March 2005

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

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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.


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 disc use 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); Triplepledge 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. This trademark statute, having common law foundations, tackles most forms of advertising and promotion and is aimed at identifying the producer of the goods that are offered for sale. In particular, Congress enacted §43(a) of the Lanham Act 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. Specifically, §43(a) creates a fed-

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6 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. Susser, 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).


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.\textsuperscript{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.’”\textsuperscript{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.”\textsuperscript{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 \textit{Dastar Corp. v. Twentieth Century Fox Film Corp.},\textsuperscript{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,” \textit{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.\textsuperscript{15}


\textsuperscript{12} David G. Savage, \textit{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}, \textit{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, \textit{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, \textit{supra} note 11, at 81 (highlighting that several lower courts have interpreted §43(a) of Lanham Act as providing “duplicate remedy for copyright infringement”).

\textsuperscript{13} Rosenthal Kwall, \textit{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, \textit{Tempest in a Test Tube: Science and Plagiarism}, 40 WAYNE L. REV. 1569, 1567 (1994) (noting recognition that artists suffer noneconomic injury when their names are not attached to their works).

\textsuperscript{14} 539 U.S. 23 (2003).

\textsuperscript{15} See Savage, \textit{supra} note 12, at 18 (noting difference between copyrights and trademarks). See generally Joan Biskupic, \textit{Supreme Court Rules in Dispute Over Copyrights}, USA TODAY, June 3, 2003, at 4a (stating that \textit{Dastar} held that unaccredited copying of work after copyright had expired was not prevented by U.S. trademark law); Linda Greenhouse, \textit{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.\textsuperscript{16} Doubleday published Crusade in Europe, and also granted exclusive television rights to an affiliate of Twentieth Century Fox Film Corporation (Fox).\textsuperscript{17} Fox then approved for Time, Inc., to produce a television series\textsuperscript{18} based on Eisenhower's book, of the same name.\textsuperscript{19} Time, Inc. thus assigned its copyright in the series to Fox.\textsuperscript{20} In 1975, Doubleday renewed the copyright on the book; Fox, however, did not renew the copyright

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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 'Newreel 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).

\textsuperscript{19} See Dastar Corp. v. Twentieth Century Fox Film Corp. 639 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").

\textsuperscript{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,

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\(^{22}\) 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 [herinafter 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 sublicense 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. Dastar released a video set entitled *World War II Campaigns in Europe*. 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.” Dastar also created new packaging, then manufactured and sold the *Campaigns* video set as its own product. Dastar’s advertising and videos themselves make no reference to Fox, Fox’s *Crusade* television series, Eisenhower’s book, or New Line’s videotapes. In addition, Dastar’s *Campaigns* screen credits lists employees of Dastar as the series’ executive producer, producer, and associate producer. (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 McClain, 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. 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, as well as in violation of state unfair competition law. Fox felt “any person reading the packaging or credits and viewing [Dastar’s] tapes would believe that only Dastar was responsible for their creation.”

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.” Over time, courts began to broaden the range of exception of characters. 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 Dastar listed itself as producer and distributor of Campaigns).

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 [herinafter 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).

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.).

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).

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

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,’ which is when one entity misrepresents another’s goods as their own. 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, “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.”

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. For the state unfair competition claim, the court “treated its resolution of the Lanham Act claim as controlling” because it felt that the decisive test under both claims was the likelihood of public confusion or deception. Dastar appealed, and the Court of Ap-
peals for the Ninth Circuit affirmed the judgment for Fox, New Line, and SFM on the "reverse passing off" claim. 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. 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." The Supreme Court thus granted certiorari and reversed the Ninth Circuit's findings. 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.

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 due1 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. Indeed, the Lanham Act “has common law foundations that were not designed to protect originality or creativity.” Historically, this Act was intended to protect brand-name goods and the consumers who buy those goods, as well as to give producers of goods an action against the ‘deceptive and misleading use’ 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.’” Scalia delves into history, 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 [the] 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., 56 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).


\(^{83}\) 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. 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." Rather than bolstering their Dastar decision, this Qualitex comment appears to reinforce Fox's argument for attribution because Dastar fits the 'imitating competitor' that the Lanham Act targets. After all, Dastar Corp. copied and made only minor changes to the Crusade series. However, in TrafFix Devices, Inc. v. Marketing Displays, Inc., 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." TrafFix avows, "copying is not always discouraged or disfavored by the laws which preserve our competitive economy." 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.

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 started 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., the Court affirms that "sharing in the goodwill of an article unprotected by... trademark" is a public concern. The key here, according to precedent, is the entry into the public domain of innovative enterprises and technologies. In the Moseley v. V Secret Catalogue decision, the Court declined to find that §43(a) has "boundless application as a remedy for unfair trade practices." 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." caution against misuse of overextension of Lanham Act and was clearly moving towards narrower view of trademark law).


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) [herinafter "Law Professors"] (citing cases which held material that entered public domain cannot be protected by Lanham Act).

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, MONDAG 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).

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 law \(^101\) 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-
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.\textsuperscript{105}

2. \textit{Dastar} and Copyright Expiration

It is the limitation of the copyright monopoly on a work that draws the \textit{Dastar} Court's attention. The public gains the right to copy, without attribution,\textsuperscript{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 \textit{exactly} the same shape.\textsuperscript{107} This is implicit in the 'carefully crafted bargain'\textsuperscript{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 \textit{do} create a federal right to 'copy and to use.'"\textsuperscript{109} The proper form of copyright protection, if one desires attribution under the law of copyright, is a copyright registration.\textsuperscript{110} Fox let its copyright expire;\textsuperscript{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 expire").

\textsuperscript{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, \textit{supra} note 80, at 14–15 (noting that public has interest in access to works protected by copyright); Ronald, \textit{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).

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

\textsuperscript{107} See \textit{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).

\textsuperscript{108} \textit{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"). \textit{See} Saunders, \textit{supra} note 11, at 169–170 (discussing what is gained and by whom in this bargain).


\textsuperscript{110} See Elgin, \textit{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, \textit{supra} note 11, at 162 (noting proper type of protection for attribution rights).

\textsuperscript{111} See \textit{Dastar}, 539 U.S. at 26 (stating Fox did not renew copyright on Crusade television series); see also McLain, \textit{supra} note 11, at 87 (noting Fox's failure to renew copyright"); Ronald, \textit{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.”\textsuperscript{112} Holding as Fox wanted would, in some views, “stifle competition in the future.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{118} One

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

\textsuperscript{113} Mamudi, supra note 2, at 14 (characterizing Court’s holding in Dastar).

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

\textsuperscript{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).

\textsuperscript{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. INTELL. 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”).

\textsuperscript{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’). \textsuperscript{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.\footnote{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).}

3. \textit{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 marketplace\footnote{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).} refer to the Copyright Act's use of the term 'author.'\footnote{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. INTELL. 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'). \textit{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).} Under the Court's decision, Dastar properly branded itself as the origin of the tapes.\footnote{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."). \textit{See generally} Mauro, supra note 50, at 2 (discussing ramifications for Twentieth Century Fox Film Corp. of Court's definition of 'origin of goods').} "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."\footnote{Justin Beck, \textit{Man vs. Machine in the Halls of Justice}, LEGAL TIMES, Nov. 3, 2003, at 19.} Under §102(a) of the Copyright Act, copyright protection subsists in original works of authorship 'fixed in any tangible medium of expression' by 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.").
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

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[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").
[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. The public domain denotes works unprotected by intellectual property rights. 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." 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." 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." Supporters of the public domain feel that 'in the era of information,' there are many benefits from a sprawling, less restrained public domain. "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 (posing that work in public domain is "a copy 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.\textsuperscript{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.\textsuperscript{138} Dastar “removes the cloud of Lanham Act liability from companies, libraries, Web sites, and databases that repack a ge facts or information that originated elsewhere.”\textsuperscript{139} The Lanham Act can no longer be used as a weapon against use of material that has entered the public domain.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{142}

\textsuperscript{137}Otiemo-Odek, \textit{supra} note 133, at 16 (asserting that, for effective patent system, viable public domain is key).

\textsuperscript{138}See Savage, \textit{supra} note 12, at 18 (noting that responsibility of attribution no longer burdens librarians). \textit{But c.f.} Gasaway, \textit{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”).

\textsuperscript{139}Mauro, \textit{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).

\textsuperscript{140}See Garrett, \textit{supra} note 74, at 578 (stating that Lanham Act cannot be used to prosecute every kind of “unfair trade practice”); see also Mauro, \textit{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, \textit{supra} note 121, at 368 (arguing that “trademark law cannot and should not be an end-run around copyright protection”).

\textsuperscript{141}Savage, \textit{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”).

\textsuperscript{142}Fries, \textit{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 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. In Eldred, the Court upheld the 1998 Sonny Bono Copyright Term Extension Act (CTEA), which extended the terms of copyright protection. The CTEA adds twenty more years of copyright protection to current and future copyright holders, and does not affect any works that have already fallen into the public domain. Most copyrights, under this Act, now run from creation until 70 years after the author's death. "For anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120

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 contained). 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").
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." 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."

In part, the *Eldred* opinion rejected a challenge that the CTEA violated the First Amendment 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. 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. Copyrights are granted for limited terms to encourage creation of new works, which will in time enter the public domain. Supporters of copyright extensions claim such extra copyright protection encour-

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

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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).


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," stands in contrast to Eldred's rule that "Congress could limit the public domain by substantially extending copyrights." Other observers state that Eldred and Dastar are consistent 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. 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." 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." It is such precedent that allowed the Dastar result to be 'predictable' 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 inconsistencies 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.
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.\textsuperscript{170}

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

\textit{Dastar}'s definition of "origin of goods" means that there is \textit{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.\textsuperscript{171} The Supreme Court gives three reasons in \textit{Dastar} as to why there would be "serious practical problems" in "reading 'origin' in §43(a) to require attribution of uncopyrighted materials."\textsuperscript{172} First, the Court feels that it would not be easy to figure out exactly who would be in this line of origin.\textsuperscript{173} The Court gives an example here about who, after copyright expiration, could perhaps fit the definition of 'origin' in the film \textit{Carmen Jones}, and thus require attribution.\textsuperscript{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)."\textsuperscript{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 \textit{Crusade in

\begin{itemize}
\item \textsuperscript{170} \textit{Beck}, supra note 123, at 19.
\item \textsuperscript{171} \textit{See Ochoa}, supra note 15, at 911 (emphasis added) (stating that Court in \textit{Dastar} would decide if there was federal right of attribution); see also \textit{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, \textit{supra} note 121, at 357 (stating that Court decided correctly when it held that Dastar could market Fox's series without attribution to Fox).
\item \textsuperscript{172} \textit{Dastar Corp. v. Twentieth Century Fox}, 539 U.S. 23, 35 (2003).
\item \textsuperscript{173} \textit{See Id.}, (stating "... the word "origin" has no discernable limits."); see also \textit{Ronald}, \textit{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, \textit{supra} note 121, at 358 (determining origin of goods creates likelihood of confusion in consumers).
\item \textsuperscript{174} \textit{See Dastar}, 539 U.S. at 35 (explaining requiring attribution would cause issues); see also \textit{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, \textit{supra} note 121, at 361 (stating that once work has entered into public domain it is not property of any one particular individual).
\item \textsuperscript{175} \textit{Dastar}, 539 U.S. at 35.
\end{itemize}
Europe. 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. The Court famously avows, "We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries."

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. 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." 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." 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).


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.’"  

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. 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. 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.” 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.”

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.” 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 Parklane 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.

to extend the Lanham Act to conflict with copyright law.\textsuperscript{188} A critique is that the cases the Court cites as its "previous decisions"\textsuperscript{189} can be distinguished from the facts of \textit{Dastar}, even though the Court argued that a broader interpretation of the phrase "origin of goods" would be inconsistent with precedent.\textsuperscript{190} In \textit{Wal-Mart Stores, Inc. v. Samara Brothers Inc.},\textsuperscript{191} \textit{TrafFix Devices Inc. v. Marketing Displays Inc.},\textsuperscript{192} and \textit{Bonito Boats, Inc. v. Thunder Craft Boats Inc.},\textsuperscript{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."\textsuperscript{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."\textsuperscript{195}

\textbf{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, \textit{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.\textsuperscript{196} One function of the Lanham Act is to prevent

\begin{itemize}
\item \textsuperscript{188} See Susser, \textit{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, \textit{supra} note 11, at 187 (discussing Court's recognition of importance of public domain in \textit{Dastar}); Saunders, \textit{supra} note 11, at 175–76 (highlighting divergence of Court's decision to uphold extension of copyright terms in \textit{Eldred} and its rejection of Lanham Act in \textit{Dastar}, which gave more power to subsequent users of copyrighted works).
\item \textsuperscript{189} \textit{Dastar}, 539 U.S. at 36.
\item \textsuperscript{190} See \textit{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, \textit{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, \textit{supra} note 5, at 13 (noting difference between copying and "making exact duplicate.").
\item \textsuperscript{191} 529 U.S. 205 (2000) (discussing knock-offs of children's clothes).
\item \textsuperscript{192} 532 U.S 23 (2001) (highlighting that functional features are not subject to trade dress protection).
\item \textsuperscript{193} 489 U.S. 141 (1989) (regarding non-patented boat hulls).
\item \textsuperscript{194} Susser, \textit{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").
\item \textsuperscript{195} \textit{Id.} (citing \textit{Dastar Corp. v. Twentieth Century Fox}, 539 U.S. 23, 36 (2003)).
\item \textsuperscript{196} See \textit{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, \textit{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”).


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. 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.”

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. 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?” 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).


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 re-
ceiving – 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, 559 U.S. at 32 (commenting reverse passing off is likely to deceive con-
sumers); 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 mat-
ter, 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 re-
quired 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, 559 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).

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, 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.

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.” 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, or the name of its author. It is basic human nature – people normally crave credit for their work. "Moral rights are legal rights that recognize an artist's attribution rights to works created on or after June 1, 1991. 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, 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.

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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).

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 studies 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).

Fries, supra note 36, at 30.

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").

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."\textsuperscript{236} Without moral rights, the American copyright system can be considered amoral.\textsuperscript{237} The effect of \textit{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 create\textsuperscript{238} and which holds as a fundamental principle that copyrights are a monopoly for a limited time.\textsuperscript{239} Initial attempts in Congress to impose moral rights failed, until Congress passed the Berne Convention Implementation Act of 1988.\textsuperscript{240} VARA, enacted as an amendment to the Copyright Act to incor-


\textsuperscript{236} Vander Voort, \textit{supra} note 13, at 1586.
\textsuperscript{237} See Rosenthal Kwall, \textit{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, \textit{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).

\textsuperscript{238} See \textit{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, \textit{The United States Should Not Adhere to the Berne Copyright Convention}, 3 J.L. & TECH. 207, 207 (1988); Russ VerSteeg, \textit{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").

\textsuperscript{239} See Packard, \textit{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, \textit{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").

\textsuperscript{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, \textit{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, is "analogous to Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works, but its coverage is more limited." The Berne Convention and VARA have forced the issue of how to deal with moral rights. 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."

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. 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).


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.'" 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." Similarly, the Second Circuit's Caroll v. Kahn 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." This even ultimately affected the end of the Crusades in Europe case: in Twentieth Century Fox Film Corp. v. Dastar Corp., 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." Because the Court's defining 'origin' "impliedly rejected any consumer confusion regarding Defendants' product," the defendant (Dastar Corp.) was the origin. There was no false designation of origin, and, thus, no consumer confusion. The Ninth

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253 Williams, 281 F. Supp. 2d at 1183.
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).
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.\textsuperscript{262}

In the First Circuit's \textit{Zyla v. Wadsworth},\textsuperscript{263} decision, another Lanham Act claim was barred due to \textit{Dastar}.\textsuperscript{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.\textsuperscript{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."\textsuperscript{266} In \textit{Boston Int'l Music, Inc. v. Austin},\textsuperscript{267} also in the First Circuit, the Supreme Court's "origin of goods" definition in \textit{Dastar} barred the plaintiffs' false designation of origin claims in violation of §43(a) of the Lanham Act.\textsuperscript{268} Here,
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, Cosmopulos, 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.