The Moral Imperative against Academic Plagiarism (without a Moral Right against Reverse Passing Off)

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THE MORAL IMPERATIVE AGAINST ACADEMIC
PLAGIARISM (WITHOUT A MORAL RIGHT
AGAINST REVERSE PASSING OFF)

2003 Niro Scavonne Haller & Niro Distinguished Lecture

by David Nimmer*

I. TREATMENT ................................................ 2
II. To Prevent the Traces of Human Events from
Being Erased by Time ................................... 6
   A. Three Scenarios .................................... 6
   B. Traces of Human Events ............................ 8
III. Moral Rights ............................................ 12
   A. Introduction ........................................ 12
      1. Categorizing Moral Rights ...................... 12
      2. Moral Rights Under the Berne Convention .... 14
         a. Prior to Berne Adherence .................. 16
         b. Ancillary to Joining the Berne Convention. 24
         c. Subsequent Developments .................. 27
   B. Dastar v. Fox ....................................... 30
      1. Background ..................................... 30
      2. Statutory Construction .......................... 33
         a. Dastar's Argument .......................... 33
         b. Position of the United States ............ 37
      3. Decision of the Court ........................... 38
         a. Ruling .................................... 38
         b. Implications as to Moral Rights .......... 42
   C. Evaluation .......................................... 44
      1. Does the Berne Convention Require
         Recognition of the Right to Forestall Listing
         Credit for Non-Authors? ....................... 44

* © 2004 by David Nimmer, Visiting Professor, UCLA School of Law and Of Counsel, Irell & Manella LLP, Los Angeles, California. I thank Bobbi Kwall for inviting me to deliver the lecture, and Daniel Gervais, Craig Joyce, Rob Kasunic, Mark Lemley, Dick Lanham, Tom McCarthy, Malla Pollack, Bernie Sorkin, and Cindy Vroom for their comments on this Article.
This article treats both plagiarism in academic life and the recent Supreme Court case of Dastar Corp. v. Twentieth Century Fox Film Corp. It reaches the conclusion that recognition of reverse passing off is unnecessary for U.S. compliance with the Berne Convention. Before confronting these multiple issues, however, some groundwork is necessary. To begin the journey, the reader’s indulgence is begged to skim a motion picture treatment for an unsavory production.

I. TREATMENT

MEMORANDUM

TO: Bob Guccione
FROM: Schadenfreude Screenwriter
DATE: April 1, 2004
RE: PRINCESS OF EGYPT

Bob,

The 25th anniversary of your debut film, CALIGULA, is coming up next year. Though most of the world might not be marking this landmark anniversary, its de-

2. As the discussion progresses, it will enumerate various species of moral rights, and refer to them frequently. For ease of reference back, those rights are previewed here:
   (a) the right to be known as the author of her work;
   (b) the right to prevent others from falsely attributing to her the authorship of a work that she has not in fact written;
   (c) the right to prevent others from being named as the author of her work;
   (d) the right to publish a work anonymously or pseudonymously, as well as the right to change her mind at a later date and claim authorship under her own name;
   (e) the right to prevent others from using the work or the author’s name in such a way as to reflect adversely on her professional standing;
   (f) integrity right;
   (g) first publication right; and
   (h) retraction right.
voted followers could think of nothing better than a follow-up project. In this spirit, I offer you the following treatment.

— Shady

TREATMENT

FEUDING PRINCESSES

INTRODUCTION

We begin in a picturesque Greek village. Periander (Perry) is mourning the loss of his wife, Melissa. Unwilling to let her go, he proceeds to have sex with her corpse. Melissa’s ghost is not amused. She refuses to reveal to her husband the place where only she knows a hidden treasure is buried—unless, that is, he makes amends. As a result, Perry orders all the women in town—rich and poor, free and slave, young and old—to march in a procession up to the local temple. Once there, he forces all of them to strip naked and offer their clothes to his dead wife. The screen is filled with masses of naked women. [Lots of close-ups, natch.]

ACT I – THE PERSIAN EMPIRE

After the audience becomes familiar with our Greek setting, we move to Uzbekistan. The great King Cyrus is arraying the mighty Persian army against the incompetent locals. He stages an elaborate bacchanal to give them hangovers (and worse). But the local queen, Tomyrus, irritated at her son’s death, charges in and slaughters all the invaders. She severs Cyrus’ head and dunks it repeatedly in a wine barrel (or is it a bag of blood?), all the while hurling imprecations at it. [Stop action here.]

With Cyrus dead, leadership falls to his eldest son, Cambyses. Camby is not altogether the traditional family man—as we learn at the outset, when he intimidates the Persian judiciary into allowing him to marry his full sisters. [The camera details the consummations, but tastefully.] Then, he hears from an oracle that Smerdis will soon be ruling in his stead. As a result, he sends a trusted advisor to secretly kill his brother, Smerdis.

Because Camby is also manifesting other signs of instability and has taken an extended leave of absence in Egypt, a local ex-con takes over and assumes the role of king. The ex-con was previously mutilated for his crimes on Camby’s order, by having his ears cut off. [Flashback to show the punishment.] The pretender sequesters the king’s harem and sleeps with each and every one of the royal wives. [Montage.] Incidentally, his name also happens to be Smerdis.

Camby realizes that the oracle is coming true and that “Smerdis” is indeed occupying the throne—only it happens to be not his brother Smerdis, whom he now realizes was needlessly murdered! In grief, Camby confesses to the Persian court that he ordered his brother to be killed. No one believes him, given how crazy he has been acting of late, and that by this time word has reached them that “Smerdis” is actually sitting on the throne anyway.
The biggest industrialist in the realm, Otanès (O.T.), decides to investigate in order to safeguard his holdings. O.T. previously married off his daughter to Camby, so she is still ensconced in the harem, which is now under Smerdis’ control. O.T. sends a message to his daughter asking her if her new husband is indeed the royal Smerdis, son of Cyrus, or some ruffian upstart. She sends word back that she never met the royal Smerdis, so she does not know. O.T. sends another message asking her to make inquiry of her fellow wife, Atossa, who is sister to Smerdis and Camby, and therefore would surely know whether the new king is her own brother or his usurper. This time the daughter sends back a message explaining that she has been segregated from all the other wives, so she cannot ask Atossa. Finally, O.T. sends a message to his daughter telling her to feel the side of her husband’s head during sex—if he lacks ears, he is none other than the ex-con, whereas if he has ears, he is the real king. She sends back a message explaining that if she were to feel underneath her husband’s turban at the height of passion, she would undoubtedly incur the death penalty. O.T. insists that she do it nonetheless, and she finds the means to obey.

So, after some frantic lovemaking [faithfully recorded on camera], the daughter feels Smerdis’ head, and indeed, finds no ears! Word gets back to Camby’s circle that there is indeed an interloper in their midst, thus setting the scene for a palace revolt. Ultimately, a new king is seated, and a new princess takes her throne.

Act II – Egypt

The scene switches to Egypt. Pharaoh is bankrolling a high living out of the Royal Treasury, which is located in a favorite pyramid. The only problem is that every few weeks it seems like there is an unaccountable diminution of the Thesaurus [who says we’re not cultured? That’s Greek for “treasure-house”]. To forestall further poaching, Pharaoh posts hordes of guards outside to make sure that no one can get in or out. No one does.

It turns out, however, that the builder of the pyramid, long since dead, included a secret chamber in which a stone fit so perfectly that after it is put back in place no one can tell that it had been removed. Before his death, the builder revealed the secret passageway only to his two sons. Now, both of them are simply helping themselves to riches whenever they want in order to maintain their debauched lifestyle.

So, Pharaoh comes up with a new plan—he puts an ingenious trap into the Treasure Room, which will inextricably entrap anyone who gets within its clutches. Sure enough, the next time the brothers go on one of their nocturnal invasions of the Thesaurus, one brother is trapped. The pair realizes that the caught brother cannot escape and that if Pharaoh’s guards find him there in the morning, they will not only execute him, but hunt down his brother. The trapped one therefore pleads that his own head should be cut off and taken away so that the other brother may live. The brother obliges. [We see every detail.]

The next day Pharaoh’s troops find the treasure-house in perfect shape—except, that is, for a headless corpse located in the trap! Everyone is nonplussed, to say the
least. Obviously, the intruder had outside help. But who? Pharaoh commands that the corpse be hung up in the public square to be eaten by the birds so as to humiliate the robber's family into revealing themselves.

The pair's mother sees her son's corpse and goes crazy. Regardless of the fact that her other son will be executed if she blabs, she is on the verge of spilling the beans in order to save her son's corpse from further desecration. A plan has to be devised.

The remaining brother saddles up his ass with wine and wanders in the marketplace past the dangling corpse. There, an "accident" causes the wine to burst and to spill onto the sidewalk. The passing guards laugh as they liberally help themselves to the cascading liquid, all of which ultimately runs off. Predictably, the guards all fall asleep from this little prank, thus allowing the living brother to steal the corpse away and save it from further ignominy. For good measure, he shaves rude messages into the beards and hair of the king's sleeping battalion.

Now, Pharaoh has been bested twice and he is hopping mad. He orders his daughter, who is a complete bombshell, to help him solve the mystery by adopting the following stratagem: she should offer to sleep with any and all comers, provided only that they tell her in bed the most daring exploits they have ever committed. The king instructs his daughter that when she hears the story of the robbery of Pharaoh's treasury or the stealing of the body she should grab hold of that man's arm and scream until the guards arrive.

There follows copious lovemaking and many ribald tales. [A movie within a movie, heavy on the sex.] Into the line comes our erstwhile hero. He has his pleasure with Pharaoh's daughter and then proceeds to tell her the full story of the disappearing rock built into the treasury, how his brother got caught there, how he cut off his brother's head, and how he staged the "wine accident" to later retrieve the corpse. The daughter grabs the arm with all her strength and screams bloody murder. Nothing can induce her to let go, so she still has a firm grasp on it when all of the guards surround the darkened bedroom and rush in.

The only problem is that the trickster has been one step ahead of her—he anticipated what she would do, so he took the precaution of bringing a spare arm (his dead brother's, one imagines) to her boudoir—which is what the guards find her holding onto when they finally burst into the royal chamber.

At this point, Pharaoh has been bested three times, so he knows that there is no one smarter in the realm to lead Egypt than this man. He proclaims that the trickster will become the new king and marry the bombshell daughter.

* * *

The stage is thus set for the titanic clash between the two princesses, Persia vs. Egypt. That sets us up for our sequel, to complete the trilogy. A treatment for that installment will be forthcoming (after I finish negotiations with a Southern Hemisphere nation which is interested in being the locale for our production).
II. To Prevent the Traces of Human Events from Being Erased by Time

A. Three Scenarios

Our subject matter juxtaposes legal rights and moral rights in attribution, inquiring into the wisdom of copyright protection in the academic context. To inaugurate the discussion, three scenarios illuminate various aspects of the matter under examination.

1. Consider first the above treatment for Feuding Princesses. Imagine that it is made into a major motion picture, with screen credit solely in the name of Shady Screenwriter.

Disclosure should be made that every name, every incident, and every relationship set forth in that treatment is copied from an earlier source. What Shady Screenwriter lacks in originality, he makes up for in classical erudition. The source for everything contained in the treatment is Herodotus, the father of history. The Histories, written in about 440 B.C.E., records not only those few accounts excerpted in that treatment, but also countless other details of antiquity.

Has there been a legal violation through omission of Herodotus' name? A moral violation? How does this initial scenario affect our inquiry?

2. When Bobbi Kwall extended the kind invitation to me to participate as the 2003 Niro Scavonne Haller & Niro Distinguished Lecturer, she asked me to submit the title for my remarks. In response, I excerpted the introduction from The Histories:

Here are presented the results of the enquiry carried out by Herodotus of Halicarnassus. The purpose is to prevent the traces of human events from being erased by time, and to preserve the fame of important and remarkable achievements produced by both

3. My primary source herein is the Oxford version of HERODOTUS, THE HISTORIES (Robin Waterfield trans., Oxford ed. 1998) (commentary by Carolyn Dewald). I thank my teacher, Prof. Dewald, not only for her gift of that volume to me with her inscription in Greek, but also for her valuable insights in our discussions about Herodotus.

4. See Carolyn Dewald, Introduction to HERODOTUS, supra note 3, at xxi (title coined by Cicero for Herodotus has stuck). Though I have been able to steer terminology away from the paternocentric in the context of the moral rights discussed below, I am not attempting to rework Cicero's language into "the parent of history." See infra text accompanying note 56.

Greeks and non-Greeks; among the matters covered is, in particular, the cause of the hostilities between Greeks and non-Greeks.\textsuperscript{6} I informed Bobbi that the title of my talk would be: \textit{To Prevent The Traces Of Human Events From Being Erased By Time}. She replied that I should instead discuss academic writing. I told her that my remarks would not slight that arena. Moral rights, I added, would figure prominently in the investigation.

The lovely brochure produced for the conference features my name prominently. It presents the title as: \textit{Prevent The Traces Of Human Events From Being Erased By Time: A Discourse on Academic Writing}.\textsuperscript{7} Close, but not exactly the way I styled it.

Has there been a legal violation of my rights through the use of my name in conjunction with a title that I did not explicitly approve? A moral violation? How does this second scenario affect our inquiry?

3.

A friend of mine is on the legal staff of the Regents of the University of California.\textsuperscript{8} Her duties recently brought her to my own institution, UCLA Law School. A colleague reviewing a student paper noticed its eerie resemblance to an obscure monograph that had been published years earlier. He brought the student up on plagiarism charges.

Putting aside the issues of requisite due process and what the appropriate punishment should be, let us focus on the substantive defense: The student claimed that "his research practice was to take notes into his laptop, then cut and paste passages in writing the paper."\textsuperscript{9} He "admitted that his work was 'fast and loose,' but denied that he had committed plagiarism."\textsuperscript{10} In other words, the student admitted that large chunks of his article stemmed from another, which he downloaded for research purposes and, when combining his own thoughts with the work of others, which he meant to indent to show its derivation from a previous source.\textsuperscript{11} But careless formatting over the

\textsuperscript{6} Herodotus, supra note 3, at 3.

\textsuperscript{7} See Nimmer, supra note 5.


\textsuperscript{10} \textit{Id}.

\textsuperscript{11} This situation is not uncommon:

She took extensive notes on the articles she read, not realizing that her notes were verbatim. Then she copied over the notes in the course of organizing the material to write the paper. By the time she began drafting, she had lost track of what words were hers and which were the words of her sources.
course of multiple drafts obscured his original purpose, he averred. The professor was not buying it. To that last defense, he might have retorted, *your unoriginal purpose, you mean.*

Has there been a legal violation of rights in this third instance? A moral violation? Again, how does this affect our inquiry into academic copyright issues?

**B. Traces of Human Events**

Herodotus was not the first person to record human events. Ionian raconteurs such as Hecataeus of Miletus (whom Herodotus often cites) preceded him. But Herodotus was the first to progress from being a traveling savant to a comprehensive chronicler, showing his audience the linkage between disparate events as a way of explicating the underlying root "cause of the hostilities between Greeks and non-Greeks." As such, I nominate him as "progenitor of academics"—not to mention precursor to every analysis that one reads in the newspaper today (substituting for "Greek" in his phrase "the cause of hostilities between Greeks and non-Greeks," depending on your choice, "Westerners," "Americans," "Moslems," "Israelis," or what have you). All that, and he managed to compose the whole without footnotes!

With the passage of millennia since his composition of the history of the Persian War, we now have a set view of "history." But writing at the discipline's dawn, Herodotus used the term in its root sense of "research" or "investigation." He would be the first to acknowledge

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14. Id. at xxii.

15. HERODOTUS, supra note 3, at 3.


17. As I write these words, nothing seems as vital to current events as an appropriate appreciation of history. Though the locus has changed from Persia next door to Mesopotamia, about the only thing that supporters and detractors of the latest war in the Gulf can agree upon would probably be the proposition that "if there's one thing that we have learned from history, it's that we have learned nothing from history."

that his findings were provisional, and subject to reinterpretation by future scholars. (Admittedly, however, not all of his observations would pass current standards of composition outlined by the American Historical Association: “Patarbemis approached Amasis and issued the king’s command, but Amasis, who happened to be on horseback at the time, lifted himself up in the saddle, farted, and told him to take that back to Apries.”)

Moreover, unlike the Biblical narrator who peeks behind the curtain to reveal the divine plan, Homer who equally shifts the scene to the gods’ machinations, the histor is resolutely empirical (indeed, avowedly secular) in what he reports. Religion figures into it, to be sure—but only (with few exceptions) insofar as the important and remarkable achievements of the individuals about whom he reports are themselves swept into re-

19. “I am obliged to record the things I am told, but I am certainly not required to believe them—this remark may be taken to apply to the whole of my account.” Herodotus, supra note 3, at 7.152, at 457. See id. at 2.123, at 144. No less than forty-one times he expresses outright disbelief in the matters that he is recording. Dewald, Narrative, supra note 16, at 163.


22. A goddess likewise appears by the third word of The Iliad. In Book Four, Athena intervenes to spoil a truce; in Book Five, Aphrodite saves one mortal, is wounded by another, and calls on Apollo for relief. Throughout, Zeus, Hera, and Poseidon are regular interveners in the affairs of men.

23. This is not to deny the existence of remarkable philosophical gems strewn along the path. An example comes at the beginning:

I will cover minor and major human settlements equally, because most of those which were important in the past have diminished in significance by now, and those which were great in my own time were small in times past. I will mention both equally because I know that human happiness never remains long in the same place.

Herodotus, supra note 3, at 1.5, at 5. See also id. at 2.173, at 165 (“Anyone who is serious all the time and never allows himself a fair measure of relaxation will imperceptibly slide into madness or at least have a stroke.”).

24. “Because I believe that everyone is equal in terms of religious knowledge, I do not see any point in relating anything I was told about the gods, except their names alone.” Id. at 2.3, at 96. “[I]f I were to explain why some animals are allowed to roam free, as sacred creatures, my account would be bound to discuss issues pertaining to the gods, and I am doing my best to avoid relating such things.” Id. at 2.65, at 121.

25. See generally Dewald, Narrative, supra note 16.

26. “In my opinion, this was because the gods were arranging things so that in their annihilation the Trojans might make it completely clear to others that the severity of a crime is matched by the severity of the ensuing punishment at the gods’ hands. That is my view, at any rate.” Herodotus, supra note 3, at 2.120, at 141. Towards the very end of his Histories, Herodotus allows that there “is plenty of convincing evidence that the divine plays a part in human affairs.” Id. at 9.100, at 581.
religious undercurrents.27 He also does not shy away from expressing an unpopular viewpoint.28

The roots of copyright are not absent from The Histories.29 The first murder recorded therein is commemorated "in a poem of iambic trimeters."30 The poet himself disclaimed gold and dominion; rather, he wrote for the sheer joy of composition itself31 (thus removing himself far from the U.S. Constitution's rationale of legal protection in order to stimulate authorship).32 Shortly thereafter, Herodotus records the birth of music, as Arion of Methymna composes a dithyramb while being borne across the sea to Taenarum on the back of a dolphin.33 People took their literature seriously in those days. When a playwright wrote of the recent fall of Miletus, "the audience burst into tears and fined him a thousand drachmas for reminding them of a disaster that was so close to home; future productions of the play were also banned."34 Though himself progenitor of the recorded word, Herodotus is sometimes uncomfortable with the passage of oral culture.35 Indeed, the histor at times associates writing with cleverness, "even the excessive cleverness of tricks and tricksters."36

27. "If I do refer to such matters, it will be because my account leaves me no choice." Id. at 2.3, at 96. Herodotus is as interested in untrue accounts as in true accounts, to the extent that the former had the capacity to inspire belief and actions among those whose history he recounts. Dewald, Narrative, supra note 16, at 166.

28. "At this point I feel impelled to express an opinion which I am not going to keep to myself, despite the fact that it will offend a great many people, because I believe it to be true." HERODOTUS, supra note 3, at 1.39, at 451.


30. HERODOTUS, supra note 3, at 1.12, at 7.

31. Id. at 598.

32. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" Mazer v. Stein, 347 U.S. 201, 219 (1954).

33. HERODOTUS, supra note 3, at 1.23, at 11.

34. Id. at 6.21, at 359. The histor also very usefully traces the origin of the alphabet back to the Phoenicians and comments on the history of writing. Id. at 5.58, at 324. There is also the following poignant vignette, which looks like it could have been taken from today's news: "[S]hortly before the sea battle, a roof collapsed on a group of children learning their letters, and out of a hundred and twenty children only one survived." Id. at 6.27, at 361. The event evidently so moved Herodotus that it shocked him from out of his normal secular detachment to remark that there "are invariably warning signs given when disaster is going to overwhelm a community or a race." Id. See also id. at 683 ("one of his rare personal comments on the pattern formed by human events").

35. Dewald, Narrative, supra note 16, at 169 (showing how Herodotus was responsive to two different thought worlds).

36. HERODOTUS, supra note 3, at 607. In addition, there is a danger that people who "take up the cithara and the harp and [who] raise their sons to be retailers" will soon "become women
To me, the fulcrum of the entire panorama is Demaratus, deposed king of Sparta, who is given uncharacteristic access to an oracle showing the ultimate demise of Xerxes. Demaratus gets many of the work's best lines:

That's how the Lacedaemonians are: they're as good as anyone in the world when it comes to fighting one on one, but they're the best when it comes to fighting in groups. The point is that although they're free, they're not entirely free: their master is the law, and they're far more afraid of this than your men are of you. At any rate, they do whatever the law commands, and its command never changes.

When Spartans fight, they make "it plain to everyone, however, and above all to the king himself, that although he had plenty of troops, he did not have many men." Demaratus gives Xerxes the only sound advice the latter ever hears about how to win the Persian War. True to form, the great king ignores the advice, with predictable results. In the end, Demaratus associates poverty with political and military success: "There has never been a time when poverty was not a factor in the rearing of the Greeks, but their courage has been acquired as a result of intelligence and the force of law.

These interrelationships of poverty, law, and intelligence will recur below in our investigation ("historiē") of copyright laws and the Academy.
III. Moral Rights

A. Introduction

What are moral rights? The reference is not to utilitarian or deontological calculations of right and wrong. Instead, that English phrase translates the French phrase, *le droit moral*. "The adjective 'moral' has no precise English equivalent, although 'spiritual,' 'non-economic' and 'personal' convey something of the intended meaning." These Continental rights loomed large as a cautionary note in this country's decision to join the Berne Convention. Much of the Berne Convention Implementation Act of 1988, and its attendant legislative history, details efforts to hold the floodgates back from a full Gallicization of moral rights in the United States.

1. Categorizing Moral Rights

In Continental conceptualization, what is *le droit moral*? Notwithstanding that formulation in the singular, France actually recognizes numerous species of *les droits moraux*: First come several variations on the droit à la paternité (also called droit au respect du nom).

46. Writing about plagiarism imbues one with hyperawareness of the need to cite sources. See Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 Cal. L. Rev. 513, 521 n.40 (1992) (citing Thomas Mallon, *Stolen Words: Forays Into the Origins and Ravages of Plagiarism* 125 (1989)); Alexander Lindey, *Plagiarism and Originality* 218 (1952). In that spirit, one must guard even against self-plagiarism. Stearns, supra, at 543–44 ("[it] becomes objectionable only when it results from laziness or the desire to mislead"). Due acknowledgement must therefore be made that portions of the discussion below derive from 3 Melville B. Nimmer & David Nimmer on Copyright §§ 8D.01–8D.02 (2004) [hereinafter Nimmer on Copyright]—not from laziness or a desire to mislead, but because that is where I have previously discussed moral rights, and it is necessary to set the stage by replowing some of that field for the discussion that follows. See infra note 353.

47. The Teutonic analog to this Gallic right is das Urheberpersönlichkeitsrecht, or the "right of the author's personality." See 1 Stephen Pericles Ladas, *The International Protection of Literary and Artistic Property* 575 n.2 (1938).


52. Note that even in France the plural has also crept in. See André Lucas et al., *France § 7, in International Copyright Law and Practice* (Paul E. Geller & Melville B. Nimmer eds., 2003).
Berne adherence was on the horizon, other commentators—53—and even Congress itself—54—anglicized that term to “paternity right.” Departing from universal usage, I chose the more gender-neutral term—55—“attribution” in writing up the Berne Convention Implementation Act of 1988 for Nimmer on Copyright.56 It is gratifying to see that my emendation has now become standard in cases and commentaries.58

In any event, the French droit à la paternité can be conceptualized along five planes:59

(a) the right to be known as the author of her work;
(b) the right to prevent others from falsely attributing to her the authorship of a work that she has not in fact written;
(c) the right to prevent others from being named as the author of her work;60
(d) the right to publish a work anonymously or pseudonymously, as well as the right to change her mind at a later date and claim authorship under her own name;61 and

55. But see infra note 293.
56. See 3 NIMMER ON COPYRIGHT, supra note 46, § 8D.01[A] n.8. If for nothing else, at least I can claim credit (paternity?) for that innovation. (In the spirit of giving credit where it is due, I must thank Dorothy Wolpert for reviewing my 1988 manuscript and suggesting excision of the sexist term “paternity.” A bit of cogitation brought to my mind the substitute “attribution.”) See Debora Halbert, Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 111, 112 (Lisa Buranen & Alice M. Roy eds., 1999) [hereinafter PERSPECTIVES ON PLAGIARISM].
57. See, e.g., Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995) (citing 3 NIMMER ON COPYRIGHT § 8D.05).
60. This particular right occupies less than a single sentence in Lucas et al., supra note 52, § 7[1][b]: “Third parties who delete the author’s name or substitute their own for that name commit an act making them liable for damages.” Id. (emphasis added). See also LUCAS, supra note 59, § 402, at 327 (“rétablier la vérité en cas d’usurpation ou d’omission”).
61. Obviously, any taxonomy of rights represents but one among many ways of dividing up a field. The “right to disclaim anonymity” is probably congruent with the right to be known as author of a work, corresponding to (a) above, and is also a function of the inalienability of moral rights. As an example of the instant right,
in a case of a ghost writer employed in the United States, the Cour d’appel of Paris enforced her right of attribution in France in the face of her contract waiving this right to be named as author. Although the court found the contract to be both subject to U.S. law and valid, it declined to give effect to any such waiver which, it considered, would have been contrary to international ordre public, that is, public policy.
Lucas et al., supra note 52, § 7[4][a].
(e) the right to prevent others from using the work or the author's name in such a way as to reflect adversely on her professional standing.

In addition, there are other species of French moral rights:

(f) *droit au respect de l'oeuvre*, i.e., the right to prevent others from making deforming changes in her work;\(^{62}\)

g) *droit de divulgation*, i.e., the right to publish a work or to withhold it from dissemination;\(^{63}\) and

(h) *droit de repentir* or *droit de retrait*, i.e., the right to withdraw a published work from distribution if it no longer represents the views of the author.\(^{64}\)

Under French law, the moral right is conceived as perpetual, inalienable, and imprescriptible.\(^{65}\) In theory, therefore, even today in France, an outrageous stage or film version of *Le Médecin Malgré Lui*\(^{66}\) could be challenged and subjected to the full range of sanctions for violation of the moral right. Moreover, even if Molière's\(^{67}\) line has long since expired in the three centuries since that play was penned, the French state might still be able to protect the integrity right under what might be termed (in Anglo-American parlance, at least) a *parens patriae* theory.\(^{68}\)

2. Moral Rights Under the Berne Convention

The Berne Convention, to which the United States has adhered since 1989, does not by its own terms incorporate any *droit de divulgation* or *droit de repentir*; accordingly, those aspects will largely drop out from this study. But the treaty does command some recognition for the *droit à la paternité* and for the *droit au respect de l'oeuvre*. Under Article 6bis, an "author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work,


\(^{63}\) Id. §§ 381–389, at 311–23.

\(^{64}\) Id. §§ 390–400, at 323–27.


\(^{66}\) *Molière*, *Le Médecin Malgré Lui* (Larousse & Co. 1966) (1666).

\(^{67}\) Actually, "Molière" was the *nom de plume* of Jean-Baptiste Poquelin—a nice instantiation of moral right (d). Note that the author of *Le Médecin Malgré Lui* himself did not escape the label "un grand et habile picoreur." *Lindey*, supra note 46, at 63.

\(^{68}\) *Ricketson*, supra note 48, at 74.
which would be prejudicial to his honor or reputation." That right must be accorded "[i]ndependently of the author's economic rights, and even after the transfer of the said rights."

The framework set forth above divides the attribution right into five prongs. The language of the Berne Convention itself is much more sparse, as it is limited to the author's right "to claim authorship of the work." The semi-official guide published by the World Intellectual Property Organization (which functions as secretariat of the Berne Convention) elaborates that the intent is to recognize three branches of the right: to assert that the author is the work's creator; to publish anonymously or pseudonymously, with the option of later changing his mind and abandoning anonymity; and to prevent use of his name with reference to a work that he did not create. Those three rights correspond to those labeled above respectively as (a), (d), and (b).

Turning to the omitted categories, the Guide makes no contention that the Berne Convention itself implements an obligation as to (c). Further, (e) is not incorporated into Berne's attribution right. Nonetheless, that right—to prevent others from using the author's name reflecting adversely on her professional standing—is itself a hybrid of both the droit à la paternité and the droit au respect de l'oeuvre. As to that latter right, called the "integrity right" in English, the same semi-official Guide notes that it is "very elastic and leaves for a good deal of latitude to the courts." Accordingly, nations might or might not choose to implement (e) as part of their own domestic schemes.

The Guide is not the only work that makes this point about diverging implementation across national boundaries. The moral rights pro-

70. Id.
71. See supra Part III.A.1. For a review of all the moral rights, see supra note 2.
72. GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 41 (1978) [hereinafter GUIDE TO THE BERNE CONVENTION]. Although the work was published anonymously, the author of that commentary is Claude Masouyé, "whose right of attribution is seldom recognized when the book is mentioned," as Daniel Gervais rightly noted to me when reviewing this article.
73. See supra Part III.A.1. An eminent commentator on the Berne Convention is not in accord on this particular enumeration. Without citing sources, he maintains that Berne's paternity right encompasses the affirmative right to attribution (a), the right to prevent use of another's name (c), and the right for the author's name to appear legibly (an offshoot of (a)). See RICKETSON, supra note 48, at 467-68. Under this formulation, passing off (b) is excluded. Id. at 468. Although that commentator is meticulous to cite the various interventions of national delegates leading to the codification of moral rights in the Berne Convention and their appropriate interpretation, id. at 456-67, 469-76, his discussion of the attribution right is uncharacteristically bereft of authority.
74. GUIDE TO THE BERNE CONVENTION, supra note 72, at 42.
vision of the Convention itself provides, "The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed." Further, in another nod to local treatment, the Convention mandates that although those rights must "be maintained, at least until the expiry of the economic rights," it requires no *post-mortem* recognition of moral rights in countries whose internal law did not require such protection at the moment of ratifying the Berne Convention.

a. Prior to Berne Adherence
   i.

A decade before U.S. accession to the Berne Convention, one court stated, "American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors." Even on the eve of joining, Judge Easterbrook derided "droit moral, the Continental principle" as a doctrine that "no American jurisdiction follows as a general matter."

If we proceed through the catalog of moral rights set forth above, that complete negation seems overstated. The French *droit de divulgation*, for instance, corresponds to the first publication right, which the United States Supreme Court vindicated as an instance of the

75. Berne Convention (Paris Text), supra note 69, art. 6bis(3). A point of methodology arises: Should reference be made to sources such as *The Guide*, or by contrast should the national laws be consulted of those countries that incorporate the text of the Berne Convention into their national laws *in haec verba*? The problem with the latter course of action is that application by a court in the Netherlands, for example, leaves it impossible to distinguish between what arises from that court's interpretation of the Berne Convention itself and what reflects its own Dutch sensibilities. Cf. Neil Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441, 453 (1997) ("By choosing instead to incorporate the Berne provisions by reference, placing them within the context of a trade instrument that in many respects differs substantially from the Berne Convention, the drafters necessarily tinted Berne-in-TRIPS with a trade hue."). That problem is particularly pointed in this instance, in which the treaty itself gives special latitude to "the legislation of the country where protection is claimed." For those reasons, the instant analysis confines itself to abstract sources of general import rather than the concrete decisions in individual nations.

76. Berne Convention (Paris Text), supra note 69, art. 6bis(2).

77. *Id.*

78. Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976). For other like propositions, see the cases collected in *3 NIMMER ON COPYRIGHT*, supra note 46, §§ 8D.02[A], 8D.02[D][1].

79. Weinstein v. Univ. of Ill., 811 F.2d 1091, 1095 n.3 (7th Cir. 1987); see Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 32 n.54 (2001). As Judge Leval remarks, "Our copyright law has developed over hundreds of years for a very different purpose and with rules and consequences that are incompatible with the *droit moral.*" Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1128 (1990).
copyright owner’s prerogatives (before U.S. adherence to the Berne Convention) in *Harper & Row, Publishers, Inc. v. Nation Enterprises*. There, the Court addressed an unauthorized scoop of President Ford’s forthcoming autobiography, *A Time to Heal*. So (g), at least, has some vitality under U.S. law. But because it belongs to the copyright owner rather than inalienably to the author, the U.S. instantiation departs from the model prescribed by Article 6bis of subsisting “[i]ndependently of the author’s economic rights, and even after the transfer of the said rights.” The *droit au respect de l’oeuvre*, to cite another example, can be conceptualized as akin to the copyright owner’s right to prevent unauthorized adaptations to her work, recognized in *Gilliam v. American Broadcasting Companies, Inc.* Now (f) has been brought into the fold as well. But different considerations govern (h):

France’s *droit de retrait*, by contrast, has largely been halted at the border. Authors who have parted with copyright ownership and thereafter recant their earlier works are powerless to extirpate current dissemination of the views they now hold heretical. The closest that U.S. law comes to a retraction right are those cases holding a violation from purveying old works of an author accompanied by a current photograph or other indicia tending to confuse the public into believing that the work is in fact current. But those cases arise out of misrepresentation, rather than an author’s inherent right to repent the literary excesses of his or her youth.

82. Berne Convention (Paris Text), *supra* note 69, art. 6bis(1). In other words, President Ford owned the copyright in *A Time to Heal* at its composition, and therefore enjoyed the exclusive right to put it into print. After he assigned the copyright, however, to Harper & Row Publishers, then that entity owned the *droit de divulgation*. In this respect, U.S. law diverges from the Berne Convention model. Although that departure will usually prove insubstantial in the case of the instant *droit de divulgation*, opposing interests between authors and publishers can, at times, give it great substance in the context of the *droit au respect de l’oeuvre*, for example. See infra note 84.
84. 538 F.2d 14 (2d Cir. 1976). Expanding the point made *supra* note 82, it was only because plaintiff in this case did not assign his work to the BBC for sublicensing to ABC that he could maintain a cause of action. Had Monty Python parted with copyright ownership in its television program, ABC could have edited it at will, without falling afoul of the adaptation right. For the effect of the Supreme Court’s opinion in *Dastar v. Fox on Gilliam*, see infra note 263.
85. Lest this arena be viewed as a backwater of the law, one must hasten to add that one of the most celebrated cases of the last decade reasoned in part from *Gilliam*. The case in question construed section 2 of the Sherman Act in evaluating the conduct of the largest software company in the nation. See United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc). The court’s invocation of *Gilliam* leads to most curious results, which are beyond the current scope. See 3 *Nimmer on Copyright, supra* note 46, § 8D.04[A][1].
86. 3 *Nimmer on Copyright, supra* note 46, § 8D.05[B] (footnotes omitted).
One commentator also finds in the U.S. doctrine of termination of transfers a limited retraction right, springing into action after passage of the requisite decades.

Turning now to the five prongs of the droit à la paternité, an author can insist that her publisher prominently display her name on the book’s cover and in all publicity; a recording artist can demand similar treatment from his record company; and so on across the categories of copyrightable works. Therefore, (a) is no stranger to these shores. Nonetheless, that right is not inalienable, as Berne seems to require:

The generally prevailing view in this country under copyright law has been that an author who sells or licenses her work does not have an inherent right to be credited as author of the work. In line with that general rule, it has been held not to infringe an author’s copyright for one who is licensed to reproduce the work to omit the author’s name.

The same considerations apply to anonymity and pseudonymity; that is, an author may require as a condition of her publishing contract that her name be omitted, or that a pseudonym be used in its stead, and even that she retain the right to alter that decision later. But absent such a contractual undertaking, once the publisher becomes copyright owner, it can make the appropriate attribution decisions, even over the author’s objection. In short, (d) assimilates to the same status as (a) in the United States.

Regardless of copyright ownership, no publisher can simply hijack the name of a non-consenting author. It would constitute the tort of passing off for Harper & Row, for instance, to reissue A Time to Heal under the name Stephen King in order to boost sales (perhaps renam-
ing it in the process to _Erased by Time_).\(^{92}\) Accordingly, (b) is probably the most robust of all moral rights under U.S. law. Turning to (c), it invokes the opposite phenomenon: reverse passing off. The discussion below treats that prong in detail. Finally, U.S. law recognizes no overt doctrine whereby an author can prevent others from using the work or the author's name in such a way as to reflect adversely on her professional standing.\(^{93}\) Nonetheless, it might be possible to vindicate moral right (e) under extreme circumstances, such as where the subject utilization constituted libel or infliction of emotional distress.\(^{94}\)

ii.

Although the quick synopsis set forth above debunks the notion that moral rights were utterly alien to the American _zeitgeist_ prior to Berne adherence, it also shows that U.S. law was then a good deal removed from full-bore protection of _le droit moral_. Nonetheless, a blue-ribbon commission, chartered by the State Department to study Berne adherence, determined that U.S. law as it then stood was compatible with Convention requirements:

> Given [i] the substantial protection now available for the real equivalent of moral rights under statutory and common law in the U.S., [ii] the lack of uniformity in protection of other Berne nations, [iii] the absence of moral rights provisions in some of their copyright laws, and [iv] the reservation of control over remedies to each Berne Country, the protection of moral rights in the United States is compatible with the Berne Convention.\(^{95}\)

That nuanced conclusion marshals numerous considerations. First and foremost, it adverts to [i] equivalent doctrines whereby moral rights find vindication under U.S. law. We return to that matter below. Next, it invokes the practice of other nations as being not significantly divergent from the U.S. experience (both [ii] and [iii]). Given the experience of other common law jurisdictions,\(^{96}\) and even civil law


\(^{93}\) For a poignant example of how a composer suffered through licensing of his song on a motion picture soundtrack in a scene depicting child rape, see Kwall, _supra_ note 48, at 36.

\(^{94}\) Such a claim seems highly doubtful. Nonetheless, there are seemingly no cases that plaintiffs refuse to file. In one illustrative example, plaintiff lost the Third Annual Rice Cook-Off contest, but nonetheless found her recipe published. She responded by filing suit for "outrage;" her husband joined in for "loss of consortium." See Griggs v. S.C. Elec. & Gas Co., 463 S.E.2d 608, 609 (S.C. 1995). In another, plaintiff alleged intentional infliction of emotional distress for using his name as the terrorist character in a comic book. See Netzer v. Continuity Graphic Assocs., 963 F. Supp. 1308, 1327 (S.D.N.Y. 1997).

\(^{95}\) See _Final Report_, _supra_ note 53, at 547.

countries," that consideration might be well-taken, although it raises the further question whether, as of today, countries like England—the most prominent example cited to Congress in 1988 as a role model for the lack of need to implement strong moral rights protection—have augmented their moral rights protection during the interim in a way that leaves the United States isolated. Finally, it relies on [iv] the safeguard contained in the Berne Convention, granting member nations leeway in their implementation of moral rights.

Returning to point [i], Congress concluded that U.S. law, as it then stood, was in compliance with Berne’s moral rights requirements. For that purpose, it relied on a study that Professor Melville Nimmer prepared in 1965-66. The blue-ribbon commission noted above likewise cited at length from that study. Although, admittedly, my father stated there that “[i]t could be said that the United States does comply with a narrow construction of the requirements of article 6bis,” he relied for that conclusion more on the lack of protection among other Berne countries [iii] than on the breadth of United States moral rights protection [i].

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97. Even such a supposedly high defender of moral rights as Germany does not necessarily implement a wholly different vision of moral rights, as a practical matter, than does the United States. A report prepared by the Copyright Office shortly after U.S. accession to Berne counts the total number of moral rights cases involving motion pictures to arise in that country during the preceding four decades. Register of Copyrights, Technological Alterations to Motion Pictures 133 (1989). The total number “could be counted on one hand, while still leaving adequate fingers free to eat a bratwurst.” 3 Nimmer on Copyright, supra note 46, § 8D.02[1] n.54.

98. See 3 Nimmer on Copyright, supra note 46, § 8D.02[D][2].

99. See Lionel Bently & William R. Cornish, United Kingdom, in International Copyright Law and Practice, supra note 52, § 7.

100. See supra Part III.A.2.


102. Id. at 34 n.67 (citing Melville B. Nimmer, Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law, 19 Stan. L. Rev. 499 (1967)). Happily, that author took me to Geneva during the year in which he prepared the report, and there enrolled me in school where I learned French—thus laying the groundwork for me to later gain an understanding of le droit moral. (Notwithstanding certain bumps of late in the Franco-American relationship that goes back more than two centuries, I particularly treasure the volume of Traité de la Propriété Littéraire et Artistique, supra note 59, that André Lucas inscribed for me: “À David Nimmer, le plus français des Californiens.”).


104. Nimmer, supra note 102, at 522.

105. Id. at 523. See id. at 522 (“[A]lthough a number of the so-called moral rights receive protection in the United States courts, a number of others do not.”).
iii.

As the analysis proceeds, we will attempt to determine whether U.S. law complies with Berne Convention norms. One possible rationale for defending U.S. non-compliance with the strictures of the Berne Convention is that other nations are similarly deficient (corresponding to point [iii] above). That excuse, in my estimation, fails. An additional consideration that dovetails with the foregoing is that the United States excepted article 6bis of the Berne Convention from enforcement under the TRIPS protocol. That consideration as well casts doubt on the bona fides of the United States in world copyright circles.

Instead, the proposition advanced below is not that the United States may shirk any obligations that it undertook when adhering to the Berne Convention. Rather, it is that the strictures of that Convention do not extend to the domain of reverse passing off. Accordingly, the United States can hold its head high in international circles, even as it deliberately declines to recognize legal protection for attribution with respect to right (c) invoked above.

iv.

Among the cases cited by the blue-ribbon commission for the proposition that moral rights are not orphaned in the United States is Smith v. Montoro. That case introduced into the realm of works of authorship the concept of reverse passing off, which has been noted

106. See infra Part III.C.1.
107. See supra Part III.A.3.a.
108. The United States has joined the Berne Convention primarily for the sake of moral leadership in the world copyright community. Yet by its minimalist approach, the United States leaves itself open to the charge that it is failing to comply with some very important Berne provisions. Prudential behavior dictates that, in order to reap the benefits that flow from appearing to be moral, the U.S. must undertake activities that will be perceived as moral. "The United States should not be perceived as imposing a double standard on the rest of the world." That combination of self-interest and morality may well lead the United States to increase the measure of moral rights that it accords. For it is morally questionable to proclaim one's moral leadership while failing to accord clearly (as opposed to arguably) sufficient moral rights.

3 Nimmer on Copyright, supra note 46, § 8D.02[D][2] (emphasis in original) (footnotes omitted).
110. See 3 Nimmer on Copyright, supra note 46, § 9A.06[C].
111. See supra note 2.
112. 648 F.2d 602 (9th Cir. 1981).
113. Smith v. Montoro did not create the tort of reverse passing off; rather, it cited previous cases for its ruling. See id. at 606, (citing John Wright, Inc. v. Casper Corp., 419 F. Supp. 292 (E.D. Penn. 1976), aff'd in relevant part sub nom, Donsco, Inc. v. Casper Corp., 587 F.2d 602 (3d Cir. 1978)). Its innovation, instead, was to take that doctrine and apply it to the realm of works
above as the instantiation of moral right (c):\textsuperscript{114} "False identification of another as author also may give rise to a claim by the actual author under section 43(a) of the Lanham Act."\textsuperscript{115} In that case, the Ninth Circuit granted relief to a film actor who found his name replaced in the credits by that of a fictional actor—an intentional fabrication. Analogizing to the substitution of a misleading trademark on physical goods, the court found a violation outside of copyright law under the Lanham Act.\textsuperscript{116} That decision paved the way for parties whose copyright claims failed to enter federal court nonetheless under the banner of "reverse passing off."\textsuperscript{117}

Notwithstanding the existence of\textit{Smith v. Montoro} and other cases within the United States vindicating certain species of moral rights under various circumstances, it is a stretch to maintain that the law in the United States as of the enactment of the Berne Convention Implementation Act of 1988\textsuperscript{118} was congruent with Article 6bis of the Berne Convention.\textsuperscript{119} Nonetheless, the Director General of the World Intel-

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that traditionally found shelter under the copyright umbrella. See Roberta Rosenthal Kwall, \textit{The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)}, 77 WASH. L. REV. 985, 1004 (2002).

\textsuperscript{114.} See supra Part III.A.1. For a quick enumeration of all the moral rights, see supra note 2.

\textsuperscript{115.} Final Report, supra note 53, at 553 (citing Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981)).

\textsuperscript{116.} Montoro, 648 F.2d at 605.

\textsuperscript{117.} Id.

Trademark law has long and properly condemned ordinary "passing off"—when, for example, a little-known, "Brand X" watch manufacturer attaches the Rolex trademark to its watches and passes them off as made by Rolex. In contrast, "reverse" passing off would occur if the Brand X company bought genuine Rolex watches, took off the Rolex mark, put its own name where Rolex's used to be, and sold the watches as "Brand X." As the example suggests, the commercial temptation to engage in "reverse" passing off is slight—as is the harm it causes. "Reverse" passing off does not directly threaten the reputation or sales of Rolex, because Rolex's name is not on the watches. Restatement (Third) of Unfair Competition § 5 cmt. a (1995). Indeed the practice is often harmless or even beneficial (as when Safeway buys Birdseye frozen peas in bulk and markets them at a discount under its own private label).

Brief for Petitioner at *14, 2002 U.S. Briefs (LEXIS) 428, Dastar v. Fox, 539 U.S. 23 (2003) (No. 02-428) [hereinafter Brief for Petitioner]. For more on this case, see infra Part III.B.

\textsuperscript{118.} In a decision handed down the very week of enactment, the court initially noted that moral rights as such are not part of U.S. law, but then recognized certain limited rights in the author based on a combination of copyright, trademark, and contract law. Soc'y of Survivors of the Riga Ghetto, Inc. v. Huttenbach, 535 N.Y.S.2d 670 (Sup. Ct. N.Y. County 1988).

\textsuperscript{119.} Elsewhere, I have contended that, at the time, protection of moral rights in the United States was significantly at odds with moral rights as enforced in countries that incorporate Article 6bis into their domestic laws \textit{in haec verba}. At the outset, all U.S. creators working in an employment relationship will, on account of that employment status, be most challenged to vindicate, under copyright law, any of the quasi-moral rights described below. Ineligibility for employees to assert moral rights in their creations "is doubtless a legal position which is incompatible with the protection provided for under Article 6bis of
lectual Property Organization explained to Congress that the various member states of the Berne Union "ardently desire" U.S. accession to the Convention "without qualification." He further expressed his "opinion that the United States may become a member of the Berne Convention without making any changes to U.S. law for the purposes of Article 6bis." The General's opinion may reflect more [ii] and [iii] than [i]. Several European commentators overtly doubt that he meant [i] (and maintain that, if he did, he was in error).  

the Berne Convention." More broadly, consider a concrete example. In 1949, composer Dmitri Shostakovich lost an action in New York for violation of his moral rights through use of his music in a context to which he objected, namely an anti-Soviet film entitled "The Iron Curtain." A parallel case in France against the same motion picture studio produced a contrary result. The same year, the muralist of a New York church unsuccessfully objected to painting over of his bare-chested Christ, which the parishioners concluded "placed more emphasis on His physical attributes than on His spiritual qualities." A French sculptor, by contrast, won substantial damages from the Commune de Baixas for destruction of his portrayal of a woman wearing the local costume. It is doubtful that, had those New York cases been brought in 1989 rather than 1949, the results would have been different. In these and countless other particulars, there is cause to question Congress' conclusion that American law as of 1989 recognized the artist's right to object to "derogatory action in relation to" his work. Moreover, the fact that the United States subsequently implemented moral rights legislation — expressly limited to the very narrow category of works of visual art, and subject to innumerable exceptions even in that field — merely highlights the contrast between our system and that of other Berne states, whose moral rights apply across almost all categories of copyrightable works.

3 NIMMER ON COPYRIGHT, supra note 46, § 8D.02[D][1] (footnotes omitted). After canvassing both sides of the debate, the conclusion reached there is that "the truth lies between the extremes. U.S. moral right protection is far from nonexistent. Yet it apparently fails to accord the full-fledged protection contemplated by Article 6bis." Id. (footnote omitted).


121. Id.

122. S. REP. No. 100-352, at 10. In that context, Dr. Bogsch adverted to section 43(a) of the Lanham Act, among other federal and state sources.

123. "In spite of the reassuring statements by Dr. Bogsch and the Senate Committee, it seems to us that the protection of 'moral rights' in the USA fails to rise to the standards contemplated by Art. 6bis." WILHELM NORDEMANN ET AL., INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW 86–87 (1990) (citing 3 NIMMER ON COPYRIGHT § 8D.02). Those professors conclude that Dr. Bogsch and the Senate Committee were inspired by "the universal desire—among members of the Union as well as by American authors—that the USA should accede to the Convention rather than by a close examination of the American law." Id. at 87. See Jane C. Ginsburg, Have Moral Rights Come of (Digital) Age in the United States?, 19 CARDOZO ARTS & ENT. L.J. 9, 10 (2001) (evaluating United States' claim to be Berne-compliant as of 1989 as "we were lying").
b. Ancillary to Joining the Berne Convention

i.

The Berne Convention Implementation Act of 1988 expressly states that U.S. law then in existence sufficed to comport with all the requirements of the Berne Convention. Article 6bis was foremost on Congress’s mind in that regard—fully a third of the enactment’s thirteen sections are designed to forestall a claim that Berne adherence creates a direct cause of action under U.S. law for the enforcement of moral rights. President Reagan likewise joined in that position.

Meanwhile, “independently of Berne adherence,” Congress simultaneously considered augmenting moral rights in the United States. The process ultimately culminated in the enactment of the Visual Artists Rights Act of 1990 (VARA). Three details about that amendment to the Copyright Act are apropos:

- Protection under VARA is limited to works of visual art. Excluded thereunder are, inter alia, motion pictures and other types of applied art.
- Even within the realm of visual art, only signed original or limited editions obtain protection. Accordingly, although that amendment might make actionable cutting up the original canvas of a Picasso painting by contrast selling posters of a Picasso painting emblazoned with mustaches or curse words added by the poster-maker (or that render his blue phase hot pink) escapes liability under VARA. Thus, “traditional copyright law protects art; by contrast, VARA protects artifacts.”

125. See 1 NIMMER ON COPYRIGHT, supra note 46, § 1.12[A].
127. H.R. REP. No. 100-609, at 40.
129. See 3 NIMMER ON COPYRIGHT, supra note 46, § 8D.06[A][1].
130. Part of the impetus for Congress to pass this amendment was the outrageous case of “two Australian entrepreneurs who cut Picasso’s ‘Trois Femmes’ into hundreds of pieces and sold them as ‘original Picasso pieces.’” H.R. REP. No. 101-514, at 17 (1990).
131. 3 NIMMER ON COPYRIGHT, supra note 46, § 8D.06[A][2]. It has been commented above that le droit moral means a personal right, rather than a right derived from the strictures of morality. See supra text accompanying note 48. Nonetheless, one court applying this law seemingly viewed itself as a moral arbiter: Notwithstanding its denial of any legal cause of action
When it does apply, VARA accords an integrity right “to prevent any intentional distortion, mutilation, or other modification of that work” and “to prevent any destruction of a work of recognized stature” along with an attribution right in three flavors:

- “to claim authorship of that work;”
- “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;” and
- “to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”

The first two bullet points stand in sharp contrast to the type of moral rights protection contemplated by Article 6bis of the Berne Convention, which applies across the board to movies, books, songs and all other types of copyrightable subject matter, and to reproductions as well as to the original artifact. About the last bullet point, it is in-

under the statute, it was moved to comment that although “plaintiff has failed to state a cause of action under VARA,” still the “carelessness of the employees in destroying Pollara’s work was utterly deplorable” and that the “defendant and his employees should be ashamed of their disregard for the obvious skill, effort and care which Pollara put into her mural.” Pollara v. Seymour, 206 F. Supp. 2d 333, 335 n.4 (N.D.N.Y. 2002). Note that unlike the sphere at issue in that case, there is a domain in which moral rights attest to moral character. See infra text accompanying note 449.

133. Id. § 106A(a)(3)(B). Query what impact this provision would have exerted on the builder who unplugged a freezer in collector Charles Saatchi’s kitchen, in which was stored a frozen “blood sculpture made by Britart’s enfant terrible, Marc Quinn” consisting of “Quinn’s head cast in nine pints of his own frozen, congealed blood.” Angelique Chrisafis, Blood Sculpture May Be Ruined, THE GUARDIAN, http://www.guardian.co.uk/arts/news/story/0,11711,749033,00.html (July 4, 2002). Similar considerations apply to the oeuvre of Joseph Beuys. When a custodian at the Dusseldorf Academy deposited Fettecke in the dustbin, it cost the state government of Rhein-Westphalia $27,000 in damages—notwithstanding that the work itself consisted of five kilograms of rancid fat and butter. See John Dornber, Where’s the Grease?, 87 ART NEWS 13 (Mar. 1988); Godfrey Barker, Never Mind the Art, Just Feel the Wealth, THE ADVERTISER, July 6, 1989.

It was not the first calamity of its kind. In 1977, one of Beuys’ most vital creations, a baby bathbat spotted with sticking plaster, was inadvertently used as a beer cooler at a museum party. No damage was done, but its integrity as a work of art was violated. Id. (that episode cost the museum $104,166). Perhaps the explanation for Beuys’ art comes from the fact that as an “ardent Nazi pilot, five times wounded in the war, [he] was shot down in the Luftwaffe JU-87 over the Russian steppes and was saved when itinerant Tartars wrapped his frozen body in felt and fat.” Id.

135. Id. § 106A(a)(1)(B).
136. Id. § 106A(a)(2).
137. Even the United States Supreme Court recognizes that “Section 106A is analogous to Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works, but its coverage is more limited.” Quality King Distribs., Inc. v. L’Anza Research Int’l, Inc., 523 U.S. 135, 150 n.21 (1998).
interesting to note which of the species of the *droit à la paternité* Congress chose to implement. The three types just noted correspond to those moral rights denominated above respectively as (a), (b), and (e). Missing from Congress’ enumeration are (c) and (d).

ii.

Moving away from VARA, the same month it passed Berne implementing legislation, Congress also enacted the National Film Preservation Act of 1988 (NFPA). The NFPA authorized the Library of Congress to designate twenty-five films per year as “culturally, historically, or aesthetically significant.” Such designated films, to the extent they were materially altered—which includes colorization—had to include a conspicuous label alerting the public to the alteration. As evidenced by the Congressional finding in the NFPA’s preamble that “it is appropriate and necessary for the Federal Government to recognize motion pictures as a significant American art form deserving of protection,” this law at least inclines in the direction of recognizing that an interest exists in film integrity, consonant with the *droit au respect de l’oeuvre*. Further, in requiring that the label warn the public that the materially altered version of the work was being released without consent from the creative talent behind the film, it accords some recognition of the right to not have one’s name associated with a work for which one wishes to disclaim responsibility, consonant with one aspect of the *droit à la paternité*. Nonetheless, the NFPA falls far short of previous attempts to legislate true moral rights protection for films, which failed because those attempts proved controversial.


139. See supra Part III.A.1. For a review of the various branches of moral rights, see supra note 2.

140. Note that the *Guide to the Berne Convention* opines that (d) is a necessary component of treaty compliance. See supra text accompanying note 72.


142. 102 Stat. at 1783.

143. 102 Stat. at 1782.

144. See 134 Cong. Rec. H3083 (daily ed. May 10, 1988) (statement of Rep. Kastenmeier) (“the best course was to avoid statutory treatment of moral rights in the context of Berne. This conclusion rested in part on the political reality that legislation with a moral rights provision simply would not pass.”); Eric J. Schwartz, *The National Film Preservation Act of 1988: A Copyright Case Study in the Legislative Process*, 36 J. COPYRIGHT SOC’Y U.S.A. 138, 139 (1989) (“Except for the creative artists involved (principally the Directors Guild of America), the legislative strategy of all the other parties was to keep the issue of moral rights, or at least the inclusion thereof, separate from the enabling legislation permitting United States adherence to the Berne
Of course, it also cannot come close to the laws of those nations that extend the integrity right to all movies, and to those that forbid colorization rather than merely requiring disclaimer labels.\textsuperscript{145}

In any event, that effort proved short-lived. Congress subsequently repealed the NFPA and substituted in its place the National Film Preservation Act of 1992.\textsuperscript{146} The latter enactment followed the Register of Copyright's preparation of a lengthy report concerning moral rights in films,\textsuperscript{147} culminating in a recommendation that Congress consider a unified system of moral rights protection, or as an alternative, an expansion of moral rights limited to the motion picture industry.\textsuperscript{148} Notwithstanding those recommendations, Congress retreated in 1992 from according moral rights protection to films;\textsuperscript{149} the 1992 law's focus is limited to celluloid preservation.\textsuperscript{150}

c. Subsequent Developments

After Berne accession, legislation and litigation marched on.\textsuperscript{151} In the former realm, Congress added strictures regarding something called "copyright management information"\textsuperscript{152} in the context of the Digital Millennium Copyright Act;\textsuperscript{153} that domain touches on moral rights, but is so convoluted\textsuperscript{154} (as is the rest of that omnibus amendment)\textsuperscript{155} as to afford no straightforward augmentation of moral

\begin{footnotes}
\item[145] See Lucas et al., supra note 52, §§ 7[1][c][ii], 7[4][a] (French court enjoins showing of colorized version of Asphalt Jungle following debate in Paris concerning colorization).
\item[147] See generally Register of Copyrights, supra note 97. The report canvasses such activities as colorizing, panning and scanning, time compression and lexiconing, all of which affect film integrity.
\item[148] Id. at 176-82.
\item[151] Given the catalog of moral rights recognized under U.S. law through the close of the twentieth century, it is erroneous to claim: "There have been cases in which moral rights crept into the discourse of American law, but this was usually because the judges did not know what they were doing." Siva Vaidhyanathan, Copyrights and Copywrongs 162 (2001).
\item[154] See David Nimmer, Copyright: Sacred Text, Technology and the DMCA 338-56 (2003).
\item[155] Id. at 385-517.
\end{footnotes}
Case developments in the field of moral rights within the United States, for the most part, continued in the old groove. Scattered decisions continued to vindicate attribution rights and integrity rights, as well as other branches of moral rights. Courts occasionally recognized—but more often denied—protection under VARA. But the anticipated floodgate of moral rights following in Berne's wake did not come to pass.

In one salient respect, however, moral rights grew. The matter under examination is *Smith v. Montoro*. From the issuance of that decision in 1981, until the United States joined the Berne Convention on March 1, 1989, applications of that precedent tended to deal with questions of standing or other aspects of law unrelated to "reverse

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156. "The interests protected by those categories of copyright management information are redolent of moral rights. Yet the fact that the statute allows the copyright proprietor (and not the author or any other interested individual) complete freedom to waive those categories of management information along with her own identity leads to the conclusion that section 1202 is not designed to protect moral rights, albeit some of the interests that it serves run parallel to that domain." 3 *Nimmer on Copyright*, supra note 46, § 12A.10[B][2][a]. As an example, a "publisher who *ex hypothesi* owns the copyright to Thomas Pynchon's novels could consent to their distribution over the Net under the name Danielle Steele. One who acts with the publisher's permission thereby avoids all liability under Section 1202." *Id.* § 12A.10[B][2][a] n.65.

157. For a review of that case law, see 3 *Nimmer on Copyright*, supra note 46, § 8D.03.

158. For a review of that case law, see *id.* § 8D.04.

159. For a review of that case law, see *id.* § 8D.05.


161. *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2d Cir. 1995) (finding lobby of hotel to have been prepared as work for hire, hence outside of VARA protection); Peker v. Masters Collection, 96 F. Supp. 2d 216, 222 (E.D.N.Y. 2000) (VARA has no application to posters); Lee v. A.R.T. Co., 125 F.3d 580, 583 (7th Cir. 1997) (VARA does not proscribe mounting of art reproductions onto tiles); Pavia v. 1120 Ave. of the Americas Assocs., 901 F. Supp. 620, 629 (S.D.N.Y. 1995) (barring claim because it took place before VARA’s enactment).

162. Before United States adherence to Berne, former Register of Copyrights David Ladd testified to Congress on behalf of a coalition of publishers opposed to Berne accession:

[C]ourts faced with moral rights claims will in close cases likely look for guidance to Berne and the laws of those nations that are far more familiar with the right mandated by the Convention. Thus, there will be substantial pressure for the courts to expand the moral rights once recognized.


passing off.” To the extent that reverse passing off rose to the fore, most decisions during that interval refused to apply it. Nonetheless, a few pre-Berne decisions picked up the Montoro banner and waved it vigorously. Still, in terms of actually applying the Lanham Act to works of authorship, only two such cases applied the doctrine of reverse passing off, of which only one case extended it.

After Berne accession, though, Montoro went on steroids. Notwithstanding an intervening amendment in the text of the Lanham Act

164. See Weissmann v. Freeman, 868 F.2d 1313, 1326 (2d Cir. 1989) (untimely assertion of theory); Sims v. Blanchris, Inc., 648 F. Supp. 480, 482 (S.D.N.Y. 1986) (denying cause of action under § 43(a)); Witco Chemical Corp. v. United States, 742 F.2d 615, 625 (Fed. Cir. 1984) (tax case); Bear Creek Prods., Inc. v. Saleh, 643 F. Supp. 489, 494 (S.D.N.Y. 1986) (plaintiff failed to show that case “arose under” the Lanham Act); U-Haul Int'l, Inc. v. Jartran, Inc., 681 F.2d 1159, 1160 (9th Cir. 1982) (upholding claim for false representation in comparative advertising campaign under section 43(a) of the Lanham Act); Rickard v. Auto Publisher, Inc., 735 F.2d 450, 454 (11th Cir. 1982) (recognizing cause of action for traditional trademark infringement); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1020 (9th Cir. 1985) (upholding traditional passing off claim); PPX Enters. v. Audiofidelity Enters., 818 F.2d 266, 268, 271 (2d Cir. 1987) (Lanham Act violation for selling “eight albums purporting to contain feature performances by Jimi Hendrix, but which either did not contain Hendrix performances at all or contained performances in which Hendrix was merely a background performer or undifferentiated session player.”).

165. See Bd. of Trade v. Dow Jones & Co., 439 N.E.2d 526, 537 (Ill. App. Ct. 1982) (reserving issue); Halicki v. United Artists Communications, Inc., 812 F.2d 1213, 1214 (9th Cir. 1987) (denying extension of Montoro to complaint that plaintiff’s film received “R” rating); Kamar Int’l, Inc. v. Russ Berrie & Co., 657 F.2d 1059, 1064 (9th Cir. 1981) (expressing no opinion whether Lanham Act was violated); Litchfield v. Spielberg, 736 F.2d 1352, 1358 (9th Cir. 1984) (denying as “meritless” claim that defendant copied “E.T.” from plaintiff’s work and then committed reverse passing off); Williams v. Curtiss-Wright Corp., 691 F.2d 168, 172 (3d Cir. 1982) (acknowledging that reverse passing off exists for numbering system for replacement parts for the J-65 jet engine, but reversing entry of preliminary injunction under facts presented).


167. But note the following dictum: “If CCNV reproduces ‘Third World America’ in any medium and profits thereby, however, an accounting would be due to Reid as a copyright owner. Independent of Reid’s ownership of the copyright, CCNV might be obliged to credit Reid as an author of the sculpture.” Cmty. for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498 (D.C. Cir. 1988) (citations omitted), aff’d on other grounds, 490 U.S. 730 (1989).


170. Lamothe recognized a Montoro tort for a truthful attribution of a song to two of its composers, but omission of the names of two other composers. Id. at 1407 (“Had the defendants decided to attribute authorship to a fictitious person, to the group ‘RATT,’ or to some other person, this would be a false designation of origin. It seems to us no less ‘false’ to attribute authorship to only one of several co-authors.”).
since that ruling had been handed down,\textsuperscript{171} courts began to apply \textit{Montoro} to construct a whole edifice of "creative credit" rules, sometimes so broad and vague as to place at risk all who copy works, even from the public domain. Courts applied \textit{Montoro}, for example, not just to active misattributions, but also when a credit was simply omitted,\textsuperscript{172} or when there were different points of view about how much credit a particular contributor deserves.\textsuperscript{173} The Second Circuit applied it not simply to cases of slavish copying, but also whenever a defendant's work qualified as "substantially similar"\textsuperscript{174} to the plaintiff's.\textsuperscript{175} Courts even found themselves in the position of being asked to rewrite television credits frame by frame, deciding how big each should be, whether it should occupy the entire frame or share it with other credits, and which credits should come at the beginning and which at the end of the show.\textsuperscript{176} In addition, a particularly pointed application of reverse passing off came in \textit{Dastar v. Fox}.

\section*{B. Dastar v. Fox}

\subsection*{1. Background}

History has a nice way of repeating itself.\textsuperscript{177} As already mentioned, the United States Supreme Court addressed moral rights in the context of President Ford's memoirs.\textsuperscript{178} It is thus fitting that the memoirs of another Republican president serve as the launching pad for the Court's next foray into this field.\textsuperscript{179}

\begin{itemize}
  \item \textsuperscript{171} The statutory language was amended under the Trademark Revision Act of 1988, effective November 16, 1989. See Pub. L. No. 100-667, 102 Stat. 3935 (1988). Even after the amendment, the Ninth Circuit relied on its prior holding in \textit{Smith v. Montoro} to characterize section 43(a) as creating two bases of liability: "false association" and "false advertising." \textit{Waits v. Frito-Lay, Inc.}, 978 F.2d 1093, 1108 (9th Cir. 1992).
  \item \textsuperscript{173} \textit{Aalmuhammed v. Lee}, 202 F.3d 1227, 1237–38 (9th Cir. 2000) (allowing suit to decide whether a contributor to Spike Lee's \textit{Malcolm X} should be credited as a "co-writer" or an "Islamic Technical Consultant").
  \item \textsuperscript{174} That copyright term of art is itself one of the most slippery to apply in practice. See 4 \textit{Nimmer on Copyright, supra} note 46, § 13.03.
  \item \textsuperscript{175} \textit{See Waldman Publ'g Corp. v. Landoll, Inc.}, 43 F.3d 775, 784 (2d Cir. 1994).
  \item \textsuperscript{176} \textit{Paquette v. Twentieth Century Fox Film Corp.}, 54 U.S.P.Q.2d 1286, 1287–88 (S.D.N.Y. 2000).
  \item \textsuperscript{177} Even putting aside Herodotus, consider the following precursor: "History plagiarized itself by bringing to our Supreme Court a dispute on the lines of" a prior one! \textit{Benjamin Kaplan, An Unhurried View of Copyright} 26 (1966).
  \item \textsuperscript{178} \textit{See supra} Part III.A.3.a.
  \item \textsuperscript{179} Going back even earlier, presidential papers are no stranger to copyright precedent. Justice Joseph Story's resolution of a seminal U.S. copyright case held in favor of one compiler of George Washington's papers over a rival. \textit{See Folsom v. Marsh}, 9 F. Cas. 342, No. 4901 (C.C.
In 1948, General Dwight D. Eisenhower completed his memoirs of World War II. The publisher, Doubleday, granted exclusive television rights in the memoirs to Twentieth Century Fox, which in turn arranged for Time Inc. to produce a TV series based on the book. The TV series, entitled *Crusade in Europe*, combined a soundtrack based on the book with film footage from the United States Army, Navy, and Coast Guard, the British Ministry of Information and War Office, the National Film Board of Canada, and unidentified Newsreel Pool Cameramen.

When the time came in the 1970s to renew its copyright in the TV series, Fox failed to do so. A decade later, when videotapes swept the American market, Fox realized that the failure to renew its copyright in the TV series was a blunder. Fox's cure was to reacquire the television rights in the book—now including the right to produce a videotape. Fox then granted SFM Entertainment the right to act as sales agent and distributor of the videotape series. SFM spent $75,000 to locate, restore, and put the TV series on videotape. SFM gave New Line Home Video a distribution license for the videotapes.

In 1995, Dastar decided to expand its music business to videotapes. To capitalize on public interest in the fiftieth anniversary of the end of World War II, it decided to utilize the public domain series, which its principals recalled from their youth. Dastar learned that the 1948 TV series was in the public domain, commercially purchased eight beta cam tapes containing it, and copied large parts into a videotape series. (It bears emphasis that what Dastar copied was the original (public domain) version of the *Crusade* television series, not the New Line video set.) It entitled the edited product *World War II: Campaigns in Europe*. Dastar spent over $90,000 on its version and sold the seven-tape boxed set for twenty-five dollars—substantially less than Fox's version.

Dastar's version was a bit more than half as long as the television series, and nearly an hour shorter than the New Line videocassettes.

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Mass. 1841). Speaking of which, the first president himself was not above reverse passing off. See Lindey, supra note 46, at 223.

180. Doubleday did renew the book's copyright in its own name, claiming for the first time that General Eisenhower composed his memoirs as a work for hire. A separate dispute in the case revolves around whether that renewal was valid. See infra note 188.

181. Though not pretending to have concrete knowledge of what went through the minds of Fox executives in the 1970s as to this particular title, I have more than once encountered situations in which motion picture studios of that era made the conscious decision to maximize revenues in the current quarter, and hence knowingly declined to expend ten dollars to renew the copyright of a twenty-eight-year-old motion picture that did not have any current prospect for generating revenue (which encompassed old movies generally before the advent of videotape).
Its product contained about thirty minutes of new footage, including a
new narrated opening title sequence and new narrated chapter head-
ing sequences. Dastar also modified the order of the footage it se-
lected from the television series. It created entirely new packaging
and a new title. Dastar’s credits listed only Dastar and its staff who
produced the Dastar series; they did not mention Fox, New Line, or
SFM.

Fox, SFM, and New Line brought suit, charging Dastar with viola-
tions of the Copyright Act by infringing the copyright in General Ei-
senhower’s book (not, of course, the expired copyright in the
 televison series). In an amended complaint, they added a claim for
violation of the Lanham Act, based on the listing of Dastar and its
personnel in the credits and the failure to mention Fox and the other
plaintiffs.182 The failure to give credit, plaintiffs maintained, consti-
tuted reverse passing off under the Lanham Act.

The Central District of California granted summary judgment
against Dastar for both copyright infringement and reverse passing
off.183 On the latter, it held that, notwithstanding the differences be-
tween the two in content, packaging, design, and title, Dastar’s series
was a “bodily appropriation” of the old Fox television series, and that
Dastar’s failure to “credit” Fox, et al., violated the Lanham Act.184
The court awarded plaintiffs an amount equal to Dastar’s profits from
its videos (approximately $784,000) and then doubled this award on
the ground that Dastar’s violation of the Lanham Act was willful.185
The resulting award substantially exceeded Dastar’s entire gross reve-
 nue from its videotape series (about $875,000).186

In an unpublished opinion,187 the Ninth Circuit reversed the sum-
mary judgment for copyright infringement.188 However, it affirmed

183. Twentieth Century Fox Film Corp. v. Entertainment Distrib., No. CV-98-07189-FMC
184. Id.
185. Id.
186. Id.
187. Twentieth Century Fox Film Corp. v. Entertainment Distrib., Nos. 00-56703, 00-56712,
01-55027, 2002 WL 649087 (9th Cir. Apr. 19, 2002). The panel consisted of Circuit Judges Kozin-
ski and Gould, plus Charles R. Breyer, United States District Judge for the Northern District of
California, sitting by designation. Id. The latter’s brother recused himself from consideration of
the case at the Supreme Court level. See infra note 230.
188. The Ninth Circuit Court of Appeals remanded the copyright count for trial to determine
whether Doubleday had properly renewed the book’s copyright. Thus, in the posture in which
the case arose to the Supreme Court, liability for reverse passing off had been sustained even
were it ultimately concluded that the work had no remaining copyright protection.

Separate from Supreme Court consideration, the district court held a later trial on remand
from the Ninth Circuit, at which point it reaffirmed its earlier summary judgment ruling that
the ruling below for violation of the Lanham Act. The circuit court concluded that Dastar was liable for reverse passing off because its product bodily appropriated the television series without attribution. The court found proof of likely confusion unnecessary "because the bodily appropriation test subsumes the less demanding consumer confusion standard." (I must confess to being far from a neutral observer, as Dastar retained my services as part of its Supreme Court team after its twin defeats at the district and appellate levels.)

2. Statutory Construction

a. Dastar’s Argument

At the simplest level, Dastar v. Fox presents an issue of statutory construction. Whatever might have been the merits of the Ninth Circuit’s construction of section 43(a) of the Lanham Act when it handed down Smith v. Montoro in 1981, the more immediate question is whether reverse passing off remains a viable cause of action since Congress later revised the language of that section. Although it certainly had the opportunity to track Montoro’s language in the

Doubleday properly renewed the book’s copyright as a specially commissioned work for hire. In an appeal currently pending before the Ninth Circuit, Dastar submits that the ruling contravenes Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

189. Credit belongs to the entire team representing Dastar at the Supreme Court level, in which I am but a bit player: David Gerber, Stewart Baker, and Jane Wald. My contribution to the brief was probably smallest among the four of us—which does not deter me from cribbing portions of it where appropriate throughout this article. See infra note 353.

190. Blazing the scholarly path ultimately presented to the Supreme Court, by limiting construction of the Lanham Act to consumer confusion rather than impinging on copyright law by protecting authors, is Randolph Stuart Sergent, Building Reputational Capital: The Right of Attribution Under Section 43 of the Lanham Act, 19 COLUM.-VLA J.L. & ARTS 45 (1994-95). The author states, “The ‘Right of Attribution’ should be drawn narrowly to ensure that consumers ultimately benefit from the additional protection given to producers.” Id. at 49.

191. As amended via the Trademark Law Revision Act of 1988, section 43(a)(1) of the Lanham Act provides:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, 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, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

Trademark Law Revision Act of 1988, Congress declined to do so. Indeed, Congress considered and rejected a proposal to expand section 43(a) to prohibit any “omission of material information.” It rejected that suggestion because it “raised difficult questions [of] freedom of speech.” Representative Kastenmeier, the subcommittee chairman responsible for the measure, made clear that, to avoid constitutional difficulties, the newly amended section 43(a) “will extend only to false and misleading statements of fact.”

The statutory hook on which the lower courts in Dastar v. Fox hung their analysis was the Lanham Act’s prohibition of “false designation of origin.” Those courts found Dastar liable based on both the names it included in its videotape series (its own and its employees’) and those it omitted (Fox, SFM, and New Line). But Dastar and its staff actually had every right to be treated as the origin of Dastar’s videotape series, whereas the three plaintiffs did not.

Beginning with Dastar’s use of its own and its employees’ names, the inclusion of those credits in Dastar’s videotape series was consistent with the purposes of trademark law. Dastar both manufactured and sold its videotape series and acted as the guarantor of its quality. Under the Lanham Act, it was entitled to attach its name to the goods to distinguish them “from those manufactured or sold by others and to indicate the source of the goods.” Phrases such as “Dastar Presents” and credits such as “executive producer” are not only unregulated by the Lanham Act but, if understood at all by consumers, are not understood as making a claim of exclusive authorship, as is shown by television productions like Charlton Heston Presents the Bi-


193. [Trademark] laws often raise difficult questions about freedom of speech. During the course of our consideration of this legislation, those difficult issues were raised and sometimes hotly contested. I am pleased to say that the bill resolves those issues satisfactorily, and that our important constitutional freedoms have been preserved.

The provisions on dilution, material omissions, and tarnishment and disparagement that were originally proposed have been deleted . . . .


196. Id. § 1127.
Nor do consumers view a "producer" credit as designating authorship; in fact, there appears to be an industry practice of awarding "producer" credits to a wide variety of contributors, including "the star's bodyguard and the investor's wife."  

Turning to the flip side, Fox, et al., were not the "origin" of Dastar's videotape series. Three reasons counsel why no such obligation should be read into the Lanham Act. First, that obligation would thrust the Lanham Act into judgments about creative contributions, which actually fall within the domain of copyright. Second, it would impose on courts an obligation to compose credits for collaborative works—a task that continues to baffle Hollywood professionals after decades of effort. Finally, the formless moral rights created by this definition of origin would supplant Congress's incremental ap-

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199. Allowing the Lanham Act to cross that boundary—to protect authors or inventors from uncredited copying—would rewrite many of the Court's recent decisions. Under the Montoro definition of origin, for example, Wal-Mart would not have been vindicated two years earlier; instead, it would have been liable for selling "knockoff" copies of Samara Brothers' children's clothing—because the copies did not credit Samara Brothers as the "origin" of Wal-Mart's clothing. Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205 (2000). Similarly, Bonito Boats could have kept right on suing competitors who used molds to duplicate Bonito's unpatented hulls—as long as Bonito sued to demand that each of their hulls identify Bonito as the "origin" of the copied design. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989). Feist Publications, too, would have found itself back in court, charged not with copying a phone book but with failing to provide an appropriate credit to Rural Telephone. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). Allowing such suits would contradict the Supreme Court's "recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy." Bonito Boats Inc., 489 U.S. at 146.
200. The Copyright Act, which expressly distinguishes between a copyright and "any material object in which the work is embodied," concerns itself with protecting the underlying creative work of authorship. 17 U.S.C. § 202 (2000). Under the Lanham Act, by contrast, it is the goods that determine who may use a trademark—the person who "manufactured or sold" the goods is the "source of the goods" and may use a trademark to identify himself or herself. 15 U.S.C. § 1127 (2000). See Columbia Mill Co. v. Alcorn, 150 U.S. 460, 463 (1893) (A trademark must be "adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or... must point distinctively... to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed... to indicate the owner or producer of the commodity...") (emphasis added).
201. The Writers Guild of America has negotiated twenty pages of rules for assigning a wide variety of credits, from "written by" to "based on characters created by," and "from a Saturday Evening Post Story by." But its rulebook is just the beginning. The rules must be interpreted, and the Writers Guild has been forced to create an entire system of "credit" arbitration to apply the rules. Disputes are common. In the four years between 1993 and 1997, over a third of all films submitted for writers' credits—415 in all—ended up in arbitration. Robert W. Welkos, Giving Credit Where It's Due, L.A. TIMES, May 11, 1998, at A1. And even this elaborate system has not kept disputes out of court. See Paquette v. Twentieth Century Fox Film Corp., 54
proach to exactly the same issue, such as its explicit decisions to confer limited rights on motion pictures via the NFPA, and to deny moral rights for films under VARA.\textsuperscript{202}

Moreover, even if Fox, \textit{et al.}, could be considered the "origin" of Dastar's videotape series, nonetheless Dastar did not make a "false designation" of origin.\textsuperscript{203} The credits that the Ninth Circuit held omitted consist of two screens in the Fox videotape series that display the New Line and SFM logos without additional information, plus the phrase "By Arrangement with 20th Century Fox."\textsuperscript{204} But Dastar could not have simply added those logos or that phrase to its own series. Had it done so, it would have been justly accused of passing off, \textit{i.e.}, of using "in commerce any word [or] name . . . which . . . is likely to cause confusion . . . as to the . . . sponsorship, or approval of his or her goods . . . by another person."\textsuperscript{205} SFM and New Line would have objected that the presence of their logos could suggest that they sponsored or approved Dastar's videotapes,\textsuperscript{206} while Fox would have objected that it had no "arrangement" with Dastar and that its reputation was being tarnished by association with a "mutilated"\textsuperscript{207} version of the old television series.\textsuperscript{208} Lawsuits raising precisely such

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\textsuperscript{202} See supra Part III.A.3.b.
\textsuperscript{203} Dastar would be protected by the first amendment if it purchased a newspaper ad to publicize its view that respondents are a gaggle of uncreative hacks whose "origin" claim is based entirely on their ability to write checks, mainly to lawyers. \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 266 (1964). If it expresses the same views in a videotape that it has produced, however, it is subject to double damages and attorneys' fees if after suit the court takes a more generous view of respondents' contributions.

\textsuperscript{204} \textit{Id.} at *19.
\textsuperscript{208} In theory, of course, Dastar could have drafted a new credit that identified the "origin" role played by Fox, \textit{et al.}, while at the same time disclaiming any sponsorship or approval by
“sponsorship” objections have become common.²⁰⁹

b. Position of the United States

At the Supreme Court level, the Solicitor General filed an *amicus curiae* brief in support of Dastar.²¹⁰ Explaining the “Interests of the United States” in the case, the brief stated that the government “has a substantial interest in ensuring that domestic law is consistent with the United State’s international obligations under the Berne Convention for the Protection of Literary and Artistic Works, 828 U.N.T.S. 221, to which the United States has acceded.”²¹¹ The brief addressed the Berne Convention itself.²¹² “In acceding to the Berne Convention, Congress carefully considered the United States’ obligations under Article 6bis and concluded that the protections available under then-existing domestic law, including the Lanham Act, were sufficient to meet those obligations.”²¹³ In support, the brief relied on a variety of sources, including the report issued by the blue-ribbon commission noted above, with its attendant citation to *Smith v. Montoro*.²¹⁴

Although reverse passing off generally does not present the classic Lanham Act problems posed by direct passing off, lower courts have concluded that certain types of reverse passing off may be proscribed by Section 43(a).

*Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981), is a path marking case. . . . The Ninth Circuit’s holding in *Montoro* is grounded in the these parties. In practice, however, there is no way to draft such an alternative credit with any confidence, for a hostile competitor like Fox can always find fault after the fact with whatever Dastar says. Fox can object that the credit is too short and simple to do full justice to its originating role, or that the credit is too complicated for viewers to understand. It can complain that the credit is more prominent than the disclaimer, and so gives too great an impression of sponsorship, or it can object that the disclaimer is as prominent as the credit and thus hides Fox’s vital contribution in a sea of legalese. And, of course, whatever is said about Fox’s role must also satisfy the parties who preceded Fox—Time, Doubleday, Gen. Eisenhower, and the like. But obtaining the consent of these parties in advance is highly unlikely. “Competition is deterred . . . not merely by successful suit but by the plausible threat of successful suit.” Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 214 (2000). In these circumstances, Dastar’s only practical choice was the one it made: leaving the credits out.

²⁰⁹. See Jim Jubinsky, Note, Copyright and Trademark: Are They Too Substantially Similar for Literary Works?, 5 Tex. Intell. Prop. L.J. 389, 400 (1997) (“[D]efendants are placed in a ‘catch twenty-two’ situation when it comes to accreditation . . . . [I]f the defendant does credit an author and the author does not like it, or does not appreciate having his name associated with the work, the original author could still claim a false designation of origin.”). See also infra note 232.


²¹¹. *Id.* at *1.

²¹². *Id.* at *9 (citing 3 Nimmer ON COPYRIGHT § 8D.01).

²¹³. *Id.* at *9.

²¹⁴. *Id.* at *10 n.5.
text of Section 43(a). As the court of appeals explained, “the Lanham Act explicitly condemn[ed] false designations or representations in connection with ‘any goods or services.’” 648 F.2d at 605; see 15 U.S.C. § 1125(a) (1982). At the time that Montoro was decided, the Lanham Act did not require a plaintiff to show that replacing the star’s name with an actor who did not appear in the film was “likely to cause confusion” as to the “origin” of the film. 15 U.S.C. § 1125(a)(1)(A) (emphasis added). But the court in Montoro emphasized that a false designation about who starred in a film is likely to affect how moviegoers perceived the nature or attributes of the film.215

Although the Solicitor General did not state an overt position, the government apparently wanted to safeguard the holding of Smith v. Montoro, even if Dastar defeated liability under the Lanham Act. The rationale for safeguarding that 1981 decision, although again not overtly stated, presumably lay in safeguarding the treaty relations of the United States. Having told the world that moral rights are protected on these shores, based in part on Montoro, the government may have been concerned lest the United States be charged with going back on its word. In general, that concern is well taken.216 But as specifically applied to safeguarding Montoro, the particulars of Berne Convention jurisprudence actually allay the basis for the government’s fear, as we will see below.217

3. Decision of the Court
a. Ruling

On June 2, 2003, the Supreme Court handed down its decision in Dastar Corp. v. Twentieth Century Fox Film Corp.,218 marking the first time219 it considered the doctrine of reverse passing off.220 Starting221

215. Id. at *14–15.
216. In particular, it matches my own ruminations about the “moral ramifications” of U.S. adherence to the Berne Convention. See supra Part III.A.3.a and note 108; infra note 271.
217. See infra Part III.C.1.
219. The previous month, a circuit court warned that there can be no tort of reverse passing off when the purported miscreant who misattributed the work was also the only lost customer potentially available to plaintiff. John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26, 45–46 (1st Cir. 2003).
220. While Dastar v. Fox was wending its way through the courts, Fox Kids Europe Holdings and Fox Latin American Channel argued to the Central District of California—the same jurisdiction in which Twentieth Century Fox had sued Dastar—that “a reverse passing off claim is not tenable under the Lanham Act.” Salim v. Lee, 202 F. Supp. 2d 1122, 1128 (C.D. Cal. 2002). The district court denied that contention based on pre-Dastar law. Id. at 1128. Another court at the same time allowed a reverse passing off claim to proceed against Michael Jackson, even though plaintiff’s construction made the Lanham Act redundant with Copyright Act allegations. Adams v. Jackson, 218 F. Supp. 2d 1006, 1012 (N.D. Ind. 2002).
with the observation that section 43(a) "does not have boundless application as a remedy for unfair trade practices," the opinion nonetheless noted that every circuit court to consider the issue has construed that section as "broad enough to encompass reverse passing off." The Court readily agreed that under the statutory language, Dastar would have made a "false designation of origin [that] is likely to cause confusion . . . as to the origin . . . [of its] goods" had Dastar simply "bought some of New Line's Crusade videotapes and merely repackaged them as its own." But it recognized simultaneously that the actual facts in the case were vastly different: [Dastar] took a creative work in the public domain—the Crusade television series—copied it, made modifications (arguably minor), and produced its very own series of videotapes. If "origin" refers only to the manufacturer or producer of the physical "goods" that are made available to the public (in this case the videotapes), Dastar was the origin. If, however, "origin" includes the

221. To drive the analysis, the Supreme Court laboriously cataloged the difference between plaintiff's and defendants' products. The Court highlighted that Dastar copied "the original version of the Crusade television series, which is in the public domain," rather than copying plaintiff's 1988 videotape version. Dastar, 539 U.S. at 26. The Court continued its catalogue of differences:

Dastar's Campaigns series is slightly more than half as long as the original Crusade television series. 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 created new packaging for its Campaigns series and (as already noted) a new title.

Dastar manufactured and sold the Campaigns video set as its own product. The advertising states: "Produced and Distributed by: Entertainment Distributing" (which is owned by Dastar), and makes no reference to the Crusade television series. Similarly, the screen credits state "DASTAR CORP presents" and "an ENTERTAINMENT DISTRIBUTING Production," and list as executive producer, producer, and associate producer, employees of Dastar. The Campaigns videos themselves also make no reference to the Crusade television series, New Line's Crusade videotapes, or the book. Dastar sells its Campaigns videos to Sam's Club, Costco, Best Buy, and other retailers and mail-order companies for $25 per set, substantially less than New Line's video set.

Id. at 26–27 (citation to record omitted).

222. Id. at 29 (quoting Alfred Dunhill, Ltd. V. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974)). The Supreme Court further noted, "Because of its inherently limited wording, § 43(a) can never be a federal 'codification' of the overall law of 'unfair competition.'" Id. (quoting Prof. McCarthy). By contrast, Smith v. Montoro implied that section 43(a) "has progressed far beyond the old concept of fraudulent passing off, to encompass any form of competition or selling which contravenes society's current concepts of 'fairness.'" Smith v. Montoro, 648 F.2d 602, 604 (9th Cir. 1981) (quoting Prof. McCarthy).

223. Dastar, 539 U.S. at 30. In that context, the opinion cites Smith v. Montoro along with decisions from four other circuits. Id.


225. Dastar, 539 U.S. at 31.
creator of the underlying work that Dastar copied, then someone else (perhaps Fox) was the origin of Dastar's product.226

Investigating the meaning of the implicated term in the Lanham Act, the Court determined that

the most 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 Dastar. The concept might be stretched... to include not only the actual producer, but also the trademark owner who commissioned or assumed responsibility for ("stood behind") production of the physical product. But as used in the Lanham Act, the phrase "origin of goods" is in our view incapable of connoting the person or entity that originated the ideas or communications that "goods" embody or contain.227

The Court rejected different treatment for communicative products, i.e., goods purchased not for their physical qualities but for their intellectual content.228 Such a proposal would bring the Lanham Act into untenable conflict with copyright law.229

The Court reversed unanimously:230 Dastar was the "origin" of the physical tapes that it sold, and accordingly committed no violation of section 43(a). Any other construction would pose "serious practical problems,"231 including presenting manufacturers with a Catch-22 in attempting to label their goods.232 Emblematic of those problems is

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226. Id.

227. Id. at 31–32 (parenthetical and footnote omitted).

228. Id. at 32.

229. Id. at 34. In International News Service v. Associated Press, 248 U.S. 215 (1918), the Court stated that "defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own." Id. at 242. Dastar does not cite to that 1918 decision. But in the interim, it has largely become a dead letter, outside of its own circumstances limited to purloining "hot news." See generally NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

230. The vote was 8-0. Justice Breyer took no part in the case, inasmuch as his brother had served on the Ninth Circuit panel below. See supra note 187.

231. Dastar, 539 U.S. at 35.

232. In JOSEPH HELLER, CATCH-22 (1961), the "catch" is that although insanity is grounds for discharge from military service, anyone who applies to get out of the army ipso facto evidences rational behavior, and hence cannot be insane. Courts and commentators typically invoke that phrase without attribution (albeit not thereby incurring liability for reverse passing off!). See, e.g., Ellison v. Robertson, 189 F. Supp. 2d 1051, 1061 (C.D. Cal. 2002) ("The Court does not accept that Congress would express its desire to do so by creating a confusing, self-contradictory catch-22 situation."); supra note 209.

233. Dastar chose to excise Fox's name from its products—for which it found itself facing a claim for reverse passing off. By contrast, had it included Fox's name on its edited version of the original television series, then Fox more than likely would have filed suit under the Lanham Act for passing off. Dastar, 539 U.S. at 36. See also 3 NIMMER ON COPYRIGHT, supra note 46, § 8D.03[B].
that the victorious parties below in this very case could only tenuously claim to be the "origin" of the original television series.\textsuperscript{234} Indeed, the Court elaborated at some length on the dangers of unmooring works of authorship from copyright law:

Without a copyrighted work as the basepoint, the word "origin" has no discernable limits. A video of the MGM film Carmen Jones, after its copyright has expired, would presumably require attribution 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). In many cases, figuring out who is in the line of "origin" would be no simple task. . . . We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.\textsuperscript{235}

[Even a]ssuming for the sake of argument that Dastar's representation of itself 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) for that representation would create a species of mutant copyright law that limits the public's "federal right to 'copy and to use,'" expired copyrights.\textsuperscript{236}

This is not to say that \textit{Dastar v. Fox} cuts off all forms of relief for rival videotape sales. Most obviously, had Fox been diligent in renewing the copyright to the television series, it would have been able to prevail on the straightforward basis of copyright infringement.\textsuperscript{237} Moreover, as already noted, had Dastar sold products manufactured by Fox with its own name substituted, it would have been liable for reverse passing off.\textsuperscript{238} Finally, the Court's opinion construed only the "origin" clause contained in the first paragraph of section 43(a); it therefore remains possible for a party to fall afoul of the second paragraph of

\textsuperscript{234} Indeed, in the present case it is far from clear that respondents have that status. Neither SFM nor New Line had anything to do with the production of the Crusade television series—they merely were licensed to distribute the video version. While Fox might have a claim to being in the line of origin, its involvement with the creation of the television series was limited at best. Time, Inc., was the principal if not the exclusive creator, albeit under arrangement with Fox. And of course it was neither Fox nor Time, Inc., that shot the film used in the Crusade television series. Rather, that footage came from the United States Army, Navy, and Coast Guard, the British Ministry of Information and War Office, the National Film Board of Canada, and unidentified "Newsreel Pool Cameramen." If anyone has a claim to being the original creator of the material used in both the Crusade television series and the Campaigns videotapes, it would be those groups, rather than Fox.

\textit{Dastar}, 539 U.S. at 35.

\textsuperscript{235} \textit{Id.} at 35-36.

\textsuperscript{236} \textit{Id.} at 34.

\textsuperscript{237} \textit{Id.} at 38.

\textsuperscript{238} \textit{See supra} text accompanying note 225.
that provision by engaging in false advertising.\textsuperscript{239} One could imagine Dastar itself falling afoul of that provision, for instance, had it advertised its videotapes as "containing all-new material never before released."\textsuperscript{240} Since it actually said nothing of the sort, Dastar escaped all Lanham Act liability under the Court's ruling.

b. Implications as to Moral Rights

Going beyond the parties to the suit, what are the implications of the case as to the greater doctrine of moral rights in the United States? In principle, there are three ways to read the Court's opinion—narrowly, broadly, and in-between.

The narrow reading is that everything in the opinion is limited to the particular subparagraph of the Lanham Act under which plaintiffs filed suit, namely its "trademark" provision,\textsuperscript{241} meaning that the ruling exerts no implication under the coordinate provision against "false advertising,"\textsuperscript{242} which was outside the complaint in suit.\textsuperscript{243} The implication would be that Fox itself could have prevailed against Dastar for the conduct under review, if only its attorneys had framed their allegations differently.\textsuperscript{244} That reading reduces everything that the Court said to a jejune exercise in pleading. In particular, it renders otiose the Court's sweeping pronouncements as to "mutant copyright law"\textsuperscript{245} and the like, and sets at naught its statement, "We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.")

\textsuperscript{240} Cf. Benson v. Paul Winley Sales Corp., 452 F. Supp. 516 (S.D.N.Y. 1978) (enjoining distribution of old recordings enclosed in album cover that would mislead consumers into believing that it represented current work). The quotation in the text is invented, inasmuch as in the actual case, by contrast, plaintiffs pursued no cause of action under this paragraph. See Dastar, 539 U.S. at 27–28. Certainly, it would seem that Dastar's actual conduct of calling itself the "origin" of its product, given its specific blessing by the Court, could not serve as the basis of a false advertising claim. See id. at 35–36. ("In many cases, figuring out who is in the line of 'origin' would be no simple task... We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.").
\textsuperscript{242} Id. § 1125(a)(1)(B).
\textsuperscript{243} Thus, if Peter Plagiarist takes a poem written by Lauren Laureate, copies it verbatim, removes the author's name and inserts Peter's own name as author, there is clearly a false statement of authorship. But there is no violation of Lanham Act §43(a)(1)(A). And there will not be a violation of Lanham Act §43(a)(1)(B) unless, as is doubtful, the purloined poem is used in "commercial advertising or promotion."

\textsuperscript{244} In other words, plaintiffs in the case included a count in their complaint only under 15 U.S.C. § 1125(a)(1)(A), not under 15 U.S.C. § 1125(a)(1)(B).
\textsuperscript{245} Dastar, 539 U.S. at 34.
Although it is too soon to track judicial application of the Dastar precedent, my own prediction is that courts will not view the decision as so limited.

The broad reading is that the opinion negates any regulation by the Lanham Act that is geared at works of authorship, rather than being limited to the domain under review of reverse passing off. Under this interpretation, the tort of authorial passing off (corresponding to right (b) in the typology offered above) as well as reverse passing off is no longer cognizable under federal law. The result would be that a publisher could hire a hack to write a potboiler and proceed to emblazon the resulting cover with the false legend "By John Grisham and Stephen King, in an unprecedented collaboration." Against that interpretation is the fact that Justice Scalia’s opinion is careful to note that Dastar would have exposed itself to liability had it engaged in false advertising. The opinion thus evinces sensitivity for truth-in-labeling. It is hard to imagine that the Court would have simultaneously discarded decades of construction of truth-in-labeling under the Lanham Act insofar as it has condemned passing off. Certainly, nothing in the opinion overtly inclines towards that earthquake. It is at war, moreover, with the Court’s observation that the flaw in plaintiffs’ allegations was stretching the Lanham Act “to cover matters that are typically of no consequence to purchasers.”

Given that the blatant falsehood of claiming that a work was authored by Grisham and King presumably would be of great consequence to purchasers, that broad construction is problematic.

We are therefore left with the middle ground in interpreting the Court’s pronouncements. The opinion should be viewed as neither so trivial as the narrow interpretation nor as implacably monumental as the broad one. Rather, the Court’s Dastar opinion about reverse passing off redefines precisely the law of reverse passing off. Its impact, accordingly, centers around such previous cases as Smith v. Montoro. The Ninth Circuit in that earlier case determined that “being accurately credited for films in which they have played would seem to be of critical importance in enabling actors to sell their . . . perform-

246. Id. at 35–36.
248. See David A. Gerber, Copyright Reigns—Supreme: Notes on Dastar Corp. v. Twentieth Century-Fox Film Corp., 93 TRADEMARK REP. 1029 (2003).
249. See supra Part III.A.1; see also supra note 2.
251. Id.
That focus on the artist is consonant with the purpose of copyright law. But it falls afield of the concerns of section 43(a), as illustrated by Dastar:

The consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product—and typically does not care whether it is. The words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers.253

Insofar as the ruling of Smith v. Montoro focused on the adverse effect suffered by an actor via the substitution of “Bob Spenser” for his name (Paul Smith) in the credits for Convoy Buddies,254 it would appear to be a dead letter at present. Nonetheless, if the producers of that film were to re-release it by falsely advertising “Tom Cruise and Jennifer Lopez in Convoy Buddies,” then proof that that billing was of affirmative “consequence to purchasers” (a proposition not difficult to imagine) would allow suit to proceed even in the post-Dastar era.255

C. Evaluation

1. Does The Berne Convention Require Recognition of the Right to Forestall Listing Credit for Non-Authors?

Given all the lead-up to moral rights in the United States premised in the jurisprudence of the Berne Convention,256 it is sobering to see the way that the issue actually played out in the first pertinent case to reach the Supreme Court. Apart from a passing question in oral argument,257 the issue failed to arise in Dastar v. Fox at all. Notwithstanding the arguments urged to it about treaty compliance,258 the Court in its opinion deemed relevant only the positive statutes enacted by Congress, rather than any representations that the government made about U.S. treaty compliance.259 Given the Court’s conclusion that

253. Dastar, 539 U.S. at 32–33.
254. Montoro, 648 F.2d at 603.
255. I thank Tom McCarthy for elucidating the point to me.
256. See supra Part III.A.3.
257. In oral argument, Justice Ginsburg asked the Solicitor General about the relevance of the Berne Convention to this case. Transcript of Oral Argument, 2003 U.S. Trans. (LEXIS) 35, at *22, Dastar v. Fox, 539 U.S. 23 (2003) (No. 02-428) [hereinafter Transcript of Oral Argument]. His brief answer was that that treaty “doesn’t expand or reduce existing rights under . . . domestic law.” Id.
259. See supra Part III.B.2.b.
the Lanham Act did not permit the subject cause of action, no further room remained to rehabilitate it.

There is nonetheless one particular in which the Court confronted the specific sphere of moral rights. Its decision recites the fact that Congress passed VARA\(^2\) in order to confer affirmative rights to claim attribution\(^2\)—but only in the circumscribed ambit of enumerated artworks.\(^2\) That limited authorization undercut the notion that Congress elsewhere afforded an open-ended right of the type contemplated by Smith v. Montoro and its progeny: "Recognizing in § 43(a) a cause of action for misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations superfluous. A statutory interpretation that renders another statute superfluous is of course to be avoided."\(^2\) In this respect, Dastar v. Fox radiates outward to limit moral rights protection not simply in the narrow sphere that it confronted, but more generally as well.

The sequence is ironic—the United States joined the Berne Convention while assuring members of the Berne Union that our domestic law, including Smith v. Montoro, recognized moral rights; Congress

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260. See supra Part III.A.3.b.
261. Dastar, 539 U.S. at 34.
262. See 3 NIMMER ON COPYRIGHT, supra note 46, § 8D.06[B][1].
263. Dastar, 530 U.S. at 35. Though beyond the current scope, the further question arises whether that ruling similarly dooms the pre-Dastar holding of the Second Circuit in Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976), insofar as that case arose under section 43(a) of the Lanham Act. Gilliam recognized a cause of action based on "mutilation" of the plaintiffs' work. The court held that presentation of a mutilated work, if accompanied by the author's name, violates section 43(a). The opinion described this entitlement in moral rights terminology as "the right of the artist to have his work attributed to him in the form in which he created it." Id. at 24 (citing 1 NIMMER ON COPYRIGHT § 110.1). Moreover, a majority of the Gilliam panel (with Judge Gurfein in disagreement) held that a notice disclaiming the authors' approval of the edited version would not constitute a defense to such a cause of action. "We are doubtful that a few words could erase the indelible impression that is made by a television broadcast . . . . Furthermore, a disclaimer . . . would go unnoticed by viewers who tuned into the broadcast a few minutes after it began." Id. at 25 n.13. Even as to those who do notice it, moreover, "some 'consumers are ignorant or inattentive, so some are bound to misunderstand no matter how careful the producer is.'" Ty, Inc. v. GMA Accessories, Inc., 959 F. Supp. 936, 941 (N.D. Ill. 1997), aff'd, 132 F.3d 1167 (7th Cir. 1997).

It must be noted that Gilliam, like Smith v. Montoro, arose under the pre-amendment version of section 43(a) of the Lanham Act. Further, the heart of its ruling is that "ABC impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents." Gilliam, 538 F.2d at 25. That concern shows solicitude for the integrity right of authors—a domain that falls within the protection of the separate enactment discussed above, viz. VARA. See 3 NIMMER ON COPYRIGHT, supra note 46, § 8D.06[B] (attribution right under VARA); § 8D.06[C] (integrity right under VARA). It is possible that the Supreme Court would have been as unfavorably disposed towards Gilliam as it in fact treated Smith v. Montoro. But the converse argument remains cognizable at present. See 3 NIMMER ON COPYRIGHT, supra note 46, § 8D.04[A][2].
later passed VARA to further the process of Berne compliance. Yet when the matter finally reached the Supreme Court, the latter enactment served as partial basis for killing the rule of the former case.

The question remains whether the short shrift that the Court paid to the Berne Convention subverts that treaty’s strictures. To appreciate this aspect, we must revert to the various prongs of the attribution right. To reiterate, French law recognizes five attribution rights:

(a) the right to be known as the author of her work;
(b) the right to prevent others from falsely attributing to her the authorship of a work that she has not in fact written;
(c) the right to prevent others from being named as the author of her work;
(d) the right to publish a work anonymously or pseudonymously, as well as the right to change her mind at a later date and claim authorship under her own name; and
(e) the right to prevent others from using the work or the author’s name in such a way as to reflect adversely on her professional standing.

Among those rights, where does the cause of action urged by plaintiffs in Dastar v. Fox fit? The gravamen of their charge was that Dastar wrongfully listed itself as the origin of the videotapes at issue in that case. Fox, in short, wished to prevent another from being named as the source of origin of a work that it considered its own. That right corresponds to the branch denominated (c) above.

The focus of Dastar v. Fox on prong (c) shows that, even if the Court had deferred to Berne Convention jurisprudence, it need not have reached a different conclusion. As canvassed above, the sparse


265. See supra note 257.

266. See supra Part III.A.1.

267. Ironically, Fox actually did not occupy that status, and its co-plaintiffs occupied it even less so. SFM and New Line had no role whatsoever in the original television series, so they cannot claim to be the origin of Dastar’s product under any plausible definition of that term. Fox’s contribution to the television series was managerial at best—it obtained television rights to General Eisenhower’s book and paid Time, Inc., to produce the television series. (Indeed, Fox’s own credits mention itself only in a subordinate clause: “A March of Time Production By Arrangement with 20th Century Fox.”) Even expanding “origin” to include claims of intangible origination may not be enough to save Fox. Fox was not the only contributor to the original television series. Nor was it the most important. Time, not Fox, actually produced the television series, and Time’s work in turn derives from a host of other sources, from General Eisenhower’s book to public domain footage shot by the armed forces of several nations. See supra note 234.
text of the Berne Convention is more limited than *le droit moral* under French law. In particular, it does not unambiguously include prong (c).\(^{268}\) Moreover, even when Congress explicitly accorded moral rights under U.S. law, limited to works of visual art, it made the explicit determination at that juncture to add various instantiations of the attribution right—specifically excluding (c).\(^{269}\) When properly appreciated, therefore, the Solicitor's solicitude for *Smith v. Montoro* was unnecessary in the context of the Berne Convention.\(^{270}\) Instead, full compliance with Article 6bis would require augmenting different prongs of the attribution right under U.S. law.\(^{271}\)

There is an additional reason why even antennae finely tuned to Berne frequencies may legitimately filter out the signal emitted by *Dastar v. Fox*. As previously explained, moral rights under the Berne Convention need not, unlike their French forebears, be perpetual, inalienable, and imprescriptible.\(^{272}\) Rather, the Berne Convention commands protection for its particular species of attribution and integrity rights only for as long as the copyright remains in subsistence (and concomitantly affords latitude for individual nations to accord protection under Article 6bis for considerably less than the full copyright term, so long as they subsist for as long as the author is living).\(^{273}\) By contrast, *Dastar v. Fox* reached the United States Supreme Court in a posture imposing liability for reverse passing off even in the absence of any copyright protection for the book and video of *Crusade in Europe*.\(^{274}\) For all these reasons, the need to safeguard a reverse passing-

\(^{268}\) See supra Part III.A.2. Also note the latitude given to individual states to calibrate the level of protection that they wish to accord. See id.

\(^{269}\) See supra Part III.A.3.b.

\(^{270}\) See supra Part III.B.2.b.

\(^{271}\) As noted above, the best rationale looks neither to the deficiency of other Berne Union states' laws, nor to exceptions from enforcement under the TRIPs protocol. See supra Part III.A.3.a. Rather, the proposition advanced herein is that the strictures of the Berne Convention do not extend to the domain of reverse passing off. “Accordingly, the U.S. can hold its head high in international circles, even as it deliberately declines to recognize legal protection for attribution (c) invoked above.” Id. See also text accompanying note 111.

\(^{272}\) Even in France, it is doubtful that corporate entities, such as Fox, would be able to vindicate a cause of action for violation of *le droit moral*. As the preeminent commentator notes, “L’œuvre de l’esprit est avant tout l’émanation d’une personnalité.” Lucas, supra note 59, § 367, at 303. The famous *Asphalt Jungle* case held at one stage that a “moral right is inalienably vested in a natural person” and hence the motion picture studio could not exploit the very work over which it owned the copyright in its altered (colorized) state. Lucas et al., supra note 52, § 7[4][a].

\(^{273}\) See supra Part III.A.2.

\(^{274}\) Even if it were ultimately to be concluded that copyright protection continues for General Eisenhower's underlying memoirs, the ex-President's death in 1961 means that the Berne Convention does not obligate the United States to accord moral-rights protection to that work at any time after that date.
off tort in the context of *Dastar v. Fox* exerts scant significance for safeguarding the integrity of U.S. adherence to the Berne Convention.

2. Should There Be a General Right to Forestall Listing Credit for Non-Authors?

Passing from construction of the Lanham Act and of the Berne Convention to questions of policy, would it be a good idea for the legislature to institute the moral right denominated (c) above? In other words, in the wake of the Court’s decision in *Dastar v. Fox*, should Congress or the various state legislatures\(^{275}\) step in to create a general right, apart from copyright, to prevent others from being named as the author of a work?\(^{276}\) To answer these questions, it is necessary to divide the inquiry between works in copyright and works in the public domain.

a. Works Subject to Copyright Protection

i.

At present, works in copyright protection are subject to attribution in the United States: The author is the initial copyright holder and fully controls the work’s initial publication. If the author consents to the dissemination of her work, she may by agreement require the use of her name, the omission of her name, or the use of a pseudonym. In each instance, the author’s choice may be enforced by appropriate litigation sounding in contract law.\(^{277}\) Accordingly, authors who retain the full panoply of rights could, in theory, vindicate each and every moral right (a)–(h) under U.S., no less than under French, law.\(^{278}\)

As to works currently subject to copyright protection in the United States, the proprietor controls their dissemination. If the publisher, having acquired title, substitutes her nephew’s name for the author’s on the book’s cover, the result seems to be a pollution of the cognitive

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\(^{275}\) To the extent that states were to enact such laws, the further question would arise whether they are preempted. Given the conclusion reached below as to the undesirability of such laws, that question is left dangling.

\(^{276}\) I have previously commented that Congress acts best when it limits its attention backwards to correcting the results of concrete cases with which it disagrees, rather than facing forward to regulate an emerging domain comprehensively for the future. See David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233 (2004). The current question is whether *Dastar v. Fox* qualifies as such a wrongly decided case deserving Congressional correction.

\(^{277}\) See 3 NIMMER ON COPYRIGHT, *supra* note 46, § 8D.03[A][3].

\(^{278}\) The Supreme Court has admonished that “it is well to remember that the property of the author or painter in his intellectual creation is absolute until he voluntarily parts with the same.” Am. Tobacco Co. v. Werckmeister, 207 U.S. 284, 299 (1907).
well of mankind. On reflection, however, the harm to society occasioned thereby is identical to that caused by an author's decision to publish his own work pseudonymously. In both cases, the public purchases a work denominated as being authored by X, whereas in fact it was composed by Y.

Under the Berne Convention (as interpreted by its secretariat), one right guaranteed to authors is the right to publish pseudonymously, corresponding to right (d) catalogued above. Accordingly, adherence to our treaty obligations precludes adoption of a new truth-in-labeling law requiring that the author's true name be invariably affixed to works of authorship. To the extent that the legislature declines, on that basis, to craft a categorical law, it is unclear why it should enact a statute more narrowly tailored to the publisher's nephew and like instances.

In particular, let us revert to the tort of reverse passing off at issue in Dastar v. Fox, corresponding to moral right (c). For current purposes, we will assume that President Eisenhower's memoirs will be determined to be protected by copyright when their status is ultimately adjudicated. It follows that Dastar would become liable for copyright infringement by distribution of its video. Thus, the copyright owner could not only vindicate moral right (c) by demanding appropriate attribution, but also could shut down Dastar's distribution

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279. See supra Part III.A.2.

280. See supra Part III.A.1. For a review of all the moral rights, see supra note 2.

281. Let us imagine that his publisher deems Salman Rushdie too controversial, and therefore markets The Satanic Verses under the name "Halibut Hurrydie." In France, it has thereby violated the author's inherent right (c). But now consider that Stephen King once voluntarily wrote under the pseudonym "Richard Bachman" as an experiment to see if he could achieve success on the inherent greatness of his writing rather than based on brand recognition. Under French law, that is his inherent right as well, corresponding to (d). Further, according to the Guide to the Berne Convention, adhering states must recognize (d) but not (c). See supra Part III.A.2. In other words, Article 6bis of the Berne Convention guarantees King the right to engage in his little experiment; if Congress were to implement an inherent consumer right for truth-in-labeling, the result would be to deny King the right to call himself Bachman, and thereby place the United States afoul of its treaty obligations!

282. Part of the problem here inheres in the mismatch between Continental legal objections and those underlying U.S. law. Le droit moral arises out of the desire to protect the author's personality. By contrast, protections under state unfair competition laws and under section 43(a) of the Lanham Act "are grounded in the identical objectives of protecting consumers from confusion and deception." Kwall, supra note 113, at 1016. For that reason, the Lanham Act is a poor vehicle to vindicate "damage to the author's spiritual interest." Id. at 1020-21.

283. That matter remains sub judice at present. See supra note 188.

284. That conclusion requires the further assumption that Dastar's videos are substantially similar to the Eisenhower memoirs. See 4 Nimmer on Copyright, supra note 46, § 13.03.
of the videotape altogether.\textsuperscript{285} It follows that the instant domain is hardly one in which U.S. law slights authorial interests such that supplemental protection is needed.

Based on the foregoing, such scenarios as the publisher’s nephew arise only when the author has signed away her rights without safeguarding her right of attribution. Is legislation that would create an inalienable right of attribution, \textit{à la mode frangaise}, either needed or desirable?

One could posit that “authors are congenitally irresponsible, [and] that frequently they are so sorely pressed for funds”\textsuperscript{286} that they will blithely give up rights that the law would otherwise secure to them.\textsuperscript{287} It may be that contract boilerplate in the copyright industries typically so provides. But before mounting a corrective campaign in Congress, what is required is an empirical investigation into whether society currently confronts scores of compositions being vended by their copyright owners in derogation of the true author’s name.\textsuperscript{288} With no such problem apparent to this observer, the need for legislation on this score strikes me as lacking.\textsuperscript{289}

What about works made for hire? In those instances, U.S. law\textsuperscript{290} treats the initial author not as the human being who creates the copyrightable composition, but rather as that person’s employer.\textsuperscript{291} One might thereupon conclude that the opportunity to contract posited above is absent, such that a new law is needed. On reflection, though, that proposition does not hold water. First, employees do indeed contract with the erstwhile copyright owner. True, the negotiations might not take place before the creation of each individual work, but they

\textsuperscript{285} The embedded assumption here is that the prevailing plaintiff would be able to obtain an injunction—which is not invariably the case. See 4 NIMMER ON COPYRIGHT, \textit{supra} note 46, § 14.06[B].


\textsuperscript{287} An old view holds that authors “are more subject than most men to indolence . . . . They must somehow be blasted out of this agreeable aimlessness, and one of the best ways is the hope of producing a competence for their children.” Zechariah Chafee, Jr., \textit{Reflections on the Law of Copyright}, 45 COLUM. L. REV. 503, 508 (1945).

\textsuperscript{288} In other words, even if publishers typically secure such rights by boilerplate contracts, no harm arises unless they subsequently act thereon by putting out works under names other than the authors’.

\textsuperscript{289} As the matter is empirical, I would adopt the contrary conclusion, if presented with the requisite surveys proving that the problem is widespread and causing serious dislocation.

\textsuperscript{290} Note that under French and German law, computer programmers categorically, and certain other authors under given circumstances, might be divested of moral rights in their creations pursuant to an analog to the work-for-hire doctrine. See Gunlicks, \textit{supra} note 51, at 651.

\textsuperscript{291} See 17 U.S.C. § 201(b) (2000). The consequence, of course, is that the human author loses any ability to assert moral rights. See, e.g., Cleary v. News Corp., 30 F.3d 1255, 1259–60 (9th Cir. 1994) (publisher need not credit author). See also infra note 379.
must predate the beginning of the process by which the employee creates works of authorship. To the extent that the future loss of attribution is deemed unacceptable, the employee always has the option of declining the proffered job. Again, only paternalism regarding employees as congenitally irresponsible would warrant abrogation of the normal scheme of freedom of contract.

Even more fundamentally, it is necessary to inquire whether present society confronts corporate copyright owners who routinely commit attribution atrocities. For these purposes, Hollywood is illustrative. The battles there over “credit” are legendary. Hardly indicative of lack of respect for crediting who does what, every film to come out of the major studios—as well as every newspaper advertisement and billboard—prominently features the names of its stars, producer, and director. As previously noted, guilds organized for this purpose engage in their own quasi-judicial enforcement of such matters of attribution. In short, the evidence is lacking that society needs a new law guaranteeing an inalienable right of attribution in the name of the initial author (either corporate or human, depending on how aggressively the legislature wished to ape French norms).

Moreover, such a new law would not help the particular claimants in Dastar v. Fox. Recall that Twentieth Century Fox arranged for Time Inc. to produce the original television series based on the book. Depending on the contours of the new law, Time Inc. might have had a cause of action against the three plaintiffs who filed suit: Fox, New Line, and SFM. None of them qualified as the original author who should be credited under a theory of inalienability. Or perhaps the new law would protect not even Time Inc., but instead its human employees who actually created the original series (whose personal identities were erased by Time). What seems clear is that even after

292. Although the circuits disagree as to commissioned works about whether the subject agreement must be memorialized before the work in question is created, they agree that the substantive agreement must be in place between the parties before the work in question is created in order for it to be deemed a work made for hire. See Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 412 (7th Cir. 1992) (requiring writing beforehand); Playboy Enters, Inc. v. Dumas, 53 F.3d 549, 560 (2d Cir. 1995) (allowing post-creation writing to memorialize pre-creation agreement).

293. At this point, I throw in the towel instead of seeking rigorous gender neutrality. See supra text accompanying note 56. But this might be the felicitous point to acknowledge the perspective that plagiarism is “a cultural notion [that] affirms the superiority of the masculine intellect.” Rebecca Moore Howard, The New Abolitionism Comes to Plagiarism, in Perspectives on Plagiarism, supra note 56, at 87, 95 n.5.

294. See supra note 201.

295. Id.

296. See supra note 234.
To end this section, consider a work about writing and attribution in theatrical distribution at the time that *Dastar v. Fox* was *sub judice* before the Court. I refer to the film *Adaptation*. At this point, STOP! If you have not seen the movie, then do not continue with so trivial an exercise as reading this article—which in the process will give away the film’s surprise and spoil the enjoyment. Instead, leave this dreary text and go experience the movie. Only then will you and I, friend, have established the necessary commonality to appreciate what is coming next.

Back already? You did see the movie—right? Very well; on we go.

Screenwriting credit for the movie goes to Charlie Kaufman and Donald Kaufman. Of course, the movie itself is about Charlie Kaufman and Donald Kaufman. The latter dies in the third act. The final screen proclaims: “In Loving Memory of Donald Kaufman.” All very well and good—except for the fact that there is no Donald Kaufman. The attribution on the film is therefore false.297

The copyright owner consented to that false credit, as undoubtedly did Charlie Kaufman.298 Therefore, neither of them can complain under current law. If the impetus for a new law mandating inalienable truth-in-authorship were to lie in a sense that the public has a right to be truthfully apprised as to who did what, regardless of what the copyright owner might have to say on the subject, then it would ensnare *Adaptation* in its net. That reason alone suffices for me to reject the utility of such a new law.299

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297. Screenwriters in the past have likewise had other reasons to have their work appear pseudonymously. See Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. Chi. L. Rev. 590, 620 n.99 (1987).

298. The word “undoubtedly” in that sentence denotes the fact that I am making an assumption, for which I lack proof. I hereby promise a complimentary treatise to the reader who proves me wrong.

299. Bobbi Kwall offers the valuable insight that “little attention has been given to the idea of unpacking the components of moral rights protections and analyzing each strand of this doctrine separately.” Kwall, *supra* note 113, at 1027. She proposes separating attribution rights from other species of moral rights and implementing a proposal to protect the former under U.S. law. *Id.* at 1027–32. I would go further: Having unbundled the attribution right itself into five separate prongs, I propose treating them separately. In particular, this article shows that right (b) currently enjoys great support in the United States, which is a salutary feature of our laws. The proposition advanced herein is that that status should continue while simultaneously right (c) should not constitute a freestanding obligation under the positive laws of the United States (as
b. Works in the Public Domain

Moving from works still subject to copyright protection to works in the public domain, new dynamics emerge. Although we have already seen that the author of a work subject to copyright protection can theoretically vindicate all moral rights (a)–(h), the author of a work in the public domain is largely bereft of such protection. Anyone can publish it over her objection, even if it were previously unpublished. So there goes (g), the droit de divulgation. Anyone can adapt it, even in ways the author detests, so there is no (f) droit au respect de l'oeuvre, either. Even if the author recants, anyone can also continue to publish it, so there is no (h) droit de repentir.

In terms of the five attribution rights (a)–(e), those are all gone, too. But there is one exception: (b) the right to prevent others from falsely attributing to her the authorship of a work that she has not in fact written. That conduct constitutes passing off, even after expiration of copyright. The deceptive use of an author's name to sell books she did not write redresses a legal interest distinct from protecting the work of authorship itself, and for that reason continues indefinitely.

In terms of the Berne Convention, that state of affairs complies with the treaty obligations of the United States, for Article 6bis requires protection only for so long as the copyright lasts. Therefore, even if it did not continue to afford right (b), the failure of U.S. law to accord moral rights protection to works in the public domain does not bring it afoul of international commitments.

But is it nonetheless a good idea to institute moral rights protection here?

Amy Heckerling produced a mild hit called Clueless. During its upward trajectory, she revealed that the plot was based on Jane Austen’s Emma. The Coen Brothers composed O Brother, Where Art
Thou? A screen credit indicates that it was “Based on The Odyssey by Homer.” Fox itself released Romeo+Juliet, starring Leonardo di Caprio and Claire Danes as the star-crossed lovers on some kind of post-modern beach.

Do we want to have courts tell Heckerling that she initially fell afoul of moral right (a)? To tell the Coens that their vision was not Homer’s, placing them afoul of (c)? To tell Fox that its desecration is not appreciated, and moreover violates (f)? Unleashing the civil law’s vision of moral rights onto the litigious society known as the United States seems nothing less than a formula for an explosion of dubious claims.

3. Resolving the First Two Scenarios

Winding our way back to Herodotus, we now have our answer. If Shady Screenwriter were an honorable individual, he would credit the story for Feuding Princesses to the father of history. But to the extent that Shady lives up to his name, the means for redress need not be legal. Society should not create a new tort for which a plaintiff could obtain standing to haul Shady into court in order to judge whether the various tales unfolding on screen trace their lineage back to The Histories. Instead, the remedy should be reviews, publicity, and other education.

We therefore reach our answer to Scenario One. There should be no actionable legal redress to Shady’s machinations.

What about Scenario Two? Does the alteration from the desired title of To Prevent The Traces Of Human Events From Being Erased By Time to the actual title of Prevent The Traces Of Human Events From Being Erased By Time: A Discourse on Academic Writing rise to the level of being appropriately subject to legal redress? Absolutely not. The alteration simply refuses to accept a speaker’s self-indulgent allusion as the sum and substance of publicity for his talk; instead, it clothes that allusion with a more concrete appraisal to the audience of

310. In Continental eyes, any interruption of the dramatic development of a movie for commercial messages could be viewed as a “mutilation.” Mario Fabiani & Alberto Musso, Italy § 7[1][b], in International Copyright Law and Practice, supra note 52 (intermediate court holding that “interruptions by spot commercials alter and disfigure the identity of the film work being broadcast”; later amendments promulgated to Broadcasting Act on this subject). Implementing that right in the United States might entail the bankruptcy of all the commercial television networks.
311. See supra note 4.
the subject matter to be covered. Even if the speaker self-righteously thought the new title a monstrosity that failed to convey his deathless contribution on the day of the conference, it scarcely contributes to social welfare to allow him to vent his spleen through the instrumentality of the courts. The organizers of a conference, no less than its keynote speaker, share a vital interest in accurately apprising the public as to the content of each presentation. To the extent that the two fail to see eye to eye, that is unfortunate—but hardly the basis on which to multiply new causes of action.

Investigating more deeply, even if we were to assume that this law review took an article entitled To Prevent The Traces Of Human Events From Being Erased By Time and unilaterally decided to publish it under the title of Prevent The Traces Of Human Events From Being Erased By Time: A Discourse on Academic Writing, listing the author as David Nimmer, there has been no violation. Even in France, that conduct might fail to be actionable, as it (a) fails to derogate from his right to be known of the author of what is in fact his work, (b) does not involve any false attribution, (c) does not involve others being named as the author, (d) involves nothing about anonymous or pseudonymous presentation, and (e) does not reflect adversely on his professional standing. A fortiori, it constitutes no violation of the less protective strictures of U.S. law.

We have seen that no actionable violation arises from Scenarios One and Two. It is submitted, however, that the opposite conclusion pertains to Scenario Three. To appreciate the differences requires a separate investigation.

IV. Plagiarism

Even after the initiation of copyright protection via the statute of Anne in 1709, "copyright infringement" remained unknown. This is not to say that all parties scrupulously respected copyrights once they were created. Rather, it is a matter of terminology. During this period, the relevant term for violating a copyright was "usurpation." Other terms then in vogue were "piracy" and "plagiary."

312. See supra Part III.A.1.
313. See supra Part III.A.3.
315. "At that time, there was no such thing as intellectual 'property.' Rather, the term 'propriety' defined the state of mind of all concerned." Nimmer, supra note note 12, at 125 (citing ADRIAN JOHNS, THE NATURE OF THE BOOK 187-90 (1998)).
316. JOHNS, supra note 315, at 461.
317. Id.
Plagiary meant in the first instance slave trading; by extension, it was applied to stealing books. 318

A. Dastar Again

The last term has stayed with us, currently in the version "plagiarism." 319 The Court in Dastar v. Fox even invoked it last term. Its reference arose in the context of attempting to define the proper domain of copyright law, an intricate puzzle that had previously engaged many lower courts, 320 but which the Supreme Court itself had previously ducked. 321 Considering whether section 43(a) of the Lanham

318. Id. n.31. See Lindey, supra note 46, at 95; Dursht, supra note 58, at 1263.
319. A vast literature underlies this term, comprising many of the greats of literature. Heinrich Heine commented, "Nothing is siller than this charge of plagiarism." The New Dictionary of Thoughts 483 (Tryon Edwards ed., 1977). Emerson expressed it as follows: "All minds quote. Old and new make the warp and woof of every moment. There is no thread that is not a twist of these two strands. By necessity, by proclivity and by delight, we all quote." RALPH WALDO EMERSON, Quotation and Originality, in LETTERS AND SOCIAL AIDS: THE COMPLETE WORKS OF RALPH WALDO EMERSON VOLUME 8, at 178 (1904). T.S. Eliot famously stated, "Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different." T.S. Eliot, Philip Massinger, in ESSAYS ON ELIZABETHAN DRAMA 153 (1932). Alexandre Dumas phrased it this way: "The man of genius does not steal, he conquers: He makes of the province that he takes an annex of his empire; he imposes on it his laws, he peoples it with his subjects." Marilyn Randall, Imperial Plagiarism, in PERSPECTIVES ON PLAGIARISM, supra note 56, at 131, 134-35 (detailing charges of plagiarism against Dumas); Lindey, supra note 46, at 224-25 (quoting Dumas, when shown an error in his book, as stating, "I haven’t read it. Let me see, who was it that wrote that one for me? Why that rascal Auguste! I’ll take care of him!"). Byron in turn commented that "the most original writers are the greatest thieves." Id. at 63.

André Schwart-Bart, when plagiarized by an African student in a flagrant display of "reverse colonialism," remarked that "it is not Mr. Ouologuem who is in debt to me, but I to him." Randall, supra, at 136, 140 n.5. Hegel commented, "It may be that honour has been effective in abolishing plagiarism, or perhaps plagiarism has ceased to be dishonorable and feeling against it is a thing of the past; or possibly an ingenious and trivial idea, and a change in external form, is rated so highly as originality and a product of independent thinking that the thought of plagiarism has become wholly insufferable." HEGEL'S PHILOSOPHY OF RIGHT 56 (T.M. Knox trans. 1952). For the perspective of Immanuel Kant on the subject, see Gilbert Larochelle, From Kant to Foucault: What Remains of the Author in Postmodernism, in PERSPECTIVES ON PLAGIARISM, supra note 56, at 121, 123.

320. For example, Scholastic, Inc. v. Stouffer, 124 F. Supp. 2d 836, 842-47 (S.D.N.Y. 2000), allowed an author who claimed to have originated materials out of which Harry Potter was fashioned to maintain various claims (as a matter of valid pleading) against J.K. Rowling and her publisher, including reverse passing off and false representation of origin. See id. at 843 n.8 (declining to consider case solely in copyright terms).

321. In TrafFix Devices, Inc. v. Marketing Displays, Inc., 532 U.S. 23 (2001), the Court finessed the question of whether copyright law limits rights conferred by other statutes. In that case, the owner of a patented dual-spring mechanism that allowed signs to withstand strong winds wished to continue its exclusive rights in the invention even after its patent expired. Id. at 26. It therefore alleged that the mechanism had acquired secondary meaning and sued a rival manufacturer for violating its trade dress. The Supreme Court denied such trade dress protection based on the disparity between trade dress and patent rights with regard to functionality.
Act should treat visegrips and other consumer products differently from communicative products such as books or videos (which customers purchase for their intellectual property rather than their physical properties), the Court rejected the posited distinction on which the Smith v. Montoro line of cases had rested:

The problem with this argument according special treatment to communicative products is that it causes the Lanham Act to conflict with the law of copyright, which addresses that subject specifically. The right to copy, and to copy without attribution, once a copyright has expired, like "the right to make [an article whose patent has expired]—including the right to make it in precisely the shape it carried when patented passes to the public." . . . The rights of a patentee or copyright holder are part of a "carefully crafted bargain," under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution. Thus, in construing the Lanham Act, we have been "careful to caution against misuse or over-extension" of trademark

Id. at 29–31. Indeed, the inventor's very process of securing patent protection (and subsequently safeguarding it via litigation) indicated that the design provided a unique and useful mechanism to resist wind shearing. Given that trade dress does not extend to functional features, the claim failed. Id.

What did that ruling about the unavailability of trade dress protection following patent expiration import with respect to expired copyrights? On the surface, nothing—indeed, quite to the contrary of patent protection, the process of applying for copyright requires the claimant to urge non-functionality. There is nothing inconsistent with claiming that one has developed original aesthetics entitled to copyright protection as a fixed work of authorship and, after the copyright term has passed, claiming that the same work is distinctively associated with its purveyor and has acquired secondary meaning subject to protection as trade dress.

Yet from a deeper perspective, the same considerations that doomed trade dress protection in TrafFix v. Marketing Displays could be argued to operate in the copyright sphere as well. In other words, as part of the constitutional trade-off for obtaining copyright protection, the argument lay that once expiration occurs, the work belongs to the public; for the erstwhile proprietor to urge a different legal theory at that juncture betrays the bargain by which it initially secured a governmentally sanctioned monopoly in the subject work. At the very end of its opinion, the Court gingerly approached that notion:

TrafFix and some of its amici argue that the Patent [and Copyright] Clause of the Constitution, of its own force, prohibits the holder of an expired utility patent from claiming trade dress protection. We need not resolve this question. If, despite the rule that functional features may not be the subject of trade dress protection, a case arises in which trade dress becomes the practical equivalent of an expired utility patent, that will be time enough to consider the matter.

Id. at 35 (citations omitted). The amicus curiae brief of Malla Pollack focused on the bargain that patentees make with the government and the public by affirmatively seeking patent protection and more generally addressed the political theory, endorsed by the founding fathers, of a Lockean commons on which all may draw. See Amicus Brief Supporting Petitioner, TrafFix Devices, Inc. Requesting Reversal, 2000 WL 1218785, TrafFix Devices, Inc. v. Marketing Displays, Inc., 532 U.S. 23 (2001) (No. 99-1571).

322. For the reference to vise-grips in oral argument, see infra text accompanying note 359.
and related protections into areas traditionally occupied by patent or copyright.\textsuperscript{324} Dastar sold videotapes that it manufactured, incorporating elements from a copyrighted work that, during the period of its subsistence, plaintiff Fox owned but which Fox had failed to timely renew, thus injecting it into the public domain. Those considerations are what moved the Court to reject "a species of mutant copyright law that limits the public's federal right to copy and to use, expired copyrights."\textsuperscript{325} Its unanimous ruling in favor of Dastar gives wide berth to copyright principles in defeating the claims of creative plaintiffs\textsuperscript{326} who attempt to dress in other garb what is at base a claim for copying the expression of another. The Court noted that its previous cases could not square with "creating a cause of action for, in effect, plagiarism—the use of otherwise unprotected works and inventions without attribution."\textsuperscript{327}

**B. Against a Free-Flow Credit Obligation**

The Court's erection of a barrier against plagiarism sets the current direction for legal protection. One court long ago stated, "a writer's reputation, which would be greatly enhanced by public credit for authorship of an outstanding picture, is his stock in trade; it is clear that irreparable injury would follow the failure to give him screen credit if in fact he is entitled to it."\textsuperscript{328} But a later court recognized that "credits run off on the screen immediately prior to or after the showing of the story portion of the film are of more interest to the industry than to the public. Adequate opportunity will exist, if this case is expeditiously processed, to insure publication of plaintiff's authorship of the idea to the industry if she is ultimately held entitled to such credit."\textsuperscript{329} The Ninth Circuit in *Smith v. Montoro*\textsuperscript{330} inclined towards

\textsuperscript{324} Id. at 33–34 (citations omitted).

\textsuperscript{325} Id. at 34 (internal quotations omitted). See supra text accompanying note 236.

\textsuperscript{326} The reference to "creative plaintiffs" is ramified. It refers to plaintiffs in the creative industries (those who write books or act in movies, for example) who hire litigators themselves endowed with the creative flair to repurpose an old doctrine of law with a new spin.

\textsuperscript{327} *Dastar*, 539 U.S. at 36. The Court cited in that regard *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205 (2000), and *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). Id. at 36–37. It also stated, "To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do." Id. at 37 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003)).


\textsuperscript{329} Luster Enters., Inc. v. Twentieth Century-Fox Film Corp., 156 U.S.P.Q. 422 (Sup. Ct. N.Y. County 1967). See *Luster Enters., Inc. v. Jacobs*, 278 F. Supp. 73 (S.D.N.Y. 1967). The cases likewise recognize that credit may also be of critical import in academe, where "marketability" can depend on one's *curriculum vitae*. See, e.g., *Omoglu v. W.B. Saunders Co.*, 30
the former view, but in *Dastar* the Supreme Court favored the latter.\(^3\) It remarked that section 43(a) of the Lanham Act "does not have boundless application as a remedy for unfair trade practices."\(^3\)\(^2\)

Consideration of what would happen if a free-floating credit obligation existed under U.S. law\(^3\)\(^3\) leads inexorably into a dystopia.\(^3\)\(^4\) Let us begin with the *Dastar* litigation at its various court levels. Starting at the Supreme Court, the brief that my colleagues and I filed on behalf of *Dastar*\(^3\)\(^5\) reflected our best effort to encapsulate powerful arguments. Consider the following attempts at eloquence:

No one views *Harper's Magazine* as a false designation simply because James and John Harper do not write its contents. Indeed, it is only in the *Montoro* world of *mutant copyright law* that the question even arises. In the world of real copyright law, it is plain that *Dastar*'s name belongs on the videotape. *Dastar*'s modification of the original television series meets the substantive standard for an independently copyrighted derivative work, and the Copyright Act has long encouraged copyright owners to put their names on copyrighted works. *See, e.g.*, 17 U.S.C. §§ 401(b)(3) & (d), 405(b), & 1202(b)-(c) (2000).\(^3\)\(^3\)\(^6\)


\(^3\)\(^3\)\(^2\) 648 F.2d 602 (9th Cir. 1981).

\(^3\)\(^3\)\(^3\) In oral argument, Justice Kennedy referred to "screen credits," that roll when "you know, you're going to the refrigerator or reading cert petitions or something." Transcript of Oral Argument, *supra* note 257, at *46-47. *See id.* at *18* ("the credits which no one ever reads").

\(^3\)\(^3\)\(^4\) *Dastar*, 539 U.S. at 29. Previous decisions had sometimes applied that same sensibility. *See, e.g.*, Comins v. Discovery Communications, Inc., 200 F. Supp. 2d 512, 522 (D. Md. 2002) ("However ungracious it may seem for Defendants to have included Comins in its 'thank you' list after deciding not to produce a film based on the Book, '[the] Lanham Act . . . should not be used as a remedy for a bruised ego.") (quoting Stratta v. George Duke Enters., 1997 WL 282250, *5* (S.D.N.Y.)). But other courts had ruled to the contrary. A month before *Dastar* was decided, for example, the Sixth Circuit barred defendants from presenting a song about Rosa Parks (featuring the lyric, "Everybody move to the back of the bus") on the basis that that title was purportedly not "artistically related to the content of the song." *Parks* v. *LaFace Records*, 329 F.3d 437, 442, 458 (6th Cir. 2003). But previously, the Ninth Circuit refused to restrain defendants from presenting a song about a Barbie girl. *Mattel, Inc.* v. *MCA Records*, Inc., 296 F.3d 894 (9th Cir. 2002). It remains open after *Dastar* whether the Sixth Circuit's point of view relies on the now-discarded construction of section 43(a) as having "boundless application as a remedy for unfair trade practices."

\(^3\)\(^3\)\(^5\) For a collection of quotations about the baleful effects that general moral rights would exert on the U.S. book publishing, newspaper, and motion picture industries, see Kwall, *supra* note 48, at 28.

\(^3\)\(^3\)\(^6\) What works for one nation's laws does not necessarily work for another's. The strong German moral right, for instance, has given rise to almost no actual litigation. *See supra* note 97. French vindication of moral rights may result in damages in the amount of one franc. *See Gunlicks*, *supra* note 51, at 626. Damages in U.S. civil actions are not typically so cabined.

\(^3\)\(^3\)\(^7\) *See supra* note 189.

\(^3\)\(^3\)\(^8\) Brief for Petitioner, *supra* note 117, at *22-23* (emphasis added) (footnote omitted).
Remarkably, even expanding "origin" to include claims of intangible origination may not be enough to save Fox. Fox was not the only contributor to the original television series. Nor was it the most important. Time, not Fox, actually produced the television series, and Time's work in turn derived from a host of other sources, from General Eisenhower's book to public domain footage shot by the armed forces of several nations. Determining the origin of a collaborative and much-modified work is the judicial equivalent of searching for the source of the Nile. In that search, however, Fox is at best a minor tributary.

Fox therefore can prevail only if the Lanham Act treats as "false" any designation of origin that does not list everyone who contributed in any way to the prior work—not just the one true source of the Nile, but every stream in its drainage basin. At a minimum this would seem to include everyone who is credited in any fashion in the original work, plus anyone credited in later modifications. Such credit obligations would continue to accrete forever, with the credits growing longer every time the work is changed. Waldman, 43 F.3d at 785 n.8 (defendant must credit plaintiff as origin of defendant's work, but must also note that plaintiff in turn had rewritten an earlier work).

Perhaps the italicized references in those extracts ring a familiar chord. For, as set forth above, when it came time for Justice Scalia to craft the Court's unanimous opinion, he concluded that allowing Fox to maintain a cause of action under section 43(a) for Dastar's representation of itself as "origin" of the videotapes that it produced "would create a species of mutant copyright law that limits the public's federal right to copy and to use, expired copyrights." The Court likewise concluded, "We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries."

Happily for Justice Scalia (as well as for the U.S. justice system), his own opinion in Dastar eliminates any right to maintain that those words in the Court's opinion represent reverse passing off, thus forestalling my colleagues and me from calling him to the bar!

Moving one level down, consider the per curiam decision from the Ninth Circuit subject to the writ of certiorari in Dastar. How did

337. Id. at *27 (emphasis added).
338. Dastar, 539 U.S. at 34 (internal quotations omitted) (emphasis added).
339. Id. at 35-36 (emphasis added).
340. I shudder to think where the contrary ruling would have led. My best recollection is that David Gerber is the mutant and Stewart Baker the modern-day Mr. Livingston, whereas I myself came up with none of those bon mots. See supra note 189. But if the Supreme Court had recognized a cause of action for reverse passing off any time a writer's words are not properly credited to him, then all of us who authored the brief undoubtedly would have striven inter sese to claim origination of those snippets.
Judges Kozinski, Gould, and Breyer\textsuperscript{341} go about crafting their unpublished decision that affirmed the judgment in favor of plaintiffs for reverse passing off? In Congressional testimony, the first has explained that "circuit judges devote something like half their time, and half the time of their clerks, to cases in which they write [published] opinions, dissents or concurrences," and that they give comparatively little attention to unpublished dispositions.\textsuperscript{342} Although his testimony does not specify, it is reasonable to extrapolate that judges focus their attention disproportionately on the former category,\textsuperscript{343} relegating the latter more to their clerks.\textsuperscript{344} But, of course, any given decision itself bears only the judges' names. What does that phenomenon reflect?\textsuperscript{345}

If my suspicion is correct that uncredited clerks contributed to the words adopted by the appellate panel\textsuperscript{346} in \textit{Dastar},\textsuperscript{347} then it is not only Justice Scalia who, in a world where reverse passing off were given broad latitude, would have to watch his back.

Going down another level still, what about the district court opinion in \textit{Dastar v. Fox}? Throughout the trial court proceedings, Judge Cooper followed the practice of many trial judges in asking the prevailing party to draft findings of fact and conclusions of law, to which the court could append its signature. (Although it would afford fortu-

\textsuperscript{341} See \textit{supra} note 187.

\textsuperscript{342} Testimony of Hon. Alex Kozinski Before the Subcommittee on Courts, the Internet, and Intellectual Property, Washington, D.C., June 27, 2002, \textit{available at} http://notabug.com/kozinski/unpublisheddispositions (last visited June 5, 2004) ("Not worry about making law in 3800 unpublished dispositions frees us to concentrate on those decisions that will affect others besides the parties to the appeal.").

\textsuperscript{343} "In order to maintain a clear and consistent body of caselaw, \textit{appellate judges spend much of their time working on published opinions}—those that announce and calibrate the circuit's decisional law." \textit{Id.} (emphasis added).

\textsuperscript{344} "[A]n unpublished disposition can often be prepared in only a few hours." \textit{Id.} It seems not unreasonable to posit that those few hours would be better spent by a clerk than the judge.

\textsuperscript{345} The prime focus of Judge Kozinski's testimony is to deny any imputation that unpublished decisions reflect lawlessness. \textit{Id.} ("I can state with some confidence that the sinister suggestion that our unpublished dispositions conceal a multitude of injustices and inconsistencies is simply not borne out by the evidence."). \textit{Dastar} confirms his conclusion. Though we obviously disagreed with the Ninth Circuit's conclusion in presenting the matter to the Supreme Court, my colleagues and I mounted our attack not at the inconsistency of this particular judgment, but on the contrary at the entire body of Ninth Circuit law initiated by \textit{Smith v. Montoro}. Unfortunately for our client, the Ninth Circuit's unpublished resolution of \textit{Dastar v. Fox} was only too consistent with that line of cases.

\textsuperscript{346} \textit{Id.} ("[T]he phrasing (as opposed to the result) of an unpublished disposition is given relatively little scrutiny by the other chambers.").

\textsuperscript{347} Even if the situation does not happen to pertain in this particular case, the general phenomenon remains: "Some judges sign off on their clerks' opinions with little or no supervisory or editorial input." Lerman, \textit{supra} note 11, at 469. "[T]he caseload per federal judge has risen to the point where very few judges, however able and dedicated, can keep up with the flow without heavy reliance on law clerks, staff attorneys, and sometimes externs too." \textsc{Richard A. Posner, The Federal Courts: Crisis and Reform} 103 (1985).
itous parallelism to state that the very opinion from which Supreme Court review arose fit that paradigm, Judge Cooper actually departed from practice as to that particular order; it reflects the stamp of her own chambers, not of the parties.) Nonetheless, the fact remains that many district court opinions, including other orders that the district court entered in this very piece of litigation, are drafted by individuals other than the judge whose signature appears at the end. We therefore see, at all levels, that a charge of reverse passing off theoretically could be levied against the jurists who resolved the germinal case of reverse passing off in the annals of our jurisprudence.348

Is the circumstance that all three courts in Dastar v. Fox were not themselves immune from charges of reverse passing off itself idiosyncratic, somehow karmically induced by the overreaching claims of the plaintiffs in this particular piece of litigation?349 Hardly. Judges quoting from briefs, clerks preparing opinions, parties drafting findings of facts—these circumstances form the backbone of litigation in the federal courts.350 The matter has even drawn comment from the Ninth Circuit in a copyright case.351

Moreover, the phenomenon of reverse passing off is scarcely limited to judicial opinions. Consider a few more instantiations.352

- It is not only judges who affix their name to legal scholarship not of their own composition.353 The same applies to law professors354 and to senior partners at law firms.355

348. See Dursht, supra note 58, at 1253.

349. See supra note 234.

350. One commentator proposes amendments to the Model Code of Judicial Conduct to redress the situation. See Dursht, supra note 58, at 1253.

351. See Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 632-33 (9th Cir. 2003) (Noonan, J., dissenting) (“The district court adopted eight of the plaintiffs’ Findings of Fact on fair use. Six are demonstrably wrong . . . . [T]he repeated errors committed by the district court because of its reliance on the drafting of the plaintiffs relieve us of any duty to defer to the trial judge.”).

352. These considerations move me to part company with the proposal to create a “tort of plagiarism per se.” See Carolyn W. Davenport, Judicial Creation of the Prima Facie Tort of Plagiarism in Furtherance of American Protection of Moral Rights, 29 CASE W. RES. L. REV. 735 (1979).

353. Given the sensitivities in this domain, I should add that no research assistant assisted me in this article. See Lerman, supra note 11, at 477 (“A scholar who delegates research or writing to another person is delegating part of the thinking that should go into the production of scholarship . . . . Many writers discover their thoughts about a topic by writing about the topic.”). But I have benefited from the research of librarian John Wilson and cribbed liberally from the Dastar brief, as well as my previous treatise writing. See supra notes 46, 189.

354. “Some law professors use lengthy tracts written by their research assistants in their own books or articles, representing that they wrote the works themselves.” Lerman, supra note 11, at 471. Note that that practice violates the strictures of the American Association of University Professors. Id. at 473-74.
• To put out videocassettes of *Carmen Jones,* credit might be necessary to (quoting Justice Scalia’s initial view of the matter) Georges Bizet, Harry Belafonte and “the unknown Frenchman who wrote the novel from whom Bizet got the idea.” Upon further deliberation, one would need to add Prosper Merimée and Oscar Hammerstein II to the list.

• Justice Scalia likewise invoked during oral argument in *Dastar v. Fox* the manufacture of “vise grips that you can have a pliers that will hold on automatically until you release it” on which the patent has expired, which he manufactures and sells under the label “manufactured by Scalia.” That conduct should not be considered to violate the rights of “Mr. Vise Grip . . . the guy that-that originally did it.”

• I have discussed elsewhere why the claims of West Publishing Company were rightly rejected in *Bender v. West.* At one point, the company defended itself by claiming that it in fact added emendations of its own invention into opinions that it published under the names of the issuing judges (but without their knowledge). Given an aggressive implementation of reverse passing off, its conduct would potentially have placed it afoul of the Lanham Act.

• Imagine trying to craft a law that incorporates every credit requirement. Hollywood guilds themselves cannot reach agreement on all the open issues. Moreover, the same exercise would need to unfold not only in the audiovisual realm, but elsewhere as well. Consider, for example, its application to the simple act of playing songs. Every time one is played on the radio, does the obligation arise to give credit to the composer? And the lyricist?

355. An associate in a law firm may be enlisted by a partner to write or to co-author a law review article on a topic of interest to the firm’s clients. The article may be published under the partner’s name alone, even if the associate wrote the entire piece. The “author” may write a footnote gratefully acknowledging the assistance of the associate in preparing the article. These footnotes seldom include any information about what were the respective roles of the partner and the associate in writing the article. *Id.* at 470.


357. Those are the figures that Justice Scalia invoked at the hearing. Transcript of Oral Argument, *supra* note 257, at *35.

358. *See supra* text accompanying note 235. The same considerations would create a cause of action against the *University of Chicago Law Review* for daring to trace “John Luther Long’s book, *Madame Butterfly,* made into a play by David Belasco, a libretto by *G. Ricordi & Co.,* and an opera by Giacomo Puccini.” *Dreyfuss,* *supra* note 297, at 622 n.108 (emphasis added). In fact, it was not a corporation that set Puccini’s music to words—it was Giuseppe Giacosa and Luigi Illica. *See G. Ricordi & Co. v. Paramount Pictures, Inc.,* 189 F.2d 469, 470 (2d Cir. 1951).


360. *Id.*

361. *See Nimmer,* *supra* note 12, at 95–115. Note that I acted as Bender’s litigation counsel. *Id.* at 43 n.165.

362. *Id.* at 101.

363. I am indebted to DePaul law student Jeremy Protas for spotting this point and calling it to my attention after my presentation.
How about the arranger; lead singer; guitarist; drummer; backup vocalists; instrumentalists; and sound engineer? Moving beyond radio, do the same considerations apply to music played on elevators? If so, far-reaching implications will follow. To cite the simplest example, architects of skyscrapers would need to include panels in elevators to display the copyright management information encoded into the music piped into elevators. Such information in turn would need to be supplied by those companies furnishing music, the whole functioning seamlessly together to protect against the multiplication of still more lawsuits.

- Even at the apex of literature, the problem is only compounded. Consider that one of the greatest poems in the English language is T.S. Eliot's *The Waste Land*. Its section III, "The Fire Sermon" contains the line "Sweet Thames, run softly till I end my song." Given that the line does not emanate from something as famous as *Hamlet* or Psalm 23, I could pass over the line without remark. But wiser heads than mine have spotted that it derives directly from Edmund Spenser's *Prothalamion*. What is most salient for current purposes is that the great poet included it without attribution. His defenders take refuge in an intent to create an "allusion" to works past. One could attempt to justify the failure to set off that material with quotation marks as being for "ironic relief."

Further rumination can cast reverse passing off as a fundamental condition of literature (and science), going back from moder-
nity to Greek literature, the New Testament, right back to the Bible (not excluding the Torah itself). (It is, moreover, a constant source of anxiety even within literature. As Philip Roth portrays a character named Philip Roth saying about a character named Philip Roth: "In his pseudonymity is his anonymity, and it's that anonymity that's killing me.")

from Middle Eastern, Asian, and African cultures are baffled by the notions that one can 'own' ideas.” C. Jan Swearingen, Originality, Authenticity, Imitation, and Plagiarism: Augustine's Chinese Cousins, in Perspectives on Plagiarism, supra note 56, at 19, 21.

372. See Marcel C. LaFollette, Stealing into Print: Fraud, Plagiarism, and Misconduct in Scientific Publishing 48–61 (1992). Through efforts at combating plagiarism in science, “it has been discovered that finding one definition of authorship acceptable to all institutions and all disciplines is . . . not just 'intellectually difficult,' but impossible.” Id. at 91.

373. Voltaire noted “that plagiarism, even at its worst, 'est assurément de tous les larcins le moins dangereux pour la société.'” Kaplan, supra note 177, at 78.

374. See Stearns, supra note 46, at 517 (Dante, Chaucer, Boccaccio); Lindey, supra note 46, at 15. Not even Leonardo da Vinci or Rembrandt are immune against such charges. See LaFollette, supra note 372, at 14, 99.

375. See Lindey, supra note 46, at 64–65 (detailing charge of plagiarism composed by Aristophanes against Aeschylus and Euripides); Marianina Olcott, Ancient and Modern Notions of Plagiarism: A Study of Concepts of Intellectual Property in Classical Greece, 49 J. Copyright Soc'y 1047 (2002). The familiar verb klepto described that condition. Id. at 1048.


377. Miles offers the insight, apropos of the absence of copyright protection in antiquity, id. at 319 n.4, that “[a]tribution, under [those] circumstances, was a property of the text rather than an indication that the text was the property of an author.” Id. at 259. He adds that if the great fault of postmodern criticism has been that, in effect, it treats all books as if they were anonymously written, then this school of criticism may suit the Bible particularly well, because so much of the Bible is irretrievably anonymous and the authorship even of those portions of the Bible that bear some kind of attribution is quite often in dispute.

Id. at 331 n.20.

378. According to one scholar, the book of Deuteronomy, through its attribution to Moses, is an early example of reverse passing off. “The voice of the text belies its belatedness. By means of it, the text's authors purchased a pedigree—both an antiquity and an authority—that the text properly lacked. In so doing, they borrowed pseudopigraphically from the very textual authority that they subverted.” Bernard M. Levinson, Deuteronomy and the Hermeneutics of Legal Innovation 6 (1997). For more on pseudopigraphy, see Sacha Stern, Attribution and Authorship in the Babylonian Talmud, 45 J. Jewish Stud. 28 (1994). See also infra text accompanying note 454.


380. Philip Roth, Operation Shylock 115 (1993). See id. at 66 (Jerusalem district judge Dalia Dorner, who tried a celebrated copyright case involving the Dead Sea Scrolls, appears anonymously.).
C. Scenario 3: Plagiarism as an Academic Offense

The foregoing ruminations should not be taken as blanket conclusions that reverse passing off is to be condoned.381 Rather, they reflect the viewpoint that granting an unbounded cause of action to redress its violation through court intervention poses a cure worse than the disease.382 Nonetheless, there remains one locale383 where the prohibition on reverse passing off serves an essential role, which could legitimately arise to affect the legal rights of those caught within its net. That domain is academe, with particular emphasis on the customs384 of higher education.385

1.

Let us now depart from the label of “reverse passing off.” As Dastar recognizes, that legal doctrine creates “a cause of action for, in effect, plagiarism—the use of otherwise unprotected works and inventions without attribution.”386 Within the academy, plagiarism contin-

381. One can find condemnation of reverse passing off in the strangest quarters. One English professor quotes the “@nti-copyright” policies of the zines Aim Your Dick and Kablooie. See Joan Livingston-Webber, GenX Occupies the Cultural Commons: Ethical Practices and Perceptions of Fair Use, in PERSPECTIVES ON PLAGIARISM, supra note 56, at 263, 266. She quotes the reservation of rights contained in the latter: FUCK COPYRIGHTS. Plegm-Phlan and Beaver Storm deeply feel it is their obligation to convey important information to you. Whether this important information comes from a published author or your pet goldfish doesn’t matter a bit. If bureaucracy did not exist and people could actually get things done, maybe these two editors would meticulously contact each and every one of their sources. But probably not. If anyone uses stuff from this particular zine, that’s fine. Just don’t say you wrote it. That’s dumb. Id. at 266. The most fascinating aspect of that diatribe is that the same authors who wish to dynamite traditional copyright protection still adhere to the necessity of avoiding reverse passing off (“Just don’t say you wrote it.”). Nonetheless, they do so not as a matter of legal postulation but rather prudential condemnation (“That’s dumb.”).

382. Sadly, plagiarism remains ubiquitous, and only grows as a phenomenon with the advent of the Internet. See, e.g., Anonymous, A Funny Thing Happened on the Way to the Web: A Cautionary Tale of Plagiarism, 93 LAW LIBR. J. 525, 526 (2001) (“The realization that this breach of professional conduct had occurred was extremely upsetting, but the evidence was right there on the Web. At the same time, I was appalled by such foolish risk taking. Plagiarism has ended many an academic career. Why would an academic librarian take such a chance?”); NEIL HOWE & WILLIAM STRAUSS, MILLENNIALS GO TO COLLEGE 120 (2003) (“special challenge ... to instill a clear understanding of where originality and plagiarism begin and end”); ANN LATHROP & KATHLEEN FOSS, STUDENT CHEATING AND PLAGIARISM IN THE INTERNET ERA: A WAKE-UP CALL 115–20 (2000).

383. As noted below, there are others as well. See infra text accompanying note 409 (example of journalism).

384. As the histor puts it, in the unlikely context of the Indian custom of eating one’s deceased parents, “rightly Pindar seems to have composed when he said ‘custom is the king of all.’” HERODOTUS, supra note 3, at 3.38, at 186.

385. See supra note 329.

ues to amount to a serious infraction. As the hapless copyist in Scenario Three learned, plagiarism can be "a capital offense for law students," whether accompanied by prior warnings or not. Of what does this crime consist? Among the bewildering profusion of characterizations, the Modern Language Association has promulgated a widely quoted four-fold definition:

I. Plagiarism is the use of another person's ideas or expressions in your writing without acknowledging the source.
II. Simply put, plagiarism is using another person's words or ideas without appropriate acknowledgement.
III. In short, to plagiarize is to give the impression that you have written or thought something that you have in fact borrowed from someone else.
IV. [P]lagiarism is:
   a. reproducing someone else's sentences more or less verbatim, and presenting them as your own;
   b. repeating another's particularly apt phrase;
   c. paraphrasing someone else's argument;
   d. introducing another's line of thinking;
   e. failing to cite the source for a borrowed thesis.

The contrast between university life and "civilian pursuits" should be immediately apparent. Copyright infringement never occurs, for instance, when one copies another's idea or even a brief phrase of expression from a work still subject to copyright protection. Furthermore, even copying the entirety of another's public domain expression—for example, Oliver Wendell Holmes, Jr.'s The Path of the Law, published in 1897—is analytically incapable of falling afoul of copyright law. By contrast, a professor who published under his own name all or part of The Path of the Law would be guilty of the most

387. See supra Part II.A.
390. For a catalogue, see id. at 51–62. See also infra text accompanying note 407 (proposing new definition).
391. St. Onge, supra note 389, at 54; Lerman, supra note 11, at 475; Dursht, supra note 58, at 1260.
392. The rules of the Modern Language Association quoted above require attribution for every thought, idea, and expression. It takes little imagination to realize that plaintiff Fox in the Dastar case, along with every other Hollywood studio, would soon go bankrupt if faced with the legal obligation, enforced at pain of litigation, to follow those strictures.
serious academic breach, potentially deserving termination.\textsuperscript{395} Indeed, if he purloined only an uncredited phrase or even idea, he would find himself culpable for plagiarism under the definition just quoted.\textsuperscript{396} By the same token, a student who submitted to her professor a paper setting forth verbatim, but under her own name, paragraphs from \textit{The Path of the Law}, would be subject to the full disciplinary weight that the school could bring to bear.\textsuperscript{397}

We now revert to Scenario Three, involving a challenge to\textsuperscript{398} UCLA Law School's discipline of a student who submitted a paper, allegedly produced in haste, presenting as the writer's own work large portions of prior scholarship.\textsuperscript{399} The pattern itself is not uncommon\textsuperscript{400} in the academic context\textsuperscript{401} and elsewhere.\textsuperscript{402} Indeed, this pattern is sometimes embarrassingly common, particularly with the advent of cutting and pasting facilitated by computer technology.\textsuperscript{403} When the University of Oregon composed a student guide to plagiarism for distribution to every incoming freshman, it was later nonplussed to learn that the

\footnotesize{395. The rationale for punishment is to protect the institution. "The notion that punishment is a cure for plagiarism is about as sound as the notion that punishment cures anything." St. \textsc{Onge}, supra note 389, at 42. On the other hand, a different view is that one should educate plagiarists instead of punishing them. See Candace Spigelman, \textit{The Ethics of Appropriation in Peer Writing Groups}, in \textsc{Perspectives on Plagiarism}, supra note 56, at 231.}

\footnotesize{396. Taken literally, that conclusion leads to absurdity: "Explicit, full attribution of all sources is impossible and not even desirable." St. \textsc{Onge}, supra note 389, at 49. "Indeed, . . . if we were to comprehensively cite our sources, we would be involved in . . . a 'full (and necessarily impossible) history of the writer's subjectivity.'" Howard, supra note 293, at 91.}

\footnotesize{397. The foregoing considerations amount to generalizations; it is not contended that this article confronts every possible scenario of academic life. As has been observed, "It is treacherous, even arrogant, to attempt to characterize the entire scholarly enterprise." St. \textsc{Onge}, supra note 389, at 25.}

\footnotesize{398. Note that the court case arose at a derivative level. In other words, when the student submitted that plagiarized paper, he committed no legal offense. Rather, his violation of academic rules subjected him to university discipline. Later, the student sued UCLA in court, claiming a violation of his rights of due process in those disciplinary proceedings.}

\footnotesize{399. Had the subject been not a paper but a comment in class, no discipline would have followed. "'Oral plagiarism' is what many of us do most of the time because it is simply too laborious to assemble 'references' even if we could recall them." St. \textsc{Onge}, supra note 389, at 59.}

\footnotesize{400. See Stearns, supra note 46, at 514, 532. See also supra note 11.}

\footnotesize{401. See Edward M. White, \textit{Student Plagiarism as an Institutional and Social Issue}, in \textsc{Perspectives on Plagiarism}, supra note 56, at 205, 210 (recounting tale of author's "favorite plagiarist" who was too busy lecturing high school students on American values to write her own papers). For a litigated case on the subject, see \textit{Napolitano v. Trustees of Princeton University}, 453 A.2d 263, 267 (N.J. Sup. Ct. App. Div. 1982) (plaintiff submitted paper in which numerous sections were taken verbatim from prior sources).}

\footnotesize{402. Amazingly, Benjamin Disraeli urged the exact same defense for having plagiarized from Louis Adolphe Thiers when eulogizing the Duke of Wellington. \textsc{Lindey}, supra note 46, at 252–53.}

\footnotesize{403. See Zebroski, supra note 376, at 39 ("It is no chance that my advanced writing students who plagiarized were \textit{all} intensively into computers.") (emphasis in original).}
guide itself had been shamelessly plagiarized wholesale from Stanford University's comparable manual. But the audacity of even that gambit is beggared by the student at the University of Kent in Canterbury, who sued his university for negligence in failing to warn him about the penalties for plagiarism.

Let us imagine for a moment that the student considered himself T.S. Eliot's intellectual heir. When the professor pointed out that the student's "original" paper consisted largely of unattributed quotes to a prior article, the student would respond that it was a clever "allusion." When pressed as to why he neglected to include quotation marks to signal his intent, he would claim "for ironic effect!" Should that defense protect the student from academic discipline? Scarcely. It violates even the most narrow definition of plagiarism propounded by one academic commentator who believes that the term has often been too loosely defined: "Plagiarism is an intentional fraud committed by the psychologically competent that consists of copying significant and substantial uncredited written materials for unearned advantages with no significant enhancement of the materials copied."

That definition does not purport to set forth the elements for a tort at law. Rather, it expresses the "house rules" that certain guilds—notably academics, but other domains as well (journalism has attracted a lot of publicity of late in that regard)—have accepted upon themselves. Those who cross the line risk not liability in court to the general public, but rather being defrocked from the particular priesthood which maintains its special rules. Even there, it leaves a


406. See supra text accompanying note 365.

407. St. Ongé, supra note 389, at 101. If that definition, rather than section 43(a) of the Lanham Act, had been the touchstone for Dastar v. Fox, it is submitted that plaintiff's case still would have foundered, inter alia, on the absence of proof that Dastar derived "unearned advantages," i.e., benefits that would have been absent had it either omitted its own name or included Fox's.

408. See, e.g., LaFollette, supra note 372, at 7–8 (recounting tale of Massachusetts' revoking license of Jordanian doctor who engaged in notorious plagiarism of scientific articles).

great many sinners in holy orders—it is only in the extreme case of a spectacular appropriation that a tenured professor will likely lose her job (although one who habitually cribs from other’s writings may, over time, develop a deserved reputation for academic shoddiness).

2.

A great deal of thought has gone into the application of copyright law to the specialized realm of academic life. Many commentators champion the position that the efforts of professors should belong to them personally. Others take the view that, applying copyright law’s work-made-for-hire doctrine under its current interpretation, the universities for which those professors work are the pertinent authors under copyright law. The middle ground also enjoys some theoretical support (and may be the actual norm, according to empirical research). Some take the position that academic freedom requires the normative conclusion that professors should enjoy copy-

410. See St. Onge, supra note 389, at 61 (“the mere charge of plagiarism can be and often is as devastating as plagiarism proved. The label is the academic equivalent of the mark of Cain.”).


412. Todd F. Simon, Faculty Writings: Are They “Works Made for Hire” Under the 1976 Copyright Act?, 9 J.C. & U.L. 485 (1983); Leonard D. DuBoff, An Academic’s Copyright: Publish and Perish, 32 J. COPYRIGHT SOC’Y 17 (1984); Sandip H. Patel, Note, Graduate Students’ Ownership and Attribution Rights in Intellectual Property, 71 IND. L.J. 481, 500 (1996). Patel’s note champions the position that graduate students, by contrast, have not given up copyright ownership. Id. at 502–12. The fact that professors habitually commit reverse passing off as to the works of their graduate students has often been noted. See Lindey, supra note 46, at 117–18.

In at least one instance, a university’s assertion of ownership over a computer program developed by its professor stymied the work’s coming into fruition. See Dreyfuss, supra note 297, at 616. It seems doubtful, however, that universities would generally be in a position to monitor the development of articles, monographs, and other scholarly products on a daily basis such as to be in a position to even begin an analysis, contrary to the professor’s desire, about when to release it into circulation.

413. “[T]here are reasons why it may be unwise to allow either schools or the teachers to secure absolute copyright ownership in educational materials.” Russ VerSteg, Copyright and the Educational Process: The Right of Teacher Inception, 75 IOWA L. REV. 381, 409, 411 (1990) (proposing “shop right” modeled on patent law). See Michele J. Le Moal-Gray, Distance Education and Intellectual Property: The Realities of Copyright Law and the Culture of Higher Education, 16 TOURO L. REV. 981, 1021 (2000). One commentator proposes a “principle of proportionality,” while conceding that “the devil in a proposal like this one is in its details.” Rochelle Cooper Dreyfuss, Collaborative Research: Conflicts on Authorship, Ownership, and Accountability, 53 VAND. L. REV. 1161, 1220–22 (2000).

414. See Ashley Packard, Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work, 7 COMM. L. & Pol’y 275, 293–308 (2002) (discussing joint owners, co-owners, royalty-free licenses, and sharing percentage of royalties); Lape, supra note 411, at 261.
right ownership;\textsuperscript{415} others derive the same conclusion from the allied vantage point of the First Amendment.\textsuperscript{416}

Concern over the issue of academic copyrights has not been limited to scholarly journals. This issue occupied a 1975 hearing before Congress.\textsuperscript{417} The larger issue on the table at that hearing was the advent of photocopying machines and what effect they were exerting on copyright owners. Of particular concern to the witnesses gathered on that day was the impact of photocopying on scholarly journals, and whether the one would lead to the extinction of the other.\textsuperscript{418}

One learns when reviewing the transcript about something called "page charges." At issue with "page charges" is a counter-intuitive concept: instead of paying an author for publication rights, the publisher charges the author for the privilege of being published!\textsuperscript{419} The testimony from thirty years ago indicated that those charges were essential to subvent the costs of specialized journals. Such charges were widespread in the sciences, and averaged about forty dollars per page at that juncture.\textsuperscript{420}

Of course, that was then. Today, by contrast, we live in the Internet age, meaning that everything has changed. Electronic publishing is now cheap—after all, one need simply take a digitized file, upload it, and \textit{Voilà!}—you have a published work accessible immediately to scholars everywhere, with no need to shoot ink onto "tree flakes en-
cased in dead cow.” Today, therefore, one can reason that there is no need for something as quaint as “page charges.”

But, one would be wrong. The lesson that emerges from following the heritage bequeathed by Herodotus is that the past stays with us. Someone who surfs the Web today searching for the term “page charges” will promptly learn, for example, that the American Astrophysical Society’s *Astronomical Journal* as of 2004 imposes charges of one hundred fifty dollars per page.

In that light, it is fascinating to revisit the issue of whether articles submitted for publication by various professors constitute works-made-for-hire. Perhaps we would determine that the “pro-professor” viewpoint in the debate is to conclude that the university owns the copyright; in that way, the institution rather than the individual would be saddled with payment of the appropriate “page charges!”

In truth, however, these are sideline issues compared to the issues of true import to the Academy. The issue is not who pays for or gains royalties for academic publication. Instead, economics are secondary here—the true issue instead is who gets credit. If Larry Lessig, for instance, writes an article for the *Duke Law Journal*, nobody actually pays page charges. He makes no money from it, and neither does his home institution, Stanford Law School.

The confluence of circumstances at issue here brings us back to Demaratus’ association of the Greeks’ poverty with their intelligence and the force of law. The mandarin class which has chosen to staff law schools has, as a group, largely decided to foreswear the remuneration of fancy law practices in favor of “the subtle power of a post-

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422. See *supra* Part II.B.
423. See *The Astronomical Journal*, available at http://www.astro.washington.edu/astrosj/charges.html (last visited June 5, 2004). The Publication Agreement propounded by the Society also provides as follows: “Because the American Astronomical Society (Society), acting through the University of Chicago Press, is undertaking to publish this paper, and because you desire to have this paper so published, you grant and assign the entire copyright for this paper exclusively to the Society.” In addition, it goes on to specify: “It is understood that you will receive no monetary compensation from the Society for the assignment of copyright and publication of the paper.” American Astronomical Society, Publication Agreement, available at http://www.journals.uchicago.edu/ApJ/ApJSPubAgree.pdf (last visited June 5, 2004).
424. In the academic context, the *aperçu* holds that “it is largely by knowing to whom to attribute inferior (and superior) work that society motivates creators to do their best.” *Dreyfuss, supra* note 297, at 606. As to the Dastars and Foxes of the world, by contrast, it is the difference in price point that is decisive. *See Dastar v. Fox*, 539 U.S. 23, 27 (2003) (“Dastar sells its Campaigns videos to Sam’s Club, Costco, Best Buy, and other retailers and mail-order companies for $25 per set, substantially less than New Line’s video set.”).
426. See *supra* Part II.B.
poned power." As a rule, they prefer to be known as élite shapers of the law rather than for selling as many units as John Grisham and Stephen King.

Far more threatening to the métier of this class than divesting economic rights into their employers under the work-made-for-hire doctrine would be to vest exclusive attribution in the employers. Consider that Atari some years ago decided to list its corporate name as author, rather than crediting individual programmers. If Stanford Law School were to adopt the same expedient, such that a given article that appears in the *Duke Law Journal* would not reveal whether it was authored by Larry Lessig, Margaret Radin, Paul Goldstein, or Kathleen Sullivan, we might, indeed, have a revolution on our hands.

3.

What features justify the disparate treatment charted above between professors (and reporters), on the one hand, and the general public facing liability in courts of law, on the other? At this point, we must recall that works protected by copyright command protection at their inception not only for all of the rights secured by Title 17 of the United States Code, but also with every species of moral rights that a French poet could desire. Moreover, with the United States Supreme Court's validation of extended copyright terms, those protections can last more than a century. Only when the author has voluntarily parted with copyright ownership can those rights be diminished. Moreover, even as to authors who have licensed their works, and even as to works that have entered the public domain, they still have the right to prevent passing off through unauthorized use of their name.

427. OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 32 (1920).
429. See *supra* Part III.C.2.a.
431. As to works published before 1978, their copyrights can last for up to ninety-five years. 17 U.S.C. § 304 (2000). As to works created thereafter, their duration exceeds a century when at least one co-author lives for three decades after the work's creation. *Id.* § 302(b) ("70 years after such last surviving author's death").
432. Absent such antecedent act by the author, the Copyright Act forbids expropriation, except in the case of bankruptcy. *Id.* § 201(c). See also 3 NIMMER ON COPYRIGHT, *supra* note 46, § 10.04.
433. For instance, even after John Grisham has licensed his whole oeuvre to a publishing house, he can still prevent it from presenting the work of another (from Herodotus to Martha Grimes) under the name "John Grisham." As set forth above, "[i]t would constitute the tort of passing off for Harper & Row, for instance, to reissue *A Time to Heal* under the name Stephen King in order to boost sales." See *supra* text accompanying note 92.
But to go further and allow authors—those whose works have entered the public domain, for example (as occurred in *Dastar v. Fox*)—to demand forever that their name accompany what they view as elements of their creation lawfully purveyed by a third party is to invite the Catch-22 situation, whereby the public domain is effectively eviscerated. Nonetheless, the same insistence that would threaten a litigation donnybrook when wielded by the Foxes of the world need cause little concern in the university context. The distinction arises because professors who offer articles and other scholarly contributions seeking to further the progress of knowledge are largely immune from the market forces that constrain the Dastars of the world. Whereas the manufacturer of a videocassette or an audio-CD must contend with the limited amount of space on a J-card or on the outside packaging, and is guided by marketing considerations and the overwhelming need to attract customer interest, those limitations are by and large alien to the academic environment. No space limitations prevent them from citing to past sources; indeed, failure to cite is the pitfall here, as it threatens to sacrifice the scholar’s credibility. Nor do professors face the Catch-22 that their citation to sources past will itself give rise to a claim for passing off.

At base, the different currency of the Academy accounts for the different regime that should govern it. The laws of the marketplace are ill served by allowing authors who no longer enjoy copyright protection to assert ersatz ownership through the vehicle of reverse passing off. The marketplace operates through the lifeblood of sales volume and mass circulation. The Academy operates on a different

434. *See supra* note 232.

435. This is not to deny that researchers act in the context of different “market” forces—the pressure to attract grant funding, or to secure academic advancement, to name but two. The point is that those considerations differ in kind from the ones to be cited in the text momentarily.


437. “Ideas, research, and writing are the currency of academe. Originality of written work is essential to the integrity of the academic system. A professor who claims the work of another as his own—even if it is only part of an article—is engaged in academic fraud.” Lerman, *supra* note 11, at 477–78. “The whole world might play this fraudulent game, but when it is played in an academy dedicated to truth, knowledge and principles, the offense is a mortal wound to the intellectual enterprise.” Dursht, *supra* note 58, at 1296. *See Copyright Law Revision, supra* note 417, at 233 (“These scholars are rarely concerned with private income from their published papers”); *id.* at 251 (“MR. DANIELSON. What does the author of these articles derive in the way of monetary or other valuable considerations? MR. LIEB. He gets fame and prestige.”).

438. Of course, one can read the testimony of artists who explain that “the real and most important reason for our obsession with perfection is in our pride. These are our names out there for everyone to see and judge.” Kwall, *supra* note 48, at 16 (quoting director Milos Forman). Nonetheless, in the same breath, even those artists must concede that “the financial incentive of our rewards is important” as well. *Id.* (quoting director Milos Forman).
currency,\textsuperscript{439} namely proper attribution.\textsuperscript{440} Scholarly articles are not composed in order to generate author royalties and thereby amortize costs over the projected life of the copyright\textsuperscript{441} with an allowance for the necessary profits in order to warrant the initial investment in publishing them.\textsuperscript{442} Rather, the entire incentive for their creation is (from the celestial perspective)\textsuperscript{443} to advance the frontiers of human knowledge and (from the earthly vantage)\textsuperscript{444} to win their authors recognition.\textsuperscript{445} The right of attribution here is not an afterthought that threatens to skew the basic incentives; in the academic context, it IS the incentive (or a large part of it) which therefore must enjoy protec-

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\item[\textsuperscript{439}] It is conceded that different considerations may apply to the realm of software and generally to patents. See Patel, supra note 412, at 484 n.7 (Gatorade has brought the University of Florida $21 million since its invention by faculty members; other technologies have earned their universities far more.).
\item[\textsuperscript{440}] It would be manifestly false to contend that professors crave recognition and artists do not. See, e.g., Lacey, supra note 65, at 1574-75 ("most artists work for a variety of motives. Many work for fame or recognition among their peers."). It would be equally false to contend that one group cares about money and the other does not. Id. at 1574 ("I do not mean to imply that money is not important to artists."). The point, instead, is that novelists, screenwriters, composers, painters, sculptors, and most other types of artists operate in an environment in which their works can ultimately find success in the marketplace. By contrast, articles in law journals, for example, regardless of how much celebrity they achieve, never generate any royalties to the professors who author them. Still, as with all aspects of life, the divisions are not hermetic. It cannot be denied that there is a marketplace for scholarly books, which can prove as lucrative (or as heartless) as the one in which sculptors and composers operate.
\item[\textsuperscript{441}] Quite to the contrary, one view labels them "the hypertrophic byproducts of the tenure process." Julie Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 MICH. L. REV. 462, 520 (1998).
\item[\textsuperscript{442}] "As the University of Chicago Copyright Policy points out, traditional scholarly works, on the whole, have never been particularly profitable. The expense of trying to manage all of the scholarly articles, monographs and academic books produced every year by faculty would likely outweigh any profit that could be made from them." Packard, supra note 414, at 306 (footnote omitted).
\item[\textsuperscript{443}] One commentator calls professors "those who are primarily entrusted with advancing knowledge in our society." Kilby, supra note 411, at 485.
\item[\textsuperscript{444}] Of course, the two perspectives work in tandem. On October 25, 1994, Prof. Andrew Wiles electrified the mathematical world with his solution to the centuries-old mystery of Fermat's Last Theorem. Although he did not thereby succeed to a copyright, he did obtain what few authors get: an offer from The Gap to model its jeans! See PAUL HOFFMAN, THE MAN WHO LOVED ONLY NUMBERS 184 (1998); Nimmer, supra note 12, at 27-28.
\item[\textsuperscript{445}] From the lyric poem to the scientific footnote, the printed word is the writer's means of proving and perpetuating his existence. That identity of self and work, and the prospect for continuation, are more precious to him than the promiscuous coin of the realm.
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tion for the enterprise to continue sensibly. 446 "Citing is paying" in this environment. 447 Here, derogation of moral rights, which elsewhere mean something other than morality, 448 attests to a defect in moral character. 449

This distinction also explains why the academic tort of plagiarism 450 arises independently of copyright subsistence. Whether a scholar in 2004 dishonestly attaches his name to writings of the distant past or of last week, the offense does not differ in kind. In either event, he is polluting the cognitive well and disgracing his professional obligations by claiming credit where it is not due. 451 Plagiarism goes to the heart of the academic enterprise in a way that reverse passing off cannot affect the commercial marketplace. 452 For that reason, plagiarism is and should remain a serious dereliction pursuant to the "House Rules" that govern in the university setting. 453

446. In the academic setting, "attribution may be more important than the right to control commercial control." Kwall, supra note 138, at 63 (quoting Mark Lemley, Rights of Attribution and Integrity in Online Communications, 1995 J. ONLINE L. art. 2, para. 11). See Stearns, supra note 46, at 529 ("In noncommercial publications, such as scholarly or scientific journals, seeing their names in print—and having their names seen by others—is the only compensation authors receive.").

447. Alice M. Roy, Whose Words These Are I Think I Know: Plagiarism, the Postmodern, and Faculty Attitudes, in PERSPECTIVES ON PLAGIARISM, supra note 56, at 55, 58; LAFOLETTE, supra note 372, at 51-52 ("Citations are the currency by which we repay the intellectual debt we owe to our predecessors."). "Scholarly citations, then, the means by which scholars establish their 'credibility' and 'give credit,' play an important role in the production and circulation of intellectual capital in their disciplinary economies." Shirley K. Rose, The Role of Scholarly Citations in Disciplinary Economies, in PERSPECTIVES ON PLAGIARISM, supra note 56, at 241-42.

448. See supra text accompanying note 48.

449. See Le Clercq, supra note 388, at 243; David Leight, Plagiarism as Metaphor, in PERSPECTIVES ON PLAGIARISM, supra note 56, at 221, 223.

450. Admittedly, an accusation of plagiarism can wound even outside of academia. See, e.g., GRIMES, supra note 379, at 165 (framing author for plagiarism is one small step short of killing him).

451. "For academic people, protecting the integrity of the intellectual record, the stream of scholarly output over the year, is a Big Deal, as professionally important as protecting the integrity of the blood supply is to the Red Cross." Le Clercq, supra note 388, at 250.

452. It is possible that a professor might also earn from an article some undeserved income that would not have accrued had he given proper credit to predecessors, and thus have alerted the journal that his contribution does not qualify as the scholarly contribution it was cracked up to be. But that state of affairs is simply incidental. By contrast, the essence of Dastar's goal was not to get credit for originating the subject material, but rather to maximize its profits by selling as much product as possible. In that context, it would presumably have been willing to forego naming itself as originator of the videotape, or using any other name that would increase sales (but not wrongly claiming that its product was manufactured by Fox, as that course of action would constitute wrongful passing off). In other words, in the marketplace, the attribution is as peripheral as it is central to the academic project.

453. Prof. Kwall makes an impassioned plea that "universities have special responsibilities to safeguard the moral rights of authors operating within their creative environments." Kwall, supra note 138, at 79-81. I share her assessment. My own is that rather than altering the laws
Thus ends our inquiry into plagiarism. It can now be seen as a subset of pseudepigraphy, which refers generally to a fictitious and unsubstantiated attribution of a work.\textsuperscript{454} But whereas pseudepigraphy in ages past typically consisted of taking a newly composed work and fictitiously attributing it to an ancient character in order to give it a more illustrious pedigree,\textsuperscript{455} modern plagiarism, in the academic context, consists of the opposite—taking an old work and fictitiously attributing it to a modern person in order to bolster his reputation.\textsuperscript{456} Thus viewed, the offense is as venal as it is dishonest—something that self-respecting institutions devoted to higher education should not tolerate.

V. Moral

In sum, there is in the United States, and there should continue to be, a moral right against passing off. As a general matter, by contrast, the reverse should be limited to specialized settings, such as academe, where attribution lies at the core of the raison d'etre for the creation of works. But in the general marketplace, where works are produced and vended for reasons independent of their attribution, the Supreme Court in \textit{Dastar v. Fox} ruled wisely in denying the existence of a general tort of reverse passing off regarding claims of origin for works of authorship.

\footnote{passed by Congress or state legislatures, the answer should be internal to the academic setting by the adoption of appropriate university policies, ratified by their respective academic senates, for application to professors and students alike.}

\textsuperscript{454} See Stern, \textit{supra} note 378, at 38.

\textsuperscript{455} \textit{Id.} at 44. See Levinson, \textit{supra} note 378, at 6.

\textsuperscript{456} See, \textit{e.g.}, \textit{supra} note 319.