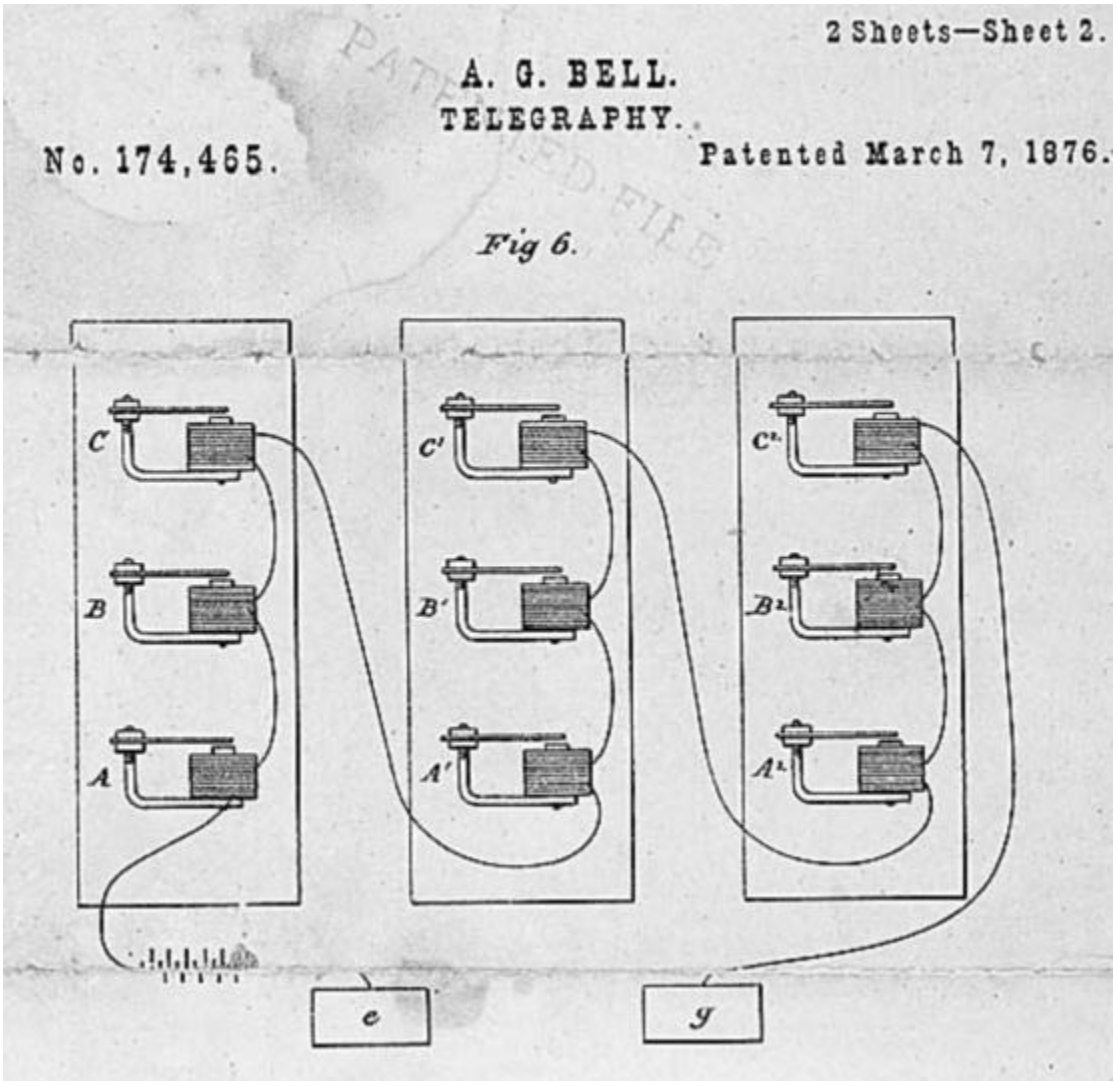
CROUCH SUPPLEMENT

PROPERTY RIGHTS BASED ON POSSESSION, INCLUDING INTELLECTUAL PROPERTY,AND GENERAL INTANGIBLES

Dennis Crouch 2026



FIRST POSSESSION AND INTELLECTUAL PROPERTY

The first-possession cases studied so far share a common feature: the claimant seeks to appropriate something that already exists in the natural world—a fox, a whale, a baseball, a dog, groundwater, a sunken ship. The claimant's labor consists in capturing, finding, or reducing to control a pre-existing thing. Intellectual property presents a fundamentally different paradigm. The claimant does not capture something from the commons; rather, the claimant creates something new—an invention, a work of authorship, a distinctive brand identity—and then seeks legal recognition of an exclusive right to that creation.

Of course, a person who builds a new machine from purchased steel and copper already owns that machine—not by virtue of first possession, but because she held title to the raw materials and merely transformed them into a new form. No doctrine of capture is needed; ownership follows continuously from the prior ownership of the inputs. Intellectual property is different precisely because the thing claimed—an idea, an expressive work, a brand identity—does not derive from raw materials that the creator already owned, and so the law must supply a theory of initial entitlement where none would otherwise exist.

This creative dimension raises an important question about the theoretical foundations of property rights. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), Chief Justice Marshall grounded the property rights of European settlers in a doctrine of discovery and conquest—a paradigm that allowed for appropriation from others. The Lockean labor theory of property, by contrast, emphasizes that one earns ownership by mixing labor with unowned resources from the common. Intellectual property fits more comfortably within the Lockean framework: the inventor or author adds value through creative effort, producing something that did not previously exist.

A powerful aspect of a new idea or knowledge is that it is nonrivalrous. My use of the Pythagorean theorem does not diminish your ability to use it. This is different from something like land or a vehicle where it can be difficult for multiple people to fully simultaneously use the resource. Property rights in inventions and creative works are thus artificial monopolies granted by law to incentivize creation, not natural rights arising from an inherent scarcity of the resource.

Despite these conceptual differences, the vocabulary and logic of "possession" pervade intellectual property law. Courts routinely speak of inventors "claiming" rights, authors "securing" copyrights, and businesses "establishing" trademark rights. In each regime, there is something recognizable as a race to first possession. The "possession" of intellectual property is, of course, a legal fiction. One cannot physically grasp an idea for an invention the way one can hold a baseball. And, although you might hold a painting in your hand, you cannot grasp the copyright which covers all such potential paintings. But the fiction serves an ordering function analogous to that of physical possession: it resolves competing claims, rewards investment, and provides notice to the world of who holds the relevant rights.

Patents

Patent law provides the clearest analogy to the first-possession rule. The patent system awards an exclusive right to the first inventor who satisfies the statutory requirements: the invention must be novel, nonobvious, and the patent must adequately describe how to make and use the invention. But unlike the hunter who simply seizes a fox, the patent applicant must submit to a rigorous examination process administered by the United States Patent and Trademark Office. A trained examiner searches the prior art, evaluates the claimed invention against the statutory requirements, and may reject the application multiple times before any patent issues. The process typically takes two to four years and often involves extensive negotiation between the applicant and the examiner over the precise scope of the patent's claims.

Those claims are central to the patent system. A patent does not simply protect the specific device or process that the inventor built in her laboratory. Rather, the patent's claims define the invention in a more abstract way that includes variations and equivalents that the inventor may never have actually constructed. A patent on a new type of solar cell, for example,

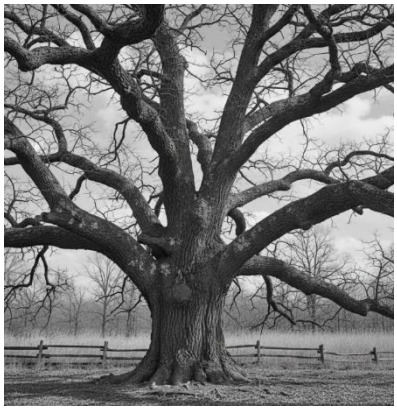
might claim not just the particular cell the inventor built, but any solar cell employing the same novel principle, regardless of the specific materials used. The idea here is to expand-out the legal exclusive rights. The examiner's job is to make sure those metes-and-bounds do not extend beyond what was actually invented after considering the state of the art and the extent of the inventors disclosure.

Since the America Invents Act of 2011, the United States has operated under a "first-to-file" system, which grants priority to the first inventor to file a patent application, regardless of who actually conceived the invention first. This statutory rule functions much like the bright-line rule advocated by the majority in *Pierson v. Post*: rather than rewarding the first person to conceive of or pursue an invention—the intellectual equivalent of "hot pursuit"—the law rewards the first to file, an act analogous to the physical capture or killing that the *Pierson* majority demanded.

Prior to 2013, the United States followed a "first-to-invent" system. This was a bit complicated because invention was typically a multi-step process that included both conception and reduction to practice. The person who was first to conceive established inchoate rights, but to establish full rights they needed to show that they acted diligently in reducing the invention to practice. Otherwise, an interloper—a later-conceiving but earlier-filing rival—could claim rights. That older regime more closely resembled the dissent's position in *Pierson v. Post*, which would have awarded the fox to the first pursuer. The shift to first-inventor-to-file reflects the same policy judgment that animated the *Pierson* majority: clear, easily administrable rules reduce disputes, encourage prompt disclosure, and provide greater certainty to competitors. The act of filing a patent application is a formal, recorded event that creates an unambiguous moment of "possession."

The analogy extends further. Just as the rule of capture in *Pierson* incentivized hunters to kill foxes quickly rather than merely chase them, the first-to-file system incentivizes inventors to disclose their inventions promptly through filing rather than pursuing development in secret. Patent law thus serves a dual purpose: it rewards the inventor with a time-limited monopoly (currently twenty years from the filing date), while simultaneously enriching the public domain through the required disclosure of how the invention works.

Copyright



Copyright takes a markedly different approach. Where the patent system requires rigorous examination, broadly drafted claims, and years of prosecution before any rights issue, copyright protection attaches automatically the moment an original work of authorship is "fixed in any tangible medium of expression." There is no examination, no examiner evaluating the work against the prior art, and no formally drafted claims defining the scope of protection. The act of fixation—writing words on paper, recording music, saving code to a hard drive—is itself the moment of "possession." The simplicity of this mechanism reflects a basic difference in what is being protected: copyright covers the author's particular expression, not the underlying idea. Two novelists may both write coming-of-age stories set during wartime, but copyright protects only their respective prose—not the concept they share.

This distinction also means that copyright does not require novelty. Two authors can independently create strikingly similar works, and each will own a valid copyright, so long as neither copied from the other. This principle of independent creation distinguishes copyright from the strict first-possession framework of *Pierson v. Post*. There is only one fox; whoever captures it first prevails. But there can be multiple independent copyrighted works on the same theme. Consider how many individuals have taken a photograph of the famous Burr Oak. What copyright prevents is unauthorized copying: the taking of someone else's particular expression. In this sense, copyright infringement is analogous to the tort of conversion in the personal property context—an interference with the rights of one who has already established "possession" through the act of original fixation.

Registration with the U.S. Copyright Office, while not required for protection to exist, is a prerequisite to filing an infringement suit and provides evidentiary presumptions of validity. Registration thus functions somewhat like the statutory notice requirements in lost-property statutes: it does not create the underlying right, but it strengthens the claimant's position and facilitates enforcement.

Trade Secrets

Trade secret law presents perhaps the most interesting possession analogy. Under both federal and state law, a trade secret includes is any information that derives independent economic value from not being generally known and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Unlike patents and copyrights, trade secret protection does not depend on a filing or registration. Instead, “possession” of a trade secret is maintained through continuous acts of secrecy—confidentiality agreements, restricted access, encryption, and other protective measures. If the holder fails to maintain reasonable secrecy, the trade secret is lost.

The holder of a trade secret can sue someone who acquires the secret through improper means—theft, breach of confidence, or espionage. But if a competitor independently discovers the same information through reverse engineering or independent research, no misappropriation has occurred. This limitation echoes the principle in copyright that independent creation is not infringement. Patent infringement, on the other hand, is a strict liability offense—independent invention is no defense, and even a competitor who arrives at the identical solution entirely on her own infringes if her product falls within the scope of the patent's claims.

Trademarks

Trademark law arguably hews closest to a pure first-possession model. Under both state common law and the federal Lanham Act, trademark rights are acquired through use in commerce—the actual act of affixing a mark to goods or using it in connection with services and offering them to the public. The first person to use a distinctive mark in commerce in connection with particular goods or services begins to acquire priority over subsequent users of the same or confusingly similar marks. This is a straightforward first-possession rule: the first to "capture" the mark by using it in the marketplace prevails. But what exactly is being captured?

Unlike the patent holder who claims an invention or the copyright holder who claims an expression, the trademark owner claims something more diffuse: the goodwill associated with the mark—the mental association in the consuming public's mind between a particular word, logo, or symbol and a particular source of goods or services. The "property" in a trademark is not the word itself but the commercial magnetism it has acquired through use, and "possession" is measured by the mark's hold on consumer perception.

Federal registration provides significant advantages—including constructive notice of the registrant's claim, a presumption of nationwide priority, and access to federal courts—but as with Copyright, registration does not itself create the right. The underlying right is rooted in use.

An important nuance is the intent-to-use application under Section 1(b) of the Lanham Act. An applicant may file a trademark application based on a bona fide intent to use the mark in commerce, even before actual use has begun. If the application matures into a registration after actual use commences, the applicant's priority dates back to the filing date. This mechanism functions like the pre-possessory interest recognized in *Popov v. Hayashi*: the applicant has taken significant but incomplete steps toward "possession" (use in commerce), and the law protects that inchoate interest from being preempted by a later user.

Name, Image, and Likeness (NIL) Rights

Rights of publicity—commonly referred to today as name, image, and likeness (NIL) rights—provide yet another variation on the first-possession theme. Unlike patents, copyrights, and trademarks, NIL rights are not "captured" through any affirmative act of filing, fixation, or use in commerce. Rather, they are understood to inhere in the individual by virtue of identity itself. Every person possesses the right to control the commercial use of their own name, image, and likeness; the "possession" is intrinsic and automatic.

The rise of NIL rights in collegiate athletics, spurred by state statutes and NCAA policy changes beginning in 2021, has brought renewed attention to this body of law. College athletes can now monetize their identities through endorsement deals, social media sponsorships, and personal appearances. The legal framework varies by state, but the common thread is that the individual's identity is treated as a species of property—one that is "possessed" from birth, though its commercial value may fluctuate dramatically based on fame, athletic achievement, and market demand.

This automatic vesting distinguishes NIL rights from every other form of intellectual property discussed here. There is no race, no first-to-file contest, and no requirement of creative effort. Yet courts still employ the language of possession and property to describe these rights, and misappropriation of another's likeness is treated as analogous to conversion—the wrongful exercise of dominion over property belonging to another.

GENERAL INTANGIBLES AND THE LIMITS OF POSSESSION

The intellectual property regimes discussed above are only a subset of the intangible interests that the law treats, often uneasily, through the conceptual lens of possession and property. The modern economy is built substantially on intangible assets—contract rights, financial instruments, data, regulatory licenses such as broadcast rights, domain names, carbon credits, cryptocurrency, and much else. In each case, the law must decide who "possesses" the intangible, what it means to transfer or lose possession, and what remedies are available when possession is wrongfully disturbed.

The Uniform Commercial Code provides one framework for thinking about intangible property. Under UCC Article 9, "general intangibles" is a residual category encompassing personal property that does not fit within more specific categories. The concept of "possession" does not translate directly to most general intangibles because they lack a physical form that can be held or controlled. Instead, the UCC substitutes the concept of "control" or "perfection by filing"—legal fictions that serve the same ordering function as physical possession: establishing priority among competing claimants and providing notice to the world.

Digital assets pose particularly acute challenges. A domain name, for instance, is "possessed" by whichever entity is listed as the registrant in the relevant domain name registry. Cryptocurrency is "possessed" by whoever controls the private cryptographic key associated with a particular blockchain address—a form of "possession" that is arguably more absolute than any physical possession because, without the key, the asset is entirely inaccessible. Courts have struggled to fit these new forms of value into traditional property categories. See, e.g., *United States v. Gratkowski*, 964 F.3d 307 (5th Cir. 2020) (analyzing Bitcoin under Fourth Amendment property concepts).

These examples illustrate a broader pattern: as property becomes increasingly intangible, the concept of "possession" becomes increasingly metaphorical. Yet courts and legislatures continue to rely on possession-based reasoning because the underlying policy concerns remain constant. The specific requirements vary dramatically across doctrines, but the structural logic is the same: define an act (or a legal status) that counts as "possession," and award priority to the first person who performs it.

NOTES AND QUESTIONS

1. Possession Without Boundaries. A patent's claims define the metes and bounds of the inventor's exclusive rights, much as a survey defines the boundaries of a parcel of land. But copyright and trade secrecy have no formal claims at all—the scope of protection is determined only after the fact, in litigation, when a court must decide whether a defendant appropriated protectable expression. Which system provides better notice to competitors? Consider the rule in *Pierson* that possession requires an unambiguous act that puts the world on notice.

2. The ELVIS Act and the Johnny Cash Sound-Alike. In *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), Ford's advertising agency asked singer Bette Midler to perform one of her hit songs for a Lincoln Mercury commercial. When she refused, the agency hired one of Midler's former backup singers and instructed her to imitate Midler's voice as closely as possible. The Ninth Circuit held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs." The court treated Midler's distinctive voice as an attribute of her identity—a kind of

property interest. Nearly four decades later, the estate of Johnny Cash invoked a similar theory. In *John R. Cash Revocable Trust v. The Coca-Cola Co.* (M.D. Tenn., filed Nov. 25, 2025), Cash's estate sued Coca-Cola for hiring a professional tribute singer to perform an original song in a college football advertisement in a voice "readily identifiable and attributable to" Cash. One difference is that Cash had died in 2003. The lawsuit was brought under Tennessee's Ensuring Likeness Voice and Image Security (ELVIS) Act of 2024, which defines a protected "voice" as "a sound in a medium that is readily identifiable and attributable to a particular individual, regardless of whether the sound contains the actual voice or a simulation." Should it matter whether Coca-Cola intended to evoke Cash specifically, or is it enough that consumers perceived the voice as Cash's? If possession of one's vocal identity is a property right, can it be "abandoned" after death, or does the ELVIS Act effectively create a perpetual property interest that survives the individual—more durable, ironically, than a patent's twenty-year term?

3. AI-Generated Voices and the Boundaries of Identity. The ELVIS Act was drafted with artificial intelligence specifically in mind, covering voices "regardless of whether the sound contains the actual voice or a simulation." Suppose a technology company trains an AI model on thousands of hours of a famous singer's recordings and uses the resulting synthetic voice to generate new songs without authorization. Has the company "taken possession" of the singer's voice? The AI output is not the singer's actual voice—it is a mathematical approximation generated by a neural network. The *Midler* court held that what matters is whether the voice is "distinctive," "widely known," and "deliberately imitated." What if this is done by AI training without any specific human intervention?

4. Money You Cannot Touch. When you deposit $1,000 in a bank account, you no longer "possess" that money in any physical sense. The bank commingles your deposit with everyone else's and lends most of it out. What you hold is a chose in action—a contractual right to demand that the bank pay you $1,000 on request. Yet in ordinary conversation, and even in legal discourse, we say that you "have" $1,000 in the bank. The law treats this account balance as your property: it can be seized by creditors, transferred to heirs, and stolen by embezzlers.

5. Owning a Share of What? Stock ownership presents a similar puzzle. A shareholder in a publicly traded corporation does not possess any particular corporate asset—she cannot walk into the company's headquarters and claim a desk, a computer, or a proportional share of the inventory. What she owns is a bundle of rights: the right to vote, the right to receive declared dividends, and a residual claim on assets upon dissolution. Today, the shareholder's "possession" consists entirely of a digital notation in a database maintained by a third-party intermediary.

6. Carbon Credits, Spectrum Licenses, and Government-Created Property. Some of the most economically significant intangible assets today exist only because the government created them by regulation. A carbon credit is a permit to emit one ton of carbon dioxide, created under cap-and-trade programs and traded on exchanges. A broadcast spectrum license grants the exclusive right to transmit on a particular radio frequency within a geographic area. Neither of these things existed as natural rights; both were conjured into existence by regulatory fiat and then distributed—sometimes by auction, sometimes by lottery, sometimes by administrative allocation. Once distributed, they are bought, sold, leased, and collateralized as though they were parcels of land. How does this fit within the theoretical framework of first possession?