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Copycat Cosmetics: The Beauty Industry and the Bounds of the American Intellectual Property System,

Marra M. Clay

Note

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*Marra M. Clay**

INTRODUCTION

Eyeshadow palettes are glittery status symbols that sparkle under cosmetic stores' bright lights.[1] They provide endless color combinations and, much like a painter's acrylic collection, are a means of artistic expression. But these palettes are more than just a trendy item; they come with substantial payouts for their creators, often to the tune of tens of millions of dollars.[2] Unfortunately for many beauty companies, this payout is quickly slashed by knockoff manufacturers that jump at the opportunity to recreate the trendy product for a lower price.[3]

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1. *See* Sanam Yar, *Palettes Are What Every Teen Wants for the Holidays*, N.Y. TIMES (Dec. 5, 2019), https://www.nytimes.com/2019/12/05/style/makeup-palettes-influencer-eye-shadow.html [https://perma.cc/4WQ6-5PZ4].

2. *See* Julia Alexander, *YouTubers Are Clashing Over Eye Shadow, and Millions of Dollars Are at Stake*, VERGE (Nov. 1, 2019), https://www.theverge.com/2019/11/1/20936459/shane-dawson-jeffree-star-conspiracy-palette-james-charles-morphe-youtube-beauty (last visited Oct. 12, 2021). For example, in 2019, two beauty bloggers released an eyeshadow collaboration estimated to generate $35 million in sales. Kimberly Arnold, *Jeffree Star and Shane Dawson Reveal Money Secrets the Beauty Industry Has Kept Under Wraps. Will Others Follow Suit?*, BEAUTY INDEP. (Nov. 14, 2019), https://www.beautyindependent.com/jeffree-star-shane-dawson-reveal-beauty-industry-money-secrets [https://perma.cc/88UA-CB9N]. Over one million palettes were purchased within the first thirty minutes of the product's release. *Id.*; Geoff Weiss, *After Selling 1 Million Palettes in 30 Minutes, Jeffree Star and Shane Dawson Announce 'Conspiracy Collection' Restock*, TUBEFILTER (Nov. 5, 2019), https://www.tubefilter.com/2019/11/05/jeffree-star-shane-dawson-conspiracy-collection-restock [https://perma.cc/QY2Z-U6Q8].

3. *Welcome to Peak "Dupe"*, GLOB. COSM. INDUS. (Aug. 31, 2016), https://www

James Charles, one of the most well-known beauty influencers, released an eyeshadow palette in collaboration with cosmetics company Morphe in 2018.[4] The palette was priced at $39 and included thirty-nine eyeshadow shades.[5] Likely due to Charles's influence, the palette broke sales records and sold out in both the United States and Europe within ten minutes.[6] Less than one year later, Wet n Wild, a cheap drugstore cosmetics brand, released a strikingly similar eyeshadow palette.[7] It included color shades identical to Charles' palette and arranged them in a similar manner, but cost as little as $25.[8]

Charles quickly accused Wet n Wild of copying his product, which he claimed he spent years creating.[9] The similarities were sizeable, and beauty YouTubers released hundreds of videos comparing the

.gcimagazine.com/marketstrends/segments/cosmetics/We-Are-at-Peak-Dupe-391916311.html [https://perma.cc/XBL6-5KMR] ("In the age of niche, limited-edition makeup brands that sell out in minutes or seconds, it's no wonder that those left out will seek out similar alternatives, or dupes (duplicates).").

4. Julianna Florian, *James Charles Palette: Worth the Hype?*, LEXINGTON LINE (Feb. 20, 2019), https://www.thelexingtonline.com/blog/2019/1/29/james-charles-palette-worth-the-hype [https://perma.cc/8HZR-PYYE].

5. *Id.* (voicing that the price would actually impress "even the thriftiest makeup lover").

6. Elisabeth Mansson, *Sister Stocked? Not a Chance. The James Charles x Morphe Palette Has Sold Out for a Second Time*, THETALKO (Dec. 13, 2018), https://www.thetalko.com/the-james-charles-x-morphe-sister-collection-sold-out-second-time [https://perma.cc/ZJL9-P3FK].

7. Harmeet Kaur, *James Charles Accuses Wet n Wild of Copying His Eyeshadow Palette*, CNN (Sept. 7, 2019), https://www.cnn.com/2019/09/07/entertainment/james-charles-wet-n-wild-eyeshadow-trnd [https://perma.cc/D4YN-LFV7]; *James Charles Calls Foul on Wet n Wild's Dupe, Here's the Legality of the Situation*, FASHION L. (Sep. 10, 2019), https://www.thefashionlaw.com/james-charles-calls-foul-of-wet-n-wilds-dupe-heres-the-legality-of-the-situation [https://perma.cc/J4ZQ-RB9U].

8. *See* Lauren Strapagiel, *James Charles Has Accused Wet n Wild of Ripping off His Eyeshadow Palette*, BUZZFEED NEWS (Sept. 7, 2019), https://www.buzzfeednews.com/article/laurenstrapagiel/wet-n-wild-james-charles-palette [https://perma.cc/RWV3-8EMT]. Note, the Wet n Wild palette price has further decreased since the product debuted.

9. *Id.*

two products.[10] The Internet rallied behind Charles and vaguely encouraged him to "sue" Wet n Wild.[11] In response to the Tweet fire, Wet n Wild stated, "We've been in business for 40 years, and during that time we've made products that everyone can afford. We're a drugstore brand."[12] After a James Charles fan called the palette a "copycat," Wet n Wild responded, "I believe it is called a dupe . . ."[13]

Beauty dupes are a common occurrence in the makeup, skincare, and hair care industries.[14] Though the definition of "dupes" varies between consumers, the general consensus is that they replicate the look of high-end products for a lower price.[15] The beauty industry uses the

10. *See, e.g.*, Garrett Hahn, *The Tea on the James Charles and Wet n Wild Dupe…*, YOUTUBE (Oct. 15, 2019), https://www.youtube.com/watch?v=Px7SD5B153A&ab_channel=GarrettHahn (last visited Oct. 13, 2021) (referring to the Wet n Wild palette dupe as "the person who copies your homework in high school"); PopLuxe, *James Charles vs Wet N Wild | The Same?!*, YOUTUBE (Sept. 28, 2019), https://www.youtube.com/watch?v=Rvz05H3-YZI&ab_channel=PopLuxe (last visited Oct. 13, 2021); Oh!MGlashes, *New Wet N Wild 40 Pan Eyeshadow Palette v.s James Charles Palette (I'm Shook!!)*, YOUTUBE (Nov. 18, 2019), https://www.youtube.com/watch?v=_Qvj3dU7iJ8&ab_channel=Oh%21MGlashes (last visited Oct. 13, 2021).

11. Charles' fans did not specifically identify any legal grounds for a lawsuit but rather broadly encouraged him to seek legal relief. *See, e.g.*, Strapagiel, *supra* note 8; @makeupgirlies, TWITTER (Sept. 7, 2019, 12:12 PM), https://twitter.com/makeupgirlies/status/1170384380419686405 [https://perma.cc/ZH69-EWXK] ("[U]nleash your inner lawsuit[.]"); @malinlovesSHx, TWITTER (Sept. 7, 2019, 12:02 PM), https://twitter.com/malinlovesSHx/status/1170381887904407554 [https://perma.cc/2RCG-SHHG] ("[S]ue them already[.]").

12. @wetnwildbeauty, TWITTER (Sept. 7, 2019, 2:13 PM), https://twitter.com/wetnwildbeauty/status/1170414905264091137 [https://perma.cc/49S8-W4PJ].

13. @wetnwildbeauty, TWITTER (Sept. 7, 2019, 2:55 PM), https://twitter.com/wetnwildbeauty/status/1170425348988837889 [https://perma.cc/E866-79UT].

14. *See, e.g.*, 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 [https://perma.cc/6AXJ-8XT8]; Rio Viera-Newton, *The Highly Convincing Skin-Care Dupes My Followers Filled Me in on*, N.Y. MAG. (May 8, 2020), https://nymag.com/strategist/article/best-beauty-skincare-dupes-review.html [https://perma.cc/SUT9-228U].

15. *See* InForTheHaul, *What Is Your Definition of "Dupe"?*, REDDIT (2019), https://www.reddit.com/r/muacjdiscussion/comments/bb1b6f/what_is_your_definition_of_dupe [https://perma.cc/8VV7-PHTF] (providing different online users' definitions of a beauty dupe, such as: "It's a dupe if any other normal person couldn't see the [sic] any significant difference between the products and the person viewing you is standing at least arms [sic] length away from your face," "For eyeshadow, everything has to be nearly identical. For lips, only the color has to match, since you can kind of alter the finish of lipsticks with balm or gloss," and "[t]o me a dupe is a duplicate, or when one company will try to emulate (duplicate) another popular companies

terms "drugstore dupes," "makeup dupes," and "high-end makeup dupes" interchangeably to describe products "similar in quality and/or shade to another product. And usually, [dupes are] used in a way to describe an affordable and/or drugstore product that is an alternative to a prestigious (and well-known) makeup product."[16] Dupes' packaging is usually distinct from high-end brands', but the products themselves resemble more expensive, trendy items. For instance, a dupe company might recreate the exact same shade of red as a $37 lipstick but sell it for only $7.[17] In the case of eyeshadows, a dupe may have the same color or shimmer as its high-end counterpart.[18] Other beauty products, such as serums or moisturizers, may try to recreate a luxury brand's smell or consistency.[19]

Not surprisingly, members of the beauty community began to question whether dupes are legal or ethical.[20] Dupe companies copy the successful trends prestigious brands establish, often riding on the coattails of their pricey marketing campaigns. These dilemmas have posed important questions to the beauty industry: Is there any way to prevent dupes? What intellectual property rights do high-end companies have to exclude dupes from the market? Are prestigious products protectable?

[sic] color stories and formulas.") (quoting other users).

16. Liana Desu, *Best Drugstore Makeup Dupes—The Ultimate List*, LIANA DESU (Feb. 2, 2020), https://lianadesu.com/drugstore-makeup-dupes [https://perma.cc/4PP3-VESV].

17. *Dupe Cosmetics Prove Big Business, but Not Without Legal Complications*, FASHION L. (May 17, 2017), https://www.thefashionlaw.com/dupe-cosmetics-prove-big-business-legally-problematic [https://perma.cc/BF4Z-U4F6] [hereinafter *Dupe Cosmetics Prove Big Business*] ("[M]any consumers actively seek out and purchase the affordable $7 lipstick with the same color and texture as the $37 designer lipstick.").

18. *See* Jessica L. Yarbrough, *The Best Eyeshadow Dupes for Cult Favorite Palettes*, RANKER (Aug. 13, 2019), https://www.ranker.com/list/best-eyeshadow-palette-dupes/jessica-defino [https://perma.cc/7T5Y-7LXM] (ranking eyeshadow dupes compared to the original palettes).

19. *See* Melanie Aman, *28 Cheap Skincare Dupes for Luxury Products*, BUZZFEED https://www.buzzfeed.com/melanie_aman/cheap-skincare-dupes-for-luxury-products [https://perma.cc/S57A-Z7EY] (last updated May 17, 2021).

20. *See* Louise Whitbread, *Is It Ethical to Continue Buying Beauty Dupes in 2019?*, DAZED BEAUTY (April 10, 2019), https://www.dazeddigital.com/beauty/head/article/46283/1/beauty-dupes-charlotte-tilbury-lidl-lawsuit-dupethat-temptalia-ethical [https://perma.cc/2ACH-HK9Q] ("With countless articles from beauty publications championing dupes further, these products are presented to consumers without questioning the often illegal and unethical side to them."); *Dupe Cosmetics Prove Big Business*, *supra* note 17; Grace Howard, *Are Beauty 'Dupes' Legal?*, BUS. FASHION (May 3, 2017), https://www.businessoffashion.com/opinions/beauty/are-beauty-dupes-legal-makeup-revolution-charlotte-tilbury [https://perma.cc/BU87-MVN5].

Despite the beauty industry's size, there is very limited scholarship discussing its unique legal issues.[21] Most legal discussion surrounding the beauty industry is related to its regulation.[22] Though there is extensive legal discussion about knockoff products in the fashion industry,[23] similar scholarship does not exist for beauty. The number of scholarly articles on dupes can be counted on one hand.[24] Because dupes are such a large player in the industry, they warrant legal analysis to determine if high-end brands have any means of protection.

21. It would be remiss to not acknowledge that the beauty industry is likely not taken seriously in the legal (and specifically intellectual property) fields due to the fact that it serves a predominately female consumer base, while beauty industry leadership, law, and intellectual property are all predominately male. Michelle Cheng, *Women Are Making over the Beauty Industry's Boy's Club*, FIVETHIRTYEIGHT (Aug. 1, 2017), https://fivethirtyeight.com/features/women-are-making-over-the-beauty-industrys-boys-club; *Gender Equality, Diversity and Intellectual Property*, WORLD INTELL. PROP. ORG., https://www.wipo.int/women-and-ip/en [https://perma.cc/2G5R-4MF5]; *A Current Glance at Women in the Law*, A.B.A. 2 (Apr. 2019), [https://perma.cc/GJU8-8UVR].

22. *See, e.g.*, Morgan G. Egeberg, *Beauty Is Pain: An Analytical View of the American Beauty Industry and the Effects of Regulation on Consumers*, 23 QUINNIPIAC HEALTH L.J. 303 (2020) (analyzing issues arising from the lack of legal regulation in the beauty industry); Lauren Jacobs, *Beauty Shouldn't Cause Pain: A Makeover Proposal for the FDA's Cosmetics Regulation*, 39 J. NAT'L ASS'N ADMIN. L. JUDICIARY 82 (2019) (assessing the FDA's current cosmetics regulation and proposing changes); Marie Boyd, *Gender, Race & the Inadequate Regulation of Cosmetics*, 30 YALE J.L. & FEMINISM 275 (2018) (critiquing the current laissez-faire approach to the regulation of cosmetics because it disproportionally places women at risk); Sarah E. Schaffer, *Reading Our Lips: The History of Lipstick Regulation in Western Seats of Power*, 62 FOOD DRUG L.J. 165 (2007) (tracing the history of lipstick legal regulation).

23. *See, e.g.*, Elizabeth Ferrill & Tina Tanhehco, *Protecting the Material World: The Role of Design Patents in the Fashion Industry*, 12 N.C. J.L. & TECH. 251 (2011) (discussing the threat that knockoff products pose to the intellectual property rights of fashion designers).

24. At the time of writing, there are exactly two pieces of legal scholarship that discuss beauty dupes, both written by law review staffers. *See* Samantha Primeaux, Note, *Makeup Dupes and Fair Use*, 67 AM. U. L. REV. 891 (2018) (suggesting beauty dupes may be legal under the fair use doctrine); Sohela Suri, *Wet N Wild Shades James Charles: Just Another Dupe or Copyright Infringement?*, SYRACUSE L. REV. LEGAL PULSE (Oct. 31, 2019), https://lawreview.syr.edu/wet-n-wild-shades-james-charles-just-another-dupe-or-copyright-infringement [https://perma.cc/BLG8-FSZB] (discussing if beauty dupes, particularly of the James Charles palette, could be prevented with copyright enforcement).

Some bloggers have argued beauty dupes are similar to fashion knockoffs,[25] which are an intellectual property ("IP") negative space.[26] Intellectual property negative space refers to fields that thrive despite lacking intellectual property protection.[27] IP rights in the United States are fundamentally incentive-based,[28] but negative spaces manage to spur innovation even without this incentive. Studying negative space industries is a useful practice for understanding the American intellectual property system's effectiveness and has been the subject of growing legal scholarship over the last decade.[29] Negative space helps scholars understand if the IP incentive model actually "holds up in the real world."[30] In recent years, scholars have studied this phenomenon by conducting case studies of different negative space fields.

25. Fashion knockoffs are often referred to as "fast fashion," which is clothing that replicates an expensive fashion designer's style at a lower price point. Adam Hayes, *Fast Fashion*, INVESTOPEDIA (Apr. 29, 2021), https://www.investopedia.com/terms/f/fast-fashion.asp [https://perma.cc/P29F-WRQN] ("Fast fashion allows mainstream consumers to purchase the hot new look or the next big thing at an affordable price."); *Dupes Are Proving a Budding New (Legal) Trend in the Beauty World*, FASHION L. (Aug. 14, 2017), https://www.thefashionlaw.com/not-necessarily-legal-dupes-proving-a-budding-new-trend-in-the-beauty-world [https://perma.cc/7Y3G-38U8] [hereinafter *Budding New (Legal) Trend*] ("Not unlike fast fashion, which falls in a space of legally permissible copying, much of the market's dupes are perfectly legal—brand owners cannot, after all, claim copyright protection for the idea of a lipstick or a generic pink blush, and certainly cannot initiate trademark proceedings over a rival's use of descriptive terms, such as 'nude,' 'highlight,' or 'shine'—commonly used cosmetics terms."); *see also* Jenna Igneri, *The Complicated Case of Beauty Dupes*, NYLON (Oct. 26, 2018), https://www.nylon.com/articles/are-beauty-dupes-problematic [https://perma.cc/5FJK-S85S] ("[M]any people who would never buy a knockoff handbag have become obsessed with another form of imitation: the beauty dupe, aka the cheaper version of a cult-favorite (and usually much more expensive) product.").

26. *See generally* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006) (discussing the fashion industry's success despite its lack of intellectual property protections).

27. Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 442 (2013).

28. Kal Raustiala & Christopher Jon Sprigman, *When Are IP Rights Necessary? Evidence From Innovation in IP's Negative Space*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 309, 310 (Ben Depoorter & Peter S. Menell eds., 2019). For further discussion of what it means for IP to be incentive-based, see discussion *infra* Part I.C.1.

29. Raustiala & Sprigman, *supra* note 28, at 311.

30. *Id.* at 312.

Scholars have identified fashion,[31] typefaces,[32] cuisine,[33] stand-up comedy,[34] graffiti,[35] and a swath of other practices as negative spaces that lack intellectual property protection. However, little of this scholarship has discussed negative space through a theoretical framework to understand its greater implications.[36]

This Note argues the beauty industry should be added to the growing list of industries occupying intellectual property negative space. It uses beauty dupes and the existing scholarship around negative space to discuss whether Congress should enact additional intellectual property legislation to "fill in" negative space and create intellectual property protection for these currently unprotected fields.

In Part I, this Note provides a background on dupes as a large player in the beauty industry. It gives a brief history, distinguishes dupes from counterfeit and knockoff products, and provides an overview of the industry's current IP portfolio. In Part II, this Note discusses how IP rights fail to prevent dupes due to substantive and practical limitations in patent and trademark law. Part III then provides an overview of negative spaces and demonstrates that beauty products should be added to the list. Part III also highlights the importance of studying negative space to understand IP's effectiveness. To conclude, Part IV discusses whether Congress should expand IP legislation to protect these currently unprotected industries. By using dupes and other negative space examples, it argues negative spaces fulfill all goals for the intellectual property system despite not having any IP rights and, thus, does not warrant additional legislation.

I. DUPES ARE GIVING THE BEAUTY INDUSTRY A MAKEOVER

The beauty industry is by no means small. It "covers a wide variety of personal products . . . , beauty appliances . . . , services . . . , and related functions."[37] Though the beauty industry is conventionally as-

31. Raustiala & Sprigman, *supra* note 26.

32. Blake Fry, *Why Typefaces Proliferate Without Copyright Protection*, 8 J. TELECOMM. & HIGH TECH. L. 425, 432–37 (2010).

33. J. Austin Broussard, Note, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691 (2008).

34. Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

35. Al Roundtree, *Graffiti Artists "Get Up" in Intellectual Property's Negative Space*, 31 CARDOZO ARTS & ENT. L.J. 959 (2013).

36. Rosenblatt, *supra* note 27, at 444.

37. *Industry Research: Beauty*, U.S.C. LIBRS., https://libguides.usc.edu/

sociated with cosmetics, it also includes haircare, fragrances, antiperspirants, oral hygiene, sun protection, and other skincare. In 2019, the beauty industry was valued at $532 billion dollars globally.[38] Studies have found that beauty even thrives during economic recessions when other industries suffer.[39] When most other industries were affected by the COVID-19 recession, the beauty industry still reeled in almost $50 billion in the United States.[40] Moreover, a 2017 survey of 2,000 individuals found that the average American woman will spend nearly $225,000 on skin products, makeup, hair care and maintenance, and other beauty products during her lifetime.[41] If dupe companies successfully replicate an expensive product at a lower price, it could have substantial economic ramifications. Dupes are nothing to scoff at.

Many in the beauty community question if it is ethical to purchase dupes that copy high-end brands.[42] To understand the role they play

industries/beauty [https://perma.cc/GL5B-TJWH].

38. Pamela N. Danziger, *6 Trends Shaping the Future of the $532B Beauty Business*, FORBES (Sept. 1, 2019), https://www.forbes.com/sites/pamdanziger/2019/09/01/6-trends-shaping-the-future-of-the-532b-beauty-business [https://perma.cc/WNV3-BTRH].

39. This economic phenomenon is called the "lipstick effect." Ekaterina Netchaeva & McKenzie Rees, *Strategically Stunning: The Professional Motivations Behind the Lipstick Effect*, 27 PSYCH. SCI. 1157, 1157 (2016). However, recent studies suggest the COVID-19 recession upended this theory. Zoe Wood, *Sleeping Beauty Halls: How Covid-19 Upended the 'Lipstick Index',* GUARDIAN (U.K.) (Dec. 18, 2020), https://www.theguardian.com/business/2020/dec/18/how-covid-19-upended-the-lipstick-index-pandemic-cosmetic-sales-makeup-skincare [https://perma.cc/J9GT-3ZNC].

40. *Revenue of the Cosmetic & Beauty Industry in the U.S. 2002 to 2020*, STATISTA, https://www.statista.com/statistics/243742/revenue-of-the-cosmetic-industry-in-the-us [https://perma.cc/HJ8H-367N].

41. Chelsea Haynes, *True Cost of Beauty: Survey Reveals Where Americans Spend Most*, GROUPON (Aug. 3, 2017), https://www.groupon.com/merchant/trends-insights/market-research/true-cost-beauty-americans-spend-most-survey [https://perma.cc/YX2H-DS3C]; *see also* Julie Gerstein, *Here's What the Average Woman in the US Spends on Makeup—and It's a Lot*, BUZZFEED (Mar. 29, 2017), https://www.buzzfeed.com/juliegerstein/heres-what-the-average-american-woman-spends-on-makeup-and [https://perma.cc/P45C-D42S]. It is likely that the pink tax, an additional price that is often added to women-specific products, plays into this ghastly amount. *See generally* Editorial, *The Pink Tax*, N.Y. TIMES (Nov. 12, 2014), https://www.nytimes.com/2014/11/13/opinion/the-pink-tax.html [https://perma.cc/86UH-UJAS] (discussing the phenomenon of stores setting higher prices for products directed at women).

42. *See* Whitbread, *supra* note 20; Igneri, *supra* note 25; *Beauty Dupes—Smart or Unethical?*, LIFESTYLE FILES (June 26, 2018), https://www.thelifestyle-files.com/beauty-dupes-smart-or-unethical [https://perma.cc/AVY9-VQZH]; greengryffin13, *Do Makeup Dupes Pose an Ethical Problem?*, REDDIT (2018), https://www.reddit.com/r/muacjdiscussion/comments/981kaj/do_makeup_dupes_pose_an_ethical_problem [https://perma.cc/3UZT-3APA].

in the market, this Section begins with a brief history of beauty dupes, distinguishes dupes from counterfeit and knockoff products, and discusses the IP rights typically afforded to beauty companies.

A. DUPES THROUGH THE AGES

Though cosmetics have been used since the ancient times during religious ceremonies in Egypt, they did not become widely used and accepted until the late 19th and early 20th centuries.[43] In no time at all, dupes hit the market. Fragrances were perhaps the first beauty product duped.[44] In the mid-20th century, perfume dupes became wildly popular. Fragrance dupe companies sold $3 perfume that smelled like $40 perfume.[45] The perfumes "closely resemble[d] designer products but cost a fraction of the price."[46] The perfume industry was aghast when imitation fragrance retail sales were expected to reach $150 million in the 1980s.[47] These "smell-alikes" were possible because fragrances cannot be trademarked.[48] Some fragrance dupe

43. *See Business of Beauty: A Resource Guide*, LIBR. OF CONG., https://guides.loc.gov/business-of-beauty/history [https://perma.cc/8NP4-MFLH]. The unpopularity of cosmetics before the Victorian era is credited to spreading Christianity and its denunciations of vanity. *Id.*

44. *See* Lisa Belkin, *Discounters' Mimicry Plagues Costly Scents*, N.Y. TIMES (Jan. 25, 1986), https://www.nytimes.com/1986/01/25/business/discounters-mimicry-plagues-costly-scents.html [https://perma.cc/UW9D-DHP7]; Julie A. Monahan, *Knockoffs' Piece of Pie Grows: More Firms Enter Knockoff Arena*, WOMEN'S WEAR DAILY, June 5, 1987, at 10, 12. It is important to note that the term "dupe" had not yet been coined, and thus the conversations surrounding these 1980s fragrance dupes refer to the copying products as "knockoffs." It is clear under today's definitions that they would be considered dupes.

45. Monahan, *supra* note 44 (noting that Parfums de Coeur, a popular fragrance dupe company in the 1980s, made $100 million in sales in 1987, equivalent to almost $250 million in 2020).

46. Belkin, *supra* note 44.

47. Denise Gellene, *Knockoff Fragrances Leave Industry Gasping: A Rose—and an Imitation Scent—May Smell as Sweet*, L.A. TIMES (May 9, 1986), https://www.latimes.com/archives/la-xpm-1986-05-09-fi-4180-story.html [https://perma.cc/8MKJ-WRUZ] (describing the "unbelievable" demand for knockoff scents).

48. *Id.* Though trademark law does allow for protection of some smells, perfumes are unprotectable because they are functional under the Lanham Act § 2. *See* 15 U.S.C. § 1052(e)(5) ("No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . [c]onsists of a mark which . . . comprises any matter that, as a whole, is functional."); *Even the Most "Instantly Identifiable" Fragrances Cannot Be Protected by Trademark Law*, FASHION L. (June 17, 2019), https://www.thefashionlaw.com/even-the-most-identifiable-fragrances-in-the-world-cannot-be-protected-by-trademark-law [https://perma.cc/SRN3-SJ9D] ("[T]he scent is essential to the purpose of a fragrance product, making it functional, and thereby, ineligible for registration with the [U.S. Patent and Trademark Office].").

companies flaunted their copying, with one company going so far as to name its dupe "The Great Pretenders."[49]

As fragrance dupes became more popular, denunciations grew. Dupe critics generally argued dupes were only successful because of the original brand's marketing.[50] For example, in 1985 high-end brand Calvin Klein Cosmetics spent more than $17 million to launch their fragrance Obsession, which made $30 million in sales.[51] Parfums de Coeur made a dupe for Obsession and also made $30 million in sales that year despite spending only $3 million on marketing.[52] One Vogue journalist went so far as to write: "[Dupes] live off the marketing and advertising of prestigious fragrances in much the same way tapeworms and other parasites live off larger animals, taking advantage of the host perfume for nutritional purposes but, in the name of self-preservation, never going so far as to kill their host."[53] Obviously, the industry had very strong feelings on this matter.

Eventually, these fragrance dupes went too far. They were not solely copying the scent, but they also started using similar packaging, names, and logos. In 1986, Calvin Klein obtained several federal court injunctions, including one against a fragrance dupe with the logo "If you like OBSESSION by Calvin Klein, you'll *love* CONFESS," using Calvin Klein's registered trademarks.[54] The European Court of Justice recently addressed a similar issue, holding that dupes cannot use comparative advertising to identify their high-end counterparts.[55] Though some fragrance dupes still exist,[56] they are not nearly as popular as

49. Gellene, *supra* note 47.

50. *Dupe Cosmetics Prove Big Business*, *supra* note 17.

51. Gellene, *supra* note 47.

52. *Id.*

53. Robert Sullivan, *Knockoff Artists*, VOGUE, April 1, 1996, at 234. As this Note later addresses, perhaps dupes' "parasitism" is not inherently bad for society because it encourages competitive pricing and increases consumer access to quality products.

54. Gellene, *supra* note 47; Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd., No. CIV. 3-86-395, 1986 WL 84359 (D. Minn. Sept. 16, 1986).

55. Case C-487/07, L'Oréal SA and Others v. Bellure NV and Others, 2009 E.C.R. I-5185, I-5247 (finding for plaintiff L'Oréal, a high-end fragrance company, after dupe company Bellure used comparative advertising to promote their cheaper fragrance) ("[T]he concept of 'taking unfair advantage of the distinctive character or the repute of the trade mark', also referred to as 'parasitism' or 'free-riding', that concept relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign. It covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation.").

56. *See, e.g.*, Catherine Helbig, *Splurge or Steal: Luxury Perfumes and Their Dupes*, BYRDIE (May 13, 2019), https://www.byrdie.com/splurge-or-steal-perfumes-346122

they were several decades ago. Some recent legal scholarship advocates for extending copyright protections to fragrances because scientific advancements have made it easier to reverse-engineer scents,[57] though the current state of IP law still does not allow protecting fragrances.[58] Fragrances are one very strong historical example of dupes, but beauty dupes today are by no means limited to scents.

In contrast to many older fragrance dupes, most currently successful dupe companies do not use prestigious brands' registered trademarks to advertise products. Instead, dupes solely replicate the substantive product, e.g., the smell of the perfume, but not the style of the bottle or the logo.[59] If consumers want to purchase dupes now, they can visit a dupe website such as Temptalia that functions as a dupe search engine.[60] Users type in a high-end product, and the search results yield dupes, where they can be purchased, and compare prices.[61] These websites employ user-generated information and consumer reviews to find the best dupes for expensive products. Dupes are also often shared on TikTok, where users compare luxury products with cheaper alternatives.[62] Even though dupes are easier to find than ever before, many of the arguments for and against dupes remain. Dupe companies argue that their products are to society's benefit because they make prestigious products affordable to the average

[https://perma.cc/SN9S-TCBG] (presenting a guide to modern "leading luxury fragrances" and their "less-costly doppelgängers").

57. *See generally* Olivia Su, Note, *Odor in the Courts! Extending Copyright Protection to Perfumes May Not Be So Nonscentsical: An Investigation of the Legal Bulwarks Available for Fine Fragrances Amid Advancing Reverse Engineering Technology*, 23. S. CAL. INTERDISC. L.J. 663 (2014); Charles Cronin, *Genius in a Bottle: Perfume, Copyright, and Human Perception*, 56 J. COPYRIGHT SOC'Y U.S.A. 427 (2009).

58. *See* 15 U.S.C. § 1052(e)(5).

59. For examples, see Valeza Bakolli, *11 Affordable Beauty Dupes That Are Just as Good as Their Fancy AF Counterparts*, BUZZFEED (June 11, 2020), https://www.buzzfeed.com/valezabakolli/dupes-for-high-end-beauty [https://perma.cc/2BXD-CQLY].

60. *The Dupe List*, TEMPTALIA, https://www.temptalia.com/makeup-dupe-list [https://perma.cc/P8PL-T2LL]; *see also Skincare Compare*, SKINSKOOL, https://skinskoolbeauty.com [https://perma.cc/S2LL-LS9E].

61. *Id.* For example, Glossier is a trendy cosmetics company that sells "Cloud Paint," a liquid blush, which retails for $18. A quick search on Temptalia reveals dupe alternatives to all of Glossier's Cloud Paint shades, including one product from ColourPop Cosmetics that retails for only $4.50. *Glossier Cloud Paint Dupes*, TEMPTALIA, https://www.temptalia.com/makeup-dupe-list/glossier-cloud-paint [https://perma.cc/B9MG-N4EV].

62. *See* As/Is, *We Test These Makeup Dupes from TikTok*, YOUTUBE (Feb. 24, 2021), https://www.youtube.com/watch?v=I9hIrAjfHEY&t=466s&ab_channel=As%2FIs (last visited Oct. 18, 2021). TikTok is a popular video-sharing social media platform.

consumer and encourage competitive pricing.[63] Others argue that the imitation hurts established brands because copying the work of another is "akin to stealing."[64] The beauty community is up in arms over this issue.

B. BEAUTY DUPES ARE DISTINCT FROM COUNTERFEITS AND KNOCKOFFS

To understand the sphere that dupes occupy in the beauty industry, it is important to distinguish them from counterfeit and knockoff products. Unlike counterfeits or knockoffs, most dupes do not attempt to trick the consumer into thinking they are buying the original high-end good.[65] They normally do not copy the name or packaging, but rather only the product itself.

"Counterfeit" and "knockoff" are colloquially interchangeable,[66] but they are different legal terms with different implications. Counterfeit products copy the original brands' registered trademarks.[67] By statute, counterfeit products are "identical with, or substantially indistinguishable from" a genuine product's trademark.[68] Counterfeits

63. Strauss, *supra* note 14 ("'Copycatting sounds like such a negative word,' [the vice president for marketing at Maybelline New York] said. 'Women should have access to the best products and be able to choose what they want to buy. If we have a fantastic, affordable product that prestige is also doing, are we doing a bad thing?'"); Linda Wells, *Beauty; Mirror Images*, N.Y. TIMES (Feb. 21, 1988), https://www.nytimes.com/1988/02/21/magazine/beauty-mirror-images.html [https://perma.cc/L5AN-GP7V] ("Some industry experts believe that this kind of imitation can benefit the consumer by encouraging more competitive pricing.").

64. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION 6 (2012).

65. Or Gotham, *The $16 Dupe for Tom Ford's (Sold Out) Lip Blush*, THE STRATEGIST: N.Y. MAG. (Aug. 22, 2019), https://nymag.com/strategist/article/winkylux-flower-balm-review-2019.html [https://perma.cc/C9F3-U4RT] ("A dupe, to be clear, is not a knockoff. A dupe is a product that in some ways works as well as—or better than—a fancier, more famous thing . . ."); Bakolli, *supra* note 59 (discussing how the popularity of beauty dupes rises from the fact that they are *not* the high-end brands, but rather cheaper alternatives, sold under a different name with different packaging).

66. Meghan Collins et al., *Knock-off the Knockoffs: The Fight Against Trademark and Copyright Infringement*, 9 ILL. BUS. L.J. 227 (2009) (demonstrating that some legal scholars even use "knockoff" and "counterfeit" interchangeably).

67. Vox, *Why This Gucci Knockoff Is Totally Legal*, YOUTUBE (Sept. 6, 2018), https://www.youtube.com/watch?v=U9wY8Wz6lCs&ab_channel=Vox (last visited Oct. 13, 2021).

68. 18 U.S.C. § 2320 (f)(1)(A)(ii). For example, Nike shoes are perhaps the most counterfeited good in the entire world. Susanna Kim, *Nike Shoes Among Most Counterfeited Goods in the World*, ABC NEWS (Apr. 18, 2016), https://abcnews.go.com/Business/nike-shoes-counterfeited-goods-world/story?id=38485256 [https://perma.cc/TT4E-NMAF]. Many counterfeit Nike shoes prominently display Nike's registered "Swoosh" trademark with the intent to deceive the consumer. Counterfeits for Nike are

are "[m]ade to look genuine in an effort to deceive" and are often produced with "intent to defraud."[69] It is usually a product that is identical to another product and therefore infringes upon the original product's trademarks. Counterfeit goods are stereotypically sold online or by back-alley vendors[70] but now are also found on websites as large as Amazon.[71] There are both civil remedies[72] and criminal penalties[73] for manufacturing and selling counterfeit goods.

In contrast, "knockoff" is an umbrella term with a wider array of definitions. Some believe knockoffs only resemble the design of an original product without necessarily copying the original brand's registered trademark.[74] Other sources say a knockoff is an "unauthorized counterfeit and [usually] inferior copy of another's product, [especially] one protected by patent, trademark, trade dress, or copyright, [and usually] passed off at a substantially lower price than the original."[75] Under this definition, knockoffs are not illegal unless a brand can prove that a knockoff is so close to the original product that the consumer is misled into believing they are purchasing the original.[76]

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so prominent that Nike has a webpage entitled "Have I Bought Fake Nikes?" and there is even a WikiHow page explaining how to spot them. *Have I Bought Fake Nikes?*, NIKE, https://www.nike.com/help/a/nike-product-authenticity [https://perma.cc/75MM-5GAW]; *How to Spot Fake Nikes*, WIKIHOW (Jan. 20, 2021), https://www.wikihow.com/Spot-Fake-Nikes [https://perma.cc/SB8C-DSJ2].

69. *Counterfeit*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 431–32 (3d ed. 1982) ("Counterfeiting is the unlawful making of false money in the similitude of the genuine. At one time under English statutes it was made treason. Under modern statutes it is a felony.").

70. Arthur Zaczkiewicz, *Counterfeits, Knockoffs, Replicas: Parsing the Legal Implications*, WOMEN'S WEAR DAILY (June 2, 2016), https://wwd.com/business-news/retail/counterfeit-knockoff-replica-legal-10437109 [https://perma.cc/W9KY-SB5M].

71. Hillary Hoffower, *Fake Products Sold by Places Like Walmart or Amazon Hold Risks of Everything from Cyanide to Rat Droppings—Here's How to Make Sure What You're Buying Is Real*, BUS. INSIDER (Mar. 29, 2018), https://www.businessinsider.com/how-to-find-fake-products-online-shopping-amazon-ebay-walmart-2018-3 [https://perma.cc/67TF-MKXW].

72. Counterfeits which are subject to civil remedies are those that violate the Lanham Act, 15 U.S.C. § 1114(1)(b). Under this section, an individual shall be liable in a civil action by the registrant if they "reproduce, counterfeit, copy, or colorably imitate a registered mark . . . ."

73. 18 U.S.C. § 2320 (defining the primary criminal counterfeiting offense as "whoever intentionally "traffics in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services," and providing criminal penalties for such an offense).

74. Vox, *supra* note 67.

75. *Knockoff*, BLACK'S LAW DICTIONARY (11th ed. 2019).

76. Zaczkiewicz, *supra* note 70.

This Note focuses on beauty dupes that do not infringe the trademark or replicate prestigious brands' packaging but are simply "cheaper alternatives to higher-end products."[77] Unlike counterfeit goods, dupes are not designed to trick the consumer but rather to help the consumer affordably acquire a trendy style.[78] Though counterfeit beauty products are a serious problem globally due to their prominence and hazards,[79] counterfeits are not at issue in this Note. Similarly, beauty dupes are also distinct from knockoff products. Though dupes attempt to copy the color, consistency, or formula of a high-end product, they do not usually copy the high-end brand's packaging, logos, or other distinctive features.[80] Further, they are not necessarily inferior to the high-end brands they replicate.[81] For the forgoing reasons, beauty dupes are distinct from counterfeit and knockoff goods and thus laws addressing those illegal products are inapplicable.

C. THE BEAUTY INDUSTRY'S CURRENT IP STRATEGY

The beauty industry is well-versed in the world of intellectual property. Specific brands' entire worth rests on their registered trademarks and heavily guarded brand image.[82] This Section provides a basic overview of intellectual property rights and discusses the ways

77. Hannah Sullivan, *Makeup Dupes: The Law of Cosmetics and Trademarks*, LIB. CONG. (Nov. 23, 2020), https://blogs.loc.gov/law/2020/11/makeup-dupes-the-law-of-cosmetics-and-trademarks [https://perma.cc/2PU7-4MN9].

78. Beth Gillette, *The Best Money-Saving Beauty Dupes*, EVERYGIRL (Apr. 29, 2019), https://theeverygirl.com/beauty-dupes [https://perma.cc/Z2B4-WAF3] (recommending cheaper knockoff products as opposed to their more expensive counterparts).

79. *See generally* Jessica Schiffer, *Why Counterfeit Beauty Products Are Booming Amid COVID-19*, VOGUE (Aug. 18, 2020), https://www.voguebusiness.com/beauty/why-counterfeit-beauty-products-are-booming-amid-covid-19 [https://perma.cc/ENN3-EPET] (discussing the recent rise in counterfeit beauty products due to the increase in online pandemic shopping); Jennifer Lei, Note, *Makeup or Fakeup?: The Need to Regulate Counterfeit Cosmetics Through Improved Chinese Intellectual Property Enforcement*, 88 FORDHAM L. REV. 309 (2019) (detailing some of the health implications of counterfeit beauty products and possible legal solutions).

80. Sullivan, *supra* note 77.

81. Taylor Justice, *Save or Splurge? 9 Drugstore Makeup Dupes, Each Under $16*, STYLEBLUEPRINT (May 21, 2020), https://styleblueprint.com/everyday/makeup-dupes [https://perma.cc/QCT4-XXDH] ("[D]rugstore makeup is just as good—*if not better*—than most luxury brands.").

82. *As the $500 Billion-Plus Cosmetics Market Continues to Grow, How Do Companies Set Themselves Apart?*, FASHION L. (July 28, 2020), https://www.thefashionlaw.com/as-the-cosmetics-market-continues-to-grow-rivals-set-themselves-apart-with-intellectual-property [https://perma.cc/R9JC-FDVV].

in which the beauty industry currently engages in IP. This Section previews the substantive IP issues that Part II will apply to dupes.

1. An Intellectual Property Primer: Types of IP and Theoretical Justifications

Intellectual property can be divided into four main categories: patent, trademark, copyright, and trade secret. IP is a property right that allows owners to benefit from their work, usually in the form of a monopoly.[83] IP rights are recognized by various legal systems, including domestic legislation and also international agreements, such as the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886).[84]

Patents were the first IP recognized in the modern legal system and provide an inventor with a limited monopoly for their useful invention.[85] Among other things, patent rights give owners the ability to exclude others from making, using, selling, or importing the invention.[86] Patents also include protections for industrial designs.[87] Patent systems have been in existence since the first administrative apparatus for granting patents was established in Venice in the late fifteenth century.[88] The American patent system is based in the U.S. Constitution, which states that Congress shall have power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[89]

The patent system now stems from Title 35 of the U.S. Code and offers a limited monopoly as a reward for inventing any "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof . . . ."[90] A patent gives its owner or assignee "'the right to exclude others from making, using, offering for sale, or selling' the invention in the United States or 'importing' the

83. *What Is Intellectual Property?*, WORLD INTELL. PROP. ORG. 2 (2020), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf [https://perma.cc/ET5Y-77DZ].

84. *See id.*

85. *Id.* at 4. American patents currently provide a twenty-year monopoly. *Id.*

86. For specific definitions of different types of patent infringement in the United States, see 35 U.S.C. § 271.

87. *What Is Intellectual Property?*, *supra* note 83, at 8.

88. Maximilian Frumkin, *Early History of Patents for Invention*, 26 TRANSACTIONS NEWCOMEN SOC'Y 47, 50–51 (1947).

89. U.S. CONST. art 1, § 8, cl. 8.

90. 35 U.S.C. § 101.

invention into the United States."[91] The patent system's purpose is to encourage innovation by rewarding inventors with intellectual property rights.[92]

Trademark rights protect signs that are capable of distinguishing goods or services between different sources.[93] Trademark law originated in the United States as a tool to protect producers from illegitimate attempts to divert trade.[94] Trademarks can include words, letters, numbers, symbols, colors, pictures, shapes, packaging, and even smells, taste, and sounds—though typically trademarks are associated with company brand names and logos.[95] In the United States, trademarks can receive common law, state, or federal protection.[96] Trademark rights are hypothetically indefinite in duration if the marks are consistently used and still valid.[97] Policymakers justify trademark law using its economic benefits: trademarks help consumers associate products with brands, which subsequently reduces consumers' shopping time and costs.[98] Trademarks "(1) minimize consumer search costs, and (2) provide incentives to producers to produce consistent levels of product quality."[99]

Copyrights are quite distinct from trademark and patent rights and are conferred upon the authors of literary and artistic works.[100] These rights recognize the cultural importance of creative practices and encourage creative expression.[101] In the United States, copyrights extend to the authors of literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and

91. *General Information Concerning Patents*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/patents/basics/general-information-patents [https://perma.cc/R86F-VYNJ] (citing the language of a patent grant itself).

92. Marshall Phelps, *Do Patents Really Promote Innovation? A Response to the Economist*, FORBES (Sept. 16, 2015), https://www.forbes.com/sites/marshallphelps/2015/09/16/do-patents-really-promote-innovation-a-response-to-the-economist [https://perma.cc/J9AA-CA9D].

93. BARTON BEEBE, TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK 12 (2020).

94. *Id.* at 14.

95. *Id.* at 13. For further details of what can and cannot receive federal trademark registration, *see* 15 U.S.C. § 1052.

96. *Protecting Your Trademark: Enhancing Your Rights Through Federal Registration*, U.S. PAT. & TRADEMARK OFF. 1, 11 (2020), https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf [https://perma.cc/3BR6-ZL76].

97. *Id.* at 29.

98. BEEBE, *supra* note 93, at 24.

99. *Id.*

100. *What Is Intellectual Property?*, *supra* note 83, at 20.

101. *See id.* at 20–21 (discussing protections offered to creators through copyright law).

sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[102]

The fourth and final category of intellectual property is trade secret law, which protects information that has "either actual or potential independent economic value by virtue of not being generally known."[103] Though previously only protected by state laws, the Defend Trade Secrets Act of 2016 now provides a federal cause of action for trade secret misappropriation.[104] Patent, trademark, copyright, and trade secret comprise the four main types of IP, although this Note primarily focuses on patents and trademarks because they are most applicable to beauty products.

The intellectual property system is rooted in three theoretical justifications that lay the foundation for intellectual property's goals. They are: (1) personality-based justifications; (2) Lockean labor theory; and (3) utilitarian justifications. The personality-based justification is very philosophical: intellectual property is an extension of self-actualization, so individuals own intellectual property because it is an aspect of their being.[105] This is often referred to as the Hegelian Justification.[106] Hegel's philosophy seeks to balance amorphous, challenging concepts such as human will, personality, and freedom.[107] A "personality" is identified by human will's struggle to actualize itself, with a person's freedom being translated into an extrinsic idea.[108] Hegel envisions spatiotemporal proximity between the creator and the creation.[109] Understandably, the personality-based justification is rather difficult to conceptualize and write into intellectual property legislation. One of the biggest challenges in implementing the personality-based justification is that it is impossible to determine when there is a "personality stake" in an invention.[110] Innovators may be more in-

102. 17 U.S.C. § 102(a)(1)–(8).

103. *Trade Secret Policy*, U.S. PAT. & TRADEMARK OFF. (Nov. 18, 2020), https://www.uspto.gov/ip-policy/trade-secret-policy [https://perma.cc/W5W6-BU6B].

104. Defend Trade Secrets Act of 2016, Pub. L. No. 114–153, 130 Stat. 376.

105. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988) (justifying a creator's ownership of their idea because ideas are "manifestation[s] of the creator's personality or self").

106. *See id.* ("The best known personality theory is Hegel's theory of property.").

107. *Id.* at 331.

108. *Id.*

109. *Id.* at 335.

110. *See id.* at 339 (commenting on the difficulty of determining when people have a "personality stake" in an object).

vested in some creations than others, so should those creations receive varying levels of intellectual property protection? This degree is difficult to measure.[111]

The Lockean justification is founded in the idea that labor should be rewarded.[112] John Locke argued that individuals are morally entitled to control the fruits of their labor.[113] This justification more clearly translates into intellectual property law. If a creator spends time and resources writing a new song, developing a new drug, or designing and marketing a new brand, they are morally entitled to that which they produce.[114] The creator has a right to own what they created.[115] This is sometimes referred to as the "sweat of the brow" theory.[116] However, the Supreme Court has suggested this philosophy is invalid. In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court held that this Lockean justification should not apply to copyright.[117] It is unclear whether this Lockean justification is still available for other forms of intellectual property, although it seems unlikely.

The utilitarian justification is most commonly used to explain the American IP system.[118] Under this philosophy, intellectual property is justified because it serves as an incentive for individuals to create more works, which is socially beneficial.[119] Intellectual property systems yield an "optimal amount of intellectual works being produced,

111. *Id.* at 330–44.

112. *See id.* at 296 (discussing the normative interpretation of Locke's labor theory).

113. *See* Adam D. Moore, *Lockean Foundations of Intellectual Property*, 7 W.I.P.O. J. 29, 30 (2015) ("We each own our labour, and when that labour is mixed with objects in the commons, our rights are expanded to include these goods.").

114. *See id.* ("[I]ndividuals are entitled to control the fruits of their labour.").

115. *See id.* ("Labouring, producing, thinking and persevering are voluntary, and individuals who engage in these activities are entitled to what they produce.").

116. *See* Julie Wald, Note, *Legislating the Golden Rule: Achieving Comparable Protection Under the European Union Database Directive*, 25 FORDHAM INT'L L.J. 987, 1008–11 (2002) (offering a brief history of the "sweat of the brow" doctrine).

117. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 354 (1991) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.04 (1990)) ("Protection for the fruits of such research . . . may in certain circumstances be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors.'").

118. *See* Alan Devlin & Neel Sukhatme, *Self-Realizing Inventions and the Utilitarian Foundation of Patent Law*, 51 WM. & MARY L. REV. 897, 912 (2009) (arguing the compelling case for utilitarianism in patent law).

119. Adam Moore & Ken Himma, *Intellectual Property*, STAN. ENCYC. OF PHIL. (Oct.

and a corresponding optimal amount of social utility."[120] If there was no intellectual property, innovators may be less likely to create out of fear that their creations would be exploited for free. They would be unwilling to take the risk to create due to concerns they would be unable to recoup the costs association with creation.[121] It is better for society to have more innovation, not only because the creations may yield a higher quality of life, but also because it supports economic development.[122] Though this utilitarian justification clearly aligns with the intellectual property system, some argue that the intellectual property system is burdensome and actually hinders innovation.[123] The utilitarian justifications for trademarks are slightly different: marks minimize consumer search time by allowing consumers to quickly identify the source of goods or services.[124] The scholarly consensus is that most fields are still more innovative than they would be without intellectual property protections.[125] These three theories are important to understand this Note's later discussions of negative space because negative space industries, for reasons to be addressed, fulfill the justifications without formal IP.

2. The Beauty Industry's Current IP Portfolio

Though this Note argues that beauty dupes are unpreventable under the current intellectual property system, this author does not mean to suggest that the beauty industry lacks IP protections altogether. The industry regularly participates in the IP system through extensive trademark protection as well as more nuanced patent and

10, 2018), https://plato.stanford.edu/entries/intellectual-property/#UtilInceBaseArguForInteProp [https://perma.cc/WS8X-6LLY].

120. *Id.*

121. *See id.* (situating a creator's ability to recover costs as an important factor in their decision to create).

122. *See id.* (outlining some consequences of a world without intellectual property protections).

123. *See, e.g.*, Gene Quinn, *America's Patent System Favors the Few and Inhibits Innovation—But Change Could Be Coming*, IPWATCHDOG (Mar. 28, 2019), https://www.ipwatchdog.com/2019/03/28/americas-patent-system-favors-the-few-inhibits-innovation-but-change-could-be-coming [https://perma.cc/93CM-KSM9].

124. *See* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269 (1987) (noting that trademarks reduce consumer search costs).

125. *See generally* Moore & Himma, *supra* note 119 (outlining the opposing conclusions about intellectual property protections on innovation).

trade secret protection.[126] This Section provides a brief overview of the industry's current IP rights.

Trademarks are the main form of intellectual property protection for beauty brands.[127] A company's brand is often considered its most important asset.[128] A "brand" can encompass many things, but it usually includes the company's name, logos, packaging, and product names.[129] These branding tools can receive trademark protection. Marks can include "any word, name, symbol, device, or any combination, used or intended to be used to identify and distinguish the goods/services of one seller" which gives its owner the "exclusive right to use the mark on or in connection with the goods/services listed in the registration."[130] Under the Lanham Act, there are two basic requirements for the mark to be eligible for trademark protection: (1) it must be used in commerce; and (2) it must be distinctive.[131]

There are certain high-end beauty brands that are well-known for their quality, and those brands rely on their reputation to make sales and convert customers. For instance, Dior is one of the most widely respected cosmetics companies.[132] If a customer is deciding which lipstick to purchase, they might decide to purchase a Dior lipstick because of the quality associated with Dior's brand. The name

126. *See From Trademarks to Proprietary Information, How Startups Can Protect the Most Valuable Aspects of Their Business*, FASHION L. (Oct. 27, 2020), https://www.thefashionlaw.com/from-trademarks-to-proprietary-information-how-start-ups-can-protect-their-intellectual-property [https://perma.cc/N97K-A6KA].

127. *Id.* ("A company's brand is often one of its most valuable assets, and it can be useful to protect this by way of trademark rights . . . .").

128. Blair Brady, *Your Brand Is Your Greatest Asset*, FORBES (Feb. 24, 2020), https://www.forbes.com/sites/forbesagencycouncil/2020/02/24/your-brand-is-your-greatest-asset [https://perma.cc/7VQR-PTWY].

129. *See From Trademarks to Proprietary Information*, *supra* note 126 (noting that a brand "can exist in generally any word, phrase, symbol, or design . . . that identifies and distinguishes the goods ofone [sic] company from those of another").

130. *Trademark Basics*, U.S. PAT. & TRADEMARK OFF., https://web.archive.org/web/20201114114338/https://www.uspto.gov/trademarks-getting-started/trademark-basics.

131. *See* 15 U.S.C. § 1127; Zatarain's, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786 (5th Cir. 1983) (establishing that potential trademarks are traditionally divided into four categories of distinctiveness: arbitrary/fanciful, suggestive, descriptive, and generic).

132. For instance, one blogger went as far as to say "[c]reativity, luxury, and excellence are all words associated with Dior and its cosmetics range. If you haven't tried any of the brand's products, be sure to do so immediately." Taylah Brewer, *30 Best Makeup Brands Every Woman Should Know*, TREND SPOTTER, https://www.thetrendspotter.net/best-makeup-brands [https://perma.cc/375Z-7JHJ].

"Dior" carries a lot of weight.[133] It would be impossible to protect this name if not for trademarks. Due to the value associated with beauty brands, trademarks are arguably many companies' most important intellectual property assets.[134]

Some beauty companies have also engaged in the patent system.[135] A significant portion of beauty patents are related to product formulation chemistry,[136] several of which have recently been the subject of extensive litigation.[137] These products were granted a patent because they introduced new ingredients in a way that was sufficient to meet the high patentability requirements.[138] Additionally, many beauty companies have obtained patents for product packaging.[139] Similarly, trade secret law may be used to protect beauty product formulas, though such protections are not nearly as extensive.[140]

133. *See id.* (illustrating Dior's reputation).

134. *See* Mahaseth, *supra* note 126 ("[T]rademark rights are extremely important for small-scale luxury cosmetic producers . . . .").

135. Some beauty companies even go so far as to have a patent quota, such as the alleged L'Oréal quota which was the subject of an employment lawsuit filed by its former in-house patent attorney. *See* Trzaska v. L'Oreal USA, Inc., 865 F.3d 155 (3d Cir. 2017). However, this is by no means the norm.

136. *See e.g.*, U.S. Patent No. 9,668,966B2 (filed Nov. 3, 2015) (patenting cosmetic compositions with microalgal components); U.S. Patent No. 9,561,163B2 (filed Nov. 5, 2015) (patenting a "cosmetic composition containing novel fractal particle-based gels" to reduce the appearance of wrinkles and skin imperfections).

137. *See, e.g.*, Liqwd, Inc. v. L'Oréal USA, Inc., 720 F. App'x. 623, 625 (Fed. Cir. 2018) (vacating and remanding the denial of Olaplex's preliminary injunction of L'Oréal's infringement on its patent for a hair protection product for use during hair bleaching). The Federal Circuit awarded the plaintiffs $91 million for L'Oréal's patent infringement, contract breach, and trade secret misappropriation. Christopher Yasiejko, *L'Oréal Owes Olaplex $91 Million for Stealing Trade Secrets*, L.A. TIMES (Aug. 12, 2019), https://www.latimes.com/business/story/2019-08-12/loreal-owes-olaplex-91-million-for-stealing-trade-secrets [https://perma.cc/89A9-6SCR]; L'Oréal USA Creative, Inc. v. Drunk Elephant, LLC, Docket No. 1:18CV00982 (W.D. Tex. Nov. 14, 2018). Drunk Elephant settled after nearly two years of litigation over patent infringement on a Vitamin C face serum. *L'Oréal and Drunk Elephant Settle Suit Over "Patent Infringing" Vitamin C Serum*, FASHION L. (Nov. 6, 2020), https://www.thefashionlaw.com/loreal-and-drunk-elephant-settle-suit-over-patent-infringing-vitamin-c-serum [https://perma.cc/3CXF-2SVB].

138. For a more thorough discussion of these requirements, see *infra* Part II.A.1.

139. *See, e.g.*, U.S. Patent No. 7,228,966B1 (filed May 7, 2004) (patenting a portable lipstick carrying case); U.S. Patent No. 10,548,385B1 (filed Jul. 11, 2018) (patenting a lipstick bullet container); U.S. Patent No. 9,282,804B2 (filed Feb. 25, 2013) (patenting a mascara applicator system).

140. *See, e.g.*, Zotos Int'l, Inc. v. Kennedy, 460 F. Supp. 268, 278–79 (D.D.C. 1978) (remanding the Food and Drug Administration's denial of plaintiff's trade secret protection for its cosmetics ingredients); Fashion Two Twenty, Inc. v. Steinberg, 339

Scholarship also suggests that body art, created using cosmetics, could receive copyright protection.[141]

Though the beauty industry has a hefty IP portfolio, those rights are typically limited to trademark protections for their brands, as well as some patent and trade secret protections for product formulas. However, due to substantive and practical issues in patent and trademark law, high-end brands cannot use those IP rights to exclude dupes.[142] As this Part has established, dupes are a growing issue in the beauty industry distinct from counterfeit and knockoff goods. Part II will expand this concept to show that dupes are substantively and practically unprotectable in the current intellectual property system.

II. DUPES ARE OUTSIDE THE SCOPE OF INTELLECTUAL PROPERTY RIGHTS

As this Note has addressed, beauty dupes are a heavily debated, rising player in of the beauty industry.[143] Though the beauty industry heavily engages in the intellectual property system, those rights fail to protect even the most IP-savvy brands from dupes. This Section discusses substantive and practical issues in both patent and trademark law that make it impossible for brands to exclude dupes from the market.[144]

F.Supp. 836, 850 (E.D.N.Y. 1971) (discussing the trade secrets protections for five formulae used in the production of cosmetics, but nevertheless denying injunctive relief because whether the formulae were actually present in the defendant's products was an issue of fact).

141. *See, e.g.*, Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97, 103 (2003) ("An *original* pictorial work that is embodied in a tattoo or a facial makeup design, however, would appear to be copyrightable, as long as it is fixed in a tangible medium of expression such as a human body.").

142. *See* discussion *infra* Part II.

143. *See* discussion *supra* Part I.A.

144. Copyright and trade secret laws, though important components of the American intellectual property system, are not addressed in the remainder of this Note. Cosmetic and beauty products are clearly outside the scope of copyrightable material. *See* 17 U.S.C. § 102(a) (defining the subject matter of copyright generally). Some international courts have found that art featured on product packaging may warrant copyright protections, but that is far from the norm. Islestarr Holdings Ltd. v. Aldi Stores Ltd. [2019] EWHC 1473 [114] (Ch) (finding that the artistic design on a cosmetics case warranted copyright protection). Beauty companies may employ trade secret law to protect product formulas and business strategies. *See, e.g.*, Tactica Int'l, Inc. v. Atl. Horizon Int'l, Inc., 154 F. Supp. 2d 586, 605 (2001) (litigating misappropriation of a beauty company's "customer lists and confidential price, discount and volume information relating to its transactions with suppliers, manufacturers, fulfillment houses and retailers."); Seed Beauty, LLC v. Coty, Inc., Docket No. 20VECV00721 (Cal. Super. Ct. filed

A. PATENTS CANNOT ADEQUATELY PREVENT DUPES

As discussed, the beauty industry does have a small number of patents, particularly for product formulas and packaging.[145] However, patents are not a viable way to prevent beauty dupes because beauty products often do not meet the patenting nonobviousness requirement. Moreover, the leisurely patent registration process does not align with quickly changing beauty trends.

1. Many Beauty Products Fail to Surpass the Nonobviousness Bar

To obtain a patent, an invention must meet several statutory patentability requirements. An invention must be patentable subject matter under 35 U.S.C. § 101,[146] novel under 35 U.S.C. § 102,[147] and nonobvious under 35 U.S.C. § 103, among other things.[148] A patent may not be obtained under § 103 if "the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been *obvious* . . . to a person having ordinary skill in the art to which the claimed invention pertains."[149] In other words, an invention is generally not patentable if those practicing in the industry would have known to create the invention.[150] This provision is referred to as the nonobviousness requirement.

There are several factors that may be taken into consideration when determining if a patent is obvious. In deciding whether to issue

June 30, 2020) (outlining a lawsuit alleging misappropriation of proprietary information); Seed Beauty, LLC v. KKW Beauty, LLC, Docket No. 20VECV00684 (Cal. Super. Ct. filed June 19, 2020) (outlining another lawsuit alleging misappropriation of proprietary information). However, trade secrets are not a useful tool in preventing against dupes that replicate color, smell, or consistency which are not secret qualities of a product.

145. *See e.g.*, U.S. Patent No. 7, 228, 966B1 (filed May 7, 2004) (patenting a lipstick container); U.S. Patent No. 9,561,163B2 (filed Nov. 5, 2015) (patenting composition of a product aimed at wrinkles).

146. An invention is typically patentable if it is useful and if it is not a product of nature, law of nature, or abstract idea. *See* Bilski v. Kappos, 561 U.S. 593, 601–02 (2010) (noting that the three enumerated exceptions are judicial creations).

147. For an invention to be novel, it must not have been known or used by others, patented or described in a printed publication, on sale, or otherwise available to the public. 35 U.S.C. § 102(a); Structural Rubber Prods. Co. v. Park Rubber Co., 749 F.2d 707, 715–16 (Fed. Cir. 1984).

148. *See* 35 U.S.C. §§ 101–103.

149. 35 U.S.C. § 103 (emphasis added).

150. See 35 U.S.C. § 102(a) for what may constitute "prior art" which prevents patentability. "Prior art" broadly refers to any prior publication, sale, public use, or patent that describes the invention at issue, rendering it unpatentable because it lacks novelty. If something qualifies as "prior art" for the purposes of § 102 novelty analysis, it likely also constitutes prior art for the § 103 nonobviousness analysis.

a patent, the U.S. Patent and Trademark Office ("USPTO") may consider: (1) the scope and content of the prior art; (2) differences between the prior art and the claims at issue; (3) the level of ordinary skill in the art; and (4) secondary considerations, such as commercial success, failures of others in the field, and if others copy the invention.[151] The USPTO will not issue a patent unless the application meets this nonobviousness requirement. With regard to beauty products, the USPTO might consider: (1) what products are currently on the market or discussed on various beauty platforms; (2) the differences between the product described in the patent application and what is currently on sale; (3) the average skill level of a beauty company manufacturer, designer, or scientist; and (4) the product's commercial success. It is important to note that a product may be commercially successful but still not meet the patentability nonobviousness requirement;[152] even cult-favorite products may not be patentable.[153]

Given this high standard, most beauty products are unpatentable. The Supreme Court has generally found that inventions do not meet the requirement if they are a relatively predictable use and combination of elements used in past inventions.[154] Even if a high-end brand creates an incredible lipstick that is wildly popular and heavily duped, it still might not be patentable.

Of course, some beauty products are patentable because they incorporate a unique formula or other truly inventive ingredient.[155] But most beauty products are not nearly as inventive.[156] There are a finite number of ingredients frequently used in beauty products, especially

151. *See* Graham v. John Deere Co., 383 U.S. 1, 17–18 (1966) (outlining the various factors that courts may consider when determining if an invention fulfills the nonobviousness requirement for patentability).

152. *See id.* at 35–36 (stating that a device's wide success "do[es] not . . . tip the scales of patentability).

153. The phrase "cult-favorite" is used primarily by beauty bloggers to refer to trendy, successful personal care products. *See, e.g.*, Victoria Hoff, *The Best Cult Beauty Products Throughout History*, BYRDIE (Sept. 10, 2021), https://www.byrdie.com/best-cult-beauty-products-of-all-time [https://perma.cc/GTL7-THYE] (noting the longevity of "cult-classic" beauty products).

154. KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 401 (2007) ("A court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.").

155. *See* 35 U.S.C. § 101 ("Whoever invents or discovers any new and useful . . . composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.").

156. *See* Strauss, *supra* note 14 ("[I]mitation has become rampant in the cosmetics industry.").

cosmetics.[157] For example, a new eyeshadow is likely the same combination of ingredients as most other eyeshadows on the market but with a new color or shimmer.[158] Patent caselaw has held that "[w]hen there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions," the invention likely fails the § 103 nonobviousness requirement.[159] In this situation, the commonly-used ingredients and colors are "predictable solutions" since most cosmetics companies draw from the same list of ingredients.[160] Because there is market pressure to develop new cosmetics products,[161] and there is a finite list of ingredients, most cosmetics products will not meet the § 103 nonobviousness requirement.[162] The USPTO will not grant a patent on these products. Thus, patents often cannot adequately protect against beauty dupes because the statutory nonobviousness requirement bars patentability for most products.

2. The Patent Prosecution Timeline Does Not Align with Quickly Changing Trends

Even if beauty products could easily be patented, it seems unlikely that most beauty companies would use this form of intellectual

157. *See* A. Panico, F. Serio, F. Bagordo, T. Grassi, A. Idolo, M. De Giorgi, M. Guido, M. Congedo & A. De Donno, *Skin Safety and Health Prevention: An Overview of Chemicals in Cosmetic Products*, 60 J. PREVENTATIVE MED. & HYGIENE E50, E51 (2019) (analyzing the ingredients in 283 different beauty products to determine common ingredients); *Understanding the Ingredients in Skin Care Products*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/articles/10980-understanding-the-ingredients-in-skin-care-products [https://perma.cc/N3NC-SXCY] (last reviewed Oct. 10, 2019) (listing the finite popular active ingredients used in skin care products currently on the market).

158. *See* Liesa Goins, *The Makeup of Makeup: Decoding Eye Shadow*, RADIANCE WEBMD, https://www.webmd.com/beauty/features/decoding-eye-shadow [https://perma.cc/UP6D-EUTQ] (listing the relatively finite different ingredients used in eyeshadow).

159. *Teleflex, Inc.*, 550 U.S. at 421.

160. *See Understanding the Ingredients in Skin Care Products*, *supra* note 157 (outlining common ingredients).

161. *See* Danziger, *supra* note 38 (discussing the projected 5–7% compound-annual-growth-rate for the beauty industry to reach or exceed $800 billion by 2025).

162. *See Cosmetic Patent Attorney: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/cosmetic-patent-attorney [https://perma.cc/5X3E-SDF6] (July 10, 2020) ("For instance, because using coconut oil in products marketed for skin care is already quite common, and many cosmetic and skin care companies are already marketing and selling products using this ingredient, a facial lotion using coconut oil cannot be patented for the use of that particular oil. Although, if that same facial lotion also uses a new type of plant resin that isn't yet commonly used, it may be patentable. The inventor will still need to show its originality, usefulness, and fulfill the other requirements.").

property protection because of the lengthy patent prosecution timeline.[163] Undergoing the time intensive and expensive patenting process might not be a practical solution to prevent dupes.

Acquiring a patent is by no means a fast process.[164] The average patent application is pending with the USPTO for almost two years, but utility patents—the type of patent beauty companies would seek—can range from one to five years.[165] The chemicals used in most beauty products would be categorized under Technology Center 1700.[166] Technology Center 1700 has an even longer average application processing timeline ("patent pendency"): almost 27 months.[167] This timeline does not include the time spent developing the product and preparing the patent application.[168] If a beauty company develops a new lipstick on January 1 and submits patent application on January 31 (a particularly expeditious drafting process for most patent firms), the patent might not issue until two years (and thousands of dollars) later. And the beauty company could not be certain that USPTO would even issue the patent.[169] It is a very slow process.

In contrast, beauty trends change extremely quickly. Though historically beauty trends would last five to ten years, now trends go out of style within two years.[170] The industry is rapidly changing, and

163. *U.S. Patent Prosecution Timeline: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/us-patent-prosecution-timeline [https://perma.cc/5FN3-HVKR] (estimating the time between "patent pending status and the mailing of the first Office Action" as 18–27 months).

164. *Id.*

165. *Patents Data, at a Glance July 2021*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/dashboard/patents [https://perma.cc/E6V6-D2BD] (showing that the average traditional total pendency for patent applications is 23months); John Powers, *The Short and Long Answers on Patent Applications*, BEST LAWYERS (Aug. 8, 2018), https://www.bestlawyers.com/article/how-long-does-it-take-to-obtain-a-patent/2065 [https://perma.cc/6J3Z-6QC9].

166. *See Patent Technology Centers Management*, U.S. PAT. & TRADEMARK OFF. (July 20, 2018), https://www.uspto.gov/patents/contact-patents/patent-technology-centers-management [https://perma.cc/Y35W-9FEE].

167. *Patents Pendency Data July 2021: Traditional Total Pendency by Technology Center*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/dashboard/patents/total-pendency-by-tc.html [https://perma.cc/CM6S-MUZ3].

168. *See U.S. Patent Prosecution Timeline: Everything You Need to Know*, *supra* note 163 (separating patent drafting from waiting for approval).

169. Powers, *supra* note 165.

170. Lauren Zumbach, *Beauty Companies Ramp up the Pace to Keep up with Faster Trends*, CHI. TRIB. (Feb. 21, 2017), https://www.chicagotribune.com/business/ct-ulta-fast-beauty-makeup-trends-0221-biz-20170217-story.html [https://perma.cc/LV2K-KWGM] (quoting beauty industry analyst Karen Grant saying, "[w]e used to deal in trends that lasted five to 10 years . . . . Now, we think it's a long trend if it lasts 24 months.").

small independent brands (that often spur new trends) increased by 42.7% in the mid-2010s.[171] Additionally, the beauty industry is moving towards more accessible e-commerce and natural ingredients, which has created a fast industry shift.[172] While some makeup artists have denounced trends,[173] or believe trends have become more niche and diverse,[174] there is no evidence that trends will die anytime soon.[175] Beauty companies need to develop and release products quickly to meet changing demands.

From a practical standpoint, it is not logical for a beauty company to spend over two years on a patent application for a product that may go out of style before the patent even issues. The cost of a patent application is fairly prohibitive for the small, independent beauty companies,[176] but even larger companies may choose to allocate that money towards intellectual property that will last after the trend dies, such as trademarks vital for brand development.[177] Because patents

171. *See* Richard Kestenbaum, *How the Beauty Industry Is Adapting to Change*, FORBES (June 19, 2017), https://www.forbes.com/sites/richardkestenbaum/2017/06/19/how-the-beauty-industry-is-adapting-to-change [https://perma.cc/8269-F2U4] (noting that "independent brands were up 42.7%" in 2016).

172. *See id.* (discussing thoughts from beauty industry representatives on e-commerce and natural beauty products).

173. Amanda Montell, *The Death of Trends: How the Beauty Industry Is Redefining Our Culture of Cool*, BYRDIE (July 8, 2019), https://www.byrdie.com/trends-beauty-industry-influencers-makeup [https://perma.cc/U5VA-ZRCF] ("[A]s backstage makeup artists and hairstylists continue to deliver season after season of 'clean skin,' 'no-makeup makeup,' and imperfect 'real-girl' hair, there appears to be an overall shift in the culture of beauty trends toward embracing an inherently less 'trendy' sense of individuality.").

174. *Id.* ("The theory is that because both social media and the beauty market itself are becoming so saturated with new brands, products, influencers, and looks (unicorn hair, rainbow highlighter), trends have become more niche and diverse. This allows consumers the chance to find something that specifically speaks to them, instead of being forced to copy Heidi Klum's heavy bangs, like everyone else.").

175. *See, e.g.*, Ama Kwarteng, *2020 Makeup Trends: 17 Looks You're About to See Everywhere*, COSMOPOLITAN (Sept. 29, 2020), https://www.cosmopolitan.com/style-beauty/beauty/g29892877/makeup-trends-2020 [https://perma.cc/PV94-UMGW] (demonstrating that even large publications such as *Cosmopolitan* still acknowledge and report on trends).

176. *See* Gene Quinn, *The Cost of Obtaining a Patent in the US*, IP WATCHDOG (Apr. 4, 2015), https://www.ipwatchdog.com/2015/04/04/the-cost-of-obtaining-a-patent-in-the-us [https://perma.cc/LB84-A9PW] (stating that the attorney's fees for filing alone can range from approximately $5,000 to over $16,000 depending on the complexity of the patent, excluding any foreign filing fees and maintenance fees).

177. For reasons that beauty companies are often encouraged to register a trademark, see *Trademark Considerations for Beauty Brands*, FORMULA BOTANICA, https://formulabotanica.com/trademark-considerations-beauty-companies [https://perma.cc/S5ZE-PERY] (noting the long-term savings potential associated

are not a pragmatic property right for most beauty companies, they are not a good means of protecting prestigious brands against dupes.

One significant exception to this is patenting products with greater longevity. If a company develops an inventive moisturizer formula or creates a new cosmetics ingredient, undergoing the patent process might be beneficial since ingredients and formulas last longer than trends. They could still be used five, ten, or even twenty years down the line, or even after the patent expires. However, this is not generally the case with beauty dupes.[178] Beauty dupes try to recreate smells, consistencies, and colors.[179] Dupes do not recreate formulas or ingredients; they instead provide consumers with a cheaper means to achieve trendy looks.[180] Undergoing the patent prosecution process to protect these trends would be time intensive, expensive, and would likely fail due to the high nonobviousness requirement.

B. DUPES ARE OUTSIDE THE SCOPE OF TRADEMARKS

Though trademarks are key in the beauty business, they are not a suitable solution to prevent dupes. There are two reasons for this. Firstly, there is no likelihood of confusion between dupes and the luxury brands.[181] 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.[182] Secondly, dupes replicate functional aspects of a product which cannot be protected under trademark law. This Section also addresses some counterarguments that luxury brands may raise.

1. There Is No "Likelihood of Confusion" Between Dupes and High-End Brands

Existing beauty trademark litigation primarily surrounds the use of names, logos, and packaging.[183] To establish trademark infringement, a plaintiff must demonstrate that: (1) it has a valid and legally

with trademark ownership).

178. *See* Strauss, *supra* note 14 (linking copied products to trends).

179. *See supra* notes 15–16, 43–45 and accompanying text.

180. *See* Desu, *supra* note 16 (stating that a dupe is a cheaper alternative to a popular makeup product).

181. *See* Whitbread, *supra* note 20 (stating that many dupes are presented as such to consumers).

182. *See id.* (explaining that dupes are "celebrated as a cost-saving option for customers").

183. *See, e.g.*, Hard Candy, LLC v. Anastasia Beverly Hills, Inc., 921 F.3d 1343, 1352 (11th Cir. 2019) (detailing plaintiff's allegation that defendant's use of the phrase "hard candy" infringed on their mark); Sheree Cosmetics, LLC v. Kylie Cosmetics, LLC, No. 18-CV-9673(VEC), 2019 U.S. Dist. LEXIS 120855, at*2–4 (S.D.N.Y. July 19, 2019) (litigating

protectable mark; (2) it owns the mark; and (3) the defendant's use of the mark to identify goods or services causes a *likelihood of confusion*.[184] Recent litigation has heightened the standard for the third requirement. In October 2020, the Ninth Circuit held that plaintiff Arcona, Inc. was not entitled to relief from Farmacy Beauty's use of its registered trademark "EYE DEW."[185] Though Farmacy's skincare product was also named "EYE DEW," the two companies' beauty products looked "nothing like each other, as their respective packaging feature[ed] different shapes, design schemes, text, and colors."[186] The court concluded that there was no actual likelihood of confusion despite the fact that the brands used the same name for the same type of product.[187] Consumers would not be confused because of the vastly different packaging.[188] Though not yet addressed by other courts, this suggests a movement towards no presumption of consumer confusion unless two products are identical, even if a similar product uses the same name or packaging.[189]

As a result of *Arcona*, prestigious brands may have a harder time establishing that dupe companies infringed their valid trademarks. Most consumers know they are purchasing a dupe instead of the original product.[190] That is the purpose of a dupe.[191] Consumers seek out dupes using websites and YouTube channels dedicated to finding dupes to track down the perfect product to replicate an expensive trend;[192] there is no likelihood of confusion. Consequently, there is no

the "BORN TO SPARKLE" mark); 2die4kourt v. Hillair Cap. Mgmt., LLC, SACV 16-01304 JVS(DFMx), 2016 U.S. Dist. LEXIS 118211, at *13 (C.D. Cal. Aug. 23, 2016) (litigating Kardashian trademarks); Xtreme Lashes, LLC v. Xtended Beauty, Inc., 576 F.3d 221, 226 (5th Cir. 2009) (litigating whether plaintiff's marks were infringed by use of similar language on defendant's product); Sally Beauty Co. v. Beautyco, Inc., 304 F.3d 964, 970–71 (10th Cir. 2002) (outlining Sally Beauty's lawsuit for use of "GENERIX" name); Beauty Time v. Vu Skin Sys., No. 96-1447, 1996 U.S. App. LEXIS 25974, at *1–2 (Fed. Cir. Sept. 16, 1996) (discussing a jurisdictional issue in a trademark lawsuit).

184. A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198, 210 (3d Cir. 2000) (emphasis added).

185. Arcona, Inc. v. Farmacy Beauty, LLC, 976 F.3d 1074, 1081 (9th Cir. 2020).

186. *Id.* at 1076.

187. *Id.* at 1081.

188. *Id.* at 1080–81.

189. *Id.* It should be noted that *Arcona* has not yet been extensively discussed by other courts and could be an outlier.

190. *See* Witbread, *supra* note 20 (describing consumer purchases of dupes as a "decision").

191. *See supra* notes 52–55 and accompanying text.

192. *See supra* note 60 and accompanying text.

trademark infringement. For a dupe company to face infringement liability, it would need to not only replicate the product but also copy other aspects of the original such as the name, logo, or packaging which may be subject to trademark protection.[193] But generally, dupes do not try to trick the consumer.[194] As a result, prestigious brands will be unable to establish the necessary likelihood of confusion element in infringement litigation.

2. High-End Brands Cannot Trademark the Functional Aspects of Their Products That Dupes Replicate

Trademarks are also not an effective strategy to prevent beauty dupes due to substantive limitations in trademark law. Trade dress is the subsect of trademark law that protects the commercial look and feel of a product, such as its design and packaging.[195] However, trade dress does not include protection for the functional components of a product.[196] To establish trade dress protections, the owner must demonstrate that which they seek to protect is nonfunctional by showing that it "is merely an ornamental, incidental, or arbitrary aspect of the device."[197] In the beauty industry, trade dress protections have included hair product bottles,[198] beauty cream containers,[199] and other types of product packaging.[200] However, trade dress cannot cover what is inside the bottle or container; trade dress may protect a lipstick tube but it cannot protect the exact shade of red inside.

193. *See Trademark Basics*, *supra* note 130 (listing what may qualify as a mark).

194. *See Arcona*, 976 F.3d at 1080–81 (noting that dupes come in distinctive packaging unlikely to confuse consumers).

195. For example, one of the strongest trade dress protections is the distinct Coca-Cola bottle. *See Trade Dress: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/trade-dress [https://perma.cc/WNF3-YM8X] ("[T]rade dress is concerned with the promotional aspects, or image, of a product or service . . . .").

196. *See* Traffix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 29 (2001); *see also* 15 U.S.C. § 1052(e) ("No trademark . . . shall be refused registration on the principal register on account of its nature unless it . . . consists of a mark which . . . comprises any matter that, as a whole, is functional.").

197. *Traffix Devices, Inc.*, 532 U.S. at 30.

198. *See* Sally Beauty Co. v. Beautyco, Inc., 304 F.3d 964, 979 (10th Cir. 2002) (commenting that the bottles have extremely similar shapes and colors).

199. Olay Co. v. Cococare Prods., No. 81 Civ. 1402, 1983 U.S. Dist. LEXIS 17613, at *25–30 (S.D.N.Y. Apr. 19, 1983).

200. Moroccanoil, Inc. v. Zotos Int'l, Inc., 230 F. Supp. 3d 1161, 1168–70 (C.D. Cal. 2017) (litigating hair oil packaging); L'Oréal USA, Inc. v. Trend Beauty Corp., No. 11 Civ. 4187 (RA), 2013 U.S. Dist. LEXIS 115795, at *64–65 (S.D.N.Y. Aug. 15, 2013) (litigating perfume packaging); Bath & Body Works Brand Mgmt. v. Advanced Beauty, No. 2:13-cv-135, 2013 U.S. Dist. LEXIS 200697, at *11–12 (S.D. Ohio Oct. 10, 2013) (litigating lotion packaging).

Trade dress cannot thwart beauty dupes due to its inability to cover functional aspects of a product. In fact, beauty dupes typically *only* replicate the functional aspects of a product.[201] Courts have recognized two forms of functionality: (1) components that are "essential to the use or purpose of the device or when it affects the cost or quality of the device;" and (2) components whose exclusive use would constitute a "significant non-reputation-related disadvantage" to competitors.[202] Under the first form of functionality, most courts would deem beauty products' color, consistency, or shimmer functional because they are essential to the use and purpose of the product.[203] These qualities are what dupes replicate.[204] Furthermore, courts have specifically held that a color cannot be trademarked if the color is a functional aspect of a product.[205] Subsequently, if a high-end beauty company creates, for example, an emerald green eyeliner, it cannot use trade dress to prevent a dupe company from creating its own emerald green product. The purpose of the product is to outline consumers' eyes in emerald green, so the color *is* its function.

3. Two (Losing) Counterarguments: Post-Sale Confusion and Dilution

Prestigious brands will likely raise two arguments in their request to prevent dupes from entering the market: post-sale confusion and dilution. The Lanham Act protects against several types of consumer confusion, including point-of-sale confusion, initial interest confusion, and post-sale confusion.[206] Post-sale confusion refers to confusion that occurs in the post-sale context.[207] This is very applicable to beauty dupes. For instance, imagine if Charlotte Tilbury—a

201. *See supra* notes 16–18 and accompanying text.

202. Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 641 (6th Cir. 2002) (quoting Qualitex Co. v. Jacobsen Prods. Co., 514 US. 159, 165 (1995)).

203. *See supra* notes 16–18 and accompanying text.

204. *Id.*

205. *Qualitex Co.*, 514 U.S. at 169–70. A color may be trademarked if it is nonfunctional and has acquired secondary meaning. *Id.* at 171–72.

206. Point-of-sale confusion refers to consumers who are confused as to the origin of the product at the time they purchase it. Initial interest confusion typically refers to when the consumer is initially confused, but then becomes aware of the true origin of a good or service before purchasing it. Malletier v. Burlington Coat Factory Warehouse Corp., 426 F.3d 532, 537 n.2 (2d Cir. 2005).

207. *See, e.g.*, Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 874, 876 (2d Cir. 1986) (affirming that post-sale confusion is actionable confusion under the Lanham Act, and applying it to a designer jean back pocket design, noting "in the post-sale context a consumer seeing appellants' jeans on a passer-by might think that

well-known and respected cosmetics company[208]—released a distinct plum-colored lipstick. Perhaps Charlotte Tilbury had a very impressive marketing campaign and became known as *the* plum-colored lipstick company. If you saw a fashion-forward woman walking down the street wearing plum-colored lipstick, you might assume she is wearing the Charlotte Tilbury plum lipstick. However, maybe the woman was actually wearing a $3 dupe purchased at her local drug store. This would be post-sale confusion.[209] Even though the individual who purchased the lipstick knows it is a dupe, you might be tricked into thinking it was the Charlotte Tilbury product. Since this type of confusion is actionable under the Lanham Act, Charlotte Tilbury may seek damages from the dupe company.

However, Charlotte Tilbury's claims would likely fail. Charlotte Tilbury likely could not demonstrate the color had acquired sufficient secondary meaning, which is required for colors to receive trademark protection.[210] Moreover, as this Note has previously demonstrated, beauty product colors are unprotectable under trademark law because they are functional.[211] Consequently, even if there is post-sale confusion it is not actionable because the high-end company does not have a valid, protectable trademark.

Prestigious brands may also argue trademark dilution by blurring. The Trademark Dilution Revision Act of 2006 amended 15 U.S.C. § 1125 to allow injunctive relief for owners of famous trademarks in the event their famous marks are likely to cause dilution by blurring.[212] Dilution by blurring is an "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark . . . ."[213] Judge Posner explained dilution by blurring is actionable because "consumer search costs will rise if a trademark becomes associated with a variety of unrelated

the jeans were appellee's long-awaited entry into the designer jeans market segment").

208. *See* Howard, *supra* note 20 (commenting on the quality of Charlotte Tilbury).

209. See *Levi Strauss & Co.*, 799 F.2d at 874 for a similar example.

210. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 171–72 (1995) (holding that colors alone can receive trademark protection if they have acquired secondary meaning). Secondary meaning "is acquired when in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself." *Id.* at 163 (quoting Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 851 n.11 (1982)).

211. *See* discussion *supra* Part II.B.2.

212. 15 U.S.C. § 1125(c)(1).

213. 15 U.S.C. § 1125(c)(2)(B). The statute also notes "a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." 15 U.S.C. § 1125(c)(2)(A).

products."[214] Typically, dilution by blurring occurs when a famous trademark is used in a different industry.[215] For example, famous beauty company Dior might obtain injunctive relief if another company released a line of kitchen knives called "Dior." However, dilution by blurring is not a winning case against dupes because the products are not unrelated.[216] Both high-end brands and dupes are in the beauty industry.[217] Thus, dilution is a losing argument.

Trademarks can provide brand protection and they are a useful tool for beauty companies to safeguard names, logos, and slogans.[218] But trademark, and specifically trade dress, cannot prevent against beauty dupes.[219] To reiterate, trademarks are not a viable protection against dupes because: (1) the "likelihood of confusion" requirement to establish infringement prevents most luxury brands from recovering remedies from dupe companies; and (2) substantive trade dress law prevents trademark protection for the functional aspects of products which dupes replicate.[220] Thus, beauty dupes are almost certainly outside the scope of trademark protection. Moreover, this Part demonstrated that patents cannot prevent dupes due to the high non-obviousness requirement and the slow patenting process.[221] Therefore, there are limitations in both trademark and patent law that make dupes unpreventable.

III. THE EMERGENCE OF INTELLECTUAL PROPERTY NEGATIVE SPACE

Some have compared beauty dupes to fashion knockoffs,[222] which are in the realm of intellectual property negative space.[223] This

214. Ty Inc. v. Perryman, 306 F.3d 509, 511 (7th Cir. 2002).

215. *See Trademark Dilution (Intended for a Non-Legal Audience)*, INT'L TRADEMARK ASS'N (Nov. 9, 2020), https://www.inta.org/fact-sheets/trademark-dilution-intended-for-a-non-legal-audience [https://perma.cc/CPN4-HRDC] (giving examples of dilution across industries).

216. *See supra* notes 14–18 and accompanying text.

217. *Id.*

218. *See Trademark Basics*, *supra* note 130 (explaining that a trademark includes words, names, and symbols).

219. *See* discussion *supra* Part II.B.2.

220. *See* discussion *supra* Part II.B.

221. *See* discussion *supra* Part I.A.1.

222. *See Budding New (Legal) Trend*, *supra* note 25 ("Not unlike fast fashion, which falls in a space of legally permissible copying, much of the market's dupes are perfectly legal . . . .").

223. *See* Raustiala & Sprigman, *supra* note 26, at 1775 (commenting that the fashion industry and IP law fail to protect fashion designs).

Part explores negative space to better understand if it could encompass beauty products. Legal scholarship has identified many areas, primarily in creative fields, that thrive despite their lack of formal intellectual property protection. These areas are wildly diverse, ranging from magic tricks[224] and academic science,[225] to hip hop mixtapes[226] and roller derby pseudonyms.[227] These areas are referred to as intellectual property negative spaces.[228] Until just a few years ago, these legal studies were treated as a curiosity. However, legal scholarship is now starting to realize the light negative spaces shed on foundational IP questions.[229] This Part defines negative space, discusses the important role that negative space plays in greater intellectual property scholarship, and summarizes some of the theories for why these spaces thrive. This Part concludes by arguing the beauty industry should be added to the list because most beauty products are unprotectable under current IP laws, but the industry is still actively growing.

A. DEFINING NEGATIVE SPACE

By its very nature, "negative space" is hard to define. It is obscure; it describes that which exists outside of the law. The phrase "negative space" was first used in IP scholarship in 2006.[230] Renowned IP scholars Kal Raustiala and Christopher Sprigman coined the term in relation to fashion design, which is one of the most notorious negative

224. Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, *in* LAW AND MAGIC: A COLLECTION OF ESSAYS 123, 134–39 (Christine A. Corcos ed., 2010) (describing generally the social norms that exist in the magic industry that protect magicians' tricks without any formal intellectual property laws).

225. *See* Keith Aoki, *Authors, Inventors, and Trademark Owners: Private Intellectual Property and the Public Domain, Part II*, 18 COLUM. VLA J.L. & ARTS 191, 207 (1994) (discussing how academic science is not driven by patent law due to its unpatentability yet is still thriving due to the scientists' desires for professional recognition, grants, and funding, among other factors).

226. Horace E. Anderson, Jr., *"Criminal Minded?": Mixtape DJs, the Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111, 113–14 (2008) (discussing broadly the copyright issues in mixtape production and the hip-hop industry at large).

227. *See* David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1095–98 (2012) (discussing the emergence of IP norms and the ways that the roller derby community protects derby names).

228. *See id.* at 1096 (remarking that areas with informal property for intangibles that remain untouched by IP law operate in the negative space).

229. Raustiala & Sprigman, *supra* note 28, at 313 ("Most importantly, negative space scholarship reverses the lens of traditional IP scholarship.").

230. *Id.*

spaces due to its prominence, cultural and economic significance, and lack of intellectual property protection.[231]

> Perhaps a useful first step in thinking about how different industries fit with different IP rules is to consider why and when industries are left out of the IP system altogether. . . . The fashion industry is interesting because it is part of IP's 'negative space.' It is a substantial area of creativity into which copyright and patent do not penetrate and for which trademark provides only very limited propertization. To date there has been little systematic exploration of what else falls within this negative space. If there are any broader conclusions we can draw about the necessity (versus the current convenience) of strong IP rights in any of the industries that operate in a high-IP environment, such conclusions would rest on more solid ground if we better understood the variety of existing low-IP equilibria.[232]

This definition first raises one of the important reasons to study negative space: it helps legal scholars better understand the effectiveness of strong intellectual property rights. Elizabeth Rosenblatt, another negative space scholar, constructed a more specific definition shortly thereafter:

> Intellectual property law stringently protects some areas of creation and innovation. It does not protect others, either because the law excludes them from protection or because creators opt out of protection or enforcement. Some of these unprotected areas even seem to benefit from the lack of protection. These are intellectual property's 'negative spaces'—*areas where creation and innovation thrive without significant formal intellectual property protection*.[233]

This second definition, "areas where creation and innovation thrive without significant formal intellectual property protection,"[234] will be used for the remainder of this Note. Under this understanding, negative space includes many things. It includes fields that are substantively unprotectable;[235] fields that are substantively protectable but, for one reason or another, the creators may not choose to engage in intellectual property protection;[236] and fields that lack intellectual

231. *See generally* C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1184–90 (2009) (arguing for a limited right against fashion design copying).

232. Raustiala & Sprigman, *supra* note 26, at 1764–65.

233. Rosenblatt, *supra* note 27, at 442 (emphasis added).

234. *Id.*

235. This would include fields such as academic research, which is substantively unpatentable. *See generally* Timothy J. Balts, *Substantial Utility, Technology Transfer, and Research Utility: It's Time for a Change*, 52 SYRACUSE L. REV. 105, 107–08 (2002) (lamenting the substantial utility requirement).

236. This would include creative practices such as tattoo design. Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 513 (2013) ("Although tattoos fall squarely within the protections of the Copyright Act, copyright law plays virtually no part in the day-to-day operation of the tattoo industry. Instead, tattooers rely on a set of informal social norms to structure creative production and mediate relationships

property but employ informal norms against copying.[237] Though this definition is still quite broad, it helps construe this very imprecise topic.

B. NEGATIVE SPACE'S RELEVANCE

The traditional artistic meaning of "negative space" explains the significance of this phenomenon in American intellectual property. "Negative space" is a term derived from art and describes the background against which a figure exists.[238] Artistically, "negative space" helps individuals see the world unconventionally because "we make sense of our space by understanding its boundaries."[239] Although the boundaries of intellectual property's negative space are convoluted, studying it will advance scholarship's understanding of IP as a whole.[240] Through understanding the negative space, legal scholars can better see IP for what it is and whether it actually achieves its purpose. Sprigman and Raustiala summarized its significance:

> The study of these unprotected forms of creativity ought to be of great interest. If we see these creative endeavors languishing as a result of uncontrolled copying, we might decide to extend IP law in order to curtail appropriation and induce investment and innovation. On the other hand, if an unprotected area of creative work thrives in the absence of legalrules against copying, we would do well to know how. We might also ask whether other currently protected forms of creativity could also flourish without expensive and potentially inefficient monopoly protections.[241]

It is foundational that American intellectual property law, particularly patents and copyright, exist to incentivize innovation. The idea

within their industry."). Legal scholars believe that the reasons tattoo artists do not engage in copyright protection is perhaps due to the increased number of custom tattoos, the challenges with copyrighting a tattoo as it is applied to a human canvas, and that copyright protection would prevent the human canvas from destroying or removing the tattoo in the future. *See id.* at 525–39 (outlining the congruencies between tattoos and copyright law).

237. Fagundes, *supra* note 227, at 1108–31 (describing the IP norms associated with roller derby names).

238. *See* Christopher P. Jones, *What Are Negative Spaces in Art?*, MEDIUM: THINKSHEET (Aug. 5, 2019), https://medium.com/thinksheet/the-art-of-negative-spaces-3094a2ff6d71 (describing negative space as "[t]he space left behind when a picture is removed from a wall").

239. *Id.*

240. Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J. L. & ARTS 317, 319 (2011).

241. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1202 (2009).

is simple: if someone is guaranteed an exclusive right to their new invention or artistic expression, they are more likely to innovate.[242] Intellectual property rights are a reward for creating new things.[243] However, some scholars debate whether or not intellectual property is actually the best way to spur innovation.[244] One way to understand whether the intellectual property system generates innovation is to study fields that lack IP protections: negative spaces. As another scholar summarized it: "Legal scholars have much to learn from such negative spaces, since the dynamics of low-IP industries can inform views about the nature and necessity of IP protections in more frequently discussed high-IP industries."[245] Through studying negative spaces, we can answer the question: is intellectual property actually working to society's benefit? Or perhaps a more reasonable question: should IP scholars adopt a broader understanding of innovation and its many drivers?[246]

C. WHY DO SOME INDUSTRIES THRIVE WITHOUT INTELLECTUAL PROPERTY?

There are many theories as to why some fields thrive despite lacking intellectual property protection. One argument is that some industries actually benefit from others copying the original designs.[247] Sprigman and Raustiala described this in *The Piracy Paradox.*[248] They argue the fashion industry benefits from fast fashion companies that

242. Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When Is It the Best Incentive System?*, *in* 2 INNOVATION POL'Y & ECONOMY 51, 51–52 (Adam B. Jaffe, Josh Lerner & Scott Stern eds., 2002).

243. *Id.* at 51.

244. *Id.* ("One complaint is that intellectual property rewards inventors beyond what is necessary to spur innovation. Another is that intellectual property is a drag to innovation, rather than a spur, since it prevents inventions from being used efficiently, especially in creating further innovations. A third complaint is that some inventions should not be protected at all but, instead, be supported by public sponsors.").

245. Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property Without Law* 1 (Soc. Sci. Rsch. Network, Working Paper, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005564 [https://perma.cc/F2V2-Q9YT].

246. Christopher J. Sprigman, *Conclusion: Some Positive Thoughts About IP's Negative Space*, *in* CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY 249, 257–58 (Kate Darling & Aaron Perzanowski eds., 2017) ("IP lawyers should think more like *innovation lawyers.* That is, they should care more about innovation, and treat the tools we are employing to provoke it as sometimes expedient, rather than invariably necessary.").

247. Raustiala & Springman, *supra* note 26, at 1691.

248. *Id.*; James Surowiecki, *The Piracy Paradox*, NEW YORKER (Sept. 17, 2007), https://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox [https://perma.cc/TBG8-H2TT].

replicate expensive designers.[249] During New York Fashion week, designers present styles that may be found in department stores the next year.[250] However, the new styles appear on discount stores' racks much sooner.[251] But this is not a problem because fashion relies on new trends. Copying designer styles is simply a "turbocharger that spins the fashion cycle faster, so things come into fashion faster, they go out of fashion faster, and that makes designers want to come up with something new because we want something new."[252] Negative space, and the permissible copying that comes along with it, may prompt those in fashion design to innovate more quickly to stay on top of fading trends.

A second theory is that these negative spaces still employ informal intellectual property systems. Negative space industries use "endemic social norms rather than formal law to regulate their intellectual property."[253] To constitute a norm as opposed to a mere behavioral regularity, "the rule against appropriation must be enforced; that is, violations must be punished."[254] Sprigman and Raustiala explained these social norms as "almost exclusively producer norms, and typically reflect[ing] a shared sense of professional or artistic identity that allows such norms to develop and become entrenched."[255] Legal scholarship has discussed these social norms for various negative space industries. One example of this is stand-up comedy. In the comedy community, joke thieves face social sanction. The allegation of stealing another's joke is enough for a comedian to be exiled from the stand-up community.[256] Other scholarship has studied IP norms in the context of roller derby pseudonyms,[257] tattoo

249. *See, e.g.*, TEDx Talks, *The Knockoff Economy: Christopher Sprigman at TEDx-CollegeofWilliam&Mary*, YOUTUBE (May 6, 2014), https://www.youtube.com/watch?v=DvRFE_yFdAg (last visited Oct. 13, 2021) (discussing how the fashion industry thrives because of copying).

250. Renee Montange, *Why Knockoffs are Good for the Fashion Industry*, MORNING EDITION: NPR (Sept. 10, 2012), https://www.npr.org/2012/09/10/160746195/why-knockoffs-are-good-for-the-fashion-industry [https://perma.cc/E4KE-J64Z].

251. *Id.*

252. *Id.*

253. Fagundes, *supra* note 227, at 1093.

254. Oliar, *supra* note 34, at 1812.

255. Raustiala & Sprigman, *supra* note 28, at 316.

256. Oliar, *supra* note 34, at 1815.

257. One community employing IP norms is roller derby. Roller derby skaters practice their sport under punky pseudonyms. Maintaining a unique name is important to roller derby skaters because the pseudonyms are a large part of skater's identities within their community. Fagundes, *supra* note 227, at 1097. Though no for-

designs,[258] and high-end cuisine.[259] These intellectual property norms have been the subject of a fair amount of legal scholarship.[260]

A third theory for why some industries lack IP protections is that the intellectual property system can be burdensome and inhibit innovation. One example of this is tattoo design. Tattoos arguably fall squarely within copyright protections.[261] However, the tattoo industry mostly forgoes formal copyright assertion and is thus a negative

mal legal intellectual property system protects these names, derby players have created an elaborate system of name registration, monitoring, and enforcement using both formal and informal norms to protect each player's pseudonym. *Id.* at 1097, 1136–37 ("[T]he informal manner in which derby girls enforce their name regulation rules creates a variety of flexible outcomes, in contrast with the binary approach of formal law, which tends to require all-or-nothing, winner-loser outcomes. Instead of issuing draconian cease-and-desist letters, derby girls can contact one another . . . . This flexibility and informality also makes interactions less threatening and more consistent with derby's spirit of sisterhood. And while forgoing trademark means that derby girls cannot take advantage of certain remedies available under the Lanham Act, such as money damages, these remedies are out of all proportion in relation to a skater's goal: to secure the uniqueness of her pseudonym within the derby world.").

258. Aaron Perzanowski identified five core social norms that govern the protection of tattoo designs. *Perzanowski*, *supra* note 236, at 515 ("First, tattooers as a rule recognize the autonomy interests of their clients both in the design of custom tattoos and their subsequent display and use. Second, tattooers collectively refrain from reusing custom designs—that is, a tattooer who designs an image for a client will not apply that same image on another client. Third, tattooers discourage the copying of custom designs—that is, a tattooer generally will not apply another tattooer's custom images to a willing client. Fourth, tattooers create and use predesigned tattoo imagery, or 'flash,' with the understanding that it will be freely reproduced. Finally, tattooers generally embrace the copying of works that originate outside of the tattoo industry, such as paintings, photos, or illustrations. In some ways, these norms unintentionally echo familiar concepts from copyright law, but they differ from formal law in important respects as well.").

259. *See* Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 188 (2008) ("[W]e find that an IP system based on implicit social norms and offering functionality quite similar to law-based systems does operate among accomplished French chefs . . . . [W]e identify three strong implicit social norms held by all chefs we interviewed. First, a chef must not copy another chef's recipe innovation exactly . . . . [Second], if a chef reveals recipe-related secret information to a colleague, that chef must not pass the information on to others without permission . . . . [Third,] colleagues must credit developers of significant recipes as the authors of that information.").

260. For additional discussion on IP norms, see Tai-Heng Chen, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT'L L. 109, 121–28 (2006); *see also* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 123–36 (1991) (discussing a taxonomy of extralegal methods and social norms through which individuals control themselves and one another).

261. Perzanowski, *supra* note 236, at 513.

space.[262] One reason copyright laws are burdensome in the tattoo industry is that tattoo artists would be required to fix their design in a tangible medium, like detailed design on paper.[263] However, many tattoo artists draw directly onto the skin, thus raising questions regarding the fixation requirement.[264] Additionally, many custom tattoo designs are collaborations between artists and clients, convoluting authorship determination.[265] Tattoo artistry is an industry whose innovation and creativity could be hindered by the intellectual property system's formalities.

A fourth reason why some industries thrive in negative space is that there are first-mover advantages to creating.[266] First mover advantages are "the 'period of de facto exclusivity' that an inventor enjoys" before others can begin copying the invention.[267] For example, football is one negative space that has powerful first-mover advantages.[268] Football teams use new moves and plays to have advantages during games, but there is nothing that can stop the opposing team from copying the play.[269] Despite this "coaches keep innovating . . . because they face short-term incentives to win a game every week and because winning now trumps the possibility of losing over the longer term as (hypothetically) their idea spreads."[270] Consequently, there is a first-mover advantage to designing new football plays. Although there are more than these four theories to explain why some industries thrive in the negative space, most negative spaces fall into one of the aforementioned categories.[271]

D. THE BEAUTY INDUSTRY MUST BE ADDED TO THE LIST

A field constitutes a negative space if it thrives despite not having any intellectual property protection.[272] As already demonstrated,

262. *Id.*
263. *Id.* at 525.
264. *Id.* at 527–28.
265. *Id.* at 534.
266. Raustiala & Sprigman, *supra* note 28, at 317.
267. *Id.* at 317–18.
268. *Id.* at 318.
269. *Id.*
270. *Id.*
271. For a more detailed discussion of what makes an industry well-suited to occupy negative space, see Rosenblatt, *supra* note 240, at 336–57.
272. Rosenblatt, *supra* note 27, at 447.

beauty dupes are currently unpreventable under patent and trademark law.[273] Despite this, the beauty industry is thriving.[274] Beauty is growing at an average of 4.5% a year, with annual growth rates ranging from 3% to 5.5%.[275] Premium brands introduce most new innovations to the market.[276] There has also been a massive shift towards online sales, with more than 11 billion USD worth of online transactions in 2010.[277] However, this shift does not appear to have impacted dupes. While department stores, which typically sell high-end brands, dropped from 13.3% of total global beauty sales in 2000 to 9.5% by 2010, drugstores—*the most common place to purchase dupes*—were barely affected.[278]

The beauty industry feeds on newness, with each year yielding more trends.[279] Consumers recently pushed for conscious capitalism, eco-friendly packaging, and natural ingredients.[280] In addition to sun protection, there is now also a desire for anti-pollution skincare.[281] 1980's-style graphic eyeliner has returned.[282] The beauty industry is

273. *See supra* Part II (explaining the substantive and practical issues in patent and trademark law that make it impossible for brands to exclude dupes from the market).

274. Statista Research Department, *Annual Growth of the Global Cosmetics Market from 2004 to 2020*, STATISTA (Apr. 12, 2021), https://lb-aps-frontend.statista.com/statistics/297070/growth-rate-of-the-global-cosmetics-market [https://perma.cc/7A6E-ZMP8]. While this growth trend is not reflected in the final year, 2020, the accompanying source report for the graphs statistical data from L'Oréal suggests this irregularity is temporary and a result of the COVID-19 pandemic rather than factors within the beauty industry. *2020 Universal Registration Document: Annual Financial Report*, L'ORÉAL 33 (Mar. 16, 2021), https://www.loreal-finance.com/system/files/2021-03/LOREAL_2020_Universal_Registration_Document_en_0_0.pdf [https://perma.cc/KK28-CDY6] ("In 2020, the Covid-19 pandemic, which spread across the world, triggered a crisis of supply due to the widespread closure of points of sale which led to an unprecedented, if temporary, decline of the beauty market.").

275. Aleksandra Łopaciuk & Mirosław Łoboda, *Global Beauty Industry Trends in the 21st Century*, MGMT., KNOWLEDGE & LEARNING INT'L CONF. 1079, 1080 (June 19–21, 2013), http://www.toknowpress.net/ISBN/978-961-6914-02-4/papers/ML13-365.pdf [https://perma.cc/C27G-P5ZS].

276. *Id.* at 1081.

277. *Id.*

278. *Id.* at 1082 (noting that between 2000 and 2010, the percentage of products sold in drugstores declined from 13.1% to 12.8%).

279. Bridget March, *13 Beauty Trends that Will Dominate in 2020*, HARPER'S BAZAAR (Jan. 2, 2020), https://www.harpersbazaar.com/uk/beauty/beauty-shows-trends/a30279675/2020-beauty-trends [https://perma.cc/3RH4-AW4B].

280. *Id.*

281. *Id.*

282. *Id.*; Katie Dupere, *Gen Z Teens Are Bringing Back '80s Makeup. Don't Be Afraid*, KNOW (Apr. 14, 2020), https://www.intheknow.com/post/gen-z-teens-are-bringing-back-80s-makeup-dont-be-afraid [https://perma.cc/LM64-J62W].

constantly researching, developing, and marketing new goods shaped to meet consumers' desire for thoughtful and inspiring products.[283] There is no indication that the beauty industry will disappear anytime soon. It is, indeed, thriving. Thus, beauty dupes should join the growing list of intellectual property negative spaces.

This begs the question: *why does the beauty industry thrive despite rampant copying?* There are a few possibilities. Though there is no documentation of any internal community norms[284] against copying in the beauty industry, perhaps there are sufficient other norms. Some scholars suggest that creators can exercise "intellectual property self-help," which frequently takes the form of social media shaming to "call out perceived misappropriations."[285] Companies may be less likely to copy another's product if they know they will be publicly shamed for it.[286] James Charles arguably engaged in this "intellectual property self-help" when he unleashed his devoted fans on Wet n Wild after they duped his eyeshadow palette.[287] However, it does not seem as though this shaming and "self-help" prevent copying in the beauty industry. Dupes are still rampant and, at the time of this writing, consumers can still purchase the Wet n Wild eyeshadow palette.

Another possible explanation for the beauty industry's continued growth is that there are sufficient first-mover advantages. Beauty

283. *Innovation and Future Trends in the Cosmetics Industry*, COSMETICS EUR., https://cosmeticseurope.eu/cosmetics-industry/innovation-and-future-trends-cosmetics-industry [https://perma.cc/5NXJ-BF2S] [hereinafter *Innovation and Future Trends*].

284. "Internal community norms" should be interpreted to mean norms among members of the beauty community, as opposed to norms involving consumers and the general public.

285. Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CAL. L. REV. 1455, 1458 (2019).

286. *See* Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, 2 (2013) ("In the shadow of formal law, shame and shaming govern intellectual property's liminal spaces, where protection is uncertain or inconsistent with the strictures of formal law . . . . [S]hame and shaming help to create and maintain 'low-IP equilibria,' where copying norms are created and internalized by the creative community . . . .").

287. *See supra* Introduction (describing the James Charles and Wet n Wild dispute).

bloggers have suggested the entire cosmetics industry is moving towards a fast-fashion model, dubbed "fast beauty."[288] "The conventional wisdom is that imitation is bad for innovation."[289] But copying actually fuels creativity in the fast-fashion model. Styles come into fashion and go out of fashion quickly.[290] Copying enables trends to rise and fall at a faster rate, which in turn inspires designers to create new designs, a process called induced obsolescence.[291] Scholarship suggests one of the reasons fashion thrives despite this induced obsolescence is the industry's first-mover advantages.[292] Designers may sell enough of their new design before copiers attack to justify continued innovation.[293]

It seems likely that the beauty industry has similar first-mover advantages. Although the process of developing a new cosmetic product can happen relatively fast,[294] it is possible for prestigious brands

288. Shannon Lawlor, *You've Heard of Fast Fashion, but Fast Beauty Is a Thing Too and the Environmental Risks Can't Be Ignored*, GLAMOUR (U.K.) (June 15, 2019), https://www.glamourmagazine.co.uk/article/what-is-fast-beauty [https://perma.cc/QS5M-AFHK]; Kati Chitrakorn, *Fast Fashion for the Face*, BUS. FASHION (Sept. 7, 2015), https://www.businessoffashion.com/articles/beauty/high-street-beauty-fast-fashion-for-the-face; *Social Media Is Reshaping Beauty Product Development*, GLOB. COSM. INDUS. (Oct. 18, 2016), https://www.gcimagazine.com/networking/coverage/Social-Media-is-Reshaping-Beauty-Product-Development-397501631.html [https://perma.cc/34P2-8FXV].

289. TEDx Talks, *Imitation Spurs Innovation: Kal Raustiala at TEDxOrangeCoast*, YOUTUBE, at 00:14 (Nov. 5, 2012), https://www.youtube.com/watch?v=m29K5VamgQM (last visited Oct. 13, 2021).

290. As French poet Jean Cocteau masterfully phrased it, "[a]rt produces ugly things which frequently become beautiful with time. Fashion, on the other hand, produces beautiful things which always become ugly with time." *Thoughts on the Business of Life*, FORBES, https://www.forbes.com/quotes/4835 [https://perma.cc/V8JJ-YRTQ].

291. Raustiala & Sprigman, *supra* note 64, at 44 ("We call this process *induced obsolescence*—that is, obsolescence induced by copying. A design is launched and, for some reason that few can predict (or even explain), it becomes desirable. Early adopters begin to wear it and fashion magazines and blogs write of it glowingly. Other firms observe its growing success and seek to ape it, often at lower price points. As the now-hot design is copied and tweaked, it becomes far more widely purchased and hence even more visible. For a time, the trend grows. Past a certain point, however, the process reverses course. The once-coveted item becomes anathema to the fashion-conscious, and, eventually, to those who are somewhat less style-focused. The early adopters move on, and the process begins again."). For a general discussion of what starts fashion trends, see Ella Alexander, *What Makes a Fashion Trend: The Secret to Capturing the Zeitgeist*, HARPER'S BAZAAR (Mar. 9, 2017), https://www.harpersbazaar.com/uk/fashion/fashion-news/news/a40346/what-makes-a-fashion-trend-the-secret-to-capturing-the-zeitgeist [https://perma.cc/K69X-GK8Q].

292. Raustiala & Sprigman, *supra* note 64, at 52–54.

293. *Id.* at 52.

294. *See supra* Part II.A.2 (discussing the rapidly changing beauty industry).

to sell sufficient product before dupes hit the market and thus justify the high development costs. Even dupe companies that are optimized to quickly copy popular trends[295] cannot produce a new product in the blink of an eye. High-end brands that generate innovative, creative products will always have a first-mover advantage over copycat cosmetics companies. It is likely the beauty industry exhibits similar induced obsolescence as fashion; companies need to constantly create to stay afloat.[296] A more detailed study of the industry could confirm this theory.

Negative space is important to study because it sheds light on IP's effectiveness. This significance explains why negative space is a growing area of legal scholarship. To reiterate, there are many reasons why industries may be well-suited for negative space. Based on this Note's Part II analysis, the beauty industry should be added to a growing list of negative space industries because high-end brands cannot use IP laws to protect their products from dupes. Using dupes and other negative space industries, this Note now zooms out to evaluate what scholars can learn from the negative space phenomenon.

IV. SHOULD CONGRESS "FILL IN" NEGATIVE SPACE?

Having concluded that beauty dupes should be added to the scholarly list of intellectual property negative spaces, this Part returns to the purpose of studying negative space: to understand the bounds of the American intellectual property system and evaluate if it successfully achieves its goals. This Part first discusses how negative spaces, particularly luxury beauty products and dupes, still meet the goals of intellectual property. It then concludes that Congress need not "fill in" the negative space with additional intellectual property protection.

295. For instance, brands such as ColourPop, NYX, and Anastasia have "optimized their product mixes to be comparable to rabidly popular, gone-in-the-blink-of-an-eye products. As a result, they are frequently cited by bloggers and editors as ideal dupes." *How to Win at the Cosmetic Dupe Game*, GLOB. COSM. INDUS. (Oct. 21, 2016), https://www.gcimagazine.com/business/marketing/How-to-Win-at-the-Cosmetic-Dupe-Game-397952341.html [https://perma.cc/8RW2-JBAL].

296. *See, e.g.*, Michella Oré, *The Best New Beauty Products We Tried in February*, GLAMOUR (Feb. 28, 2021), https://www.glamour.com/gallery/the-best-new-beauty-products-we-tried-in-february (demonstrating that beauty websites are reviewing new products on a monthly basis to determine new trends). For further discussion on the demand for constant innovation within the beauty industry, see *infra* Part IV.A.2.C.

A. NEGATIVE SPACE STILL ACHIEVES IP'S GOALS

Negative space is a helpful tool for understanding whether the intellectual property system actually achieves its purpose. It calls into question whether IP serves as an accurate determinant of innovation.[297] This Section demonstrates that negative spaces still achieve these same goals, even without intellectual property protection.

1. Goals of the Intellectual Property System

The theoretical justifications for the intellectual property system inform its primary goals.[298] The World Trade Organization outlines three primary objectives of intellectual property rights, organized by intellectual property type.[299] Firstly, the rights of authors of literary and artistic works are protected through copyright and related rights. The purpose of protecting these rights is "to encourage and reward creative work."[300] Secondly, distinctive signs are protected through trademark laws. The purpose of protecting these distinctive signs is to "stimulate and ensure fair competition and to protect consumers, by enabling them to make informed choices between various goods and services."[301] Thirdly, other types of intellectual property, mainly patents and trade secrets, exist to stimulate innovation. The social purpose of these intellectual property rights is "to provide protection for the results of investment in the development of new technology, thus giving the incentive and means to finance research and development activities."[302] These three intellectual property objectives encompass the personality-based, Lockean, and utilitarian justifications previously addressed.[303]

297. Raustiala & Sprigman, *supra* note 28, at 324.

298. For a complete discussion of the three theoretical justifications (utilitarian, labor theory, and personality-based theory), see *supra* Part I.C.1.

299. *What Are Intellectual Property Rights?*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm [https://perma.cc/KY3X-MJ2J]. Though the United States is not necessarily required to achieve these goals, they broadly summarize the main goals of intellectual property globally. *Intellectual Property: Protection and Enforcement*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm [https://perma.cc/N3XJ-3SN9].

300. *What Are Intellectual Property Rights?*, *supra* note 299.

301. *Id.*

302. *Id.*

303. *Supra* Part I.C.1.

2. Dupes and Other Negative Space Industries Fulfill These Goals

Negative space industries meet all three goals for an IP system. This Section uses specific negative space case studies to demonstrate that all three intellectual property objectives are fulfilled by various negative space fields despite their lack of IP protection.

a. To Encourage and Reward Creative Work

According to the World Trade Organization, one IP goal is to encourage and reward creative work.[304] However, there are many negative spaces that actively reward creativity. One formal way the beauty industry rewards creative work is through the Independent Innovation Awards program, which is the industry's most robust recognition for beauty innovators.[305] This professional recognition can be displayed on packaging to enhance product marketing.[306] Winners often receive publicity in high-profile beauty publications.[307] Some beauty publications craft their own similar lists.[308] In the world of viral, cult-favorite beauty products, increased online publicity on trusted beauty blogs is a significant award for creating innovative products.

Another example of a negative space that encourages and rewards creative work is illegal graffiti art.[309] Illegal graffiti art, which is an act of vandalism as opposed to graffiti created lawfully, does not receive intellectual property protection because "illegal works are, in practice, precluded from copyright status and moral rights protection under the Visual Artists Rights Act."[310] It is a negative space. Despite this, illegal graffiti art is still encouraged and often rewarded. The core values of graffiti art include respect in the graffiti community, artistic expression and urban beautification, rebellion, and power in the form of peer competition, aesthetic dominance, and subculture membership.[311] These core values are extralegal. However, legal scholars have

304. *What Are Intellectual Property Rights?, supra* note 299.

305. BEAUTY INNOVATION AWARDS, https://beautyinnovationawards.com [https://perma.cc/9U7F-ANWY].

306. *FAQs*, BEAUTY INNOVATION AWARDS, https://beautyinnovationawards.com/faqs [https://perma.cc/2C8M-PM4R].

307. *See, e.g.*, Rachel Krause, *Beauty Innovator Awards 2020: Shop the Winners*, REFINERY29, https://www.refinery29.com/en-us/beauty-innovator-awards-2020 [https://perma.cc/2AQE-RT7D].

308. *See, e.g.*, Jessica Chia, *These Are the 2020 Winners of Our Best of Beauty Breakthrough Awards*, ALLURE (Sept. 15, 2020), https://www.allure.com/gallery/best-of-beauty-new-breakthrough-product-winners [https://perma.cc/7BZN-MRPK].

309. Roundtree, *supra* note 35, at 961.

310. *Id.*

311. *Id.* at 963.

argued they encourage, reward, and incentivize creation.[312] Beauty and illegal graffiti art exemplify how negative spaces rewards creativity without formal IP.

b. To Stimulate and Ensure Fair Competition and Protect Consumers by Enabling Them to Make Informed Choices Between Various Goods and Services

The World Trade Organization's primary objective for the trademark system is "to stimulate and ensure fair competition and protect consumers, by enabling them to make informed choices between various goods and services."[313] Many negative spaces that operate outside of trademark law still achieve this goal. For instance, some members of the beauty community argue that beauty dupes are beneficial for consumers.[314] They give consumers more options, provide for competition in the market,[315] and encourage competitive pricing.[316] Beauty dupes make trendy looks available to those who cannot afford luxury brands.[317] They make high-quality items available to everyday consumers and prevent luxury brands from pricing out the middle class. Dupes increase consumer choice, which in turn stimulates competition.[318] Furthermore, there is not a strong need to protect consumers because many consumers know they are purchasing a dupe rather than the high-end brand.[319] Beauty dupes are just one example of a negative space that lacks trademark protections but nevertheless stimulates fair competition and protects customers.

Another negative space example that fulfills this goal is financial institution technology.[320] Despite the lack of IP, financial giants such

312. *Id.*

313. *What Are Intellectual Property Rights?*, *supra* note 299.

314. Primeaux, *supra* note 24, at 925.

315. *Id.*

316. Wells, *supra* note 63.

317. Bakolli, *supra* note 59 ("You deserve the best—whatever your budget!"); Primeaux, *supra* note 24, at 893.

318. Primeaux, *supra* note 24, at 899.

319. *Id.* at 892–93.

320. The financial services industry is particularly innovative but engages in very little IP protection. Raustiala & Sprigman, *supra* note 64, at 156. Financial firms typically innovate to satisfy the needs of particular customers, avoid taxes, lower transaction costs, and take advantages of new technologies for assessing the quality of debt. *Id.* at 159. Because of this, patents are not always a viable option because financial institutions often benefit from sharing their technology with competitors, as it may be necessary "to grow markets to the size at which they become efficient and lucrative." *Id.* Conversely, there are instances in which financial firms do not seek standardization in order to grow a new market. *Id.* But even in these cases where copying is rampant,

as Goldman Sachs, Morgan Stanley, Citigroup, Deutsche Bank, Credit Suisse and HSBC all have maintained their market shares.[321] This is credited to the relationships they have built with clients.[322] Even if Morgan Stanley copies Goldman Sachs's new investment technology, consumers are not confused between the two institutions and may choose to stay with Goldman Sachs if they have had a good experience with it in the past. Consumers are still able to make informed choices between goods and services due to an established relationship with their primary financial firm. Both beauty dupes and financial institution technology are negative spaces that demonstrate the World Trade Organization's second intellectual property objective—to stimulate and ensure fair competition and to protect consumers by enabling them to make informed choices between various goods and services—is satisfied.

c. To Incentivize Research and Development Activities

The World Trade Organization's final intellectual property objective is to incentivize research and development activities.[323] The cosmetics industry also aligns with this goal. Innovative products, produced after extensive research and development, are one of the main indicators of success in the multibillion-dollar industry.[324] Technological advances over the years have "allowed manufacturers to create a wide scheme of colors for lipstick, nail color, blush, etc. Technology has allowed companies to bottle thousands of different smells that make up the perfume business."[325] However, creating new colors and smells is not the only reason beauty companies invest in research and development. Beauty companies' research delves into "all imaginable aspects of beauty and well-being, from investigating consumer behaviour and beauty aspirations, the biology of skin, hair, teeth and oral cavity, to new innovative technologies and bettering sustainable development methods."[326] Every year, approximately 25% of cosmetics

the firm that introduces the new type of security typically benefits from dominating the market shares for several years. *Id.* at 160. Thus, it is a negative space industry.

321. *Id.*

322. *Id.* at 160–61.

323. *What Are Intellectual Property Rights?*, *supra* note 299.

324. Sameer Kumar, Cindy Massie & Michelle D. Dumonceaux, *Comparative Innovative Business Strategies of Major Players in Cosmetic Industry*, 106 INDUS. MGMT. & DATA SYS. 285, 286 (2006).

325. *Id.* at 293.

326. *Innovation and Future Trends*, *supra* note 283.

products on the market are either new or improved.[327] To be successful, cosmetics companies "are forced to innovate a new product, replace a product, or upgrade [their] products to meet the demands of consumers at all levels."[328] Moreover, "the cosmetic industry is full of 'fads' and it is important that each cosmetic company addresses the fads and establish core or basic products that will continue to be purchased over time."[329]

Economic scholars believe that this need to satisfy new trends and create innovative products will force the cosmetic industry to continue investing money into research and development.[330] In fact, most successful cosmetics companies are those which extensively invest in research and development.[331] Creating a successful cosmetics company includes thorough research and development and product marketing.[332]

However, the beauty industry is by no means the only negative space field that fulfills the goal of incentivizing research and development activity. Basic academic scientific research is often considered a negative space because it is largely unpatentable.[333] Despite this, there are substantial incentives for this type of research.[334] Researchers are driven by a desire to obtain professional recognition, promotions, grants, tenure, and increased funding.[335] For many faculty, research is just part of their job; it is something they are expected to do, with or

327. *Innovation*, COSMETICS EUR., https://cosmeticseurope.eu/about-us/we-care/innovation [https://perma.cc/6C39-CNAZ].

328. Kumar, *supra* note 324, at 292.

329. *Id.*

330. *Id.* at 301 ("Authors' believe that the cosmetic industry will continue to invest money into R&D, as innovation is the key to success . . . .").

331. For example, Estée Lauder—a well-respected, successful cosmetics company—uses complex technology and thorough research and development, and this is part of the reason why competitors have a hard time imitating its products. *See id.* at 300 ("The uniqueness of Estée Lauder's products come from a high technology and extensive R&D. These efforts make other competitors to have a hard time to imitate their products.").

332. *Id.* at 299.

333. Aoki, *supra* note 225, at 207. It should be noted that there is a distinction between basic research and applied research. Applied research may have enough utility to meet patentability requirements. However, basic research often lacks utility for the purposes of obtaining a patent. Richard R. Nelson, *Reflections on "The Simple Economics of Basic Scientific Research": Looking Back and Looking Forward*, 15 INDUS. & CORP. CHANGE 903, 906–12 (2006). Thus, while applied research may receive patent protection, basic research is a negative space.

334. *Id.* at 907–09.

335. Aoki, *supra* note 225, at 207.

without a patent reward.[336] These extralegal incentives are sufficient to drive academic research without the patent system. Academic research is just one example of an intellectual property negative space that still incentivizes research and development.

The three main objectives of the intellectual property system are: (1) to encourage and reward creativity; (2) to stimulate and ensure fair competition by enabling consumers to make informed choices between various goods and services; and (3) to incentivize research and development activities.[337] Negative spaces miraculously achieve all three goals without any intellectual property protection. Perhaps this suggests that the intellectual property system is not necessary to achieve these objectives, and thus Congress should modify the United States' existing intellectual property systems.

B. NO CONGRESSIONAL ACTION IS NECESSARY

If these negative spaces are thriving without intellectual property protections, is the intellectual property system actually doing its job? Negative spaces fulfill all of the intellectual property system's goals *without actually having any intellectual property rights*. Should Congress enact more formal intellectual property protections for these industries? Or should Congress question the entire IP system's effectiveness? At this time, no action is the best action. There are many industries that still need existing intellectual property to thrive and increasing Congressional oversight over negative space industries could inhibit innovation. From a utilitarian perspective, Congress should allow negative spaces to continue innovating independent of any formal intellectual property law.

Firstly, just because some industries thrive without intellectual property protections does not mean that is the case for all industries. Many fields need intellectual property protections and would not survive if the IP system was radically overhauled.[338] There are many factors that make some industries better suited for negative space than

336. Marshall Shepherd, *Professors Are Often Asked 'What Do You Teach?' But They Do Far More*, FORBES (July 19, 2018), https://www.forbes.com/sites/marshallshepherd/2018/07/19/professors-are-often-asked-what-do-you-teach-they-do-far-more [https://perma.cc/HQK5-46TM] (describing the research expectations for professors).

337. *What Are Intellectual Property Rights?*, *supra* note 299.

338. Henry Grabowski, *Patents, Innovation and Access to New Pharmaceuticals*, 5 J. INT'L ECON. L. 849, 851 (2002). Perhaps the most prominent example of this is the pharmaceutical industry. Pharmaceuticals could be deemed an "anti-negative space," as they would suffer greatly if stripped of their intellectual property. *Average Cost of Developing a New Drug Could Be Up to $1.5 Billion Less than Pharmaceutical Industry*

others. Some of these factors include creativity not being tied to exclusivity, community norms, and burdensome existing intellectual property laws.[339] Yes, legal scholarship has generated a growing list of negative spaces (this Note joining such scholarship). But these negative space industries are not the norm. Most fields are not naturally well-suited to thrive without intellectual property.

IP certainly has its critics. There is a growing body of legal and economic scholarship suggesting intellectual property monopolies are not necessary to spur innovation.[340] However, other international economists have studied the relationship between intellectual property protections and innovation on a global scale. Their studies unambiguously found that intellectual property rights generally have a strong positive correlation with innovation.[341] Whether the intellectual property system actually spurs innovation is wildly beyond the scope of this Note. That topic could fill textbooks. But it's certainly an issue worth keeping in mind when discussing negative spaces' innovative successes. Perhaps more detailed comparisons of high-IP and low-IP industries would shed additional light on this issue.

Secondly, at this time it does not appear necessary for Congress to "fill in" the negative space with additional intellectual property legislation. Many negative spaces currently could employ intellectual property protections but actively choose not to because the IP hinders

Claims, LONDON SCH. HYGIENE & TROPICAL MED. (Mar. 4, 2020), https://www.lshtm.ac.uk/newsevents/news/2020/average-cost-developing-new-drug-could-be-15-billion-less-pharmaceutical [https://perma.cc/MRZ5-ZVHK]. It takes an average of $1.3 billion to develop and license a new prescription drug, and patents are the only bar against low-cost imitation for these medicines. *Id.* Without patents, the pharmaceutical industry would experience a significant free-rider problem. *Id.*

339. Rosenblatt, *supra* note 240, at 336–57 (identifying what makes some industries well suited to negative space).

340. *See, e.g.*, Michele Boldrin & David K. Levine, *Perfectly Competitive Innovation*, 55 J. MONETARY ECON. 435, 436 (2008) ("This [article] is an attempt to cast doubt on the claim that monopoly is necessary for innovation, both as a matter of theory and as a matter of fact. We do not claim full originality: economists such as Stigler (1956) have explicitly rejected the Schumpeterian claim since about our birth dates. Recent authors such as Hellwig and Irmen (2001), Boldrin and Levine (2002), and Zeira (2006) have produced growth models in which innovation is assumed to take place absent monopoly."). Arguably, intellectual property rights enforced by license fees have a negative effect on innovation because they hinder information sharing and sequential innovation. Julia Brüggemann, Paolo Crosetto, Lukas Meub & Kilian Bizer, *Intellectual Property Rights Hinder Sequential Innovation. Experimental Evidence.*, 45 RSCH. POL'Y 2054, 2055 (2016) (conducting and analyzing a real-effort laboratory experiment to study the effects of intellectual property rights on participant creativity).

341. Sunil Kanwar & Robert Evenson, *Does Intellectual Property Protection Spur Technological Change?*, 55 OXFORD ECON. PAPERS 235, 236 (2003).

innovation.[342] It is uncertain whether these industries would engage in IP even if it was available. Also, though negative spaces are typically creative fields, they are very diverse. It would be challenging to create some new intellectual property system to protect all negative spaces and their unique issues. What type of IP could protect beauty products, stand-up comedy, and basic research? "Filling in" negative space would be administratively and legislatively complex and burdensome.

Lastly, not enacting new intellectual property protections is the most utilitarian decision. As previously discussed, these industries already achieve the World Trade Organization's intellectual property goals. It would be a poor use of resources to craft unnecessary laws and systems to protect these negative spaces. Innovation is already happening without IP. Society receives these industries' benefits without the financial and administrative burden of supporting a larger intellectual property system. Further, some of this "legal copying" actually helps society, as noted with fashion knockoffs and beauty dupes.[343] There is a greater incentive for competitive pricing, consumer choice, and accessibility of quality products. From a utilitarian standpoint, many would argue that this "legal copying" is a good thing.

Although studying negative space is a useful exercise in understanding the bounds of the intellectual property system, at this time it would be rash to propose Congressional action. Negative spaces are actively thriving and innovating without the administrative burden of an intellectual property system, so imposing one on them would be a poor use of resources. The primary objectives of the intellectual property system are still being met. Additionally, a complete overhaul of IP would negatively impact industries that have become dependent on intellectual property rights. More detailed scholarship directly comparing high-IP and low-IP fields could further explore this topic.

CONCLUSION

This Note has argued that beauty dupes should be added to the growing list of intellectual property negative spaces. Beauty dupes are unpreventable under patent and trademark laws, but the industry is nevertheless thriving. This Note seeks to engage in a broader discussion regarding negative space. Industries that thrive despite lacking intellectual property protection provide insight into the bounds of the

342. *See supra* note 236 and accompanying text (discussing how tattoo artists could use copyright protections but chose not to because it is burdensome and hinders some creativity).

343. *See supra* Part IV.A.2.b.

American intellectual property system. Since negative spaces fulfill intellectual property's goals without any intellectual property protections, perhaps they suggest that intellectual property is not necessary. It would be unwise for Congress to "fill in" the negative space at this time.