Assessing The SEC's Changing Approach To NFT Regulation

By **John Cahill and Taylor Bialek** (November 17, 2025)

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U.S. policy on nonfungible tokens has shifted from enforcement-first to a more disciplined framework grounded in economic reality. The U.S. District Court for the Central District of California's Sept. 30 decision in Adonis Real v. Yuga Labs reflects this change in ideology, clarifying the distinction between speculative investment schemes and projects centered on culture or community.[1]

The case aligns with the evolving positions of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission, moving away from treating NFTs as subject to the securities laws, and focusing on how NFTs are marketed, their trading infrastructure and the expectations of purchasers.

Early SEC actions pushed for broad regulation, but subsequent court decisions and statements from the commissioners of the SEC and CFTC have narrowed the regulatory focus. The current approach is more fact-specific, distinguishing community and access-oriented NFTs from those tied to profit-driven narratives or promoter-controlled ecosystems.

The Adonis Real Decision

On Sept. 30, the Central District of California granted Yuga's motion to dismiss the second amended complaint with leave to amend. The court applied the Howey test — a legal standard derived from the U.S. Supreme Court's 1946 decision in SEC v. W. J. Howey Co. that determines if a transaction is an investment contract and therefore a security — and held that the plaintiffs failed the first prong.

Rather than treating the "investment of money" prong of the Howey test as a rubber stamp, the order focused on whether the assets were offered as investments or for consumption. Looking at promotional materials, the court found Yuga's messaging centered on membership, access, status, events and other consumptive uses, many made before any plaintiff invested. The plaintiffs' reliance on buyer motives and generic value talk did not transform those offers into investments.

The plaintiffs also failed the "common enterprise" prong, as the court found that the complaint did not plausibly allege horizontal pooling or strict vertical commonality.

The court distinguished the instant case from prior cases because NFTs related to the Bored Ape Yacht Club collection and ApeCoin reside on a public blockchain network and trade on independent venues such as OpenSea and Coinbase. Yuga's creator-earnings fees accrued on every transfer regardless of holder gains, which weakened any claim that fortunes were tied. A brief argument that both the plaintiffs and Yuga Labs owned ApeCoin was not enough to show that their financial outcomes were directly connected in the way required to establish strict vertical commonality.

On the "expectation of profits" prong, references to intrinsic or long-term value, price, and volume were not profit commitments. The court contrasted prior pleadings that pointed to

explicit profit-signaling and platform-control interdependence.

On the "efforts of others" prong, the court indicated that dependence on Yuga's road map and development could be satisfied, but that point was academic given the failures of the other elements.

After the second amended complaint was dismissed, the plaintiffs amended to cure the identified Howey deficiencies. On Oct. 24, the defendants filed another motion to dismiss, arguing that the plaintiffs' third amended complaint still fails to plead a security.

Early Enforcement Actions

In 2023 and 2024, the SEC brought actions that applied the Howey test to NFT offerings marketed with narratives of future value tied to promoter efforts.

In the SEC's first enforcement action against an NFT project, the commission alleged that Impact Theory LLC, a media company, raised roughly $29.9 million by selling Founder's Key NFTs in late 2021, framing the purchase as participation in the company's growth plans.[2] The SEC's cease-and-desist order emphasized multiple factors: messaging that tied the purchaser upside to the company's future success, a structure that routed ongoing secondary-market royalties to the issuer, and the absence of SEC registration.

The company settled with the SEC in August 2023, paid more than $6 million in monetary relief, and undertook remediation that included buying back tokens and destroying inventory.

The commission reinforced its position weeks later in the Stoner Cats 2 LLC action, alleging that the sale of more than 10,000 NFTs raised approximately $8.2 million in minutes while marketing tied value to the success of a celebrity-backed animated series.[3] The issuer highlighted resale activity, floor price, secondary-market royalties of 2.5%, and token-gated access in ways that cultivated an expectation of profit from managerial efforts. The settlement included a civil penalty of $1 million and the destruction of tokens held by the project.

The SEC's September 2024 action against Flyfish Club LLC extended the SEC's enforcement to NFTs created as part of a hospitality venture.[4] Flyfish Club sold about 1,600 membership NFTs, raising roughly $14.8 million to fund a members-only restaurant. Marketing suggested potential profits through resale or leasing for passive income, and the issuer collected around $2.7 million in royalties on secondary sales before discontinuing them.

The settlement imposed a $750,000 penalty and remediation, such as halting royalties, removing marketplace links and destroying tokens in the issuer's possession. Flyfish Club cooperated with the SEC and continues to operate as a members-only restaurant.

Notably, SEC Commissioners Hester Peirce and Mark Uyeda dissented from the SEC's Impact Theory, Stoner Cats and Flyfish Club settlements, warning that an enforcement-first, guidance-later approach risks chilling legitimate creative communities. The commissioners questioned whether scattered promotional statements sufficed to create an investment contract, and urged formal rulemaking that distinguishes access-oriented NFTs from capital-raising schemes.

Further, with respect to Flyfish Club, the commissioners emphasized that the managerial

efforts of the principals were to create a fine-dining experience, and whether NFT holders' expectations were met should not be judged under Howey. Their concerns foreshadowed the institutional recalibration that would emerge through judicial decisions and subsequent agency guidance.

Judicial Clarification

Friel v. Dapper Labs was notably the first significant judicial ruling involving an NFT project.[5] In denying Dapper Labs' motion to dismiss in February 2023, the U.S. District Court for the Southern District of New York applied Howey's economic-reality lens and held that plaintiffs plausibly alleged NBA Top Shot Moments were investment contracts. The court emphasized that:

- Purchasers invested money;
- Dapper operated the private Flow blockchain and controlled transaction validation; and
- The only recognized marketplace pooled and retained user funds to support the ecosystem.

Moments allegedly had no value outside this closed system, such that shutting down Flow or the marketplace could drive values to zero.

A reasonable expectation of profits was plausibly supported by promotional posts highlighting record sales and profit-signaling emojis, scarcity tiers, and low-priced packs that often resold for higher prices. The "efforts of others" prong was supported by allegations that Dapper's maintenance of Flow, scarcity curation, and liquidity and withdrawal controls were essential to value. The court held that even if some buyers have a "consumptive motivation" for a digital asset, that does not preclude its initial offer from being an investment contract at the pleading stage.

In the year following Friel, the U.S. District Court for the District of Massachusetts, in Dufoe v. DraftKings Inc., applied a similar framework to NFTs minted on a public blockchain but bought, sold, and held within the company's own marketplace and custody system.[6] The court in July 2024 denied the motion to dismiss and allowed Exchange Act claims, including operating an unregistered exchange or broker-dealer.

Building on that framework, the U.S. District Court for the Southern District of Florida in Harper v. O'Neal considered whether the Astrals NFTs and Galaxy governance tokens promoted by former basketball player Shaquille O'Neal qualified as investment contracts and were therefore securities.[7] Applying the Howey test, the court in August 2024 concluded on a motion to dismiss that the plaintiffs plausibly alleged three elements:

- There was an investment of money, because buyers paid real value, including Solana, to obtain Astrals NFTs and Galaxy tokens.
- There was a common enterprise, because potential returns were tied to the Astrals team's managerial efforts in branding, partnerships and product development, as well as its control over the intellectual property, website and marketplace.
- Purchasers had a reasonable expectation of profits based on the team's efforts, as shown by promotional statements about price targets, publicized venture

partnerships and white paper projections, even if future gaming features might exist or some purchases occurred on secondary markets.

The Emerging Judicial Framework

Courts are applying a fact-specific analysis that turns on the business's structure and communications rather than labels. Claims tend to survive where a promoter operates core infrastructure or a captive marketplace, and where the complaint ties value to that infrastructure through pooled funds, platform-controlled wallets, scarcity mechanics or clear profit signaling.

By contrast, when assets exist on public blockchain networks and trade on independent marketplaces, plaintiffs must allege concrete pooling or a strict vertical tie and an objective profit commitment. References to value or price standing alone will be insufficient to plead a proper cause of action under the Howey test.

Creator royalties that accrue on every transfer can weigh against a shared fortunes theory, because the promoter earns regardless of holder gains. Celebrity involvement is not determinative unless tied to control over branding, distribution, custody or reinvestment plans, together with specific profit messages.

The inquiry is functional, focusing on economic reality rather than formal labels. The same class of assets can fall on different sides of Howey depending on market design and what purchasers were objectively led to expect.

Administrative and Policy Developments

As courts narrow Howey's reach for NFTs, Peirce has pressed for transparent rulemaking over case-by-case settlements.

On Feb. 21, Peirce invited public input on the SEC's crypto task force, arguing that durable policy requires rules, not piecemeal enforcement. She urged for predictable, principled standards to balance innovation and investor protection, echoing her earlier dissent in the Impact Theory matter and signaling a shift toward coherent frameworks.

In a Sept. 26 speech focused on NFTs, Peirce emphasized that creator royalties do not by themselves make NFTs securities, and that artistic or community-driven projects should not be presumed to be investment schemes. She called for space to monetize creative work while holding promoters accountable when they solicit profits based on managerial efforts.

Acting CFTC Chairman Caroline Pham has articulated a complementary stance. Applauding the U.S. Department of Justice's move away from "regulation by prosecution," in April, she endorsed prioritizing actions against fraud and market abuse over technical registration cases absent willful violations.

In that context, she placed NFTs within a technology-neutral, principles-based framework that applies existing anti-fraud and market-integrity tools rather than crafting NFT-specific rules. The CFTC's approach evaluates what a token is and how it is offered, preserving room for legitimate creators while enforcing against true investment-scheme promotions.

Conclusion

NFT regulation has moved from ad hoc enforcement to a framework that separates cultural participation from capital formation. Early SEC matters showed that profit-centric narratives, secondary-market royalties tied to issuer revenue, and promoter-dependent ecosystems can trigger securities obligations even when tokens have consumptive uses. Courts have added discipline.

Recent cases illustrate the line. In Friel and Dufoe, courts allowed claims where value depended on an issuer-controlled infrastructure — including Dapper's private Flow blockchain (a high-performance, decentralized network that initially operated more like a private chain but is now fully decentralized) and marketplace, and DraftKings' captive marketplace with platform-controlled wallets — and where marketing highlighted profit cues such as record-sale posts, financial dashboards and assurances of scarcity.

Harper is consistent, sustaining allegations based on fundraising; team control over intellectual property, the website and the marketplace; decentralized autonomous organization reinvestment plans; venture partnerships; explicit floor-price targets; and broad online solicitation that support statutory seller theories.

Adonis Real shows the other side: assets on public blockchain networks, trading on independent venues such as OpenSea and Coinbase, royalties accruing regardless of holder gains, communications emphasizing membership and access rather than objective appreciation, and insufficient common-enterprise and profit-expectation allegations.

Applied to Howey, common-enterprise claims are strongest where proprietary ledgers, captive marketplaces, custody or listing gatekeeping, or reinvestment plans centralize price formation. They are weaker on public chains with independent markets and revenue decoupled from investor gains.

A reasonable expectation of profits is supported by overt price celebration, scarcity guarantees, dashboards, floor or volume targets, and predictable markups, and it faces headwinds when messaging centers on access and community on a public blockchain network.

Reliance on managerial efforts is bolstered by control over private chains, exclusive marketplaces, custody limits, intellectual property and distribution, and stated reinvestment plans. It falters when allegations rest on brand building without control over the chain or venue.

Taken together, the recent cases and commissioners' statements point to a practical path forward for NFT projects. Projects should deliver genuine utility or art on public, open infrastructure; avoid profit-focused marketing; minimize platform control; clearly disclose functionality and royalties; and build compliance into sales, custody and transfers. This approach limits exposure under securities laws while preserving room for creativity and growth.

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[1] Adonis Real v. Yuga Labs, 2:22-cv-08909 (C.D. Cal. 2022).

[2] See Order Instituting Cease-and-Desist Proceedings, In re: Impact Theory LLC, Securities Act Release No. 11226, Admin. Proc. File No. 3-21585 (U.S. Sec. & Exch. Comm'n, Aug. 28, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/33-11226.pdf.

[3] In re: Stoner Cats 2 LLC, Order Instituting Proceedings, Securities Act of 1933 Release No. 11233, Admin. Proc. File No. 3-21655 (U.S. Sec. & Exch. Comm'n, Sept. 13, 2023), available at: https://www.sec.gov/files/litigation/admin/2023/33-11233.pdf.

[4] See In re: Flyfish Club LLC, Release No. 11305, Admin Proc. File No. 3-22114 (U.S. Sec. & Exch. Comm'n, Sept. 16, 2024), available at: https://www.sec.gov/files/litigation/admin/2024/33-11305.pdf; 2024 WL 16301382 (SEC Sept. 16, 2024).

[5] Friel v. Dapper Labs Inc., 657 F. Supp. 3d 422 (S.D.N.Y. 2023).

[6] See Dufoe v. DraftKings Inc., 2024 U.S. Dist. LEXIS 116412, 2024 WL 3278637, at *3 (D. Mass. July 2, 2024).

[7] Harper v. O'Neal, No. 1:23-cv-21912, 2024 WL 3845444 (S.D. Fla. Aug. 16, 2024).