

Don't Get Duped: The Rise of "Dupe" Litigation in the United States

September 4, 2025 – *The TMCA*

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If you've scrolled on social media, set foot in a popular retailer, or have a teenager in your life, it's likely you've heard the term "dupe" (short for "duplicate") to describe affordable alternatives to high-end products such as handbags, makeup, and even furniture. Indeed, one need only conduct a cursory search on Amazon or the TikTok Shop to find a cheaper alternative for any luxury product imaginable. For brand owners, however, the rise of dupes can be a serious problem.

"Dupes" vs. Counterfeits

The major difference between dupes and counterfeit goods is that counterfeit goods purport to be authentic, often using a business's trademarks in an attempt to deceive consumers into believing they are receiving legitimate goods. Conversely, while a dupe may be visually similar in terms of design, packaging, ingredients, and overall product aesthetics, it does not typically copy any third-party trademarks, and consumers generally recognize the goods to emanate from a different source than its higher-end inspiration. And, while the selling of counterfeit goods is blatantly illegal under both federal and state laws, the sale of dupes is a gray area which has just begun to be explored in U.S. courts.

Lawsuits

While recent cases in the United Kingdom and Australia involving dupes have provided helpful precedent on which brand owners can rely, the jurisprudence in the United States is much sparser. Recent lawsuits filed by big name brands have gained media attention for asking courts to rule on whether dupes are lawful, or if there are grounds on which brand owners may be able to rely to combat being "duped".

In *Deckers Outdoor Corporation v. Last Brand, Inc.*, No. 3:23-cv-04850 (N.D. Cal.), Deckers Outdoor Corporation ("Deckers"), the owner of the well-known Uggs shoe brand, alleges, in part, trade dress infringement and unfair competition against competing consumer products brand, Quince, based on Quince's "dupe" version of Uggs'

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Class Ultra Mini Boot.

Quince's "Australian Shearing Mini Boots"



Uggs' "Classic Ultra Mini"



Based on the visual similarities between the boots, Deckers claims Quince has infringed its trade dress in an effort to exploit Deckers' goodwill and the reputation it has acquired in its Classic Ultra Mini.

In *Sol De Janeiro USA, Inc. et al. v. MCoBeauty Pty Ltd et al.*, No. 1:24-cv-08862 (S.D.N.Y.), the popular beauty brand Sol De Janeiro ("Sol") filed suit against MCoBeauty ("MCo"), a company founded on providing "dupes" of well-known beauty brands. No stranger to lawsuits, MCo has faced multiple lawsuits in both its home country of Australia as well as in the United Kingdom. It has generally prevailed in defending against trademark infringement claims though, as the brand creates its own trademarks for its products.

In the United States, however, brands have the unique ability to rely on trade dress rights, which is exactly what Sol alleges infringement of in its November 20, 2024 Complaint.

MCoBeauty's Infringing Products



Sol de Janeiro Products



Sol alleges false advertising, trade dress infringement, and unfair competition against MCo, noting, "[t]o sell its knockoff fragrances [MCo] publishes, endorses, sponsors, hosts, and/or supports" on its social media and website that its "fragrances are copies or duplicates of four of" Sol's popular products.

In its Answer, MCo denies each of the claims against it, adding affirmative defenses that Sol's trade dress design is ornamental, functional, non-distinctive, and generic.

In a busy year for MCo, it is also facing claims of trade dress infringement in Aramara Beauty LLC v. Mco Beauty Pty Limited et al., No. 1:25-cv-04808 (S.D.N.Y.), from owner of the Glow Recipe beauty brand, Aramara Beauty, LLC ("Aramara"). Aramara claims one of MCo's facial serums features a similar bottle shape, bottle color scheme, serum color, and product packaging to its popular "Watermelon Glow Dew Drops".



Aramara's Complaint points to MCO's social media and advertising for its product which feature similar taglines and color schemes, and even go so far as to claim "It's not a dupe. It's a dupé!"

Trade Dress Protection

Each of these lawsuits relies on trade dress rights in product design and packaging. In the United States, product design trade dress and product packaging trade dress are evaluated differently. Product designs themselves can never be inherently distinctive and will always require a showing of acquired distinctiveness and evidence the product is not merely functional in order to be accorded trade dress protection. Conversely, product packaging may be inherently distinctive, though it also requires a showing that the packaging is not merely functional.

When a trade dress does more than just identify its source (*i.e.*, it offers some sort of utilitarian or operative function as well), it loses its eligibility for trade dress protection, on the basis that it is functional. To prove distinctiveness for product design or non-inherently distinctive product packaging, owners must make a showing that the design/package has acquired distinctiveness and functions as a source indicator. Given the extensive evidence often required to make a claim of acquired distinctives, it's not surprising that brand owners often have a difficult time enforcing their rights against dupes absent a commercially strong brand.

With the increase in media attention and legal proceedings involving dupes, brand owners may wish to explore obtaining federal trade dress registrations to better combat falling prey to being the next "duped" brand. Moreover, given the hurdles with proving acquired distinctiveness in many instances, owners may wish to get a head start on this

process by having a discussion with their trademark counsel.