

## The End of the Line for the Dirty Dancing Case

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We have previously [blogged](#) about claims brought by Lions Gate

## Related Capabilities

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Entertainment against a TD Ameritrade ad campaign featuring the tagline “Nobody puts your old 401K in a corner.” This was an obvious and humorous allusion to the iconic line from *Dirty Dancing* that “Nobody puts Baby in a corner,” heightened by the ad’s depiction of a man lifting a piggy bank over his head after the piggy bank jumped into the man’s arms. The case was filed in 2015, leading to a hotly contested motion to dismiss. In March 2016, the court issued an Order dismissing Lions Gates’ trademark infringement and unfair competition claims as preempted by the Copyright Act and barred by the Supreme Court’s holding in *Dastar Corp. v. Twentieth Century Fox Film Corp.* The Supreme Court’s 2003 decision in *Dastar* had held that the Lanham Act’s prohibition on false designations of origin of goods “does not refer to the author of any idea, concept or communication embodied in” the goods. Rather a false designation of origin claim relates to the identity of the producer of tangible products sold in the marketplace.

Temperatures have apparently cooled between Lions Gate and Ameritrade, with the parties

entering into a settlement agreement. Notwithstanding the settlement, Lions Gate did not want the March 2016 Order dismissing its trademark claims to remain on the books. Contending that the settlement would preclude an appeal of the district court's interlocutory dismissal order, Lions Gate filed a motion to vacate the order with respect to the trademark claims. Interestingly, as part of the settlement agreement, TD Ameritrade agreed not to oppose the motion. The lack of an opposition brief did not assist Lions Gate's efforts, as the district court has now issued a further Order denying the vacatur motion.

According to the district court, its March 2016 Order properly applied *Dastar* in holding that Lions Gates' trademark and unfair competition claims based on a false designation of origin theory could not be maintained where there is no likely confusion as to the producer of a tangible product sold in the marketplace. TD Ameritrade was not selling merchandise bearing NOBODY PUTS BABY IN A CORNER, but rather was advertising financial services clearly identified as originating with TD Ameritrade. There was no attempt to pass off products or services of TD Ameritrade as coming from Lions Gate or vice versa. Moreover, Lions Gates' claims were preempted because the allegations concerned false designation of origin of a "communicative product" – the ad campaign. The court rejected Lions Gates' contention that its March 2016 dismissal order had been based on an over-expansive application of *Dastar*. As the court explained, its dismissal order had properly acknowledged that there may be instances where a "communicative good" could be protected under both copyright and trademark principles, but in this case, the trademark claims asserted against the TD Ameritrade ad campaign were "barred under *Dastar*, as they do not protect rights in a communicative product that are distinct from those already protected by the Copyright Act."

As Baby's father says in the movie, "When I'm wrong, I say I'm wrong" – but the court in *Lions Gate* didn't think it was wrong. So this may be the end of the drama for Lions Gate. While the terms of the settlement agreement are not publicly known, its experience in court has not been the time of its life.