



## DUPES: COMPARISON LISTS 2.0

### What Are “Dupes”?

Although the term *dupes* lacks an official definition, it is derived from the word *duplicate* and it has gradually become a popular marketing term used to promote products that “duplicate” well-known ones; the use of the term *dupes* has spread widely across social media notably via influencers.

The primary business model behind *dupes* relies on triggering an immediate association in consumers’ minds between the original products and their low-priced alternatives: it is based on the renown and the aura of the “duplicated” products.

Therefore, the success of *dupes* depends exclusively on the use of the well-known trademarks, either directly in the description of *dupes* on the websites, by promoters (mainly influencers), or via search engines, where queries about well-known products lead users to *dupes*.

### **The dupe market cannot exist without referencing well-known trademarks.**

The perfume sector is likely one of the most affected by the growing trend of *dupes*: Perfume dupes refer to fragrances that attempt to replicate the scent of well-known or iconic perfumes and which are sold on dedicated websites or via social media.

Actors involved in the *perfume dupes* business seem to consider themselves entitled to such use, maliciously pretending that i) freedom of expression and ii) the absence of author rights protection entitle them to freely use the trademark of the well-known “duplicated” perfumes.

It is true that fragrances are not inherently protectable under author rights law in French case law : A landmark decision of the French Supreme Court dated 10<sup>th</sup> December 2013 indeed ruled that *“the fragrance of a perfume, apart from its manufacturing process, which is not itself a work of the mind, does not take a form possessing this characteristic, and therefore cannot benefit from copyright protection”*<sup>1</sup>.

However, even though it is often the case with new trends such as *dupes* that people wonder whether there is a “legal vacuum” to be filled, it is in fact a case of legal overflow.

Indeed, the marketing of *dupes* may trigger liability under trademark law, consumer law (notably in terms of misleading commercial practices and unlawful comparative advertising) and even under civil

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<sup>1</sup> [French Supreme Court, 10<sup>th</sup> dec. 2013, n°11-19.872.](#)

law (in terms of unfair competition and parasitism), which applies to all “actors” involved in the sale and promotion of *dupes*.

Promoting a fragrance by associating it with a well-known perfume must be considered as unlawful.

As a reminder, the unauthorized use of a well-known trademark in comparison lists can constitute trademark infringement according to the landmark *L’Oréal v. Bellure*<sup>2</sup> decision of the European Court of Justice (ECJ, C-487/07, 10<sup>th</sup> February 2009).

The ECJ notably concluded that the use of trademarks in comparison lists affected the communication, investment, and advertising functions of those marks, constituting:

- Undue advantage taken from the reputation of a well-known trademark (Article 5(2) of Directive 89/104/EEC, now Article 10(2)(c) of Directive (EU) 2015/2436) with the sole purpose of attracting the relevant public to benefit from a commercial advantage;
- Trademark infringement (Article 5(1)(a) of Directive 89/104/EEC, now Article 10(2)(a) of Directive (EU) 2015/2436);
- Unlawful comparative advertising (Articles 3a(1)(g) and (h) of Directive 97/55/EC on misleading advertising, now Articles 4(f) and (g) of Directive 2006/114/EC);

French case law has been fully consistent with the ECJ and has condemned the practice of comparison lists in the perfume industry.

Indeed, the French Supreme Court explicitly stated<sup>3</sup> that the use of comparison lists associating a lesser-known perfume with a well-known trademark constitutes trademark infringement; according to the Court, these practices take unfair advantage of the reputation and the prestige of the original trademarks, undermining both their distinctiveness and their economic value<sup>4</sup>.

There is no reason to treat the perfume *dupes*, and more broadly the dupes phenomenon, differently, as the actors involved seek to take unfair advantage of the reputation and prestige of well-known trademarks.

Article L713-3-1 6° of the French Intellectual Property Code, which transposed Article 10 of Directive 2015/2436 of 16<sup>th</sup> December 2015, expressly prohibits as trademark infringement: ***“The use of the sign in comparative advertising in breach of the provisions of Articles L122-1 to L122-7 of the French Consumer Code.”***

In fact, Article L122-2 of the French Consumer Code notably provides that comparative advertising may not take unfair advantage of the reputation attached to a trademark of goods or services, discredit or denigrate the trademarks of a competitor and/ or present goods or services as imitations or replicas of goods or services bearing a protected trademark.

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<sup>2</sup> *L’Oréal v. Bellure*, CJEU, Case C-487/07, 18<sup>th</sup> June 2009.

<sup>3</sup> French Supreme Court (Criminal chamber), 16<sup>th</sup> June 2015, No. 14-82.595.

<sup>4</sup> *Supra*, the Cour de Cassation upheld the decision of the Court of Appeal of Aix-en-Provence in the part stating that ***“the use of comparison tables is indeed a commercial argument; it follows from all these elements that the defendants were indeed guilty of trademark infringement, as the comparison tables used as a commercial argument by the company APA towards its clients had no other purpose than to enable them to in turn make use of these illicit correspondences to market products derived from APA’s bases; thus, the decision of the first judges will be upheld regarding the defendants’ guilt for trademark infringement”***

Therefore, the *dupes* practice, insofar as it allows an operator to take unfair advantage of the reputation of a trademark, constitutes unlawful comparative advertising within the meaning of Article L122-2 of the French Consumer Code, and therefore a trademark infringement under Article L713-3-1 of the French Intellectual Property Code.

### **What About Banning The Term “Dupe” Itself?**

In France, Article L.713-3-1 of the French Intellectual Property Code expressly prohibits the unauthorized use of a trademark in combination with terms such as *formule* (formula), *façon* (manner), *système* (system), *imitation* (imitation), *genre* (type), and *méthode* (method).

French case law holds that this list is not exhaustive. This principle was recently reaffirmed by the Court of Appeal of Lyon<sup>5</sup> in its decision dated 15<sup>th</sup> March 2024 which ruled that the terms cited in Article L.713-3-1 are illustrative and not exhaustive.

Therefore, any use of the term “*dupe*” associated with a trademark could reasonably be prohibited under Article L.713-3-1 of the French Intellectual Property Code.

### **The Issue Of “Consumer Reviews”**

Following the initial measures taken, notably by Perfume Houses, against the online marketing and promotion of *dupes*, explicit references to well-known trademarks have begun to disappear from online *dupe* descriptions.

However, operators continue to display consumer reviews that mention the well-known trademarks being “duplicated”, thereby preserving the connection with the original products.

Nonetheless, managing and maintaining consumer reviews constitutes a form of advertising, for which website operators have to remain fully liable.

This is the position adopted by the German Federal Court of Justice (I ZR 136/24 and I ZR 137/24) on 24<sup>th</sup> April 2025, which ruled that the use of consumer reviews constitutes a form of online advertising for which the operators are fully liable<sup>6</sup>.

In France, a similar approach is likely to prevail, as the publication of consumer reviews on a website already triggers specific obligations on website publishers pursuant to Article L111-7-2, L121-3 and L121-4 of the French Consumer Code.

### **The *dupe* market cannot exist without referencing well-known trademarks**

The *dupes* trend relies entirely on the use of well-known trademarks as references and takes unfair advantage of their reputation. This practice constitutes a form of “Comparison List 2.0”, which is

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<sup>5</sup> Lyon Court of Appeal, 15<sup>th</sup> March 2024, No. 22/14663.

<sup>6</sup> Link to the LinkedIn article on the German Federal Court of Justice decision on dupe online sellers : [https://www.linkedin.com/posts/lubberger-lehment\\_dupemarketing-customerreviews-trademark-activity-7325478214955364353-CkIQ?utm\\_medium=ios\\_app&rcm=ACoAAJS-oYBqSD--qu3s9ki96hwb16gBcpQXM&utm\\_source=social\\_share\\_send&utm\\_campaign=copy\\_link](https://www.linkedin.com/posts/lubberger-lehment_dupemarketing-customerreviews-trademark-activity-7325478214955364353-CkIQ?utm_medium=ios_app&rcm=ACoAAJS-oYBqSD--qu3s9ki96hwb16gBcpQXM&utm_source=social_share_send&utm_campaign=copy_link).

likely to amount to trademark infringement under unlawful comparative advertising. Ultimately, even the mere use of the term *dupe* in association with a trademark may also be subject to prohibition.

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