

# MAKEUP AND MADE-UP PROTECTION: UNVEILING THE NEED FOR STRONGER LEGAL PROTECTIONS AGAINST MAKEUP DUPES WITHIN THE LUXURY BEAUTY INDUSTRY

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## I. INTRODUCTION

As the beauty industry continues to evolve, so do the trends within the industry.<sup>1</sup> One of the most notable trends is the rise of makeup duplicates, colloquially known as “dupes.”<sup>2</sup> Dupes have taken the cosmetics industry by storm, and their popularity shows no sign of slowing down in the coming years.<sup>3</sup>

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<sup>1</sup> See Anush Melikyan, *Dupe Culture Takes Over Social Media*, CLARK CHRON. (Mar. 14, 2024), <https://clarkchronicle.com/features/2024/03/14/dupe-culture-takes-over-social-media> (“Although wearing or using knockoff products has typically been ridiculed, the growing popularity of the dupe culture on TikTok has changed the perspective and attitude towards the idea of dupes.”); see also Rebecca Weeks, *The Dupe Dilemma: Beauty Industry Trends*, HONCHŌ (Dec. 14, 2023, 8:31 AM), <https://www.honchosearch.com/blog/the-dupe-dilemma-beauty-industry-trends> (“In the ever-evolving landscape of the beauty industry, one trend that has gained significant traction is the rise of ‘dupes.’”).

<sup>2</sup> See Melikyan, *supra* note 1 (“Dupe culture as a whole is booming in popularity; #Dupe has been viewed over a billion times on both TikTok and Instagram.”); see also Weeks, *supra* note 1 (explaining how the trend of makeup dupes has grown within the past few years).

<sup>3</sup> See Fleur Burrows, *Dupe Culture: The Dark Side of Makeup Dupes*, MATCH MY MAKEUP (Apr. 26, 2023), <https://www.matchmymakeup.com/blog/dupe-culture-in-the-makeup-industry> (describing the growing popularity of dupes within the beauty community); see also *The Symbiotic World of Beauty Dupes: Fragrance, Makeup & Beyond*, GLOB. COSM. INDUS. (Mar. 14, 2024), <https://www.gcimagazine.com/consumers-markets/article/22889779/the-symbiotic-world-of-beauty-dupes-fragrance-makeup-beyond> (“About 1/3 of all makeup users use dupes, but that percentage jumps to nearly 50% for millennials and Gen Z, pointing to a generational shift in the category.”).

Makeup dupes are products created by different brands, often lower-end brands, to simulate luxury beauty products at a lower price point.<sup>4</sup> Dupes often replicate the packaging, formula, or appearance of viral luxury beauty products.<sup>5</sup> Although makeup dupes have been around since the early 2000s, they have proliferated in the past few years due to increased dupe-related content from social media influencers.<sup>6</sup>

Introduced initially as imitations of popular or limited edition beauty products, these dupes have quickly evolved into borderline exact copies.<sup>7</sup> While counterfeit products copy a brand's registered trademark for the purposes of deception, dupes seek to provide affordable alternatives to the consumer who knowingly purchases them.<sup>8</sup> There are a few ways in which companies attempt to duplicate luxury beauty products.<sup>9</sup> The most common form of makeup dupes

<sup>4</sup> See Burrows, *supra* note 3 (“Makeup dupes are products that mimic the look and feel of high-end makeup at a fraction of the cost.”); see also Anna Price, *Makeup Dupes: The Law of Cosmetics and Trademarks*, LIBR. OF CONG. BLOGS (Nov. 23, 2020), <https://blogs.loc.gov/law/2020/11/makeup-dupes-the-law-of-cosmetics-and-trademarks/> (“With so many high-end makeup brands on the market, it gets increasingly difficult to keep up financially. Dupes, or ‘duplicates,’ in the beauty world are considered a ‘cheaper alternative to higher-end products.’”).

<sup>5</sup> See Jennifer Underwood, *Makeup Dupes: Imitation as the Cheapest Form of Flattery*, UNIV. BRIT. COLUM. INT. PROP. L. (Apr. 22, 2024), <https://iplaw.allard.ubc.ca/2024/04/22/makeup-dupes-imitation-as-the-cheapest-form-of-flattery/> (“[T]he term dupe describes a product which intends to resemble a high-end product at a lower price point, often with similar packaging, appearance, or formula.”); see also Burrows, *supra* note 3 (“Dupes are affordable alternatives to high-end foundations that provide the same or similar results.”).

<sup>6</sup> See Priyansha Mistry, *Dupe Dynasty: TikTok and Instagram Reels Reshape Budget Shopping*, INDUS. LEADERS MAG. (Sept. 8, 2023), <https://www.industryleadersmagazine.com/dupe-dynasty-tiktok-and-instagram-reels-reshape-budget-shopping/> (“The term ‘dupe’ has been around for quite some time, originating in the beauty industry in the early 2000s.”); see also 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> (“The [makeup dupe] trend first took root on social media when influencers and their followers began turning away from pricey makeup brands, touting dupes delivering similar results.”).

<sup>7</sup> See Mistry, *supra* note 6 (explaining how the term dupe originally described products that resembled sold-out or discontinued items from luxury brands); see also Lucy Cocoran, *The War Between Designer Versus Dupe Makeup Brands: How Do We Know Which Is Better?*, ELLE (July 19, 2022), <https://www.elle.com.au/beauty/beauty-news/how-do-makeup-dupe-brands-work-27356> (explaining how MCoBeauty, a popular dupe brand, creates exact dupes to satisfy consumer demands).

<sup>8</sup> See Macaela Mackenzie, *Makeup Dupes are Unknowingly Being Bought by Consumers*, ALLURE (July 24, 2017), <https://www.allure.com/story/how-to-avoid-buying-counterfeit-beauty-products> (explaining the difference between makeup dupes and counterfeit products); see also Pamela N. Danziger, *Shopping Cosmetic Dupes is Tricky. Dupeshop Beauty Solves for That.*, FORBES (Nov. 16, 2023, 11:56 AM), <https://www.forbes.com/sites/pamdanziger/2023/11/16/shopping-cosmetic-dupes-is-tricky-dupeshop-beauty-solves-for-that/> (“A counterfeit product is intended to deceive by using unauthorized trademarks. A dupe is a duplicate that is a near-identical substitute for a high-end product at a lower price.”).

<sup>9</sup> See Danziger, *supra* note 8 (“Richmond, VA-based Brandefy took one approach, developing clinically-based dupe formulas for a narrow range of skincare products, such as a \$32 Vitamin C serum that dupes a \$182 Skinceuticals product.”); see also Underwood, *supra* note 5 (describing the various ways that beauty brands produce dupes of luxury beauty products).

recreates the package and product design of luxury beauty products.<sup>10</sup> These dupes aim to mimic the aesthetics of products utilizing similar color schemes or designs.<sup>11</sup> Formulation dupes are an additional form of makeup dupes where a cosmetic product's texture or beauty effect is replicated.<sup>12</sup> Brands are increasingly producing products that replicate both the packaging and formulation of viral luxury beauty products.<sup>13</sup>

However, the rise of makeup dupes presents several issues within the beauty industry.<sup>14</sup> Particularly, dupes present various issues within copyright, patent, and trademark law.<sup>15</sup> One of the main issues that has arisen is makeup dupes infringing the trademark rights of luxury beauty brands.<sup>16</sup> Trademark law protects aspects of products that identify its source, or in other words, the item's producer.<sup>17</sup> Further, trademark law seeks to assist consumers in purchase

<sup>10</sup> See Underwood, *supra* note 5 (“Packaging and product design imitations are the most common form of makeup dupe.”); see also Robert Roby, *Have You Been Duped?*, KNOBBE MARTENS FASHION & BEAUTY BLOG (May 9, 2017), <https://www.knobb.com/blog/have-you-been-duped/> (describing examples of makeup brands that produce dupes to replicate luxury beauty products packaging).

<sup>11</sup> See Underwood, *supra* note 5 (“These dupes primarily aim to evoke the style and appearance of the original product, rather than replicate its effects or formula.”); see also Roby, *supra* note 10 (“While most brands copy only characteristics of the beauty product itself, some brands take ‘duping’ one step further by also copying the product packaging.”).

<sup>12</sup> See Underwood, *supra* note 5 (“Similar to product design dupes, formulation dupes occur when brands attempt to emulate the specific effect or unique texture of a product.”); see also Burrows, *supra* note 3 (explaining how luxury foundation formulas are frequently duped).

<sup>13</sup> See Roby, *supra* note 10 (“Popular drug store beauty brand, Makeup Revolution, has caught the attention of consumers and designer makeup brands with its duping of both makeup products and packaging.”); see also Allison O’Hara, *Beauty Dupes and Trademark Enforcement*, FORDHAM INTELL. PROP. MEDIA & ENT. L. J. IN BLOG (Nov. 5, 2018), <http://www.fordhamiplj.org/2018/11/05/beauty-dupes-and-trademark-enforcement/> (“Many drugstore brands seek to replicate the color, texture, and performance of products from YSL, Urban Decay, and the like. But some discount brands, namely Makeup Revolution and Bad Habit, create products with packaging and layout that looks ‘eerily similar’ to popular luxury cosmetics.”).

<sup>14</sup> See Mistry, *supra* note 6 (“Dupes that are almost identical to the original products blur the line between inspiration and outright copying.”); see also Weeks, *supra* note 1 (“While the accessibility of dupes is commendable, their impact on the beauty industry isn’t without drawbacks.”).

<sup>15</sup> See O’Hara, *supra* note 13 (“With serious implications for both brands and consumers, it is worth asking whether dupes infringe the trademark rights of the luxury brands they copy.”); see also Samantha Primeaux, *Makeup Dupes and Fair Use*, 67 AM. U. L. REV. 891, 893 (2018) (“Makeup dupes are alternative products from lower-cost brands that perform the same function as prestige products, presenting a wide range of intellectual property issues to consider, with potential causes of action existing within copyright, patent, and trademark law.”).

<sup>16</sup> See O’Hara, *supra* note 13 (describing the issues revolving around makeup dupes and how they may infringe on luxury brands trademark rights); see also Roby, *supra* note 10 (“The concerns of brands and consumers, combined with the ethical issues of copying, call into question the legality of beauty product duping. Are beauty dupes infringing on the trademark rights of the copied brands?”).

<sup>17</sup> See O’Hara, *supra* note 13 (“Trademark law protects the aspects of a product that serve a source-identifying purpose.”); see also Roby, *supra* note 10 (“Trademark law protects those aspects of a product that identify its source. In other words, what is it about the product that makes consumers think it comes from one particular manufacturer?”).

making who often rely on product packaging to make their purchases.<sup>18</sup> Accordingly, trademark law protects both product packaging and design as trade dress.<sup>19</sup>

One of the most duped beauty products within the past few years has been the Hollywood Flawless Filter, created by luxury beauty brand Charlotte Tilbury.<sup>20</sup> This product was considered innovative within the luxury beauty industry as it combined the formulas of a primer and highlighter.<sup>21</sup> Due to its innovative formulation, the product became popular among social media platforms.<sup>22</sup> Other cosmetic brands such as e.l.f. Cosmetics (“e.l.f.”) and MCoBeauty released their own versions of the Hollywood Flawless Filter, which garnered great success.<sup>23</sup> The original Hollywood Flawless Filter retails for around \$44.00, while dupes are sold for under \$20.00.<sup>24</sup> These dupes not

<sup>18</sup> See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162–63 (1995) (explaining how consumers may come to rely on certain aspects of a product in order to indicate the product’s origin); see also Roby, *supra* note 10 (“Trademark law recognizes that consumers often rely upon product design and/or product packaging as an identifier of the source of the product.”).

<sup>19</sup> See Roby, *supra* note 10 (explaining how product design and product packaging can be protected by trademark law as trade dress since consumers often rely upon packaging as an identifier of the source of the product); see also O’Hara, *supra* note 13 (“Because product packaging and design can help consumers identify the source of a product, trademark law protects these aspects as trade dress.”).

<sup>20</sup> See Burrows, *supra* note 3 (“One of the most duped products of the last [two] years is the Charlotte Tilbury Hollywood Flawless Filter.”); see also Beth Gillette, *9 Best Charlotte Tilbury Flawless Filter Dupes, Tested and Reviewed for 2022*, COSMOPOLITAN (Nov. 15, 2022), <https://www.cosmopolitan.com/style-beauty/beauty/g41960856/charlotte-tilbury-flawless-filter-dupes> (listing several dupes currently on the market for the popular Charlotte Tilbury Hollywood Flawless Filter).

<sup>21</sup> See Kiana Murden, *TikTok Made Me Buy It: This Viral Multitasking Highlighter That Blurs Like a Beauty Filter*, VOGUE (Aug. 19, 2022), <https://www.vogue.com/article/charlotte-tilbury-hollywood-flawless-filter-review> (“The product seemed to be a mainstay in the routines of all the It girls, from Adele to the singer-songwriter Griff; and now, two years later, it’s still buzzy.”); see also Burrows, *supra* note 3 (“This product is a hybrid between a primer and a highlighter, designed to give you a radiant, glowing complexion.”).

<sup>22</sup> See Murden, *supra* note 21 (“As I became TikTok-obsessed at the height of the pandemic, it seemed I couldn’t go ten videos without seeing my fellow beauty-lovers posting a Charlotte Tilbury Hollywood Flawless Filter review.”); see also Burrows, *supra* note 3 (“The product’s versatility and popularity have made it a prime target for duping, leading to a flood of similar products on the market.”).

<sup>23</sup> See 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> (describing how the brand MCoBeauty gained popularity after releasing its “Flawless Glow,” a dupe of the Charlotte Tilbury Hollywood Flawless Filter); see also E.l.f. *Just Duped Charlotte Tilbury’s \$40 Airbrush Filter and We’re Shook*, HUDA BEAUTY (July 29, 2022), [https://hudabeauty.com/us/en\\_US/blog-e-l-f-charlotte-tilbury-flawless-filter-dupe-86406.html](https://hudabeauty.com/us/en_US/blog-e-l-f-charlotte-tilbury-flawless-filter-dupe-86406.html) (comparing the e.l.f. cosmetics dupe of the Charlotte Tilbury Hollywood Flawless Filter to the original product).

<sup>24</sup> See Erin Docherty, *‘I Tried the \*Identical\* Dupe for Charlotte Tilbury’s Flawless Filter. Here Are My Honest Thoughts.’*, MAMAMIA (May 1, 2023), <https://www.mamamia.com.au/mcobeauty-flawless-glow-review> (comparing the price between the Charlotte Tilbury Hollywood Flawless Filter and the MCoBeauty dupe); see also HUDA BEAUTY, *supra* note 23 (comparing the prices between the e.l.f. cosmetics Halo Glow Liquid Filter and the Charlotte Tilbury Hollywood Flawless Filter).

only replicated Charlotte Tilbury's formula, but they also replicated the Hollywood Flawless Filter packaging.<sup>25</sup> However, Charlotte Tilbury is no stranger to dupe culture, as other cosmetic brands have duped several of its products within the past few years.<sup>26</sup> While luxury beauty brands such as Charlotte Tilbury may seek legal action under trademark law, it can be difficult for brands to establish that their products qualify for protection as trade dress.<sup>27</sup>

To strengthen trademark protections for luxury beauty brands against makeup dupes, this Comment proposes amending the Lanham Act to combat the rise of makeup dupes.<sup>28</sup> Part II provides a brief background on trade dress laws and the elements required to establish a claim under the Lanham Act.<sup>29</sup> Part III highlights the current inadequacies of the current trade dress protections afforded by the Lanham Act, including its failure to account for generic product designs and the irrelevance of consumer confusion in makeup dupe cases.<sup>30</sup> Part IV proposes a novel solution to modify the Lanham Act to accommodate the makeup dupe phenomenon.<sup>31</sup> The solution calls for clarifying and strengthening the guidelines for trade dress protection to provide luxury beauty brands a remedy for the harm caused by makeup dupes.<sup>32</sup> Finally, Part V concludes with a brief overview of how amending the Lanham Act will safeguard luxury beauty brands from the negative impacts of makeup dupe culture.<sup>33</sup>

<sup>25</sup> See Docherty, *supra* note 24 (explaining how the packaging and formula of MCoBeauty's dupe is almost identical to the Charlotte Tilbury Hollywood Flawless Filter); see also Ainsworth, *supra* note 23 ("In the case of MCoBeauty's viral dupe of Charlotte Tilbury, Ms Sullivan said the priority was the formula, because that's what her customer base was requesting.").

<sup>26</sup> See Fabiana Buontempo et al., *TikTok Can't Stop Talking About This Very Popular \$42 Makeup Product, so We Tested Its \$9 Dupe to See Which One Is Actually the Best*, BUZZFEED (Aug. 9, 2024), <https://www.buzzfeed.com/fabianabuontempo/charlotte-tilbury-blush-vs-elf-dupe-review> (describing another popular Charlotte Tilbury product that was duped by e.l.f. cosmetics); see also Mia Lyndon, *FULL FACE 9 Best Charlotte Tilbury Dupes for Flawless Filter, Magic Cream and More*, U.S. SUN (May 21, 2024), <https://www.the-sun.com/shopping/6114877/best-charlotte-tilbury-dupes> ("Some of the brand's most-loved products cost more than a pretty penny – so it's unsurprising that Charlotte Tilbury 'dupes' are one of the internet's most-discussed beauty topics.").

<sup>27</sup> See O'Hara, *supra* note 13 (explaining how certain aspects of beauty products which are being duped make it difficult to seek recourse through trademark law); see also Roby, *supra* note 10 ("As such, beauty brands may have difficulty establishing trade dress rights, whether in court or when seeking to register the product design or packaging design with the U.S. Trademark Office.").

<sup>28</sup> See *infra* Part IV (suggesting the Lanham Act should be revised in order to accommodate the growing makeup dupe phenomenon).

<sup>29</sup> See *infra* Part II (explaining the governing law and how the Lanham Act provides protection for trade dress infringement).

<sup>30</sup> See *infra* Part III (highlighting the deficiencies in the Lanham Act and how it hinders luxury beauty brands from pursuing legal action against makeup dupes).

<sup>31</sup> See *infra* Part IV (proposing a novel solution to address the current inadequacies of the Lanham Act).

<sup>32</sup> See *infra* Part IV (describing how amending the Lanham Act should include clearer guidelines for trade dress protection).

<sup>33</sup> See *infra* Part IV (explaining how amending the Lanham Act will provide luxury beauty brands with legal remedies for the harm caused by makeup dupes).

## II. BACKGROUND

### A. DEFINING THE LANHAM ACT

The Lanham Act (“Lanham Act”) provides a seller or producer with the exclusive right to register a trademark and to prevent competitors from using it.<sup>34</sup> A trademark is a symbol, word, or device utilized to indicate a product’s source and differentiate the product from competitors.<sup>35</sup> Section 43(a) of the Lanham Act provides brands with a cause of action when they believe they have been damaged or are likely to be damaged by another brand’s false designation of a product.<sup>36</sup> Additionally, Section 43(a) of the Lanham Act extends its protections to the trade dress of a product.<sup>37</sup> The term trade dress encompasses all aspects of a product’s overall appearance, including size, shape, texture, and graphics.<sup>38</sup> The elements for trade dress protection under the Lanham Act require the trade dress to be inherently distinctive, non-functional, and the infringement of the trade dress creates a likelihood of consumer confusion.<sup>39</sup>

However, makeup cases are infrequently litigated, as it can be difficult for brands to establish the elements required under the Lanham Act.<sup>40</sup> Luxury

<sup>34</sup> See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995) (explaining the Lanham Act grants a seller or producer the exclusive right to a trademark and to prevent competitors from using that trademark); see also *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000) (citing 15 U.S.C. § 1125(a) (2012)) (explaining how “[i]n addition to protecting registered marks, the Lanham Act, in § 43(a), gives a producer a cause of action for the use by any person of ‘any word, term, name, symbol, or device, or any combination thereof . . . which . . . is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods.’”).

<sup>35</sup> See Price, *supra* note 4 (“To prevent confusion across brands and their products, makeup companies can register a trademark.”); see also *What is a Trademark?*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Mar. 30, 2025) (“A trademark can be any word, phrase, symbol, design, or a combination of these things that identifies your goods or services. It’s how customers recognize you in the marketplace and distinguish you from your competitors.”).

<sup>36</sup> See *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (2d Cir. 1991).

Coach’s federal claim is based on section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1988), which provides a civil action in favor of those who believe they have been damaged, or are likely to be damaged, by the use of a “false designation of origin” on a good or service.

*Id.*; see also 15 U.S.C. § 1125(a) (1988) (explaining how a party that violates the act shall be liable in a civil action).

<sup>37</sup> See *Coach Leatherware Co.*, 933 F.2d at 168 (“Section 43(a) extends protection to a product’s ‘trade dress’—the total image of a good as defined by its overall composition and design, including size, shape, color, texture, and graphics.”); see also *Stormy Clime Ltd. v. Progroup, Inc.*, 809 F.2d 971, 974 (2d Cir. 1987) (explaining how the Lanham Act extends its protection to trade dress).

<sup>38</sup> See *Mana Prods., Inc. v. Columbia Cosmetics Mfg., Inc.*, 65 F.3d 1063, 1068 (2d Cir. 1995) (“The term trade dress refers to how a product looks, its total image, or its overall appearance. As such, it includes a product’s ‘composition and design, including size, shape, color, texture and graphics.’”); see also *Coach Leatherware Co.*, 933 F.2d at 168 (defining trade dress as the product’s overall composition and design).

<sup>39</sup> See *Mana Prods., Inc.*, 65 F.3d at 1068 (listing the elements required to establish a cause of action for trade dress protection); see also *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (describing what elements are required to bring forth a case under the Lanham Act).

<sup>40</sup> See O’Hara, *supra* note 13 (explaining how courts are hardly roiling with lawsuits involving

beauty brands may be reluctant to pursue legal action against makeup dupes due to the costly and time-consuming nature of trade dress actions.<sup>41</sup> Further, courts have been reluctant to broaden trade dress rights in functional or decorative product features, fearing it will impede competition.<sup>42</sup>

## B. DISTINCTIVENESS

For a product to be protected as trade dress under the Lanham Act, the product's packaging must be distinctive.<sup>43</sup> A mark can be distinctive in two ways: it is inherently distinctive or has acquired secondary meaning.<sup>44</sup> If a trade dress is inherently distinctive, then it is not required to establish that the mark has a secondary meaning.<sup>45</sup> Secondary meaning is acquired "when the purchasing public 'associates' its design with a single producer or source rather than simply with the product itself."<sup>46</sup>

In *Abercrombie & Fitch Co. v. Hunting World, Inc.*, the court established five general categories where a product's distinctiveness may fall: generic, descriptive, suggestive, arbitrary, and fanciful.<sup>47</sup> Generic marks allude "to the

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makeup dupes); see also Alix Strauss, *The Most Lucrative Form of Flattery*, N.Y. TIMES (Oct. 15, 2013), <https://www.nytimes.com/2013/10/17/fashion/the-most-lucrative-form-of-flattery.html> ("No matter what grumbling happens behind the scenes, the courts are hardly roiling with lawsuits over knockoff cosmetics.").

<sup>41</sup> See O'Hara, *supra* note 13 ("It may be difficult for a brand to prove that its packaging—for example, a lipstick tube or blush compact—is inherently distinctive if the packaging is not unique or eye-catching, or if the use of that packaging is customary in the beauty industry."); see also Primeaux, *supra* note 15 (explaining which sorts of makeup dupes may be subject to costly litigation due to infringing conduct).

<sup>42</sup> See O'Hara, *supra* note 13 ("In addition, courts hesitate to grant broad trade dress rights in 'mechanically functional features' or 'mere ornamentation' because 'doing so would stifle legitimate competition.'"); see also Grace Howard, *Are Beauty 'Dupes' Legal?*, BUS. FASHION (May 3, 2017), <https://www.businessoffashion.com/articles/opinion/are-beauty-dupes-legal-makeup-revolution-charlotte-tilbury> (explaining how it is difficult for brands to trademark functional features, such as a lipstick bullet design).

<sup>43</sup> See *Two Pesos, Inc.*, 505 U.S. at 768 ("In order to be registered, a mark must be capable of distinguishing the applicant's goods from those of others."); see also *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 977 (10th Cir. 2002) (explaining when a product is considered distinctive and is thus entitled to trademark protection).

<sup>44</sup> See *Mana Prods., Inc.*, 65 F.3d at 1068 ("To prevail in a trade dress infringement suit under the Lanham Act, plaintiff must first prove that its identifying mark is itself inherently distinctive or that it has become distinctive by acquiring a secondary meaning."); see also *Two Pesos, Inc.*, 505 U.S. at 769 ("Section 2 of the Lanham Act provides that a descriptive mark that otherwise could not be registered under the Act may be registered if it 'has become distinctive of the applicant's goods in commerce.'").

<sup>45</sup> See *Mana Prods., Inc.*, 65 F.3d at 1069 (explaining it is not necessary to establish that a product has acquired secondary meaning when trade dress is inherently distinctive); see also *Two Pesos, Inc.*, 505 U.S. at 774 ("Engrafting onto § 43(a) a requirement of secondary meaning for inherently distinctive trade dress also would undermine the purposes of the Lanham Act.").

<sup>46</sup> *Coach Leatherware Co., v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (2d Cir. 1991) (describing how the trade dress of a product can acquire secondary meaning); see also *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 853 (1982) (holding the defendant failed to indicate how the colors of a drug acquired secondary meaning).

<sup>47</sup> See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976) ("Arrayed in

genus of which the particular product is a species.”<sup>48</sup> Typically, generic marks do not qualify for protection as they identify the product rather than identify the product’s source.<sup>49</sup> Descriptive marks may be registered only if the holder of the mark establishes secondary meaning.<sup>50</sup> The final three categories of distinctiveness—suggestive, arbitrary, and fanciful—are inherently distinctive and will always satisfy the first element for trade dress protection.<sup>51</sup>

### C. FUNCTIONALITY

Additionally, a product’s packaging must be non-functional to be eligible for trade dress protection.<sup>52</sup> Functionality refers to any aspect of the product that is essential to the product’s purpose.<sup>53</sup> As such, “a design is legally functional, and thus unprotectable, if it is one of a limited number of equally efficient options available to competitors and free competition would be unduly hindered by according the design trademark protection.”<sup>54</sup>

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an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.”); *see also* *Two Pesos, Inc.*, 505 U.S. at 768 (“Marks are often classified in categories of generally increasing distinctiveness; following the classic formulation set out by Judge Friendly, they may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful.”).

<sup>48</sup> *See* *Mana Prods., Inc.*, 65 F.3d at 1069 (describing what qualifies as a generic mark); *see also* *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) (“A generic term is one that refers to the genus of which the particular product is a species.”).

<sup>49</sup> *See* *KP Permanent Make-up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 602 (9th Cir. 2005) (“Generic marks are not capable of receiving protection because they identify the product, rather than the product’s source.”); *see also* *Park ‘N Fly, Inc.*, 469 U.S. at 194 (“Generic terms are not registrable, and a registered mark may be canceled at any time on the grounds that it has become generic.”).

<sup>50</sup> *See* *KP Permanent Make-up, Inc.*, 408 F.3d at 602 (“Merely descriptive marks, which describe the qualities or characteristics of a product, may be registered only if the holder of the mark shows that the mark has acquired distinctiveness through secondary meaning.”); *see also* *Park ‘N Fly, Inc.*, 469 U.S. at 194 (explaining how descriptive marks may only be registered if the registrant shows it has acquired secondary meaning).

<sup>51</sup> *See* *Mana Prods., Inc.*, 65 F.3d at 1069 (“Suggestive and arbitrary or fanciful marks are inherently distinctive. Hence, these marks always satisfy the first element of the test for trade dress protection.”); *see also* *Abercrombie & Fitch Co.*, 537 F.2d at 10 (establishing and explaining the five different categories of distinctiveness).

<sup>52</sup> *See* *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (“It is also clear that eligibility for protection under § 43(a) depends on nonfunctionality.”); *see also* O’Hara, *supra* note 13 (explaining how in order for any form of trade dress to be protectable under trademark law, it must be non-functional).

<sup>53</sup> *See* *Henri Bendel, Inc. v. Sear, Roebuck & Co.*, 25 F. Supp. 2d 198, 201 (S.D.N.Y. 1998) (defining functionality as a quality or characteristic essential to the purpose of a product); *see also* *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 31 (2d Cir. 1995) (explaining that functional packaging and product designs are not protected under the Lanham Act).

<sup>54</sup> *See* *Henri Bendel, Inc.*, 25 F. Supp. 2d at 201–02 (describing when a product design is considered to be legally functional); *see also* *Two Pesos, Inc.*, 505 U.S. at 775 (explaining how the Fifth Circuit has held that functional designs cannot be protectable due to the effects it would have on competitors within an industry).



## D. LIKELIHOOD OF CONFUSION

Lastly, a brand is required to prove the likelihood of confusion.<sup>55</sup> To establish the likelihood of confusion, it must be shown that “numerous ordinary prudent purchasers are likely to be misled or confused as to the source of the product in question because of the entrance in the marketplace of defendant’s mark.”<sup>56</sup> The federal courts have established a seven-factor test to determine whether a suspected infringing product creates the likelihood of consumer confusion: the type of mark; similarity of the mark; similarity of the products the marks represent; the retail outlets and customers the brands share in common; similarities in the type of advertising used; the intent of the defendant; and actual confusion.<sup>57</sup> As a result, probability of confusion exists where a large number of consumers are likely to be confused as the source of a product.<sup>58</sup>

## III. DISCUSSION

The growing popularity of makeup dupes has revealed significant gaps in the trade dress protections afforded by the Lanham Act.<sup>59</sup> While the Act establishes a framework to protect trade dress, its application to the beauty industry and the increase of dupes has been challenging.<sup>60</sup> As the elements required to bring forth an action under the Lanham Act can be challenging to establish,

<sup>55</sup> See *Two Pesos, Inc.*, 505 U.S. at 769 (“It is, of course, also undisputed that liability under § 43(a) requires proof of the likelihood of confusion.”); see also Primeaux, *supra* note 15, at 912 (“Proving that a likelihood of confusion exists is an integral part of a trademark or trade dress infringement claim because without confusion, there would be no manifest problem regarding the secondary user’s appropriation of the mark.”).

<sup>56</sup> See *Bath & Body Works Brand Mgmt., Inc. v. Summit Ent., LLC*, 7 F. Supp. 3d 385, 393 (S.D.N.Y. 2014) (explaining what a party must demonstrate in order to satisfy the likelihood of confusion element under the Lanham Act); see also *Gruner + Jahr USA Publ’g. v. Meredith Corp.*, 991 F.2d 1072, 1077 (2d Cir. 1993) (describing how in order for a party to succeed in a trademark infringement suit, the party must demonstrate a probability of confusion).

<sup>57</sup> See *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.* 921 F.3d 1343, 1360 (11th Cir. 2019) (“Our precedent sets out a seven-factor test to determine whether a purportedly infringing product creates a likelihood of consumer confusion.”); see also *Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc.*, 122 F.3d 1379, 1382 (11th Cir. 1997) (describing the seven factors used to determine whether or not a product is likely to cause consumer confusion).

<sup>58</sup> See *Bath & Body Works Brand Mgmt., Inc.*, 7 F. Supp. 3d at 393 (describing how the likelihood of consumer confusion exists when consumers are confused as to the source of a product); see also *Nora Beverages, Inc. v. Perrier Grp. of Am.*, 269 F.3d 114, 121 (2d Cir. 2001) (“A probability of confusion may be found when a large number of purchasers likely will be confused as to the source of the goods in question.”).

<sup>59</sup> See Roby, *supra* note 10 (“The uncertainty as to whether beauty products will be protected through trade dress may compel brands to rely on the strength of their brand names and the quality of their products.”); see also Underwood, *supra* note 5 (“For brands that are being negatively affected by the dupe industry, it may feel that there are limited enforcement options available.”).

<sup>60</sup> See Primeaux, *supra* note 15 (“While not all makeup dupes are nefarious—some dupes just happen to be comparable substitutes for a pricier product—other companies take duping to the extreme when they too closely imitate a high-end product’s packaging.”); see also Roby, *supra* note 10 (“Due to the hurdles in establishing and enforcing trade dress rights, beauty brands may be reluctant to take action against other companies that copy not only their product, but also the look and feel of their products.”).

luxury beauty brands are often left with no remedies for makeup dupes.<sup>61</sup> A key issue lies with the difficulty of establishing the distinctiveness of product packaging for makeup products.<sup>62</sup> Generic designs, such as lipstick or mascara tubes, make it difficult for a brand to claim trade dress infringement.<sup>63</sup> This difficulty in proving distinctiveness has allowed brands to produce nearly identical makeup dupes with minimal legal repercussions.<sup>64</sup>

#### A. DUPE BRANDS' LEGAL TACTICS

Australian beauty brand MCoBeauty has become widely known for its affordable and indistinguishable makeup dupes.<sup>65</sup> The brand has created a complex system to skillfully maneuver the legal landscape and avoid legal action involving its dupes.<sup>66</sup> Although the brand has faced several lawsuits, its strategic approach has allowed it to thrive in the dupe market.<sup>67</sup> MCoBeauty

<sup>61</sup> See O'Hara, *supra* note 13 (describing the obstacles luxury beauty brands face when trying to bring forth a trade dress action); see also Roby, *supra* note 10 ("However, if the design or packaging is not highly unique or unusual, or has not gained recognition over time or through 'look for' marketing, it may be difficult to show source-indicating function as required for trade dress protection.").

<sup>62</sup> See Roby, *supra* note 10 ("Even if the product design or the packaging design is sufficiently distinctive to be registered, some packaging designs and even more product designs are functional and, therefore, not registrable."); see also *Mana Prods., Inc. v. Columbia Cosmetics Mfg., Inc.*, 65 F.3d 1063, 1070 (2d Cir. 1995) (finding the color and shape of a makeup compact was not "striking" or "unusual" and thus was not inherently distinctive).

<sup>63</sup> See O'Hara, *supra* note 13 (describing how it can be difficult for a brand to establish its makeup packaging is distinctive, when it is not unique or eye-catching); see also *Ashley Furniture Industries, Inc. v. SanGiacomo N.A. Ltd.*, 187 F.3d 363, 369 (4th Cir. 1999) (explaining how the determination of whether a mark is generic relies on the facts of the case).

<sup>64</sup> See Primeaux, *supra* note 15 ("The courts have yet to consider this issue, but the prevalence of makeup dupes in the market paired with outrage and disdain from high-end brands makes this issue ripe for litigation."); see also Roby, *supra* note 10 ("Consumers may recognize the iconic J'Adore fragrance bottle and the green and pink Great Lash mascara tube, and associate them with their brands, Dior and Maybelline, respectively.").

<sup>65</sup> See Courtney Borrett, *I Tried All of MCoBeauty's New Products to Find Out Which Dupes Are Better Than the Original*, PEDESTRIAN (Sept. 27, 2024), <https://www.pedestrian.tv/style/mcobeauty-makeup/> ("When it comes to affordable dupes, there's one Australian brand that springs to mind — MCoBeauty."); see also Minnie Isaac, *I'm a Skinfluence Who has Worked Paid with MCoBeauty. Here's Why I'm No Longer Featuring Them on My Socials*, WHITE RABBIT SOC. (July 16, 2024), <https://www.whiterabbitsocial.com/all-articles/mcobeauty-copy-cat-cosmetics-brand> (criticizing the extremes to which MCoBeauty has gone to produce its makeup dupes).

<sup>66</sup> See Ainsworth, *supra* note 23 (describing how MCoBeauty's attorney researches products the brand is seeking to dupe in order to avoid legal repercussions); see also 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), <https://www.abc.net.au/news/2024-07-02/mcobeauty-charlotte-tilbury-beauty-dupes-trademarks-lawsuits/104019774> ("That legal advice is precisely how MCoBeauty was able to dupe the product so accurately, the company's founder and CEO Shelley Sullivan said.").

<sup>67</sup> See Ainsworth & Terzon, *supra* note 66 ("On occasions the company appears to have crossed the line. MCoBeauty was sued twice for trademark infringement in 2021 and ended up rebranding its own products as a result."); see also Rachel Choy, *How Does MCoBeauty Get Away with Those Near-Identical Dupes? The CEO Just Explained It*, PEDESTRIAN (July 4, 2024),

strategically focuses on replicating generic packaging and formulas to avoid legal action.<sup>68</sup> The brand recently revealed its strategy to avoid being the subject of a lawsuit.<sup>69</sup> Specifically, the MCoBeauty legal team explained how they got away with their most successful dupe, the MCoBeauty Flawless Glow.<sup>70</sup> The brand successfully avoided trademark infringement by conducting extensive research and concentrating its efforts on generic or unregistered marks.<sup>71</sup> By changing the registered aspects of the Charlotte Tilbury Hollywood Flawless Filter yet maintaining the generic marks, the brand narrowly escaped crossing legal boundaries while producing a nearly identical dupe.<sup>72</sup> MCoBeauty's tactics reflect a broader trend in the beauty industry, where brands capitalize on the difficulties of pursuing legal action for makeup dupes.<sup>73</sup>

## B. THE GENERIC MARK DILEMMA

With the prevalence of generic marks in the beauty industry, proving distinctiveness under the Lanham Act has become an obstacle for brands to pursue

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<https://www.pedestrian.tv/style/mcobeauty-designer-dupes-charlotte-tilbury/> ("It turns out that while it seems like a grey area – the company has been sued twice in the past for copyright infringement – creator and owner Shelley Sullivan insists everything is above board.").

<sup>68</sup> See Ainsworth, *supra* note 23 ("We have a whole product development team of about [10] people, and we have a great external lawyer . . . and we have a look at the product packaging, and then we go through a process of seeing that there's no trademarks and there's no patents."); see also Ainsworth & Terzon, *supra* note 66 ("He explained that what can and can't be replicated in the world of 'beauty dupes' all comes down to protected brand assets — if it doesn't infringe on Charlotte Tilbury's trademarks, then MCoBeauty can legally dupe it.").

<sup>69</sup> See Choy, *supra* note 67 ("MCoBeauty's trademarks and patent lawyer Len Mancini broke it down for ABC's *The Business*, saying the product didn't infringe on any of Charlotte Tilbury's trademarks."); see also Ainsworth, *supra* note 23 ("Although the multi-million-dollar business has faced legal hurdles before for its copycat cosmetics, MCoBeauty has a rigorous process in place to ensure its lipsticks don't cause lawsuits.").

<sup>70</sup> See Choy, *supra* note 67 ("The founder admitted that the MCoBeauty Flawless Glow was the 'closest to the line' when it came to mimicking another product, the viral Charlotte Tilbury's Hollywood Flawless Filter. MCoBeauty's version will set you back \$35 at Woolworths, while Charlotte Tilbury's version is \$70 at Mecca."); see also Ainsworth & Terzon, *supra* note 66 ("The example he gave first is MCoBeauty's spin on Charlotte Tilbury's three-word brand name 'Hollywood Flawless Filter,' which it has changed to 'MCoBeauty Flawless Glow.'").

<sup>71</sup> See Ainsworth, *supra* note 23 ("I will search registered design databases, patent databases, trademark databases in Australia, overseas, all around the world, trying to work out what exactly it is the original product maker has protected."); see also Ainsworth & Terzon, *supra* note 66 ("In fact, we trademarked the name of the product, and also the symbols, because the company that we took that product off hadn't trademarked certain elements of their product.").

<sup>72</sup> See Ainsworth & Terzon, *supra* note 66 ("Not only did MCoBeauty's version of it use the word 'flawless', but it also had the same golden lid, circular bottle and even a similar wand to apply the product. It was also half the price at \$35."); see also Choy, *supra* note 67 (describing how the founder of MCoBeauty was aware of how identical their dupe of the Charlotte Tilbury Hollywood Flawless Filter was to the original product).

<sup>73</sup> See Isaac, *supra* note 65 ("Simply, MCoBeauty isn't duping anymore, they're creating copy-cat cosmetics and are getting very tacky."); see also Primeaux, *supra* note 15 (explaining how brands are continuously utilizing the Fair Use Defense under the Lanham Act in order to avoid legal action for makeup dupes).

legal action against dupes, such as those created by MCoBeauty.<sup>74</sup> Considering that many beauty product features, such as color palettes or packaging designs, are commonly used within the industry, it becomes nearly impossible to argue that a particular mark is associated with one brand.<sup>75</sup> The Lanham Act as it currently stands, leaves luxury beauty brands in a vulnerable position when their products contain generic marks or designs.<sup>76</sup> For luxury beauty brands, this proves quite difficult as marks may fail to meet the distinctiveness requirement even if they have gained market recognition.<sup>77</sup> Consequently, other beauty brands can freely create makeup dupes so long as the replicated marks are not registered.<sup>78</sup>

### C. RETHINKING THE CONSUMER CONFUSION REQUIREMENT

The Lanham Act's requirement to establish consumer confusion does not align with the reality of makeup dupe cases.<sup>79</sup> The consumer confusion requirement under the Lanham Act seeks to protect consumers from being misled into purchasing products they believe are from a specific source when they are

<sup>74</sup> See Roby, *supra* note 10 (explaining how lipstick tubes, are difficult to establish as distinctive under the Lanham Act); see also Kelly Kovack, *Beauty Brands Leading Packaging Design Trends in 2021*, BEAUTY MATTER (Mar. 5, 2021), <https://beautymatter.com/articles/beauty-brands-leading-packaging-design-trends-in-2021> (describing the different packaging schemes utilized in the beauty industry).

<sup>75</sup> See Underwood, *supra* note 5 (explaining how e.l.f. cosmetics frequently has similar packaging schemes to other beauty brands); see also Marra M. Clay, *Copycat Cosmetics: The Beauty Industry and the Bounds of the American Intellectual Property System*, 106 MINN. L. REV. 425, 426–27 (2021) (“Wet n Wild, a cheap drugstore cosmetics brand, released a strikingly similar eyeshadow palette. It included color shades identical to Charles’ palette and arranged them in a similar manner, but cost as little as \$25.”).

<sup>76</sup> See *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 638 (“Thus *Samara Brothers* leaves in place the rule that generic product configurations are not protectable as trade dress under § 43(a).”); see also *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) (explaining how marks which are classified as generic are not registrable).

<sup>77</sup> See Roby, *supra* note 10 (explaining how market recognition may not be sufficient for luxury beauty brands to establish distinctiveness under the Lanham Act); see also *Benefit Cosmetics LLC v. E.L.F. Cosmetics, Inc.*, No. 23-cv-00861-RS, 2023 WL 4409104, at \*3 (N.D. Cal. July 7, 2023) (finding the allegation that “consumers recognize the Roller Lash Trade Dress as linked to Benefit’s premium quality mascara product” to be sufficient at the pleading stage).

<sup>78</sup> See O’Hara, *supra* note 13 (“High-end brands themselves may be unwilling to take action against dupes due to the costly and time-consuming nature of trademark enforcement. The best strategy for high-end brands may be ‘to look forward, think of new things and make whatever [they] make the best thing out there.’”); see also Ainsworth, *supra* note 23 (“In simple terms, Mr. Mancini’s job is to look at a product, and find out how much of it is protected by the original brand so MCoBeauty knows where the legal boundaries are early on.”).

<sup>79</sup> See Mackenzie, *supra* note 8 (“To be clear, there’s a difference between makeup dupes — the more affordable versions of popular products we knowingly buy — and counterfeits — knockoffs you don’t realize aren’t the real deal until it’s too late.”); see also Weintraub Firm, *Likelihood of Confusion Analysis Under the Lanham Act*, WEINTRAUB TOBIN (Aug. 15, 2012), <https://www.theiplawblog.com/2012/08/articles/trademark-law/likelihood-of-confusion-analysis-under-the-lanham-act/> (“A trademark’s distinctiveness measures its primary significance to the purchasing public.”).

purchasing a knockoff.<sup>80</sup> However, unlike traditional knockoffs where consumers are deceived of a product's origin, makeup dupes operate in a transparent marketplace where consumers are fully aware they are purchasing a dupe.<sup>81</sup> This transparency makes consumer confusion an unlikely possibility, as the appeal of dupes lies in the consumer's awareness that they are purchasing a lower-cost alternative.<sup>82</sup>

This distinction was highlighted in the recent lawsuit between Benefit Cosmetics ("Benefit") and e.l.f.<sup>83</sup> On February 24, 2023, Benefit initiated a lawsuit against e.l.f. alleging trademark infringement, trade dress infringement, false designation of origin, and unfair competition of its Roller Lash Mascara.<sup>84</sup> E.l.f. had released an eerily similar mascara called Lash 'N Roll, which had a black

<sup>80</sup> See Jonathon K. Hance & Drew Taggart, *Unanimous Supreme Court: Consumer Confusion is Trademark Infringement Test, Even for Punny Parodies*, THE NAT'L L. REV. (June 12, 2023), <https://natlawreview.com/article/unanimous-supreme-court-consumer-confusion-trademark-infringement-test-even-punny> ("Accordingly, the core inquiry for trademark infringement under the Lanham Act is whether a defendant's use of a name or brand is 'likely to cause confusion.'"); see also Primeaux, *supra* note 15 ("One of the central aims of trademark law is to 'preserve the source-identifying meaning of marks.'").

<sup>81</sup> See Josh Elledge, *Product 'Dupes': How They Have Changed Product Purchasing and Brand Loyalty*, MICH. LIVE (Nov. 24, 2023), <https://www.mlive.com/business/2023/11/product-dupes-how-they-have-changed-product-purchasing-and-brand-loyalty.html> ("However, more and more, we're seeing consumers in the younger generations prefer dupes to full-priced luxury brand items."); see also *The Impact of Beauty Dupes on Cosmetics Category Sales*, NIQ (Nov. 17, 2023), <https://nielseniq.com/global/en/insights/analysis/2023/the-impact-of-beauty-dupes-on-cosmetics-category-sales/> ("In fact, affordability is the main driver for consumers to choose a dupe.").

<sup>82</sup> See Primeaux, *supra* note 15 ("Proving that a likelihood of confusion exists is an integral part of a trademark or trade dress infringement claim because without confusion, there would be no manifest problem regarding the secondary user's appropriation of the mark."); see also *The Beauty Dupe Generation: Gen Z's and Millennial's Aspirational Beauty Opportunity: New Report & Video*, GLOB. COSM. INDUS. (Oct. 17, 2024), <https://www.gcimagazine.com/consumers-markets/news/22923675/the-beauty-dupe-generation-gen-zs-and-millennials-aspirational-beauty-opportunity-new-report-video> ("Gen Z is reportedly 'twice as likely to be influenced to purchase a scent that is a dupe or inspired by a more expensive scent,' per the Circana analysts, in part because these shoppers believe that lower cost fragrances can be just as good as their more premium counterparts.").

<sup>83</sup> See Sher Shares Beauty, *ELF COSMETICS X BENEFIT LAWSUIT! Elf Dupes & Their OG Counterparts Full List: Did They Go Too Far?*, YOUTUBE (Aug. 3, 2024), <https://youtu.be/hHPDCMo-AUYM?si=IWCOthzOhx7teYY> (describing all of the dupes produced by e.l.f. in addition to the Benefit Cosmetics lawsuit); see also Bonnie Eslinger, *'Roller Lash' and 'Lash 'N Roll' Mascaras Face Off in TM Trial*, LAW 360 (Aug. 26, 2024), <https://www.law360.com/articles/1873484> (describing the details of the lawsuit between Benefit Cosmetics and e.l.f. Cosmetics).

<sup>84</sup> See Lisa Miller, *Benefit Cosmetics Sues E.L.F. Cosmetics: Is This the End for Makeup Dupes?*, COLUM. J.L. & ARTS (Oct. 18, 2024), <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/725> ("On February 24, 2023, Benefit Cosmetics LLC sought action in the Northern District of California against e.l.f. Cosmetics, Inc. for alleged trademark infringement, trade dress infringement, false designation of origin, and unfair competition of its iconic Roller Lash Mascara."); see also *Benefit Cosmetics LLC v. E.L.F. Cosmetics, Inc.*, No. 23-cv-00861-RS, 2023 WL 4409104, at \*1 (N.D. Cal. July 7, 2023) ("The Complaint asserts nine claims for relief under federal and state law for trademark infringement, trade dress infringement, false designation of origin, and unfair competition.").

tube with pink writing and a pink cap.<sup>85</sup> The complaint specifically alleged that e.l.f. copied the design of Benefit's mascara tube and the trademarked "Hook 'n' Roll" mascara wand.<sup>86</sup> E.l.f.'s mascara quickly went viral online as a dupe for Benefit's Roller Lash.<sup>87</sup> Not only did e.l.f.'s Lash 'N Roll have similar packaging, but it was advertised similarly.<sup>88</sup> Both products are sold at popular beauty retailer ULTA Beauty, which Benefit claims is likely to confuse or mislead consumers.<sup>89</sup> E.l.f.'s attorney argued the asserted trade dress was not protectable and, thus, there was no likelihood of confusion.<sup>90</sup> Further, "e.l.f. has maintained that its product is nothing more than a legally allowable 'dupe,' a product that has the same function but comes with a lower price."<sup>91</sup> Both brands emphasized

<sup>85</sup> See Eslinger, *supra* note 83 ("E.l.f. also went with the same color scheme, Herring underscored, showing the court an internal email at e.l.f. between designers acknowledging that 'Lash 'N Roll' was inspired by the black and pink colors of 'Roller Lash.'"); see also Miller, *supra* note 84 ("The Lash 'N Roll and Roller Lash contain similar advertised features of curled lashes along with a pink top and black base along with pink lettering down the side of the black base, and e.l.f.'s Lash 'N Roll Mascara is similarly titled to Benefit's 'Hook 'N' Roll' trademark.").

<sup>86</sup> See Miller, *supra* note 84 ("Specifically, they allege that e.l.f. copied the physical design of the mascara tube and the 'Hook 'n' Roll' trademark used in connection with the mascara, which is designed to lengthen, curl, and darken eyelashes."); see also *Benefit Cosmetics LLC v. E.L.F. Cosmetics, Inc.*, 2023 WL 4409104 at \*1 ("Since as early as March 2015, Benefit has been using its registered Roller Lash and Hook 'N' Roll trademarks in connection with mascara and a mascara brush respectively.").

<sup>87</sup> See Miller, *supra* note 84 ("This e.l.f. product has gone viral across social media platforms for being a 'dupe' of the ever popular Roller Lash Mascara."); see also Mae Sittler, *Rating Viral Drugstore Mascaras*, YOUTUBE (Oct. 4, 2023), <https://www.youtube.com/watch?v=8L4lwnf6Hqo> (reviewing the e.l.f. Cosmetics Lash 'N Roll mascara which has gone viral on social media).

<sup>88</sup> See Eslinger, *supra* note 83 ("Even after 'Lash 'N Roll' was released, e.l.f. continued to copy Benefit with similar marketing materials, the lawyer said."); see also *Benefit Roller Lash Mascara vs. e.l.f. Lash 'N Roll Mascara Review*, MILABU BEAUTY REV., <https://milabubautyreview.com/elf-lash-n-roll-mascara/> (last visited Mar. 30, 2025) ("But, [e.l.f.] Lash N Roll Mascara has entered the scene with a similar wand and the same lifting and curling promises – let's review it.").

<sup>89</sup> See Miller, *supra* note 84 ("Benefit claims that Ulta's sale of an identical product in the same or similar channels of trade is 'likely to confuse or mislead' the public into believing these two products are from the same source."); see also *Benefit Cosmetics LLC v. E.L.F. Cosmetics, Inc.*, 2023 WL 4409104 at \*1 ("Benefit and e.l.f. are both global cosmetics companies that sell competing mascara products both online and in-store in some of the same retailers.").

<sup>90</sup> See Eslinger, *supra* note 83.

E.l.f.'s lawyer, Anthony Lo Cicero of Amster Rothstein & Ebenstein LLP, told the court on Monday that Benefit's asserted trade dress — the mascara tube with a pink cap and a black base with pink lettering — is not protectable. In addition, there's no likelihood that consumers will mix up the two products, Lo Cicero said.

*Id.*; see also Miller, *supra* note 84 (describing the allegations made in the lawsuit by Benefit Cosmetics regarding consumer confusion).

<sup>91</sup> See Eslinger, *supra* note 83 (describing the arguments made by e.l.f. in the lawsuit regarding its social media viral mascara dupe); see also Jeffrey H. Greene & Owen Miklos, *Brands, Beauty and Big Issues: High-Profiles US Cases to Watch in 2024*, GLOB. LEGAL POST (June 13, 2024), <https://www.globallegalpost.com/news/brands-beauty-and-big-issues-high-profile-us-cases-to-watch-in-2024-67285408> ("In particular, the court found that Benefit had plausibly alleged, through seven years of continuous investment and marketing, that its trade dress had acquired secondary meaning, despite [e.l.f.'s] contention that that inference was unwarranted.").

the manners and methods in which they market their mascaras to consumers.<sup>92</sup> The emphasis on consumer awareness and purchasing behavior illustrates how consumer confusion is less of a concern in makeup dupe cases as consumers actively and consciously purchase these products.<sup>93</sup>

#### IV. SOLUTION

To adequately protect luxury makeup brands against dupes, this Comment proposes amending the Lanham Act to create a more effective and accessible avenue for brands seeking legal redress against makeup dupes.<sup>94</sup> The suggested amendments include clarifying the guidelines for the required elements of distinctiveness and functionality under the Lanham Act and removing the consumer confusion requirement in makeup dupe cases.<sup>95</sup> Revising the Lanham Act to establish clearer guidelines would create an effective framework for resolving makeup dupe cases, enabling courts to better address the problems at hand.<sup>96</sup>

##### A. REVISING THE DISTINCTIVENESS REQUIREMENT

The current requirements for trade dress protection under the Lanham Act impose a high standard for proving distinctiveness, particularly when the trade dress in question is considered generic.<sup>97</sup> Instead, there should be beauty

<sup>92</sup> See Eslinger, *supra* note 83 (“We take great care to design packaging that’s highly unique, fun, creative and will stand out in the marketplace.”); see also Miller, *supra* note 84 (“Whether or not e.l.f.’s product is infringing on Benefit’s trademarks has yet to be decided, and this decision could have major implications for the rest of the beauty industry.”).

<sup>93</sup> See Greene & Miklos, *supra* note 91 (“The court’s order on Benefit’s trade-dress claim provides a useful framework for companies – especially companies in the cosmetics industry – looking for additional enforcement tools for their intellectual property.”); see also Eslinger, *supra* note 83 (“‘We gave an affordable, mass-priced version of a product previously available only on prestige,’ the lawyer said. ‘Nobody was confused.’”).

<sup>94</sup> See O’Hara, *supra* note 13 (summarizing the monetary and legal obstacles luxury beauty brands face when trying to seek legal recourse for beauty dupes); see also Primeaux, *supra* note 15 (“Moreover, the idiosyncrasies of each court’s jurisprudence create a legal ambiguity that poses significant questions about the protectability of trade dress.”).

<sup>95</sup> See Roby, *supra* note 10 (describing how luxury beauty brands may still face difficulties in proving non-functionality while pursuing legal action under the Lanham Act even if they are able to establish distinctiveness); see also Clay, *supra* note 75, at 452 (“Firstly, there is no likelihood of confusion between dupes and the luxury brands. Consumers know that they are purchasing from a dupe company and are excited to achieve the trendy look without the luxury brand’s price-tag.”).

<sup>96</sup> See O’Hara, *supra* note 13 (explaining how luxury beauty brands may be unwilling to seek legal action against makeup dupes due to the difficulties in establishing the required elements to bring forth a trade dress suit); see also Howard, *supra* note 42 (“Noble concedes that it’s a grey area, as savvy brands ‘can easily find loopholes within the regulations for IP and trademark rights — they know what they have to avoid so they’re not infringing anything.’”).

<sup>97</sup> See *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 216 (2000) (“We hold that, in an action for infringement of unregistered trade dress under § 43(a) of the Lanham Act, a product’s design is distinctive, and therefore protectible, only upon a showing of secondary meaning.”); see also *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 775 (1992) (describing the rigorous analysis required to establish distinctiveness in cases involving trade dress).

industry-specific criteria that allow for a broader, case-by-case analysis of distinctiveness.<sup>98</sup> Generally, the beauty industry is constrained by functional packaging, as many brands utilize similar packaging components or color schemes.<sup>99</sup> To better address this issue, the Lanham Act should recognize a form of secondary meaning for generic trade dress that considers the influence of social media and the unique branding strategies of the beauty industry.<sup>100</sup> This would allow beauty brands to establish distinctiveness for marks that may be deemed generic, by proving consumers associate the brand with those specific marks.<sup>101</sup> This revision of the distinctiveness requirement would allow courts to assess the circumstances with consideration of the cumulative effects of trade dress without worrying about the current standards for distinctiveness.<sup>102</sup>

#### B. REFINING THE FUNCTIONALITY TEST

Additionally, refining the functionality element to exclude aesthetic aspects of trade dress, which are consistently copied in makeup dupes, would provide

<sup>98</sup> See Caitlin Canahai & Mark P. McKenna, *The Case Against Product Configuration Trade Dress*, in RESEARCH HANDBOOK ON TRADEMARK LAW REFORM 137, (Graeme B. Dinwoodie & Mark D. Janis eds., 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3336366](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3336366) (“Experience with those tests gave the Court ‘little confidence that a reasonably clear test’ of inherent distinctiveness could be devised with respect to product design.”); see also *Trade Dress: A Comprehensive Exploration of Intellectual Property*, COHN LEGAL, <https://www.cohnlg.com/trade-dress-a-comprehensive-exploration-of-intellectual-property/> (last visited Mar. 30, 2025) (“Determining the distinctiveness of trade dress involves subjective assessments. What may be considered distinctive to one observer might not be seen the same way by others. This subjectivity can make it challenging to establish and defend the distinctiveness of trade dress elements.”).

<sup>99</sup> See Abby Epperly, *Color Psychology in Packaging: Choosing the Right Palette*, MERCH. BOXES (Mar. 4), <https://www.merchantboxes.com/blog/color-psychology-in-packaging> (describing how brands utilize different colors to attract consumers, particularly how soft pastels are a trend in the beauty industry); see also COHN LEGAL, *supra* note 98 (“Trade dress protection and design patents may overlap in certain cases, especially when protecting product designs.”).

<sup>100</sup> See, e.g., Susan Ross, *Personal Brands, Social Media, and the Lanham Act*, SOC. MEDIA L. BULL. (Aug. 30, 2017), <https://www.socialmedialawbulletin.com/2017/08/personal-brands-social-media-lanham-act/> (“In addition, the court found that many of the models used the same methods of advertising as the defendants: social media.”). See generally COHN LEGAL, *supra* note 98 (“Establishing secondary meaning, especially for trade dress that is not inherently distinctive, can be challenging.”).

<sup>101</sup> See Ross, *supra* note 100 (“Most ‘right of publicity’ cases are brought under state laws and in state courts. Here, the fact that the individuals had ‘personal brands’ and could point to specific images allegedly impermissibly used by defendants, led this court to conclude that a Lanham Act claim could proceed.”); see also Carl Caslowitz, *Trade Dress and Section 43(A) of the Lanham Act: Protection for “Total Image” of the Visual Displays of Software Applications*, IDEA: THE J. OF L. AND TECH. 187, 188 (1993) (“The term ‘Apple’, as used to identify computers, is arbitrary because apples have little if anything to do with computers. Thus the designation of ‘Apple’ for a computer is inherently distinctive.”).

<sup>102</sup> See Caslowitz, *supra* note 101 (“It is important, however, that a trade dress be examined as a whole rather than examining each individual element from which the trade dress is composed.”); see also Kryn Hanold, *What is Trade Dress Infringement?*, RED POINTS, <https://www.redpoints.com/blog/trade-dress-infringement> (last updated June 8, 2022) (“There are general guidelines to help determine what constitutes trade dress infringement, but each case is so unique that it’s often necessary to thoroughly assess.”).



luxury beauty brands with more protection under the Lanham Act.<sup>103</sup> This would allow brands such as Charlotte Tilbury and Benefit to safeguard the aesthetic elements of their packaging, which are frequently mimicked in dupes.<sup>104</sup> Further, despite makeup dupes consistent copying, brands still heavily invest in creating cohesive visual identities that consumers grow to associate with their brand.<sup>105</sup> This trend of creating cohesive visual identities is prevalent in the beauty industry.<sup>106</sup> Through this revision, the Lanham Act would then acknowledge that certain aesthetics aspects, such as packaging shapes or colors, while common in the beauty industry, are still worthy of protection.<sup>107</sup>

<sup>103</sup> See Douglas A. Rettew & Max Jarquin, “Useful” to Know: Recent Developments on Utilitarian and Aesthetic Functionality, MONDAQ (July 29, 2021), <https://www.mondaq.com/united-states/trademark/1096600/useful-to-know-recent-developments-on-utilitarian-and-aesthetic-functionality> (“If found functional, a feature or design is not protectable under any circumstance, and the existence of alternative designs capable of performing the same function is irrelevant.”); see also Elijah Hartman, *U.S. Trademark Functionality and Protectable Aesthetics: Can I Trademark That?*, HARRIS SLIWOSKI (May 7, 2024), <https://harris-sliwoski.com/blog/u-s-trademark-functionality-and-protectable-aesthetics-can-i-trademark-that> (“The test for aesthetic functionality determines if it is competitively necessary to use the feature of the design in the relevant market. If a product satisfies one of these tests, it is functional, and therefore ineligible for trademark protection.”).

<sup>104</sup> See Karishma Desai, *Alternatives to Try if You Can't Afford Charlotte Tilbury Makeup*, THE LIST (May 19, 2021, 11:30 AM), <https://www.thelist.com/414587/alternatives-to-try-if-you-cant-afford-charlotte-tilbury-makeup> (“In fact, Makeup Revolution caused controversy when they released their since-discontinued Renaissance Lipsticks, for allegedly copying the Pillow Talk Lipstick, down to Charlotte Tilbury’s signature packaging, per Cosmopolitan UK.”); see also Josie O’Brien, *Glow Getter Primark Drops a Brand New Dupe of Benefit’s Iconic Hoola Bronzer For £29 Less and Shoppers are ‘Totally Obsessed’*, THE SUN, <https://www.thesun.co.uk/fabulous/26761004/benefit-hoola-bronzer-dupe-primark-make-up> (Mar. 18, 2024, 2:43 PM) (“The PS . . . Powder Bronzer will set you back just £3.50 and comes in very similar packaging to the real deal.”).

<sup>105</sup> See Limei Hoang, *The Luxury Beauty Market is Booming. But How Can Brands Stand Out From the Crowd?*, LUXURY SOC’Y (May 25, 2023), <https://luxurysociety.com/en/luxury-beauty-market-booming-how-can-brands-stand-out-crowd> (“It is this kind of educated specificity that luxury brands must understand when entering into the beauty arena, and even then, they must ensure that what they do, fits in with what their brand represents.”); see also *What Is a Visual Identity for a Brand? How It Works and How to Create the Right One*, STRIPE, <https://stripe.com/en-pl/resources/more/what-is-a-visual-identity-for-a-brand-how-it-works-and-how-to-create-the-right-one> (last updated Apr. 1, 2024) (“Brands choose colours that reflect their identity and influence how their brand is perceived.”).

<sup>106</sup> See *How Aesop and Glossier Nailed Their Brand Identity — and How You Can Too*, MICHAEL PINFOLD BRANDING DESIGN, <https://www.michaelpinfold.com/post/how-aesop-and-glossier-nailed-their-brand-identity-and-how-you-can-too> (last visited Mar. 30, 2025) (“Both Aesop and Glossier, however different, have created a brand identity that is perfectly suited for a lifestyle brand. Their visual identity is cohesive and aligned with their brand values, making them instantly recognisable and memorable.”); see also Jen, *Captivating Visual Identities of Beauty Brands*, DESIGN MONTAGE (Jan. 21, 2023), <https://designmontage.com.au/captivating-visual-identities-of-beauty-brands/> (“In the world of beauty, where appearances matter greatly, visual identity plays a pivotal role in captivating consumers and conveying brand values.”).

<sup>107</sup> See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 169 (1995) (“The functionality doctrine, as we have said, forbids the use of a product’s feature as a trademark where doing so will put a competitor at a significant disadvantage because the feature is ‘essential to the use or purpose of the article’ or ‘affects [its] cost or quality.’”); see also Russ VerSteeg, *Reexamining Two Pesos, Qualitex, & Wal-Mart: A Different Approach... Or Perhaps Just Old Abercrombie Wine In a New Bottle?*,

## C. ELIMINATING THE CONSUMER CONFUSION REQUIREMENT

As consumers are frequently on the hunt for the next best dupe, consumer confusion is rarely relevant in makeup dupe cases.<sup>108</sup> Rather, the Lanham Act should narrow its focus on assessing whether the dupes are likely to cause brand dilution.<sup>109</sup> In makeup dupe cases, consumers knowingly purchase dupes rather than the original luxury beauty product, as dupes are often openly marketed as low-cost alternatives.<sup>110</sup> Due to this transparency in the beauty industry, the risk of consumer confusion is greatly minimized; however, luxury beauty brands still suffer harm.<sup>111</sup> By modifying this requirement, the Lanham Act could better address the issues posed by makeup dupes, allowing luxury beauty brands a more practical means of protecting themselves against trade dress infringement.<sup>112</sup>

23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1249, 1282 (2013) (“In this regard, refusing trademark protection on the basis of aesthetic functionality shares the underlying policy of refusing trademark protection on the basis of utilitarian functionality.”).

<sup>108</sup> See Underwood, *supra* note 5 (“Most consumers in this context know they are purchasing a dupe instead of the original product as that is the purpose of a dupe.”); see also Price, *supra* note 4 (“As dupes have become more prevalent, a number of questions about them started coming to mind.”).

<sup>109</sup> See COHN LEGAL, *supra* note 98 (“Trade dress dilution occurs when the distinctive nature of a famous trade dress is weakened by the use of similar trade dress by others. Dilution claims aim to protect the uniqueness and recognition of well-known trade dress.”); see also Heather Bromfield & Jessica Richardson, *Actual Dilution or Likelihood of Dilution? The Evolution of Trademark Law an Interview with John Crittenden of Cooley Godward Kronish*, U.C. DAVIS BUS. L.J. (2008), <https://blj.ucdavis.edu/archives/8/2/actual-dilution-or-likelihood-dilution-evolution-trademark-law> (discussing the factors that are codified in the Federal Trademark Dilution Revision Act of 2006).

<sup>110</sup> See Natallia Bambiza & Jacquelyn Wenskus, *Circana Gives the Scoop on Dupes*, BEAUTY PACKAGING (June 7, 2024), [https://www.beautypackaging.com/contents/view\\_experts-opinion/2024-06-07/circana-gives-the-scoop-on-dupes/](https://www.beautypackaging.com/contents/view_experts-opinion/2024-06-07/circana-gives-the-scoop-on-dupes/) (“Within the beauty industry, in particular, fragrance and makeup products stand out in the dupe craze, with the escalating popularity of scents and makeup products that provide a similar benefit to luxury products for a fraction of the price.”); see also Janya Sundar, *A Tale of Two Dupes: How Beautyblender and Lululemon Are Fighting Back Against Copycats*, FAST CO. (Nov. 4, 2024), <https://www.fastcompany.com/91218180/beautyblender-dupes-plan-to-fight-back> (“Whereas traditional product knockoffs used to carry a sense of shame, dupes have become something to celebrate, especially among Gen Z and millennials.”).

<sup>111</sup> See Francois Maingret, *The Difference Between Counterfeits and Dupes – And How These Products Impact Brands*, FRANCOIS MAINGRET (May 19, 2024), <https://fmaingret.com/2024/05/the-difference-between-counterfeits-and-dupes-and-how-these-products-impact-brands/> (“There is no confusion for customers, as they understand that they are not buying the original product or brand.”); see also Kate Ainsworth, *Why Questioning MCoBeauty on the Ethics of Makeup Dupes Struck a Nerve on Social Media*, ABC NEWS (July 5, 2024), <https://www.abc.net.au/news/2024-07-06/mcobeauty-small-business-ethics-questions-cosmetics/104065730> (“Already, we had spoken to lawyers who explained that it can be difficult for small businesses to take on larger companies who may have duped their product, but couldn’t do anything about it because they didn’t have the financial backing.”).

<sup>112</sup> See Tulip Mahaseth, *How to Protect Small-Scale Luxury Cosmetics Brands’ IP*, RED POINTS, <https://www.redpoints.com/blog/how-to-protect-cosmetics-brands-ip/> (last updated June 8, 2022) (“Arguably, trademark rights are extremely important for small-scale luxury cosmetic producers because they not only allow producers to distinguish themselves from other competitors in the marketplace, but also serve as a representation of their goodwill and loyalty among consumers, which takes significant time and resources to cultivate.”); see also Primeaux, *supra* note 15 (“Although

## D. THE IMPACT ON LUXURY BEAUTY BRANDS

These proposed amendments to the Lanham Act would provide an easier means of protection for luxury beauty brands such as Charlotte Tilbury, which has faced multiple challenges with makeup dupes.<sup>113</sup> Revisiting the brand's viral Hollywood Flawless Filter, the product features a clear bottle with a gold cap and popular doe-foot applicator.<sup>114</sup> Despite its generic features, the Hollywood Flawless Filter could still be protected under the proposed distinctiveness criteria.<sup>115</sup> Charlotte Tilbury's efforts in creating a cohesive visual identity are clear, as the brand has invested extensively in creating its iconic rose gold packaging which consumers have grown to associate with the brand.<sup>116</sup> Under the proposed amendments, Charlotte Tilbury could establish secondary meaning through showing how social media popularity has made its design elements synonymous with the brand.<sup>117</sup> Lastly, removing the consumer confusion requirement would facilitate the process for Charlotte Tilbury to seek legal action against dupe brands like MCoBeauty.<sup>118</sup> This would shift the focus from

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trademark law seeks to protect innovators, its twin aim is to promote competition.”).

<sup>113</sup> See Lyndon, *supra* note 26 (“So you can get the popular Charlotte Tilbury look but on a budget, you just need to know where to look.”); *see also* Desai, *supra* note 104 (describing the various Charlotte Tilbury products that have been famously duped).

<sup>114</sup> See Parama Sarkar, *Is Charlotte Tilbury Hollywood Flawless Filter Worth It? Review, Swatches Inside*, THEBEAUTYINSIDEOUT (Jan. 17, 2023), <https://thebeautyinsideout.com/charlotte-tilbury-hollywood-flawless-filter/> (“Charlotte Tilbury Hollywood Flawless Filter comes with a doe foot applicator and a transparent bottle. The product name is printed in classic golden color.”); *see also* Melanie R. Chadwick, *Charlotte Tilbury Reveals the Secrets Behind Her Brand-New Hollywood Flawless Filter*, ALLURE (Feb. 22, 2018), <https://www.allure.com/story/charlotte-tilbury-hollywood-flawless-filter-like-facetune-in-a-bottle> (“Tilbury suggests using the doe-foot applicator to dot it on underneath your foundation of choice, primer style, for a subtle glow, or blending it with your foundation for a slightly more intense radiance (my preferred method).”).

<sup>115</sup> See Naya Tilly, *Charlotte Tilbury Hollywood Flawless Filter, Review*, NAYA TILLY, <https://www.nayatilly.com/single-post/2019/10/14/charlotte-tilbury-hollywood-flawless-filter-review> (last visited Mar. 30, 2025) (“Packaging: sleek, nicely weighted glass bottle with a signature rose-gold cap; the product is distributed with an oversized doe-foot applicator (*think Shape Tape*).”); *see also* Murden, *supra* note 21 (“With so many endorsements touting different benefits floating around, I was intrigued by the Hollywood Flawless Filter but didn’t want to take the plunge until I had figured out what *exactly* this product was meant to do. After some research, it seemed the answer is a little bit of everything.”).

<sup>116</sup> See Giselle La Pompe-Moore, *Honestly, This Might Be the Only Lipstick You Need in Your Life*, WHOWHATWEAR, <https://www.whowhatwear.com/charlotte-tilbury-lipsticks> (last updated Dec. 15, 2020) (“I don’t know if it’s the signature rose gold packaging or the Old Hollywood style, but I’m into glamour with a capital G, so therefore, I’m very into Charlotte Tilbury lipsticks.”); *see also* Tilly, *supra* note 115 (describing Charlotte Tilbury’s classic rose gold packaging).

<sup>117</sup> See Bella Cacciatore, *The Best Charlotte Tilbury Products Worth the Hype*, GLAMOUR (Sept. 14, 2021), <https://www.glamour.com/gallery/best-charlotte-tilbury-products> (“In keeping with Tilbury’s personal makeup style, the line focuses heavily on ’90s-inspired smoky eyes and plush lips, and the brand’s glowing-skin essentials have been trending on TikTok for months (the Light Wands are still out of stock everywhere after going viral in April).”); *see also* La Pompe-Moore, *supra* note 116 (“In keeping with the brand’s starlet vibe, you can’t go wrong with this show-stopping true red for all skin tones.”).

<sup>118</sup> See *How MCoBeauty Built a Luxury Dupe Empire and Thrived Amid Legal Battles*, LET THE RAVEN TALK (Oct. 3, 2024), <https://www.lettheraventalk.com/post/how-mcobeauty-built-a-luxury->

preventing consumer confusion to addressing the actual harm Charlotte Tilbury faces due to makeup dupes, such as harm to its market position and brand identity.<sup>119</sup>

## V. CONCLUSION

In conclusion, the Lanham Act as it currently stands is inadequately equipped to provide sufficient trade dress protections to luxury beauty brands in makeup dupe cases.<sup>120</sup> As such, the Lanham Act should be amended to address the unique challenges posed by makeup dupes.<sup>121</sup> Clarifying the requirements for distinctiveness and functionality, and removing the consumer confusion requirement, would strengthen the trade dress protections afforded by the Lanham Act.<sup>122</sup> With the cosmetics market predicted to reach over \$716 billion in 2025, and the continued rise of the makeup dupe phenomenon, the need for stronger legal protections will only continue to grow.<sup>123</sup> These amendments

dupe-empire-and-thrived-amid-legal-battles (“In its defence, MCoBeauty argued that the two brands target entirely different customer bases. They contended that Tarte’s customers would easily recognize the significant price difference between Tarte’s ‘Shape Tape’ concealer and the more affordable offerings from MCoBeauty, thereby minimising the likelihood of confusion between the products.”); *see also* Ainsworth, *supra* note 23 (“On [Mr.] Mancini’s end, his searches concluded that there were key elements of Charlotte Tilbury’s Hollywood Flawless Filter that MCoBeauty could also use without issue.”).

<sup>119</sup> *See Trademark Injury in Law and Fact: A Standing Defense to Modern Infringement*, 135 HARV. L. REV. 667, 670 (2021) (“[T]he likelihood of confusion test suffers from a normative gap. It focuses exclusively on the probability of confusion when it should also consider confusion-related harm and the reasons for redressing that harm.”); *see also* Daryl Lim, *Trademark Confusion Revealed: An Empirical Analysis*, 71 AM. U. L. REV. 1285, 1306 (2022) (“Proxies like intent, survey evidence, mark strength, and consumer sophistication fail to incorporate real-world purchasing conditions or are better considered within other factors. Trademark infringement is fundamentally flawed if the likelihood of confusion turns on these proxies.”).

<sup>120</sup> *See* Primeaux, *supra* note 15 (“Within trademark law, makeup dupes bring a classic yet nuanced problem to the forefront of emerging issues due to their rise in popularity, salience in the market, and potential to compete with some of the oldest, most powerful brands.”); *see also* Underwood, *supra* note 5 (“If dupe companies successfully replicate an expensive product at a lower price, it could have substantial market ramifications.”).

<sup>121</sup> *See* COHN LEGAL, *supra* note 98 (“Trade dress protection faces challenges in adapting to changing consumer trends and styles. What may be distinctive today could be commonplace tomorrow, requiring courts to reassess the protectability of certain trade dress elements.”); *see also* Eslinger, *supra* note 83 (“‘It will reveal that I don’t know much about this,’ the judge said. ‘Does mascara mean by definition “eyelash” . . . in other words . . . can it mean eyeliner?’”).

<sup>122</sup> *See Trade Dress: The Forgotten Trademark Right*, FINDLAW, <https://corporate.findlaw.com/intellectual-property/trade-dress-the-forgotten-trademark-right.html> (last updated July 3, 2017) (“As a practical matter, practitioners should expect descriptiveness rejections to all applications for trade dress.”). *See generally* Lanham Act, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/lanham\\_act](https://www.law.cornell.edu/wex/lanham_act) (last visited Mar. 30, 2025) (explaining the current requirements for a mark to be eligible for protection under the Lanham Act).

<sup>123</sup> *See Beauty Industry Revenue and Usage Statistics 2024*, HELPLAMA (Nov. 2024), <https://help-lama.com/beauty-industry-revenue-usage-statistics/> (“Global beauty industry revenue is expected to top \$716 billion by 2025.”); *see also* NIQ, *supra* note 81 (“The popularity of dupes can be partly attributed to persistent inflation—consumers want products with price points that won’t strain their budgets. This rise in popularity hasn’t diminished demand for beauty products overall; 77% and 60% of consumers expressed a steadfast commitment to purchasing skincare and makeup,

would facilitate the process for luxury beauty brands seeking legal redress against makeup dupes, ensuring brands are protected in the constantly evolving beauty industry.<sup>124</sup>

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respectively.”).

<sup>124</sup> See *2024 Amendments to Copyright and Trademark Statutes: An Authoritative Analysis*, ROCKLAW, <https://www.rock.law/2024-amendments-to-copyright-and-trademark-statutes-an-authoritative-analysis/> (last visited Mar. 30, 2025) (“In 2024, significant amendments were made to both copyright and trademark statutes in the United States, reflecting ongoing efforts to adapt to the rapidly evolving landscape of intellectual property (IP) law.”); see also Primeaux, *supra* note 15 (“Makeup dupes are changing the ways consumers purchase makeup products, and the prevalence of these cheaper alternatives has implications for beauty companies and their intellectual property rights.”).