APPLYING THE DOCTRINE OF ADVERSE POSSESSION TO COPYRIGHT LAW: A CALL FOR ECONOMIC EFFICIENCY, CERTAINTY, AND FAIRNESS THROUGH LEGISLATIVE REFORM

ABSTRACT

The current copyright system protects an author's work for the life of the author plus 70 years, meaning an author retains the rights of exclusivity[1] *to that work regardless of how, or if, it is used. With the stated goals of the copyright system being progress, certainty, and fairness, the modern revisions making registration non-essential to copyright protections directly contradicts those goals. The adverse possession doctrine, in both real and personal property, injects certainty, fairness, and economic efficiency into property ownership by ensuring the owners of property use their property and defend it in a timely manner. This Note proposes, through analyzing the history of adverse possession and the legislative path of copyright, that Congress make copyright susceptible to the adverse possession doctrine. Congress can make the doctrine applicable by removing preemption and exclusivity statutes and allowing federal and state courts to apply the common law doctrine, as the court in* Gee v. CBS, Inc. *did. It is through this application that fairness, progress, and certainty can be achieved through the copyright system.*

TABLE OF CONTENTS

1. Exclusivity includes the right to reproduce, distribute, make derivative works, display, and perform. *See* Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 560–61 (1999).

I. INTRODUCTION

In 2012, the United States Copyright Office issued a Notice of Inquiry, seeking information on "orphan works."[2] An orphan work is a work that has been copyright protected, but the author is not easily identifiable through a good-faith search.[3] Orphan works have also been described as "older and more obscure works with minimal commercial value that have copyright owners who are difficult or impossible to track down."[4] The Copyright Office has recognized that the issues presented by orphan works run contrary to the goals of the copyright system.[5] However, nothing is mentioned of copyrights that do not fit within these narrowly tailored definitions. What about copyrights whose owners are readily identifiable but unused? What about copyrights whose owners are difficult to find but still have high economic value? Works that one would actually use, growing both one's personal economy and the nation's economy, may be precluded because someone made the work first but fails to actually use it.[6] Copyright-eligible works do not have to be registered to be afforded copyright protection nor do the works need to be renewed.[7]

2. Orphan Works and Mass Digitization, 77 Fed. Reg. 64,555, 64,555 (Oct. 22, 2012).

3. *Id.*

4. Golan v. Holder, 565 U.S. 302, 355 (2012) (Breyer, J., dissenting).

5. Orphan Works and Mass Digitization, 77 Fed. Reg. at 64,555.

6. *See, e.g.*, John Wiley & Sons, Inc. v. Golden, No. 14-942 (AET), 2015 WL 716880, at *8 (D.N.J. Feb. 19, 2015) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)) (recognizing the pleading standard for a claim of copyright infringement is simply (1) the party has a valid copyright and is the owner of that copyright and (2) the infringer has copied those works; there is no recognition of a better use in pleading).

7. Olive Huang, Note, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265, 268 (2006) (explaining that the 1976 Copyright Act "abolished" such requirements).

This Note argues the goal of the copyright system, which is defined as economic efficiency and fairness, is best served by applying the adverse possession doctrine to copyright law. Opponents to this idea argue that applying this doctrine runs contrary to fairness, which would have the effect of de-incentivizing creators of copyrightable works.[8] In fact, some have argued the application of adverse possession is more akin to incentivizing theft by allowing one to obtain title by simply following the elements of the test.[9] By doing so, the person who best uses the copyright likely will become the holder of the copyright. Successful application of the adverse possession doctrine can easily be accomplished through two amendments to the United States Code, effectively turning over copyrights to the realm of state law. In arguing for this change, this Note first discusses the history, purpose, and policy of the adverse possession doctrine. Next, this Note discusses the path U.S. copyright laws have taken to get to the state they are in today, with a particular eye toward the modern revisions in 1976 and 2005. This Note then discusses the nature of the law today, showing how particular provisions make copyrights ripe for abuse and misuse. Lastly, this Note outlines the path forward for applying the adverse possession doctrine to copyright law by examining the routes taken in other areas of intellectual property, case law discussing its use both now and before the 1976 revision, and federal preemption revisions.

II. THE ADVERSE POSSESSION DOCTRINE

A. *The History of the Adverse Possession Doctrine*

The term adverse possession was first used in 1787 by the English Lord Mansfield.[10] The doctrine of adverse possession traces its roots to England in the seventeenth century, when the doctrine was largely regarded as a statute of limitations; however, the previous owner of the land could take back their property regardless of when the property was adversely possessed.[11] The doctrine was first only applicable to land, as exemplified in the 1715 North Carolina legislature's act establishing a seven-year statute of

8. *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 878 (N.J. 1980) (Handler, J., dissenting) (arguing that applying the doctrine allows thievery).

9. *See id.* at 872 (majority opinion), *rev'g* 405 A.2d 840 (N.J. Super. Ct. App. Div. 1979) (citing the lower court's dissenting opinion and the judge's fear of promoting a "handbook for larceny").

10. CHARLES C. CALLAHAN, ADVERSE POSSESSION 50 (1961).

11. *Id.* at 49–50.

limitations for the recovery of land.[12] The modern usage and elements of adverse possession in the United States find their roots in New York in 1828 when the idea of a statute of limitations on ejectment met with the need for color of title.[13]

The ability of an individual to take property that is not being used has long been recognized as a foundational tenet of the law, though the application of adverse possession alters this tenet by not requiring abandonment.[14] The broadening of this universal tenet from just derelict property to property that has not been abandoned is best described by Justice Oliver Wendell Holmes when he said, "It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time . . . takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."[15] To put it more simply, the law expects that two competing claims to land will be vigorously defended, both on the side of the prior owner attempting ejectment and the adverse possessor who has used the land for a significant period of time.[16]

The United States and the individual state governments have all taken much from the early English statute of limitations approach to adverse possession, thereby transforming early English law into the modern-day doctrine.[17] In our modern conceptualization of the adverse possession doctrine, each state has adopted some form of an adverse possession statute,

12. *Id.* at 50–51.

13. *Id.* at 52; *see Ejectment*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining ejectment as the removal of an occupier from a piece of property).

14. *Derelict*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining derelict as forsaken or abandoned as well as cast away personal property); s*ee* Hawkins v. Barney's Lessee, 30 U.S. 457, 467 (1831) ("The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law . . . ."); D'Angelo v. McNutt, 868 A.2d 239, 242 (Me. 2005) (listing elements of adverse possession as "(1) actual; (2) open; (3) visible; (4) notorious; (5) hostile; (6) under a claim of right; (7) continuous; (8) exclusive; and (9) of a duration exceeding the twenty-year limitations period" without mention of any abandonment element (quoting Striefel v. Charles-Keyt-Leaman P'ship, 733 A.2d 984, 989 (Me. 1999))).

15. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

16. *See* Kristine S. Cherek, *From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World*, 20 VA. J. SOC. POL'Y & L. 271, 285 (2012).

17. Todd Barnet, *The Uniform Registered State Land and Adverse Possession Reform Act, A Proposal for Reform of the United States Real Property Law*, 12 BUFF. ENVTL. L.J. 1, 11–12 (2004).

though there are slight variances from state to state that can make a large difference.[18] The basic elements employed by most states are (1) actual possession, (2) open and notorious possession, (3) exclusive and continuous possession, (4) hostile possession, and (5) possession under a claim of right; however, some states combine or modify the language used.[19] For example, in South Dakota, a claim of adverse possession with no legal document on which to base possession will only be successful if the property had an enclosure protecting it or if the property was improved or cultivated.[20] In Iowa, the party asserting adverse possession must show a good-faith belief that a claim or right to title existed.[21] Adverse possession is a state law claim, and thus when it is asserted in a federal court, the federal court applies the doctrine of the state where the property is located.[22] While the different mechanisms of how one satisfies the doctrine are important, the distinctions across jurisdictions are not important for purposes of this Note and will only be discussed in passing where appropriate.

B. *The Policy Rationale Underpinning the Adverse Possession Doctrine*

A central policy rationale in adverse possession is economic efficiency, which is the idea that property should be used to its best economic potential.[23] As the Michigan Court of Appeals stated, "The underlying philosophy of a claim for adverse possession is to encourage land use, as it favors the productive use of land over its disuse."[24] However, economics is not the only underlying rationale for having a doctrine that can strip people's property away from them. Adverse possession as a doctrine exists to encourage the owners of property to resolve issues of ownership in a reasonable time frame, rather than bring a claim after it lays dormant for too long.[25]

18. *Id.* at 12.

19. *See* Garrett v. Huster, 684 N.W.2d 250, 253 (Iowa 2004); Estate of Becker v. Murtagh, 968 N.E.2d 433, 437 (N.Y. 2012); Underhill v. Mattson, 886 N.W.2d 348, 352 (S.D. 2016).

20. *Underhill*, 886 N.W.2d at 352 (citing S.D. CODIFIED LAWS § 15-3-13 (2016)).

21. Carpenter v. Ruperto, 315 N.W.2d 782, 785 (Iowa 1982) (quoting Litchfield v. Sewell, 66 N.W. 104, 106 (Iowa 1896)).

22. Christ Church Pentecostal v. Richterberg, 334 F.2d 869, 874 (10th Cir. 1964).

23. Canjar v. Cole, 770 N.W.2d 449, 454 (Mich. Ct. App. 2009) (citing John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 537 (1996)).

24. *Id.* (citing Sprankling, *supra* note 23, at 537).

25. Watson v. Mense, 298 S.W.3d 521, 526 (Mo. 2009).

Opponents argue the adverse possession doctrine is not fair at all as the doctrine is one that legalizes theft and allows for the thief to obtain legal title due in large part to evading the statute of limitations.[26] The doctrine puts a disadvantage on the poor or innocent owners who simply did not pay enough attention to their property.[27] However, the doctrine does allow for greater certainty for property whose owners cannot be located because the doctrine allows the adverse possessor, upon satisfying the time requirement, to not have to fear superior title.[28] Indeed, though some may argue the fairness of rewarding "thieves" of copyright if they can elude the statutory time requirement, this pitfall is offset by the ability of adverse copyright possessors to utilize copyrights from missing owners with a sense of certainty.[29]

Additionally, some argue adverse possession runs contrary to the Contracts Clause and Due Process of Law.[30] This argument has failed as, at its core, adverse possession is a statute of limitations which does not impair one's ability to enter into contracts or perform under those contracts, nor does it deprive an individual of property without due process of law since the doctrine establishes a time frame and parameters to stop the taking.[31] Thus, the idea of maximizing the utility of property and encouraging a timely defense of property is the policy foundation of adverse possession.

26. *See* O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980) (citing O'Keeffe v. Snyder, 405 A.2d 840, 850 (N.J. Super. Ct. App. Div. 1979)); *id.* at 878 (Handler, J., dissenting) (arguing for a disregard of the statute of limitations for art thieves and instead for a policy of deciding on the merits who is entitled to own the property in question).

27. *See* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2432–33 (2001).

28. *Id.* at 2443.

29. *See O'Keeffe*, 416 A.2d at 872. *But see* Stake, *supra* note 27, at 2443 ("[A]dverse possession does help deal with a different sort of uncertainty: the problem of the missing owner.").

30. Short v. Texaco, Inc., 406 N.E.2d 625, 629 (Ind. 1980), *aff'd*, 454 U.S. 516 (1982).

31. *Id.*; s*ee* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts . . . ."); *id.* amend. XIV, § 1 (establishing that "nor shall any State deprive any person of life, liberty, or property, without due process of law"). The Contracts Clause prevents states and local government from interfering with existing contracts. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 646 (4th ed. 2013).

C. *Adverse Possession of Chattels*

A chattel is a "[m]oveable or transferable property."[32] In other words, it is personal property and not real property. In particular, a chattel can include an intangible right to control the use of something.[33] A copyright involves the exclusive right to control reproduction, display, and distribution, among others.[34] Thus, a copyright may be classified as a chattel. Since the early days of the United States, the doctrine of adverse possession has been recognized as being applicable to chattels.[35] In modern usage, "the doctrine applies with equal force to personal property, or at least to chattels."[36] Just as with real property, where title is transferred to the adverse possessor upon meeting the necessary elements, with chattels the adverse possessor becomes the true owner of the chattel upon a successful claim of the doctrine.[37] Another similarity between adverse possession of real property and chattels is that the doctrine is essentially a statute of limitations, and it does not begin (meaning the clock does not start) until possession by the adverse possessor is open.[38]

The elements necessary to satisfy a claim of adverse possession of chattels are that the possession has to be "hostile, actual, visible, exclusive, and continuous," which are nearly identical to the elements of adverse possession of real property.[39] To successfully claim adverse possession of chattels, one has to publicly exercise ownership over the personal property in a way that showcases ownership in the item, even though the chattel is not the individual's property until the proscribed time has run.[40] Open and

32. *Chattel*, BLACK'S LAW DICTIONARY (10th ed. 2014).

33. Coultas v. Liberty Mut. Fire Ins. Co., No. 3:15-cv-0237-PK, 2015 WL 2376003, at *5 (D. Or. May 18, 2015).

34. *Copyright*, BLACK'S LAW DICTIONARY (10th ed. 2014).

35. *See* Montgomery v. Wynns, 20 N.C. (3 & 4 Dev. & Bat.) 667, 672 (1839) (per curiam) (discussing the requisite needs of adverse possession of chattels, in particular the color of title element).

36. Gee v. CBS, Inc., 471 F. Supp. 600, 653 (E.D. Pa.), *aff'd*, 612 F.2d 572 (3d Cir. 1979).

37. *Id.* (quoting Percy Bordwell, *Property in Chattels*, 29 HARV. L. REV. 374, 378 (1916)).

38. O'Keeffe v. Snyder, 416 A.2d 862, 870–71 (N.J. 1980) (citing RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY 33 (3d ed. 1975)).

39. *Id.* at 870 (citing Redmond v. N.J. Historical Soc'y, 28 A.2d 189, 194 (N.J. 1942)).

40. *See Gee*, 471 F. Supp. at 653 (discussing the requisite visibility and exclusivity needed for a claim of adverse possession).

visible means not only that one acts as the owner but that the possession is such that it would put the previous owner on actual or constructive notice that the property is being adversely possessed.[41] Continuous in the case of this doctrine means the adverse possessor met the other requirements of the doctrine for the statutorily provided time period.[42] The hostile element often is a demand-and-refuse element, meaning the hostile possession of the chattel does not start until the prior owner requests the return of the property and the adverse possessor refuses to return the property.[43] One cannot possess property in a hostile nature satisfactory to the statute if the use of the property was permissive.[44] The requisite time one must adversely possess a chattel is far shorter than for one who is adversely possessing real property.[45] In general, the possessory periods may tack onto each other from one adverse possessor to the other, as it does in real property.[46] The elements to prove adverse possession of chattels do not vary greatly from adverse possession of real property, which exemplifies the malleability and ease of applying the doctrine to different areas, including copyrights.

III. HISTORY OF THE UNITED STATES COPYRIGHT LAW

Congress was granted the authority to protect copyrights by the founders in the Constitution.[47] The first Congress of the United States placed

41. *O'Keeffe*, 416 A.2d at 871; *see also Gee*, 471 F. Supp. at 655 (quoting Rufford G. Patton, *Other Methods of Acquiring Title to Land*, *in* 3 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES § 15.1, at 768 (A. James Castner ed., 1952)) (discussing that the open element, sometimes combined with notorious, means giving notice to the original owner such that they can initiate actions to stop the adverse possession and recover their property).

42. Barinof v. United States, 329 F. Supp. 830, 841 (S.D.N.Y. 1971) (discussing the need to meet the requirements over the period "in order to prevail").

43. *O'Keeffe*, 416 A.2d at 871 (discussing a prior case where the statute of limitations for the adverse possession claim did not start to run until the adverse possessor refused to return the painting to the prior owner).

44. *Barinof*, 329 F. Supp. at 842 (citing Sundstrom v. Village of Oak Park, 30 N.E.2d 58, 63 (Ill. 1940)).

45. *Compare id.* at 841 (stating the period one needs to adversely possess chattels in Illinois for a successful adverse possession claim is five years), *with* D'Angelo v. McNutt, 868 A.2d 239, 242 (Me. 2005) (stating the period necessary to successfully claim adverse possession of real property in Maine is 20 years).

46. M. C. D., Annotation, *Rule That Adverse Possession of Successive Holders May Be Tacked, in Determination of Period of Limitation, as Applicable to Chattels*, 135 A.L.R. 711 (1941).

47. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful

into law the first copyright protections in 1790 with the purpose of protecting authors' and inventors' exclusivity for their works.[48] The idea was to secure the individual inventors and authors of these works in science and the arts from competing claims of ownership.[49] Essentially, Congress did not manifestly alter the state of copyright law from 1790 to 1909, when Congress updated the law because of the new technologies of "motion pictures and sound recordings."[50] Though many meetings and discussions took place, another major revision did not take place in copyright law until 1976 when, again, new technologies were becoming ubiquitous and exemplified the outdated nature of the copyright law.[51] The revision on September 30, 1976, is the framework of today's modern copyright law.[52] Congress's stated purpose in updating the law was to generally revise the 1909 law and allow the copyright protections for certain modern works such as cable television, sound recordings, and designs.[53] The most recent revision of the copyright law was in 2005; though still using the framework of 1976, Congress provided for more stringent protections, especially in the realm of motion pictures.[54]

IV. THE CURRENT COPYRIGHT LAW

The 1976 revision, discussed above, made registration of the copyright, and thereby notice of the true owner of the copyright to those who might want to use the copyright, permissive, where under the 1909 Act, registration was mandatory in order to be afforded any copyright protections.[55] Importantly, the current copyright law explicitly preempts all common law and state statutes, meaning the former copyright laws that governed under state law and through the application of state common law are no longer

Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

48. H.R. REP. NO. 94-1476, at 47 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5660.

49. *Id.*

50. *Id.* (discussing Congress's 1909 revision).

51. *Id.* at 48–49.

52. *Id.* at 46.

53. *Id.* at 48–49.

54. H.R. REP. NO. 109-33(I), at 1–2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 220, 220–21.

55. *Compare* 17 U.S.C. § 408 (2012) ("[R]egistration is not a condition of copyright protection."), *with* Copyright Act of 1909, Pub. L. No. 60-349, § 9, 35 Stat. 1075, 1077 ("[A]ny person entitled thereto . . . may secure copyright for his work by publication thereof with the notice of copyright required by this Act . . . .").

good.[56] This preemption was reasoned on the grounds that a unitary federal system was needed to reverse "the present anachronistic, uncertain, impractical, and highly complicated dual system."[57] The 2005 revision did not change these two important provisions.[58]

Today, a copyright by an individual author is protected for the life of the author plus 70 years, whereas a work that was either done for hire (for a business) or anonymously is protected for a straight 95 years.[59] In the 1976 Act, a copyright by an individual author lasted for 50 years plus the life of the author, and a work for hire lasted for 75 years.[60] This was changed in 1998 with a stated purpose of conforming U.S. copyright law to copyright law of the European Union, which in 1998 included the protection of 70 years plus the life of the author for individually authored works.[61] From 1962 to 2001, Congress extended the time for which a copyright may be protected 11 times.[62] Contrary to the stated purpose of the 1998 extension, which was to conform to international standards for copyright terms, many observers at the time, and still to this day, remark that the extensions of the term of the copyright, especially the 1998 extension, were to protect existing copyrights and to afford protection extending beyond the previous period, which is evidenced by the fact that the various acts have retroactive applicability.[63] In order to win a copyright infringement case, the complaint has to plead only two things: (1) the plaintiff is the owner of a valid copyright and (2) that copyright was copied.[64] The plaintiff does not have to plead that the

56. 17 U.S.C. § 301(a) (2012) (stating "all legal or equitable rights" equivalent to the copyrights created under the Act, whether before enactment or after, are to be the sole jurisdiction of this Act. "[N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."); *see also* Gee v. CBS, Inc., 471 F. Supp. 600, 654–55 (E.D. Pa.), *aff'd*, 612 F.2d 572 (3d Cir. 1979) (applying New York and Pennsylvania state adverse possession and choses in action law to copyright claims).

57. H.R. REP. NO. 94-1476, at 129.

58. *See* Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (showing no alterations to 17 U.S.C. § 301 or § 408).

59. 17 U.S.C. § 302(a), (c).

60. Design Protection Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

61. H.R. REP. NO. 105-452, at 4 (1998).

62. Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001).

63. *Id.*

64. John Wiley & Sons, Inc. v. Golden, No. 14-942 (AET), 2015 WL 716880, at *8 (D.N.J. Feb. 19, 2015) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)).

copyright is registered, which would give notice to the public that it is owned. The continual extension of the protection, during which registration is not needed to be afforded protection, runs absolutely contrary to the ideals of fairness and certainty discussed above.

The original 1976 Act provides that an individual's copyright cannot be taken or transferred by any governmental organization or official.[65] This is in contrast to the general rule, which is that copyrights are freely transferrable; though the statute particularly states that in the event of intestate succession, copyrights transfer as if they were personal property (i.e. chattels).[66] Arguably then, outside the context of intestate succession, copyrights that are transferred are not thought of as personal property; however, the statute does not say what the medium of that transfer is, only that the "ownership" can be transferred.[67]

Under current intellectual property law, copyrights are the one form of intellectual property that do not have some sort of activity requirement.[68] Under federal law, trademarks are defined in part as an item one intends to "use in commerce," thus the status as a trademark is lost when the definitional "use in commerce" is no longer present.[69] Similarly, trade secrets usually have some form of active protection involved because their secrecy has to be maintained.[70] Furthermore, the term of the copyright is not as limited nor as short as a patent, which is subject to more stringent requirements to start with, and after meeting those stringent requirements,

65. Design Protection Act § 201(e); *see also* Act of Nov. 6, 1978, Pub. L. No. 95-598, § 313, 92 Stat. 2549, 2676 (amending the original language from the 1976 Act, codified in 17 U.S.C. § 201(e), to allow for a limited exception in the case of bankruptcy proceedings).

66. 17 U.S.C. § 201(d)(1) (2012) (stating "may be bequeathed by will or pass *as personal property*" (emphasis added)).

67. *See id.*

68. *See* Winstead v. Jackson, 509 F. App'x 139, 143 (3d Cir. 2013) (recognizing all that is needed for a claim of infringement on a copyright is that the plaintiff is the owner of the copyright and that it has been copied in some way).

69. *See* 15 U.S.C. § 1127 (2012); *see also* Electro Source, LLC v. Brandess-Kalt-Aetna Grp., Inc., 458 F.3d 931, 936 (9th Cir. 2006) (detailing the use-it-or-lose-it aspect of trademark law).

70. *See, e.g.*, CAL CIV. CODE § 3426.1(d) (West 2018) (defining trade secret as something whose secrecy is key to economic value and as information that is subject to reasonable secrecy efforts); IOWA CODE § 550.2(4)(b) (2017) (defining a trade secret in part by being "subject [to] efforts that are reasonable under the circumstances to maintain its secrecy").

a patent is only protected for 20 years—though those 20 years may be extended if more stringent conditions are met.[71]

The next Part of this Note discusses the benefits and process by which the doctrine of adverse possession can, and should, be applied to copyrights. However, it is important to note a significant provision of the current copyright law that some opponents to this Note's argument may argue provides equivalent flexibility—the fair use doctrine.[72] The fair use doctrine is a statutory scheme that allows a non-owner of a copyrighted work to invade the exclusivity of that copyright.[73] The statute provides four factors that must be considered: "(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."[74] For a number of reasons, fair use is not an alternative to adverse possession. First, to constitute a fair use, the otherwise infringing use likely cannot be commercial in nature.[75] Removing commercial use from an otherwise better use of a copyright is antithetical to economic efficiency—it is economically inefficient. Second, and most importantly, this several factor test is unequivocally uncertain.[76] While fair use may be fair for noncommercial uses, it is uncertain, economically inefficient, and unfair for commercial uses.

V. APPLYING THE ADVERSE POSSESSION DOCTRINE TO COPYRIGHT LAW

A. *Domain-Name Squatting and Congress's Response*

Congress has previously recognized the value of economic efficiency as a means to take the lawful property of others away. In particular, Congress did so when it enacted the Anticybersquatting Consumer Protection Act,

71. 35 U.S.C. § 154(a)(2) (2012).

72. *See* 17 U.S.C. § 107 (2012).

73. *See id.* (providing for a scheme allowing what would otherwise be an infringing use).

74. *Id.*

75. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

76. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." (citing *Harper & Row, Publishers, Inc.*, 471 U.S. at 560)).

which statutorily mandates that a person cannot buy a domain name and then essentially sit on it until it has sufficient economic value to sell.[77] Congress made an important distinction in domain-name squatting by requiring certain familiarity of the domain name and bad faith, neither of which is necessary for current adverse possession application.[78]

The Lanham Act, which deals with the misuse of trademarks, allows for a similar remedy as adverse possession would afford. Under the Act, frequent and open use of a trademark by the public, such that the trademark becomes generic, allows the protection to dissipate from that trademark.[79] While the title to the trademark does not transfer as it would under adverse possession, the protections afforded to the owner who let the trademark be used so publicly vanish as they would under adverse possession.[80] This shows a willingness on the part of Congress to uphold the tenets of economic efficiency and certainty in intellectual property.

B. *Common Law*

1. *Federal Courts, Adverse Possession, and Copyrights*

As the *Advance Magazine Publishers Inc. v. Leach* court stated, "No court has decided whether the doctrine of adverse possession applies to intellectual property since the revision of the Copyright Act in 1976."[81] While that court dismissed the claim of adverse possession due in part to its novelty,[82] the court in *Disney Enterprises, Inc. v. Entertainment Theatre Group* found adverse possession in copyright law to be helpful in discussing issues of ownership and infringement, leaving the door open to

77. 15 U.S.C. § 1125(d) (2012).

78. *See id.*

79. Daniel J. McFeely, Note, *An Argument for Restricting the Patent Rights of Those Who Misuse the U.S. Patent System to Earn Money Through Litigation*, 40 ARIZ. ST. L.J. 289, 318 n.159 (2008).

80. *Compare id.*, *with* Gee v. CBS, Inc., 471 F. Supp. 600, 656 (E.D. Pa.), *aff'd*, 612 F.2d 572 (3d Cir. 1979) (citing Patton, *supra* note 41, § 15.1 et seq.) (holding that one of the elements for adverse possession, as applied to copyrights, would require the possession to be "open" and "notorious," such that it gives notice to the true owner to pursue a claim to regain their property).

81. Advance Magazine Publishers Inc. v. Leach, 466 F. Supp. 2d 628, 635 (D. Md. 2006).

82. *Id.* at 635–37 (recognizing a claim for adverse possession under the 1976 Act is a novel claim but ultimately ruling against that claim on grounds of preemption and the operations of the current act).

applicability.[83] The *Disney Enterprises, Inc.* court recognized this applicability because of the messy possibility of retroactive licenses that would render suits for infringement impossible and absurd.[84] Copyrights, according to the court, should serve the public in order to enrich everyone, and as such, clear and certain lines are needed as to who owns the copyright and as to other features of copyright law.[85] While adverse possession has not yet been extended to intellectual property, doing so would help balance uncertainty in stale claims, much the same as adverse possession does for real property, which would provide the kind of stringent boundaries around copyright law for which the D*isney Enterprises, Inc.* court argued.[86] Importantly, a federal court has already recognized the applicability of adverse possession to copyrighted material, albeit before the 1976 revisions took effect.[87]

2. Gee v. CBS, Inc.*: A Case Study*

In *Gee v. CBS, Inc.*, the court examined the exact issue of the applicability of adverse possession of chattels to copyrights.[88] This case is emblematic of how courts across the nation may deal with claims of adverse possession of copyrights if the changes suggested later in this Note were in effect, as they essentially were in 1979 when this case was decided. In *Gee*, the court was dealing with musical recordings of Bessie Smith made in the 1920s and 1930s.[89] Obviously, the 1976 Copyright Act did not apply at that time nor did it apply to the re-recordings made in the early 1970s.[90] While there were many claims asserted by the plaintiff in *Gee*, the court considered whether adverse possession could apply and how it would apply in the case at hand.[91]

For the *Gee* court, it was important to emphasize that adverse possession is backed by a policy that a limit should exist for when someone

83. Disney Enters., Inc. v. Entm't Theatre Grp., No. 13-5570, 2014 WL 5483487, at *8 n.8 (E.D. Pa. Oct. 30, 2014).

84. *Id.* at *8.

85. *Id.* at *8 n.8 (quoting Zuill v. Shanahan, 80 F.3d 1366, 1370 (9th Cir. 1996)).

86. *See* McFeely, *supra* note 79, at 318.

87. Gee v. CBS, Inc., 471 F. Supp. 600, 654 (E.D. Pa.), *aff'd*, 612 F.2d 572 (3d. Cir. 1979).

88. *Id.* at 653–55.

89. *Id.* at 610.

90. *See id.* at 611.

91. *Id.* at 653.

can claim superior title to an item—in essence the idea of certainty and fairness.[92] A dispute existed as to whether the copyright in question was formed.[93] It was the way Bessie Smith performed the song, her "style and manner," that was ultimately ruled to be protected as a "chose in action."[94] A chose is a general term for a personal item, whether tangible or intangible.[95] A chose in action is an in personam right, based in property, to recover an item.[96]A chose in action can basically only be exercised through action, as no one can physically possess an intangible chose in action.[97] Because there was no federal prohibition on applying state law to copyrights, the court looked at both New York and Pennsylvania law to determine the applicability of adverse possession to choses in action. [98] The court found New York expressly permitted it and Pennsylvania likely would as well.[99] The uneasy nature of whether Pennsylvania courts would apply adverse possession to choses in action was quashed by the Pennsylvania Supreme Court when it said, "At common law, rights in a literary or artistic work were recognized on substantially the same basis as title to other property."[100] Importantly, the court said, "We find nothing in the case law . . . which requires limiting the doctrine [of adverse possession] to tangible chattels."[101]

While the classification is important, *Gee* also provides a framework for how to assess claims of adverse possession as they relate to copyrights. This framework would be the guide for courts across the nation. The court applied the elements of (1) open and notorious; (2) actual; (3) exclusive; (4) hostile; (5) continuous; (6) under a claim of right; and (7) for the proscribed

92. *Id.* (quoting RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 16, at 33 (2d ed. 1955)) (recognizing that public policy disfavors "disturbing the existing situation by the presentation of ancient rights, concerning which proof may be difficult because of faulty recollection and the absence of essential witnesses").

93. *Id.* at 610–11.

94. *Id.* at 654–55.

95. *Chose*, BLACK'S LAW DICTIONARY (10th ed. 2014).

96. *Chose in Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

97. *Gee*, 471 F. Supp. at 647, 654 (quoting BROWN, *supra* note 92, § 7, at 11). *But see* Coultas v. Liberty Mut. Fire Ins. Co., No. 3:15-cv-0237-PK, 2015 WL 3276003, at *5 (D. Or. May 18, 2015) (categorizing a chose in action the same as a personal chattel, which includes intellectual property such as a copyright).

98. *Gee*, 471 F. Supp. at 654.

99. *Id.*

100. *Id.* at 655 (quoting Waring v. WDAS Broad. Station, Inc., 194 A. 631, 634 (Pa. 1937)).

101. *Id.* at 654.

period.[102] The proscribed period was three years for New York or six years for Pennsylvania, and adverse possessors would have to show their possession was uninterrupted throughout this entire period.[103] The elements were applied just as they have been applied to adverse possession to chattels throughout the years, as discussed previously in Part II.C, where essentially the adverse possessor must have possessed the property openly to give notice to the actual owner.[104] The *Gee* court recognized the issue of how to measure the continuous element when it gave possible measurements, such as how long money was received for the use of the property, the length of uninterrupted public listings asserting the adverse possessor as the owner, and the length of time that the use of the property was available for distribution.[105] Hostile, as a factor for adverse possession, does not mean there must be bad faith but merely that the use of the copyright is not permissive from the true owner.[106] In *Gee*, the court found the defendant's use of the copyright had met the elements prior to the statutory time period and continued past that period; thus, the defendant had acquired that copyright through adverse possession.[107]

Admittedly, no federal court that has had the opportunity to examine the applicability of adverse possession to copyrights since the *Gee* decision has extended its ruling.[108] The likely reasoning may be that the *Gee* court was dealing with older copyrights, and as such the principles were not applicable

102. *See id.* at 655 (quoting Priester v. Milleman, 55 A.2d 540, 543–44 (Pa. Super. Ct. 1947)).

103. *Id.* at 656.

104. O'Keeffe v. Snyder, 416 A.2d 862, 871 (N.J. 1980); *see also Gee*, 471 F. Supp. at 655 (quoting Patton, *supra* note 41, § 15.1, at 768) (discussing that the open element, sometimes combined with notorious, means giving notice to the original owner so the owner can initiate actions to stop the adverse possession and recover their property).

105. *Gee*, 471 F. Supp. at 655–56.

106. *Id.* at 655 (stating "hostility" simply means "the true owner has not consented to possession").

107. *Id.* at 657.

108. Picture Patents, LLC v. Terra Holdings LLC, Nos. 07 Civ. 5465(JGK)(HBP) & 07 Civ. 5567(JGK)(HBP), 2008 WL 5099947, at *3 (S.D.N.Y. Dec. 3, 2008); Advance Magazine Publishers, Inc. v. Leach, 466 F. Supp. 2d 628, 634–37 (D. Md. 2006) (calling an argument to extend the ruling similar to *Gee* "novel," but ultimately holding that the modern version of the Copyright Act only allows for transfers of copyrights as an "operation of law" if it is a voluntary transfer (or the result of a bankruptcy action)). *But see* Modeliste v. Sehorn, No. 2007-CA-0297, 2008 WL 8917564, at *3 (La. Ct. App. Oct. 22, 2008).

given the modifications to the U.S. copyright law.[109] Another possible reasoning for the lack of extension is that courts and copyright holders alike are afraid of the message that allowing adverse possession may send, namely that it encourages bad faith, which limits the effect the doctrine has on fairness.[110] Bad faith in this context is intended to mean actual theft, where an individual actually steals the personal property from the original owner and uses adverse possession to legitimize their criminal actions.[111]

However, these concerns are limited by the fact that the ability to prove many of the elements necessary for adverse possession is extremely limited due to their intangible nature.[112] Even Justice Handler, who dissented in *O'Keeffe v. Snyder*, argued that while the possibility for allowing thievery to happen exists, the parties in a legitimate action for adverse possession should be allowed to argue their case on the merits to establish who has an actual entitlement, rather than basing the arguments in such a case solely off of a statute of limitations argument.[113] Though a resolution on the merits would not be as certain as a statute of limitations, the ability of the parties to argue their case on the merits, where the true owners may argue their case and the adverse possessors may argue theirs, is certainly more fair than disallowing any claim by the adverse possessors.[114]

The foregoing discussion in large part is an application of both common and statutory state law. While it is true "[t]here is no federal general common law," adverse possession is largely a doctrine of state statutes as applied by courts and thus would not require a transition to a federal common law, but rather a reworking of federal statutes.[115]

109. *See Gee*, 471 F. Supp. at 610.

110. O'Keeffe v. Snyder, 416 A.2d 862, 878 (N.J. 1980) (Handler, J., dissenting).

111. *Id.* (suggesting the majority holding would "stimulate and legitimize art thievery").

112. *See Modeliste*, 2008 WL 8917564, at *3.

113. *O'Keeffe*, 416 A.2d at 878 (Handler, J., dissenting).

114. *See id.* (arguing the adverse possessor should be entitled to all legal defenses and equitable claims).

115. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); *see* Emily Doskow, *State-by-State Rules on Adverse Possession*, NOLO, http://www.nolo.com/legal-encyclopedia/state-state-rules-adverse-possession.html (last visited Aug. 3, 2018) (providing a comprehensive list of all the state codifications of adverse possession, exemplifying the statutory nature of adverse possession).

C. *Fixing the Current Law*

For Congress to afford economic efficiency, fairness, and certainty to copyright law—in a similar fashion as it has for the transferability of copyrights—Congress must simply amend the copyright statutes. The first amendment would be to take copyrights out of the exclusive jurisdiction of the federal courts, as was done with trademarks.[116] All that would be required for this amendment is to remove the word *copyright* from the second sentence of 18 U.S.C. § 1338(a) so it would read: "No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents [or] plant variety protection . . . ."[117] As mentioned above, the federal courts do not have common law of their own.[118] As such, for the common law elements of adverse possession to apply, state and federal courts must be able to apply state common law.[119] Congress should also amend the statute to take away the provision expressly preempting all common law, state statutory law, and former copyright laws.[120] This would require a simple repeal. While the idea of a repeal is simple, the repeal would still need to follow the regular legislative process, which often times can be arduous for even the most uncontroversial pieces of legislation.[121] However, the interest groups in Congress, especially those in the motion picture arena, might erect nearly immovable barriers to getting these repeals.[122] These simple amendments would allow the reasoning

116. 28 U.S.C. § 1338(a) (2012) (providing for original jurisdiction over trademarks, as well as patents and copyrights, but not exclusive jurisdiction, as it has over copyrights and patents).

117. *Id.*

118. *See supra* note 115 and accompanying text.

119. *See Erie R.R. Co.*, 304 U.S. at 78.

120. 17 U.S.C. § 301(a) (2012).

121. *See Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics (last visited Aug. 14, 2018) (showing 3 percent of the introduced legislation in the 114th Congress was enacted into law and just 2 percent of bills filed in the most recent 115th Congress were enacted into law); *see, e.g.*, To Designate the Facility of the United States Postal Service Located at 324 West Saint Louis Street in Pacific, Missouri, as the "Specialist Jeffrey L. White, Jr. Post Office," H.R. 6373, 114th Cong. (2016) (showing this proposed bill to rename a post office was introduced but never considered).

122. Jonathan Schwartz, Note, *Will Mickey Be Property of Disney Forever? Divergent Attitudes Toward Patent and Copyright Extensions in Light of* Eldred v. Ashcroft, 2004 U. ILL. J.L. TECH. & POL'Y 105, 119–20 (discussing the role of Disney and other interest groups in the 1998 extension of the copyright term; it is only rational to believe a shift in a system that favors the copyright holders would meet equal influence

espoused in *Gee* to become persuasive again, allowing a court, such as the *Advance Magazine Publishers Inc.* court, to say it has dealt with the issue and the issue is properly decided under adverse possession.[123]

VI. CONCLUSION

Adverse possession is meant to express society's goals of economic efficiency, fairness, and certainty.[124] The ability to claim superior title to property when years have passed while that property has been used as the adverse possessor's own repudiates these foundational principles. Copyrights, due to the continued extensions, last for a very long time and have the potential for great economic impact.[125] The goal of the 1976 revisions to the Copyright Act was to ensure certainty in copyright ownership, a goal that can be further ensured with the application of adverse possession.[126]

Orphan works are not currently being used to their best economic potential. Due to the lack of registration requirements, any person who wants to "adopt" an orphan work, and give it worth, does so at the risk of litigation and a cessation of the right to use that work.[127] The adverse possessor is still at risk even if the adverse possessor cannot, after doing his or her due diligence, find the true owner. Congress can make this system more fair, more certain, and more economically efficient by sending copyrights back to the states and allowing state law to govern them, as they do with all other forms of property. The necessity of economic efficiency and certainty in this arena far outweighs claims of perceived unfairness. After all, a copyright owner only needs to adequately defend the copyright, and adverse possession will not be an issue.

Notice, via registration, of a copyright's existence does not have to be given to the public for the copyright holder to exercise copyright protections

from these groups).

123. *See* Advance Magazine Publishers Inc. v. Leach, 466 F. Supp. 2d 628, 635 (D. Md. 2006); Gee v. CBS, Inc., 471 F. Supp. 600, 657 (E.D. Pa.), *aff'd*, 612 F.2d 572 (3d Cir. 1979).

124. *See Gee*, 471 F. Supp. at 653; Canjar v. Cole, 770 N.W.2d 449, 454 (Mich. Ct. App. 2009) (citing Sprankling, *supra* note 23, at 537).

125. Disney Enters., Inc. v. Entm't Theatre Grp., No. 13-5570, 2014 WL 5483487, at *8 n.8 (E.D. Pa. Oct. 30, 2014) (quoting Zuill v. Shanahan, 80 F.3d 1366, 1370 (9th Cir. 1996)).

126. *Id.* (quoting *Zuill*, 80 F.3d at 1370).

127. 17 U.S.C. § 408 (2012).

against the public.[128] That is not fair to the public. An unregistered copyright, with an unknown owner, still receives protection for at least 70 years, leaving the ownership unknown and the potential for that work dormant.[129] That is uncertain. The Constitution empowers copyright protection "[t]o promote the Progress of Science and useful Arts."[130] The current system inhibits progress. Adverse possession promotes progress in fairness, economic efficiency, and certainty.

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128. *See id.*

129. *See* 17 U.S.C. § 302(a).

130. U.S. CONST. art. VIII, § 8, cl. 8.

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