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Reading Our Lips:
The History of Lipstick Regulation in Western Seats of Power

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Abstract

This paper traces the history of lipstick's social and legal regulation in Western seats of power, from Ur circa 3,500 B.C. to the present-day United States. Sliced in this manner, lipstick's history emerges as heavily cyclical across the Egyptian, Grecian, Roman, Western European, English, and American reigns of power. Examination of both the informal social and formal legal regulation of lipstick throughout these eras reveals that lipstick's fluctuating signification concerning wearers' class and gender has always largely determined the extent and types of lipstick regulations that Western societies put in place. Medical and scientific knowledge, however, has also played an important secondary role in lipstick's regulatory scheme.

Thus, lipstick status laws, primarily intended to protect men, long predated laws concerning lipstick safety. Safety laws, in turn, long focused solely on human safety before very recently also branching out into environmental and animal safety. In the future, Western societies should expect to see a continuation of lipstick status regulations, albeit probably informal social ones, as well as increasingly comprehensive lipstick safety regulations regarding human, environmental, and animal well-being.

Ur and Egypt

Historically, one was relatively less likely to die from lipstick than from most other cosmetics products. This does not mean, however, that lipstick has a past lacking in either danger or fascination. Lipstick's appropriately colorful history began with Queen Schub-ad of ancient Ur.[1] Circa 3,500 B.C.,[2] this Sumerian queen used lip colorant made with a base of white lead and crushed red rocks.[3] The Sumerian people apparently adopted the practice with gusto, as Sir Leonard Woolley's excavation of Ur's 'Royal Cemetery' revealed that those who could afford to do so had themselves buried with their lip paints stored in cockleshells.[4] Neighboring Assyrians, both women and men, likewise began painting their lips red.[5]

[1] To situate Ur for modern Western readers: Ur stood a major city in Sumer, one of Mesopotamia's four distinct civilizations that also included Akkad, Assyria, and Babylonia. We now know the entire region as Iraq. Sally Pointer, The Artifice of Beauty: A History and Practical Guide to Perfumes and Cosmetics 11 (2005).

[2] *See*, *e.g.*, Fenja Gunn, The Artificial Face: A History of Cosmetics 35 (1973). *But see*, Pointer, *supra* note 1, at 11 (suggesting the date of first lipstick use closer to 2,500 B.C.).

[3] *See*, Gunn, *supra* note 2, at 35 (stating that this original lip color contained white lead). *See also*, Meg Cohen Ragas & Karen Kozlowski, Read My Lips: A Cultural History of Lipstick 13 (1998) (stating that this original lip color contained crushed red rocks). Such information about ancient lipsticks' components has recently become available through gas chromatography, which allows for identification of minute residues extracted from old containers. Pointer, *supra* note 1, at x. The ingredient identification remains imperfect, however, because: some ingredient compounds have altered or disappeared over time, cosmetics containers often served multiple uses and so contain residues from multiple substances, and the waterproofing treatments used on the cosmetics containers interferes with residue analysis. Pointer, *supra* note 1, at x-xi. Fortunately, in some cases, written evidence can help corroborate the chromatographic findings or help fill the informational gaps. Pointer, *supra* note 1, at ix.

[4] Pointer, *supra* note 1, at 11-15.

[5] Richard Corson, Fashions in Makeup from Ancient to Modern Times 25 (2003).

Lipstick culture then reached the burgeoning Egyptian empire, where it continued to primarily denote social status rather than gender. Egyptian men and women boldly applied makeup as part of their daily routine, using, in some form, most of the cosmetic aides ever devised.[6] Eyes had the most cultural importance, and so garnered the most attention, but lips too received color from red ochre, either applied alone or mixed with resin or gum for more lasting finish.[7] Like all Egyptian cosmetics, lip color was concocted at home in brass or wooden makeup kits[8] and perfumed.[9] During the empire's heyday and twilight years, lip paint increased in importance and sophistication, with its use continuingly unhindered by any form of regulation. Popular color choices included orange, magenta, and blue-black.[10] Red also remained a fashionable option, and, in fact, the use of carmine as a primary red dye in lipstick initially came from Egypt's 50 B.C. avante garde, such as Cleopatra.[11] In life, it became a social mandate to apply lip paint using wet sticks of wood, and, in death, each well-to-do woman took at least two pots of lip paint to her tomb.[12]

Greece

While Egypt began to decline, Greek culture rose and spread. As would almost all of the Western peoples to follow, these ancient Greeks had a tumultuous relationship with lipstick. Ancient Greece, indeed, provides

[6] *Id.* at 8.

[7] Pointer, *supra* note 1, at 16-19.

[8] Jessica Pallingston, Lipstick 7 (1999). A typical Egyptian makeup kit would include: pots for mixing lip color, egg whites for facials, pumice stones and razors for scraping off body hair, crushed ant eggs for eyeliner, and perfume. *Id.*

[9] Corson, *supra* note 5, at 12.

[10] Pallingston, *supra* note 8, at 8.

[11] Ragas & Kozlowski, *supra* note 3, at 13. Carmine dye comes from the dried, ground remains of pregnant female cochineal insects, whose fatty flesh and eggs are red. Teresa Riordan, Inventing Beauty 36 (2004). These cohineal insects live as parasites on prickly pear cacti. Susan Okie, *Coloring in Food, Makeup Tied to Allergic Attacks,* Wash. Post, December 9, 1997, at Z5.

[12] Pallingston, *supra* note 8, at 8.

a case study of several social and legal patterns in lipstick's history. The social patterns include: lipstick's shifting cultural signification between social status and femininity, authorities' backlash against previous rampant reliance on lipstick's artificial beauty, and a lipstick revival in spite of this leadership disfavor. Early in the Greek empire, most women eschewed all facial makeup, although they did rely on elaborate hair dyes and fake hair.[13] Lip paint became largely the domain of prostitutes, whose red lip color involved both such standard materials as red dye and wine and such extraordinary ingredients as sheep sweat, human saliva, and crocodile excrement.[14] It was in this context of lipstick signaling prostitution that the first known formal regulation of lipstick arose. In what would become a prominent pattern in lipstick regulation, this first lipstick law focused on lipstick's potential deception of men and undermining of class divides rather than on its safety for women. Under Greek law, prostitutes who appeared in public either at the wrong hours or without their designated lip paint and other makeup could be punished for improperly posing as ladies.[15]

Greece's neighboring Minoans on Crete and Thera, meanwhile, seemingly retained the more liberal Middle Eastern attitude towards lipstick, as evidenced by wall paintings that "show women with unnaturally red lips."[16] The Minoans' "Tyrian dye," a purplish-red pigment produced from a gland in the murex shellfish, not only colored their famed fabrics, but also their lip and face paints.[17] Whether from these more permissive neighbors or from prostitutes' enticing example, at some point between700 and 300 B.C., lip color seeped into Classical Greece's mainstream culture.[18] During this first of many lipstick revivals, Greek art began depicting women handing one another cosmetics articles.[19] Greek tombs from the period contained covered

[13]Gunn, *supra* note 2, at 38-40.

[14]Pallingston, *supra* note 8, at 8. *See also*, Gunn, *supra* note 2, at 38 (prostitutes, known as *hetaerae*, "wore lavish makeup as a mark of their trade").

[15]Pallingston, *supra* note 8, at 9.

[16]Pointer, *supra* note 1, at 28. *See also*, Gunn, *supra* note 2, at 39.

[17]Pointer, *supra* note 1, at 28.

[18]*See*, *id.* at 34. If one can trust Plutarch's account though, then acceptance of lipstick cannot have come to pass until the latter half of this allotted timeframe, at least in Sparta. For, Plutarch reports that Lycurgus banished all cosmetics from Sparta. Corson, *supra* note 5, at 41.

[19]Pointer, *supra* note 1, at 34-35. The artwork does not make clear whether the cosmetics presenters represent friends,

boxes, called *pyxides*, used for storing cosmetics.[20] Interestingly, as these historical traces suggest, use of lip paint leapt directly from prostitutes and foreigners to the elite; lower class working women continued to avoid makeup.[21] Color for the newly acceptable, and even socially exclusive, lip paint came from vegetable substances such as mulberries and seaweed,[22] from the roots of an alkanet-like plant known as *polderos*,[23] and from the considerably less safe vermilion.[24]

Rome

By the time that Greece fell and the Roman Empire got well underway, between 150-31 B.C., lipstick had returned to high popularity and low regulation.[25] Lipstick at this point reverted to demarcating purely social status, not gender, with the color of lip paint that men wore generally indicating their social standing and rank.[26] This is not to suggest that women did not preserve their predominance as lipstick consumers though. Empress Poppaea Sabina, "the crazy wife of the crazy emperor Nero," retained no less than one-hundred attendants to "maintain her looks and keep her lips painted at all times."[27] Indeed, most wealthy Roman women had designated, specially-trained makeup and hairstyling slaves, *cosmatae*, who were overseen by a

slaves, or professional beauticians, only that women assisted one another in their beauty routines. *Id.* at 34.

[20] *Id.* at 34-35.

[21] Corson, *supra* note 5, at 40.

[22] Ragas & Kozlowski, *supra* note 3, at 14.

[23] Riordan, *supra* note 11, at 34.

[24] Ragas & Kozlowski, *supra* note 3, at 14. Common vernacular has long used "vermilion" as the name for an orange-red mercuric sulfide (HgS) that, like all mercury compounds, is toxic. *Vermilion*, Wikipedia: The Free Encyclopedia (Feb. 13, 2006), *at* http://en.wikipedia.org/wiki/Vermilion.

[25] It here requires mention that some historians credit Romans' enthusiasm for lipstick more to the early Britains than to the Greeks. Pointer, *supra* note 1, at 41. The Romans almost certainly imitated the Britains' use of small bronze mortars and pestles for grinding up the mineral pigments used in cosmetics. *Id.*

[26] Pallingston, *supra* note 8, at 9. Lipstick as a status indicator resulted from informal social rules rather than formal legal ones though, for once lipstick returned to a male practice, regulations of lipstick vanished. *Id.*

[27] *Id.*

headmistress of the toilette, the *ornatrix*.[28] Following Poppaea's lead, Roman women tended to use a red or purplish lip paint[29] made out of ochre, iron ore, and fucus.[30] Echoing the Sumerian's use of lead and the Greek's reliance on vermilion, this Roman enthusiasm for the mercuric plant fucus infused lip paint with a potentially deadly poison; those poor persons who had to rely on red wine sediments for their lip color likely faired better in the end.[31]

Western Europe

Eventually, as the Roman Empire crumbled, Western Europe descended into the Dark Ages,[32] a "shadowy and uncertain time" from which few records of everyday life survive.[33] Most information on lipstick from this period comes from the writings of churchmen, who objected to its usage, although to only moderate effect.[34] As Christianity and bad weather concomitantly took hold, "there was a gradual but distinct shift in favor of a rather plainer, and possibly slightly less washed existence."[35] The Roman Empire's fall rendered

[28] Pointer, *supra* note 1, at 38. Each of these slaves would have a different, specific role in the toilette process. *Id.*

[29] Some historians believe that this "lip paint" was, literally, just standard paint. It has come to appear likely that the Romans used essentially the same paint for cosmetic and artistic purposes. *Id.* at 36-37.

[30] Ragas & Kozlowski, *supra* note 3, at 13.

[31] Pallingston, *supra* note 8, at 9. Lest this recount of various ill-advised ingredients seem incompatible with the previous guarded endorsement of lipstick's relative safety, it bears note that other cosmetics had even more dangerous and downright bizarre recipes that continued up through much more recent dates. For example, skin cosmetics have featured concoctions ranging from "puppy-dog-fat wrinkle creams and splashing on one's own urine in the sixteenth century, to mixtures of pig brain, alligator intestine, and wolf blood in the Middle Ages." *Id.* at 5. As late as the eighteenth century, most foundation, used to mask smallpox scars and skin defects, had a white lead-base; thus, face powder not only exacerbated skin problems, but also posed a general health hazard. Gunn, *supra* note 2, at 110-115. As late as the early 1930s in America, only a few states worried about the lead commonly found in hair dyes and other cosmetics. M.C. Phillips, Skin Deep: The Truth About Beauty Aids – Safe and Harmful 231-32 (1934).

[32] Historians more properly term the "Dark Ages" the "European Early Middle Ages," but here propriety will be eschewed in favor of comprehensibility for the average educated reader. *See, e.g.*, Theodore E. Mommsen, *Petrarch's Conception of the 'Dark Ages,'* 17 Speculum 226 (1942) (discussing the origins of and historical period denoted by the phrase "the Dark Ages").

[33] Pointer, *supra* note 1, at 55.

[34] Corson, *supra* note 5, at 65.

[35] Pointer, *supra* note 1, at 58.

trade routes precarious, and so also likely hurt cosmetics commerce.[36] However, scraps of documentation from throughout this five-hundred-year period, as well as the continued complaining of religious writers, makes clear that lipstick remained at least relatively in use by females and entirely free from regulation of law.[37] In Spain around 500 A.D., the lower classes frequently wore lip paint.[38] A couple of centuries later in Germany and Britain, orange lip color became widely popular.[39] Beginning in the 800s A.D., crystal cosmetics containers with jeweled lids trickled out from Constantinople, thus suggesting that upper class enthusiasm for cosmetics, likely including lip paints, had returned.[40] Several Irish texts refer to red lips achieved with the help of herbal dyes.[41] Therefore, although interested historians generally identify the Dark Ages with a decline in lipstick use, some lip painting evidently did occur throughout most countries during the period.[42]

Not until the start of the Middle Ages,[43] actually, did religious criticism of lipstick finally gain widespread hold in some countries, most notably England.[44] In England, "a woman who wore make-up was seen as an incarnation of Satan," because such alteration of her given face challenged God and his workmanship.[45] While this interdiction against lipstick mostly took the form of social rather than legal sanctions, lip tattooing

[36] *Id.* at 55.

[37] At this point it requires reemphasis that this commentary applies only to the Western world. Lip paint use by both men and women actually remained fairly constant in Asia and Africa during the Western world's Dark Ages, and so a significant amount of the most interesting information on lipstick from this time period comes from those continents. CORSON, *supra* note 5, at 88-90 (discussing lip paint's use in Asia and Africa). As no work short of a book could cover the entirety of lipstick's history across all of time and space though, such interesting information must unfortunately fall outside the scope of this paper.

[38] *Id.* at 78.

[39] *Id.*

[40] POINTER, *supra* note 1, at 56.

[41] *Id.* at 65.

[42] Along with the abovementioned examples of lip paint use, men often painted their lips blue when charging into battle. PALLINGSTON, *supra* note 8, at 10. Since people have traditionally conceptualized such war paint as distinct from lipstick though, lip painting done for battle purposes will not receive further attention herein.

[43] *See, e.g.*, Rondo Cameron, *Europe's Second Logistic*, 12 COMP. STUD. IN SOC'Y & HIST. 452, 456 (1970) (review article) (referencing the period around the thirteenth through fifteenth centuries as the "High Middle Ages").

[44] Generalizing about lip paint usage during this period actually proves very tricky, as usage varied so much by country and century. CORSON, *supra* note 5, at 77. For more or less the most part though, lip paint fell into disfavor and become the domain of prostitutes. *Id.*

[45] PALLINGSTON, *supra* note 8, at 10. "This was the era of Lipstick as Satan." *Id.* at 11.

was outright outlawed.[46] Even in England, however, the social proscriptions on lip coloring had their exceptions. Applying a lily or rose tint to one's lips remained permissible based on those colors' connotation with purity.[47] Thus, many women would fashion rose lip rouge of sheep fat and mashed up red roots.[48] Moreover, other countries never so fully accepted the idea the piety prohibited lipstick. During the 1200's A.D. in present-day Italy, lipstick remained an important tool for social demarcation, with high society ladies wearing bright pink lip rouge and lower class women wearing earthy red lip rouge.[49] Then, when the Crusades reintroduced Western Europe to the extensive Middle Eastern use of cosmetics, lipstick acquired a slightly wicked allure.[50] By the 1300s A.D., the rich had alchemists create their lip rouge and apply it while doing incantations.[51] Those with less money would either concoct their own lip rouge or try to buy it from itinerant merchants before the merchants got caught and jailed for witchcraft.[52]

Lipstick's paradoxical standing as both a popular and shunned item fully developed in the Renaissance period. Courtesans of England, France, Venice, and Milan, whose social position presumably rendered them immune to such confliction, all used lip rouge with abandon.[53] In England, both the women and men of Edward IV's court wore lip rouge as well.[54] The king himself christened a few official lip rouges, such as "Raw Flesh."[55] However, peddlers selling lip rouge at rural fairs, and usually playing on crowds' superstitions to claim that the lip rouges possessed protective power, still risked hanging as sorcerers.[56] Across the Channel

[46] *Id.* at 178.
[47] *Id.* at 11.
[48] *Id.*
[49] Ragas & Kozlowski, *supra* note 3, at 14.
[50] *See*, Pointer, *supra* note 1, at 71. *See also*, Gunn, *supra* note 2, at 60-66.
[51] Pallingston, *supra* note 8, at 121.
[52] *Id.* at 120.
[53] Pointer, *supra* note 1, at 75.
[54] *Id.* at 74.
[55] Pallingston, *supra* note 8, at 112. The king's chosen name fit in nicely with other fashionable lip rouge appellations, which included: "Beggar's Grey," "Rat," "Horseflesh," "Soppes-in-Wine," "Puke," "Sad," "Blod," "Plunket," and "Sheep." *Id.* at 111-12.
[56] *Id.* at 121.

in France, upper-class women mostly left lipstick to 'the other sort of woman.'[57] While, in Italy, ladies continued to wear lip rouge, but with subtlety born of church pressure.[58]

England

1500s

This simultaneously widespread criticism and widespread use of lipstick continued apace in the 1500s A.D.[59] England, which grew increasingly powerful throughout the century, embraced lipstick on the eve of Queen Elizabeth I's coronation.[60] A lip rouge devotee, Elizabeth usually made her own crimson color with a combination of cochineal, gum Arabic, egg whites, and fig milk.[61] Elizabeth or one of her close associates also appears to have invented the lip pencil, which either she or her servants made by mixing ground alabaster or plaster of Paris with a coloring ingredient, rolling the resultant paste into a crayon shape, and drying it in the sun.[62] Most court ladies imitated the queen in boldly wearing lip rouge, but the majority of women proceeded with more caution.[63] On one hand, the English loved lipstick to the point that it not infrequently

[57] Corson, *supra* note 5, at 79.

[58] *Id.* at 95. The Italians also simply did not consider lip color as important as whitening face powders during this time. *Id.* at 97.

[59] Significant portions of the Continent experienced much less disquiet over lipstick than did England. For example, Italy wholeheartedly accepted lip rouge, serving as a trendsetter for neighboring countries. Gunn, *supra* note 2, at 74. France too seems to have decided lip rouge entirely appropriate, since, in Paris, even the nuns wore it. Ragas & Kozlowski, *supra* note 3, at 14.

[60] Gunn, *supra* note 2, at 74. *See also*, Paula Boock, On Make-up and Makeover 29-30 (2003) (detailing the many ways in which "Elizabeth's vanity created a national culture of beauty," from increased lip rouge usage to proliferation of mirrors).

[61] Ragas & Kozlowski, *supra* note 3, at 14. *See also*, Pallingston, *supra* note 8, at 179 (describing Queen Elizabeth's enjoyment of lipstick).

[62] Riordan, *supra* note 11, at 34. *See also*, Gunn, *supra* note 2, at 76 (describing Queen Elizabeth's lip pencil).

[63] Pointer, *supra* note 1, at 91.

served as a cash substitute.[64] Part of this lipstick craze is doubtless attributable to the country's sharp rise in wealth and the Renaissance zeitgeist of "rediscovery of life, of beauty, form, and colour," which factors scholars credit with stimulating cosmetics use generally.[65] A substantial part of lipstick's popularity though, came from the belief that it could work magic, possibly even ward off death.[66] Modern minds might find this faith in lipstick's health benefits ironic given that ceruse served as a main ingredient in most lip rouges and salves of the period, but few Elizabethans questioned their lip rouge's power.[67] The queen herself credited lipstick with lifesaving powers, and so, when she fell ill, applied lip rouge increasingly heavily.[68] By her death, Elizabeth had on nearly a half-inch of lip rouge.[69]

On the other hand, however, this belief in lipstick's magical force caused the cosmetic to provoke the wrath of church and also state. Pictures of devils putting lipstick on women appeared often,[70] and women frequently had to address their lipstick use at confession.[71] One prominent text declared cosmetics usage a mortal sin unless done "to remedy severe disfigurement or so as to be not looked down upon by [one's] husband."[72] Such church disapproval alone might not have produced tremendous result. As one historian summarizes the situation: "Despite all of the criticism from men, be they moralists, poets, or husbands, more and more women painted, and their painting was at least tolerated by the public."[73] When the law stepped in though, with the first formal lipstick regulation since Ancient Greece, women of the lower classes had to take care. Parliament passed a law declaring the use makeup to deceive an Englishman into marriage punishable as

[64] Pallingston, *supra* note 8, at 12.
[65] Neville Williams, Powder and Paint: A History of the Englishwoman's Toilet Elizabeth I – Elizabeth II 25-26 (1957).
[66] *Id.* In fact, street corner cosmetics vendors were commonly considered magicians. *Id.*
[67] *Id.* at 15. Ceruse, essentially the same thing as the ancient Sumerians' white lead, is "a carbonate of lead made by exposing plates of that metal to the vapour of vinegar." *Id.*
[68] Pallingston, *supra* note 8, at 12.
[69] *Id.*
[70] *Id.* at 50.
[71] Pointer, *supra* note 1, at 87.
[72] *Id.*
[73] Corson, *supra* note 5, at 110. The social and religious censure had so little effect that men too occasionally wore makeup, perhaps following the lead of France's Henry III. *Id.* at 117-19.

witchcraft.[74]

1600s

The 1600s A.D. presented more of the same: a continued siege on lipstick from clergy, ethicists, and occasionally lawmakers, and a continued love affair with lipstick by the English population.[75] During James I's reign in the early part of the century, lip rouge remained evident but relatively discrete among both upper and lower classes.[76] As so often before, the classes wore different colors of lipstick. This time though, the color distinction was principally, if not solely, based on cost of ingredients. The upper class indulged in a bright cherry red while the lower class stuck with the cheaper ochre red.[77] It warrants note that the upper class also enjoyed safer lip rouge made with a base of "bear's grease," melted down animal fat imported from France, while the lower class continued wearing lip rouge made of the much cheaper ceruse.[78] Even male courtiers employed lip rouge, but, because lipstick remained very much identified with femininity, they also tried to disguise this practice.[79] This female discretion and male secrecy vanished upon the establishment of Charles II's court. Ladies painted freely, favoring full red lips modeled after previous years' theatrical makeup.[80] Gentlemen also openly began wearing lip rouge, as the cosmetic's signaling of femininity and

[74] *See, e.g.*, POINTER, *supra* note 1, at 96. Some historians also report that mere wearing of lip rouge by lower-class women provided adequate cause for arrest. It remains unclear though whether such writers are overstating the previously referenced witchcraft laws or referring to some other less known rule or practice. *See, e.g.*, PALLINGSTON, *supra* note 8, at 12.

[75] Religious and moral pundits continued to view cosmetics "as cheating, as altering God's most precious gift." RAGAS & KOZLOWSKI, *supra* note 3, at 16. By and large, those in the provinces listened to these critiques and avoided makeup, while those in London and a few of the larger towns paid no heed to such complaints and painted away. WILLIAMS, *supra* note 65, at 5-6.

[76] CORSON, *supra* note 5, at 121.

[77] *Id.* at 127. Both classes painted on the same lip shape though, a lower lip significantly fuller than the upper. *Id.*

[78] WILLIAMS, *supra*, note 65, at 16. Some prominent scientists, such as Royal Society member Sir Robert Moray, had begun to publicly note the dizziness, headaches, and blindness that plagued the workmen who produced ceruse, but the substance's toxicity remained far from common knowledge. *Id.* at 15-16.

[79] CORSON, *supra* note 5, at 127-28. Historians have plausibly argued that the probably homosexual James I's own reputation of effeminacy encouraged lip rouge use. *See, e.g,*. GUNN, *supra* note 2, at 89 (writing that: "undoubtably, the king's homosexual reputation encouraged effeminacy at court. It is certain that James I's favorites used more make-up than the most flamboyant of Elizabethan fops.").

[80] CORSON, *supra* note 5, at 149-162. During this period, the acknowledged point of bothering to wear lip rouge was to garner attention. PALLINGSTON, *supra* note 8, at 13.

stigma of impropriety had much faded.[81] Since lip and check rouge had yet to include fixatives, this rampant use proved quite messy.[82] The rampant use, levels of rouge and powder unseen for several hundred years prior, also prompted Parliament to consider taking action. A bill introduced to Parliament in 1650, "called for the suppression of 'the vice of painting, wearing black patches, and the immodest dress of women.' "[83] The bill ultimately did not pass, however, due to a majority considering it impracticable.[84]

1700s

Although Parliament's efforts at ridding the public of lipstick failed in the short term, England did veer away from lipstick in the long run.[85] By the 1700s, wearing lipstick had returned to a surreptitious practice in England, due both to social and to legal penalties. While French ladies wore blatant makeup[86] and scorned the natural look as only for prostitutes, in England nearly opposite norms arose.[87] London prostitutes wore vivid makeup, while young ladies wore almost none, increasing lip rouge usage only upon aging.[88] The older ladies who did wear lip rouge often prepared it themselves – some of the better homes had "still rooms" intended for this purpose – from family or popular recipes.[89] One such popular recipe featured white

[81] Corson, *supra* note 5, at 164. *See also*, Pallingston, *supra* note 8, at 12 (more strongly asserting that "all respectable men wore lipstick").
[82] Williams, *supra* note 65, at 17-18.
[83] Pointer, *supra* note 1, at 101.
[84] *Id.*
[85] *See*, Corson, *supra* note 5, at 185 (reporting that young English women used little lipstick in the 1700s, although they would still use lipstick upon reaching older age). *See also*, Pallingston, *supra* note 8, at 80 (reporting that 1700s penalties for lipstick use successfully deterred women from wearing it). *But see.*, Williams, *supra*, note 65, at 56-66 (contending that lip rouge use, even by teenagers, continued with more subtlety but no secrecy in the 1700s).
[86] Frenchwomen went through approximately two million pots of lip rouge per year in the 1780s. Ragas & Kozlowski, *supra* note 3, at 16. They had some two dozen kinds of lip rouge from which to choose, liquid and dry and in various shades. Corson, *supra* note 5, at 249.
[87] Corson, *supra* note 5, at 187. For the French, cosmetics took on an important social function, with the time and method of cosmetics' application occurring in a ritualized, public manner. *See*, Pointer, *supra* note 1, at 114-115 (explaining that: "often the public toilette was a carefully staged replay of the dressing of the hair and applying of make-up to a woman who had already been through the expert hands of her maids beforehand.").
[88] Corson, *supra* note 5, at 187.
[89] *Id.* at 230-241.

pomatum, wax, ox's marrow, and alkanet.[90] Another, called for grinding up roses with hog's lard, letting it macerate two days, and then melting and straining the mixture, with an infusion of more roses as needed.[91] Gold leaf was also suggested as a nice addition to any lip salve.[92] Of course, some women did not bother with such elaborate concoctions, and simply applied brandy to their lips until they turned red.[93] This reserving of lip rouge for the older, and so presumably married, women moved from social convention to severe black letter law in 1770.[94] Rather than merely discouraging lip rouge through taxation, as done to hair powder,[95] Parliament declared that women who seduced men into matrimony through use of lip and cheek paints could have their marriages annulled as well as face witchcraft charges.[96] Specifically, the legislation declared:

> All women of whatever age, rank, profession or degree, whether virgins, maids or widows, that shall, from and after such Act, impose upon, seduce and betray into matrimony any of His Majesty's subjects, by the scents, paints, cosmetic washes, artificial teeth, false hair, Spanish wool, iron stays, hoops, high-heeled shoes or bolstered hips, shall incur the penalty of the law in force against witchcraft and the like misdemeanours and [their] marriage[s], upon conviction, shall become null and void.[97]

While this law intended only to protect men, it also had the fortuitous consequence of deterring women from the unavoidably public purchasing of shop lip rouges, which lip rouges merchants often adulterated with vermilion.[98] A previous 1724 Act regulating drugs had increased lipstick safety in a similarly incidental manner. Said Act prohibited from London and the surrounding vicinity any medicine or preparation contain-

[90] *Id.* at 234.
[91] *Id.* at 235.
[92] *Id.* at 260.
[93] *Id.* at 235.
[94] Perhaps "gray letter law" would more properly describe this slightly mysterious 1770 law. For, although several authors mention, and even quote the Act, a search through statutes passed by the House of Lords in the 1760-1780 timeframe reveals no such cosmetics legislation. Historian Neville Williams comments on his lack of luck in locating this Act as well, writing that: "the date of this Act is given by W.A. Poucher. . . [as well as] by Louis Stanley. . . [but] I have failed to find the Act in the printed *Statutes* for the sessions of that year; nor has a search of the original Parliament Rolls met with success." Williams, *supra* note 65, at74 n.54.
[95] *Id.* at 86-87 (noting that, beginning in 1795, women who powdered their hair had to take out licenses for a guinea a year, with special terms for fathers who had more than two unmarried daughters and for servants).
[96] Ragas & Kozlowski, *supra* note 3, at 17. *See also*, Corson, *supra* note 5, at 245 (writing that English Parliament grew alarmed by makeup, because they feared that it often seduced or betrayed men into matrimony); Pallingston, *supra* note 8, at 80 (writing that British women were not infrequently arrested for wearing lip rouge as an attempt to trick men into marriage).
[98] Corson, *supra* note 5, at 262. Bath physician Dr. A Fothergill loudly lamented that most cosmetics contained poisons, including "carmine, or harmless rouge," which was usually prepared with a strong mineral acid (nitrous acid) and often adulterated with vermilion (a preparation of mercury). *Id.*

ing certain dangerous ingredients, some of which dangerous ingredients had formerly commonly appeared in lip rouge.[99]

Meanwhile, the American colonies,[100] a continued thorn in England's side, shifted from following English ambivalence towards lipstick in the 1600s A.D.[101] to emulating French obsession with lipstick in the 1700s A.D.[102] American women achieved reddened lips by most means imaginable, from rubbing red snippets of ribbon across their mouths, to carrying around lemons for sucking on throughout the day, to purchasing Spanish Papers.[103] Bavarian Red Liquor also promised American women red lips, whether rubbed on or drunk. Even Martha Washington had a favorite recipe for lip rouge, which involved: wax, hogs' lard, spermaceti, alkanet root, almond oil, balsam, raisins, and sugar.[104] Although the American colonies largely rejected England's attitude towards lipstick, some of them did imitate English laws protecting men from lipstick trickery. In Pennsylvania, for example, a man in the 1700s could have his marriage annulled if his wife had used lip rouge or other cosmetics during the couple's courtship.[105]

1800s

[99]Statute 10 Geo. I, c. 20. "By virtue of this [law], the censors of the College of Physicians, assisted by the wardens of the Apothecaries' Company, could enter any shop, inspect goods and order those which did not come up to their standards to be destroyed." WILLIAMS, *supra* note 65, at 67-68. While helpful, this Act did not prevent metallic compounds from remaining in lip rouges through the following century, which compounds led to poisoning, muscle paralysis, and lip color turning black when exposed to the sulphur from coal fires. *Id.* at 106.

[100]Technically, the American "colonies" only existed for the first three-quarters of the century, as they won independence and became "former colonies" in 1783. *See*, *e.g.*, Charles R. Ritcheson, *The London Press and the First Decade of American Independence, 1783-1793*, 2 J. OF BRIT. STUD. 88 (1963).

[101]CORSON, *supra* note 5, at 142.

[102]Eventually the French Revolution at the end of the century rendered lip rouge unpopular in France, for wearing lip rouge signaled sympathy with the aristocracy and, ergo, provided cause for guillotining. PALLINGSTON, *supra* note 8, at 68. Americans continued to enjoy lipstick though, as they had never associated it with monarchy. *Id.*

[103]*Id.* at 13-14. Spanish Papers were quite literally pieces of paper thickened with a carmine dye that would transfer to one's mouth upon rubbing. *Id.* at 13. Less obviously though, "Spanish Papers" actually came from China, not Spain. GUNN, *supra* note 2, at 130.

[104]PALLINGSTON, *supra* note 8, at 182. *See also*, RIORDAN, *supra* note 11, at 34 n.22 (reciting the same recipe as does Pallingston, and further noting that Mrs. Washington euphemistically referred to this mixture as a "salve for chapped lips").

[105]RAGAS & KOZLOWSKI, *supra* note 3, at 17.

As the Victorian Age dawned, England's eighteenth century censure of lipstick swelled into extreme condemnation of it.[106] Some scholars have suggested that a propensity for viewing women as childlike creatures combined with a craze for nature and 'natural' beauty propelled this horror of makeup, which represented worldly artifice.[107] Others contend that Victorians' tendency to view women in commercial terms, with women's value determined largely by their beauty, prompted the dislike of cosmetics; cosmetics deceived male purchasers into overvaluing women's worth, and so represented a "particularly pernicious" form of commercial duplicity.[108] For whatever reasons though, social ban on lip rouge reverberated with such force as to render the lack of legal regulation largely moot. Queen Victoria publicly declared makeup "impolite,"[109] and makeup became socially unacceptable for all but prostitutes and actresses.[110] Lipstick, in particular, remained the least respectable of cosmetics throughout the century.[111] Of course, with lipstick, "going out of fashion simply meant going underground."[112] Women developed a range of strategies for dodging the social prohibition on lip rouge. Many women turned to non-cosmetic methods, such as kissing rosy crepe paper[113] or biting their lips to attain a red color[114] and doing lip calisthenics to achieve the idealized bee-stung shape.[115] Many others turned to all manner of subterfuges. Lip salves used with the excuse of moistening chapped lips actually "cunningly concealed a touch of carmine."[116] Lip rouges also masqueraded as

[106] Discussion of the Victorian Era demands one final stressing of this paper's necessarily limited scope. While lipstick did hit an all-time low in England during the nineteenth century, focusing only on lipstick in England could generate a most misleading image of lipstick's global status. For example, during the same period in China, lipstick enjoyed a surge in popularity, with Chinese women applying carmine to not only their lips but also to their tongues. Corson, *supra* note 5, at 311.

[107] *See, e.g.*, Gunn, *supra* note 2, at 131.

[108] Kathy Peiss, *On Beauty and the History of Business, in* Beauty and Business: Commerce, Gender, and Culture in Modern America 9-10 (Philip Scranton ed., 2001).

[109] Pallingston, *supra* note 8, at 14.

[110] *Id. See also*, Ragas & Kozlowski, *supra* note 3, at 18.

[111] Ragas & Kozlowski, *supra* note 3, at 20. *See also*, Gunn, *supra* note 2, at 129 (commenting that, while powder and subtle cheek rouge crept back into use over the course of the century, lip color remained "undesirable and vulgar").

[112] Corson, *supra* note 5, at 292. In addition to looking at personal and business records from the era, one can look to the invention of badger hair brushes for applying lip rouge as a fairly clear sign that lip rouge still had a critical mass of customers. Gunn, *supra* note 2, at 139.

[113] Ragas & Kozlowski, *supra* note 3, at 18.

[114] Corson, *supra* note 5, at 383.

[115] Riordan, *supra* note 11, at 35-36 (describing English and also American women's attempt to obtain bee-stung mouth shapes by repeating sequences of words beginning with "p," most popularly "peas, prunes, and prisms," with "potatoes" and "papa" also sometimes added).

[116] Gunn, *supra* note 2, at 132.

medicine, with "the medicine makeup quack [finding] a new home on the edge of the medical profession."[117] Clandestine beauty establishments at which one could buy lip rouge survived based on discretion; women would arrive veiled, get ushered into individual private rooms, and then smuggle their purchases back home for hiding.[118] Women also secretly traded recipes and made lip rouge with their friends in underground lip rouge societies.[119] Finally, the particularly privileged would also sneak off to the more permissive Paris to buy Guerlain's lip pomade, which involved grapefruit mixed with butter and wax.[120]

All of this furtively continued use of lip rouge eventually started to seep out into the open towards the very end of the century. This relaxation in social lipstick restrictions most often gets credited to actresses who made it into the fringes of society while continuing to wear the makeup that they employed professionally.[121] Continued unabashed use of makeup by high-end prostitutes known as *demi-mondaines* also likely contributed to lipstick's eventual resurfacing.[122] Additionally, more cynical scholars propose that lip rouge application became allowable largely because men found it newly expedient to permit such application. According to this theory, men began to quietly encourage cosmetics use in the hopes that a concern for makeup would in turn discourage the even greater evil of female sports and professional pursuits.[123] Whether for genuinely progressive or for more insidious reasons though, by the 1890s older women could tolerably use lip rouge, although unmarried women still could not, except in gatherings of female friends.[124] While most women would still only apply lip rouge in strict secrecy, it did reappear in store windows publicly.[125] That lipstick slowly became more endurable in no way means that lipstick became actually accepted though, as

[117] Pallingston, *supra* note 8, at 15.
[118] Gunn, *supra* note 2, at 138.
[119] Pallingston, *supra* note 8, at 15 (writing that: "lip rouge was spoken of aboveground as the most indecent of all makeup, [but] lipstick societies underground traded recipes").
[120] Ragas & Kozlowski, *supra* note 3, at 18.
[121] Gunn, *supra* note 2, at 139. Actresses' use of stage makeup dates back to 1660, when, for the first time, women rather than boys began acting the feminine parts in plays. Williams, *supra* note 65, at 41.
[122] Gunn, *supra* note 2, at 143.
[123] Boock, *supra* note 60, at 36 (citing Max Beerbohm's *In Defense of Cosmetics* as an example of such arguments for increasing cosmetics usage in order to decrease women's pursuit of 'masculine' activities).
[124] *Id.* at 141-42.
[125] Corson, *supra* note 5, at 337. Cheek and lip rouge in particular remained "in a state of dubious respectability [throughout the century]... Many women used it, but most of them preferred not to advertise the fact." *Id.* at 380.

demonstrated by famed actress Sarah Bernhardt causing one of the century's greatest scandals in the 1880s when she applied red lip rouge in public.[126] Even the wild beauty Lola Montez, mistress of both Franz Liszt and Louis I of Bavaria, apparently felt compelled to in print warn women that lip rouge leads to sure destruction, even though this warning did not correlate particularly well with her own experience.[127]

Thus, overall the English lagged far behind their former American subjects in lipstick use. The first department store makeup counter opened at New York's B. Altman's in 1867.[128] That same year, Harriet M. Fish of New York patented a lip and cheek rouge pad colored with carmine, strawberry juice, beet juice, and hollyhock root.[129] Americans' few previous qualms about lipstick lingered on, but Americans generally plunged ahead in using and developing lip rouge much as they pulled ahead of England in industrialization.[130]

United States

1900-1920

At the turn of the twentieth century, lipstick began to acquire the symbolic and economic standing that it holds today, with rapidly increasing numbers of women using the product impervious to its lack of safety

[126] *See, e.g.*, PALLINGSTON, *supra* note 8, at 14.

[127] CORSON, *supra* note 5, at 324-327. Lola wrote, or at least attached her name to, a beauty hints book containing the statement: "Let every woman at once understand that paint can do nothing for the mouth and lips, the advantage gained by the artificial red is a thousand times more than lost by the sure destruction of that delicate charm associated with the idea of 'nature's dewey lip.' " *Id.* at 327.

[128] PALLINGSTON, *supra* note 8, at 76.

[129] RIORDAN, *supra* note 11, at 35. Also popular in Chicago at that time was a lip and cheek rouge made of alkanet root, oil of roses, and oil of turpentine. *Id.*

[130] *See, e.g.*, Jonathan Prude, *Capitalism, Industrialization, and the Factory in Post-Revolutionary America*, 16 J. OF EARLY REPUBLIC 237 (1996) (discussing the motivations and meanings of American industrialization following the Revolutionary War).

regulations.[131] Lipstick continued to symbolize femininity as it continuously had done for four hundred years prior, but now this symbolism contained a twist. Due to the endorsement of leading suffragettes, lipstick more specifically symbolized female emancipation.[132] Leaders such as Elizabeth Cady Stanton and Charlotte Perkins Gilman trumpeted the wearing of lip rouge as an emblem of women's emancipation, and incorporated its use into the 1912 New York Suffragette Rally.[133] Thereafter, suffragettes wore a particularly noticeable shade of red lip rouge as part of standard rally procedure.[134] In both America and England, women publicly applied lip rouge with the express intent of appalling men.[135] Lipstick's long proscription by social, religious, and legal male authority made it a ready symbol for female rebellion.

At the same time though, displaying full, colorful lips for traditional beautification reasons, both via 'natural' and cosmetic methods, also continued. Those of a Gibson Girls persuasion would make their lips red and swollen by biting them and sucking on hot cinnamon drops.[136] Women following Baroness d'Orchamps' advice from the 1907 *Tous les Secrets de la Femme* would redden their lips by soaking them for five minutes in a glass of warm water, followed by smearing them with camphorated pomade, and finally topping them off with glycerine.[137] Extra adventurous ladies might seek the lipstick tattoos of Gorge Burchett, the most famous tattoo artist in England around 1910.[138] Simultaneously though, cosmetic lip color also continued to

[131]Richard Corson describes the period as one in which, "the cosmetics cycle returned to the completely free and open use of makeup. . . Perhaps for the first time since the ancient Egyptians, the unlimited use of cosmetics came to be universally accepted, both socially and morally." Corson, *supra* note 5, at 393. This seems rather an overstatement, considering the controversy that lipstick still managed to stir, but Corson's effusion does capture the remarkable increase in acceptance and application of lipstick.

[132]Although evidently not a theory espoused by scholars, it seems at least possible that several female entrepreneurs' success as cosmetics magnates also contributed to lipstick's transformation into a symbol of emancipation. To take one well-known example: a young Canadian woman named Florence Nightingale Graham borrowed $6,000 from a cousin to start a cosmetics company named Elizabeth Arden; Graham repaid the loan within four months, and ten years later refused an offer to buy the company for $15,000,000. *Id.* at 420.

[133]Pallingston, *supra* note 8, at 17.

[134]Pointer, *supra* note 1, at 156.

[135]Gunn, *supra* note 2, at 148.

[136]Ragas & Kozlowski, *supra* note 3, at 20.

[137]Corson, *supra* note 5, at 414. The Baroness did responsibly warn women that they should not rely on this procedure too often, as glycerine will eventually cause lips to lose elasticity. *Id.*

[138]Pallingston, *supra* note 8, at 69.

advance, facilitated by such developments as the first synthetic carmine.[139] The French company Guerlain introduced the first lip rouge in actual stick form for its aristocratic clients.[140] And, by the eve of the World War I, it had become common to purchase lipstick stored in tinted papers or rolled in paper tubes.[141] During the War, Americans then developed this French innovation further. The first modern tubes of lipstick came out of Waterbury, Connecticut in 1915, when Maurice Levy of the Scovil Manufacturing Company realized that one could mass produce and distribute the popular sticks of lip color by packaging them in a protective metal casing.[142] Levy tubes "were two inches long and had a plain dip-nickel finish," operating via slide levers on the side of the tubes.[143] Lipstick, as people now called it,[144] still had far to develop though; for example, the common American recipe of crushed insects, beeswax, and olive oil produced lipstick with an unfortunate tendency to turn rancid several hours after application.[145] Locally-produced lipsticks of pigmented powder mixed with butter or lard created similar problems.[146]

No safety laws, federal or state, checked either such preservation problems or the continued use of harmful ingredients in some lipsticks. This lack of regulation did not come from total ignorance of cosmetics' dangers, for the federal legislature had, as early as 1897, begun trying to pass a major food and drug safety law that would include cosmetics under its auspices.[147] Resistance to cosmetics regulation from the National Pure Food and Drug Congress though, finally forced legislators, in 1900, to drop the bill's cosmetics provision in order to get it passed.[148] Thus did the Pure Food and Drugs Act of 1906 ultimately fail to include cosmetics

[139] Riordan, *supra* note 11, at 36.
[140] Pallingston, *supra* note 8, at 16.
[141] Riordan, *supra* note 11, at 37.
[142] Pallingston, *supra* note 8, at 16.
[143] Riordan, *supra* note 11, at 39.
[144] Actually, people initially referred to the product as "lip stick," apparently after the Old English "lippa sticka," but merging the words into a single term became increasingly standard over the next two decades. Pallingston, *supra* note 8, at 82.
[145] Ragas & Kozlowski, *supra* note 3, at 45.
[146] Pallingston, *supra* note 8, at 14.
[147] Jacqueline A. Greff, *Regulation of Cosmetics That Are Also Drugs*, 51 Food & Drug L.J. 243 (1996).
[148] *Id.* at 243-44. The Pure Food and Drugs Act of 1906 passed only "after long struggle" that necessitated a number of compromises. Rayburn D. Tousley, *The Federal Food, Drug, and Cosmetic Act of 1938*, 5 J. of Marketing 259 (1941). The

under its jurisdiction, "except in an exceedingly remote fashion."[149] Only when labeled with claims of preventing, mitigating, or curing disease did cosmetics like lipstick become subject to federal regulation.[150] State-level regulations for lipstick safety remained similarly absent, although a couple of states considered limiting lipstick use for other reasons. New York's Board of Health considered banning lipstick out of concern that it might poison the men who kissed women wearing it.[151] A bill introduced in the Kansas legislature's 1915 session would have made it a misdemeanor for any woman under age 44 to wear cosmetics if "for the purpose of creating a false impression."[152]

1920s

This heady environment of increasing lipstick development and use unchecked by any lipstick safety laws only heightened in the years following World War I.[153] Levy's original push-up lipstick tubes quickly gave way to the swivel lipstick tubes that people know today. In 1923, James Bruce Mason Jr. patented the first swivel lipstick, with the lipstick case bottom featuring a decorative screw head that one turned as the lip color depleted.[154] In the following years, the U.S. Patent Office then issued "upwards of one-hundred patents for different lipstick shapes and dispenser variations."[155] Among the more extraordinary of these patented ideas came: octagon lipsticks, lipsticks designed to resemble toast popping out of a toaster, and lipsticks whose covers rolled back in imitation of roll-top desks.[156] Devices intended to rearrange women's

Act, in its final form, basically prohibited the interstate commerce shipment of adulterated or misbranded foods or drugs. Tousley, *supra*, at 259.

[149] Phillips, *supra* note 31, at 226-27.

[150] *Id.* at 227.

[151] Ragas & Kozlowski, *supra* note 3, at 23.

[152] Boock, *supra* note 60, at 33.

[153] Even in England, lipstick mounted a huge comeback to reign alongside the eyebrow pencil as the most important cosmetics item in the 1920s. Gunn, *supra* note 2, at 149-50.

[154] Riordan, *supra* note 11, at 39.

[155] *Id.* at 40.

[156] *Id.* Predictably, less creative but more sensible lipstick designs, such as the popular "tango case," actually met with much more commercial success. Pointer, *supra* note 1, at 158.

mouths into more pleasing shapes, such as a clamp that promised to mold the upper lip into a cupid's bow, also claimed patents.[157] Not only these peculiarities but also more lasting innovations came out of the 1920s though, such as lip gloss,[158] and the first in a long line of purportedly indelible and waterproof lipsticks.[159] Other debuting options, such as lipsticks that change color upon application[160] and flavored lipsticks,[161] have also remained cyclically trendy to this day. Whether caused by or the cause of these continuing advances in cosmetics technology, lipstick use continued to sharply increase. Approximately fifty million American women used lipstick in the 1920s,[162] enough, according to one prominent advertising agency, to stretch three-thousand miles per year.[163] A new term, the "generation gap," was even coined in 1925 to describe the disparity between mother and daughter generations' lipstick use.[164] Cosmetics generally became the United States' fourth biggest industry after cars, movies, and bootleg liquor.[165]

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[157] Riordan, *supra* note 11, at 43. The patent for this particular lip clamp belonged to Hazel Mann Montealegre of Kansas. *Id.*

[158] *See, e.g.*, Ragas & Kozlowski, *supra* note 3, at 24 (discussing Max Factor's career generally and his 1928 introduction of lip gloss in particular); Bud Brewster, *50 Years of Cosmetic Color*, 110 Cosm. & Toiletries, Dec. 1995, at 107 (narrating how Max Factor created lip gloss so that actresses' lips could have a moist appearance without the ladies continually having to lick their lips as previously done).

[159] Corson, *supra* note 5, at 462-471. A text from around the time warned that, even apart from the dubiousness of claims to indelibility, women should avoid indelible lipsticks because of they often had bromo acid dye for their colorant and contained lead or other harmful materials. Phillips, *supra* note 31, at 47-48.

[160] Corson, *supra* note 5, at 481. The incredibly successful brand Tangee sold only one shade of lipstick, a light orange that turned coral pink upon application. *Id.* Tangee's makers, marketing to the parents of young girls, created the fiction that this color change came from the lipstick blending in with its wearer's natural lip color. Riordan, *supra* note 11, at 45-46. In actuality, a bromo-acid dye in the lipstick changed colors depending on the degree of alkalinity in the wearer's lips. Riordan, *supra* at 46.

[161] Pallingston, *supra* note 8, at 19.

[162] Ragas & Kozlowski, *supra* note 3, at 24. *But cf.*, Corson, *supra* note 5, at 481-83 (cautioning that, despite lipstick's impressive gain in favor, powder still ranked as the preeminent cosmetics product in the United States, with ninety percent of women using powder while only fifteen percent used lipstick).

[163] Corson, *supra* note 5, at 490.

[164] Pallingston, *supra* note 8, at 70. Attempting to bridge this gap, marketers schemed to reach mothers through their daughters, with such counsel as: "do see to it that your Mummy looks smart. Remember, no man really likes to go to a girl's home and see the mother of the girl he admires looking dowdy" Williams, *supra* note 65, at 132, quoting Jane Hawthorn, How to Look Your Best 45 (1928).

[165] Pallingston, *supra* note 8, at 19. *But see*, Nancy Koehn, *Estée Lauder: Self-Definition and the Modern Cosmetics Market*, *in* Beauty and Business: Commerce, Gender, and Culture in Modern America 217 (Philip Scranton, ed., 2001) (contending that, despite rapid growth, the United States beauty industry remained relatively small in the 1920s).

Reasons for this increasing lipstick use varied widely. Flappers took a page from earlier women's rights advocates, and wore scarlet lipstick "in a deliberate and, it seems, successful attempt to shock their elders."[166] Simultaneously, the "New Woman," a more faithful reincarnation of previous feminists, also adopted lipstick as a badge.[167] Many women also wore lipstick with no such rebellious intent though. Some believed the magazine advertisements' assurances that lipstick would protect their mouths from sucking in the germs and pollution of ongoing industrialization.[168] Others wished to imitate the color and shape of their favorite movie stars' mouths, particularly "the Clara Bow Look, the Theda Bara Look, [and] the Mae Murray Look."[169] These trademark mouths created by Max Factor originated from a movie lighting problem; hot studio lamps caused lip pomade to run, and so Max Factor started using greasepaint foundation to cover their natural outlines of actresses' mouths and then placed only thumbprints of lipstick at their lips' centers.[170] When these accidentally developed bow print mouths became tremendously stylish, Max Factor capitalized on their success by selling an eponymous line of cosmetics, which he referred to as "make-up," thereby further creating cosmetics history.[171]

A smattering of resistance to such lipstick furor remained, else, of course, women would not have worn lipstick as a rebellious gesture. According to one 1923 commentator: "Probably the lip-stick has aroused sharper critical rage than any other whimsicality of women. It can appear to have seized the feminine imagination more violently than any other specific device of fashion."[172] New Hampshire, whether out of

[166] GUNN, *supra* note 2, at 150.
[167] RIORDAN, *supra* note 11, at 45.
[168] PALLINGSTON, *supra* note 8, at 17.
[169] *Id.* at 17-18. Indeed, accepted wisdom holds that: "without the invention of the moving picture the revolution in the use of cosmetics would have proceeded at a very much slower pace. . . . [women] modeled their appearance as far as they could on America's untitled aristocracy – the stars of Hollywood." WILLIAMS, *supra* note 65, at 135.
[170] PALLINGSTON, *supra* note 8, at 19. Unbeknownst to the viewing public, Max Factor also used black lipstick on actresses, because it looked better than pink and red when photographed. *Id.*
[171] *Id.* at 20 (explaining that, before Max Factor, people used the term "makeup" solely to denote the products that actors used, never for ladies' "cosmetics").
[172] CORSON, *supra* note 5, at 464 (attributing the comment to Alexander Black).

moral or health concerns, unsuccessfully tried to ban the use of all cosmetics in the state.[173] Neither other states nor the federal government issued legal comment on lipstick's morality or safety.[174] Many lipsticks of the time ranged from uncomfortable, as a result of soap bases,[175] to downright dangerous, as a result of coal tar dyes,[176] but the situation apparently met with no official comment.[177]

1930s

Come the 1930s though, with the types of lipstick products, number of lipstick consumers, and wealth of lipstick producers multiplying in tandem, this regulatory environment shifted dramatically. Now conventional products, such as lip liner[178] and at least allegedly sun-protectant lipstick[179] first appeared during this decade. Several other new products, such as the lipstick stencil for ensuring symmetrical application, also briefly surfaced.[180] In addition to introducing new products, manufacturers rapidly promulgated enhance-

[173] *Id.* at 468-69.

[174] The federal government did make seven amendments to the Pure Food and Drugs Act of 1906, such as: a drug misbranding provision whose requirement of intent to commit fraud made this provision (known as the "fraud joker") almost impossible to enforce, a food labeling provision that required inclusion of food's net weight on labels, a standard for the milk fat content of butter, standards for the quality and fill of canned fruits and vegetables, and an amendment to factory inspection provisions for seafood. However, no cosmetics provisions numbered among the Act's intended improvements. Tousley, *supra* note 148, at 259-62.

[175] Pallingston, *supra* note 8, at 20.

[176] Corson, *supra* note 5, at 485 (describing a typical 1920s lipstick as consisting of a paraffin base reinforced with either wax or cocoa butter and tinted with either carmine or coal tar dye). Despite having no specific statutory authority to do so, the FDA actually did make an effort to control these coal tar dyes by inspecting products before they left manufacturing plants and publishing a list of approved dyes. *Developments in the Law: The Federal Food, Drug, and Cosmetic Act,* 67 Harv. L. Rev. 632, 677 (1954) (hereinafter "*Developments in the Law*"). Use of an unlisted dye did not qualify as a per se violation though, and these informal regulatory attempts could not ensure safety nearly as well as could the eventual the Food, Drug, and Cosmetic Act's mandatory coal tar dye list and certification requirements. *Developments in the Law*, *supra*, at 677.

[177] Lipstick could, in some cases, indirectly face restrictions based on the Federal Trade Commission's (FTC's) control over false advertising as a method of unfair competition. James F. Hoge, *"An Appraisal of the New Drug and Cosmetic Legislation from the Viewpoint of Those Industries*," 6 Law & Contemp. Probs. 111-12 (1939). The FTC did not opt to expend much of its supervisory power on lipstick though, perhaps because the agency only had the power to force modification of claims rather than stop sales of products, and had met with little success in its early twentieth century cosmetics cases anyway. Phillips, *supra* note 31, at 236. And, despite FDA Chief Walter G. Campbell's vocal efforts, no more direct cosmetics regulation was enacted. Hoge, *supra*, at 111.

[178] Pallingston, *supra* note 8, at 20.

[179] *Id.* at 21. Helena Rubinstein became the first to advertise lipstick as offering sun protection, although whether her lipstick truly provided said protection is questionable. *Id.*

[180] Riordan, *supra* note 11, at 48 (noting Montanan Marie L. Helchan's patenting of the lipstick stencil in 1938).

ments to existing products. For example, they developed lipsticks with shinier finishes,[181] heavily perfumed lipsticks so that customers received two products in one,[182] and designed any number of multi-function lipstick cases.[183] These developments met with mass enthusiasm, as documented by the fashion magazine *Vogue* declaring lipstick a defining item of the twentieth century.[184] A survey of Depression-era households showed that fifty-eight percent of them owned at least one tube of lipstick, compared to fifty-nine percent owning a jar of mustard.[185] Women began applying lipstick more regularly than they brushed their teeth,[186] and the cosmetics industry became one of very few that left the Depression wealthier than when it went in.[187]

For the first time in history, this proliferating lipstick met with an explosion safety regulations, both at the federal and at the state level. On the federal level, political will, women's lobbying, and cosmetics industry resignation collectively fostered an environment in which safety limitations on cosmetics generally could pass. Several important politicians helped shepherd the first safety regulation of cosmetics, with the powerful President Franklin D. Roosevelt a vital force among them. Shortly after taking office, Roosevelt announced his support for strengthening of the Pure Food and Drug Act of 1906, thereby signaling to agency and congressional actors that renewed efforts to correct the lack of cosmetics regulation could now succeed.[188] One such actor, physician and New York Senator Royal S. Copeland, then pushed the discussion further.[189]

[181] Gunn, *supra* note 2, at 156.
[182] Pallingston, *supra* note 8, at 21. Likely, manufacturers did not know about the Egyptian tradition of perfumed lip color, and so viewed lipstick-perfume as an entirely original concept.
[183] *Id.* at 115 (describing an assortment of lipstick cases that ran the gamut from simply having wrist straps or keychains to coming complete with a seventy-nine page biography of Madame du Barry, mistress to Louis XV).
[184] Corson, *supra* note 5, at 508 (reprinting the magazine's announcement that: "if we were perpetuating the gestures of the twentieth century for posterity, putting on lipstick would head the list").
[185] Ragas & Kozlowski, *supra* note 3, at 26.
[186] Riordan, *supra* note 11, at 46.
[187] Pallingston, *supra* note 8, at 21.
[188] Thomas J. Donegan, Jr., *Fifty Years of Cosmetic Safety: A Government and Industry Partnership*, 50 Food & Drug L.J. 151, 152 (1995).
[189] Hoge, *supra* note 177, at 111 (noting that Senator Copeland entered politics as a physician and adopted the Food, Drug,

Copeland took up the slow battle to regulate cosmetics in 1933 after hearing from the Food and Drug Administration (FDA) that they knew Koremlu, a depilatory cream containing thallium acetate, was poisoning people, but lacked any authority to stop the harm.[190] He introduced, although did not actually read, a bill for entirely replacing the old Pure Food and Drug Act with a new, more stringent food, drug, and cosmetics regulation,[191] which bill became known as the "Tugwell Bill," after its general sponsor, Assistant Secretary of Agriculture Rexford Guy Tugwell.[192] However, it almost immediately became clear to Copeland that this original bill would not pass, and so he had it revised before reintroducing it in 1934.[193] This second, more moderate bill though, appeased none of the previous objectors and upset consumer groups, and so it too died in committee.[194] A third attempt followed, but continued to meet with resistance and died in committee as had its elder siblings.[195] Finally, the following year, a fourth bill did make it through the

and Cosmetic Act as "one of the major efforts of his public career").

[190] Laura A. Heymann, *The Cosmetic/Drug Dilemma: FDA Regulation of Alpha-Hydroxy Acids,* 52 Food & Drug L.J. 357, 362 (1997). Individual damages suits eventually forced the maker of this cream into bankruptcy, but not before many people had gotten hurt. *Id.*

[191] *Developments in the Law*, note 176 *supra*, at 635 n.16 (recounting that Copeland did not read the bill before introducing it, and later discovered that he himself did not support the bill's original version based on its granting the Secretary of Agriculture excessive power).

[192] Vincent A. Kleinfeld, *Legislative History of the Federal Food, Drug, and Cosmetic Act,* 50 Food & Drug L. J. 65, 67-68 (1995). Originally, Tugwell submitted his bill to the Chairmen of the House and Senate Committees on Agriculture, only turning to Copeland, of the Senate Committee on Commerce, after these others had both refused to consider the bill. Tugwell and his consultant David Cavers negatively perceived Copeland as someone who tended to compromise with rather than overcome opposition, and who lacked President Roosevelt's favor. *Id.* These suspect characteristics probably ended up proving valuable, as Copeland's reputation for conservatism likely helped offset Congress' hostility towards Tugwell. *Id.* at 68, n.7. *See also*, *Developments in the Law*, *supra* note 176, at 634-35 n.15 (explaining that the first bill for the Food, Drug, and Cosmetic Act was drafted by those in charge of carrying out the 1906 Act, namely the FDA and the Solicitor's Office of the Department of Agriculture).

[193] Kleinfeld, *supra* note 192, at 74. None of the revisions specifically pertained to cosmetics, but they did effect cosmetics regulation insofar as the new bill made any regulations promulgated by the Secretary of Agriculture subject to suits to enjoin enforcement. *Id.*

[194] *Id.* Opposition primarily arose regarding three points. First, opposition came from the publishing industry, terrified of liability for printing mislabeled claims. *Id.* at 75. The next, third version of the bill would get rid of this opposition by eliminating publisher liability so long as the publisher provided the Secretary of Agriculture with the name and address of the person who had caused dissemination of the offending advertisement. *Id.* at 75. Second, opposition arose regarding the Secretary of Agriculture's ability to set food standards, which opposition would likewise diminish with the third version of the bill that allowed the Secretary to establish only one standard rather than multiple standards of food. *Id.* at 75. Third and finally, opposition arose from consumer groups that thought the bill too lax. *Id.* at 74.

[195] *Id.* at 75. Major objections to the third bill centered on two issues. First, people debated how strictly to define misbranding, how much leeway to leave for puffery. *Id.* Secondly, people argued about whether to enact a new act at all as opposed to just revising the current Pure Food and Drug Act, which existent Act had the advantage of twenty-seven years of court decisions construing it. *Id.*

Senate Committee on Commerce.[196] Copeland then introduced this fourth bill to the Senate, punctuating his presentation with pictures of the women recently blinded by mascara,[197] and Roosevelt publicly stated his hope that the bill would pass.[198] Thenceforth, the bill bounced back and forth between the Senate and the House for the rest of the 1935 session, with approximately forty significant changes made to it during the process.[199] Ultimately, the House rejected the bill as misallocating power between the FDA and the Federal Trade Commission (FTC),[200] and so the bill died.[201] A fifth bill entered the 1936 session of Congress though, and, after two years of debate and one highly-publicized drug disaster,[202] finally passed as the Food, Drug, and Cosmetic Act.[203] While neither the congressional debates nor the final text of the statute focused on lipstick directly, the Act did dramatically impact lipstick safety due to rules that cosmetics could not contain "poisonous" or "deleterious" substances in such quantities as might render the cosmetics injurious,[204] and cosmetics labeling could not make false or misleading claims.[205] Unlike most provisions of the Act, which did not take effect until one year after the Act's final presidential approval, these injurious cosmetics provisions

[196] *Id.* at 77-78 (discussing the fourth bill, which actually differed very little from the third bill, but somehow managed to push through committee regardless).

[197] *See*, Donegan, *supra* note 188, at 152 (stating that Copeland focused on women blinded by mascara when introducing the legislation, despite industry's contention that the supposed rash of blinding had never occurred). *See also*, Greff, *supra* note 147, at 244 (stating that, during the 1934 debates, Copeland presented "before and after pictures of beautiful women who from use of Lash Lure [mascara] went blind").

[198] Kleinfeld, *supra* note 192, at 82.

[199] *Id.* at 78-90. Arguments included: whether the FDA should have power to make multiple seizures, whether the FDA or FTC should regulate food and drug advertisements, and whether cosmetics should become regulated at all. *Id.*

[200] Whether the FDA or the FTC should control false and misleading advertisements for food, drugs, and cosmetics remained a perennial dispute throughout the five year process of getting the new safety regulation passed, with the House consistently favoring FTC control and the Senate consistently favoring FDA control. Tousley, *supra* note 148, at 260.

[201] Kleinfeld, *supra* note 192, at 90.

[202] When ninety people died from the solvent diethylene glycol in the drug Elixir Sulfanilamide-Massengill, which its manufacturer had tested for flavor but not effect, public pressure ensured that the House finally agreed to pass the new food, drug, and cosmetic safety regulation. *Id.* at 92. That more people did not die from this elixir of sulfanilamide was due to FDA officials creatively realizing that, even though they lacked authority to seize the drug for deadliness, they could seize the drug on the misbranding technicality of calling itself an "elixir" without actually containing any alcohol, as required by the United States Pharmacopoeia's definition of elixirs. Tousley, *supra* note 148, at 261 n.5.

[203] Kleinfeld, *supra* note 192, at 91-99. Debates prior to the bill's passage continued to focus on misbranding provisions, seizure action provisions, allocation of advertising regulation, and what options industry would have for contesting the Secretary of Agriculture's future standards and rulings. *Id.*

[204] 21 C.F.R. § 700 (2006).

[205] 21 C.F.R. § 701 (2006). In short, the Food, Drug, and Cosmetic Act prohibits adulteration and misbranding of cosmetics, which means that the FDA can deem lipstick illegal either for its substance or for its labeling. Heymann, *supra* note 190, at 363.

went into immediate effect along with the Act's other two deemed urgent provisions pertaining to poisonous drugs and new drug approval.[206]

Influential throughout this process were women's lobbying and manufacturers' lack thereof. Women's lobbying in favor of food, drug, and cosmetics regulation continuously increased in terms of both numbers and intensity. The coalition of women's interest groups expanded from the originally active American Home Economics Association and National Congress of Parents and Teachers, which had supported regulation since the original Tugwell Bill, to sixteen national organizations,[207] all "represented at every hearing" and engaged in "quiet steady lobbying."[208] These groups did not end up entirely delighted with the final Food, Drug, and Cosmetic Act, for reasons such as its failure to mandate ingredients listing on all cosmetics products for direct-to-consumer and professional sale.[209] However, they considered the requirement that government review all coal tar coloring a significant win, despite the exception for hair products.[210] At final evaluation, none of the women's groups supported the final Act in its entirety, but they did consider it a very respectable start that they could hopefully later strengthen through amendments.[211] While this women's lobbying went on, the cosmetics industry did not protest, and even qualifiedly supported, federal cosmetics regulation. Such a reversal of previous industry position resulted largely from the growing patchwork of state cosmetics regulations; rather than remain subject to a multitude of state regulations that varied widely in scope and

[206] Tousley, *supra* note 148, at 263. Compare this immediate enforcement of the cosmetics safety provisions to the ambling enforcement of labeling provisions, which provisions' effectiveness was first postponed by amendment to January 1940, and then made further postponable at the Secretary of Agriculture's discretion until June 1940. *Id.*

[207] Louise G. Baldwin & Florence Kirlin, *The New Food, Drug, and Cosmetic Legislation*, 6 Law & Contemp. Probs. 144, 144 n.1 (1939) (listing the sixteen involved organizations as the: American Association of University Women, American Dietetic Association, American Home Economics Association, American Medical Women's Association, American Nurses Association, Council of Women for Home Missions, General Federation of Women's Clubs, Girls Friendly Society of the U.S. of America, National Board of the Y.W.C.A., National Congress of Parents and Teachers, National Consumers' League, National Council of Jewish Women, National League of Women Voters, National Women's Trade Union League, Women's Christian Temperance Union, and Women's National Homeopathic Medical Fraternity).

[208] *Id.* at 144.

[209] *Id.* at 146. Campaigning for such ingredient listing came from a concern for allergic reactions. *Id.*

[210] *Id.* at 147. Before the Food, Drug, and Cosmetic Act passed, "approximately fourteen hundred different shades [of coal tar dye were] used in cosmetics," with industry claiming "some 90 to 100 separate colors" as "essential." *Id.*

[211] *Id.* at 145.

stringency, the cosmetics industry preferred one set of uniform national rules.[212]

Indeed, state regulation of lipstick and other cosmetics sprouted in all directions during the 1930s.[213] Regulation ranged from the strikingly exacting Maine law, to several other strict but more limited state laws, to a range of state imitations of the pending federal legislation. Maine enacted perhaps the most protective law, which compelled manufacturers to register all cosmetics formulas with the State Department of Health.[214] Under the Maine Act for the Regulation of Cosmetics:

> No person, firm, corporation or copartnership shall hold for sale, sell, offer for sale, in intrastate commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with and a certificate of registration secured from the department of health and welfare.[215]

Registration required paying an initial inspection fee and annual renewal fee, and failure to register or distribution after registration rejection could result in product seizure and fines.[216] Said registration rejection could occur at the Maine Department of Health's discretion; the Act authorized the health department to refuse certificates of registration to any cosmetics that it judged to contain injurious substances in amounts that could prove poisonous, injurious, or detrimental to a person.[217] Manufacturers, predictably enough, almost immediately challenged the constitutionality of this measure, attempted to have its enforcement temporarily and permanently enjoined.[218] The United States Supreme Court, however, definitively denied

[212] *See e.g.*, Tousley, *supra* note 148, at 261.

[213] Cosmetics regulation did not approach the level of food and drug regulation though, as every state except New Mexico had laws regulating the manufacture and sale of adulterated and misbranded food and drugs by the time that the federal Food, Drug, and Cosmetic Act passed. Ole Salthe, *State Food, Drug and Cosmetic Legislation and its Administration,* 6 LAW & CONTEMP. PROBS. 165, 167 (1939).

[214] PHILLIPS, *supra* note 31, at 232. *See also*, Tousley, *supra* note 148, at 260-61 (characterizing the Maine law as a most important piece of state cosmetics regulation). *But see*, Hoge, *supra* note 177, at 112 n.5 (dismissing the Maine statute as providing little real supervision, in spite of the statute's seemingly strong text, and in contrast to most commentators' view of the statute).

[216] *See, e.g.*, Bourjois, Inc. v. Chapman, 301 U.S. 183, 185 (1937) (cosmetics company unsuccessfully protesting against this registration system).

[217] Salthe, *supra* note 213, at 170-71.

[218] PHILLIPS, *supra* note 31, at 232.

these attempts with *Bourjois, Inc. v. Chapman*.[219] Justice Brandeis, writing for the unanimous majority, summed up the Court's response to the manufacturer's constitutional claims with: "Sixteen distinct grounds of invalidity are urged with great earnestness. None is well founded. Only a few need to be discussed."[220]

Other states also had strict, but piecemeal cosmetics regulations. For example, New Jersey prohibited use of methyl alcohol in cosmetics, Kentucky banned poisonous and dangerous eyebrow and eyelash dyes, and New Hampshire banned the aforesaid dyes as well as lead-based hair dyes.[221] Florida too had something of a cosmetics regulation, insofar as Florida's Toilet Articles Misbranding Law required that, if the retail seller's name appeared on a cosmetics label, then the manufacturer's name and address must appear on the label as well.[222] Such regulations as these did not directly improve lipstick safety, but they did indirectly promote lipstick safety by helping to re-conceptualize cosmetics as regulable items and to impel cosmetics manufacturers to support broad federal regulation as a preferable alternative to the otherwise inevitable state regulation.

Three states, Louisiana, Virginia, and North Dakota, passed comprehensive cosmetics laws that borrowed heavily from differing portions of the pending federal legislation.[223] Louisiana's Cosmetic Law essentially copied version S.5 of the pending Food, Drug, and Cosmetic Act, and required registration of every cosmetics

[219]Bourjois, Inc., 301 U.S. 183 at 186 (ruling against Bourjois, Inc. on all counts).

[220]*Id.* New York corporation Bourjois, Inc. challenged the Maine cosmetics law in Maine federal court and then in the Supreme Court as void under several provisions of both the State and Federal Constitutions. *Id.* at 184-85. In response, the Supreme Court rejected all of Bourjois' claims, affirming the prior rejection of most claims without comment, and then explaining its affirmation of the rejection of Bourjois' Commerce Clause and Fourteenth Amendment claims. *Id.* at 186-90. The Court found that Maine's cosmetics legislation did not unduly burden interstate commerce under the Commerce Clause, because: (1) the statute limited its operation to intrastate commerce by banning only the *sale* of unregistered cosmetics *within* Maine and applying equally to all cosmetics, whether manufactured in or out of state, and (2) the statute's fifty-cent inspection and annual renewal fees were not unreasonable on their face, and Bourjois had failed to prove them otherwise. *Id.* at 186-88. Then, the Court found that Maine's cosmetics legislation also did not violate the Fourteenth Amendment's Due Process Clause, or due process under the Maine Constitution, because nothing prohibited delegating safety certification authority to executive agencies, and applicants could appeal denials of cosmetics safety certification to state superior courts. *Id.* at 188-89. The Court also mentioned in closing that Bourjois lacked standing to object to the Maine statute's provisions regarding forfeit and seizure of unregistered cosmetics, because, by the time that any of Bourjois' out-of-state goods reached Maine, those goods would belong to someone else. *Id.* at 190.

[221]Phillips, *supra* note 31, at 231.

[222]Salthe, *supra* note 213, at 170.

[223]Tousley, *supra* note 148, at 261.

product.[224] However, for all this registration rigor, Louisiana evidently favored a considerably more moderate approach to cosmetics regulation than did its federal and state contemporaries. Instead of using the registration process to preemptively eliminate poisonous cosmetics, Louisiana used the registration process to ensure merely that cosmetics containing poisons indicated the fact on their labels.[225] Virginia's Cosmetic Permit Law similarly emulated a draft of the Food, Drug, and Cosmetic Act, complete with a registration process and definitions of adulterated and misbranded cosmetics.[226] Unlike Louisiana though, Virginia intensified the federal model, by not only prohibiting the sale of cosmetics without a permit but also prohibiting the very manufacture of cosmetics by any person not pre-approved by the Virginia Board of Pharmacy.[227] In between these two extremes, North Dakota's Cosmetic Act most closely resembled the final Food, Drug, and Cosmetic Act provisions, as North Dakota took the final version of the pending federal cosmetics legislation for its model.[228] Given this onslaught of divergent state and dramatic federal regulations, the American 1930s represents among the most important chapters in lipstick's legal regulatory history. Ironically, despite the moment's obvious importance now, and all of the political turmoil and public activism that surrounded it even at the time, the first safety regulations of lipstick and other cosmetics slipped by unnoticed by the general populace. One writer of the era exclaimed:

> Except in the trade papers, no piece of major legislation [referring to the Food, Drug, and Cosmetic Act] has received less publicity and attention. During the five years the [Food, Drug, and Cosmetic Act] was considered in Congress it was seldom mentioned in the general press, and it has received little attention during the two years that have elapsed since its passage."[229]

Hence, with the importance of lipstick safety regulation established in the law but not yet embedded in the

[224] Salthe, *supra* note 213, at 170.
[225] Phillips, *supra* note 31, at 231.
[226] Salthe, *supra* note 213, at 171. *See also*, Hoge, *supra* note 177, at 112 n.5 (emphasizing the importance of the Virginia law).
[227] Salthe, *supra* note 213, at 171.
[228] *Id.*

public conscious, lipstick encountered the 1940s.

1940s

American lipstick production and consumption managed to flourish still further in the eye of World War II. With lipstick by this point firmly established as big business, lipstick producers' marketing, both in terms of advocating lipstick generally and in terms of promoting individual brands, grew more sophisticated.[230] Manufacturers sold lipstick as not a dishonorable frivolity, but rather a vital part of the war effort; they turned lipstick into a symbol of resilient femininity in the face of danger, a symbol that would boost the morale of both the women wearing the lipstick and the male soldiers who saw such attractive American females.[231] Tangee, still one of America's biggest lipstick companies at the time, launched a "War, Women, and Lipstick" campaign promoting lipstick as a patriotic instrument of personal morale.[232] Commissioned studies showed make-up an effective morale builder, and so led the U.S. Director of Economic Stabilization to order factory dressing rooms stocked with lipstick to improve female workers' efficiency.[233] Even the Marines had an official, mandatory "Montezuma Red" lipstick intended to match the trim on women's hats.[234] As well as selling their theory of lipstick to the public generally, manufacturers also began selling particular

[230]Despite lipstick's big business sales and marketing levels though, most lipstick was still made by hand, and the most advanced machines could only make one-hundred and forty-four sticks in a batch. Brewster, *supra* note 158, at 107.

[231] *Vogue* magazine encouraged women to take lipstick application seriously, advising: "paint your lips as an artist would," using a brush and combining multiple shades of lipstick. Corson, *supra* note 5, at 519.

[232]Pallingston, *supra* note 8, at 21-22.

[233]*Id.* at 22.

[234]Amy Argetsinger, *Academy Weighs New Tailor for the Female Sailor,* Wash. Post, Oct. 28, 1995, at A1. Indeed, the rule that female marines must wear lipstick continued up through the early 1990s. *See, e.g.*, Kenneth L. Karst, Note, *The Pursuit of Manhood and the Desegregation of the Armed Forces,* 38 UCLA L. Rev. 499 (1991) (relating that a 1980s training manual "require[d] recruits to wear makeup, with lipstick and eye shadow the allowable minimum"); Julie Yuki Ralston, Note, *Geishas, Gays and Grunts: What the Exploitation of Asian Pacific Women Reveals About Military Culture and the Legal Ban on Lesbian, Gay, and Bisexual Service Members*, 16 Law & Ineq. J. 661 (1998) (pointing out that: "a Marine recruit training manual used after the Gulf War stated that female recruits would be given 'instruction in hair care, techniques of make-up application, guidance on poise, and etiquette,' " and would also be "issued official lipstick during boot camp.").

brands of lipstick to more narrowly targeted clientele, marketing particular lines of lipstick as appropriate to specific types of women. For example, 1940s marketing executives later explained that they did Maybelline for "not too intelligent girls," Revlon "for tarts," and Cover Girl "for the nice girls."[235]

Such marketing met with high consumption, a consumption likely driven in part by excitement over new products, in part by the escapism that historically characterizes troubled times, and in part by increased assurance of lipstick's safety. Although the war did force the replacement of metal cases with first plastic cases and then, eventually, paper ones, lipstick generally became only more elaborate and advanced.[236] For example, lipsticks began to come disguised as other objects, such as binoculars, or equipped with accessories, such as emergency flashlights in case of blackout.[237] Gala of London offered a refillable lipstick called "Lipline," which became popular both sides of the ocean.[238] Max Factor developed the first truly indelible lipstick, in the sense of long-lasting rather than of permanent, titled Tru-Color.[239] Goya introduced the first lip liner in the form of its "Thick and Thin" lipstick, a set of two tubes linked by a chain, with the "thick" tube containing lipstick and the "thin" tube containing a lip pencil for outlining lips.[240] Along with these new or improved varieties of lipstick, there also appeared new playful packaging to entice buyers wishing to escape wartime's somberness. Some lipsticks opened in novel manners, such as Clairol's patented lipstick that opened like a switchblade.[241] Many lipsticks received newly playful names, an idea originated

[235] Boock, *supra* note 60, at 38.
[236] Ragas & Kozlowski, *supra* note 3, at 27.
[237] Pallingston, *supra* note 8, at 115.
[238] Ragas & Kozlowski, *supra* note 3, at 27.
[239] *Id.* at 24 (acclaiming Max Factor's lipstick as the first non-irritating, long-lasting formula that did not change color after application). *But see*, Brewster, *supra* note 158, at 107 (noting that indelible lipsticks possessed a discouragingly bitter taste until manufacturers finally came up with a truly workable formula in the 1950s).
[240] Gunn, *supra* note 2, at 162. Goya also came up with a "Grandee lipstick" twice the size of normal lipstick, but this innovation did not fare as well over time. Ragas & Kozlowski, *supra* note 3, at 27.
[241] Riordan, *supra* note 11, at 52.

by Revlon.[242] And, by the latter half of the decade, Elizabeth Arden had profitably embraced the emphasis on color and novelty packaging by offering matching lipstick and nail polish sets.[243] With all of these product options and packaging styles, and with the Food, Drug, and Cosmetic Act finally in place to monitor their safety,[244] more American women spent more money on lipstick than ever before. In 1941, Americans spent twenty million dollars on lipstick.[245] That figure, by 1946, had crept up to thirty million dollars spent on five-thousand tons of lipstick.[246] Ninety percent of American women wore lipstick.[247]

While consumer focus remained intent upon lipstick, American regulatory focus generally turned elsewhere during the war and its aftermath. The new federal Food, Drug, and Cosmetic Act had just begun taking effect, and so safety improvements did occur in accordance with the Act's recently passed rules.[248] Almost no new law, safety or social, emerged though, the one exception being a federal luxury tax on lipstick that allowed the government to wrest approximately six million dollars annually from the country's mass lipstick consumption.[249] Comparing this absence of United States lipstick regulation to the European lipstick regulatory regime perhaps demonstrates the triumph of lipstick producers' marketing campaign even better than do the sales figures themselves. Whereas America placed no restrictions on lipstick, England passed a Limitations of Supplies order that cut the manufacturing of lipstick and other cosmetics to the bare minimum

[242] Ragas & Kozlowski, *supra* note 3, at 65.
[243] Gunn, *supra* note 2, at 162.
[244] Among the first safety rules issued under the Food, Drug, and Cosmetic Act was that the coal tar dyes previously used in lipsticks with abandon now required approval before use, and testing on mice before approval. Corson, *supra* note 5, at 519.
[245] *Id.* at 520.
[246] *Id.* at 528.
[247] Brewster, *supra* note 158, at 107.
[248] Lipstick still had not become entirely problem-free, but most of the remaining problems involved non-lethal harms, such as allergic reactions to the dyes in lipsticks. *See*, *id.* (recounting that Dr. Waldemar Schweisheimer named dyes in cosmetics as the seventh most common cause of dermatitis, well behind perfumes reacting with sunlight). *See also*, Phillips, *supra* note 31, at 46-47 (writing that: "on the whole, lipstick is probably a harmless cosmetic," with possible dangers arising largely from the dyes used, and even then the dangers mostly of an allergen nature).
[249] Corson, *supra* note 5, at 528.

in order to conserve materials for war purposes.[250] Promptly after the law's passage, a lipstick black market then sprung up in London.[251] Hitler likewise banned lipstick in Germany, but German women refused to work under such conditions and so forced a relenting of the law.[252]

1950s

With the lipstick industry having successfully re-imagined lipstick as a symbol of devout, conventional femininity, lipstick became a ubiquitous, and even indispensable, item during the 1950s.[253] Statistics from the time show that nearly one-hundred percent of American college girls wore lipstick,[254] and ninety-eight percent of all American women wore lipstick, compared to ninety-six percent that brushed their teeth.[255] Instead of buying just one tube of lipstick coordinated to hair color or complexion, women began buying several lipsticks to coordinate with various outfits.[256] By 1959, Americans spent ninety-three million dollars on buying sixty-two million tubes of lipstick.[257] Such figures mostly result from voluntary lipstick consumption, but some lines of work actually required that women wear lipstick. Airlines followed the marines' example, and generally considered lipstick part of their flight attendants' uniform.[258]

Once again, demand and development swelled concurrently. Some genuine product development occurred, with the most important but least acknowledged development concerning a fidgeting with lipstick formulas

[250] Gunn, *supra* note 2, at 159

[251] Pallingston, *supra* note 8, at 22. For those English women not prepared to dabble in illegal goods and those American women not prepared to pay the hiked lipstick prices, alternatives to lipstick also arose; most commonly, magazines advised using beetroot juice to tint lips. Pointer, *supra* note 1, at 160.

[252] Ragas & Kozlowski, *supra* note 3, at 27.

[253] This assertion applies to England as well, with lipstick's renewed English respectability perhaps best captured by Queen Elizabeth's having commissioned a special coronation lipstick to match her purple and crimson robes. Pallingston, *supra* note 8, at 78.

[254] Ragas & Kozlowski. *supra* note 3, at 31.

[255] *Id.* at 53.

[256] *Id.* at 30.

[257] Riordan, *supra* note 11, at 60.

[258] Peiss, *supra,* note 108, at 16 (adding that the reasoning behind this lipstick requirement became particularly clear with National Airlines' infamous "Fly Me" advertising campaign, "which sold the attendants' beauty and sexuality at least as much as [it did] air transportation").

in order to improve comfort. Manufacturers reduced lipstick's levels of carnuba and beeswax by about ten percent, and also reduced the level of bromo acids to avoid drying out the lips.[259] However, such backstage maneuvers received much less attention than did more visible changes, such as the popular new shimmering lipsticks.[260] Of course, few consumers realized that this shimmer came from guanine, a crystalline substance in fish scales, guano, and other animal excrements.[261] White lipsticks first appeared as well, with the white gleam coming from the addition of titanium.[262] Liquid lipstick also surfaced as a 'modern' offering, its links to the original forms of lipstick either forgotten or conveniently forgotten.[263] Most development involved marketing though.[264] The single most important marketing advance involved the discovery of the "teenager," which discovery led to a proliferation of girlishly named lipsticks targeting teens.[265] However, there also arose new marketing tactics designed to boost the spending of all ages. Estee Lauder introduced the first free sample and gift with purchase, giving away miniature lipsticks, rouges, eye shadows, and face creams despite competitors' derisive comments about the business strategy of giving away the store.[266] Revlon decided to start bringing out lipstick shades every six months rather than annually, so that women would think of lipstick as a shorter-lived product and buy it more frequently.[267] It was Revlon too that launched the most famous lipstick advertising campaign of the decade, a campaign entitled "Fire & Ice" that first ran in 1952 with a two-page, full-color spread featuring model Dorian Leigh on the first page and fifteen

[259]Brewster, *supra* note 158, at 107. Bromo acids, in particular, had previously played a critical role in long-lasting lipstick by staining the skin, but they also dried out the skin in a problematic manner that begged for their replacement. *Id.*

[260]Credit usually goes to Mearl Corp. for having first produced these pearlescent lipsticks. Brewster, *supra* note 158, at 107.

[261]Corson, *supra* note 5, at 546.

[262]Gunn, *supra* note 2, at 166. Despite the new shimmery and pale colors though, dark reds actually became the most oft chosen hues at this time, possibly because people considered the dark reds to enhance the newly fashionable suntanned look. *Id.* at 165.

[263]Brewster, *supra* note 158, at 107 (naming the major producers of liquid lipstick as Liptone in the United States, Lip-Cote in England, and Libussa in Germany).

[264]In fact, development and listing costs have resulted in the origination of only one truly new color since World War II, and this color, Red no. 40, has more use for foods than it does for cosmetics. *Id.*

[265]Pallingston, *supra* note 8, at 23. Apparently, the marketing worked, as two-thirds of 1950s teenagers reported having worn lipstick since at age fourteen. Corson, *supra* note 5, at 535.

[266]Koehn, *supra* note 165, at 231-32.

[267]Corson, *supra* note 5, at 538.

questions designed to "test" whether the reader's personality suited Revlon products on the second page.[268] In fact, lipstick became such a heavily marketed, fiercely competitive business, that a period known as the "lipstick wars" began.[269] Cosmetics companies attempted to destroy one another via such methods as sending thugs into stores to destroy competitors' lipstick displays, attempting to steal competitors' formulas, and bugging staff telephones.[270] Scandals abounded both regarding these ongoing wars and regarding marketing ploys, with the loudest commotion involving Revlon's implication in rigging the television show "The $64,000 Question."[271]

Whether because political attention could shift from war abroad to domestic matters, or because scientific advances led to better understanding cosmetics' risks, or because lipstick had become a respectable product used by all proper women, federal and state interest lipstick regulation revived. At the state level, twenty nine states adopted the Uniform State Food, Drug, and Cosmetic Bill, a piece of legislation closely patterned after the Food, Drug, and Cosmetic Act.[272] At the federal level, a regulatory surge, in terms of both enforcement and enactment, also occurred. Unlike in the original 1930s skirmish over cosmetics regulations, the FTC actually participated in rather than resisted this 1950s regulatory charge.[273] In 1953, the FTC

[268] Brewster, *supra* note 158, at 107 (explaining in more detail that the second page's questions actually "said nothing about cosmetics but suggested the dual nature of the women who wear them. It was a way of giving women what one Revlon executive called 'a little immoral support' "). *See also*, Corson, *supra* note 5, at 536 (noting the fame of Revlon's "Fire & Ice" lipstick and nail polish promotion).

[269] Pallingston, *supra* note 8, at 30.

[270] *Id.*

[271] *Id.* at 31 (reporting that Revlon used this popular show to hawk its products and, consequently, came under suspicion when the show's rigging became public). Of anecdotal interest: Revlon nearly turned down the opportunity for its famously infamous sponsorship of the $64,000 Question, because Charles Revlon doubted that black-and-white television could effectively sell color cosmetics. Brewster, *supra* note 158, at 107. These doubts quickly dispelled though when a shade of lipstick featured on the show sold out in ten days. Brewster, *supra* note 158, at 107.

[272] *Developments in the Law*, *supra* note 176, at 636 n.31 (detailing how states tended to follow the Executive Committee of the Association of Food and Drug Officials of the United States' recommendation to adopt state food, drug, and cosmetics regulation that patterned itself after the federal regulation).

[273] The FTC's willing participation in efforts to regulate cosmetics, although initially startling, becomes unsurprising when one considers the difference between these 1950s regulations and their 1930s predecessors. Drafts of the Food, Drug, and Cosmetic Act in the 1930s threatened the FTC's jurisdiction over advertising, and so the FTC resisted the regulation out of territorial concerns. In contrast, the 1950s regulatory activity involved, first, the FTC getting to reinforce its territorial control over advertising by wielding that power, and, second, Congress enacting substantive safety law that in no way implicated the FTC's activities.

decided to battle lipstick manufacturers' misleading claims, and declared that lipsticks could no longer claim themselves "indelible," "smear proof," or "non-smear."[274] Instead, cosmetics companies could only promote lipsticks as "longer lasting" or "less likely to smear."[275] The FDA largely left such enforcement battles to the FTC, perhaps in part due to the FDA's early lack of success in its own misbranding actions.[276] Indeed though, the FDA almost entirely ignored lipstick and other cosmetics during the 1950s, deeming their dangers far secondary to the lethality risks of food and drugs.[277] Congress, however, had other views of the risks, specifically the cancer risks of colorants.

Congress passed two cosmetics-relevant amendments to the Food, Drug, and Cosmetic Act, the Food Additives Amendment and the Color Additives Amendment. First, representative James D. Delaney, "the primary congressional champion of the battle against cancer," inserted into a food additives bill a zero-tolerance clause for the use of carcinogenic additives in either processed foods or cosmetics.[278] Although the additives bill had previously not implicated cosmetics, the 1957 addition of this "Delaney Amendment" occasioned relatively little congressional debate.[279] The Secretary of Health Education and Welfare[280] did object to the Delaney Clause as excessive though, because the general chemical additives provisions already covered reasonable risks of cancer and because the Delaney Clause's provisions:

> . . . are so broadly phrased that they could be read to bar an additive from the food supply even if it [the additive] can induce cancer only when used on test animals in a way having no bearing on the question of carcinogenicity for its [the additive's] intended use.[281]

[274] Brewster, *supra* note 158, at 107.
[275] *Id.*
[276] James C. Munch & James C. Munch, Jr., *Notices of Judgment: Cosmetics*, 14 Food Drug Cosm. L.J. 399, 401 (1958) (noting that during the first twenty years of FDA control over cosmetics, the agency litigated two cosmetics misbranding cases and lost both).
[277] Brewster, *supra* note 158, at 107.
[278] Douglas Sheehy, *A De Minimis Exception to the Delaney Clause: A Reassessment of Les v. Reilly*, 50 Food & Drug L. J. 257, 260-62 (1995).
[279] *Id.* at 261.
[280] By this point, the FDA had moved into the Department of Health Education and Welfare, and hence the Secretary of Health Education and Welfare's interest in the bill. Although the FDA began under the Department of Agriculture, the FDA transferred to the Federal Security Agency in 1940, which in turn became the Department of Health Education and Welfare in 1953. *Developments in the Law*, *supra* note 176, at 635 n.18.

These objections managed to get the food additives bill reported out of committee, without the Delaney language, but Delaney quickly convinced the general assembly to reinsert the language.[282] Responding, the Assistant Secretary of Health Education and Welfare wrote a long letter insisting on the agency's opposition to the Delaney Clause, but also adding that, in the interest of passing the bill, the department would withdraw its objection to the Clause if revised to state that banning additives as cancerous required completing tests appropriate to evaluate the additives' safety as used in food.[283] Accepting the compromise, Congress incorporated the revised 'appropriate tests' language into the bill, and in 1958 passed the Food Additives Amendment in a subsection stating:

> Provided, That no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal, except that this proviso shall not apply with respect to the use of a substance as an ingredient of feed for animals which are raised for food production, if the Secretary finds (i) that, under the conditions of use and feeding specified in proposed labeling and reasonably certain to be followed in practice, such additive will not adversely affect the animals for which such feed is intended, and (ii) that no residue of the additive will be found (by methods of examination prescribed or approved by the Secretary by regulations, which regulations shall not be subject to subsections (f) and (g)) in any edible portion of such animal after slaughter or in any food yielded by or derived from the living animal.[284]

It bears note that the law did not take quite so extreme an approach as the above-quoted text suggests, for the law included a grandfather clause exempting any substances that had already received regulatory approval under the Food, Drug, and Cosmetic Act or the Federal Meat Inspection Act of 1907.[285] However, the law still did impose an absolute ban on additives, including colorants used in cosmetics, if appropriate tests revealed the additives to produce any risk of cancer in humans or animals.[286]

[282]Degnan & Flamm, *supra* note 281, at 237.
[283]Degnan & Flamm, *supra* note 281, at 237-38. The Department of Health Education and Welfare considered this appropriate testing methods language preferable to the original language that, if read literally, would have forbidden approval of any substance that by any method of administration could cause any type of cancer in any animal. *Id.* at 238.
[285]Sheehy, *supra* note 278, at 261.
[286]Donegan, *supra* note 188, at 154.

Moreover, Congress also passed a second law that further restricted the use of specifically color additives in both food and cosmetics. With the FDA's ungrudging support this time, Congress went on to construct the first and only federal pre-market approval requirement for cosmetics.[287] Under the Color Additive Amendment, as ultimately passed in 1960:

> A color additive shall, with respect to any particular use (for which it is being used or intended to be used or is represented as suitable) in or on food or drugs or devices or cosmetics, be deemed unsafe... unless: (A) there is in effect, and such additive and such use are in conformity with, an [FDA] regulation... listing such additive for such use, including any provision of such regulation prescribing the conditions under which such additive may be safely used, and (B) such additive either is from a batch certified, in accordance with [FDA] regulations... for such use, or has, with respect to such use, been exempted by the Secretary [of Health Education and Welfare] from the requirement of certification; or such additive and such use thereof conform to the terms of an [investigational use by qualified experts] exemption...[288]

Put in plain English, this language prohibits cosmetics companies from using any color additive unless the FDA has listed that additive as approved for the given use, and that additive comes from a batch certified for use.[289] How the FDA decides which colorants to list as approved was also specifically mandated by the legislation, with the Delaney Clause resurfacing as an element of the approval test. Specifically, in determining a color additive's safety:

[287] *Id.*

[289] *See,* Donegan, *supra* note 188, at 154 (providing a particularly lucid explanation of the regulatory regime that the Color Additive Amendments created).

> . . . the Secretary shall consider, among other relevant factors: (i) the probable consumption of, or other relevant exposure from, the additive and of any substance formed in or on food, drugs or devices, or cosmetics because of the use of the additive, (ii) the cumulative effect. . . of such additive in the diet of man or animals, taking into account the same or any chemically or pharmacologically related substance or substances in such diet, (iii) safety factors which, in the opinion of [qualified] experts. . . are generally recognized as appropriate for the use of animal experimentation data, and (iv) the availability of any needed practicable methods of analysis for determining the identity and quantity of the pure dye and all intermediates and other impurities contained in such color additive, such additive in or on any article of food, drug or device, or cosmetic, and any substance formed in or on such article because of the use of such additive. A color additive shall be unsafe, and shall not be listed, for any use which will or may result in ingestion of all or part of such additive, if the additive is found by the Secretary to induce cancer when ingested by man or animal, or if it is found by the Secretary, after tests which are appropriate for the evaluation of the safety of additives for use in food, to induce cancer in man or animal, and shall be deemed unsafe and shall not be listed, for any use which will not result in ingestion of any part of such additive, if, after tests which are appropriate for the evaluation of the safety of additives for such use, or after other relevant exposure of man or animal to such additive, it is found by the Secretary to induce cancer in man or animal.[290]

This language creates a situation in which colorants, like other additives, must not pose any risk of cancer. But also, unlike in the case of other additives, the FDA must prescreen all colorants for a risk of cancer and other harms before manufacturers can incorporate the colorants into any product.[291] Given lipstick's obvious reliance on colorants, this new color additives law meant another sizeable bump up in lipstick's regulatory obligations.[292] Thus, by the end of the 1950s, almost all women used lipstick, a majority of the states had laws regulating lipstick, and the federal laws applicable to lipstick had become both more strictly enforced and just plain stricter.

1960s

[291] Getting the FDA to engage in this prescreening process requires payment of a fee by the desiring manufacturer. Or, as the Amendment phrases it: "The admitting to listing and certification of color additives, in accordance with regulations prescribed under this Act, shall be performed only upon payment of such fees, which shall be specified in such regulations, as may be necessary to provide, maintain, and equip an adequate service for such purposes." 21 U.S.C. §379.

[292] Some scholars accurately note that the cosmetics portions of the Food, Drug, and Cosmetic Act have remained essentially unchanged since their original 1938 passage. *See*, *e.g.*, Greff, *supra* note 147, at 244. However, the Act's requirements for cosmetics have nonetheless heightened, due to generally applicable 1950s amendments that are, in practice, particularly exacting on cosmetics.

Following several decades of extensive lipstick developments, the 1960s brought a lull in lipstick's societal, technological, and legal evolution. Tumult that swept up most established institutions and conventions left lipstick relatively untouched as an accepted emblem of femininity. Similarly, lipstick's technological aspects experienced tweaking but no dramatic overhauls. The late-1950s phenomena of white and beige lipsticks increased in popularity to become best sellers.[293] Correlated to these colors' popularity, an aspiration to wear lipstick but look as if one was not wearing lipstick posed probably the decade's most noteworthy change and complicated challenge for manufacturers, who invented complex formulas to produce lipsticks with the effect.[294] For all the manufacturers' efforts though, one of the most popular 'lipsticks' remained a product intended as a concealer, called "Erase."[295] The countervailing trend of over-painting the upper lip to create a permanent smile, however, ensured that lipstick business remained solid.[296] Such over-painted mouths often featured the glittery, frosted colors whose 1950s popularity endured, but with the improvement of mica, iron oxides, and titanium dioxide replacing excrement and fish scales as the standard source of these colors' sparkle.[297] Building off of these glitzy predecessors, heavier metallics, particularly in the Helena Rubinstein line, also became trendy.[298] Other momentary trends included a 1964 caramel-flavored lipstick[299] and a fad for lipstick made with or simulating baby product ingredients.[300] In terms of lipstick ideas with historic purpose though, only one stands out; manufacturers improved the coloring process by using the spectrophotometer to develop new color combinations and precisely calibrate color batches.[301] The 1960s major advance involved the lipstick industry's increasing recognition of the need to treat lipstick production

[293] Pallingston, *supra* note 8, at 24.
[294] *Id.*
[295] *Id.*
[296] Corson, *supra* note 5, at 552.
[297] Pallingston, *supra* note 8, at 90.
[298] Corson, *supra* note 5, at 572 (commenting on the late 1960s popularity of Helena Rubinstein's bronze, silver, and gold lipsticks). *See also*, Ragas & Kozlowski, *supra* note 3 at 32 (naming the James Bond film *Goldfinger*, in which a secretary dies from an overdose of gold body painting, as largely responsible for the metallic lipstick craze).
[299] Corson, *supra* note 5, at 561.
[300] Pallingston, *supra* note 8, at 23-24 (citing such ingredients and flavors as: baby powder, baby oil, bubble bath, and candy floss).
[301] Brewster, *supra* note 158, at 107.

as an exact scientific process.[302]

This realization came none too soon, as the Food and Color Additive Amendments went into effect and forced lipstick manufacturers to take more care with ingredients than ever before. Almost two hundred colors went into cosmetics during the 1950s, but this number began rapidly declining during the 1960s towards the current level of thirty-four permissible colors.[303] Although lipstick experienced virtually no legal developments in terms of new laws, federal lipstick jurisprudence yet remained a dynamic field, with the FDA and cosmetics industry struggling to interpret and implement the recent additives regulations. Interpretation of the Color Additive Amendment provoked the greatest fights between the FDA and industry, particularly on three sub-issues. First, the FDA interpreted the Color Additive Amendment to allow for defining lipstick and other finished cosmetics as color additives, and so duly issued a regulation defining finished cosmetics as a color additive.[304] As this regulation meant that cosmetics companies needed to get every lipstick pre-approved before sale, the industry naturally challenged the regulation. And, in *Toilet Goods Ass'n., Inc. v. Finch*, the cosmetics industry[305] succeeded in this challenge.[306] The Second Circuit Court of Appeals ruled that the FDA had exceeded its statutory authority in regulating lipstick and other finished cosmetics as color additives, because: (1) the Color Additives Amendment shows no sign that Congress intended pre-market approval for cosmetics, (2) given that the Color Additive Amendment applies equally to food, drugs, and cosmetics, it amounts to unreasonable differential treatment to regulate cosmetics with colorants in one manner while

[302]The industry also recognized the potential for simply marketing products as scientific, exemplified by Estée Lauder's launching the Clinique brand as state-of-the-art, medically sound skincare, complete with salespeople wearing white lab coats and carrying penlights. Koehn, *supra* note 165, at 242.

[303]Brewster, *supra* note 158 at 107 (describing the drop in allowable cosmetics colors from a couple hundred in the 1950s to thirty-four by the 1990s, or, specifically to: fourteen reds, seven yellows, four oranges, four greens, two blues, two violets, and one brown, some with conditions of use).

[304]21 C.F.R. § 8.1(f) (as cited in Toilet Goods Ass'n, Inc. v. Gardner, 278 F. Supp. 786 (1986)). *See also*, Donegan, *supra* note 188, at 154 (discussing how the FDA adopted an expansive interpretation of the Color Additives Amendment and argued that, under the Amendment, lipstick and any other substance that "when applied to the human body results in coloring," represented a color additive requiring pre-market approval).

[305]Cosmetics companies were represented in court by an industry trade group, then called the "Toilet Goods Association," but today known as the "Cosmetic, Toiletry, and Fragrance Association" (CTFA). Donegan, *supra* note 188, at 154.

[306]Toilet Goods Ass'n, Inc. v. Finch, 419 F2d 21, 24-28 (1969).

regulating food and drugs with the same colorants in an entirely different manner,[307] and (3) defining finished cosmetics products as color additives would frustrate the Color Additive Amendment's underlying "safe for use" principle.[308] Secondly, the FDA also issued a regulation defining diluents, components intentionally mixed with color additives in order to facilitate the color additives' use in food, drugs, or cosmetics like lipstick, as color additives.[309] This too the cosmetics industry successfully contested. The *Finch* appellate court left intact the ruling of the *Toilet Goods Ass'n, Inc. v. Gardner* lower court,[310] which held that diluents cannot constitute color additives, because: (1) this would contradict the plain meaning of the Color Additive Amendment's and Food, Drug, and Cosmetic Act's terminology, (2) simultaneous to passing this Amendment, Congress made changes to the Act's section regulating diluents, which changes did not include authorizing pre-market clearance procedures for diluents, and (3) the Amendment's legislative history includes deliberate rejection of premarket approval requirements for ingredients other than color additives [311] Third and finally, the FDA put forth a regulation announcing that it could suspend the availability of cosmetics certification proceedings to manufacturers who refused FDA inspectors access to manufacturing facilities, processes, and formulae involved in the manufacture of additives.[312] Contrasting the fates of other regulations, this regulation survived challenge by the cosmetics industry. After the Second and Third

[307]The Court further points out that ingested food and drugs presumably pose more hazard than do cosmetics, and so, if any differential treatment were justified, it would involve stricter regulation of food and drug, not stricter regulation of cosmetics. Finch, 419 F2d 21, at 27 (stating that: "if there is a difference in hazard, foods and drugs, which are ingested, would seem to outrank cosmetics; indeed cosmetics were not brought into the regulatory scheme until 32 years after foods and drugs").

[308]*See, e.g.*, Walter W. Jones, Jr., *Validity, Construction, and Application of Color Additive Provisions of Federal Food, Drug, and Cosmetic Act, as Amended (21 U.S.C.A. §§321(t, u), 361(a. e), 376), and of Implementing Regulations,* 12 A.L.R. Fed. 475 (summarizing the holdings on several questions raised in the Toilet Goods Ass'n, Inc. v. Finch case).

[309]21 C.F.R. § 8.1(m) (as cited in Toilet Goods Ass'n, Inc. v. Gardner, 278 F. Supp. 786).

[310]Finch, *supra* note 302, at 24 (observing that the Government does not appeal the district court's holding that diluents cannot constitute color additives).

[311]Toilet Goods Ass'n, Inc. v. Gardner, 278 F. Supp. 786, 791-92.

[312]21 C.F.R. § 80.34 (2006) (stating that: "when it appears to the Commissioner that a person has refused to permit duly authorized employees of the Food and Drug Administration free access to all manufacturing facilities, processes, and formulae involved in the manufacture of color additives and intermediates from which such color additives are derived. . . [then the Commissioner] may immediately suspend certification service to such person and may continue such suspension until adequate corrective action has been taken."). This regulation provoked industry outcry, because, by conditioning certification of lipstick and other cosmetics on access to several forms of manufacturing information, the FDA effectively authorized itself to ban any cosmetics whose manufacturers did not allow FDA access to any additives-related manufacturing data that the FDA wished to see.

Circuits split on how to treat the regulation,[313] the Supreme Court accepted cert and denied the industry's request for pre-enforcement declaratory and injunctive relief on the grounds that the controversy had not come ripe for adjudication.[314] Without the FDA having ever yet enforced the regulation, the Court could not know whether or when the Commissioner would order an inspection under the regulation, and for what reasons.[315] Furthermore, the Court considered that no irreparable harm to manufacturers would result from not judicially determining the regulation's validity until an actual case of enforcement under the regulation arose.[316]

Implementation of the Food and Color Additives Amendments had similarly high stakes, for it involved the banning of many colors upon which the cosmetics industry had previously depended. However, the process provoked relatively fewer legal battles, because the Amendments' unequivocal language left little leeway for evading the delisting duties, and because the FDA resisted the delisting of colors almost as much as the cosmetics industry did.[317] Since the Color Additive Amendment made clear that no color could appear in products until affirmative proof of the color's safety had been established, and since cosmetics companies had to themselves pay for this FDA safety testing, many colors ended up delisted not because the colors actually posed any danger, but simply because companies deemed it not worth doing expensive tests on multiple similar shades.[318] In such manner did Reds Nos. 10, 11, and 13 get delisted apparently without

[313] *See*, Abbott Labs. v. Celebrezze, 352 F.2d 286, 291 (1965) (Third Circuit Court of Appeals holding that district courts lack jurisdiction to engage in pre-enforcement judicial review of administrative regulations issued under the Food, Drug, and Cosmetic Act); Toilet Goods Ass'n, Inc. v. Gardner, 360 F.2d 677, 683-87 (1966) (Second Circuit Court of Appeals, on interlocutory appeal, holding that district courts do have jurisdiction to issue pre-enforcement rulings about administrative regulations issued under the Food, Drug, and Cosmetic Act; but, in this case, until an actual instance of enforcement arises, the possibility of unlawful injury under the regulation is too remote to merit declaratory judgment).

[314] Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 160-61 (1967).

[315] *Id.* at 162-64.

[316] *Id.* at 164-66 (with this consideration most directly expressed in the statement that: "no irremediable adverse consequences flow from requiring a later challenge to this regulation by a manufacturer who refuses to allow this type of inspection").

[317] *See*, *e.g.*, Peter Barton Hutt & Richard A. Merrill, Food and Drug Law 877 (2d ed. 1991) (noting that the FDA particularly resisted delisting colors based on cancer risk, and indeed, "for over a decade [after the Food and Color Additives Amendments passed], the FDA applied either [Amendment's] Delaney Clause on only two occasions, both times to ban unimportant indirect food additives").

[318] Brewster, *supra* note 158, at 107.

argument.[319] Court cases on color delistings would come, as the FDA's and cosmetic industry's thorny relationship continued, but not until the following decade.

1970s

In this climate did the 1970s arrive, attendant with a jumble of shifts in lipstick's social connotation as well as continued federal regulatory maneuvers. Looking at lipstick from a social perspective, people spent the 1970s busily rebelling both with and against lipstick, and product developments catered to each of these divergent rebellions in turn. As it had so often before, lipstick became a symbol of social rebellion, adopted by both sexes of the punk-rock music and cultural movement to express sex, violence, and general nonconformity.[320] Purple and black became the most popular colors due to this contingent.[321] Later in the decade, the disco style, yet another fashion originating from the music scene, also relied on lipstick for its deliberately provocative look. Celebrity makeup artist Way Bandy's 'boogie-nights face' revolved around the deep, glossy red lips that now epitomize many people's conception of the 1970s.[322] When lipstick bullets themselves developed a gleaming finish, standard today but entirely new back then, it likely seemed a bold complement to these bold looks. Whether by coincidence or considered effort, just at the time that musically-inspired looks began to favor dark and shiny lipstick as a symbol of their rebellion, manufacturers began flaming their lipsticks; that is, manufacturers sent finished tubes of lipstick through flames at high speed, so that the lipsticks' outer wax coats would melt and then re-solidify as a shiny shells.[323]

[319] *Id.*

[320] Pallingston, *supra* note 8, at 25. With lipstick's history of bisexual use widely unknown, the wearing of lipstick by male rock stars, such as David Bowie, Kiss, and Mick Jagger, passed as the utmost in ground-breaking rebelliousness. *Id.*

[321] *Id.*

[322] Corson, *supra* note 5, at 597-98.

[323] Gunn, *supra* note 2, at 176. Another trend that might represent either coincidence or clever analysis of the market for rebelliousness, edgy designer Yves Saint Laurent began producing lipsticks labeled with cryptic numbers rather than descriptive

On the polar opposite hand, however, feminists rebelled by not wearing lipstick. Doing an about-face from the previous wave of feminism, 1970s feminists protested not with but against lipstick, condemning the commercialized beauty business as degrading to women.[324] Feminists' staunchly no-makeup look little disturbed cosmetics manufacturers though, as they had spent the previous ten to fifteen years wrestling an aesthetically-motivated no-makeup look.[325] By the time that the 1970s rolled around, cosmetics manufacturers had long since regrouped against anti-makeup impulses with 'natural look' makeup, which product lines they then simply repositioned as "celebrating the liberated woman."[326] Cosmetics manufacturers likewise did not suffer too badly from the growing 'New Age' enthusiasm for 'natural' products. To some extent, this trend cost the cosmetics industry business, as potential lipstick customers opted for alternative measures, like staining their lips with raspberry juice.[327] In substantial part though, cosmetics companies could adequately meet the craze for 'natural' products with product enhancements or marketing gimmicks, depending upon one's perspective. Lipstick producers responses to New Age movement demands included: plant extracts showing up in lipstick ingredients,[328] formulas named and flavored like natural products,[329] and advertising emphasis on lipsticks' medicinal attributes.[330]

Looking at the 1970s lipstick world from a regulatory perspective a similar number of contrary forces came

names. Pallingston, *supra* note 8, at 25.

[324]Boock, *supra* note 60, at 38.

[325]During this decade, the lipstick business did quite well. Yardley's factory alone, to give an English, but nonetheless illustrative, example, produced twenty thousand tubes of lipstick daily. Gunn, *supra* note 2, at 175.

[326]Boock, *supra* note 60, at 39.

[327]Corson, *supra* note 5, at 591.

[328]Pallingston, *supra* note 8, at 25.

[329]Ragas & Kozlowski, *supra* note 3, at 66 (highlighting Bonnie Bell as particularly profiting from this approach, with the flavored lip glosses that the company introduced in 1973 still reigning as the world's top selling lip glosses today).

[330]Gunn, *supra* note 2, at 172-73. *See also*, Pallingston, *supra* note 8, at 43 (writing that: "it [has become] the norm for make-up companies to gently fool the public into seeing cosmetics as scientific/medicinal potions. . . [by choosing] names that hint that make-up, if used well, can be a drug"); Koehn, *supra* note 165, at 243 (detailing that cosmetics giant Estée Lauder added the designedly high-tech Prescriptives line to its armament in 1979, bolstering the line's scientifically professional image with lengthy makeup counter consultations).

into play. Previously seen skirmishes over color additives continued, additional conflicts over ingredient labeling developed, and, at the same time, a quivering partnership between the FDA and the Cosmetic Toiletry and Perfumery Association (CTFA) materialized. Delisting of lipstick colorants continued to occur, again apparently without much argument, until the FDA delisted Red No. 2.[331] The FDA banned[332] Red No. 2 on the basis of a Russian study's finding that the basic compound in Red No. 2, amaranth, caused cancer.[333] This Russian study did not provide particularly reliable data, as the study involved a crude version of Red No. 2 different than that used in the United States.[334] When the FDA tried duplicating the Russian study though, its lab mixed up the test rats and so ended up with no verifiable results.[335] And, the cosmetics industry refused the FDA's command that the industry undertake a study of the color itself, deeming the undertaking some combination of too expensive and too silly.[336] So, the FDA ultimately terminated Red No. 2's provisional listing solely based on Russia's study. A legal challenge of this termination, *Certified Color Mfrs. Ass'n v. Mathews*, resulted in summary judgment upholding the FDA's decision, because the FDA had a rational basis[337] for delisting once there existed a suggestion of carcinogenicity and the subsequent

[331]Red No. 2, as most succinctly characterized by the D.C. Appellate Court that ruled on this colorant's delisting, "is a petroleum derived color additive widely used in [the United States] artificially to create or brighten the white, brown, purple, or red colors of various foods, drugs, and cosmetics." Certified Color Mfrs. Ass'n v. Mathews, 543 F.2d 284, 289 (1976). As suggested by the above quotation, Red No. 2 once stood as an FD&C color, meaning that manufacturers could incorporate the color additive into food, drugs, and cosmetics, as contrasted to D&C colors, which only have safety approval for use in drugs and cosmetics. Pallingston, *supra* note 8, at 91. Since the distinction between FD&C and D&C colors matters much less to the history of cosmetics like lipstick than it does to the history of food, the body text of this paper does not obsess over the labels.

[332]More technically, the FDA removed Red. No. 2 from its previous provisional listing status. Those enacting the Color Additive Amendment recognized that requiring pre-approval for all colorants would result in a draconian ban on all colorants, and, hence, many products, unless there existed some buffer zone during which the FDA could complete some of the newly required safety screenings. Therefore, the Amendment's "Transitional Provisions" authorized an initial thirty-day provisional listing, extendable by the Commissioner if desired, for the nine most commonly used colors. 21 USCS §376(a)(1) & (2). Subsequently, the FDA extended this provisional listing status to twenty-three colors for many years, which extension survived legal challenge as being: (1) within the FDA's lawful authority and discretion under the Amendment, and (2) not arbitrary or irrational, because no previous evidence of safety problems with the colors existed, but the colors also had not yet undergone recently available, more rigorous safety tests. McIlwain v.Hayes, 690 F.2d 1041, 1043 (1982). From this long limbo of provisional listing then did Red No. 2 eventually drop to delisted status.

[333]Brewster, *supra* note 158, at 107.

[334]*Id.*

[335]Id.

[336]*Id.*

[337]When ruling on FDA decisions made under the Food, Drug, and Cosmetic Act, courts use the standard of review provided by the Administrative Procedure Act, which standard of review allows only for setting aside those agency decisions that "are found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Certified Color Mfrs. Ass'n

principal study under review could offer no contravening finding of safety.[338] In such manner did the United States become the only country that does not allow use of Red No. 2.[339]

Along with such continued strife over incidents of color delistings, another federal regulatory battle also arose, this one unrelated to the Food, Drug, and Cosmetic Act. Beginning in 1973, the FDA exercised its authority under the Fair Packaging and Labeling Act to require that lipstick and all other cosmetics intended for consumer sale come with full ingredient labeling.[340] Ingredient names, listed in descending order of predominance and in proper nomenclature,[341] now needed to appear on all packaging.[342] Any ingredients used for flavor or fragrance purposes also needed to receive identification as such.[343] For cosmetics that also qualified as drugs,[344] active drug ingredients in the cosmetics needed to: be listed first, be listed not only on the outer but also on the inner container labels, and be identified as "active ingredients."[345] These notions of cosmetics labeling had percolated for several years, ever since the passage of the Fair Packaging and Labeling Act in 1966, because the FDA had originally hesitated over whether the Act really gave the FDA

v. Mathews, 543 F.2d 284, at 293. A revisitation of the previously discussed *Finch*, *Abbott Labs.*, and *Gardner* cases will, thus, also reveal instances of this standard of review.

[338] *Id.* at 295.

[339] Brewster, *supra* note 158, at 107.

[340] Donegan, *supra* note 188, at 155. Since the Fair Packaging and Labeling Act only covers "consumer commodities," the FDA could only require labeling of those cosmetics intended for consumer sale, not cosmetics intended for professional use or for distribution as free samples. Heinz J. Eiermann, *Cosmetic Ingredient Labeling: an American Experience*, 107 Cosm. & Toiletries, Aug. 1992, at 57.

[341] Proper nomenclature entails listing ingredients under those names provided in an elaborate hierarchy of sources for ingredient names. Manufacturers must use ingredients' FDA-prescribed names if such names exist. Eiermann, *supra* note 340, at 57. If, as in the case of most ingredients, the FDA has not prescribed its own names, then manufacturers must list ingredients under the names dictated by the following set of compendia, in descending order of authority: the CTFA Cosmetic Ingredient Dictionary, the United States Pharmacopeia, the National Formulary, the Food Chemical Codex, USAN, and the USP Ditionary of Drug Names. *Id.* Should an ingredient neither have an FDA-prescribed name nor appear in any of the aforementioned compendia, then manufacturers must list it under either a name generally recognized by consumers or a chemical or technical name. *Id.*

[342] Donegan, *supra* note 188, at 155.

[343] Eiermann, *supra* note 340, at 57.

[344] This particular stipulation did not much affect lipstick at the time, but has become applicable recently with lipsticks' inclusion of sunscreen.

[345] Eiermann, *supra* note 340, at 57.

authority to require cosmetics labeling.[346] The FDA had originally proposed voluntary labeling of cosmetics ingredients in 1972, which proposal the cosmetics industry rejected, only to have Georgetown professor Joseph Page, his student Anthony Young, and the Consumer Federation of America eventually convince the FDA that it could impose even stricter mandatory labeling requirements.[347] Upon initial publication of the labeling requirements, anyone adversely affected by the requirements had the right to object and request a hearing, which industry representatives duly proceeded to do until 1975.[348] Industry objections noted but not satisfied, the FDA phased in the new cosmetics labeling requirements over eighteen months, permitting exhaustion of existing inventories of lipsticks and other cosmetics so as to mitigate labeling requirements' economic impact.[349] At that point, the cosmetics industry, in *Independent Cosmetic Mfrs. & Distributors, Inc. v United States Dep't of Health, Educ. and Welfare*, turned to the court system for declaratory and injunctive relief against the labeling requirements. The D.C. District Court dismissed the suit for want of jurisdiction, which dismissal the D.C. Appellate Court upheld based on the Fair Packaging and Labeling Act's specifying federal appellate courts as the forum for challenges to regulations promulgated under the Act.[350] Then, because the Appellate Court did have jurisdiction to hear the suit, the Court went on to consider and rule against the industry's substantive and procedural challenges to the FDA's labeling regulation.[351] After the Supreme Court denied certiorai,[352] the cosmetics industry settled down to obeying ingredient labeling

[346] *Id.*

[347] *Id.* The FDA inclined strongly towards requiring cosmetics labeling, if possible, because it expected that labeling would help consumers and dermatologists avoid allergy problems, and would also help reduce manufacturers' unreasonable claims based on knowledge that the list of ingredients would undercut such claims. *Id.*

[348] *Id.*

[349] *Id.*

[350] Independent Cosmetic Mfrs. & Distributors, Inc. v United States Dep't of Health, Educ. & Welfare, 574 F.2d 553, 554-55 (1978). Actually, the Appellate Court also further elaborated on this jurisdictional holding, in order to address the Fair Packaging and Labeling Act's savings clause, which allows for concurrent jurisdiction by trial courts. Recent binding precedent of *Nader v. Volpe,* 466 F.2d 261 (1972), pointed out the Appellate Court, limits the exercise of jurisdiction created only by savings clauses to those instances in which Congress' specified first choice of judicial review fails to provide an adequate remedy "because of some extraordinary circumstances" not present in this case. *Id.* at 554. Only in "instances of agency action which is *ultra vires* or damaging beyond the capability of the statutory procedure to repair," may a court other than an Act's specified first-choice court exercise jurisdiction created by a saving clause. *Id.* at 554.

[351] *Id.* at 560, (writing that: "We deny, in No. 75-1845, ICMAD's petition for review. The challenge to the substance of the 1973 regulation is untimely; the attack on the procedure followed in amending the regulation fails because no prejudice has been shown.").

[352] Independent Cosmetic Mfrs. & Distributors, Inc. v United States Dep't of Health, Educ. & Welfare, 439 U.S. 893 (1978).

laws, which have since grown increasingly detailed as well as increasingly accepted.[353]

Simultaneous to this fighting over delisting of colorants and listing of ingredient though, the FDA and the cosmetics industry, as represented by the CTFA, also cultivated an uneasy partnership. As early as the 1960s, the FDA and CTFA had begun working more or less together to mediate the FDA's goal of cosmetics safety and the CTFA's goal of avoiding cosmetics regulations.[354] This collaboration produced most tangible results starting in the 1970s, however, with the initiation of the Voluntary Cosmetic Reporting Program in 1974, the formation of the Cosmetic Ingredient Review body in 1976, and negotiations over cosmetics Good Manufacturing Practice guidelines beginning in 1977. The Voluntary Cosmetic Reporting program represented a compromise by which manufacturers would voluntarily give the FDA information about the location of manufacturing establishments, the ingredients used in products, and incidents of adverse reactions to products, in exchange for the FDA not implementing mandatory reporting regulations.[355] To apply this regulatory scheme to lipstick: a lipstick manufacturer wishing to maintain good FDA relations could fill out information forms on its lipstick manufacturing plants, its lipstick ingredients, and any reported problems with its lipsticks, but the lipstick manufacturer would not absolutely have to do so. Due to this last option of not having to file reports if the costs of doing so seem to outweigh the goodwill benefits, Voluntary Cosmetic Reporting did not prove an unqualified success, as discussed later. It does, however, still exist in revised form today.

[353]Eiermann, *supra* note 340, at 57 (enumerating additional facets of cosmetics labeling law, including: a petition process for avoiding listing trade secret ingredients, rules for alternative off-package ingredient listing on mail-order cosmetics, and itemization of the incidental ingredients that do not require listing).

[354]Greff, *supra* note 147, at 245 (describing how "initiative [had] switched back and forth" between the FDA and CTFA since the 1960s, "with industry proposing voluntary programs, and the FDA calling for refinements and clarifications in industry procedures").

[355]Donegan, *supra* note 188, at 157 (further explaining that "although the [reporting] program is voluntary, the procedure for providing information [under the program] is established in FDA regulations"). *See also*, 21 C.F. R. §710-720 (2006) (spelling out the procedures for voluntary reporting on manufacturing facilities and ingredients).

More complete success seems to have resulted from the contemporaneously formed Cosmetic Ingredient Review, as measured by the relative lack of FDA and consumer mumblings about the process as well as by the alternate cost of the FDA taking the ingredient review process upon itself. Scholars disagree as to whether the initial suggestion of creating a cosmetics industry-funded ingredient review board came from the FDA or from the CTFA.[356] However, one or the other of these entities initiated exploratory meetings on cosmetics ingredient testing in 1974, followed by a series of briefings and review meetings in 1975.[357] The Consumers Union, upon hearing about these meetings, brought *Consumers Union of United States, Inc. v. Dept. of Health, Educ., & Welfare*, challenging that the meetings qualified as advisory committee meetings and, under the Federal Advisory Committee Act, needed to occur in public.[358] Although the Consumers Union lost the case on summary judgment,[359] the Consumers Union nonetheless succeeded in bringing about the formation of a somewhat publicly-accessible Cosmetic Ingredient Review body.[360] Said Cosmetic Ingredient Review body, officially formed in 1976, took the FDA's own developing Over-The-Counter Drug Review body as its model.[361] The Cosmetic Ingredient Review has the stated goal of providing "independent, public expert review of the most frequently-used cosmetic ingredients."[362] To accomplish this goal, the Cosmetic Ingredient Review features an Expert Panel of seven scientists and physicians[363]

[356] *See*, Donegan, *supra* note 188, at 156 (asserting that the FDA originally considered creating a cosmetics review body itself, but then decided it better to use agency resources elsewhere and induced the cosmetics industry to take on ingredient reviews). *But see*, Greff, *supra* note 147, at 245 (suggesting that the CTFA perceived a threat in the FDA's new over-the-counter drug ingredient review, and so initiated a cosmetics industry ingredient review in the hopes that this voluntary industry-administered review would ward off a mandatory government-administered review).

[357] Greff, *supra* note 147, at 245.

[358] Consumers Union of United States, Inc. v. Dept. of Health, Educ., & Welfare, 409 F. Supp. 473, 474 (1976)

[359] *Id.* at 477 (holding that: "In the present matter FDA was not undertaking a regulatory program... At issue were not agency policy matters which FDA could consider and resolve, with assistance from an advisory group. Rather, FDA had before it a voluntary plan drafted by CTFA, to be amended by CTFA, and eventually to be implemented or rejected by CTFA. In the final analysis, the action to be taken and the decisions to be made were unilateral. The Court concludes that FDA was not obtaining advice or recommendations from CTFA at the meetings and that the parties were therefore not bound by the provisions of the Federal Advisory Committee Act. Neither chartering of CTFA nor public access to FDA-CTFA meetings is required.").

[360] Greff, *supra* note 147, at 246.

[361] Donegan, *supra* note 188, at 156.

[362] *Id.*

[363] These scientists and physicians represent the disciplines of chemistry, dermatology, oncology, pharmacology, and toxicology. *Id.*

whose assessment of ingredients is overseen by three non-voting liaison representatives, appointed by the FDA, the CTFA as industry spokesperson, and the Consumer Federation of America as consumer watchdog respectively.[364] Voting Expert Panel members, selected via public nomination[365] by scientific and clinical societies, government agencies, and consumer organizations, ask that manufacturers submit test data for or undertake costly tests on ingredients that have made the Cosmetic Ingredient Review's "priority list" based on the ingredients' frequency of use or suspected or known toxicity.[366] Panelists then review the results that manufacturers submit, and determine ingredients safe, unsafe, or undeterminable due to lack of sufficient data.[367] Determinations receive publication in an annual *CIR Compendium*, which determinations the industry tends to rely upon but is not bound to follow.[368]

Along similarly advisory but not mandatory lines, the FDA and CTFA began negotiating over creation of cosmetics Good Manufacturing Practices. In 1977, the FDA announced that it intended to institute Good Manufacturing Practices for eye make-up preservatives as a first step towards having Good Manufacturing Practices for all types of cosmetics.[369] Rather than protesting against such imposition of Good Manufacturing Practices, the CTFA merely filed a petition stating what the industry would prefer to see in such cosmetics Good Manufacturing Practices.[370] The FDA then incorporated the cosmetics industry's petition into the Good Manufacturing Practice guidelines featured in the FDA "Investigations Operations Manual."[371] Since then, the FDA has removed the guidelines and so ended federal cosmetics Good Manufacturing Practices

[364] *Id.*

[365] The nomination process, to ensure Expert Panel independence, also involves conflict-of interest checks using the same standards as applied under federal law to FDA advisory committee members. *Id.*

[366] *What Price Beauty: Judging the Safety of What Goes in Your Hair And on Your Face*, Wash. Post, July 1, 1986, (Health), at 12 (hereinafter "*What Price Beauty*").

[367] Donegan, *supra* note 188, at 156. *See also*, Greff, *supra* note 147, at 246 (adding that ingredients declared "safe" may, more specifically, be declared either 'safe as currently used' or 'safe with qualifications).

[368] Greff, *supra* note 147, at 246.

[369] *Id.*

[370] *Id.* (hinting that this CTFA willingness to engage in a discussion of how to best structure cosmetics Good Manufacturing Practices might have involved a strategic decision that having cosmetics Good Manufacturing Practices might save cosmetics that were also drugs from falling subject to much stricter drug Good Manufacturing Practices).

[371] *Id.*

altogether.[372] Despite the cosmetics Good Manufacturing Practices' minor importance as regulations though, they retain major historical importance as a formative instance of FDA and cosmetics industry collaboration. Amidst the legal battling between the FDA and the cosmetics industry over color delistings and labeling requirements, the two also managed to develop the collaborative relationship that characterizes current government-industry relations, and informs the sparing regulation of cosmetics as compared to the regulation of foods and drugs.[373] Along with all cosmetics, lipstick underwent increased federal safety regulation in the 1970s, but of a lenient voluntary nature. Although lipstick's social signification and accompanying social norms evolved in uniquely conflicted ways during the 1970s, lipstick's legal regulation included few, if any, idiosyncrasies.

1980s

Developments that encompassed but did not focus on lipstick even more strongly characterized the 1980s' informal and formal regulatory environment. The individual product of lipstick changed little in the 1980s, either socially or technologically. Red became the de rigeur color, worn by all cosmetics icons from Madonna, to Jerry Hall, to Ivana Trump, to Nancy Reagan.[374] Advertising lipsticks as not tested on animals just began to gain market cache.[375] Beyond that, however, it appears that no lipstick-specific news merited contemporary documentation. Plenty of regulatory events involving cosmetics generally did occur though, attention prudent given that the global cosmetics industry had grown into $118 billion behemoth.[376] Most

[372] *Id.* (further specifying that the FDA removed the guidelines in 1990 and requested that the CTFA withdraw its petition in 1994).

[373] Cosmetics currently stand the only FDA-regulated product group that does not have its own, individual center within the FDA, and "requirements for cosmetics are substantially less extensive and complex than [are] requirements for foods, drugs, or medical devices." Greff, *supra* note 147, at 248.

[374] Corson, *supra* note 5, at 602.

[375] *Id.* at 600.

[376] Rita Rubin, *Toxic Beauty Wrinkles? Dry Skin? Oily Hair? Just How Safe Are the Products that Promise to Solve*

noteworthy among the regulatory events came: continuing color delistings, continuing industry self-regulatory measures, and a new burst of state legislation.

Despite its own vociferous dislike of doing so, the FDA delisted several more cosmetics colors during the 1980s. Initially, the FDA tried to avoid delisting colors, because it considered the Delaney Clause standard for delisting, namely any risk of cancer no matter how minute, simply illogical.[377] This strategy backfired though, when Secretary of Health and Human Services Margaret Heckler had to face legislative charges of willfully violating the law by not banning dyes known to cause cancer.[378] Heckler argued in defense that a de minimis exception to the Delaney Clause existed, that Congress did not intend to ban colorants whose normal usage posed only the smallest risk of cancer to humans.[379] This argument did not much satisfy many members of Congress,[380] or the consumer group Public Citizen,[381] which brought suit against FDA Commissioner Frank E. Young for having approved external use of Red No. 10 and Orange No. 17 despite knowledge that both substances can cause liver cancer in rats.[382] Douglas Letter argued on behalf of the FDA that: "Because the risks presented by these dyes were so small... [the agency] had 'inherent authority' under the de minimis doctrine to list them for use in spite of [the Delaney Clause] language.[383] Peter Barton

Cosmetic Blemishes?, CHI. TRIB., Dec. 7, 1988, (Style) at 20. Lipstick accounted for a large fraction of this figure, with worldwide lipstick sales totaling $580 million in 1986, and worldwide lipstick sales totaling an additional $140 million that year. PALLINGSTON, *supra* note 8, at 83.

[377]Furthermore, the FDA had recently won a case in which it refused to delist a color additive as carcinogenic. Scott v. Food & Drug Admin., 723 F.2d 322, 325-26 (1984) (holding that the FDA can permanently list Green No. 5 as approved for use in drugs and cosmetics, because only an impurity within Green No. 5 rather than Green No. 5 taken as a whole has been shown to cause cancer).

[378]*A Lipstick You Can Live With,* WASH. POST, July 3, 1985, at A16 (commenting on Heckler's hearing before the House Government Operations Committee and the surrounding cosmetics safety issue).

[379]*Id.*

[380]While the FDA stance on how to handle carcinogenic colorants did not meet with much favor, it would overstate the case to claim that no Congresspersons grasped the FDA's point. Senator Orrin Hatch and Congressman Al Gore several times attempted to reform the Delaney Clause so that it would reflect new scientific knowledge that there exist safe levels of potentially carcinogenic substances. Degnan & Flamm, *supra* note 281, at 255.

[381]Public Citizen, formally named the "Public Citizen Health Research Group" by founder Ralph Nader, argued no risk of cancer permissible. Deborah Blumenthal, *4 Dyes Fading Under Scrutiny By U.S. Courts*, N.Y. TIMES, July 9, 1988, §1 (Style Desk) at 52.

[382]Public Citizen v. Young, 831 F.2d 1108 (1987).

[383]*Id.* at 1111.

Hutt argued on behalf of intervenor CTFA that: "Manufacturers need a wide choice of colors, just as the Renaissance artist needed a full spectrum on his palette centuries ago."[384] Despite these FDA and CTFA arguments, and despite judicial agreement that the colorants posed only "trivial" risk, the D.C. Court of Appeals ruled in favor of Public Citizen.[385] The Court wrote:

> We hold that the Delaney Clause of the Color Additive Amendments does not contain an implicit *de minimis* exception for carcinogenic dyes with trivial risks to humans. We base this decision on our understanding that Congress adopted an extraordinarily rigid position denying the FDA authority to list a dye once it found it to induce cancer in... animals in the conventional sense of the term. We believe that, in the color additive context, Congress intended that if this rule produced unexpected or undesirable consequences, the agency should come to it for relief. That moment may well have arrived, but we cannot provide the desired escape.

Following denial of certiorari by the Supreme Court,[386] the FDA banned Red No. 19 and Orange No. 17, as well as Red No. 8 and Red No. 9, to much fanfare. This ban marked the first color additive delisting since 1976, and the only time that so many colors had gotten delisted at once.[387] The lawyer for Public Citizen, William B. Schultz, proclaimed the ban a public victory, because it involved losing no health benefit and gaining a little cancer prevention. Schultz told *The Washington Post*: "For cosmetics, it may mean that there are a few shades of lipstick that will be lost. I think that will make no difference to people."[388] Cosmetics manufacturers assured *The New York Times*, that the industry had already reformatted lipsticks and other cosmetics immediately after the *Public Citizen v. Young* decision, and so consumers would notice

[384] When the Judge questioned whether Hutt really expected her to equate manufacturers' use of Red No. 19 in cosmetics with Michelangelo's use of paints on the Sistine Chapel, Hutt dropped the argument. He did, after all, have more serious arguments about putting the risk of Red No. 19 and Orange No. 17 into realistic perspective; Hutt pointed out that an entire lifetime of using Red No. 19 would pose ten times less risk of cancer than would eating one charbroiled steak each year or so. Morton Mintz, *Carcinogenic Dyes Have Colorful Day in Court; Cosmetics Industry Invokes Michelangelo in Effort to Win Approval*, WASH. POST, March 27, 1987, at F1.

[385] Public Citizen v. Young, 831 F.2d 1108, at 1121-1122.

[386] Cosmetic, Toiletry & Fragrance Ass'n v. Public Citizen, 485 U.S.1006 (1988) ("The petition for writ of certiorari is denied").

[387] Philip J. Hilts, *FDA to Ban 4 Additives in Cosmetics, Drugs*, WASH. POST, June 7, 1988, at A21 (also providing the statistic that, prior to delisting, the cosmetics and drug industries had produced one-hundred and sixty-five thousand pounds of these dyes annually).

[388] *Id.*

no difference in products following the FDA regulation.[389]

Then, shortly after this colorant spectacle, the FDA announced the additional delisting of Red No. 3. A large-scale study in the early 1980's had shown that Red No. 3 can cause thyroid cancer in rats when used in very high doses, but the FDA resisted delisting Red No.3 until 1990 based on how miniscule a risk this lipstick color additive posed to humans.[390] Extrapolating the study's data showed a maximum human risk of no larger than one in one-hundred thousand from a lifetime consumption of Red No. 3, a risk significantly smaller, the FDA pointed out, than that of natural disasters or airplane accidents.[391] Having had its commonsense arguments about such risk analysis categorically rejected in *Public Citizen* though, the FDA droopily banned Red No. 3 accompanied by public statements that it disliked doing so.[392] Secretary of Health and Human Services Dr. Louis W. Sullivan "all but apologized" for delisting Red No. 3, stating that: "Today's action [removing Red No. 3 from cosmetics like lipstick] is yet another reminder of the need for Congress to consider updating the law to reflect advances in the methods of scientific assessment that were not available when the law was originally passed in 1960."[393] The FDA considered the Delaney Clause miserably outdated, because the Clause's zero tolerance premise that had seemed sensible in a time of crude knowledge about and detection of carcinogens now proved irrational in an era of more sophisticated understanding of cancer.[394] In contrast, California Representative Henry A. Waxman, who had placed continued political pressure on the FDA to delist Red No. 3, counter-argued that: "The Delaney Clause is founded on the principle that it is good public policy to err on the side of public health."[395] Political will

[389] *4 Dyes Fading Under Scrutiny By U.S. Courts*, *supra* note 381, at 52.
[390] Malcolm Gladwell, *FDA:Red Dye's Reluctant Regulator: Partial Ban Points to Limitations of 30-Year-Old Delaney Clause*, WASH. POST, Feb. 7, 1990, at A21 (commenting that the FDA had avoided responding to the animal study's showing of cancer by labeling the study's risk assessment "highly speculative").
[391] *F.D.A. Limits Red Dye No. 3*, N.Y. TIMES, Jan. 30, 1990, (Science Desk), at C10.
[392] *Id.* (quoting the Secretary of Health and Human Service's official statement that: "Small as the risk is, we have no choice under the law but to end the provisional listing of this product.")
[393] Gladwell, *supra* note 390, at A21.
[394] *Id.*
[395] *Id.*

favored Waxman, and the Delaney Clause remains on the legislative books today.

Since the FDA favored, or at least guardedly trusted, the cosmetics industry though, most cosmetics regulation continued to impose less severe safety standards and to take the form of self-regulatory measures. Commissioner Young testified before Congress in 1988 that "cosmetics [are] the lowest of the hazards" that the FDA regulates, which testimony the subsequent Commissioner David Kessler would echo in a 1991 Congressional hearing.[396] Dr. Heinz J. Eiermann, the director of the FDA's division of cosmetics technology, perhaps best explained matters with the remarks that: the FDA considered cosmetics much less of a concern than food or drugs, and so thought it prudent to conserve FDA resources by allowing the cosmetics industry to self-regulate, but the FDA also worried about consumers thinking that cosmetics received much more careful regulation than they actually did.[397] Reasonably enough then, the FDA navigated this intellectual conflict by pressuring the cosmetics industry to adopt such self-regulatory measures as extended labeling and continued ingredient reviews. Since, as previously footnoted, the Fair Packaging and Labeling Act only applies to products sold in retail establishments, the FDA lacked authority to force labeling of cosmetics sold exclusively for professional use.[398] Nonetheless, in 1989, the CTFA instituted a voluntary labeling program for professional cosmetic products.[399] This voluntary labeling program tends to privilege simplicity for manufacturers over informative value for users, for example, it has ingredients listed in alphabetical order rather than in order of predominance, but the program still fairly resembles the FDA's mandatory labeling system.[400]

[396] Donegan, *supra* note 188, at 151.
[397] *What Price Beauty*, *supra* note 366. at 12.
[398] Donegan, *supra* note 188, at 157.
[399] *Id.* CTFA representatives agreed to voluntary labeling of professional products during 1988 Congressional hearings, and then had the process up and running by the end of 1989. Eiermann, *supra* note 340, at 57.
[400] Eiermann, *supra* note 340, at 57.

Voluntary ingredient reviews also continued, by this point a firmly established industry practice that stood "the centerpiece of current industry self-regulation."[401] Working through its mandate to provide independent review of the safety of one-thousand seven-hundred cosmetics ingredients, the Cosmetics Ingredient Review had investigated two-hundred and twenty-nine ingredients by its tenth anniversary of operation.[402] Determinations from these investigations met with almost universal industry compliance, a dutifulness rendered less surprising when one considers that the Cosmetic Ingredient Review only deemed one ingredient wholly unsafe. Said unsafe ingredient, an antioxidant called hydroxyanisole that tends to strip lips of their pigment, got promptly removed from lipstick in 1983.[403] Not everyone, however, felt satisfied by this industry ingredient review, or industry self-regulation more broadly. For example, the National Institute of Occupational Safety and Health went on record with the *Chicago Tribune* as critical that nearly nine-hundred cosmetics ingredients had come to government attention as potentially toxic, and yet only fifty-six of these ingredients had undergone industry review.[404] Consumer groups also found it troublesome that, in 1988, less than half of cosmetics manufacturers had reported any consumer complaints to the FDA under the voluntary reporting guidelines.[405]

Concerns about shortcomings of industry self-regulation found outlet not with the FDA but in state legislatures, producing a burst of new state cosmetics regulations. The multiplying state regulations concerning cosmetics mostly patterned themselves after the Food, Drug, and Cosmetic Act.[406] However, New York City and California went considerably beyond the federal model. New York City enacted the first restrictions on

[401] *What Price Beauty*, *supra* note 366, at 12.
[402] *Id.*
[403] Rubin, *supra* at note 376, at 20.
[404] *Id.* (recording the National Institute of Occupational Safety and Health's complaint that its analysis of nearly three-thousand chemicals used in cosmetics had revealed that, for eight-hundred and eighty-four of the chemicals, the government had received toxicity reports from at least one scientific researcher).
[405] *Id.*
[406] Donegan, *supra* note 188, at 151-58.

cosmetics companies' use of store testers.[407] Governor Cuomo, concerned about the spread of eye inflammation, conjunctivitis, and herpes, successfully pushed for requirements that cosmetics companies who wished to let store customers sample their products either must use individual-sized testers of eye and lip products or must post signs warning that communal testers should only be used on hands or arms.[408] California, at the same time, enacted a more extensive and more contested regulation concerning cosmetics that contain carcinogenic or reproductively toxic chemicals.[409] Said California cosmetics regulation came embedded in Proposition 65, or, once passed, the Safe Drinking Water and Toxic Enforcement Act of 1986. As the name suggests, the Act primarily focused on, and received extensive publicity for, attempting to eliminate carcinogens and reproductive toxins from the California drinking water supply.[410] However, this ostensibly environmental law also contained rigorous warning requirements for consumer products that used chemicals "known by the state of California to cause cancer or reproductive toxicity."[411] More specifically, the Act pronounces that:

> No person in the course of doing business [which encompasses cosmetics companies] shal
> knowingly and intentionally expose any individual to a chemical known to the state to
> cause cancer or reproductive toxicity without first giving clear and reasonable warning to
> such individual, except as provided in Section 25249.10.[412]

Section 25249.10 then provides ways that cosmetics and other manufacturers can avoid labeling their products as health hazards by proving that exposure to any chemical listed as carcinogenic "poses no significant risk assuming lifetime exposure at the level in question" and that exposure to any chemical listed as reproductively toxic "will have no observable effect at one-thousand times the level [used in the cosmetics item]."[413] For

[407] Deborah Blumenthal, *New Lipstick? A Safer Sample*, N.Y. Times, Aug. 6, 1988, (Style Desk), at 33.
[408] *Id.* This law passed in the late 1980s without any significant cosmetics industry opposition, but the law did not go into effect until January 1, 1990. *Id.*
[409] Donegan, *supra* note 188, at 159.
[410] *Id.*
[411] *Id.*
[413] Cal. Health & Saf. Code §25249.10. "Listed" in this case means appearing on the Governor's list of chemicals known to cause cancer or reproductive toxicity, as established in §25249.8 of the Safe Drinking Water and Toxic Enforcement Act. *See,* Cal. Health & Saf. Code §25249.8.

those cosmetics and other manufacturers that either cannot or will not spend the money to prove all of their quantities of chemicals harmless though, the manufacturers' products must carry labels[414] with clearly worded warnings of cancer or reproductive toxicity risk.[415] While the general populace did not much notice the advent of this new cosmetics safety system, the cosmetics industry lost no time in disputing it. Together with the food and drug trade associations, the cosmetics trade association petitioned the FDA to issue a regulation that would administratively preempt the California law for FDA-regulated products, but the FDA declined to do so.[416] Simultaneously, these trade associations petitioned the California to pass a "safe harbor" provision that exempted FDA-regulated products from the Safe Drinking Water and Toxic Enforcement Act.[417] This state-level petition succeeded a bit better than did the federal one, as California briefly enacted the requested safe harbor regulation, but the safe harbor soon got repealed in 1993 as part of a lawsuit settlement with environmental groups.[418] Thus, those selling cosmetics in California continue to contend with significantly heightened, but not entirely clear, ingredient safety requirements. More than five-hundred chemicals now appear on the state's danger list, but many of the listed chemicals have established safe exposure levels while most unlisted chemicals have not received affirmative safety approval and so might suddenly require warning labels at any time.[419] Moreover, since not only the state Attorney General but also private citizens have authority to enforce the Safe Drinking Water and Toxic Enforcement Act, cosmetics

[414]Theoretically, the "clear and reasonable" warning can take several forms, such as shelf signs, but realistically the only practical alternative usually proves a label warning. Donegan, *supra* note 188, at 159.

[415]The regulations implementing the Safe Drinking Water and Toxic Enforcement Act actually specified that the warning's precise language: "This product contains a chemical known to the state of California to cause cancer (reproductive toxicity)." *Id.*

[416]*Id.*

[417]*Id.*

[418]*Id.* Coincident to the cosmetics industry's attempts to entirely exempt itself from the Safe Drinking Water and Toxic Enforcement Act, a broader business consortium known as the Ingredient Communication Council tried the alternate tactic of just reducing the Act's impact. *Id.* at 159 n.45. The Ingredient Communication Council tried to minimize the Act's effects by using a toll-free phone number warning system combined with newspaper and store advertising in lieu of placing warnings on products themselves. Ingredient Communication Council, Inc. v.Lungren, 2 Cal. App. 4^{th} 1480, 1483 (1992). This scheme failed as thoroughly as did the cosmetics industry's efforts though, since the California Attorney General quickly challenged and the California Appellate Court for the Third District quickly rejected the phone warning system as inadequate under the Act. Ingredient Communication Council, 2 Cal. App. 4^{th} 1480 at 1491-98.

[419]Donegan, *supra* note 188, at 160.

manufacturers must take the threat of liability for intentional or inadvertent chemical content violations very seriously.[420] Particularly in California, but also in New York and at the federal level, the 1980s featured a continued development of general cosmetics safety regulations, although very little change concerning lipstick individually.

1990s

After a decade of high use but little discussion, lipstick entered an era of even higher use and much discussion, both social and legal. With cosmetics an $18.5 billion dollar industry in the United States alone,[421] and lipstick sales outnumbering sales of other cosmetics products four to one,[422] lipstick loomed socially large in the 1990s' economic and cultural conscious. The economics of lipstick became a hot topic, within the wider business community as well as within the cosmetics industry. That more than three-quarters of all women wore lipstick, helps explain how Clinique could sell one lipstick every second of business hours.[423] Such figures also help explain Wall Street's epiphany that lipstick represents a serious source of profit, specifically, ten dollars of revenue to every twenty-five cents of production cost, and the consequent flurry of economic activity involving lipstick companies.[424] Revlon, Inc. and Estée Lauder both had successful public offerings in the mid-1990s.[425] Other major lipstick producers became highly sought acquisition targets of Fortune 500 Companies, with Elizabeth Arden selling to Unilever and Cover Girl and Max Factor selling to Procter & Gamble.[426]

[420] *Id.* (explaining that although the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment holds responsibility for interpreting and implementing the Safe Drinking Water and Toxic Enforcement Act, the state Attorney General and private citizens, upon sixty days notice to the proper authority, can enforce the Act.

[421] Greff, *supra* note 147, at 243 (citing $18.5 billion as the cosmetics industry's value for 1996).

[422] Pallingston, *supra* note 8, at 2.

[423] *Id.* at 1-2.

[424] *Id.* at 90.

[425] Glenn Collins, *Cosmetics Romance the Bull; As Industry Lures Investors, Can Revlon Also Rise?*, N.Y. Times, Feb. 7, 1996, (Business/Financial Desk), at D1 (naming Estée Lauder's offering price as $26 dollars per share).

[426] *Id.* Acquiring Cover Girl and Max Factor enviably positioned Procter & Gamble as the leading mass-marketer of cosmetics

Although those within the lipstick industry had already treated their businesses as corporate concerns for half a century, this newfound corporate legitimation from those outside the lipstick industry led to still heightened levels of professionalism, particularly in the areas of product design and marketing. All major lipstick companies became engrossed in perfecting such product design details as the clicking sounds that their lipsticks made when closing.[427] Each line consciously engineered a different click intended to complement its brand image; Lancôme now uses a "definitive, well-engineered click," Givenchy "a heavy click, more metallic than plastic," and Clinique "a resounding snap," to offer a few self-described examples.[428] Alternately, offering more liquid versions of lipstick in pots or tubes became a 'novel' way to deliver the product.[429] Major lipstick companies also developed a couple of crafty marketing strategies. The first of these strategies involved a more sophisticated form celebrity endorsement. Cosmetics companies had long used advertisements featuring celebrities to sell lipstick, but now companies leveraged celebrity power in a subtler manner. Specifically, lipstick companies created colors expressly for celebrities in the hopes that the flattered celebrities would wear the colors and become profitably associated with the companies' brands.[430] Maneuvering popular figures into wearing a lipstick brand certainly cost less than did traditional celebrity advertising contracts and probably also had greater efficacy. For, by the 1990s, consumers recognized that celebrities appeared in formal advertisements only in order to make money rather than because they actually liked the given products, but consumers had not yet learned to suspect celebrities' informal use of products as premeditated.

Additionally, there emerged a second promotional strategy of catering to newly recognized niche markets.

in the United States, although France's L'Oreal S.A., with its acquisition of Helena Rubenstein, still stood the world's largest cosmetics company. *Id.*

[427] Pallingston, *supra* note 8, at 116.

[428] *Id.*

[429] Ragas & Kozlowski, *supra* note 3, at 36. Presumably most consumers did not recognize that liquid lipstick marked a return to the lipstick's earlier, less sophisticated form rather than an innovation.

[430] *Id.* at 26 (offering the example of two companies creating lipsticks specifically for Madonna).

Lipstick manufacturers had periodically tapped into both music and naturalist subcultures, but never with the concentration seen in the 1990s. Grunge culture that accompanied alternative music initially posed a threat to cosmetics, as grunge centered on rejecting beautification.[431] However, cosmetics speedily managed to capitalize on grunge, using a strategy best exemplified by Urban Decay, which devoted its entire line to abnormal colors with defiantly unattractive names like "Gunk" and "Roach."[432] A fashion for "bare faces with off-kilter lipstick colors" also sprang from the marketing machines of lipstick manufacturers as an ideal way to merge grunge sensibilities with lipstick sales.[433] Those taking bizarre beauty products to their most radical offered glow-in-the-dark lipstick and other makeup, but the FDA put an end to this, because the makeup's glow came from an unapproved color additive, zinc sulfide.[434] Similarly, lipstick began to target the naturalist market by incorporating trendy "natural" ingredients and allegedly gentler formulas. Many lipsticks began to boast vitamins and herbs.[435] Advertisements suggested, without actually stating, that hemp included in lipsticks would provide a high for or mellow out users.[436] St. John's Wort within lipstick received similarly suggestive marketing as capable of providing a magical or medicinal mood boost.[437] Revlon began a "New Age Naturals" line,[438] while Estée Lauder started an entire botanical spin-off brand called Origins.[439] Even those manufacturers who did not bill their lipsticks as infused with plants

[431] *See*, CORSON, *supra* note 5, at 607.
[432] PALLINGSTON, *supra* note 8, at 26
[433] *Id.*
[434] Tamar, Nordenberg, *FDA Takes Dim View of Glow-in-the-Dark Makeup*, 32 FDA CONSUMER 38, Jan./Feb. 1998. The idea of fluorescing makeup had existed as far back as the 1970s, but the FDA's citing eight companies for the makeup's inclusion of an illegal color additive had mostly halted the makeup's production. *Id.* During the 1990s though, Zauder Brothers, Inc. persisted in producing glow-in-the-dark cosmetics, responding to a 1994 warning letter from the FDA only by submitting a color additive petition for approval of zinc sulfide. *Id.* As forewarned, the FDA took legal action against Zauder Brothers, filing a complaint against the company's glow cosmetics in the District Court for the Eastern District of New York and seizing one-hundred and eighty-five cartons of the cosmetics. *Id.* Eventually the case settled with a consent decree under which the U.S. Marshals Service destroyed the glowing cosmetics. *Id.*
[435] PALLINGSTON, *supra* note 8 at 28.
[436] *Id.* (lipstick's industrial form of hemp actually contains no drugs, and so claiming too directly that hemp lipstick has drug properties could get manufacturers in trouble for false advertising).
[437] *Id.* (adding that, centuries before, around the time that authorities punished lipstick use as witchery, St. John's Wort was esteemed as a potently magical herb capable of freeing the air from devils).
[438] Dori Stehlin, *Cosmetic Safety More Complex Than at First Blush*, FDA CONSUMER (Dept. Health & Human Servs.), Nov. 1991, rev. May 1995, *available at* http://vm.cfsan.fda.gov/~dms/cos-safe.html (noting that, as in the case of most 'natural' cosmetics, Revlon's New Age Naturals just added plant extracts to the same base formulas used in Revlon's other products).
[439] Koehn, *supra* note 165, at 244.

and herbs, at least added "hypoallergenic" offerings.[440] Such marketing of "natural" and "hypoallergenic" cosmetics bothered the FDA, as the descriptors have absolutely no concrete meaning. "They [cosmetics manufacturers] could wave a tube of plant extract over the bottle and declare it natural. Who's to say what they're actually using?" vented John E. Bailey, FDA director of colors and cosmetics.[441] Often the 'natural' ingredients are merely the standard chemical ingredients renamed,[442] and, when manufacturers do actually use unprocessed ingredients, it just leads to preservation problems anyway.[443] "Hypoallergenic can mean almost anything to anybody," Bailey also commented.[444] Indeed, hypoallergenic means nothing more than that the manufacturer feels a product less likely than other products to cause allergic reactions, with no clinical testing of this manufacturer hypothesis required.[445] As explained by a prescient *New York Times* journalist when the term 'hypoallergenic' began surfacing:

> Hypoallergenic cosmetics do not differ greatly from others, if at all. Virtually all cosmetics have been stripped of the major allergy-provoking offenders." [Also, since individuals differ in sensitivity] even a product marketed as hypoallergenic can sometimes provoke an allergic reaction.[446]

A prior FDA attempt to officially define "hypoallergenic" and similar terms[447] had already been struck down by the D.C. Appellate court in the 1970s though.[448] So, the FDA did nothing beyond grouse about

[440] CORSON, *supra* note 5, at 608.

[441] Stehlin, *supra* note 438.

[442] *See, e.g.*, PALLINGSTON, *supra* note 8, at 91 (citing as examples that: "Tocopherol" often appears as "vitamin E," "Butylated Hydroxytoluene" appears as an "anti-oxidant," and "Caprylic" or "Capric Triglyercide" appears as "coconut oil"); Jane E. Brody, *Getting a Clearer Perspective on the Claims for Cosmetics*, N.Y. Times, Sept. 12, 1984 at C1 (writing that " 'Natural' cosmetics are not known to have any particular benefit to the skin. . . the products contain most or all of the same ingredients found in [other] cosmetics").

[443] *Id.* (explaining that, like natural foods low in preservatives, natural lipsticks have problems staying fresh).

[444] Stehlin, *supra* note 438.

[445] *Id.*

[447] In 1974, the FDA had published proposed Regulation 700.100, stating that: "A cosmetic may be designated in its labeling by words that state or imply that the product or any ingredient thereof is 'hypoallergenic' if [and only if] it has been shown by scientific studies that the relative frequency of adverse reactions in human subjects from the test product is significantly less than the relative frequency of such reactions from each reference [product]." 39 F.R. 7921. The regulation specified that it also covered phrases conveying the same meaning as "hypoallergenic," such as "allergy tested" and "sensitivity." 39 F.R. 7288. Labeling that went beyond claims of hypoallergenicity to imply complete safety or complete absence of adverse reaction risk would be deemed illegal misbranding. 39 F.R. 7288

[448] Cosmetics company Almay successfully challenged the FDA's proposed definition of "hypoallergenic," and accompanying comparison testing requirement for products advertised as hypoallergenic, as arbitrary and capricious. Almay Inc. v. Califano, 569 F.2d 674, 681-83 (1977).

the cosmetics companies' disingenuous terminology during the 1990s.[449] With the FDA having thrown up its hands on the issue, the lipstick industry continued to design and market products with more skill than scruples, while the business world waxed enthusiastic about lipstick's profit potential.

Outside the business world too, lipstick became an increasingly discussed item, as an awakening to lipstick's omnipresence led to analysis of lipstick's reflection of and impact on American culture. San Francisco's MOMA chose lipstick as one of the twelve featured items in its *Icons: Magnets of Meaning* exhibition, and with reason.[450] People theorized about how trends in lipstick reflected societal moods. For example, there emerged a debate about whether brown had become the new favorite shade of lipstick because of the new coffee culture, or as part of a penitent reaction to the 1980s' flashy decadence.[451] People even more seriously theorized about the social essence of lipstick itself. Some psychologists contended lipstick a reflection of society's youth worship, reasoning that adults redden their lips to recapture the naturally redder lips that infants possess.[452] Many other psychologists argued lipstick actually reflective of adult sexuality and the American preoccupation therewith.[453] This camp pointed out that painting on lipstick causes lips to mimic the aroused labia's redness and swelling, as well as that lipstick tubes usually have a phallic design.[454]

Such debates blended into a related discussion of lipstick's impact on society. Not only did people view

[449] Along with the FDA complaining to the press about cosmetics marketing, as seen in the Bailey comments cited previously, the FDA also printed many articles warning people about cosmetics marketing in the *FDA Consumer*. A representative example of such articles on cosmetics marketing reads: "The FDA has tried to establish official definitions for the use of certain terms such as 'natural' and 'hypoallergenic,' but its regulations were overturned in court. So, companies can use them [the terms] on cosmetic labels to mean anything or nothing at all. Most of the terms have considerable market value in promoting cosmetic products to consumers, but dermatologists say they [the terms] have very little medical meaning." Carol Lewis, *Clearing Up Cosmetic Confusion*, FDA Consumer, May-June 1998, *available at* http://www.fda.gov/fdac/features/1998/398_cosm.html.

[450] Ragas & Kozlowski, *supra* note 3, at 100. Lipstick made several other appearances in 1990s art, such as Stacy Greene's photographs of her friends' lipstick tubes. *Id.* at 104-05.

[451] Pallingston, *supra* note 8, at 26-27.

[452] Ragas & Kozlowski, *supra* note 3, at 76 (referring to psychologist Rita Freedman).

[453] Ragas & Kozlowski, *supra* note 3, at 75-76, 102 (referring primarily to psychologist Debbie Then, but mentioning other academics as well).

[454] *Id.*

lipstick as reflecting a societal preoccupation with sexuality, but also as fueling the preoccupation. In some parts of the world, this notion led to legal regulation of lipstick; for example, the Malaysian government under Kuala Lumpur sharply curtailed lipstick use on the rationale that lipstick inspires illicit sex.[455] Along similar lines, women seeking asylum from Iran have testified to having their lips rubbed with shards of glass for wearing sexualizing lipstick.[456] In the United States, however, only social controversy resulted, primarily amongst feminists. The 1970s feminist divide between seeing lipstick as a symbol of emancipation and seeing lipstick as a symbol of oppression, in the form of trivializing sexualization, continued. Lipstick served as an emblem of female strength for the California Women Legislators Caucus, which started conferring Read My Lipstick shame awards upon those whose political utterances they considered demeaning to women.[457] However, others followed Egyptian feminist Nawal El Saadawi in critiquing lipstick as "the post-modern veil."[458] Those in the lipstick industry, preferred to sidestep this minefield entirely, and refocus on lipstick's social impact in terms of the product's socially responsible characteristics. Manufacturers positioned lipstick as the poster product for charity, with sales of Clinique lipstick famously raising money for breast cancer and MAC lipstick sales raising $10 million for the AIDS fund.[459] Manufacturers also trumpeted lipstick and other cosmetics as attuned to animal rights. When animal rights groups developed a bunny leaping into stars logo to mark companies that have pledged to not conduct or commission animal testing on any ingredients or finished products, several cosmetics companies made the pledge and paid the licensing fee.[460] The CTFA's

[455] *Id.* at 17.

[456] *See, e.g.*, Yadegar-Sargis v. INS 297 F.3d 596, 600 (2002). Theresa, Sidebothom, *Immigration Policies and the War on Terrorism*, 32 Denv. J. Int'l L. & Pol'y 539, 570 (2004).

[457] Jerry Gillam, *"Read My Lipstick" Award Will Take Smack at Sexist Remarks*, L.A. Times, April 27, 1990, at A30 (announcing Larry Malmberg, president of the California Peace Officers Research Association, as the "award's" first recipient for saying that: "I don't think the voters are ready for a woman governor").

[458] *See. e.g.*, Sonali Kolhatkar, *Women and War: A Critical Discourse,* 20 Berkeley J. Gender L. & Just. 352, 354 (1994) (quoting El Saadawi's oft stated indictment of lipstick's role in Western society, and criticizing Beauty Without Borders for considering beauty courses a good way to liberate women).

[459] Ragas & Kozlowski, *supra* note 3, at 71.

[460] Barbara Thomas, *The Sign of Alternative Testing*, L.A. Times, Jan. 22, 1999, at E3 (covering the new "Corporate Standard of Compassion for Animals" logo). The article also further explains that the logo represents an effort to set a common standard for animal testing abstention and that the fee for using the logo in turn funds the campaign to promote awareness of the log and spot checks to ensure compliance by companies using the logo. *Id.*

vice president for legislative relations, Michael Petrina, then spoke out about how little cosmetics companies engage in animal testing[461] and how much money they devote to developing alternative testing measures.[462] Such assurances about the commitment to animal rights have a certain deviousness, because the FDA's acceptance of only that safety data obtained through animal testing means that any cosmetics companies not currently using animal testing just uses ingredients already animal tested in the past instead.[463] However, assurances of not testing on animals did help to correct a public misperception about the extent of cosmetics animal testing as well as help to increase lipstick's market caché as a socially responsible product.

Amidst society's latest round of awakening to lipstick's importance and debating its positive or negative implications, legal actors at both the federal and state levels also became even more alert to lipstick and other cosmetics. Federally, the FDA continued to struggle with supervising industry self-reporting, as well as to more intently grapple with the cosmetics and drugs overlap. As in years previous, during the 1990s the FDA wrestled with conflicting desires to let the cosmetics industry self-regulate based on cosmetics' low risk and to end industry self-regulation based on the industry's doing a slipshod job of reporting problems. Bailey, again acting as the FDA's voice on cosmetics issues, characterized serious injury from any makeup, let alone the historically safer lipstick products, as "a pretty rare event. We don't see it happen that often," he told *FDA Consumer* magazine.[464] With most complaints about cosmetics involving allergic reactions to fragrance and preservatives, the FDA strongly inclined to reserve agency resources for more dangerous products.[465] Yet, the FDA also worried about how seldom the cosmetics industry reported problems to the

[461] *Id.* (quoting Petrina's explanation that, despite a mistaken perception to the contrary, cosmetics companies do very little animal testing because they do not need to; most ingredients have long since received any animal testing necessary).
[462] *Id.* (giving the figure as more than $110 million invested over the course of the 1990s).
[463] Stehlin, *supra* note 438 (spelling out the animal testing situation as regards the FDA, namely that the FDA considers animal testing the only testing method proven effective, and so requires animal testing on those additives that need pre-market approval and frowns upon the failure to safety test other ingredients on animals).
[464] *Id.*
[465] *Id.*

FDA, approximately one FDA report for every fifty reports to industry according to Bailey's estimates.[466] The FDA very much wanted to see industry reporting well above the existing thirty-five percent level, and to receive more complete reports from those companies that did make them at all.[467] Aggravating the situation, the FDA had stressed these same criticisms for years, to scant industry response. In 1984, Eiermann, in his role as director of cosmetic technology, had complained to *The New York Times* that: "The information we get from manufacturers is hit or miss, mostly miss."[468] Of the estimated sixty thousand cosmetics-related injuries each year, only three-hundred and forty-three reports of injury reached the FDA per year during the early 1980s.[469] By the 1990s, those outside the FDA had also begun commenting critically on the cosmetics self-regulation system. Jacqueline A. Greff, wrote for an increasingly loud chorus of voices when she observed in the *Food & Drug Law Journal* that cosmetics "nominally are regulated by [the] Food and Drug Administration, [but] the agency's regulation is extremely lenient," and only suffices because of cosmetics' low-risk status.[470] Thus, by the late 1990s, the FDA decided it time to reconsider structuring cosmetics regulation as a largely voluntary, industry-administered system. The upshot of this reconsideration was: industry self-regulation and voluntary reporting had not caused severe enough problems to warrant replacing self-reporting with mandatory reporting, but the system in general, and adverse reporting in particular, also did not satisfy the FDA. Therefore, the FDA would entirely discontinue voluntary filing for adverse reactions, or for "cosmetic product experiences" in regulatory lingo. The FDA's revocation proposal stated in pertinent part that:

[466] *Id.*

[467] Judith Foulke, *Cosmetic Ingredients: Understanding the Puffery*, FDA CONSUMER, May 1992, rev. Feb. 1995, *available at* http://www.fda.gov/fdac/reprints/puffery.html (quoting Mark Waleski, chief of the FDA's cosmetics registration program, as commenting critically that: "Based on the number of [cosmetics] companies we think are eligible to participate [in voluntary reporting], only about 35 percent do... [and] sometimes the information a firm submits is incomplete... And if a firm does not update its submissions with additions or deletions, the information in the registration files could accumulate as inaccurate information.")

[468] Jane E. Brody, *Personal Health*, N.Y. TIMES, Sept. 19, 1984, at C10.

[469] *Id.* (summarizing FDA testimony from Congressional hearings).

[470] Greff, *supra* note 147, at 243.

> While the VCPE [Voluntary Cosmetic Product Experiences regulation] has provided usefu information regarding relative adverse reaction baseline rates, it has suffered from some serious limitations. Industry participation in this portion of the program has historically been very limited and selective, the reports lack sufficient details to be useful, and annua reports are sent in long after the occurrence of an adverse reaction. This limited participation has persisted even though the program has been modified several times over the years to make it easier for companies to participate. In this regard, the VCPE provides a false impression about the ability of the voluntary program to ensure the safety of cosmetics Thus, the VCPE program no longer provides any new information about cosmetic adverse reactions, and it no longer serves the important purpose of helping to find harmful cosmetics and to remove them from the marketplace. With current budgetary constraints on FDA it is difficult to justify the continuation of a program that does not contribute directly to increasing the safety of cosmetics or protecting the public health. Adding data to the information that FDA has obtained over 20 years about baseline adverse reaction rates wil be unlikely to have any value. Thus, FDA is proposing to revoke part 730 [the adverse reactions reporting section].[471]

Following the above-stated proposed revocation, final revocation of adverse reaction reporting took place the following year.[472] In announcing this final revocation, the FDA did mention that it would continue to make adverse reaction reporting forms available and would also consider an offsetting addition of cosmetics adverse reactions to its MedWatch program. [473] Currently, healthcare professionals and members of the public may voluntarily report cosmetics adverse reactions on MedWatch Form FDA 3500, but no one, either inside or outside of the cosmetics industry, must report cosmetics adverse reactions.[474]

[472] 62 FR 43071, 43073 (Aug. 12, 1997) (announcing the final revocation of 21 C.F.R. § 730 and outlining the three formal comments submitted during this revocation proposal's public comment period. One comment supported the decision to completely abolish voluntary reporting. A second comment likewise supported abolition of voluntary reporting, but saw a need to compensate for its absence by: (1) enhancing the MedWatch program to include cosmetics adverse reactions, (2) implementing an FDA policy of referring consumers with adverse reactions to the responsible cosmetics companies, and (3) retaining some process by which the industry collectively could analyze product experiences and report serious reactions to the FDA. The third comment recommended that, rather than revoking the voluntary adverse reaction reporting system, the FDA revise the system to make reporting mandatory and add a toll-free hotline for consumers to notify the FDA of adverse reactions; this comment too mentioned including cosmetics adverse reactions in the MedWatch program).

[473] *Id.* at 43073-74 (rejecting a comment's assertion that the voluntary adverse reaction reporting system failed, as opposed to having successfully accomplished its purpose of establishing baseline adverse reaction rates and so having no further use, but accepting the need to consider including cosmetics in the MEDWATCH program).

[474] *See, e.g.,* 63 F.R. 65000, 65030-31 Nov. 24, 1998 (announcing the FDA's proposed plan for complying with the Food and Drug Administration Modernization Act of 1997 by, among other things, evaluating new methods of gathering information about cosmetics adverse reactions given the 1996 elimination of the previous voluntary cosmetics adverse reaction reporting program), followed by 65 F.R. 69314, 69315 Nov. 16, 2000 (announcing that the FDA has submitted to the Office of Management and Budget for review and clearance the proposed collection of information on adverse reactions to various products, including adverse reactions to cosmetics under the voluntary portion of the MedWatch program), and most recently 70 F.R. 48157, 48158 Aug. 16, 2005 (mentioning, in the preface to an announcement about modifying MedWatch forms' formatting, that healthcare professionals and the public may use Form FDA 3500 [the form for voluntary reporting] to report adverse events involving cosmetics).

Given this late-1990s decision to more or less end adverse reaction reporting but otherwise leave industry self-regulation and self-reporting intact, the cosmetics regulation system will presumable stay status quo for the foreseeable future. Whether self-regulation, with industry ingredients testing and voluntary reporting at its core, suits the lack of problems with cosmetics, or whether self-regulation more insidiously camouflages actually present problems, remains open to debate. Reasonable people have argued that, even did manufacturers more punctiliously report problems to the FDA, the FDA would still have little information on the cosmetics problems occurring in the United States, because consumers almost never relay complaints to cosmetics manufacturers in the first place.[475] At least one consumer redress study has found that ninety-eight percent of consumers who experienced memorable problems with lipstick and other categories of cosmetics did not inform manufacturers about the problems, and forty-five percent of consumers who experienced memorable problems with lipstick and other categories of cosmetics did not mention the problems to anyone.[476] Such empirics might argue for continuing to muddle along with industry self-reporting and self-regulation, because most problems with cosmetics have so little gravity that even those affected think them not worth complaining about. Additionally, such empirics suggest that the FDA's forcing manufacturers to report would do little good given how little manufacturers know to begin with; in this case, in order to produce significant safety benefits, the FDA would need to expend an unreasonable amount of resources to itself extensively test products for problems. Alternately, however, such empirics might point towards the need for a new regulation system, because extraordinarily low levels of consumer reporting might indicate that the cosmetics industry deliberately makes it difficult for consumers to report problems in order to avoid knowing about the problems. If many cosmetics industry players have implemented labyrinthine customer service structures so as to avoid getting feedback about safety problems, this would raise concern about the

[475] Betty J. Diener & Stephen A. Greyser, *Consumer Views of Redress Needs*, 42 Journal of Marketing 21, 25-26 (1978) (reporting the results a 1974 telephone survey of nearly five-hundred randomly selected females in nineteen American cities showed).

[476] *Id.*

industry's integrity in other self-regulation measures as well.[477]

FDA concerns, however, overridingly focused on, and today continue to focus on, the cosmetics and drugs overlap. The Food, Drug, and Cosmetic Act classifies products by their intended uses, as determined by explicit and implicit manufacturer representations, rather than by products' inherent properties.[478] To offer one example: a jar of cold cream might qualify under the Act as a cosmetic, but it might also qualify as a drug, or it might qualify as both,[479] all depending on the manufacturer's claims.[480] As a result of this situation, the cosmetics industry has lived under the recognized threat of having its products thrust into the highly-regulated drug category since the Food, Drug, and Cosmetic Act's initial passage.[481] If deemed a drug, a cosmetics product suddenly comes subject to mandatory product registration with the FDA, more frequent FDA inspections, and current good manufacturing practices that entail: use of consultants,

[477] That the cosmetics industry engages or has ever engaged in a deliberate conspiracy to thwart safety reporting seems unlikely. However, that companies individually decide to funnel resources anywhere except fielding consumer complaints seems less farfetched, whether merely for profit reasons or actually for knowledge avoidance reasons. Anecdotal evidence of the difficulty involved in communicating with major cosmetics companies arose even in the course of writing this paper. Lipstick information requests sent to the consumer relations and marketing departments of the top six cosmetics manufacturers resulted in: one refusal to provide information, four disregards of the request, and one helpful response from Shiseido. The information requests took the form of a three-question survey, which explained the academic reason behind the inquiry, asked very open-ended questions, encouraged companies to skip any question that they still felt uncomfortable with, and provided multiple methods for response. The companies were ranked, and selected for inquiry, according to most recent available international market share figures. *See,* Sameer Kumar, *Exploratory Analysis of Global Cosmetic Industry: Major Players, Technology, and Market Trends*, 25 TECHNOVATION 1263, 1264 (2005) (listing the market shares for the ten highest grossing cosmetics companies as of year 2000, namely, in descending order: L'Oréal SA, Estée Lauder Company, Procter & Gamble Company, Revlon, Inc., Avon Products, Inc., Shiseido Company Ltd., Coty, Inc., Kanebo Ltd., Kose Company Ltd., and Chanel SA. These companies collectively account for 62.1% of the global cosmetics market).

[478] *See, e.g.*, HUTT & MERRILL, *supra* note 315, at 824. This overview of the definition of "cosmetic" also further elaborates that, "attempting to formulate a hard and fast rule differentiating between cosmetic claims and drug claims is virtually impossible," with some products clearly cosmetics solely intended to promote attractiveness, and other products clearly drugs intended to effect physiological changes, but a third category of products murkily entailing both attractiveness promotion and a slight physical effect. *Id.* While the FDA has attempted to deal with the classificatory muddle by publishing advisory opinions as to whether it deems certain types of products cosmetics or drugs, the opinions tend to merely demonstrate how unpredictable the cosmetics-drug categorization is. *Id.*

[479] Qualifying as both a drug and a cosmetic puts a product in the worst possible regulatory position, because not only do drugs face many regulations that cosmetics do not, but cosmetics also face a few regulations that drugs do not. For example, drugs need list only active ingredients on their labels, while cosmetics need to list essentially all ingredients on their labels. Greff, *supra* note 147, at 250

[480] Congress explicitly anticipated that having classification depend upon intent rather than upon actual effect would allow the FDA to regulate fraudulent remedies for health problems. *Id.* at 253

[481] Commentary published just three years after the Food, Drug, and Cosmetic Act passed assessed that: "probably the most difficult problem raised [for the cosmetics industry] is whether certain products shall be classified as cosmetics or drugs." Tousley, *supra* note 148, at 266.

stricter quality control, heightened personnel requirements, and more stringent limitations on the ingredients and containers used.[482] One 1990s industry insider thus understandably wrote that: "the tension between drug and cosmetic status has been the primary feature of the evolution of cosmetic law in the last fifty years."[483] However, in the 1990s, the threat of drug classification for "cosmeceuticals" became ominously more intense, particularly for lipstick.[484] Partially the FDA's frustration with other methods of regulating cosmetics, partially the fad for therapeutic advertising claims, and partially the advent of sunscreen cosmetics products account for this intensification of drug classification efforts. Straightforward methods of reigning in cosmetics' unsubstantiated claims, such as bringing misbranding charges, had repeatedly failed the FDA, and, so, classifying problematic cosmetics as drugs became appealing.[485] Classifying cosmetics as drugs enables the FDA to improve both cosmetics' safety and labeling, by preventing cosmetics that do have drug-like properties from entering the market without adequate safety testing as well as preventing cosmetics that do not have drug-like potency from masquerading as having such curative powers.[486] Towards this end, the FDA in the 1990s began more aggressively pursuing, or at least threatening to pursue, drug classification for cosmetics. The FDA took the position that mere presence of certain ingredients in cosmetics products could render the products drugs, regardless of any claims made, an expansion of the traditional rule that

[482]Patrick R. Jones, Note, *Protecting the Consumer From Getting Burned: the FDA, the Administrative Process, and the Tentative Final Monograph on Over-the-Counter Sunscreens*," 20 Am. J. L. & Med. 317, 329 (1994) (hereinafter "*Protecting the Consumer From Getting Burned*").

[483]Greff, *supra* note 147, at 243.

[484]The term "cosmeceuticals" refers to those hybrid cosmetic and pharmaceutical products that make up "the gray area between cosmetics and drugs." Cosmeceuticals contain active ingredients seen in pharmaceuticals, but at lower concentrations, and claim physiological effects, but of a temporary and often not scientifically-substantiated nature. Brian A. Liang & Kurt M. Hartman, *Only Skin Deep: FDA Regulation of SkinCare Cosmetics Claims*, 8 Cornell J. L. & Pub. Pol'y 249, 261-62 (1999). The FDA does not accept the term "cosmeceuticals," however, because the term does not appear in the Food, Drug, and Cosmetic Act. Some would argue that this should change, and that the FDA and Congress should follow other countries in recognizing cosmeceuticals, and regulating them as a unique category distinct from either cosmetics or drugs. Heymann, *supra* note 190, at 372.

[485]*Id.* at 249-52 (explaining the appeal of classifying cosmetics as drugs, but also criticizing this approach both as inappropriate given the legislative mandate to police all, not just some, cosmetics' labeling and misleading claims, and as inadequate given that courts' periodically reject drug classification efforts).

[486]Greff, *supra* note 147, at 252 (characterizing the FDA as having five incentives to classify cosmetics as drugs: ensuring safety by precluding the use of certain ingredients, ensuring proper labeling to prevent injury, ensuring disclosure of products' material effects to prevent confusion, preventing manufacturers' from dodging drug regulations, and preventing use of ineffective ingredients in products that make drug claims or that consumers view as drugs).

only "intended use" could determine products' classifications.[487] Previously mentioned cosmetics company enthusiasm for incorporating herbal ingredients and hinting but not stating that cosmetics had therapeutic effects no doubt spurred such FDA rigor in seeking more drug classifications and under a broader range of circumstances.

The advent of sunscreen in cosmetics played no small part in the magnifying the cosmeceuticals focus either though. Incorporating sunscreen into cosmetics became increasingly popular at the end of the twentieth century as the link between sun exposure and skin cancer became increasingly clear.[488] Lipstick with sun protection became exceptionally popular, and profitable; manufacturers could charge twelve to thirteen percent more for lipsticks that claimed ultraviolet ray (UV) protection.[489] Almost immediately the FDA grew concerned by the possibility of cosmetics manufacturers dangerously claiming sun protection without really adequately providing that protection.[490] So, the FDA added cosmetics containing sunscreen to the beach-use sunscreen regulation that the FDA had begun drafting years earlier.[491] This 1993 Tentative Final Monograph featured six-hundred pages on over-the-counter sunscreen products,[492] with one-hundred and eight pages

[487] *See, e.g.,* Donegan, *supra* note 188, at 158 (describing the distinction between cosmetics and drugs as "still an active area of inquiry," in part due to the FDA's new position that ingredients alone can render cosmetics drugs) & Greff, *supra* note 147, at 253-255 (explaining that the FDA has decided certain ingredients have only drug functions and lack cosmetics functions).

[488] Some awareness of the sun's potential to cause at least beauty damage, as well as of sunscreens' potential to protect against such damage, appears to have existed as early as a few hundred years previous. One of seventeenth century play-write Ben Jonson's works features a doctor scolding a patient for not wearing "the white oil" that the doctor prescribed as sun protection. Williams, *supra* note 65, at 17. Likely the doctor character here referred to some mixture involving petrolatum, which is a semi-solid substance more commonly known as "mineral oil" or "white oil," and which the FDA today lists as an active ingredient for over-the-counter skin protectant products. Lin L. Healy, et. al., *Slippery Competition: Vegetable Oil, Hydrocarbons and Esters Pose Slippery Competition for Petrolatum and Mineral Oil in Personal Case Products*, 173 Global Cosm. Indus. 38 (Sept. 1, 2005).

[489] *Protecting the Consumer From Getting Burned*, *supra* note 482, at 319-20.

[490] *Id.* at 318.

[491] Robert P. Brady, *A Lawyer's View – Sunscreen TFM: Legal Implications Present and Future; Tentative Final Monograph*, 108 Cosm. & Toiletries 43 (1993) (recounting how the FDA published an Expert Panel Report on over-the-counter sunscreen products in August 1978, and then spent fifteen years composing a subsequent Tentative Final Monograph on sunscreens, with sunscreens including the addition of cosmetics containing sunscreens).

[492] *Protecting the Consumer From Getting Burned*, *supra* note 482, at 321.

devoted exclusively to sunscreen in cosmetics.[493] According to the Tentative Final Monograph, cosmetics could only contain sunscreen without triggering drug status[494] if the cosmetics did not use any of twelve phrases that suggested sunscreen, sun protection, freckle prevention, wrinkle prevention, or certain anti-aging properties.[495] Additionally, the Tentative Final Monograph set out the acceptable and unacceptable language that either sunscreen or non-sunscreen cosmetics products may use regarding aging due to sun and skin cancer,[496] as well as banned the term "waterproof" for sunscreen cosmetics.[497] As with all Tentative Final Monographs, this publication did not create any legally binding regulations but did give manufacturers a good idea of what would likely be required of them and their cosmetics soon enough.[498] Manufacturers and any other interested parties received a chance to comment on the tentative regulation before the binding Final Monograph issued.[499] Not astonishingly, such a momentous proposal generated several hundred comments, the majority of which concerned how the tentative regulation did not properly address UVA protection and how the FDA should forego its attempt to cap SPF levels at 30.[500] These comments apparently had some effect. For, although the provision on sunscreen cosmetics' drug status took effect as of year 2000,[501] the comprehensive Final Monograph for over-the-counter sunscreen products got extended multiple times before finally taking effect in 2003.[502] At least one of the extensions explicitly centered on formally reopening the

[493] Brady, *supra* note 491, at 43.

[494] This general rule about cosmetics with sunscreen getting drug status included an exception for nail polish and hair products, because, in those products, sunscreen serves the non-drug function of preventing color from fading. However, if such nail and hair products indicate sunscreen's presence, then they must also specify that the sunscreen serves a purely cosmetic function. *Id.*

[495] *Id.* (listing the twelve phrases that triggered drug status, a few of which phrases have since been banned entirely, as: "sunscreen," "shields from the sun," "blocks out the rays of the sun," "protects from the sun," "prevents or protects against freckling," "prevents or protects against wrinkling," "prevents or protects against redness or uneven coloration of the skin," "protects against UVA/UVB," "shields the skin against specific factors that accelerate the signs of skin aging," "helps to acquire an even tan," "permits tanning," "protects against premature aging, skin aging, skin lesions, an skin cancer").

[496] *Id.*

[497] *Protecting the Consumer From Getting Burned*, *supra* note 482, at 324 (explaining further that sunscreen cosmetics may say "water resistant" if they require reapplication after forty minutes of sweating or water-related activity, or "very water resistant" if they last eighty minutes before requiring such reapplication).

[498] *Id.* at 321.

[499] Brady, *supra* note 491, at 43.

[500] *Protecting the Consumer From Getting Burned*, *supra* note 482, at 326.

[501] 21. C.F.R. § 700.35 (2006).

[502] 68 Fed. Reg. 33362 (June 4, 2003).

administrative record for comments on UVA/UVB testing requirements.[503] Similarly, it did not become misbranding to "state[] a specific SPF value above 30 or [use] similar language indicating a person can stay in the sun more than 30 times longer than without sunscreen" until 2003, and even today this rule remains "stayed until further notice."[504]

While at the federal level the FDA concentrated on when to classify cosmetics as drugs and how to confront cosmetics industry self-regulation, legislators at the state level also grew active in developing a new breed of environmentally-oriented cosmetics laws. Cosmetics laws centered on environmental protection arose in several states during the 1990s, most notably California, New York, and New Jersey. Once again, California led the way in state augmentation of federal cosmetics law with an extensive environmental protection law targeting exclusively those products covered under the Food Drug and Cosmetic Act. California's inventive 1994 packaging requirements, known formally as the Rigid Plastic Packaging Container Program, demanded that cosmetics companies wanting to sell their products in California reduce their products' environmental impact in one of four ways.[505] In order to sell cosmetics packaged in plastic containers, which category encompasses almost all lipsticks, companies newly needed to either: make their containers from at least twenty-five percent recycled material, ensure that their containers get recycled at a forty-five percent recycling rate, make their containers reusable or refillable, or engineer source reduced containers.[506] Most cosmetics companies chose to use the first recycled materials option, and convinced legislators to postpone the statute's effect date so that cosmetics companies could figure out how to use recycled packaging without violating FDA adulteration regulations.[507] Meanwhile, New York, in 1991, amended its air pollution prevention laws to

[503] 65 Fed. Reg. 36319 (June 8, 2000).
[504] 21 C.F.R. § 352.50 (2006).
[505] 14 C.C.R. § 17943 (2006) (laying out the purpose of and definitions involved in the Rigid Plastic Packaging Container Program, which applies to food and drugs as well as cosmetics). *See also*, Donegan, *supra* note 188, at 161.
[506] 14 C.C.R. § 17944 (2006). *See also*, 14 C.C.R. § 17943 (2006) (defining a "source-reduced container" as a container that weighs ten percent less than either (1) the given manufacturer's previously used containers for the given product, with several options for demarcating 'previously used,' or (2) other manufacturers currently used containers for similar products).
[507] Donegan, *supra* note 188, at 161.

better include the production of cosmetics and drug products.[508] New Jersey focused on waste management like California, and included cosmetics packaging under the auspices of its general Toxic Packaging Reduction Act of 1992.[509] Having seen numerous states enact environmental cosmetics regulations during the 1990s suggests that this new strain of cosmetics law may prove an important regulatory trend in the decades to come.

2000s and Beyond

These clear historic patterns then offer a model for understanding what social and legal trends have begun to and will continue to crop up in the twenty-first century. On the social side, lipstick currently reigns ubiquitous, but lipstick's historical pattern of veering from the heights of popular to the depths of social unacceptability, make it much more likely than most people probably imagine for lipstick to go severely out of fashion within the next century. The Victorian Era's social prohibition on lipstick did not represent anomalous prudishness to which society will never return, but rather represented just the latest dip in lipstick's perpetual cycle of rising and falling permissibility. A coalescence of feminist subsets' unrest about lipstick's trivialization of women, conservationists' call for not wasting resources on unnecessary consumer goods like lipstick, and religious right groups' continued dislike for lipstick's materialist, sexual implications, could easily squelch the seemingly untouchable lipstick market. Such upheaval relates to the long-term future though, in the short-term, lipstick will likely experience continued market success and increased global social acceptance.

For the next few decades, lipstick will likely remain a huge socioeconomic player in the United States, as suggested by the most recent market statistics as well as by recent technological developments. Statistical

[508] 6 N.Y.C.R.R. § 233.2 (2006) & 6 N.Y.C.R.R. § 235-2.1 (2006).
[509] 1991 N.J. A.L.S. 520 & N.J. Stat. § 13:1E-99.44 (2006).

indicators of solidity include that the United States cosmetics industry presented a $32.7 billion global market last year, with lipstick earning $9.4 billion, behind facial makeup but ahead of eye makeup and nail products.[510] The color cosmetics sub-segment, already the third largest cosmetics and toiletries sub-segment, has also begun growing particularly quickly of late, registering a nearly thirteen percent annual growth rate as compared to the overall sector's approximately three percent annual growth rate.[511] Aging baby boomers who have increasing amounts of disposable income to spend on beauty products, coupled with new emerging markets in Eastern Europe, Latin America, and Asia, should allow for sustaining such growth.[512] On average, each woman buys four lipsticks every year,[513] usually from one of the top four cosmetics companies that account for roughly seventy-five percent of all United States lipstick revenues.[514] Both nationally and globally, in fact, the lipstick market has become a very concentrated one, with essentially ten powerful companies making almost all sales.[515] Following these ten cosmetics powerhouses, a second set of companies account for a remaining eleven percent share of the lipstick and other cosmetics market.[516] Between the high revenues from lipstick, high growth rate of lipstick sales, and already consolidated nature

[510]Nancy Jeffries, *Color Blends Fashion and Function*, 173 Global Cosm. Indus. 42 (Nov. 1, 2005). *But cf.*, Kumar, *supra* note 477, at 1264 (describing the cosmetics industry in 2001 as only a $22.5 billion market and lipstick as only a $6.6 billion market, which might reflect that Jeffries overstated the industry's profitability figures, but might also just reflect a sharp rise in the cosmetics industry's profitability between 2001 and 2005 as the economy recovered from the dot.com crash).

[511]Kumar, *supra* note 477, at 1265.

[512]*Id.* at 1267 (citing L'Oreal's 2003 Management Report to its board). L'Oreal's report also lays out the industry's frailties, specifically that consumers' health, environmental, and animal testing concerns could raise costs and that the FDA could heighten regulations. *Id.*

[513]Ragas & Kozlowski *supra*, note 3, at 7 (noting, however, that while lipstick is a frequently purchased item, it is also one of the most commonly shoplifted items).

[514]Kumar, *supra* note 477, at 1265 (specifying that Revlon holds a nearly twenty-two percent market share in the United States, followed by L'Oreal with a nearly fourteen percent share, followed by Procter & Gamble and Estée Lauder). *See also*, Jeffries *supra* note 510 (noting that alternately named brands actually controlled by L'Oreal include Maybelline and Lancome, and that named brands controlled by Procter & Gamble include Max Factor and Cover Girl) & Koehn, *supra* note 165, at 245 (listing Estee Lauder's alternately named brands as: Clinique, Prescriptives, Origins, Aveda, Bobbi Brown, jane, Jo Malone, La Mer, MAC, and Stila).

[515]*See, e.g.,* Jeffries, *supra* note 510 (listing, as the companies that matter: L'Oreal, Estée Lauder, Procter & Gamble, Avon Products, Shiseido, Revlon, Coty, Chanel, Kanebo Cosmetics, and Alticor); Kumar, *supra* note 477, at 1265-66 (providing earnings and cash flow data on the top cosmetics companies); Koehn, *supra* note 165, at 245 (drawing the cutoff for companies that matter slightly higher at seven global cosmetics companies).

[516]Kumar, *supra* note 477, at 1264 (writing that eleven percent of the leftover market share goes to another nine or ten companies: LVMH, The Body Shop, Mary Kay, Kao, Yves Rocher, Pola Cosmetics, Beiersdorf, Oriflame International, Boots Company, and Alticor, if one places it in the second rather than the first tier).

of the lipstick market, the economic statistics on lipstick indicate a strong presence for the near future.[517]

Technological developments pertaining to lipstick provide a second suggestion that lipstick will maintain public attention for the next several years. While the basic recipe for lipstick has changed uniquely little throughout history,[518] the exact formulation of lipstick's base has improved, as have the options for texture, color, and non-cosmetic uses. Formulating the proper types and quantities of the waxes, oils, and emollients that collectively constitute the base of all lipsticks has become an increasingly elaborate science over time.[519] Of late, cosmetics manufacturers have moved from simply relying on one type of wax, one type of oil, and one emollient to mixing several ingredients from each category for a better combination of quality and cost efficiency. The wax component, which gives lipstick its shape, now usually consists of a carnauba wax and beeswax mixture.[520] Carnauba wax offers an improvement over classic pure beeswax, because carnauba's high melting temperature renders lipsticks less likely to melt in hot weather.[521] Additionally, a more sophisticated beeswax, developed in the late 1990s and known by the brand name Ultrabee, now helps to prevent lipstick sweating, improve lipstick application, and render lipstick more transfer resistant.[522] The oil component

[517] The cosmetics market's consolidated nature has not escaped its participants, who monitor their few competitors. L'Oreal, the global leader in cosmetics sales, regularly analyses competitors' strengths and weaknesses. In 2003, for example, L'Oreal reported to its board on Estée Lauder, Proctor & Gamble, Avon, and Revlon to name a few. Estée Lauder has difficulty promoting products, thought L'Oreal, and the trend of shopping at discount stores that do not sell Estée Lauder products will hurt the company further. Proctor & Gamble has high operating margins and high name recognition, but also has size-related innovation difficulties. Avon has the world's largest direct sales network and a strong history of restructuring easily, but the trend of shopping at discount stores should hurt Avon as much as it does Estée Lauder, because now Avon has many more competitors in cheap cosmetics. And, Revlon, has the best mass-marketing, but has the disadvantage of relatively low research and development spending. *Id.* at 1264 & 1267.

[518] Pallingston *supra*, note 8, at 6 (writing that, "unlike other cosmetics, lipstick's ingredients have pretty much stayed the same" over time).

[519] *Id.* at 86 (explaining that bases made up of oils, waxes, and emollients give all lipsticks their adherence and ability to last).

[520] *Id.*

[521] *Id.*

[522] *Color Innovations Aid the Formulator*, Manufacturing Chemist 15 (June 1998) (enthusing about the new transesterification products of beeswax mixed with dimethicone copolyol). Along with improved beeswax, adsorptive polymers also can prevent lipsticks from sweating when added "unloaded," as contrasted to the polymer's "loaded" form when used to deliver active ingredients like alpha hydroxyl acids or vitamins. *Id.*

now relies more heavily on castor oil than before,[523] using lanolin and petrolatum[524] in only supplemental form, presumably due to lanolin's pesticide contamination risk[525] and petrolatum's allergy risk.[526] And, the emollients, protective agents that both disperse pigment and offer some moisturizing, have upgraded from the standard castor oil, lanolin, and esters[527] to also include brand-name moisturizers and aloe vera, as well as multipurpose collagen and sunscreen.[528] Insertion of nylon microspheres, a practice popularized throughout the latter half of the 1990s, further assists in this dispersion and moisturizing process. Not only do the nylon miscrospheres' fine particle size and narrow particle distribution improve the dispersal and skin adhesion of color, but nylon microspheres also deliver moisture better than did the formerly used water, which required extensive mixing at high temperatures.[529] Moreover, the entire process of combining these waxes, oils, and emollients has become mechanized, ensuring that lipsticks turn out exactly the same every time. To describe the process briefly: machines dispense pigments into a wetting agent and grind the mixture into a thick slurry,[530] at which point the wax is added followed by the oils and other incidentals like fragrance.[531] Then the mixture enters a temperature controlled heating stage, after which the liquid gets poured into cold metal molds for a two to four minute dwell time.[532] Bullets measuring about one-fourth inch long[533] and taking

[523] Pallingston *supra*, note 8, at 86-87 (describing the usual lipstick formula as sixty-five percent castor oil, fifteen percent beeswax, ten percent carnauba wax, and five percent lanolin, rounded out with the thickener ozokerite, color, and fragrance). *But see,* Valerie Parison, *Active Delivery from Nylon Particles; Nylon Microspheres*, 108 Cosm. & Toiletries 97 (Dec. 1993) (approximating the typical lipstick formula as nearly sixty percent ricin oil, nine percent carnauba wax, nine percent lanolin, and six percent beeswax, rounded out by treated nylon microspheres, pigments, fragrance, ozokerite, and preservatives).

[524] Petrolatum often gets referred to as mineral oil, a prettier sounding derivative of petrolatum. Pallingston *supra*, note 8, at 95.

[525] *See,* Ian Johnson, *Low Pesticide Lanolin: A History*, 105 Cosm & Toiletries 63 (Aug. 1990) (considering the issue of lanolin's purity in regards to pesticide residues, which became so controversial in the late 1980s and early 1990s that the FDA began working to set acceptable contamination levels). *See also*, Pallingston *supra*, note 8, at 95-97 (explaining that lanolin "is a yellow, fatty secretion from the oil and glands of sheep," also used as a lubricant for wheeling stones in ancient Egypt and as the earliest recorded laxative)

[526] Pallingston *supra*, note 8, at 95-97 (characterizing petrolatum, which Brooklyn chemist Robert Chesebrough discovered when it clogged his workers' drills, as a desirably effective moisturizer but an undesirably common allergen).

[527] *Id.* at 86-87 (writing on the purpose of emollients and the standard options for emollients).

[528] Ragas & Kozlowski *supra*, note 3, at 40.

[529] Parison, *supra* note 523.

[530] Pallingston, *supra* note 8, at 88 (explaining further that the more finely the pigment mixture gets ground, the more uniform the final lipstick color turns out).

[531] *Id.* at 87-88 & 113-114 (explicating that perfumes and flavorings, most often rose water and vanilla, serve to disguise the natural odors and tastes of other ingredients).

[532] *Id.* at 88-89.

[533] *Id.* at 84.

one of three shapes[534] exit the molds while still cold so as to not risk shape distortion, enter their cases, and shoot through a flame for about half a second to create the now expected flawlessly smooth, glossy finish.[535] Thus has lipstick's basic recipe developed into a sophisticated formula of multiple varieties of each ingredient processed in a mechanized manner to more reliable and aesthetically pleasing effect.

Along with honing the basic lipstick formula, cosmetics companies have also, over the past few decades, figured out how to create at least six different textures of lipstick by adjusting the relative proportions of wax, oil, and emollients. Standard matte lipsticks have more wax and pigment, less emollients.[536] Crème lipsticks have more oil than do matte lipsticks, and, as the most popular texture of lipstick today, the newer crèmes have nearly rendered mattes obsolete.[537] The even yet newer option of gloss lipstick depends upon having many more emollients than do other textures of lipstick, and also upon using softer waxes.[538] Similarly, the sheers or stains, which have appeared in the past decade as a subtler spin on glosses, feature a lot of oil and softer than normal wax.[539] Shimmers offer the twenty-first century version of the 1970s glimmer lipstick, with the glittery look now coming from mica or silica more often than ground fish scales.[540] Finally, long-lasting lipsticks, although attempted for nearly a century, have just in the past few years become actually durable as well as comfortable. Discovery of a new beeswax-silicone derivative that evaporates quickly on the lip's surface for wear-resistant color but that also has an oil-like consistency for comfortable moistness has provided the key to realizing the long-lasting texture.[541] Addition of a free radical scavenger known as

[534] Manufacturers make three basic shapes of lipstick, all of them variations on the bullet that first appeared in the late 1930s. Fishtail lipsticks get angled on both sides of the tip, teardrop lipsticks have a pointed tip angled on one side, and wedge lipsticks have a rounded tip angled on one side. RAGAS & KOZLOWSKI *supra*, note 3, at 40

[535] PALLINGSTON, *supra* note 8, at 89.

[536] *Id.* at 46.

[537] *Id.*

[538] *Id.*

[539] *Id.*

[540] *Id.*

[541] *Color Innovations Aid the Formulator*, *supra* note 522. *See also*, PALLINGSTON *supra*, note 8, at 86 (describing the new beeswax in more layman's terms).

expanchimie has helped too though, as it can lock in moisture without obstructing dye's longevity.[542]

Color has improved along with texture, both in terms of safety and looks. In terms of safety, known poisons like vermilion, mercury, and arsenic have long since vanished from lipstick. Ensuring the safety of colorants has more than mere historic concern though, as evidenced by both the ongoing color additives testing and this year's proposed rule on carmine labeling. Despite its status as the classic red dye[543] in lipstick since ancient Egyptian times, carmine turns out to pose a risk of life-threatening allergic reactions, as discovered by University of Michigan doctors in the late 1990s.[544] So, the FDA in 2006 announced a proposed revisal of its labeling requirements such that cochineal extract and carmine must appear on all food and cosmetics labels in order to help affected customers avoid the colorant.[545] Correspondingly, the appearance of lipstick color has also continued to improve, with more shades, more special effects, and more complete pigment dispersion for more uniformly intense hues.[546] Use of interference colors has, in particular, advanced within the past five to ten years.[547] Effect pigments, such as pearlescents, metallics, and, quite recently, iridescent colors, have helped lipstick companies expand into the preteen market.[548] As color assessment remains "the most studied and explored field in lipstick evaluation," presumably persistent use of reflectance spectrophotometry, reflectance tristimulus colorimetry, and video imaging will improve color quality yet further.[549] That expensive product development technology continues to expand and improve

[542] *Color Innovations Aid the Formulator*, *supra* note 522 (describing expanchimie's production, via molecular distillation of sesame oil, and purpose, moisturizing).

[543] In technical terms, the words "pigment" and "dye" do not operate quite so interchangeably as used herein. Technically, pigment color adheres to the lips' surface, while dye color gets absorbed into the skin. Pallingston *supra*, note 8, at 87.

[544] Okie, *supra* note 11, at Z5 (announcing that University of Michigan doctors used the Prausnitz-Kustner test to demonstrate that patients' immune systems produce possibly life-threatening allergic reactions to the carmine dye).

[545] 21 Fed. Reg. 4839 (Jan. 30, 2006).

[546] Jeffries, *supra* note 510.

[547] *Color Innovations Aid the Formulator*, *supra* note 522.

[548] Sara Mason & Rachel Rasmussen, *State of the Industry: Understanding Consumer Need and Opportunity Can Bet t he Difference in Beating a Competitor in a Crowded Marketplace, No Matter the Economic Climate*, 171 Global Cosm. Indus. 26 (Dec. 1, 2003).

[549] Rodolphe Korichi, et. al., *Quantitative Assessment of Properties of Make-Up Products By Video Imaging: Application to Lipsticks*, 6 Skin Research and Tech. 222, 222-24 (2000) (offering considerably more details about all three quantitative measures of color analysis, and advocating for video imaging as the best method for assessing colors' covering power, brightness, and

lipstick's base formula, texture, and color options[550] indicates industry sanguinity about lipstick's future, and also provides a reasonable chance that consumer demand will continue responding to the continuously improving product.

Technological development of non-cosmetic applications for lipstick has also increased the product's desirability and could contribute towards its longevity. Both lipstick's previously discussed sun protection faculty and lipstick's even more recent forensic utility render lipstick newly valuable for reasons totally apart from beautification. Lipstick, or alternately marketed chapstick, that serves as sun protection has become big business; it will likely grow into even bigger business once people begin to better appreciate lips' constant exposure to the sun, particularly the lower lip, which receives the highest ultraviolet exposure of any facial region.[551] At the moment, lipsticks actually fail to deliver their advertised SPF, because people, in practice, do not apply lipsticks with the required thickness and frequency necessary to achieve and maintain labeled SPFs.[552] However, lipstick has potential to offer a particularly appealing form of ultraviolet protection, because lipstick's strong adhesive quality makes it a more potent sun block than other sunscreen preparations that contain more water and cling less well.[553] Since awareness about the importance of sun protection grows each year, lipstick's alter ego as a sunscreen could prove most profitable. As a sun block, lipstick could both saturate the male market for the first time in several hundred years and could also garner more frequent purchase in the female market because of the safety need for frequent application. Along with this recent

streakiness).

[550]One might easily underestimate the extent of these options, with L'Oreal's labs alone creating more than three thousand lipstick formulas per year. Kumar, *supra* note 477, at 1267. At present, L'Oreal's Lancome brand alone offers nineteen lip products in two-hundred and eighty-two shades. *See*, Lancome online store, *available at* www. lancome-usa.com/_us/_en/catalog/makeup2.aspx?CategoryCode=AXEMakeupˆF1_Lipsˆ F2_Lip_Lipcolour&& (Feb. 8, 2006).

[551]H. Maier, et. al., *Assessment of Thickness of Photoprotective Lipsticks and Frequency of Reapplication: Results from a Laboratory Test and a Field Experiment*, 148 Brit. J. of Dermatology 763, 764 (2003). Along with emphasizing lips' need for sun protection given their frequent exposure, Maier and colleagues also acknowledge that it "appears that lip skin is less sensitive to UV radiation than [is] normal skin." *Id.* at 768.

[552]*Id.* at 763-768 (reporting the results from a lab test and a ski trip field test involving male and female participants; lab test participants applied lipstick at about fifty percent of the reference area density, while field test participants applied lipstick more thickly but still on the low side, and both groups of participantsapplied the lipstick far to infrequently for adequate protection).

[553]*Id.* at 767 (but also noting lipstick's disadvantageous tendency to get wiped off and licked away).

consumer utility as sun protection, lipstick also has utility to detectives as a source of forensic evidence. Lipstick marks offer investigators an excellent perpetrator, victim, or witness identification method, because lips' unique patterns of furrows, highlighted by lipstick, provide a reliable identifier akin to fingerprints.[554] Having lip prints as an alternative to fingerprints proves particularly valuable when trying to raise marks on corpses. Raising fingerprints on human skin, although possible, holds particular difficulty, because "the same organic elements that generate the prints – and are used for detection – can also be found on the skin. Therefore, interferences in developing are frequent."[555] Marks made in lipstick do not pose the same difficulty though, and it has recently even become possible to develop invisible lip marks on skin when the person who left the marks wore long-lasting lipstick.[556] In a study published this year, scientists showed it possible to raise invisible lipsticked lip marks, at least if the marks were made relatively recently and if the lipstick was a long-lasting formula, by spreading a reagent of Sudan III, Sudan Black, or Oil Red O on corpses' skin.[557] While lipstick's forensic value will not directly spark consumer sales, and could decrease lipstick use among those who prefer to remain less traceable, lipstick's forensic value should render it popular with law enforcement and justice officials, and so in turn less vulnerable to any sort of official resistance. Lipstick's gradual taking on of functions other than cosmetic ones signals its dominant role in society that seems unlikely to immediately change. The sheer volume of technology poured into and developed around lipstick vehemently suggests that lipstick's social status will remain high and so any social sanctions remain low.[558]

[554] Jon-Seong Ryu, et. al., *Improving Lip Wrinkles: Lipstick-Related Image Analysis*, 11 Skin Res. & Tech. 157, 157-63 (2005) (mentioning the way in which lipstick's highlighting of lip wrinkles aids forensic scientists, but focusing on the finding that lipsticks containing asiaticoside can reduce the number and depth of lip wrinkles associated with aging).

[555] Esperanza Navarro, et. al., *Criminalystic: Effectiveness of Lysochromes on the Developing of Invisible Lipstick-Contaminated Lipmarks on Human Skin, A Preliminary Study*, 158 Forensic Sci. Int'l. 9 (2006).

[556] *Id.* at 9-10.

[557] *Id.* at 10-13.

[558] In addition to the technological developments particular to lipstick discussed above, lipstick has also benefited from the more universally applicable development of the internet. Like other products, lipstick now gets sold online, sometimes through elaborate virtual make-over sites. Digital marketing does challenge lipstick companies though, because online shopping does not allow for persuasive face-to-face consultations or for sampling. Kumar, *supra* note 477, at 1270.

Just as lipstick's social regulation will probably remain at its current low level, lipstick's legal regulation will probably continue to remain at its historical high. Given that the average woman now eats one to three tubes of lipstick per year,[559] or four to nine pounds of lipstick over the course of her lifetime,[560] this safety regulation seems wise. Alternately, given the historical concern with lipstick's threat to masculine rather than feminine safety, the estimation that teenage boys actually consume the highest quantities of lipstick invites the product's safety regulation.[561] At the national level, the FDA likely cannot avoid adding international regulatory awareness to its doubtless continued monitoring of color additives and the cosmetics-drugs distinction, and state actors likely will continue amplifying federal regulations. Considering that the FDA's monitoring of color additives and of the thin divide between cosmetics and drugs has more gained than lost momentum over the past thirty or so years, one can expect that this dual regulatory concentration will continue for at least the next several years to come.[562] The FDA will almost surely need to expand this focus to international regulatory issues though, given the increasing globalization of the cosmetics market. Theoretically, cosmetics companies could simply make differently formulated products for the different major United States, European Union, and Japanese markets, and the FDA could regulate cosmetics careless of other countries' noticeably divergent procedures for doing so.[563] More likely though, the powerful cosmetics industry will pressure the government to work towards globally standardized cosmetics

[559] Pallingston *supra*, note 8, at 173.

[560] Ragas & Kozlowski *supra*, note 3, at 7.

[561] Pallingston *supra*, note 8, at 45 (reporting the hypothesis that teenage boys' proclivity for spending long hours kissing the group of heaviest lipstick wearers leads to the boys particularly high lipstick consumption).

[562] *See, e.g.,* 69 Fed. Reg. 44927 (July 28, 2004) (recent petition for and acceptance of listing Black No. 2 for use in lipstick and other cosmetics); 65 Fed. Reg. 48375, 48375-76 (Aug. 8, 2000) (recent amendment to the color additives regulations to permit certain use of luminescent zinc sulfide in externally applied cosmetics not intended for daily wear and only marketed on special occasions such as Halloween); 70 Fed. Reg. 1721, 1721-24 (Jan. 10, 2005) (recent guidance concerning labeling requirements for and possible drug status of cosmetics that contain alpha-hydroxy acids).

[563] Janet Winter Blaschke, *Globalization of Cosmetic Regulations*, 60 Food & Drug L. J. 413, 413-19 (2005) (naming the primary world cosmetics markets and explaining how these markets have dissimilar regulations regarding ingredient approval, labeling, product registration or notification, and cosmetics versus drug status divisions).

regulations while consumer groups will also exert somewhat parallel pressure on government to offer the same protections as do other countries. Already, at least four glimmerings of such a multinational regulatory synchronization process have surfaced. A United States-initiated International Nomenclature of Cosmetic Ingredients has begun working towards a universal ingredient listing system.[564] The European Union has already begun implementing this standardized ingredient identification system in order that people in all of its member countries might use a single Latin-based cosmetics label rather than needing multiple labels for each product.[565] In addition, the cosmetics industry holds "Mutual Understand" meetings every four years to share information and work towards regulatory harmonization.[566] Thirdly, United States environmental groups have begun to growl about the absence of paraben limitations in cosmetics here, given that the European Union's Cosmetics Directive has set maximum paraben concentrations for cosmetics under its control.[567] This debate could balloon even further from merely arguments about the cancer risk posed by cosmetics' containing parabens as preservatives into arguments about the United States' generally risk-based cosmetics regulations[568] as compared to the European Union's more protective hazard-based regulations.[569] Fourth and finally, American animal rights groups have observed and commented on the European Union's Seventh Amendment to the Cosmetics Directive,[570] which, upon the development of alternative tests, would introduce a ban on selling cosmetics whose ingredient or product safety tests involved animal testing.[571]

[564] *Id.* at 417-18.

[565] *The Complexities of Cosmetics Labeling*, Inside Cosm., 23, Oct. 1997. Somewhat ironically, the United States has yet to make the obvious corollary move regarding ingredient quantity labeling; the United States still insists that cosmetics quantities be listed in avoirdupois and fluid ounces despite the world's use of metric measurements. Blaschke, *supra* note 563, at 415.

[566] Blaschke, *supra* note 563, at 418-19.

[567] Veronica MacDonald & Nancy Seewald, *Household and Personal Care; Awash in New Rules*, Chemical Wk., Nov. 30, 2005, at 25.

[568] The United States' color additive laws provide one notable exception to the otherwise industry-friendly, risk-based approach to cosmetics regulation. *Id.*

[569] *See*, *id.* (providing background information on why environmental groups worry about parabens in cosmetics, namely because the groups think that parabens could cause cancer by accumulating in the body's fatty tissue and mimicking the actions of oestrogen, as well as why the United States has taken a different regulatory approach to parabens than has the European Union).

[570] *See e.g.,* Avril Stephens, *Animal Rights Slam EU Testing Ban*, CNN, Nov. 7, 2002, *available at* http://edition.cnn.com/2002/WORLD/europe/11/07/eu.cosmetics/index.html (discussing European animal rights' activists dissatisfaction with the extent of the Seventh Amendment to the Cosmetics Directive but American animal rights' activists view of the Amendment as a step in the right direction that the United States should emulate).

[571] Azalea P. Rosholt, *The Seventh Amendment Directive – An Unnecessary Measure to a Necessary End – Possible Legal*

On their own none of these international discussions scream revolution, but, taken together, they suggest that federal regulation of lipstick and other cosmetics will of necessity increasingly acquire an international perspective.

At the state level too, regulation will likely develop along the lines seen in the past few decades, but perhaps with legislators' adopting a heightened awareness for what other similarly situated regulators have chosen to do. Despite cosmetics companies' wishes, states will continue to add on to the national cosmetics laws, and to do so in an independent enough manner as to leave cosmetics companies liable for differing regulations on a state by state basis. For example, California, yet again at the forefront of expansive state regulation, last year passed the California Safe Cosmetics Act.[572] Under this new Act, cosmetics companies that wish to sell products in California must disclose to the state any use of phthalates or other harmful chemicals in the cosmetics, must provide the state Department of Health Services with relevant health effects data and studies and other information as requested, and must submit to higher regulation of commercial cosmetics than federal law would otherwise require.[573] Hearkening back to the influence of international cosmetics law, San Francisco Senator Carole Migden spearheaded this legislation inspired by the European Union's year 2003 ban on phthalates from cosmetics.[574] Presumably other states will continue to follow California in using state regulation to tighten what some think the overly loose federal regulation of cosmetics. Since several states have in the past few decades begun piling their own rules atop the federal cosmetics regulations, and since it has become widely recognized that this phenomenon of state cosmetics regulation is occurring, it seems likely that states will more and more often look to one another's cosmetics laws when shaping their

Challenges to Directive 2003/15/EC of the European Parliament and of the Council Amending Council Directive 76/768/EEC Under European Union Law, 60 Food Drug L. J. 421, 422-25 (discussing the animal testing ban put forth by the Seventh Amendment to the Cosmetics Directive and its potential for success relative to 1993's Sixth Amendment to the Cosmetics Directive, which Sixth Amendment attempted to accomplish the same goal but without having an automatic effectiveness date).

[572] *See,* 2005 Cal. A.L.S. 729 (2005)(announcing the California Safe Cosmetics Act, its motivations, and its purposes).

[573] Institute for Global Health & University of California Berkeley, *The California Safe Cosmetics Act 2005,* Health Pol'y Monitor, *available at* http://www.healthpolicymonitor.org/en/Policy_Survey/Search_for_Policy_ Reforms/Survey_Details/The_California_Safe_Cosmetics_Act_2005.html?content_id=251&sortOrder=sortAsc&rating_valueDegree%20of%20Innovatio

[574] *Id.*

own. So does state regulation's future seem set to trod its late twentieth-century path of states supplementing federal cosmetics regulations, logically, although not necessarily, looking to other states' already accomplished cosmetics regulations as guidance.

The Western history of lipstick, although begun multiple millennia ago, has the remarkably modern feel of any tale that takes at its essence human nature and the laws that this human nature produces. Because lipstick, from the start, heavily implicated identity, whether class or gender or both, lipstick's regulation did initially and has continually involved informal and formal status rules concerning who could and could not use the cosmetic. Early status regulations of lipstick often took actual legal form, whereas more recent status regulations have almost always taken unwritten social form, but understood dictates about who acceptably may wear lipstick have hardly faded away. That elite legal journals discuss "lipstick lesbians" as radically destabilizing the rules of gender by wearing a symbol of femininity while making masculine sexual choices, demonstrates that status regulation of lipstick, however nominally informal, remains forcefully in effect.[575] In addition to the age-old status regulations though, other types of lipstick regulations have also accumulated over time. Advances in medical and scientific knowledge led to a second layer of human safety regulations. Even more recently, concern for the environment coupled with an increased understanding of cosmetics' environmental impact has brought about a third round of lipstick regulations focused on environmental safety. Within the last twenty years, animal rights concerns have also produced a fourth layer of animal safety lipstick regulations. And the history books have not closed on either the status or the varied safety regulations; society should expect to see in the future what it has in the past, lipstick phasing in and out of respectability but lipstick's formal and informal regulation haltingly experiencing a net increase regardless.

[575] *Patriarchy is Such a Drag: The Strategic Possibilities of a Posmodern Account of Gender*, 108 Harv. L. Rev. 1973, 1988 (1995).