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UNENFORCEABLE ‘INFRINGEMENT’: THE BENEFITS OF MAKEUP
DUPES AND LEGAL COPYING

SARAH ROSENBERG*

Beauty dupes—products meant to directly copy and serve as a substitute for specific luxury beauty products—are hugely profitable. Popular dupes of products sold by beauty giants such as Dior or L’Oreal are rarely challenged by litigation, and the majority of dupes are sold completely uncontested. How have dupes had such market success, and is there anything to be done about their intentional copying?

In this Note, I provide an overview of all avenues of intellectual property protection available to beauty companies and explain why they ultimately fail at excluding dupes from the market. I also discuss some of the forces outside the system of intellectual property laws which may be restricting the creation and sale of beauty dupes. Finally, I analyze dupes in the larger context of the goals of the intellectual property system and conclude that dupes generate independent social good in a variety of ways. Just as copyright fair use allows for certain kinds of copying of protected material, the value generated by beauty dupes provides a justification to avoid liability for certain kinds of copying.

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INTRODUCTION

Hyperconsumerism has changed the consumption landscape for the average consumer.¹ The goalposts have shifted: instead of purchasing an item for its quality or authenticity, current consumerism culture incentivizes maximalism and purchasing large quantities of items.² Hyperconsumerism is especially salient in the beauty industry, due to both the wide variety of products available and the

¹ See Teofana Dimitrova et al., *I Consume, Therefore I Am? Hyperconsumption Behavior: Scale Development and Validation*, 11 Soc. Scis. 1, 2 (Nov. 20, 2022) (“If, previously, one used to consume in order to live, what really matters in a hyperconsumption society is consumption itself: consuming here and now, without any restriction or restraint in the search for unattainable individual happiness solely through consumption.”); see also Jessica DeFino, *The Skin as an Antidote To Consumerism*, SUBSTACK: REV. OF BEAUTY BY JESSICA DEFINO (Aug. 5, 2022), <https://jessicadefino.substack.com/p/consumerism-in-skincare-industry> [<https://perma.cc/Q5RB-NVQ8>] (“At this point in American history, consumer culture is embedded in our brains, I think. It’s already shaped our shopping habits. It’s almost instinctual to hear ‘I need this!,’ even if a brand doesn’t explicitly say ‘you need this!’”).

² Emily Kirkpatrick, *A Day in Dupes*, THE CUT (June 2, 2023), <https://www.thecut.com/article/dressing-in-dupes.html> [<https://perma.cc/ATE2-LU4A>] (“[A]uthenticity is no longer the point for the majority of consumers.”).

large amount of products required to keep up with fast-paced trends.³ As a result, consumers are gravitating towards “dupe shopping”, with “CNBC report[ing] TikTok videos with the #dupe hashtag have racked up nearly six billion views.”⁴ A ‘dupe’ (short for duplicate) is the term for a product that imitates a luxury good in appearance or performance.⁵ In the makeup and skincare (or ‘beauty’) industry, dupes have emerged as a serious competitor to traditional luxury goods, offering consumers essentially the same good at a cheaper price point.⁶ As the CEO of e.l.f., a company notorious for selling popular beauty dupes, described his company’s approach: “We have this unique ability to take inspiration from our community, or the best of prestige, and be able to introduce [a version of the product] at extraordinary values.”⁷ Beauty dupes are unique even in the larger field of dupes, as they are unlike other products where a consumer can visually evaluate a dupe for its similarities and dissimilarities to the original product. For beauty products, “[w]hat’s in the bottle or tube is of primary importance, and it takes real experts to guide dupe shoppers in that world.”⁸ Companies in the business of selling beauty dupes are able to take advantage of a lack of effective intellectual property protection to duplicate luxury beauty products and sell their version of the product without the typical upcharge associated with a luxury brand.⁹ Ironically, the lack of intellectual property protection has advanced some of the goals of the intellectual

³ See Daniela Morosini, *What Blink-And-You’ll-Miss-It Beauty Trends Mean in the Long Term*, BUS. OF FASHION (Mar. 12, 2024), <https://www.businessoffashion.com/articles/beauty/what-blink-and-youll-miss-it-beauty-trends-mean-in-the-long-term/> [<https://perma.cc/D2EV-Q653>] (“Consumers can immediately start recreating trends with products they already have at home, but depending on whatever’s ‘in’ at any given moment, different products can see a sales bump or slump. 2023’s popular ‘clean girl’ makeup look, for example, often eschews foundation in favour of light concealer.”).

⁴ Pamela N. Danziger, *Shopping Cosmetic Dupes is Tricky. Dupeshop Beauty Solves for That*, FORBES (Nov. 16, 2023), <https://www.forbes.com/sites/pamdanziger/2023/11/16/shopping-cosmetic-dupes-is-tricky-dupeshop-beauty-solves-for-that> [<https://perma.cc/G3H9-SJ99>].

⁵ Marra M. Clay, Note, *Copycat Cosmetics: The Beauty Industry and the Bounds of the American Intellectual Property System*, 106 MINN. L. REV. 425, 427 (2021).

⁶ Amelia Bell, *What You Need to Know Before Buying Beauty Dupes*, REFINERY29 (Apr. 3, 2021), <https://www.refinery29.com/en-gb/beauty-dupes-ethical-problems> [<https://perma.cc/BU6L-FCFB>].

⁷ Brad Smith & Eyek Ntekim, *Three Reasons Why e.l.f. Beauty Sales Are Booming*, YAHOO!FIN. (Nov. 8, 2023), <https://finance.yahoo.com/video/three-reasons-why-e-l-185642781.html>? [<https://perma.cc/HU3B-PRU4>].

⁸ Danziger, *supra* note 4.

⁹ The Styles Desk, *How Can ‘Absurd’ Luxury Prices Be Justified?*, N.Y. TIMES (Nov. 7, 2023), <https://www.nytimes.com/2023/11/07/style/luxury-fashion-brands-prices.html> [<https://perma.cc/5CLV-4QV8>] (“[A]verage luxury prices are up by 25 percent since 2019.”).

property system, as the current beauty industry preserves the first mover's profits while still encouraging innovation and competition.¹⁰ Beauty dupes are certainly here to stay, and they allow an under-served consumer class the opportunity to access products they were previously priced out of, while limiting negative impacts on existing luxury beauty products.

This Note seeks to evaluate how the beauty dupe industry has escaped liability under an intellectual property regime and examines the unique benefits that dupes offer consumers. In Part I, I define dupes specifically in the context of the beauty industry and provide an overview of dupes' place in the market for beauty products. In Part II, I provide an overview of all intellectual property protections that luxury beauty products utilize and analyze how these protections operate only at the boundaries of the dupe market, ultimately failing to remove or restrict dupes from the market. In Part III, I analyze the value of dupes as an independent good and discuss the various ways that they generate value, both for consumers and under the theories that justify the intellectual property regime.

I

WHAT IS A DUPE?

A. *Two Types of Copying in Beauty Products: Acceptable and Infringing*

In discussing beauty dupes, it is important to differentiate between copies of luxury products that are infringing and copies of luxury products that cannot be prevented. As discussed above, dupes are products that imitate a luxury good's look or feel for a lower price point.¹¹ For a variety of reasons, beauty products' formulas are not often protected by either patent or trade secret.¹² Thus, brands who choose to reverse-engineer and replicate these popular products generally do not infringe any form of intellectual protection. So long as companies creating dupes refrain from additionally copying the protected packaging and branding of

¹⁰ Jaelyn 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/CBW6-U9GL>] (“A lot of [beauty industry] players have called out the dupes as a positive because they push innovation . . . and keep bringing newness to the market”).

¹¹ Clay, *supra* note 5, at 427.

¹² See *infra* Sections II.B, II.C.

the original product, they can create a dupe of the original luxury good that is not infringing.¹³

Non-infringing dupes should be differentiated from copies of luxury goods that do infringe. There are three main types of copying that infringes on a protected aspect of a luxury good: copying packaging that is protected through design patents or trade dress,¹⁴ copying a patented formula and selling the product in different packaging as a dupe,¹⁵ and creating a counterfeit good.¹⁶ Products that are designed and promoted as direct alternatives to a luxury good in a manner that infringes an established intellectual property right are sometimes considered a product dupe, but for the purpose of this paper will be classified as an unsuccessful dupe and not considered in the analysis that follows. Generally, the term ‘dupe’ is used by consumers and theorists to encompass a wide variety of products, including infringing products and counterfeits, as well as brand behavior.¹⁷ This note will not follow that convention; to the extent infringing products are considered dupes, they are unsuccessful ones, as they can be excluded from the market if brands enforce their rights.

B. Beauty Dupes’ Market Success: Unique Share of Consumer Market

Beauty dupes are attractive to beauty consumers for a multitude of reasons. Crucially, dupes are offered on a lower price range than comparable luxury products. One of the more popular dupes, the e.l.f. lip oil dupe for Dior’s Addict Lip Glow Oil, costs \$8 as opposed to the \$40 price tag for the luxury product.¹⁸ Dupes offer a cheap and accessible entry point into a market otherwise dominated by

¹³ See *infra* Sections II.A, II.D.

¹⁴ Complaint, Tatcha LLC v. Too Faced Cosms. LLC, No. 3:17-cv-4472 (N.D. Cal. filed Aug. 7, 2017); see also Rachel Krause, *Too Faced Is Facing a Lawsuit Over Lipstick*, REFINERY29 (Aug. 9, 2017), <https://www.refinery29.com/en-us/2017/08/167312/too-faced-tatcha-lipstick-lawsuit-packaging> [<https://perma.cc/JT84-5V7B>].

¹⁵ See Cheryl Wischhover, *Beauty Junkies Love Cheap Dupes of Expensive Products. A New L’Oréal Lawsuit Could Threaten That.*, Vox (Nov. 16, 2018, 1:10 PM), <https://www.vox.com/the-goods/2018/11/16/18098503/loreal-drunk-elephant-skinceuticals-lawsuit> [<https://perma.cc/V3NA-7RXQ>].

¹⁶ Lanham Act, 15 U.S.C. § 1127 (“A ‘counterfeit’ is a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.”).

¹⁷ See Clay, *supra* note 5, at 427–28 n.15 (some consumers use the term dupe to indicate varying levels of product mimicry, while other consumers use it to describe brand behavior).

¹⁸ Peiser, *supra* note 10.

expensive luxury goods.¹⁹ Especially in a market defined by short-term trends and quickly shifting preferences,²⁰ many consumers simply can't afford to participate in buying luxury goods and turn to dupes as a financially feasible alternative.²¹

Additionally, dupes are generally viewed as quality products. One consumer report found that almost three quarters of consumers surveyed think that affordable makeup "works just as well" as makeup from luxury brands.²² This impression of quality, especially at the price point offered, is bolstered by the wave of influencers and social media partners who advertise dupes both for free and as partners with brands.²³ Consumers can watch videos of varying length about the wearability, application, packaging experience, and overall impression of any popular product from their favorite beauty influencers, who review luxury goods alongside or even in direct comparison to dupes.²⁴ Much of the social desirability

¹⁹ See Bell, *supra* note 6 ("[D]upes are so popular ... [because t]hey help make beauty accessible to everyone, provide a wider spectrum of products and tap into some of the biggest beauty trends. ... [D]upes ... offer a cheap and easy entry point into discovering beauty.").

²⁰ The beauty industry's normal lifecycle of trends has been especially impacted and accelerated by beauty influencers on social media platforms, in particular TikTok. See Morosini, *supra* note 3 (discussing how TikTok has accelerated the trend cycle, particularly in beauty, and giving examples of different short-lived trends that each required the use of different kinds of products); see also Bell, *supra* note 6 (There is increasing "demand from Gen Z and millennial consumers [who are] eager to get [a]hold of the latest beauty trends fast. ...").

²¹ Smith & Ntekim, *supra* note 6 ("Our poreless putty primer is at \$10. So you can bring millions of more people who can afford that, who might not be able to afford a \$56 primer.").

²² Simon Pitman, *Mintel Research Suggests Dupes are Pushing US Consumers Towards Affordable Makeup*, COSMS. DESIGN USA (Oct. 6, 2023), <https://www.cosmeticsdesign.com/Article/2023/10/06/mintel-research-suggests-dupes-are-pushing-us-consumers-towards-affordable-makeup> [<https://perma.cc/VEH8-J4E8>].

²³ Dupes are identified and discussed on a variety of social media platforms. Influencers who post to YouTube tend to post long-form videos that discuss several products in one video and feature the influencer applying the product while discussing the packaging and their opinions on the product quality. See Tati Westbrook, *12 Drugstore Makeup DUPES ... Save Cash!!!*, YOUTUBE (Feb. 15, 2024), <https://youtu.be/8omuHqZwuR0?si=pu0XHIWSxdhgZLNZ> [<https://perma.cc/CM9S-FRHV>]. Brands also promote their dupes and cultivate an impression of quality through sponsoring installations at popular events such as Coachella and sending influencers on brand trips. See, e.g. Jordan Hart, *I'm a Beauty Influencer Who's Gone on Several Brand Trips. It May Look Glamorous, but They Can Be Loads of Work and I've Experienced Inequality on the Job*, BUS. INSIDER (May 13, 2023), <https://www.businessinsider.com/im-beauty-influencer-attended-several-brand-trips-what-ive-learned-2023-5> [<https://perma.cc/X9TF-VYG8>].

²⁴ Beauty dupe videos take many forms, but the most popular are the drugstore hauls, 'full face' tester videos, and direct comparison videos. Drugstore hauls feature influencers reviewing new dupes that have just been released. See Tati Westbrook, *All New Drugstore Makeup*, YOUTUBE (Apr. 25, 2024), <https://www.youtube.com/watch?v=8omuHqZwuR0>.

of dupes is constructed by this content. The relationship here is reciprocal: content creators have a never-ending source of products to review and create content about, which helps them to grow their individual fame, and makeup and beauty dupes are continually identified, analyzed, and promoted online.²⁵ Indeed, dupes are often identified as such and correlated with a luxury good by a third party, such as an influencer, an online blog, or an online community, as opposed to the company selling the dupe.²⁶ Beauty companies intentionally rely on and encourage unpaid consumers to review and discuss their products;²⁷ the normalization and endorsement of dupes bolsters consumer purchases of dupes, and companies that sell dupes do not need to create a marketing and legal strategy to identify their products as a dupe of a specific luxury product. The very nature of social media content also encourages the purchase of dupes, as consumers are constantly hawked a never-ending variety of new products, often dupes, that they are encouraged to buy to stay on top of trends.²⁸ Social media content creators review an exorbitant amount of products; consumers who follow their purchases and consume their

<https://youtu.be/CgbYfTP1jpM?si=6I54JwcoLUrEUvi8> [<https://perma.cc/B9UL-TDR7>]. Full face tester videos feature influencers doing their full face of makeup with dupe products, or half their face with dupes and half with luxury products. See Laura Lee, *Full Face Testing VIRAL Drugstore Dupes! 2023 Drugstore vs High End!*, YOUTUBE (Feb. 9, 2023), <https://youtu.be/ouDz51RF8Oo?si=DuJPMi5Jty3AqNdT> [<https://perma.cc/V59N-BNJ3>]. Finally, direct comparison videos feature the influencer using and reviewing the luxury and dupe product in direct comparison, and, typically, deciding which product they prefer. See, e.g., Risa Does Makeup, *10 Drugstore Makeup Dupes That Rival High End Products!*, YOUTUBE (May 9, 2024), <https://youtu.be/D6GvGCSA9PU?si=oKRFHlz8wnm1ongA> [<https://perma.cc/ZT4E-HK34>].

²⁵ See, e.g., Westbrook, *supra* note 24. At the time of this paper's publication, Westbrook has around eight million followers on YouTube.

²⁶ See, e.g., REDDIT: R/MAKEUPDUPES, <https://www.reddit.com/r/makeupdupes/> [<https://perma.cc/DV5W-5SQT>] (last visited Mar. 26, 2025); TEMPTALIA, <https://www.temptalia.com/product/> [<https://perma.cc/CF9R-R9TR>] (last visited May 9, 2024); BRANDEFY, <https://brandefyskin.com> [perma.cc/H3CC-VYC8] (last visited May 9, 2024); DUPETHAT (@dupethat), INSTAGRAM, <https://www.instagram.com/dupethat/?hl=en> [<https://perma.cc/4FJG-LMEY>] (last visited Mar. 26, 2025).

²⁷ *Benefit Cosms. LLC v. e.l.f. Cosms., Inc.*, 2024 U.S. Dist. LEXIS 228112, at *4–5 (N.D. Cal. Dec. 17, 2024) (“Much like other beauty brands, both parties rely on and encourage unpaid, user-generated endorsements and reviews of their products on platforms like Instagram, TikTok, and YouTube.”).

²⁸ See Bell, *supra* note 6 (“When we look at the influencer realm, dupes are so often associated with ‘hauls’ and, while fun to watch, they promote the ethos of a “more is more” unbridled consumption that is bad for the planet’ . . . because dupes are usually a lot cheaper than the original, consumers might be inclined to buy more products.”).

content also want to, by dint of their engagement with beauty influencer content, participate in the purchase and use of these products.²⁹

II

INTELLECTUAL PROPERTY PROTECTIONS AVAILABLE TO BEAUTY AND MAKEUP COMPANIES: LIMITED APPLICABILITY DOES NOT ALLOW LUXURY BRANDS TO EXCLUDE DUPES FROM THE MARKET

Dupes are clearly attractive to consumers and compete directly as cheaper alternatives to products offered by major players in the industry. Why have dupes been allowed to develop and capture a significant market share, and what attempts have been made to restrict their success? Luxury beauty and makeup companies have the economic power and incentive to utilize the full scope of intellectual property protections available to them to protect their products. Undeniably, some avenues of protection are more suited to beauty products than others. No method of intellectual property protection fully covers every aspect of a product, and companies often protect their products using a combination of the protections available. This section will survey the major avenues of protection available to luxury beauty goods—trademark, trade secret, utility patent, design patent, and copyright—and demonstrate how they are a misfit in preventing the type of copying in which dupes engage.

A. *Trademark*

One of the more successful strategies luxury beauty brands can use to limit dupes in the marketplace is through enforcing their trademark rights. There are three primary ways brands can do so.

First, brands can enforce their mark against any dupe producer that uses a counterfeit version of the brand's mark to advertise products.³⁰ While many dupe producers market their products under their own companies' mark, this avenue of enforcement does prevent an unscrupulous actor from entering the market and attempting to sell a counterfeit product with a counterfeit mark.³¹ For consumers

²⁹ See *id.*; see generally Dimitrova et al., *supra* note 1 (reviewing previous literature that focused on the hyperconsumption implications in fashion trends and brands).

³⁰ Lanham Act, 15 U.S.C. § 1127.

³¹ Counterfeit goods can be excluded from the market by private actors or by the state enforcing criminal counterfeit statutes. See, e.g., Deputy Chief Marc Reina, MSL (@LAPDMarcReina), TWITTER (Apr.

who are only interested in buying the authentic luxury good, this is a crucial form of protection, as it prevents them from unknowingly buying a counterfeit product.

Second, much of a dupe's market success comes from linking the duped good to the luxury good, as the linkage is what makes dupes valuable.³² Despite this linkage generating essential value for the duped product, brands that specialize in dupes generally do not use the luxury good's trademark in advertising their duped product. Under the Lanham Act, trademark holders have a right to protect their marks from unlicensed use by others.³³ However, there do exist certain fair use doctrines that allow for the use of marks by others without permission from the mark's owner. One of those defenses is nominative fair use, which "is a use of another's trademark to identify the trademark owner's goods or services."³⁴ So long as there is no likelihood of confusion, dupes are allowed to use a luxury good's trademark on their product for the purpose of comparative advertising.³⁵ Courts have defined comparative advertising as "whe[n] a defendant has used the plaintiff's mark to describe the plaintiff's product, even if the defendant's ultimate goal is to describe his own product."³⁶ Thus, the Lanham Act allows the use of another's mark for the purpose of comparative advertising even without permission and explicitly excludes a trademark dilution claim in this area.³⁷

Oddly, makeup and beauty dupes generally do not take advantage of the comparative advertising exception; even beauty companies whose primary business is dupes, such as e.l.f., broadly refrain from using another's trademark to indicate what product their dupe is copying. As much of the value of a dupe lies in identifying it as a comparison product to a luxury good at a lower price point, this is

13, 2018, 1:01 AM), <https://twitter.com/LAPDMarcReina/status/984657708547649537> [<https://perma.cc/V9BD-L98T>] (publicizing an LAPD raid of twenty-one sellers of counterfeit cosmetics in LA's Fashion District).

³² Tim W. Dornis & Thomas Wein, *Trademarks, Comparative Advertising, and Product Imitations: An Untold Story of Law and Economics*, 121 PENN. ST. L. REV. 421, 423 (2016) ("Without more information about the two products' correlations, the copy is usually not considered an appropriate alternative to the original. It is thus essential to evoke a mental connection between the substitute and the original.").

³³ 15 U.S.C. § 1114.

³⁴ 3 J. THOMAS MCCARTHY, TRADEMARKS & UNFAIR COMPETITION § 23:11 (5th ed. 2025).

³⁵ *See id.*

³⁶ *Id.*

³⁷ *Id.*; Lanham Act, 15 U.S.C. § 1125(3) ("The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection: ... advertising or promotion that permits consumers to compare goods or services").

baffling market behavior. Instead, comparison of a dupe to a luxury product occurs mainly through third party advertising.³⁸ Beauty influencers, both well-known influencers who operate under formalized agreement with beauty companies and smaller-scale influencers who do not, as well as consumers themselves, are the primary sources of identifying dupes and associating them with their luxury counterpart.³⁹ Those who operate as identifiers of dupes hugely influence the market: companies whose entire business is in identifying beauty dupes can boost a products' sales on their say-so alone, with or without contribution from beauty companies.⁴⁰ This strategy is even more baffling when one considers that it effectively limits the market for dupes to only the informed consumer who has gone out of their way to track down this information prior to purchase. While beauty dupes certainly serve a separate market of consumers whose primary criteria is a cheaper cosmetic product, there surely are consumers who would choose one product over another based on the product being a dupe of a specific luxury good, if only brands would identify their product as such on their packaging or even descriptions on online beauty retailers' websites.

Why do brands who sell dupes restrict themselves from taking advantage of the nominative fair use exception in their packaging and advertisement? The answer may lie outside of the United States. While comparative advertising is directly protected in the U.S., the same cannot be said for the EU, where the comparative advertising doctrine is very rare. The EU sets a 'strict prohibition'⁴¹ on comparative advertising that "present[s] goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name."⁴² This prohibition, considered by many European countries as 'per se,' reflects a long tradition in Europe, which historically disallowed this type of advertising.⁴³ This divergence

³⁸ Danziger, *supra* note 4 ("Dupe shopping in beauty is another matter. What's in the bottle or tube is of primary importance, and it takes real experts to guide dupe shoppers in that world.").

³⁹ See *id.*; Benefit Cosms. LLC v. e.l.f. Cosms., Inc., 2024 U.S. Dist. LEXIS 228112, at *18 (N.D. Cal. Dec. 17, 2024).

⁴⁰ Danziger, *supra* note 4 (describing Dupeshop's dupe identification process as a combination of independent testing, consumer requests, market research, and samples sent from dupe manufacturers. Identifying a good dupe for a luxury product is a success for the company).

⁴¹ Dornis & Wein, *supra* note 32, at 424.

⁴² Directive 2006/114, of the European Parliament and of the Council of 12 December 2006 concerning Misleading and Comparative Advertising (Codified Version), 2006 O.J. (L 376) 21, 23 (EC).

⁴³ Dornis & Wein, *supra* note 32, at 433.

in international law may explain the otherwise perplexing decision of many beauty companies to refrain from labeling their products as dupes. Brands may have made the decision that it was more worthwhile to use one consistent packaging across global markets instead of tailoring packaging specifically to American consumers in an attempt to capture an additional, unknown market share, especially when brands' current strategy has demonstrated success.

Finally, luxury brands can use trade dress to restrict dupes from using similar packaging. Trade dress refers to the “total image of a product and may include features such as size, shape, color, or color combinations, texture, graphics, or even particular sales techniques.”⁴⁴ Trade dress for product packaging is protectable if it is inherently distinctive or if it has acquired a secondary meaning.⁴⁵ If a brand has used a particular product packaging long enough for it to obtain secondary meaning and indicate the source of the product, then they have a good claim for enforcing their rights in that trade dress against others who want to use infringing packaging so long as they can show there is consumer confusion as to the origin of the product. This may leave luxury brands vulnerable to a dupe product imitating new packaging very shortly after it hits the market. However, so long as brands are able to maintain unique and recognizable packaging for a few years on the market, it then becomes feasible for them to enforce their trade dress rights against a dupe that wants to use similar packaging as a method of indicating that it is a dupe for a specific luxury product.⁴⁶

Brands should decide carefully when to enforce their trademark rights. A recent lawsuit brought by Benefit for alleged infringement of their trademark and trade dress against e.l.f. for a dupe product was ultimately unsuccessful.⁴⁷ Benefit did establish the protectability of its trademarks and trade dress for the product at issue, their Roller Lash.⁴⁸ However, despite e.l.f. admitting on the record that it took cues from Benefit's product and intended to create a dupe product, the court

⁴⁴ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1 (1992) (quoting *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983)).

⁴⁵ *See id.* at 773–76.

⁴⁶ Complaint at 4–7, *Tatcha LLC v. Too Faced Cosms. LLC*, No. 3:17-cv-4472, (N.D. Cal. filed Aug. 7, 2017) (describing Tatcha's marketing strategy as deliberately using the same product packaging for their lipsticks with one unique change for each new product launch).

⁴⁷ *Benefit Cosms. LLC v. e.l.f. Cosms., Inc.*, 2024 U.S. Dist. LEXIS 228112 at *2–*3 (N.D. Cal. Dec. 17, 2024).

⁴⁸ *Id.*

ultimately found that Benefit had only shown that “consumer confusion is ... a possibility,” and failed to show that consumer confusion around the source of e.l.f.’s product was probable.⁴⁹ The courts, at least in California, have come down firmly on the side of dupes: so long as they don’t cause consumer confusion, brands cannot bring suit against a company simply for intentionally designing and placing a dupe on the market.

B. Trade Secret

Trade secret law offers another avenue of protection to beauty brands, but one that is of much more limited application and use. Trade secret covers ‘ideas held in secret’ and protects innovations without imposing external requirements for registration and protection as the patent system does.⁵⁰ Trade secret protection operates against all and for as long as the innovation remains unknown; it does not, however, prevent others from discovering the idea through independent research or reverse engineering and “exploiting it for profit.”⁵¹ The types of products created by the beauty industry do not lend themselves easily to protection through trade secret because parties who seek to assert a trade secret action must prove that the information was not readily ascertainable at the time of alleged infringement.⁵² If the information has ever been included in an approved patent or a patent application then a brand cannot assert trade secret protection, so brands must choose one form of protection over the other.⁵³ Additionally, retail cosmetic products are required by the FDA to publish an ingredient list for consumers, making all ingredients used in a competitor’s product readily accessible to all beauty companies.⁵⁴ When considering the advantages of trade secret against utility patent, it is unlikely that a company with a truly novel concept would choose to protect their formula or

⁴⁹ *Id.* (citation omitted).

⁵⁰ *Russo v. Ballard Med. Prods.*, 550 F.3d 1004, 1011 (10th Cir. 2008).

⁵¹ *Id.* at 1012; *see also* Wischhover, *supra* note 15 (“there are labs [for beauty products] that can analyze and reverse engineer products, in a process called ‘deformulation.’”).

⁵² *See* *Olaplex, Inc. v. L’Oréal U.S. Inc.*, 855 Fed. App’x. 701, 706 (Fed. Cir. May 6, 2021) (“The only reasonable finding the jury could make ... was that Olaplex did not disprove that the information was at least readily ascertainable at the time of the alleged misappropriation.”).

⁵³ *See id.* at 707 (prior-art references that disclosed the alleged trade secret demonstrated that it was “readily ascertainable by proper means.”).

⁵⁴ “*Trade Secret*” *Ingredients*, FDA (Mar. 26, 2024), <https://www.fda.gov/cosmetics/cosmetics-labeling/trade-secret-ingredients> [<https://perma.cc/4CH7-Q78X>].

ingredients with trade secret instead of patent, as the risk of reverse engineering is substantial due to the required publication of ingredients.

C. *Utility Patent*

A beauty company can theoretically patent the formula for their product or a novel technique they create. This is a useful tactic for brands who develop an innovative technology in their product or product application,⁵⁵ or develop a novel formula for a product or ingredient. However, several factors make this protection not particularly useful for beauty brands. First, assuming that the product itself is eligible for a utility patent, it can take one to five years to go through the patent process, including writing and filing the application.⁵⁶ In an industry where trends cycle through quickly and brands are incentivized to put out new products quickly, this timeline reduces the value of obtaining a patent, as by the time a company has obtained patent protection, the peak sales period has already passed.⁵⁷ Additionally, many products that brands create are just minor tweaks on an existing product, offering consumers a new shade, tint, or packaging. This is not likely to meet the novelty requirement to obtain a utility patent.⁵⁸ However, if a brand invests time and money into developing an original product, as opposed to slightly tweaking something already on the market, then it may be worth their time and money to pursue a patent for this new product.⁵⁹ When considering the combination of the finite amount of ingredients and the tendency towards product reformulation instead of innovation in the beauty market, this may be a higher bar

⁵⁵ For an example of a beauty brand patenting an innovative technology, *see* *Compliant* at ¶ 46, *Lashify, Inc. v. Qingdao Lashbeauty Cosm. Co., LTD.*, No. 6:22-CV-776, 2022 WL 22888656 (W.D. Tex. July 12, 2022) (alleging patent infringement of Lashify’s lash extension system).

⁵⁶ Daniela Morosini, *How Patents Became the Beauty Industry’s Secret Weapon*, *VOGUE BUS.* (Apr. 11, 2022), <https://www.voguebusiness.com/beauty/how-patents-became-the-beauty-industrys-secret-weapon> [<https://perma.cc/5QSY-F83U>].

⁵⁷ *See id.*; *see also* Morosini, *supra* note 3 (“The lightening-fast pace of TikTok can make it difficult to create new products in response to trends—by the time the product in question is on store shelves, the internet may have moved on.”).

⁵⁸ 35 U.S.C. § 102.

⁵⁹ *L’Oreal and Drunk Elephant Settle Suit over “Patent Infringing” Vitamin C Serum*, *FASHION L.* (Nov. 6, 2020), <https://www.thefashionlaw.com/loreal-and-drunk-elephant-settle-suit-over-patent-infringing-vitamin-c-serum/> [<https://perma.cc/X2P5-76RR>]. L’Oreal’s patent protected the compound, “stabilized ascorbic acid compositions and methods.” *Id.* L’Oreal filed suit against Drunk Elephant for infringement, but the parties eventually settled. The duped product is still available to consumers.

to meet than anticipated.⁶⁰ The beauty industry is already limited in form, by the type of products available, and in function, by the market incentive for brands to make their own version of products that comply with current trends. For all these reasons, while it may make sense in limited situations involving a truly novel innovation to patent a beauty product, utility patents generally offer little protection to brands interested in using intellectual property to exclude dupes from the market. In those limited situations, however, protecting the product by patent can ensure the brand is able to recover significant damages from successful dupes, especially if the infringement was found to be willful.⁶¹

D. Design Patent

Another useful method of intellectual property protection is design patent. Design patent protects “new, original, and ornamental design” so long as the application satisfies the requirements of novelty, non-obviousness, ornamentality, and non-functionality.⁶² Brands can file a design patent to protect some or all ornamental elements of their packaging design, but the scope of protection is limited to packaging only and not the product itself. Unlike trademark, the design (here, the design of product packaging) does not need to be distinctive or have secondary meaning in order to be protectable.⁶³ While design patent cannot be used to protect a product’s packaging in its entirety, it can be used strategically to protect what brands perceive to be the most distinctive or unique ornamental elements of their packaging.⁶⁴ The flip side of this protection is that luxury brands cannot prevent dupe products from doing the same for their own packaging.⁶⁵ While design patents can protect certain ornamental elements of a product’s packaging

⁶⁰ Eduardo Perez et al., *Special Issue Information*, COSMS. (July 31, 2022), https://www.mdpi.com/journal/cosmetics/special_issues/Novel_Cosmetic [<https://perma.cc/Z8EN-WGAH>] (“However, the cosmetic industry has lacked innovation in recent decades, relying largely on reformulations and repackaging of the same functional ingredients, instead of performing research and development to identify new actives.”).

⁶¹ *Jury Awards Lashify \$30.5M in Case Against Chinese Copycat Co.*, FASHION L. (Sept. 24, 2024), <https://www.thefashionlaw.com/lashify-awarded-305m-in-case-against-chinese-copycat-co/> [<https://perma.cc/Q6S8-YC29>].

⁶² 35 U.S.C. § 171–73.

⁶³ *See id.*

⁶⁴ *See, e.g.*, Mary Kay’s design patent protecting some elements of their product packaging. U.S. Patent No. D741, 723 S (issued Oct. 27, 2015).

⁶⁵ *See, e.g.*, e.l.f. Cosmetics design patent protecting the hang tab of their product packaging. U.S. Patent No. D878, 204 S (issued Mar. 17, 2020).

from being mimicked by a dupe protect, this does not prevent dupes from packaging their products in a different manner and obtaining recognizability as a dupe in that packaging. It does, however, help in preventing dupes from selling their version of the products formula in packaging identical to or extremely similar to the original products, much in the way trade dress protections operate, but without the requirement of secondary meaning. Design patent protection then can be used as a stopgap measure prior to a product developing secondary meaning to protect elements of a product's packaging that recently entered the market against fast-moving dupes.

E. Copyright

Copyright protections within the United States offer extremely limited protection to beauty products. Similarly to design patents, copyright can only be used to protect the packaging design itself, not the product. The copyright statute lists eight categories eligible for protection; of these, beauty products can only claim protection under the category of pictorial, graphic, or sculptural works for product packaging.⁶⁶ Additionally, if the object seeking copyright protection has utilitarian functionality (which product packaging certainly does), then the product is considered a "useful article."⁶⁷ Copyright does not offer protection to a pictorial, graphic, or sculptural element of a useful object unless these features are separable from the utilitarian aspects of the design.⁶⁸ As the court recently addressed in *Star Athletica*, an element of pictorial, graphic, or sculptural design must be separable from the useful article and "qualify as a protectable pictorial, graphic, or sculptural work ... either on its own or fixed in some other tangible medium of expression" in order to qualify for copyright protection.⁶⁹ This is an especially high bar for any beauty product to pass, as beauty product packaging is hugely functional and

⁶⁶ 17 U.S.C. § 102(a) ("Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression ... Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.").

⁶⁷ 17 U.S.C. § 101 ("A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'").

⁶⁸ 17 U.S.C. § 102(a).

⁶⁹ *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405, 405 (2017); *see generally* Samantha Burdick, *Star Athletica Tells the Fashion Industry to Knock-It-Off with the Knockoffs*, 46 PEPP. L. REV. 367 (2019).

also of limited space to incorporate separable designs due to its size. Furthermore, copyright protection would only extend to the pictorial or sculptural design itself, and would not cover the utilitarian or functional aspects of the product packaging that are more likely to be copied.⁷⁰

III

RECONCILING THE VALUES OF OUR INTELLECTUAL PROPERTY SYSTEM WITH DUPES

A. *The Value a Dupe Generates Aligns with the Utilitarian Theory of Intellectual Property*

Beauty products exist in a low-IP equilibrium within the intellectual property schema.⁷¹ Beauty dupes and original products do not exist in a true IP “negative space,” defined as “areas where creation and innovation thrive without significant formal intellectual property protection.”⁷² Beauty brands, both luxury and dupes, vigorously enforce the intellectual property protections that they have,⁷³ but luxury brands have very little control over derivative works created without trademark or patent infringement.⁷⁴ Luxury beauty brands cannot prevent dupes from being made or sold, but both luxury and dupe beauty brands can enforce similar rights stemming from their product’s originality or their brand’s trademark. Thus, it would be more accurate to say instead that beauty products and dupes exist in a low-IP space. As IP litigation over these products occurs on the periphery of the intellectual property system, it is useful to analyze dupes against the context of the values and motivations of the intellectual property system.

⁷⁰ Charlotte Tilbury recently successfully enforced infringement of its copyright in a makeup palette against a dupe created by Aldi in Europe. Copyright protection in this case was limited to original works, and “decoration or works involving a sufficient element of craftsmanship” are protected. See Myserson Solics., *Charlotte Tilbury Wins Copyright Battle Against Aldi*, MYERSON (Sep. 5, 2019), <https://www.myerson.co.uk/news-insights-and-events/charlotte-tilbury-wins-copyright-battle-against-aldi> [<https://perma.cc/7QQA-ECKT>]. The differing standards for copyrightability suggest that a similar suit would not be successful in the United States.

⁷¹ Clay, *supra* note 5, at 457–60.

⁷² *Id.* at 459 (quoting Elizabeth L. Rosenblatt, *Intellectual Property’s Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 422 (2013)); see generally Kai Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1764–65 (2006).

⁷³ See *supra* Section II.

⁷⁴ Clay, *supra* note 5, at 464–68.

Under the most common theoretical justification for intellectual property protections, the utilitarian theory, “intellectual property is justified because it serves as an incentive for individuals to create more works, which is socially beneficial.”⁷⁵ Generally, the goals of a utilitarian-based system are innovation and the creation of new products.⁷⁶ In the case of the beauty industry, beauty dupes do not hinder these goals but rather, in some areas, promote them. First, dupes do not interfere with the first mover advantage, as a product is only attractive as a dupe to mimic a luxury good already available on the market.⁷⁷ Dupes certainly add new products to the market and ostensibly do so with new or variant formulas and product packaging. Dupes may also incentivize luxury companies to innovate beyond what they would with only regular market incentives. The motivation is twofold: luxury beauty companies may want to create a truly novel product that cannot be duped, thus creating new products or techniques; furthermore, they may want to increase the value of their brand such that consumers on the margins choose to buy the luxury product instead of the dupe in order to feel that they possess the value of the brand.

Additionally, the reverse engineering that companies who produce dupes engage in to create their products is itself a form of innovation. While these imitative formulas are comparable enough to be dupes, they are not identical, and some consumers report enjoying the dupe product more than the original.⁷⁸ Thus, even without vigorous intellectual property protection to prevent all deliberate

⁷⁵ *Id.* at 442.

⁷⁶ *Id.* at 442–43.

⁷⁷ In addition to luxury brands maintaining their first mover advantage, dupes can increase luxury product sales by providing consumers a low-entry point to try a new type of product. Once familiar with the product, some consumers choose to purchase a luxury version in the future. *See* NIELSEN IQ, THE IMPACT OF BEAUTY DUPES ON COSMETICS CATEGORY SALES (Nov. 17, 2023), <https://nielseniq.com/global/en/insights/analysis/2023/the-impact-of-beauty-dupes-on-cosmetics-category-sales/> [<https://perma.cc/YMY2-WLNL>] (“When consumers purchase a niche category (like primer or setting spray) for the first time, they’re more likely to experiment with affordable products, then trade up in the future.”); *see also* Danziger, *supra* note 4 (“Dupes . . . allow the whole market to expand because it allows people to try new types of products they wouldn’t be able to afford otherwise. And sometimes, after testing a dupe, customers will actually trade up to the higher-end brand.”).

⁷⁸ *See* Peiser, *supra* note 10.

copying, the beauty industry is consistently producing new products and is financially booming.⁷⁹

What keeps this system stable, and does anything prevent dupes from overrunning luxury goods on the market? There is no industry consensus on this matter, but I will offer two intuitions. First, the value of a luxury beauty brand is not to be underestimated. Many of the brands that sell the most expensive products are powerhouses in their own right and have truly terrific staying power in the market.⁸⁰ There are a significant portion of beauty consumers for whom a dupe is never going to be a desirable option for purchase when compared with the luxury product.⁸¹ Additionally, for those products that are truly innovative, or for brands who advertise based on the use of a special, proprietary ingredient, a dupe will never serve as a substitute, as the product's appeal relies on the use of the protected technology or ingredient. Second, while there are certainly consumers who purchase dupes for their affordability, there is a not insignificant subset of consumers who are interested in purchasing both products. Perhaps influenced by the beauty influencer norm of trying both products or by the culture of hyperconsumerism that influences beauty consumers,⁸² dupes may be additional purchases instead of substitute purchases. Regardless of the reason, the fact remains that the beauty industry has not been destabilized by the widespread availability of dupes, and luxury beauty companies are more than holding their own.

B. *Are Dupes Protectable on Their Own Merits?*

Beauty dupes are legally permissible copies of luxury beauty products that companies then package and sell independently under their own trademarks and with their own packaging. Dupes often attain great popularity and are hugely

⁷⁹ See *id.* (In a 112 billion dollar industry, the “[m]ass market beauty sales jumped 8 percent year over year, while prestige brands swelled 14 percent . . .”).

⁸⁰ See Simon Ganzallo, *The 10 Richest Cosmetic Brands in the World*, RICHEST (Nov. 15, 2022), <https://www.therichest.com/luxury/the-richest-cosmetic-brands-in-the-world/> [https://perma.cc/H3CL-E8YC].

⁸¹ See Pitman, *supra* note 22 (“Mintel’s data also reveals that perceptions of value in the makeup category are nuanced, with 41% of the respondents stating that they prefer to buy premium products, regardless of price.”).

⁸² Tori Crowther, *Let’s Be Honest: We Have an Overconsumption Problem in Beauty*, LIVETHATGLOW (May 8, 2024), <https://www.livethatglow.com/overconsumption-problem-in-beauty/> [https://perma.cc/AL92-WL6H] (“According to the biggest TikTok beauty influencers, products no longer need a single drawer in a bedroom reserved to keep them organized, they need to be housed in an entire room . . .”).

profitable on their own merits.⁸³ However, companies that produce and sell dupes are limited by the exact same restrictions as luxury good producers. Essentially, the characteristics that allow companies to create dupes also make dupes equally hard to protect through intellectual property against further copying. There is a certain equilibrium to this: a market where some creators could protect derivative products while the creators of the original good could not would disincentive anyone from being the first to create and would threaten to destabilize the beauty market.

Our current intellectual property regime has created a thriving tiered market with only a minority group of customers overlapping. Most beauty commentators think that the customer for a luxury beauty product is a relatively high-income shopper who is not seeking a cheap alternative.⁸⁴ Empirical studies have proved this intuition true: a 2023 study found that of beauty consumers surveyed, 41% preferred to buy premium beauty products regardless of price.⁸⁵ Additionally, those consumers who are buying dupes may be locked out of the luxury beauty market or are not interested in paying the price of a luxury product. A separate consumer study found that 44% of beauty consumers purchased dupes because they could not afford high-end products, and 23% did not think luxury goods are worth the price.⁸⁶ The market data seems to suggest that dupe products are not significantly interfering with luxury beauty products sales; indeed, the products appear to be purchased by different discrete groups of buyers. Instead of stealing sales from luxury beauty companies, dupes instead appear to have opened the market to those who could not previously afford to participate or who were not willing to pay the cost of entry.

While dupes and luxury beauty products have access to the same level of intellectual property protections, dupes do generate independent value. Selling easily accessible versions of popular beauty products without the upcharge associated with purchasing a luxury good has opened the market to more consumers and allowed consumers who already participated to buy new kinds of products.⁸⁷ Indeed, 98% of beauty consumers surveyed “stated that discovering

⁸³ Peiser, *supra* note 10.

⁸⁴ *Id.*

⁸⁵ Pitman, *supra* note 22.

⁸⁶ NIELSEN IQ, *supra* note 77.

⁸⁷ *Id.*

dupes has expanded their beauty routines.”⁸⁸ While the products themselves are not the creations of independent innovation, neither are a significant portion of their luxury beauty counterparts. The beauty industry is built on derivative innovation, and dupes should not be excluded simply because their design takes more from others than some.

C. Luxury Brands Use Alternative Methods to Protect Their Products and Compete with Dupes

There are several factors that restrict the profit of beauty dupes independent of the intellectual property protections that luxury brands can leverage against infringing products. As luxury brands can only use litigation to keep dupes from the market in limited circumstances, beauty brands have turned to methods outside the legal system to limit consumer purchases of dupes. Some of these strategies are led by brands themselves; others are industry-wide issues.

The first factor that limits overall consumption of dupes is the industry-wide reckoning over moral consumerism. Moral consumerism covers two related topics: those who see dupes as ‘theft’ of luxury brands products and innovation, and those who believe in moral consumerism with the goals of sustainability and environmentalism. To the first concern over theft, there is a growing movement of commentators in the beauty industry who feel that buying a dupe instead of an original product is ethically wrong and supportive of theft.⁸⁹ Specifically, some see the diversion of profits from luxury brands who created the original product to other companies who create dupes as a serious enough harm that it is a compelling justification to deliberately choose to not purchase dupe products in order to avoid financially supporting a moral wrong.⁹⁰ Although courts have only rarely recognized dupes as infringing on the original products’ IP rights, some consumers don’t share the same opinion. Those who believe dupes are theft or “stealing” from luxury brands have a conception of ownership that does not map onto the legal framework under our current intellectual property regime, and act as conscientious

⁸⁸ *Id.*

⁸⁹ Louise Whitbread, *Is It Ethical to Continue Buying Beauty Dupes In 2019?*, DAZED DIGIT. (Oct. 4, 2019), <https://www.dazeddigital.com/beauty/article/46283/1/beauty-dupes-charlotte-tilbury-lidl-lawsuit-dupethat-temptalia-ethical> [<https://perma.cc/2FTS-GJ5R>].

⁹⁰ *See id.* (“I would rather just buy a cheaper brand than buy a dupe, e.g. Rimmel instead of a duped MAC product, it’s people profiting off someone else’s work that I think is wrong.”).

objectors by refusing to purchase beauty dupes. While dupes are well-established in the beauty industry at this point in time, there is still a loud minority who believe that dupes are just “profiting off [of] someone else’s work” and actively choose to refrain from purchasing beauty dupes.⁹¹

Additionally, those concerned with moral consumerism separately refrain from purchasing dupes because they are concerned about the overconsumption of beauty products that dupes encourage and enable and consider that good reason to be against all dupes as a concept.⁹² Specifically, these consumers are concerned with the waste generated by excessive consumerism and the amount of resources used by the beauty industry in general.⁹³ They have identified beauty dupes in particular as a harmful excess that consumers should choose not to purchase in order to act according to sustainable principles.⁹⁴ These critics classify dupes as a whole as harmful and unsustainable because they are copies of existing products, thus creating unnecessary waste, and by their very existence encourage the culture of hyperconsumerism that leads to excess purchases.⁹⁵

Secondly, luxury beauty brands may be counting on the strength of the brand loyalty that they have cultivated with their customers to limit the risk that some of their customers will turn to dupes instead. Known as ‘cult favorite’ beauty products, these are products that have staying power on the market despite a high price point.⁹⁶ To complement and further build cult favorite status, the beauty industry has external methods of promoting their products. Industry renowned beauty commentators often run annual awards and best-of lists (for example, the Allure Best of Beauty annual list) that reinforce the perception of prestige and quality for whichever product and brand tops the list.⁹⁷ While it is hard to point to

⁹¹ *See id.*

⁹² Bell, *supra* note 6. (“It’s the idea that we need to constantly buy more . . .”).

⁹³ *See id.* (“Beauty trends . . . have long taught us to consume more . . . With even more hype and spending tied to dupe culture, the exponential rise in dupes could be detrimental where beauty waste is concerned.”).

⁹⁴ *See id.* (“Dupes are associated with ‘hauls’ and, while fun to watch, they promote the ethos of a ‘more is more’ unbridled consumption that is bad for the planet.”).

⁹⁵ *See id.* (“[B]ecause dupes are usually a lot cheaper than the original, consumers might be inclined to buy more products . . . [D]upe culture feeds the cycle of consumerism and production.”).

⁹⁶ *See* Karina Hoshikawa, 22 *Cult-Favorite Beauty Products That Have Stood the Test of Time*, REFINERY29 (June 22, 2020), <https://www.refinery29.com/en-us/best-selling-beauty-products> [<https://perma.cc/G5WH-SNP6>].

⁹⁷ ALLURE: BEST OF BEAUTY, <https://www.allure.com/best-of-beauty-2023-winners> [<https://perma.cc/B9DE-QXVS>] (last visited Mar. 27, 2025).

any specific award or aura of prestige and determine how effective it is at reinforcing luxury beauty companies' power in the market, the mere fact that the industry supports and acknowledges value in these mechanisms indicates that they exert some control over the market.

Finally, beauty products are unique in the utility that customers get from purchasing luxury beauty items. An average consumer purchases a luxury trademark as an indicator of status and prestige, as well as quality and brand loyalty.⁹⁸ Beauty products differ because once the product is applied and worn in public, the packaging containing the trademark is not brought along with it in public.⁹⁹ Thus, only the consumer knows what was purchased and what is being worn. Unlike luxury shoes or handbags, where the prominent mark indicates to all who see the item in public that the consumer purchased a product from a specific brand, the majority of makeup and beauty products are applied and worn without any indicator of a brand. Any value derived from purchasing the luxury trademark is in the personal enjoyment one gets from owning and using a luxury good, and not in others' recognition of the luxury trademark and the associated status and wealth that it indicates. The logic follows that for beauty products, there is less or even no value to be derived from public recognition of its packaging and trademark past the original consumer purchase, as the consumer cannot gain value from public recognition of their ownership of a luxury good.

This quirk of beauty products, both luxury and dupes, creates an interesting extension of Barton Beebe's influential work *Intellectual Property Law and the Sumptuary Code*. In Beebe's work, he argues that intellectual property law has been used to uphold a modern form of the sumptuary code, or a "system of consumption practices . . . by which individuals in the society signal through their consumption their differences from and similarities to others"¹⁰⁰—more succinctly, a "consumption-based system of social distinction."¹⁰¹ Thus, consumers derive

⁹⁸ Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 819–23 (2010).

⁹⁹ The exception to this is certain lip products such as lipsticks and lip glosses, which are often portable and re-applied publicly, thus displaying ownership of a luxury mark attached to the product packaging. For more on how lip products have historically been used as a status symbol see Maria Santa Poggi, *How Lip Gloss Became a Status Symbol*, HARPER'S BAZAAR (Apr. 5, 2024), <https://www.harpersbazaar.com/beauty/makeup/a60319881/lip-gloss-trend-2024/> [<https://perma.cc/2C4P-QPKC>].

¹⁰⁰ Beebe, *supra* note 98, at 812.

¹⁰¹ *Id.* at 813.

value both from purchasing a luxury good and from the ownership and public recognition of that luxury good in its secondary use as a marker of exclusivity, which is then understood by the public as a proxy for class status.¹⁰² Intellectual property, most often trademark, has been used to create a modern-day sumptuary code because it is capable of “protecting forms of distinction from imitation and overproduction.”¹⁰³ In excluding those of a lower economic class from owning a recognizable copy, or dupe, of a luxury trademark, those of a higher economic class maintain their status.¹⁰⁴

Luxury beauty products and dupes both fit and do not fit in this framework. A luxury brand’s trademark is still vigorously protected by general intellectual property protection, and it is one area that dupes have not been able to successfully copy. The status hierarchy in who can afford which class of mark still exists, as does the utility a consumer gets from purchasing a luxury good. However, when going about daily life, no average consumer would be able to identify if the beauty products someone used were luxury or dupes merely by seeing their face. The only thing visible to the public would be the quality of the product or the skill used in applying it, not the price or exclusivity of the product’s associated mark. Thus, beauty dupes exist as a partial exception to the sumptuary code in a manner unique to the beauty industry, as other popular dupes in areas such as fashion cannot achieve the same. The purchase and use of a dupe beauty product poses less of a threat to the existence of an intellectual property structured sumptuary code because the beauty industry, by the very nature of its products’ separability from its packaging and mark, as well as the inability to attach a trademark to the public display of the product separate from its packaging, cannot participate in creating a visible hierarchy the same way as other major industries. This effect may create less incentive for luxury beauty companies to exert time and money in excluding dupes from the market.

A recent study examining the relationship between income inequality and the purchase of counterfeit luxury goods adds another layer onto Beebe’s analysis. The study ultimately found that “perceived [income] inequality ... increases consumption of counterfeit luxury goods [and this consumption is driven] ... by

¹⁰² *See id.* at 819–24.

¹⁰³ *Id.* at 815.

¹⁰⁴ *Id.* at 866–68.

motives to restore social equality.”¹⁰⁵ While focused on counterfeit goods and not dupes, the study highlighted the egalitarian value of counterfeits, or the ability of counterfeit goods to symbolically reject the market norm of income inequality.¹⁰⁶ In reaching this conclusion, the study’s authors evaluated three potential motivations behind the purchase of counterfeits: egalitarian motives, defined as purchasing counterfeits specifically to “undermine the exclusivity of luxury goods”;¹⁰⁷ consumers who sought to improve their own status; and consumers who sought belonging in their current status group.¹⁰⁸ As discussed above, beauty products are unique in that only the consumer knows what products were applied and the associated cost; all anyone external can judge is the quality (and perhaps, quantity) of products applied. Thus, while the purchase of a counterfeit good in general could be in response to any one of the three motivating factors, the purchase of a beauty dupe has to be for egalitarian motives, or undermining the exclusivity of luxury goods. Consumers cannot demonstrate that they belong in their current social group or demonstrate upward mobility with the purchase of a beauty counterfeit, as no one will see their use of it. Thus, the purchase of beauty counterfeits, and by extension dupes, is in response to egalitarian motivations. Purchasing beauty dupes allows consumers to “react to income inequality by using consumption to ostensibly shape social conditions” and “restore social equality.”¹⁰⁹ This intuition is further borne out by a commonly observed phenomenon known as “the lipstick effect,” where consumers turn to small luxuries, often lipstick, in times of economic downturns where their purchase of larger luxuries decreases.¹¹⁰ Just as purchasing lipstick is used during financial downturns to preserve markers of financial status, so too do beauty dupes allow consumers to present whatever face they want to the world, without a large price tag required.

The relationship between beauty dupes and income inequality becomes especially salient when considered in light of the value that beauty products have

¹⁰⁵ Jingshi Liu et al., *The Egalitarian Value of Counterfeit Goods: Purchasing Counterfeit Luxury Goods to Address Income Inequality*, J. CONSUMER PSYCH. 1, 10–11 (July 1, 2024), <https://myscp.onlinelibrary.wiley.com/doi/epdf/10.1002/jcpy.1431> [https://perma.cc/7LEB-UQB2].

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 10–11.

¹⁰⁹ *Id.* at 11.

¹¹⁰ Santa Poggi, *supra* note 99.

to the average consumer. As beauty reporter Jessica DeFino observed, “[s]o much of our identity is tied up in the products that we use, and the ways that we use them . . . [a]nd the rituals we develop, using these products—it becomes an almost religious experience, like an experience of self-discovery.”¹¹¹ For those consumers who want to experience certain trends, use certain products, or achieve a certain quality to their makeup but cannot afford the original luxury product, beauty dupes offer them a way to still obtain the experience they want. Makeup and skincare are commonly used in acts of self-expression, and even in creative works.¹¹² In addition to the personal utility people derive from makeup, wearing makeup is treated as a social norm and women can be penalized for noncompliance. One study found that women who wore professional makeup received three times as many positive responses when applying for a salesperson job as compared to women who do not wear makeup.¹¹³ The use of makeup and beauty products is undoubtedly vital in how a person, often a woman, chooses to present herself to the world and navigate social standards. Increasing the range and quality of products a person has access to without imposing cost as a barrier should be seen as a net positive in this context.

CONCLUSION

While some decry them as unethical, beauty dupes take advantage of a lack of applicable intellectual property protection to create cheaper versions of popular luxury beauty products. Dupes are extremely popular among consumers who cannot afford luxury beauty items, among those who want to participate in market trends without investing lots of money, and among those who want to be part of the trend-setting contingent of beauty commentators. On their part, luxury beauty companies do not hesitate to enforce actionable infringement suits for trade

¹¹¹ Amy Wakeham, *Talking Beauty Culture, Criticism and Consumerism with Jessica DeFino*, COUNTRY & TOWN HOUSE (Feb. 2024), <https://www.countryandtownhouse.com/travel/new-travel-rules/> [perma.cc/P43E-FRQL].

¹¹² See generally Laken Brooks, *The Pigments of Patriarchy and Femme Trans Exclusion in the History of the “All Natural” Makeup Movement*, in MAKEUP IN THE WORLD OF BEAUTY VLOGGING: COMMUNITY, COMMERCE, & CULTURE 127, 127–31 (Clare Douglass Little ed., 2020) (discussing the use of makeup in gender expression); see also Rosanna K. Smith et al., *Makeup Who You Are: Self-Expression Enhances the Perceived Authenticity and Public Promotion of Beauty Work* 48 J. CONSUMER RSCH. 102, 104 (Jan. 26, 2021) (discussing the link between beauty work and self-expression).

¹¹³ Sevag Kertechian, *The Impact of Beauty during Job Applications*, J. HUM. RES. MGMT. RSCH. 1, 5 (Feb. 16, 2016) (comparing results in France and Italy).

dress or patent infringement, but do not invest much beyond that in excluding dupes from the market. Currently, beauty dupes function as a low-intellectual property equilibrium space, although the beauty industry certainly is regulated and influenced by factors other than intellectual property protection. Beauty dupes create innovation, add new products to the market, enable more consumers to participate in beauty trends, and may even incentivize luxury companies towards more expansive innovation. Beauty dupes overall operate as a social good, both in regard to their place in the beauty market and as independent products.