pay the loan, the NFT will be awarded to the lender<sup>22</sup>. In this case, the peculiarity is that if a watch exists, only the NFT is transferred. The transfer could be blocked due to the difference between the watch's market value and, therefore, the NFT and the loan to be repaid.

On the natural rarity, the platforms play a lesser role. However, the Bored Ape case shows an evolution with a born of a specialized platform for the exclusive marketing of this collection. This platform also sells limited edition NFTs specially made and linked to this collection.

### **The Link Between Sales Methods and Final Prices: Open Sea's Insider Trading Case**

The selling methods used by the platforms can also

19 R. PALLIAM, *The fine Art of Investing determining risk and return on investment in Art*, 2019, Available at SSRN [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3500829](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500829)

20 Specifically, in the case of Janesh s/o Rajikumar, the latter had entered into a loan agreement and a refinancing agreement where he had pledged an NFT as collateral Bored Ape Yacht Club NFT no. 2162. On this case, see Kayyali, *Court in Singapore Enjoins Transfer of Bored Ape NFT*, <https://www.afslaw.com/perspectives/alerts/court-singapore-enjoins-transfer-bored-ape-nft>.

21 See <https://cointelegraph.com/news/nft-de-fi-borrower-uses-luxury-watch-backed-nft-as-collateral-for-a-loan>, 11 July 2023.

22 This is an ancillary contract generally connected to a sale to ensure the correct fulfillment of the obligations and is widespread in Anglo-Saxon legal systems. For a reconstruction of the birth escrows starting from the real estate sector, see in particular J. MANN, *Echrows their use and value*, in *Univ. Illinois Law Forum*, 1949, p. 298 ss.; D.J. ZHENG, *Online resolution of e-commerce disputes: perspectives from the European Union, the Uk, and China*, Springer, 2020, p.320 ss.

influence prices, as shown by the “shop windows effect”. This effect guarantees greater visibility to some NFTs placed prominently on the site or in a specific box to attract user attention. Mainly, this highlighted positioning guarantees greater visibility than simple inclusion among the search results displayed in descending order.

Just the OpenSea marketplace has shown a clear example of the show windows effect already used in marketing goods by Big Techs such as Amazon.

In the latest case in the United States, the District Court of New York opened an investigation for telematic fraud against a worker of OpenSea managing the insertion of NFTs in the show window. The worker tasked with advertising some NFTs by placing them in the marketplace shop window, which is changed several times a week, had purchased dozens of NFTs before listing. Later, once displayed, he resold them at significantly higher prices than his purchase price. Therefore, the worker exploited his confidential information on the NFTs in the shop window to benefit from the subsequent price increase. In the opening text of the proceeding, the behavior described was defined as “insider trading in NFTs”<sup>23</sup>. However, the case has been classified as telematic fraud, given that NFTs are not qualified as financial instruments.

Presentation is one of the typical methods of influencing the prices of platforms, but the sale way also impacts prices. The most common system is auction sales, although sometimes there are also fixed-price sales. The high number of users worldwide allows the definition of a price at a global level on the value of the NFT by exposure’s platform and the ability to suggest users purchases between predictive algorithmic analysis digital wallets linked to user accounts. The platform shows suggestions for buying NFTs based on analysis of purchased, owned NFTs and user data, including economic availability defined on purchases already made.

The auction can have a reserve price to guarantee the awarding only for equal or greater than the fixed one. Alternatively, a time criterion can be used. In this case, the auction can have two different modalities, i.e. purely timed with a deadline for the offer or with an indefinite duration, and the auction closes by accepting one of the offers presented.

An interesting aspect is that, depending on the NFT and its belonging to a collection, the sale and purchase price at

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23 N. Chastain would have exploited the confidential information possessed in the period between May and September 2021, and this would have allowed him to sell, e.g. on August 2, 2021, the NFT the Brawl 2 at double the purchase price and on August 9, the “Flipping and Spinning” NFT even for 250% higher than the purchase price. See 22 CRIM 305 on <https://www.justice.gov/usao-sdny/press-release/file/1509701/download>.

auction varies and any new sale. The price fixed in new sales would influence the same volumes of the secondary market, and, in many cases, the times to sell can be long-lasting. For example, the OpenSea data show as some NFTs are left unsold after creation (equal to 39%), and even among those sold, some are unsold in the secondary market, given that 92% are resold only three times after minting<sup>24</sup>.

These data show the possible relevance of selecting artists and works for sale and verify certain illiquidity of NFTs. The data reported are challenging to evaluate. An NFT can be purchased for the first time on one platform but subsequently resold on another, even if the attribution of royalties through smart contracts aims to limit this phenomenon. The possibility of selling on various platforms would make it necessary to have aggregated data available.

The diversification of sales channels and the existence of closed platforms, such as Foundation, a platform by invitation only with non-clear data<sup>25</sup>, analyze aggregated data even more complex.

Moreover, from the available data, it is impossible to extrapolate whether there is a correlation between inclusion in a collection and more incredible speed of sale. This aspect can influence the market in two ways. It favours a greater demand on the secondary market for these NFTs, and it can also generate an emotional experience in the seller significant to the price (e.g. willingness to sell only on condition of a significant gain or only at a price considered fair). This emotion also influences the willingness to pay off the buyer, who may be willing to spend much more than budgeted to have NFTs of a given collection.

### **THE ROLE OF GAMIFICATION ON USER’S DECISIONS: THE CASE OF BORED APE COLLECTION**

One of the most exciting aspects of selling the prices of NFTs is the connection between gamification and NFTs themselves. Gamification represents a pleasing experience for potential buyers, and multiple manifestations influence the user’s decisions. The first type is the presentation of information (graphics used, presentation and order of NFTs on the platform, including the showcase effect).

A second technique is identifiable in the auction and bidding mechanism accompanied by messages, also graphically capable of accelerating purchases (e.g. notifications to indicate the presence of bidding or the approaching deadline in timed auctions).

The third is identifiable the utilities to purchasing an NFT,

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24 KIM et al., 2023 cit.

25 M.A. FAZLI, A. OWFI, M.R. TAESIRI, Under the Skin of Foundation NFT Auction, September 2021, available on <https://arxiv.org/pdf/2109.12321.pdf>.

including exclusive access, tokens<sup>26</sup>, games, and similar mechanisms. Finally can also be mentioned the alleged gratuitousness identifiable, for example, in advertising the absence of purchase commissions.

These techniques accelerate the taking of single or multiple purchase decisions thanks to recognizing exclusive accesses or a system similar to the game accompanying the numerous bids in the auction to win an NFT. This situation is hazardous for the user. The unique nature of the NFTs, the need for adequate information and the recent success on the market can make it difficult to identify his willingness to pay<sup>27</sup> for a specific NFT with the possible creation of debts.

An example is the Bored Ape collection. The artworks in this collection are pleasing thanks to exclusive access to a club of owners with famous people from the sport and entertainment, as well as exclusive events and use in the Metaverse. To these advantages must be added another as the possibility of accessing a game (Doo-Key Dash) dedicated to the main monkey of the collection to complete, which it may be necessary to purchase during the game and in which the progress ability can make you win awards. Similar utilities have a more or less evident gambling component which, in light of the high volatility of NFTs, can lead to high risks equal to those deriving from purchases on the stock exchange.

These risks can be strengthened in the social context by applications for displaying NFTs owned on user profiles or by offering NFTs created exclusively for platforms. The exhibition in the social profile is part of a gamification process to attract new audiences and, above all, young people. It is interesting to highlight how, in some cases, serial collections and low prices can also favour multiple purchases in a limited time without careful evaluation of the information available and risks. The perception of risk can be even more complex when the purchases are in a game with access reserved only for holders of an NFT, as in the case of Doo-Key Dash.

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26 The ApeCoin token was distributed on March 17, 2022, to all holders of an NFT Bored Ape and Mutant Ape, giving them the right to participate in the ApeDao. On DAO see A. SIMS, *Decentralised Autonomous Organisations: Governance, Dispute Resolution and Regulation*, November 2021, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3971228](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3971228), B.S. MONDOH, S.M. JOHNSON, M. GREEN, A. GEORGOPOULOS, *Decentralised Autonomous Organisations: The Future of Corporate Governance or an Illusion?* June 2022, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4144753](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4144753), P. MATERA, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, in *Fordham J. Corp. & Fin. L.*, 27, 2022, p. 114 C. SANDEI, *Intelligenza artificiale e diritto dei mercati finanziari tra informazione e responsabilità. Riflessioni a margine di alcuni recenti provvedimenti*, in L. AMMANNATI, A. CANEPA, , Giappichelli, Torino, 2023, p. 115.

27 L. ARNAUDO, R. PARDOLESI (2016), *Sul giusto prezzo tra Aquino e Aspen*, *Mercato Concorrenza Regole*, 3, 479.

In these situations, the line between the user and the investor buying cryptocurrency at auctions can become blurred. This matter is essential for assessing risks and, above all, for the user's protection. In investment, the regulation would be the financial one with the application, for example, of information obligations to protect the user and enable the platform. Furthermore, if the possession of the NFT gives rise to advantages such as access to a reserved club and a game while not determining recognition as a utility token opens further doubts about their nature.

## **THE DOUBLE ROLE OF SOCIAL MEDIA BETWEEN THE CREATION OF NFTS COLLECTIONS AND ADVERTISING**

Social media play a double role as a place for advertising NFTs sold on other platforms and, at the same time, sellers of NFTs themselves, often made by artists exclusively for that social media.

The dual role of social media platforms deserves a separate examination.

The marketing, particularly collectibles, concerns NFTs in limited editions and exclusively for the platform by pre-selected artists. They encourage purchases by young people on social media for use for their profile.

In this case, the sale usually does not occur at auction, and the price is already partially predefined by a minimum and a maximum threshold. An example is collectibles offered by Reddit, for which the minimum price threshold (set at \$9.99) and the maximum price (set at \$99.99) had previously been defined, as well as the payment method.

Since January 2022, Twitter has also activated the function for using NFTs as an image for profiles and displaying the collection owned by a user.

In July 2022, Twitter promoted NFTs of Avatars as profile images and usable also on other platforms. Although the one presented was a limited edition, Reddit allowed artists an agreement to create collectible avatars marketable through social media. Artists can use the service's platform will have proceeds from the sale and royalties for subsequent sales.

Even the Meta platform, first on Instagram and later on Facebook, had envisaged similar methods for displaying its NFTs and collectibles following the connection with its wallet, even if it recently left.

This application allowed Meta to acquire data deriving from wallet and profile. Instagram and Facebook, thanks to the information on the NFTs held, would also have had data on previous transactions (including the exchange used) on any apps used and on the availability of cryptocurrencies. The possibility of acquiring this data is one of the elements that favour the introduction of NFTs by social media because it allows the enrichment of user profiling processes already in



place and on which has recently intervened Digital Markets Act<sup>28</sup> (DMA).

These examples show how social media is marketing NFTs and collectibles by leveraging social media networks' potential to influence demand and pricing.

To get an idea, think of how an analysis carried out on the increase in tweets on Twitter relating to 18 NFTs projects included in the profiles determined the passage from 50 to 60,000 daily tweets<sup>29</sup>.

This increase has the first direct effect on the notoriety of NFTs, greater attention to the collections and projects created or in progress with increased demand, particularly for exclusive collections. An increase in demand favours both an increase in prices and the development and possible development of a secondary market for these collections thanks to marketing also on specialized platforms with auction mechanisms and consequently higher prices than those of the first sale.

Moreover, even the first sale takes place more quickly thanks to the sense of belonging to one's network of contacts which can encourage purchases.

### **SOCIAL MEDIA, MISLEADING ADVERTISING OF INFLUENCERS, AND USERS PROTECTION**

The business model of social media platforms has multiple factors that make them different from any other digital media. Among these, the main ones are profiling, marketing techniques and the recent affirmation of professional figures active on social media in the role of influencers. They can make any product reliable and attractive because they have recommended them.

Two dynamics deserve particular attention: the "framing effect"<sup>30</sup> and the "network effect"<sup>31</sup>, which are closely connected. The first means that the decision to purchase,

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28 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66.

29 S. CASALE BRUNET, M. ZICHICHI, L. HUTCHINSON, M. MATTAVELLI, S. FERRETTI, The impact of NFT profile pictures within social network communities, International Conference on Information Technology for Social Good, September, 2022, <https://arxiv.org/abs/2206.06443>.

30 M.J. ROSZKOWSKI, SNELBECKER G.E., Effects of "framing" on measures of risk tolerance: Financial planners are not immune, *Journal of Behavioral Economics* 1990, n. 3, 237 ss.; N. LINCIANO, Le distorsioni comportamentali e la consulenza finanziaria, in AGE, 2012, 1 ss.

31 Network effect generally means that the increase in the number of users directly correlates with the value and quality of the service, and operators and users derive mutual benefit from this increase.

even of an NFT, can be favoured by the context in which it is taken<sup>32</sup>. The networks built by individuals homogeneous in terms of interests and preferences (starting from friends) favour the taking of similar decisions thanks to an emotional component of empathy and involvement generated by the sense of belonging.

Such an arrangement strengthens the process of capturing attention, which is limited in time, and favoured by the origin of the messages from one's network<sup>33</sup>. At the same time, the presence of friends and, in any case, a high number of users also strengthen the network effect, i.e. the attraction of an increasing number of users attracted by the presence of other users.

For this reason, social media today is the ideal place for advertising any product, including NFTs.

They have one more element compared to specialized marketplaces: the trust of users in the content published on their network is generated by an emotional component made up of sensations and strengthened by the sharing of content and moments of one's private life as well as a coincidence of interests and actions. This trust is also one of the critical elements to favour the adoption of identical mass decisions by many subjects in a very short period<sup>34</sup>, as happened in the Gamestop case<sup>35</sup>.

The effects described allow us to understand why social media can increase user risks. The information on advertised NFTs is even more concise than on marketplaces, even if there is a specific link to find more details. Moreover, there is a dangerous mix between information and communication, making it more difficult to distinguish what is essential and impartial information from what is not.

To these aspects is added a different element capable of generating vulnerability for the individual deriving from the

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32 A. TVERSKY, D. KAHNEMAN, *The Framing of Decision and the Psychology of Choice*, Science, 1981, 453.

33 See D. EVANS, *Attention Rivalry among Online Platforms*, Coase – Sandors Working Paper Series in Law and Economics, 2013, p. 3, rep. sul sito [www.chicagounbound.uchicago.edu](http://www.chicagounbound.uchicago.edu); P. Bordalo., N. Gennaioli, A. Shleifer, *Competition for attention*, *Rev. Econ. Studies*, 2016, p. 481; T. WU, *Blind Spot: The Attention Economy and the Law*, *Antitrust Law Journal*, 2019, p.771 ss.

34 See W. VON METTENHEIM, K.P.WIEDMANN, *The Complex Triad of Congruence Issues in Influencer Marketing*, *J. Consumer Behav.*, 2021, 1277.

35 On this case see J.E. FISCH, *GameStop and the Reemergence of the Retail Investor*, U of Penn, Inst for Law & Econ Research Paper No. 22-16 and N. NEWMAN, *GameStopped: How RobinHood's Gamestop Trading Halt Reveals the Complexities of Retail Investment Protection*, *Forham Journal of Corporate and Financial Law*, vol. 28, No 2, 2023, 395 ss.

activity and possible hidden advertising by fin-influencers<sup>36</sup>. A recent American case offers an example of the role in directing user decisions in December 2022 initiated by the Securities and Exchange Commission (SEC).

Specifically, eight influencers have been accused of a \$100 million securities fraud because, through Twitter and Discord, they manipulated stocks traded on the exchange. Using their fame, they advertised their stock purchases to pretend they were prosperous traders and to encourage their followers to make duplicate purchases. Their action was successful and resulted in a significant increase in the prices of the reported shares. As soon as this happened, the influencers sold the advertised titles without communicating them on social media and making profits of around 100 million dollars by taking advantage of inexperienced and poorly informed followers<sup>37</sup>.

In recent months, the SEC has also intervened in the misleading advertising of influencers. Precisely in February 2023, he dealt with a case of particular interest because in the case in question, the influencer, the sportsman Paul Pierce, had an outstanding sponsorship contract not mentioned in the posts on social media, and above all, he had carried out part of his invitation to purchase of crypto assets only through images (in particular screenshots) not accompanied by text. In this case, the noteworthy aspect is that despite the absence of an explicit invitation and written text, the images alone were sufficient to affect on the market. The SEC has punished Pierce with \$1,115.00 for a three-year commitment not to promote crypto-assets<sup>38</sup>.

Even at the European level, the European Securities Markets Authority (ESMA) and the European Supervisory Authorities (ESAs) have been interested in the phenomenon<sup>39</sup>.

In two press releases, the first from ESMA and the second

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36 ESMA, Final report on European Commission mandate on certain aspects relating to retail investor protection, defines a fin-influencer as an “influencer who generates content on financial topics such as investments”. ESMA 35-42-1227, 29 April 2022, p.9. See also Commissione Nazionale per le Società e la Borsa (CONSOB), AI e abusi di mercato: le leggi della robotica si applicano alle operazioni finanziarie? May 2023, <https://www.consob.it/documents/11973/201676/qg29.pdf/768199a2-e17c-ca8e00a5186da9a19f79?t=1685344502568>).

37 United States District Court Southern District of Texas, Case 4:22 cv04306, 13 December 2022, <https://www.sec.gov/litigation/complaints/2022/comp-pr2022-221.pdf>.

38 SEC, Securities Act of 1933, Release n. 11157, 17 February 2023, Administrative proceeding n. 3-21305, <https://www.sec.gov/litigation/admin/2023/33-11157.pdf>.

39 ESMA Statement on Investment Recommendations on Social Media, ESMA70-154-2780, 28 October 2021 and ESAs ESAs, EU financial regulators warn consumers on the risks of crypto-assets. ESA 2022 15, del 15 march 2022.

joint from the three supervisory authorities (ESAs,), the risks deriving from social media for making investment decisions and purchasing crypto-assets are underlined. In them, it is recalled that an investment recommendation can be identified in any information capable of suggesting an investment strategy, explicitly or implicitly, including opinions regarding the present or future value or price of such instruments. From this point of view, social media present multiple and different criticalities from the point of view of the “misled investor”, deriving primarily from the difficulty of perceiving the difference between a “simple communication” or a recommendation to which the effects of the so-called anchoring bias, i.e. the greater dependence on the first information received than on subsequent ones.

The issue of transparency about crypto-assets also emerges from the MICA Regulation, albeit to crypto-assets other than tokens linked to assets. It underlines how marketing communication must comply with certain information and clarity requirements. As influencers’ activity demonstrates, such a forecast may not be sufficient given that marketing communications are only sometimes immediately recognizable on social media.

## **CONCLUSIONS**

In a market where volatility is very high and sales have significant increases, the design of marketing platforms and the uncertain nature of NFTs highlight new vulnerabilities and risk profiles for users.

These derive primarily from the nature of the marketing platforms and the use of different techniques to influence sales prices, volumes and the types of NFTs sold. Similar dynamics derive from the absence of certainty of the value of individual NFTs and the variability of NFT depending on whether it is placed in a collection or not and from the limited availability of the information available to buyers. The theme of information is central from two points of view. The first concerns the availability of information for users on the characteristics of the artist and the collection and the purchase risk due to the change in value over time. The second concerns the difficulty of having complete information on the primary market development and, above all, of the secondary market because there are no aggregate data on the volumes of specialized and private platforms. In this context, as a further variable, social media are inserted both as platforms capable of encouraging certain purchases and as new operators for marketing. From a legal point of view, such a framework makes it difficult for the individual buyer to be sure about the existing protection guarantees both from the point of view of the applicable rules and the judges to whom to address in case of disputes. As highlighted, the absence of a specific regulation of the NFT in many countries and the possible qualification as an asset whose circulation is regulated by the e-commerce regulation can lead to certainty and clarity in buyers regarding the nature of the purchase made and its potential illiquidity.



In its last intervention of 25 May 2023<sup>40</sup>, ESMA underlined how an initial reduction of risks of unregulated products such as NFTs could not do without greater clarity on the “regulatory status” and the implications for protecting the user.

The difficulty of having complete data on transactions also determines an inability to fully understand the number and type of subjects involved and active in the NFTs market. The reconstruction of these aspects is made particularly complex by usernames and by the fact that the very nature of the distributed ledger only identifies a cryptographic signature. This means that not only is it challenging to understand whether they are collectors, investors or subjects attracted by the information present on the net or social media, but also what the actual number of buyers is, given that an individual can quickly generate multiple identities<sup>41</sup> with which to make purchases and even not be an individual but a company or another intermediary.

To these aspects are added other risks specifically identifiable in activities carried out by social media and potentially definable mass disinformation influencers for

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40 ESMA Statement, ESMA highlights the risks arising from the provision of unregulated products and/or services by investment firms, ESMA 35-36-2813, 25 May 2023.

41 See V. LEMME, *La transizione giuridica. La crisi del diritto di fronte alla sfida tecnologica*, Giappichelli, 2023, p.74 ss.

marketing that is not always correct and characterized by potential misleading advertising in an environment capable of amplifying its effects due to the presence of network and framing (European Parliament 2022<sup>42</sup>).

In particular, at the European level, ESMA has intervened several times and has hypothesized, for example, the adoption of new guidelines capable of making operators more responsible and understood in a broad sense, mainly when they act in a social environment and when the “information” can induce the purchase of financial products and crypto-assets. This action would require a pre-selection of the information considered “vital”, i.e. fundamental for a correct decision and not always reported for a complete identification of what is proposed, including the risk. Such an activity, very useful in the abstract, may not be easy to implement given that it would require identifying of “vital” information<sup>43</sup> of each type to be provided to savers and complete visibility and comprehensibility.

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42 European Parliament and of the Council On Contestable and Fair Markets In The Digital Sector and Amending Directives (Eu) 2019/1937 And (Eu) 2020/1828 (Digital Markets Act), 2020/0374, 14 September 2022.

43 European Insurance Occupational Pension Authority (EIOPA), Public consultation on retail investor protection, 28 January - 28 February 2022, [www.eiopa.europa.eu/document-library/consultation/public-consultation-retail-investor-protection](http://www.eiopa.europa.eu/document-library/consultation/public-consultation-retail-investor-protection)

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