



JIPEL

NYU Journal of Intellectual Property
& Entertainment Law

VOLUME 14

NUMBER 2



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NEW YORK UNIVERSITY

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JOURNAL OF INTELLECTUAL PROPERTY
AND ENTERTAINMENT LAW

VOLUME 14

SPRING 2025

NUMBER 2

DUPES

ALEXANDRA J. ROBERTS*

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I
DUPE CULTURE

Dupe culture is having a moment. From major players like Walmart and Glade using the term to describe their products in online ads, to “dupe influencers” posting viral videos on TikTok, to savvy shoppers building dupe-focused communities on Reddit, dupes dominate sales and searches.¹ Seventy-one percent of Gen Z and sixty-seven percent of Millennials report that they sometimes or always buy

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¹ For examples of Walmart and Glade using the term “dupe” in their marketing, see *Shoulder Bag Baguette Bags Bottega Jodie Bag dupes Women Vintage Hobo Handbag Fashion Pleated Purse Shoulder Bag Underarm Small Tote - Light Blue*, WALMART, <https://www.walmart.com/ip/Shoulder-Bag-Baguette-Bags-Bottega-Jodie-Bag-dupes-Women-Vintage-Hobo-Handbag-Fashion-Pleated-Purse-Shoulder-Bag-Underarm-Small-Tote-light-blue/3428053645?classType=VARIANT&athbdg=L1700>

dupes.² Where older generations clandestinely purchased dupes hoping to pass them off as the real thing, young bargain-hunters eschew gatekeeping and proudly share their finds with friends and followers. But even as many advertisers and influencers embrace the term, Amazon has banned its use,³ TikTok has blocked the hashtag #designerdupe,⁴ and Target’s legal team forbids the company from saying

[<https://perma.cc/9GN2-F2YN>] (last visited Mar. 22, 2025) (referring to the item as a dupe of a Bottega designer bag in the title and the description of the item for sale); *Glade Dupe Detector*, GLADE, <https://www.gladedupedetector.com/> [<https://perma.cc/ER9F-V49H>] (last visited Mar. 22, 2025) (Glade’s app that allows users to upload a picture of any candle in order to find the Glade dupe). For an example of a “dupe influencer,” see *The Dupes You Need* (@thedupesyouneed), TIKTOK, https://www.tiktok.com/@thedupesyouneed_ [<https://perma.cc/TBR6-5EE7>] (last visited Mar. 22, 2025). For an example of a reddit community focused on dupes, see *r/findfashion*, REDDIT, <https://www.reddit.com/r/findfashion/> [<https://perma.cc/KV2Q-LEG2>] (last visited Mar. 22, 2025).

² Bruce Crumley, *Influencers Fuel Popularity of ‘Dupe’ Products – and Present Big Opportunities for Upstart Brands*, INC. (Dec. 18, 2023), <https://www.inc.com/bruce-crumley/influencers-fuel-popularity-of-dupe-products-and-present-big-opportunities-for-upstart-brands.html> [<https://perma.cc/J2PM-MNBX>] (citing Jennifer Ortakales Dawkins, *Gen Z is the ‘Dupe’ Generation*, BUS. INSIDER (Dec. 14, 2023), <https://www.businessinsider.com/gen-z-is-the-dupe-generation-2023-12> [<https://perma.cc/B63U-B2G5>]). Another poll by Morning Consult found that 49% of Gen Z and 44% of millennial respondents have intentionally purchased a dupe. See Ana Teresa Solá, *With Gen Z, Millennials now the Biggest ‘Dupe’ Shoppers, Online Culture has ‘Flipped the Script,’ Analyst says*, CNBC (Oct. 31, 2023, 8:38 AM), <https://www.cnn.com/2023/10/31/gen-z-millennials-are-shopping-for-dupes-the-most-report-finds.html> [<https://perma.cc/KD4Q-EELJ>].

³ “Consistent with Amazon’s commitment to protecting intellectual property rights, Amazon does not allow the use of the terms ‘dupe,’ ‘fake,’ or ‘faux’ in connection with a brand name to describe an item.” *What is Amazon Associates Anti-Counterfeit Policy?*, AMAZON, <https://affiliate-program.amazon.com/help/node/topic/GER4LUCFFTZJ2FDC> [<https://perma.cc/YW5E-G7ED>] (last visited Mar. 6, 2025). See also Katherine Masters, *‘Dupes’ Clothing, Perfume Craze Lures Holiday Shoppers as Major Brands Fret*, REUTERS (Nov. 20, 2023, 11:54 AM), <https://www.reuters.com/business/retail-consumer/lululemon-birkenstock-duplicate-styles-lure-holiday-shoppers-2023-11-20/> [<https://perma.cc/G4NL-77P3>]. The American Apparel & Footwear Association urges other platforms to follow suit by banning #designerdupes and related hashtags. AM. APPAREL & FOOTWEAR ASS’N, *DUPES INFLUENCERS: THE CONCERNING TREND OF PROMOTING COUNTERFEIT APPAREL, FOOTWEAR, AND ACCESSORIES ON SOCIAL MEDIA* 17, 19 (2021).

⁴ AM. APPAREL & FOOTWEAR ASS’N, *supra* note 3 3, at 19 (“TikTok recently blocked #designerdupe, explaining to those who search for the hashtag that it may be associated with content that violates the TikTok guidelines”); Ernesto Van der Sar, *TikTok Blocks Z-Library Hashtag Pending Piracy Investigation*, TORRENTFREAK (Oct. 31, 2022), <https://torrentfreak.com/tiktok-blocks-z-library-hashtag-pending-piracy-investigation-221031/> [<https://perma.cc/28DA-AYPJ>] (quoting a TikTok representative, who stated, “TikTok proactively blocks search results for terms that violate our Community Guidelines, including terms that relate to counterfeit goods such as #designerdupe and #designerrelicas.”).

the word.⁵ This Article interrogates the multiple meanings of “dupe” and sets out to answer the question, is dupe advertising ever false advertising?

“Dupe” has no single definition because it’s used differently by different contingents.⁶ As a shortened form of “duplicate,” meaning “a copy,” the noun has been in circulation since the early 1900s.⁷ “Dupe” also has another denotation, one not irrelevant to this discussion—it refers to a person who has been misled, a “victim of deception.”⁸ Use of the term has increased dramatically in the past five years:⁹ Google searches for “dupe” rose 40% from 2021 to 2022;¹⁰ the hashtag #dupe racked up 6.3 billion views on TikTok in 2023 alone.¹¹ Keyword searches for “dupe” combined with a brand or product name have skyrocketed across

⁵ Miller Kern & Haley Henschel, *Dupes Are the Biggest Shopping Trend of 2023. Here’s Why.*, MASHABLE (Apr. 26, 2023, 12:45 PM), <https://mashable.com/roundup/best-dupes> [<https://perma.cc/FU9S-FWU3>] (“[A] now-deleted comment from the Target account on TikTok says the company’s legal team forbids them from actually using the term ‘dupe.’”).

⁶ In addition to the uses discussed here, gamers have long used “dupe” to refer to the “the practice of using bugs or exploits to clone in-game currency or rare items.” *See id.*

⁷ *Dupe* (n.2), OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/dupe_n2 [<https://perma.cc/6AVP-D2H2>] (last visited Mar. 6, 2025).

⁸ *Dupe* (n.1), OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/dupe_n1 [<https://perma.cc/8WVK-VVB4>] (last visited Mar. 23, 2025).

⁹ Meme librarian Amanda Brennan traces the first appearance of the modern use of dupe, “as a stand-in for something pricey, sold out, or discontinued,” to a 2007 post in a craft forum. Kern & Henschel, *supra* note 5. According to The Guardian, “the first wave of beauty YouTubers were highlighting cheaper products as far back as 2010.” Amelia Hill, *Counterfeit Goes Cool: High-End Brands Urged to Embrace Rise of #Dupe*, THE GUARDIAN (May 20, 2024, 2:00 PM), <https://www.theguardian.com/media/article/2024/may/20/counterfeit-cool-high-end-brands-urged-embrace-dupe> [<https://perma.cc/5PNK-HSFE>]. *See also* Maura Judkis, *In Gen Z’s World of “Dupes,” Fake is Fabulous – Until You Try It On*, WASH. POST (Mar. 22, 2023), <https://www.washingtonpost.com/lifestyle/2023/03/22/dupes-shopping-trend-gen-z> [<https://perma.cc/R7CF-MEZ2>] (calling dupes “a Gen Z rebranding of fashion and beauty products that are cheaper versions of the real thing—duplicate, but also duplicity, since the wearer might trick someone into believing they bought designer”).

¹⁰ Liz Flora, *Inflation is Raising Demand for Affordable Beauty Dupes*, GLOSSY (July 6, 2022), <https://www.glossy.co/beauty/inflation-is-raising-demand-for-affordable-beauty-dupes/> [<https://perma.cc/3VX9-JE9Y>].

¹¹ Rebecca Deczynski, *How to Use Dupes to Drive Sales*, INC. (Dec 21, 2023), <https://www.inc.com/rebecca-deczynski/how-to-use-dupes-to-drive-sales.html> [<https://perma.cc/THN7-QQBP>].

social media platforms¹² and retail sites like Amazon,¹³ eBay,¹⁴ and Temu.¹⁵ The Oxford English Dictionary,¹⁶ Google Ngram,¹⁷ Google Trends,¹⁸ and Law360¹⁹ all confirm the word's speedy ascension.

In some circles of the Internet, a dupe is a more affordable version of an unattainably expensive product.²⁰ I'll call those "pure dupes." A dupe in the beauty industry might be a lipstick in the same shade as that of a luxury label, a serum that uses the same ingredients as a high-end one, an affordable version of an expensive haircare tool, or a discount-brand shampoo that positions itself as equivalent to a fancier one. "Dupe" is also used widely to describe a perfume that mimics the scent, but not the packaging, of a more expensive perfume.²¹ In fashion, a dupe might be a shoe, dress, or handbag that fits the same description as the one from a prestige brand worn by celebrities or featured in magazines—and could even pass for the real deal if you squint—but the dupe only recreates the item's look, not

¹² Masters, *supra* note 3 ("Hashtag searches for dupes of major brands - including Skims underwear and Deckers' Ugg boots - have been viewed millions of times on TikTok.").

¹³ *For Some Brands, Searches for Dupes Top Those for the "Real Thing"*, THE FASHION L. (Nov. 28, 2023), <https://www.thefashionlaw.com/men-are-twice-as-likely-as-women-to-buy-counterfeits-per-uk-study/> [<https://perma.cc/5STB-U8SK>] ("Recent Amazon search trend data provided to TFL by Marketplace Pulse shows that in some cases, searches for Skims dupes have grown to overtake searches for authentic Skims products.").

¹⁴ *Id.* ("[Consumers] are also actively seeking out product replicas on e-commerce platforms like Amazon, Etsy, and eBay.").

¹⁵ Second Amended Complaint at ¶¶ 182-183, 313, Roadget Bus. Ltd. v. PDD Holdings Inc., No. 1:22-cv-07119 (N.D. Ill. June 14, 2023) (alleging Temu auto-completes searches that include "dupe").

¹⁶ OXFORD ENG. DICTIONARY, *supra* note 7.

¹⁷ Google Ngram also shows an increase in use of "dupe" between 2010–2019, with a marked rise for "dupe" (noun) and only a minimal rise for "dupe" (verb). GOOGLE BOOK NGRAM VIEWER, <https://books.google.com/ngrams/> (set the time range from 2010 to 2019; then search for "dupe_NOUN,dupe_VERB") (last searched July 28, 2024).

¹⁸ GOOGLE TRENDS, <https://trends.google.com> (follow "Explore" hyperlink; enter "Dupe" as the search term; set the geographic range to the United States; set the range as 2004 to present) (accessed July 29, 2024).

¹⁹ The author found only one search result for "dupe" in Law360 articles published in 2004, one in 2005, four in 2006, and one in 2007, compared to twenty-four in 2022 and twenty-three in 2023.

²⁰ Lucy Maguire, *Gen Z Loves Dupes. Is This Bad News for Luxury Fashion Brands?*, VOGUE BUS. (Apr. 10, 2023), <https://www.voguebusiness.com/fashion/gen-z-loves-dupes-is-this-bad-news-for-luxury-fashion-brands> [<https://perma.cc/ATS7-ZH2P>].

²¹ See, e.g., Angela Tricarico, *Bath and Body Works Has Affordable Dupes of All Your Favorite Perfumes*, N.Y. POST (Feb. 4, 2025, 1:24 PM), <https://nypost.com/shopping/bath-and-body-works-perfume-dupes/> [<https://perma.cc/BH86-37C9>] (listing less-expensive "dupes" of expensive perfumes).

its logo or insignia.²² Fast fashion retailers like Asos, Zara, and Shein diligently feed consumers' appetite for dupes, churning out lower-priced copies of high-end brands' products at remarkable speed.²³ Some discount chain stores, such as Walmart and Aldi, engage in similar practices.²⁴

But dupes aren't limited to makeup and beauty, though those categories receive the most attention. "Dupe" is versatile. Over-the-counter drugs have been characterized as dupes, as have generic or compounded versions of prescription drugs and devices.²⁵ In electronics and home goods, shoppers seek out dupes for brand-name speakers, blenders, and couches. Dupes regularly go viral; demand for specific dupes can even overtake demand for the original.²⁶ And while some decry dupes' existence even when they're perfectly legal, others argue that copying

²² Maguire, *supra* note 20.

²³ For discussion of a lawsuit filed against Shein for copying, see Anna Saber, Neda Shaheen & Suzanne Giammalva, *6 AI Cases and What They Mean For Copyright Law*, LAW360 (Jan. 3, 2024, 3:57 PM), <https://www.law360.co.uk/articles/1780344/6-ai-cases-and-what-they-mean-for-copyright-law> [<https://perma.cc/7F9C-GR67>] (discussing *Perry v. Shein Distribution Corp.*, stating that the plaintiffs "allege that Shein's network of related entities employs an algorithm intended to cull and copy the most commercially valuable designs."). See also Sharon Pruitt-Young, *Why Indie Brands Are At War With Shein And Other Fast-Fashion Companies*, NPR (July 20, 2021 2:25 PM), <https://www.npr.org/2021/07/20/1018381462/why-indie-brands-are-at-war-with-shein-and-other-fast-fashion-companies> [<https://perma.cc/AUH3-DNHQ>]; Chavie Lieber, *Fashion brands steal design ideas all the time. And it's completely legal.*, Vox (Apr. 27, 2018, 7:30 AM), <https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m> [<https://perma.cc/T2E3-9DW3>].

²⁴ See Hill, *supra* note 9 ("In some cases, dupes are openly produced by retailers looking to undercut rivals – discount supermarket chains Aldi and Lidl are well known for their imitations of private-label products."). American Eagle called Walmart "a repeat offender" in a recent infringement suit, citing multiple other lawsuits against it. Plaintiffs' (Redacted) Brief In Support of Motion for Summary Judgment, *American Eagle Outfitters, Inc. v. Walmart, Inc.*, No. 2:20-cv-00412-MJH, 2022 WL 2194592 (W.D. Pa. Jan. 28, 2022).

²⁵ E.g., Saleen Martin, *Weight-Loss Patients Warned of Counterfeit Ozempic as Dupes of Popular Drug Proliferate*, USA TODAY (June 27, 2024, 11:04 AM), <https://www.usatoday.com/story/news/health/2024/06/27/ozempic-dupe-counterfeit-warning-who/74231137007/> [<https://perma.cc/J6Y6-D3CJ>]; Kate Knibbs, *It's Shockingly Easy to Buy Off-Brand Ozempic Online, Even if You Don't Need It*, WIRED (July 12, 2024, 10:41 AM), <https://www.wired.com/story/glp1-ozempic-wegovy-semaglutide-compounding-pharmacies-hims-reflexmd-alan-meds-henry-ro-getthinmd/> [<https://perma.cc/ALJ6-C7SN>] (referring to compounded versions of prescription drugs as "dupes").

²⁶ Sangeeta Singh-Kurtz, *Drowning in Dupes: Shoppers Will Buy Anything — Except the Real Thing*, THE CUT (May 30, 2023), <https://www.thecut.com/article/peak-dupe.html> [<https://perma.cc/4P5M-JR7S?type=standard>] ("Today, the dupe itself is more valuable than the original, and the quality alternatives have been eclipsed by a tsunami of trash."); *For Some Brands, Searches for Dupes Top Those for the "Real Thing"*, *supra* note 13.

spurs competition²⁷ and that interest in a dupe increases the allure of the real thing, benefiting the “duped” brand by leading consumers to perceive it as even more elite and desirable.²⁸

A dupe isn’t always a legitimate, lower-priced substitute. For another set of users, a dupe is quite simply a counterfeit.²⁹ Counterfeits replicate well-known brands’ registered trademarks or logos, as when someone other than Chanel sells a handbag featuring the brand’s famous interlocking “C’s.”³⁰ Reports have noted a rise in the use of the term, related hashtags, and assorted intentional misspellings to help shoppers find counterfeits and work around filters; on some sites, “dupe” picked up where similar code words like “knockoff,” “AAA,” “mirror quality,” and “reps” left off.³¹ Some consider this use of “dupe” a co-opting of the term:³² a well-known fashion law blog explains that “dupe” was “traditionally used to refer to legally above-board products that take inspiration from other, existing (and often much more expensive) products,” but “the new use of ‘dupe’ refers to

²⁷ See generally Kal Raustiala & Christopher Jon Sprigman, *THE KNOCKOFF ECONOMY* 7 (2012) (describing “the piracy paradox,” in which copying spurs, rather than harms, innovation in fashion and other industries); Jaclyn Peiser, *Viral ‘Dupes’ Make E.L.F. the Makeup Brand of the Moment*, WASH. POST (Dec. 17, 2023), <https://www.washingtonpost.com/business/2023/12/17/elf-makeup-dupes/> [<https://perma.cc/8CEW-4FZ4?type=standard>] (“Counterintuitively, prestige brands are generally unbothered by dupes. . . . ‘A lot [of them] have called out the dupes as a positive because they push innovation . . . and keep bringing newness to the market.’”) (quoting analyst Korinne Wolfmeyer).

²⁸ *The Impact of Beauty Dupes on Cosmetics Category Sales*, NIELSEN IQ (Nov. 17, 2023), <https://nielseniq.com/global/en/insights/analysis/2023/the-impact-of-beauty-dupes-on-cosmetics-category-sales/> [<https://perma.cc/5EBC-972U>] (“In an analysis of both affordable cosmetics brands (duper) and higher priced brands that tend to attract imitators (duped) [both] experienced a surge in both dollar sales and buyers between July 2022 and July 2023, indicating that both types of brands can coexist in the category.”); Singh-Kurtz, *supra* note 26 (“when a dupe goes viral, both it and the original product often sell out.”).

²⁹ The Lanham Act defines “counterfeit” as a “spurious mark which is identical with, or substantially indistinguishable from, a registered trademark” and prohibits trafficking in goods or services and knowingly using a counterfeit mark in connection with them. 18 U.S.C. § 2320.

³⁰ *Id.* For discussion of a lawsuit concerning Chanel counterfeits, see Julie Zerbo, *Chanel Wins Final Judgment in What Goes Around Comes Around Resale Case*, THE FASHION L. (Mar. 3, 2025), <https://www.thefashionlaw.com/chanel-wins-final-judgment-in-what-goes-around-comes-around-case/> [<https://perma.cc/2FQE-CPBD>].

³¹ AM. APPAREL & FOOTWEAR ASS’N, *supra* note 3, at 6.

³² E.g., Nicolette Shamsian, *Fashion Victims: Dupes Are A Serious Problem*, ABOVE THE LAW (Dec. 7, 2023, 11:17 AM) <https://abovethelaw.com/2023/12/fashion-victims-dupes-are-a-serious-problem/> [<https://perma.cc/VKX3-86P6>] (“Semantically, the definition of a dupe does not encompass products that violate the intellectual property rights of the original company. However, influencers are also promoting counterfeits under the guise of dupes.”).

products that make unauthorized use of brands' names and other legally-protected trademarks, meaning that they are not [true dupes] but trademark infringing and/or counterfeit goods.”³³ The American Apparel and Footwear Association has taken an emphatic stand against dupe influencers, accusing them of “facilitating the sale of unauthorized and counterfeit goods ... partak[ing] in illicit activity and potentially becom[ing] accessories in the trafficking of illegal counterfeits.”³⁴ And two recent law review articles treat “dupe” as synonymous with “counterfeit.”³⁵ Dupe influencers who sell counterfeits have become increasingly creative, shipping out lookalikes with separate logo stickers or patches for buyers to attach at home or using hidden links to advertise products on one platform and route followers to another to purchase them.³⁶ “Infringing dupes,” dupes that knowingly infringe design patents, utility patents, copyright, trademark, trade dress, or trade secret protection, fall into an adjacent and overlapping category.³⁷

Of course, there is plenty of gray area between “dupes” as counterfeit or infringing goods and “dupes” as affordable alternatives to high-end products. Some dupe producers aspire to get as close as they can not only to the product, but also to its name, appearance, and packaging, without actually infringing. I’ll call those “risky dupes.” Australian cosmetics company MCoBeauty, for example, is known for “openly pushing legal boundaries to duplicate trending, higher-end cosmetics,

³³ Searches for “Replicas” Are Down Thanks to the Rise of the Dupe, THE FASHION L. (July 27, 2021), <https://www.thefashionlaw.com/searches-for-replica-may-be-down-but-fashion-and-luxury-brands-are-still-being-targeted/> [https://perma.cc/3QTJ-U5ZY?type=image].

³⁴ AM. APPAREL & FOOTWEAR ASS’N, *supra* note 3, at 8, 13.

³⁵ Gina Boone, *Designing Dupes: A Legislative Proposal for Holding Online Marketplaces Contributorily Liable for Counterfeit Goods*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1302, 1352 (2021) (advocating legislation to hold online marketplaces contributorily liable for counterfeit sales); Albert Aini, *Contributory Infringement and Dupe Influencers*, CARDOZO ARTS & ENT. L.J.: BLOG (Feb. 21, 2022), <https://cardozoaelj.com/2022/02/21/contributory-infringement-and-dupe-influencers/> [https://perma.cc/B3QS-5UUT] (arguing dupe influencers might be liable as contributory infringers).

³⁶ Complaint at ¶ 3, Amazon.com, Inc. v. Fitzpatrick et al, No. 2:20-cv-01662 (W.D. Wash. Nov. 12, 2020) (“As Fitzpatrick explains to her followers, a ‘hidden link’ means ‘[y]ou order a certain product that looks nothing like the designer dupe in order to hide the item from getting taken down [by Amazon] and orders being cancelled.’”).

³⁷ While “counterfeit” is often used colloquially to refer to infringing products, or “as a synonym for ‘fake,’” Professor Sarah Fackrell cautions against importing the concept of counterfeits into other areas like design patent, noting that counterfeit is a legal term of art and conflating it with infringement is a rhetorical device that some have used to manipulate lawmakers and courts. Sarah Fackrell, *The Counterfeit Sham*, 138 HARVARD L. REV. 472, 473 (2024).

selling them at major retail outlets for a much lower price.”³⁸ The company publicly embraces duping as a “pillar” of its marketing strategy.³⁹ While its stated goal is to stay on the non-infringing side of the line, MCoBeauty has been sued several times for infringement and opted to settle those suits.⁴⁰ Arguably, though, its strategy is similar to the less risky “store brand” approach with which American consumers are already quite familiar.⁴¹ A grocery chain might offer shampoo in a bottle designed to mimic that of Herbal Essences, position the shampoo next to Herbal Essences on its shelves, and include text like “compare to ingredients in Herbal Essences”; they might even name their version something similar yet distinguishable, like “Organic Essence.” United States courts have typically treated such comparative marketing—positioning a product as a house brand alternative to another and using packaging cues to make the reference obvious—as acceptable if it doesn’t create a likelihood of consumer confusion.⁴²

Risky dupes are risky, therefore, precisely because it’s difficult to predict with certainty that they will not be found infringing. While counterfeits that copy the brand name and logo of luxury goods tend to be recognizable as counterfeits to sellers and buyers alike, infringing products may be less readily identifiable as infringing.⁴³ In the fashion industry in particular, some forms of intellectual property protection can be hard to come by or take too long to obtain to be practically useful,⁴⁴ so copyists may assume brands lack enforceable rights in the

³⁸ Kate Ainsworth & Emilia Terzon, *After Being Sued Twice, MCoBeauty Has Become a Multi-Million-Dollar Empire Built on Beauty Dupes*, ABC NEWS (July 1, 2024, 2:52 PM), <https://www.abc.net.au/news/2024-07-02/mcobeauty-charlotte-tilbury-beauty-dupes-trademarks-lawsuits/104019774> [https://perma.cc/YM9S-5THR].

³⁹ *Id.*

⁴⁰ Kate Ainsworth, *MCoBeauty Follows a Rigorous Process When it Dupes Cosmetics. Here’s What It Looks Like*, ABC NEWS (July 3, 2024, 3:05 PM), <https://www.abc.net.au/news/2024-07-04/mcobeauty-explains-beauty-dupe-process-product-development/104052268> [https://perma.cc/U77A-T6YY] (referencing lawsuits by American brand Tarte and Australian company Chemcorp; both lawsuits settled out of court).

⁴¹ *Conopco, Inc. v. May Dep’t Stores Co.*, 46 F.3d 1556, 1565 (Fed. Cir. 1994) (“this form of competition has become commonplace and well-known in the marketplace”).

⁴² *Id.* at 1557; *G.D. Searle & Co. v. Hudson Pharm. Corp.*, 715 F.2d 837, 838 (3d Cir. 1983).

⁴³ It’s certainly possible for counterfeit products to deceive consumers, especially depending on the price of the goods, how they’re described by the seller, and the context of the purchase. But more often, because of their lower price point and the way they’re sold, counterfeit plaintiffs can only plausibly allege post-sale, rather than point of sale, confusion.

⁴⁴ Raustiala & Sprigman, *supra* note 27, at 28–30.

products they dupe. Where a fabric print is protected under copyright, the shape of a sneaker under design patent, the formula for a face serum under utility patent or trade secret, or the overall appearance of a hairspray bottle under trade dress, the duper may be unaware of that protection. Whether or not protection exists can be difficult for dupe producers and dupe advertisers to ascertain, especially when it comes to trade dress, which is less likely to be registered than word marks or logos—meaning competitors are not on notice of trade dress owners’ real or perceived rights. And whether a court would find infringement of any form of intellectual property is notoriously difficult to predict.⁴⁵ Intent may play a role in assessing infringement in some jurisdictions,⁴⁶ but it’s not the only element that matters, and courts differ on how they interpret the role of intent when a brand tried to copy a product but was not trying to pass their copy off as authorized or confuse consumers. (Meanwhile, when it comes to false advertising—discussed further below—several circuits have rejected the idea of intent to deceive having any role to play at all.)⁴⁷

Lastly, in this continuum of dupes, we have “scam dupes.” According to one study, nearly half of consumers consider themselves to have been “scammed” when they purchased a viral dupe product on social media.⁴⁸ Of those, 38% said the item wasn’t of the quality shown or described; 26% reported that the item arrived

⁴⁵ Design patent may provide an exception to some of these rules, as it tends to be both easier to obtain than trade dress or utility patent protection and easier to predict infringement outcomes for than copyright, trade secret, utility patent, or trademark infringement. See Sarah Burstein, *Is Design Patent Examination Too Lax?*, 33 BERKELEY TECH. L.J. 607, 611 (2018); Sarah Burstein & Saurabh Vishnubhakat, *The Truth About Design Patents*, 71 AM. U. L. REV. 1221, 1223 (2022). Countries differ on not only protectability of designs, but also willingness to find unfair competition in the absence of protectability. See Mary LaFrance, *Passing Off and Unfair Competition: Conflict and Convergence in Competition Law*, 102 TRADEMARK REP. 1096, 1105–06 (2012).

⁴⁶ See Jake Linford, *An Information Theory of Intentional Trademark Infringement*, 62 HOUS. L. REV. 275, 280 (2024); Alfred C. Yen, *Intent and Trademark Infringement*, 57 ARIZ. L. REV. 713, 714, 722–23 (2015); Mark Bartholomew, *Trademark Morality*, 55 WM. & MARY L. REV. 85, 105 (2013).

⁴⁷ See *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 131 (3d Cir. 1994); *Pizza Hut, Inc. v. Papa John’s Intern., Inc.*, 227 F.3d 489, 497 (5th Cir. 2000).

⁴⁸ 49% of American Gen Z and Millennial Social Media Users Have Been Scammed Purchasing a Viral ‘Dupe’ Product, TRUSTPILOT (Nov. 8, 2023), <https://press.trustpilot.com/49-of-american-gen-z-and-millennial-social-media-users-have-been-scammed> [https://perma.cc/TJ45-ETA3]; Alexandra Pastore, *Almost Half of Young Consumers Have Been Tricked by ‘Dupe’ Products on Social Media*, WWD (Nov. 21, 2023, 9:47 AM), <https://wwd.com/business-news/business-features/young-consumers-tricked-dupe-products-social-media-1235944171/> [https://perma.cc/KGY6-ZBYL].

damaged; 24% said it never arrived at all; 14% reported an allergic reaction to it; and 9% said they had to seek medical treatment after they used it.⁴⁹ Some accounts report sellers using photos or videos of someone else's product to market their own.⁵⁰ Whether or not a dupe is infringing or counterfeit, it may simply be so low quality as to constitute a scam; in some cases, it may not even exist.

So “dupe” contradicts itself; it is large, it contains multitudes.⁵¹ The spectrum of dupes includes a) “pure” dupes: lower-priced, distinctively-branded and non-infringing alternatives to luxury or high-priced goods; b) “risky” dupes: lower-priced alternatives that aren't as clearly non-infringing; c) “infringing” dupes: products that infringe another producer's intellectual property; d) “counterfeit” dupes, products that use other producers' registered trademarks or logos; and e) “scam” dupes: egregiously poor-quality goods, goods that don't come close to matching their advertised description, or goods that never actually ship to purchasers. The categories overlap, of course, and a dupe can fall into more than one category at the same time—a dupe might be counterfeit and a scam, for example, or counterfeit and infringing. An apparently pure dupe might also be risky.

The consequences of advertising and selling counterfeit, infringing, and risky dupes are fairly straightforward: producers and in some cases advertisers should be aware that IP owners may enforce their rights against those sellers by suing, sending cease and desist letters, or availing themselves of platform-specific takedown procedures. Law enforcement might pursue criminal counterfeiting charges;⁵² FTC or state attorneys general might attempt to shut down a business for defrauding

⁴⁹ Pastore, *supra* note 48.

⁵⁰ See, e.g., Rosey Bowling, *Is It a Dupe, or Is It Just a Scam?*, BROWSER MEDIA (Jan. 31, 2024), <https://browsermedia.agency/blog/is-it-a-dupe-or-is-it-just-a-scam/> [<https://perma.cc/2H6A-8YCZ>]; see also Francois Maingret, *The Difference Between Counterfeits and Dupes—And How These Products Impact Brands*, FRANCOIS MAINGRET: BUS. STRATEGY BLOG (May 19, 2024), <https://fmaingret.com/2024/05/the-difference-between-counterfeits-and-dupes-and-how-these-products-impact-brands/> [<https://perma.cc/BL2U-F686>] (“Sellers of counterfeits will often use fake or stolen images from genuine products . . . to make them look legitimate.”).

⁵¹ Walt Whitman, *Song of Myself*, 51 (1855) (“Do I contradict myself?/ Very well then I contradict myself,/ (I am large, I contain multitudes.)”).

⁵² See 18 U.S.C. § 2320 (providing criminal penalties for trafficking counterfeit goods).

consumers.⁵³ For scam dupes, the appropriate cause of action might be breach of contract, breach of express or implied warranty, or false advertising independent of the use of the term “dupe.”

This Article mostly sets aside issues of infringement and counterfeiting to focus on one specific question: is the simple fact that something is marketed as a “dupe” ever, in itself, enough to constitute false or deceptive advertising? While it may be uncontroversial to claim that marketing counterfeit, infringing, risky, and scam dupes as “dupes” for well-known products can be deceptive, I argue that even sellers of pure dupes might be vulnerable to false advertising claims if the products are simply too different to merit the label “dupe.”

II DUPE USERS

Who actually uses the term “dupe”? It isn’t just influencers, though their use of the term has surged in recent years, especially on platforms like TikTok, Instagram, Facebook, and YouTube.⁵⁴ Consumers use the term and hashtag to seek out alternatives for products they can’t afford or for which they simply prefer to pay less, building entire communities around various categories of dupes. Reddit, which saw a 50% rise in the creation of dupe-focused communities on its site from 2022 to 2023,⁵⁵ is rife with examples, but so are specialty sites like What to Expect (a platform for expecting parents)⁵⁶ and dupe.com (a search engine for furniture dupes).⁵⁷ Google search data from the trend forecaster Spate found online

⁵³ See, e.g., Katherine Skiba, *FTC Goes After 25 ‘Counterfeit’ Websites Claiming to Sell Lysol, Clorox, AARP* (Nov. 6, 2020), <https://www.aarp.org/money/scams-fraud/ftc-fake-websites-disinfectants-2020/> [<https://perma.cc/TTD2-TEF9>].

⁵⁴ Pastore, *supra* note 48 (“[P]latforms to find the ‘best dupes’ were revealed as TikTok (50 percent), Facebook (48 percent), Instagram (42 percent) and YouTube (42 percent). At the same time, common sales of ‘dupes’ are reported as found most often from Amazon (44 percent), Facebook (31 percent), TikTok (39 percent), Instagram (23 percent), eBay (13 percent), Shein (13 percent) and Target (12 percent).”).

⁵⁵ *New Data Shows that “Dupes” Mania is Not Cooling*, THE FASHION L. (July 3, 2024), <https://www.thefashionlaw.com/new-data-shows-that-dupes-mania-is-not-cooling/> [<https://perma.cc/3T5N-DTEN>]. This statistic includes Reddit communities not limited to those that use the specific term “dupe.”

⁵⁶ See, e.g., Jenn Sinrich, *These Pregnancy-Friendly Leggings Are the Lululemon Dupes You’ve Been Waiting For*, WHAT TO EXPECT (Oct. 28, 2021), <https://www.whattoexpect.com/baby-products/trends/lululemon-dupes-amazon> [<https://perma.cc/VQ3T-ANAX>].

⁵⁷ DUPE, <https://dupe.com/> [<https://perma.cc/J7FC-9XD7>]; see also Fred Nicolaus, *What a New Dupe-Hunting Site Says About the Industry’s Relationship With Knockoffs*, BUS. OF HOME (Apr. 3,

searches for “dupe + skin care” increased 123.5 percent in a single year.⁵⁸ Traffic on Dupeshop, a platform that compares beauty dupes against their more expensive counterparts, has increased more than 100 percent year over year and boasts more than a million users.⁵⁹ Journalists and bloggers write reviews, rankings, and recommendations for dupes, with headlines like “35 Cheap Product Dupes That Are Just As Good As The Real Thing,”⁶⁰ “The Best Designer Dupes of 2023 and Where to Buy Them: Gucci, Cartier,”⁶¹ and “Splurge or Save? Sephora Collection Dupes for High-End Favorites.”⁶² Fashion and entertainment magazines like *Us Weekly*⁶³ and *InStyle*⁶⁴ also recommend products as “dupes” for others, as they have long done by other names before the term “dupe” came into vogue. And speaking of vogue, *Teen Vogue* uses the tag “dupes” to collect its copious dupe coverage in one place.⁶⁵

In addition to all those third-party uses, major companies have turned to “purposeful duping,” making dupe claims in their marketing materials.⁶⁶ Whole

2024), <https://businessofhome.com/articles/furniture-dupes-kim-kardashian-donald-judd-knockoffs> [https://perma.cc/84GV-ULMC].

⁵⁸ NIELSEN IQ, *supra* note 28.

⁵⁹ Perdita Nouril, *For Every High End Beauty Product You Can Now Find a Carbon Copy for Half the Price, but as Dupe Culture Gains Ground, WH Asks Who's Really Profiting?*, *WOMEN'S HEALTH* (Jan. 3, 2024), <https://www.womenshealthmag.com/uk/beauty/skin/a46265674/beauty-dupes/> [https://perma.cc/U6MM-XJZR]. See also DUPESHOP, <https://dupeshopbeauty.com/> [https://perma.cc/4MVM-7C44].

⁶⁰ Allison Hart, *35 Cheap Product Dupes That Are Just as Good as the Real Thing*, *22 WORDS* (Dec. 19, 2022), https://twentytwowords.com/35-cheap-product-dupes-that-are-just-as-good-as-the-real-thing/?utm_source=googlesearch [https://perma.cc/J4QW-SSJN].

⁶¹ Sophie Cannon, *The Best Designer Dupes of 2023 and Where to Buy Them: Gucci, Cartier*, *N.Y. POST* (Mar. 9, 2024, 10:09 AM), <https://nypost.com/article/best-designer-dupes/> [https://perma.cc/7BT4-PJHT].

⁶² Malika Wichner, *Splurge or Save? Sephora Collection Dupes for High-End Favorites*, *GROUPON*, <https://www.groupon.com/coupons/blog/best-sephora-makeup-dupes-guide> [https://perma.cc/9UPB-QQ86] (last visited Mar. 22, 2025).

⁶³ Hannah Kahn, *No One Will Believe You Got This Luxury-Looking Lounge Set on Amazon*, *US WEEKLY* (Aug. 5, 2023), <https://www.usmagazine.com/shop-with-us/news/luxury-looking-lounge-sweater-set-new-release-amazon/> [https://perma.cc/5DA4-86HF].

⁶⁴ Emily Kelleher, *12 Dupes for the Iconic Yellow Dress from 'How to Lose a Guy in 10 Days'*, *INSTYLE* (Feb. 27, 2025, 7:09 AM), <https://www.instyle.com/how-to-lose-a-guy-in-10-days-dress-dupes-8646215> [https://perma.cc/G5FN-YHDJ].

⁶⁵ *Dupes*, *TEEN VOGUE*, <https://www.teenvogue.com/tag/dupes> [https://perma.cc/MP8C-5E2U].

⁶⁶ *Beauty Dupes: Friend or Foe?*, NIELSEN IQ (Nov. 2, 2023), <https://nielseniq.com/global/en/insights/infographic/2023/beauty-dupes-friend-or-foe-beauty-inner-circle/> [https://perma.cc/GH6L-X9FX].

Foods⁶⁷ and Walmart⁶⁸ have used “dupe” in advertisements, whether sincerely or tongue in cheek.⁶⁹ Some companies are not shy about plastering their websites with the word—like perfume brand Aromapassions, whose second-level domain names include “dupe” and whose homepage proclaims in large font that visitors to the site can “buy perfume dupes online.”⁷⁰ Makeup brand Lottie London seeks out and reposts influencers’ dupe videos that feature its products and use hashtags like #dupe and #fentydupe.⁷¹ And air freshener brand Glade launched its own “dupe detector,” where users are invited to upload a photo of a candle they like so the app can recommend a Glade product with a similar scent as a substitute.⁷²

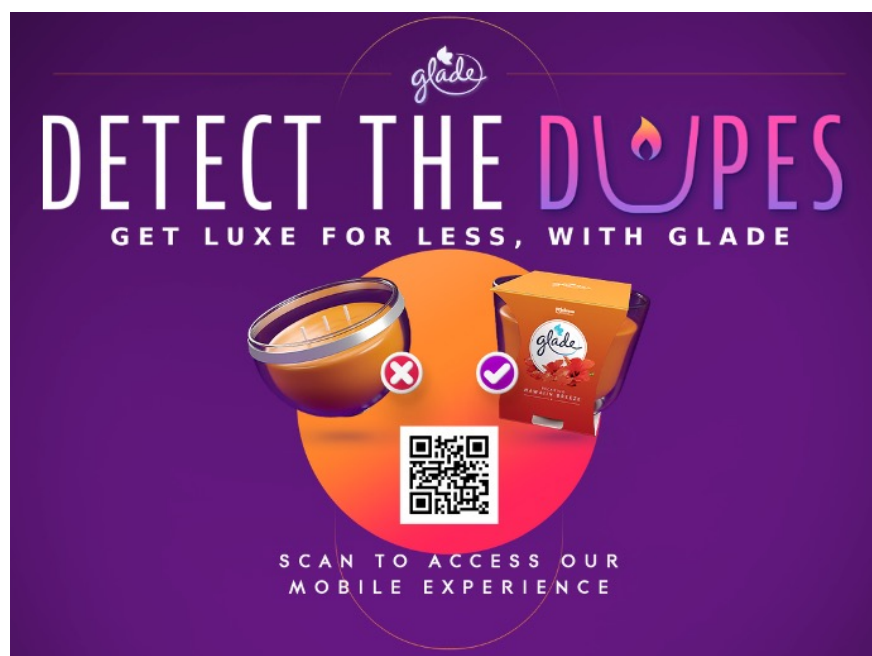


Figure 1: Glade Advertises its dupe detector app on its website

⁶⁷ Whole Foods (@wholefoodsmarket), TikTok (Jan. 27, 2023), <https://www.tiktok.com/@wholefoodsmarket/video/7193472779335798062> [<https://perma.cc/57VM-RSHL>].

⁶⁸ Complaint, Vans, Inc. v. Walmart, Inc., No. 8:21-cv-01876-DOC-KES, 2022 WL 1601530 (C.D. Cal. Mar. 31, 2022).

⁶⁹ The Whole Foods TikTok meets this description. See Whole Foods, *supra* note 67 (playfully referring to products as dupes).

⁷⁰ AROMAPASSIONS, <https://aromapassions.com/> [<https://perma.cc/UV8X-Z3MA>] (last visited July 20, 2024). The brand describes its mission as “bring[ing] luxury perfumery to the world at a decent price that anyone can afford.” *About AromaPassions*, AROMAPASSIONS, <https://aromapassions.com/pages/about-best-perfume-dupe-company> [<https://perma.cc/UV4P-JA3B>] (last visited July 20, 2024).

⁷¹ Flora, *supra* note 10.

⁷² *Glade Dupe Detector*, GLADE, <https://www.gladedupedetector.com/> [<https://perma.cc/ER9F-V49H>].

Some companies, though, eschew the term even when they've built their business model around the concept. Dossier, which sells dupes of designer perfumes and boasted 10,342% growth in just three years, avoids saying “dupe” altogether, instead relying heavily on the term “impressions” to describe their smell-alike fragrances. A spokesperson explains that it's “[n]ot because we're embarrassed about what we're doing. Not at all. We're very proud of it . . . It's more that we were fearing that it might have a negative connotation and more importantly, we wanted to be known for high quality.”⁷³

But most of all, it is influencers who are consistently credited with, or alternately blamed for, the meteoric rise of dupe culture. Some have built their personal brand as dupe experts and accrued hundreds of thousands of followers by shilling dupe recommendations across product categories. Influencers are “social media personalities paid to leverage their popularity to market products and shape consumer preferences.”⁷⁴ Anyone who promotes a product online in exchange for something—whether that thing is money, commission, free stuff, or any other benefit that might affect the weight consumers give their endorsement—is engaged in influencer marketing.⁷⁵ Researchers have found that influencers have a “profound impact” on consumers' purchasing intentions and stimulate demand for the products they endorse.⁷⁶ In the more traditional version of this model, a brand might connect with an established social media influencer and negotiate a deal in which the influencer promotes the brand's products on one or more social media platforms, such as a flat payment for a set of posts or a pay scale that rewards posts on different platforms at different rates. Some brands might send a product to a group of influencers and ask them all to post about it in the same week. Many brands supply the influencer with guidance, such as keywords to use and product attributes to highlight.⁷⁷

⁷³ Deczynski, *supra* note 11.

⁷⁴ Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 89 (2020).

⁷⁵ *Id.* at 89–90.

⁷⁶ *Men Are Twice as Likely as Women to Buy Counterfeits, Per UK Study*, THE FASHION L. (Feb. 23, 2024), <https://www.thefashionlaw.com/men-are-twice-as-likely-as-women-to-buy-counterfeits-per-uk-study/> [<https://perma.cc/5STB-U8SK>].

⁷⁷ Roberts, *supra* note 74, at 94–96.

But influencer marketing takes many forms. Influencers, especially dupe influencers, increasingly engage in affiliate marketing rather than contracting directly with brands. In affiliate marketing, an influencer receives a cut of the profit when the content they post results in a sale,⁷⁸ with sales typically tracked through affiliate links that consumers click to purchase the product or codes that shoppers enter at checkout. In some cases, the influencer is posting at the behest of the brand and may have negotiated their rate. But platforms like LIKEtoKNOW.it (often abbreviated LTKit) and programs like TikTok Shop, Instagram Shopping, and Amazon Storefront have cut out the middleman, making it possible for influencers to endorse products and earn income without being specifically selected by brands as ambassadors.⁷⁹ While traditional fashion and beauty influencers may occasionally post about dupes, dupe influencers are likely to design their entire persona around informing followers about dupe products—whatever that term means to them—with account names like @thedupesyouneed⁸⁰ and @dupethat.⁸¹ Given the range of referents for “dupe,” that means some dupe influencers are operating entirely above-board in recommending alternative, lower-cost products in a niche like fashion or beauty, while others deal primarily in counterfeits.

It also means some influencers are unknowingly endorsing infringing products or making deceptive claims, which may be riskier than they realize given that it’s possible—if unlikely—for them to be liable for false or misleading

⁷⁸ See *Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 635 n.1 (S.D.N.Y. 2016) (“When a customer arrives at the retailer’s website by clicking on the [affiliate]’s URL link, any resulting purchases are tracked and the affiliate receives a commission on each purchase.”).

⁷⁹ Roberts, *supra* note 74, at 124 n.292 (“[I]nfluencers approved by LTK.it do not require brands’ permission to promote products and receive commission on sales, although some do use the app in conjunction with paid collaborations. . . . The same is true for Amazon’s affiliate program.”) (citing *What Is RewardStyle?*, ONE ROOF SOC. (June 11, 2018), <https://www.oneroofsocial.com/articles/rewardstyle> [<https://perma.cc/ANE4-W4QU>]); Meg Prater, *Everything You Need to Know About the Amazon Affiliate Program*, HUBSPOT (May 29, 2020), <https://blog.hubspot.com/sales/amazon-affiliate> [<https://perma.cc/H9LP-WAMS>]; *What is TikTok Shop Affiliate Marketing?*, TIKTOK SHOP (May 3, 2023), <https://business.tiktokshop.com/uk/blog/detail/10018122> [<https://perma.cc/UH9N-ZQSL>]).

⁸⁰ The Dupes You Need (@thedupesyouneed), TIKTOK, https://www.tiktok.com/@thedupesyouneed_ [<https://perma.cc/TBR6-5EE7>] (last visited Mar. 22, 2025).

⁸¹ DUPETHAT (@dupethat), INSTAGRAM, <https://www.instagram.com/dupethat> (last visited Mar. 22, 2025).

advertising⁸² as well as direct or contributory infringement.⁸³ Whether an influencer is hired directly by a brand, uses affiliate links independently, or does not earn money at all when they post about dupes has implications for liability, as does any guidance they receive from the brand they're endorsing. An influencer who posts about dupes for fun, not profit, or monetizes their account with an embedded advertising model like the one YouTube uses for successful channels rather than tying profits to specific endorsements or sales, is less likely to be liable for deceptive claims or infringement. An influencer who uses an affiliate model or sells their own goods or services is engaging in advertising and may be liable under state or federal law;⁸⁴ the nature of their posts may also bring them under a separate set of platform-specific rules for advertisers that don't apply to users sharing finds for free.

And when an influencer contracts with a brand to endorse their products, both the influencer and the brand may be liable if the influencer violates the law. For example, haircare brand L'Oréal hired twin influencers Makenzie and Malia to post on TikTok about the brand's Olaplex dupe,⁸⁵ a relationship the twins disclosed in compliance with FTC guidance using the hashtag #LorealParisPartner. If aspects

⁸² "Any party who makes a false or misleading advertising statement can theoretically be liable under the Lanham Act. Most false advertising claims are brought against the seller of goods, which is often the party that directly disseminated the false or misleading claim. But other parties, including the agency who authored a campaign and the individual endorsers who played a role in disseminating its claims, may also be liable." Roberts, *supra* note 74, at 129 (citing Bruce P. Keller, "It Keeps Going and Going and Going": *The Expansion of False Advertising Litigation Under the Lanham Act*, 59 L. & CONTEMP. PROBS. 131, 139–40 (1996)); *Tria Beauty, Inc. v. Radiance, Inc.*, No. C 10-5030 RS, 2012 WL 12919483, at *3 (N.D. Cal. June 12, 2012) (declining to dismiss false advertising claim against endorser under California law); *see also* FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.1(d)–(e) (2023) ("The [endorser] is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. . . . Endorsers may be liable for statements made in the course of their endorsements . . .").

⁸³ *See, e.g.,* *Petunia Prods., Inc. v. Rodan & Fields LLC*, No. 8:21-cv-00630, 2022 U.S. Dist. LEXIS 135324, at *6 (C.D. Cal. Aug. 6, 2021). Actress and influencer Molly Sims was sued for direct trademark infringement along with multi-level marketing company Rodan + Fields, whose brow product she endorsed on her blog. The court refused to dismiss Petunia's trademark infringement and unfair competition claims in the lawsuit against Sims in an August 2021 order, reasoning that her blog post was a paid advertisement and crossed the line "from protected consumer commentary to commercial use."

⁸⁴ *See, e.g.,* Order Denying Defendant's Motion to Dismiss and Motion to Strike at 4–5, *Travelers v. Expedition 196, LLC*, No. 2022-CA-003089-B (D.C. Super. Ct. Sept. 13, 2023) (holding that an influencer can qualify as a merchant under the DC consumer protection statute's definition and be liable under advertising laws that govern merchants).

⁸⁵ Singh-Kurtz, *supra* note 26.

of their message, which includes “Dupe alert” and “I’m talkin’ \$33 versus \$90,”⁸⁶ were deemed deceptive, both L’Oréal and the twins could be held accountable.⁸⁷

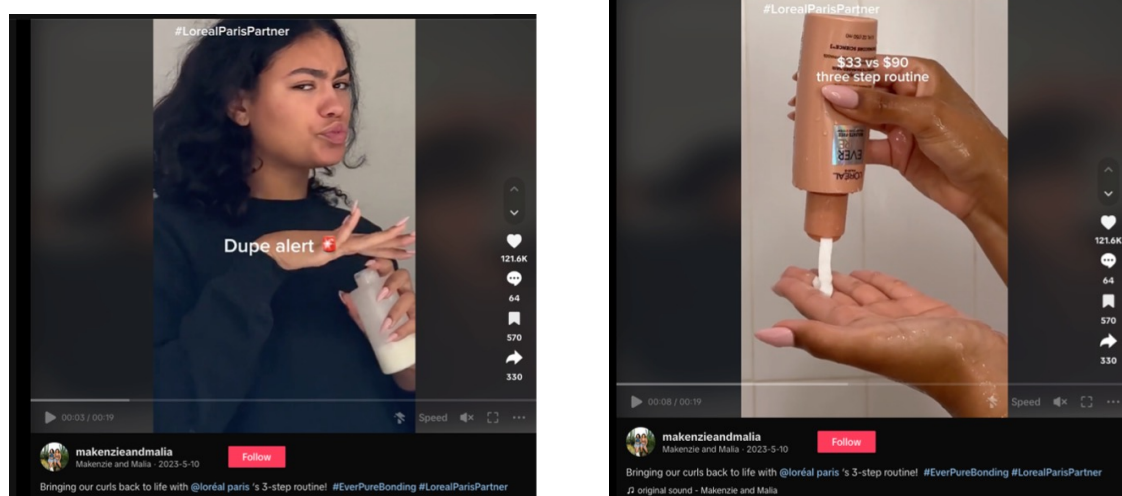


Figure 2: @Makenzieandmalia display an Olaplex product for which they claim the L’Oreal product is a dupe, with on-screen text “Dupe alert” and the hashtag #LorealParisPartner.

III DUPE ADVERTISING LAW

False advertising is prohibited by a number of different laws, including the federal Lanham Act, the Federal Trade Commission (FTC) Act, and state consumer protection or deceptive practices statutes and common law prohibitions.⁸⁸ False advertising also violates the terms of service of most social media platforms.⁸⁹ Section 43(a)(1)(B) of the Lanham Act prohibits false or misleading statements about a company’s own goods or services or those of another party that are likely to deceive consumers, affect their purchasing decision, and harm the complaining party in some way, such as through reduced sales or reputational damage.⁹⁰

⁸⁶ Makenzie and Malia (@makenzieandmalia), TIKTOK, <https://www.tiktok.com/@makenzieandmalia/video/7231657344751422766> [<https://perma.cc/4TU9-T7XE>].

⁸⁷ 16 C.F.R. § 255.1(d) (“Advertisers are subject to liability for misleading or unsubstantiated statements made through endorsements or for failing to disclose unexpected material connections between themselves and their endorsers.”).

⁸⁸ For more extensive discussion of false advertising prohibitions under state, federal, and agency laws, see Alexandra J. Roberts, *Multi-Level Lies* at III, U.C. DAVIS L. REV. (forthcoming 2025) (manuscript at 7).

⁸⁹ *Id.* at 16–18 (discussing advertising-related terms of service on Facebook, Instagram, TikTok, LinkedIn, and Twitch).

⁹⁰ 15 U.S.C. § 1125(a)(1)(B).

Companies have standing to sue under the Lanham Act; consumers do not.⁹¹ The FTC Act, meanwhile, prohibits unfair or deceptive acts or practices in commerce as part of FTC's consumer protection mandate.⁹² The Commission can bring administrative complaints or federal lawsuits, issue cease and desist orders, enjoin deceptive practices, mandate corrective advertising or disclosures, and impose penalties such as disgorgement and restitution.⁹³ And consumer protection laws in every state prohibit deceptive commercial practices; in most states both consumers and attorneys general or other state agencies are empowered to sue violators to enforce those prohibitions.⁹⁴

FTC also issues additional guidance construing the FTC Act, including guidance specific to individuals and brands engaging in influencer marketing, a form of endorsement.⁹⁵ According to its "Guides Concerning the Use of Endorsements and Testimonials," endorsements must be truthful and nonmisleading and reflect the honest opinions of the endorser,⁹⁶ and an endorser must have been a bona fide user of the product advertised when an ad represents them to be.⁹⁷ Endorsers' claims also require substantiation, just as an advertiser's own claims do.⁹⁸ And individuals who receive a material benefit for endorsing a product or brand that might affect the weight or credibility of their endorsement must clearly disclose that fact.⁹⁹ A material benefit can include getting paid to post

⁹¹ See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131–32 (2014) ("[A] plaintiff must allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act . . .").

⁹² 15 U.S.C. § 45(a)(1).

⁹³ 15 U.S.C. §§ 45(l)–(m).

⁹⁴ See generally CAROLYN CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 9 (Mar. 2018), <https://www.nclc.org/resources/how-well-do-states-protect-consumers/> [<https://perma.cc/R9VS-5Z48>]; Roberts, *supra* note 88 (manuscript at 18–19).

⁹⁵ 16 C.F.R. § 255.1(a); see also *FTC's Endorsement Guides: What People Are Asking*, FTC (June 2023), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/JX9S-6EMZ>].

⁹⁶ 16 C.F.R. § 255.1(a).

⁹⁷ 16 C.F.R. § 255.1(c).

⁹⁸ 16 C.F.R. § 255.1(a); FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984).

⁹⁹ 16 C.F.R. § 255.5; FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596, 22599 (Apr. 18, 2016).

about a product, receiving a percentage of sales through an affiliate agreement, owning a stake in the business whose products the influencer endorses, or receiving free products or services.¹⁰⁰ Both advertisers and endorsers are liable for false or unsubstantiated statements made by endorsers, as well as for endorsers' failure to disclose that content is sponsored.¹⁰¹ So while some advertisers seem to view influencer marketing as a loophole that enables them to disseminate false claims or disguise advertisements as organic content, FTC guidance and other advertising regulations belie that view. While dupe influencers are more likely to engage in affiliate marketing directly through a platform like LTK.it or Amazon storefront, as discussed above, they are still included as endorsers under FTC's definitions and bound by the same guidance.¹⁰² Influencer marketing can be particularly insidious because it filters advertising claims through individuals whose followers feel they know and trust them, and whose recommendations those followers view as authentic and sincere.¹⁰³ Those features make application of false advertising laws in the influencer marketing context crucial to avoid deception.

Comparative advertising—comparing one's products or services to those of another—is legal as long as it isn't false or deceptive.¹⁰⁴ In fact, according to one practical guide, about a third of all advertising in the US is comparative, and studies show that comparative ad claims “produce[] greater attention and message recall” than noncomparative claims.”¹⁰⁵ FTC has defined comparative advertising as “advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other

¹⁰⁰ The same is true in Europe. *See* Case C-371/20, *Peek & Cloppenburg KG v. Peek & Cloppenburg KG*, ECLI:EU:C:2021:674 (CJEU 2021) (clarifying the concept of payment in the Unfair Commercial Practices Directive).

¹⁰¹ 16 C.F.R. § 255.1(d).

¹⁰² *See* 16 C.F.R. § 255.5 (example 11); Guides Concerning Use of Endorsements and Testimonials in Advertising, 88 Fed. Reg. 48092, 48102 (Jul. 26, 2023).

¹⁰³ Roberts, *supra* note 74, at 84–85.

¹⁰⁴ *See* 4 CALLMANN ON UNFAIR COMP., TR. & MONO. § 22:45 n.17 (4th ed. 2024) (citing federal and state cases); *Sykes Lab'y, Inc. v. Calvin*, 610 F. Supp. 849, 854-55 (C.D. Cal. 1985) (“The sole limitation on this freedom [to copy another's product and reference their mark] is that the copyist cannot use another's trademark in a manner that would confuse the public as to the copy's source and he cannot make false claims about the similarity or respective quality of the products involved.”).

¹⁰⁵ Jenna D. Beller, *The Law of Comparative Advertising in the United States and Around the World: A Practical Guide for U.S. Lawyers and Their Clients*, 29 INT'L LAW. 917, 920 (1995).

distinctive information.”¹⁰⁶ Comparative claims can include superiority claims, which assert a product is better than those of competitors, and parity claims, which assert that a product is at least equal to those of competitors.¹⁰⁷ And advertisers are entitled to use competitors’ trademarks in advertising, calling the products or brands out by name, as long as they satisfy the principles of nominative fair use.¹⁰⁸ Under nominative fair use doctrine, advertisers are free to compare their products to those of competitors—including calling out those competitors by name—and explain why consumers should choose theirs, with slogans like “produce as fresh as Whole Foods, at half the price” or “if you like Ray-Ban, you’ll LOVE Rayex.”

Those references to others’ products do not just benefit the advertisers—they benefit consumers too, providing information and benchmarks that shoppers often find useful in making a purchasing decision. Comparative advertising may be particularly crucial to sellers of products like eyeshadow, perfume, and food; as one treatise author points out, “colors, scents, and flavors . . . cannot be described verbally; they can only be compared to something the consumer already knows.”¹⁰⁹ FTC has officially come out in support of comparative advertising, which it deems “a source of important information to consumers [that] assists them in making rational purchase decisions, . . . encourages product improvement and innovation, and can lead to lower prices in the marketplace.”¹¹⁰ The Commission is therefore committed to “scrutinize carefully” attempts to restrain the use of comparative advertising given its benefits.¹¹¹

¹⁰⁶ FTC, Statement of Policy Regarding Comparative Advertising (Aug. 13, 1979), <http://www.ftc.gov/bcp/policystmt/ad-compare.htm> [<https://perma.cc/6JFZ-Q647>].

¹⁰⁷ Leonard K. Samuels & Jeffrey S. Wertman, *Is Your Competitor Making False Comparative Advertising Claims?*, BERGER SINGERMANN LLP (Nov. 30, 2016), <https://www.bergersingerman.com/news-insights/is-your-competitor-making-false-comparative-advertising> [<https://perma.cc/XXW7-V39D>].

¹⁰⁸ The nominative fair use doctrine varies somewhat by jurisdiction, but the most commonly-used test requires that 1) the product or service in question is not readily identifiable without use of the trademark; 2) only so much of the mark as is reasonably necessary to identify the product or service is used; and 3) the user has done nothing that would suggest sponsorship or endorsement by the trademark holder. *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 304, 308 (9th Cir. 1992).

¹⁰⁹ 4 CALLMAN ON UNFAIR COMP., TR. & MONO. § 22:45 n.5 (4th ed.)

¹¹⁰ FTC, *supra* note 106.

¹¹¹ *Id.*

But that commitment comes with caveats.¹¹² FTC supports brand comparisons where the advertiser identifies the basis of comparison, such as price or performance. Comparative claims, like all advertising claims, must be truthful and non-deceptive, and comparative advertising in particular “requires clarity.”¹¹³ The McCarthy treatise reminds, “[e]ven if a seller uses a competitor’s mark in comparative advertising so as not to cause a likelihood of confusion of affiliation, but the claims of comparison with other goods are not true, there can be liability for false advertising or trade disparagement.”¹¹⁴ Professors Tushnet and Goldman, in their advertising law casebook, note that parity claims can only be proven false by showing that the comparator is superior,¹¹⁵ i.e. that the advertised product is not as good as, as effective as, or as liked as the product to which the ad compares it. “Nonetheless,” they continue, “products need not be identical to be compared. If the basis of comparison is sensible in light of consumer uses of a product or service, then comparison is legitimate even though other types of comparisons are also possible.”¹¹⁶

When assessing whether an advertising claim is false or misleading, factfinders place claims into one of several categories. A claim can only be a statement of fact if it’s capable of being proven true or false.¹¹⁷ Claims that are too general, vague, subjective, or exaggerated to be understood as factual are known as “puffery.” A slogan like “Better ingredients. Better pizza” for a restaurant chain falls into this category: whether one set of ingredients or brand of pizza is better or worse is a subjective assertion, and different consumers are likely to reach different conclusions.¹¹⁸ Likewise, a claim that a brand of pasta is “America’s Favorite Pasta” constitutes mere opinion, rather than a statement

¹¹² See, e.g., *SATA GmbH & Co. KG v. Cent. Purchasing LLC*, No. CV2002131DDPJPRX, 2021 WL 949598, at *4 (C.D. Cal. Mar. 12, 2021) (“Notably, the [FTC] regulation does not preclude prohibitions on comparative advertising, or even suggest that all comparative advertising is pro-competitive. Rather, the regulation emphasizes the value of truthful, non-deceptive comparative advertising.”).

¹¹³ FTC, *supra* note 106.

¹¹⁴ 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:52 (5th ed.).

¹¹⁵ REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW: CASES AND MATERIALS* 244 (5th ed. 2020).

¹¹⁶ *Id.* at 246.

¹¹⁷ *Pizza Hut, Inc. v. Papa John’s*, 227 F.3d 489, 496 (5th Cir. 2000) (“[A] statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification.”).

¹¹⁸ *Id.*

of fact that could be adjudged true or false.¹¹⁹ And when a cable company ran ads showing pixelated images to represent the clarity of a competitor's picture, the court ruled those images puffery rather than false visual claims because they were so exaggerated that no reasonable consumer would take them seriously.¹²⁰ Advertising law is centered on consumer perception. So if we surveyed consumers, we might find that any reasonable shopper who saw a post touting a \$12 Shein boot as a dupe for a \$2,000.00 Chanel boot would consider the comparison mere puffery, too exaggerated and unlikely a proposition to convey any real or measurable equivalence between the shoes besides the basic fact that both are, well, shoes. But if every claim calling something a dupe is mere puffery, how do we end up with nearly half of the consumers surveyed reporting they felt scammed or disappointed by a dupe?¹²¹

If an advertising claim is not puffery, it might be deemed literally false, false by necessary implication, or misleading. Claims communicated through visual representations, including photographs, images, and videos, can qualify as false or misleading claims.¹²² Most jurisdictions and FTC divide literally false claims into two categories: efficacy claims, which are general claims that a product is effective or does what it's supposed to do, and establishment claims, which reference data or studies in support of their veracity. Courts typically interpret a *prima facie* Section 43(a)(1)(B) case to require that an actionable claim be 1) false or misleading; 2) affecting interstate commerce; 3) in advertising or promotion; 4) deceptive; 5) material, i.e. affecting the purchasing decision; and 6) injurious.¹²³ Most courts presume deceptiveness when a claim is literally false, and some also presume materiality; otherwise, or when a claim is deemed merely misleading, deceptiveness and materiality can be proved using consumer surveys. FTC takes a similar approach; it also considers not only what the claim affirmatively communicates but also whether it fails by omission to reveal any

¹¹⁹ *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391 (8th Cir. 2004).

¹²⁰ *Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144, 148 (2d Cir. 2007).

¹²¹ TRUSTPILOT, I note 48.

¹²² Roberts, *supra* note 74, at 112–13; *see generally* Malla Pollack, *Suing Your Cut-Rate Competitor: Store Brands and “Compare To” Packaging*, 113 AM. JUR. TRIALS 279 (2009).

¹²³ TUSHNET & GOLDMAN, *supra* note 115. These factors are derived from the landmark false advertising case *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 782–83 (N.D. Ill. 1974).

material facts.¹²⁴ State laws vary, with some defining false advertising explicitly and others incorporating FTC's definitions.¹²⁵

Of course, heterogeneity in meaning will always exist—the same claim in the same advertisement will be interpreted differently by different consumers based on their experience, expectations, trust in the source, and other factors. For survey evidence to be useful, courts need to establish some benchmarks to determine how many deceived consumers is enough to enjoin a claim. Courts have grappled with the same question in trademark law: how many consumers must find a mark famous, generic, inherently distinctive, or confusingly similar to another mark for an owner to earn or lose protection or succeed in enforcing their rights against another party? While there are no concrete answers to that question, courts considering survey evidence in a likelihood of confusion analysis generally agree that “a competent survey showing that the number of deceived consumers is ‘not insignificant’ will be sufficient proof of confusion.”¹²⁶ Some consider 15% the key threshold for a survey to weigh toward infringement.¹²⁷

In Section 43(a)(1)(B) cases, when courts presume a literally false claim is deceptive and material, actual consumer perception is less likely to influence the outcome. Where a claim is impliedly false or merely misleading, though, courts rely heavily on surveys, and tend to apply a similar “not insignificant” or “not insubstantial” standard to the one they use in infringement cases.¹²⁸ Survey

¹²⁴ 15 U.S.C.A. § 55 (West) (defining “false advertisement”); *FTC and FDA Send Warning Letters to Companies Selling Flavored E-liquids About Social Media Endorsements Without Health Warnings*, FTC (June 7, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/06/ftc-fda-send-warning-letters-companies-selling-flavored-e-liquids-about-social-media-endorsements> [<https://perma.cc/RA5Z-E783>] (“The FTC stated [in warning letters] that the FTC Act’s prohibition on unfair or deceptive practices includes the failure to disclose material health or safety risks in advertising.”).

¹²⁵ Roberts, *supra* note 88 (manuscript at 15–16).

¹²⁶ Thomas W. Edman, *Lies, Damn Lies, and Misleading Advertising: The Role of Consumer Surveys in the Wake of Mead Johnson v. Abbott Labs*, 43 WM. & MARY L. REV. 417, 430–31 (2001).

¹²⁷ See, e.g., Camilla Hrdy, *Likelihood of Confusion: Is 15% The Magic Number?*, WRITTEN DESCRIPTION BLOG (May 17, 2019, 5:49 PM), <https://writtendescription.blogspot.com/2019/05/likelihood-of-confusion-is-15-magic.html> [<https://perma.cc/D2LV-GBVQ>] (recounting a talk by attorney David Bernstein about the “fifteen percent benchmark” in trademark likelihood of confusion analyses).

¹²⁸ TUSHNET & GOLDMAN, *supra* note 115, at 178 (surveying case law and summarizing that “a good rule of thumb is that a good, well-controlled survey that shows net 20% or greater deception will be highly persuasive for the plaintiff, and that one that shows 10% or less will be persuasive for the defendant.”). FTC also applies a “substantial number” standard when considering how many consumers must be likely to be deceived. *Id.*

evidence is usually not necessary in FTC and Better Business Bureau's National Advertising Division (NAD) cases—both agencies consider themselves sufficiently expert to judge how a claim will be perceived—but it may still be helpful.¹²⁹ Courts construing both the FTC Act and the Lanham Act have held that where the false claim is likely to cause very serious harm or involve human safety, smaller percentages of deceived consumers may suffice to support the claim.¹³⁰

As an alternative to courts, some companies take their false advertising complaints to NAD. NAD applies federal false advertising law as well as some principles derived from FTC guidance¹³¹ in its non-binding dispute resolution process. Companies with gripes against competitors' advertising find the NAD appealing because its process is streamlined, efficient, and far less expensive than federal litigation, and most companies whose ad claims are challenged voluntarily comply with NAD's recommendations—perhaps because if they decline, NAD refers the dispute to FTC. NAD also conducts its own monitoring of advertising claims and independently initiates about a quarter of the cases it hears.¹³²

In determining whether an advertising claim is false, factfinders must first construe the meaning of the claim.¹³³ Few courts have taken up the question of how to interpret a claim that one product is a dupe of another.¹³⁴ But dupe advertising is a form of comparative advertising, which is a genre courts have certainly seen before. Claims like “compare [product being advertised] to [other leading product]” or “if you like [competitor brand], you'll love [advertiser's brand]” are far from

¹²⁹ *Id.* at 164.

¹³⁰ *Id.*

¹³¹ Roberts, *supra* note 74, at 113 (citing Terri Seligman & Hannah Taylor, *Navigating the National Advertising Division*, LANDSLIDE MAG. (Mar.–Apr. 2019), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/navigating-national-advertising-division/#7 [<https://perma.cc/46ZT-PDJ2>]; John E. Villafranco & Katherine E. Riley, *ABA, So You Want to Self-Regulate? The National Advertising Division as Standard Bearer*, 27 ANTITRUST 79, 79–80 (2013)).

¹³² *National Advertising Division (NAD)*, BBB NAT'L PROGAMS, <https://bbbprograms.org/programs/all-programs/national-advertising-division#> [<https://perma.cc/X8P2-ANLL>].

¹³³ *Sherrell Perfumers, Inc. v. Revlon, Inc.*, 483 F. Supp. 188, 191 (S.D.N.Y. 1980) (citing *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 164–67 (2d Cir. 1978)).

¹³⁴ *But see Bausch & Lomb Inc. v. Nevitt Sales Corp.*, 810 F. Supp. 466, 469 (W.D.N.Y. 1993) (granting preliminary injunction where defendant “envisioned” its sunglasses as “less expensive ‘duplicates’” of Ray-Ban's and “referred to some ... as duplicates of Wayfarers® or Clubmasters®, or as Cat® style sunglasses”).

new.¹³⁵ The Eighth Circuit in one such like/love case held that an advertiser “does not commit unfair competition merely because it refers to another’s product by name in order to win over customers interested in a lower cost copy of that product if the reference is truthful” and non-confusing.¹³⁶ A federal court applying state law reached the same conclusion where an advertiser used the phrase “If You Like Estee Lauder ... You’ll Love Beauty USA.”¹³⁷ Likewise, the Second Circuit had no problem with hang tags that described the garments they hung from as copies of Dior originals, holding that the law “does not prohibit a commercial rival’s truthfully denominating his goods a copy of a design in the public domain, though he uses the name of the designer to do so.”¹³⁸

But the details matter. Courts have held that while comparative claims communicate a mere invitation to compare in some cases, in others they may convey, “depending on their wording and context, ... a specific assertion of measurable fact, such as the same ingredients or efficacy.”¹³⁹ Factfinders in some cases have therefore deemed “like/love,”¹⁴⁰ “alternative to,”¹⁴¹ “compare to,” or “our version of” advertising claims to communicate a factual representation of equivalence or a claim requiring substantiation. In one case, perfume brand Shalimar contended that another brand’s claims that its product was “like” or

¹³⁵ See Pollack, *supra* note 122, at § 55 (“Courts officially approve of truthful comparative advertising. However, not all ‘like, love’ or ‘compare to’ cases rule for the defendant.”).

¹³⁶ Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd., 824 F.2d 665, 668 (8th Cir. 1987).

¹³⁷ Diversified Mktg., Inc. v. Estee Lauder, Inc., 705 F. Supp. 128, 137 (S.D.N.Y. 1988).

¹³⁸ Societe Comptoir De L’Industrie Cotonniere Etablissements Boussac v. Alexander’s Dept. Stores, Inc., 299 F.2d 33, 36 (2d Cir. 1962).

¹³⁹ Rexall Sundown, Inc. v. Perrigo Co., 651 F. Supp. 2d 9, 21 (E.D.N.Y. 2009) (citing Axcan Scandipharm Inc. v. Ethex Corp., 585 F. Supp. 2d 1067, 1083 (D. Minn. 2007) (plaintiff could succeed on its claims that its product was an alternative to defendant’s product “if it can prove that the Defendants’ advertising suggests that [the products] contain the same ingredients, in the same quantities ... when in fact they do not”)) (denying summary judgment and finding “Rexall has raised a genuine disputed issue of material fact as to whether any alleged implied assertion of equivalence, in terms of ingredient formulation and/or efficacy in defendant’s Compare To Statements, is false”).

¹⁴⁰ Charles of the Ritz Grp. Ltd. v. Quality King Distribs., Inc., 636 F. Supp. 433, 438 (S.D.N.Y. 1986) (enjoined based on likelihood of confusion, not falsity of comparative claim).

¹⁴¹ See *Axcan*, 585 F. Supp. 2d at 1083 (citing Healthpoint, Ltd. v. Ethex Corp., Civil No. SA-01-CA-646, 2004 WL 2359420, at *16 (W.D. Tex. July 14, 2004) (holding that advertising “wound-debridement ointment as an alternative to the plaintiff’s competing ointment was actionable because it could suggest that the two products had the ‘same active ingredients in the same quantities’”)) (“Courts have...held that advertising one product as an ‘alternative to’ another may violate the Lanham Act”); see also *Solvay Pharms. v. Ethex Corp.*, Civil No. 03-2836(JRT/FLN), 2006 WL 738095, at *3 (D. Minn. Aug. 7, 2006).

“similar to” Shalimar and that “if you like [Shalimar] then you’ll love [Fragrance S]” were false. The district court had granted summary judgment to the advertiser, relying only on the court’s own sniff test in determining that the fragrances were indeed similar, but made clear that if they had not been, it would be possible to find the comparison “false, misleading, or fraudulent.”¹⁴² The Ninth Circuit, pointing to expert affidavits concluding that the products differed in chemical composition, fragrance, and longevity,¹⁴³ reversed the district court, finding a genuine issue of material fact remained on the similarity question and therefore on whether the advertiser’s comparative claims constituted false representations.¹⁴⁴ In a different perfume case, the court deemed packaging that called copycat perfumes “our version of” better-known scents deceptive because that language “impl[ied] that the products are similar, if not equivalent,” when they were actually neither.¹⁴⁵

Meanwhile, in a district court case, a manufacturer of dietary and nutritional supplements called Body Solutions sued a competitor, alleging that its use of the phrase “Compare to Body Solutions” on labels constituted a false or misleading claim because it suggested that the two products were identical, substantially similar, or equally effective.¹⁴⁶ While the advertiser tried to paint its comparative claim as puffery, the court disagreed, stating that the “invitation to ‘compare’ does not qualify as a vague claim of superiority. Unlike more subjective terms often used in advertising, ‘compare’ suggests that a product’s performance has in fact been tested and verified.”¹⁴⁷ And in another case, a district court considered sunglasses sold with a label inviting consumers to compare its prices to another brand and concluded that the label was misleading in that it either suggested that the products were similar in quality or that they were affiliated.¹⁴⁸ Because the lens quality was totally dissimilar and the companies were not affiliated, the court deemed the comparison misleading.¹⁴⁹ In other words, the court held that an invitation

¹⁴² Saxony Prod., Inc. v. Guerlain, Inc., 513 F.2d 716, 721 (9th Cir. 1975).

¹⁴³ *Id.* at 722.

¹⁴⁴ *Id.* at 723.

¹⁴⁵ Coty Inc. v. Excell Brands, LLC, 277 F. Supp. 3d 425, 461 (S.D.N.Y. 2017).

¹⁴⁶ Nutrition & Fitness, Inc. v. Mark Nutritionals, Inc., 202 F. Supp. 2d 431, 434 (M.D.N.C. 2002).

¹⁴⁷ *Id.* at 435–36 (denying motion to dismiss and holding that “at this stage, Defendant has adequately alleged that Plaintiff’s labels contain a false or misleading statement”).

¹⁴⁸ Cartier, Inc. v. Deziner Wholesale, LLC, No. 98 Civ. 4947(RLC), 2000 WL 347171, at *4 (S.D.N.Y. 2000).

¹⁴⁹ *Id.* at *4–5.

to compare a low-end copycat with the high-end product it copied communicated more than simply “both brands sell sunglasses, and Deziner’s sunglasses cost less.” Instead, it conveyed some equivalence between the products—one the court found did not exist.¹⁵⁰ In the Dior hangtag case mentioned above, the court only declined to enjoin the comparison to the luxury brand because it was “apparently truthful,” clarifying “[w]e do not understand plaintiffs to claim that the garments were so poorly made or executed as not to constitute copies.” Some dupes, as we know, *are* so poorly made as not to constitute copies¹⁵¹—so to the extent that the line of cases allowing comparative claims rests on truthful comparison, it will not always apply if dupe claims are challenged.

It bears noting, though, that many of the Lanham Act cases that have explored the possible deceptiveness of comparative advertising claims are at heart trademark or trade dress infringement cases that also allege unfair competition, free-riding, or false advertising; their likelihood of confusion and false advertising analyses can be difficult to disentangle completely.¹⁵² The NAD considers only advertising claims, so its assessments are not intertwined with trademark ones. According to NAD, “the determination as to whether a ‘compare to’ claim is a comparative performance claim or merely an ‘invitation’ to compare the products in question depends on the context in which the ‘compare to’ claim appears in the challenged advertising.”¹⁵³ That context can include factors like the product’s positioning as a house brand offering¹⁵⁴ or the proximity of the “compare to” claim to more objective efficacy claims like, in the case of shoe inserts billed as similar to

¹⁵⁰ Note that comparative claims about prescription drugs or devices fall under FDA jurisdiction and require a much higher level of substantiation if deemed to be claims of bioequivalence.

¹⁵¹ See, e.g., Rosey Bowing, *Is It a Dupe, or Is It Just a Scam?*, BROWSER MEDIA (Jan. 31, 2024), <https://browsermedia.agency/blog/is-it-a-dupe-or-is-it-just-a-scam/> [<https://perma.cc/NG5W-DFX4>] (recounting how one creator noticed thirty-two different companies advertising a dupe of a specific corset-backed dress, so she ordered several to compare; all of the dupes she received were poor quality and lacking basic features: “none of the dresses matched the pattern of the one shown in the ads, and every single one was made out of cheap, flimsy fabric, with little shape or support. And of course, no corset back on any of them.”).

¹⁵² The claim “if you love Ray-Ban®, you’ll LOVE Rayex®,” for example, was held to exacerbate the likelihood of confusion that already existed. *Bausch & Lomb Inc. v. Nevitt Sales Corp.*, 810 F. Supp. 466, 477 (W.D.N.Y. 1993).

¹⁵³ *Bausch & Lomb Inc. v. Wal-Mart Stores, Inc.*, NAD/CARU Case No. 5808 (Feb. 4, 2015), at 1.

¹⁵⁴ *Id.* at 13–14 (“NAD noted that consumers who shop at Wal-Mart are familiar with the Equate brand as being a Wal-Mart brand and, hence, a less expensive alternative to competing name brands . . . In these contexts, NAD determined that the challenged ‘Compare to’ claims invite consumers to try Equate’s less expensive or ‘value’ products and compare it with their brand-name counterparts”).

Dr. Scholl's, "Superior Comfort" and "Helps Reduce Impact Forces." In several cases, NAD has deemed "compare to" claims simply invitations to compare two products without making parity or comparative performance claims that require substantiation.¹⁵⁵ But in one of those cases, NAD rested its conclusion in part on the fact that a real basis for comparison did exist, "unlike an advertiser that seeks to deceptively 'upgrade' its product by comparing it to a completely dissimilar and superior product."¹⁵⁶ And in a handful of other decisions, NAD recommended that advertisers discontinue use of "compare to" claims, finding they could leave reasonable consumers under the impression that the brands being compared "are similar in type, composition and efficacy"¹⁵⁷ when no substantiation for those claims had been provided.

FTC does not appear thus far to have taken specific action against dupe influencers or issued guidance about the use of the term "dupe." But it seems inevitable that some dupe influencers violate its Guides. First, a study found that most influencers engaged in affiliate marketing on YouTube and Pinterest fail to disclose that they derive a material benefit from those posts.¹⁵⁸ That failure may be even more deceptive than it is when traditional influencers do it, because it's more difficult for followers to spot that an influencer's posts are advertisements when they are not shilling for a well-known brand. Second, influencers can be liable under the FTC Act for false or misleading claims, just like traditional advertisers can; if comparative claims can be construed as making representations about quality, materials, or product features, which Lanham Act and NAD precedent indicates

¹⁵⁵ *Id.*; *Energizer Holdings, Inc. v. Spectrum Brands, Inc.*, NAD/CARU Case No. 5132 (Jan. 5, 2010); *Merz Pharmaceuticals LLC vs: Target Corp.*, NAD/CARU Case No. 4688 (June 29, 2007); see also *Diversified Marketing, Inc. v. Estee Lauder, Inc.*, 705 F. Supp. 128, 132 (S.D.N.Y. 1988) ("Plaintiff's advertising may invite comparative shopping ...").

¹⁵⁶ *Energizer Holdings*, NAD/CARU Case No. 5132 at 10.

¹⁵⁷ *Lifes2Good, Inc. v. Lang Pharma Nutrition, Inc.*, NAD/CARU Case No. 5881 (Sept. 2, 2015) at 13; see also *Schering-Plough Healthcare Products, Inc. v. Implus Corp.*, NAD/CARU Case No. 3563 (July 1, 1999) ("NAD concluded that although the claim 'compare [Foot Cradle] to DynaStep' is not an explicit, comparative claim, in the context of the challenged advertising it could be reasonably interpreted to mean that Foot Cradle is the functional equivalent of DynaStep").

¹⁵⁸ Arunesh Mathur, Arvind Narayanan & Marshini Chetty, *Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest*, 2 *PROC. OF THE ACM ON HUM.-COMPUT. INTERACTION* 1, 2 (empirical research analyzing 3,472 YouTube videos and 18,237 Pinterest pins with affiliate links and finding only 7 to 10% contained any written disclosure, and the vast majority of those disclosures did not satisfy FTC disclosure guidelines).

they can, then claims that one product is a dupe for another may well be deemed false. And finally, an endorser must be a bona fide user sharing their true opinion. Some dupe influencers have explained that they use features like reverse image searching to locate dupes to share with their followers.¹⁵⁹ Whether the dupe is a couch or a lipstick, an influencer who doesn't own and use it or hasn't at least tried it out violates this aspect of FTC guidance.

While this discussion focuses primarily on US advertising law and US cases, dupe advertising takes place—and reaches consumers—worldwide. As in other aspects of advertising regulation, some countries have more restrictive laws about comparative advertising than does the US.¹⁶⁰ A number of civil law regimes prohibit or previously prohibited comparative advertising completely, some on the view that even non-confusing comparative advertising necessarily involves one brand free-riding on the goodwill of another.¹⁶¹ In the European Union, the Misleading and Comparative Advertising Directive lists the conditions under which comparative advertising is permitted, including where “it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.”¹⁶² That means that even in the absence of confusion or deception, an advertiser can face liability for advertising something as an imitation or replica of a branded good. In one case applying that provision, a company advertised smell-alike perfumes, using similar packaging to the branded version and providing retailers with a comparison list matching the branded perfumes with the advertiser's own version.¹⁶³ The UK court that initially heard the case concluded that the advertiser's use of the other perfume trademarks violated the law by taking unfair advantage of the reputation of the brands it copied, even though

¹⁵⁹ See Singh-Kurtz, *supra* note 26 (quoting interior design influencer Emily Wainwright, who uses Google Shopping and reads reviews to find dupes to post, and finance influencer Sarah Adekola, who uses reverse image searching on a number of platforms to locate dupes to share); Maguire, *supra* note 20 (describing influencer Vivian Tu's process of finding a “dupe” Bottega Veneta bag using reverse image searching on Amazon and then adding it to her Amazon storefront).

¹⁶⁰ See Roberts, *supra* note 74, at 114 n.223.

¹⁶¹ LaFrance, *supra* note 45, at 1108.

¹⁶² Directive 2006/114/EC Article 4(g) of the European Parliament and of the Council of 12 December 2006 Concerning Misleading and Comparative Advertising and Repealing Council Directive 84/450/EEC, 2006 O.J. (L 376) 23 (“Comparative advertising shall, as far as the comparison is concerned, be permitted when . . . it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.”)

¹⁶³ L'Oréal SA v. Bellure NV [2007] EWCA (Civ) 968 (Eng.).

neither retailers nor consumers were deceived.¹⁶⁴ The Court of Appeal of England and Wales referred several questions to the European Court of Justice (ECJ).¹⁶⁵ The ECJ agreed with the lower court and further construed the Directive to say that goods or services fall within the meaning of the provision whether presented as imitations or replicas explicitly or implicitly.¹⁶⁶ The ECJ's decision suggests that a term like "dupe" that indicates a product is a duplicate of or substitute for another likely also exceeds the bounds of acceptable comparative advertising in the EU. Nonetheless, the case has its critics;¹⁶⁷ several scholars read the "imitations or replicas" directive as essentially banning comparative advertising.¹⁶⁸

While a few brands are engaging directly in dupe culture, as discussed above, many are watching from the sidelines, scrutinizing references to their brands to determine whether the term signals an infringing product or deceptive claim or merely acceptable comparative advertising or puffery. A number of lawsuits have mentioned or included evidence of use of the term "dupe." Some cite a defendant's products being described as a dupe as evidence of actual confusion, as when American Eagle sued Walmart over jeans that it claimed infringed its distinctive trade dress.¹⁶⁹ Others cite the "dupe" label as proof of intentional copying, as when handbag brand Cult Gaia sought to enjoin Steve Madden's production and sale of a bag it deemed an unauthorized copy of its Ark Bag.¹⁷⁰ One company included

¹⁶⁴ *Id.*; Gencs Valters, *Comparative Advertising in Europe*, GENCS VALTERS LAW FIRM (June 9, 2015), <http://www.gencs.eu/news/view/2411> [<https://perma.cc/57DC-CQAQ>].

¹⁶⁵ *L'Oréal SA v. Bellure NV* [2007] EWCA (Civ) 968 (Eng.).

¹⁶⁶ Case C-487/07, *L'Oréal SA v. Bellure NV*, 2009 E.C.R. 1-05185.

¹⁶⁷ *E.g.*, Dev Gangjee & Robert Burrell, *Because You're Worth It: L'Oréal and the Prohibition on Free Riding*, 73 MOD. L. REV. 282, 283 (2010) (criticizing the case as "theoretically unsound" and "run[ning] counter to the thrust of the European trade mark law").

¹⁶⁸ *See, e.g.*, Darren Meale & Joel Smith, *Enforcing a Trade Mark When Nobody's Confused: Where the Law Stands after L'Oréal and Intel*, 5 J. INTELL. PROP. L. & PRAC. 96, 100 (2010) ("The authors struggle to think of a comparative advert that is now lawful, and this cannot have been the ECJ's intention."); *see also* Rebecca Tushnet, *Towards Symmetry in the Law of Branding*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 971, 973 n.11 (2011) (noting that in Europe, comparative advertising is considered "wrongful behavior").

¹⁶⁹ Plaintiffs' (Redacted) Brief In Support of Motion for Summary Judgment at 7, 16, *Am. Eagle Outfitters, Inc. v. Walmart, Inc.*, No. 2:20-cv-00412-MJH, 2023 WL 1778786 (W.D. Pa. Jan. 28, 2022) ("As reflected in the ... comments from fashion influencers, their followers on social media, and even from shoppers at Walmart.com, consumers have recognized Walmart's jeans with the infringing BPS logo as 'AE dupes' ... actual confusion is reflected in the many comments by consumers and influencers about the similarity of Walmart's Accused BPS logo to AE's BPS logo").

¹⁷⁰ *Steven Madden, Ltd. v. Jasmin Larian, LLC*, No. 18 CIV. 2043, 2019 WL 294767, at *2 (S.D.N.Y. Jan. 22, 2019) (dismissing defendant's counterclaims). The parties settled.

the detail in its utility patent infringement complaint, noting “Beauty writers, influencers, and customers refer to KISS’s copycat Falscara as a ‘dupe’ of Lashify’s system.”¹⁷¹ Another included use of the label in its copyright infringement complaint, suggesting that “consumers and commentators” calling Old Navy items “dupes” of Lilly Pulitzer items was proof of their “striking” similarity.¹⁷² And others, perhaps unsurprisingly, cite the use of “dupe” in reference to products that resemble theirs in general support of their trade dress or trademark infringement claims.¹⁷³

Finally, and most relevant to this discussion, several brands have included evidence of the use of “dupe” or “duplicate” in connection with false advertising claims. Vans, in its suit against Primark alleging trademark infringement and federal false advertising, notes that “Primark’s influencers compare the Infringing Products to Vans authentic products and refer to and promote the Infringing

Cult Gaia and Steve Madden Settle Suit, But Cult Gaia and Madden’s Supplier Are Still Locked in Theirs, *THE FASHION L.* (Aug. 2, 2019), <https://www.thefashionlaw.com/cult-gaia-and-steve-madden-settle-one-suit-cult-gaia-and-maddens-supplier-are-still-locked-in-fight/> [https://perma.cc/PZR6-PD2Z].

¹⁷¹ Complaint at 12, *Lashify, Inc. v. Kiss Nail Prods., Inc.*, No. 2:20-cv-10023 (D.N.J. Aug. 5, 2020). Lashify also used the term in a statement to Law360 celebrating an ITC investigation that included imports of eyelash extension systems, with CEO and founder Sahara Lotti expressing she was “pleased that the ITC instituted the investigation as we need to end the normalization of improper dupes in the beauty industry.” Adam Lidgett, *ITC Launches Fake Eyelash, Computer Gear, OLED Probes*, *Law360* (Oct. 26, 2020), <https://www.law360.com/articles/1322492/itc-launches-fake-eyelash-computer-gear-oled-probes> [https://perma.cc/M3QV-YRJG].

¹⁷² Complaint at 13, *Sugartown Worldwide LLC v. Old Navy, LLC*, No. 1:15-cv-02633-ELR (N.D. Ga. July 24, 2015). *See also* James Charles Calls Foul on Wet n Wild’s Dupe, *Here’s the Legality of the Situation*, *THE FASHION L.* (Sept. 10, 2019), <https://www.thefashionlaw.com/james-charles-calls-foul-of-wet-n-wilds-dupe-heres-the-legality-of-the-situation/> [https://perma.cc/N7Y3-83DB] (discussing Charles’ assertion that Wet ‘n Wild infringed his copyright by copying his eyeshadow palette); *Charlotte Tilbury Prevails in Copyright Case Over Beauty “Dupes”*, *THE FASHION L.* (Aug. 21, 2019), <https://www.thefashionlaw.com/charlotte-tilbury-prevails-in-case-over-beauty-dupes/> [https://perma.cc/2YXN-NDLQ] (discussing Tilbury’s win in UK copyright infringement case over Aldi makeup case and powder).

¹⁷³ *See* Complaint at 71–72, *Vans, Inc. v. Walmart, Inc.*, No. 8:21-cv-01876 (C.D. Cal. Nov. 15, 2021) (“Walmart is well aware that many of its affiliates promote and endorse Walmart’s Infringing Footwear by (1) openly referring to Vans while promoting them, (2) explicitly selling them as ‘Van dupes’ or ‘Vans knockoffs,’ and/or (3) intentionally trying to divert potential customers away from Vans by suggesting that the prestige of Vans’ shoes can be acquired without paying Vans’ normal prices.”); *see also* Complaint at 2, *Amazon.com v. Fitzpatrick et al*, No. 2:20-cv-01662 (W.D. Wash. Nov. 12, 2020) (“Fitzpatrick and Kelly-Krejci refer to the products they promote as ‘dupes’ ... these so-called ‘dupes’ are obviously counterfeit goods that blatantly copy the registered trademarks of luxury brands.”).

Products as ... ‘duplicate’ Vans.”¹⁷⁴ Haircare brand It’s a 10, in a suit against a manufacturer of lookalike products alleging trade dress infringement, federal false advertising, and violation of Florida’s Deceptive Practices Act, highlights consumer reviews on Amazon calling defendant’s product a “drugstore dupe for It’s a 10 Miracle Leave-In” and “a total dupe” for its product.¹⁷⁵ Amazon accused two popular influencer accounts of federal false advertising and violation of Washington’s consumer protection law when they promoted their products as “dupes” as part of a “sophisticated campaign of false advertising for the purpose of evading Amazon’s counterfeit detection tools.”¹⁷⁶ And while Lashify has sued one competitor for allegedly marketing dupes, a second competitor, Urban Dollz, has sued Lashify for false advertising based on claims by the company and its agents that Urban Dollz’ DIY lash system “is a ‘dupe’ of [Lashify’s] system.”¹⁷⁷ In the suit, Urban Dollz seeks an order prohibiting Lashify from “engaging in false advertising under the Lanham Act, including by making false statements ... accusing [Urban Dollz] of being a ... dupe.”¹⁷⁸

Most recently, Williams-Sonoma Inc. (WSI), whose portfolio includes furniture brands Pottery Barn and West Elm as well as Williams-Sonoma, sued dupe.com, a website and browser extension that enables consumers to use reverse image searching to find alternatives to high-end furniture, which the defendant labels “dupes.”¹⁷⁹ WSI alleges numerous kinds of false claims by the defendant, including accusing West Elm of “scam[ming]” consumers by selling for “over \$2,000.00” a chair when the defendant claims “the same chair” is available for 80–90% less from other sellers. In reality, according to the complaint, the West

¹⁷⁴ Complaint at 22, *Vans, Inc. v. Primark Stores Ltd.*, No. 1:18-cv-07214 (E.D.N.Y. Dec. 18, 2018).

¹⁷⁵ Complaint at 6, *It’s a 10, Inc. v. Key Brands Intl., Ltd.*, No. 0:15-cv-61291-WJZ (S.D. Fla. June 17, 2015).

¹⁷⁶ Complaint at 2, *Amazon.com*, No. 2:20-cv-01662. The parties later reached a settlement that prohibits the influencers from advertising, linking to, or selling products on Amazon. Annie Palmer, *Amazon settles with influencers who allegedly peddled counterfeits on Instagram and TikTok*, CNBC (Sept. 30, 2021), <https://www.cnbc.com/2021/09/30/amazon-settles-with-influencers-who-allegedly-ran-counterfeit-scheme.html> [<https://perma.cc/42A2-KRQ4>]

¹⁷⁷ First Amended Complaint at 35, *Urban Dollz LLC v. Lashify, Inc.*, No. 2:23-cv-01427 (C.D. Cal. Nov. 7, 2023) (“Defendants’ claims in advertisements that they are the only real brand selling DIY lashes, that they are the first DIY lash system, and that any other brand is a ‘dupe’ of their system constitute false advertisement.”).

¹⁷⁸ *Id.* at 44.

¹⁷⁹ Complaint at ¶ 7, *Williams-Sonoma Inc. v. Carrot Cart Inc.*, Case 1:24-cv-06597 (SDNY Aug. 30, 2024).

Elm chair costs significantly less; most importantly, “the same chair” cannot be available from other retailers because it is exclusively designed and manufactured for WSI.¹⁸⁰ According to the complaint, while the website purports to help consumers find dupes, i.e. it “claims that its search tool returns [products] that are ‘the same’ or very similar to the products that users query, Dupe.com searches routinely return results that are materially different from the original product in appearance, material, size, dimensions, and/or quality.”¹⁸¹ By owning and operating a website named for dupes, with which it claims users can locate dupes for their desired furniture items and through which it advertises, showcases, and receives commissions on the sale of those so-called dupes, defendant allegedly engages in false advertising and unfair competition under the Lanham Act and state law.¹⁸²

IV DUPED BY DUPES

A recent study found 49% of consumers surveyed considered themselves to have been “scammed” when they purchased a viral dupe product on social media.¹⁸³ Is that simply the consequence that purchasers risk when they choose to buy a dupe to save money, rather than splurge on the desired item from the well-known brand—play stupid games, win stupid prizes? In fact, doesn’t this consumer experience demonstrate exactly why big brands invest so heavily in their trademarks and reputations: so consumers know a product is high quality and its producer stands behind it? And if a product arrives damaged, doesn’t arrive at all, or harms the buyer, isn’t that simply a breach of warranty, and perhaps deceptive advertising by the seller unrelated to their use of the term “dupe”? Maybe. But maybe there’s more to explore here. With as many as half of consumers feeling swindled, it’s worth asking what the use of the term “dupe” actually conveys in an advertisement and whether and when it might constitute false advertising.

Take, for example, the \$600 Dyson Airwrap, a hair multistyler that comes with six attachments and promises to dry, curl, straighten, smooth, volumize,

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at ¶ 8, 23.

¹⁸² The complaint also alleges copyright infringement based on the use, downloading, display, and embedding of WSI photos.

¹⁸³ TRUSTPILOT, *supra* note 48; Pastore, *supra* note 48; Masters, *supra* note 3 (describing the 30-49% as “disappointed” by dupes).

and more—reportedly one of the products consumers most frequently search for in combination with the term “dupe.”¹⁸⁴ Websites from Business Insider to TechRadar have reviewed and ranked Airwrap dupes.¹⁸⁵ If a competitor or paid influencer advertises a “Dyson Airwrap dupe” that’s only equipped with half as many features as the real thing, is billing the product as a dupe a false claim? What if the dupe is known to cause burns because it reaches a much higher temperature than the Airwrap does? What if the dupe is simply poor quality—not fit to replace anyone’s standard hair dryer, curler, or flatiron, so not worth even its meager price? Does the comparison to the Airwrap inherent in calling it a “dupe” convey some equivalence, or is it just a way to grab attention without making any factual claims?

Or consider a pair of Vans, sought after as skate shoes due in part to a thick and sticky rubber sole that provides maximum grip on a skateboard and makes the shoes more durable. Now imagine Walmart’s “Van dupes” have a plastic sole that makes them ill-equipped for skateboarding. The image below shows a post on TikTok from a Walmart store advertising Vans lookalike sneakers with the hashtag #vansdupe. Has Walmart misled consumers by characterizing their shoes as dupes for the skate shoes if they don’t share those basic features with real Vans?

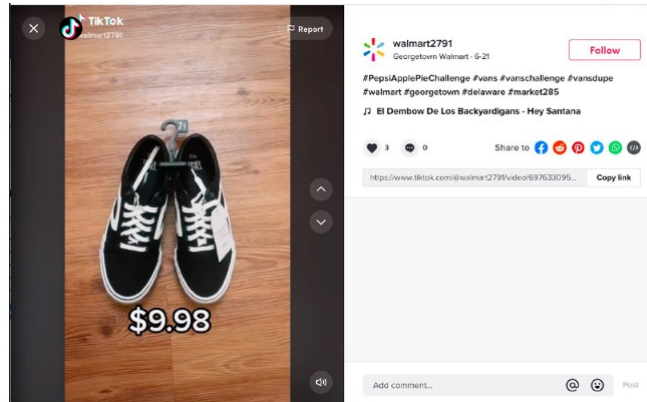


Figure 3: Still from a video post by TikTok user “@walmart2791” features a pair of non-Vans shoes available at Walmart for \$9.96 along with hashtags including #vans, #vanschallenge, and #vansdupe

¹⁸⁴ Flora, *supra* note 10 (citing data from Google).

¹⁸⁵ See Kristin Magaldi, *The 12 Best Dyson Airwrap Dupes for Salon-Worthy Hair*, BUS. INSIDER (Feb. 4, 2025, 1:48 PM), <https://www.businessinsider.com/guides/beauty/best-dyson-airwrap-dupes> [https://perma.cc/7Y8G-MXRZ]; Jennifer Oksien, *The Best Dyson Airwrap Dupes 2025: Cheaper Airwrap Alternatives to Buy Today*, TECHRADAR (Dec. 13, 2024), <https://www.techradar.com/best/the-best-dyson-airwrap-dupes-2022-our-top-tested-airwrap-alternative-hot-air-stylers> [https://perma.cc/56R7-MQCK].

Now think of a beauty product like Eve Hansen Hydrating Hyaluronic Acid Serum, which sells for one-seventeenth the price of a \$220 cult favorite from SkinMedica. If the Eve Hansen product is advertised as a dupe, but turns out to contain different ingredients than the SkinMedica product and as a result irritates users with sensitive skin, should the advertiser bear some responsibility for positioning the products as equivalents? Dupes have also taken off in the perfume market, as the advent of gas chromatography analysis enables producers to reverse-engineer a fragrance by identifying and quantifying its ingredients.¹⁸⁶ Does that ability increase the likelihood that a consumer will assume they can trust a product marketed as a dupe for their desired perfume? If a seller uses the term “dupe” for a fragrance with different ingredients in different quantities, does that context render their characterization deceptive?

Answering these questions requires drilling down on not only what kinds of representations courts have construed to constitute false or deceptive comparative advertising, but also what “dupe” means to consumers. And as discussed in Section I, “dupe” doesn’t mean just one thing—from counterfeit dupes to risky dupes to pure dupes, it can mean different things to different people, sometimes at the same time. Just as with other categories of comparative advertising, such as “like/love” claims, “compare to __” claims, and the use of similar trade dress to convey equivalence, context is crucial. Consumer surveys will be needed to ascertain what consumers take away from a dupe claim, and perception will be shaped by how the claim is framed, what products are being compared, and who the relevant purchasers are.¹⁸⁷

¹⁸⁶ Susie Ruiz-Lichter, *Sniffing Out Perfume IP Protections In Changing Landscape*, LAW360 (Aug. 21, 2023), <https://www.law360.com/articles/1710821/sniffing-out-perfume-ip-protections-in-changing-landscape> [<https://perma.cc/367C-5UDY>]. For more on intellectual property rights in perfume, see generally Amanda Levendowski, *Open Source Perfume*, 45 CARDOZO L. REV. 1055 (2024).

¹⁸⁷ Of course, heterogeneity in meaning will always exist—the same claim in the same advertisement will be interpreted differently by different consumers based on their experience, expectations, trust in the source, and other factors. Courts have grappled with questions of percentages in trademark law—how many consumers must find a mark famous, generic, inherently distinctive, or confusingly similar to another mark for a court to agree and an owner to earn or lose protection or enforce rights against another party? *See, e.g.*, Camilla Hrdy, *Likelihood of Confusion: Is 15% The Magic Number?*, WRITTEN DESCRIPTION (May 17, 2019), <https://writtendescripton.blogspot.com/2019/05/likelihood-of-confusion-is-15-magic.html> [<https://perma.cc/D2LV-GBVQ>] (recounting a talk by attorney David Bernstein about the “fifteen percent benchmark” in trademark likelihood of confusion analyses); *see also* Edman, *supra* note 126 (“While there are no specific

CONCLUSION

The public has a compelling interest in the information function of advertising and in producers communicating to consumers the existence of alternatives to dominant brands. This principle underlies both nominative fair use doctrine and FTC's policy in favor of comparative advertising. As the Ninth Circuit articulated in *Smith v. Chanel* back in 1968, "[t]he presence of irrational consumer allegiances may constitute an effective barrier to entry. Consumer allegiances built over the years with intensive advertising ... extend substantial protection to firms already in the market."¹⁸⁸ Comparative advertising is the best way to challenge those firmly entrenched allegiances.

What's more, copying existing products in ways that do not infringe intellectual property rights is in the public interest;¹⁸⁹ muzzling producers from advertising with reference to the brands they copied would undermine the ability to communicate those options to consumers, "bar[ring] effective communication of claims of equivalence"¹⁹⁰ and inhibiting the free flow of commerce.¹⁹¹ Comparative marketing, and in particular dupe marketing, offers brands that are newer, smaller, or simply less famous the ability to cut through the noise and

answers to [the question of what percent of consumers must be confused to find a likelihood of confusion], there is general agreement that a competent survey showing that the number of deceived consumers is 'not insignificant' will be sufficient proof of confusion."). In Lanham Act false advertising litigation, courts presume without survey evidence that a literally false claim is also deceptive, and many courts will also presume materiality; even if consumer perception varies in those cases, it's unlikely to influence the outcome. Where a claim is impliedly false or merely misleading, though, courts rely heavily on surveys, and tend to apply the same "not insubstantial number" standard in Lanham Act false advertising cases as they do in infringement ones. *See TUSHNET & GOLDMAN, supra* note 115 (surveying case law and summarizing that "a good rule of thumb is that a good, well-controlled survey that shows net 20% or greater deception will be highly persuasive for the plaintiff, and that one that shows 10% or less will be persuasive for the defendant."). Survey evidence is usually not necessary in FTC and NAD cases, though it may still be helpful—both agencies consider themselves sufficiently expert to judge how a claim will be perceived. *Id.* at 167. FTC applies a "substantial number" standard when considering how many consumers must be likely to be deceived. *Id.* at 187. Both FTC and Lanham Act courts, though, have held that where the false claim is likely to cause very serious harm or involve human safety, smaller percentages of deceived consumers may suffice to support the claim. *Id.* at 187.

¹⁸⁸ *Smith v. Chanel, Inc.*, 402 F.2d 562, 567 (9th Cir. 1968) (internal quotations and citations omitted).

¹⁸⁹ *Meale & Smith, supra* note 168, at 99.

¹⁹⁰ *Chanel*, 402 F.2d at 567–68.

¹⁹¹ *See Roho, Inc. v. Marquis*, 902 F.2d 356, 360 (5th Cir. 1990) ("Although copyists undoubtedly incur the enmity of the product's creator, they serve the public interest by promoting competition and price reductions.").

reach consumers (directly or through intermediaries) with their messages about affordable alternatives.¹⁹² Seeking out dupes using search features on social media and shopping sites and following dupe influencers grants savvy shoppers access to products and services that better fit their budget and serve their goals and that they might not otherwise discover. And dupe influencers have incentive to avoid deceiving their followers, given their value derives from their reputation, reliability, and recommendations.

Maybe all's fair in love, war, and dupe marketing. How can someone be surprised when their \$11 dupe AirPods from Temu lack many of the features of their \$250 Apple ones,¹⁹³ or their \$12 Gucci loafer dupes from an Amazon shop with an unpronounceable name aren't made of real leather?¹⁹⁴ Calling something a dupe is a form of comparative advertising. Comparative advertising, as the case law illustrates, is all fine and good—until it's not. Amazon has outlawed dupe marketing for a reason, and consumers' widespread disappointment indicates that in some cases, characterizing something as a dupe is over-promising. While many ads calling a product a dupe of another are non-deceptive and noninfringing, there are likely some that don't bear scrutiny. When a product infringes, use of the term “dupe” can exacerbate the confusion and qualify as unfair competition or false advertising. And even when a product itself does not violate any laws, promoting it as a dupe might be false or misleading if consumers understand the term as a

¹⁹² See generally Ann Bartow, *Counterfeits, Copying and Class*, 48 Hous. L. Rev. 707, 707–08 (2011) (“Repressing or illegalizing knockoffs illegitimately prevents lower income people from procuring and enjoying goods with aesthetic attributes that are not properly monopolized through trademark law”); Marra M. Clay, *Copycat Cosmetics: The Beauty Industry and the Bounds of the American Intellectual Property System*, 106 Minn. L. Rev. 425, 465–66 (2021) (arguing non-infringing beauty dupes occupy intellectual property’s negative space and are good for innovation and competition); Samantha Primeaux, *Makeup Dupes and Fair Use*, 67 Am. U. L. Rev. 891, 922, 924 (2018) (arguing good-faith makeup dupes are permissible under the Lanham Act’s fair use doctrines).

¹⁹³ Jessica Fiero & Connie Reichert, *I Saved \$1,260 Buying Tech Dupes on Temu. The Shoddy Gear Wasn’t Worth the Discount*, CNET (July 21, 2024, 9:47 AM), <https://www.cnet.com/tech/features/i-bought-tech-dupes-on-temu-the-shoddy-gear-wasnt-worth-the-1260-in-savings/> [https://perma.cc/9GGZ-H9L7].

¹⁹⁴ For more on Amazon and its trademark registration system, see Jeanne Fromer & Mark P. McKenna, *Amazon’s Quiet Overhaul of the Trademark System*, 113 Cal. L. Rev. (forthcoming 2025) (arguing Amazon created its Brand Registry in part to address concerns about counterfeits, but it has profound effects on trademark law). For more on unpronounceable trademarks on Amazon, see Grace McLaughlin, *Fanciful Failures: Keeping Nonsense Marks off the Trademark Register*, 134 Harv. L. Rev. 1804 (2021).

representation that the item possesses certain qualities or features or is comparable in quality to the original.

Litigation citing use of the term “dupe” is already pending¹⁹⁵ and more will likely follow. Courts should seek to understand what consumers perceive the term to mean in the specific context of the ad in question. Brands, influencers, and consumers should also proceed with caution and awareness of the risks of dupe marketing and dupe purchasing. Given the desirability and utility of characterizing products as dupes, the European approach—holding that explicitly advertising something as an imitation is inherently unfair—goes too far. But expecting consumers to sort through dupe advertising claims to parse what “dupe” conveys in every new situation may be unduly burdensome. Future litigation will have to reckon with the question of what consumers perceive the term to convey in a particular context from a particular speaker. For now, even sophisticated consumers may be made dupes by dupes.

¹⁹⁵ See Section III, *supra*.