

**DASTAR, ATTRIBUTION, AND PLAGIARISM**

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## I. INTRODUCTION

Between the oral argument and the issuance of the decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,<sup>1</sup> the saga of Jayson Blair, the *New York Times* reporter who had fabricated and plagiarized numerous articles, unfolded in the national media.<sup>2</sup> At the heart of both cases was a knowing failure to attribute the source of information conveyed by the speaker. *Dastar* failed to reveal that much of the footage of its World War II videotape came from a Twentieth Century Fox television series;<sup>3</sup> and Blair failed to reveal that he copied quotations and descriptions from other newspaper articles.<sup>4</sup> And yet, *Dastar* emerged the victor in the Supreme Court, while Blair resigned and was disgraced.<sup>5</sup>

This asymmetry of outcomes results from the fact that while society views plagiarism as normatively wrong, it is not, at least after the *Dastar* decision, a violation of law. A plagiarist “present[s] as new and original an idea or product derived from an existing source.”<sup>6</sup> A plagiarist also is a copyright infringer if he copies another person’s protected expression. His legal offense, however, lies in copying the expression, not in failing to attribute its source.

In *Dastar*, Fox attempted to impose legal liability on *Dastar* for non-attribution.<sup>7</sup> It attempted to convert plagiarism, which violates the moral standards of many professions and communities, into a legal violation. The Supreme Court rejected this effort emphatically.<sup>8</sup> The Court had a strong legal basis for concluding that plagiarism did not violate section 43(a) of the Lanham Act. But the Court also reached the right result from a public policy perspective. The “wrongness” of non-attribution depends significantly on the context in which it occurs. The law is poorly suited to make the nuanced distinctions better left to the self-regulatory mechanisms of specific communities.

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<sup>1</sup> 539 U.S. 23, 66 U.S.P.Q.2d (BNA) 1641 (2003).

<sup>2</sup> See Dan Barry et al., *Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at A1.

<sup>3</sup> *Dastar*, 539 U.S. at 26-27, 66 U.S.P.Q.2d (BNA) at 1643.

<sup>4</sup> Barry, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> WEBSTER’S THIRD NEW INT’L DICTIONARY 1728 (3d ed. 1993).

<sup>7</sup> *Dastar*, 539 U.S. at 27, 66 U.S.P.Q.2d (BNA) at 1643.

<sup>8</sup> *Id.* at 38, 66 U.S.P.Q.2d (BNA) at 1648.

This article will first compare the legal offense of copyright infringement with the moral offense of plagiarism. Then, it will examine efforts to create legal liability for plagiarism via “reverse passing off” under section 43(a) of the Lanham Act, and the Supreme Court’s rejection of these efforts in *Dastar*. Finally, the article will look at non-attribution in different contexts, and conclude that the Supreme Court correctly refused to impose liability on an act that is offensive in some contexts and appropriate in others.

## II. COPYRIGHT INFRINGEMENT V. PLAGIARISM

The Supreme Court in *Sheldon v. Metro-Goldwyn Pictures Corp.* explained that certain provisions of copyright law were intended to deter “deliberate plagiarism,” thereby suggesting the terms are interchangeable.<sup>9</sup> While many acts of copyright infringement may also constitute acts of plagiarism, there are significant differences between the two.

The U.S. Constitution authorizes Congress to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings . . . .”<sup>10</sup> Pursuant to this authority, Congress enacted the Copyright Act, codified at title 17 of the U.S. Code. Under 17 U.S.C. § 102(a), “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . .”<sup>11</sup> Section 106 of the Copyright Act provides “the owner of copyright . . . the exclusive right . . . to reproduce the copyrighted work in copies or phonorecords . . .” and to “prepare derivative works based on the copyrighted work . . . .”<sup>12</sup> Section 501 then states that “[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . .”<sup>13</sup>

Copyright protects the author’s expression. The copyright owner can file suit in federal court against any person who copies the expression without authorization. As a general matter, however, U.S. copyright law has nothing to do with attribution. Thus, a student who uploads the latest *Harry Potter* novel to the Internet infringes the copyright regardless of whether he claims he wrote the

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<sup>9</sup> 309 U.S. 390, 397, 405, 44 U.S.P.Q. (BNA) 607, 610, 613 (1940).

<sup>10</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>11</sup> 17 U.S.C. § 102(a) (2000).

<sup>12</sup> *Id.* § 106.

<sup>13</sup> *Id.* § 501.

