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Bored Apes – Intangible "Goods" Pave the Way for Trademark Protection of NFTs

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In a recent decision establishing important precedent for trademark rights associated with digital assets, the Court of Appeals in *Yuga Labs, Inc. v. Ripps*, Case No. 24-879, 2025 WL 2056060 (9th Cir. July 23, 2025), clarified that non-fungible tokens (NFTs) are "goods" for the purposes of trademark law. However, the court held that summary judgment on the likelihood of confusion was improper without further factual development. Thus, while companies offering NFTs can assert trademark rights to combat consumer confusion, obtaining an early ruling on trademark infringement may still prove challenging.

Plaintiff, Yuga Labs, Inc. (Yuga) created the Bored Ape Yacht Club (BAYC) – a famous collection of 10,000 NFTs, each associated with a unique digital cartoon image of an ape with distinct traits, expressions, and clothing. Owning a Bored Ape NFT also granted membership to an exclusive online community with perks, including exclusive virtual events, parties, and access to special content. Initially selling for an average of $200, these NFTs sparked a cultural phenomenon – a unique mix of art, social status, and blockchain tech – that fueled a booming secondary market, with resellers selling some of these digital pieces for more than $24 million, with a 2.5 percent royalty to Yuga.

Despite its growing popularity, BAYC has also been at the center of a few controversies. Defendant Ryder Ripps, an artist and social activist, criticized Yuga for alleged racism on his personal website. Together with Jeremy Cahen, a social media figure in the crypto space, Ripps launched the "Ryder Ripps Bored Ape Yacht Club" NFT collection (RR/BAYC), with each NFT linked to the exact same Yuga cartoon digital images and identifiers. Ripps' NFTs had a disclaimer that they were "a new mint of BAYC imagery, recontextualizing it for educational purposes, as protest and satirical commentary."

Yuga sued for infringement of its unregistered trademarks and cybersquatting. In response, Ripps argued that Yuga lacked enforceable trademark rights, and even if such rights existed, Ripps' use of BAYC marks was protected under nominative use and the First Amendment. The district court awarded summary judgment to Yuga, and Ripps appealed.

NFTs are "Not Merely Monkey Business"

Recognizing that NFTs are relatively nascent technology, the Court provided a brief overview of NFTs, describing them as authenticating software code uniquely associated with fungible digital content. Tokenizing the authenticating code on unique digital art files creates scarcity in the market, giving NFTs proprietary value. Each NFT receives a contract name and contract symbol when created, which is permanently embedded into the NFTs' metadata and used to track conveyances.

Crucially for *Yuga Labs*, Ripps used the *exact same identifiers* as Yuga (the contract name Board Ape Yacht Club and symbol BAYC) and linked its NFTs to the *exact same artwork* as Yuga's NFTs. Yuga argued that this showed Ripps' attempt to pass off their NFTs as Yuga's BAYC NFTs.

Despite Being Intangible, NFTs are "Goods" for the Purposes Trademark Law

As a threshold matter, Yuga could only prevail on a claim of trademark infringement if Yuga indeed had a valid and enforceable trademark. The Lanham Act (the primary federal statute governing trademarks in the United States) prohibits a person or entity from using "in commerce any word, term, name, symbol, or device . . . which . . . is likely to cause confusion . . . as to the origin . . . of his or her *goods*." 15 U.S.C. § 1125(a)(1).

In an effort to nullify the claim of trademark infringement, Ripps argued that Yuga's trademark claim failed because NFTs are not "goods" under the Lanham Act. In making this argument, Ripps relied on case law involving *tangible* goods that contain *intangible* expressive content (e.g., video cassettes and compact discs). *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) and *Slep-Tone Ent. Corp. v. Wired for Sound Karaoke and DJ Servs., LLC*, 845 F.3d 1246 (9th Cir. 2017).

In these cases, the courts held that, for the purposes of trademark law, the "origin" of the consumer product is the manufacturer of the *tangible* good (i.e., the video cassette or CD) <u>not</u> the author/creator of the expressive content residing therein (i.e., video and audio content). Rather, the *intangible*, expressive content was protectible under copyright law and could not be afforded trademark protection separate and apart from the source of the tangible goods themselves. Ripps interpreted these cases to mean that all intangible goods (such as NFTs) are not "goods" under the Lanham Act and are, thus, ineligible for trademark protection.

The *Yuga* Court, however, clarified that there can be both tangible and intangible aspects with separate origins and protections in the same good, emphasizing that, unlike the intangible content stored on cassettes or CDs, NFTs are not contained in tangible goods and are not sold in a tangible marketplace. Instead, NFTs are purely, *intangible*, digital creations existing solely in an intangible world – namely, digital files traded within a digital marketplace. As the Lanham Act does not expressly exclude intangible goods, the Court held that NFTs were trademarkable goods.

Failed Defenses: Illegal Activities, Naked Licensing, Fair Use, and First Amendment

Ripps also attempted to invalidate Yuga's trademark rights by asserting that (1) the BAYC marks were ineligible for trademark protection because the associated NFTs were sold in violation of securities laws (sold as unregistered securities), and (2) Yuga abandoned its trademark rights because it failed to exercise quality control over third party use of its marks, engaging in what is commonly referred to as "naked licensing." The Court was not convinced, finding that (1) there was no clear connection between the source-identifying function of NFTs and the alleged illegal activity, and (2) there was no indication that a trademark license was ever granted or intended to be granted among Yuga and purchasers of the associated NFTs.

Next, Ripps asserted nominative fair use and First Amendment defenses, neither of which were viewed favorably by the Court. Briefly, the Court dismissed these defenses, stating that Ripps did more than simply use the BAYC marks to describe or comment on Yuga's NFTs. Rather, Ripps incorporated the BAYC marks into the RR/BAYC NFTs and used the same as source-identifiers for Ripps' NFTs. This activity falls *outside* the bounds of these defenses.

Despite Trademark Protection, Likelihood of Confusion Requires Further Factual Development

Having disposed of Ripps' assertions of trademark invalidity and affirmative defenses, the Court then turned to the merits of Yuga's trademark infringement claim, which required a showing that Ripps' use of the BAYC mark is likely to cause confusion among a significant number of reasonably prudent consumers. Courts typically assess the likelihood of confusion through a multifactor analysis, such as the eight-factor analysis employed in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979). The Court emphasized legal precedent, cautioning against resolving the likelihood of confusion on summary judgment and, after analyzing each of the relevant eight *Sleekcraft* factors, reversed the district court's grant of summary judgment accordingly. Overall, while certain important factors weighted in favor of a likelihood of confusion (i.e., strength of the BAYC marks and "nearly identical" goods), other factors were neutral or slightly favored Ripps. As such, there was insufficient proof to support a verdict for Yuga at summary judgment, pushing this question to be reviewed by a reasonable factfinder at trial.

Looking Ahead and Strategic Implications

This case marks the first appellate-level framework for applying trademark law to NFTs, reinforcing that, while NFTs are "goods" that fall within the Lanham Act, a fact-intensive likelihood of confusion analysis will dominate these disputes.

This decision highlights the need for brand owners and NFT creators to strengthen their trademark portfolios, ensure formal registrations are in place, and establish thorough brand enforcement strategies. In addition, any agreement related to the transfer of these digital assets should be carefully drafted to preserve ownership of trademarks while granting appropriate rights to users in a way that avoids "naked licensing" pitfalls.

For digital artists, incorporating existing trademarks into NFT projects remains risky; even commentary or protest may not shield them from infringement claims if consumers are misled about the source. Creators should consider alternative approaches to expression that do not confuse or imply source identification.

If you have any questions about trademark protection or enforcement, please contact Aaron S. Chaloner Ph.D. or Paulluvi Henley.