

No. _____

In the
Supreme Court of the United States

BILL GAEDE AND NILA GAEDE,

Petitioners,

v.

MICHAEL DELAY, ANASTASIA BENDEBURY,
AND BIOSPINTRONICS, L.L.C.,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether usurpation of scientific priority constitutes a violation under *either* the 'false designation of origin' clause of the Lanham Act or the copyright infringement provisions of the Copyright Act.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- Bill Gaede
- Nila Gaede

Bill and Nila Gaede are a married couple

Respondents and Defendants-Appellees below

- Michael Delay
- Anastasia Bendebury
- Biospintronics, L.L.C.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit
Nos. 23-35217, 23-35531

Bill Gaede; Nila Gaede, Husband and Wife, *Plaintiffs-Appellants*, v. Michael Delay; Anastasia Bendebury; Biospintronics, LLC, *Defendants-Appellees*.

Date of Final Opinion: March 6, 2024

U.S. District Court, District of Oregon, Portland
Division

No. 3:22-cv-00380-YY

Bill Gaede; Nila Gaede, Husband and Wife, *Plaintiffs*, v. Michael Delay; Anastasia Bendebury; Biospintronics, LLC, *Defendants*.

Date of Final Opinion: March 1, 2023

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The Ninth Circuit's Memorandum affirming the judgment of the District Court in *Gaede v. DeLay*, is at App.1a.

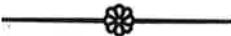
The District Court's Order in *Gaede v. DeLay, et al.*, Case No. 4:20-CV-00091-ACA, in the United States District Court for the District of Portland, Oregon is included at App.8a.

These opinions were not designated for publication.



JURISDICTION

The Ninth Circuit entered its final opinion on March 6, 2024. App.1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

STATUTORY PROVISIONS

15 U.S.C. § 1125

“False designation of origin . . . of . . . services”

(a) Civil action

- (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, or
- (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

17 U.S.C. § 101-Definitions

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

17 U.S.C. § 103(a)(b)

“protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully . . .

The copyright . . . extends only to the material contributed by the author of such work . . . and does not imply any exclusive right in the preexisting material."

17 U.S.C. § 106
Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 107**Limitations on exclusive rights: Fair use**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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 in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 501

- (a) Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author
- (b) The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.

CONSTITUTIONAL PROVISIONS**U.S. Const. amend. V—“due process of law”**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV—“equal protection”

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. art. I, § 8, cl.8

“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”



STATEMENT OF THE CASE

In 2017, while completing their PhDs at Columbia University, Respondents/Defendants discovered Petitioners/Plaintiffs’ 1999 copyrighted book. They quickly realized that the novel ideas proposed in the book had the potential to seriously challenge the physical interpretations that Quantum Mechanics, General Relativity, and String Theory offer for light, electricity, magnetism, gravity, and the workings of the atom. By 2019, Defendants had created professional sites and channels and declared themselves to be the originators of Plaintiffs’ ideas. For a full year, Defendants worked behind Plaintiffs’ backs despite belonging to the same Facebook group, claiming to have made over \$40,000 through donations and published articles by peddling Plaintiffs’ ideas as their own.^{1, 2}

¹ Excerpt from the article Defendants published in the Business Insider:

“people loved our scientific explanations”.

App.32a, § 75. <https://www.businessinsider.com/how-couple-furloughed-turned-science-website-into-viable-business-2020-4>

2 Defendants explained after they were served with a notice to cease and desist that the motive for their usurpation of Plaintiffs' authorship was that Plaintiffs were not having success in getting their theory known to the physics establishment. On April 13, 2021, after Plaintiffs discovered Defendants' secret activities, Defendant DeLay wrote in a group where Defendants and Plaintiff Bill Gaede were members,:

"I honestly didn't think he'd [Plaintiff Bill Gaede] want to be associated with the mathematical/ academic directions that I've moved into . . . "

App.65a.

Defendant DeLay repeated this assertion in a letter he sent Plaintiff Bill Gaede on April 15, 2021:

"I genuinely didn't think you'd want to be associated with us, due to the mathematical/academic nature of our work . . . "

App.71a.

Defendant Bendebury repeated Defendants' motivation in a comment she made in the Facebook group:

"Sure, we made it through . . . but what about everyone else that came after us? What about the people that would come across the ideas and just ignore them, because they hadn't been presented in a way that they could absorb?

" . . . no one ever hearing about these ideas, never realizing that the narratives of the high priests of physics were sorely incomplete? We [Defendants Bendebury and Delay] took the bet that it would be better to face you getting angry at some point . . . "

App.68a.

Defendants also placed the following comment on April 13, 2021, in the group:

The unique physical interpretations [i.e., ideas] that Defendants usurped as coming out of their minds comprise the core of Plaintiffs' book, without which the book is worthless. In effect, Defendants erased the name *Bill Gaede* as the author of his ideas and placed in its stead the names *Anastasia Bendebury* and *Michael DeLay*. As of this writing, Defendants continue to sell Plaintiffs' theories, mechanisms and physical interpretations in interstate commerce as if they had discovered and originated them. Defendants' indispensable advertising sales pitch consists of telling the scientific world that they originated Plaintiffs' seminal ideas.

On March 2022, Plaintiffs filed a complaint in the District Court of Portland, Oregon, under two statutes: The Lanham Act U.S.C. 15 § 1125 and the Copyright Act U.S.C. 17. The Factual Allegations in Plaintiffs' complaint served as an introduction to both acts.³ The complaint made it clear throughout that the central issue was that Defendants usurped

"We didn't cite Bill as inspiring our ideas originally because after years of talking with him about these ideas we thought that . . . associating with him obviously prevents us from reaching a larger mathematically-oriented, mainstream audience."

Defendant Michael DeLay wrote the following comment to Plaintiff Bill Gaede in a letter dated October 3, 2021:

"Your citation only initially eluded my works on account of the toxic public reputation you have hewn around your personality and science . . . I was and am concerned that any associate I forge with you or your RSM will threaten the chances of the ideas reaching a wider audience."

³ Second Amended Complaint, App.24a-50a, §§ 25-141.

not the use, but the role of originators of Plaintiffs' ideas.⁴ ⁵ ⁶ Access was not an issue. Defendants

⁴ The following are examples that Plaintiffs presented in the District Court where Defendants claim authorship of the ideas.

"We are well prepared to rationalize", We propose", "We choose to invoke hydrogens as our atoms", "we have a mechanism for how our atoms are connected". "our interconnecting helix", "we can finally rationalize", "We'll use our nodal atomic model to explain"

Second Amended Complaint, App.33a-34a, § 82

⁵ Second Amended Complaint, App.46a, § 129.

<https://ropehypothesis.com/wp-content/uploads/2022/12/01-Definitions.pdf>

<https://ropehypothesis.com/wp-content/uploads/2022/12/02-Light.pdf>

<https://ropehypothesis.com/wp-content/uploads/2022/12/03-Atom.pdf>

<https://ropehypothesis.com/wp-content/uploads/2022/12/04-TwoAtoms.pdf>

<https://ropehypothesis.com/wp-content/uploads/2022/12/05-Electricity.pdf>

<https://ropehypothesis.com/wp-content/uploads/2022/12/06-Magnetism.pdf>

<https://ropehypothesis.com/wp-content/uploads/2022/12/07-Gravity.pdf>

⁶ Excerpts from the record in Footnote 5, *supra*:

- a. "the defendants claim throughout their article that 'they' are the originators of the structures and mechanisms involved in this suit." Pg. 1 of Light.pdf.
- b. "the issue is . . . that the defendants . . . also claim to be the originators of physical interconnectivity between atoms." *Id.*, Pg. 4.

conceded in Court that the source of the intellectual material they sell originated with Plaintiffs. App.60a.

On March 1, 2023, the District Court dismissed the case with prejudice [App.8a] and Plaintiffs filed a timely appeal. The District Court did not address the usurpation of authorship issue in the context of copyright law.

On appeal, Plaintiffs again stated up front to the Circuit Court that their primary complaint was not about use or lack of attribution, but about authorship: “ . . . defendants continue to claim through articles and videos to be the originators of plaintiffs’ theories. This is the main complaint raised by plaintiffs in this case.”⁷ The 9th Circuit Court of Appeals affirmed the lower court’s decision on the merits and reversed the court’s decision on attorney fees. App.1a.

- c. “the defendants eagerly claimed throughout their articles that they were the originators of the structures and mechanisms described below.” Pg. 1 of Atom.pdf.
- d. “Is it fair to upstage Einstein . . . and claiming to have discovered the relation between energy and mass?” *Id.*, Pg. 4
- e. “Plaintiffs were the originators of the following . . . ” Pg. 6 of TwoAtoms.pdf.
- f. “They [the defendants] claim even to this day that ‘they’ are the originators of the mediating structures and the mechanisms.” Pg. 1 of Gravity.pdf.

⁷ Appellants’ Opening Brief, Pg 10. Docket 2, 05/23/2023.



REASONS FOR GRANTING THE PETITION

Scientific priority is a hallmark of science and is defined as:

“In science, priority is the credit given to the individual or group of individuals who first made the discovery or propose the theory. Fame and honours usually go to the first person or group to publish a new finding . . . the tradition is often referred to as the priority rule, the procedure of which is nicely summed up in a phrase “publish or perish”, because there are no second prizes . . . the race to be first inspires risk-taking that can lead to scientific breakthroughs which is beneficial to the society . . . ”⁸

If scientific priority is not respected, the purpose of the copyright statute—“to promote the Progress of Science and useful Arts”—would be entirely defeated. *Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340, (1991). Theoretical physicists and other scientists would have no incentive to publish their original insights if authorship itself can be usurped with impunity by opportunists.

The District Court failed to address scientific priority in its decision regarding copyrights. Plaintiffs argue that there is a reason the copyright code distinguishes between Science and the Arts, for why

⁸ Plaintiffs discovered the term ‘scientific priority’ in the appeals phase of this case. See https://en.wikipedia.org/wiki/Scientific_priority

would the statute specify these categories otherwise? Plaintiffs allege, *inter alia*, that scientific priority is of incalculable importance in science, much more so than in the Arts. A physical interpretation such as Einstein's seminal proposal that 'gravity is the warping of spacetime'—which overthrew Newton's theory that 'gravity is a force'—is a revolutionary insight that triggers a major paradigm shift in the discipline. In physics, it is the idea and not how it is expressed (*i.e.*, poetry) that has value. Ergo: There are no second prizes in science! Nobel and other science prizes are granted for original ideas, not for latter day rephrasing of those ideas. Nobel Prizes in Literature, on the other hand, are primarily granted for expressions.

The Circuit Court also failed to address usurpation of authorship under the copyright statute. The breathtaking consequences are certain to spark tsunamis in the copyright world. Should the 9th Circuit Court's landmark decision stand, Defendants will henceforth be allowed to claim in interstate commerce that they also originated Isaac Newton's or Albert Einstein's gravitational theories. The Court's decision has effectively annulled the profession of theoretical physicist and jeopardized the funds that flow into physics think tanks.

The Copyright Office also appears to need guidance. Plaintiffs posed the issue of usurpation of scientific priority to their legal group and the reply indicated that they have trouble understanding the question: ⁹

⁹ Letter to the Copyright Office:

"Does usurpation of scientific priority [https://en.wikipedia.org/wiki/Scientific_priority] constitute a vio-

“Copyright law expressly excludes copyright protection for “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied.”

Sincerely,
Parker

This is essentially the same reply that the District and Circuit Courts gave Plaintiffs in their respective decisions. If the specialists at the Copyright Office had trouble understanding the question and eventually had no answer, it suggests that the District and Circuit Courts also had trouble understanding the question after a cursory reading of Plaintiffs' complaint.

lation of copyright law? In other words, if someone copyrights a book containing seminal scientific ideas and someone else falsely claims to have originated that same idea after reading the copyrighted book, does this constitute a violation of the Copyright Act? Is the person who usurps authorship of a scientific idea that has been introduced in a copyrighted book in violation of Title 17 USC? Is scientific priority an unenumerated, exclusive, untransferable, eternal right tacitly protected by the copyright statute? Can someone other than Isaac Newton claim to have originated his gravitational theory? Can Article 8 of the Constitution — “securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” — apply to scientific priority? For instance, copyrights, patents, and trademarks can be sold, and all have expiration dates. In contrast, scientific priority is nontransferable and eternal.”



ARGUMENT

I. DEFENDANTS COMMITTED COPYRIGHT INFRINGEMENT WHEN THEY USURPED AUTHORSHIP OF PLAINTIFFS' IDEAS.

The District Court justified its decision to dismiss the case, stating, “That is the same thing that plaintiffs allege here: that defendants made “illusory” (or “arguably minor”) changes to plaintiffs’ work, and then packaged the new works as originating from defendants.” App.17a. Quoting *Feist*, the Court opined that “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” It turns out that copyright law also allows the use of the idea even without attribution, an action that is widely spurned as plagiarism in academia. However, nowhere does copyright law allow Defendants to claim to have originated Plaintiffs’ ideas, especially in the context of Science and its vital scientific priority.¹⁰ Failure to credit a source of an idea [‘soft’ plagiarism] could be due to oversight, negligence, inadvertence, carelessness . . . Proactively, deliberately, and knowingly replacing the originating author’s name [‘hard’ plagiarism] is straight forward fraud. The magistrate significantly downplayed Plaintiffs’ authorship accusation or conflated it with monopolization of the idea and, thus, reduced the main charge—“pack-

¹⁰ Plaintiffs’ complaint (App.20a) includes over 10 sections in which Defendants masked the expressions of Plaintiffs’ ideas with close synonyms and claimed them ‘as their own’.

aged the new works as originating from defendants”—to a trivial footnote.

The District Court’s misdirection began when it exaggerated Defendants’ alleged ‘new works’. Plaintiffs duly documented that the ideas Defendants’ sell (theories, explanations, mechanisms, and physical interpretations of electromagnetic and gravitational phenomena) are exactly the same.¹¹ And here, the Court erred as a matter of law when it failed to follow procedure. The law compels plaintiff to “show that the ideas in the works at issue are substantially similar . . . plaintiff must demonstrate that the works are substantially similar in both ideas and expression”. *Frybarger v. International Business Machines*, 812 F.2d 525, 528 (9th Cir. 1987). Inexplicably, the Court failed to establish first whether the ideas were identical before addressing the expressions. The magistrate demonstrated a vague understanding of the evidence placed before her, stating in her decision that: “the two passages seem to be describing the same theory about physical phenomena” and “some of the passages from defendants’ website may arguably be characterized as “paraphrasing” plaintiffs’ work . . .” Respectively App.16a and 17a. (Plaintiffs’ emphasis added in all cases). If it was ‘arguably’, the issue should have been argued during oral arguments to clarify what the magistrate was failing to understand about the scientific evidence presented.¹² Instead, the Court

¹¹ See Footnotes 2, 5 & 6.

¹² Docket 55 Request for Oral Argument. App.78a

Plaintiffs requested oral arguments because the scientific intellectual material in dispute was too extensive to include in the complaint. They feared that the magistrate may not understand

expatiated on the tangential aspects of the use of expressions (*i.e.*, the idea-expression dichotomy) which was Plaintiffs' secondary argument.¹³

The Court glossed over scientific priority because the copyright statute contains no specific provision for usurpation of authorship of the idea. Plaintiffs discovered that there is no section of the code that they could reference in their complaint regarding this issue other than the general heading 'copyright infringement'. The way the law reads today only allows Plaintiffs to support this charge with evidence of usurpation of authorship. Plaintiffs nevertheless take the position that a complaint need not specify that usurpation of authorship is against copyright law any more than an indictment for bank robbery or murder needs to clarify that these constitute crimes. It is plain common sense and self-evident.

It is to note, however, that Title 17 USC § 501 (b) does tacitly protect the originator's exclusive right to claim to be the source. It states in its relevant part that:

The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to

the scientific issues at stake since this is an entirely new theory of physics that has nothing in common with the physical interpretations of mathematical physics. The Court summarily denied oral arguments, thus depriving Plaintiffs of the opportunity to cross-examine Defendants and settle first the issue of whether the physical interpretations of electromagnetic and gravitational phenomena [*i.e.*, the ideas, concepts] of opposing parties were the same.

¹³ Court failed to factor that the ideas were the same despite the fact that Defendants admitted copying the novel physical interpretations and mechanisms from Plaintiffs.

institute an action for any infringement of that particular right committed while he or she is the owner of it.

Plaintiffs argue that scientific priority is one of the particular unenumerated, exclusive, inalienable rights implicitly protected by the act and by the Constitution. The predicate in Article 8 of the Constitution—“securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”—does not and cannot extend to scientific priority. Copyrights, patents, and trademarks can be sold, and all have expiration dates. In contrast, scientific priority is nontransferable and eternal. Scientific priority is an undeclared yet integral component of copyright law because it is a historical fact. A copyright only formalizes that the idea originated with a given individual and allows that individual to sue. Isaac Newton and Albert Einstein will forever be credited with having discovered their respective gravitational theories whether the idea was engraved in an article or sprang during a recorded talk. Rights to origination cannot be deliberately wrenched from these two authors without incurring copyright infringement under the Copyright Act and fraud under the Lanham Act.

The Copyright Act also protects the originator of an idea through 17 U.S.C. § 103(a)(b) which reads in its relevant part . . .

“protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully . . .

The copyright . . . extends only to the material contributed by the author of such work . . . and does not imply any exclusive right in the preexisting material.”

17 U.S.C. § 103(a)(b).

Plaintiff Bill Gaede’s exclusive right includes the fact that he is the only individual on Earth who can claim to be the originator of his unique physical interpretations and do so forever. He does not hold a monopoly over his ideas. He holds a monopoly over claiming to be the originator of his ideas. Defendants have unlawfully proclaimed in the process of advertising their site and YouTube channels that they originated his theories. They were keenly aware that the name of the person who first came up with the novel insight and seminal mechanisms is of immense historical and marketing value in science. It is for this reason that Defendants structured their strategic advertising sales pitch around this vital issue. The District Court implicitly invoked § 103 to justify its decision when it stated that “copyright protection may extend only to those components of a work that are original to the author.” App. II, pg 8. Plaintiffs argue that the phrase ‘what is original to the author’ includes their exclusive, unlimited right to claim scientific priority.

Usurping authorship does not qualify for protection even under the guise of ‘fair use’ because scientific priority is an unlimited, exclusive right embodied in the act. Title 17 U.S.C. § 107. A copyright is limited by time, but § 501(b) protects the exclusive “particular right” to scientific priority “while he or she is the owner of it” . . . which is forever. 17 USC § 501(b).

The Circuit Court also glossed over the key authorship issue. It affirmed the lower court's decision, reasoning that, "As the district court noted, "Plaintiffs' proposed amendments to the complaint continue to reflect claims over 'ideas' and not copyrightable original expression of those ideas". App.2a-3a.

Plaintiffs argue that the Circuit Court misplaced the context. Plaintiffs' made it clear in their briefs in both courts that their claims were not over monopolizing the usage of those ideas. Quite the contrary! The more their theories were spread, the better. Plaintiffs provided both District and Circuit Courts with examples of third parties unrelated to them that did in fact make use of Plaintiffs' physical interpretations, one of them for profit. And although Plaintiffs did raise the issue of blatant plagiarism by the two Columbia-graduated Defendants, this case was also not about failure to attribute. The complaint was about Defendants cosmetically dressing Plaintiffs' novel subatomic architectures with synonyms and claiming the theories, mechanisms, and physical interpretations 'as their own'. App.33a-35a, §§ 81-88. This is an unprecedented case of usurping authorship of the underlying ideas by masking them under the guise of expressions.

II. DEFENDANTS VIOLATED THE 'FALSE DESIGNATION OF ORIGIN' CLAUSE OF TITLE 15 U.S.C. § 1125 WHEN THEY DELIBERATELY USURPED SCIENTIFIC PRIORITY FROM PLAINTIFFS.

Under the Lanham Act, the District Court erroneously justified its decision to dismiss the case on the basis that Plaintiffs were incongruously attempting to prosecute a case of plagiarism [*i.e.*, copyrights] via a fraud statute. Quoting *Dastar*, the

Court held that: “[W]e conclude that the phrase [“origin of goods”] refers to the producer of the tangible goods that are offered for sale, and not the author of any idea, concept or communication embodied in those goods.”¹⁴ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S.Ct. 2041 (2003). The *Dastar* Court was addressing the issue of who originated the tangible videotapes and rightfully leaned on the side of the defendants. To complicate plaintiffs’ argument in the *Dastar* case, the authors failed to renew the copyrights, thus allowing the copyrights to the intangibles embodied in the tapes to expire. These and other factors make *Dastar* markedly different than Plaintiffs’ present case:

1. *Dastar* dealt with origin of goods and not with the origin of a service (*i.e.*, marketing a scientific theory). There are no tangible goods involved in the instant dispute which centers around the origin of the ideas.
2. The copyrights in *Dastar* had expired. Plaintiffs still hold valid copyrights to their scientific books—the only goods involved—both of which are not at issue.
3. *Dastar* was a case of failing to credit the source: ‘soft’ plagiarism as explained earlier. Thus, plaintiffs in that case tacitly conceded that *Dastar* was the original source of the historical script. Soft plagiarism is definitely unrelated to the Lanham Act and only involves copyrights. The instant case is a violation of hard plagiarism. Defendants

¹⁴ App.18a. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S.Ct. 2041 (2003)

proactively, deliberately, and fraudulently usurped Plaintiffs' eternal right to scientific priority. This is a case where Defendants are falsely claiming in interstate commerce that they created/originated Plaintiffs' unique theories, mechanisms, and physical interpretations. This constitutes false designation of origin of the educational services they sell: falsely stamping Plaintiffs' ideas with Defendants' informal Demystifying Science 'trademark'.

The Circuit Court sided with the District Court and rejected Plaintiffs' contentions by quoting the *Dastar* Court's decision:

"In that case, the Supreme Court explained that, under § 1125 of the Lanham Act, the phrase "origin of goods" refers to the "producer of the tangible product sold in the marketplace" and is "incapable of connoting the person or entity the ideas or communications that 'goods' embody or contain." *Id.* at 31—32.

The Court of Appeals did not quote the entire passage and, hence, misplaced the context. In the sentence that follows, the *Dastar* Court explained its reasoning regarding authors, stating: "To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do." What is perpetual in the instant case is neither patent nor copyright. What is perpetual is scientific priority! No law, no court in the land can change the fact that Isaac Newton or that Albert Einstein discovered their respective gravitational theories. No law, no court in the land can deprive the

originator of a theory, mechanism, or physical interpretation of physics of the inalienable, perpetual right to claim scientific priority.

The Appeals Court further justified its decision by referencing another section of *Dastar* . . .

“The Court also noted that individuals do not “face Lanham Act liability for failing to credit the creator of a work,” and the Lanham Act should not be read “as creating a cause of action for, in effect, plagiarism.” . . . In sum, the Lanham Act was “not designed to protect originality or creativity,” and is not concerned with “the author of any idea, concept, or communication.”

The Circuit Court interprets this passage as an across-the-board mandate outlawing any reference to the author of an idea under the Lanham Act.

The Court errs when it conflates the contexts. This is not a case of protecting the author of an idea in the sense of failing to provide attribution (soft plagiarism), which could just as well be due to inadvertence, negligence, human error, etc. Omissions in such circumstances fall squarely within copyright law and outside the purview of the Lanham Act. The case before this Court is one of hard plagiarism where the Defendants knowingly, deliberately, and fraudulently sell a product in interstate commerce of which the key marketing feature is the originator of the idea. Defendants are keenly aware that, should the ideas they wrongfully peddle as theirs happen to trigger a paradigm shift in physics, the Defendants profit from the windfall. They get all the credit and their names are etched in history forever. Falsey

and proactively claiming to be the originator of a theory (fraud) crosses the red line and goes way beyond failing to attribute credit (copyright).

In other words, the Circuit Court errs because the issue is not copyrights being prosecuted under a fraud statute. The issue is false designation of origin of a service. Defendants are deliberately and falsely advertising in interstate commerce that they are the originators of intellectual material (*i.e.*, services) which they did not originate. This is definitely a fraud committed against the rightful creators: the Plaintiffs. What Defendants reverse-palmed off is not ideas (copyright), but Plaintiffs' scientific priority (fraud). *Woodke v. Dahn*, 873 F.Supp. 179, 189 (N.D. Iowa 1995). Indeed, Petitioners do not even need to bring up copyrights in the fraud scenario because whether the ideas are copyrighted or not has no bearing on the historical fact of who originated them.

III. DEFENDANTS ADVERTISED THEIR EDUCATIONAL SERVICES WITH A *SINE QUA NON* SALES PITCH CRITICAL TO THEIR BUSINESS PLAN: THAT THEY ORIGINATED PLAINTIFFS' SCIENTIFIC IDEAS.

Defendants are direct competitors of Plaintiffs. Their strategic marketing point is advertising that they discovered Plaintiffs' ideas.¹⁵ They are proactively taking credit for being the masterminds behind Plaintiffs' seminal ideas with the expectation that it will trigger a paradigm shift in physics.¹⁶ Traffic would otherwise flow to the authentic originator. This explains

¹⁵ See Footnotes 1 and 3.

¹⁶ See Footnote 2.

why Defendants skirted attribution.¹⁷ It also provides the reason for why Defendants stepped over the red line and proactively claimed and still claim to be the originators of Plaintiffs' physics ideas.

IV. CONSTITUTIONAL CONSIDERATIONS

The Circuit Court declined to consider Appellants' 5th and 14th constitutional arguments on the basis that Plaintiffs had not justified why they were not brought up at the district level in their second amended complaint. App.3a.

Appellants did in fact explain in their brief that they were not afforded the opportunity to do so in federal court. The First Amended Complaint involved frivolous issues raised by Defendants on: 1. the ownership of the copyrighted book in question and 2. whether Plaintiffs were the owners of the images introduced in the complaint. The District Court declared both of Defendants' arguments moot. Plaintiff Bill Gaede was and is the sole owner of the copyrights of the book in question—and more pertinently, the author and creator of the ideas in it. And Plaintiffs

¹⁷ Letter from Defendants to Plaintiffs dated 05/01/2021:

"In the summer of 2017, while grad students at Columbia University, we taught physics at a high school summer camp. In trying to suss out the best ways to explain basic atomics to students we came across the work of Bill Gaede, who had seemingly reawakened an insight that had been lost since the time of Huygens and Descartes: light and gravity absolutely require a physical mediator for comprehension . . . Your name should have been there from the beginning . . .

App.74a.

did not accuse Defendants of copying their images. The Second (and last) Amended Complaint was the only amendment on the merits. At that point, the District Court summarily dismissed the case, limiting its analysis to the expressions. Plaintiffs did not have an opportunity to raise any further arguments.

Plaintiffs also had no way of knowing what the Court would decide regarding the specific constitutional issue of scientific priority or whether it would concede oral arguments to discuss in greater detail scientific aspects that the magistrate did not comprehend. It is to note that the Court did concede oral arguments on the frivolous issue of whether Defendants' shell company required formal representation of an attorney.

Appellants further argued that the Circuit Court nevertheless had the jurisdiction and prerogative to consider the constitutional aspects. Apparently, the judges decided to delegate this task to the higher court. The District Court would have likely done the same.

Plaintiffs believe that it would have been pointless to file a motion for reconsideration in either court since both the District Court and the Circuit Courts were in agreement that legal precedent dictates that neither the Copyright Act nor the Lanham Act protect scientific priority. The Circuit Court also declined to consider the constitutional aspects. Additionally, Petitioners were painfully aware that motions for reconsideration are rarely granted and that justifying irreparable harm would have been an uphill battle.

Plaintiffs' first constitutional argument is that the idea-expression dichotomy attempts against the 5th Amendment 'fair notice' provision for two reasons:

1. It is statutorily ambiguous and thus delegates legislative authority to the judiciary, largely because . . . 2. the indispensable term ‘idea’ in the Copyright Act has yet to be defined in Title 17 U.S.C. § 101-Definitions.

Plaintiffs’ second argument is that the idea-expression dichotomy also violates the 14th Amendment “equal protection” clause in that it limits the right to inalienable intangible property: value recognition and reputational value of being declared the originator of a seminal scientific idea. It denies theorists the right to patent, copyright, or trademark that which is of great significance in physics: the originator of the idea. Specifically, it singles out the independent researcher, leaving the individual with no recourse in law to protect their valuable historical primacy: being recognized as the originator of a major paradigm shift.¹⁸

¹⁸ The reason there is no precedent in the legal world for theories of physics is that the courts have relied upon and delegated to universities the task of patrolling and detecting plagiarism and deciding who has committed academic suicide. But this arrangement discriminates against independent researchers who by definition are not part of the mainstream academic world. Independent researchers should not have to rely on entities outside the legal world for protection of their inalienable property: *being the originator of a theory*.



CONCLUSION

The District and Circuit Courts erred as a matter of law when the judges failed to realize that usurping authorship of an idea does in fact amount to copyright infringement under the Copyright Act (usurpation of authorship) and as fraud under the Lanham Act (false designation of origin). If this usurpation doesn't qualify as a violation under either act, Petitioners are at a loss to identify the statute they must invoke to recover their inalienable right to scientific priority. Should certiorari be denied, a landmark will be set that an author's name is fair game. The profession of theoretical physicist is summarily abolished. And all grants to think tanks of physics come to a halt. It is for these reasons that Petitioners request that this Honorable Court grant this writ of certiorari.

Respectfully submitted,

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