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2005

## Artists Don't Get No Respect: Panel on Attribution and Integrity

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28 Colum. J.L. & Arts 435-449 (2005)

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# GEORGETOWN LAW

## Faculty Publications



April 2010

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## Symposium: Metamorphosis of Artists' Rights in the Digital Age

### Artists Don't Get No Respect<sup>1</sup>: Panel on Attribution and Integrity

Moderator: Robert Clarida

#### Panelists:

##### **Jonathan Band**

*Partner, Morrison & Foerster*

Jonathan Band is a partner in the Washington, D.C. office of Morrison & Foerster, LLP. Mr. Band's areas of practice include intellectual property, administrative and appellate litigation, Internet regulation and legislation. Mr. Band also has advised clients on Internet issues including spam, privacy, gambling and indecency. Mr. Band is the co-author of *Interfaces on Trial: Intellectual Property and Interoperability in the Global Software Industry*, published by Westview Press, and over fifty articles on intellectual property and Internet topics. He is an adjunct professor at Georgetown University Law Center, and he serves on the Editorial Board of *The Computer and Internet Lawyer*. Mr. Band received his B.A., *magna cum laude*, Phi Beta Kappa, from Harvard College and a J.D. from Yale Law School. He is admitted to practice in the District of Columbia and California and before the U.S. Supreme Court and the U.S. Courts of Appeals for the Eighth, Tenth and District of Columbia Circuits. In 2003, Mr. Band filed a brief before the U.S. Supreme Court on behalf of the American Library Association and other groups in *Dastar v. Twentieth Century Fox*.

##### **Rebecca Tushnet**

*Assistant Professor, New York University Law School*

Rebecca Tushnet is an assistant professor at the New York University School of Law, visiting at Georgetown University Law School 2004-2006. After clerking for Chief Judge Edward R. Becker of the Third Circuit Court of Appeals in Philadelphia and Associate Justice David H. Souter of the U.S. Supreme Court, she practiced intellectual property law at Debevoise & Plimpton before joining the NYU faculty. Her publications include *Copy This Journal: How Fair Use Doctrine Harms Free Speech and How Copying Serves It* (Yale L.J. 2004), *Copyright as a Model for Free Speech Law* (B.C. L. Rev. 2000) and *Legal Fictions: Copyright, Fan Fiction, and a New Common Law* (Loy. L.A. Ent. L.J. 1997). Her work currently focuses on the relationship between the First Amendment and copyright

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1. This play on words is attributed to Rodney Dangerfield.

and false advertising law. She has advised and represented several fan fiction websites in disputes with copyright and trademark owners. She is also an expert on the law of engagement rings.

**Eugene Mopsik**

*Executive Director, American Society of Media Photographers*

Eugene Mopsik, a successful Philadelphia corporate/industrial photographer, took up his appointment as Executive Director of the American Society of Media Photographers (ASMP) in January of 2003. Since joining ASMP in 1975, Mr. Mopsik has played a key role in the organization's activities from chapter to national levels. Prior to his appointment as Executive Director, Mr. Mopsik served on ASMP's board of directors, including a term as president in 2000-2001. Mr. Mopsik frequently participates in trade association panel discussions and has spoken at the University of the Arts, Moore College of Art, and Drexel University. Recently, he has been involved in discussions with the *New York Times* regarding its new freelance contract and has worked to create new agreements between photographers and the American Institute of Architects (AIA) regarding the rights to images submitted for various AIA competitions. Mr. Mopsik received his B.S. in Economics from the Wharton School of the University of Pennsylvania. Contrary to the good advice of family, friends, and the Philadelphia Small Business Development Center, he proceeded with his chosen career in commercial photography. His photography work was primarily corporate/industrial for such clients as Mack Trucks, Mitsubishi/Fuso, Hyster Company, Ingersoll-Rand, Reed Publishing and Citicorp.

**MODERATOR:** First we're going to be talking about the *Dastar* decision.<sup>2</sup> The *Dastar* decision was issued last summer by the U.S. Supreme Court, which addresses the issue of how, if at all, does section 43(a) of the Lanham Act<sup>3</sup> apply to works of authorship when they're imbedded in tangible products? The decision left a lot of people scratching their heads because section 43(a) was supposed to be an important part of the U.S. commitment to respect moral rights when we joined the Berne Convention in 1989. And now in the wake of *Dastar*, it seems that that may no longer be possible. You may remember the Gilliam against ABC case involving the Monty Python episodes that had been edited for television?<sup>4</sup> What's the fate of a decision like that in the wake of *Dastar*? Is there still a viable claim for misattribution of an artistic work after *Dastar*? We will turn to Professor Band for a more thorough examination of this conflict.

**BAND:** I am going to discuss not only the *Dastar* decision but also *the Family*

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

3. 15 U.S.C. § 1125(a) (2000).

4. *Gilliam v. American Broadcasting Company*, 538 F.2d 14 (2d Circuit 1976).

*Movie Act*<sup>5</sup> and the *Clear Play* litigation<sup>6</sup> and other legislation that also has an impact on this whole issue of moral rights. Now when people discuss moral rights, they're usually talking about two things. One is the right of integrity, in other words, the author's right to prevent other people from changing the work, distorting the work, mutilating it, putting it in an unfavorable light, that kind of thing. And second, they might be discussing the right of attribution, meaning whenever the work is reproduced or re-disseminated, the author's name is always attached to it. Certainly in the continental European view of copyrights and moral rights are extremely important. Copyright in Europe is seen in many ways as an extension of the author's personality, and, therefore, rights of integrity and attribution are extremely important. European countries are also part of the Berne Convention.<sup>7</sup> If a lot of you have taken a copyright class here, you may have heard that there are virtually no moral rights in the United States, and, certainly, our general approach to copyright is very different from the European approach. We have much more of an economic incentive based model as opposed to this continental view that copyright is really about protecting the author's personality or the extension of the author's personality. This has created a very different orientation. But to some extent there has always been some recognition of moral rights in the United States.

Historically, the right of integrity in the United States has been guaranteed through the right to prepare derivative works based on the copyrighted work. In copyright law, this is covered by section 106(2) which says that a derivative work right is part of the bundle of rights that belongs to the copyright owner.<sup>8</sup> In addition, section 106(a), the Visual Artist's Rights Act,<sup>9</sup> gives added protections that you don't find anywhere else in the Copyright Act. This is seen as the basic framework for all works and their owner's moral rights: you have the right to prepare derivative works and you have specialized rights in the Visual Artist's Rights Act.

Section 43(a) of the Lanham Act is one of these catch-all provisions at the end of the trademark law, and it is usually used for the doctrine of passing-off, and it is the type of trademark violation or misappropriation that you typically see.<sup>10</sup> So, for example, let's imagine that I decided to go into the watch making business. No one would want to buy a Band watch. So let's say I started labeling it Rolex. Let's say I started putting the label Rolex on it. That would be passing-off. I would be passing-off my product as if it were a Rolex watch and that would obviously be a bad thing to do and that would, in addition to being a violation of other parts of the trademark law, to the extent that Rolex is registered, it would also be passing-off in

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5. Family Movie Act of 2004, H.R. 4586, 108th Cong. (2d Sess. 2004).

6. See Rick Lyman, *Hollywood Balks at High-Tech Sanitizers; Some Video Customers Want Tamer Films, and Entrepreneurs Rush to Comply*, N.Y. TIMES, Sept. 18, 2002, at E2 (describing the litigation initiated against Clearplay).

7. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979.

8. 17 U.S.C. §106(2) (2000).

9. *Id.* § 106(a).

10. 15 U.S.C. § 1125(a) (2000).

violation of section 43 of the Lanham Act.

Reverse passing-off is a little different. It's kind of a counter intuitive notion. Let's say I was trying to make everyone think that Band watches were really good watches. So, conceivably, I would buy Rolex watches and label them as Band watches, and then they would go into the marketplace, and you would have all these product reviewers that say "Hey, these Band watches are really good!" Now obviously, in the long term, that would be a pretty bad strategy because I'd have to spend 1,000 dollars a watch to buy the Rolex and only sell it for 100 bucks. But, conceivably, over time, once I build up my brand, I might be able to switch and then sell the crummy watches that I was importing from Taiwan, and I could still have the Band label. People would remember the good Band watches which were in fact really Rolex watches. That's the doctrine of reverse passing-off that happens much more rarely, and again there's always kind of a unique market situation why a person would have an incentive for reverse passing-off.

At some point, smart lawyers realized that the doctrine of reverse passing-off could be used in the attribution context. Now remember, there is no specific right of attribution under the U.S. copyright law, but, in various cases, people were able to start using the reverse passing-off doctrine as a way of making sure that they gained attribution. For example, people in the entertainment industry would say, "look, I want to make sure that I get credit when my work is being distributed," and they would argue that "if the work was distributed without my name on it then and it was distributed as if someone else were the producer, or the director or the author" and therefore this was reverse passing-off.

Then a split emerged between the Ninth Circuit and the Second Circuit in terms of how much needed to be taken before you could make this reverse passing-off claim. The Ninth Circuit rule was that if a person engaged in bodily appropriation of someone else's work and then put his name on it, that was reverse passing-off.<sup>11</sup> The Second Circuit used a substantial similarity standard. The substantial similarity standard resembles the test for copyright infringement. The Second Circuit imported the substantial similarity standard for copyright infringement into this reverse passing-off context.<sup>12</sup> So in other words, if a publisher published a book that was substantially similar to my book but then put my name on it, not only would I have a copyright claim against that publisher, but I might also have a Lanham Act claim that he was reverse passing-off.

So, you had the circuit split, and then the *Dastar* case came along. Now it's interesting that these cases especially always arose where there was a reason for the copyright claim not to work. That was the case in the *Dastar* case. Twentieth Century Fox converted the memoirs of Dwight D. Eisenhower into a TV series. At some point, however, Fox screwed up the renewal of the copyright. And so even though Eisenhower still had a copyright in the underlying memoirs on which the TV series was based, Fox lost its copyright in the series itself.

Dastar decided to make its own miniseries of video cassettes based on the

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11. See *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990).

12. See *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775 (2d Cir. 1994).

Twentieth Century Fox series. They took the Fox footage and added some of their own stuff, and they distributed it on videocassette. Fox sued along with Eisenhower's estate. The Eisenhower case proceeded forward because the copyright was still good. But Fox's case, at least the copyright part, was dismissed because Fox had not renewed its copyright. Fox pressed forward with a Lanham Act claim. It said that Dastar was engaged in reverse passing-off. It argued that Dastar was claiming that the Fox footage is Dastar product and that violates Twentieth Century Fox's rights of attribution. Dastar had never attributed the footage to Twentieth Century Fox.

The Ninth Circuit ruled against Dastar, which sent it up to the Supreme Court. Everyone assumed that the decision would focus on the standard to be applied in attribution cases: do you use the Ninth Circuit standard of bodily appropriation or do you use the Second Circuit standard of substantial similarity? The lawyers for Dastar, sort of as a tertiary argument, argued well, "you know, there really should be no reverse passing-off argument at all under section 43(a) of the Lanham Act because it doesn't comport with the way the statute's written." No one really took that argument seriously except for Justice Scalia. He ruled that section 43(a) does not create a cause of action for non-attribution.<sup>13</sup> Although he didn't throw out reverse passing-off all together, he did say that it didn't create a cause of action for non-attribution when you were dealing with communicative products. In other words, when you were dealing with copyrightable works, there was no reverse passing-off protection. He came to this conclusion by looking very carefully at the wording of the statute. The statute, he argued, discusses misrepresenting what was the origin of the good. He argued the "good" was the videotape cassette and the videotape cassette is made by Dastar. Dastar, in fact, is the entity that is making the videocassette. Therefore, it is not engaged in reverse passing-off.

The informational content stored on the videocassette came from Twentieth Century Fox, but Justice Scalia argued that the footage is not what section 43(a) of the Lanham Act protects. The question is where did this good come from? The good, which is this videotape came from Dastar. So, the essence of the *Dastar* decision is that you could no longer use section 43(a) of the Lanham Act when you were dealing at least with the distribution of hard copy because either the book would be coming from the publisher who actually printed it or the videotape is coming from whoever is actually making and distributing the videotape cassette. Now, you have to look at who is making the physical object as opposed to what is the source of the informational content. And Scalia sort of justified this saying, if this were not the case, the Lanham Act would be creating a species of mutant copyright law.

The other very powerful image in the *Dastar* opinion is the problem of giving attribution and how far back do you go? If you base a book on a movie, and then the movie itself was based on something else, and that was based on some folk tale, the question is how far back do you go? Scalia argued that such a quest was like

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

looking for the source of the Nile.<sup>14</sup> Both of these images (of mutant copyright law and the source of the Nile) were taken directly from the petitioner's brief—but he failed to attribute them.

Now to the *Clearplay* issue. We will need the right of integrity which really derives from the right that the author has to make derivative works. Clearplay is a small company in Utah which has developed software which is loaded in a special kind of DVD player which automatically skips content that the user decides is offensive.<sup>15</sup> For example, the user rents *Saving Private Ryan* and the user decides it's too bloody and uses the Clearplay technology (which has fourteen different filters to choose from) to omit offensive content. The technology works by having someone at Clearplay code the movie and creates the filter to run with the particular movie and then the user decides what filters to use.

Now, once Clearplay put this on the market, it got the angry letters from individual directors and from the Directors' Guild of America claiming that this technology was a violation of the Copyright Act and the Lanham Act although they were not necessarily very clear on what the theory was.<sup>16</sup> They were just complaining that the product was wrong and Clearplay should stop distribution. As a result, Clearplay and a few other companies producing the product filed a declaratory judgment action still pending in Colorado.<sup>17</sup> If you examine the various counterclaims that were filed by the directors, the precise legal theory changes. It varies from direct infringement to contributory infringement to the right to create derivative works to a user's creation of a derivative work. This might reflect that there is not a strong basis for the director's claims, but, in any case, these motions are still pending.

Because this litigation has gotten quite a bit of attention, and it precipitated the introduction of the Family Movie Act<sup>18</sup> by Chairman Lamar Smith who is the Chairman of the House Intellectual Property Subcommittee. And, in essence, the legislation says that if you have a technology that allows this kind of skipping over offensive contents such a technology is not in violation of the Copyright Act or the Lanham Act. The Act would immunize the Clearplay technology from suit.

There was a hearing before the House IP Subcommittee about this bill on the 17th of June,<sup>19</sup> and I just want to summarize some of the testimony. Mary Beth Peters, the Register of Copyrights, testified against the bill arguing that the legislation is premature—after all, there had not been a decision in the litigation. There was therefore no reason to have legislation responding to litigation before you have any kind of decision. She expressed great ambivalence about the

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14. *Id.*

15. See Clearplay, <http://www.clearplay.com> (last visited May 18, 2004).

16. Documents for the litigation are available at *Director's Guild of America*, Archives (Sept. 20, 2002) at [http://www.dga.org/news/pr\\_expand.php3?281](http://www.dga.org/news/pr_expand.php3?281).

17. *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. filed Oct. 28, 2002).

18. Family Movie Act of 2004, H.R. 4586, 108th Cong. (2d Sess. 2004).

19. *Family Movie Act of 2004: Hearing on H.R. 4586 Before the House Subcomm. On Courts, the Internet and Intellectual Property*, 108th Cong. 111 (2004), available at <http://www.copyright.gov/docs/regstat061704.pdf> [hereinafter *Family Movie Act Hearings*].



technology. She argued that if the user was so concerned about the offensive content of the DVD, he had a choice to buy the product. If you are going to rent or buy the DVD, the user should respect the vision of the director. Peters also didn't like the notion that a business was being built on other people's content. In other words, Clearplay was building its business model on the content that the various studios were producing.

Peters also insinuated that Clearplay was violating moral rights in changing the way the movie was perceived. Steven Spielberg, when he made *Saving Private Ryan*, made it the way he wanted to make it using his artistic vision. Clearplay is allowing users to change the director's artistic vision. Peters said that even though it's contrary to the principle of moral rights, it doesn't actually violate any moral rights from VARA because it takes place in the context of a private performance, and the omissions are relatively minor, and the user is aware that this was not the director's artistic vision.

Peters then discussed whether Clearplay indeed violated existing copyright law. She argued that it was not an infringement of the reproduction right because no copies of the DVD are being made. Because of the way the technology operates, the DVD player plays the DVD and when it gets to the offensive "byte" it simply skips over it. Second, Peters argued that there was no infringement of performance right because the viewing was a private performance. The technology was typically used in the home.

Peters then confronted and discussed in depth whether Clearplay was an infringement of the derivative work right. Again, she argued that there was no public performance or fixation. There is a split in the circuits right now on whether someone violates the derivative work right even if a copy is never made.<sup>20</sup> In addition, the Clearplay software isn't a derivative work because the software itself doesn't include the underlying work. The code of the software simply indicates where to skip; it tells the DVD player skip at byte 45, byte 200, etc.

Jack Valente, who is the former president of the MPAA, also testified against the bill.<sup>21</sup> He argued the Clearplay technology did contribute to infringement of the derivative work right, and he pointed to the fact that you could design the software to skip for any purpose, not only offensive content. His view was let the market and industry negotiations work this out. Let Clearplay negotiate some kind of license with the studios rather than Congress meddle with it.

Notwithstanding the testimony of Valente and Mary Beth Peters, the House of Representatives passed the bill anyway. The bill indicates that as long as you don't make a permanent copy of the edited work, it's not infringement, either of copyright or trademark law. The two limitations are simply that: (1) you can't have a fixed copy of the altered version, and (2) that no changes, deletions or additions are made to commercial advertisement. So in other words, you're able to skip the artistic vision of the artist. But heaven forbid that the software skip over a

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20. Compare *Lewis Galoob Toys v. Nintendo of America*, 964 F.2d 965 (9th Cir. 1992), with *Midway Mfg. Co. v. Artic Int'l. Inc.*, 704 F.2d 1009 (7th Cir. 1983), cert. denied, 464 U.S. 823 (1983).

21. *Family Movie Act Hearings*, supra note 19.

commercial! The Family Movie Act was passed by the House in September, and then it moved to the Senate. In the Senate, it was part of HR-2391 which was sort of an omnibus intellectual property bill. The bill did not pass the Senate before the Senate adjourned, and one of the reasons why it didn't pass was because of the commercial skipping language. So this whole IP bill collapsed in large measure because of that little provision. The Senate will have another chance to address the bill after the election.<sup>22</sup>

**TUSHNET:** I actually wanted to talk about fan creativity and its relationship to attribution, drawing on what came out of *Dastar*. I say fan creativity, and not fan fiction, because one of the things that broadband has brought us is what I like to call fan creativity. No longer do fans who want to share their creations with other fans of the same television show or movie or book have to attend a convention. No longer do they just share their new stories, they can also share arts they've drawn, photographs they've manipulated, and, my current favorite, music videos made with clips from the film, re-cut, re-edited into a new story to the accompaniment of music. And that's why I'm going to say fan creativity at this point.

I focused before solely on the fiction, because that was almost all of what was out there. Now there's much more. When I was considering the question of the moral right to attribution and how unauthorized fan creativity relates to that concept, it struck me that there are two interesting issues from a theoretical perspective. The first is: who gets the credit? When I was in law school and discovered fan fiction, the reason why I got into intellectual property was because most of these stories had a disclaimer—no copyright infringement intended, these characters aren't mine, I'm not making any money, please don't sue. And as a student, my question was—does that work? Is that good enough? I was interested in these disclaimers because copyright law does not have an explicit place in the fair use test for evaluating disclaimers as a factor favoring a defense in the way that trademark law does. I, nonetheless, concluded that, in general, fan fiction was going to be fair use. It has yet to be litigated to any particular conclusion. Although cease and desist letters do so still go out, and fans still either comply or they say no, generally there is no result. That is, I think a lot of the copyright owners are unwilling to deal with the publicity and the possibility of finding this as fair use in a litigated case.

Anyway, one of the things I've noticed over the past seven years is that the disclaimers seem to be becoming less common. Fans just launch right into their creation. Is this a sign of increasing disrespect for intellectual property meaning another side effect of the "Napsterization" of Internet culture? I concluded that the answer is no, not necessarily.

I want to go to the title of this panel—"Authors Don't Get No Respect." Do we think that Mr. Band is a plagiarist because he didn't say "Authors Don't Get No Respect," c.f. Rodney Dangerfield? No, of course we don't because we all knew the reference. And just as we know the reference, no one who reads the fan story

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22. Congress enacted the ClearPlay legislation this year as Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 167, 119 Stat. 218 (2005).

or looks at a piece of fan art on the Internet is likely to think that fan made up Superman, or Harry Potter. It is the social context that provides the disclaimer inherently in the production, not necessarily an explicit reference.

The existence of social practices about attribution could *potentially* solve the problem in *Dastar* that Justice Scalia cribbed: tracing the source of the Nile. We could have a social consensus about when attribution is important, and that could actually limit the nightmarish problem of finding out who really created the documentary edition in *Dastar*. Fox might not have won if we look at social practices of attribution, since probably people don't care that much. In fact, Fox didn't even make the documentary—Fox bought the rights. So to say that Fox is the proper source doesn't make sense even if we assume that people care about who is the source of the footage.

Attribution doesn't have to be explicit to give credit if the audience knows the source of the material. This ties into the idea of materiality which is more important in false advertising law than it is in trademark law. However, it plays a role here mainly whether people care about where the material they're looking at comes from. Literary or creative source is material to audiences in a different way than trademark ordinarily expects. That is, let's assume that you are faced with two big thick novels, both of which say Tom Clancy on the cover. One of them is a pirate copy of *The Hunt for Red October*, by a pirate publisher, not sending any money back to Tom Clancy, not authorized. But it is nonetheless "the book." And then you have another novel that says Tom Clancy on the cover, it's from Tom Clancy's publisher, Tom Clancy gets money when it's sold, but it's not written by Tom Clancy—it's written by somebody else. Now, which one of those is the Tom Clancy novel? I think a lot of us would feel that the pirate copy has a stronger moral claim to be a Tom Clancy novel and a stronger claim of attribution than the legitimate one. Because what we care about was who came up with the work. Similarly, I think that as a matter of social practice, nobody cared where Scalia got this language from in *Dastar* because the point of the brief was to get into the opinion. That's the best thing that could possibly have happened to the language in the brief. So who cares about attribution? This kind of variation in social norms about attribution is not the same as with ordinary trademarks. To say what I said about the Clancy novel, it would be ridiculous to say the same thing about a counterfeit Chanel handbag. And that's one of the reasons that attribution fundamentally doesn't fit in the scheme as it was set up under the Lanham Act which is a trademark-focused scheme.

While the first half of this discussion was based on who gets the credit, the second is who gets the blame? What happens when there's stuff we don't like? This is a concern in fan creativity, often when the fan introduce sexuality into places—a romance between Captain Kirk and Mr. Spock is sort of the standard example. So, obviously, Viacom does not want that to be the official interpretation of the relationship. So, who's responsible for that interpretation, when fans write stories in which Kirk and Spock are lovers? Well, transformative use has been defined in copyright law as adding new material that reflects critically on the original and produces a new work. And, the court has distinguished between

parody, which has a strong claim to fair use, and satire which has a much weaker claim. Parody comments on the work itself. Satire just uses the work to criticize something else. But that means that transformative use and parody critically depend on what was already in the work. A parody or a transformative work is a work in which subtext becomes text. "Sexualizing Barbie" (which happens in a number of cases that Mattel has lost<sup>23</sup>) is another example when a court finds fair use, it tends to say "of course, it's obvious that you could find sexuality in Barbie, even though Mattel doesn't want to admit it." Clearly she started as a sex toy and has not changed so much from it.

Using transformativeness in fiction may give the author the unkindest cut of all because the court holds when the use is transformative that the interpretation was in the text all along—it was therefore the audience to define all along.

To bring this back to the fan creativity, I think fan creators have the same sort of sense about their work as the courts when they talk about transformative use. They also have to goal of finding the original elements that spur their creative work. So one of the elements of critical debate in evaluating fan works among fans is, is it a good characterization? Does the fan creation sound like Kirk and Spock? Does this sound like characters in Harry Potter? So even if they are having sex, does it seem like something Kirk and Spock would do? And that idea of good characterization is that the fan creator is just finding something that was in the text all along and making a plausible extension. I think these are puzzles for concepts of fair use and certainly of moral rights, because we do want to let people have interpretations of works but we do have to recognize that the interaction between the audience and the text is complicated and may end up in ways that the author didn't intend.

**MOPSIK:** Over the years the American Society of Media Photographers (ASMP) has worked closely with the registrar of copyright to try to effect changes beneficial to working photographers. We worked very closely to effect the passage of the changes in 1976. And beyond that, we were instrumental in the copyright author regulations that allow for group registration of published images which was a very big issue for photographers. One of the reasons that attribution, in particular, is important to commercial photographers is that it, in many ways, is keyed to proper compensation. For the most part, our members are not as concerned with integrity, although I do have a bunch of good examples involving that. But generally, a commercial photographer licenses the use of an image for a particular use over particular time for a certain number of times. He may be compensated on the space, he may be compensated on the size of the press run and the use.

But whether or not that image is cropped, modified or recombined, for the most part, is not an issue for the photographer. A photographer licenses that image for that commercial use and only in certain cases would the client not be able to pretty much use it as they see fit. Recently, we had the case of running a group of archive images in our quarterly publication of *Bulletin*, and we had to contact Richard

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23. See *Mattel, Inc. v. Walking Mountain Productions*, 353 F. 3d 792 (9th Cir. 2003).

Avedon shortly before his death. Avedon was a photographer who could certainly control the integrity of his images by the sheer force of his reputation within the marketplace. And one of the issues that Avedon raised with us was: if we are going to run a very famous photograph of his, *Nastasha Kinski and the Snake*, no other photograph could appear on the same page with his. We could have text on that page, but no other photographs.

And that worked fine for us because we just moved all our text onto that page and then ran other images in other pages. We had four pages of photographs. But you know that's an incidence where a photographer can exercise that kind of will. Those cases are the exception.

Generally images don't appear with credit except in editorial market and frequently in textbooks. With the exception of someone like Annie Leibowitz who did the "Got Milk" campaign featuring people with white mustaches, photographs of the famous personalities have no identification of the photographer. The Annie Leibowitz photographs have a very fine line that identifies who the personality is and identifies her as the photographer. Generally, though, in advertising, images appear without attribution. The same thing is applicable in collaborative material and sales brochures. Occasionally, or not uncommonly, in the back of annual reports, there will be a very small photo-credit. But you rarely see on-page credits or coincidental credits or copyright notices for photographers.

In newspapers, you generally have on-page credit, but it is becoming complicated because now you've got a photographer's name along with the name of his photo agency. In certain cases, there will be no credit for the photographer, but it will be just the stock agency that is credited. One of the issues with the credits especially in the editorial market is that the editorial market is at the low end of compensation for photographers and part of the compensation, effectively, is having that on-page credit. So if you are doing a work for the *New York Times*, and you know that you are not being compensated (from a cash stand point) at the reasonable level, part of the compensation is the fact that here you are in the *New York Times* with its extraordinary distribution and the prestige that the *Times* carries and you have a photo credit there. So then your corporate clients or other clients may see this and attribute to you some additional value and that allows you to further promote your services. So, when you don't have that credit or cash, you're really coming out short in the editorial market.

One of the big problems facing photographers in the digital environment is the tracking of images. There are certain exit data that can be attached to images, but currently there is no way to keep that information from being stripped. So as the image moves from the photographer to the client or moves from the stock agency to a licensed user, the attribution information can be stripped.

Most photo-manipulation programs bury the attribution information, and you have to go in and dig it out. At the same time, it is very easy to strip from the file and therefore is difficult for the photographer to track uses and changes.

When a client purchases a license for an image, the image is sitting in some art director's hard drive. The paperwork that describes the license granted is probably either in accounting office or some art buyer's office. So, down the line, if

someone wants to use the image, it becomes a real project to try to connect whatever the license was with the image and that further leads to abuse of copyright in the market.

There are other programs such as Google's "Image Search" program. You can go into Google right now, click on "Images" and type in a key word, for example, the Statue of Liberty. Up will come pages and pages of thumbnail images out of context without attribution. You can take those thumbnails and drag and drop them right off the page and put them anywhere. If you click on the image, it takes you to the image in context, at which point a little disclaimer comes up top saying that this image may be copyrighted, but in any case it greatly facilitates access to images.

Also mentioned in the previous panel discussion was Amazon's "Look-Inside-the-Book feature." What Mr. Taylor talked about was how authors can either grant permission or ask that those excerpts be taken down from Amazon. The problem for our members is that frequently there are images on those pages that are uploaded to the web, and we don't know of any occasions where Amazon has gone to the rights holders of those images and ask for permission to put them up there. They try to seek permission for the written content but not for the visual content.

You may have been aware earlier, well, in today's *New York Times* page A22, under advertising, a headline reads "Bush Campaign Replaces Ad that had Doctored Images."<sup>24</sup>

It was a case of a photograph of Bush speaking to an assembled group, and within the group, they literally added more soldiers to give a greater military presence to the image. Another case earlier this year was an image purported to be an AP wire photo of young John Kerry and Jane Fonda sitting side by side, with Jane Fonda speaking.<sup>25</sup> It turned out that these two images were taken by separate photographers, a year apart, at total different locations. Fonda was speaking indoors, and in fact she was standing. Kerry was in fact seated at a table. The images were taken back in 1970 and 1971.<sup>26</sup> They were recombined to come up with a single image that was circulated to the Internet, and was picked up by the news outlets and papers until it was verified by the actual photographers that this image in fact never existed. But it is just so easy right now using Photoshop to create images that have just incredible veracity. Previously it was much more difficult. You could do great retouching years ago but it was expensive.

Now this kind of recombination work and retouching is within easy reach of mass markets. Ken Light who was one of the photographers of the Kerry photographs wrote a *Washington Post* editorial Feb. 28, 2004. He said that, "It's not that photographic imagery was ever unquestionable in its veracity; as long as pictures have been made from photographic film, people have known how to alter images by cropping. But what I've been trying to teach my students about how easy

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24. Jim Rutenberg, *Bush Campaign Replaces Ad That Had Doctored Images*, N.Y. TIMES, Oct. 29, 2004, at A1.

25. See John Rockwell, *Artifice Can Be Art's Ally as Well as Its Enemy*, N.Y. TIMES, Mar. 12, 2004, at E4.

26. *Id.*

and professional-looking these distortions of truth have become in the age of Photoshop—and how harmful the results can be—had never hit me so personally as the day I found out somebody had pulled my Kerry picture off my agency's Web site, stuck Fonda at his side, and then used the massive, unedited reach of the Internet to distribute it all over the world."<sup>27</sup>

There was another case of a photographer named Leigh Fuphorse, a buddy of mine from Philadelphia. He took the photograph of Fonda seated in the foreground with Kerry kind of soft in the background at a rally which is an actual unretouched image. The image was placed with Corbis, a large stock agency, and it was lifted from their archives and used by anti-Kerry forces to show his alliance to Fonda.<sup>28</sup> One of the things on the horizon right now which seeks to solve some of these issues is an initiative called PLUS, which stands for Picture Licensing Universal System.<sup>29</sup> The PLUS Coalition is an inter-organization worldwide group working cooperatively to create and disseminate a universal picture licensing language for the benefit to picture licensors and licensees alike. It creates a series of classification codes for certain uses and then all of this information is embedded with the image and travels with it. And it is hoped in the long run that this kind of efforts will mediate some of the issues that we are facing right now.

**BAND:** I just wanted to mention actually that I completely agree with the point made about how attribution has a social context and how it varies widely. The petitioners in *Dastar* case were thrilled that Justice Scalia used their metaphors. They probably wouldn't have minded if he had dropped a footnote and given them a little credit. But certainly given that the main goal was to advance clients' interests, and their clients' interests were hugely advanced by his using their metaphors, that made the difference. But there is a difference between legal academia, where every sentence in a law journal should be footnoted, and legal practice, where you have Justice Scalia taking things from other people or you even have initiatives.

Some controversy is how some courts now issue findings of fact. When you get out to practice, a lot of times in litigation, the court will ask each side to give its own proposal of findings of law and facts. To some extent, a good judge will take a little bit from here and there and actually do their own work and comes the decision. But there are incidents where courts have wholesale-adopted one side's findings of law and findings of facts and then the decision was appealed on that basis. Most of the reviewing courts would say such a practice is ok because the parties agreed to such a process. But some courts have thought that it is improper.

Another area whether context makes a huge difference is popular history versus academic history. Again, academic history is very heavily footnoted (not as bad as a law journal), but you have to indicate where you got every fact, where you got every idea or other people who had similar ideas. Whereas in popular history there are no footnotes and no attribution. You are not supposed to infringe copyrights,

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27. Ken Light, *Fonda, Kerry and Photo Fakery*, WASH. POST, Feb. 28, 2004, at A21.

28. *Id.*

29. PLUS at <http://www.useplus.org> (last visited May 17, 2005).

but it is perfectly acceptable to copy as long as you are not copying expression.

**MODERATOR:** That brings out something that I wanted to ask you about in connection with *Dastar*. You were talking about reverse passing-off and the example that you gave was buying Rolex and put your name on it as reverse passing-off and it doesn't make a lot of economic sense for you to do that.

But it seems to me that in the context of communicative product, which is what you were talking about in *Dastar*, it makes a lot of sense for you to put your name on somebody else's work. This is a very different transaction and you have vast incentives to take credit for somebody else's work. In the aesthetic context, you want to say look at me, I made this great thing. In the context of watches, it is not gonna cost you thousand dollars to buy a Rolex.

**TUSHNET:** Not just in aesthetic context. Judges and partners are often quite willing to do the same thing.

**MODERATOR:** I am talking about communicative works, as opposed to hard goods. I don't know that it is a silly idea that you treat the two so differently, and what Justice Scalia did in *Dastar*, to say it makes no difference, goods are good, origins are origins. Attribution can have a lot of value in one context and not in the other.

I was also going to ask you a question about an area that you didn't get into and that has come up in my practice which is not so much fan creativity about fictional characters as about real people. There is certainly a lot out there. One of my clients is a broadcaster, and a number of on-air personalities are frequently the subject of very elaborate pornography which is written about and sold on the internet.

There was the decision of *Hustler Magazine v. Falwell*,<sup>30</sup> where there was a parody of Reverend Falwell in the *Hustler* magazine. And *Hustler* won the case on First Amendment grounds in the defamation context. That wasn't a right of publicity context where you are actually selling or making commercial use of someone else's name or likeness. I am wondering whether you feel that the First Amendment should be applied differently when it is a real person as opposed to fictional characters.

**TUSHNET:** I guess under current laws it is actually an easier case with a real person because there is no property the person can point to. I am actually very aware of this stuff that is available for free about the real people. If you are not selling it, then any right of publicity claim faces insurmountable barriers, and this is probably as it should be. That is, I think right of publicity makes most sense when somebody is trying to use a celebrity's persona to sell something of their own that the celebrity did not endorse

**MODERATOR:** Let me ask you a question, Mr. Band, about the Clearplay situation and about the legislation and litigation. As I recall the facts, there was a parallel practice going on where people actually bought tangible tapes and snipped out the parts they did not like, and then put them back together, and made them available. Is that litigation still going on to your knowledge and is that addressed

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30. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).



by this legislation?<sup>31</sup>

**BAND:** The litigation is complicated, because there are a lot of judgment actions and there are a lot of different practices and technologies. You can imagine three different scenarios. One is the Clearplay software where no copies are being made—the technology simply skips over the original content. Another extreme is where I buy a DVD, I make a copy of it and I edit things out. That clearly is a infringing derivative work rights and infringing reproduction rights. The scenario I pose is the middle case where I buy a copy and I pay for it, and I made changes to it and sell that copy. So I am not infringing reproduction rights because I started with one copy and edited one copy. But I have changed the ways the copy looks and I think there is a defendant and a plaintiff in this case that did have that practice. There has been no resolution of this case. I think there is precedent that would support both outcomes given there is a one-to-one relationship because you started with one copy and you ended with one copy. I am least sympathetic with the third situation. Given that you end up with a fixed changed copy, I think there would be an infringement of copyrights.

**TUSHNET:** My reaction is that you are descriptively correct that there is a spectrum under current law. It is silly as a policy matter for there to be a spectrum. The consumer who buys the edited DVD experiences the same thing as the consumer who buys the software that produces the edited DVD. It is socially wasteful to allow one and not the other and we should make a choice

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31. This action is part of the consolidated case; *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. filed Oct. 28, 2002).