

MEMORANDUM

DATE: June 6, 2003

SUBJECT: Unfair Competition Law Does Not Bar Uncredited Copying of Public Domain Work

In Dastar Corp. v. Twentieth Century Fox Film Corp., the U.S. Supreme Court ruled that copying public domain works without attribution does not violate federal unfair competition law.

Fox owned the copyright in the television series “Crusade in Europe,” based on a book by General Dwight D. Eisenhower. The series was first broadcast in 1949. Fox did not renew its copyright in the series, and the copyright expired in 1977. In 1995, Dastar released a set of videos titled “World War II Campaigns in Europe,” made up almost entirely of footage from the Fox series. Dastar did not obtain permission from Fox or give credit to Fox. Fox sued Dastar, claiming that Dastar had engaged in “reverse passing-off” in violation of Lanham Act § 43(a), which prohibits use in commerce of any false designation of origin which is likely to cause confusion as to the origin of the goods on which the designation is used. The District and Circuit Courts both ruled in favor of Fox.

On appeal, the Supreme Court noted that the issue turned on the definition of “origin” in the Lanham Act – whether “origin” refers to the source of the physical goods (the videos) being made available to the public (*i.e.*, Dastar), or whether it refers to the creator of the original “communicative work” (*i.e.*, Fox). The Court found that “origin” refers to the source of the goods being sold to the public and therefore, in using the footage in its videos, Dastar had not violated the Lanham Act, as it had truthfully identified itself as the source of the videos.

In coming to its conclusion, the court weighed both practical and legal considerations. In particular, the Court noted that giving goods containing “communicative works” special treatment would conflict with copyright law, stating that “[t]he right to copy, and to copy without attribution, once a copyright has expired . . . passes to the public.” Otherwise, the Court stated, it would be creating “a species of mutant copyright law that limits the public’s ‘federal right to ‘copy and to use.’”” The Court also noted that copiers of public domain works would be in a difficult position, if *failing* to credit the creator of a work resulted in Lanham Act liability and *giving* credit to the creator could also result in Lanham Act liability (should such credit falsely imply the creator’s “sponsorship or approval” of the copy).

This case underscores the importance of copyright law as the sole source for protection for rights in “communicative works,” and demonstrates that, once a work is in the public domain, its creator cannot prevent its copying or force the copier to give the creator attribution.

For further information regarding this case and its implications, please contact Greg Shatan (212.309.6852), Joshua Paul (212.309.6087) or Ron Dreben (202.739.5213) in the firm’s Trademark/Copyright Practice Group.