

**ONLINE MARKETPLACES' RESPONSIBILITY FOR HARM FROM  
COUNTERFEIT COSMETICS\***

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*Products liability law was implemented to protect consumers injured by harmful products. But what happens when victims cannot contact the companies that created or supplied the product that injured them? Such is the case when consumers are injured by counterfeit products purchased through online third-party marketplaces. Consumers are unable to contact the manufacturers who created these products, because their information is not available on the marketplace or on product packaging, or the sellers of these harmful counterfeits, since they use false contact information and can easily disable their marketplace accounts. As a result, consumers are left without a remedy. By adapting contributory liability rules commonly applied to intellectual property law and liability requirements imposed by the Digital Millennium Copyright Act (“DMCA”), courts can include online third-party marketplaces within the category of potentially liable parties and provide victims with a means to hold those responsible for the injuries they caused.*

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\* Second Prize Winning Piece, 2020 Berkeley Technology Law Journal Student Writing Competition.

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### I. INTRODUCTION

Counterfeit products have existed for centuries. Consumers are likely familiar with counterfeit products in the fashion industry, yet

counterfeits exist in a variety of other industries, including the cosmetic industry. Counterfeit cosmetics are more harmful than counterfeit fashion because, instead of being low quality or wearing out after a short period of use, counterfeit cosmetics can negatively impact the health and safety of those who purchase and use them.<sup>1</sup>

This Article addresses counterfeit cosmetics, not makeup dupes. Makeup dupes and counterfeit cosmetics are, on the surface, similar concepts. But, makeup dupes are lower priced cosmetic products that function similarly to higher-end cosmetic products (primarily in color and consistency),<sup>2</sup> while counterfeit cosmetics are products created by a third-party to copy the look of genuine products in an attempt to pass the lesser quality products off as the authentic product.<sup>3</sup> While counterfeit packaging and product colors may look similar to those of the authentic product, often counterfeit products come from countries and factories with insufficient (or nonexistent) safety and quality regulations.<sup>4</sup> In some cases, counterfeit cosmetics have been found to contain high levels of bacteria, animal waste,<sup>5</sup> and lead.<sup>6</sup> Many consumers are unaware of these differences in regulation and ingredient quality and, to the untrained eye, the counterfeit product often looks identical to the authentic product. As a result, consumers who willingly (or unknowingly) use counterfeit cosmetics risk adverse results including allergic reactions, blisters,

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<sup>1</sup> See Jennifer Lei, *Makeup or Fakeup: The Need to Regulate Counterfeit Cosmetics through Improved Chinese Intellectual Property Enforcement*, 88 *FORDHAM L. REV.* 309, 327–28 (2019).

<sup>2</sup> Samantha Primeaux, *Makeup Dupes and Fair Use*, 67 *AM. U. L. REV.* 891, 893 (2018).

<sup>3</sup> See *id.*

<sup>4</sup> Aliza Karetnick & Kelly Bonner, *Counterfeit Cosmetics: Fake Beauty, Real Danger*, *DUANE MORRIS: BYLINED ARTICLES* (Apr. 25, 2018), [https://www.duanemorris.com/articles/counterfeit\\_cosmetics\\_fake\\_beauty\\_real\\_danger\\_0418.htm](https://www.duanemorris.com/articles/counterfeit_cosmetics_fake_beauty_real_danger_0418.htm) [<https://perma.cc/T5ZV-C6SV>].

<sup>5</sup> Kimberly Holland, *Counterfeit Makeup a Rip-Off . . . and a Health Danger*, *HEALTHLINE: HEALTH NEWS* (Apr. 25, 2018), <https://www.healthline.com/health-news/counterfeit-makeup-a-health-danger> [<https://perma.cc/MH8V-PEB7>].

<sup>6</sup> Karetnick & Bonner, *supra* note 4.

disfigurement,<sup>7</sup> and infections.<sup>8</sup> Furthermore, authentic brands suffer decreased sales and tarnished goodwill from the existence and sale of counterfeit products.

Who should be liable for harm caused by counterfeit products sold through online marketplaces? The traditional answers are the manufacturer and seller. The manufacturer knowingly creates a counterfeit product while the seller knowingly sells the counterfeit product. But, does an online marketplace owner have a responsibility to police its marketplace and take down listings for counterfeit cosmetics? This Article argues that the answer to that question is yes. Online marketplaces should be responsible for consumer harm caused by counterfeit cosmetics sold through their third-party marketplaces. Even Amazon itself, arguably the best-known website with a third-party marketplace, has stated that “the law relating to the liability of online service providers is currently unsettled”<sup>9</sup> and has admitted that it “could be liable for fraudulent or unlawful activities of sellers.”<sup>10</sup> Even if this is true, traditional products liability law only holds a party liable for harm if it has control over the product, but repeatedly courts have not found online marketplaces to exert that requisite control.<sup>11</sup> Due to this gap in traditional products liability law, courts should adopt contributory liability rules more commonly used in intellectual property law to provide a basis to hold a marketplace owner liable for consumer harm.

The Digital Millennium Copyright Act (“DMCA”) provides an excellent framework for the type of contributory liability that should

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<sup>7</sup> Holland, *supra* note 5.

<sup>8</sup> Sarah Tayna Official, *\$6 KYLIE JENNER KYSHADOW PALETTE | REAL VS FAKE | I ALMOST LOST MY EYE!*, YOUTUBE (Sept. 22, 2016), [https://www.youtube.com/watch?v=Qjxtharf\\_AA](https://www.youtube.com/watch?v=Qjxtharf_AA) [<https://perma.cc/ZGE7-J43W>].

<sup>9</sup> Amazon.com, Inc., Annual Report (Form 10-K) (Feb. 1, 2019).

<sup>10</sup> *Id.*

<sup>11</sup> See *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 501 (M.D. Pa. 2017); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 144 (4th Cir. 2019); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197, at \*1 (D.N.J. July 24, 2018); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 400 (S.D.N.Y. Aug. 27, 2018); *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425 (6th Cir. 2019).

be assigned to online marketplaces.<sup>12</sup> Online marketplaces may argue that they do not have the ability to police their entire product catalog provided by third-party sellers. Yet, this is the exact argument that internet service providers (“ISPs”) assert when attempting to skirt responsibility for copyright-infringing works posted on websites they host.<sup>13</sup> For this reason, the DMCA implemented the notice-and-takedown procedure, under which ISPs are not liable for contributory infringement unless they refuse to remove claimed infringement after they are notified of its existence.<sup>14</sup> By using an approach that mirrors the DMCA, online marketplaces could avoid liability for counterfeit products unless they refuse to remove these products from their marketplace once they are notified that the products are counterfeit, and, in the case of counterfeit cosmetics, harmful.

This Article argues that marketplace owners should be liable for harm caused to their customers by counterfeit cosmetics. The Article first outlines the culture surrounding counterfeit cosmetics and the protections afforded to companies whose products are counterfeited. Later in Part II, the Article describes the differences between trademark law and product liability for marketplace owners. Finally, Part III, using Amazon as an example, suggests a new basis for contributory product liability based on an established two-part test for contributory trademark liability. This test allows consumers to seek recourse against third-party marketplace owners, such as Amazon, that exercise control over the products sold in their marketplaces. This proposed test can be applied to counterfeit products other than cosmetics, but cosmetics act as a clear illustration of the unknown physical harm that consumers are currently left to suffer with no clear resolution.

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<sup>12</sup> 17 U.S.C. § 1201.

<sup>13</sup> See Salil K. Mehra & Marketa Trimble, *Secondary Liability, ISP Immunity, and Incumbent Entrenchment*, 62 AM. J. COMP. L. SUPP. 685, 689 (2014).

<sup>14</sup> 17 U.S.C. § 512(c).

## II. BACKGROUND

From Cleopatra's kohl eyeliner<sup>15</sup> to Japanese geishas' white face makeup made from nightingale droppings,<sup>16</sup> cosmetics have played an important cultural role for millennia. People have used cosmetics to enhance physical beauty since as early as 6,000 BCE.<sup>17</sup> Early forms of Egyptian cosmetics were made directly from natural ingredients like nuts mixed with animal fat.<sup>18</sup> Later, women created cosmetics at home and applied them in private as the practice was frowned upon, likened to a form of deception.<sup>19</sup> Now, creating cosmetics, applying products, and showcasing cosmetic looks is a form of artistry and a profitable career for professionals from chemists to social media influencers. In fact, the United States cosmetic industry is valued at \$49.2 billion per year<sup>20</sup> with the global products market estimated to be valued at \$805 billion within the next four years.<sup>21</sup> But, even with the spread of makeup's popularity, the United States does not effectively protect its citizens from harm caused by cosmetics. While the Food and Drug Administration ("FDA") has the authority to regulate cosmetics under the Food, Drug, and Cosmetic Act ("FDCA"), the agency does not assert its authority over the cosmetic industry.<sup>22</sup>

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<sup>15</sup> Alastair Sooke, *How Ancient Egypt Shaped our Idea of Beauty*, BBC, <https://www.bbc.com/culture/article/20160204-how-ancient-egypt-shaped-our-idea-of-beauty> [<https://perma.cc/S8ES-BA5J>] (last visited Oct. 26, 2020).

<sup>16</sup> JOHN DOUGILL, *KYOTO: A CULTURAL HISTORY* 22 (2006).

<sup>17</sup> *The Power of Makeup*, BODYLORE, <https://sites.wp.odu.edu/bodylore/2019/03/04/the-power-of-makeup/> [<https://perma.cc/BA3Q-PN2S>] (last visited Aug. 29, 2020).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Revenue of the Cosmetic/Beauty Industry in the United States from 2002 to 2020 (in Billion U.S. Dollars)*, STATISTICA, <https://www.statista.com/statistics/243742/revenue-of-the-cosmetic-industry-in-the-us/> [<https://perma.cc/DB7L-QMFR>] (last visited Oct. 11, 2020) (valuing the United States' cosmetic industry in 2020 at \$49.2 billion).

<sup>21</sup> Lei, *supra* note 1, at 325.

<sup>22</sup> See Julie Mueller, *Pulling Our Hair Out and Glossing Over the Problem: A Call to Strengthen the FDA's Power to Regulate Cosmetics Through an Amendment to the Federal Food, Drug, and Cosmetic Act*, 79 U. PITT. L. REV. 317, 318 (2017).

*A. How YouTube Plays a Role in Influencing Consumers' Views on Counterfeit Cosmetics*

Beauty and technology work together to appeal to consumers' wants and needs. Consumers can browse countless cosmetic brands online and in-store. From the comfort of their homes, consumers can use a mobile application to find their perfect foundation shade,<sup>23</sup> join a subscription box service to receive new products each month,<sup>24</sup> and click through targeted advertisements on social media to purchase advertised items.

YouTube has become an epicenter for beauty-related content. Content creators, some with upwards of ten million subscribers,<sup>25</sup> post near-daily videos on topics such as new brand releases,<sup>26</sup> makeup hauls,<sup>27</sup> makeup tutorials,<sup>28</sup> makeup and skincare brand

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<sup>23</sup> *bareMinerals MADE-2-FIT*, BAREMINERALS, <https://www.bareminerals.com/makeup/makeup-featured/made-2-fit/> [<https://perma.cc/SCV8-F3MU>] (last visited Oct. 17, 2018).

<sup>24</sup> IPSY, <https://www.ipsy.com/> [<https://perma.cc/6F2H-D226>] (last visited Oct. 17, 2018); BOXYCHARM, <https://www.boxycharm.com/> [<https://perma.cc/VS55-DSNX>] (last visited Oct. 17, 2018).

<sup>25</sup> See, e.g., Jeffreestar, YOUTUBE, <https://www.youtube.com/user/jeffreestar> [<https://perma.cc/C4FH-HTDL>] (last visited Oct. 19, 2018) (showing 11,012,144 subscribers); NikkieTutorials, YOUTUBE, <https://www.youtube.com/user/NikkieTutorials> [<https://perma.cc/B82U-3S5D>] (last visited Oct. 19, 2018) (showing 11,043,226 subscribers); Zoe Sugg, YOUTUBE, <https://www.youtube.com/user/MoreZoella> [<https://perma.cc/Z6E2-A2PH>] (last visited Oct. 19, 2018) (showing 12,004,435 subscribers).

<sup>26</sup> Beauty News, *BEAUTY News – 19 October 2018 | New Releases & Updates*, YOUTUBE (Oct. 18, 2018), <https://youtu.be/MhemKJi6ciY?t=600> [<https://perma.cc/T2FA-QDGZ>].

<sup>27</sup> ThatGirlShaeXo, *HUGE Fenty Beauty Haul + Trying It ALL On*, YOUTUBE (Sept. 16, 2017), <https://www.youtube.com/watch?v=L5DIMN-Ar4c> [<https://perma.cc/QW7L-5XLK>].

<sup>28</sup> PONY Syndrome, *Kylie Jenner Transformation Make-up (With sub) 카일리 제너 커뷰 메이크업*, YOUTUBE (Sept. 2, 2016), <https://www.youtube.com/watch?v=dqOsYjKtrZI> [<https://perma.cc/5BS2-5C98>].

collaborations,<sup>29</sup> subscription box contents,<sup>30</sup> monthly favorites,<sup>31</sup> and first impressions.<sup>32</sup> Some creators focus on providing objective and unbiased reviews;<sup>33</sup> others take advantage of sponsorships to create their content.<sup>34</sup> In fact, beauty influencers drive ninety-seven percent of cosmetics-related conversations across various social media platforms.<sup>35</sup>

While some creators willingly purchase and test counterfeit cosmetics to see how well they work compared to their authentic counterparts,<sup>36</sup> others believe they purchased the authentic product for a lower price and subsequently discover they actually purchased the counterfeited product—suffering harm as a result.<sup>37</sup> Persuaded by these influencers, viewers take this information and decide whether to purchase the counterfeit items themselves.

This increase in accessibility to information about cosmetics, combined with the recent boom in social media and online sharing, has created two different responses for consumers desiring name-brand, expensive cosmetic products at a lower price.

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<sup>29</sup> Revolution Beauty, *REVOLUTION | NEW REVOLUTION SKINCARE MORNING + EVENING ROUTINE!*, YOUTUBE (Aug. 29, 2018), [https://www.youtube.com/watch?v=WtduYn\\_Ajg0](https://www.youtube.com/watch?v=WtduYn_Ajg0) [<https://perma.cc/6JWD-NRF9>].

<sup>30</sup> KathleenLights, *October Boxycharm Unboxing (Try-on Style) | 2018*, YOUTUBE (Oct. 17, 2018), <https://www.youtube.com/watch?v=3fnVLQLcnOI&t=234s> [<https://perma.cc/4TBG-CTBU>].

<sup>31</sup> Joan Kim, *SEPTEMBER FAVORITES 2018*, YOUTUBE (Oct. 2, 2018), <https://www.youtube.com/watch?v=i8F3R8VF9Po> [<https://perma.cc/M832-WE5B>].

<sup>32</sup> STEPHANIE TOMS, *FULL FACE OF FIRST IMPRESSIONS – TESTING NEW HIGH END MAKEUP!*, YOUTUBE (Sept. 4, 2018), [https://www.youtube.com/watch?v=IWENY9yq\\_Ck](https://www.youtube.com/watch?v=IWENY9yq_Ck) [<https://perma.cc/QA9M-CDFZ>].

<sup>33</sup> Stephanie Nicole, *MORPHE BRAND REVIEW*, YOUTUBE (Feb. 23, 2016), <https://www.youtube.com/watch?v=PAP6GdyI1B8> [<https://perma.cc/NLC9-9X54>].

<sup>34</sup> Pixielocks, *HOW YOUTUBERS MAKE MONEY: Ads, Sponsorships, Networks, and more!*, YOUTUBE (Oct. 21, 2017), <https://youtu.be/3b-Q0BNUGz4d> [<https://perma.cc/ZXY9-8S5Z>].

<sup>35</sup> Lei, *supra* note 1, at 326.

<sup>36</sup> Sophdoeslife, *FAKE VS REAL-MY OWN PALETTES HAVE FAKES ON WISH? I ORDERED ONE. WHAT NEXT* □ | *sophdoesnails*, YOUTUBE (Oct. 15, 2018), <https://www.youtube.com/watch?v=IZTjaUHMMvo> [<https://perma.cc/AY6Z-6DE4>].

<sup>37</sup> Haven Cruise, *I bought a FAKE Beauty Product & had an ALLERGIC REACTION! What Was it?! :(*, YOUTUBE (July 29, 2017), [https://www.youtube.com/watch?v=Jt8W2Z\\_cSbU&t=3s](https://www.youtube.com/watch?v=Jt8W2Z_cSbU&t=3s) [<https://perma.cc/F2JG-NG5L>].

Consumers looking to save money will turn either to makeup dupes, or counterfeit makeup, whether knowingly or unknowingly.<sup>38</sup>

### B. Counterfeits

Counterfeit cosmetics copy an authentic product's packaging without attempting to duplicate its quality.<sup>39</sup> As a result, counterfeiters can pass off their infringing product as a less expensive alternative to the authentic makeup product.<sup>40</sup> Counterfeiters often save money by using lower quality ingredients, which have the potential to endanger consumers' health and safety.<sup>41</sup>

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<sup>38</sup> A makeup dupe is a less expensive, drugstore alternative that generally offers the same color and formula as the original makeup product but does not necessarily come in the same packaging as the original. See Primeaux, *supra* note 2. Specifically in the legal context:

Within the purview of trademark law, some commentators have recognized that most makeup dupes could constitute either trademark infringement or trade dress infringement. While the elements to establish a prima facie case for either type of infringement are parallel, makeup dupes most often imitate the distinctive packaging of popular high-end products, so it is more likely that lawsuits involving makeup dupes will center on trade dress infringement.

*Id.* at 894 (citations omitted). Some makeup dupes, like the Etude House Double Lasting Foundation alternative to the Estee Lauder Double Wear Foundation, come in dissimilar packaging. But other makeup dupes, like the Makeup Revolution Light and Shade Palette alternative to the Kat Von D Shade + Light Palette, take advantage of the original brand's design. Rachel Krause, *Kat Von D Just Called This Brand Out On Instagram – Here's Why*, REFINERY29 (Mar. 20, 2017, 1:45 PM), <https://www.refinery29.com/en-us/2017/03/146074/kat-von-d-makeup-revolution-shade-light-palette-copied-feud> [<https://perma.cc/9ZP5-BNZF>]. For the consumer, however, the ultimate goal is to find a product that creates the same end result—whether the packaging is the same is generally immaterial. Primeaux, *supra* note 2, at 892–93. To note, this Article does not consider makeup dupes in its analysis, as these are legitimate products that did not prompt this Article's legal proposal. See Macaela Mackenzie, *Makeup Dupes Are Unknowingly Being Bought by Consumers*, ALLURE (July 24, 2017), <https://www.allure.com/story/how-to-avoid-buying-counterfeit-beauty-products>.

<sup>39</sup> Lei, *supra* note 1, at 326–27.

<sup>40</sup> *Id.* at 327.

<sup>41</sup> Barbara Kolsun & Jonathan Bayer, *Indirect Infringement and Counterfeiting: Remedies Available Against Those Who Knowingly Rent to Counterfeiters*, 16

Furthermore, many counterfeit products contain high levels of bacteria, animal waste,<sup>42</sup> and lead<sup>43</sup> that exceed FDA regulations and pose a risk to consumers' health. Some YouTube content creators, looking to share their experience and spread awareness, have published videos about their experience with counterfeit cosmetics.<sup>44</sup>

There are three common reasons a consumer will purchase a counterfeit product. First, the consumer is aware that the counterfeit is fake, but wants the prestige of using a high-end product without paying the high-end price.<sup>45</sup> Second, the consumer believes that they found a deal where they will receive the genuine product for a lower price.<sup>46</sup> Third, social media influencers purchase counterfeit products to create content for their accounts (primarily YouTube).<sup>47</sup> Because of the increased popularity of counterfeit cosmetics, and the potential for consumer harm, it is somewhat surprising that the FDA has failed to assert more of its authority over the cosmetics industry.

### C. Ineffective Food & Drug Administration Regulations

Historically, FDA regulations have been ineffective in protecting consumers from harm caused by both genuine and counterfeit cosmetics. In fact, early FDA acts did not regulate cosmetics at all.<sup>48</sup> While current regulations include "cosmetics" as a regulated category, the agency has promulgated few rules to

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CARDOZO ARTS & ENT. L.J. 383, 384 (1998) (asserting that counterfeiters produce goods that fail to meet trademark holders' quality control standards).

<sup>42</sup> Holland, *supra* note 5.

<sup>43</sup> Karetnick & Bonner, *supra* note 4.

<sup>44</sup> See, e.g., Sophdoeslife, *supra* note 36.

<sup>45</sup> Felix Tang et al., *Understanding Counterfeit Consumption*, 26 ASIA PAC. J. OF MKTG. AND LOGISTICS 4, 5 (2014).

<sup>46</sup> See *id.* at 11.

<sup>47</sup> See, e.g., Safiya Nygaard, *Real Vs Fake Makeup Under a Microscope*, YOUTUBE (Aug. 24, 2018), [https://www.youtube.com/watch?v=GJ9\\_7L873m8](https://www.youtube.com/watch?v=GJ9_7L873m8), [<https://perma.cc/J96Y-PAD2>].

<sup>48</sup> Roseann B. Termini & Leah Tressler, *American Beauty: An Analytical View of the Past and Current Effectiveness of Cosmetic Safety Regulations and Future Direction*, 63 FOOD & DRUG L.J. 257, 258 (2008).

counteract harm caused by cosmetics.<sup>49</sup> A solution is necessary to fill this gap in FDA regulation.

### 1. *Before Food & Drug Administration Regulations*

Dangerous cosmetics are not a recent creation. During the late 1800s, many cosmetics contained harmful ingredients like lead, mercury, and arsenic.<sup>50</sup> Women used these products even though they were warned about their dangerous ingredients.<sup>51</sup> Despite the fact that records show that local U.S. governments regulated food and drugs as early as 1656,<sup>52</sup> the cosmetics industry remained largely ignored.

### 2. *The Food and Drug Act*

The Food and Drug Act—the Federal Food, Drug, and Cosmetic Act’s predecessor—did not give the FDA the power to regulate cosmetics.<sup>53</sup> Around 1906, when the Food and Drug Act was enacted, cosmetic sales in the United States were not nearly as high as they are today.<sup>54</sup> The minimal sales of cosmetic products and their small impact on the economy was likely a reason Congress did not make a stronger effort to regulate cosmetics.<sup>55</sup>

Attitudes towards cosmetics began to change after World War I, once cosmetics became more accessible through different companies and societal views toward wearing makeup began to change.<sup>56</sup> As a result, more consumers were directly affected by cosmetics’ quality.<sup>57</sup> This societal change and greater public

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<sup>49</sup> Mueller, *supra* note 22, at 318.

<sup>50</sup> Termini & Tressler, *supra* note 48, at 257.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 258 (noting the FDA received inquiries about hazardous cosmetics on the market but stated that it did not have the power to regulate cosmetics).

<sup>54</sup> *Id.* at 257.

<sup>55</sup> *Id.* at 257–58.

<sup>56</sup> *Id.* at 258; Meryl C. Maneker & Vickie E. Turner, *Cosmetics and Beauty Product Litigation*, 59 PRAC. LAW. 29, 30 (2013).

<sup>57</sup> Termini & Tressler, *supra* note 48.

recognition of cosmetics ingredients' adverse effects led to a desire to protect consumers from the potential harms of cosmetics.<sup>58</sup>

### 3. *The Federal Food, Drug, and Cosmetic Act*

In 1934, the Federal Food, Drug, and Cosmetic Act ("FDCA") gave the FDA the power to regulate cosmetics.<sup>59</sup> Even though the FDA now has this jurisdiction, the agency does not effectively use its authority to protect consumers from harm caused by either authentic or counterfeit cosmetics.

#### a. *Consumer Harm Before the FDCA*

Before the FDCA, supposedly safe cosmetic products often led to consumer harm. One such product was Lash Lure, a popular eyelash and eyebrow dye that promised to give its users longer-lasting effects than traditional mascara or eyebrow pencils.<sup>60</sup> Like many other cosmetics from the 1930s, Lash Lure was not tested for safety and did not list ingredients on its packaging.<sup>61</sup> Some women suffered horrific side effects from the product, including vision impairment and even blindness.<sup>62</sup> One woman, Mrs. Brown, used the product while preparing to be honored at an event for her work with the local parent-teacher association.<sup>63</sup> Shortly after applying the product, her eyes itched and burned.<sup>64</sup> The next day, "her eyes [were] gone and the flesh around them [was] a mass of tortured scars."<sup>65</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> 21 U.S.C. §§ 301–92 (1934).

<sup>60</sup> Erika Kawalek, *Artfully Made-Up*, LEGAL AFFAIRS, [http://legalaffairs.org/issues/November-December-2005/feature\\_kawalek\\_novdec05.msp](http://legalaffairs.org/issues/November-December-2005/feature_kawalek_novdec05.msp) [<https://perma.cc/DPR3-J45B>] (last visited Oct. 19, 2018).

<sup>61</sup> *80 Years of the Federal Food, Drug, and Cosmetic Act*, U.S. FOOD & DRUG ADMIN. [hereinafter *80 Years*], <https://www.fda.gov/AboutFDA/History/VirtualHistory/HistoryExhibits/ucm612270.htm> [<https://perma.cc/WE8V-7JD8>] (last visited Oct. 19, 2018); Kawalek, *supra* note 60.

<sup>62</sup> *80 Years*, *supra* note 61.

<sup>63</sup> Kawalek, *supra* note 60.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Koremlu (sometimes referred to as Kormelu), another product from the 1930s, was advertised as a revolution in hair removal.<sup>66</sup> Koremlu functioned as a depilatory so women would not have to shave to remove unwanted hair.<sup>67</sup> This product, however, contained thallium acetate, otherwise known as rat poison.<sup>68</sup> Dozens of women were incapacitated or poisoned by this depilatory cream.<sup>69</sup> Women also suffered from neuromuscular damage, respiratory problems, blindness, and permanent hair loss.<sup>70</sup> In one case, after using Koremlu, a 26-year-old woman reportedly lost her teeth, her eyesight, and her ability to walk.<sup>71</sup>

*b. The Need for the Federal Food, Drug, and Cosmetic Act*

It became clear that the FDA's inability to regulate cosmetics under the "drug" category of the Food and Drug Act led to a lack of control over dangerous cosmetics.<sup>72</sup> President Roosevelt, urged by societal demand and the rising number of cosmetics-related injuries, declared a need for more careful cosmetic regulation and enforcement.<sup>73</sup> This change in attitude led to the creation of the FDCA.<sup>74</sup>

Passed in 1938,<sup>75</sup> the FDCA was established to promote consumer safety and protect consumers from misleading claims in the food, drug, and cosmetic industries.<sup>76</sup> The FDCA defines the term "cosmetic" as:

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<sup>66</sup> *80 Years*, *supra* note 61.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; Kawalek, *supra* note 60.

<sup>69</sup> Kawalek, *supra* note 60.

<sup>70</sup> *80 Years*, *supra* note 61.

<sup>71</sup> *Id.*

<sup>72</sup> Termini & Tressler, *supra* note 48, at 259.

<sup>73</sup> *Id.*

<sup>74</sup> *See id.*

<sup>75</sup> Sara Lykken, *We Really Need to Talk: Adapting FDA Processes to Rapid Change*, 68 *FOOD & DRUG L.J.* 357, 364 (2013) (quoting ALEXANDER WYNTER BLYTH & MEREDITH WYNTER BLYTH, *FOODS: THEIR COMPOSITION AND ANALYSIS* 4 (1903)).

<sup>76</sup> Amity Hartman, *FDA's Minimal Regulation of Cosmetics and the Daring Claims of Cosmetic Companies that Cause Consumers Economic Harm*, 36 *W. ST. U. L. REV.* 53, 54 (2008).

(1) [A]rticles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap.<sup>77</sup>

Under the FDCA, cosmetics may not be adulterated or misbranded.<sup>78</sup> A cosmetic is adulterated:

- (a) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual, except that this provision shall not apply to coal-tar hair dye, the label of which bears the following legend conspicuously displayed thereon: "Caution--This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness.", and the labeling of which bears adequate directions for such preliminary testing. For the purposes of this paragraph and paragraph (e) the term "hair dye" shall not include eyelash dyes or eyebrow dyes.
- (b) If it consists in whole or in part of any filthy, putrid, or decomposed substance.
- (c) If it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.
- (d) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.
- (e) If it is not a hair dye and it is, or it bears or contains, a color additive which is unsafe within the meaning of section 379e(a) of this title.<sup>79</sup>

While the FDCA forbade the adulteration of cosmetic products, it did not sufficiently address issues in the cosmetic industry.

*c. After the FDCA*

Although the Federal Food, Drug, and Cosmetic Act has the word "cosmetic" in its title, the Act primarily focuses on regulations for the food and drug industries.<sup>80</sup> This focus has a wider impact than

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<sup>77</sup> 21 U.S.C. § 321.

<sup>78</sup> *Id.* § 361.

<sup>79</sup> *Id.*

<sup>80</sup> Mueller, *supra* note 22.

consumers would initially recognize. While consumers consider the “cosmetic” category to include only makeup, it also includes products such as toothpaste, body wash, hair dye, and mouthwash.<sup>81</sup> None of these products were properly regulated under the FDCA.<sup>82</sup> Even though the FDCA was established to promote consumer safety and protection from misleading claims,<sup>83</sup> the act only gives FDA authority to take a reactive approach to protecting consumers from harm.<sup>84</sup> Under the FDCA, the FDA has no power to approve cosmetics or ingredients in cosmetics before products go on the market.<sup>85</sup> The FDA cannot recall cosmetics that cause adverse effects; it can only issue a written request that the manufacturer voluntarily recall the product.<sup>86</sup> The FDA also cannot require cosmetic manufacturers to report customer complaints.<sup>87</sup> While the FDA can issue safety alerts and monitor recalls, the FDA must still rely on cosmetics companies to voluntarily recall a product.<sup>88</sup>

While the FDA seems powerless in addressing cosmetic products' hazardous ingredients, the agency has taken an active role in regulating color additives in cosmetics. For example, “after children became sick from eating Halloween candy and popcorn dyed with Orange No. 1 food coloring, Congress passed the Color Additive Amendments of 1960, requiring pre-market approval for and imposing conditions for use upon color additives in foods, drugs, and cosmetics.”<sup>89</sup>

Despite the FDA's mostly passive approach to cosmetics regulation, the cosmetics industry promotes a self-regulatory regime

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Hartman, *supra* note 76.

<sup>84</sup> Mueller, *supra* note 22, at 321.

<sup>85</sup> *Id.* at 320; Rajiv Shah & Kelly E. Taylor, *Concealing Danger: How the Regulation of Cosmetics in the United States Puts Consumers at Risk*, 23 *FORDHAM ENVTL. L. REV.* 203, 203 (2012).

<sup>86</sup> Mueller, *supra* note 22, at 320.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Lykken, *supra* note 75, at 365.

through the Personal Care Products Council (“PCPC”).<sup>90</sup> The PCPC offers resources such as the Voluntary Cosmetic Reporting Program<sup>91</sup> and Cosmetic Ingredient Review (“CIR”) Expert Panel<sup>92</sup> to support the FDA in protecting consumers. While the cosmetics industry is steadfastly protective of this self-regulation, as of 2005, the CIR panel had only assessed the safety of eleven percent of the ingredients in personal care products.<sup>93</sup> U.S. consumers cannot rely on this limited, partial reporting process when making purchasing decisions. While the FDA, and CIR, have proven ineffective in sufficiently regulating cosmetics, intellectual property law and products liability law have addressed separate but related concerns in the genuine and counterfeit cosmetics industries.

#### *D. Intellectual Property Infringement Versus Products Liability*

Intellectual property law and products liability law provide effective but limited ways for companies and consumers to address issues caused by counterfeit or harmful cosmetics. Through intellectual property law, specifically trademark and copyright law, companies can protect their brands’ goodwill and address unauthorized use of their creative works. Products liability law has given consumers a means to hold companies accountable for harm caused by their products. Both areas of the law, however, are individually deficient in addressing the harm caused by counterfeit cosmetics. A combination of intellectual property protection and products liability would more effectively address the harm.

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<sup>90</sup> See Jacqueline A. Greff, *Regulation of Cosmetics That Are Also Drugs*, 51 FOOD & DRUG L. J. 243, 245 (1996).

<sup>91</sup> *Voluntary Cosmetic Reporting Program*, PERS. CARE PRODS. COUNCIL (2019), <https://www.personalcarecouncil.org/science-safety/voluntary-cosmetic-reporting-program/> [<https://perma.cc/V7NT-6EEV>].

<sup>92</sup> *Cosmetic Ingredient Review*, PERS. CARE PRODS. COUNCIL (2019), <https://www.personalcarecouncil.org/science-safety/cosmetic-ingredient-review/> [<https://perma.cc/Q7C2-GAJ4>].

<sup>93</sup> Shah & Taylor, *supra* note 85, at 204.

### 1. *Trademark Infringement*

A brand uses its trademarks, such as its brand name or logo, to signal the quality of its products.<sup>94</sup> As a result, brands are incentivized to create a strong reputation for their trademarks. Unfortunately, counterfeiters take advantage of the established goodwill of a brand to sell products bearing those same marks, but with lower quality ingredients.

In most claims of trademark infringement, courts consider three inquiries: “(1) whether the trademark or trade dress is distinctive or has acquired secondary meaning; (2) whether there is a likelihood of confusion due to the low-end brand’s imitation of the high-end brand; and (3) whether the imitated design is non-functional.”<sup>95</sup> Well-known brands most likely have registered their trademarks, which creates *prima facie* evidence for the court to presume that the registered mark is valid.<sup>96</sup>

In contrast, for products liability disputes, courts do not need to make any determinations about the validity of a trademark. The key focus is not brand reputation, but rather whether the consumer has suffered a harm from the product she used.

### 2. *Indirect Copyright Infringement—The Dance Hall Cases & Vicarious Liability*

Courts have applied vicarious or contributory liability in cases involving copyright infringement even though such liability is not included in the Copyright Act.<sup>97</sup> Indirect liability for copyright

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<sup>94</sup> Primeaux, *supra* note 2, at 904.

<sup>95</sup> *Id.* at 896

<sup>96</sup> *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138, 142 (2015) (stating that registration is “*prima facie* evidence of the validity of the registered mark . . .”) (citation omitted).

<sup>97</sup> *Kolsun & Bayer, supra* note 41, at 392; *see* *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198–99 (1931); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *M. Witmark & Sons v. Tremont Soc. & Athletic Club*, 188 F. Supp. 787 (D. Mass. 1960); *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523 (D. Neb. 1944), *aff'd*, 157 F.2d 744 (8th Cir. 1946); *Buck v. Pettijohn*, 34 F. Supp. 968 (E.D. Tenn. 1940); *Buck v. Crescent Gardens Operating Co.*, 28 F. Supp. 576 (D. Mass. 1939); *Buck v. Russo*, 25 F. Supp. 317 (D. Mass. 1938); *Irving Berlin, Inc. v. Daigle*, 26 F.2d 149, *rev'd on*

infringement was first promoted in cases involving dance halls, where an owner or manager hired a performer who presented copyrighted material without appropriate permission.<sup>98</sup> Dance halls benefitted from the performers' infringement because these performances attracted more customers to the hall.<sup>99</sup> In such cases, the owner did not need to have control over the music selection or knowledge that the performance was infringing in order to shoulder a portion of liability.<sup>100</sup> Whether the performers were independent contractors was also not a factor in the Court's analysis; the central consideration was that the dance hall owner benefitted from the musicians' infringing performances.<sup>101</sup>

Unlike dance hall owners and managers, landlords have generally not been found liable for the infringing activity of their tenants.<sup>102</sup> Courts have held that the two parties need a stronger relationship for such liability to be imposed.<sup>103</sup>

The United States Court of Appeals for the Second Circuit formulated the modern standard for vicarious copyright liability in *Shapiro, Bernstein & Co. v. H.L. Green*,<sup>104</sup> a dispute involving department store owners and concessions vendors. The court held that, "[v]icarious liability occurs when a defendant has the power to exercise control over the infringing activity and has a 'direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired.'"<sup>105</sup>

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*other grounds*, 31 F.2d 832 (5th Cir. 1929); *M. Witmark & Sons v. Fastime Amusement Co.*, 298 F. 470 (E.D. S.C. 1924), *aff'd*, 2 F.2d 1020 (4th Cir. 1924); *Harms v. Cohen*, 279 F. 276 (E.D. Pa. 1922).

<sup>98</sup> *Kolsun & Bayer*, *supra* note 41, at 392.

<sup>99</sup> *Id.* at 393–94.

<sup>100</sup> *Id.* at 394.

<sup>101</sup> *See id.*

<sup>102</sup> *Id.* at 392–93.

<sup>103</sup> *Id.* at 393.

<sup>104</sup> *Shapiro, Bernstein & Co. v. H.L. Green*, 316 F.2d 304 (2d Cir. 1963).

<sup>105</sup> *Kolsun & Bayer*, *supra* note 41, at 395 (citing *Shapiro, Bernstein & Co.*, 316 F.2d at 307).

By employing such a rule, the Court gave store owners, who had the ability to police their concessions vendors, an incentive to eliminate the sale of infringing goods on their premises.<sup>106</sup> The court's rule was further strengthened by the fact that infringing products were easy to spot superficially.<sup>107</sup>

### 3. *Indirect Trademark Infringement—The Flea Market Cases*

Courts have inquired as to whether flea market operators can be held contributorily liable for trademark infringement committed by its vendors.<sup>108</sup> In *Coach v. Goodfellow*,<sup>109</sup> the accessories brand, Coach, sued a flea market operator under the Lanham Act for selling counterfeit Coach products.<sup>110</sup> The flea market operator was arguably informed of this illegal conduct several times: first, through a letter sent by Coach which cited potential federal and state law violations, and second, through a letter from the District Attorney General informing him that counterfeit Coach sales were continuing at the flea market.<sup>111</sup> Even further, the flea market operator admitted to knowing that vendors sold counterfeit Coach products after he received the first letter and that the District Attorney's office made several raids where arrests were made.<sup>112</sup>

The Sixth Circuit Court of Appeals referred to a Supreme Court decision where the Court first recognized contributory liability:<sup>113</sup>

The Court determined that liability under the Lanham Act may be imposed on those who facilitate trademark infringement, stating that where a "distributor 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, [it] is contributorially[sic] responsible for any harm done as a result of the deceit."<sup>114</sup>

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<sup>106</sup> *Id.* at 395.

<sup>107</sup> *Id.*

<sup>108</sup> *See* *Coach, Inc. v. Goodfellow*, 717 F.3d 498, 500 (6th Cir. 2013).

<sup>109</sup> 717 F.3d 498 (6th Cir. 2013).

<sup>110</sup> *Id.* at 499.

<sup>111</sup> *Id.* at 500.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 503 (quoting *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 854 (1982)).

<sup>114</sup> *Id.*

The Sixth Circuit held that the flea market operator was a provider of a product or service and continued to supply these resources to vendors even after knowing they were engaged in trademark infringement.<sup>115</sup> Further, the Court established the operator's actual knowledge of the counterfeit sales.<sup>116</sup> While the text of the Lanham Act only references direct trademark infringers, here, the Supreme Court established that parties who facilitate infringement may also be liable.<sup>117</sup> As a result, flea market operators can be held liable for vendors' trademark infringement.<sup>118</sup>

#### 4. *Addressing Infringement in the Digital Age—The Digital Millennium Copyright Act*

DMCA<sup>119</sup> was enacted in 1998 to harmonize U.S. copyright law with the World Intellectual Property Organization Copyright Treaty.<sup>120</sup> The DMCA also updated U.S. copyright law to function in the digital age.<sup>121</sup> Within the Act's text are "safe harbor" provisions that limit service providers' liability for hosting infringing works.<sup>122</sup> To satisfy the safe harbor requirements, a provider must quickly remove infringing material once it is notified of the infringing works.<sup>123</sup> A provider cannot benefit from the safe harbor provisions if it does not take down infringing materials once it is aware of those materials.<sup>124</sup> A provider has the requisite level of awareness if it has actual knowledge of the infringing material or is aware of facts or circumstances revealing specific instances of infringement.<sup>125</sup>

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<sup>115</sup> *Id.* at 503.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (quoting *Inwood Lab'ys*, 456 U.S. at 854).

<sup>118</sup> *Id.*; see *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996); see *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1148–49 (7th Cir. 1992).

<sup>119</sup> 17 U.S.C. § 1201.

<sup>120</sup> *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2d Cir. 2012).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 27 (citing Title II of the DMCA, "Online Copyright Infringement Liability Limitation Act" (OCILLA), S. Rep. No. 105-190 at 2, 19 (1998)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 32.

<sup>125</sup> *Id.*

### 5. *Products Liability—The Auctioneer Cases*

Unlike flea market operators in trademark infringement cases, auctioneers are generally not held liable for harm under products liability law.<sup>126</sup> For a party to be held liable under products liability law, it must be within one of the enumerated classes detailed in the relevant products liability act.<sup>127</sup> For example, Pennsylvania's Strict Products Liability Law<sup>128</sup> (adopted from section 402A of the Second Restatement of Torts) defines a potentially liable "seller" as:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.<sup>129</sup>

Other such categories include "manufacturers" and "distributors."<sup>130</sup> The Restatement (Third) of Torts states:

The rule stated in this Section applies only to manufacturers and other commercial sellers and distributors who are engaged in the business of selling or otherwise distributing the type of product that harmed the plaintiff. [ . . . ]

It is not necessary that a commercial seller or distributor be engaged exclusively or even primarily in selling or otherwise distributing the type of product that injured the plaintiff, so long as the sale of the product is other than occasional or casual. [ . . . ] However, the rule does not cover occasional sales (frequently referred to as "casual sales") outside the

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<sup>126</sup> *Musser v. Vilsmeier Auction Co.*, 522 Pa. 367, 376 (1989).

<sup>127</sup> *See Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17 Civ. 2738, 2018 WL 3546197, at \*6 (D.N.J. July 24, 2018); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 396-97 (S.D.N.Y. Aug. 27, 2018).

<sup>128</sup> RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

<sup>129</sup> *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 499 (M.D. Pa. 2017).

<sup>130</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. c (AM. L. INST. 1998).

regular course of the seller's business. Thus, an occasional sale of surplus equipment by a business does not fall within the ambit of this rule. Whether a defendant is a commercial seller or distributor within the meaning of this Section is usually a question of law to be determined by the court.<sup>131</sup>

There are limitations as to who is considered a "seller" under strict products liability law. Keeping public policy in mind, courts have held that "sellers" must be causally linked to the defective product, have control over the defective product, and have directly placed the defective product into the stream of commerce.<sup>132</sup> Agency is not enough—the party must be able to remove a product's defects before the product is introduced to customers.<sup>133</sup> It is the party's ability to bear the cost of eliminating defects and protect the consumer from harmful products that allows the party to be held strictly liable under products liability law.<sup>134</sup>

As a result, courts have not held auctioneers as sellers under strict products liability laws because, in simply providing the market for sale, the auctioneer cannot determine the quality of the variety of products he auctions,<sup>135</sup> let alone directly impact the soundness of those products.<sup>136</sup>

#### 6. "Sellers" in Products Liability Acts

In many cases, a retailer can only be held liable for harm caused by a product if the retailer is categorized as a "seller," "distributor," or "manufacturer." Products liability laws and the definitions of these terms vary from state to state. For example, Georgia considers a "product seller" to be:

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<sup>131</sup> *Id.*

<sup>132</sup> *Antone v. Greater Ariz. Auto Auction*, 115 P.3d 1074, 1076 (Ariz. Ct. App. 2007) (citing *Winsor v. Glasswerks PHX, L.L.C.*, 63 P.3d 1040, 1048–49 (Ariz. Ct. App. 2003)).

<sup>133</sup> *Id.* at 1078 (citing *Tauber-Arons Auctioneers Co. v. Superior Court*, 101 Cal. App. 3d 268, 275 (Cal. Ct. App. 1980)).

<sup>134</sup> *Id.* at 1076 (quoting *Tucson Indus., Inc. v. Schwartz*, 501 P.2d 936, 939–40 (Ariz. 1972)); *Caruth v. Mariani*, 463 P.2d 83, 86–87 (Ariz. Ct. App. 1970).

<sup>135</sup> *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 283 (Pa. 1989).

<sup>136</sup> *Id.* at 281 (citing *Nath v. Nat'l Equip. Leasing Corp.*, 439 A.2d 633, 636 (Pa. 1981)).

[A] person who, in the course of a business conducted for the purpose leases or sells and distributes; installs; prepares; blends; packages; labels; markets; or assembles pursuant to a manufacturer's plan, intention, design, specifications, or formulation; or repairs; maintains; or otherwise is involved in placing a product in the stream of commerce. This definition does not include a manufacturer which, because of certain activities, may additionally be included within all or a portion of the definition of a product seller.<sup>137</sup>

On the other hand, Tennessee defines a “seller” as “a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale, or for use or consumption. ‘Seller’ also includes a lessor or bailor engaged in the business of leasing or bailment of a product.”<sup>138</sup>

Many states have adopted the Restatement (Second) of Torts section 402A.<sup>139</sup> Only recently have current products liability laws, including those proposed by the Restatement (Second) of Torts, held online third-party marketplaces like Amazon responsible for counterfeit cosmetic harm. For example, the Third Circuit<sup>140</sup> and the Western District of Wisconsin<sup>141</sup> have found that Amazon can be a seller in a product liability case, deviating from other jurisdictions' rulings that Amazon does not directly sell nor have required control

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<sup>137</sup> GA. CODE ANN. § 51-1-11.1 (1987).

<sup>138</sup> TENN. CODE ANN. § 29-28-102(7) (2012).

<sup>139</sup> See *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 499 (M.D. Pa. 2017); Georgia D. Koutouzos, *Amazon.com Can't Be Held Liable for Faulty Product Sold on its Online Site by Third-Party Vendor*, PRODS. LIAB. L. DAILY (Dec. 22, 2017), <https://rus.wolterskluwer.com/news/products-liability-law-daily/amazon-com-can-t-be-held-liable-for-faulty-product-sold-on-its-online-site-by-third-party-vendor/43395/> [<https://perma.cc/EBJ3-KY8Z>].

<sup>140</sup> *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 145–54 (3d Cir. 2019); see also Patrick McKnight, *Amazon Sellers Face Unique Legal Challenges in 2020*, AM. BAR ASS'N (April 10, 2020), [https://www.americanbar.org/groups/business\\_law/publications/committee\\_newsletters/cyberspace/2020/202004/fa\\_1/](https://www.americanbar.org/groups/business_law/publications/committee_newsletters/cyberspace/2020/202004/fa_1/) [<https://perma.cc/63CY-FDA9>] (last visited Oct. 11, 2020) (“[A] three-judge panel concluded Amazon could be deemed the ‘seller’ and held liable under Pennsylvania law. The court rejected arguments from Amazon that it was protected by Section 230 of the Communications Decency Act.”).

<sup>141</sup> *State Farm Fire and Casualty Company v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 969–74 (W.D. Wis. 2019).

over third-party products.<sup>142</sup> While some courts may be moving in the right direction, a stronger rule with greater incentives is needed for Amazon, and other online marketplaces, to no longer avoid responsibility and liability for harms caused by counterfeit cosmetics sold on their websites.

### 7. *Recent Opinions Regarding Amazon as a “Seller”*

In the age of online consumerism, customers have sued online sellers for harm caused by defective products. Unsurprisingly, Amazon has been a prominent party in such cases. Whether a retractable dog leash snaps back and hits someone in the eye,<sup>143</sup> a battery pack,<sup>144</sup> headlight,<sup>145</sup> or hoverboard catches on fire,<sup>146</sup> or a glass coffeemaker shatters,<sup>147</sup> Amazon customers seeking damages have sued the behemoth, regardless of whether the product was purchased directly from Amazon or from a third-party seller.

To determine whether Amazon can be liable under strict products liability, courts in several jurisdictions have focused on whether Amazon can be classified as a “seller” under that state’s products liability act.<sup>148</sup> Courts have provided several reasons why Amazon cannot be liable under this strict liability framework. First, courts have held that because Amazon plays no role in the selection of goods a third-party seller offers, it cannot have a direct impact on the manufacture of those products and, as a result, is not a “seller.”<sup>149</sup> Second, courts have held that Amazon cannot be classified as a “seller” because it does not provide the content that appears on the

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<sup>142</sup> See *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 422–28 (6th Cir. 2019).

<sup>143</sup> *Oberdorf*, 295 F. Supp. 3d at 497.

<sup>144</sup> *Allstate N.J. Ins. Co. v. Amazon.com, Inc.* No. 17 Civ. 2738, 2018 WL 3546197, at \*1 (D.N.J. July 24, 2018).

<sup>145</sup> *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 137 (4th Cir. 2019).

<sup>146</sup> *Fox*, 930 F.3d at 418.

<sup>147</sup> *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 394 (S.D.N.Y. Aug. 27, 2018).

<sup>148</sup> See *Erie Ins. Co.*, 925 F.3d at 137; *Oberdorf*, 295 F. Supp. 3d at 501; *Allstate N.J. Ins. Co.*, 2018 WL 3546197, at \*5; *Eberhart*, 325 F. Supp. 3d at 399; *Fox*, 930 F.3d at 422.

<sup>149</sup> *Oberdorf*, 295 F. Supp. 3d at 501.

product's detail page.<sup>150</sup> Third, courts have held that even when Amazon provides fulfillment services for third-party sellers,<sup>151</sup> it is not a "distributor," because providing this service does not transfer title of the product to Amazon.<sup>152</sup> Fourth, courts have held that a plaintiff's subjective belief that they purchased the product directly from Amazon is not a factor in determining whether Amazon is a "seller."<sup>153</sup> Finally, regardless of any public policy argument supporting such a change, courts are hesitant to expand a products liability act's definition of "seller," stating that this expansion is a job for the legislature, not the courts.<sup>154</sup>

In strict products liability cases, courts have characterized Amazon as a provider of services.<sup>155</sup> Amazon maintains an online marketplace, provides warehousing and shipping services, and processes payments.<sup>156</sup> Courts have held that none of these services meet the threshold for holding Amazon susceptible to strict products liability.<sup>157</sup>

Based on Amazon's evasion of the "seller" classification, an adjusted standard of contributory liability should be applied to online marketplaces to protect the vulnerable populations that are negatively affected by counterfeit cosmetics. As a 2002 study discovered, consumers' wealth was not the primary determinant of whether the consumer purchased counterfeit goods—brand status

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<sup>150</sup> See *Fox v. Amazon, Inc.*, No. 3:16-cv-03013, 2018 WL 2431628, at \*2 (M.D. Tenn. Aug. 30, 2018).

<sup>151</sup> Amazon offers a Fulfillment by Amazon (FBA) program through which third-party sellers ship items to Amazon, after which Amazon stores, picks, packs, ships, and provides customer service for those products. *Fulfillment by Amazon*, AMAZON.COM, <https://sell.amazon.com/fulfillment-by-amazon.html> [<https://perma.cc/9K43-6GDA>] (last visited Oct. 26, 2020).

<sup>152</sup> *Fox*, 2018 WL 2431628, at \*7; see *Eberhart*, 325 F. Supp. 3d at 398–99.

<sup>153</sup> *Fox*, 2018 WL 2431628, at \*7 ("Plaintiffs have not cited any authority indicating the subjective belief of the buyer is a relevant factor to consider in applying the TPLA definition of 'seller.'").

<sup>154</sup> *Id.* at \*8.

<sup>155</sup> See also *Eberhart*, 325 F. Supp.3d at 399.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

was an important factor across financial classes.<sup>158</sup> As a result, the two groups most likely to purchase counterfeit cosmetics are younger, low-income students and “blue collar” consumers along with educated white-collar males.<sup>159</sup> Other individuals who purchase counterfeit goods are “less confident, less successful, of lower status, less wealthy and tend to have large households.”<sup>160</sup> An additional liability standard for online marketplaces will help protect these consumers from the health hazards that can arise from using counterfeit cosmetics.

### III. ANALYSIS

To protect consumers from the harms of counterfeit cosmetics, courts should hold online third-party marketplaces liable for the sale of and subsequent harm caused by counterfeit cosmetics. While the products liability regulatory scheme protects consumers in traditional sales relationships, third-party marketplaces allow sellers to hide behind fake accounts, false banking information, and easily deleted online personas. This deception and obscurity makes it difficult for injured parties to recover against sellers who use third-party marketplaces. Intellectual property law can address some of these gaps when assigning liability.

By adapting contributory liability rules from intellectual property law and adjusting the notice-and-takedown scheme from the DMCA, courts would create liability for online third-party marketplaces, such as Amazon, while providing these companies with a safe harbor through which to insulate them from that liability. These safe harbors would promote the dual goals of increasing the accountability of online third-party marketplaces and protecting consumers from dangerous counterfeit goods.

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<sup>158</sup> Nicolas Hamelin et al., *'Faking Brands': Consumer Responses to Counterfeiting*, 12 J. CONSUMER BEHAV. 159, 162 (2012); Gerard Prendergast et al., *Understanding Consumer Demand for Non-Deceptive Pirated Brands*, 20/7 MKTG. INTEL. & PLAN. 405, 411 (2002).

<sup>159</sup> Hamelin et al., *supra* note 158, at 161.

<sup>160</sup> *Id.*

*A. Using the Digital Millennium Copyright Act to Outline Liability*

Like flea market operators, Amazon is more like a dance hall than a landlord. Amazon can control its premises, Amazon.com, and receives a direct financial benefit from customers who make purchases from its website through fees via its Fulfillment by Amazon program.<sup>161</sup> Amazon currently removes suspected counterfeit listings based on its own product reviews<sup>162</sup> but, due to the scope of the website's operations, it would be unreasonable for the company to be liable for all harmful counterfeit cosmetics that are sold on its website.

A more reasonable liability framework would adapt the DMCA's Safe Harbor threshold which provides:

- (c) Information residing on systems or networks at direction of users.—
  - (1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—
    - (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
    - (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
    - (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
    - (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
    - (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or

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<sup>161</sup> *Let's Talk Numbers*, AMAZON.COM, [https://sell.amazon.com/pricing.html?ref\\_=sdus\\_soa\\_pricing\\_n](https://sell.amazon.com/pricing.html?ref_=sdus_soa_pricing_n) [https://perma.cc/9L3H-4MXK] (last visited Mar. 29, 2020).

<sup>162</sup> *Amazon Anti-Counterfeiting Policy*, AMAZON SELLER CENT., <https://sellercentral.amazon.com/gp/help/external/201165970> [https://perma.cc/WY4B-F26Y] (last visited Apr. 12, 2018).

disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.<sup>163</sup>

Under the DMCA Safe Harbor guidelines, Amazon (or any other operator of a third-party online marketplace) would not be contributorily liable for harmful counterfeit cosmetics when, upon receiving notice that the product in question is a counterfeit cosmetic that has led to physical harm, it “acts expeditiously to remove” offending products from its marketplace.<sup>164</sup> While Amazon does not choose the products that third-party sellers offer on its marketplace or create the content that third-party sellers upload to their product detail pages, Amazon has the necessary control over its marketplace to play a role in reducing customers’ exposure to, and injury from, harmful counterfeit cosmetics.

The use of a two-part test based on notice and continued involvement with sellers of harmful cosmetics would create an incentive for market owners, such as Amazon, to police and eliminate sales of counterfeit cosmetics. In fact, Amazon would not need to create a new, cumbersome, or invasive system through which to identify and eliminate harmful counterfeit cosmetic listings. As with copyright law’s DMCA Safe Harbor provision, Amazon’s liability is activated only when it is alerted that a product is likely counterfeit and harmful. But, unlike under the DMCA, Amazon would not need to act on a single notice.

A potential contributory products liability rule for an online third-party marketplace such as Amazon would be:

A company is liable for harm caused by counterfeit cosmetics sold through its marketplace if:

- (1) the company is aware that the good in question is a counterfeit; and
- (2) the company continues to allow the product to be sold on its third-party marketplace.

Awareness would be determined through traditional trademark liability means such as actual knowledge or awareness of specific

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<sup>163</sup> 17 U.S.C. § 512(c)(1)(A)–(C).

<sup>164</sup> *Id.* § 512(c)(1)(C).

instances. Amazon would not be liable for harm from counterfeit cosmetics based on a generalized knowledge of customer harm, as such knowledge is insufficient to impose an affirmative duty to create a remedy.<sup>165</sup> Instead, Amazon's liability would arise once it is made aware of specific instances of harm through the use of a notice system similar to that in the DMCA, meaning a company such as Amazon would be required to start an investigation of a potentially counterfeit product if it has received notice that consumers believe the product is counterfeit and/or has caused harm to consumers. Amazon already has a similar reporting system for alleged copyright and trademark infringement<sup>166</sup> and could, theoretically, modify this system for products liability use.

This contributory products liability rule is not limited in its scope to counterfeit cosmetics—the same framework can be applied to protect consumers of any counterfeit item, from electronics to automobile parts to personal care products.

### *B. Obstacles of the Approach*

The below section addresses potential arguments against the above-described contributory liability framework for online third-party marketplaces.

#### *1. Contacting Defendant Parties*

Although Amazon's third-party sellers are clear defendants for strict products liability cases, it can often be impossible for plaintiffs to reach these sellers after they have suffered harm. Third-party sellers can easily provide fake information when creating their Amazon seller accounts, refuse to respond to emails, or delete their accounts altogether.<sup>167</sup> Further, the product manufacturers from whom these third-party sellers purchase their goods are even more

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<sup>165</sup> See *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 107 (2d Cir. 2010).

<sup>166</sup> See *Report Infringement*, AMAZON.COM, <https://www.amazon.com/report/infringement> [<https://perma.cc/4F2P-3SSX>] (last visited Apr. 13, 2019).

<sup>167</sup> *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 145 (3d Cir. 2019) (“There are numerous cases in which neither Amazon nor the party injured by a defective product, sold by Amazon.com, were able to locate the product’s third-party vendor or manufacturer.”).

difficult to reach—no manufacturer information is provided by sellers during account registration and no manufacturer information is displayed on product packaging, especially if the product is counterfeit.<sup>168</sup> Rather than support defendants’ liability evasion, this Article’s proposed rule for third-party marketplaces allows harmed customers to seek restitution from an additional party that has a degree of control over whether the harmful product is available in the marketplace.

### 2. *Additional Burden on the Law Enforcement & Court Systems*

It is unlikely that making Amazon an eligible party for contributory products liability cases will create an additional burden on the court system. This change will likely not lead to new cases; instead, Amazon’s inclusion as a defendant will be an additional facet in cases that would have already otherwise been tried. In addition, plaintiffs are already including Amazon as a defendant in their products liability cases. Providing an additional test for this new cause of action will not significantly change how many of these cases are litigated.

### 3. *Duty of Care*

Courts have found sellers to owe a duty of care to customers affected by the use of a product.<sup>169</sup> Opponents may argue that companies like Amazon, who are not legally “sellers,” do not owe a duty of care when it comes to products sold on its third-party marketplace. This argument ties into the concept of control and then begs another question: because Amazon does not have any control over the product being sold, how can it be liable for harm caused by that product?

Based on the traditional legal concept of duty of care, imposition of liability can depend on factors such as the relationship of the parties and “the consequences of placing that burden on the defendant . . . .”<sup>170</sup> Currently, courts do not give weight to a

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<sup>168</sup> *Id.*

<sup>169</sup> 5 ALFRED W. GANS, CHARLES F. KRAUSE & STUART M. SPEISER, AMERICAN LAW OF TORTS § 18:42 (2020).

<sup>170</sup> *Id.*

customer's belief that Amazon sold them the product they purchased on its third-party marketplace.<sup>171</sup> Amazon, however, handles all financial transactions and customer service complaints related to products sold on its third-party marketplace. While these interactions may not characterize companies like Amazon as "sellers" under current products liability acts, this relationship between Amazon and the customer weighs toward assigning Amazon some level of duty of care toward its marketplace customers.

Imposing contributory liability on Amazon would not create a severe burden on its operations. Amazon already has an infringement notice platform and a robust customer service team complete with streamlined contact methods.<sup>172</sup> Undoubtedly, Amazon receives complaints from marketplace customers for issues they have had from products purchased on its marketplace.

Amazon has the requisite control and ability to document product issues necessary to qualify it for a level of duty of care and, as a result, contributory liability for harm caused by counterfeit cosmetics sold on its third-party online marketplace.

#### IV. CONCLUSION

Although products liability law exists to protect consumers from harmful products, consumers harmed by counterfeit cosmetics purchased through online marketplaces face a gap in the law where they cannot obtain a remedy for the harm they have suffered. By adopting a two-part liability standard of awareness and removal to extend liability to online marketplace providers, courts close this gap by providing consumers with the protection they need without heavily burdening online marketplaces or the legal system. As a result, fewer counterfeit cosmetics will be available through online marketplaces, and physical harm caused by these dangerous products will become less common.

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<sup>171</sup> Allstate N.J. Ins. Co. v. Amazon.com, Inc. No. 17 Civ. 2738, 2018 WL 3546197, at \*11 (D.N.J. July 24, 2018) (“[W]hether these services may have caused Ms. Wilmot to *believe* Amazon was the seller is of no moment.”).

<sup>172</sup> See *Report Infringement*, *supra* note 168.

