

Journal of Civil Rights and Economic Development

Volume 19
Issue 2 *Volume 19, Winter/Spring 2005, Issue 2*

Article 7

March 2005

"Origin of Goods": Delving into Dastar Corp. v. Twentieth Century Fox Film Corp.

Denine C. Pagano

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

Recommended Citation

Pagano, Denine C. (2005) "'Origin of Goods': Delving into Dastar Corp. v. Twentieth Century Fox Film Corp.," *Journal of Civil Rights and Economic Development*. Vol. 19 : Iss. 2 , Article 7.
Available at: <https://scholarship.law.stjohns.edu/jcred/vol19/iss2/7>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

“ORIGIN OF GOODS”: DELVING INTO *DASTAR CORP. V. TWENTIETH CENTURY FOX FILM CORP.*

DENINE C. PAGANO*

I. INTRODUCTION

Enacted in 1946, the Lanham Act,¹ the “foundation of United States trademark law,”² has the purpose of promoting registration of trademarks,³ creating a cause of action for the “deceptive and misleading use of marks” in commerce,⁴ and (in protecting people engaged in commerce) thwarting consumer confusion and

* Graduated magna cum laude from the College of the Holy Cross with a B.A. in English, and was selected as a member of the Phi Beta Kappa Honor Society. The author would like to thank the Journal of Legal Commentary for the publication of this piece, and would also like to thank her family and ‘Caddie’, without whose love, support, and guidance, law school and this paper would not have been possible.

¹ 15 U.S.C. § 1125(a) (2004) (encouraging registration of trademarks and other marks). See *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 687 (2d Cir. 1971) (defining Lanham Act); see also *Stauffer v. Exley*, 184 F.2d 962, 965 (9th Cir. 1950) (explaining further meaning of Lanham Act).

² Sam Mamudi, *Supreme Court Sets Trade Mark Boundaries*, EUROMONEY INST’L INVESTOR MANAGING INTELL. PROP., July 1, 2003, at 14 (discussing Supreme Court ruling that diminished ability of holders to use trade mark law to counter copyright infringement).

³ See 15 U.S.C. § 1127 (2004) (defining trademark as “word, name, symbol, or device, or any combination thereof...(1) used by a person, or (2) which a person has a bona fide intention to use in commerce...to identify and distinguish...goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods”); DONALD E. BIEDERMAN & SILFEN ET AL., *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 257 (CT, Praeger 2001) (defining trademark as “a sign, device, or mark by which the goods produced or dealt in by a particular individual or business are distinguished from those produced or dealt in by others”); see also *Aluminum Fabricating Co. v. Season-All Window Corp.*, 259 F.2d 314, 317 (2d Cir. 1958) (stating that registration is *prima facie* evidence of validity).

⁴ See 15 U.S.C. § 1127 (2004) (stating that intent of the statute “is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; . . . to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception... by the use of reproductions...of registered marks”); see also *Marriott Corp. v. Ramada, Inc.*, 826 F. Supp. 726, 727 (E.D.N.Y. 1993) (explaining that Lanham Act addresses itself to false or misleading designations); *Tripledge Products, Inc. v. Whitney Resources, LTD.*, 735 F. Supp. 1154, 1160 (S.D.N.Y. 1990) (stating that Lanham Act gives statutory remedy for trademark infringement and unfair competition to party injured by false designation of origin of its product).

destruction of producer goodwill.⁵ This trademark statute, having common law foundations, tackles most forms of advertising and promotion⁶ and is aimed at identifying the producer of the goods that are offered for sale.⁷ In particular, Congress enacted §43(a) of the Lanham Act⁸ to codify the common law trademark doctrine of 'passing off,' which is the representation of one person's goods or works as those of another.⁹ Specifically, §43(a)¹⁰ creates a fed-

⁵ See *Virgin Enters v. Nawab*, 335 F.3d 141, 146 (2d Cir. 2003) (discussing that cause of action will arise if significant number of consumers are confused by infringing mark); *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1037 (2d Cir. 1992) (stating that main question is whether marking will contribute to consumer confusion); see also Howard J. Sussner, *Supreme Court: Federal Lanham Act No Help to Owners of Expired Copyrights*, INTELL. PROP. LITIG. REP., July 22, 2003, at 13 (discussing unfair competition functions of Lanham Act).

⁶ See *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1270 (10th Cir. 2000) (discussing that there is cause of action against anybody who uses misleading misrepresentation of fact in commerce, which in commercial advertising or promotion, misrepresents nature of another person's goods or services), *aff'd*, 317 F.3d 1121 (10th Cir. 2003); see also *Gillette Co. v. Wilkinson Sword, Inc.*, 795 F. Supp. 662, 663 (S.D.N.Y. 1992) (explaining that advertising agencies can also be liable under Lanham Act if they knowingly participate in false advertising); Harold P. Weinberger & Jonathan M. Wagner, *A Lanham Act False Advertising Suit is the Weapon of Choice*, METROPOLITAN CORP. COUNS., Oct. 2003, at 00 (clarifying that Lanham Act reaches national and local advertising, and other modes, such as product labeling, letters, and oral exchanges by sales representatives).

⁷ See *Wal-Mart Stores Inc., v. Samara Bros.*, 529 U.S. 205, 209 (2000) (stating that trademark is any symbol, word, name, or device used to distinguish producer's goods from others on the market); see also *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137,144 (2d Cir. 1997) (explaining that Lanham Act is used to enable consumers to be able to distinguish between consumers goods); Laura Gasaway, *Origin of Goods in Trademark Law Does Not Mean Creator*; *Copyright Corner*, SPECIAL LIBR. ASS'N INFO. OUTLOOK, Nov. 1, 2003, at 7 (noting that common law foundations were not designed to protect originality or creativity).

⁸ 15 U.S.C. § 1125(a) (2004) (explaining that §43 of Lanham Act was intended not only to prevent false designations as to origin, but to protect consumers against all forms of misrepresentation of products). See *Pgc Property., L.L.C. v. Wainscott/Sagaponack Property Owners, Inc.*, 250 F. Supp. 2d 136, 140 (E.D.N.Y. 2003) (stating that §43 of Lanham Act protects those parties who are in connection with goods and services); see also *PepsiCo, Inc., v. Dunlap Tire & Rubber Corp.*, 578 F. Supp. 196, 199 (S.D.N.Y. 1984) (explaining that purpose of §43 was to address claims of deception and misrepresentation constituting trademark infringement and unfair competition).

⁹ See *Larkin Group, Inc., v. Aquatic Design Consultants, Inc.*, 323 F. Supp. 2d 1121, 1121 (D.Kan. 2004) (explaining that passing off is when someone tries to claim another person's goods as his or her own); see also Roberta Rosenthal Kwall, *The Attribution Right in the United States; Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 1003 (2002) (noting how, traditionally, passing off was crucial for authenticating common law unfair competition); Lori H. Freedman, *Reverse Passing Off: A Great Deal of Confusion*, 83 TRADEMARK REP. 305, 307 (1993) (discussing congressional intent underlying §43(a)).

¹⁰ 15 U.S.C. § 1125(a)(1)(A) (2004) (stating that there is civil action when, "[a]ny person who...uses in commerce any word..., or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which (A) is likely to cause confusion...of such person with another person, or as to the origin, sponsorship, or approval...by another person"). See generally Freedman, *supra* note 9, at 307 (explaining congressional intent behind §43(a)).

eral remedy against those who use, in commerce, false designations of origin.¹¹

Clearly, the Lanham Act protects both producers and consumers, yet, recently, some courts have broadened the Act “to protect *original creators* on the grounds that consumers deserve to know the ‘origin of goods.’”¹² Such court interpretation inevitably led to the creation of the idea that the Lanham Act could function as “the one federal enactment capable of safeguarding the right of attribution.”¹³ Are original creators entitled to such actions for credit under §43(a)’s language of “origin,” or were the courts going too far?

In *Dastar Corp. v. Twentieth Century Fox Film Corp.*,¹⁴ the Supreme Court levels their answer: the courts *were* stretching the Lanham Act in their protection of original creators. Through clear definition of the §43(a) phrase “origin of goods,” *Dastar* holds there is no such right to ‘proper credit’ for an original creator with an expired copyright under §43(a) of the Lanham Act.¹⁵

¹¹ See Stuart G. Richeson, *Unattributed Copying of Work No Longer Protected by Copyright*, 51 LA. B.J. 218, 218–19 (2003) (discussing purpose of §43 of Lanham Act); see also Lynn McLain, *Thoughts on Dastar from a Copyright Perspective: A Welcome Step Toward Respite for the Public Domain*, 26 U. BALT. INTELL. PROP. L. J. 71, 72 (2002/2003) (clarifying that §43(a) of Lanham Act prohibits false or misleading designations or representations regarding origin of goods); Kurt M. Saunders, *A Crusade in the Public Domain: The Dastar Decision*, 30 RUTGERS COMPUTER & TECH. L.J. 161, 166 (2004) (quoting §43(a) of Lanham Act which states that “false designation[s] of origin” are prohibited).

¹² David G. Savage, *Justices Fine-Tune Coverage of Trademark Act; Films and Other Works in the Public Domain Can Be Copied and Revised For Sale Without Crediting the Original Creators*, *High Court Says*, L.A. TIMES, June 3, 2003, at 18 (emphasis added) (commenting on protectiveness of federal judges in California and New York concerning authors, composers, and producers). See generally Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 265 (2004) (describing how Lanham Act had been read by many as particularly affording authors relief against misattributions of authorship); McLain, *supra* note 11, at 81 (highlighting that several lower courts have interpreted §43(a) of Lanham Act as providing “duplicate remedy for copyright infringement”).

¹³ Rosenthal Kwall, *supra* note 9, at 988. See generally *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (defining right of attribution as “the right of an artist to be recognized by name as the author of his work or to publish anonymously or pseudonymously, the right to prevent the author’s work from being attributed to someone else, and to prevent the use of the author’s name on works created by others”); Kurt Vander Voort, *Tempest in a Test Tube: Science and Plagiarism*, 40 WAYNE L. REV. 1569, 1587 (1994) (noting recognition that artists suffer noneconomic injury when their names are not attached to their works).

¹⁴ 539 U.S. 23 (2003).

¹⁵ See Savage, *supra* note 12, at 18 (noting difference between copyrights and trademarks). See generally Joan Biskupic, *Supreme Court Rules in Dispute Over Copyrights*, USA TODAY, June 3, 2003, at 4a (stating that *Dastar* held that unaccredited copying of work after copyright had expired was not prevented by U.S. trademark law); Linda Greenhouse, *Court Rules Out Using Trademark Law in Case About Old War Footage*, N.Y. TIMES, June 3, 2003, at 26 (highlighting how decision was eagerly anticipated in intellectual property circles because of “intersection of copyright and trademark law”).

Is the Court's reasoning correct? What are the implications for creators, for the public domain, for the right to attribution in America? What is *Dastar's* legacy?

II. DASTAR CORP. V. TWENTIETH CENTURY FOX FILM CORP.

A. *The Facts of Dastar*

In 1948, General Dwight D. Eisenhower wrote *Crusade in Europe*, his personal memoirs of the European allied Campaign during the Second World War.¹⁶ Doubleday published *Crusade in Europe*, and also granted exclusive television rights to an affiliate of Twentieth Century Fox Film Corporation (Fox).¹⁷ Fox then approved for Time, Inc., to produce a television series¹⁸ based on Eisenhower's book, of the same name.¹⁹ Time, Inc. thus assigned its copyright in the series to Fox.²⁰ In 1975, Doubleday renewed the copyright on the book; Fox, however, did not renew the copyright

¹⁶ See *Dastar*, 539 U.S. at 25 (specifying that Eisenhower completed *Crusade in Europe* three years after German surrender at Reims); see also Tyler T. Ochoa, *Amicus Brief: Introduction: Rights of Attribution, Section 43(a) of the Lanham Act, and the Copyright Public Domain*, 24 WHITTIER L. REV. 911, 913 (2004) (noting that *Crusade in Europe* describes Eisenhower's personal experiences in World War II); Saunders, *supra* note 11, at 163–64 (highlighting how *Crusade in Europe* was Eisenhower's first hand account of Allied Campaign in Europe during Second World War).

¹⁷ See *Dastar*, 539 U.S. at 25 (noting how Doubleday also registered this book with Copyright Office in 1948); see also Ochoa, *supra* note 16, at 913 (emphasizing that Eisenhower assigned "all" of his rights pertaining to *Crusade in Europe* to Doubleday); Saunders, *supra* note 11, at 163 (reiterating sequence of events between Eisenhower, Doubleday and Fox).

¹⁸ See *Dastar*, 539 U.S. at 26 (describing television series as twenty-six episodes, first broadcast in 1949, and commenting that television series, blended soundtrack based on "narration of the book with film footage from the United States Army, Navy, and Coast Guard, the British Ministry of Information and War Office, the National Film board of Canada, and unidentified 'Newsreel Pool Cameramen'"); see also Laurence P. Colton and Nigamnarayan Acharya, *Intellectual Property*, 55 MERCER L. REV. 1327, 1348 (2004) (noting that Time, Inc. obtained copyright registration on television series). See generally Ginsburg, *supra* note 12, at 271 (commenting on how Fox's contribution to production of television series was "more formal than real" because Time, Inc. was principle creator).

¹⁹ See *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 25-26 (2003) (noting name of television series was "Crusade in Europe"); see also Peter A. Craft & Michael G. Sheppard, *How Will Recent Court Decisions Impact Your Practice? Find Out Here, in Part 2, Civil Cases*, 39 TENN. B. J. 12, 36 (2003) (clarifying that Fox "arranged" for Time to produce television series); Ochoa, *supra* note 16, at 915 (specifying that Fox commissioned "March of Time" film unit of Time, Inc. to produce "Crusade in Europe").

²⁰ See *Dastar*, 539 U.S. at 25–27 (stating facts of case); see also Ochoa, *supra* note 16, at 915 (noting how Fox registered copyright listing Time, Inc. as author after assignment); Saunders, *supra* note 11, at 163 (reemphasizing how Time, Inc. assigned its copyright in television series to Fox).

on the *Crusade in Europe* television series.²¹ The result of Fox's failure to renew its copyright in the series is crucial in the Supreme Court's mind: Fox's actions left the television series in the public domain.²² In 1988, Fox reacquired the television rights in Eisenhower's book, including the exclusive right to distribute the series on video.²³ Thus, Fox gave SFM Entertainment ("SFM") and New Line Home Video, Inc., ("New Line") the exclusive rights to distribute the original television series.²⁴ SFM and New Line restored the episodes and repackaged the entire series on videotape; New Line then distributed the videotapes.²⁵

Dastar Corp. purchased eight beta cam tapes of the original version of Fox's *Crusade* television series, which, as the Supreme Court notes, is in the public domain.²⁶ Dastar copied these tapes,

²¹ See *Dastar*, 539 U.S. at 26 (describing Doubleday's status as "proprietor of copyright in a work made for hire"); see also Brandy A. Karl, *Reverse Passing Off and Database Protections*: *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 9 B.U. J. SCI. & TECH. L. 481, 484 (2003) (reiterating that Doubleday submitted renewal for copyright on Eisenhower's book as work for hire); Ochoa, *supra* note 16, at 916 (suggesting that if book was work made for hire, renewal copyright of Doubleday would be valid, and copying any portions of television series based on book would be infringement).

²² See *Dastar*, 539 U.S. at 26 (affirming that Fox's copyright on the series expired in 1977); see also *Lanham Act Cannot Prevent Unaccredited Copying of Uncopyrighted Work*, COMPUTER LAWYER, (The Computer & Internet Lawyer, Aspen Publishing), Aug, 2003, at 27 [hereinafter *Unaccredited*] (stating once copyright has expired, copyright law gives public right to copy without attribution); Gasaway, *supra* note 7, at 7 (affirming right to copy, without credit, once work passes into public domain after copyright expiration).

²³ See *Dastar*, 539 U.S. at 26 (stating that Fox also reacquired exclusive right to sublicense others to distribute *Crusade in Europe* television series on video); see also Jessica Bohrer, *Strengthening the Distinction between Copyright and Trademark: The Supreme Court Takes a Stand*, 2003 DUKE L. & TECH. REV. 23 (2003) (stating that Fox reacquired television rights in book, including exclusive right to sub-license distribution capability to others); Stacey L. Garrett, *No Need to Search the Nile: The Supreme Court Clarifies the Use of Public Domain Works in Dastar v. Twentieth Century Fox*, 2003 U. ILL. J.L. TECH. & POL'Y 573, 575 (2003) (noting that these exclusive rights were purchased by Fox).

²⁴ See *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 26 (2003) (noting that distribution would be done on video); see also Ochoa, *supra* note 16, at 917 (stating that SFM reproduced series in package of six videocassettes for sale to consumers); Garrett, *supra* note 23, at 575 (explaining SFM Entertainment and New Line Home Video Inc.'s right to distribute videotape was put to contract).

²⁵ See *Dastar*, 539 U.S. at 26 (noting that SFM restored negatives which it obtained); see also William G. Barber, *Recent Developments in Trademark Law: Reverse Domain Name Hijacking, Mutant Copyrights, and Other Mysterious Creatures of the Trademark World*, 12 TEX. INTELL. PROP. L.J. 361, 364 (2004) (noting that Fox authorized SFM to restore TV series); Ochoa, *supra* note 16, at 916-17 (explaining that in 1980, SFM originally purchased from Time-Life Films, Inc., March of Time film library, which included original negatives of *Crusade in Europe* series, but could not distribute television series without clearing rights with Doubleday).

²⁶ See *Dastar*, 539 U.S. at 26 (noting in 1995, Dastar decided to expand its product line from music compact discs to videos); see also Richard Ronald, Note: *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 19 BERKELEY TECH. L.J. 243, 250 (2004) (noting that Dastar did not purchase repackaged tapes sold by New Line); Andrew Jones et al., *Trademark versus Copyright Protection - Whether an uncredited motion picture participant may recover under the Lanham Act*, 5 TEX. REV. ENT. & SPORTS L. 191, 201 (2003)

and then edited the *Crusade in Europe* TV series.²⁷ Dastar released a video set entitled *World War II Campaigns in Europe*.²⁸ How did Dastar alter Fox's work? Dastar "substituted a new opening sequence, credit page, and final closing for those of the *Crusade* television series; inserted new chapter-title sequences and narrated chapter introductions; moved the 'recap' in the *Crusade* television series to the beginning and retitled it as a 'preview'; and removed references to and images of the book."²⁹ Dastar also created new packaging, then manufactured and sold the *Campaigns* video set as its own product.³⁰ Dastar's advertising³¹ and videos themselves make no reference to Fox, Fox's *Crusade* television series, Eisenhower's book, or New Line's videotapes.³² In addition, Dastar's *Campaigns* screen credits lists employees of Dastar as the series' executive producer, producer, and associate producer.³³

(suggesting that Dastar bought series in deliberate effort to compete with Fox, SFM, and New Line).

²⁷ See *Dastar*, 539 U.S. at 26 (noting that Dastar's series is slightly more than half as long as original *Crusade in Europe* television series); see Karl, *supra* note 21, at 484 (noting that campaigns were approximately half as long as *Crusade*, but contained approximately half-hour of original footage); see also Garrett, *supra* note 23, at 575 (suggesting that other than altering opening and closing sequences, content of videos was essentially the same).

²⁸ See *Dastar*, 539 U.S. at 26 (maintaining that Dastar's reasoning was anticipated renewed interest in World War II on 50th anniversary of war's end); see also Ochoa, *supra* note 16, at 917 (noting that Dastar employee produced the derivative work based on original television series); Saunders, *supra* note 11, at 164 (noting that *Campaigns* videos made no reference to the *Crusade* television series, New Line's *Crusade* videotapes, or book).

²⁹ *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 26-27 (2003) (describing Dastar's modifications to Fox's original television series, *Crusade*, and noting that, as a result, Dastar's *Campaigns* series is slightly more than half as long as the *Crusade* television series).

³⁰ See *Dastar*, 539 U.S. at 27 (asserting that Dastar sells its *Campaigns* videos to Sam's Club, Costco, Best Buy, and other retailers and mail-order companies for \$25 per set, which is less than cost of New Line's *Crusade* videotapes); see also Saunders, *supra* note 11, at 164 (noting that videos proved to be one of Dastar's biggest selling products); Deborah Nathan, *Supreme Court Will Hear Dispute Under Lanham Act*, ENT. LIT. REP., March 31, 2003 (stating that Dastar's profits were approximately \$784,000).

³¹ See *Dastar*, 539 U.S. at 27 (describing Dastar's advertising as "Produced and Distributed by: *Entertainment Distributing*"); see also McLain, *supra* note 11, at 87 (stating that Dastar manufactured and sold *Campaigns* as its own product); Saunders, *supra* note 11, at 164 (noting that Dastar's advertising did not reference *Crusade* television series).

³² See *Dastar*, 539 U.S. at 27 (adding that executive producer, producer, and associate producer listed on videos were employees of Dastar); see also Karl, *supra* note 21, at 484 (stating that Dastar removed any references to original television series); Ronald, *supra* note 26, at 250 (explaining that Dastar packaged *Campaigns* video series, which was half as long as original *Crusade* series).

³³ See *Dastar*, 539 U.S. at 27 (showing how Dastar's credits state, "DASTAR CORP presents" and "an ENTERTAINMENT DISTRIBUTING Production," with no mention to *Crusade*); see also Bohrer, *supra* note 23, at 23 (stating that *Campaigns* series makes no

B. Respondents' Claims

In 1998, Fox, SFM, and New Line (collectively, 'Fox') sued, alleging that Dastar's sale of its *Campaigns* videos infringes Doubleday's copyright in Eisenhower's book, and inherently, the exclusive TV rights in that book.³⁴ Fox later amended the complaint, adding claims that Dastar's sale of the *Campaigns in Europe* videos without proper credit to the *Crusade in Europe* series constituted "reverse passing off," in violation of §43(a) of the Lanham Act,³⁵ as well as in violation of state unfair competition law.³⁶ Fox felt "any person reading the packaging or credits and viewing [Dastar's] tapes would believe that only Dastar was responsible for their creation."³⁷

C. "Reverse Passing Off"

Codified in §43(a), 'passing off' is defined as "when a producer misrepresents his or her own goods or services as those of another producer."³⁸ Over time, courts began to broaden the range

mention of *Crusades* series); Matthew Ian Goforth, *Casenote: Trademark Law – The Lanham Act – Federal Trademark Law Does Not Protect the Ideas or Communications Embodied in a Communicative Product*, 34 CUMB. L. REV. 335, 345 at n.10 (2003/2004) (referring to fact that Darstar listed itself as producer and distributor of *Campaigns*).

³⁴ See *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 26-27 (2003) (explaining that *Campaigns* only differs from *Crusade* in opening sequence, credit page, and final closing); see also Jonathan D. Reichman & Amy G. Feinsilver, *Origin of Goods Under the Lanham Act*, THE INTELL. PROP. STRATEGIST, July 11, 2003 at 1 (noting that Fox brought action alleging that Dastar's video series infringed copyright in Doubleday book); *Supreme Court Expands Rights of Copyright Holders*, DELAWARE LAW WEEKLY, June 11, 2003 at D5 [hereinafter *Copyright Holders*] (stating that SFM and New Line sued in 1998, alleging that Dastar's video failed to provide appropriate credit to the original television series).

³⁵ 15 U.S.C. §1125(a) (2004) (stating, in relevant part, claim of "false designation of origin, false or misleading designation of fact, or false or misleading representation of fact...likely to cause confusion" as to origin of goods). See Ochoa, *supra* note 16, at 922 (characterizing passing off as when one person ['defendant'] 'passing off' its goods as those of another person ['plaintiff'], "by using the plaintiff's mark on goods manufactured by the defendant"); see also Williams v. Curtiss-Wright Corp. 691 F.2d 168, 172 (1982) (explaining that false designations of origin in form of "reverse palming off" are in violation of Lanham Act.).

³⁶ See *Dastar*, 539 U.S. at 27–28 (noting that upon cross-motions for summary judgment, District Court found for Fox on all three counts); see also Reichman, *supra* note 34, at 1 (stating that "reverse passing off" is in violation of state unfair competition law); Janet Fries & Michael J. Remington, *Who Remembers the Names? Author's rights in flux after Dastar ruling*, LEGAL TIMES, July 21, 2003, at 30 (explaining that Court granted Fox's motion for summary judgment).

³⁷ James B. Astrachan, *Supreme Court's Decision on Copyrights Morally Wrong*, DAILY RECORD (Baltimore, MD), July 11, 2003, at 1.

³⁸ Gasaway, *supra* note 7, at 21. See 15 U.S.C. §1125(a) (2004) (defining palming off as when manufacturer tries to 'pass off' his goods by tagging them with another's trade-

of unfair competition law by including the opposite notion of 'reverse passing off,'³⁹ which is when one entity misrepresents another's goods as their own.⁴⁰ Fox claimed Dastar engaged in such reverse passing off, and thus was guilty of false designation of origin under §43(a) of the Lanham Act,⁴¹ "because [Dastar] had copied, edited, and added to *Crusade* and re-released it as *World War II Campaigns in Europe*, without attributing original material to Fox."⁴²

D. Procedural History

The United States District Court found for Fox, New Line, and SFM on all three counts: copyright infringement, reverse passing off in violation of the Lanham Act, and unfair competition.⁴³ For the state unfair competition claim, the court "treated its resolution of the Lanham Act claim as controlling"⁴⁴ because it felt that the decisive test under both claims was the likelihood of public confusion or deception.⁴⁵ Dastar appealed, and the Court of Ap-

mark); *see also Dastar*, 539 U.S. at 28 n.1 (defining passing off [or palming off] as when someone misrepresents his own goods or services as those of someone else).

³⁹ Ochoa, *supra* note 16, at 922 (classifying reverse passing off as using defendant's mark on goods manufactured by plaintiff). *See Freedman*, *supra* note 9, at 305 (discussing reverse passing off in relation to passing off); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION 5 (1995) (stating reverse passing off occurs when one marks another's good with his own trademark).

⁴⁰ *See Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 28 n.1 (2003) (describing reverse passing off); *see also Gasaway*, *supra* note 7, at 21 (defining reverse palming off as when "the producer misrepresents someone else's goods or services as his or her own"); Jeanne Hamburg, 'Bodily Appropriation' of a Creative Work, N.Y.L.J., March 19, 2003, at 4 (explaining that reverse passing off takes place when "junior user...falsely identifies itself as the originator or source of the senior user's goods).

⁴¹ *See Dastar*, 539 U.S. at 30 (observing all Circuits that deliberated issue found § 43(a) "broad enough to encompass reverse passing off"); *Gasaway*, *supra* note 7, at 21 (elucidating how Fox claimed Dastar was guilty of false designation of origin because Dastar was not original creator of content of videotapes); *Mamudi*, *supra* note 2, at 14 (noting that Fox claimed Dastar engaged in reverse passing off because they did not attribute original material to Fox).

⁴² *Mamudi*, *supra* note 2, at 14.

⁴³ *See Dastar*, 539 U.S. at 27-28 (observing how that court awarded Dastar's profits to respondents and then subsequently doubled those profits pursuant to §35 of the Lanham Act, 15 U.S.C. § 1117(a), in order to discourage similar behavior in future); *Astrachan*, *supra* note 37, at 1 (noting that District Court held that public was likely to be confused, thus awarding profits to Fox and then doubling them to deter other acts of infringement); *Mamudi*, *supra* note 2, at 14 (explaining that case came before Supreme Court after Dastar appealed circuit court ruling in favor of Fox).

⁴⁴ *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 27-28 (2003).

⁴⁵ *See Dastar*, 539 U.S. at 28 (citing Ninth Circuit holding that standard for both Lanham Act and state unfair competition claim is whether public is likely to be deceived or confused by lack of attribution); *see also Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 34 Fed. Appx. 312, 316 (9th Cir. 2002) (upholding District Court's grant of sum-

peals for the Ninth Circuit affirmed the judgment for Fox, New Line, and SFM on the “reverse passing off” claim.⁴⁶ The amount of Dastar’s copying of *Crusade* played a substantial part in the Court of Appeals decision on the §43(a) claim: Dastar’s ‘bodily appropriation’ of Fox’s original *Crusade* series was deemed sufficient to establish reverse passing off.⁴⁷ The Court of Appeals stated that, “Dastar copied substantially the entire *Crusade in Europe* series created by Twentieth Century Fox, labeled the resulting product with a different name and marketed it without attribution to Fox [and] therefore committed a ‘bodily appropriation’ of Fox’s series.”⁴⁸ The Supreme Court thus granted certiorari and reversed the Ninth Circuit’s findings.⁴⁹ Justice Scalia stated that the Court had to decide whether §43(a) of the Lanham Act, with its focus on deception of the consumer, precludes the ‘unaccredited copying’ of a work.⁵⁰

mary judgment for Fox on reverse passing off claim); *Twentieth Century Fox Film Corp. v. Dastar Corp.* 2000 U.S. Dist. Lexis 22064 at 2 (granting summary judgment on California unfair competition law in conjunction with showing of reverse passing off under Lanham Act). See generally David R. McKinney, *Telephone Mnemonics and Complementary Numbers: A Review of Trademark and Unfair Competition Law and Policy*, 1999 B.Y.U.L. Rev. 435, 459 (1999).

⁴⁶ See *Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, 34 Fed. Appx. 312, 316 (9th Cir. 2002) (reversing as to copyright claim and remanding, while saying nothing about resolution of state unfair competition claim); see also Astrachan, *supra* note 37, at 1 (noting Ninth Circuit decision finding for Fox, SFM, and New Line); Mamudi, *supra* note 2, at 14 (discussing Supreme Court’s disagreement with Ninth Circuit holding of reverse passing off).

⁴⁷ See *Dastar*, 539 U.S. at 28 (citing *Entm’t Distrib.*, 34 Fed. Appx. at 316); see also Astrachan, *supra* note 37, at 1 (discussing Ninth Circuit decision finding Dastar had engaged in reverse passing off); *Unaccredited*, *supra* note 22, at 27 (discussing 9th Circuit’s holding of reverse passing off).

⁴⁸ *Dastar*, 539 U.S. at 28 (citing *Entm’t Distrib.*, 34 Fed. Appx. at 316 and explaining how Court of Appeals also affirmed District Court’s §43(a) Lanham Act award of doubling Dastar’s profits). See *Unaccredited*, *supra* note 22, at 27 (describing ‘bodily appropriation’ as Dastar’s work in marking their product with different name, without attribution to Fox).

⁴⁹ See *Dastar*, 539 U.S. at 28 (granting certiorari and reversing Ninth Circuit decision); see also Mamudi, *supra* note 2, at 14 (discussing Supreme Court’s holding reversing Ninth Circuit decision); Astrachan, *supra* note 37, at 1 (noting Court’s reversal of Ninth Circuit decision).

⁵⁰ See *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 25 (2003) (noting that second issue for Court, which was purposely not decided, was “whether a court may double a profit award under §1117(a), in order to defer future infringing conduct”); see also Tony Mauro, *Lanham Act Ruling Adds to Public Domain Protection*, RECORDER (American Lawyer Media, San Francisco, CA), June 3, 2003, at 1 (explaining how “Justice Breyer recused himself because his brother, Judge Charles Breyer, had earlier ruled on the case in the Ninth Circuit U.S. Court of Appeals”); Mamudi, *supra* note 2, at 14 (noting Justice Breyer was recused due to fact that his brother had heard case in federal court).

III. DASTAR'S RE-DEFINITION OF "ORIGIN OF GOODS" UNDER §43(A) OF THE LANHAM ACT

The issue for the Court in *Dastar* was whether, "in marketing and selling Campaigns as its own product without acknowledging its nearly wholesale reliance on the Crusade television series,"⁵¹ Dastar Corp. had committed a false designation of origin (and was thus likely to cause confusion for consumers)⁵² under §43(a) of the Lanham Act. "The court's answer was no,"⁵³ with the crux of the case turning on the meaning of the phrase "origin" of "goods" under §43.⁵⁴ The Court's starting point for an answer seems logical: a dictionary.⁵⁵ The heart of Webster's explanation of "origin" is "source,"⁵⁶ while its definition of "goods" is "wares; merchandise."⁵⁷

Therefore, in relation to the Lanham Act's prohibition of the false designation of the origin of goods,⁵⁸ the Court feels that "the natural understanding of the "origin" of "goods" - the source of wares - is the *producer* of the tangible product sold in the marketplace, in this case the physical Campaigns videotape sold by

⁵¹ *Dastar*, 539 U.S. at 31 (stating 'gravamen' of claim).

⁵² See *id.* at 31 (explaining that Dastar marketed and sold Campaigns as its own product); see also 15 U.S.C. § 1125(a) (1997) (stating civil liability for parties who are connected to any goods or services); Goforth, *supra* note 33, at 337 (noting that only question that Court had to answer was meaning of "origin of goods"); Ronald, *supra* note 26, at 252 (conveying issues decided by the Court).

⁵³ Greenhouse, *supra* note 15, at 26 (summing up plaintiff's claims as "whether, in offering its video set as its own product, with only its own employees listed in the screen credits, Dastar had falsely described the videos' 'origin'").

⁵⁴ See *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 31 (2003) (referring to dictionary for definition of origin and goods); see also *Supreme Court Rejects Lanham Act Claim for Failure to Attribute Uncopyrighted Work*, 10 No. 3 ANDREWS INTELL. PROP. LITIG. REP., June 10, 2003, at 3 [hereinafter *Failure to Attribute*] (referring to this definition as determining element in deciding Dastar's liability); Gasaway, *supra* note 7, at 7 (stating that Court made its decision by primarily focusing on difference between meaning of "originality" in copyright law and "origin of the goods" in trademark law).

⁵⁵ See *Dastar*, 539 U.S. at 31 (utilizing dictionary for definitions of origin and goods). See generally Goforth, *supra* note 33, at 337 (referring to Court's citing of dictionary for terms at issue); Ronald, *supra* note 26, at 252 (discussing Court's dictionary findings).

⁵⁶ *Dastar*, 539 U.S. at 31 ("the dictionary definition of 'origin' is '[t]he fact or process of coming into being from a source,' and '[t]hat from which anything primarily proceeds; source'" (quoting WEBSTER'S NEW INT'L DICTIONARY 1720-1721 (2d ed. 1949))).

⁵⁷ *Id.* at 31 (quoting WEBSTER'S NEW INT'L DICTIONARY 1079 (2d ed. 1949)).

⁵⁸ See 15 U.S.C. § 1125(a) (1997); see also *Failure to Attribute*, *supra* note 54, at 3 (communicating purpose of act which is relevant to this discussion); Mauro, *supra* note 50, at 1 (stating that Lanham Act forbids any act that generates confusion regarding origin of good).

Dastar”⁵⁹ – not, importantly, the initial creator of that product. The Court feels that, as used in §43(a), “the phrase ‘origin of goods’ is. . .incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain.”⁶⁰ This narrow definition settles the issue: Dastar, as the originator of those exact videotapes that were placed into the marketplace, wins the case.⁶¹ There is no merit to Fox’s claim; there is no false designation of origin under §43(a) because Dastar indeed identified *itself* as the origin of the *Campaigns* videos.⁶² This means that Fox, the original creator, the author,⁶³ the entity that originally “created the work in the copyright sense,”⁶⁴ does not have a claim, under §43(a), “against a company that created a video by copying most of a Fox television program whose copyright had expired.”⁶⁵ The Court’s reasons for their definition of “origin of goods” are: the history and purpose of the Lanham Act, consistency with precedent, conflict with copyright law, attribution problems, and customer expectations regarding origination of a product.⁶⁶ Is this holding a setback to writers, or a benefit to the public domain? Is an action under §43(a) really merely resurrecting an expired copyright, or simply requesting credit?

⁵⁹ *Dastar*, 539 U.S. at 31 (emphasis added). See Mauro, *supra* note 50, at 1 (commenting that this definition precludes people who made earlier versions of same from fitting definition of “origin”); Susser, *supra* note 5, at 13 (reviewing Court’s decision that, “[s]ince Dastar actually made the tangible goods it sold, it did not falsely designate anything by eschewing credit to Fox”).

⁶⁰ *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 32 (2003).

⁶¹ See *Dastar*, 539 U.S. at 38 (holding that respondents would not be able to prevail on their Lanham Act claim); see also Gasaway, *supra* note 7, at 7 (discussing ramifications of Court’s decision in finding Dastar as origin); Susser, *supra* note 5, at 13 (stating that Court did not consider any awarding of damages).

⁶² See *Dastar* 539 U.S. at 37 (stating that Dastar has no liability for saying it is producer of videos); see also Gasaway, *supra* note 7, at 7 (stating that Dastar is originator of goods and there is no false statement of origin); Susser, *supra* note 5, at 13 (clarifying that, because Dastar in fact manufactured tangible merchandise it sold, it did not falsely designate something by failing to credit Fox or New Line).

⁶³ See *Dastar*, 539 U.S. at 25 (stating that Fox was given exclusive television rights to the book); see also Susser, *supra* note 5, at 13 (explaining that Doubleday licensed television rights to Fox); *Failure to Attribute*, *supra* note 54, at 3 (stating that Fox was original creator of television program).

⁶⁴ Gasaway, *supra* note 7, at 7.

⁶⁵ *Failure to Attribute*, *supra* note 54, at 3.

⁶⁶ See *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 29 (2003) (detailing reasoning behind their definition); see also *Failure to Attribute*, *supra* note 54, at 3 (discussing that using different definition would conflict with copyright law); Susser, *supra* note 5, at 13 (explaining that history of Lanham Act would not allow for any other definition).

IV. THE COURT'S JUSTIFICATIONS FOR THE DASTAR HOLDING

A. *The History and Purpose of the Lanham Act*

The Supreme Court's first support for its precluding the original author from asserting reverse passing off under a §43(a) false designation of origin claim is that the chosen definition is in line with the 'history and purpose' of the Lanham Act itself.⁶⁷ Indeed, the Lanham Act "has common law foundations that were not designed to protect originality or creativity."⁶⁸ Historically, this Act was intended to protect brand-name goods and the consumers who buy those goods,⁶⁹ as well as to give producers of goods an action against the 'deceptive and misleading use'⁷⁰ of trademarks. As initially passed, §43(a) fashioned a federal remedy against those "who used in commerce either 'a false designation of origin, or any false description or representation' in connection with 'any goods or services.'⁷¹ Scalia delves into history,⁷² noting that §43(a)'s original version allowed the term "origin of goods" to en-

⁶⁷ See *Dastar*, 539 U.S. at 32 (stating that any other definition would be out of accord with history of Lanham Act); see also Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 108 n.67 (2003) (outlining that Supreme Court chose to decide *Dastar*'s limits to trademark law on statutory grounds, rather than possible constitutional ones); Susser, *supra* note 5, at 13 (discussing that broader reading of plain text would not serve purposes of Lanham Act).

⁶⁸ Gasaway, *supra* note 7, at 7.

⁶⁹ See *Dastar*, 539 U.S. at 32 (stating that Lanham Act protects against trademark infringement that would deceive customers who are loyal to brand); see also Savage, *supra* note 12, at 18 (explaining that consumers who buy brand name goods are protected by Lanham Act); Susser, *supra* note 5, at 13 (discussing that Act protects deception of consumers).

⁷⁰ *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 28 (2003) (citing 15 USC § 1127 (2004) (defining initial purpose of Lanham Act to make "actionable the deceptive and misleading use of marks," and "to protect persons engaged in . . . commerce against unfair competition").

⁷¹ *Dastar*, 539 U.S. at 29 (explaining Second Circuit observation regarding §43(a)); see *id.* at 30 n.3 (citing original 1946 version of §43(a) as focusing on locality, stating that there is false designation of origin claim "by any person doing business in the locality falsely indicated as that of origin or the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation"). See *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273 n.8 (recognizing language of original version of §43(a)); see also Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U.L. REV. 807, 816 (1999) (examining history of interpretation of Lanham Act by federal courts).

⁷² See *Dastar*, 539 U.S. at 29–30 (reviewing prior interpretation of phrase 'origin of goods' as stated in original §43(a)); see also *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 777 (1992) (Stevens, J., concurring) (explaining how it could be possible to read original §43(a)'s definition of 'origin of goods' as meaning "the geographic location in which the goods originated"); Ronald, *supra* note 26, at 252 (noting that Court in *Dastar* considered Stevens' interpretation from *Two Pesos, Inc.*).

compass “not only the actual producer, but also the trademark owner who commissioned or assumed responsibility for (‘stood behind’) production of the physical product.”⁷³ However, Scalia explains that, after the 1988 amendments to §43(a), defining “origin of goods” to include the original author of a work would be ‘stretching’ the text of the Lanham Act.⁷⁴ In the *Dastar* Court’s unanimous view, such stretching is no longer needed,⁷⁵ even though the Court acknowledges that §43(a) “is one of the few provisions that goes beyond trademark protection.”⁷⁶ In stating that §43(a) “does not have boundless application as a remedy for unfair trade practices,”⁷⁷ it seems that the Court wants to draw a line. This can also be seen where the Court states that §43(a)’s limited wording cannot allow it to function as a complete federal unfair competition law.⁷⁸ “Boundless” and “limited wording” seem vague reasons for prohibiting the original author of a formerly copyrighted work to receive attribution under a statute that remedies false description of origin of goods.

⁷³ *Dastar*, 539 U.S. at 31, 32 n.5 (observing that 1946 version of §43(a) “was read as providing a cause of action for trademark infringement even where the trademark owner had not itself produced the goods sold under its mark, but had licensed others to sell under its name goods produced by them -- the typical franchise arrangement,” and showing that 1988 amendments to §43(a) specifically make illegal such confusion as to origin); see also 15 U.S.C. § 1125(a) (2004) (stating civil liability for parties who are connected to any goods or services).

⁷⁴ See *Dastar*, 539 U.S. at 31–32 (stating natural perception of the words origin and goods); see also Garrett, *supra* note 23, at 573 (noting that Ninth Circuit had taken language from copyright law and applied it to trademark law); McLain, *supra* note 11, at 72 (commenting on problems arising from inclusion of original authors under ‘origin of goods.’).

⁷⁵ See *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 32–33 (2003) (clarifying that extending meaning would not be within purpose and history of Lanham Act); see also Garrett, *supra* note 23, at 573 (commenting that, in *Dastar* Justice Scalia wrote for court and refused to extend meaning of Lanham Act); Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 639 (analyzing *Dastar* holding that “it is not trademark infringement to copy an expressive work on which there is no subsisting copyright without giving credit to the original author of the work.”).

⁷⁶ *Dastar*, 539 U.S. at 29 (describing most of Lanham Act as focusing on ‘registration, use, and infringement’ of marks).

⁷⁷ *Id.* (citing *Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974) in discussing both original §43(a) and its 1988 amendment).

⁷⁸ See *Dastar*, 539 U.S. at 29 (citing 4 J. MCCARTHY TRADEMARKS AND UNFAIR COMPETITION § 27:7, p 27–14 (4th ed. 2002) (McCarthy)) (limiting §43(a) to prohibiting only specific unfair trade practices mentioned in its text); see also *High Point Accessories ex rel. Idea Factory v. Sells-Floto, Inc.*, 1998 U.S. Dist. LEXIS 5968, 5968 n.1 (1998) (recognizing Supreme Court’s description of wording in §43(a) as ‘inherently limited’ and its effect on function of statute); Saunders, *supra* note 11, at 167 (analyzing language of Court in *Dastar*).

B. *The Need (and Desire) for Consistency with Precedent*

The Court also does not extend §43(a) to include original creators because it feels that such an extension would cause trademark law to conflict with precedent.⁷⁹ In general, the goal of trademark law is to protect consumers, not producers,⁸⁰ so this law is aimed at identifying the producer of goods to protect the goodwill of businesses and prevent unfair copying.⁸¹ Trademark law does not focus on incentives to innovate,⁸² but is intended to safeguard customers from being deceived by harmful products.⁸³

⁷⁹ See *Dastar*, 539 U.S. at 31–33 (stating desire to define origin of goods as excluding Fox because such finding would be inconsistent with precedent, as well as stretch text of Lanham Act); see also Ginsburg, *supra* note 12, at 267–68 (2004) (recognizing that § 43(a) does not extend to original creators in wake of *Dastar* decision); Saunders, *supra* note 11, at 161 (explaining that 'origin of goods' in Lanham Act refers to "the producer of the tangible goods that are offered for sale, and not to the author of an idea or communication embodied in those goods.").

⁸⁰ See *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 609 (7th Cir. 1986) (announcing that

[t]he goal of trademark protection is to allow a firm to affix an identifying mark to its product (or service) offering that will, because it is distinctive and no competitor may use a confusingly similar designation, enable the consumer to discover in the least possible amount of time and with the least possible amount of head-scratching whether a particular brand is that firm's brand or a competitor's brand.

Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc., 781 F.2d 604, 609 (7th Cir. 1986)); see also *Zip Dee, Inc. v. Dometic Corp.*, 931 F. Supp. 602, 607 (N.D. Ill. 1996) (stating that goal of trademark law is "assisting the consumer by avoiding confusion as to a product's source."); Ashley Packard, *Copyright Term Extensions, the Public Domain, and Intertextuality Intertwined*, 10 J. INTELL. PROP. L. 1, 14 (2002) (discussing how trademark law has origins in common law, aiming to stop consumer confusion in marketplace).

⁸¹ See *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 32 (2003) (noting how §43(a) would prohibit action like trademark infringement because it deceives consumers and impairs producer's goodwill); see also *Vornado Air Circulation Sys. v. Duracraft Corp.*, 58 F.3d 1498, 1508 (10th Cir. 1995) (stating that one core concept of trademark protection is that sellers' goodwill should be protected); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995) (explaining that trademark law seeks to protect firm's reputation by promoting competition).

⁸² See *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 34 (2001) (noting how rewarding manufacturers for innovation in creativity is function of patent law's 'period of exclusivity'); see also *Hubbell Inc. v. Pass & Seymour, No. 94 civ. 7631, U.S. Dist. LEXIS 11050, *6 (S.D.N.Y. 1995)* (noting that patent laws seek to reward innovation, while trademark laws do not); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (announcing that one purpose of federal patent system is to seek to foster and reward innovation).

⁸³ See *Savage*, *supra* note 12, at 18 (noting difference between trademark and patent law; "copyrights and patents protect creators – authors and inventors – while trademarks are intended to protect consumers from being fooled by counterfeit products"); see also *American Distilling Co. v. Bellows & Co.*, 102 Cal.App.2d 8, 24 (1951) (explaining that trademark law "is not made for the protection of experts, but for the public - - that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearance and general impressions." (citing *Stork Restaurant, Inc. v. Sahati*, 166 F.2d 348, 359 (9th Cir. 1948)); *Georgia Carpet Sales, Inc. v. SLS Corp.*, 789 F.Supp. 244, 246 (N.D. Ill. 1992) (explaining that law is designed to prevent public from being 'unwittingly deceived').

*Qualitex Co. v. Jacobson Products Co.*⁸⁴ states that prevention of unfair copying “helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.”⁸⁵ Rather than bolstering their *Dastar* decision, this *Qualitex* comment appears to reinforce Fox’s argument for attribution because *Dastar* fits the ‘imitating competitor’⁸⁶ that the Lanham Act targets. After all, *Dastar* Corp. copied and made only minor changes to the *Crusade* series.⁸⁷ However, in *TrafFix Devices, Inc. v. Marketing Displays, Inc.*,⁸⁸ the Supreme Court states that legal protections must “subsist with the recognition that in many instances there is no prohibition against copying goods and products.”⁸⁹ *TrafFix* avows, “copying is not always discouraged or disfavored by the laws which preserve our competitive economy.”⁹⁰ Citing *TrafFix*, the *Dastar* Court notes the care taken to “caution against misuse or over-extension’ of trademark and related protections into areas traditionally occupied by patent or copyright.”⁹¹

⁸⁴ *Qualitex*, 514 U.S. at 162–63 (affirming that, “the courts and the patent and Trademark Office have authorized for use as a mark a particular shape (of a Coca-Cola bottle), a particular sound (of NBC’s three chimes), and even a particular scent (of plumeria blossoms on sewing thread”).

⁸⁵ *Id.* at 164 (internal quotation marks and citation omitted) (observing that this will encourage ‘production of quality products’). See *Daster*, 539 U.S. at 34 (citing *Qualitex* as support).

⁸⁶ *Qualitex*, 514 U.S. at 163–64 (noting that these competitors are discouraged from selling inferior products). See, e.g., *Williams v. UMG Recordings*, 281 F. Supp. 2d 1177, 1183 (C.D.Cal. 2003) (noting that trademark law prevents imitating competitors from reaping both financial and reputation related rewards); see also *Felix the Cat Prods. v. New Line Cinema*, No.99 cv 9339, U.S.Dist.LEXIS 21763, *6 (C.D.Cal.2000) (explaining that Lanham Act targets imitating competitors to assure potential customers that an item they like is “made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.”).

⁸⁷ See *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 26 (2003) (suggesting that these minor changes were not equivalent of misrepresenting someone else’s goods or services as your own); Ochoa, *supra* note 16, at 911 (stating facts of *Dastar* case); Richeson, *supra* note 11, at 218 (explaining *Dastar* edited beta cam tapes of original television series).

⁸⁸ 532 U.S. 23, 29 (2001) (holding that claim is barred if there is no trade protection for functional feature).

⁸⁹ *Id.*

⁹⁰ *Id.* (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989)) (noting that in some situations copying can be quite beneficial).

⁹¹ *Dastar*, 539 U.S. at 34 (citing *TrafFix*, 532 U.S. at 29) (discussing precedent as reason for narrow ‘origin’ definition). See Bohrer, *supra* note 23, at 23 (highlighting that Court saw *Dastar* case as opportunity to distinguish trademark law from patent and copyright law and caution against application of trademark law into these two other areas); see also Graeme B. Dinwoodie, *The Seventh Annual Honorable Helen Wilson Nies Memorial Lecture in Intellectual Property Law, The Trademark Jurisprudence of the Rehnquist Court*, 8 MARQ. INTELL. PROP. L. REV. 187, 206 (2004) (noting that Court in *TrafFix* was careful to

Indeed, in *Sears, Roebuck & Co. v. Stiffel Co.*,⁹² the Court affirms that “sharing in the goodwill of an article unprotected by . . . trademark”⁹³ is a public concern. The key here, according to precedent, is the entry into the public domain of innovative enterprises and technologies.⁹⁴ In the *Moseley v. V Secret Catalogue*⁹⁵ decision, the Court declined to find that §43(a) has “boundless application as a remedy for unfair trade practices.”⁹⁶ Consistent with history, *Dastar* holds, if *Dastar Corp.*’s self-description as “the ‘Producer’ of its videos amounted to a representation that it originated the creative work conveyed by the videos, allowing a cause of action under §43(a). . . would create a species of *mutant copyright law* that limits the public’s “federal right to ‘copy and to use,’” expired copyrights.”⁹⁷

caution against misuse of overextension of Lanham Act and was clearly moving towards narrower view of trademark law).

⁹² 376 U.S. 225 (1964).

⁹³ *Id.* (noting that public is deeply interested in sharing in goodwill of article no longer protected by patent). See Gwendolyn Gill, *Through the Back Door: Attempts to Use Trade Dress to Protect Expired Patents*, 67 U. CIN. L. REV. 1269, 1287 (1999) (highlighting that Court found that public has right to enjoy article upon expiration of patent); see also William P. Kratzke, *The Supreme Court and Trade Dress- A Short Comment*, 24 HASTINGS COMM. & ENT. L.J. 73, 84 (2001) (stating that Court’s decision was guided by principle that one should be able to imitate publicly known, unpatented articles).

⁹⁴ See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989) (explaining that ultimate goal of patent is to promote free competition in exploitation of unpatented designs and innovations); see also *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (stating that “the stringent requirements for patent protection seek to ensure that ideas in the public domain remain there for the use of the public”); *Comedy III Prods. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000) (holding “the Lanham Act cannot be used to circumvent copyright law. If material covered by copyright law has passed into the public domain, it cannot then be protected by the Lanham Act without rendering the Copyright Act a nullity”).

Bonito, 489 U.S. at 150-151. See *Comedy III Prods. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000) (holding “the Lanham Act cannot be used to circumvent copyright law. If material covered by copyright law has passed into the public domain, it cannot then be protected by the Lanham Act without rendering the Copyright Act a nullity”); *Brief Amici Curiae of Intellectual Property Law Professors in Support of Dastar Corporation*, 24 WHITTIER L. REV. 931, 941 (Summer, 2003) [hereinafter “*Law Professors*”] (citing cases which held material that entered public domain cannot be protected by Lanham Act).

⁹⁴ 537 U.S. 418 (2002).

⁹⁵ 537 U.S. 418 (2002).

⁹⁶ *Moseley*, 537 U.S. at 418. See Jennifer Elgin, *Supreme Court Holds that Lanham Act Does Not Protect The Right to Claim Authorship in a Literary Work*, MONDAQ LTD., June 20, 2003, at 1 (noticing ‘echo’ between *Dastar* and *Moseley*’s strict interpretations of §43(a)); see also Stephen W. Feingold, et al., *Supreme Court Will Decide Whether Fair Use Defense Survives a Showing of Likely Confusion*, INTELL. PROP. STRATEGIST, April 7, 2004, at 1 (noting that Supreme Court has consistently scaled back relief for trademark holder over last twelve years).

⁹⁷ *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 34 (2003) (citing *Bonito*, 489 U.S. at 165) (emphasis added).

C. Conflict with Copyright Law: That “Carefully Crafted Bargain”⁹⁸

1. Copyright Law

Legal specialists “praised the [Supreme Court’s *Dastar*] ruling for clarifying the difference between copyrights and trademarks.”⁹⁹ Another reason why the Court does not extend §43(a) to include original creators is because they feel that such an extension would cause trademark law to conflict with the law of copyright.¹⁰⁰ In contrast to trademark law, the Constitution directly grants Congress the power to regulate copyright and patent law¹⁰¹ in the Copyright and Patent Clause of the Constitution,¹⁰² which functions as “an economic incentive to encourage individuals to produce more work, thereby contributing to the progress of science and the arts, which in turn benefits the general public welfare.”¹⁰³ Creators obtain copyright security, but only for a specific time, so their works ultimately become free for public use.¹⁰⁴ This limited monopoly under copyright law oper-

⁹⁸ *Bonito*, 489 U.S. at 150–51 (referring to protection that copyright holder receives by having its work copyrighted, and then to beneficial access that public receives when that work’s copyright expires and public has right to copy that work without attribution).

⁹⁹ *Savage*, *supra* note 12, at 18.

¹⁰⁰ *See Dastar*, 539 U.S. at 34 (stating that “[I]n construing the Lanham Act, we have been careful to caution against misuse or over-extension of trademark and related protections into areas traditionally occupied by patent and copyright.”); *see also Unaccredited*, *supra* note 22, at 27 (highlighting that Court recognized that purchasers often have interest in ideas and communications of products they buy. However, the Court also noted that application of Lanham Act to such products would create conflict with copyright law); *Gasaway*, *supra* note 7, at 7 (noting how crediting authors of un-copyrighted work conflicts with law of copyright).

¹⁰¹ *See* U.S. CONST. art. I, §8, cl. 8 (securing authors and inventors exclusive rights); *Sony Corp. of America v. Universal City Studios, Inc.* 104 S. Ct. 774, 782–783 (noting that Congress has power to define scope of limited copyright monopoly and to craft patent and copyright laws); *Packard*, *supra* note 80, at 14 (affirming how “copyright and patent law draw their force from the Constitution”).

¹⁰² U.S. CONST. art. §8, cl. 8 (stating, “the Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”). *See Sony*, 104 S. Ct. at 783 (noting Congress’ Constitutional authority); *Ginsburg*, *supra* note 12, at 306 (stating Congress’ authority stems from Constitution).

¹⁰³ *Packard*, *supra* note 80, at 14-15. *See* Christina N. Gifford, *The Sonny Bono Copyright Extension Act*, 30 U. MEM. L. REV. 363, 373 (2000) (discussing Framers’ intent to recognize need for protecting creative work).

¹⁰⁴ *See* Jaime Davids, *Eldred v. Ashcroft: A Critical Analysis of the Supreme Court Decision*, 13 DEPAUL-LCA J. ART & ENT. L. 173, 176 (2003). (explaining need to balance protection with importance of having “widespread dissemination of creative works”); *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* 109 S. Ct. 971, 975 (1989) (noting Congress may not grant unlimited monopoly over intellectual property rights); *Ronald*, *supra*

ates to balance the opposing interests of the general public with a work's creators, who benefit in reaping monetary and social rewards for their creation.¹⁰⁵

2. *Dastar* and Copyright Expiration

It is the limitation of the copyright monopoly on a work that draws the *Dastar* Court's attention. The public gains the right to copy, without attribution,¹⁰⁶ once a copyright expires. The Court discusses patent law: once a patent has expired, the public has the right to make the formerly patented object in *exactly* the same shape.¹⁰⁷ This is implicit in the 'carefully crafted bargain'¹⁰⁸ that copyright holders agree to when they create their works under copyright law. "It has been well established that in the case of an expired patent, the federal patent laws *do* create a federal right to 'copy and to use.'"¹⁰⁹ The proper form of copyright protection, if one desires attribution under the law of copyright, is a copyright registration.¹¹⁰ Fox let its copyright expire,¹¹¹ hence,

note 26, at 243 (positing that title case "may ultimately stand for principle that authors and other copyright owners lose all intellectual property rights in their creative works once copyrights expires").

¹⁰⁵ See *Sony Corp. of America v. Universal City Studios Inc.*, 104 S. Ct. 774, 782 (discussing public purpose achieved by limited monopoly grant); see also *Packard*, *supra* note 80, at 14–15 (noting that public has interest in access to works protected by copyright); *Ronald*, *supra* note 26, at 255 (commenting on merits of public policy that allows lower cost access to public domain goods while retaining ability to prosecute cases involving real deception).

¹⁰⁶ See *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 33 (2003) (clarifying that once copyright expires right to copy is with public); *Garrett*, *supra* note 23, at 573 (noting that essence of *Dastar* opinion is public domain materials may be used without attribution). See generally *Dauids*, *supra* note 104, at 176 (discussing importance of limited time for protection to encourage dissemination of information).

¹⁰⁷ See *Dastar*, 539 U.S. at 33 (citing *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964)) (discussing right to make article whose patent has expired); see also *Kellogg v. Nat'l Biscuit Co.*, 305 U.S. 111, 120–22 (1938) (discussing when object has entered public there are no exclusive rights to the form); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185 (1896) (stating when patent expires manufacturer does not have monopoly).

¹⁰⁸ *Dastar*, 539 U.S. at 33 (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989)) (noting that under this bargain, "once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution"). See *Saunders*, *supra* note 11, at 169–170 (discussing what is gained and by whom in this bargain).

¹⁰⁹ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989).

¹¹⁰ See *Elgin*, *supra* note 96, at 1 (proposing Fox should have not allowed its copyright to expire); see also *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001) (stating, "in general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying"); *Saunders*, *supra* note 11, at 162 (noting proper type of protection for attribution rights).

¹¹¹ See *Dastar*, 539 U.S. at 26 (stating Fox did not renew copyright on *Crusade* television series); see also *McLain*, *supra* note 11, at 87 (noting Fox's failure to renew copyright); *Ronald*, *supra* note 26, at 250 (stating Fox failed to renew its copyright).

Crusade in Europe was in the public domain. One interpretation is that the *Dastar* “Court merely prevented Fox from getting relief through the Lanham Act back door that it could not get through the copyright front door The high court saw Fox’s lawsuit as an effort to resurrect its expired copyright, despite Fox’s protestations that it only wanted proper credit.”¹¹² Holding as Fox wanted would, in some views, “stifle competition in the future.”¹¹³

What could Fox have done under trademark law to change this outcome? First, “if Fox had renewed the *Crusade in Europe* television series, it would have had a claim for copyright infringement.”¹¹⁴ If *Dastar* had gone to a store to purchase some of New Line’s *Crusade* videotapes, and then simply repackaged those tapes as their own, then Fox ‘undoubtedly’ would have a claim of reverse passing off.¹¹⁵ However, the Court, in distinguishing *Dastar*’s acts as very discrete from mere repackaging, returned to the important fact that Fox’s *copyright had expired*.¹¹⁶ The Supreme Court characterized *Dastar*’s actions as taking a “creative WORK in the public domain—the *Crusade* television series – [copying] it, [making] modifications (arguably minor), and [producing] its very own series of videotapes.”¹¹⁷ Since *Dastar* copied the tapes, but changed Fox’s original series to produce its own tapes, the Court holds *Dastar* as the origin of the tapes it sold.¹¹⁸ One

¹¹² Susser, *supra* note 5, at 13 (noting what motivated suit was *Dastar*’s cheaper version in direct competition with Fox).

¹¹³ Mamudi, *supra* note 2, at 14 (characterizing Court’s holding in *Dastar*).

¹¹⁴ *Failure to Attribute*, *supra* note 54, at 3 (commenting how Fox could have copyright infringement or misrepresentation claims).

¹¹⁵ See *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 31 (2003) (stating that Fox’s reverse passing off claim would be sustained if *Dastar* had repackaged New Line’s *Crusade* videotapes as its own.”); see also *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 45 (2003) (defining reverse passing off as “where the defendant falsely attributes the plaintiff’s product to itself or a third party”); *Ochoa*, *supra* note 16, at 922 (defining reverse passing off as defendant placing its own mark on merchandise made by plaintiff).

¹¹⁶ See *Craft*, *supra* note 19, at 36 (noting that when copyright expires, no attribution is required); Michael Rosenbloum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTEL. PROP. L. 163, 164 (1997) (stating that original 1909 “Copyright Act provided that if the author of a copyrighted work was still living when the first copyright term expired, he or she had to renew the copyright in order to receive continued protection”).

¹¹⁷ *Dastar*, 539 U.S. at 31 (elucidating that if ‘origin’ applies only to “manufacturer or producer of the physical ‘goods’ that are made available to the public (in this case the videotapes), *Dastar* was the origin”).

¹¹⁸ See *Craft*, *supra* note 19, at 36 (noting “*Dastar* took a work in the public domain, copied and made minor changes, and produced its own videos”); see also *Failure to Attribute*, *supra* note 54, at 3 (stating that “origin of goods” refers to the “producer of goods and not

critique of this distinction in behavior between straight repackaging and minor changes is that the lack of a straight line boundary for where reverse passing off ends.¹¹⁹

3. *Dastar* and the Copyright Act

Some supporters of the Court's definition of the "origin of goods" as the producer of the tangible product in the marketplace¹²⁰ refer to the Copyright Act's use of the term 'author.'¹²¹ Under the Court's decision, *Dastar* properly branded itself as the origin of the tapes.¹²² "The maker of the *Dastar* videotape was the person who made the copy, not the author under the Copyright Act. . . . [c]orrectly identifying the author of a work is not the same thing as correctly identifying the maker of a copy of the work."¹²³ Under §102(a) of the Copyright Act, copyright protection subsists in original works of authorship 'fixed in any tangi-

the author"); *Susser*, *supra* note 5, at 13 (noting that Court held "origin" to refer to "producer of tangible goods that are offered for sale, and not to author of any idea.>").

¹¹⁹ See *Waldman Publishing Corp. v. Landoll, Inc.*, 848 F. Supp. 498, 501 (S.D.N.Y. 1994) (noting that "the concept of reverse passing off is of broad dimension, limited only by the ingenuity of wrongdoers seeking to mislead"); see also *Susser*, *supra* note 5, at 13 (criticizing Court for its lack of guidance regarding reverse passing off).

¹²⁰ See *Dastar*, 539 U.S. at 31 (stating that most common interpretation of "origin of goods" is producer"); *Williams v. UMG Recordings*, 281 F. Supp. 2d 1177, 1182 (C.D.Cal. 2003) (citing *Dastar's* definition of origin of goods); *Bretford Mfg. v. Smith Sys. Mfg. Co.*, 286 F. Supp. 2d 969, 971 (N.D.Ill. 2003) (applying *Dastar's* definition of origin of goods).

¹²¹ See *Saunders*, *supra* note 11, at 170 (explaining that Lanham Act does not exist to reward originality in authorship, but instead prohibits actions like trademark infringement that deceive consumers and impair producer's goodwill and assures producer that it will reap financial, reputation-related rewards associated with product); see also Joshua K. Simko, Comment: "Every Artist is a Cannibal, Every Poet is a Thief": Why The Supreme Court was Right to Reverse the Ninth Circuit in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 11 J. INTEL. PROP. L. 355, 365 (2004) (noting that there is conflict between Justice Scalia's definition of origin of goods as producer of tangible product sold in marketplace and definition of origin of goods as connoting person or entity that originated ideas or communications that 'goods' embody or contain, i.e., 'author'). See generally 17 U.S.C. § 102(a) (2000) (outlining as 'works of authorship' literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works).

¹²² See *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 31 (2003) (concluding most natural understanding of 'origin' of 'goods' is producer of tangible product sold in marketplace, in this case physical Campaigns videotape sold by *Dastar*.); see also *Zyla v. Wadsworth*, 360 F.3d 243, 252 (1st Cir. 2004) (stating "The Court found that no false designation of origin had occurred because *Dastar* accurately identified itself as the manufacturer of the physical video, even if it had not accurately credited others for the creative content of the video."). See generally *Mauro*, *supra* note 50, at 2 (discussing ramifications for Twentieth Century Fox Film Corp. of Court's definition of 'origin of goods').

¹²³ Justin Beck, *Man vs. Machine in the Halls of Justice*, LEGAL TIMES, Nov. 3, 2003, at 19.

ble medium of expression.¹²⁴ Here, ‘originality’ does not require complete novelty, but refers to the person “whose creative endeavor brought the work to fruition. . . [who] might be the producer of a motion picture, the author of a novel, or the developer of software.”¹²⁵ The statutory language of §102(a) ensures that a work’s author did not copy that work from some other entity.¹²⁶ Therefore, *Dastar* supporters praise the Court for clarifying that ‘origin’ under the Lanham Act is distinct from ‘original’ under the Copyright Act.¹²⁷ *Dastar* shows the Court’s belief that “the copyright statute itself creates a right to do such copying.”¹²⁸

4. The Public Domain: An Important Aspect of Copyright Law

A copyright necessarily and immediately attaches when one creates a fixed, original work of authorship.¹²⁹ Under copyright law, “the right to copy without attribution once a copyright has expired is precisely what passes to the public when copyright protection terminates.”¹³⁰ The largest category of public domain

¹²⁴ 17 U.S.C. § 102 (a) (2000) (highlighting that “copyright protection subsists...in original works of authorship fixed in any tangible medium of expression”).

¹²⁵ Gasaway, *supra* note 7, at 7 (noting difference in meaning between term ‘originality’ in copyright law, and ‘origin of goods’ in trademark law).

¹²⁶ See *Id.* (summing up Copyright Act); see also Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 396 (2003) (explaining “a world without copyright [law] . . . [is] a world in which creators of works could not prevent others from appropriating their work either through reproduction, adaptation, or performance.”). See generally 17 U.S.C. § 102(a) (2000) (defining “copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression”).

¹²⁷ See *Dastar*, 539 U.S. 31 (defining ‘origin of goods’ under §43(a) of Lanham Act); see also Garrett, *supra* note 23, at 573 (noting “commentators hailed this decision [for, *inter alia*, establishing that] . . . ‘trademark law cannot be used as a subterfuge to extend the limited exclusivity enjoyed by copyrights and patents’”); Savage, *supra* note 12, at 18 (stating “Legal experts praised the ruling for clarifying the difference between copyrights and trademarks”).

¹²⁸ Posner, *supra* note 75, at 639.

¹²⁹ See 17 U.S.C. §102 (a) (2000) (explaining “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”); see also *Importance of the Public Domain*, SPECIAL LIBR. ASS’N INFO. OUTLOOK, July 1, 2001, at 32 [hereinafter *Importance*] (stating “copyright automatically attaches when one creates a fixed, original work of authorship”); R. Scott Griffin, Note & Comment: *A Malpractice Suit Waiting to Happen: The Conflict between Perfecting Security Interests in Patents and Copyrights (a Note on Peregrine, Cybernetic, and Their Progeny)*, 20 GA. ST. U. L. REV. 765, 771 (2004) (commenting that ownership of copyright attaches to author at time work is fixed in tangible medium).

¹³⁰ Gasaway, *supra* note 7, at 7. See *Importance*, *supra* note 129, at 32 (clarifying that Copyright Act “does not define public domain. Instead, it details the conditions necessary for copyright protection, the types of works that are eligible for protection, the rights of copyright holders and the exceptions to these exclusive rights”).

works is composed of just such expired copyright works – like Fox's *Crusades*.¹³¹ The public domain denotes works unprotected by intellectual property rights.¹³² A public domain work can be used “by anyone in any manner imaginable without the need to acquire or pay for rights. There are no royalties to be paid, and no option payments.”¹³³

The *Dastar* decision seems to validate the public domain's importance in ruling “§43(a) does not prevent the unaccredited copying of an uncopyrighted work.”¹³⁴ *Dastar* copied a work that had fallen into the public domain, and the Court ruled that once a copyright expires, others may copy the work “and pass it off as their own without incurring liability.”¹³⁵ Supporters of the public domain feel that ‘in the era of information,’ there are many benefits from a sprawling, less restrained public domain.¹³⁶ “A vigor-

¹³¹ See *Importance*, *supra* note 129, at 32 (noting three categories of works in public domain in addition to expired copyrights); see also Edward Samuels, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution: The Public Domain Revisited*, 36 LOY. L.A. L. REV. 389, 391 (2002) (noting category of materials in public domain which have had their copyrights extended from twenty-eight years to lifetime of author plus seventy years, and materials in public domain due to forfeiture of copyright); Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y 137, 151–52 (1993) (stating that category of materials in public domain which has greatest “historical and theoretical footing” are works which have expired copyright).

¹³² See *Beck*, *supra* note 123, at 19 (noting *Dastar* defense position that if copy is made of public domain work, those copies ‘originate’ with copier); see also James Boyle, *The Public Domain: Foreword: The Opposite of Property?*, 66 LAW & CONTEMP. PROBS. 1, 30 (2003) (noting that information in public domain is “free” and that freedom associated with public domain has varied meanings); *Importance*, *supra* note 129, at 32 (positing that work in public domain is “opposite of a copyrighted work” in that “[i]f the work is within the public domain, there are no ownership rights associated with the work. It may be said that everyone and no one owns the work. Therefore, anyone may reproduce the work, distribute it, adapt it, etc.”).

¹³³ Jay S. Kenoff & Richard K. Rosenberg, *Methods for Obtaining Rights in Property to Produce Plays*, N.Y.L.J., Dec. 27, 1991, at 5 (reiterating that much care should be taken in determining whether work is in fact in public domain). See Dr. James Otieno-Odek, *Public Domain in Patentability After the Uruguay Round: A Developing Country's Perspective with Specific Reference to Kenya*, 4 TUL. J. INT'L & COMP. L. 15, 15 (1995) (proposing that “[t]he public domain is the pool from which inventors have an unfettered right to extract information without fear of encroaching on third party patent rights”); c.f. Andrew Beckerman-Rodau, *Are Ideas Within the Traditional Definition of Property?: A Jurisprudential Analysis*, 47 ARK. L. REV. 603, 642 (1994) (stating that since materials that are in public domain are not property, they are “not subject to property rights”).

¹³⁴ *Craft*, *supra* note 19, at 36 (noting that *Dastar* “took a work in the public domain, copied and made minor changes, and produced its own videos”).

¹³⁵ *Greenhouse*, *supra* note 15, at A26 (noting, however, that ruling could have limited effect because case's facts were “unusual”).

¹³⁶ See Jaime Davids, *Eldred v. Ashcroft: A Critical Analysis of the Supreme Court Decision*, 13 DEPAUL-LCA J. ART & ENT. L. 173, 174 (2003) (specifying that archives such as libraries and Internet allow people to access information in public domain at no cost); see also Edward Lee, *supra* note 67, at 119 (noting that “[t]he public domain . . . delineates an important sphere in which people have equal rights, and ultimate power, over information, ideas, and knowledge”); Robert K. Paterson & Dennis S. Karjala, *Traditional Knowl-*

ous and broad public domain is imperative for the creation of local inventiveness and an adaptive research capability. It is also critical to the creation of a cadre of scientific personnel.”¹³⁷ “Librarians, researchers, and Internet archivists lauded the decision,” because it drew a line – the phrase ‘origin of goods’ in §43(a) does not require a subsequent user of a public domain work to inform the audience of who created the original.¹³⁸ *Dastar* “removes the cloud of Lanham Act liability from companies, libraries, Web sites, and databases that repackage facts or information that originated elsewhere.”¹³⁹ The Lanham Act can no longer be used as a weapon against use of material that has entered the public domain.¹⁴⁰

Critics of *Dastar* claim that the ruling is “setback to the writers and producers of older works, ruling that the original creators of films, books, and songs whose copyrights have expired do not have a right to be credited on new works that rely on the original.”¹⁴¹ When a “copyright expires and a work enters the public domain, don’t look to trademark law for a continuing right of attribution. The Court could have stopped there, but went much further by finding – some say resurrecting – a federal right to copy and use works in the public domain.”¹⁴²

edge, Intellectual Property, and Indigenous Culture: Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples, 11 CARDOZO J. INT’L & COMP. L. 633, 649 (2003) (arguing that everyone benefits from large intellectual property public domain, and therefore public domain cannot be eliminated simply on rationale that “some of it belongs to a specifically identifiable cultural heritage”).

¹³⁷ Otieno-Odek, *supra* note 133, at 16 (asserting that, for effective patent system, viable public domain is key).

¹³⁸ See Savage, *supra* note 12, at 18 (noting that responsibility of attribution no longer burdens librarians). *But c.f.* Gasaway, *supra* note 7, at 21 (contending that some librarians find not attributing work to its original author “unethical and misleading”). See generally *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 31 (2003) (finding that “origin of goods” denotes “producer of the tangible product sold in the marketplace”).

¹³⁹ Mauro, *supra* note 50, at 1 (explaining that ruling could limit amount of lawsuits filed by persons who claim they did not receive sufficient acknowledgement for their work).

¹⁴⁰ See Garrett, *supra* note 74, at 578 (stating that Lanham Act cannot be used to prosecute every kind of “unfair trade practice”); see also Mauro, *High Court Hands Fox Copyright Defeat*, E-COMMERCE L. & STRATEGY, June 13, 2003, at 3 (noting that recent cases have used Lanham Act to prosecute copyright infringement, but Act cannot be used against *Dastar*); Simko, *supra* note 121, at 368 (arguing that “trademark law cannot and should not be an end-run around copyright protection”).

¹⁴¹ Savage, *supra* note 12, at 18 (noting that “works in the public domain can be freely copied and revised for sale to the public – and without crediting the original creator”).

¹⁴² Fries, *supra* note 36, at 30.

5. "The *Eldred* Quandary": *Dastar* and Copyright Consistency

Other *Dastar* critics point to the looming shadow of the Supreme Court's controversial *Eldred v. Ashcroft*¹⁴³ decision – and the apparent contradiction with the Court's statement in *Dastar* that its narrow definition of "origin of goods" comes from a desire to be consistent with precedent.¹⁴⁴ In *Eldred*, the Court upheld the 1998 Sonny Bono Copyright Term Extension Act (CTEA),¹⁴⁵ which extended the terms of copyright protection.¹⁴⁶ The CTEA adds twenty *more* years of copyright protection to current and future copyright holders,¹⁴⁷ and does not affect any works that have already fallen into the public domain.¹⁴⁸ Most copyrights, under this Act, now run from creation until 70 years after the author's death.¹⁴⁹ "For anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120

¹⁴³ 537 U.S. 186 (2003).

¹⁴⁴ See *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 32 (2003) (noting that "the phrase 'origin of goods' was incapable of denoting the person or entity that originated the ideas" that goods contain). See generally Saunders, *supra* note 11, at 162 (reiterating Court's view that phrase "origin of goods" referred to producer of tangible goods); Bohrer, *supra* note 23, at 6 (noting that Court narrowly defined meaning of phrase "origin of goods").

¹⁴⁵ 17 U.S.C. § 302 (2004).

¹⁴⁶ See William Patry, *Court Takes Hands Off Approach on Copyrights*, N.Y. L. J., May 12, 2003, at 7 (stating that CTEA generously extended terms of copyright protection for another 20 years). See generally Dennis Harney, *Mickey Mousing the Copyright Clause of the U.S. Constitution: Eldred v. Reno*, 27 DAYTON L. REV. 291, 291 (2002) (declaring that CTEA extended terms of copyright protection); Michael Keyes, *Whatever Happens to Works Deferred?: Reflections on the Ill-Given Deferments of Copyright Term Extension Act*, 26 SEATTLE UNIV. L. R. 97, 98 (2002) (noting that "amendment grants a twenty-year public domain deferment to those copyright holders with existing copyrights in works of authorship").

¹⁴⁷ See *id.* (noting that "historically, Congress treated all copyright holders the same, extending durations to existing and future copyrights"). See generally *Eldred*, 537 U.S. at 195 (observing that CTEA retains 'general structure of the 1976 Copyright Act'); Craft, *supra* note 19, at 36 (highlighting that copyright protection for current and future copyright holders is seventy years).

¹⁴⁸ See *Copyright Holders*, *supra* note 34, at D5 (remarking on substantial lobbying regarding CTEA by Hollywood film studios, including Walt Disney Co. - whose numerous Mickey Mouse copyrights would have expired in 2003 without CTEA's twenty-year copyright extension); see also Davids, *supra* note 136, at 174 (stating that CTEA does not affect any works that have already fallen into the public domain); Harney, *supra* note 146, at 291 (noting that trademarks did not enter public domain as a result of CTEA).

¹⁴⁹ See 17 U.S.C. § 302 (a)(2004) (announcing that "copyright ... endures for... 70 years after the author's death"); see also *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003) (noting that under act, most copyrights "now run from creation until seventy years after the author's death"); Patry, *supra* note 146, at s7 (noting that "as a result of the decision, for works created on or after Jan. 1, 1978, the term of copyright for individual authors is life of the author plus 70 years; for works first published before that date, the term is 95 years from the date of first publication").

years from creation, whichever expires first.”¹⁵⁰ The Supreme Court held “that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”¹⁵¹

In part, the *Eldred* opinion rejected a challenge that the CTEA violated the First Amendment¹⁵² in keeping ‘millions of works’ out of the public domain for twenty years longer than before – and thus encroaching on the freedoms of speech and press by rejecting the public’s access to these works.¹⁵³ The CTEA’s extension of copyright protection affects the bargain that balances the rights of copyrights holders – and their desire for ‘exclusive rights’ under copyright protection – with the public’s desire for access to such works when copyrights expire.¹⁵⁴ Copyrights are granted for limited terms to encourage creation of new works, which will in time enter the public domain.¹⁵⁵ Supporters of copyright extensions claim such extra copyright protection encour-

¹⁵⁰ 17 U.S.C. §302(a) (2004) (announcing that “in a case of anonymous work ... the copyright endures for the term of 95 years ... or a term of 120 years ... whichever expires first”); *Eldred*, 537 U.S. at 196.

¹⁵¹ *Eldred*, 537 U.S. at 208.

¹⁵² See Craft, *supra* note 19, at 36 (specifying that Court also rejected contention that Act could not apply to current copyrights, or went beyond Constitution’s proscribed “limited Times” specification for copyright monopolies); see also Sue Ann Mota, *Eldred v. Reno – Is The Copyright Term Extension Act Constitutional?*, 12 ALB. L.J. SCI. & TECH. 167, 168 (2001) (noting that Court of Appeals in *Eldred v. Reno* held that Congress was not prohibited from extending copyright term by either Copyright Clause or First Amendment). See generally U.S. CONST. amend. I (affirming that “Congress shall make no law...abridging the freedom of speech or of the press”).

¹⁵³ See *Eldred v. Reno*, 239 F.3d 372, 374 (2001) (explaining plaintiffs’ claim that Copyright Term Extension Act was unconstitutional for three reasons, including notion that copyright extension violated “limited times” requirement of Copyright Clause). See generally U.S. CONST. amend. I (stating that Congress may not create any law that limits freedom of speech).

¹⁵⁴ See *Eldred v. Ashcroft*, 537 U.S. 186, 244 (2003) (describing way in which statute that exceeds limitations of Copyright Clause may create conflict between Clause and First Amendment, thereby depriving public of benefits of free speech); see also William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 HOUS. L. REV. 749, 759 (2003) (discussing bargain one enters into with copyright protection); Patry, *supra* note 146, at s7 (noting that CTEA results in “an undeserved and unnecessary windfall...given to copyright holders.”).

¹⁵⁵ See Beck, *supra* note 123, at 19 (explaining that precedent has established that copyrights are granted for limited terms in order to promote creation of new works that will one day enter public domain); see also Mark B. Radefeld, *The Medium is the Message: Copyright Law Confronts the Information Age in New York Times v. Tasini*, 36 AKRON L. REV. 545, 547 (2003) (stating that authors are granted only limited monopoly in their work as incentive to create and circulate their work in order to achieve ultimate goal of furthering “the progress of science and the useful arts”).

ages even more creativity.¹⁵⁶ Critics of *Eldred*, claiming overbreadth,¹⁵⁷ claim that, “extending. . . already existing copyrights does not encourage the creation of new works. . . [or fit] easily into what appeared to be a well-established constitutional framework.”¹⁵⁸

How, then, can *Eldred*'s extension of copyright protection – and thus narrowing the public domain – reconcile with *Dastar*'s focus on the rule that, once a copyright expires, the work falls into the public domain? Indeed, how is *Dastar* consistent with this precedent? “When the Court took [*Dastar*], many Court watchers were surprised. Some theorized that the justices were looking to counterbalance *Eldred v. Ashcroft*, their Jan. 15 ruling that the CTEA is constitutional.”¹⁵⁹ The *Dastar* opinion even cites to *Eldred*, finding the phrase “origin of goods” to encompass the original creator (Fox) would “be akin to finding that §43(a) creates a species of perpetual patent and copyright, which Congress may not do.”¹⁶⁰

The congruency of *Eldred* and *Dastar* are debated. Some observers feel that the two decisions differ from each other,¹⁶¹ and state that the *Dastar* decision, “in giving added *protection* to the public domain”¹⁶² and allowing “greater freedom for those who

¹⁵⁶ See Senator Orrin G. Hatch & Thomas R. Lee, “To Promote the Progress of Science”: The Copyright Clause and Congress’s Power to Extend Copyrights, 16 HARV. J.L. & TECH 1, 3 (2002) (arguing that evidentiary record prior to enactment of Copyright Term Extension Act demonstrates that term extensions would further science by promoting creation and distribution of copyrighted material); see also Packard, *supra* note 80, at 3 (asserting that supporters of Copyright Term Extension Act believe that term extensions will promote creativity); Patry, *supra* note 146, at s7 (noting that other CTEA supporters feel that twenty year extension does indeed fulfill Constitution’s “limited Times” decree in Art. I, §8, cl. 8)

¹⁵⁷ See *Eldred*, 537 U.S. at 198 (stating that Court of Appeals has clearly demonstrated that same Copyright Clause allows Congress to “amplify the terms of an existing patent.”); see also *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003) (demonstrating that Congress may not create perpetual patents or copyrights); Patry, *supra* note 146, at s7 (predicting that such breadth will spill over into other areas, namely patent legislation).

¹⁵⁸ *Eldred v. Ashcroft*, 537 U.S. 186, 223 (2003) (Stevens, J., dissenting) (arguing that “limited times” provision promotes progress of science by ensuring that protected innovations will enter public domain upon term expiration).

¹⁵⁹ Fries, *supra* note 36, at 30 (commenting *Eldred* is constitutional decision while *Dastar* remains case of statutory construction).

¹⁶⁰ *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 37 (2003) (citing *Eldred*, 537 U.S. at 208).

¹⁶¹ See Mauro, *supra* note 50, at 1 (stating difference between decisions); see also McLain, *supra* note 11, at 87 (calling attention to Court’s differing concerns in *Eldred* and *Dastar*); Saunders, *supra* note 11, at 175 (noting apparent contrast between Court’s expansion of copyright owners’ rights in *Eldred* and restriction of those rights in *Dastar*).

¹⁶² Mauro, *supra* note 50, at 1 (emphasis added).

plagiarize works already in the public domain,"¹⁶³ stands in contrast to *Eldred's* rule that "Congress could *limit* the public domain by substantially extending copyrights."¹⁶⁴ Other observers state that *Eldred* and *Dastar* are consistent¹⁶⁵ because both strengthen copyright holders' rights and narrow the public domain. These supporters feel that the court created an equilibrium between the two cases, in *Eldred's* deferral to Congressional legislation that stretches the length of time a work may be protected, and thus, kept out of the public domain, as well as *Dastar's* later conceding considerable liberty to users of works already in the public domain due to crucial copyright expiration.¹⁶⁶ The Supreme Court has "struck the proper balance between the rights of copyright holders and the rights of the public to use works whose copyrights have expired and are thus in the public domain."¹⁶⁷ Indeed, *Eldred* and *Dastar* both stress that "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."¹⁶⁸ It is such precedent that allowed the *Dastar* result to be 'predictable'¹⁶⁹ in its focus on copyright expiration because "a work in the public domain can be copied and distributed by anyone. . . . The plaintiff's problem was not a false designation of origin, but the

¹⁶³ *Copyright Holders*, *supra* note 34, at D5 (characterizing *Dastar*).

¹⁶⁴ Mauro, *supra* note 50, at 1 (emphasis added).

¹⁶⁵ See *Copyright Holders*, *supra* note 34, at D5 (concluding that "at first blush, *Dastar* and *Eldred* appear to be a schizophrenic approach to the issues presented. Closer examination, however, reveals striking consistencies between the opinions"); see also Saunders, *supra* note 11, at 175-76 (finding reconciliation through broader consideration of *Dastar* and *Eldred*. Both opinions demonstrate "the Court's willingness to reinforce a copyright owner's exclusive rights ... as well as the Court's reluctance to circumscribe the availability of works already in the public domain. Overall these decisions both represent "the Court's ongoing deference to Congress in [copyright] matters"; *id.* at 162 (contending that Court has struck "balance between the rights of copyright owners and the rights of the public to use and adapt works whose copyrights have expired and are therefore in the public domain").

¹⁶⁶ See *Copyright Holders*, *supra* note 34, at D5 (contending that such balance coincides with copyright investigations and precedent and clarifying that CTEA ensures that "American authors would receive the same copyright protection in Europe as their European counterparts"); see also Tyler T. Ochoa, *Copyright Law: 1984 and Beyond: Two Decades of Copyright Law*, 20 SANTA CLARA COMPUTER & HIGH TECH. L. J. 167, 170 n.28 (finding that decision in *Dastar* mitigated any stringent protection of copyrights resulting from decision in *Eldred*).

¹⁶⁷ *Copyright Holders*, *supra* note 34, at D5.

¹⁶⁸ *Eldred*, 537 U.S. at 219 (citing *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (clarifying that although Copyright laws protect expressions, others may still exercise their First Amendment rights).

¹⁶⁹ Beck, *supra* note 123, at 19 (explaining Court's correct distinction between copyright and trademark laws. In order to identify the correct origin of a work, the Court must identify the difference between the author of a work and a person who copies it).

manufacture and distribution of unauthorized copies. But because the work was in the public domain, no authorization was needed."¹⁷⁰

D. *The 'Practical Problems' with a Lanham Act Right of Attribution*

Dastar's definition of "origin of goods" means that there is *no federal right of attribution* for the former owner of a copyright once that copyright expires and the formerly copyrighted work enters the public domain.¹⁷¹ The Supreme Court gives three reasons in *Dastar* as to why there would be "serious practical problems" in "reading 'origin' in §43(a) to require attribution of uncopyrighted materials."¹⁷² First, the Court feels that it would not be easy to figure out exactly who would be in this line of origin.¹⁷³ The Court gives an example here about who, after copyright expiration, could perhaps fit the definition of 'origin' in the film *Carmen Jones*, and thus require attribution.¹⁷⁴ The Court's answer is that attribution would have to go "not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Merimee (who wrote the novel on which the opera was based)."¹⁷⁵ This example typifies, says the Court, how neither Fox, nor its licensees SFM and New Line, have attained status as the "*original creator*" because Time, Inc. was the principal creator of the television series *Crusade in*

¹⁷⁰ Beck, *supra* note 123, at 19.

¹⁷¹ See Ochoa, *supra* note 16, at 911 (emphasis added) (stating that Court in *Dastar* would decide if there was federal right of attribution); see also Saunders, *supra* note 11, at 162 (stating that there is no "federal moral right of attribution" after previously copyrighted work has entered public domain); Simko, *supra* note 121, at 357 (stating that Court decided correctly when it held that *Dastar* could market Fox's series without attribution to Fox).

¹⁷² *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 35 (2003).

¹⁷³ See *Id.* (stating ". . . the word 'origin' has no discernable limits."); see also Ronald, *supra* note 26, at 252 (stating that meaning of word "origin" cannot be stretched so much so as to include "creative imaginators of an underlying work."); Simko, *supra* note 121, at 358 (determining origin of goods creates likelihood of confusion in consumers).

¹⁷⁴ See *Dastar*, 539 U.S. at 35 (explaining requiring attribution would cause issues); see also Zyla v. Wadsworth, 360 F.3d 243, 251-52 (1st Cir. 2004) (holding that *Dastar* was controlling because no false designation of origin had occurred by Zyla's publisher); Simko, *supra* note 121, at 361 (stating that once work has entered into public domain it is not property of any one particular individual).

¹⁷⁵ *Dastar*, 539 U.S. at 35.

Europe.¹⁷⁶ The Court imagines that such a broad interpretation of the Lanham Act would require, perhaps, for the *Crusade* tapes to credit even the military cameramen who took the footage.¹⁷⁷ The Court famously avows, “We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.”¹⁷⁸

Supporters of this ‘practical problem’ to an attribution right for works with expired copyrights agree that there are no defined limits in §43(a) as to who is the creator that should be credited.¹⁷⁹ Critics of this argue that the Court’s *Dastar* ruling “throttled the attribution rights of authors. . . . The decision was morally wrong and only modestly supported. . . . It is too difficult, the Supreme Court wrote, to ferret out the identity of an author. I can’t imagine difficulty as a bar to attribution.”¹⁸⁰ Another critique feels that the Court’s own example of this difficulty in attribution works against their decision: “Yet his example – that the producer of a remake of the film *Carmen Jones* would have to give credit to MGM, Oscar Hammerstein II, Georges Bizet, and Prosper Merimee – doesn’t seem that onerous. . . . If this is ‘mutant copyright,’ the mutation is very weak.”¹⁸¹ Furthermore, an argument against the Court’s reasoning holds that a person using the work of another has to check to see if that work is in the public domain so that it can be used without compensation – and since the second creator is checking anyway, “one could argue that tak-

¹⁷⁶ See *Dastar*, 539 U.S. at 35–36 (noting that SFM and New line had nothing to do with making of series, because they were merely licensees, as well as stating that “involvement with the creation of the television series was limited at best.”); see also Fries, *supra* note 36, at 30 (stating that broad reading of Lanham Act would require essentially everyone involved in Fox series to be credited); Jonathan D. Reichman, *Origin of Goods Under the Lanham Act*, INTELL. PROP. STRATEGIST, July 11, 2003, at 1 (avowing that word “origin” has no discernable limits).

¹⁷⁷ See Mauro, *supra* note 50, at 1 (stating that overly broad interpretation of Lanham Act could require credit to go to military cameramen who took wartime footage).

¹⁷⁸ *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 35–36 (2003).

¹⁷⁹ See Elgin, *supra* note 96, at 1 (stating that broadly construing Lanham Act makes it difficult to determine who should be credited with film or novel); Tony Mauro, *No Copyright? No Credit, Court Rules High Court says Lanham Act doesn’t Require Copiers to Acknowledge Creators of Works Now in Public Domain*, LEGAL TIMES, June 9, 2003, at 12 (explaining there was doubt regarding Lanham Act meaning of copying material of public domain).

¹⁸⁰ Astrachan, *supra* note 37, at 1 (arguing that compliance with health care privacy or environmental laws may not be simple task). See Ginsburg, *supra* note 12, at 268 (implying that phrase “origin” would still apply to authors of idea, concept or communication embodied in good); see also Saunders, *supra* note 11, at 177 (arguing that owners of works have tried to persuade Congress to extend intellectual property protection).

¹⁸¹ Fries, *supra* note 36, at 30.

ing the time to give attribution to known author of the works is not unduly burdensome.”¹⁸²

The Court's second ‘practical problem’ to an attribution right for communicative products with expired copyrights is that such a right would place manufacturers in a no-win situation.¹⁸³ These manufacturers could potentially face Lanham Act liability, depending on the Court's definition of the phrase “origin of goods,” for either failing to credit original creators or for crediting such a creator in a way that implies sponsorship or approval of the new copy.¹⁸⁴ Supporters feel that, “It is difficult to imagine how such a notice could be given without confusing the public in some manner. In order to avoid such a result, the Lanham Act should be interpreted to permit the free use of materials in the public domain, without any duty to identify the former owner of the expired copyright.”¹⁸⁵ Critics argue this could be easily overcome with a “disclaimer of such sponsorship or approval, such as ‘the contribution of the following authors or filmmakers whose copyrights have expired is acknowledged, though none of them have sponsored or approved of this version.’ Further, the . . . originators may approve, if asked.”¹⁸⁶

The Supreme Court's third ‘practical problem’ with requiring an attribution right for works with expired copyrights is that, “reading §43(a) of the Lanham Act as creating a cause of action for, in effect, plagiarism—the use of otherwise unprotected works and inventions without attribution—would be hard to reconcile with our previous decisions.”¹⁸⁷ Supporters agree that the *Dastar* decision is consistent with recent decisions in its refusal

¹⁸² Susser, *supra* note 5, at 13 (noting that it is not particularly difficult to give everyone in chain of title of creativity line in small print, because “motion pictures, as a rule, give credit to far less important contributors in their lengthy credits, such as caterers on the set”).

¹⁸³ See *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 35 (2003) (commenting that without copyrighted work as base point requiring attribution to uncopyrighted materials would pose practical problems); see also *Law Professors*, *supra* note 94, at 944 (arguing that interpreting that Lanham Act requires that the publisher or a revised work credit the former publisher or distributor of a work in the public domain would place the publisher in a no-win situation). See generally *Parlane Hosiery Co. v. Shore*, 439 U.S. 323, 338 (1979) (discussing the unfairness of a “heads I win, tails you lose” form of litigation.).

¹⁸⁴ See 15 U.S.C. § 1125(a)(1)(A) (2004) (stating that it is forbidden for person to use “any word, term, name, symbol, or device, or any combination thereof” that is likely to cause mistake as to origin of his or her goods); see also *Dastar*, 539 U.S. at 36 (explaining this practical problem).

¹⁸⁵ *Law Professors*, *supra* note 94, at 945.

¹⁸⁶ Susser, *supra* note 5, at 13.

¹⁸⁷ *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 36 (2003).

to extend the Lanham Act to conflict with copyright law.¹⁸⁸ A critique is that the cases the Court cites as its “previous decisions”¹⁸⁹ can be distinguished from the facts of *Dastar*, even though the Court argued that a broader interpretation of the phrase “origin of goods” would be inconsistent with precedent.¹⁹⁰ In *Wal-Mart Stores, Inc. v. Samara Brothers Inc.*,¹⁹¹ *TraFFix Devices Inc. v. Marketing Displays Inc.*,¹⁹² and *Bonito Boats, Inc. v. Thunder Craft Boats Inc.*,¹⁹³ the plaintiffs were not seeking mere attribution; instead, the plaintiffs had claims “for damages and an injunction against manufacture and sale of the perceived knock-off under any circumstances.”¹⁹⁴ Other critics argue that “copying substantially all of a work of authorship (‘wholesale reliance’) without giving intellectual content credit – may be just a fancy way of saying plagiarism is not illegal.”¹⁹⁵

E. Consumers’ Thoughts about Origin

In a reason related to the history and purpose of the Lanham Act, as well as to the “practical problems” associated with attribution, *Dastar* also gives a narrow definition to the §43(a) phrase “origin of goods” because of the Court’s perception of customers in the marketplace.¹⁹⁶ One function of the Lanham Act is to prevent

¹⁸⁸ See Susser, *supra* note 5, at 13 (noting that court felt Lanham Act should not be broadly construed if consumer did not care who created product in intellectual content sense). See generally McLain, *supra* note 11, at 187 (discussing Court’s recognition of importance of public domain in *Dastar*); Saunders, *supra* note 11, at 175–76 (highlighting divergence of Court’s decision to uphold extension of copyright terms in *Eldred* and its rejection of Lanham Act in *Dastar*, which gave more power to subsequent users of copyrighted works).

¹⁸⁹ *Dastar*, 539 U.S. at 36.

¹⁹⁰ See *Dastar*, 539 U.S. at 31–33 (stating desire to define origin of goods as excluding Fox because such finding would be inconsistent with precedent, as well as stretch text of Lanham Act). See generally Beck, *supra* note 123, at 19 (explaining that precedent has established that copyrights are granted for limited terms in order to promote creation of new works that will one day enter public domain); Susser, *supra* note 5, at 13 (noting difference between copying and “making exact duplicate.”).

¹⁹¹ 529 U.S. 205 (2000) (discussing knock-offs of children’s clothes).

¹⁹² 532 U.S. 23 (2001) (highlighting that functional features are not subject to trade dress protection).

¹⁹³ 489 U.S. 141 (1989) (regarding non-patented boat hulls).

¹⁹⁴ Susser, *supra* note 5, at 13 (extrapolating difference between copying “the work of another as a new tangible product (such as a piece of clothing) versus [making] type of exact duplicate possible with sound recordings, photographs or film footage. The first type of copy is based on the former work, while the second type is the former work”).

¹⁹⁵ *Id.* (citing *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 36 (2003)).

¹⁹⁶ See *Dastar Corp.*, 539 U.S. at 31–32 (2003) (restricting definition of “origin of goods” as “the producer of the tangible product sold in the marketplace); see also Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 832 (2004)

deception of *consumers* interested in the identity of the creator or the identity of a physical product's manufacturer.¹⁹⁷ The Court notes that §43(a) disallows measures that mislead consumers and harm a producer's goodwill.¹⁹⁸

The Court uses an example¹⁹⁹ in order to clarify the desires of consumers in the modern marketplace: when a consumer purchases a soft drink like Pepsi, that consumer does not necessarily presume that Pepsi itself created the *original* idea for a soft drink as a product or that Pepsi was the first to invent a scientific soft drink formula.²⁰⁰ The Court's cursory summation is that consumers of such branded products "typically [do] not *care*" whether the brand-name company selling the product (the soda, for example) is "the same entity that came up with the idea for the product, or designed the product."²⁰¹ Basically, the consumer does not care *who* came up with the soda, as long as they get soda

(proposing that *Dastar* decision was based on Court's assumptions of consumer thought processes); Laurence P. Colton, *2003 Eleventh Circuit Survey: Intellectual Property*, 55 MERCER L. REV. 1327, 1348-49 (2004) (explaining *Dastar* limitation of phrase "origin of goods").

¹⁹⁷ See *Dastar*, 539 U.S. at 32 (holding that "Section 43(a) of the Lanham Act prohibits actions like trademark infringement that deceives consumers and impairs a producer's goodwill"); see also Mark A. Kahn, *May the Best Merchandise Win: The Law of Non-Trademark Uses of Sports Logos*, 14 MARQ. SPORTS L. REV. 283, 286 (2004) (stating purpose of Lanham Act was preventing use of misleading and deceptive marks which confuse customer). See generally Scott Harvison, *Two Wrongs Making a Right: Using the Third and Ninth For a Uniform Standard of Fame in Federal Dilution Law*, 25 SEATTLE U. L. REV. 867, 869 (2002) (citing protection of customers' interests in identity of their purchase as one of two functions of Lanham Act).

¹⁹⁸ See *Dastar*, 539 U.S. at 32 (stating one example as trademark infringement); see also Timothy R.M. Bryant, *Trademark Infringement: The Irrelevance of Evidence of Copying to Secondary Meaning*, 83 NW. U. L. REV. 473, 482 (1988) (announcing Congress' purpose in § 43(a) of Lanham Act as protecting producer's goodwill and as protecting against deception of consumers); John D. Marans, *Westchester Media Co. L.P., et al. v. PRL USA Holdings, Inc.: The Fight Over the Name, "Polo,"* 8 VILL. SPORTS & ENT. L.J. 351, 356 (2002) (explaining that Lanham Act prevents consumers from being misled by confusing trademark and protects manufacturer's right to identify and distinguish his or her goods).

¹⁹⁹ See *Dastar*, 539 U.S. at 32 (clarifying that Lanham Act would indeed outlaw "the Coca-Cola Company's passing off its product as Pepsi-Cola or reverse passing off Pepsi-Cola as its product"); see also Austin, *supra* note 196, at 876 (agreeing that §43(a) of Lanham Act forbids Coca-Cola or Pepsi-Cola from misrepresenting their product as other company's); Ronald, *supra* note 26, at 244 (explaining reverse passing off using same Pepsi and Coca-Cola example).

²⁰⁰ See *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 32 (2003) (postulating that consumers of brand-name products like Coke or Pepsi "believes that that company produced (or at least stands behind the production of) that product, surely does not necessarily believe that that company was the "origin" of the drink in the sense that it was the very first to devise the formula"); see also Robert P. Andris & Elise R. Vasquez, *Supreme Court Clarifies the Meaning of "Origin of Goods" in Trademark Law*, 15 No. 11 J. PROPRIETARY RTS. 6, 7 (2003) (concluding that brand-loyal cola consumer do not care if company was origin of formula). See generally Gasaway, *supra* note 7, at 7 (stating producers of goods, and not authors of ideas, were identification aim of Lanham Act).

²⁰¹ *Dastar*, 539 U.S. at 32 (emphasis added).

from the expected manufacturer or source. Deciding that the initial origin of the product is usually and predictably of no importance to consumers leads the Court to preclude original creators in their narrow definition of “origin of goods” under §43(a) of the Lanham Act.²⁰² This seems to conflict with some Circuit history: in 1974, “Congress’ purpose in enacting §43(a) of the Lanham Act is to create a special and limited unfair competition remedy, *virtually without regard for the interests of consumers generally and almost certainly without any consideration of consumer rights of action in particular.*”²⁰³

V. THE LEGACY OF DASTAR

A. *Rejection of a §43(a) Right to Attribution*

The Court holds that the phrase “origin of goods” in the Lanham Act cannot include attributing the entity that originated the ideas embodied in goods – effectively holding that once a copyright expires, the public should not be impeded from accessing the work, in such a way as commanding the Lanham Act to require such attribution to the original creator.²⁰⁴ This begs critics of the court’s attribution arguments to ask, “Why not balance the rights of authors and the public? Why not use the Lanham Act to provide the attribution an author demands and the public is entitled to? Why allow a subsequent author to trade on the value of an earlier work without acknowledgement? Why should consumers not know the ‘origin’ of the work?”²⁰⁵ Is it more ethical to hold the opposite of the *Dastar* holding – that the en-

²⁰² See *Id.* (postulating that the Lanham Act should not be stretched to cover matter of no usual importance to purchasers); see also Susser, *supra* note 5, at 13 (observing that court felt Lanham Act should not be broadly construed if consumer did not care who created product in intellectual content sense).

²⁰³ *Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974) (emphasis added).

²⁰⁴ See *Dastar*, 539 U.S. at 33 (explaining Lanham Act “should not be stretched to cover matters that are typically of no consequence to purchasers); see also Astrachan, *supra* note 37, at 1 (noting that, according to Supreme Court, requiring attribution of original author of uncopyrighted work is impediment to public’s access of that work); Garrett, *supra* note 23, at 580 (concluding that Court in *Dastar* established bright-line rule requiring proper attribution only for use of works outside of public domain); Saunders, *supra* note 11, at 162 (observing that, according to *Dastar*, there is no federal moral right of attribution that exists after work has entered public domain).

²⁰⁵ Astrachan, *supra* note 37, at 1.

tity using a work in the public domain should be required to cite to the original author?²⁰⁶

1. Communicative Products

While a can of Pepsi and a videotape are both simply items floating around in the stream of commerce, created by someone and then sold by someone else, a branded product like a soda is arguably fundamentally different from a communicative product - which has significance due to the intellectual content conveyed as opposed to physical function.²⁰⁷ Looking at novels, for example, the Court admits consumers buy books with an eye towards the *author*, not because of the publisher.²⁰⁸ Interestingly, "this, of course, is what Fox argued."²⁰⁹ Although acknowledging that purchaser concern might differ between a soda and a videotape, the Court declined to adopt a different attribution standard for communicative products.²¹⁰ Historically, the Court's alignment of 'origin' with producer of the wares in the stream of commerce is correct: the Lanham Act originally "was aimed at identifying the

²⁰⁶ See *id.* (finding decision to allow copy of work without attribution of original author morally wrong); see also Ginsburg, *supra* note 12, at 263 (interpreting author attribution as moral right that should be incorporated in U.S. Copyright Act); Gasaway, *supra* note 12, at 7 (affirming that it would be more ethical "especially in...serious...scholarship where it would be unconscionable to publish such work without crediting earlier work from public domain").

²⁰⁷ See *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 33 (2003) (describing books or videos, not hammers, as communicative products); see also Astrachan, *supra* note 37, at 1 (noting that works of authorship are different from consumer appliances, since the consumer is interested in author of book but not engineer of product); Goforth, *supra* note 33, at 337-38 (reiterating Supreme Court's argument that although purchaser concern for communicative products may be different, Lanham Act should not apply).

²⁰⁸ See *Dastar*, 539 U.S. at 33 (stating that purchaser of a novel is interested first and foremost in originator of story conveyed in that book); see also *id.* at 2048 (noting that extending term 'origin' would force statute to "include not merely the producer of the physical item (the publishing house Farrar, Straus and Giroux, or the video producer *Dastar*) but also the creator of the content that the physical item conveys"); Garrett, *supra* note 23, at 579 (agreeing with court's reasoning that consumer of communicative product is more interested in creator of product than its manufacturer); Elgin, *supra* note 96, at 1 (noting that purchasers probably care more about author of communicative product than publisher).

²⁰⁹ *Supreme Court Rules that Distributor of Video of Edited Version of Public Domain Television Series Did Not Violate Lanham Act by Failing to Credit Twentieth Century Fox as Series' Creator*, ENT. L. REP., June, 2003, at 1 (presenting Fox's argument to require author attribution); see also *Dastar*, 539 U.S. at 31 (addressing defendant's argument that consumer is interested in author of communicative product, but refusing to require author attribution for uncopyrighted work).

²¹⁰ See *Dastar*, 539 U.S. at 33 (concluding copyright law and Lanham Act would conflict if special treatment was given to communicative products); see also Elgin, *supra* note 96, at 1 (stating ideas, concepts, and communications of goods are not covered under Lanham Act); Greenhouse, *supra* note 15, at 26 (defining 'tangible good' under Court's analysis as referring to counterfeit watch, for example, but not communicative products).

producer of the goods that are offered for sale, not the author of any idea, concept, or communication embodied in those goods.”²¹¹

The author of a communicative product also has an interest in avoiding reverse passing off under the Lanham Act, yet the Court rejects expansion of “origin of goods” to include them.²¹² However, *Dastar* critics claim that an argument for attribution rights is much stronger for a communicative product than for a hammer or a soda can.²¹³ “Origin means the producer of the products. And that’s the rub. Works of authorship are different from lawn mowers and food processors. Consumers buy appliances without regard to the identity of the engineer who designed them. The buy decision is different for authors and writers.”²¹⁴ Most people would prefer to know the author of intellectual property, like a book author.²¹⁵ The ‘origin’ of a book - one author who thinks up the ideas contained - is peculiarly different from the ‘origin’ of a soda’s scientific formula.²¹⁶ On one hand, *Dastar*’s *Campaigns* tapes are simply “edited material no longer under copyright from someone else’s production.”²¹⁷ On the other hand, the tapes can be seen as a communicative product, deserving of – and not receiving – attribution.

²¹¹ Gasaway, *supra* note 7, at 7 (stating producers of goods, and not authors of ideas, were identification aim of Lanham Act).

²¹² See *Dastar*, 539 U.S. at 32 (commenting reverse passing off is likely to deceive consumers); see also Richeson, *supra* note 11, at 218 (stating inclusion of communicative products under Lanham Act would result in conflict with copyright law); Susser, *supra* note 5, at 14 (noting word ‘origin’ does not include authors of intellectual content).

²¹³ See Astrachan, *supra* note 37, at 1 (arguing that people take notice of creators and authorship); see also Fries, *supra* note 36, at 30 (commenting people are concerned with creators of copyrightable works); McLain, *supra* note 11, at 80 (highlighting copyrightable works are subject to reverse passing off).

²¹⁴ Astrachan, *supra* note 37, at 1.

²¹⁵ See Astrachan, *supra* note 37, at 1 (arguing that people are concerned more about author of book than its publisher); see also Fries, *supra* note 36, at 30 (stating that, “In all probability, some consumers don’t care about the source of noncopyrightable subject matter, such as data.... Most of us want to know who wrote the book or took the photo”); Susser, *supra* note 5, at 15 (commenting purchaser is likely to be interested in author of copyrightable work).

²¹⁶ See Astrachan, *supra* note 37, at 1 (arguing that people notice creators and authors); see also Fries, *supra* note 36, at 30 (noting that most people do not take interest in creator of public information but do notice creators of works of art); Susser, *supra* note 5, at 13 (noting communicative products have ‘particular’ origin in “sense of original creator or author”);

²¹⁷ Frank J. Murray, *Justices Refuse to Hear Veterans’ Benefits Case; Promise of Free Medical Care Broken*, WASH. TIMES, June 3, 2003, at A01 (stating attribution is not required for uncopyrighted material).

2. VARA, Berne, and the Moral Rights Doctrine

The *Dastar* decision, while expressly showing that §43(a) of the Lanham Act provides no right of attribution,²¹⁸ seems to highlight the virtue of the express right of attribution contained in the Visual Artists' Rights Act [VARA] of 1990.²¹⁹ The right of attribution – part of the moral rights doctrine – is the right to be recognized as an author of a work.²²⁰ VARA's express right of attribution states that "the author of a work of visual art. . . shall have the right. . . to claim authorship of that work."²²¹ The *Dastar* court noted that "recognizing in §43(a) a cause of action for misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations [in VARA] superfluous. A statutory interpretation that renders another statute superfluous is of course to be avoided."²²² The Court further comments that VARA is an example of Congress explicitly expanding intellectual property protections.²²³ Supporters agree: users of public domain works should not have to worry about being sued from

²¹⁸ See *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 33 (2003) (explaining rights to copy without attribution passes to public once copyright expires); see also Fries, *supra* note 36, at 30 (stating attribution is not required when copyright terminates); Ginsburg, *supra* note 12, at 269 (stating that uncopyrighted works do not require attribution).

²¹⁹ 17 U.S.C. § 106(A) (2004) (stating that "the author of a work of visual art shall have the right to claim authorship of that work").

²²⁰ See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (specifying that right of attribution entitles recognition of an artist "by name as the author of his work or to publish anonymously or pseudonymously, the right to prevent the author's work from being attributed to someone else, and to prevent the use of the author's name on works created by others, including distorted editions of the author's original work"); see also *English v. BFC&R.E. 11TH St. LLC*, 1997 U.S. Dist. LEXIS 19137, at * 7 (S.D.N.Y. Dec. 2, 1997) (pointing out that right to attribution allows artist to be known as author of his work), *aff'd*, No. 98-7032(L), 98-7238, 1999 U.S. App. LEXIS 23697 (2d Cir. NY, Sept. 27, 1999); Benjamin S. Hayes, Note, *Integrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 OHIO ST. L.J. 1013, 1019 (2000) (noting conflict between right of attribution and American work for hire doctrine, in which commissioner of work receives credit for that work).

²²¹ 17 U.S.C. §106(A) (2004) (delineating rights of authors of visual works, who also have right, under §106, to "prevent the use of his or her name as the author of any work of visual art which he or she did not create").

²²² *Dastar*, 539 U.S. at 34–35 (arguing that VARA was created with great deal of specificity in order to limit its reach to certain group of artists and interpretation such as this would undermine intentions of Congress).

²²³ See *id.* at 34 (emphasizing that, unlike Lanham Act, VARA is specific and provides "carefully limited and focused" right of attribution); see also Greenhouse, *supra* note 15, at 26 (asserting that Congress clearly fashioned new rights for visual artists by passing VARA); Ochoa, *supra* note 16, at 926 (declaring that VARA provides rights to distinct class of artists).

former copyright owners (whose copyrights have expired) for misattribution.²²⁴

Critics of this part of *Dastar* scream that “one man’s superfluous statutory provision is another man’s multiple remedy. Extending §43(a) to non-attribution surely does *not* conflict with the Visual Artists Rights Act.”²²⁵ In the same vein, some feel that VARA “provides relatively limited rights of attribution and integrity for certain visual artists.”²²⁶ VARA does not protect all artists or everything called ‘art,’²²⁷ but rather shelters only a narrowly defined class of *visual art*.²²⁸ Few American artists have actually brought claims under VARA.²²⁹ VARA also only grants

²²⁴ See *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 256 (1945) (stating that, under patent law, “not only is the invention of a patent dedicated to the public upon its expiration, but the public thereby becomes entitled to share in the good will which the patentee has built up in the patented article or product through the enjoyment of his patent monopoly”); see also John T. Cross, *Giving Credit Where Credit Is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 WASH. L. REV. 709, 766 (1997) (announcing that once copyright laws give someone right to copy work of art, he is permitted to receive credit for copies); Ochoa, *supra* note 16, at 923 (explaining that once work of art enters public domain, previous copyright owners no longer have exclusive right to it and anyone is free to copy work of art without incurring liability).

²²⁵ Susser, *supra* note 5, at 13 (emphasis added) (claiming that VARA is not harmed by § 43 (a) for variety of reasons, including fact that plaintiff has higher burden of proof when asserting cause of action under § 43 (a)).

²²⁶ Rosenthal Kwall, *supra* note 9, at 30 (commenting that VARA’s limited scope “not only privileges the voices of powerful industries over those of authors, but also privileges the voices of certain authors over others”).

²²⁷ See *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003) (noting that VARA only protects artists that craft “works of visual art,” works of “recognized stature,” or works of art that could not be altered without damage to the artist’s “honor or reputation”); see also *Martin v. City of Indianapolis*, 982 F. Supp. 625, 631 (S.D. Ind. 1997) (holding that since plaintiff’s sculpture, *Symphony #1*, was well known and won many awards, it was work of “recognized stature”), *aff’d*, 192 F.3d 608 (7th Cir. 1999); *Scott v. Dixon*, 309 F. Supp. 2d 395, 397–98, 400 (E.D.N.Y. 2004) (concluding that plaintiff’s sculpture was not work of “recognized stature” because it remained in defendant’s backyard, away from public’s view).

²²⁸ See *Pollara*, 344 F.3d at 269 (stating that not only must art fit narrow definition of “visual art” but art must also be “of recognized stature”); see also *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995) (describing ‘visual art’ under VARA as including “paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes, existing in a single copy or limited edition of 200 copies or fewer”); Monica E. Antezana, *The European Union Internet Copyright Directive as Even more than It Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT’L & COMP. L. REV. 415, 430 (2003) (viewing VARA’s definition of visual art as narrow).

²²⁹ See Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1948 (2000) (stating that “application of VARA and the related state statutes is limited to a mere handful of cases”); see also Leigh Jones, *Artistic Stature; Sculptor Loses Bid to Protect Work Under Federal Law*, 65 N.Y. L.J. 16 (2004) (reporting that few cases have dealt with VARA); Geri J. Yonover, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 82 (1996) (observing that “many artists vigorously exercise their moral rights (of attribution) in such countries as France, Italy, Germany and Canada”).

attribution rights to works created on or after June 1, 1991.²³⁰ The Court does not seem to take into account the connection between VARA and films – like the disputed *Crusade* and *Campaigns* here. The definition of ‘visual art’ under VARA specifically excludes motion pictures and audio-visual media,²³¹ and thus would not even cover *Dastar’s* films. Interestingly, VARA was originally limited, in part, in response to the motion picture industry itself, which was concerned with the effect of the moral rights doctrine in America.²³²

Also, finding a right of attribution under §43(a) “would still allow copying in any medium without obtaining a license or other authorization. And the author would still have no control over how, when, where, why, or for whom copies were produced. The only requirement would be to acknowledge authorship.”²³³ Indeed, one possible solution to avoid consumer confusion as to the origin of a product would be to label a work taken from the public domain with its own name,²³⁴ or the name of its author. It is basic human nature – people normally crave credit for their work.²³⁵ “Moral rights are legal rights that recognize an artist’s

²³⁰ See 17 U.S.C. § 106A (2004) (defining section to be effective 6 months after date of enactment); see also *Bd. of Managers of Soho Int’l Arts Condo. v. City of New York*, 2003 U.S. Dist. LEXIS 10221, *28 n.12 (S.D.N.Y. 2003) (finding that “as VARA was enacted into law on December 1, 1990, the effective date is June 1, 1991.”); *Carter*, 71 F.3d at 83 (clarifying that such rights last for length of author’s life, for individual author).

²³¹ See 17 U.S.C. § 101 (2004) (defining audio-visual works as outside scope of statute); see also *Leicester v. Warner Bros.*, 232 F.3d 1212, 1219 n.3 (9th Cir. 2000) (excluding motion pictures and audio-visual works from scope of VARA); *Carter*, 71 F.3d at 84 (stating that motion picture and audio-visual works are not covered by VARA).

²³² See David A. Honicky, *Film Labelling as a Cure for Colorization [and other Alterations]: A Band-Aid for a Hatchet Job*, 12 CARDOZO ARTS & ENT L.J. 409, 430 (1994) (distinguishing opposing motives in film industry of creators who wish to preserve film as created as to motives of studios who often desire to alter film for economic gain); see also Rosenthal Kwall, *supra* note 9, at 28 (emphasizing need of “film producers [to] have unencumbered freedom to adapt their productions to differing needs of various markets”); Jennifer T. Olsson, *Rights in Fine Art Photography: Through a Lens Darkly*, 70 TEX. L. REV. 1489, 1513 (1992) (postulating that film industry’s objections to moral rights doctrine stem from economic motives of non-artists).

²³³ Fries, *supra* note 36, at 30.

²³⁴ See *Maljack Prods. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 887 (9th Cir. 1996) (citing and agreeing with Leslie A. Kurtz, *Protection for Titles of Literary Works in the Public Domain*, 37 RUTGERS L. REV. 53, 77 (1984), wherein she wrote that there is little likelihood that public will become confused if and when public domain work retains its original name); see also *Law Professors*, *supra* note 94, at 940–41 (summarizing case law and determining that work in public domain may be reproduced with same name without consumer confusion); Simko, *supra* note 121, at 368 (determining that “more recent cases suggest that subsequent purchaser must only label public domain work with its own name”).

²³⁵ See Rosenthal Kwall, *supra* note 9, at 985 (stating that “people typically desire recognition for their accomplishments”); see also Susan P. Liemer, *Understanding Artists’*

noneconomic interest in his work. . . . The moral right of attribution recognizes that the artist has suffered a noneconomic injury when his name is not attached to one of his works.”²³⁶ Without moral rights, the American copyright system can be considered amoral.²³⁷ The effect of *Dastar*, ultimately, is to remove an avenue to sue for attribution – and thus contrast to the moral rights ideology.

Moral rights have met staunch opposition. Opponents deem the moral rights dogma as contradictory to the traditional American copyright system, which views copyright as an economic incentive to create²³⁸ and which holds as a fundamental principle that copyrights are a monopoly for a limited time.²³⁹ Initial attempts in Congress to impose moral rights failed, until Congress passed the Berne Convention Implementation Act of 1988.²⁴⁰ VARA, enacted as an amendment to the Copyright Act to incor-

Moral Rights: A Primer, 7 B.U. PUB. INT. L.J. 41, 49 (1998) (stating that artists’ works are extension of themselves and thus artists desire recognition for their work); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyrightlaw*, 12 CARDOZO ARTS & ENT. L.J. 1, 34 (1994) (likening relationship of artists’ work to “sacrosanct” “natural link” between father and his child).

²³⁶ Vander Voort, *supra* note 13, at 1586.

²³⁷ See Rosenthal Kwall, *supra* note 9, at 27 (arguing that the absence of substantive federal protections for the moral rights of the artistic creator of intellectual property create an “amoral” copyright system, which favors the economic interests of the property owner over the non-economic interests of the creator of the property); see also Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 28, 29 (1985) (contending that the lack of federal legislation protecting the moral rights of creators creates an imbalance amongst competing interests in intellectual property).

²³⁸ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431, 432 (1984) (stating that opponents of Berne in the United States believe that granting authors moral rights will impair these traditional economic incentives, and have a negative impact on editorial practices in the media); see also Arthur B. Sackler, *The United States Should Not Adhere to the Berne Copyright Convention*, 3 J.L. & TECH. 207, 207 (1988); Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 830 (1992) (noting that opponents of the Berne Convention Implementation Act believed that the adoption of moral rights would “impede the production and distribution of copyrighted works”).

²³⁹ See Packard, *supra* note 80, at 8 (commenting that American copyright system has traditionally viewed copyrights as limited monopoly for copyright holder, rather than natural property right); see also Note, *Visual Artists’ Rights in a Digital Age*, 107 HARV. L. REV. 1977, 1984 (1994) (noting that “[t]he American copyright system assumes that artists will produce creative works only if given incentive of limited monopoly”).

²⁴⁰ See *Carter v. Helmsley-Spear, Inc.* 71 F.3d 77, 82, 83 (2d Cir. 1995) (stating that bills introduced by Congress to protect artists’ rights had drawn little support until adoption of Berne Convention Implementation Act of 1988); see also 9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06 fn 2 (Nellie Howard et al. eds., Release No. 64, 2004) (commenting that “Congressional proposals to implement artists’ rights dates back to 1979”); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 259 (1995) (noting that attempts have been made over last twenty years to enact moral rights legislation that have failed until adoption of Berne Convention and Visual Artist’s Rights Act).

porate the moral rights doctrine,²⁴¹ is “analogous to Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works, but its coverage is more limited.”²⁴² The Berne Convention and VARA have forced the issue of how to deal with moral rights.²⁴³ However, “as a signatory to the Berne Convention, the United States is obligated to protect authors’ moral rights (something U.S. copyright law has traditionally not done), but has skirted the issue by concluding that current domestic laws, such as *unfair competition*, defamation, privacy and contract law, adequately protect author’s work.”²⁴⁴

In truth, the *Dastar* decision “raises the question of whether the U.S. is now in default of its obligations under Berne” because the United States used §43(a) as an example when it joined Berne to show that its law did indeed protect moral rights.²⁴⁵ Indeed, a few years ago, serious discussions were “given to the idea that authors’ moral rights were protected. . . under legal schemes other than copyright. Chief among these, it was argued, was §43(a). . . [VARA’s] narrow protection of moral rights was tolerated because other protections were supposedly available, includ-

²⁴¹ See *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003) (stating that VARA was enacted by Congress as amendment to Copyright Act to protect moral rights of some artists); see also *Cort v. St. Paul Fire & Marine Ins. Companies, Inc.*, 311 F.3d 979, 984-85 (9th Cir. 2002) (noting that VARA protects moral rights of “integrity” and “attribution” to partially implement moral rights provision of Berne Convention); *Carter v. Helmsley-Spear, Inc.* 71 F.3d at 83 (stating that VARA granted rights of attribution to certain class of artists).

²⁴² *Quality King Distributors, Inc. v. L’Anza Research International, Inc.*, 523 U.S. 135, 149 n.21 (1998). See 17 U.S.C. §106A (granting author of work rights of attribution and integrity); The Berne Convention for the Protection of Literary and Artistic Works, art.6 bis, 1 B.D.I.E.L 715 (2004) (guarantees author of work rights of attribution and integrity).

²⁴³ See Hayes, *supra* note 220, at 1013 (arguing that recognition of moral rights for author under Berne and VARA have forced issue of “[h]ow to cope with moral rights”); see also Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U.L. REV. 945, 948 (1990) (suggesting that VARA, as federal legislation that only addresses moral rights of visual artists, represents incremental approach that will foster further legislation about moral rights); Patrick G. Zabatta, *Moral and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095, 1129 (1992) (contending that recognition of moral rights for author under Berne and VARA have created obligation for Congress to address moral rights for non-visual artists).

²⁴⁴ Packard, *supra* note 80, at 8 (emphasis added).

²⁴⁵ See *Supreme Court Rules that Distributor of Video of Edited Version of Public Domain Television Series Did Not Violate Lanham Act by Failing to Credit Twentieth Century Fox as Series’ Creator*, ENT. L. REP., June, 2003, at 1 (suggesting that United States may be in violation of the Berne Convention following *Dastar* decision, although there are no enforceable remedies against member nations who violate the convention. Article 6bis(3) of Convention states that any relief to enforce the moral rights of an author should be governed by legislation of nation that claim comes from, and creates no remedy of its own).

ing state laws against misappropriation and, of course, §43(a).”²⁴⁶ *Dastar*’s critics show surprise that, after *Dastar*, the Lanham Act does not protect attribution – thus lacking moral rights protection – and rights of attribution are not available under other legal avenues since VARA’s passing.²⁴⁷ The consequences are dire: “If the publisher of *Mr. Darcy’s Daughters*, a sequel to *Pride and Prejudice* by modern author Elizabeth Aston, sold a boxed set of the sequel and the original, apparently it could omit any mention of Jane Austen. But could it actually claim authorship of *Pride and Prejudice* for Ms. Aston?”²⁴⁸ As a result, in light of copyright law’s focus on the protection of author’s pecuniary interests and failure to preserve attribution, some *Dastar* opponents call for a solution: an independent right of attribution.²⁴⁹

B. *Dastar*’s Legacy in the Courtroom

Thus far, how have subsequent lower courts interpreted the *Dastar* holding? Many cases affected by *Dastar* involve a failure to give credit to authors who helped create part of a work. In *Williams v. UMG Recordings*,²⁵⁰ the ‘materially identical’ (to the facts of *Dastar*) §43(a) reverse passing off claim of a film narrator and director was barred as a matter of law, based on *Dastar*’s definition of the ‘origin of goods.’²⁵¹ The *Williams* court held that such failure to credit is *not* actionable under the Lanham Act after *Dastar*.²⁵² In addition, the Ninth Circuit affirmed that *Dastar* is “not a broad sweeping dismissal of reverse passing off claims

²⁴⁶ Fries, *supra* note 36, at 30.

²⁴⁷ See *id.* (noting that, after *Dastar* and VARA, attribution rights are not available under other legal schemes); see also Ginsburg, *supra* note 12, at 282 (arguing that *Dastar* Court’s reading of VARA provides fewer attribution rights after VARA than before VARA); Astrachan, *supra* note 37, at 1 (stating that Court’s decision in *Dastar* throttled attribution rights).

²⁴⁸ Fries, *supra* note 36, at 30.

²⁴⁹ See Ginsburg, *supra* note 12, at 286 (stating that amendment to U.S. Copyright Act specifically providing attribution rights is necessary to afford meaningful rights to authors); see also Rosenthal Kwall, *supra* note 9, at 1020 (arguing that plaintiffs are forced to rely on Lanham Act to remedy violation of their attribution rights, but such remedy could only be provided within scope of independent right of attribution); Saunders, *supra* note 11, at 178 (noting that attribution rights will not exist unless expressly created by Congress).

²⁵⁰ 281 F. Supp. 2d 1177, 1177 (C.D. Cal. 2003) (discussing director’s claim that failure of defendants to include his name in film that he contributed to violated Lanham Act).

²⁵¹ *Id.* at 1181–84 (citing *Dastar Corp. v. Twentieth Century Fox*, 539 U.S. 23, 38 (2003)).

²⁵² See *Williams*, 281 F. Supp. 2d at 1181 (discussing director’s claim that failure of defendants to include his name in film he contributed to violated Lanham Act).

and is limited to defining 'origin of goods.'²⁵³ The *Williams* decision blatantly notes that Dastar's holding shows that a "defendant's failure to credit. . . is actionable only where the defendant literally repackages the plaintiff's goods and sells them as the defendant's own – not where, as here, Defendants are accused only of failing to identify someone who contributed not goods, but ideas. . . to Defendants' product."²⁵⁴ Similarly, the Second Circuit's *Caroll v. Kahn*²⁵⁵ decision sums up these Lanham Act false designation of origin claims regarding failure to credit: "A Lanham Act claim based on Defendants' alleged failure to give Plaintiff proper credit as author and/or producer, however, is foreclosed by *Dastar*."²⁵⁶ This even ultimately affected the end of the *Crusades in Europe* case: in *Twentieth Century Fox Film Corp. v. Dastar Corp.*,²⁵⁷ the Ninth Circuit had to reconsider the plaintiff Fox's unfair competition claim in light of the Supreme Court's 'refining' the definition of the term "origin of goods."²⁵⁸ Because the Court's defining 'origin' "impliedly rejected any consumer confusion regarding Defendants' product,"²⁵⁹ the defendant (Dastar Corp.) was the origin.²⁶⁰ There was no false designation of origin, and, thus, no consumer confusion.²⁶¹ The Ninth

²⁵³ *Williams*, 281 F. Supp. 2d at 1183.

²⁵⁴ *Williams v. UMG Recordings*, 281 F. Supp. 2d 1177, 1177 (C.D. Cal. 2003).

²⁵⁵ 2003 U.S. Dist. LEXIS 17902, at *1 (N.D.N.Y. Oct. 9, 2003) (discussing plaintiff's claim as alleging that defendants used his storyline and treatment for film, and then failed to credit him as film's producer and author).

²⁵⁶ *Id.* at *15. See *Bretford Mfg. v. Smith Sys. Mfg. Co.*, 286 F. Supp. 2d 969, 972 (N.D. Ill. 2003) (holding that there is no misrepresentation in false designation 'reverse passing off' claim because, after *Dastar*, court interprets the Lanham Act as being concerned with completed tangible product in marketplace); see also *Larkin Group, Inc. v. Aquatic Design Consultants, Inc.*, 323 F. Supp. 2d 1121, 1126–27 (E.D. Va. 2004) (holding that Lanham Act claim based on use of another's ideas in business proposal without attribution of credit is foreclosed by *Dastar*); *Tao of Systems Integration, Inc. v. Analytical Serv.'s & Materials, Inc.*, 299 F. Supp. 2d 565, 572 (E.D. Va. 2004) (explaining that elimination of Lanham Act claim for use of another's ideas in business proposal is type of action intended by Court to be precluded by *Dastar*).

²⁵⁷ 2003 U.S. Dist. LEXIS 21194, at *1 (C.D. Cal. Oct. 14, 2003).

²⁵⁸ *Id.* at *6–7 (announcing that Court's decision to define "origin of goods" changed law).

²⁵⁹ *Twentieth Century Fox Film Corp.*, 2003 U.S. Dist. LEXIS 21194, at *8.

²⁶⁰ See *id.* at *8 (explaining how Court's definition of 'origin' rejects the possibility of consumer confusion); see also *Larkin Group, Inc. v. Aquatic Design Consultants, Inc.*, 323 F. Supp. 2d 1121, 1124–27 (E.D. Va. 2004) (explaining that under *Dastar* 'origin' of final product is producer of it, not simply someone who contributed to it); *Tao of Systems Integration, Inc. v. Analytical Services & Materials, Inc.*, 299 F. Supp. 2d 565, 572 (E.D. Va. 2004) (noting that contributor of ideas to final business proposal is not 'origin' of final business proposal under *Dastar*).

²⁶¹ See *Twentieth Century Fox Film Corp.*, 2003 U.S. Dist. LEXIS 21194, at *8 (noting that definition of 'origin of goods' in *Dastar* rejects possible consumer confusion regarding

Circuit holds that, correspondingly, the defendant Dastar caused no consumer confusion under the congruent California unfair competition claim.²⁶²

In the First Circuit's *Zyla v. Wadsworth*²⁶³ decision, another Lanham Act claim was barred due to *Dastar*.²⁶⁴ A professor sued under §43(a) of the Lanham Act because her work had been used in the fourth edition of a textbook without her permission or appropriate attribution.²⁶⁵ The First Circuit states, "[t]he Supreme Court has determined, however, that §43(a)(1)(A) does not apply to the type of claim that [the plaintiff] raises. . . . [c]laims of false authorship should be pursued under copyright law instead of under the Lanham Act."²⁶⁶ In *Boston Int'l Music, Inc. v. Austin*,²⁶⁷ also in the First Circuit, the Supreme Court's "origin of goods" definition in *Dastar* barred the plaintiffs' false designation of origin claims in violation of §43(a) of the Lanham Act.²⁶⁸ Here,

parties' works); see also *Bretford Mfg. v. Smith Sys. Mfg. Co.*, 286 F. Supp. 2d 969, 971–72 (N.D. Ill. 2003) (explaining that origin of table was its producer and not producer of legs used to construct it); *Williams v. UMG Recordings*, 281 F. Supp. 2d 1177, 1183 (C.D. Ca. 2003) (concluding that Court's interpretation of 'origin of goods' in *Dastar* precluded Lanham act claim by contributor of ideas to movie).

²⁶² See *Twentieth Century Fox Film Corp.*, 2003 U.S. Dist. LEXIS 21194, at *8 (holding that defendant's claim to be sole producer did not create consumer confusion); see also *Garrett*, *supra* note 23, at 575–80 (explaining how there can be no consumer confusion over origin of works in public domain); *Simko*, *supra* note 121, at 358–68 (discussing role of consumer confusion in Lanham Act claim after Supreme Court's decision in *Dastar*).

²⁶³ 360 F.3d 243, 251–52 (1st Cir. 2004) (holding that *Dastar* precludes Lanham Act action brought by author of portion of text used to construct complete textbook edition).

²⁶⁴ See *id.* at 251–52 (concluding that *Dastar* is controlling case for this set of facts); see also *Schiffer Publ'g, Ltd. v. Chronicle Books, LLC*, 2004 U.S. Dist. LEXIS 16180, at *11–*12 (D. Pa. 2004) (citing *Wadsworth* for proposition that removing author's name from work does not create valid Lanham Act claim). But see *Empresa Cubana Del Tabaco v. Culbro Corp.*, 2004 U.S. Dist. LEXIS 4935, at *85–*86 (S.D.N.Y. 2004) (finding valid Lanham Act claim where plaintiff and defendant had similar marks for their brands of cigars even though they were not competing in same country due to trade embargo).

²⁶⁵ See *Zyla*, 360 F.3d at 246 (noting that plaintiff felt this would cause confusion as to origin of the good); see also *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77, 78–79 (2d Cir. 2004) (finding that compiler of certain author's poems had no valid Lanham Act claim against publisher that originally turned down compilation and subsequently published their own compilation of same author's poems); *Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550, 552 (10th Cir. 1998) (holding no likelihood of confusion between plaintiff *Heartsprings* and defendant *Heartspring's* marks despite similarity of marks).

²⁶⁶ *Zyla*, 360 F.3d at 251–52 (citing *Dastar Corp. v. Twentieth Century Fox*, 123 S. Ct. 2041, 2048–2049 (2003) (stating that, "no false designation of origin had occurred because *Dastar* accurately identified itself as the manufacturer of the physical video, even if it had not accurately credited others for the creative content of the video").

²⁶⁷ 2003 U.S. Dist. LEXIS 16240, at *1 (D. Mass. Sept. 12, 2003) (stating "no false designation of origin had occurred because *Dastar* accurately identified itself as the manufacturer of the physical video, even if it had not accurately credited others for the creative content of the video").

²⁶⁸ See *id.* at *3–*4 (noting that their claim is "sufficiently covered by the law of Copyright"); see also *Auscape Int'l v. Nat'l Geographic Soc'y*, 2004 U.S. Dist. LEXIS 15764, at

plaintiffs claimed that defendants impermissibly copied distinguishing parts of their composition or stole a sample from the sound recording into the defendants' song.²⁶⁹ Citing *Dastar* to find no false designation of origin, the First Circuit dismisses the plaintiffs' Lanham Act claim "because the...claims are sufficiently covered by the law of copyright, and [we] decline to construe §43(a)...to require attribution to plaintiff [for the song] where the defendants here are the 'origin' of the product they recorded, produced, and sold on their own."²⁷⁰

VI. CONCLUSION

Ultimately, in defining "origin of goods" in §43(a) of the Lanham Act to mean "the source of wares...the *producer* of the tangible product sold in the marketplace,"²⁷¹ – not, notably, the initial creator of that product, the main legacy of *Dastar Corp., v. Twentieth Century Fox Film Corp.*²⁷² seems to be a negation of an attribution right under the Lanham Act, with a focus on works falling into the public domain upon copyright expiration. Supporters of an attribution right can hope that VARA lives up to its potential as the route to attribution for visual artists; however, what is *really* the course for works that do not fit VARA's tight specifications? Conversely, *Dastar's* bright side is exactly this

*41 (S.D.N.Y. 2004) (citing *Dastar* for proposition that Lanham Act protects producer of goods and not originator of goods); *Eco Mfg. LLC v. Honeywell Int'l, Inc.*, 2003 U.S. Dist. LEXIS 11384, at **5 (S.D. Ind. 2003) (agreeing with *Dastar* notion that "after the patent expires...the American public has the right to practice the invention").

²⁶⁹ See *Boston Int'l Music*, 2003 U.S. Dist. LEXIS 16240, at *3–*4 (noting that defendants did not credit plaintiff as author of work); see also *DigiGAN, Inc. v. iValidate, Inc.*, 2004 U.S. Dist. LEXIS 1324, at *14 (S.D.N.Y. Feb. 3, 2004) (referring to *Dastar* in patent case to show that Lanham Act is not "a panacea for all unfair trade practices"); *Butler v. Target Corp.*, 2004 U.S. Dist. LEXIS 12829, at *17–*18 (D. Cal. 2004) (quoting *EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopolos, Inc.*, 228 F.3d 56, 64 (2d Cir. 2000), as amended) (proposing that "Concluding that a song can serve as an identifying mark of the song itself would stretch the definition of trademark -- and the protection afforded under § 43(a) -- too far and give trademark law a role in protecting the very essence of the song, an unwarranted extension into an area already protected by copyright law.").

²⁷⁰ *Boston Int'l Music*, 2003 U.S. Dist. LEXIS 16240, at *4 (citing *Dastar*, 123 S.Ct. at 2050) (highlighting that phrase 'origin of goods,' as used in §43(a) of Lanham Act 'refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept of communication embodied in those goods').

²⁷¹ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31 (2003) (emphasis added) (noting that this is most natural interpretation of word "origin").

²⁷² See *Dastar*, 539 U.S. at 25 (acknowledging that defendant is not original creator of work); see also *McLain, supra* note 11, at 72 (noting that *Dastar* has left "no right of attribution to the creator of an underlying or original work when that work is in the public domain and is copied by another").

emphasis on the public domain's importance. With such a globally connected world, and the importance of the World Wide Web, such a hearty and broad public domain allows for the free flow of information – and the future of the copyright system itself. Thus, *Dastar* allows that 'carefully crafted' copyright bargain to flourish.

