D.I.Y. After *Dastar*: Protecting Creators’ Moral Rights Through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements

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The Canadian feature film *Hollywood North*, like many American films about the film industry, focuses on Hollywood’s corrupting influence.1 A Canadian attorney quits practicing law to produce a movie version of a novel he loves. After incurring a large debt, he secures the necessary financial backing by signing some established American stars, one of whom insists on “script approval.” This actor, an aging action star with reactionary political views, commissions a complete rewrite of the film to match his political philosophy. Powerless, the lawyer-turned-producer begins shooting the new script and laments the Faustian bargain he made to produce his film. Eventually, the author of the novel shows up on the set and

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1. *HOLLYWOOD NORTH* (Ballpark Productions Ltd. 2003). For examples of American films with a similar focus, see STATE AND MAIN (Fine Line Features 2000) and SWIMMING WITH SHARKS (Cineville, Inc. 1994).
sees the mutilated version of her work. She calls the producer names, but she has no legal recourse. After all, the film only claims to be “based on” her book.

This interpretation of the term “based on” is consistent with American case law and entertainment industry practice. The action star’s power to mutilate the novelist’s work with impunity adds to the film’s pointed critique of Hollywood’s degrading influence. Such mutilation appears to violate a fundamental legal right. The novelist’s right to keep her creation intact would fall under the heading of “moral rights,” a bundle of artists’ rights that is explicitly recognized in other countries but that enjoys only spotty protection in the U.S.

Moral rights are the personal rights—as opposed to economic rights—artists have in their creations. In most countries that recognize them, moral rights exist independently of any copyright or patent protection held in the work. While some countries, most notably France, also recognize the right of disclosure and retraction, this article concerns itself with the two core moral rights: the right to get credit for a work of art (attribution) and the right to protect a work from excessive editing or mutilation (integrity). In 1989, the U.S. adopted the Berne Convention for the Protection of Literary and Artistic Work, an international treaty that included a provision requiring signatories to recognize the rights of attribution and integrity. Congress ratified the treaty without passing any statute recognizing those rights, reasoning that attribution and integrity were adequately protected under existing statutes. In 1990, Congress passed the Visual Artists Rights Act (VARA), an amendment to the Copyright Act extending attribution and integrity rights to a narrow

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2. E.g., King v. Innovation Books, 976 F.2d 824, 829-31 (2d Cir. 1992) (holding that author was not permitted to enjoin a film’s use of the term “based on” because there was enough similarity between the two works).
4. See, e.g., id.
8. Hughes, supra note 6, at 20.
class of visual artwork, but leaving all other forms of art, literature and music without such protections.

The 2003 Supreme Court decision *Dastar Corp. v. Twentieth Century Fox Film Corp.* prompted many intellectual property attorneys to again call on Congress to expand recognition of moral rights through another amendment to the Copyright Act. In *Dastar*, the Court stated that section 43(a) of the Lanham Act (the federal trademark and unfair competition statute) does not require those who legally copy works in the public domain to credit the works’ original authors, at least when the authors are myriad and their contributions not necessarily copyrightable. Subsequent district and circuit court decisions applied the case’s holding to copyrighted works. The decision – and especially its definition of “origin of goods” – has prompted some legal commentators to question whether the U.S. can even adhere to the Berne Convention without an amendment to the Copyright Act or a completely new law. Without determining whether a statutory remedy is likely to come to pass or even advisable, this article will argue that moral rights in the U.S. still can be protected through existing remedies.

Part I examines the scope of *Dastar* and argues that it is sufficiently narrow to permit some false attribution claims based on section 43(a) of the Lanham Act. As support, Part I examines district court cases after *Dastar* as well as pre-*Dastar* attribution cases that are still arguably good law. Part II examines the Second Circuit case of *Gilliam v. ABC, Inc.*, in which the Monty Python comedy troupe successfully enjoined ABC from showing a mutilated copy of its work, as a model for pursuing right of integrity claims. Part II will show that this case is still good law, including its Lanham Act rulings and its explicit endorsement of moral rights.

Part III will highlight other avenues artists have to protect their moral rights, using the bundle of rights given in the Copyright

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16. See generally id.
Acknowledging that unequal bargaining power and the realities of the marketplace often prevent artists from fully exploiting these rights, this section will suggest collectively bargained agreements as a way to ensure those rights, using the Writers Guild of America Basic Agreement as an imperfect, but illustrative, model.

Part IV will examine the effect of VARA on works of art that it does not protect, using both the text of the statute and the Congressional record. It will emphasize Congress's intent to keep VARA separate from the rest of the Copyright Act and refute the argument that VARA's narrow protections show a Congressional intent to bar moral rights protection for works outside VARA's scope.

I. DASTAR IS NOT THE DEATH KNELL

The facts of Dastar stretch back more than 50 years to a memoir General Dwight D. Eisenhower wrote detailing his World War II experiences in Europe. His publisher, Doubleday, licensed the book, titled “Crusade in Europe,” to Twentieth Century Fox to make a television series of the same name. Fox hired Time/Life to make the series, which aired in 1949. In 1975, Doubleday renewed its copyright in the book, but Fox let its copyright in the film lapse. In 1988, Fox re-acquired the television rights to the book and gave New Line Home Video and SFM Entertainment the exclusive rights to distribute videos of the 1949 television series. Meanwhile Dastar, recognizing that the series was now in the public domain, used it to make a video of its own. Although Dastar's video made only minor modifications to the original series, it gave no credit to Fox or anyone else involved in making the original series. Fox, New Line and SFM brought an action alleging that Dastar violated Doubleday’s copyright in the book, and thus, their exclusive television rights in the film. They later amended their complaint to also allege that Dastar's sale of the tapes “without proper credit” was an example of “reverse palming off” and violated section 43(a) of the Lanham Act. Before the case

19. Id.
20. Id. at 25-26.
21. Id. at 26.
22. Id.
23. Id.
24. Id. at 27.
25. Id.
26. Id.
got to the Supreme Court, the Ninth Circuit remanded the copyright claim for further factual determinations—specifically, whether Eisenhower’s agreement with Doubleday was a valid “work for hire” agreement.\(^{27}\) The Supreme Court decided only the Lanham Act issue.\(^{28}\)

The Supreme Court dismissed the claim in a unanimous decision with one abstention.\(^{29}\) In his majority opinion, Justice Scalia framed the plaintiffs’ Lanham Act claim as an attempt to resurrect an expired copyright.\(^{30}\) In his recitation of the facts, he noted that Fox added the Lanham Act claim as an amendment to Doubleday’s copyright claim,\(^{31}\) and his analysis showed a determination to prevent the Lanham Act from pre-empting the Copyright Act’s limitations.\(^{32}\) He reached his objective through a careful parsing of the statutory language in section 43(a) of the Lanham Act.\(^{33}\)

The Lanham Act provides civil redress to claimants damaged by certain types of statements or representations made in commerce. The Act includes the federal trademark statute as well as other provisions protecting unregistered marks.\(^{34}\) Section 43(a)(1) of the Act is divided into two parts: section 43(a)(1)(A) lists several types of actionable commercial communications,\(^{35}\) and section 43(a)(1)(B) is specifically concerned with false advertising.\(^{36}\) Section 43(a)(1)(A), the basis of the \textit{Dastar} claims, also has two parts: a list of eight types of commercial communication and a list of six ways those communications could confuse or deceive consumers.\(^{37}\) The \textit{Dastar} plaintiffs based their claim on one item from each list: “false designation of origin” from list one and “origin” from list two. They alleged that Dastar’s failure to credit Fox as the origin of the video constituted a false designation of the origin of goods likely to deceive or confuse consumers as to the video’s origin.\(^{38}\) The Court determined that the claim hinged on the meaning of the words “origin” and “goods.”\(^{39}\)

\(^{27}\) \textit{Id.} at 26, n.2; see also 17 U.S.C. § 201(b) (2000) (defining “work for hire”).
\(^{28}\) \textit{Dastar}, 539 U.S. at 28.
\(^{29}\) \textit{Id.} at 23 (Breyer, J., recusing himself).
\(^{30}\) \textit{Id.} at 33-34.
\(^{31}\) \textit{Id.} at 27.
\(^{32}\) \textit{Id.} at 33-34.
\(^{33}\) \textit{Id.} at 31-32.
\(^{35}\) \textit{Id.} § 1125(a)(1)(A).
\(^{36}\) \textit{Id.} § 1125(a)(1)(B).
\(^{37}\) \textit{Id.} § 1125(a)(1)(A).
\(^{38}\) \textit{Dastar}, 539 U.S. at 27.
\(^{39}\) \textit{Id.} at 31.
Relying on precedent, the dictionary, the history of both the Lanham and Copyright Acts, and practical concerns, the Court ruled that “goods” were the tangible videotapes and “origin” was the producer of those tangible goods. The Court reasoned that “origin” could include the company that commissioned or approved the production of the videotapes, but not the creators of the content of the tapes, pointing out that the creators of intellectual content are protected by copyright and patent. Therefore, the plaintiffs’ claim would be valid only if the defendant purchased the actual videotapes, and repackaged them as its own before selling them. Even though Dastar’s modifications to the video were minor, the fact that it copied and edited the footage on new videotapes was enough for Dastar to be deemed the “origin” of the goods under section 43(a).

At first glance, such a narrow definition of “origin” appears to disenfranchise those who create the content for videos and other commercial media. However, as Justice Scalia points out, such creators still have protections under the Copyright Act, which, unlike the Lanham Act, was created to reward creative artists. Moreover, the Court did not completely close the Lanham Act to attribution claims; it only closed a small section of 43(a)(1)(A) – the parts involving the word “origin” – to attribution claims for public domain works. In its opinion, the Court cites both practical concerns and precedent that demonstrate why section 43(a)(1)(A) is ill-suited for attribution for such claims.

One of the practical reasons the Dastar opinion gave not to extend the definition of “origin” to the creators of intellectual property is the challenge of determining the true creator of a television series like “Crusade in Europe.” The origin of the content could be traced beyond Fox, who merely commissioned it, and Time, who merely pieced together battlefield footage, newsreels and parts of

40. **Id.** at 36-37.
41. **Id.** at 31.
42. **Id.** at 28-30.
43. **Id.** at 35-38.
44. **Id.** at 31-32.
45. **Id.** at 32-34, 37-38
46. **Id.** at 31.
47. **Id.**
48. **Id.** at 37-38.
49. **Id.** at 33-34; see also U.S. CONST. art. I, § 8, cl. 8 (encouraging creation by granting Congress the power to provide creators with limited monopolies over their works).
50. **Dastar**, 539 U.S. at 35.
51. **Id.** at 35-37.
52. **Id.** at 35-36.
Eisenhower’s book. The Court opined that, more than the plaintiffs, the originators of the content in question were “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.’” Without a valid copyright as a backdrop, it is difficult to determine whom to credit. As the opinion noted, “[w]e do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.”

As Scalia noted, an extension of the definition of “origin” could also conflict with precedent in other types of Lanham Act cases. The wrong alleged in Dastar was “reverse palming off,” which occurs when a producer misrepresents someone else’s goods or services as her own. A definition of “origin” that included the creator of the intellectual property behind goods in commerce would conflict with precedent in claims for simple “palming off” (representing one’s own goods or services as those of someone else). Claims for palming off often occur when a “knock-off” brand is likely to be mistaken for a reputable name brand, thus cutting into the name brand’s sales, trading on its good will, and, if the knock-off goods are of shoddy quality, tarnishing its reputation. In order to bring such a claim when no explicit claim of origin is made, precedent requires that the plaintiff demonstrate that its goods have acquired secondary meaning, or in other words, are recognizable by consumers as belonging to its brand. If the definition of origin of goods included such intellectual property as the design of its product—which would normally be protected by patent or copyright—the plaintiff could skirt the requirement for secondary meaning and simply bring a claim for reverse palming off.

As the opinion pointed out, an expanded definition of “origin” could give rise to more absurd results. If a plaintiff’s design were already in the public domain, it could still claim, as Fox did, that the knock-off used its design without giving it proper credit. Ironically, if the producer of the knock-off brand did give the name brand proper

53. See id. at 35.
54. Id.
55. Id.
56. Id. at 36.
57. Id. at 31.
58. Id. at 28 n.1.
59. Id. at 32.
60. Id. at 36 (citing Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 208 (2000)).
61. Dastar, 539 U.S. at 36-37.
62. See id. at 36.
credit, then the name brand could have a reverse palming off claim under section 43(a)(1)(A) because the labeling could cause confusion as to “affiliation” or “approval.”

Considering Dastar’s reputation as hostile to artist’s rights, it is worth noting that all four of its unsuccessful plaintiffs were corporations, none of which claimed to make any artistic contribution to the intellectual property in question. Indeed, the only identifiable “artist” in the case was the late General Eisenhower, who arguably relinquished the copyright and control of the work to his publisher, Doubleday. The court’s unanimity may be linked to plaintiffs’ seemingly disingenuous position: they were not creators seeking credit but corporate licensees who had let their copyright protection lapse. As holders of what they thought were the exclusive rights to distribute the video in question, the plaintiffs wanted to stop the defendant from selling its version of the video, and it is doubtful that their aim would have changed had the defendant given them “proper credit.”

Even under the Court’s definition of “origin,” creative artists seeking proper credit may still use section 43(a) of the Lanham Act, a fact which has eluded some commentators. As noted above, Dastar concerned the term “origin” only as used in section 43(a)(1)(A) of the Lanham Act. “False designation of origin” is only one of at least three types of communications the subsection lists, and “origin” is only one of several means of deception. Thus, even without using “origin,” there are several ways a defendant could be liable under section 43(a)(1)(A). Artists can still argue that improper attribution is likely to confuse or deceive as to “connection,” “association,” “sponsorship” or “approval,” which would include most claims for simple “palming off.”

64. Id. at 23.
65. The Ninth circuit held that whether or not Eisenhower intended the book to be a work for hire was a triable issue of fact and remanded it to the district court. Id. at 24 n.2.
66. See id. at 26.
67. Id. at 27 (discussing the plaintiff’s claim under section 43 of the Lanham Act in which they allege that Dastar’s sales “without proper credit” constitute reverse passing off).
68. See LINDEY & LANDAU, supra note 14, § 2:43; Lowe & Khosla, supra note 11, at 40.
69. Dastar, 539 U.S. at 31.
71. Dastar, 539 U.S. at 31-33.
73. Dastar, 539 U.S. at 28-31.
As the *Dastar* opinion noted, section 43(a)(1)(B)’s provision for false advertising claims, which does not even contain the word “origin,” is also a valid cause of action for artists seeking redress for certain types of false attribution.74 Until the 1988 Trademark Revision Act, “false designation of origin” and “any false description or representation” appeared side by side in the same provision listing actionable commercial communication.75 As noted above, the current version of section 43(a) relegates false advertising claims to section 43(a)(1)(B), which requires that they be “in commercial advertising or promotion” and misrepresent “the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.”76 While the statute appears to set the bar higher for false advertising claims, certain types of false attribution cases can clear it. For example, a published book or album, which falsely purports to be the work of a famous artist misrepresents its “nature, characteristics or qualities” in “commercial advertising,” thereby providing a valid section 43(a)(1)(B) claim.77

District court cases in *Dastar’s* progeny have recognized the distinction between claims arising under section 43(a)(1)(A) and those arising under section 43(a)(1)(B).78 Many of these cases fall outside the entertainment and publishing industries,79 but their holdings remain applicable to those industries. Decided a year after *Dastar* in the district of Kansas, *Larkin Group, Inc. v. Aquatic Design Consultants* dismissed a section 43(a)(1)(A) reverse palming off claim, while leaving open a section 43(a)(1)(B) false advertising claim to determine whether the same facts cleared the “commercial advertising or promotion” hurdle.80 In making its section 43(a)(1)(A) determination, the *Larkin* court surveyed and synthesized *Dastar’s* first-year progeny.81

The plaintiff in *Larkin* was an aquatic design firm suing a competing firm formed by two of its former employees.82 The complaint alleged that the defendants, former employees, stole the

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74. Id. at 38.
75. Id. at 31 n.3 (quoting the Lanham Trademark Act of 1946, 76 Pub. L. No. 489, 60 Stat. 441 (1946)).
79. See, e.g., id.
80. Id. at 1127-29.
81. Id. at 1125-27.
82. Id. at 1123.
plaintiff’s designs and used them in proposals to three potential clients, which were also the plaintiff’s potential clients. The court found that *Dastar* foreclosed the section 43(a)(1)(A) claim, because the proposals were not goods in commerce and even if they were, the defendants did not misrepresent their “origin” according to *Dastar*’s definition of the term (defendants were the origin of the tangible proposals, regardless of who originated each part). None of the non-origin prongs of section 43(a)(1)(A) − “connection” “approval” etc. − applied in this case, as they generally apply to cases of palming off rather than reverse palming off.

In determining whether the defendants’ actions fit under section 43(a)(1)(B) as “commercial advertising or promotion” the court applied the industry-specific Tenth Circuit definition, which asks if the information is “disseminated sufficiently to the relevant purchasing public to constitute ‘advertising’ or ‘promotion’ within that industry.” Noting that, in some industries, communication with one potential purchaser could be a sufficient portion of the relevant purchasing public, the court found it needed more facts to determine whether sending proposals to three potential clients was sufficient to constitute “commercial advertising or promotion” in the aquatic facility design industry. Apparently, this court left the second section 43(a)(1)(B) hurdle − whether the proposals misrepresented the “nature, characteristics, qualities, or geographic origin” of either plaintiff’s or defendant’s services − for further factual determinations as well.

The Southern District of Iowa case of *Pioneer Hi-Bred Intl. v. Syngenta Seeds Inc.* clarified that section 43(a)(1)(B) false advertising claims must clear this second hurdle. The plaintiff, a seed manufacturer and breeder, alleged that its competitor used its

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83. Id. at 1123.
84. Id. at 1126-27; *see e.g.*, Bretford Mfg., Inc. v. Smith Sys. Mfg. Co., 286 F. Supp. 2d 969 (N.D. Ill. 2003) (holding that the use of a table leg, made by another manufacturer, in a display model for a table did not violate section 43(a)(1)(A) after *Dastar*), aff’d, 419 F.3d 576 (7th Cir. 2005).
85. *See* 15 U.S.C. § 1125(a)(1)(A) (2000) (noting that the “non-origin” terms have to do with misrepresenting a product’s connection or affiliation with a person or company, which comes into play when a manufacturer tries to pass off her own goods as the goods of someone else).
86. *Larkin*, 323 F. Supp. 2d at 1127 (citing Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1273-74 (10th Cir. 2000)).
87. Id. at 1128 (citing Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734-35 (9th Cir. 1999)).
88. Id.
89. *See id.*
90. No. 4:02-cv-90541 (S.D. Iowa Aug. 17, 2004).
germplasm – the genetic information from which seed corn is derived— to make seed corn it then packaged as its own, giving the impression it had come from defendant’s germplasm. Acknowledging that Dastar made section 43(a)(1)(A) unavailable, the plaintiff contended that marketing seeds made from its germplasm as defendant’s own – essentially, reverse palming off – was false advertising under section 43(a)(1)(B). The court dismissed the claim, finding that marketing seed corn without crediting the true developer of the germplasm did not misrepresent the product’s “nature, qualities, characteristics or geographic origin.” The opinion stated that plaintiff would need to show more evidence of such misrepresentation to proceed on section 43(a)(1)(B), but it did not in any way suggest that the subsection was off-limits in attribution cases.

In spite of Dastar’s clear language and the holdings of its progeny, some commentators still mischaracterize the case as the end of section 43(a) claims for attribution. Alexander Lindey and Michael Landau do just that in the third edition of their treatise, Lindey on Entertainment Publishing and the Arts. Not only does their treatise omit any mention of the “non-origin” attribution claims available in section 43(a)(1)(A), but it fails to note the 1988 revision of the Lanham Act, which brought about the existence of section 43(a)(1)(B). As argued below, this new provision saves many of the pro-attribution cases they claim Dastar overturned. Moreover, the difference between “palming off” and “reverse palming off” appears to elude them, which also leads them to overstate Dastar’s effect. They cite several earlier, pro-attribution decisions to support their assertion that Dastar effectively overturned “decades of common practice.” However, all but one of the Lanham Act cases they cite are still arguably good law. An examination of a few of them is illustrative of the continued utility of section 43(a) in cases of improper attribution.

In the fascinating case of Follet v. New American Library, Inc., best-selling author Ken Follet successfully sued to change the placement of his name on a non-fiction book he had edited. Before

91. Id. at 1 n.1.
92. Id. at 2.
93. Id. at 5.
94. Id. at 6 (citing 15 U.S.C. § 1125(a)(1)(B) (2000)).
95. See generally id.
97. See id.
98. Id.
99. Id.
he gained fame as a novelist, Follet did editing work for New American, including a rewrite of a non-fiction book by a French author.\textsuperscript{101} Hoping to cash in on the success of Follet’s novels, New American released the French author’s book with Follet’s name on the cover in large print, implying Follet was the principle author.\textsuperscript{102} The cover further perpetuated this illusion, stating the book was “by the author of” and listing two of Follet’s novels.\textsuperscript{103} The non-fiction book was released at the same time Follet was promoting his newest novel, and conceivably diluted some of its commercial impact.\textsuperscript{104} Addressing the cause of action, the District Court cited the old version of section 43(a), which places all types of actionable communication in the same subsection.\textsuperscript{105} It then analyzed Follet’s contribution to the non-fiction book and determined what was meant by “principle author.”\textsuperscript{106} The court determined that such a cover display was false, and thus violated the Lanham Act.\textsuperscript{107} The court found the book “constitute[d] a false representation and false designation of origin,”\textsuperscript{108} but the court’s subsequent reasoning indicates that a false description would be sufficient to find for the plaintiff.\textsuperscript{109} The claim, if it arose today, would likely be valid under section 43(a)(1)(B) of the modern Lanham act,\textsuperscript{110} and would be unaffected by the \textit{Dastar} ruling. To fans of Follet’s fiction work, such a false designation of authorship misrepresents the “characteristics or qualities” of the non-fiction book, inducing potential buyers to believe it contains the characteristics and qualities of Follet’s fiction.\textsuperscript{111}

The same holds for the Southern District of New York case of \textit{Benson v. Paul Winley Record Sales Corp.}\textsuperscript{112} and the Second Circuit case of \textit{PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.}\textsuperscript{113} Both cases involved early recordings of famous guitarists, George Benson and Jimmy Hendrix respectively, which featured them as background

\begin{thebibliography}{99}
\item \bibitem{101} Id. at 306.
\item \bibitem{102} Id. at 308.
\item \bibitem{103} Id.
\item \bibitem{104} Id.
\item \bibitem{105} See \textit{id.} at 310-11.
\item \bibitem{106} Id. at 311.
\item \bibitem{107} Id. at 312.
\item \bibitem{108} Id. at 309.
\item \bibitem{109} See \textit{id.} at 312.
\item \bibitem{111} See Follet, 497 F. Supp. at 312 (noting the court’s rationale for the finding that Follet’s rewrites, however extensive, did not make him the principle author of the work in question).
\item \bibitem{112} 452 F. Supp. 516 (S.D.N.Y. 1978).
\item \bibitem{113} 818 F.2d 266 (2d Cir. 1987).
\end{thebibliography}
session players.\textsuperscript{114} In both cases, the courts found that the sellers of these recordings violated the Lanham Act with misleading packaging likely to cause consumers to believe the artists mentioned were featured performers.\textsuperscript{115} Both courts based their decisions on the false description rather than false designation of origin clause of the old statute; \textit{PPX} explicitly stated that this was not a “false designation of origin” case, and both opinions held that the false descriptions on the album covers misrepresented the characteristics of the products inside.\textsuperscript{116} This put both rulings squarely inside section 43(a)(1)(B) protection and outside \textit{Dastar}’s sphere of influence.

The only holding mentioned in the Lindey and Landau treatise that \textit{Dastar} affects is the 1980 Ninth Circuit ruling in \textit{Smith v. Montoro}.\textsuperscript{117} The case involved a film studio that had removed an actor’s name from the credits and promotional materials of a film in which he appeared, substituting another actor’s name.\textsuperscript{118} The Ninth Circuit overturned the dismissal of the actor’s section 43(a) claim, stating that such a substitution constituted a valid claim of “express reverse palming off.”\textsuperscript{119} \textit{Smith} was cited in the 2003 case \textit{Williams v. UMG Recordings, Inc.},\textsuperscript{120} a case that, like \textit{Dastar}, involved a copyright claim for the illegal use of copyrighted material and a section 43(a) claim for the use of that material without proper credit.\textsuperscript{121} The Central District of California denied the defendant’s motion for summary judgment on the Lanham Act claim a few months before \textit{Dastar}, and then reversed itself immediately after \textit{Dastar}.\textsuperscript{122} It found the Supreme Court’s definition of “origin” overruled previous Ninth Circuit decisions “to the extent they find a reverse passing off claim based on the failure to credit the author of any idea, concept or communication embodied by the tangible goods.”\textsuperscript{123} The lower court also found that the Supreme Court’s ruling barred such reverse passing off claims whether or not the object of misattribution was under copyright.\textsuperscript{124}

\textsuperscript{114} \textit{See} \textit{PPX Enters.}, 818 F.2d at 267; Benson, 452 F. Supp. at 517.
\textsuperscript{115} \textit{See} \textit{PPX Enters.}, 818 F.2d at 272; Benson, 452 F. Supp. at 518.
\textsuperscript{116} \textit{See} \textit{PPX Enters.}, 818 F.2d at 272; Benson, 452 F. Supp. at 518.
\textsuperscript{117} 648 F.2d 602 (9th Cir. 1981).
\textsuperscript{118} \textit{Id.} at 603.
\textsuperscript{119} \textit{Id.} at 607.
\textsuperscript{120} 281 F. Supp. 2d 1177 (C.D.Cal. 2003).
\textsuperscript{121} \textit{See id.} at 1179.
\textsuperscript{122} \textit{Id.} at 1184.
\textsuperscript{123} \textit{Id.} at 1184 n.10.
\textsuperscript{124} \textit{Id.} at 1185.
Even under the Central District’s interpretation, plaintiffs in a situation identical to the one in *Smith* may bring an action based on section 43(a)(1)(B). Listing the wrong name in a film’s promotional materials could be found to misrepresent the “nature, characteristics, [or] qualities” of the film, depending on the level of fame of the named or unnamed actor and his/her ability to affect consumer perception of the film. Like in the *PPX Enterprises, Benson* and *Follet* cases, the defendant’s conduct in *Smith* could be actionable without involving the “origin” clauses.

While *Dastar* was not as fatal to attribution claims as Lindey and Landau suggest, it did overturn at least one landmark attribution case that was favorable to creators. The Ninth Circuit case of *Lamothe v. Atlantic Recording Corp.* allowed co-authors of joint works to sue for credit, relying on a definition of “origin” that included authorship. The case involved two songs recorded by the popular heavy metal group Ratt. Robinson Crosby, a member of Ratt, had written the songs with Robert Lamothe and Ronald Jones, who were members of his former band, Mac Meda. The Copyright Act allows one author of a joint work to license the work without the consent of the other authors, as long as the license is non-exclusive and the other authors receive their share of the profits. Crosby licensed the songs to a publisher, which licensed them to Atlantic Records, which sublicensed them to the sheet music company Chappell Music. The credits on the sheet music and album cover failed to list Lamothe and Jones as co-authors of either of the songs, so Jones and Lamothe sued under the old version of section 43(a). In denying the defendant’s motion for summary judgment, the Ninth Circuit cited *Smith* heavily, noting that in claims for reverse palming off: “the originator of the misidentified product is involuntarily deprived of the advertising value of [his] name and the goodwill that otherwise would stem from public knowledge of the true source of the satisfactory

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127. 847 F.2d. 1403, 1407 (9th Cir. 1988).
128. Id. at 1405.
129. Id.
131. *Lamothe*, 847 F.2d at 1405.
132. Id.
133. Id. at 1405-07.
Because it found a reverse palming off claim in a case of misattribution, and had no alternative theory, this case was clearly overturned by Dastar.

The Ninth Circuit acknowledged a public policy reason to extend the Lanham Act to claims for attribution. Unlike the claims in PPX Enterprises, Benson and possibly Smith, their claim does not rise to the level of section 43(a)(1)(B), because leaving out relatively unknown authors does not misrepresent the “nature, characteristics, [or] qualities” of the work. Nor would it qualify under the non-origin parts of section 43(a)(1)(A), because no “association,” “sponsorship,” or “approval” is alleged.

Even though the Copyright Act entitles the co-authors like those in Lamothe to a share of the revenues, credit is often a more valuable commodity to songwriters and other “behind the scenes” artists seeking to build a career. It could have been worse for them; if they’d written the songs under the Copyright Act’s “work for hire” provision, they would be entitled to no share of the profits at all. It is the relatively unknown artist, working behind the scenes on a project whose destiny she does not legally control, who is the most hurt by Dastar, and presents the strongest case for an amendment to the Copyright Act. However, artists in this class can protect their right to attribution in other ways.

II. GILLIAM IS GOOD LAW

As shown by the cases above, an artist wishing to remove her name from a work has a better chance of success under Dastar’s construction of section 43(a) than an artist wishing to add her name to a work. In Follet, Benson, and PPX Enterprises, established artists

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134. Id. at 1407.
135. Id.
136. Id. at 1405.
138. Id. § 1125(a)(1)(A).
140. See 17 U.S.C. § 201(b).
142. See Lamothe v. Atl. Recording Corp., 847 F.2d 1403, 1405 (9th Cir. 1988); Smith, 648 F.2d 602 (9th Cir. 1981).
sought to protect their reputations by removing their names from works that falsely represented their talents or creative voice. Their motive is similar to that of an artist who wants to assert the moral right of integrity and protect her work from mutilation or excessive editing. In situations where an artist feels her work has been mutilated, she may seek to completely enjoin it from publication or broadcast. This is especially true when dissociation from the work is impossible or would do little to alleviate the damage. Seeking injunction may be a way to force the publishing entity to scale back its changes, or it may be an earnest attempt to keep the mutilated work out of the public sphere.

In Gilliam v. ABC, Inc., the creators of several episodes of “Monty Python’s Flying Circus” were granted a preliminary injunction to keep an edited version of their work from airing in the U.S. The creators, who also appeared in the sketches, did not contract directly with the defendant network, but had granted the BBC, which originally aired the episodes in the U.K, the right to license broadcasts “in any overseas territory.” From the BBC, Time-Life acquired the right to distribute the tapes in the U.S and it was Time-Life who contracted with ABC and edited the episodes at ABC’s request.

The plaintiffs’ action against ABC involved a copyright claim and a Lanham Act claim under the old version of section 43(a). The copyright claim hinged on the construction of the plaintiffs’ original contract with the BBC. Termed a “scriptwriters’ agreement,” the contract provided for the plaintiffs to write and deliver the scripts to the BBC. The agreement required the network to consult with the writers about any changes they intended to make to the script and did not provide for any changes or cuts after the scripts were recorded. As an additional safeguard, the writers retained for themselves all

143. See generally, PPX Enters., 818 F.2d 266; Follet, 497 F. Supp. 304; Benson, 452 F. Supp. 516.
145. See id. (recognizing that the creators of the sketches were also the performers, so it would be impossible to show the mutilated sketches without involving their identities).
146. See id. at 18 (noting that the creators of the comedy sketch attempted to negotiate with the mutilators before seeking an injunction).
147. Id. at 26.
148. Id. at 17.
149. Id. at 17-18.
150. Id. at 19-20, 24-25.
151. See id. at 19-21.
152. See id. at 17 n.2 (providing the agreement terms).
153. See id.
rights not specifically granted in the contract.\textsuperscript{154} Along with the overseas distribution rights, the BBC gave Time-Life permission to edit the tapes “for insertion of commercials, applicable censorship or governmental . . . rules and regulations, and National Association of Broadcasters and time segment requirements.”\textsuperscript{155} As part of its finding that the plaintiffs showed a likelihood of success on the merits, the Second Circuit found that such rights to edit were not the BBC’s to give, and therefore, the mutilations violated the writer’s copyright in the work.\textsuperscript{156}

The court’s rationale illustrates the potential of the Copyright Act for pursuing mutilation claims. \textit{Gilliam} came down before the Act’s 1976 revision, but the \textit{Gilliam} court based its decision on the “derivative works” provisions in the Copyright Act,\textsuperscript{157} which, along with the court’s interpretation of those provisions, remain good law. Moreover, the 1976 Act’s elimination of the distinction between common law and statutory copyright, and the accompanying requirement that a work must first be published before it is protected,\textsuperscript{158} strengthens the plaintiff’s position.

In explaining the rationale for its decision on the copyright claim, the \textit{Gilliam} court stated, “the ability of the copyright holder to control his work remains paramount in our copyright law.”\textsuperscript{159} After rebutting what it described as “technical” arguments from the defendant, the court stated that the purpose of the copyright act was “to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection.”\textsuperscript{160} In using the Copyright Act to protect the plaintiffs’ work from mutilation, the Second Circuit connected the right of integrity to the primary constitutional purpose of the copyright act, which is to encourage artists to create.\textsuperscript{161}

As for finding likelihood of success on the section 43(a) claim, the court issued a more explicit endorsement of moral rights, which it described as including “the right of the artist to have his work attributed to him in the form in which he created it.”\textsuperscript{162} The opinion

\textsuperscript{154} See id.
\textsuperscript{155} Id. at 18.
\textsuperscript{156} Id. at 19.
\textsuperscript{157} Id. at 19 (citing the Copyright Act of 1909, ch. 320, § 7, 35 Stat. 1075 (1909)); see also 17 U.S.C. § 106 (2000).
\textsuperscript{158} See Gilliam, 538 F.2d at 19-20 n.3.
\textsuperscript{159} Id. at 21.
\textsuperscript{160} Id. at 23.
\textsuperscript{161} U.S. CONST. art. I, § 8, cl. 8.
\textsuperscript{162} Gilliam, 538 F.2d at 24.
stated that, while not explicitly mentioned in the Copyright Act, the rights of attribution and integrity are essential to the economic rights the Act protects, and thus, must be protected by means “outside the statutory law of copyright.”

The court continued, “[a]lthough such decisions are clothed in terms of proprietary right in one’s creation, they also properly vindicate the author’s personal right to prevent the presentation of his work to the public in a distorted form.” The court found that ABC’s cuts “impaired the integrity” of plaintiff’s work and presented to the public “a mere caricature of their talents.”

Like many of the above-mentioned cases, Gilliam involved the old version of section 43(a), which does not draw a clear line between false advertising and false designations of origin. However, the court in Gilliam, like the Ninth Circuit in Lamothe, appears to rely more on the false designation of origin clause, which puts it in potential conflict with Dastar. As with the cases mentioned above, this conflict can be reconciled by placing the case within section 43(a)(1)(B) or in the non-origin provisions of section 43(a)(1)(A).

First, to fit into the section 43(a)(1)(B) false advertising prong, the conduct must be “in commercial advertising or promotion” and “misrepresent[] the nature, characteristics, qualities, or geographic origin” of a product, service, or enterprise. The first hurdle is to classify the episodes in question as “commercial advertising or promotion.” The Gilliam court implied this classification was appropriate by mentioning that the ABC broadcast would be many Americans’ first impression of the Monty Python comedy troupe, and would thus determine whether or not they would become fans. The opinion also found that the mutilation of the episodes would misrepresent the qualities of the troupe to such viewers, thus satisfying the other element of section 43(a)(1)(B).

In the alternative, Gilliam and other mutilation cases can be reconciled with Dastar by placing them within section 43(a)(1)(A), but outside the reach of Dastar’s definition of origin. In a mutilation case

163.  Id.
164.  Id.
165.  Id. at 25.
171.  Id.
172.  Gilliam, 538 F.2d at 19.
173.  Id.; see also id. at 24 (noting that it exposed plaintiffs to criticism for work that was not theirs).
like *Gilliam* a “word, term, name, symbol or device or any combination thereof” might be likely to confuse or deceive as to “approval of his or her goods, services or commercial activities by another person.”174 By broadcasting the mutilated versions of Monty Python sketches, ABC arguably presented a “combination” of “words,” “names” and “devices” likely to lead viewers to the false belief that the creators approved of such mutilations.175 Essentially, ABC was “palming off” the edited product as the work (fitting under “service” or “commercial activity”) of the plaintiff.176 This false belief is made more plausible because the creators were also the actors shown on the screen.178 Therefore, a mutilation case with facts similar to *Gilliam* could still be brought under section 43(a)(1)(B) or under the “palming off” provisions of section 43(a)(1)(A), even though *Gilliam* itself was brought under a more liberal definition of “origin.”

**III. OTHER AVENUES TO ATTRIBUTION AND INTEGRITY**

*Gilliam* is a particularly useful model for integrity claims, as well as a resource for attribution claims, because it found likelihood of success on all three main avenues for pursuing moral rights: copyright, unfair competition (which includes the Lanham Act) and contract.179 It also showed how copyright and contract claims can be used in concert: the court found that Time-Life violated the plaintiffs’ copyright because its editing exceeded the rights plaintiffs granted to the BBC in their “writer’s agreement.”180 When used in conjunction with a contract, the rights protected in the Copyright Act181 are powerful tools in the protection of moral rights.

**A. Using the Copyright Act’s “Bundle” of Rights**

The *Gilliam* court’s finding that the right of integrity, termed the right to “control” by the court, is a necessary part of the Copyright Act’s protections is supported by specific provisions in the statute.182 Although the Copyright Act is generally viewed as a protection for

175. Id.; *Gilliam*, 538 F.2d at 24.
177. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 28 (2003) (distinguishing “reverse passing off” from “palming off”).
180. Id. at 22.
182. See id.
economic rights, the provisions involving “derivative works,” and their interplay with the compulsory license provision for sound recordings, show a concern that goes beyond the pecuniary.

As one of the six exclusive rights a copyright holder may “do or authorize,” section 106 grants the right “to prepare derivative works based upon the copyrighted work.” Section 101 defines a derivative work, listing several examples: “translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.” Unless the creation meets the qualifications to be a “work made for hire,” the copyright belongs to the creator upon creation, and she has the right to authorize any of the above derivative works and dictate the terms of that authorization. Essentially, she can ensure her rights of attribution and integrity as a term of such authorization. Even the fictional novelist in Hollywood North could have insisted on script approval and credit as terms of her authorization to make a film version of her book.

Seemingly more problematic from a moral rights perspective is the compulsory license for sound recordings found in section 115 – but even that provision is tempered by a concern for moral rights. After the copyright holder has made or authorized a sound recording of a “non-dramatic” musical work and distributed copies of it to the public, section 115 allows any other artist to record and release a “cover” version, as long as she notifies and pays a statutory royalty to the copyright holder. This provision clearly scales back the right to

184. See id. § 106(2).
185. See id. § 115.
186. See id. § 106(2).
187. See id. § 101.
188. See id. § 101 (defining “work made for hire”); id. § 201(b) (defining ownership rights for a “work made for hire”).
189. See id. § 201(a).
190. See id. § 106.
193. “Non-dramatic” includes all musical works excluding complete musical plays and operas. See generally Stigwood Group Ltd. v. Sperber, 457 F.2d 50 (finding that a performance of 20 of the 23 songs from Jesus Christ Superstar, in their original sequence, was a “dramatic performance” and as such was not subject to compulsory license provisions).
194. 17 U.S.C. § 115(a)-(c); see also id. §§ 801(b)(1), 803 (authorizing the Librarian of Congress to appoint and convene copyright arbitration panels to readjust the rate listed in § 115); 63 Fed. Reg. 7,288, 7,289 (Feb. 13 1998) (Section 255.3(c) sets the royalty rate at 8.5 cents a copy or 1.65 sense a minute for records made and distributed after January 1, 2004.
prepare or authorize derivative works; without it, section 106(2) would give composers (and those to whom they sell their copyrights) the right to control all recordings of their work as derivative works.\textsuperscript{195} In order to prevent mutilation pursuant to a compulsory license, section 115(a)(2) limits the amount a compulsory licensee can change the original work, prohibiting alterations to “the basic melody or fundamental character . . . .”\textsuperscript{196} It also denies compulsory licensees the copyright protections afforded to authorized makers of derivative works, putting cover recordings outside the definition of derivative works.\textsuperscript{197} The message to compulsory licensees is clear: you may copy with only notification and payment, but you must have authorization to change the melody or character of the piece.\textsuperscript{198}

In addition to the right to prepare derivative works, section 106 gives creators the exclusive right to make copies of the work, distribute copies to the public, perform or display the work publicly and, in the case of recordings, transmit the work to the public in a digital audio format\textsuperscript{199} such as radio.\textsuperscript{200} The section also gives creators the ability to license their right to producers, record labels or film studios, which, in theory, means they can insist on proper attribution and complete integrity as a condition of the license.\textsuperscript{201} In practice, however, the alienability of these rights and the unequal bargaining power of many emerging artists means that the rights of attribution and integrity are often the first things sacrificed in order to get a work disseminated to the public.\textsuperscript{202}

In some cases, particularly in the music industry, asserting and monitoring all of one’s section 106 rights is impractical. For example, it is impossible for the writer of a hit song to personally collect her fee every time her song is played on a radio station or performed by a cover band in a bar. That task falls to one of three performing rights societies\textsuperscript{203} – ASCAP, BMI or SESAC – which collect subscription fees

\textsuperscript{195} See 17 U.S.C. § 101 (listing sound recordings as an example of a derivative work); id. § 106(2) (vesting an exclusive right to authorize derivative works in the creator).
\textsuperscript{196} Id. § 115(a)(2).
\textsuperscript{197} Id.
\textsuperscript{198} Id.; see id. § 101 (defining “derivative work” to include “any other form in which a work may be recast, transformed or adapted”); id. § 106(2).
\textsuperscript{199} Id. § 106(1)-(6).
\textsuperscript{200} Id. § 101 (providing a general description of “digital transmission[s]”).
\textsuperscript{201} See id.
\textsuperscript{202} However, this trend appears to be changing with the proliferation of artist-owned record labels, such as Kung Fu, Nitro, Hopeless, Epitaph, and Fat Wreck Chords, and director owned film production companies.
\textsuperscript{203} Id. § 101 (defining “performing rights societies”).
from radio stations and performance venues, monitors the ubiquity of the song and pays the artist an estimated share based on the going royalty. Similarly, the task of granting licenses to record cover versions often falls to the Harry Fox Agency which allows the licensee to avoid the stringent reporting requirements of the compulsory license.204 When these section 106 authorizations are farmed out, it is difficult for creators to insist on any special rights to integrity and attribution.

**B. Using Collective Bargaining to Protect the Rights of Attribution and Integrity**

Unequal bargaining power relative to the production or dissemination entity is the primary reason many artists give up their moral rights.205 Some classes of creative artists have strengthened their bargaining position by forming guilds through which they bargain with the production entities. One film and television industry group that makes the acquisition of attribution and integrity rights its mission is the Writer’s Guild of America (WGA).206 Although screen and television writers are generally seen as the lowest paid and least acknowledged members of the entertainment industry family207 — with WGA members even working for several months under an expired contract in 2004208 — the WGA’s strategy for gaining attribution and integrity rights is worth exploring.

It is extremely rare for WGA writers to own copyrights in their work. Usually, they either sell their screenplays or teleplays or create them as works for hire.209 However, as a term for giving up the

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205. Lowe & Kholsa, supra note 11, at 40.


209. Writers Guild of America, East & Writers Guild of America, West, Creative Rights for Writers of Theatrical and Long Form Television Motion
copyright by sale or work for hire, the WGA agreement includes specific provisions protecting their credit and “creative rights.”

Members are not allowed to waive these provisions or work for a production entity who is not a signatory to the basic agreement, though all are allowed to negotiate more favorable terms than the basic agreement provides. The WGA is organized under the National Labor Relations Act and enforces its basic agreements through member grievance procedures and binding arbitration, with the National Labor Relations Board as the final authority, subject to judicial review in federal court.

In some cases, the WGA’s Minimum Basic Agreement mitigates a writer’s transfer of copyright by giving back certain rights, such as the right to publish the work in literary form or as a play or the right to buy back the material after five years if the producer does not make a film out of it. In the Minimum Basic Agreement and WGA manuals, such rights are referred to as “separated rights.” In all cases, the Minimum Basic Agreement grants WGA members certain rights calculated to protect the integrity of its member’s work. It breaks down these rights in a manual titled *Creative Rights for Writers of Theatrical and Long-Form Television Motion Pictures*.

While the script is still in the development stage, those rights include the right to perform the first rewrite after the writer’s script is acquired or optioned and the right to perform the first revision after there is a new element on the project, such as a new director or star. Before production begins, and if a director has not been engaged, the writer has a right to meet with the producer for a “meaningful

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210. WGA, BASIC AGREEMENT, supra note 206, at 55.
212. Id. § 6.
215. WGA, EAST & WGA, WEST, supra note 209, at 5-6.
216. Id.
217. See generally id.
218. Id. at 8; see also WGA, BASIC AGREEMENT, supra note 206, at 244.
219. WGA, EAST & WGA, WEST, supra note 209, at 9; see also WGA, BASIC AGREEMENT, supra note 206, at 244.
discussion of the translation of his/her vision to the screen.” While these rights do not completely protect the writer’s right to integrity, they are steps in that direction, and, like separated rights, help mitigate the loss of the guarantees of a valid copyright.

Because attribution is so important to its members, the WGA issues and updates a Screen Credits Manual and a Television Credits Manual explaining the credit provisions in its 2001 Theatrical and Television Basic Agreement. The preface to both manuals begins, “a writer’s position in the motion picture or television industry is determined largely by his/her credits,” and calls determining proper credit “one of the most important services the Guild provides for its members.” The preface further states that the Guild accomplishes this goal through its Basic Agreements with employers and through rules governing the conduct of its members.

Both manuals are organized into the same sections and subsections, and the rules for each medium differ only slightly. The Basic Agreement gives the WGA final authority on the writing credits of all the films and television shows signatory companies produce. Pursuant to this authority, and with itself as the arbitrator in all disputes, the WGA outlines a series of rules governed by the following belief, stated in both manuals: “fewer names and fewer types of credit enhance the value of all credits and the dignity of all writers.” The WGA uses a combination of approaches to achieve this end. First, it has an elaborate notification scheme. It requires signatory companies to notify writers of any other writers who are working or have worked on the same project and requires all writers currently working on a project to notify each other. For television

220. WGA, EAST & WGA, WEST, supra note 209, at 11-12; see also WGA, BASIC AGREEMENT, supra note 206, at 349.
222. WGA, SCREEN CREDITS MANUAL, supra note 206.
223. Id.
224. WGA, SCREEN CREDITS MANUAL, supra note 206; WGA, TELEVISION CREDITS MANUAL, supra note 221; compare WGA, BASIC AGREEMENT, supra note 206, at 469-99, with WGA, BASIC AGREEMENT, supra note 206, at 500-20.
225. WGA, BASIC AGREEMENT, supra note 206, at 55.
226. WGA, SCREEN CREDITS MANUAL, supra note 206, § III(B)(7); WGA, TELEVISION CREDITS MANUAL, supra note 221, § III(B)(8).
227. WGA, SCREEN CREDITS MANUAL, supra note 206, §§ II-III; WGA, TELEVISION CREDITS MANUAL, supra note 221, §§ II-III.
228. WGA, SCREEN CREDITS MANUAL, supra note 206, § I(A)(1); WGA, TELEVISION CREDITS MANUAL, supra note 221, § I(A)(1).
shows of 90 minutes or longer or by request in any film, writers must also be notified of anyone hired after them to work on the same material.\footnote{229} Signatories must send the WGA and all writers assigned to work on a project the project’s tentative credits, and the writers have the right to contest those credits to the WGA before the release of the film or television show.\footnote{230}

The WGA pursues its “fewer types of credit” agenda with a list of acceptable credits for each medium, such as “written by,”\footnote{231} “story by,”\footnote{232} “screenplay by,”\footnote{233} and “screen story by . . . .”\footnote{234} Any type of writing credit not on the list may only be used with a specific waiver from the WGA.\footnote{235} Some listed types, such as “adaptation by,” may only be used as a result of arbitration.\footnote{236}

The WGA pursues its “fewer names” agenda with specific limits on the number of writers that can be credited in each category; generally, no more than two.\footnote{237} An ampersand between two names indicates a writing team, which is counted as one writer.\footnote{238} However, arbitration is required in order to list two writing teams (or three

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\begin{itemize}
\item \footnote{229} WGA, Screen Credits Manual, supra note 206, § I(A)(1); WGA, Television Credits Manual, supra note 221, § I(A)(1).
\item \footnote{230} WGA, Screen Credits Manual, supra note 206, § II; WGA, Television Credits Manual, supra note 221, § II.
\item \footnote{231} WGA, Screen Credits Manual, supra note 206, § III(A) (stating that “written by” is used when the writer is entitled to both the “Story by” credit and the “Screenplay by” credit); see also WGA, Basic Agreement, supra note 206, at 472.
\item \footnote{232} WGA, Screen Credits Manual, supra note 206, § III(A) (“Story by” is used when a guild member contributes narrative material “distinct from [a] screenplay and consisting of [a] basic narrative, idea, theme or outline indicating character development and action.” It applies to stories written under guild employment jurisdiction, stories purchased from a professional writer and sequel stories written under guild jurisdiction.); see also WGA, Basic Agreement, supra note 206, 469-72.
\item \footnote{233} WGA, Screen Credits Manual, supra note 206, § III (“screenplay by” is used when a writer has contributed individual scenes and full dialogue constituting a substantial contribution to the final script and the writer entitled to “story by” credit is a different writer or the screenplay was based on source material.); see also, WGA, Basic Agreement, supra note 206, at 469.
\item \footnote{234} WGA, Screen Credits Manual, supra note 206, § III(A) (“screen story by” is used when the screenplay is based upon both source material and a story and the story is substantially new or different from the source material).
\item \footnote{235} WGA, Screen Credits Manual, supra note 206, § III(B)(7); WGA, Television Credits Manual, supra note 221, § III(B)(8).
\item \footnote{236} WGA, Screen Credits Manual, supra note 206, § III(A)(10); WGA, Television Credits Manual, supra note 221, § III(A)(15); see also WGA, Basic Agreement, supra note 206, at 469.
\item \footnote{237} WGA, Screen Credits Manual, supra note 206, § III(B); WGA, Television Credits Manual, supra note 221, § III(B).
\item \footnote{238} WGA, Screen Credits Manual, supra note 206, §§ I(B), III(A)(1); WGA, Television Credits Manual, supra note 221, §§ I(B), III(A)(1).
\end{itemize}
writers) in the “screenplay by” film credit category.\footnote{239} To get “screenplay by” credit at all, a writer or team must write thirty-three percent of an adapted screenplay or fifty percent of an original screenplay.\footnote{240} If disputed, experienced WGA members assess such percentages in arbitration, based on certain listed elements of a screenplay.\footnote{241} Of course, both manuals recommend that writers keep detailed track of all of the work they do.\footnote{242}

By reducing the number of names and types of credit listed, the WGA hopes to enhance two things: “the value of all credits and the dignity all writers.”\footnote{243} While its rules may reduce the number of writers hired or even force some writers to work without credit,\footnote{244} the WGA believes unrestrained crediting would put writers in a far worse predicament.\footnote{245} An examination of how the rules achieve their stated purposes reveals that those purposes are aimed as much at the right of integrity as attribution.

Fewer credits enhance the value of each. If producers are allowed to invent new categories of credit or load existing credits with the names of their friends, children, mistresses or bookies, (which, according to Hollywood lore and WGA dogma, was common practice before the WGA),\footnote{246} the writers who did the actual work have their credit diluted.\footnote{247} This is a direct violation of the right to attribution.

However, the WGA rules are wary of having too many writers actually working on a script. The notification requirements in Section I of both manuals confront a “too many cooks” situation, in which producers hire a succession of writers to rewrite one another’s scripts, without informing the original writer or telling the “script-doctor” whose script he is changing.\footnote{248} The notification requirements coupled

\footnote{239. WGA, SCREEN CREDITS MANUAL, supra note 206, § III(A)(4).}
\footnote{240. Id. § III(B)(4).}
\footnote{241. Id. § III(B)(4)(c).}
\footnote{242. Id. § I(A)(3).}
\footnote{243. Id. § III(B)(7); WGA, TELEVISION CREDITS MANUAL, supra note 221, § III(B)(8).}
\footnote{244. Writers Guild of America, East, Credits Forum (2002) available at http://wgaeast.org/features/credits-forum.html, [hereinafter WGA East, Credits Forum] (section on “shared credit,” second comment by J.F. Lawton); see also BIEDERMAN ET AL., supra note 207, at 633 (discussing the prevalence of secret rewrites).}
\footnote{245. WGA East, Credits Forum, supra note 244 (section on “shared credit,” second comment by J.F. Lawton).}
\footnote{246. Id. (section on “Production Executives,” introductory paragraph).}
\footnote{247. See id. (section on “Production Executives,” first comment by Seth Freeman stating, “writers are concerned about producers coming in after the fact, or at the last minute, claiming credit for something when the writer going in had no idea that the producer viewed himself as a writer, or had any intention to do that”).}
\footnote{248. WGA, SCREEN CREDITS MANUAL, supra note 206, § I(A)(1); WGA, TELEVISION CREDITS MANUAL, supra note 221, § I(A)(1); see also WGA East, Credits Forum, supra note}
with the credit limits have a chilling effect on multiple rewrites: any writer hired to do a second rewrite would know she may not get credit for it,249 especially in light of the WGA’s presumptions in favor of the first writer.250 By chilling multiple rewrites, the WGA can ensure its writers’ scripts stay more intact, strengthening their right of integrity.251 Protecting against a culture where writers can have their work mutilated without notification is likely what the WGA means by enhancing “the dignity of [the] writer[.]”252

Of course, the WGA credits system is not a perfect safeguard of the rights of attribution and integrity.253 In a recent forum of WGA members and officers, some opined that the rules were ineffective,254 and even counter-productive.255 One writer at the forum pointed out that the percentage requirements for “screenplay by” credit create an incentive for a second writer to change more of the script than necessary to qualify for credit.256 Producers still hire “script-doctors” to change scripts, some of whom work anonymously, and credit for screenwriters is by no means guaranteed.257 These purported problems are by no means insubstantial, but the fact that the WGA has final say over credits means its members can fine-tune the rules themselves through their representatives. The ability to determine

244 (section on “Shared Credit,” with Stephen Schiff commenting, “there was one case that supposedly had 12 writers - the idea of having all of them listed, nestled in a tiny credit block next to the director’s name is tough to contemplate”).
249. WGA, SCREEN CREDITS MANUAL, supra note 206, § III; WGA, TELEVISION CREDITS MANUAL, supra note 221, § III.
250. WGA, SCREEN CREDITS MANUAL, supra note 206, § I(C); WGA, TELEVISION CREDITS MANUAL, supra note 221, § I(C); see also WGA East, Credits Forum, supra note 223, at section on “Writer Protections/Standards for Determining Credit” (WGA member and officer acknowledging the WGA’s “first writer bias”).
251. WGA East, Credits Forum, supra note 244 (third comment by J.F. Lawton stating: “The problem with films that have numerous participating writers is not that we don’t allow enough credits. The problem is that the studio felt that they needed ten or more different writers to write it.”).
252. WGA, SCREEN CREDITS MANUAL, supra note 206, § III(B)7; WGA, TELEVISION CREDITS MANUAL, supra note 221, § III(B)8; see also, WGA East, Credits Forum, supra note 244 (third comment by J.F. Lawton stating: “The more you change, the better your chances of winning”).
253. WGA East, Credits Forum, supra note 244 (section on “shared credit,” first comment by J.F. Lawton).
254. WGA East, Credits Forum, supra note 244 (section on “shared credit,” first comment by Nicholas Kazan).
255. WGA East, Credits Forum, supra note 244 (section on “shared credit,” third comment by J.F. Lawton stating: “The studios play us for suckers because they designed a whole bonus system all based on this credits lottery mentality that pits writer against writer.”).
256. Id.
257. BIEDERMAN, supra note 207, at 633 (discussing the prevalence of secret rewrites).
how they will be credited and to set limits on the number of rewrites done on their work represents a huge moral rights gain for WGA writers.

IV. PUTTING VARA IN PROPER PERSPECTIVE

As noted above, VARA protects the rights of attribution and integrity for creators of a narrow class of visual arts. Such protections are independent of the other rights listed in the Copyright Act and last for the life of the author. The plaintiffs in Dastar were not eligible for VARA’s protections and the lapse of the copyright made them ineligible for the protections listed in section 106 of the Copyright Act, which were explored in the previous section. While some commentators have advocated the extension of VARA’s protections to all types of copyrightable expression, they have not yet been successful. However, this does not mean that Congress foreclosed all moral rights protections for expression outside of VARA, nor does it mean that the protections explored above render VARA superfluous. As seen in the congressional record, VARA was intended to be narrow and have no effect, positive or negative, on the ability of artists outside its scope to protect their moral rights.

In a speech in support of VARA, Congressman Carlos J. Moorhead of California told the U.S. House of Representatives that his support of the act was “predicated, in large part, on the fact that it is so narrowly drawn.” He stated that the act protected the prescribed class of artists “without interfering, directly or indirectly, with the ability of U.S. copyright owners and users to further the constitutional goal of ensuring public access to a broad, diverse array of creative works.” The “constitutional purpose” to which he referred was the Article 1, Section 8 provision for Congress to encourage authors by giving them a monopoly for “limited times . . . .”

259. Id. § 106A(a).
261. Lowe & Kholsa, supra note 11, 44; Crabbs, supra note 11.
262. See Dastar, 539 U.S. at 35 (Justice Scalia stated that extending moral rights protections to works with expired copyrights would render VARA superfluous. If the right to attribution can be tied to the exclusive rights in 106 and not just to “origin” in the Lanham Act, it does not touch VARA; nor does VARA touch it.).
264. Id.
265. Id.
266. U.S. CONST. art. 1, § 8, cl. 8.
Congress was concerned that a broad statute would create perpetual copyright protections, which would be unconstitutional, but Congressman Moorhead was just as concerned with protecting the rights of production entities to whom artists had transferred their copyrights. His speech mentioned U.S. preeminence in the exportation of copyrighted material and the importance of maintaining it by protecting the “the capacity of U.S. copyright industries to produce, alter and disseminate their works.” Finally, he assured his colleagues that there was no breach of “the broad wall that we have erected against the legislation spilling over and affecting the producers of books, magazines, motion pictures and other creative work.”

While the “broad wall” Congressman Moorhead mentioned is intended to keep VARA’s protections from seeping into the rest of the Copyright Act, it must also keep Gilliam and its ilk safe. The text of VARA itself proclaims that the rights it grants are “independent of the exclusive rights provided in section 106” of the Copyright Act. When read in light of Congressman Moorhead’s remarks, this passage clearly means that the section 106 rights are also independent of VARA. Thus, no argument exists that VARA closes the door on moral rights protections that already existed for subject matter outside its scope.

V. CONCLUSION

While U.S. statutes and courts do not officially recognize moral rights, they do provide artists with some means of protecting them. While Dastar may have rendered those means inadequate in a few situations, it still left most of section 43(a) of the Lanham Act open to artists seeking attribution and integrity. In a majority of situations, artists outside the scope of VARA can protect their moral

267. See Dastar, 539 U.S. at 33-34 (“[W]e have been careful to caution against misuse or over-extension.”).
269. Id.
271. See Shostakovich v. Twentieth Century Fox Film Corp., 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948) (determining that composers of works in the public domain could not sue to get them removed from a film because the U.S. does not recognize a cause of action arising out of moral rights).
272. See Lamothe v. Atl. Recording Corp., 847 F.2d 1403, 1405 (9th Cir. 1988) (Dastar effectively blocked joint authors, like the plaintiffs in this case, from using the Lanham Act to sue for credit).
rights through the bundle of rights given them in the copyright act, and by insisting on moral rights protections as a term of the contract granting any of those rights to another party. When an unequal bargaining position with a production or publication entity makes such insistence impossible, artists can form guilds or unions and bargain collectively for moral rights. In short, Dastar was by no means a boon to artists’ rights, but it was not a total bust either.