Michael A. Heller & Rebecca S. Eisenberg
Can Patents Deter Innovation?
The Anticommons in Biomedical Research
Perspectives 159-69

• The tragedy of the commons was the overuse of a scarce resource. There was no right to exclude others.

• The tragedy of the anticommons is the underuse of a scarce resource because the government gives too many people the right to exclude others.

Heller & Eisenberg cont’d

• Unintended results of privatization.
  • Problems in post-socialist economies.
  • Concurrent fragments.
  • Stacking licenses.
  • Patent Pools.
    • Transaction costs.
    • Heterogeneous interests.
    • Cognitive biases.
Acquisition by Adverse Possession

Transfer of interest in land without the consent of the prior owner and even in spite of the dissent of such owner. A *forced conveyance*. 

Why does the law provide for forced conveyances through AP?

- Efficient allocation of scarce resources.
- Reliance interest of 3d parties: protects 3d party purchasers, lenders, etc., encourages development because you know who to deal with.
- Reliance interest of AP: allows wrongdoer to move on with life.
Why does the law provide for forced conveyances through AP?

- Desirability of quieting title: promotes security; allows people to arrange affairs.
- Decay or loss of evidence: without the statute of limitations claims could be brought up many years later.

Why does the law provide for forced conveyances through AP?

- Interest in discouraging sleeping owners: must act to remove trespassers; promptness suggests importance of claim.
Van Valkenburgh v. Lutz cont’d

N.Y. Civil Practice Act
Casebook p. 118, n. 11

• § 34 – possession required for a minimum of 15 years.

• § 39 - must demonstrate actual occupation under claim of title or claim of right.

• § 40 - actual occupation means that the land has been enclosed, or “usually” cultivated and improved.

Elements of Adverse Possession

• Actual physical exclusive possession.

• Open and Notorious.

• Adverse and under claim of right or title.

• Continuous occupation for the statutory period.
Actual physical exclusive possession.

- Not shared with the owner.
- Triggers a cause of action for trespass or wrongful entry against which the SOL runs.

Open and Notorious.

- Acts of entry have to reasonably inform an attentive landowner that someone is on her property.
- Notice such as cultivation or enclosure.
- *The sleeping theory.*
Adverse and under claim of right or title.

- Hostile.
- Not in possession subordinate to the owner but is claiming it for herself.
- Partly so that owner doesn’t think that the occupant will make no claim and partly to reward the productive acts of occupancy.
- *The earning theory.*

Continuous occupation for the statutory period.

- As an actual owner would do as appropriate to the type of property.
- Makes sure that the owner has enough time to discover the wrongful possession and do something about it.
- Also makes sure that the adverse possessor is really sticking to his claim of right, earning the land, and getting very attached to it.
Marengo Cave Co. v. Ross,
10 N.E.2d 917 (Ind. 1937), Casebook p. 125.

- *Ad coelum* doctrine.
  - Other possible rules.
- Bilateral Monopoly.

Adverse/Claim of Title
Relevancy of State of Mind

1. **Objective.** State of mind of the adverse possessor is irrelevant because the purpose is to quiet title after a reasonable period of time.

2. **Good faith.** State of mind matters. You must have good faith or honest occupation.

3. **Aggressive trespasser.** State of mind matters. You must be adverse and hostile and thus know that you are trespassing.