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I. Introduction

Nothing is original. Steal from anywhere that resonates with inspiration or fuels your imagination. Devour old films, new films, music, books, paintings, photographs, poems, dreams, random conversations, architecture, bridges, street signs, trees, clouds, bodies of water, light and shadows. Select only things to steal from that speak directly to your soul. If you do this, your work (and theft) will be authentic. Authenticity is invaluable; originality is nonexistent. And don't bother concealing your thievery—celebrate it if you feel like it. In any case, always remember what Jean-Luc Godard said: "It's not where you take things from—it's where you take them to."¹

Counterfeits have been a pervasive problem facing the fashion industry for decades. Long before teens of TikTok started posting videos showcasing their “designer dupes” for all the world to see, consumers sought out cheaper copies of luxury designer products in the back rooms of the Canal Street storefronts, through hidden doors where consumers could find the bag that they couldn't afford in Barney's.² Most analyses regarding this topic focus on Amazon and the large marketplace sellers and how their liability should attach.³ But these analyses miss a significant factor in the access to these listings in the first place. Current scholarship generally fails to address the role that the internet and social media play in the prevalence of counterfeit posts on third party

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¹ Jim Jarmusch, *Things I've Learned: Jim Jarmusch*, MOVIEMAKER (June 5, 2013), <https://www.moviemaker.com/jim-jarmusch-5-golden-rules-of-moviemaking/>.

² *Hot Genre of Videos on TikTok: Those Dedicated to Showcasing Luxury Fakes*, THE FASHION LAW, (Mar. 2, 2020), <https://www.thefashionlaw.com/a-hot-genre-of-videos-on-tiktok-those-dedicated-to-finding-low-cost-luxury-fakes/>; Megan Graham, *TikTok Teens are Obsessed with Luxury Fakes*, CNBC (Mar. 1, 2020), <https://www.cnbc.com/2020/02/29/tiktok-teens-are-obsessed-with-fake-luxury-products.html>.

³ Peter S. Sloane, *Development in the Law: Trademark Vigilance in the Twenty-First Century: An Update*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1197 (2020); Julie Liu, Article, *From Inwood to Internet and Beyond: Assessing the Web Host-User Relationship in Contributory Online Trademark Infringement*, 11 WASH. J.L. TECH. & ARTS 105 (2015).

marketplace sites and the role that consumer demand plays in the availability and abundance of counterfeit goods sold on the internet. Before the days of Amazon, it was more difficult for counterfeit goods to make their way onto the shelves of reputable retailers, but with the growth of the internet and the rise of Amazon, counterfeiters are able to post their products on what people believe to be a reputable site, giving counterfeiters a much larger and seemingly credible presence than they did in the past.⁴ A simple search on Amazon for a “fake Gucci belt” or a “knockoff Cartier ring” most likely will not land a person on the page for the perfect copy of that designer piece. This is because the counterfeit sellers know that this will get them reported and kicked off the site.⁵ Instead, purchasers seeking counterfeit goods on a third-party marketplace site will follow bloggers on social media platforms like Instagram and TikTok to find a link to the counterfeit good that they are looking for, which is typically available only for short periods before being reported and taken down.⁶ Sellers on marketplaces such as Amazon are aware of the procedures that Amazon has in place and are constantly changing their tactics in an effort to evade the counterfeit detection measures and continue to offer their products on Amazon and other online marketplace sites.⁷ Amazon has been taking steps to remedy these types of issues, but there is no affirmative responsibility for third-party online marketplaces to accept direct liability for the

⁴ Suthivarakom, Ganda, *Welcome to the Era of Fake Products*, NY TIMES, (Feb. 11, 2020), <https://www.nytimes.com/wirecutter/blog/amazon-counterfeit-fake-products/>.

⁵ *See infra* text accompanying notes 180–183.

⁶ *Id.*

⁷ *See* Complaint at 10, *Amazon v. Fitzpatrick*, (W.D. Wash. 2020) (No. 2:20-cv-01662) (Amazon Brand Registry (2017), “a free service to any rights owner with a government-registered trademark, regardless of the brand’s relationship with Amazon.”); Complaint at 10, *Amazon v. Fitzpatrick*, (W.D. Wash. 2020) (No. 2:20-cv-01662) (Transparency (2018), “a product serialization service that effectively eliminates counterfeits for enrolled products”); Complaint at 10, *Amazon v. Fitzpatrick*, (W.D. Wash. 2020) (No. 2:20-cv-01662) (Amazon Project Zero (2019), “a program to empower brands to help Amazon drive counterfeits to zero.”); *see infra* text accompanying notes 180-183.

infringing use of another’s mark by a third-party seller.⁸ As Amazon continues to crackdown, however, it continues to become more and more difficult for sellers to disguise their posts and those that do are starting to get caught.⁹

This Comment will begin with a brief background of counterfeiting, then go into the details about the counterfeiting business and finally discuss the different protections available to trademark owners and what trademark owners can do in addition to remedies already available. Part II will discuss the background of counterfeiting, providing some important statistics, and it will discuss the important distinction between a “dupe” and a counterfeit and explain the misconception among consumers as to the meaning of commonly used terms to refer to different types of copycat fashion goods. Part II will then it will discuss why trademark law should concern itself with the counterfeit market, aside from the obvious reasons for protecting registered users and their marks. Part III will explain the different routes by which trademark owners can go about policing and enforcing their marks against infringing users and the new problems facing the fashion industry, namely the trend on social media toward counterfeits. It will also explore the avenues available for brands to pursue legal action against counterfeiters and infringers. Part IV will detail why the traditional means of policing and enforcing marks are no longer enough and examine a recent case that considers the intersection of counterfeiting, social media, and online marketplaces.

II. From back alleys to TikTok: A brief timeline of counterfeiting

Counterfeiting is not a new phenomenon. There has been a market for counterfeit goods for as long as there have been goods that people wanted to have but simply could not afford. While

⁸ Evans, *Amazon’s Investments To Curb Counterfeiting*, (Nov. 23, 2020), <https://www.digitalcommerce360.com/2020/11/23/amazon-cracks-down-on-a-creative-counterfeit-scheme-with-new-lawsuit/>.

⁹ Complaint, *Amazon v. Fitzpatrick*, (W. D. Wash. 2020) (No. 2:20-cv-01662).

designers seek to halt the availability of counterfeit goods that dilute the value of their brands, it is something of an achievement to have created a product or good that people want to copy. Virgil Abloh of “Off-White” famously said about counterfeiting, “you can’t counterfeit something that’s not wanted, that’s the highest achievement that you can get: to make an idea and then someone want to make a copy of it.”¹⁰ Prior to the existence of the internet and social media, counterfeiting was a relatively contained problem.¹¹ Counterfeits were sold on street corners, in back rooms, or at flea markets, and were actively sought out by those seeking to obtain “luxury” items without the luxury price tag.¹² With the expansion of the internet and its unlimited access to social media, there is a new demographic of individuals seeking out counterfeit products to bolster their image and portray an affluent lifestyle that they could not otherwise afford.¹³ The younger generations are seeking out counterfeit goods through social media sites, where bloggers reveal where to score a dupe of the latest and greatest luxury items.¹⁴ Social media sites like Instagram and TikTok have become something of an alternate reality that people use to portray lifestyles that do not accurately represent their lives, and counterfeit goods provide an accessible route for users to flaunt a lifestyle that they could not, in reality, afford.¹⁵ And not only has access to counterfeit goods been bolstered by the availability of access to the internet, but the quality and accurateness of the counterfeit

¹⁰ Aleks Eror, *Is Counterfeiting Actually Good for Fashion*, HIGHSNOBIETY, <https://www.highsnobiety.com/p/counterfeit-fashion-brands/> (last visited Nov. 14, 2020).

¹¹ Peter S. Sloane, *Development in the Law: Trademark Vigilance in the Twenty-First Century: An Update*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1197, 1204 (2020).

¹² *Id.*

¹³ *Id.*

¹⁴ *Infra* note 30.

¹⁵ Maldonado, *Why Is Everyone On TikTok Buying Fake Designer Handbags*, (Nov. 1, 2020), <https://stylecaster.com/dhgate-fake-luxury-handbags-tiktok/>.

goods in many cases have become so good that it is almost impossible to distinguish the original from the fake without an expert's eye.¹⁶

A. Counterfeiting by the numbers

The counterfeit trade is an over \$500 billion global industry.¹⁷ The growth of the internet and e-commerce has changed how retailers and consumers interact, and has consequently changed the way that counterfeiters are so readily able to reach consumers.¹⁸ Specifically, the rise of third-party marketplaces has exacerbated the issues when it comes to the availability of counterfeit goods through e-commerce.¹⁹ A third-party marketplace is “any web-based platform that includes features primarily designed for arranging the sale, purchase, payment, or shipping of goods, or that enables sellers not directly affiliated with an operator of such platforms to sell physical goods to consumers located in the United States.”²⁰ Amazon is an example of a third-party marketplace.²¹ And while consumers report that they generally feel confident making purchases through online third-party marketplaces, a 2017 study found that online third-party marketplace purchases made

¹⁶ *Nowadays, Counterfeit Goods are “Almost Identical” to the Real Thing*, THE FASHION LAW (May 24, 2018), <https://www.thefashionlaw.com/counterfeit-goods-are-almost-identical-the-the-real-thing/> (“We are now at the point where the fakes are almost identical to the real ... where they are almost 99 percent identical.”).

¹⁷ *Trade in Fake Goods is Now 3.3% of World Trade and Rising*, OECD (Mar. 18, 2019), <http://www.oecd.org/governance/trade-in-fake-goods-is-now-33-of-world-trade-and-rising.html>.

¹⁸ DEPARTMENT OF HOMELAND SECURITY, COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES 7 (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_ply_counterfeit-pirated-goods-report_01.pdf.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Leo Sun, *Amazon's Third-Party Marketplace Faces Fresh Regulatory Headwinds*, THE MOTLEY FOOL (Feb. 7, 2020), <https://www.fool.com/investing/2020/02/07/amazon-third-party-marketplace-regulatory-headwind.aspx>.

up 39% of all unwitting purchases of counterfeit goods²². These statistics are why third-party marketplaces like Amazon have put in place measures to combat these types of postings.²³

But unknowing counterfeit purchases are not the only issue facing consumers, online retailers, and marketplaces. Arguably worse and potentially more damaging to trademark owners and brands than the unintentional purchase of counterfeit goods is the intentional purchase of counterfeit goods. A 2019 report by the International Trademark Association found that 79% of “Gen Zers” had purchased a counterfeit good in the year prior to a study that was done in November of 2018.²⁴ Studies like these seem to indicate that while the intentional purchase of counterfeit fashion has always been an issue facing the industry, the younger generation, with the help of the internet and social media, is actively seeking out and finding counterfeits more readily than ever before.²⁵ Research also indicates that this younger generation of shoppers do not seem to intend to stop making these purchases any time soon, regardless of whether or not they would have the income to purchase the real thing.²⁶ As a result, despite the advancements in technology that allow sites to regulate the marketplace and weed out counterfeit postings, it remains especially difficult for online marketplaces and brand owners alike to prevent the occurrence of counterfeits

²² MarkMonitor Online Barometer: Global online shopping survey 2017 – consumer goods. Downloaded from https://www.markmonitor.com/download/report/MarkMonitor_Online_Shopping_Report-2017-UK.pdf. p. 6 (2017); DEPARTMENT OF HOMELAND SECURITY, COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES 15 (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_pley_counterfeit-pirated-goods-report_01.pdf (“However, the majority of respondents that unintentionally purchased fake products found them via online marketplaces (39 percent) . . .”).

²³ *Id.*

²⁴ *Changing Behaviors: Gen Z and Counterfeits*, WORLD INTELLECTUAL PROPERTY REVIEW (May 29, 2019), <https://www.worldipreview.com/contributed-article/changing-behaviors-gen-z-and-counterfeits> (based on a study of more than 4,500 respondents aged 18 and 23 years old in 10 countries); The Pew Research Center indicates that anyone born in the year 1997 or later is considered “Generation Z” (aka “Gen Z”). Dimock, *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RESEARCH CENTER (Jan. 17, 2019), <https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/>.

²⁵ *Id.*

²⁶ *Id.*

because of the high demand for them.²⁷ It appears that no matter how many measures sites like Amazon put in place to prevent counterfeiting, as long as there remains a demand for counterfeit goods, people will find a way to sell and purchase them.²⁸ This is why brands need to find new ways to protect brand value in the midst of counterfeit culture on the internet and on social media.

B. Dupe versus counterfeit: what's the difference and why does it matter?

There is a misconception among consumers about the definitions of terms such as “dupe,” “knockoff,” and “look alike,” among others.²⁹ The term “dupe” is regularly used by influencers to incorrectly describe exact replicas of designer goods that are sold for a fraction of the price of the original that it is replicating.³⁰

The correct term for such products is actually “counterfeit.”³¹ The term “dupe” is technically the term for a designer “inspired” item that looks very similar to the original, but

²⁷ Palmer, *Amazon Says A New ‘Counterfeit Crimes Unit’ Will Work With Law Enforcement To Take On Fraudsters*, CNBC (June 24, 2020), <https://www.cnbc.com/2020/06/24/amazon-says-counterfeit-crimes-unit-to-work-with-law-enforcement.html>.

²⁸ Amazon Anti-Counterfeiting Policy, AMAZON, (last accessed Jan. 20, 2021), <https://sellercentral.amazon.com/gp/help/external/201165970>.

²⁹ *Designer Dupe vs. Fake: What's the Difference?*, THE BRUNETTE NOMAD BLOG (Aug. 6, 2019), <https://thebrunettenomad.com/2019/08/designer-dupe-vs-fake-whats-the-difference.html/#:~:text=A%20designer%20dupe%20is%20an,name%20or%20it's%20trademarked%20logo> (“A designer dupe is an inspired item that does not bear the markings of its designer counterpart. It’s not something you could pass off as that designer but looks very similar. These items are meant to give you the look of the brand but don’t include the designer name or it’s trademarked logo.”).

³⁰ *Best Goyard Dupes and Inspired Bags*, SONIA BEGONIA BLOG (Nov. 14, 2020), <https://soniabegonia.com/best-goyard-dupes-and-inspired-bags/> (Using “designer dupe” and “designer inspired look alike bags” to refer to two different things, when in fact the terms can be used interchangeably. “In today’s designer dupes post, I will be zoning in on Goyard dupes and Goyard inspired look alike bags.”); *Amazon Designer Dupes Under \$40 (Part 2)*, SASSY SOUTHERN BLONDE BLOG (Jan. 13, 2019), <https://www.sassysouthernblonde.com/amazon-designer-dupes-under-40-part-2/>. *But see, Disclaimer: Designer Dupes vs. Fakes*, PRADA AND PEARLS BLOG (July 1, 2019) <http://pradaandpearls.com/disclaimer-designer-dupes-vs-fakes/> (using the term “dupe” to correctly refer to a non-infringing item.); *What is an Influencer?*, INFLUENCER MARKETING HUB, (Oct. 19, 2020), <https://influencermarketinghub.com/what-is-an-influencer/> (“Influencers in social media are people who have built a reputation for their knowledge and expertise on a specific topic. They make regular posts about that topic on their preferred social media channels and generate large followings of enthusiastic, engaged people who pay close attention to their views.”).

³¹ 15 U.S.C. § 1127 (2020) (“A ‘counterfeit’ is a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.”).

without making infringing use of the original designer's mark.³² The fashion industry describes a counterfeit essentially as "a product that is identical to another product, and thereby infringes upon the trademark of that product mark (trademark)."³³ Counterfeits typically appear indistinguishable from the original, except that they are usually inferior in quality.³⁴ "These are most commonly sold online, and via street corner and back-alley vendors."³⁵ "Knockoffs" are defined in the fashion industry as products that resemble the original, but are not exact replicas of it.³⁶ These "knockoff" products are typically sold at a lower price-point than their original counterpart and can be found in-stores and online, often at reputable retailers.³⁷

And while these "knockoffs" are not in and of themselves illegal like counterfeits, they can be challenged by the trademark owner as an infringing use of its marks.³⁸ Counterfeits usually make use of the brand's trademark(s) in ways that make the copy almost identical to the original, but "dupes" or "knockoffs" do not use such symbols and merely resemble the original, rather than duplicate it.³⁹ In practice, "knockoffs" are also sometimes described as "a colloquial term, which encompasses both counterfeits and infringements of any products, including fashion goods such

³² *What's the Deal? Designer Dupes vs. Knockoffs*, WITH A CITY DREAM BLOG (Feb. 26, 2020), <http://www.withacitydream.com/blog/2020/2/24/whats-the-deal-designer-dupes-vs-knockoffs> ("Many bloggers, influencers & people often misuse the word 'dupe' when the word that is more fitting is 'knockoff' or 'counterfeit good' but those sound *scary* or even *dirty* & therefore are avoided at all costs.") (emphasis in original).

³³ Arthur Zaczekiewicz, *Counterfeits, Knockoffs, Replicas: Parsing the Legal Implications*, WWD (June 2, 2016), <https://wwd.com/business-news/retail/counterfeit-knockoff-replica-legal-10437109/>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*; Jennifer Saranow Schultz, *The Legality of Knockoffs*, POST: BUCKS, (Oct. 28, 2010), <https://bucks.blogs.nytimes.com/2010/10/28/the-legality-of-buying-knockoffs> ("[A]lmost anywhere in the world, it's illegal to sell them but legal to buy them.").

³⁹ Schultz, *The Legality of Knockoffs*, POST: BUCKS, (Oct. 28, 2010), <https://bucks.blogs.nytimes.com/2010/10/28/the-legality-of-buying-knockoffs> ("Counterfeit goods, they said, actually have copies of a brand's label or signature symbols or marks that so closely resemble the original they appear identical (think a Lacoste-looking design with the signature alligator). Knockoffs, on the other hand, don't have such words or symbols and merely resemble the original.").

as handbags, apparel, footwear and the catchall term—accessories.”⁴⁰ Another, newer term used by counterfeiters to describe these copies of designer goods is “replica.”⁴¹ This term brings up yet another grey area when used to describe offerings online.⁴² Replicas that are identical to the existing marks are illegal, but replicas that merely resemble the design of a trademarked good or logo are similar to “knockoffs” and are not legally problematic in the same way that a counterfeit is.⁴³

Take, for example, the below blog post, which provides visual examples of the designer “dupes” that this blogger has located on Amazon and has provided the links for.⁴⁴ The author of this post has incorrectly labeled the items seen in the post as “dupes” but when viewing some of the genuine goods that these “dupes” refer to, it is clear that the goods that this blogger is promoting are, in fact, counterfeits and not simply dupes.⁴⁵ The implication of this is that purchasers may not realize that the goods that they are purchasing are in fact illegal counterfeits because they are masked with the term “dupe,” and they may see the purchase as a harmless way of saving money on luxury goods. And even if purchasers do feel some sense of moral wrong for purchasing a fake luxury bag, maybe using a term less “scary” than counterfeit masks that feeling of wrongdoing for some buyers, thus again perpetuating the market for these goods.⁴⁶

⁴⁰ Zaczekiewicz, *Counterfeits, Knockoffs, Replicas: Parsing the Legal Implications*, WWD (June 2, 2016), <https://wwd.com/business-news/retail/counterfeit-knockoff-replica-legal-10437109/>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Another term used in a similar way is “inspired by.” Sometimes items listed as “inspired by” are exact replicas, while other times they are items that resemble and take inspiration from the trademarked item but do not actually make use of the registered marks; Luib, *The Scary Truth You Need to Know Before Buying Counterfeit Luxury Handbags*, BALLER ON A BUDGET, (Mar. 22, 2019), <https://www.theballeronabudget.com/the-scary-truth-you-need-to-know-before-buying-counterfeit-luxury-handbags/>.

⁴⁴ It is difficult to find examples of the actual Amazon listings to cite to because they are taken down daily. *Amazon Designer Dupes Under \$40 (Part 2)*, SASSY SOUTHERN BLONDE BLOG (Jan. 13, 2019), <https://www.sassysouthernblonde.com/amazon-designer-dupes-under-40-part-2/>.

⁴⁵ See text accompanying notes 47-51.

⁴⁶ Downs, *Is Everyone Buying Fake Bags But Me*, ELLE (Jan. 22, 2020), <https://www.elle.com/fashion/a30627106/repladies-reddit-fake-bags/>.

Figure 1⁴⁷:



*Amazon is the KING of dupes. No question about it! My Amazon Fashion Finds Under \$40 was my top blog post of 2018, so I knew I needed to publish an updated one for 2019 ASAP! I am not kidding when I say this one is a hundred times better than the first. It's full of designer dupes at crazy discounted prices! Sure, the pieces aren't real, BUT they are such a close replica. Even the reviews are overall positive! I tried to only link credible sellers, but always check the reviews just in case. I hope you enjoy these pieces as much as I do!*⁴⁸

Figure 2⁴⁹:

⁴⁷ *Amazon Designer Dupes Under \$40 (Part 2)*, SASSY SOUTHERN BLONDE BLOG (Jan 13, 2019), <https://www.sassysouthernblonde.com/amazon-designer-dupes-under-40-part-2/>.

⁴⁸ *Id.*

⁴⁹ Example of one of the “dupes” from Figure 1. GUCCI, https://www.gucci.com/us/en/pr/women/handbags/shoulder-bags-for-women/chain-bags-for-women/gg-marmont-small-matelasse-shoulder-bag-p-443497DTDIT1000?gclid=Cj0KCQiAnb79BRDgARIsAOVbhRqD4yksQFZAUtlfwo6rWuu9Nwd1NDU2VS5fva8rZVSPDZwmfhSzSQAav30EALw_wcB (GG Marmont small matelassé shoulder bag) (last visited Nov. 15, 2020).

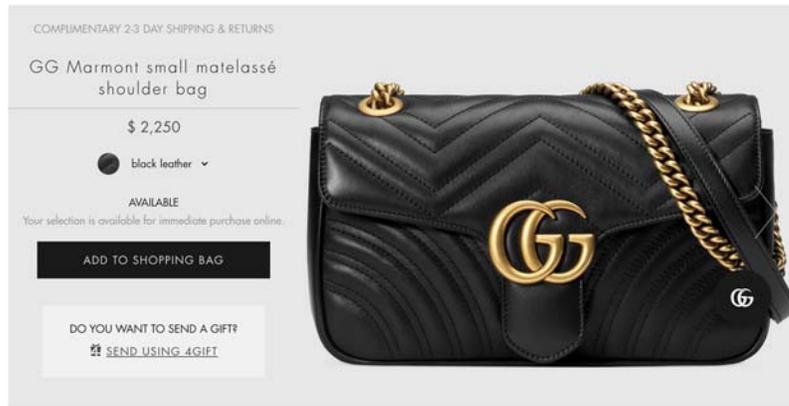


Figure 3⁵⁰:

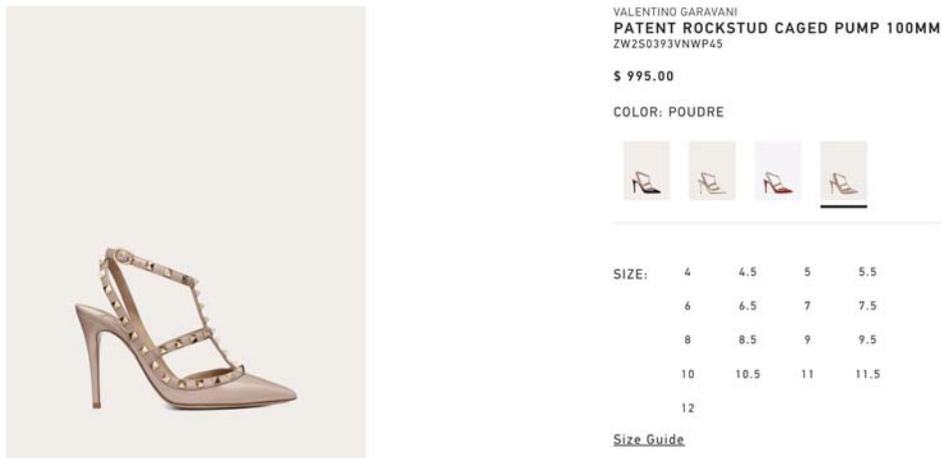


Figure 4⁵¹:



⁵⁰ Example of one of the “dupes” from Figure 1. VALENTINO GARAVANI, https://www.valentino.com/en-us/high-heel-pumps_cod5016545970106939.html#dept=US_MH_RockstudShoes_W (Patent Rockstud Caged Pump 100MM) (last visited Nov. 15, 2020).

⁵¹ Example of one of the “dupes” from Figure 1. HERMES, <https://www.hermes.com/us/en/product/clic-h-bracelet-H700001Fv01PM/> (Clic H Bracelet) (last visited Nov. 15, 2020).

The misunderstanding when it comes to the technical terms used for these products is particularly important because, unlike knockoffs and dupes,⁵² “counterfeits represent a particularly egregious form of copying and as a result, are held to a specific, heightened legal standard.”⁵³ The interchangeable use of these terms denoting counterfeit or infringing goods indicates one of the initial difficulties with identifying and policing improper uses of trademarks. This is problematic because counterfeiters and consumers tend not to have the same understanding as the trademark owners or those policing the marks. And while the fact that a seller or influencer uses the term “dupe” or “knockoff” does not change the way how the law will see it, it is important because sellers, influencers, and consumers may not realize that the type of sale that they are engaging in is even wrongful if they have a skewed understanding as to what the law defines as a counterfeit, and therefore illegal good.

What is even more alarming is that counterfeiters are becoming so good that the infringing goods are nearly indistinguishable from the originals; the counterfeits are becoming increasingly more realistic and are actually being confused with the original.⁵⁴ In the past, it was relatively clear to tell that a bag was a counterfeit or a copy. The price was exceptionally low, the quality was very obviously inferior, and small details were lacking. Today, counterfeit goods are of shockingly good quality and the goods are very often alarmingly similar to the original, to the point that an onlooker and even the owner of the bag would not be able to tell the difference. These products come packaged as if they were purchased from the luxury retailer directly, including the box, dust bag (for purses and leather goods), even down to the pamphlets in the box for care and

⁵² Actual dupes used in the correct sense of the term – *not* counterfeit.

⁵³ *The Counterfeit Report: The Big Business of Fakes*, THE FASHION LAW (Oct. 11, 2019), <https://www.thefashionlaw.com/the-counterfeit-report-the-impact-on-the-fashion-industry/>.

⁵⁴ See YouTube, *9 Amazon Designer Dupes vs. Real Designer Product: Comparing Fakes vs. Real*, (May 16, 2019) <https://www.youtube.com/watch?v=eTP8yClu3iI>.

keeping.⁵⁵ Because counterfeits are getting better and better, they are getting harder to spot and to control.⁵⁶ This also becomes a problem because fakes then make their way onto luxury resale sites like The RealReal and are resold for prices that reflect the resale value for authentic goods.⁵⁷ Thus, the person who originally purchased and then sold the (then knowing) counterfeit good is selling it to an unwitting purchaser to turn a profit for both the seller and the reseller⁵⁸. This ultimately will encourage the counterfeit producer to continue to make these goods because the producer knows that they can profit from the sale of them as if they were authentic originals.⁵⁹

C. What's the big deal: Aside from protecting brands, why should trademark law care about stricter regulation of counterfeit or "dupe" goods?

The first and most obvious reason that trademark law should care about stricter regulation of counterfeit goods is to protect trademark owners against infringers and to allow trademark law to function in the way that it was intended to, as a source identifier. But beyond the obvious reasons, there are health, safety, economic, and even national security risks associated with the promotion, sale, and distribution of counterfeit goods in America.

1. Health and safety risks.

⁵⁵ See YouTube, *9 Amazon Designer Dupes vs. Real Designer Product: Comparing Fakes vs. Real*, (May 16, 2019) <https://www.youtube.com/watch?v=eTP8yClu3iI>.

⁵⁶ *How to Successfully Buy Designer Dupes on DHGate*, KATVIANA (blog post) (last updated Jan. 2021), <https://katviana.com/2020/07/01/how-to-successfully-buy-designer-dupes-on-dhgate/> (The images featured on the post include examples of fake products next to their real counterparts, with some even featuring the false receipts, bags and boxes that sometimes come with the counterfeit items).

⁵⁷ Kestenbaum (Contributor), *The RealReal Sold Me A \$3,600 Fake; Here's Why Counterfeits Slip Through Its Authentication Process*, FORBES, (Oct. 23, 2019), <https://www.forbes.com/sites/richardkestenbaum/2019/10/23/if-fake-bags-are-being-sold-on-the-realreal-how-can-the-resale-business-ever-succeed/?sh=1f1ed8b96acb>.

⁵⁸ The seller refers to the person who originally purchased the counterfeit product then sold it to the consignment, and the reseller refers to the host site (in the case above, The RealReal).

⁵⁹ *The RealReal Sold Me A \$3,600 Fake; Here's Why Counterfeits Slip Through Its Authentication Process*, FORBES, (Oct. 23, 2019), <https://www.forbes.com/sites/richardkestenbaum/2019/10/23/if-fake-bags-are-being-sold-on-the-realreal-how-can-the-resale-business-ever-succeed/?sh=1f1ed8b96acb>.

Because the market for counterfeit goods is a “black market,” or in other words, an unregulated market, the materials used in the goods can present safety risks to consumers.⁶⁰ With purchasing goods from the black market, individuals run the risk of purchasing unsafe products that might be made with dangerous or hazardous materials.⁶¹ There are no safety standards to be held to and usually workers are not guaranteed safe working conditions or fair wages.⁶² This highly unregulated environment presents not only physical dangers but moral questions.⁶³ These risks are less worrisome with goods such as purses or t-shirts, but when it comes to consumer products engineered for safety (like a counterfeit child’s car seat) there can be serious consequences.⁶⁴ And while counterfeit fashion does not pose the same kinds of safety threats as a counterfeit child’s car seat, there are still significant risks that consumers take when purchasing counterfeit goods.⁶⁵ For example, in *Juicy v. IL Keon Oh*, the defendants were selling counterfeit Juicy Couture Jewelry that, in some cases, contained lead.⁶⁶ Because the counterfeit jewelry is produced and sold on the black market, where there is no government regulation or oversight, the seller provided no warning or information about the presence or dangers of lead in jewelry to the consumer, nor were they required to.⁶⁷

Above are just a few examples of the dangers that consumers face when purchasing counterfeit goods, but, in many cases, consumers are not aware that these dangers exist when

⁶⁰ DEPARTMENT OF HOMELAND SECURITY, COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Pamela Boykoff and Clare Sebastian, *Fake and Dangerous Kids Products are Turning Up For Sale On Amazon*, CNN (Dec. 23, 2019), <https://www.cnn.com/2019/12/20/tech/amazon-fake-kids-products/index.html>.

⁶⁵ *Id.*

⁶⁶ *Juicy*, 2010 U.S. Dist. LEXIS 148682. (“Plaintiffs further allege that some or all of the counterfeit jewelry delivered and sold by Defendants contained lead but Defendants failed to provide a precautionary label as required by law.”).

⁶⁷ *Id.*

purchasing counterfeit goods. It seems that if consumers were more aware of the harms and risks associated with purchasing counterfeit goods, it is likely that less people would purchase these goods and the market would lose business. In order to reduce the occurrence of counterfeit purchases, trademark owners, online marketplaces and social media hosts should educate their users and consumers about the dangers of purchasing counterfeit goods. They need to make the counterfeit market look so undesirable that individuals do not want to participate in it. Especially since the younger generations (Gen Z and Millennials) are becoming acutely aware of how their actions have a larger effect.⁶⁸ These younger generations are stepping up and taking action against injustices where they see them and if these consumers were aware of the injustices and the horrible effects that counterfeit sales can have, they just might find them a little bit less desirable.

2. Economic Harm

Another concern is that the market for counterfeit goods causes economic harm to the U.S. market.⁶⁹ “The growth in online sales of counterfeit and pirated goods directly harms – and unfairly competes against – the many legitimate companies that produce, sell and distribute genuine goods, often resulting in lost profits, employee layoffs, and diminished incentive to innovate.”⁷⁰ In a 2018 report, it was estimated that “counterfeit goods displaced about half a trillion dollars of global sales of legitimate companies in 2013 and forecasts this displacement to reach \$1 to \$1.2 trillion by 2022.”⁷¹ According to a Statista report, sales losses from counterfeit

⁶⁸ Kim Parker and Ruth Igielnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What we Know About Gen Z So Far*, PEW RESEARCH CENTER (May 14, 2020), <https://www.pewsocialtrends.org/essay/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far/>.

⁶⁹ DEPARTMENT OF HOMELAND SECURITY, COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES 18 (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_pley_counterfeit-pirated-goods-report_01.pdf.

⁷⁰ *Id.*

⁷¹ DEPARTMENT OF HOMELAND SECURITY, COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES 18 (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_pley_counterfeit-pirated-goods-report_01.pdf.

goods worldwide in 2020 was in excess of \$56.5 billion.⁷² The category with the highest loss was clothing at about \$31.9 billion followed by pharmaceuticals at about \$12.4 billion. These numbers are alarming for many reasons, but particularly because these goods are produced and sold through illegitimate sources, taking away from the global economy and putting valuable dollars often in the hands of organized crime groups and terrorist organizations.

3. National Security, Organized Crime & Terrorism

Purchases of counterfeit goods have also been linked to organized crime and terrorism. According to the Department of Homeland Security's 2020 report on *Combatting Trafficking in Counterfeit and Pirated Goods*, "law enforcement officials have uncovered intricate links between the sale of counterfeit goods and transnational organized crime."⁷³ One such example includes the suspected link between counterfeit goods and the 9/11 attacks.⁷⁴

Investigators even believe that there may be a link between counterfeiting and the September 11, 2001 attacks on New York and Washington. The week after the attacks, fifteen hundred counterfeit vendor stalls – some purportedly owned and operated by Al Qaeda – at the Tri-Border Market in South America, where \$70 million of business is done in cash every day, closed shop. And during a raid in early 2002 on a midtown Manhattan luggage store that was run by a man of Middle Eastern descent and sold fake luxury handbags and watches, New York security expert Andrew Oberfeldt and intellectual property rights lawyer Heather McDonald found a flight manual, simulator program and copies of technical schematics of a bridge.⁷⁵

(citing International Chamber of Commerce, *The Economic Impacts of Counterfeiting and Piracy – Report prepared for BASCAP and INTA*, <https://iccwbo.org/publication/economic-impacts-counterfeiting-piracy-report-prepared-bascap-inta/>).

⁷² *Sales Losses Due to Fake Goods By Industry Worldwide*, STATISTA, (Mar. 2020),

<https://www.statista.com/statistics/1117921/sales-losses-due-to-fake-good-by-industry-worldwide/>.

⁷³ DEPARTMENT OF HOMELAND SECURITY, *COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES 18* (2020),

https://www.dhs.gov/sites/default/files/publications/20_0124_ply_counterfeit-pirated-goods-report_01.pdf.

⁷⁴ Luib, *The Scary Truth You Need to Know Before Buying Counterfeit Luxury Handbags*, BALLER ON A BUDGET, (Mar. 22, 2019), <https://www.theballeronabudget.com/the-scary-truth-you-need-to-know-before-buying-counterfeit-luxury-handbags/>.

⁷⁵ *Id.*

The operation of large-scale counterfeiting requires centralized coordination that leads to a recognized agreement that these operations are run by large scale organized crime groups.⁷⁶ The fact that the purchase of counterfeit goods can fund large scale organized crime and terrorist operations should be enough to discourage consumers from knowingly purchasing these goods, and even to become more diligent in avoiding purchases of unknowingly counterfeit goods.

III. Legal courses of action currently available to trademark owners

Trademark law is a creature of common law that developed out of the use of marks that indicated the source of the product or service being offered. The registration of a Trademark with the United States Patent and Trademark Office offers the best way for brands to protect their brand names and images.⁷⁷ And while trademark law provides some means of redress for those brands whose marks are compromised by others seeking to profit off of the good will of the brand, the problem of counterfeiting does not seem to be going away.⁷⁸ With the rise of the internet, the problem of counterfeiting has only expanded over time, and the more channels for the goods to be showcased on, the worse the problem will continue to get.⁷⁹

Owners of registered marks currently have at least three meaningful ways to challenge an infringing or otherwise damaging use of their trademarks or trade dresses. The first of these options is a pure infringement claim under the Lanham Act.⁸⁰ The second option is a counterfeiting claim under the Lanham Act.⁸¹ The third option is a trademark dilution claim under

⁷⁶ *Fakes are Not Fashionable: A BBB Study of the Epidemic of Counterfeit Goods Sold Online*, BETTER BUSINESS BUREAU, (May 2019), https://www.bbb.org/globalassets/local-bbbs/st-louis-mo-142/st_louis_mo_142/studies/counterfeit-goods/BBB-Study-of-Counterfeit-Goods-Sold-Online.pdf.

⁷⁷ Lanham Act § 32, 15 U.S.C. § 1501(a)(1) (2020).

⁷⁸ See Lanham Act § 32, 15 U.S.C. § 1051 *et seq.*

⁷⁹ See Peter S. Sloane, *Development in the Law: Trademark Vigilance in the Twenty-First Century: An Update*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1197 (2020).

⁸⁰ Lanham Act § 32(a), 15 U.S.C. § 1114 (2020).

⁸¹ Lanham Act § 32(a), 15 U.S.C. § 1127 (2020).

the Lanham Act.⁸² Of these three options, the most impactful for trademark owners is the counterfeiting claim because this makes available additional remedies for the trademark owner and thus has more “bite” when it comes to redress for the infringing use.⁸³

A. Pure Infringement Claim Under the Lanham Act

The first way that a trademark owner can challenge another’s use of its mark is through an infringement claim under the Lanham Act.⁸⁴ The Lanham Act provides that:

Any person who shall, without the consent of the registrant – (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided . . .⁸⁵

To prevail on an infringement claim, the trademark owner must establish that: “(1) it has a valid registered mark; and that (2) Defendants used the mark, (3) in commerce, (4) in connection with the sale or advertising of goods or services, and (5) without Plaintiff’s consent.”⁸⁶

1. Likelihood of Confusion

In addition to the factors above, the trademark owner must establish that the defendant’s use of the mark “is likely to cause confusion . . . as to the affiliation, connection, or association of [Defendants] with [Plaintiff], or as to the origin, sponsorship, or approval of [Defendant’s] goods, services, or commercial activities by [Plaintiff].”⁸⁷ The test for determining likelihood of confusion is known in different circuits by different names, stemming from the factors set forth in

⁸² Lanham Act § 32(a), 15 U.S.C. § 1125(c)(1) (2020).

⁸³ 18 U.S.C. § 2320 (2020).

⁸⁴ 15 U.S.C. § 1114.

⁸⁵ *Id.*

⁸⁶ *Naked Cowboy v. CBS*, 844 F. Supp 2d 510, 515 (S.D.N.Y. 2010).

⁸⁷ *Id.* (quoting *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400, 407 (2d Cir. 2005)).

Polaroid Corp. v. Polarad Electrics Co., which have come to be known in the Second Circuit as the “*Polaroid* factors.”⁸⁸ The list enunciated by the Second Circuit reads as follows:

Where the products are different, the prior owner’s chance of success is a function of many variables: the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant’s good faith in adopting its own mark, the quality of defendant’s product, and the sophistication of the buyer.⁸⁹

Not one single factor of the likelihood of confusion test is dispositive without considering the other factors.⁹⁰ Even where the courts found no actual confusion as to the marks, it is not determinative in that the court might still find likelihood of confusion between the marks based on the other factors.⁹¹

The likelihood of confusion inquiry raises an interesting question when it comes to the social media trend toward purchasing counterfeit goods. With an infringement claim, “the critical determination is ‘whether an alleged trademark infringer’s use of a mark creates a likelihood that the consuming public will be confused as to who makes the product.’”⁹² In cases where the consumer is actively seeking out counterfeit goods, the consumer is not confused as to the source of the goods; they know that it is counterfeit because it is what that consumer is looking to purchase. The *Polaroid* factors even consider the sophistication of the buyer to determine whether that buyer would likely be confused as to the origin of the goods.⁹³ Clearly, the buyer is not confused in this case, but a person viewing that product on that buyer would very likely be

⁸⁸ Each circuit has established its own form of the likelihood of confusion test, each using a substantially similar set of factors. *See e.g.*, *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482 (1st Cir. 1981) (“Pignons” factors); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522 (4th Cir. 1984) (“Pizzeria Uno” factors); *Autozone Inc. v. Strick*, 543 F. 3d 923 (7th Cir. 2008) (“AutoZone” factors); *Polaroid Corp. v. Polarad Elects. Corp.*, 287 F.2d 492 (2d Cir. 1961).

⁸⁹ *Id.* at 495.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Juicy Couture, Inc. v. IL Keun Oh.*, 2010 U.S. Dist. LEXIS 148682 (C.D. Cal., Sept. 10, 2010).

⁹³ *Polaroid*, 287 F. 2d at 495.

confused as to the maker of the goods because the counterfeit item, to the bare eye, looks like the genuine product.

2. Secondary Liability

Secondary liability for trademark infringement under the Lanham Act arises when a defendant “. . . intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.”⁹⁴

There are two different bases of secondary liability recognized by the courts: “(1) contributory infringement, for inducing infringement or knowingly supplying the means to infringe; and (2) vicarious liability imposed under the principles of agency law.”⁹⁵ Additionally, the Restatement of the Law (Third) of Unfair Competition defines contributory infringement as intentionally inducing a third person to engage in infringing conduct, or failure to take reasonable precautions to protect against reasonably anticipated infringing conduct by a third party.⁹⁶

The development of secondary liability for trademark infringement in the context of unfair competition began with the *Eli Lilly* case.⁹⁷ There, the court held that “one who induces another to commit a fraud and furnishes the means of consummating it is equally guilty and liable for the injury.”⁹⁸ From there, the court laid out the test for contributory liability in *Inwood v. Ives Labs.*⁹⁹ In *Inwood*, the court articulated a new knowledge standard, which placed responsibility for contributory liability on those manufacturers or distributors who supplied their goods to one whom

⁹⁴ 15 U.S.C. § 1114(a).

⁹⁵ See *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121 (10th Cir. 2003).

⁹⁶ Restatement of the Law (Third) of Unfair Competition § 27 (AM. LAW INST. 1995).

⁹⁷ *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526 (1924).

⁹⁸ *Id.* (finding petitioner guilty of unfair competition because petitioner was attempting to coerce pharmacists into palming off its products for that of respondent’s brand).

⁹⁹ *Inwood Lab’y, Inc. v. Ives Lab’y, Inc.*, 456 U.S. 844 (1982) (finding no vicarious or contributory liability because the defendant was not intentionally inducing the pharmacists to mislabel its product and there was no showing that defendant continued to supply its product to those pharmacists whom it knew were mislabeling the product).

it “knows or has reason to know is engaging in trademark infringement.”¹⁰⁰ The court further expanded its interpretation of the *Inwood* knowledge standard in the *Hard Rock* case.¹⁰¹ There, Hard Rock Café Licensing Corporation sued the owners and operators of various flea markets for contributory trademark infringement for the sale of counterfeit T-Shirts at the defendants’ flea markets.¹⁰² The court held that the findings did not support a showing of contributory liability on the part of the flea market operators.¹⁰³ The *Inwood* standard remained controlling law until the *Tiffany v. eBay* decision in 2010, which interpreted the *Inwood* standard and acknowledged that while eBay did not engage in contributory liability, the *Inwood* standard did in fact apply to online third-party marketplaces.¹⁰⁴

3. Application of the *Inwood* standard to online third-party marketplaces

Tiffany v. eBay was the first case to consider the application of *Inwood* to the online marketplaces.¹⁰⁵ In *Tiffany*, plaintiffs, Tiffany & Co.,¹⁰⁶ brought an action against defendant, eBay,¹⁰⁷ asserting various causes of action, including trademark infringement, trademark dilution, and false advertising.¹⁰⁸ Tiffany’s trademarks are world famous, and it is particularly known for “its iconic robin’s egg blue boxes and white bows.”¹⁰⁹ Tiffany’s jewelry is sold

¹⁰⁰ *Id.* (“If a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one who it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.”).

¹⁰¹ *See* *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.* 955 F.2d 1143 (7th Cir. 1992) (finding that willful blindness may support a finding of actual knowledge for the purposes of contributory liability).

¹⁰² *Id.* (Court applied the *Inwood* test to determine whether the flea market operators knew or had reason to know that counterfeit “Hard Rock Café” shirts were being sold in its flea markets).

¹⁰³ *Id.*

¹⁰⁴ *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 97 (Tiffany is a “world-famous purveyor of, among other things, branded jewelry.”).

¹⁰⁷ *Id.* (eBay, is an online marketplace that ““provides a venue for the sale [of goods] and support for the transaction[s], [but] it does not itself sell the items’ listed for sale on the site.”).

¹⁰⁸ *Id.*

¹⁰⁹ *Tiffany*, 600 F.3d 93, 97.

exclusively through its own channels and is sold only in new condition.¹¹⁰ Notably, Tiffany does not operate a secondary market in authentic Tiffany jewelry.¹¹¹

Around 2004 and 2005, after becoming aware of the sale of counterfeit merchandise offered on eBay, Tiffany conducted surveys called “Buying Programs,” in which it purchased goods off of eBay to inspect them and determine the number of counterfeits being sold on the site.¹¹² The court found that based on the information collected during the “Buying Programs,” a significant portion of the “Tiffany” sterling silver offered for sale on the eBay website was counterfeit.¹¹³ The court also found that eBay knew “that some portion of the Tiffany goods sold on its website might be counterfeit,” while acknowledging that there were a substantial number of authentic Tiffany goods offered for sale on the eBay website as well.¹¹⁴ Ultimately, the court rejected Tiffany’s claims of direct infringement by eBay,¹¹⁵ and turned to the question of whether eBay could be held secondarily liable for the actions of the users of its platform.¹¹⁶

The *Tiffany* court, being the first to consider whether *Inwood* applies to the online marketplace, found that it does apply, but that eBay was not liable under the *Inwood* test because eBay did not “intentionally induce another to infringe a trademark;” or “continue to provide its service to one whom it knows or has reason to know is engaging trademark infringement.”¹¹⁷ The Court reasoned that eBay satisfied its burden in that it took affirmative steps to remove those

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (73.1% of items purchased during the 2004 Buying Program and 75.5% of the items purchased during the 2005 Buying Program were determined to be counterfeits).

¹¹⁴ *Tiffany*, 600 F.3d at 98.

¹¹⁵ *Id.* at 102 (finding that eBay was never in possession of the items and thus was not a direct infringer based on the definition of direct infringement.); 15 U.S.C. § 1114(1)(a) (“[T]he owner of a mark registered with the Patent and Trademark Office can bring a civil action against a person alleged to have used the mark without the owner’s consent.”).

¹¹⁶ *Tiffany*, 600 F.3d at 105–06.

¹¹⁷ *Id.*

listings that were infringing on Tiffany’s mark after Tiffany had informed eBay of those listings.¹¹⁸ The court further found that the *Inwood* standard, narrowly applied, required that Tiffany show that eBay had more than a just a generalized knowledge that users were posting infringing items on their site, but rather Tiffany had to show that eBay knew of specific instances of infringing conduct *and failed to take action to remove those listings of which it became aware*.¹¹⁹ The court found that Tiffany failed to meet this burden and that eBay was not liable for contributory infringement.¹²⁰

Particularly relevant in this case was the “NOCI” form (Notice Of Claimed Infringement).¹²¹ Under this program, eBay’s policy was to remove the reported listings within twenty-four hours, but the listings were usually removed within half that amount of time.¹²² During the time period in question, eBay “never refused to remove a reported Tiffany listing, acted in good faith in responding to Tiffany’s NOCI’s, and always provided Tiffany with the seller’s contact information.”¹²³ In support of the fact that eBay was taking action to regulate and remove counterfeit postings on its site, the court additionally found that eBay spends as much as \$20 million on measures to prevent counterfeit sales on its site, including “Buyer Protection”¹²⁴ programs, a “Trust and Safety”¹²⁵ department, a “Fraud Engine,”¹²⁶ and the

¹¹⁸ *Id.* at 106–07.

¹¹⁹ *Id.* (*emphasis added*).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Tiffany*, 600 F.3d at 99.

¹²⁴ *Id.* (“In certain circumstances, the buyer would be reimbursed for the cost of the items purchased on eBay that were discovered not to be genuine.”).

¹²⁵ *Id.* (About 4,000 employees “devoted to trust and safety.” Over 200 focusing exclusively on combatting infringement. And over 70 working directly with law enforcement.).

¹²⁶ *Id.* (“[W]hich is principally dedicated to ferreting out illegal listings, including counterfeit listings.” This included manual searches to “identify blatant instances of potentially infringing . . . activity.” Even used “Tiffany-specific filters” to help distinguish authentic from counterfeit Tiffany goods.).

“VeRO Program.”¹²⁷ Without evidence that eBay knew of specific listings and yet failed to take those listings down, the court could not find in favor of Tiffany.¹²⁸

The *Tiffany* case set the stage for infringement claims against third-party marketplaces such as Amazon.¹²⁹ This case opened the door for infringement claims against parties other than those who were directly producing or selling the counterfeit items. A secondary infringement claim is a great tool for brands as a means to police their marks because it allows the trademark owner to pursue a claim against the host website that is, in essence, allowing the infringer to sell its product on the site.¹³⁰ This is particularly useful because oftentimes, in the past, the sellers using third-party marketplaces used false identities to create accounts and thus were difficult to find and pursue legal action against once they delete their listings and accounts from the site.¹³¹ This secondary liability provides trademark owners with the opportunity to obtain a remedy for third-party marketplaces’ failure to police their own sites for counterfeit goods.¹³² With the combined efforts of trademark owners and third-party marketplace sites, infringing listings can be better policed and hopefully can lead to a decrease in the presence of infringing products on marketplace sites in the future.

B. Counterfeiting Claim

The second avenue available for the trademark owner is to pursue a counterfeiting claim under the Trademark Counterfeiting Act of 1984.¹³³ In order to prevail on a counterfeiting claim, the plaintiff must first establish that the defendant is using its federally registered mark, or

¹²⁷ *Id.* (A “notice-and-takedown” system” where trademark owners could report listings containing potentially infringing goods.).

¹²⁸ *Id.*

¹²⁹ *Tiffany*, 600 F.3d 93.

¹³⁰ *Id.*

¹³¹ Suthivarakom, *Welcome to the Era of Fake Products*, NY TIMES, (Feb. 11, 2020), <https://www.nytimes.com/wirecutter/blog/amazon-counterfeit-fake-products/>.

¹³² *Id.*

¹³³ Trademark Counterfeiting Act of 1984, 18 U.S.C. § 2320 (2020).

one that is “substantially indistinguishable” from the federally registered mark.¹³⁴ Next, the plaintiff must establish that the defendant is knowingly using this mark without permission to do so.¹³⁵ Then, the plaintiff must establish that the mark that is being copied is federally registered and used in commerce, that the products are the type covered by the trademark, and that the use is “likely to cause confusion, to cause mistake, or to deceive.”¹³⁶ The Lanham Act defines a counterfeit as “a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.”¹³⁷ Under § 1117 of the Lanham Act, courts have wide discretion when it comes to awarding damages for counterfeiting.¹³⁸ Pursuing a counterfeit claim gives an additional “bite” because the trademark owners are able to recover greater damages from defendants who are counterfeiting trademarked goods as opposed to those who are simply infringing on trademarked goods.¹³⁹ It allows the plaintiff to recover defendant’s profits, damages sustained by the plaintiff, and costs of the action.¹⁴⁰

The problem with a counterfeiting claim is that while the trademark owners are able to recover significant amounts of damages in the form of lost profits and are able to obtain a permanent injunction that legally stops the infringer from being able to use the mark, the real damage has already been done.¹⁴¹ By the time the plaintiff obtains the relief sought, the brand has typically already been damaged by the unauthorized use of the mark, damage that money cannot always compensate for. Even further, the injunctions can’t always stop the wrongdoer either, the behavior that was engaged in was, in most cases, knowingly illegal, so it is not

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 15 U.S.C. § 1127.

¹³⁸ 15 U.S.C. § 1117.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Lauren Maturri, Note: The Devil Wears Nada: How The Current Statutory Damages System For Counterfeit Trademarks As Demonstrated In Chanel, Inc. V. Matos Is Out Of Style, 62 VILL. L. REV. 327, (2017).

unlikely that the infringer might continue this behavior even after the lawsuit is finalized. So, while the counterfeiting claim is one of the better courses of action for a trademark owner to take in terms of remedy, it still can leave trademark owners searching for better ways to protect their marks before the harm is done.

C. Trademark Dilution

The third avenue available to trademark owners is to pursue a trademark dilution claim under the Lanham Act.¹⁴² Under the Lanham Act, the owner of a “famous mark” may enjoin a person from using a “mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark.”¹⁴³ Trademark dilution claims have historically puzzled trademark scholars.¹⁴⁴ The federal antidilution statute “protects ‘famous’ marks from commercial uses that cause ‘dilution of the distinctive quality of the mark.’”¹⁴⁵ There are two main types of dilution claims that a trademark owner may file; the first is “dilution by blurring,” and the second is “dilution by tarnishment.”¹⁴⁶ Trademark owners are more likely to prevail on dilution claims when the junior mark is likely to cause confusion.¹⁴⁷ In other words, a trademark owner is more likely to prevail on its claim of trademark dilution when the copiers’ goods are likely to confuse consumers as to the origin of the good.¹⁴⁸ This is because the purpose of trademarks is source identification.¹⁴⁹ When consumers are confused as to the source of the

¹⁴² 15 U.S.C. § 1125(c)(1).

¹⁴³ *Id.*

¹⁴⁴ Barton Beebe, *The Suppressed Misappropriation Origins of Trademark Antidilution Law: The Landgericht Elberfeld’s Odol Decision and Frank Schechter’s the Rational Basis of Trademark Protection*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP 59* (Rochelle Cooper Dreyfuss and Jane C. Ginsburg, eds., Cambridge University Press, 2014) (misappropriation claims disguised).

¹⁴⁵ *Ty, Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002).

¹⁴⁶ *Id.* (indicating that the third possibility for pursuing a dilution claim – “free riding” – is the most far-reaching of the claims and is not used as frequently); 15 U.S.C. § 1125(c)(2)(B); 15 U.S.C. § 1125(c)(2)(C).

¹⁴⁷ *Ty*, 306 F.3d 509.

¹⁴⁸ *Id.*

¹⁴⁹ 15 U.S.C. § 1127.

product, it is more likely that the infringing product is damaging to the reputation of the registered user and thus more likely to “dilute” the brand by either tarnishing the registered user’s reputation or by blurring the line between the mark owner’s goods and the infringer’s goods.¹⁵⁰

“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.”¹⁵¹ This refers to “the whittling away of the established trademark’s selling power and value through its unauthorized use by others upon dissimilar products.”¹⁵² There are six non-exhaustive factors that the court considers in resolving a dilution by blurring claim.¹⁵³ The six factors are:

(1) the degree of similarity between the mark or trade name and the famous mark; (2) the degree of inherent or acquired distinctiveness of the famous mark; (3) the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; (4) the degree of recognition of the famous mark; (5) whether the user of the mark or trade name intended to create an association with the famous mark; (6) any actual association between the mark and the trade name or famous mark.¹⁵⁴

“Dilution by Tarnishment” is an “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.”¹⁵⁵ In considering a dilution by tarnishment case, the court typically looks further than whether the consumer simply associates the negative-sounding junior mark with the famous mark.¹⁵⁶ The court instead looks to how the reputation of the junior mark and product affects the positive reputation of the senior (famous) mark.¹⁵⁷ Dilution by tarnishment “generally arises when the plaintiff’s trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context likely

¹⁵⁰ *Ty*, 306 F.3d 509.

¹⁵¹ *But see Starbucks Corp. v. Wolfe’s Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009); 15 U.S.C. § 1125(c)(2)(B).

¹⁵² *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1028 (2d Cir. 1989).

¹⁵³ *Starbucks*, 588 F.3d 97.

¹⁵⁴ *Tiffany v. eBay, Inc.*, 600 F.3d 93, 111 (2d Cir. 2010); 15 U.S.C. § 1125(c)(2)(B)(i-vi).

¹⁵⁵ 15 U.S.C. § 1125(c)(2)(C).

¹⁵⁶ *Nordstrom, Inc. v. Nomorerack Retail Group, Inc.*, 2013 U.S. Dist. LEXIS 41810 (W.D. Wash., March 25, 2013).

¹⁵⁷ *Id.* (Finding that there was not sufficient evidence to show that NoMoreRack had a bad reputation and therefore determined that the use of NoMoreRack was not likely to cause dilution by tarnishment to Nordstrom Rack.)

to evoke unflattering thoughts about the owner’s product.”¹⁵⁸ The standard for proving dilution by tarnishment has evolved from “causes actual harm” to “likely to cause dilution,” where the standard remains today.¹⁵⁹

While trademark dilution has been traditionally disfavored and infrequently successful when it comes to infringing uses of another’s trademark, it is conceivable that dilution claims would be a better tool when it comes to uses that are likely to cause confusion, such as counterfeit goods making use of a registered trademark. One such example of how dilution by tarnishment occurs in the fashion industry is through a loss of consumer trust after unwittingly purchasing a counterfeit good with the belief that the product is that of the trademark owner.¹⁶⁰ For example, “an Incopro report found 26% of shoppers have mistakenly bought a counterfeit good, and 52% of consumers have lost trust in a brand after buying a fake item online.”¹⁶¹ This type of confusion combined with the poor quality of the infringing good diminishes the value of the brand because the consumer now associates the poor quality of the counterfeit good with the brand name of the trademarked good.¹⁶²

IV. So, what’s the problem: Why are the available legal remedies not enough and what else can brands do?

There is a new problem that makes it even more difficult for both trademark owners and online marketplaces alike, which is the role that social media plays in both promoting and

¹⁵⁸ *Id.* (quoting *Deere & Co. v. MTD Prods., Inc.*, 41 F. 3d 39, 43 (2d Cir. 1994)).

¹⁵⁹ *V Secret Catalogue, Inc. v. Moseley*, 605 F. 3d 382 (6th Cir. 2010) (Finding the mark likely to cause dilution, defendant was using the name “Victor’s Little Secret” to sell lingerie products. International lingerie company Victoria’s Secret sued for dilution by tarnishment. “At least 8 federal cases in 6 jurisdictions that conclude that a famous mark is tarnished when its mark is semantically associated with a new mark that is used to sell sex-related products.”)

¹⁶⁰ Tatiana Walk-Morris, *Can Retailers Combat Consumer Desire for Counterfeits?*, RETAIL DIVE (Feb. 11, 2020), <https://www.retaildive.com/news/can-retailers-combat-consumer-desire-for-counterfeits/571695/>.

¹⁶¹ *Id.*

¹⁶² *Id.*

supplying counterfeit goods.¹⁶³ While the above legal options are available to trademark owners and provide a starting point for reducing the number of counterfeit sales on the internet, they do not solve the main issues. One of the main issues is that there is a social media trend toward purchasing counterfeits and that social media influencers do not face the same type of liability that third-party marketplaces do. Another issue is that it is often difficult for trademark owners to pursue these legal courses of action against every seller of counterfeit goods, especially since many sellers are unidentified or are impossible to track down.

A. Social Media & Counterfeits.

With the rising trend of designer dupes on social media, brands need to do more to protect their marks and to combat counterfeits. But there is such an abundance of bloggers, influencers, and consumers alike posting about their counterfeit goods, so it is near impossible for brands to stop every single one. Piers Barclay, Chief Strategy Officer at Incopro, said of the increasing prevalence of counterfeit luxury goods, “[w]ith the rise of social media . . . and people trying to show very aspirational lifestyles, that’s a big driver of it.”¹⁶⁴ Fifteen-year-old teenagers are likely not purchasing \$1,720.00 Cartier rings, nor are their parents purchasing them for their children. But today, children can go on Tik Tok, find their favorite influencer wearing a “dupe” of the ring, and follow the link provided by the influencer, where the fifteen-year-old can purchase a copy of the ring for \$20, and in many cases, the influencer will make a commission off the sale of that ring.¹⁶⁵

¹⁶³ *Amazon Sues Influencers, Marketplace Sellers Over Alleged Counterfeit Scheme*, THE FASHION LAW (Nov. 12, 2020), <https://www.thefashionlaw.com/amazon-sues-influencers-marketplace-sellers-over-alleged-counterfeit-scheme/>.

¹⁶⁴ Walk-Morris, *Can Retailers Combat Consumer Desire for Counterfeits?*, (Feb. 11, 2020), <https://www.retaildive.com/news/can-retailers-combat-consumer-desire-for-counterfeits/571695/>.

¹⁶⁵ Love Ring, Cartier.com, (last accessed Jan. 20, 2021), <https://www.cartier.com/en-us/collections/jewelry/collections/love-all/b4084600-love-ring.html>.

In order to stop the trend of social media influencers and bloggers promoting and encouraging the purchase of counterfeit goods, influencers and bloggers should be held liable for the contribution to the counterfeit sale in the same way that online third-party marketplaces are liable to trademark owners for contributory infringement of a mark. Because the purchase of a counterfeit good in and of itself is not “illegal,” there must be more emphasis and policing on the end of the seller, and ultimately on the promoter of the goods. If influencers faced more serious consequences for promoting counterfeit goods and if they were aware of the liability that they could face for promoting these types of products, the behavior would likely decrease drastically.

Social media sites typically have policies that detail what kind of activities are permissible and what types of posts are allowed and not allowed on their sites.¹⁶⁶ TikTok, for example, has a policy that does not allow advertising or user content that “violates or infringes someone else's copyrights, trademarks, or other intellectual property rights.”¹⁶⁷ While this policy remains in effect, it is up to other users to report these types of videos on the app and TikTok will remove them at their discretion. But it is not clear from this language whether a video reviewing a “designer dupe” on the platform would be in violation of this policy, or if individual users are even aware of or understand this policy or that a designer dupe is even in violation of the policy at all.¹⁶⁸ Social media needs to be the focus of these efforts because a significant portion of the traffic to counterfeit sellers comes from “influencers” or “bloggers” who use social media sites to promote the links that they find with the high-quality duplicates that the consumer is looking for. Placing direct liability on the influencers that make these videos would probably result in a decrease in the

¹⁶⁶ See, e.g., Community Guidelines, Tik Tok, <https://www.tiktok.com/community-guidelines?lang=en>; Help Center -- Privacy and Safety Center, Instagram, <https://www.facebook.com/help/instagram/termsfuse>.

¹⁶⁷ Graham, *TikTok Teens are Obsessed with Fake Luxury Products*, CNBC.com, (Mar. 1, 2020), <https://www.cnbc.com/2020/02/29/tiktok-teens-are-obsessed-with-fake-luxury-products.html>; Community Guidelines: Intellectual Property Violations, TikTok, <https://www.tiktok.com/community-guidelines?lang=en>.

¹⁶⁸ *Id.*

popularity of flaunting and sharing these products and links, ultimately resulting in a decrease in the overall occurrence of these types of purchases. After all, these people, unlike the unnamed Amazon sellers, have real livelihoods on the line, and their real names and reputations. It is probably a bad look, however, for brands to go after small influencers who ultimately are idolizing their product and just probably cannot afford it. Brands do not want to ostracize fans or customers, and they similarly have a reputation to uphold and a trust that they want to have with consumers.

Instead, another route could be to hold social media sites secondarily liable for the behavior of the users on its platform in a similar way to how online third-party marketplaces are subject to liability for the actions of its users. If these sites were subject to liability on the basis of their users, they would likely be more inclined to shut down these accounts for counterfeiting. Just as third-party marketplaces are in the best position to monitor the activity that occurs on its site, so are social media platforms in the best position to monitor the activity that occurs on its platforms. Social media sites have already shown that they are capable of monitoring and taking down activity that it determines is violative of its guidelines based on user tags, comments, and more.¹⁶⁹ In this respect, it should be fairly easy for these platforms to implement a similar method to monitor posts about counterfeits, designer dupes, and the like. By putting the responsibility on the sites, it would eliminate the fear of brands losing customers for “going after fans” and would make it much easier for brands to control their marks since it would be near impossible to sue hundreds of thousands of individual actors on these platforms.¹⁷⁰

¹⁶⁹ See, e.g., Hatmaker, Perez, *Facebook Blocks Hashtags For #Sharpiegate, #Stopthesteal Election Conspiracies*, TechCrunch.com, (Nov. 5, 2020), <https://techcrunch.com/2020/11/05/facebook-blocks-sharpiegate-hashtag-election-conspiracies/>; Christie, *Instagram Censored One of These Photos But Not The Other We Must Ask Why*, (Oct. 19, 2020), <https://www.theguardian.com/technology/2020/oct/20/instagram-censored-one-of-these-photos-but-not-the-other-we-must-ask-why>; Lewak, *How Social Media Censorship ‘Silences’ Conservative Thoughts*, NYPost.com, (Oct. 10, 2020), <https://nypost.com/article/social-media-censorship-conservatives/>.

¹⁷⁰ Graham, *TikTok Teens are Obsessed with Fake Luxury Products*, CNBC.com, (Mar. 1, 2020), <https://www.cnbc.com/2020/02/29/tiktok-teens-are-obsessed-with-fake-luxury-products.html>.

B. What are marketplaces doing: A look at Amazon’s response.

Amazon has been taking steps to remedy these types of issues, but, as we have seen, there is no affirmative responsibility for third-party online marketplaces to accept direct liability for the infringing use of another’s mark by a third-party seller.¹⁷¹ Some of the measures that Amazon has taken include the Amazon Brand Registry,¹⁷² a service called Transparency,¹⁷³ and Project Zero.¹⁷⁴

Amazon broke ground recently, filing a suit against a pair of influencers in the United States District Court Western District of Washington at Seattle alleging, among other things, False Designation of Origin and False Advertising, and violations of the Washington Consumer Protection Act.¹⁷⁵ This is one of the first major actions taken against influencers for the promotion and sales of counterfeit goods. This case details the types of activities that are occurring with influencers who are in direct contact with Amazon third-party sellers in promoting and selling counterfeit goods through Amazon.¹⁷⁶

While Amazon and other online third-party marketplace sellers are taking the initiative to cleanse their sites of counterfeits and attempt to regain consumer trust, influencers are taking to

¹⁷¹ Evans, *Amazon’s Investments To Curb Counterfeiting*, (Nov. 23, 2020), <https://www.digitalcommerce360.com/2020/11/23/amazon-cracks-down-on-a-creative-counterfeit-scheme-with-new-lawsuit/>.

¹⁷² Amazon Brand Registry, Amazon.com, (last accessed Jan. 20, 2021) <https://brandservices.amazon.com/brandregistry>; Evans, *Amazon’s Investments To Curb Counterfeiting*, (Nov. 23, 2020), <https://www.digitalcommerce360.com/2020/11/23/amazon-cracks-down-on-a-creative-counterfeit-scheme-with-new-lawsuit/> (Allows registered trademark owners to register with Amazon and provides a means for reporting listings that infringe on the trademark owner’s mark(s) and other useful tools for combatting counterfeit listings and sellers on Amazon).

¹⁷³ Transparency, Amazon.com, (last accessed Jan. 20, 2021) <https://brandservices.amazon.com/transparency>; Evans, *Amazon’s Investments To Curb Counterfeiting*, (Nov. 23, 2020), <https://www.digitalcommerce360.com/2020/11/23/amazon-cracks-down-on-a-creative-counterfeit-scheme-with-new-lawsuit/>.

¹⁷⁴ Project Zero, Amazon.com, (last accessed Jan. 20, 2021) <https://brandservices.amazon.com/projectzero>; Evans, *Amazon’s Investments To Curb Counterfeiting*, (Nov. 23, 2020), <https://www.digitalcommerce360.com/2020/11/23/amazon-cracks-down-on-a-creative-counterfeit-scheme-with-new-lawsuit/>.

¹⁷⁵ 15 U.S.C. § 1125(a); RCW 19.86.010, *et seq.*

¹⁷⁶ *See* Complaint, Amazon v. Fitzpatrick, (W.D. Wash. 2020) (No. 2:20-cv-01662).

social media and finding ways to dodge Amazon and others' efforts.¹⁷⁷ Influencers are increasingly taking to social media sites like Instagram, YouTube and even TikTok to promote their counterfeit wares, either directly or in concert with third-party sellers.¹⁷⁸ Initially, this took the form of Instagram posts and blog posts indicating the Amazon links where followers could find what influencers call "designer dupes," that were available for short periods of time before Amazon was able to flag the post and remove it for violating user guidelines.¹⁷⁹ These Instagram and blog posts were virtually the only way to find these products on Amazon, as the sellers would refrain from using identifying terms that would alert Amazon to the infringing posts.¹⁸⁰

But as Amazon improved its policing, sellers, with the help of influencers began finding more creative ways to post counterfeit products without being caught by Amazon.¹⁸¹ One such way that this was made possible was through the use of "hidden links."¹⁸² Hidden links, as described by an influencer who formerly went by the name "@styleeandgrace" is essentially a scheme in which the consumer is directed by the influencer to use an Amazon link to purchase what looks to be a generic item, but is in fact a counterfeit designer item.¹⁸³ Bloggers and influencers use hidden links to avoid detection by Amazon and other marketplaces' programs that filter out infringing listings. The influencer "@styleeandgrace" specifically explained "hidden links" to her followers, stating that "[y]ou order a certain product that looks nothing like the designer dupe in order to hide the item from getting taken down and orders being canceled."¹⁸⁴ These bloggers know that what they are doing is evading Amazon's system and this is exactly

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Complaint, Amazon v. Fitzpatrick, (W.D. Wash. 2020) (No. 2:20-cv-01662).

¹⁸² *Id.* at 3.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

what they want to do.¹⁸⁵ These individuals even disguise the names of sites and products in their blog posts as a way to avoid detection from Amazon and others.¹⁸⁶

Figure 6¹⁸⁷:



The intention in doing this is to evade Amazon’s counterfeit detection tools, thus allowing the sellers to continue operating their counterfeit businesses with a lower chance of being reported and/or taken down by Amazon.¹⁸⁸ This “hidden links” scheme is just one example of how sellers along with influencers are employing creative, deceitful tactics to attempt to continue engaging in their illegal behavior despite efforts by marketplaces like Amazon to put an end to this type of

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* Instead of using the proper name “Amazon” in the blog post describing what a hidden link is, Fitzpatrick intentionally identifies Amazon as “ama*zon” and uses “du*pes” in place of “dupe.”

¹⁸⁷ Example of hidden link taken from Defendant’s (now disabled) Instagram account, @styleandgrace. Complaint, Amazon v. Fitzpatrick, (W.D. Wash. 2020) (No. 2:20-cv-01662). (Because these links are so readily taken down, it is difficult to refer back to these accounts as proof of the infringing behavior).

¹⁸⁸ *Id.*

activity on its sites.¹⁸⁹ This type of activity forces Amazon to expend additional resources in addition to its current methods of policing counterfeits, but it is not a task that can be accomplished singlehandedly.¹⁹⁰

V. Conclusion

While Amazon's efforts in *Amazon v. Fitzpatrick* begin to bring to light the cross-section of social media and counterfeiting, it is only the beginning.¹⁹¹ The root of the problem is that people *want* counterfeit goods. And as long as people continue to want them, manufacturers will make them, sellers will provide them, and influencers will promote them.

In today's world, where social media is king, counterfeit goods provide people with the means to portray an affluent, luxurious lifestyle that they long to achieve, but cannot afford. In order to effectively combat the counterfeit market, trademark owners, marketplaces and social media sites must come together to battle counterfeiting from all angles. No one method alone will be able to eliminate the presence of counterfeits and counterfeiters. In reality, there is no way to entirely eradicate this behavior. But when the channels through which these bad actors provide and promote counterfeit goods come together to fight this growing problem, it is more likely that the efforts will be effective.

¹⁸⁹ *Id.* at 14 (“ . . . Fitzpatrick deceived Amazon and its customers by working with Seller Defendants to remove indicia of infringement from the Amazon offer listing page in order to evade Amazon’s fraud and counterfeit detection tools.”).

¹⁹⁰ *See supra* note 8.

¹⁹¹ Complaint, *Amazon v. Fitzpatrick*, (W.D. Wash. 2020) (No. 2:20-cv-01662).