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NFTs, Trademarks, Fair Use, and the First Amendment

By Erick Baldemar Rivera

The advent and rapid expansion of commerce in non-fungible tokens ("NFTs") have pushed courts into unfamiliar territory, tailoring traditional trademark law to new forms of digital commerce. In the first federal appellate decision analyzing NFTs and trademark law, *Yuga Labs, Inc. v. Ripps*, 144 F.4th 1137 (9th Cir. 2025), the U.S. Court of Appeals for the Ninth Circuit ruled on a broad array of trademark issues arising from the sale and marketing of NFTs tied to the highly visible Bored Ape Yacht Club ("BAYC") collection.

While the opinion touches on several doctrinal areas, this discussion focuses on the trademark status of NFTs, the limits of the nominative fair use and First Amendment defenses, and how likelihood-of-confusion analysis applies in an NFT marketplace populated by sophisticated consumers. In dealing with those issues, the court situated NFTs squarely within the Lanham Act framework, and held that traditional trademark law is perfectly adequate to govern even novel digital goods.

BACKGROUND OF THE DISPUTE



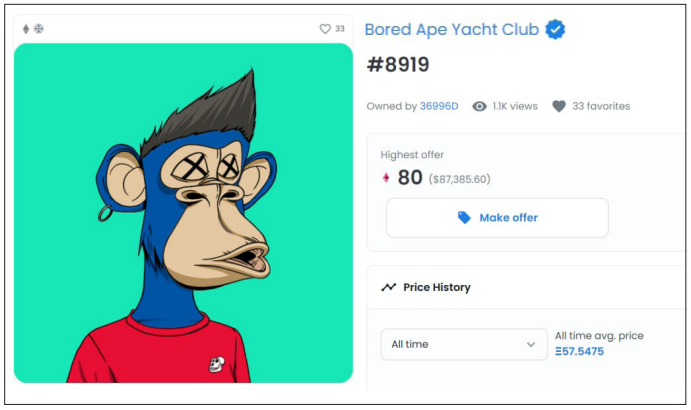
BAYC #8817

Yuga Labs is the creator of the BAYC NFT collection, which consists of thousands of unique cartoon ape images, such as: An image of BAYC #8817, which sold for $3.4 million. *See MoneyMade Article* Click Here.

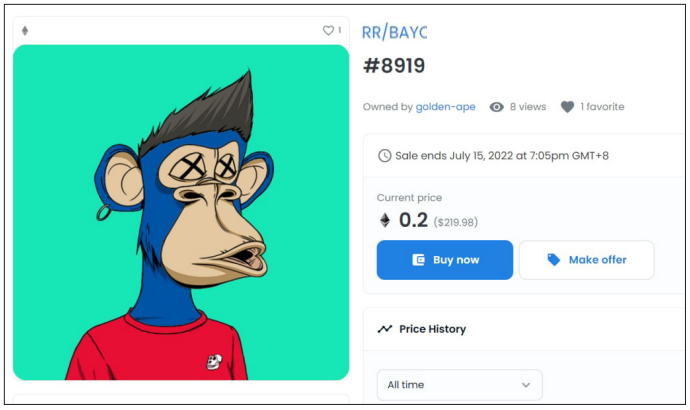
For purposes of terminology, the court defined "non-fungible token" as: "an intangible, fully virtual, authenticating software code that is associated with separate digital or physical content." In more general terms, an NFT is essentially a digital certificate of ownership recorded on a digital ledger that establishes ownership of a specific digital item, in much the same way a deed proves ownership of a house. Yuga marketed and sold NFTs associated with these ape images using the BAYC name and related logos and imagery. The record reflected that BAYC NFTs were promoted not merely as digital artwork, but also as gateways to exclusive online communities, in-person events, branded merchandise, and other benefits tied to the BAYC brand.

Defendants Ryder Ripps and Jeremy Cahen launched a competing NFT project that incorporated the same underlying ape images and used Yuga's BAYC marks in connection with the marketing and sale of their own NFTs ("RR/BAYC"). Yuga brought claims under the Lanham Act for false designation of origin and cybersquatting, among others. The defendants asserted a variety of defenses, including nominative fair use and First Amendment protection.

Comparison of NFTs created by both BAYC and RR/BAYC. *See Blockhead Article* Click Here.



BAYC #8819



RR/BAYC #8819

After extensive proceedings, the district court granted summary judgment in Yuga's favor on several issues and later awarded equitable relief. The defendants appealed, placing before the Ninth Circuit a set of questions that went to the heart of how trademark law applies to NFTs.

NFTS AS TRADEMARKABLE GOODS

A threshold issue addressed by the Ninth Circuit was whether NFTs can constitute "goods" under the Lanham Act. The statute does not define "goods," nor does it exclude digital assets from trademark protection. Traditional trademark law generally considers "goods" capable of bearing "trademarks" to be physical, vendible, commodities, in contrast to intangible "services" covered by "service marks." In some sense, NFTs do not fit exactly within that traditional goods or services framework. The defendants argued that Yuga's NFTs were merely digital deeds or authentication mechanisms rather than goods capable of being protected under trademark law.

> YUGA'S NFTS WERE 'NOT MERELY MONKEY BUSINESS AND CAN BE TRADEMARKED.'

The court rejected that characterization. Focusing on how consumers experience NFTs in the marketplace, the Ninth Circuit held that Yuga's NFTs were "not merely monkey business and can be trademarked." The court emphasized that BAYC NFTs functioned as commercial products sold in commerce and that purchasers perceived them as more than a passive record of ownership. Because the NFTs themselves were offered and marketed under Yuga's trademarks, they qualified as goods capable of bearing trademarks protectable under the Lanham Act.

NOMINATIVE FAIR USE

One of the defendants' primary defenses was nominative fair use, which applies when a defendant uses a plaintiff's mark to refer to the plaintiff's own product, rather than to identify the source of the defendant's goods. *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1031 (9th Cir. 2010). The doctrine commonly protects uses of trademarks for comparison, criticism, or commentary, provided the defendant does not suggest sponsorship or endorsement, and provided the defendant does not use "more" of the plaintiff's branding than necessary.

The Ninth Circuit held that the nominative fair use did not apply. Although the defendants said their NFT project was intended to critique Yuga and the BAYC collection, the court focused on how the RR/BAYC marks were actually used in commerce, namely to sell competing NFTs containing artwork identical to those associated with Yuga's NFTs.

In doing so, the court found, defendants were not merely referring to, and identifying, Yuga's products; they were using Yuga's marks "as marks" to identify the source of their own NFTs. That went beyond what was reasonably necessary to identify or comment on Yuga's products and instead implicated the core source-identifying function of trademarks. As a result, the court rejected the nominative fair use defense.

FIRST AMENDMENT AND THE ROGERS DOCTRINE

The defendants also asserted a defense based on the First Amendment, relying on the doctrine established in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). That case involved the literary title, *Ginger and Fred*, for a Federico Fellini film in which two cabaret performers danced in a manner emulating the iconic style of Ginger Rogers and Fred Astaire. The court held that First Amendment protections were heightened in that context, and dismissed trademark claims since the challenged title had "artistic relevance" to the film at issue, and it did not "explicitly mislead" the public about the source or sponsorship of the work. The Ninth Circuit described *Rogers* as a "cabined doctrine" that applies only when a trademark is used as part of an expressive work and not as a source identifier.

However, based on the Supreme Court decision in *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140 (2023), the Ninth Circuit explained that when a defendant's use of a mark is at least in part for source identification, the First Amendment defense to trademark infringement does not apply. Here, the defendants used the BAYC marks in branding and selling their own NFTs, not solely as expressive commentary or criticism of the BAYC NFTs. Because the challenged uses operated as trademarks, *Rogers* did not bar Yuga's infringement claims.

LIKELIHOOD OF CONFUSION AND SOPHISTICATED NFT CONSUMERS

Although the Ninth Circuit resolved several claims and defenses in Yuga's favor, it did not affirm summary judgment on the ultimate question of trademark infringement. Applying the *Sleekcraft* factors, the likelihood-of-confusion factors considered in the Ninth Circuit, the court held that genuine issues of material fact remained as to likelihood of consumer confusion.

First, the court considered the sophistication and discrimination of NFT consumers in relation to the "degree of care" factor. The court stated that "[g]iven the nature of NFTs, their relative novelty, and that they remain a mystery to most consumers, they are inherently sophisticated goods." The court also observed that NFTs are often expensive, which suggests the heightened degree of care consumers exercise when purchasing them.

> [DEFENDANTS] WERE USING YUGA'S MARKS 'AS MARKS' TO IDENTIFY THE SOURCE OF THEIR OWN NFTS.

These findings weighed against a likelihood of confusion and underscored the importance of considering the specific characteristics of NFT markets. Other *Sleekcraft* factors, such as the strength of Yuga's marks and the similarity of the parties' offerings, weighed in different directions and tended to neutralize each other. Accordingly, the court concluded that the likelihood-of-confusion analysis was disputed, and must be decided by a trial rather than summary judgment.

CONCLUSION

The Ninth Circuit's decision in *Yuga Labs, Inc. v. Ripps* confirms that NFTs fall comfortably within the existing framework of trademark law when they function as branded goods sold in commerce. The court declined to carve out special rules for NFTs and reaffirmed the limits of nominative fair use and First Amendment defenses when the challenged terms are used as source identifiers. At the same time, the opinion highlights the importance of a careful, fact-specific, likelihood-of-confusion analysis that accounts for NFTs being "inherently sophisticated goods." Rather than creating a new body of NFT-specific doctrine, the decision reinforces that traditional trademark principles remain fully capable of addressing disputes in emerging digital markets. ■

*firm*UPDATE

APPOINTMENTS

Thad Chaloemtiarana



Thad has been appointed to serve on the Executive Committee of The IP Law Foundation, and also on the INTA Trademark Office Practices Committee.

Robert Sacoff



Bob is Co-Chairing the AIPPI United States Group Report on Study Question Q298, "Parody as a Defense to Trademark Infringement." The national report of the US Group, along with many other national and regional AIPPI group reports around the world, will all be assimilated, debated, and harmonized in a Resolution of AIPPI at its 2026 World Congress in Hamburg, Germany, October 7-10, 2026.

*firm*NOTEWORTHY

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