Adverse Possession of Copyright: A Proposal to Complete Copyright’s Unification with Property Law

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I. INTRODUCTION

By virtue of the Constitution, Congress is empowered to secure for intellectual creators an economic entitlement of limited duration in their works. Congress has exercised this power since enacting the first federal copyright statute in 1790. Despite existing in one form or another for over 200 years, however, American federal copyright law enters the 21st century at the center of a fierce, though relatively silent, controversy centered on the scope of protection enjoyed by copyright owners.

The root cause of this controversy is technological development: namely, the cheap creative power of digital technology coupled with the ease of content distribution provided by the Internet. Naturally, this change has threatened the bottom line of content

2. Copyright Act of 1790, ch. 15, 1 Stat. 124.
3. Magliocca, supra note 1, at 1045.
distributors and copyright owners with businesses built on traditional retail distribution.\footnote{Id. at 1048-49.}

In the face of this technological change, and the distributors’ resulting insecurity, Congress has sought to strengthen the copyright owners’ position.\footnote{Id. at 1050.} Two statutes enacted in 1998, the Copyright Term Extension Act\footnote{Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).} and the Digital Millennium Copyright Act,\footnote{Digital Millennium Copyright Act, Pub. L. No. 105-304, § 502, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. § 512 (2000)).} go a long way toward accomplishing this goal by extending the duration of protection by 20 years and criminalizing efforts to bypass technological protections on copyrighted material.\footnote{Magliocca, supra note 1, at 1050-51 (discussing the expansion of copyright owner rights).}

Critics of an expanded copyright regime point out that “more copyright protection is not always better.”\footnote{Id. at 1044.} Overprotection stifles creativity by removing too much expression from the public domain in the name of security for copyright owners.\footnote{Id.} Further, overprotection runs the risk of empowering copyright owners “to bar expression that they do not like.”\footnote{Id. at 1051.} At the core, however, critics are uncomfortable with what they see as a recent tendency of the law to view copyright as a form of property rather than a statutory privilege.\footnote{See Magliocca, supra note 1, at 1051-52 (describing the copyright-as-property analogy as “misguided” and copyright as “in a deepening crisis”).} No doubt, these critics believe that a return to what they perceive as the “traditional” view of copyright, as a statutory privilege rather than as property, would solve many problems.\footnote{Id. at 1370.}

This Note argues that the inequities present in copyright law do not stem from it tracking “standard” property law too closely, but rather that the distance separating copyright from property is a cause of inequity. To address this problem, this Note advocates the judicial adaptation of the doctrine of adverse possession to copyright. Part II of this Note traces the history of viewing copyright as a form of property. This Note introduces the unique qualities of an intangible form of property, such as copyright, and reconciles these qualities with tangible property. The discussion of copyright as property concludes with a brief review of its treatment by various American legal institutions.

Part III of this Note explains the doctrine of adverse possession as well as the philosophies and theory underlying it. This section also introduces and outlines the case of Zuill v. Shanahan\footnote{Zuill v. Shanahan, 80 F.3d 1366 (9th Cir. 1996) (rejecting a claim of co-ownership after the statutory period elapsed).} in which the court expressed approval for applying a statute of limitations to copyright co-ownership claims.\footnote{Id. at 1370.} Following this, Part III proposes an adaptation of adverse possession to copyright, working through the traditional elements of adverse possession and illustrating their function in copyright using the fact pattern of Zuill. This Note concludes in Parts IV and V by urging judicial acceptance of adverse
possession as a valid claim in the context of copyright.

II. BACKGROUND

A. The Historical Roots of Copyright as Property

The notion of copyright as a form of property is “deeply rooted in Anglo-American law.” As early as 567 A.D., the Irish King Diarmaid employed the theory to assist him in resolving a controversy over a copied psalm book. Treating the copied book like the offspring of a cow, the King ruled that any copies derived from the original belonged to the owner of the original.

Despite the allure of this tale, it is certain that King Diarmaid did not consider the implications of his ruling on copyright law. As Mark Rose writes, “copyright—the practice of securing marketable rights in texts that are treated as commodities—is a specifically modern institution” largely growing out of “the development of the advanced marketplace society in the seventeenth and eighteenth centuries.”

Rose’s economic perspective on early copyright development finds confirmation in the public reaction of the Stationers’ Company to the abolition of the Court of Star Chamber in 1641. The Stationers’, threatened with the loss of their lucrative printing monopoly, published a pamphlet lamenting the national danger posed by unrestricted printing. Though their arguments may have been questionable, the nature and timing of the Stationers’ tirade illustrates an early linking of economics and the legal protection of intellectual property.

It is important to note, however, that the nature of intellectual property protection in the 17th century was regulatory, an aspect of censorship, rather than an aspect of property law.

The theoretical basis underlying protection of intellectual works shifted in the early 18th century. Contemporary writers, such as Daniel Defoe and Joseph Addison, published a series of works rejecting the contemporary regulatory regime and speaking of
authors’ works as their property.\textsuperscript{26} In his writing, Addison argued that authors deserved as much a property right in their intellectual works as artisans obtained in their physical creations.\textsuperscript{27}

The foundation of Addison’s argument resonated strongly with John Locke’s theory of natural rights.\textsuperscript{28} “Locke began with the assumption that people had a natural right of property in their bodies. Since people owned their bodies, Locke reasoned that they also owned the labor of their bodies and, by extension, the fruits of that labor.”\textsuperscript{29} Locke’s reasoning easily led to the implication that authors, by virtue of their intellectual labor, gain a property right in their creative works.\textsuperscript{30}

The culminating product of this theoretical discourse was the Statute of Anne, which provided authors the exclusive right to print their works.\textsuperscript{31} The symbolic importance of this legislation was immense: its passage “marked the divorce of copyright from censorship and the reestablishment of copyright under the rubric of property rather than regulation.”\textsuperscript{32} While there is question as to whether the Parliament intended such a radical shift,\textsuperscript{33} British courts from the era began to apply a property model to copyright.\textsuperscript{34}

American lawmakers, not shy about importing Lockean theory, joined the British in embracing the notion of copyright as property.\textsuperscript{35} Many early state copyright statutes “expressly acknowledged the goal of ‘securing to authors’ a property right in their work.”\textsuperscript{36} The notion of copyright as property “was embraced by both the framers of the United States Constitution and the drafters of subsequent copyright legislation.”\textsuperscript{37} In defining the scope of copyright, the Supreme Court in \textit{Wheaton v. Peters},\textsuperscript{38} expressly, and bluntly, stated, “a man is entitled to the fruits of his own labours . . . .”\textsuperscript{39} Other American courts have “analogized an author’s copyright to many disparate forms of tangible property—from land, to cattle to horses.”\textsuperscript{40} Taken as a whole, these sources strongly support the proposition that American law has historically viewed copyright as a form of property.

\begin{itemize}
\item \textsuperscript{26} \textit{Id.} at 34-37.
\item \textsuperscript{27} \textit{Id.} at 36 (quoting \textsc{Joseph Addison, The Tatler} 101 (Donald F. Bond ed., 1987)).
\item \textsuperscript{28} Ciolino & Donelon, supra note 16, at 365; Alfred C. Yen, \textit{Restoring the Natural Law: Copyright as Labor and Possession}, 51 OHIO ST. L.J. 517, 523 (1990) (addressing the interaction of Lockean philosophy and copyright).
\item \textsuperscript{29} Yen, \textit{supra} note 28, at 523.
\item \textsuperscript{30} \textit{Id.} at 524.
\item \textsuperscript{31} Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), \textit{reprinted in} H. RANSON, \textsc{The First Copyright Statute} 109-17 (1956).
\item \textsuperscript{32} \textit{Rose}, \textit{supra} note 19, at 48.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} Ciolino and Donelon specifically refer to British courts equating copyright infringement with trespass, thereby implicitly equating copyright with property. Ciolino & Donelon, \textit{supra} note 16, at 366.
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.} at 367.
\item \textsuperscript{37} \textit{Id.} at 366-67; \textit{contra} Magliocca, \textit{supra} note 1, at 1019 (asserting that the framers viewed copyright as a disagreeable, though necessary, monopoly).
\item \textsuperscript{38} \textit{Wheaton v. Peters}, 33 U.S. (8 Pet.) 591 (1834) (holding that no federal common law of copyright existed).
\item \textsuperscript{39} \textit{Id.} at 595.
\item \textsuperscript{40} Ciolino & Donelon, \textit{supra} note 16, at 368 (citations omitted).
\end{itemize}
B. Addressing the Unique Aspects of Intangible Property in the Property Law Framework

At first blush, the idea of copyright as a form of property seems difficult to conceive, and may seem patently erroneous. After all, “[a]n intellectual creation differs radically from land and chattels.”41 The most significant, or at least the most basic, difference “is that intellectual property lacks the tangible qualities [usually] associated with . . . property.”42 A parallel issue is that possession of the underlying matter protected by copyright, information, is nonrivalrous.43 Two, three, or a million people could possess the same piece of information without affecting other possessors in any way.44

Despite these real differences, the law has long dealt with copyright as a form of property with little or no hesitation.45 As Professor Wendy Gordon explains in her article discussing copyright, “property is not a matter of touchable ‘things’ but rather a set of rules governing human relations in regard to resources . . . .”46 This set of rules defines property owners as those having rights “to exclude other people from the resource,” the power “to transfer the property to others,” and the right to “use the property to suit [their] purposes.”47 Though very broad, “[p]roperty owners’ rights to exclude, powers of transfer, and privileges of use are not unlimited.”48 Legal mechanisms such as the rule against perpetuities, adverse possession, the law of nuisance, and eminent domain place limits on the rights of property owners.49

The Copyright Act of 1976 is the legal bedrock of modern American copyright law.50 Section 106 of the Act grants a series of exclusive rights to copyright owners to use their copyrighted materials in particular, though nearly all encompassing, ways.51 Section 106 also grants copyright owners the power to authorize others to exercise their rights.52 As Professor Gordon indicates, these grants in the 1976 Act create a legal ownership system analogous to that which exists in tangible property.53 Copyright owners, by virtue of the statute, have the ability to exclude others from their copyrighted material,54 the power to transfer their copyrighted material, and wide latitude in the use of their copyrighted material.55

41. Breyer, supra note 18, at 288.
44. Id. at 686.
46. Id.
47. Id. at 1354.
48. Id. at 1361.
49. Id. at 1361, 1362.
53. Gordon, supra note 45, at 1365; see also Litman, supra note 42, at 971.
54. The power to exclude refers to the copyrighted material rather than a physical embodiment of it, such as a book.
55. Gordon, supra note 45, at 1365.
Despite the consistency between the nature of copyright and property in a legal sense, the practical issues relating to its intangibility remain. In a certain sense, “copyright law, unlike tangible property law, suffers from a severe lack of demarcation.”

In the context of tangible property, specifically real property, physical boundaries, such as fences, provide notice of the extent of an owner’s property rights. Works of authorship, the subject matter of copyright, do not bear such blatant lines of ownership.

As Professor Gordon explains, however, “[c]opyright provides its own boundaries which, by and large, substitute well for physical boundaries . . . .” First, copyright law requires that a work, in order to receive the benefits of copyright, must be “fixed” in a “tangible medium of expression.”

Thus, an owner of intangible property, in order to receive the benefits of protection, must render it tangible, thereby creating a perceivable boundary. Additionally, though a voluntary process, the Copyright Act creates significant litigation incentives for copyright owners to place marks of notice on their works.

The second form of boundary copyright law creates is the idea/expression dichotomy. General ideas, including broad themes, may be copied without violating the copyright owner’s rights, as copyright only protects an author’s original creative expression. Though applying this boundary is less clear-cut than its simplicity suggests, it nonetheless serves as a method of demarcation.

Finally, the limited set of rights granted by section 106 creates a boundary. For an owner to claim a violation of her intellectual property, she must be able to point to a right specified in section 106 “in regard to a protectable aspect of an original and ‘fixed’ work of authorship.” This is entirely analogous to violations of tangible property; an owner must show a violation of her protectable boundaries. Taken as a group, these three forms of boundaries, though applying to an intangible piece of property, describe an intellectual property system sufficiently “tangible” to function.

C. Criticisms of Copyright as a Form of Property

Many commentators find great fault in a system that views intangibles, such as copyright, as synonymous with tangibles. The first criticism leveled at viewing

57. Id.
58. Id. at 374-75.
59. Gordon, supra note 45, at 1380.
61. For instance, a copyright owner who applies proper notice eliminates a defendant’s ability to mitigate damages using an “innocent infringer” defense. 17 U.S.C. §§ 401, 402.
62. Gordon, supra note 45, at 1381.
63. Id. at 1382; 17 U.S.C. § 102.
64. Gordon, supra note 45, at 1382; 17 U.S.C. § 102(b).
65. See Litman, supra note 42, at 975.
67. Gordon, supra note 45, at 1383. Such exclusive rights include the right to copy, the right to prepare derivative works, the right of distribution, the right of public performance, the right of public display, and the right of public performance of sound recordings via digital audio transmission. 17 U.S.C. § 106.
68. Gordon, supra note 45, at 1383.
69. See Ciolino & Donelon, supra note 16, at 371 (describing the copyright-as-property analogy as
copyright as property is that the possession of intellectual property, unlike tangibles, is nonrivalrous. Nonetheless, the rights copyright owners enjoy, rights that contribute to the boundaries of their property, effectively eliminate such concerns. Multiple persons cannot intrude upon (or possess) a copyright owner’s rights without harming the owner’s rights. Thus, while copyright’s subject matter, information, may be nonrivalrous, copyright surely is not.

The second and third criticisms of viewing copyright as a full-fledged form of property focus on the intangibility of copyright and the difficulties of boundary setting. As to intangibility, “[p]roperty is not a matter of touchable ‘things’ but rather a set of rules governing human relations in regard to resources.” As to boundary setting, copyright may not physically separate parcels of ownership, but it does provide boundaries of its own.

A final major criticism lies in the argument that copyright supposedly imposes unique limitations on owners not consistent with property ownership. These allegedly unique limitations include the fair use doctrine, the limited duration of copyright, and the fact that copyright protects only expression and not ideas. Tangible property owners, however, are subject to several limitations on their ownership, limitations comparable in scope to that borne by copyright owners. Such limitations include adverse possession, the rule against perpetuities, the law of nuisance, zoning, and limitations on measures that property owners may take to exclude trespassers. Despite their restricting effects, these limitations on tangible property owners are “consistent with property ownership.” Such comparable limitations are no basis for disparaging copyright as a form of property.

D. The Acceptance of Copyright as a Form of Property

Despite these criticisms of viewing copyright as a form of property, American law has consistently treated it as such. In the courts, this treatment has taken the form of analogies between copyright and such disparate things as land, cattle, and horses. The
Supreme Court has gone so far as to hold that intellectual property is entitled to the protection of the “takings” clause. Moreover, the Copyright Act creates a property framework for works of authorship. Whatever the theoretical shortcomings of viewing copyright as a form of property, such shortcomings do not change jurisprudential reality. American law has a history of viewing copyright as property and continues to do so.

III. ANALYSIS

A. The Basic Tenets of Adverse Possession

The doctrine of adverse possession operates to bar a property owner from recovering property “held adversely by another for a specified period of time.” In its most common form, adverse possession takes place in the context of real property. Nonetheless, the property at issue in an adverse possession claim need not be real. To prevail on an adverse possession claim, a possessor must show that his possession was: (1) “actual,” (2) “open, visible, and notorious,” (3) “exclusive,” (4) “continuous,” and (5) “hostile and under claim of right.” It is important to note that the adverse possessor does not need a reasonable basis for claiming the property at issue to gain ownership.

The primary justification for adverse possession is economic efficiency. By “shifting ownership [to the adverse possessor] without benefit of negotiation or a paper transfer” the law treats the property at issue as abandoned. Put another way, “the owner who does not react to the adverse possession of his property for years is indicating that he does not value the property more than the cost of taking the minimum steps necessary to maintain his property right; that is the economic meaning of abandonment.”

The doctrine fosters and “require[s] diligence on the part of . . . [property] owner[s] and penalize[s] those who sit on their rights too long . . . .” In doing so it rewards a possessor “who is [likely] utilizing [the property at issue] more efficiently than the true theft of such property is no different from stealing a horse); Harms v. Cohen, 279 F. 276, 280 (E.D. Pa. 1922) (analogizing ownership of copyright to ownership of a cow)).

85. See supra Part II.B (discussing the similarities between copyright and property).
86. See supra Part II.A (tracing the development of copyright as a form of property).
88. See id. (describing adverse possession as operating on real property).
90. HOVENKAMP & KURTZ, supra note 87, at 55.
91. Id.
94. Id.
95. HOVENKAMP & KURTZ, supra note 87, at 54.
Adverse possession fosters economic efficiency by acting as a built in purgative of the property system that clears away the claims of itinerant or non-productive owners. The doctrine reflects a property system that frowns upon stagnation and inefficient hoarding.

As a further foundation, the expectation interests of the adverse possessor provide support for the doctrine. Once an adverse possessor occupies another’s property, a relationship of forbearance develops. The longer the adverse possessor holds the property, the longer the true owner forbears from taking legal action, the more right the adverse possessor has for viewing the property as his own. After a sufficient period has passed, it would be impermissible to disrupt the expectations of the adverse possessor. In this way, the doctrine serves to prevent impermissibly fickle behavior on the part of property owners.

B. Zuill v. Shanahan: A Foot in the Door for Adverse Possession of Copyright

Despite its role in promoting efficient property allocation, the adverse possession doctrine has received scant judicial attention in the area of copyright. An exception is the Ninth Circuit’s opinion in Zuill v. Shanahan. The Zuill court dealt with the application of “the copyright statute of limitations, 17 U.S.C. § 507(b), as applied to claims of co-ownership.” This case involved the Hooked on Phonics learning program. Zuill and Rossi had assisted Shanahan in the early phases of product development, composing and performing music to accompany the learning programs. In 1987, Shanahan presented a written agreement to his partners that identified himself as sole copyright owner and offered them each a small share of the profits. Zuill and Rossi were displeased with their share and refused the agreement. Negotiations ceased and Shanahan continued to market the product, which bore his name as sole copyright owner.

In 1991, after Shanahan’s efforts to market Hooked on Phonics became profitable, Zuill and Rossi sought a declaratory judgment that they were each one-third co-owners in the copyright to Hooked on Phonics. In addressing the claim, the court first rejected plaintiffs’ contention that the copyright statute of limitations does not affect co-
ownership rights. Zuill and Rossi protested that applying this statute of limitations “creates something like adverse possession to copyright ownership.” In response, the court stated: “We see nothing wrong with this resemblance. Copyright, like real estate, lasts a long time, so stability of title has great economic importance.” The court held that Zuill and Rossi’s claim was time barred. The Court’s holding is significant in that the court expressed approval for time barring the claims of copyright owners in a manner similar to adverse possession.

C. A Proposed Framework for Adverse Possession of Copyright

Legal thinkers have yet to develop a truly comprehensive and satisfactory framework for adverse possession of copyright. The one proposal currently on offer, authored by Constance Bagley and Gavin Clarkson, is defective in large part because it refuses to view infringing activity as a basis for adverse possession, relying instead on a thinly veiled permissive system. What follows is a proposal for adapting adverse possession to copyright bearing in mind its fundamental theoretical underpinnings in economic efficiency and the expectation interests of the adverse possessor. Each of the technical aspects of adverse possession will be adapted into a functional framework. To aid understanding, each section will apply its piece of the framework to the fact pattern of Zuill.

1. Actual Possession

In the sense of tangible property, actual possession merely refers to occupying and using the property as the average owner would. Transferring this concept to copyright, though not difficult, requires strict attention to the separation between copyright as a property right and the underlying material protected by copyright. Copyright owners do not have a property interest in the protected expression; they have a property interest in the power to control the protected expression. Put another way, when a copyright owner assigns the right to distribute her work, she is relinquishing one of the exclusive controls she holds over her protected expression rather than shifting any of the protected material underlying the copyright. This distinction may seem semantic, but it is crucial to applying adverse possession to intangible property.

This distinction in mind, an adverse possessor of a copyright would fulfill the actual possession requirement by actively using one or more of the interests provided by

110. Id. at 1369.
111. Id. at 1370.
112. Zuill, 80 F.3d at 1370.
113. Id. at 1371.
114. See Bagley & Clarkson, supra note 92 (proposing a system of adverse possession of intellectual property).
115. Id. at 370; see infra Part III.C.5 (arguing that copyright infringement is a prerequisite to meeting the hostility requirement of adverse possession).
116. See supra Part III.A (discussing adverse possession’s theoretical bases in detail).
117. See supra Part III.A (describing the traditional adverse possession requirements).
118. Zuill, 80 F.3d at 1366; see supra Part III.B (outlining the facts of Zuill).
119. HOVENKAMP & KURTZ, supra note 87, at 65.
copyright as the average owner would. Under the facts of the Zuill case, actual possession occurred when Shanahan proceeded with product development and marketing as though he were sole owner. Such total appropriation, however, is not required. Any affirmative act, such as unauthorized reproduction of a copyrighted work or unauthorized distribution, would fulfill the requirement since such acts clearly implicate and infringe exclusive rights of the copyright’s true owner.

2. Open, Visible, and Notorious

The open, visible, and notorious requirement of adverse possession ensures that a true owner, had he bothered to inquire, would discover the adverse possessor. No actual knowledge by the true owner is required, but the adverse possessor cannot conceal her possession. The justification for such a requirement is obvious; it would be patently unfair to strip a property owner of title without him having the chance to discover the threat he was under.

Copyright’s intangibility places copyright owners in a difficult position. The true owner of a copyright interest has neither an immovable land plot to check up on nor a distinct physical object to monitor. This physical reality implies that open, visible, and notorious possession cannot be as simple to achieve in copyright as it is in tangible property. At the same time, it would be unacceptable to allow copyright owners to escape adverse possession by exercising willful blindness over the possession of their property. A workable adaptation must account for the copyright’s ephemeral nature without overprotecting owners.

Adapting this requirement to copyright requires reference, once again, to the justifications underlying adverse possession. Adverse possession penalizes owners who fail to take the basic steps necessary to protect their property interest by compelling “the reallocation of . . . property to a higher valued use . . . .” Therefore, a correct adaptation would compel a copyright owner to remain reasonably cognizant of the integrity of his property in order to protect it. It follows that for an adverse possessor to fulfill the openness requirement her possession must be conspicuous enough to fall under a reasonably diligent owner’s radar.

The necessary level of conspicuousness, and the form it takes, will invariably differ based on the copyright interest at issue and the nature of the underlying protected material. For instance, open possession of the right to distribute a book would differ from open possession of the right to public performance of a motion picture. Generally, however, the requisite level of openness required of an adverse possessor to a copyright will be higher than it might be with a tangible form of property. The law cannot force copyright owners to take heroic efforts to protect their hard-to-monitor property; adverse possession promotes efficient property use, not wasted effort. An adverse possessor’s possession must be sufficiently open, visible, and notorious for the reasonably cognizant

120. See supra Part III.B (outlining the facts of Zuill).
122. HOVENKAMP & KURTZ, supra note 87, at 67.
123. Id. at 55, 67.
124. See supra Part III.A (discussing the theoretical justifications for adverse possession).
125. LANDES & POSNER, supra note 93, at 31.
copyright owner to detect. Referring again to the facts of Zuill, Shanahan’s possession fulfilled the openness requirement as soon as he presented Zuill and Rossi with an agreement indicating himself as sole copyright owner. Less direct, though no less open, was Shanahan’s marketing of the Hooked on Phonics program under his sole copyright. Both sets of behavior meet the openness requirement under the proposed framework.

3. Exclusive Possession

The exclusivity requirement of adverse possession poses some special considerations in any adaptation to intangible property. In the tangible sphere, the “requirement is not met if the owner and the adverse possessor both use the property.” In practice, however, the likelihood of simultaneous use of a given piece of tangible property is low due to physical realities. Copyrighted expression, on the other hand, is a nonrivalrous form of property that can easily be subject to simultaneous use.

Again, for adverse possession, attention must go to the distinction of copyright as a property interest separate from the expressive material it protects. The bundle of controls called copyright is the property interest at stake. Copyright is not nonrivalrous. An adverse possessor cannot possess one of the copyright controls without harming the interest of the true owner. Thus, adapting the exclusivity requirement requires nothing more than a steady grasp of copyright as a property form distinct from the underlying expressive material.

In its adapted form, an adverse possessor of copyright meets the exclusivity requirement on whichever right, or rights, she occupies that the true owner does not. For instance, if a copyright owner makes no affirmative use of his right to prepare derivative works, then an adverse possessor preparing derivative works would meet the exclusivity requirement under that particular right.

A further wrinkle in the exclusivity requirement is the possibility that two or more adverse possessors might occupy the same right at the same time. This wrinkle exists in adverse possession of tangible property as well. In tangible property, the resolution most consistent with adverse possession is to address the exclusivity requirement only to the relationship between the true owner and any given adverse possessor. The true owner’s property right, which each adverse possessor seeks, is at the heart of adverse possession. The non-exclusivity between multiple adverse possessors is immaterial to the true owner’s property right. Therefore, the best reasoned approach is not to let the competition of adverse possessors protect the true owner’s property right for him by denying fulfillment of the exclusivity requirement.

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126. See supra Part III.B (outlining the facts of Zuill).
129. Id.; see supra Part II.B (discussing nonrivalrous property and boundary setting for nonrivalrous property). Great care must be taken to distinguish “copyrighted expression” (the physical expressive material protected by copyright) and “copyright” (a property interest distinct from the protected expression).
130. The true owner could, however, displace such exclusivity by affirmatively exercising his right to prepare derivative works.
131. Hovenkamp & Kurtz, supra note 87, at 66.
132. Id.
There is no compelling reason to reach a different result in the case of copyright. Competition amongst adverse possessors should not provide an unjustified legal windfall to an itinerant or inattentive copyright owner. In copyright, as well as tangibles, the relationship between the adverse possessor and the true owner determines exclusivity.

The facts of Zuill\(^{133}\) provide a clear example of exclusive possession of a copyright interest. Zuill and Rossi, assuming they had valid rights as co-owners, made no affirmative use of these rights during the five years Shanahan masqueraded as sole owner. Shanahan’s exclusive use was not, and could not be, thrown off by their silent discontent. Further, based on the facts, Shanahan was the sole adverse possessor even though, as was discussed, another adverse possessor would not defeat Shanahan’s exclusivity. As a result, Shanahan’s use of the copyright interests in Hooked on Phonics was exclusive.

4. Continuity

In the context of adverse possession of tangibles, possession is continuous when it is “without abatement, abandonment or suspension in occupancy by the claimant, and also without interruption by either physical eviction or action in court.”\(^{134}\) This requirement, like the openness requirement, assists property owners by providing them a chance to detect and deal with adverse possessors.\(^{135}\) Owners’ interests aside, this requirement does not contemplate adverse possession without interruption.\(^{136}\) An adverse possessor may be absent from the property claimed if such absence is consistent with the behavior of a responsible true owner.\(^{137}\) Further, if the property is typically used seasonally, consistent seasonal possession fulfills the continuous possession requirement.\(^{138}\)

The continuity requirement requires little adaptation to address adverse possession of copyright. As with tangibles, an adverse possessor of a copyright interest meets the continuous possession requirement by using that interest as frequently as a reasonable true owner would. One difference from tangibles is that adverse use of a copyright interest requires a higher level of affirmative action by an adverse possessor. The adverse possessor, in most cases, does not have the ability to assert use through exclusion of the true owner. Thus, continuous use of a copyright interest must take the form of an affirmative use rather than conservation of the property right.

As envisioned here, the continuity requirement largely folds into the openness requirement in the arena of copyright. Both requirements seek to provide property owners fair notice of adverse possessors.\(^{139}\) This fair notice must reach the reasonably cognizant copyright owner. For adverse possession of a copyright interest to be sufficiently open to detection, it most likely will have to be continuous. Thus, in the realm of copyright, continuity nearly becomes a necessity for meeting the openness requirement.

Referring yet again to the facts of Zuill,\(^{140}\) Shanahan worked consistently on his

\(^{133}\) See supra Part III.B (outlining the facts of Zuill).

\(^{134}\) HOVENKAMP & KURTZ, supra note 87, at 55.

\(^{135}\) Id. at 67.

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) Id. at 67 n.27.

\(^{139}\) HOVENKAMP & KURTZ, supra note 87, at 67.

\(^{140}\) See supra Part III.B (outlining the facts of Zuill).
product throughout the five years between claiming sole ownership and Zuill and Rossi’s suit. His work included the open development, marketing, and distribution of Hooked on Phonics. Shanahan’s use is a perfect fulfillment of the continuity requirement.

5. Hostility

An adverse possessor meets the requirement of hostility by treating the claimed property as her own.\textsuperscript{141} Hostile possession is the antithesis of permissive use.\textsuperscript{142} To show hostility, objective factors, rather than the claimant’s subjective intent, are the most appropriate means.\textsuperscript{143} Thus, an adverse possessor may claim property in good faith or as an unrepentant trespasser; it makes no difference if her actions are hostile to the true owner’s property interest.\textsuperscript{144}

Bagley and Clarkson, in their proposed system of adverse possession of intellectual property, would forbid copyright infringement from qualifying as hostile possession.\textsuperscript{145} Their position on hostility destroys any possibility of adverse possession functioning in copyright. Copyright infringement is, for most purposes, a strict liability offense.\textsuperscript{146} This means that both intentional and good faith appropriators of copyright interests are, in fact, infringers. Thus, removing infringement as a type of hostile possession creates either a permissive or a functionless system.

A better reasoned result would be to set infringement as the test for hostility. Put another way, if a claimant is not infringing a copyright interest she is not displaying sufficient hostility to the owner’s property interest to justify shifting it to her. There is no reason to reward a claimant who is not using the property as an owner and who fails to raise “the property to a higher-valued use.”\textsuperscript{147} Appropriating the copyright interest and using it as an owner requires infringement, a very workable objective standard for hostility that encompasses both intentional and good faith appropriators.

To illustrate we will revisit the facts of Zuill\textsuperscript{148} once more. In 1987, Shanahan presented Zuill and Rossi with an agreement that declared his sole ownership of the copyright.\textsuperscript{149} He spent the next five years treating the copyright interests in Hooked on Phonics as his own and any consideration of his partners’ earlier work as a sort of goodwill gesture.\textsuperscript{150} If Zuill and Rossi had interests as co-owners, Shanahan clearly infringed them. Shanahan’s actions were hostile to their ownership interests. Thus, Shanahan fulfilled the hostility requirement.

\begin{itemize}
\item \textsuperscript{141} HOVENKAMP & KURTZ, supra note 87, at 68.
\item \textsuperscript{142} Id. at 55.
\item \textsuperscript{143} Id. at 68.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Bagley & Clarkson, supra note 92, at 370. Bagley and Clarkson implicitly discard the hostility requirement in their discussion, pulling their proposal ever closer to a permissive regime. Id.
\item \textsuperscript{146} CIOLINO & DONELON, supra note 16, at 351.
\item \textsuperscript{147} LANDES & POSNER, supra note 93, at 31.
\item \textsuperscript{148} See supra Part III.B (outlining the facts of Zuill).
\item \textsuperscript{149} Zuill v. Shanahan, 80 F.3d 1366, 1368 (9th Cir. 1996).
\item \textsuperscript{150} Id.
\end{itemize}
6. Additional Considerations

Adverse possession requires a set period of time after which a property owner’s claim fails against the interests of the claimant. The statute of limitations set by the Copyright Act for civil actions is “three years after the claim accrued.”\footnote{151} Courts should use this three-year period, set by Congress, as the statute of limitations for owners’ claims against adverse possessors.

Applying adverse possession to copyright raises the issue of whether an adverse possessor can claim public domain material.\footnote{152} A copyright interest, as has been noted, is a discrete property interest separate from the underlying protected material. Expiration destroys the copyright interest; expiration destroys the property. There is neither an owner to claim against nor a property interest to obtain in the public domain. Thus, the public domain is insulated against the claims of would-be adverse possessors.

IV. RECOMMENDATION

The foregoing analysis leads to the conclusion that the adverse possession doctrine can function in the realm of copyright. While some adaptation is required, adverse possession fits copyright as well as any other form of property. What remains to be determined, however, is why courts should support such application.

As has been established, copyright interests are a form of property quite separate from the material they protect.\footnote{153} As a result, analysis of whether to apply adverse possession can ignore the intellectual and philosophical baggage accompanying copyrighted expression. The scope of ownership in the copyright interest is at issue, nothing else.

As a form of property, it is striking that copyright interests have escaped the rigors of adverse possession as long as they have. Unquestionably, property law favors the utilization of private property over mere conservation.\footnote{154} Adverse possession embodies this preference by acting as a purgative of the property law system; it eliminates the ownership claims of itinerant and typically unproductive property holders.\footnote{155} The failure of courts to apply adverse possession to copyright interests diminishes their societal value and flies in the face of their status as property.

The law must recognize that “[c]opyright gives authors only what trespass law gives landowners: Authors have the right to exclude others from what they own.”\footnote{156} Without application of adverse possession, however, copyright gives authors far more than landowners ever enjoyed in the United States: the right to unrestricted hoarding of property. This dual-level property system is patently inequitable. If only in the interests of economic efficiency, the favoritism enjoyed by copyright owners must end.

\footnote{151}{17 U.S.C. § 507(b) (2004).}
\footnote{152}{LANDES & POSNER, supra note 93, at 31. Simply put, the public domain consists of material unprotected by copyright, most often due to the expiration of the statutory term of copyright protection. See SCHECHTER & THOMAS, supra note 20, at 5-6 (providing general background on the public domain).}
\footnote{153}{See supra Part III.C.1 (discussing the difference between copyright and the expression it protects).}
\footnote{154}{LANDES & POSNER, supra note 93, at 31.}
\footnote{155}{See supra Part II.A (discussing the purposes of adverse possession).}
\footnote{156}{Gordon, supra note 45, at 1370.}
To this end, this Note urges courts to apply adverse possession to copyright interests. While some adaptations to the doctrine are required, none are particularly onerous. So long as one pays strict attention to the difference between a copyright interest, which is a form of property, and the underlying protected material, which is not a form of property, the fit between copyright and the adverse possession doctrine is relatively seamless.\textsuperscript{157}

V. CONCLUSION

Property law protects owners’ right to use or waste their property “as they see fit.”\textsuperscript{158} At the same time, the law recognizes that protecting owners’ right to waste property is hardly a worthy goal and thus limits the scope of protection for such ownership behavior.\textsuperscript{159} Adverse possession, more than any other doctrine, represents the law’s hesitancy to protect owners’ right to waste and willingness to shift ownership to active property users.\textsuperscript{160}

Copyright interests, though intangible, are as much a form of property as any other.\textsuperscript{161} As such, it is purely anomalous that copyright interests are not subject to the beneficial influence of adverse possession. Adverse possession is not a penalty on ownership; it is an embodiment of the value and respect society places on the active use of property. If society values copyright interests, as it surely does, these interests deserve the same respectful treatment. Application of adverse possession is the single most important step in the right direction.

\begin{footnotesize}
\begin{enumerate}
\item[157.] See supra Part III.C.1 (discussing the distinction between copyright interests and the underlying protected expression).
\item[158.] Gordon, supra note 45, at 1360.
\item[159.] See supra Part III.A (addressing property law’s disdain for waste and stagnation); Gordon, supra note 45, at 1361.
\item[160.] LANDES & POSNER, supra note 93, at 31.
\item[161.] See supra Part II.B (discussing copyright’s status as property).
\end{enumerate}
\end{footnotesize}