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ADVERSE POSSESSION OF ORPHAN WORKS

*Katherine Moran Meeks**

In recent decades, Congress has elongated the term of copyright protection and eliminated the requirement that authors register and renew their copyrights. These changes, aimed partly at bringing our copyright system into line with Europe's, have brought about significant collateral damage. They have resulted in a large population of orphan works—that is, works that remain under copyright protection but whose owners cannot be found. The uncertain ownership status of these works has hampered libraries, museums, and private companies from using them in ways that might be beneficial to the public. This Article proposes that the doctrine of adverse possession could be adapted to extinguish the copyright in these orphan works and free them for use by the general public.

I. INTRODUCTION

Copyright law does not discriminate between high and low art, or even between art and workaday expression. It extends protection equally to timeless symphonies and ephemeral pop ballads.¹ While the commercial lifespan of most copyrighted works is accordingly brief,² some works retain value through the generations.³ The authors and corporations that own

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1. This has been true at least since 1903, when the Supreme Court held that copyright protection does not turn on a judge's assessment of the quality of the expression. As Justice Holmes famously admonished, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth" of literary and artistic creations. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

2. *See Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting) ("[O]nly about 2% of copyrights between 55 and 75 years old retain commercial value.").

3. *See, e.g., Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001) (noting that *Gone With the Wind*, published in 1936, remains "one of the best-selling books in the

such commercially viable works have pressured Congress to broaden the sweep of their intellectual property rights.⁴ Lawmakers have obliged by repeatedly elongating the term of copyright protection in recent decades.⁵ At the same time, Congress has eliminated the requirement that authors register and renew their copyrights,⁶ onetime administrative formalities that were designed to maintain protection only for those works that had some commercial or sentimental value to their owners.⁷

These changes, aimed at pieces with continuing viability, have delivered less celebrated works into a purgatory of uncertain ownership. Copyright protection persists for out-of-print books, historic photos, and other cultural artifacts even when the owner has died, faded into obscurity, or ceased to stake any claim to them.⁸ Yet the threat of an infringement suit from some long-lost owner, however remote, has frustrated libraries, museums, and private actors that are seeking to incorporate these so-called orphan works⁹ into digital archives that have the potential to open new avenues of scholarship and learning.

This Article proposes that Congress should adapt the real property doctrine of adverse possession to clear the muddy rights to orphan works and release them into the public domain. Adverse possession is a mechanism for resolving competing claims to land that arise where an owner has failed to assert his rights for many years, thereby allowing a hostile trespasser to assume control of the land as if it were his own.¹⁰ If

world” and that the copyright holder recently granted permission for a second sequel); Ethan Smith & Erica Orden, *Mickey, Darth Vader to Join Forces*, WALL ST. J., Oct. 31, 2012, at B1 (describing the longevity of the *Star Wars* movies and announcing the sale of Lucasfilm, the company that owns them).

4. See Charles Kenny, *Mickey Mouse, Villain: How Copyrights for U.S. Cartoons Are Holding the Developing World Hostage*, FOREIGN POL’Y, Mar./Apr. 2011, at 29 (noting that Disney “spent more than \$5 million in 2009” to lobby the federal government on intellectual property issues).

5. See General Revision of Copyright Law, Pub. L. No. 94-553, § 302(a), 90 Stat. 2541, 2572 (1976) (codified at 17 U.S.C. § 302(a) (1976)).

6. See *id.* (renewal); *id.* § 408(a) (registration).

7. Olive Huang, Note, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERKELEY TECH. L.J. 265, 269 (2006).

8. See *id.* at 267–68.

9. *Golan v. Holder*, 132 S. Ct. 873, 905 (2012) (Breyer, J., dissenting) (defining orphan works as “older and more obscure works with minimal commercial value that have copyright owners who are difficult or impossible to track down”).

10. See Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1123 (1984).

the adverse possessor can satisfy each element of a common law test,¹¹ a court will strip the original owner of his title and vest it in the trespasser.¹²

The doctrine carries an odor of unfairness, but several compelling policies justify its harsh consequences for the original owner. Adverse possession removes stale claims to land,¹³ improving its value in the marketplace. It expresses the law's preference for productive use of resources over passive neglect.¹⁴ Additionally, it encourages owners to be watchful custodians of their property and to take at least minimal care to prevent it from becoming a nuisance.¹⁵ Although Congress would need to modify the common law test before it could be applied to intangible property, the policy rationale behind adverse possession applies with equal or greater force in the orphan works context. When copyright holders fail both to exploit their products and to register their whereabouts with the Copyright Office, their intellectual property rights should be expunged so as not to shackle libraries, museums, or other institutions that perceive a scholarly or commercial demand for the work.¹⁶

A handful of courts have already embraced the application of adverse possession to copyright, if only for a limited purpose.¹⁷ They have used the doctrine to repel claims by putative heirs or joint owners who surface after years of silence, threatening to disrupt another's longstanding and profitable use of a copyrighted work. In *Gee v. CBS, Inc.*, for example, a federal district court held that a record company's open and notorious sale of a sound recording by the blues singer Bessie Smith operated, over a period of years, to extinguish any right that her adopted son had to the work.¹⁸ This Article envisions a broader role for the doctrine of adverse

11. *Chaplin v. Sanders*, 676 P.2d 431, 434 (Wash. 1984) (en banc) (“In order to establish a claim of adverse possession, the possession must be: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious and (4) hostile and under a claim of right made in good faith.”).

12. *See Merrill, supra* note 10, at 1127.

13. *See id.* at 1128.

14. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 860 (3rd ed. 2000).

15. *Merrill, supra* note 10, at 1130.

16. *Cf. Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985) (“[C]opyright is intended to increase and not to impede the harvest of knowledge.”).

17. *E.g., Zuill v. Shanahan*, 80 F.3d 1366 (9th Cir. 1996); *Gee v. CBS, Inc.*, 471 F. Supp. 600 (E.D. Pa. 1979).

18. *Gee*, 471 F. Supp. at 657 (concluding that, under state copyright law, the record company's “arguably wrongful possession of exclusive rights to ‘At the Christmas Ball’ ripened into complete and perfect ownership, good against Bessie Smith's estate”).

possession than previously recognized by the courts. At present, no mechanism exists for expunging the intellectual property rights of authors who, by all appearances, have abandoned their copyrighted works.¹⁹ When these rights no longer benefit the author,²⁰ they should not paralyze others who have identified a new use for the work. Adverse possession could remove the threat of infringement liability and help resurrect books, photographs, and other forms of creative expression that have fallen out of circulation, thereby enriching the store of human knowledge.

This proposal would help counteract the seemingly inexorable expansion of intellectual property rights.²¹ The Constitution empowers Congress to grant copyright protection in order to promote the dissemination of knowledge,²² but the repeated extensions of the copyright term have sometimes impeded the use of older or lesser-known works whose authors cannot easily be found. In 2001, for example, the library at Carnegie Mellon University considered whether to make digital copies of the books in its collection, a project that would require the permission of copyright holders except where needed to preserve a particularly brittle copy of a book.²³ The university excluded nearly a quarter of its books from the digital archive after it failed to identify the copyright holders.²⁴ Just as it does in the real property context, adverse possession could lift the cloud of uncertainty regarding ownership of these works. As envisioned in this Article, the doctrine would immunize an institution such as Carnegie Mellon from liability for copying, displaying, or distributing copyrighted works. Furthermore, after a period of years, the adverse use of a book, photograph, or other creative expression would destroy the owner's

19. See Huang, *supra* note 7, at 268.

20. To avoid orphaning his work, an author does not have to publish or commercially exploit it. Indeed, many copyrighted works have purely sentimental value. The author simply has to give an outward signal that the work is owned and exercise his right to exclude. See *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 681 (S.D.N.Y. 2011).

21. See Robert Brauneis, *Copyright and the World's Most Popular Song*, 56 J. COPYRIGHT SOC'Y U.S.A. 335, 340 (2009) (noting that copyright law historically did not need a version of adverse possession, "arguably because the limited term of copyright protection itself served the function of clearing title and balancing the interests of the inattentive owner and the productive user," but suggesting that one might be warranted now).

22. U.S. CONST. art. I, § 8, cl. 8.

23. Letter from Denise Troll Covey, Principal Librarian for Special Projects at Carnegie Mellon Univ., to Jule L. Sigall, Assoc. Registrar for Policy & Int'l Affairs, U.S. Copyright Office (Mar. 22, 2005), available at <http://www.copyright.gov/orphan/comments/OW0537-Carnegie Mellon.pdf>.

24. *Id.*

entitlement and deposit the work into the public domain, the intellectual commons from which future authors, scholars, and publishers may borrow without fear of detonating an infringement suit.²⁵ Adverse possession would thus help to “promote the Progress of Science and useful Arts” where copyright itself has failed to serve that constitutional end.²⁶

Parts II and III of this Article describe the genesis of the orphan works problem and detail specific instances where it has impeded efforts by libraries, publishers, and search engines to make such works available to the public. Parts IV and V propose that the doctrine of adverse possession could be extrapolated from its roots in real property law to provide a solution to the orphan works problem. Congress would need to retool the doctrine before it could be introduced into the copyright law, but public policy would provide the necessary guidance. Finally, this paper argues that adverse possession will help restore balance to a copyright system that has aggrandized the rights of authors at the expense of the public. By repeatedly lengthening the term of copyright protection, Congress has impoverished the public domain, that repository of works free from private ownership that other artists can tap for inspiration. This Article argues, as others have before, that the public domain is not a boneyard of works no longer subject to copyright protection, but rather an affirmative concept that deserves consideration in any proposal to expand private rights.²⁷

II. THE ORPHAN WORKS PROBLEM

Starting in 1976, Congress introduced several changes to the copyright law that have given rise to the orphan works problem. Authors historically obtained copyright protection for only a brief period of years, with the option to renew the copyright if it remained valuable at the end of that term.²⁸ When Congress passed the first copyright statute in 1790, for

25. See *Gaiman v. McFarlane*, 360 F.3d 644, 655 (7th Cir. 2004) (noting that, where a “work is in the public domain, the publisher could publish it without the author’s permission”); Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2066 (2012) (“Other resources are declared to be open to all as a matter of policy, such as . . . copyrights that have expired and returned to the public domain.”).

26. U.S. CONST. art. I, § 8, cl. 8.

27. See Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 86–87 (2003) (pushing for an “affirmative discourse” about the importance of the public domain that might serve as a counterweight to the property rights rhetoric that fuels the continued expansion of the copyright term).

28. See Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124.

example, it granted protection for fourteen years plus a fourteen-year renewal term.²⁹ By 1909, it had elongated that term to twenty-eight years with the option to renew for twenty-eight more.³⁰ During its housecleaning of the copyright statute in 1976, however, Congress embarked on a fundamental change, abandoning the fixed term with a renewal option and establishing a period of protection lasting for the life of the author plus fifty years.³¹

The legislative history reflects several reasons for the seismic shift. First, lawmakers jettisoned the renewal system to save authors the “substantial burden and expense” that this “highly technical” process imposed.³² They replaced it with a term of protection tied to the author’s life to ensure that the books, music, or artwork that he labored to produce could sustain him through old age and generate returns for his heirs after his death.³³ Lawmakers felt that tying the term of protection to the life of the author was especially important as advances in technology seemed poised to extend the commercial life of many artistic works, potentially by many decades.³⁴ Finally, and most importantly, Congress felt a “pressing” need to bring this country’s copyright term into conformity with that of many European countries, which typically extended copyright protection for the life of the author plus fifty years.³⁵ At the time, many of those countries expressed resentment that American works enjoyed a longer term

29. *Id.*

30. Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080–81.

31. General Revision of Copyright Law, Pub. L. No. 94-553, § 302(a), 90 Stat. 2541, 2572 (1976) (codified at 17 U.S.C. § 302(a) (1976)).

32. H.R. REP. NO. 94-1476, § 302(5), at 134 (1976).

33. *Id.* § 302(1). The House Report argued that extending the term of protection would produce a benefit to authors without harming the public, which “frequently pays the same for works in the public domain as it does for copyrighted works.” *Id.* § 302(3). This claim beggars belief. Copyright gives an author monopoly control over his work, which in turn allows him to extract a higher price than he could in a perfectly competitive market, or in a market where the work is free for all to use. See Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 126 (2002). Recent history provides an example. In 1994, as part of the Uruguay Round Agreements Act, Congress extended copyright protection to certain works by foreign authors that had previously been in the public domain. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976 (1994) (codified at 17 U.S.C. § 104A (2006)). Once the work came under copyright protection, the price that orchestras paid for a Shostakovich score rose “by a multiple of seven.” Golan v. Holder, 132 S. Ct. 873, 904 (2012) (Breyer, J., dissenting).

34. H.R. REP. NO. 94-1476, § 302(2), at 134.

35. *Id.* § 302(7), at 135.

of protection in Europe than European works enjoyed in the United States.³⁶ Congress believed that an internationally uniform copyright term would smooth relations with trading partners and “provide certainty and simplicity in international business dealings.”³⁷

Even if Congress’s decision to fashion our copyright term in Europe’s image made sense from a diplomatic perspective, it ignored the divergent legal and philosophical traditions that underpin the two copyright systems. Copyright protection in Europe is tethered to the life of the author because it is viewed as a natural right flowing from the author’s deep personal connection to his creative expression—a concept often referred to as moral rights.³⁸ By contrast, copyright protection in the United States has historically lasted for a shorter, fixed term because it is viewed as an instrumental benefit given to authors to incentivize their production of creative expression for the ultimate benefit of the public.³⁹ By aligning the copyright term at home with that in Europe, Congress effectively superimposed a moral rights framework onto the copyright statute while neglecting the countervailing interest in a robust public domain.

In 1998, Congress extended the length of protection to the life of the author plus seventy years, again to keep pace with prevailing international practice.⁴⁰ As of 1993, the European Union’s member states had granted copyright protection for the life of the author plus seventy years—except that foreign works received only the amount of protection they had in their country of origin.⁴¹ Media and entertainment firms successfully argued

36. *Id.*

37. *Id.*; see also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 306 (1996) (“There are many reasons for copyright’s expansion, including technological development, power politics (both domestic and international), and the transformation of the United States from a net importer to a major exporter of intellectual works.”).

38. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988) (delineating the “personality theory” underlying European copyright, under which an owner has a property right in his creative work because it “is a manifestation of the creator’s personality or self”).

39. See *Golan*, 131 S. Ct. at 900 (Breyer, J., dissenting) (arguing that the “economic philosophy” embedded in the Copyright Clause envisions that “limited monopoly privileges . . . are conferred for a public reason—to elicit new creation”); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 450–52 (2007) (outlining the nineteenth-century debate in the United States between those who viewed copyright as a “fundamental, natural, even ‘God-given’” right and those who saw it as a “utilitarian construct,” and noting that the Supreme Court decisively came down on the side of the latter).

40. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (codified at 17 U.S.C. § 302(a)).

41. S. REP. NO. 104-315, at 4–5 (1996).

that they were forfeiting revenue opportunities abroad⁴² because the life-plus-fifty rubric was still in place in the United States.⁴³ Meanwhile, some companies had more particular reasons for urging Congress to fortify their intellectual property rights both at home and abroad. Disney would have watched one of the world's most valuable copyrights, Mickey Mouse, pass into the public domain if Congress had not extended the term of protection in 1998.⁴⁴

These changes may have buoyed the media and entertainment sector, but they also came at a distinct cost. Now that authors no longer have to renew their copyrights, protection persists even for works that have little commercial or sentimental value for their creators.⁴⁵ To illustrate, in 1973, just three years before the copyright statute's overhaul, only fifteen percent of authors elected to renew their copyright after the initial term of twenty-eight years had expired.⁴⁶ Furthermore, recent studies suggest that "only about 2% of copyrights between 55 and 75 years old retain commercial

42. See, e.g., *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary*, 104th Cong. 53 (1995) (statement of Jack Valenti, President and CEO, Motion Picture Association of America) (arguing that, without a copyright term extension, "American works would go into the public domain in Europe" earlier than European works would, "thereby cutting off revenues for American copyright owners, and transferring those revenues into European hands").

43. See H.R. REP. NO. 105-452, at 4 (1998) (claiming that the extension would "ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States"); 143 CONG. REC. 4573 (1997) (quoting Orrin Hatch, the Senator who introduced the Copyright Term Extension Act, as arguing that the legislation would allow "American copyright owners to benefit to the fullest extent from foreign uses").

44. See Robert Darnton, *Google and the Future of Books*, N.Y. REV. BOOKS, Feb. 12, 2009, at 9 (lamooning the Sonny Bono Copyright Term Extension Act of 1998 as the "Mickey Mouse Protection Act").

45. See Epstein, *supra* note 33, at 124 ("By degrees, the copyright law has flipped over from a system that protected only rights that were claimed to one that vests all rights, whether claimed or not."); David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 157 (1981) (describing the scope of the 1976 Copyright Act as "ludicrous," and observing that it extends protection to such ephemera as "notes to babysitters, instructions to chimney sweeps, directions to my house").

46. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 135 (2004); see also William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 473 (2003) (noting that "fewer than 11 percent of the copyrights registered between 1883 and 1964 were renewed at the end of their twenty-eight-year term").

value.”⁴⁷ Renewal used to segregate works that had value to their author from those that did not, freeing the remainder to enter the public domain.⁴⁸ Without that mechanism, copyright protection persists for a wide array of works, whether or not the author cares to have the exclusive right to them.⁴⁹ When an author cannot be located, expansive intellectual property rights have impeded libraries, museums, and private companies from making digital copies of this material and posting it to online databases where it might receive newfound attention from scholars.⁵⁰ As Professor Lawrence Lessig put it:

Forget Mickey Mouse. . . . Forget all the works from the 1920s and 1930s that have continuing commercial value. The real harm of term extension comes not from these famous works. The real harm is to the works that are not famous, not commercially exploited, and no longer available as a result.⁵¹

In spite of this collateral damage, Congress is unlikely to revive the renewal system. Lawmakers recognized even as they were amending the statute in 1976 that they were extending protection even for works that had “practically no value to anyone” except scholars and specialists.⁵² They nonetheless concluded that the benefits of eliminating renewal, particularly bringing the United States into conformity with international copyright norms, outweighed the disadvantages.⁵³

Even as Congress eliminated renewal and elongated the term of

47. *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting) (citing EDWARD RAPPAPORT, CONG. RESEARCH SERV., 98-144 E, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES (1998)).

48. *See Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007).

49. *See Jane C. Ginsburg, The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 314 (2010) (“Protection thus ‘subsists’ even for casual communications, and even though the author may not be a professional creator, and hence may be unaware of or indifferent to any copyright in her work.”).

50. *See* Comments of the Library of Congress in Response to the Copyright Office Notice of Inquiry Regarding Orphan Works 3 (Mar. 25, 2005) [hereinafter Comments Regarding Orphan Works], available at <http://www.copyright.gov/orphan/comments/OW0630-LOC.pdf>.

51. LESSIG, *supra* note 46, at 221.

52. H.R. REP. NO. 94-1476, § 302(7), at 136 (1976).

53. *See id.* (“It is true that today’s ephemera represent tomorrow’s social history, and that works of scholarly value, which [now fall] into the public domain after 28 years, would be protected much longer under the bill. Balanced against this are the burdens and expenses of renewals . . . and the extremely strong case in favor of a life-plus-50 system.”).

protection, it made another pivotal change that has beached thousands, perhaps millions, of creative works in a wilderness of uncertain ownership. Authors traditionally had to satisfy three threshold requirements before they could obtain copyright protection: (1) affix a copyright notice to the work, (2) register it with the U.S. Copyright Office, and (3) deposit two copies with the Library of Congress.⁵⁴ By putting authors through these paces, the law ensured that copyright would attach only where the creator believed it would produce economic returns.⁵⁵ More likely than not, the bureaucratic hassle would dissuade authors from seeking protection for works with only limited or ephemeral value.⁵⁶ In 1976 and 1989, however, the United States discarded these “formalities” in order to join the Berne Convention, the international copyright treaty that forbids governments from subjecting authors to a bureaucratic steeplechase before they can obtain intellectual property protection.⁵⁷ Today, copyright materializes the moment an author “fixes,” or records, his work in a “tangible medium of expression.”⁵⁸ Nothing more is required. The demise of formalities, like the demise of renewal, means that copyright attaches “indiscriminately” to works that have value and those that do not.⁵⁹ It also means that copyright

54. These formalities date to the first copyright statute, passed in 1790, when authors had to deposit their work with the Secretary of State rather than the Library of Congress. *See* Copyright Act of 1790, ch.15, §§ 1, 3, 4, 1 Stat. 124, 124–25; *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663–67 (1834); *see also* Abraham Bell & Gideon Parchomovsky, *The Case for Imperfect Enforcement of Property Rights*, 160 U. PA. L. REV. 1927, 1942 (2012) (noting that, under the 1909 act, “[i]f an author published her work without attaching a proper notice of copyright ownership, the law would treat her publication as a ‘dedication to the public’ that stripped away all legal protection for her copyright”).

55. *See* Ginsburg, *supra* note 49, at 313.

56. *See id.* (“These formalities thus . . . have divided works of perceived economic significance worth the effort of compliance from the mass of other creations, leaving the latter free for others to exploit.”).

57. General Revision of the Copyright Law, Pub. L. No. 94-553, § 408(a), 90 Stat. 2541, 2580 (1976) (codified at 17 U.S.C. § 408(a)); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified at 17 U.S.C. § 101 *et seq.*); *see also* Berne Convention for the Protection of Literary and Artistic Works art. 5(2) (providing that the “enjoyment and the exercise” of intellectual property rights “shall not be subject to any formality”); BRIAN T. YEH, CONG. RESEARCH SERV., RL33392, “ORPHAN WORKS” IN COPYRIGHT LAW 3 (2008) (noting that Congress discarded formalities partly to lift the “undue burden” they imposed on authors, but primarily to “harmonize U.S. copyright law with international treaties and practice”).

58. 17 U.S.C. § 102(a) (2006).

59. Lawrence Lessig, *Little Orphan Artworks*, N.Y. TIMES, May 20, 2008, at A23.

holders have become more difficult to identify.⁶⁰ Even after Congress eliminated the formalities, many authors continued to attach the copyright notice to their works and register them with the Copyright Office precisely so that parties seeking to use or license the work might contact them.⁶¹ Nonetheless, many works bear no trace of their owner. These are the orphans, and libraries, corporations, and individuals use them at peril of litigation.⁶²

The uncertainty surrounding orphan works has handicapped libraries and museums in their efforts to post collections online. In 2001, the Library of Congress sought to display on its public web site letters, news clippings, and other papers kept by the author and political philosopher Hannah Arendt.⁶³ Of the approximately 25,000 items in the collection, the library selected 7000 pieces for permissions research, of which it eventually displayed 5000.⁶⁴ The library declined to post the remaining works because it could not identify the copyright owners.⁶⁵ Similarly, Cornell University discovered that roughly half of its collection of agricultural monographs were orphans.⁶⁶ The Holocaust Memorial Museum in Washington, D.C., declined to publish thousands of historical documents online because it could not locate the copyright holders.⁶⁷ The Los Angeles Public Library has withheld its collection of Mexican folk music from the public for the same reason.⁶⁸ Meanwhile, Duke University

60. REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 22 (2006) (summarizing four reasons why it is often difficult for libraries and other potential users to locate the owner of a copyrighted work: (1) copies do not contain adequate information identifying the copyright holder; (2) changes in ownership or changes in the circumstances of the owner have made it difficult to identify or locate the owner; (3) information in copyright registries is limited; and (4) research into a work's provenance is time-consuming and expensive).

61. Authors have another powerful incentive to register their works: registration is necessary to bring an infringement suit, if not to obtain copyright protection in the first instance. 17 U.S.C. § 411 (2006). Authors must also register their work before they can obtain statutory damages or attorney's fees arising out of the suit. *Id.* § 412.

62. See Lewis Hyde, *Advantage Google*, N.Y. TIMES, Oct. 4, 2009, at BR27.

63. Comments Regarding Orphan Works, *supra* note 50, at 6.

64. *Id.*

65. *Id.*

66. Hyde, *supra* note 62.

67. *Id.*

68. *Golan*, 132 S. Ct. at 905 (Breyer, J., dissenting) (noting other examples and citing a study estimating that thirteen million books and 225,000 films under copyright in Europe are orphans).

failed to unearth the copyright owners for more than half of its collection of 7000 advertisements published between 1911 and 1955.⁶⁹ These, like thousands of other orphaned historical documents, remain accessible to scholars only in hard copy in university libraries.

These libraries and museums might seem, at first blush, to have a compelling fair use claim to these works.⁷⁰ They are building digital archives in order to advance scholarship and learning, not to earn a profit, a factor that tends to weigh heavily in a court's fair use analysis.⁷¹ But the copyright statute contains a specific provision that governs library archiving.⁷² It allows libraries to make digital copies only when printed volumes are "damaged, deteriorating, lost, or stolen," and replacement copies cannot be bought for a reasonable price.⁷³ Moreover, the digital copies may be displayed only in the physical confines of the library, not on a public web site.⁷⁴ This narrow provision would seem to foreclose libraries from invoking the more general fair use defense in support of ambitious efforts to make entire collections available on the web.⁷⁵ In addition, the fair use defense would not immunize individuals or corporations that have identified a commercial, rather than a scholarly or nonprofit, use for orphan works.⁷⁶ The essayist Lewis Hyde has noted that publishing houses, as much as libraries, have hesitated to distribute works of historical or scholarly interest because of their murky copyright status:

Orphan works are all those Brats whose copyrights are still

69. Huang, *supra* note 7, at 268.

70. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (defining fair use as "a privilege in others than the owner . . . to use the copyrighted material in a reasonable manner without his consent," and noting the four-factor test for evaluating whether borrowing is fair); *see also* 17 U.S.C. § 107 (2006) (prescribing the elements of the four-factor test, namely (1) "the purpose and character of the use," (2) "the nature of the copyrighted work," (3) "the amount and substantiality" of what is borrowed, and (4) "the effect of the use upon the potential market for or value of the copyrighted work").

71. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) ("The first factor in a fair use enquiry is 'the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.'" (quoting 17 U.S.C. § 107(1) (2006))).

72. 17 U.S.C. § 108 (2006).

73. *Id.* § 108(c).

74. *Id.* § 108(c)(2).

75. Dotan Oliar, *The Copyright-Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Infliction of Harm*, 64 STAN. L. REV. 951, 965 n.62 (2012).

76. *See Harper & Row*, 471 U.S. at 562.

active but whose parents cannot be found. There are millions of them out there, and they are gumming up the world of publishing. Suppose a publisher wants to print an anthology of 1930s magazine fiction. Copyright now lasts so long (a century in many cases) that the publisher must assume that there are rights holders for all those stories. Suppose that half the owners can't be found. What should the publisher do? Its lawyers will advise abandoning the anthology: statutory damages for copyright infringement now stand between \$750 and \$150,000 per instance.⁷⁷

Of course, one company more than any other has run aground on the rocky shoals of the orphan works problem.

III. THE GOOGLE BOOK PROJECT

In 2002, Google began a Promethean effort to digitize every book ever published.⁷⁸ The company's founders, Larry Page and Sergey Brin, were graduate students at Stanford when a flood destroyed thousands of the university's books in 1998, and the episode impressed on them the need to preserve books in a form less prone to devastation and decay.⁷⁹ From Google's early days as a startup company, Page and Brin envisioned an online library that would "unlock the wisdom" stored in rare and out-of-print books that "are not accessible to anyone except the most tenacious researchers at premier academic libraries."⁸⁰ Natural disasters aside, they wanted to save books from the harsh reality of the print market, in which publishers shunt yesterday's books aside to make way for the latest bestseller.⁸¹ As Brin described in an essay in the *New York Times*:

Books written after 1923 quickly disappear into a literary black hole. With rare exceptions, one can buy them only for the small number of years they are in print. After that, they are found in only a vanishing number of libraries and used book

77. Hyde, *supra* note 62.

78. See Jeffrey Toobin, *Google's Moon Shot*, NEW YORKER, Feb. 5, 2007, at 30, 30 (explaining Google's ambitious plans to "scan every book ever published," and recounting the history of the project from inception to present).

79. Sergey Brin, Op-Ed., *A Library to Last Forever*, N.Y. TIMES, Oct. 9, 2009, at A31.

80. *Id.*

81. *Id.*

stores. As the years pass, contracts get lost and forgotten, authors and publishers disappear, the rights holders become impossible to track down.⁸²

Of course, Google also hoped to reap a profit from the book project.⁸³ Its searchable online database includes twelve million volumes and counting,⁸⁴ many of them out of print, and Google has explored whether it might sell subscriptions to universities interested either in its powerful search function or in the access it would afford to rare books previously available at only a handful of major research libraries.⁸⁵ Google has already introduced several search tools, currently available for free, that might prove especially tantalizing to scholars. One of these allows linguists to trace the origin of words and their frequency of use over time by tapping “books published between 1500 and 2008 in English, French, Spanish, German, Chinese and Russian.”⁸⁶

Although its library project could revolutionize access to books, Google has stirred outrage among authors and publishers with its cavalier approach to copyright.⁸⁷ Google did not build its online archive solely with books in the public domain, but instead took the audacious step of scanning copyrighted books without seeking the permission of copyright holders.⁸⁸

82. *Id.*

83. See Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1320–21 (2010) (describing ways in which Google intends to monetize its book project, including by selling institutional subscriptions and tailoring ads to consumers who search the book database); Eric Pfanner, *Google Has Deal in France for Book-Scanning Project*, N.Y. TIMES, June 12, 2012, at B5 (describing a settlement between French publishers and Google that will allow the latter to scan and sell digital copies of out-of-print books).

84. *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011).

85. *Id.* at 671.

86. Patricia Cohen, *In 500 Billion Words, A New Window on Culture*, N.Y. TIMES, Dec. 17, 2010, at A3. To use this feature, visit *Ngram Viewer*, GOOGLE BOOKS, <http://books.google.com/ngrams> (last visited Mar. 6, 2013).

87. See *Authors Guild*, 770 F. Supp. 2d at 681–82 (cataloguing negative responses to Google’s book scanning project); Emily Anne Proskine, Note, *Google’s Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project*, 21 BERKELEY TECH. L.J. 213, 219 (2006) (observing that Google’s strategy of requiring authors to opt out of having their books included in the digital library was “anathema” to many in the publishing industry). *But see* Samuelson, *supra* note 83, at 1314–15 (quoting Robert Darnton, the Harvard librarian, as saying the book project elicits *both* “utopian enthusiasm” and “jeremiads about the danger of concentrating power to control access to information”).

88. See Michael Hiltzik, Op-Ed., *Building a Digital Public Library Without Google’s Money*, L.A. TIMES, Mar. 25, 2011, at B1 (describing Google’s “strategy of scanning books first and worrying about copyrights later”).

The company asserts that its library project amounts to fair use because it does not make the full text of copyrighted books available through its search engine.⁸⁹ Instead, when a user punches in a search for a recent bestseller, Google displays only a brief excerpt, or “snippet,” that might entice the user to buy a legitimate copy of the book.⁹⁰ This claim is at least plausible. In recent years, the courts of appeals have allowed search engines to display “thumbnail” images and other imperfect or partial copies of protected works where they help connect users with information.⁹¹ The fact that many of the books Google has copied are out of print, and are therefore producing little or no revenue for copyright holders, also tends to bolster its fair use defense.⁹²

Nonetheless, a coalition of authors and publishers sued in 2005, seeking damages as well as removal of their books from Google’s online database.⁹³ The parties reached a settlement in 2009, agreeing that Google could continue to make electronic copies, sell online access to individual books, and hawk subscriptions to its database in exchange for sharing revenue with authors and publishers.⁹⁴ In effect, the parties engineered a “forward-looking” business deal that allowed Google to build a comprehensive online library without fear of copyright liability.⁹⁵ The settlement gave Google broad immunity from future lawsuits because of the sheer size of the plaintiff class.⁹⁶ With the exception of 6800 authors and publishers who opted out of the agreement, the class included every person who holds a copyright in a book or insert published in the United States, including the owners of orphan works.⁹⁷ Scholars, interest groups,

89. Toobin, *supra* note 78, at 33.

90. *Id.* at 32–33.

91. *E.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 815 (9th Cir. 2003).

92. *See* Maxtone-Graham v. Burtchaell, 631 F. Supp. 1432, 1438 (S.D.N.Y. 1986) (“Although going out of print does not terminate a copyright, it is an appropriate element to consider [in conducting the fair use analysis].”), *aff’d*, 803 F.2d 1253 (2d Cir. 1986); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1627–28 (1982) (arguing that distribution of out-of-print works may justify a fair use defense, “since markets cannot form where goods are unavailable”).

93. *Authors Guild*, 770 F. Supp. 2d at 670.

94. *Id.* at 671.

95. *Id.* at 677.

96. *Id.* at 682 (quoting a lawyer for the Internet Archive as arguing that the settlement would give Google “a right, which no one else in the world would have, . . . to digitize works with impunity, without any risk of statutory liability, for something like 150 years”).

97. *Id.* at 676.

and the U.S. Department of Justice swiftly objected to the breadth of the settlement.⁹⁸ The Justice Department argued that the parties had used the class action mechanism to effect a dramatic restructuring of intellectual property rights, a job that properly belonged to Congress.⁹⁹ The government was particularly troubled that the settlement would give Google a “de facto monopoly” over orphan works.¹⁰⁰ Google would pocket a portion of the revenue it earned from the sale of orphan works, depositing the remainder into a registry that would safeguard the money in case copyright holders resurfaced within ten years, after which the unclaimed funds would be distributed to literary charities.¹⁰¹ Even as Google profited from these unclaimed books, none of its competitors, including Microsoft, Amazon, and Yahoo!, could enter the market for orphan works, at least without risking a lawsuit.¹⁰²

In the face of these pointed objections, the federal district court rejected the settlement in March 2011.¹⁰³ Judge Denny Chin acknowledged that the agreement would help resurrect millions of orphan works,¹⁰⁴ but he admonished that thorny questions about rights in unclaimed books should be answered by Congress, not the courts: “The questions of who should be

98. *See id.* at 673 (noting that the court received more than five hundred comments on the proposed settlement, the “vast majority” of which were negative).

99. *See* Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 3, *Authors Guild, Inc. v. Google Inc.*, No. 05-8136 (S.D.N.Y. Feb. 4, 2010) [hereinafter Statement of Interest] (“The Supreme Court has cautioned that ‘Rule 23 . . . cannot carry the large load’ of restructuring legal regimes in the absence of congressional action—however sensible that restructuring might be.”).

100. *Authors Guild*, 770 F. Supp. 2d at 682; *see also* Samuelson, *supra* note 83, at 1358 (“Use of a class action settlement to restructure markets and to reallocate intellectual property rights, particularly when it would give one firm a de facto monopoly to commercialize millions of books, is arguably corrosive of fundamental tenets of our democratic society.”). *But see Recent Cases: Southern District of New York Rejects Proposed Google Books Settlement Agreement*, 125 HARV. L. REV. 1274, 1279–80 (2012) (arguing that concerns about the “anticompetitive impact” of the settlement are “overstated,” because antitrust doctrines such as the competitive duty to deal might require Google to license orphan works to competitors at reasonable prices).

101. Amended Settlement Agreement § 6.3, *Authors Guild, Inc. v. Google Inc.*, No. 05-8136 (S.D.N.Y. Nov. 13, 2009).

102. *See* Statement of Interest, *supra* note 99, at 21 (“The suggestion that a competitor should follow Google’s lead by copying books *en masse* without permission in the hope of prompting a class action suit to be settled on terms comparable to the [amended settlement agreement] is poor public policy and not something the antitrust laws require a competitor to do.”).

103. *Authors Guild*, 770 F. Supp. 2d at 686.

104. *Id.* at 678–79.

entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties.”¹⁰⁵ The court urged the parties to return to the negotiating table and consider limiting the plaintiff class only to authors and publishers who affirmatively opted into the settlement.¹⁰⁶ Although this arrangement would cure many of Judge Chin’s objections to the agreement,¹⁰⁷ it would not allow Google to include orphan books in its digital library, because the authors of such works are, by definition, unavailable to consent. For now, orphan books remain untouchable by Google or any other publisher, prisoners of extravagant intellectual property protection.¹⁰⁸

Congress must resolve the problem.¹⁰⁹ In 2006, at the direction of Senators Orrin Hatch and Patrick Leahy, the Copyright Office recommended a reasoned solution that took pains to preserve the rights of absent authors.¹¹⁰ If after a reasonably diligent search a party fails to find the owner of a copyrighted work, the Copyright Office would allow him to use that work without permission on the condition that he pay a licensing fee if the author eventually surfaces.¹¹¹ In essence, the proposal would liberate parties to use orphaned works by capping potential damages. In 2006 and 2008, lawmakers considered but never passed several bills that

105. *Id.* at 677.

106. *Id.* at 686.

107. *See id.*

108. After Judge Chin rejected the proposed settlement, the Authors Guild and several individual plaintiffs filed an amended complaint in federal district court in October 2011. Fourth Amended Class Action Complaint, Authors Guild, Inc. v. Google Inc., No. 05-8136 (S.D.N.Y. Oct. 14, 2011). The Authors Guild sued as a class on behalf of all United States residents who hold a copyright in at least one book that was registered with the Copyright Office within three months of its first publication. *Id.* at 7. This registration requirement would seem to exclude many orphan works from the proposed class. Google filed a motion to dismiss against the Authors Guild, arguing that the association does not have standing to raise copyright infringement claims on behalf of its members. The district court denied the motion and certified the proposed class. *See* Authors Guild, Inc. v. Google Inc., 282 F.R.D. 384, 386 (S.D.N.Y. 2012). The Second Circuit stayed proceedings in the district court so that Google could appeal the class certification. *See* Order Granting Motion to Stay the Proceedings, Authors Guild, Inc. v. Google Inc., No. 12-3200 (2d Cir. Sept. 17, 2012). Meanwhile, Google announced a settlement with the publishers, but not with the authors. *See* Jeffrey A. Trachtenberg, *Google, Publishers Settle Dispute*, WALL ST. J., Oct. 5, 2012, at B5.

109. *See* Golan v. Holder, 132 S. Ct. 873, 894 (2012) (labeling the orphan works problem as fitting for legislative rather than judicial resolution).

110. REGISTER OF COPYRIGHTS, *supra* note 60, at 1.

111. *Id.* at 12–13.

would have implemented the office's proposal.¹¹²

With the collapse of the Google settlement, Congress has a fresh opportunity to confront the orphan works problem. This Article proposes that lawmakers should embrace, up to a limit, the Copyright Office's proposal to fix damages for the use of such works. If a party exploits orphaned expression and the true owner resurfaces within a period of years determined by statute, Congress should require the former to pay the owner a reasonable license fee and perhaps desist from using the work altogether. Its resolution of the problem should not end there, however. If the owner fails to appear after that period of years has expired, the other party's open and notorious use of the work should serve to extinguish the copyright and place the work in the public domain.

This mechanism for stripping intellectual property rights from a delinquent owner resembles the real property doctrine of adverse possession.¹¹³ Although adverse possession could impose harsh consequences on copyright holders, sound public policy favors divesting them of their entitlement where they have neglected the property for a significant amount of time.¹¹⁴ This policy justification carries perhaps greater force with copyright than it does with real property. Expansive intellectual property rights have handcuffed libraries, museums, and private actors such as Google from resurrecting books and other expressive works, even when the copyright owner no longer has any use for them.¹¹⁵ By importing adverse possession into the copyright statute, Congress could manumit these works into the public domain and thereby serve the constitutional purpose of promoting "the Progress of Science and useful Arts."¹¹⁶

112. See YEH, *supra* note 57, at 9–16 (providing a summary of the bills).

113. See Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135–36 (1918).

114. See *id.* at 136.

115. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1563–64 (1993) (arguing that "creators should have property in their original works, only provided that such grant of property does no harm to other persons' equal abilities to create or to draw upon the preexisting cultural matrix and scientific heritage").

116. U.S. CONST. art. I, § 8, cl. 8.

IV. POLICIES JUSTIFYING APPLICATION OF ADVERSE POSSESSION TO COPYRIGHT

A property right denotes the right to exclude others from land or possessions.¹¹⁷ To some extent it also implies a duty to exclude,¹¹⁸ as reflected in the doctrine of adverse possession. Adverse possession inflicts a penalty on owners who have failed to monitor, maintain, or exclude others from their property, thereby allowing a hostile trespasser to occupy the land as if it were his own.¹¹⁹ If the trespasser satisfies the elements of a common law test, a court will strip the original owner of title and create new title in the trespasser.¹²⁰ The trespasser's possession of the land must be "(1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile under a claim of right."¹²¹ The trespasser meets this test by asserting "visible . . . acts of ownership"¹²² over the property, perhaps by building a fence, clearing brush, or erecting a building.¹²³ Through these acts of dominion, the trespasser not only telegraphs to the rest of the world that he is the rightful occupant of the property, but also serves notice on the original owner that he is ousting him from the land.¹²⁴ If the true owner nonetheless fails to bring an action in ejectment before the statute of limitations expires,¹²⁵ then the true owner loses his right to the property.¹²⁶

117. See Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576 (2009) (defining a property right as "a set of exclusive use privileges protected by an exclusionary right").

118. See ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 808–09 (2d ed. 1993).

119. See *id.* at 814.

120. See *id.* at 807–08.

121. *Chaplin v. Sanders*, 676 P.2d 431, 434 (Wash. 1984) (en banc).

122. *Lessee of Ewing v. Burnet*, 36 U.S. (11 Pet.) 41, 52 (1837).

123. See John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 826 (1994) (observing that the doctrine requires the would-be adverse possessor to "either reside on the land, install improvements such as fences and outbuildings or cultivate part of the land continuously during the statutory period" as a way of asserting a "visible challenge" to the original owner's rights).

124. See *In re Estate of Duran*, 66 P.3d 326, 330 (N.M. 2003) ("In the typical adverse possession case . . . the length and quality of the possession serve as notice.").

125. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 198 (2007) (noting that the statute of limitations for actions in ejectment varies by state, running "from a low of five to a high of forty years").

126. The original owner loses not only his *remedy*, but also forfeits his *right* to the land. Dean Ames quoted Lord Mansfield for this proposition: "'Twenty years' adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes

In essence, the trespasser acquires title to the property through a sequence of two steps. First, he establishes good title against all but the true owner through exclusive possession.¹²⁷ Second, that possession ripens into good title when the statute of limitations runs and the original owner can no longer invoke the power of the courts to remove the trespasser from the land.¹²⁸ Notably, adverse possession does not effect a transfer of title from the original owner to the trespasser.¹²⁹ Instead, it extinguishes the former's title and vests original title with the latter, who has the strongest claim to the property by virtue of his long possession.¹³⁰ As Professor William Walsh explains, "There is, of course, no transfer by operation of law or otherwise of the former owner's title. A new title has arisen simply and solely because of the wrongful possession followed by the statutory extinguishment of the former title."¹³¹

Adverse possession is bitter medicine for the original owner. Not only does the doctrine dissolve his title to the property, but it does not require the adverse possessor to pay for the land.¹³² As Professor Henry Ballantine explained:

Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not

away his right of possession." J.B. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313, 319 (1890); see also HENRY F. BUSWELL, THE STATUTE OF LIMITATIONS AND ADVERSE POSSESSION § 229, at 313 (1889) ("But by the Act 3 and 4 Wm. IV. c. 27, § 34, it was provided that 'at the end of the time limited . . . the right and title to the land shall be extinguished.'").

127. See Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2422 (2001) (explaining that, while an adverse possessor's rights are "inferior" to the real owner's before the statute of limitations has run, her rights "are superior to any stranger's by virtue of her prior possession"); cf. *In re Lehman Bros. Holdings, Inc.*, 439 B.R. 811, 816 (S.D.N.Y. 2010) (noting the "old aphorism that possession is nine-tenths of the law").

128. See *Kipka v. Fountain*, 499 N.W.2d 363, 365 (Mich. Ct. App. 1993) ("At the root of claims of title by adverse possession . . . is the statute of limitations on actions to recover possession of land.").

129. 1 WILLIAM F. WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY 122–23 (1947).

130. *Id.*

131. *Id.*; see also STOEBCUK & WHITMAN, *supra* note 14, at 853 (noting that "adverse possession provides a rare instance in which original title may arise in a mature society").

132. Cf. *Warsaw v. Chicago Metallic Ceilings, Inc.*, 676 P.2d 584, 586 (Cal. 1984) (overturning an intermediate appellate court holding that an adverse user had to compensate the original owner to obtain a prescriptive easement, the doctrinal cousin of title acquired through adverse possession).

even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of law.¹³³

The law justifies these harsh results on policy grounds. First, adverse possession quiets title where two or more people have asserted competing claims to land.¹³⁴ By erasing stale claims and clarifying ownership, the doctrine enhances the market value of land and enables its sale, transfer, or mortgage.¹³⁵ Without such a mechanism, potential purchasers of land could face excessive information costs researching the chain of title and negotiating with multiple owners who might be tempted to extract holdout prices.¹³⁶ Relatedly, the doctrine vindicates the reliance interests of creditors, tenants, and others who entered into business arrangements with the adverse possessor under the belief that he was the true owner of the land.¹³⁷ Third, adverse possession serves as a background threat that should spur owners to be diligent stewards of their property.¹³⁸ While the law does not require owners to keep day-to-day watch over their land, it penalizes those who fail to take even minimal steps to monitor their property.¹³⁹ It bears emphasizing that owners do not have to develop or actively use their land in order to protect themselves from a claim of adverse possession; they merely have to take periodic notice of the property and exercise their right to eject hostile trespassers.¹⁴⁰ Still, it is often said that adverse possession expresses the law's preference for productive use

133. Ballantine, *supra* note 113, at 135.

134. *See id.* (asserting that quieting title is the preeminent purpose of the doctrine); *see also Chaplin*, 676 P.2d at 435 (“The doctrine of adverse possession was formulated at law for the purpose of, among others, assuring maximum utilization of land, encouraging the rejection of stale claims and, most importantly, quieting titles.”).

135. Merrill, *supra* note 10, at 1129.

136. *Id.*

137. *Id.* at 1132.

138. *Cf.* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 677 (1986) (noting that the statute of limitations in adverse possession “shapes the primary conduct of private parties”).

139. *See* Merrill, *supra* note 10, at 1130–31.

140. Some scholars have argued that adverse possession does not take adequate account of the social and environmental benefits of keeping land undeveloped. *See* Stake, *supra* note 127, at 2435. Professor Merrill debunks this argument, noting that owners do not have to develop their land, but merely keep up a minimum level of maintenance that signals to others an owner is present. Merrill, *supra* note 10, at 1130–31.

of land over passive neglect.¹⁴¹

These same policies justify the application of adverse possession to orphan works. As described in Part II, *supra*, the repeated extension of the copyright term, coupled with the demise of the renewal, registration, and notice requirements, has freighted thousands of expressive works with uncertain ownership status. Just as adverse possession extinguishes stale claims that cloud title to land, it could expunge the rights of missing copyright owners who are neither exploiting their works nor maintaining a current registration that would allow others to find them. By stripping the private entitlement from orphan works, the doctrine would help return intellectual property to the market, encouraging libraries, museums, or corporations that had been wary of an infringement suit to find new audiences for the material. At the same time, adverse possession would serve as a background threat that would induce authors to maintain an active copyright registration and prevent their works from lapsing into orphan status in the first place. Just as the doctrine should spur land owners to be good stewards of their property, so too should it induce copyright owners to maintain a public presence so that others might contact them and obtain a license for their work.

In this way, adverse possession would promote the fundamental purposes of copyright. In contrast with European copyright regimes, which seek to vindicate an author's intrinsic and subjective connection to his creative expression,¹⁴² copyright law in the United States attempts to promote the dissemination of knowledge by offering authors a carrot, in the form of exclusive rights, to produce creative expression.¹⁴³ Although the entitlement vests in the author, the Constitution's Copyright Clause

141. See, e.g., *O'Dell v. Stegall*, 703 S.E.2d 561, 576 (W. Va. 2010) (observing that the doctrine “rewards the person who has made productive use of the land, it fulfills expectations fostered by long use, and it conforms titles to actual use of the property”); *STOEBUCK & WHITMAN*, *supra* note 14, at 860 (listing, among other policies underlying adverse possession, the argument that “those who will keep land productive by using it should be given permanence”).

142. See *supra* note 38 and accompanying text.

143. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and Useful Arts.’”); Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 507 (1945) (quoting an 1841 speech before the House of Commons in which Thomas Macaulay said, “It is desirable that we should have a supply of good books: we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of remunerating them is by means of copyright”).

envisions the reading public as the ultimate beneficiary.¹⁴⁴ It therefore grants Congress authority to bestow copyright protection for only “limited Times,” after which the work becomes free for all to publish, distribute, copy, and display.¹⁴⁵ As Professor Roberta Kwall has observed, the Framers “were heavily influenced by the utilitarian goals of promoting progress, safeguarding public access and protecting the public domain as the mechanism assuring access to information and facts in expressive works.”¹⁴⁶ Indeed, she reads the “promoting progress” language, rather than the “exclusive right” language, as the primary grant of authority in the Copyright Clause.¹⁴⁷

The seeming harshness of this proposal dissipates if one considers that it would apply only to copyrighted works that have essentially been abandoned by their owners. Adverse possession would *not* denude an author of his entitlement any time another party infringed his copyright and he failed to bring suit to enforce his rights within the three-year statute of limitations.¹⁴⁸ In that case, the author would lose only his *in personam* right against the particular infringer.¹⁴⁹ The doctrine would strip an owner of his *in rem* right¹⁵⁰ to the work only after a potential user met his burden of showing, through the series of steps detailed in Part V.B *infra*, that the copyright holder had all but abandoned his interest in the work.

So why not rely on the doctrine of abandonment?¹⁵¹ Courts have

144. See *Eldred v. Ashcroft*, 537 U.S. 186, 241 (2003) (Stevens, J., dissenting) (embracing the idea that “ultimate public access is the overriding purpose of the constitutional provision”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

145. H.R. REP. NO. 105-452, at 4 (1998) (“Upon the expiration of the copyright term, the work falls into the public domain,” meaning that anyone may perform, display, make copies, or distribute the work “without first having to get authorization from the copyright holder.”).

146. Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1981 (2006).

147. *Id.* at 1984.

148. See 17 U.S.C. § 507(b) (2006) (providing a three-year statute of limitations for all civil actions under the Copyright Act).

149. See Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 435 (2011) (defining an *in personam* right as one that is “thought to operate against a specific individual or set of individuals”).

150. See *id.* (defining an *in rem* right as one that is “operational against the world at large”).

151. See Eduardo M. Penalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196 (2010) (defining abandonment as the “legal judgment that an owner has successfully and

recognized that copyright holders may abandon their entitlement, but to do so they must engage in an overt act that broadcasts their intent to relinquish their rights.¹⁵² Orphan works cannot be deemed abandoned within the common law definition because their owner has faded into obscurity without signaling his intent that others may use the work.¹⁵³ In this situation, adverse possession provides a superior means of erasing vestigial entitlements that have no continuing value to their owners. At the same time, it would restore the value of these works in the marketplace, because they would be newly available to others who might find commercial, artistic, or scholarly use for them—perhaps by including them in a database or compilation of out-of-print works, as Google has done with its digital library.¹⁵⁴

Courts have already proven willing to extinguish the copyrights of sleeping owners. Several federal courts have drawn an analogy to adverse possession to repudiate claims by putative co-owners who return after a long absence to assert rights in a work that another has made profitable.¹⁵⁵ In *Zuill v. Shanahan*, for example, two composers who contributed to the musical score for *Hooked on Phonics* sought a declaration that they shared ownership of the copyright with the program's creator and were each entitled to a third of his profits.¹⁵⁶ The Ninth Circuit rejected their claim,

unilaterally severed ties of ownership that previously bound her to an item of property," and noting that an abandoned chattel becomes "a res nullius, a thing owned by no one").

152. *Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc.*, 191 F.2d 594, 598 (2d Cir. 1951); *see also* Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 375–76 (2010) (explaining the common law requirement that a party seeking to abandon property must carry out "a voluntary act" memorializing his intent to surrender his rights).

153. *See* Matthew W. Turetzky, *Applying Copyright Abandonment in the Digital Age*, 2010 DUKE L. & TECH. REV. No. 019, ¶¶ 21–27 (acknowledging that abandonment is not easily applied to orphan works because of its intent and overt act requirements, but proposing changes to the doctrine that might make it suitable).

154. *See* Megan L. Bibb, Note, *Applying Old Theories to New Problems: How Adverse Possession Can Help Solve the Orphan Works Crisis*, 12 VAND. J. ENT. & TECH. L. 149, 173–74 (2009) (observing that many orphan works may have little value on their own, but that a collection of many such works may have considerable value).

155. *See* *Santa-Rosa v. Combo Records*, 471 F.3d 224, 228 (1st Cir. 2006) ("[W]e cannot think of a more plain and express repudiation of co-ownership than the fact that Combo openly, and quite notoriously, sold Santa Rosa's records without providing payment to him."); *Gaiman v. McFarlane*, 360 F.3d 644, 654 (7th Cir. 2004) (observing the "close analogy to the doctrine of adverse possession"); *Tolliver v. McCants*, No. 05 Civ. 10840 (JFK), 2009 WL 804114, at *11 (S.D.N.Y. Mar. 25, 2009) (drawing an analogy between adverse possession and the rule that "past notice of an ownership dispute can bar all future copyright claims").

156. *Zuill v. Shanahan*, 80 F.3d 1366, 1368 (9th Cir. 1996).

holding that the defendant had “expressly and repeatedly” denied their ownership interest in the work, an act the court likened to the ouster of a cotenant that “starts the adverse possession statute of limitations running.”¹⁵⁷ Because the composers failed to bring suit to clarify their ownership within the three-year statute of limitations, waiting instead until the program began to turn a profit, they lost any potential stake they had in the work.¹⁵⁸ In rejecting their claim, the court noted that their demand reeked of opportunism:

It is inequitable to allow the putative co-owner to lie in the weeds for years after his claim has been repudiated, while large amounts of money are spent developing a market for the copyrighted material, and then pounce on the prize after it has been brought in by another’s effort.¹⁵⁹

Importantly, the court in *Zuill* did not simply bar the composers from bringing an infringement claim against the Hooked on Phonics creator. It expunged their *in rem* right to the work, barring them from bringing a claim not only against this particular defendant, but against any and all future defendants as well.¹⁶⁰ In so doing, the court recognized the unfairness that results when copyright holders neglect their rights until a co-owner has developed a market for the work.¹⁶¹ This same risk attends orphan works. Almost by definition, the authors of orphan works fail to grasp the value of their copyright. If another successfully exploits the work, then he should not have his profits disrupted by a dormant owner who asserts his rights after years of acquiescence—especially since the subsequent user, and not the original copyright owner, recognized its market potential.

157. *Id.* at 1370.

158. *Id.* at 1370–71.

159. *Id.*

160. *Id.* at 1369 (“The putative co-owners . . . argue that the statute of limitations cuts off the remedy, but not the right. . . . This argument fails”); *see also* *Merchant v. Levy*, 92 F.3d 51, 56 (2d Cir. 1996) (“We hold that plaintiffs claiming to be co-authors are time-barred three years after accrual of their claim from seeking a declaration of copyright co-ownership rights and any remedies that would flow from such a declaration.”).

161. *Cf.* DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 427–28 (4th ed. 2010) (describing the problem of so-called patent trolls “who let dormant patents lie fallow until they can be raised to assert a claim to essential parts of a substantial business developed by someone else,” and arguing that enforcement of the trolls’ patent rights with injunctive relief would allow these speculators to extort excessive licensing fees).

V. ADAPTING THE DOCTRINE

Adverse possession is in some ways an unnatural fit for copyright. It is a doctrine rooted in long and uninterrupted possession of land, and copyright is an intangible entitlement that is “incapable” of physical possession.¹⁶² But as conceived in this Article, adverse possession is an analogy—a phrase borrowed for its familiarity. Where both tangible and intangible property are concerned, adverse possession expresses a policy preference for unburdening property of surplus entitlements that obstruct its productive use in the marketplace.¹⁶³ If anything, this public policy concern resonates with even more force in the intellectual property context, because the copyright that vests in the author is not an end in itself, but a means of benefitting the public by incentivizing the production of creative expression.¹⁶⁴ An overly literal reading of the doctrine should not eclipse the compelling policy commonalities that justify the application of adverse possession to copyright as well as to land.

While the policies underlying adverse possession translate readily from the real to the intellectual property context, Congress would have to adapt the black letter test before it could be applied to copyright.¹⁶⁵ As traditionally applied to land, the doctrine vests original title in a hostile trespasser through the following two-step process: the trespasser acquires rights in land by virtue of his long and exclusive possession, and his possession ripens into good title once the statute of limitations has run and the original owner is powerless to bring an action in ejectment.¹⁶⁶ This Article proposes replacing that sequence with another test focused not on possession, but on the balance of the equities. If a party seeking to use a copyrighted work (1) made reasonably diligent efforts to identify and

162. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.05[C][1] (rev. ed. 2011).

163. See Merrill, *supra* note 10, at 1128–30.

164. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is . . . intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

165. See Constance E. Bagley & Gavin Clarkson, *Adverse Possession for Intellectual Property: Adapting an Ancient Concept to Resolve Conflicts Between Antitrust and Intellectual Property Laws in the Information Age*, 16 HARV. J.L. & TECH. 327, 365 (2003) (“The nature of intellectual property is such that almost any real property analogy will require modification.”).

166. See *supra* notes 126–28 and accompanying text.

locate the copyright holder, (2) posted notice to a registry describing his intended use, and (3) subsequently engaged in open and notorious use of the work, the running of the statute of limitations would strip the copyright holder of his property right and deposit the work into the public domain. This test builds from the premise that a copyright holder should not lose his entitlement unless, by all appearances, he has orphaned his work; each prong aims to furnish notice on the owner that his right is in jeopardy. But once all efforts to give notice have proven fruitless, equity and sound public policy favor lifting the owner's monopoly and emancipating the work into the public domain. This test has precedent in cases adapting adverse possession to chattel property,¹⁶⁷ which have likewise shifted the focus from possession to the balance of the equities. The following section will explore one such case and propose additional tweaks for shaping the doctrine to the particular contours of intellectual property.

A. *O'Keeffe v. Snyder and the Adverse Possession of Chattels*

O'Keeffe v. Snyder is the seminal case in which the New Jersey Supreme Court retrofitted adverse possession to apply to chattel property, and it provides a useful guidepost in extending the doctrine to copyright.¹⁶⁸ The case concerned three small paintings stolen from the artist Georgia O'Keeffe in 1946.¹⁶⁹ O'Keeffe did not report the theft to police, advertise it in industry publications, or take any steps to recover the work other than spreading the word among friends in the New York art world.¹⁷⁰ When the paintings surfaced at a gallery thirty years later, O'Keeffe brought an action in replevin against the putative owner; he reposed with a defense of adverse possession.¹⁷¹

The court acknowledged that previous cases had recognized the doctrine's application to movable property, but it identified an "inherent problem" in extrapolating the doctrine beyond its origins in the law of real property.¹⁷² As the court observed, "Real estate is fixed and cannot be

167. *Cf.* 17 U.S.C. § 201(d)(1) (2006) (analogizing copyright to "personal property," at least in the limited context of intestate succession); 35 U.S.C. § 261 (2006) (declaring that "patents shall have the attributes of personal property").

168. *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).

169. *Id.* at 864.

170. *Id.* at 865–66.

171. *Id.* at 866.

172. *Id.* at 871.

moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of open, notorious, visible, hostile, continuous acts of possession on it.”¹⁷³ Unlike an owner ousted from land, an owner dispossessed of his chattel may have no notice of the whereabouts of the missing object or the identity of the thief, finder, or good-faith purchaser who may have acquired it.¹⁷⁴ As the *O’Keeffe* court noted, if jewelry is stolen in one county in New Jersey, “it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality.”¹⁷⁵

The court in *O’Keeffe* needed a test to resolve the disputed ownership of the three paintings, but it rejected a test focused on the defendant’s long possession.¹⁷⁶ Because the defendant and his predecessors in interest held the paintings in a private home for nearly thirty years, their long possession was unlikely to alert O’Keeffe of her rights.¹⁷⁷ Instead, the court adopted a test focused on the balance of the equities.¹⁷⁸ It held that the statute of limitations would toll where the bereaved owner exercised reasonable diligence in tracking down his missing goods, as by notifying law enforcement of the theft or loss.¹⁷⁹ If the injured party put forward such an effort, his cause of action for replevin would not accrue until he either discovered or should have discovered facts that would enable him to initiate the suit, such as the location of the item and the identity of the wrongful possessor.¹⁸⁰ The court characterized this “discovery rule” as “a vehicle for transporting equitable considerations into the statute of limitations for replevin.”¹⁸¹

The focus of the inquiry will . . . be . . . whether the owner has acted with due diligence in pursuing his or her personal property. . . . The rule permits an artist who uses reasonable

173. *Id.* at 873.

174. *O’Keeffe*, 416 A.2d at 871.

175. *Id.*

176. *Id.* at 872.

177. *Id.* at 866.

178. *Id.* at 872.

179. *See id.* (“The rule permits an artist who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession.”).

180. *O’Keeffe*, 416 A.2d at 869.

181. *Id.* at 872.

efforts to report, investigate, and recover a painting to preserve the rights of title and possession. . . . In determining whether the discovery rule should apply, a court should identify, evaluate, and weigh the equitable claims of all the parties.¹⁸²

The court remanded O’Keeffe’s case for additional fact finding, but it suggested that the equities did not tilt in her favor because she had failed to take affirmative steps to recover the stolen paintings.¹⁸³ If the lower court barred her action for recovery, it would effectively vest good title in the wrongful possessor.¹⁸⁴

O’Keeffe holds several lessons for the importation of adverse possession into the copyright regime. First, the case identified the central difficulty of applying the doctrine to property that is not rooted in a single location.¹⁸⁵ Just as owners would have to search a potentially limitless number of locations to track down their missing chattel, copyright holders would incur excessive costs attempting to monitor every use of their creative expression. It might well escape their notice that a library had displayed their photographs among thousands of others in a digital archive; a musician had performed their songs in an obscure nightclub; or an artist had tessellated their images into a collage. This proposal acknowledges that authors will not be able to prevent all instances of infringement, and it does not impose a duty of perfect enforcement. Authors would not lose their copyright any time another pirated their work and the statute of limitations expired; in that case, they would lose only their *in personam* right against the particular infringer.¹⁸⁶ As the *O’Keeffe* court recognized, adverse possession is not a defense “identical” to the running of the statute of limitations.¹⁸⁷ The doctrine operates only where an additional or aggravating factor indicates that the entitlement should no longer remain with the original owner. With land, that factor is the trespasser’s long

182. *Id.*

183. *Id.* at 866.

184. *See id.* at 874 (“History, reason, and common sense support the conclusion that the expiration of the statute of limitations bars the remedy to recover possession and also vests title in the possessor.”).

185. *Id.* at 871.

186. *See* Balganesch, *supra* note 149, at 435.

187. The New Jersey Supreme Court rejected the trial court’s conclusion that “the defenses of adverse possession and expiration of the statute of limitations were identical” and characterized the test instead as an amalgam of the statute of limitations and equitable considerations. *O’Keeffe*, 416 A.2d at 872.

possession.¹⁸⁸ With chattels, it is equity.¹⁸⁹

This Article, following the path charted by *O’Keeffe*, proposes a test that would mimic the traditional doctrine of adverse possession by brigading the statute of limitations with equitable and public policy considerations. Where copyright is concerned, adverse possession should come into play only where the author appears to have discarded his work, not only ceasing to publish, display, or otherwise profit from it, but also failing to leave any identifying information that would aid others seeking permission to use it. A work needs dog tags if the author wishes to prevent it from passing into the public domain.

B. Elements of the Adverse Possession Test

The following test strives to balance the equities between an absent copyright holder and a party seeking to use his orphaned expression (“the copier”). It would require the copier to (1) conduct a reasonably diligent search for the author,¹⁹⁰ (2) post notice in a registry indicating that the work is believed to be orphaned, and (3) make open and notorious use of the work for the duration of the statutory period. Each prong of the test serves a notice-giving function. Taken together, the three elements strive to rouse dormant copyright holders and protect them from the erroneous deprivation of their rights.¹⁹¹ If the author takes notice of the unconsented use of his work before the statute of limitations has run, then he may sue the copier for infringement. The author would, however, be entitled to only limited or nominal damages if the copier could demonstrate compliance with each element of the three-part test.¹⁹² If instead the copyright holder fails to

188. Once the statute has run, the trespasser takes title because his long possession has telegraphed to the rest of the world that he is the rightful owner. See Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 74 (1985) (“For the common law, *possession* or ‘occupancy’ is the origin of property.”).

189. See *O’Keeffe*, 416 A.2d at 872.

190. “Reasonably diligent search” is the standard suggested by the register of copyrights. REGISTER OF COPYRIGHTS, *supra* note 60, at 8.

191. A test less protective of the interests of copyright owners could encourage predatory behavior. Cf. Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L. Q. 723, 729 (1986) (noting that some adverse possessors engage in bad faith rent-seeking activity, such as seeking out land that might be “easy pickings” for a “successful expropriation”).

192. The register of copyrights suggested limiting damages to “reasonable compensation,” which is to say “the amount the user would have paid to the owner had they engaged in negotiations before the infringing use commenced.” REGISTER OF COPYRIGHTS, *supra* note 60, at 12. This Article suggests pegging damages even lower than the price resulting

assert his rights before the end of the statutory period, then he would lose his ownership interest and the work would pass into the public domain. Essentially, the three-part test would serve to identify instances where a copyright holder has truly orphaned his work, such that it would not be inequitable to strip him of his title and free the work for use by others.

1. Reasonably Diligent Search

To distinguish his use of a copyrighted work from bare infringement, a potential copier would have to conduct a reasonably diligent search to locate the owner and request permission to reproduce, display, or otherwise use the work.¹⁹³ To satisfy this standard, a copier should review registrations filed with the Copyright Office and search the records of libraries, publishing companies, or private clearinghouses, such as the American Society of Composers, Authors, and Publishers. If such efforts prove fruitless, the copier could consult experts in the field who might be able to identify the work and trace its provenance. Ultimately, the federal courts would be charged with developing and fleshing out the “reasonably diligent” standard through the lens of particular cases. In so doing, the courts should tailor the stringency of their inquiry to the expected economic value of the orphaned work. They should, in other words, demand a less resource-intensive search in cases where the work in question has only scholarly, as opposed to commercial, value. A more searching standard could make permissions research prohibitively expensive for the libraries or museums that are most likely to resurrect cultural artifacts that might have value only to scholars.

2. Notice in a Registry

Before it imports adverse possession into the copyright statute, Congress should establish a searchable registry where a would-be copier could post notice that he planned to publish, display, or otherwise exploit an orphaned work.¹⁹⁴ Like the requirement that a copier conduct a reasonably diligent search, the posting requirement would increase the likelihood that a copyright holder would obtain actual notice that his rights

from a hypothetical negotiation, because the copier is likely to incur high search costs where the work has little or no identifying information.

193. *See id.* at 98–108.

194. *See O’Keeffe*, 416 A.2d at 872 (observing that “there does not appear to be a reasonably available method for an owner of art to record the ownership or theft of paintings,” and recommending the adoption of a registry).

were in peril before the running of the statutory period. In updating the registry, the copier should not only give a written description of the orphaned work, but should also include digital images, audio clips, or other excerpts that might help the copyright holder identify his work.

Lawmakers considered creating such a registry in one of the failed bills addressing the orphan works crisis.¹⁹⁵ The Copyright Office criticized this proposal at the time, arguing that it would impose an “inappropriate burden” on copiers “with large collections of orphan works,” such as museums seeking to display thousands of historic photographs on an external web site.¹⁹⁶ However, this Article takes the view that inflicting such a burden beats the alternative that museums and libraries have chosen: mothballing the orphaned works rather than exposing themselves to the risk of a lawsuit from a hibernating copyright holder.

3. Open and Notorious Use

Finally, the copier must engage in open and notorious use of the orphaned work for the entirety of the statutory period. Like the other parts of the test, this element is intended to alert missing authors that a copier is encroaching on their rights so that they might seek relief before the statute of limitations expires.¹⁹⁷ Because its effect is likely to be incremental as compared with the other prongs of the test, the “open and notorious” standard should not be especially demanding. It would not require the copier to engage in widespread dissemination of the orphaned work, but merely to engage in something other than a purely private use. Such purely private uses might include displaying a painting in the home or performing a song for a small group of friends.

4. Passage into the Public Domain

As previously described, adverse possession extinguishes the original owner’s title to land and creates original title in the trespasser; it does not effect a transfer from one to the other.¹⁹⁸ Because the entitlement does not remain intact, Congress does not have to bestow the same exclusive rights on the copier as it did on the original holder of the copyright. Once the copier establishes all three elements of the test and the statute of limitations

195. Orphan Works Act of 2008, H.R. 5889, 110th Cong. § 3 (2008).

196. REGISTER OF COPYRIGHTS, *supra* note 60, at 113.

197. STOEBUCK & WHITMAN, *supra* note 14, at 856.

198. *See supra* notes 129–31 and accompanying text.

has run, the work would pass into the public domain, where the copier as well as any other consumer would have the right to use it without fear of liability.¹⁹⁹ Where the original copyright holder has ceased both to exploit the work and exclude others from using it, adverse possession would become a means of accelerating its entry into the public domain.²⁰⁰

This proposal is fully consonant with the goals of the Copyright Clause.²⁰¹ Copyright law does not give an author all the spoils of his creativity. It rewards his labor by granting him the exclusive right to publish, distribute, and adapt his work, but it also sets an expiration date after which the material becomes free for all to use.²⁰² By liberating creative works from private ownership after a period of years, the copyright system fosters a robust public domain from which other authors may draw inspiration without fear of treading on someone else's copyright. Thus the Sherlock Holmes stories, arguably free from copyright protection,²⁰³ have given rise to a slick movie adaptation starring Robert Downey, Jr.; a BBC miniseries set in modern-day London; and the television drama *House, M.D.*, featuring a doctor whose depression, drug dependency, and genius for solving medical riddles call the fictional detective to mind. Originality in the strong sense is rare indeed; every author alloys what is personal to him with what he has read before.²⁰⁴ Even Shakespeare cribbed from the ancient Greeks and the Italian *commedia dell'arte*.²⁰⁵ By establishing that

199. See *supra* note 25 and accompanying text.

200. Under current law, works do not enter the public domain until seventy years after the author's death. See 17 U.S.C. § 302(a) (2006).

201. It is also consistent with trademark law. See Strahilevitz, *supra* note 152, at 391 ("When a trademark falls into disuse, there is no longer any justification for impoverishing the public domain, however slightly, so the mark is returned to the commons where it can be appropriated by any other firm that wishes to use it in commerce.").

202. See U.S. CONST. art. I, § 8, cl. 8 (allowing Congress to grant copyright for only "limited Times").

203. See Jennifer Schuessler, *Suit Says Sherlock Belongs to the Ages*, N.Y. TIMES, Mar. 7, 2013, at C1 (noting lawsuit against Arthur Conan Doyle's estate alleging that most Holmes stories are in the public domain).

204. See *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissent) ("Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."); see also Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurrall*, 121 YALE L.J. ONLINE 601, 601 (2012) (defining "dissental" as a colloquialism for a dissent from denial of rehearing en banc).

205. See generally Robert Henke, *Transporting Tragicomedy: Shakespeare and the Magical Pastoral of the Commedia dell'Arte*, in EARLY MODERN TRAGICOMEDY 43 (Subha Mukherji & Raphael Lyne eds., 2007).

copyright should persist for only “limited Times,”²⁰⁶ the Constitution recognizes the vital importance of maintaining—and building—a pool of unprotected expression from which any artist may draw.²⁰⁷

This argument retains vitality even after *Golan v. Holder*, the recent case in which the Supreme Court arguably downplayed the importance of a robust supply of creative raw materials.²⁰⁸ *Golan* involved a challenge to a statute in which Congress bestowed copyright protection on certain foreign works—previously in the public domain—that would have been entitled to such protection “had the United States maintained copyright relations” with their home country at the time of their creation.²⁰⁹ Musicians, publishers, and others who had built their business on free access to these works claimed that Congress had transgressed the limited times provision in the Copyright Clause by removing these works from the public domain.²¹⁰ In rejecting their challenge and holding that the public domain is not “inviolable,”²¹¹ the Court reasoned that the Constitution vests Congress with authority to calibrate the incentives best suited to encourage not only production, but also dissemination, of creative works.²¹² In this case, Congress made a rational judgment that improving copyright relations with foreign governments would strengthen the market for American works abroad.²¹³ The decision affirmed that Congress has broad, if not untrammelled, discretion to define the contours of intellectual property rights, subject only to rational basis review by the courts.²¹⁴ While Congress exercised that discretion in this instance to enlarge copyright

206. U.S. CONST. art. I, § 8, cl. 8.

207. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 977 (1990) (“Copyright commentary emphasizes that which is protected more than it discusses that which is not. But a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all.”).

208. *Golan v. Holder*, 132 S. Ct. 873 (2012).

209. *Id.* at 878.

210. *Id.* at 878, 884.

211. *Id.* at 878, 886.

212. *Id.* at 888–89.

213. *Id.* at 889.

214. See *Golan*, 132 S. Ct. at 887 (“Given the authority we hold Congress has, we will not second-guess the political choice Congress made between leaving the public domain untouched and embracing [the Berne Convention] unstintingly.”); *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (“[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”).

protection at the expense of the public domain, *Golan* suggests it would be equally legitimate for Congress to use adverse possession to prune private entitlements and free orphan works for use by the general public.

C. Future Developments

This proposal requires a brief addendum. The test described in the preceding subsection could require libraries, museums, and private companies to incur potentially high research costs en route to concluding a work has been orphaned. If these institutions invest not only in research, but also in shepherding potentially valuable orphan works back to the marketplace, they face the risk that a competitor will free ride off their efforts and begin publishing works that have gained a proven audience. While these institutions should not obtain a full-fledged copyright in the orphan works they rediscover—these are public domain materials, after all—they perhaps deserve a circumscribed right that would apply against direct competitors and protect the incentive to locate such works in the first instance.²¹⁵ As Professors Willam Landes and Richard Posner observed:

Often the demand for particular works of intellectual property is unknown before they actually hit the market. . . . In the absence of copyright protection, other publishers can wait and see which author sells and then bring out their own version of his works. . . . A complete solution would require that the “resurrectors” of old works on which copyright had expired without renewal, like finders in the law of real property, be allowed to obtain copyright in those works.²¹⁶

The scope of such a right is beyond the bounds of this Article, though it perhaps might apply only to libraries, museums, or companies that serve the public interest by creating online archives to make formerly obscure works available to a broad audience.²¹⁷

In any event, the creation of the right is premature. Even without some type of quasi-copyright protection, Google plans to invest roughly

215. See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239–42 (1918) (recognizing a newswire’s quasi-property right in unpublished news, good only against direct competitors).

216. Landes & Posner, *supra* note 46, at 489; see also Netanel, *supra* note 37, at 370 (arguing that, to counteract free-rider problems, “the democratic approach might well support the extension of limited copyright-like protection for those who ‘publish’ public domain works in digital format”).

217. Cf. Bibb, *supra* note 154, at 177 (“The only entities capable of adverse possession of orphan works should be nonprofit libraries and archives.”).

\$800 million in scanning current and out-of-print books to populate its online library.²¹⁸ While Google may have banked on earning a return on this investment through its monopoly power—it has a unique product because its competitors have not been willing to include copyrighted, as well as public domain, works in similar online repositories²¹⁹—the proliferation of other digital archives suggests that some type of exclusive right is not needed, at least yet, to incentivize their creation.²²⁰

VI. CONCLUSION

Congress has impoverished the public domain by repeatedly expanding the rights of intellectual property owners since 1976, no matter what the collateral damage. Importing adverse possession into the statute could help counteract that steady expansion and replenish the common stock of unprotected expression. While Congress would have to amend the elements of the common law test before it could be applied to intangible property, the policies underlying adverse possession pertain as much to copyright as they do to land. By paring back overbroad copyright protection that has impeded, rather than promoted, the dissemination of knowledge, adverse possession would serve the constitutional purpose of promoting “the Progress of Science and useful Arts.”²²¹

218. Toobin, *supra* note 78, at 33–34. Google has invested tremendous manpower in bringing its library project to fruition. It designed and built high-resolution scanners capable of handling millions of books, and it developed software that allows the public to reconnoiter their text in a way no library catalog ever has. This software was more than a simple extension of Google’s existing search function. As one of its engineers explained to the journalist Jeffrey Toobin, “The real challenge is to get somebody something they are actually interested in, inside a book. Web sites are part of a network, and that’s a significant part of how we rank sites in our search—how much other sites refer to the others. Books are not part of a network. There is a huge research challenge, to understand the relationship between books.” *Id.*

219. *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 679, 682–83 (S.D.N.Y. 2011).

220. See, e.g., Daniel J. Wakin, *Free Trove of Music Scores on Web Hits Sensitive Copyright Note*, N.Y. TIMES, Feb. 22, 2011, at A1 (describing an online archive with 85,000 classical music scores created by a conservatory student with help from volunteer labor); cf. David Streitfeld, *In a Flood Tide of Digital Data, an Ark Full of Books and Film*, N.Y. TIMES, Mar. 4, 2012, at A1 (chronicling the efforts of Brewster Kahle, a billionaire Silicon Valley entrepreneur, founder of the Internet Archive, and modern-day Carnegie, to collect and store hard copies of hundreds of thousands of books, many of which have been digitized).

221. U.S. CONST. art. I, § 8, cl. 8.