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DIGITAL-AGE CLAIMS FOR OLD-WORLD RIGHTS

Joseph M. Beck*
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Thanks to the internet, litigation over copyright infringement can occur between residents of different continents almost as easily as between residents of different states. To be sure, despite many similarities in the copyright laws of countries that are members of the Berne Convention, conflicts of laws issues can and do arise from such international disputes. For example, a court sitting in France, recently applied United States fair use law to dismiss a claim of copyright infringement of French works, a result that might not have been the same had French law been applied.¹

But what about moral rights—rights that, although entirely independent of copyright, are in many cases implicated by the same operative facts that give rise to a claim of copyright infringement? The moral rights laws of the United States, on one hand, and of many European countries, on the other, are far less similar than the copyright laws applied in those countries. Notwithstanding a European court’s decision to apply U.S. copyright law in a particular case, will the same court, on public policy grounds, apply its own law to moral rights claims arising from the same facts? And if so, will that European court’s moral rights judgment later be deemed unenforceable in the United States, where vindicating such rights could conflict with foundational public policy by altering the traditional contours of copyright protection in a manner that would chill speech and violate the First Amendment? It is this conflict that the authors seek to explore.

I. INTRODUCTION

The Berne Convention for the Protection of Literary and Artistic Works of 1886 (the Berne Convention)² requires that the copyright laws of the treaty signatories reflect certain common rights and privileges, with the result that copyright is one of the more internationally uniform bodies of law.³ Nevertheless, as between the United States and Europe, there are significant differences in two important doctrines: fair use and moral rights. These differences become of more

¹ See Société des Auteurs des Arts Visuels et de l’Image Fixe (SAIF) v. SARL Google France, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris 3e ch., May 20, 2008, available at http://www.foruminternet.org/specialistes/veille-juridique/jurispudence/tribunal-de-grande-instance-de-paris-3e-chambre-ire-section-20-mai-2008-2672.html (noting that the situs of the alleged infringement—the location of the servers and the headquarters where relevant company decisions were made—was on U.S. soil). The authors are helping defend Google in related and parallel cases in France and the United States involving the scanning of books.


³ If Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976) is no longer good law, however, as discussed infra, questions arise as to the true extent of the United States’ adherence to these Berne requirements.
than an academic interest when a work protected by strict moral rights laws in one country (for example, France or Belgium) is used in a manner that implicates comparatively liberal fair use rights in another country (for example, the United States). This is especially true given the importance of fair use in mediating the tension between copyright protection and free expression under the First Amendment of the U.S. Constitution, and the increase of international information exchange brought about by the internet.

This conflict was addressed in part in a handful of well-known cases in the mid-to-late Twentieth Century involving disputes over internationally distributed films. More recently, the issue has surfaced in European lawsuits involving various web applications developed by United States-based Google. Two of these lawsuits, *Société des Auteurs des Arts Visuels et de l’Image Fixe (SAIF) v. SARL Google France* and *Google v. Copiepresse*, in which the authors assisted Google in preparing

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4 See, e.g., *Turner Entm’t Co. v. Huston*, Cour d’appel [CA] [regional court of appeal] Versailles, civ. ch., Dec. 1994, translated in 16 No. 10 ENT. L. REP. 3 (1995) (involving the colorization and broadcast of “Asphalt Jungle”); *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948). The *Shostakovich* case was brought by several famous Soviet composers who objected to the use of their public-domain music and their names in the credit lines, in a motion picture the plaintiffs viewed as anti-Soviet. While the New York court noted that “[c]onceivably, under the doctrine of moral right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author’s rights,” it recognized the implicated “conflict between the moral right and the well-established rights of others to use such works [in the public domain]” and, more importantly, the fact that “[i]n the present state of our law the very existence of the right is not clear . . . .” *Id.* In France, however, the plaintiffs were able to obtain an injunction. See *Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Américaine Twentieth Century*, Cour d’appel [CA] [regional court of appeal] Paris, Jan. 13, 1953, D. Jur. 16, 80 (noting that Twentieth Century-Fox violated the composers’ rights). In *Huston*, John Huston’s heirs brought suit against Turner Entertainment Co. to enjoin the airing in France of Turner’s colorized version of Huston’s black and white film “Asphalt Jungle.” *CA Versailles, civ. ch.*, Dec. 1994. An intermediate French court denied the injunction, holding that U.S. law governed Huston’s studio contracts, and under U.S. copyright law, Huston was not the author of the work-for-hire film. The high French court reversed, however, holding that artists’ moral rights were “laws of mandatory application” regardless of the national origin of the works or the claimants. The court held that under French law, Huston was an “author” and his moral rights were not waiveable by contract and persisted beyond his death to be inherited by the plaintiffs. Upon determining that the colorization in fact violated Huston’s right of integrity in the film, the court issued an injunction against broadcasting it in France. *Id.*

5 *SAIF*, T.G.I. Paris 3e ch., May 20, 2008. In *SAIF*, the French court found that U.S. copyright law applied to SAIF’s copyright infringement claims under Article 5 of the Berne Convention because the United States was the territory where the wrongdoing occurred (Google’s registered office is located in California, which is also where Google’s decisions and the activity of its search engines occurred). Conducting an analysis under 17 U.S.C. § 107, the French court found that Google’s display of thumbnail images of the complainants’ works in its Google Images application constituted a fair use under U.S. law.

6 *Google v. Copiepresse*, No. 06/10.928/C Tribunal de premiere instance de Bruxelles,
testimony, squarely addressed the application of this U.S. fair use principle in France and Belgium, respectively, and in the latter, created the opportunity for a hypothetical analysis of the application of U.S. law to the Belgian plaintiffs' moral rights claims. In Copiepresse, the Plaintiff, a Belgian newspaper association, claimed that Google's display of headlines and short excerpt "snippets" of news stories published on the internet without including the names of the individual authors of the articles on the Google News page constituted a violation of the authors' moral rights of integrity and attribution.7 The authors' analysis in that case supports the position that these moral rights claims would be dismissed in a U.S. court because they would be found to be preempted by U.S. copyright law and by operation of the Supremacy Clause of the U.S. Constitution, or in violation of the First Amendment to the U.S. Constitution. This analysis is significant because even though European courts may not actually apply U.S. substantive law when deciding moral rights claims, a finding that any resulting foreign judgment would violate the U.S. Constitution would affect the plaintiffs' ability to enforce the judgment in the United States.8

II. MORAL RIGHTS

A. MORAL RIGHTS OVERVIEW

"Moral rights," also referred to as "le droit moral," are a bundle of rights created for the purpose of protecting an author's reputation. These rights are personal to the artist and are entirely separate from the real property or copyright rights associated with a particular work; the artist retains them even after the work is sold, the copyright in the work is sold or licensed, or the work falls into the public domain.9 Moral rights include the right of disclosure, or first publication;
the right of attribution, previously known as paternity; the right of integrity; and
the right of withdrawal or the author’s right to withdraw or disavow his work after
it is published. Of these, this Article will focus primarily on the rights of
attribution and integrity.

The right of attribution encompasses the author’s right to control recognition
of authorship—basically, to require the author’s name to be associated with, or
withdrawn from, a work. The moral right of integrity protects authors from
reputational harm from the intentional truncation, distortion, modification, or
mutilation of their works.

B. SUMMARY OF U.S. MORAL RIGHTS LAWS

The Berne Convention requires protection of moral rights—specifically the
right of attribution and the right of integrity—but permits member countries to
provide greater protection as well. Moral rights protection in the United States
is much more limited than in many European countries, existing primarily in the
Any remaining protection required under Berne is supposedly provided in the
United States by its privacy, defamation, unfair competition, and intellectual
property laws.

(VARA) protects certain works of visual art, specifically, certain paintings,
drawings, prints, and sculptures and limited-edition photographs. Importantly,
VARA does not apply to films, literary works, electronic publications, advertising,
works made for hire, or works not under copyright.

In addition to being limited to certain types of works of visual art, the federal
rights of attribution and integrity created by VARA are themselves more limited
than similar rights in some civil law countries. For example, while the rights of
attribution and integrity are perpetual in France, Italy, and Spain, and while they
endure for the full period of copyright protection in the United Kingdom,
Australia, and New Zealand, works created on or after the effective date of VARA

10 See 3 NIMMER & NIMMER, supra note 9, §§ 8D.03–05.
13 See Berne Convention, supra note 2.
rights of attribution and integrity).
15 See id. (applying to authors of “work[s] of visual art”; see also 17 U.S.C. § 101 (defining “work
of visual art”).
16 VARA, 17 U.S.C. § 106A.
are subject to the federal U.S. rights of attribution and integrity only during the life of the artist.\textsuperscript{17}

2. \textit{Common Law Moral Rights}. Other than the limited federal moral rights created by VARA for certain works of visual art, the only sources of moral rights protection in the United States are state moral rights laws, to the extent they are not preempted by federal law, and common law moral rights-type claims that have been recognized by courts (and possible protection under § 43(a) of the Lanham Act as discussed infra). While there have been instances where U.S. courts have recognized or appeared to recognize moral rights-type claims, the current vitality of such decisions has been called into doubt by subsequent decisions and the passage of VARA.\textsuperscript{18}

\textsuperscript{17} Id. § 106A(d)(1). Works subject to VARA but created before its effective date, the title to which has not been transferred, are eligible for moral rights protection under VARA that is coextensive with the period of copyright protection for such works. Id. § 106A(d)(2). The moral rights created by VARA are also limited by several exceptions, including the notable exception that they do not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any ["poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication"; or "any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container"; or any portion of any such item, or "any work made for hire"].

\textsuperscript{18} See, e.g., Stevens v. Nat'l Broad. Co., 148 U.S.P.Q. 755, 758 (Cal. Super. Ct. 1966) (granting, in a pre-VARA oral opinion, a preliminary injunction preventing the National Broadcasting Company from cutting and editing plaintiff's film, \textit{A Place in the Sun}, to insert commercials that would "alter, adversely affect, or emasculate the artistic or pictorial quality of said motion picture . . . ." The court based its decision on the fact that "a photofilm can be an art form," and that the court can grant relief to protect an art form's "artistic integrity." VARA, of course, explicitly exempts from protection motion pictures.); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 575 (N.Y. Sup. Ct. 1949) (responding to plaintiff's reliance on language in the Berne Convention and the concept of "moral rights" in European cases by stating that "[t]he conception of 'moral rights' of authors, so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decision or writers." (quoting Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947))). There are also cases that appear to allude to moral rights in U.S. common law, but which turn on contract law and which, if any, rights remained with the author as per the sales contract. See, e.g., Preminger v. Columbia Pictures Corp., 49 Misc. 2d 363 (N.Y. Sup. Ct. 1966) (establishing, based on contract law principles, the right of a grantee of television rights to cut and edit a film so long as the custom and usage so provided, and the artistic merit of the work was not impaired).
3. The Right of Integrity: Gilliam v. American Broadcasting Co. In Gilliam v. American Broadcasting Co., a pre-VARA case, the Second Circuit extended relief for a moral right of integrity-type claim under § 43(a) of the Lanham Act. The plaintiffs in Gilliam, members of the comedy troupe "Monty Python," argued that defendant ABC’s truncation of their "Monty Python’s Flying Circus" works to fit them within the dictates of U.S. commercial television constituted a mutilation of their works, and that attributing the edited program to plaintiffs as their work constituted a misrepresentation that harmed their reputations.

The Second Circuit found that "an allegation that a defendant has presented to the public a ‘garbled,’ distorted version of plaintiff’s work seeks to redress the very rights sought to be protected by the Lanham Act, 15 U.S.C. § 1125(a), and should be recognized as stating a cause of action under that statute." The court added that "the edited version broadcast by 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. We believe that a valid cause of action for such distortion exists ...."

Nearly twenty years later, however, and after the passage of VARA, a district court in the Second Circuit denied that any common law moral rights claim of integrity emerged from Gilliam. On the contrary, in Choe v. Fordham University School of Law, the Southern District of New York held:

There is no federal claim for violation of plaintiff’s alleged “moral rights.” The Court in Gilliam stated that nearly 20 years ago. . . . Whatever language there may be in [Community for Creative Non-Violence v.] Reid or Gilliam to suggest a federal common law claim for

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19 538 F.2d 14 (2d Cir. 1976).
21 Gilliam, 538 F.2d at 18.
22 Id. at 24–25 (internal citations omitted); see also 15 U.S.C. § 1125(a) ("(1) 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 . . . shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.").
23 Id. at 25. Judge Gurfein, in his concurring opinion, was more skeptical:

If a distortion or truncation in connection with a use constitutes an infringement of copyright, there is no need for an additional cause of action beyond copyright infringement. . . . So far as the Lanham Act is concerned, it is not a substitute for droit moral which authors in Europe enjoy. . . . [T]he Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like.

Id. at 26–27 (internal citations omitted).
deprivation of an author’s "moral rights" is dictum, and has not generated any claim in this Circuit for almost 20 years.... Because the law in this Circuit does not recognize an author's common law "moral rights" to sue for alleged distortion of his written work, plaintiff's purported "moral rights" claim is dismissed.24

4. The Right of Attribution: Dastar Corp. v. Twentieth Century Fox Film Corp. In Dastar Corp. v. Twentieth Century Fox Film Corp., the U.S. Supreme Court held that recognizing a claim for failure to attribute authorship of a public domain work under the Lanham Act would render superfluous 17 U.S.C. § 106A's express limitations on the scope of the federal right of attribution and would create a perpetual copyright not authorized by the Constitution.25

In Dastar, the defendant copied, edited, and repackaged tapes of a public-domain television series based on a copyrighted book about World War II. The tapes and their advertising referred to defendant Dastar Corporation and its employees as the producers of the tapes and made no mention of the original book, the plaintiff's television series from which the defendants copied the footage, or the plaintiff's series' producers. Ruling on the plaintiff's Lanham Act reverse passing-off claim, the Supreme Court held that the attribution of the "origin" of the tapes sold by defendant was not a false designation of origin as prohibited by the Lanham Act, adding that recognizing a Lanham Act claim for failure to attribute authorship for a public-domain work would "create a species of mutant copyright law that limits the public's 'federal right to "copy and to use,"' effectively creating a "species of perpetual ... copyright, which Congress may not do" under the U.S. Constitution.27

While the Dastar decision itself involved a public domain work, courts have since applied the Supreme Court's reasoning in that case to dismiss moral rights-style attribution claims involving copyrighted as well as public domain works.28

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26 Id. at 34.
27 Id. at 37.
28 See, e.g., Zyla v. Wadsworth, 360 F.3d 243 (1st Cir. 2004) (affirming summary judgment for defendant on Lanham Act claim for failure to grant plaintiff co-author credit of a copyrighted textbook, and citing Dastar for its statement that "[t]he Supreme Court has determined ... that Section 43(a)(1)(A) does not apply to the type of claim that Zyla raises .... Claims of false authorship ... should be pursued under copyright law instead."); Carroll v. Kahn, 68 U.S.P.Q.2d 1357 (N.D.N.Y. 2003) ("A Lanham Act claim based on Defendants' alleged failure to give Plaintiff proper credit as author and/or producer, however, is foreclosed by Dastar."); Williams v. UMG Recording, Inc., 281 F. Supp. 2d 1177 (C.D. Cal. 2003) (holding barred as a matter of law under Dastar plaintiff's Lanham Act claim based on failure to attribute to plaintiff his contribution in re-editing and re-scoring a copyrighted film).
One district court described the post-*Dastar* landscape for attribution claims under the Lanham Act as follows:

*Dastar* makes clear that a claim that a defendant's failure to credit the plaintiff on the defendant's goods is actionable only where the defendant literally repackages the plaintiff's goods and sells them as the defendant's own—not where, as here, Defendants are accused only of failing to identify someone who contributed not goods, but ideas or communications (or, for that matter, 'services') to Defendants' product.29

The Lanham Act attribution claim that survives *Dastar*, then, would appear to be a very narrow claim for false attribution.

III. U.S. COPYRIGHT LAW, THE FIRST AMENDMENT, AND INTERNATIONAL TREATY OBLIGATIONS

The primacy of First Amendment values in American jurisprudence has been illustrated in a long line of cases upholding freedom of expression against laws that would chill or create prior restraints on speech.30 The coexistence of copyright law—which restrains infringing speech, yet is also authorized by the Constitution—and the First Amendment's free speech protections depends on the defense of fair use and the operation of the idea/expression dichotomy; where neither is available, copyright law may have to yield.31 Recently, in *Golan v.*

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29 *Williams*, 281 F. Supp. 2d at 1184.
30 See, e.g., *Near v. Minnesota*, 283 U.S. 697, 718 (1931) (“It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.”); *see also* *New York Times v. United States*, 403 U.S. 713 (1971) (holding that an injunction prohibiting the *New York Times* from printing portions of the “Pentagon Papers” constituted a prior restraint on speech and thus an impermissible violation of the First Amendment); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (ruling from the bench before issuing an opinion on fair use, that an injunction barring publication of *The Wind Done Gone*, which the trial court had found to constitute “unabated piracy” of *Gone With the Wind*, was unconstitutional).
31 See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001) (“In copyright law, the balance between the First Amendment and copyright is preserved, in part, by the idea/expression dichotomy and the doctrine of fair use.”); *see also* *Eldred v. Ashcroft*, 537 U.S. 136, 221 (2003) (“[C]opyright's built-in free speech safeguards are generally adequate to address [First Amendment concerns]. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.' But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.” (citation omitted)); *Golan v. Gonzalez*, 501 F.3d 1179, 1185–92 (10th
Gonzalez, the Court of Appeals for the Tenth Circuit held that Congress's enactment of copyright law was subject to First Amendment scrutiny where it altered the traditional contours of copyright protection by potentially limiting use of the public domain, as the court found that section 514 of the Uruguay Round Agreements Act did when it restored copyright protection to public domain works in furtherance of international treaty obligations.\(^{32}\) On remand, the District of Colorado found that section 514 of the URAA violated the First Amendment.\(^{33}\)

Moral rights enforcement is similarly subject to limitations by the First Amendment. In Wojnarowicz v. American Family Ass’n, involving an artist’s work attributed to the artist in truncated form, the Southern District of New York addressed a narrowly drawn New York “moral rights” statute that, like VARA, applied only to fine art and only provided limited rights.\(^{34}\) The court recognized a First Amendment distinction between the display of an altered work attributed to the author of the original work and display of an altered work not attributed to the author of the original work, noting that the former was “not the type of speech or activity that demands protection, because such deception serves no socially useful purpose” and therefore held that “[t]he First Amendment does not protect the public display of altered artwork, falsely attributed to the original artist.”\(^{35}\) However, the court held that:

The public display of an altered reproduction . . . in which there is no express or reasonably implied attribution to the original artist is altogether unlike the public attribution of an altered reproduction of a work of art to its original artist. While the former is protected speech, the latter is not.\(^{36}\)

Cir. 2007) (holding that the Copyright Term Extension Act was not unconstitutional, but that section 514 of the Uruguay Round Agreement Act (URAA) was subject to First Amendment scrutiny because restoring copyright protection to certain foreign works in the public domain interfered with plaintiffs’ First Amendment interests); Golan v. Holder, 611 F. Supp. 2d 1165 (D. Colo. 2009) (determining that section 514 of the URAA Act did not survive First Amendment scrutiny).

\(^{32}\) Golan v. Gonzalez, 501 F.3d 1179.

\(^{33}\) Holder, 611 F. Supp. 2d 1165 (D. Colo. 2009).

\(^{34}\) 745 F. Supp. 130, 134 (S.D.N.Y. 1990). The statute at issue in Wojnarowicz provided in relevant part:

No person other than the artist or a person acting with the artist’s consent shall knowingly display in a place accessible to the public or publish a work of fine art . . . by that artist . . . in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist . . . and damage to the artist’s reputation is reasonably likely to result therefrom . . . .

\(^{35}\) Id. at 134–35.

\(^{36}\) Id. at 140.
Google's "Google News" application aggregates on one website organized access to news articles from internet news sources across the web. Through automated "crawling," indexing, and proprietary technology that automatically analyzes webpage content and clusters together related articles, Google News provides users the ability to identify specific news stories with search terms and to browse by topic a constantly-updated database of headlines and short excerpts of news reports. It is not the news articles themselves that are made available on Google News, but rather a headline, a "snippet" consisting of the first 300 characters of the story, and perhaps a low-resolution thumbnail image of a photograph. The headline acts as a hot link, transferring the user to the internet news source where the article is published and may be viewed in full.

In addition to claims of copyright infringement, Plaintiff Copiepresse, a Belgian company managing the rights of Belgian, French, and German language news publishers, claimed that the Google News application violated the authors' moral rights of disclosure, attribution, and integrity. While the trial court denied the right of disclosure claim, noting that Google News only indexes news articles already published on the web, it found the attribution right violated because Google News listed the internet news publisher's name, but not the individual author's name. The right of integrity was also found to have been violated by Google News's reproduction of only part of the authors' works and by the clustering of different articles together by topic, in a manner that could cause associations that might wrongfully alter the authors' intended editorial or philosophical positions.

While the Belgian appellate court may choose to apply Belgian moral rights law, rather than U.S. law, it is doubtful that the plaintiff would be able to enforce any foreign moral rights judgment in the United States due to fundamental conflicts both with the U.S. Copyright Act and the First Amendment.
A. COPIEPRESSE’S ATTRIBUTION AND INTEGRITY CLAIMS: CONFLICT WITH THE U.S. CONSTITUTION AND COPYRIGHT ACT

The attribution claim asserted by the plaintiff in Copiepresse likely would be found to conflict impermissibly with U.S. law whether it was brought under the federal Lanham Act or as a state or common law claim. Styled as a Lanham Act § 43(a) claim, it would usurp the superior position of U.S. Copyright Law under the cases following Dastar, which have refused to enforce such claims except “where the defendant literally repackages the plaintiff’s goods and sells them as the defendant’s own.” In Copiepresse, the plaintiff did not allege that Google “repackaged” news articles as Google’s own, but rather that Google modified them without attribution. As such, the claim of failure to attribute fails the narrow Lanham Act false attribution claim that survives Dastar, and would likely be found to conflict impermissibly with the U.S. Copyright Act.

Similarly, under the reasoning in Dastar, allowing a state law attribution claim like that asserted by the Belgian Copiepresse plaintiff would create a “mutant copyright”—one extending the author’s exclusive rights beyond those created by Congress and providing neither a fair use nor an idea-expression defense. If the right the plaintiff asserted in Copiepresse existed in the United States, a party such as Google making a highly transformative, lawful fair use under copyright law would still be subject to moral rights liability if the original author’s name was not included. If Google attributed to the original authors the modified versions of their works, however, Google would be subject to liability under the Lanham Act claim for false attribution that survived the Supreme Court’s holding in Dastar. Allowing such a broad right of attribution claim under U.S. law would destroy the carefully-crafted balance of public and private rights embodied by the Copyright Act. Moreover, such a broad state or common law attribution right would also conflict with the Supremacy Clause of the U.S. Constitution, which mandates that state law inconsistent with federal law is of no force.


Williams v. UMG Recording, Inc., 281 F. Supp. 2d 1177, 1184; see also supra note 28 and accompanying text.

The transformative alteration of copyrighted work has been endorsed expressly by the U.S. Supreme Court. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994); cf. SAIF, T.G.I. Paris 3e ch., May 20, 2008 (finding Google Image Search’s display of thumbnail images of the complainants’ works to be a fair use under U.S. law). The authors submitted the testimony of five U.S. law school professors with expertise in copyright law in a parallel case in France to the effect that Google’s reproduction of snippets was transformative.

See U.S. CONST. art. VI, § 2 (“[T]he Authority of the United States, shall be the supreme Law of the Land.”).
Despite the Second Circuit's extension of relief for a moral rights-type integrity claim in *Gilliam v. American Broadcasting Co.*, the integrity claim in *Copiepresse* likely would be found to conflict with U.S. law. To be sure, the continued viability of the decision in *Gilliam* has been brought into question. But if the pre-VARA claim recognized in *Gilliam* were still enforceable today, it would not be broad enough to encompass the facts of the integrity claim asserted in *Copiepresse*. In *Gilliam*, plaintiffs were named as the authors of the truncated version of their work, effectively constituting a misrepresentation under U.S. law. In *Copiepresse*, however, Google News does not include the name of the individual authors of the articles; in fact, this omission is the basis of plaintiff's right of attribution claim. Moreover, the Supreme Court's reasoning in *Dastar* should apply with equal force to an integrity claim of the type brought in *Copiepresse*, as recognizing such a claim would similarly create a "mutant copyright" that would extend the author's exclusive rights beyond those provided for in the Copyright Act, and would create liability for uses by the public specifically endorsed by the U.S. Supreme Court, such as transformative uses.

B. *COPIEPRESSE'S ATTRIBUTION AND INTEGRITY CLAIMS: CONFLICT WITH THE FIRST AMENDMENT*

In addition to the preemption issues discussed above, there are also strong arguments that moral rights claims of the type asserted by the plaintiff in *Copiepresse* would impermissibly alter the traditional contours of copyright protection in a manner that would chill free speech in violation of the First Amendment.48

1. The Right of Integrity. The civil law right of integrity claim asserted by the plaintiff in *Google v. Copiepresse* neither preserves the built-in First Amendment safeguards nor replaces them with safeguards of its own. Application of the factors applied by U.S. courts in conducting fair use analyses shows that uses

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45 538 F.2d 14 (1976).

46 *See supra* note 24 and accompanying text; *see also* United States v. Microsoft Corp., No. Civ. A. 98-1232, 1998 WL 614485, at *16 (D.D.C. 1998) ("But the *Gilliam* court acknowledged the lack of statutory or doctrinal support in copyright law for the right it recognized and ultimately grounded its decision in trademark law. Several subsequent decisions considering *Gilliam* have declined to endorse the 'moral right' argument Microsoft advances." (internal citations omitted)).

47 *Gilliam*, 538 F.2d at 24.

48 Under analogy to the rule in *Golan v. Gonzalez*, 501 F.3d 1179, 1184 (10th Cir. 2007), derived from the Supreme Court's opinion in *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003), moral rights claims that would alter the traditional contours of protection under the U.S. copyright law by expanding the author's exclusive rights in a manner that would impair freedom of expression would have to withstand First Amendment scrutiny.
permitted as fair use under traditional U.S. copyright law would be prevented by Copiepresse’s integrity claims. The very type of transformative use which the doctrine of fair use allows in order to provide adequate “breathing room” for the First Amendment would be punished by enforcement of Copiepresse’s integrity claims. The second fair use factor allows greater use of nonfiction, utilitarian expression than of more highly creative works, but the integrity claims brought by Copiepresse—based on the use of news articles—clearly do not distinguish between creative and nonfiction works. As for the third fair use factor, the less a defendant copies from the original work, the more likely the third factor will weigh in favor of fair use. By contrast, under a right of integrity analysis, the less a defendant copies, the more the defendant has “truncated” or “mutilated” the work. Finally, the fourth factor would be irrelevant to a right of integrity analysis because whether or not the defendant’s use affected the copyright owner’s potential market for a particular use does not carry weight in an assessment of the reputational harm that moral rights seek to remedy.

Similarly, the First Amendment safety valve of the idea-expression dichotomy would provide no defense against an integrity claim such as the one brought against Google in Copiepresse. Even extensively revising an author’s original work so that only uncopyrightable ideas and facts are used would not immunize a party from an integrity claim for mutilation of the original work.

2. The Right of Attribution. Similarly, Copiepresse’s civil law moral right of attribution claims would likely be found unenforceable in the United States as running afoul of the core constitutional values embodied in the First Amendment. In Copiepresse, Google’s use was of an excerpt of the authors’ news articles, not attributed to the individuals who penned them. While the court in Wojnarowicz noted that the display of an altered work falsely attributed to the original work’s author was not speech protected by the First Amendment, the court recognized that the alteration or mutilation of a work without express or implied attribution to the original artist “is protected speech.” Therefore, enforcement in the United States of an attribution claim like Copiepresse’s would threaten to punish speech protected by the First Amendment. In sum, allowing enforcement of such integrity and attribution claims would impermissibly chill protected speech in violation of core constitutional values under the First Amendment. Authors wishing to make use of another’s work would face a Hobson’s choice:

49 See 17 U.S.C. § 107 (2006) (listing the fair use factors: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used...; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”).

50 See supra note 31 and accompanying text.

reproducing with attribution the unaltered original work in its entirety, thereby subjecting themselves to copyright liability, or reproducing an excerpt or otherwise altered version of the original, thereby subjecting themselves to moral right of integrity claims (as well as attribution claims if the author's name were omitted and a possible Lanham Act § 43(a) claim if the author's name were included). 52

V. CONCLUSION

Copiepresse's moral rights claims (typical of claims which exist in a number of European Union countries) conflict with core fundamental U.S. laws and the U.S. Constitution. The idea-expression dichotomy and fair use doctrines are critical to the U.S. Copyright Act's coexistence with the First Amendment, itself one of the most foundational principles of U.S. law. Because of the significance of the conflict that would be created (including the inapplicability of a fair use defense and the idea-expression dichotomy to an integrity claim), it is likely that constitutional principles and public policy considerations would weigh strongly against enforcement in the U.S. of civil law rights of attribution and integrity of the nature asserted by the plaintiff in the Belgian Copiepresse case.

52 While a divided court in Gilliam v. American Broadcasting Co. narrowly upheld a moral rights-type integrity claim under § 43(a) of the Lanham Act, where the defendant attributed to the plaintiffs a truncated version the plaintiffs' work, as discussed supra Part II.B.3, the Copiepresse case involved no false attribution. Rather, Google News's use in Copiepresse was exactly the type of use protected in Wojnarowicz: a "public display of an altered reproduction . . . in which there is no express or reasonably implied attribution to the original artist." Wojnarowicz, 745 F. Supp. at 140.