



yes, virtual goods are still goods for trademark purposes

Bryse Thornwell
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On July 23, 2025, in a significant update for the evolving intersection of intellectual property and blockchain technology, the United States Court of Appeals for the Ninth Circuit issued a unanimous opinion affirming critical trademark principles as they apply to non-fungible tokens (“NFTs”) and digital assets. *See Yuga Labs, Inc. v. Ripps, et al*, Case No. 24-879.[1] The opinion, written by Circuit Judge Danielle J. Forrest, upheld the district court’s ruling on several key issues, including (1) NFTs are “goods” for purposes of the Lanham Act; (2) trademark rights are not automatically transferred with the sale of an NFT; and (3) the First Amendment and the test set forth in *Rogers v. Grimaldi* does not protect an infringer when it uses an infringing mark as a *source identifier* in connection with the infringer’s goods.

Plaintiff Yuga Labs Inc. (“Yuga”) is the creator of the globally recognized NFT collection known as the *Bored Ape Yacht Club* (“BAYC”), which features stylized cartoon images of apes in various colors, poses, backgrounds, and outfits. Defendants Ryder Ripps and Jeremy Cahen (collectively, the “Defendants”), launched their own NFT collection under the name *Ryder Ripps Bored Ape Yacht Club* (“RR/BAYC”). According to the Defendants, the RR/BAYC project was created as a form of “appropriation art” aimed at “criticizing and satirizing” the BAYC collection. The Defendants specifically alleged that they were commenting on the “neo-Nazi symbolism, alt-right dog whistles, and racist imagery” found in Yuga’s BAYC collection and in its broader brand.

In July 2022, Yuga filed a complaint against the Defendants asserting several violations of the Lanham Act. In response, Defendants filed an answer challenging the validity and enforceability of Yuga’s trademarks in the BAYC collection (the “BAYC Marks”). They further argued that, even if the BAYC Marks were protectable, the Defendants’ use of the BAYC Marks was shielded by the doctrine of nominative fair use and protected under the First Amendment. The Defendants also filed counterclaims alleging various causes of action, though only their claims for violations of the Digital Millennium Copyright Act (“DMCA”)

attorneys

Bryse K. Thornwell

practice areas

entertainment & ip litigation
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and declaratory judgment were relevant to the Ninth Circuit's analysis. The district court granted summary judgment in favor of Yuga on both the trademark infringement and cybersquatting claims, dismissed the Defendants' counterclaims, and issued a permanent injunction prohibiting Defendants from promoting or selling any products or services using the BAYC Marks.

On appeal, Defendants challenged the district court's grant of summary judgment in favor of Yuga raising several arguments, including: (1) NFTs are not "goods" under the Lanham Act, and therefore fall outside the scope of trademark protection; (2) Yuga lacked enforceable trademark rights since the BAYC Marks were used in connection with unlawful sales and any trademark rights Yuga may have had were extinguished upon the sale of the NFT; (3) the use of the BAYC Marks in the RR/BAYC collection qualified as nominative fair use because the Defendants used the BAYC Marks to criticize Yuga's BAYC NFT collection and general business practices; and (4) because the BAYC Marks were used in connection with an expressive work, Defendants' use was protected under the First Amendment, and Yuga instead needed to satisfy the heightened test under *Rogers v. Grimaldi* to establish trademark infringement.

The Ninth Circuit rejected the Defendants' first claim, and re-affirmed that NFTs qualify as "goods" for purposes of the Lanham Act. The Court emphasized that NFTs are goods because they are actively bought, sold, and traded in commerce through online marketplaces. The Ninth Circuit also cited the United States Patent and Trademark Office's ("USPTO") conclusion that NFTs constitute "goods" under the Lanham Act. While not binding authority, the Ninth Circuit found the USPTO's interpretation persuasive given the absence of a statutory definition of "goods" from Congress. According to the Court, the Defendants incorrectly relied on *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) (per curiam), to argue that intangible goods, such as NFTs, are not eligible for trademark protection. The opinion distinguished those cases by noting that they addressed "a recognized distinction between the tangible good and the intangible aspects of *that same good*." In contrast, NFTs exist solely in the digital world as fully intangible goods and therefore present a materially different context.

Next, the Ninth Circuit addressed the Defendants' argument that Yuga lacked enforceable trademark rights. Specifically, Defendants claimed: (1) Yuga engaged in unlawful conduct by selling the BAYC NFTs as unregistered securities; and (2) Yuga effectively "gave up" the rights to its BAYC Marks by transferring trademark rights to consumers during the sale of their NFTs. The Court easily rejected the first claim, finding "an insufficient nexus between Yuga's alleged securities violation and its use of the BAYC Marks as a source identifier in commerce to warrant withholding trademark protection." The Ninth Circuit also rejected the Defendants' argument that Yuga forfeited its trademark rights through the sale of the BAYC NFTs. In making the forfeiture argument, Defendants cited the terms and conditions on Yuga's website, which state that buyers receive "all" rights in the artwork. Defendants contended that "all" rights included rights to the BAYC Marks. Based on this interpretation, they claimed Yuga had effectively transferred, abandoned, and/or failed to adequately police its trademarks. The Court disagreed, holding that the BAYC Marks (as source identifiers) were separate from the artwork contained in the BAYC NFTs itself; and that because the terms and conditions were silent on the transfer of trademark rights specifically, it was not reasonable to believe that an actual transfer, whether express or implied, had occurred.



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After confirming that Yuga's NFTs were eligible for trademark protection and that Yuga did not transfer its trademark rights through the sale of the BAYC NFTs, the Ninth Circuit turned to the central issue of actual infringement. To prevail on its infringement claim, Yuga had to show that "a 'reasonably prudent consumer' in the marketplace is likely to be confused as to the origin of the good or service bearing one of the marks." However, because the Defendants asserted affirmative defenses of nominative fair use and First Amendment protections, the Court addressed these threshold issues before analyzing the potential likelihood of confusion.

The nominative fair use doctrine allows a defendant to use an established mark to describe the plaintiff's products or services. The Defendants asserted that they were merely using the BAYC Marks to critique, comment on, and call attention to the problematic imagery in the BAYC NFTs. The Ninth Circuit disagreed, concluding that the Defendants went beyond "merely describing" the BAYC NFTs, and in fact used the BAYC Marks "to create, promote, and sell *their own NFTs* associated with the same artwork as Yuga's NFT collection." The Court then pointed to the Supreme Court's holding in *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 148 (2023), noting that, like the defendants in that case, the Defendants here "used the marks as *marks*...It does not matter that the Defendants' ultimate goal may have been criticism and commentary."

The Defendants' First Amendment defense invoking the *Rogers* test failed for similar reasons. According to the Court, the First Amendment exception does not apply when an infringer uses an established trademark as a source identifier for its own goods, which the Defendants had done.

Although the Ninth Circuit discredited Defendants' affirmative defenses, it noted that Yuga still had the burden to prove an actual likelihood of confusion from the Defendants use of the BAYC Marks. Using the factors established in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979), the Ninth Circuit reversed the district court's grant of summary judgment on the issue of trademark infringement, finding that based on the evidence presented, a likelihood of confusion could not be decided "as a matter of law." The Court specifically pointed to the visual and auditory differences between "BAYC" and "RR/BAYC," use of different online marketplaces, sophistication of buyers in the NFT market, and the Defendants' conflicting "dual intent" behind using the BAYC Marks as both commentary and as a source identifier as evidence the district court failed to consider in favor of the Defendants. Accordingly, the Court remanded on the likelihood of confusion issues.

The Ninth Circuit also reversed the district court's grant of summary judgment on Yuga's cybersquatting claim. To prevail in its cybersquatting claim, Yuga was required to prove "(1) the defendant registered, trafficked in, or used a domain name; (2) the domain name is identical or confusingly similar to a protected mark owned by the plaintiff; and (3) the defendant acted 'with bad faith intent to profit from that mark.'" The Court held that because a reasonable person could determine that the visual and auditory differences of adding "rr" to the domain name ("bayc.com" vs. "rrbayc.com") are enough to eliminate a likelihood of confusion, the cybersquatting claim could not be decided as a matter of law.

Finally, the Court also briefly touched on the Defendants' DMCA violation and declaratory judgment counterclaims to briefly note that these claims addressed copyright matters not at issue in Yuga's trademark infringement claim nor at issue in the evidence presented at the summary judgment stage.



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The Ninth Circuit's opinion in *Yuga Labs Inc.* affirms a crucial legal principle that emerging technologies, including NFTs and other digital assets, are not beyond the reach of established intellectual property law, while reminding us to be mindful whenever we apply established legal rules to emerging technologies.

[1] We previously reported on the district court's opinion.

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