



NFTmarks

Brian L. Frye

For better or worse, everyone's heard of NFTs (non-fungible tokens) and the digital art market they created essentially out of nothing. But no one really understands NFTs or the NFT market, not even the people creating and collecting them. What are NFTs and why do people want to own them? I'd be lying if I said I

knew. Ask two enthusiasts and you'll get three answers, maybe none of them true, and certainly not the full story.

Still, I think it's possible to draw some conclusions about why people value NFTs and how the NFT market works by observing which NFTs are popular and what people do with them. The most popular NFT

collections are currently CryptoPunks and Bored Ape Yacht Club. Why do collectors want to own those NFTs and what can their choices tell us about why collectors value NFTs?

The value of an NFT seems to depend primarily on the popularity of the brand it represents. NFT collectors want to own NFTs associated with popular brands and want to associate themselves with those brands. That's why the most popular NFT collections are designed to be used as profile pictures or "PFPs." NFT collectors crave the clout of owning a popular NFT and PFP NFTs make it easy to show off.

Often, the best way to understand a market is to study disputes and determine why they arise and how they are resolved. The biggest dispute in the NFT market is currently Yuga Labs' trademark infringement action against Ryder Ripps.¹ Yuga created the Bored Ape Yacht Club (BAYC) NFT collection and is the gorilla of the NFT space. Ryder Ripps is a conceptual artist who claims Yuga is a front for racist Nazi trolls.² Ripps trolled them right back by creating and selling his own NFTs of the Bored Ape Yacht Club images and essentially daring Yuga to sue him.

Yuga took the bait. What will it mean for the Bored Ape Yacht Club NFT collection and the NFT space? We shall see. But I suspect the lawsuit will force courts and collectors to ask why people value NFTs. Ripps says the BAYC images are racist. How will his allegations affect the value of the BAYC NFTs? I have no idea. But I'm pretty confident the outcome will tell us a lot about the NFT market.

What is an NFT?

Technically, a non-fungible token or "NFT" is a particular kind of data recorded on a digital ledger, typically the blockchain of a digital currency. The data on a blockchain usually represents ownership of a quantity of the native currency of that blockchain. An NFT represents something else, typically "ownership" of a digital image. An NFT is a "token" because it represents something other than digital currency, and is "non-fungible" because every NFT is unique.

As a practical matter, the NFT market is the digital equivalent of the art market. When art collectors buy a painting or sculpture, what they're really buying is an entry on an artist's catalogue raisonné, the list of all of the works attributed to that artist. Of course, ownership of a catalog entry is usually represented by a physical token, often a dirty canvas or lumpy rock. But it's the catalog entry that is valuable, not the token. If the connection between the token and the catalog entry is broken, the token is worthless. A million-dollar painting is worth nothing if it turns out to be a forgery.

The NFT market works the same way, except it eliminates the need for a physical token by enabling transactions in the catalog entry itself. Most NFTs represent "ownership" of a work of art, usually a digital image. NFT collectors value NFTs based on the works of art they represent. However, NFT collectors only value NFTs they consider legitimate, and the perceived legitimacy of an NFT usually depends on who created it. In general, NFTs created by the author of a work are considered legitimate, but NFTs created by someone else usually

are not.

Most people assume NFTs consist of digital images. They're wrong, but it's a reasonable mistake. While NFTs typically represent ownership of a digital image, few NFTs actually include a copy of the image they represent. While an NFT can consist of any kind or quantity of data, writing data onto a blockchain is costly, so most NFTs contain as little data as possible, typically just the wallet address of the NFT's owner and a URL pointing to the digital image the NFT represents. In other words, most NFTs are the digital equivalent of a certificate of authenticity. Usually, an NFT isn't itself a work of art, but rather represents ownership of a work of art.

NFTs as Property

So, what does it mean for an NFT to represent "ownership" of a work of art? It depends. There are lots of different ways of owning a work. In the conventional art market, collectors usually own a physical object, like a painting or sculpture, or at least a certificate of authenticity that represents ownership of a work. Often, it's also possible to own the copyright in a work if it includes copyrightable subject matter and the copyright term hasn't ended. And one can also own a trademark in an artist's brand. For example, the painter Thomas Kinkade registered the word mark PAINTER OF LIGHT.³

Digital art is the same, except there's no physical object to own. For decades, digital artists tried to sell their work by giving collectors physical certificates of authenticity, with little success. Unfortunately, collectors just weren't buying it. But somehow, NFTs

changed everything. Suddenly, collectors clamored for these new digital certificates of authenticity.

What does it mean to own an NFT of a work? It's the same as owning a painting or sculpture, except you own a digital token, rather than a physical one. When you buy a painting or sculpture, you get a physical object, but you don't get any rights in the work it represents, other than the right to display the object you own. The artist keeps the copyright and controls their brand. NFTs are the same. You get a digital object and the implicit right to display the work it represents unless the artist gives you more.

So, what do you get when you buy a work of art, whether it's a painting, a sculpture, or an NFT? You get the right to claim ownership of the thing you bought, whatever that means. It doesn't seem like much. But it's all that matters. The owner of a painting, sculpture, or NFT doesn't need to own a copyright or control a brand. All they need is the ability to sell whatever they own to someone else.

A painting or sculpture is a thing you can sell. So is an NFT. The only difference is that everyone is familiar with the market for paintings and sculptures, so no one thinks twice about it. By contrast, the market for NFTs is new, so it seems weird and people don't understand it. But they're actually the same. Art markets are just markets for being the owner of prestige goods other people want to own.

NFT IP

Still, new markets, new problems. It's all well and good to observe that the NFT market is essentially identical to the



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conventional art market. But it's another thing entirely to convince artists and collectors. People want to understand what they own and the easiest way to understand NFTs is as a kind of intellectual property. Unfortunately, this conception isn't very helpful.

While NFT enthusiasts disagree about almost everything, they especially disagree about whether "intellectual property" matters to the NFT market. Unfortunately, this use of the meaningless term intellectual property just confuses the question. Yes, NFTs present lots of copyright and trademark problems. But the answers depend on copyright and trademark law, not intellectual property handwaving.

Most NFTs represent ownership of a digital image. So the key copyright question is whether NFT ownership should also mean copyright ownership. Some NFT collectors insist copyright ownership is critical to the value of an NFT. But others prefer CC0 NFTs,⁴ arguing NFT images should be in the public domain.

Different NFT creators approach copyright differently—if they think about copyright at all! —but there are three typical outcomes. Some do nothing and keep any copyright in the images associated with their NFTs, like Larva Labs did with CryptoPunks. Some give some or all the copyright to the NFT owner, like Yuga Labs did with Bored Ape Yacht Club. And some put

the images in the public domain, like Nouns Foundation did with Nouns.

So, is owning the copyright in the image associated with an NFT actually valuable? Who knows? Intellectual property maximalists insist it is, but I'm not so sure. For one thing, some NFT images may not even be copyrightable in the first place, and the copyright in many others is probably quite narrow.⁵

For another, it's unclear why anyone would want to license particular NFT images. Copyright protects original works of authorship. But most of the popular NFTs represent automatically generated images, many of which are quite similar to each other. Why license any particular image, if you can license a similar one for less? Or just generate a new image which isn't associated with any NFT. Owning the copyright in the image associated with an NFT is valuable only if people want to license that particular image, as opposed to any similar image.

What about trademarks? They present similar problems. Sure, the owner of an NFT can claim and even register a trademark in the image associated with their NFT. But just because you use your NFT image in connection with your product or service doesn't mean consumers will notice, and that's all trademark law really cares about. Most of the popular NFT collections consist of thousands of similar images, differentiated by features only NFT enthusiasts find compelling, or even notice. And if consumers can't tell one image from another, those images are unlikely to make good trademarks.

Realistically, what most NFT images communicate is the brand of the NFT

collection, not the brand of the NFT owner. Sure, some celebrities and NFT influencers have managed to turn their Punk or Ape image into a brand, at least to a limited degree. But it's their own brand doing all the work, not the NFT. And the stronger a brand their NFT image becomes, the less able similar images become to function as brands in the first place.

Who benefits? The creator of the NFT collection, whose brand becomes stronger and stronger as the collection becomes more popular and is used by more people. When NFT owners use their NFT images as brands, what they're really doing is free (or sometimes paid) publicity for the creator of the NFT collection.

In other words, from a trademark perspective, the valuable brand is the brand of the collection and the consumer goodwill associated with it, not particular NFT images. That's why Yuga gives Bored Ape Yacht Club NFT owners the "IP" associated with their NFT image, whatever that means. It's not only free for Yuga, it's a canny way of encouraging Ape NFT owners to promote Yuga's brand. And it's why Yuga bought the Punks "IP" from Larva, even if there wasn't much to buy. What they wanted was the brand.

A Pyrrhic Victory?

Yuga's lawsuit against Ripps is important because it shows how much of Yuga's value is tied up in the Bored Ape Yacht Club brand. Notably, Yuga didn't really care about other NFT collections that "ripped" off the Ape images, like PHAYC and Phunky Ape Yacht Club, which used "flipped" Ape images. Those collections weren't harming Yuga's

brand. If anything, they were promoting it.

Ripps is different. He's threatening the value of Yuga's brand, and Yuga is doing everything in its power to make him stop. Can they? Even if their trademark infringement claims are successful in court, the lawsuit is only amplifying Ripps's damaging claims. Yuga's trying to contain the damage, but

who knows whether it will work. At the very least, it suggests that NFTs really are all about branding.

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REFERENCES

1 1 See generally *Yuga Labs, Inc. v. Ryder Ripps et al*, 2:22-cv-04355 (C.D. Ca. June 24, 2022).

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3 PAINTER OF LIGHT, Reg. No. 1988294.

4 <https://cyberscrilla.com/what-is-a-cc0-nft/>

5 See, e.g., Brian L. Frye, *Are CryptoPunks Copyrightable?*, *Pepperdine Law Review* (forthcoming) (arguing that the CryptoPunks images may not be copyrightable) and Alfred "Dave" Steiner, *Bored Apes & Monkey Selfies: Copyright & PFP NFTs*, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4116638 (arguing that the copyright in the Bored Ape Yacht Club images is very narrow).