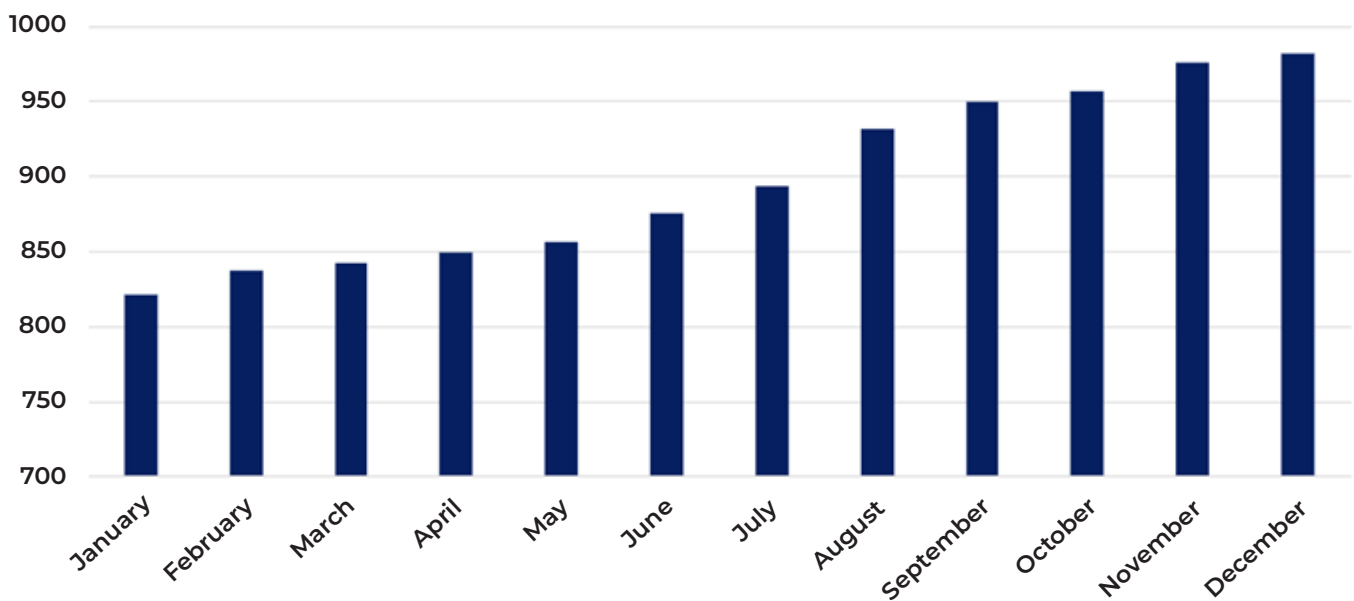


ONLINE BRAND PROTECTION

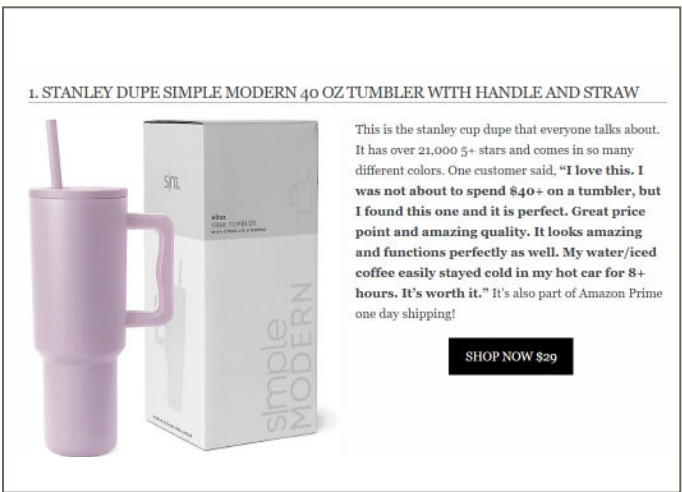
When Do Dupes Dupe? The Challenges of Taking Down Copycat Products from Online Platforms

In recent years, a major problem confronting brand owners has been the rise of “dupe” products on online platforms. Driven by millennial and Gen Z influencers and consumers, the term ostensibly gained currency as shorthand for “duplicate”. Yet, as one academic **notes**, the connotations of the word have grown to become versatile, encompassing not only directly counterfeit or infringing products, but also lookalike products that test the boundaries of trademark law.

Considering this, how do brands protect intellectual property rights with the rise of dupe culture? Furthermore, while various articles in the mainstream media have tended to focus on the dupe phenomenon in the context of the luxury goods and premium apparel sector, data with **Authentix** shows that the word “dupe” has become a normalized, catch-all term spanning a wide range of sectors. In 2024, Authentix recorded an increase in the usage of the term by approximately 20 percent in a twelve-month period (our measurement covering 10 major social media platforms and marketplaces and 100 leading brands across multiple sectors).



Invariably, the unique selling proposition behind dupe products is the fact that they cost less than the original product they seek to imitate. As an example of a typical dupe listing, below are screenshots of two images we encountered online. The first advertises dupes of Nike sneakers and the second Stanley drinkware - both products costing significantly less than the original.



In the examples above, if both brand owners own registrations for figurative trademarks/trade dress or designs copied in the dupe product, both cases would be clear-cut cases of trademark infringement. But this is often not the case. Accordingly, in instances like those above, it could be argued that word mark infringement has taken place. Although the word NIKE and the swoosh logo do not appear to be affixed to the dupe sneakers, and the word STANLEY similarly does not seem to be affixed to the tumbler, both listings arguably breach the permissible limits of comparative advertising. For instance, in the European Union, **Directive 2006/114/EC** disallows comparative advertising where a trader attempts to “present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.” Further, applying the principle of **initial interest confusion** (recognized by courts around the world, and defined as a situation “where a plaintiff can demonstrate that a consumer was confused by a defendant’s conduct at the time of interest in a product or service, even if that initial confusion is corrected by the time of purchase”) it could be argued that the listings amount to trademark infringement, via dilution. In addition, in both the above cases, a case for passing off could also be made.

Judicial support for brand owners can be found in the landmark case of **L’Oreal v Bellure**, involving the sale of smell-alike perfumes. The European Court of Justice (ECJ) had affirmed that comparative advertising may be disallowed “even where the use of a trademark is not capable of jeopardizing the essential function of the mark, which is to indicate the origin of the goods or services, provided that such use affects or is liable to affect one of the other functions of the mark.” Further, if “an advertiser...states explicitly or implicitly in comparative advertising that the product marketed by him is an imitation of a product bearing a well-known trade mark presents goods or services as imitations or replicas”, then the “advantage gained by the advertiser as a result of such unlawful comparative advertising must be considered to be an advantage taken unfairly of the reputation of that mark.”

Nevertheless, when attempting to take down dupe listings, there is sometimes resistance from certain online platforms. For a start, such platforms only protect registered rights and insist on the production of trademark or design certificates. If a complaint seeks to protect unregistered rights and seeks recourse to the law of passing off or unfair competition, these platforms outrightly reject such an argument. Further, even where a brand owner does own valid trademark registrations, the platforms may not delist dupe products where the seller, in the platform’s view, has clarified that the dupe product emanates from a different manufacturer. In other words, in the platform’s opinion, where there is no confusion regarding the primary function (source function) of the seller’s trademark, there cannot be any infringement. Dilution-based arguments pertaining to the secondary function of the trademark are thus not acknowledged. Such cases commonly occur when dupes are advertised or reviewed by social media influencers in vlogs and reels, where the platform feels that sellers have adequately distinguished dupes from the original.



As an example, the Authentix online brand protection team recently filed a complaint before a leading video sharing platform, where a lookalike dress made by its client (let us say, ABC) was advertised by a fashion influencer in a reel as “Best ABC dupe”.


To the chagrin of brand owners, there are certain jurisprudential fig leaves that dupe sellers and platforms can rely on. It is generally recognized by courts and legislation that a reference to a trademark, if in accordance with honest commercial practices, does not amount to trademark infringement. Moreover, elementary principles of free speech would protect an objective price comparison between two products. Many vloggers are thus canny enough to issue disclaimers and conditional statements to protect their sales pitches, sometimes even eliminate all references to the trademark of the original product. Frustratingly, for brand owners, platforms point to such statements while responding to takedown notices or when someone reports copyright infringement.

The legal chicanery employed by dupe sellers came to the fore in a case between Benefit Cosmetics and e.l.f. Cosmetics, decided by a US District Court. The court described both companies as catering to Gen Z influencers and relying on social media endorsements and reviews. Benefit had claimed that e.l.f.’s mascara product “Lash ‘N Roll” had infringed the trademark and trade dress of its mascara product “Roller Lash” (screenshots of both products, from Amazon, are reproduced below). Further, Benefit also used the term “Hook ‘N Roll” (a registered trademark owned by it) on its Roller Lash product. In response, e.l.f. argued that any similarities were ‘mere cues’ to consumers that Lash ‘N Roll is an affordable alternative to Roller Lash.” In its ruling, the court described e.l.f.’s product as a dupe and acknowledged that it was inspired by Benefit’s product.

The court also acknowledged that the word marks in question “look and sound similar”. Yet, the court still did not find trademark infringement. On the question of word mark infringement, the court pointed to dissimilarities in the appearance of the word marks on packaging, including Benefit’s prominent use of its house mark. With respect to trade dress infringement, the court stated: “Benefit clears the first hurdle of protectability, but it cannot demonstrate a likelihood of confusion.”



The court suggested that evidence in the nature of consumer surveys was required “to show consumer confusion beyond the mere hypothetical.” The court also opined that the class of consumers buying the products in question were sophisticated enough not to be deceived, and that the difference in price between both products “would likely raise a consumer’s eyebrow.” The court remarked: “To the contrary, e.l.f. shows it intended to create a mass market curling mascara product under its brand name and brand qualities, at approximately a fifth of the price of Benefit’s prestige product.”



Benefit Cosmetics Roller Lash Super Curling & Lifting Mascara in Black 0.3 oz

Brand: Benefit
 4.5 ★★★★★ 5,676 ratings
 Overall Pick



2K+ bought in past month

-16% \$24⁴⁴ (\$81.47 / ounce)
 List Price: \$29.00


FREE International Returns
 No Import Charges & \$7.22 Shipping to United Kingdom Details

Sales taxes may apply at checkout

Color: **Black**

	
\$24.44 (\$81.47 / ounce) \$29.00	\$24.54 (\$81.80 / ounce) \$26.00

[Click to see full view](#)



e.l.f. Lash 'N Roll Mascara, Curling Mascara For Visibly Lifted Lashes, Lifts & Separates Lashes. Long-Lasting Formula, Vegan & Cruelty-Free, Deep Brown

Visit the e.l.f. Store
 4.4 ★★★★★ 7,635 ratings
 Amazon's Choice

3K+ bought in past month




\$6⁰⁰

No Import Charges & \$7.15 Shipping to United Kingdom Details

Sales taxes may apply at checkout

Get a \$80 Amazon Gift Card instantly upon approval for the Amazon Store Card. No annual fee.

Color: **Deep Brown**

		
5 options from \$5.79	\$6.00	\$6.00

It should be pointed out that the above IP infringement case merely represents the decision of a single US judge. It is highly plausible that a court in another jurisdiction might have taken a less generous view of the defendant's product. Further, there were facts and circumstances in the case that may not apply in other cases. Thus, in the end, a strategy to take down against dupe sellers and influencers must be assessed on a case-to-case basis. While cases of blatant counterfeiting and trademark infringement must be targeted aggressively, borderline cases should preferably be dealt with greater care. If platforms are non-responsive, brand owners could file test cases or send letters directly to sellers and influencers, ideally investigating the size, reach and influence wielded by each target in advance. In certain cases, an overly aggressive strategy may backfire, as certain influencers have cheekily mocked companies sending them cease-and-desist letters. Meanwhile, brand owners must continue to engage with platforms through advocacy forums, particularly impressing upon them to recognize dilution-based forms of trademark infringement and protect unregistered rights.





Protect Your Brand and Content Rights with Online Brand Protection

Fakes, dupes and diverted goods not only endanger brand revenue and consumer trust but can also put consumer health and safety at risk.

Authentix advises over 200 of the world's leading brands, including Fortune 500 clients, on intellectual property related challenges in the digital world emanating not just from the conventional sphere of online marketplaces, but also more challenging arenas like social media platforms, NFT portals and the darknet. Authentix **online brand protection** solutions combine cutting-edge technological tools with expert analysis, enabling our clients to reduce infringements and counterfeits on online marketplaces, social media platforms and websites by up to 90%. **Schedule a meeting** with one of our brand protection experts today for services including:

- Tracking trademark infringement online and removing offers for fakes/ dupes
- Tracking pirated content online and removing infringing content
- Assisting with enforcement or settlement
- Support with legal research and drafting
- Specialized services in China



North America | Europe | Middle East | Africa | Asia

Innovative Brand Protection Solutions For Total **Product Integrity**



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