

David Fagundes, Accession and Copyright (abstract of work in progress 2011)

Accession is an ancient doctrine that permits those who, without consent but in good faith, take and productively use another's chattel to acquire title to it so long as they reimburse the owner for the value of the converted good. Accession and its cognate doctrines are inspired by a series of rationales: ethical reservations about sanctioning wrongful appropriation; pragmatic concerns about distinguishing conjoined chattels; and welfarist motivations to incentivize productive use of goods. Recent work has asked what accession and its rationales may tell us about patents and trade secrets. This paper explores the accession insight in the context of another form of intellectual property: copyright. The idea of accession is not entirely foreign to copyright. Several of its doctrines, such as the section 115 compulsory license and the fair use defense, limit liability for users who make use of owners' works without consent. Other doctrines, such as the adaptation right that gives owners broad control over derivative works, imposes liability even on users who make socially valuable, though unconsented to, improvements on underlying works. Yet none of these doctrines fit squarely with accession doctrine, and examining this mismatch between accession's and copyright's treatment of socially useful, but unconsented-to, appropriations yields a series of insights about each of these doctrines. Examining copyright through the lens of accession draws attention to the persistently inconsistent role of mental states in law's approach to both tangible and intangible property; suggests a broader place for the role of liability rules as a remedy for wrongful appropriations of chattels and works of authorship alike; and illuminates the underappreciated efficiency of theft, and in turn, of copyright infringement.