Dastar's *Next Stand*

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A number of recent cases involve trademark or unfair competition claims based on a defendant's use of aspects of copyrighted or formerly copyrighted works (or at least works claimed to be protected by copyright), including characters, fictional places, and magic tricks. A second group of cases assert infringement of trademarks that originated more conventionally but where the allegedly infringing use is within the content of an expressive work. All of these cases put significant pressure on the boundary between copyright and trademark protection, some of them raising directly the question of whether trademark law can be used to control expressive content.

One might have thought that the Supreme Court's decision in *Dastar v. Twentieth Century Fox* would definitively resolve these cases. After all, despite the fact that the Court resolved that case by interpreting the statutory language "origin of goods," *Dastar* was animated in large part by the Court's concern that requiring attribution for creative content would turn trademark law into some "mutant" form of copyright protection. Thus, one might expect *Dastar* to serve the same role in the trademark/copyright interface as *TrafFix* plays in policing the trademark/patent conflict – *Dastar* supplies the rules by which courts determine when parties can use trademark claims to protect works of authorship. And such an expectation would not be entirely unmet: a number of courts have in fact read *Dastar* to bar false designation of origin claims that were based on the defendant's use of creative content that originated with the plaintiff. Courts have even relied on *Dastar* to bar false advertising claims based on claims about the "origin" of content, despite the fact that *Dastar* itself expressly left the door open to some false advertising claims.

Yet *Dastar* remains deeply controversial. More problematically, because it involved a reverse passing off claim in which the plaintiff's content lacked secondary meaning, *Dastar's* reach remains somewhat unclear. This essay argues that *Dastar* should be understood, or at least should be extended, to rule out categorically claims based on the content of a work. And while there may be reasons to be particularly concerned about cases involving alleged confusion resulting from the defendant's use of the plaintiff's creative work, I argue that *Dastar's* preemptive effect should reach any claim that is based on confusion that allegedly results because of the content of the *defendant's* creative work. Courts, in other words, should refuse to infer anything about the source of a work, or of any goods embodying that work, because of its creative content.