CHAPTER 1

The Concept of Property

Look around you. Almost everything you see is owned by someone. In fact, life as we know it would be impossible without property. The book you are reading, the chair you are sitting on, the clothes you are wearing, the land surface underneath you, and the airspace which you occupy—all are governed by property rights.

As you begin to study property law, it is logical to ask two questions:

- Why do we recognize property?
- What is property?

The answers to these questions are closely intertwined. For example, the reasons why we recognize property influence what we consider to be property and vice versa. We begin to explore these questions in Chapter 1, but they raise fundamental themes that will recur throughout the entire book.

A. Why Recognize Property?

Suppose that a nut tree stands on top of a hill. Who owns the tree? It might be owned by the government as public property like a tree in a national park. It might be private property, that is, property owned by one or more private persons or businesses. Or perhaps the tree is not owned by anyone.

This course focuses on private property, which we will simply call “property.” Our property law system is based on the concept that property is a human invention, not the result of divine gift or natural right. Thus, property exists only to the extent that it is recognized by the government, an approach called legal positivism.
As the English philosopher Jeremy Bentham noted more than 200 years ago: “Before laws were made there was no property; take away laws, and property ceases.” Because property is a human invention, it is necessarily based on reason. The justification for property is important because it determines the scope and extent of legally recognized property rights. Accordingly, natural law theory—the idea that certain rights naturally exist as a matter of fundamental justice regardless of government action—has little impact on modern property law.

Most people take property for granted, without questioning why it exists. In fact, if someone had asked you last week why our society recognizes private property, you might have had trouble coming up with a convincing answer. So, as a starting point, we will examine five theories that seek to justify the recognition of property rights. We will then explore how these theories apply to two specific cases.

1. Five Theories of Property

a. Protect First Possession

You are probably familiar with the adage: “first come, first serve.” This concept is the heart of our first theory.

Perspective and Analysis

When the question arises as to why some people, rather than others, should own things, one of the issues which comes to mind is the question, “Who had it first?” The notion that being there first somehow justifies ownership rights is a venerable and persistent one.


The first possession approach offers a practical explanation for how unowned things become property. Suppose that our hypothetical nut tree is unowned. A is sitting under the tree when several nuts fall off, and he grabs them. Under this approach, A owns the nuts simply because he was the first person to take possession of them.
In a setting where resources were plentiful but people were few—like the early United States—this first-in-time approach accurately describes how unowned things came to be owned. Particularly during the nineteenth century, property rights in water, oil and gas, wild animals, and other natural resources were often allocated to the first possessor. The first-in-time concept has less relevance today because almost every tangible thing is already owned by someone, but you will see its lingering influence throughout the course. For example, all of us use this principle in everyday life. A parking space on a public street, a seat in a movie theater, or a place in a long line—all are allocated through an implicit first-in-time system.

Yet most scholars conclude that the first possession approach does not adequately justify property as a general matter. It describes how property rights arose, but not why it makes sense for society to recognize those rights. See, e.g., Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 75 (1985).

b. Encourage Labor

Writing in the late 1600s, John Locke reasoned that each person was entitled to the property produced through his own labor. Assuming an unlimited supply of natural resources, Locke argued that when a person “mixed” his own labor (which he owned) with natural resources (which were unowned), he acquired property rights in the mixture. Returning to our hypothetical tree, assume that B picks all the nuts off the tree, puts them in a bag, and takes them home to eat. Under the labor theory, the nuts are now B’s property because she acquired them through her labor.

Perspective and Analysis

To Americans [in the 1700s] . . . the writings of John Locke made a good deal of sense. Locke celebrated the common individual, arguing he possessed natural rights that arose in advance of any social order and trumped even the powers of the King. Preeminent among these individual rights was the right to property, which Locke justified by way of his well-known labor theory. As Locke interpreted the Bible, God originally gave the Earth to humankind collectively; as property in common, yet any individual who wanted could seize a thing from the common stock, including land, and make it his own simply by mixing his labor with it. Before the labor was added, the thing had no value. Once the labor was mixed in, value arose and the thing became private property.
Locke's labor theory of property made particularly good sense in North America, more so than it did in England. Frontier colonists could easily see how labor was the key ingredient in the creation of value. Moreover, because land was plentiful, one person's occupation of land did not deny his neighbor the chance to gain land too. Back in England, a person had to buy property or inherit it, and one person's occupation of land did deny another the chance to use it. . . .


Labor theory has profoundly influenced American property law, as you will see throughout the course. But even at this early stage, you should consider its potential limitations. For example, how does labor theory apply in a modern legal system where almost everything is already owned? Hint: one potential application may be in the realm of newly created property, such as copyrights and patents.

**c. Maximize Societal Happiness**

Under traditional utilitarian theory, as developed by Jeremy Bentham, we recognize property in order to maximize the overall happiness of society. Thus, it is a means toward an end. We distribute and define property rights in a manner that best promotes the welfare of all citizens—not simply those who own property. Thus, classic utilitarian theory would say that C owns our hypothetical nut tree not solely in order to benefit C, but because recognizing C's title will promote the welfare of all members of society. For example, if C's ownership is protected, C is able to use the nut tree in a manner that best serves the common good—perhaps harvesting the wild nuts for sale in the local market, using lumber from the tree to make valuable products, or preserving the tree to protect environmental values. Ownership gives C the security that he needs to use the tree effectively.

The law and economics approach views land only as a commodity in commerce, like any other raw material. Accordingly, it tends to ignore the non-monetary benefits of environmental preservation. In Chapter 12, you will explore an alternative view—an ecological approach to land ownership. The law and economics variant of utilitarianism has powerfully affected modern property law scholarship. Under this approach, property is seen as an efficient method of allocating valuable resources in order to maximize one particular facet of societal happiness: wealth, typically measured in dollars.
Perspective and Analysis

In order for an economy to reach its full potential, that is, to achieve an optimal level of production, there are three basic features which its system of property rights must have: universality, exclusivity, and transferability. The first requirement, universality, means that all valuable, scarce resources must be owned by someone. This requirement becomes obvious when illustrated with an example. Suppose that, as in India, cows were sacred and could not be killed or used for commercial purposes or consumption in any form. . . . An economy which is prevented from using cows and cow by-products certainly would be smaller than the same economy where cows could be so used. . . .

The second requirement is exclusivity. If an owner is unable to exclude others from the use and enjoyment of the property, then the owner has no incentive to improve the property. . . . Suppose an owner owned a piece of property which produces nothing. If the owner worked the land and planted crops, in time the land could produce a great crop of substantial value. But if the owner does not have the right to exclude others from the land, then . . . marauding opportunists would simply wait until the crop was ready to be harvested, and come and take the fruits of the hard-working owner’s land and labor. No owner would make such an undertaking . . .

The final requirement for an optimal economy is transferability of property. . . . Suppose that there are two adjoining lots. The first lot has a restaurant which is very popular. The second lot has a small shack where the owner of the second lot lives. The restaurant owner would like to buy or lease the lot from the shack dweller. In a system which only allows exclusive ownership, the shack dweller cannot sell or lease his land. In fact, the shack dweller can never leave, because he cannot buy or rent another dwelling either. Everyone is stuck where they are with what they have. No gains from trade can be made. . . .


Under the law and economics approach, property exists to ensure that owners use resources in an efficient manner—that is, in a manner which maximizes economic value defined as a person’s willingness to pay. As you would expect, this approach is more complex than we can cover in an introductory section. You will study more aspects of law and economics theory later in the course.
d. Ensure Democracy

Civic republican theory posits that property facilitates democracy. During the 1700s, elections to the British House of Commons were still affected by so-called "rotten boroughs"—electoral districts that contained only a handful of voters. Typically, these voters were tenants on farm land owned by a local patron who could control their votes, leading to sham elections. In contrast, Thomas Jefferson and others envisioned the new United States as a nation of free yeoman farmers who owned their own lands and could thus exercise the independent political judgment that was vital for true democracy. (In fact, at one time only property owners were eligible to vote in most states.) Under this approach, we would recognize D's ownership of our hypothetical nut tree and the surrounding land because this provides D with the economic security necessary to make political decisions that serve the common good.

Perspective and Analysis

The most fundamental point about the relationship between property and democracy is that a right to own private property has an important and salutary effect on the citizens' relationship with the state and—equally important—on their understanding of that relationship. . . . Personal security and personal independence from the government are guaranteed in a system in which rights of ownership are protected through public institutions.

This theme has played a large role in republican thought. In the republican view, the status of the citizen implies a measure of independence from government power. . . . In fact, the republican tradition, read in the light of modern understandings, argues not for an abolition of private property, but instead for a system that attempts to ensure that everyone has some . . .

A central point here is that in a state in which private property does not exist, citizens are dependent on the good will of government officials, almost on a daily basis. . . . They come to the state as supplicants or beggars rather than as rightholders. Any challenge to the state may be stifled or driven underground by virtue of the fact that serious challenges could result in the withdrawal of the goods that give people basic security. A right to private property, free from government interference, is in this sense a necessary basis for a democracy . . .


The Supreme Court struck the same theme in United States v. 12 Cases of Wine, 251 U.S. 1 (1919) when it observed that "[p]roperty rights are necessary to preserve freedom. . . ."
Civic republican theory is less prominent today than it was in the 1700s, in part because most citizens obtain economic security from wages earned at a job, not from farming their own land. Still, many scholars suggest that giving each person a “stake in society” through property ownership will provide political and social benefits to all.

**e. Facilitate Personal Development**

Based on the work of German theorist Georg Hegel, personhood theory argues that property is necessary for an individual’s personal development. Under this view, each person has a close emotional connection to certain tangible things, which virtually become part of one’s self—such as family photos, love letters, or perhaps a home. Suppose that E’s family has owned our hypothetical nut tree for four generations; as a child, E literally grew up under the tree. Thus, E venerates the tree as almost an extension of herself. Under personhood theory, E’s rights in the tree should merit special protection.

**Perspective and Analysis**

... The premise underlying the personhood perspective is that to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights. ...

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.

One may gauge the strength or significance of someone’s relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one’s personhood if its loss causes pain that cannot be relieved by the object’s replacement. ... For instance, if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so. ...

Once we admit that a person can be bound up with an external “thing” in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that “thing.”...

All other things being equal, Professor Radin suggests that a right to personhood property should be given priority over a conflicting claim by the owner of non-personhood property. For example, she argues that a tenant’s right to a rented apartment should be seen as personhood property. From the tenant’s perspective, the apartment is a home; from the landlord’s side, it is typically viewed in non-personhood terms as an investment. Accordingly, Radin advocates expanding the legal rights of residential tenants.

f. Conclusion

All five theories help form the foundation of American property law. But it is important to understand that no one theory is accepted as the only justification for property. Our property law system reflects a blend of different approaches, including these theories and others which you will encounter later in the book. Indeed, even these five theories overlap with each other.

2. Two Stories: The Fox and the Celebrity

We begin over 200 years ago, when the United States was a comparatively new nation, stretching from the Atlantic Ocean to the Rocky Mountains. With development clustered along the Atlantic Coast, over 95% of the country was a vast wilderness. Natural resources were abundant, and the human population was small. As you would expect, these conditions influenced the development of American property law.

Our first case concerns an unlikely dispute, set in the wilderness of early New York. Who owns the fox? And why?

Pierson v. Post

Supreme Court of New York
3 C.B.R. 175 (1801)

This was an action of trespass on the case commenced in a justice’s court, by the present defendant against the now plaintiff.

The declaration stated that Post, being in possession of certain dogs and hounds under his command, did, “upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox,” and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was
so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off. A verdict having been rendered for the plaintiff below, the defendant there sued out a certiorari, and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action.

Tompkins, J. delivered the opinion of the court.

... The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox, as will sustain an action against Pierson for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal feræ naturæ, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals?

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes, lib. 2. tit. 1. s. 13. and Fleta, lib. 3. c. 2. p. 175. adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognised by Bracton, lib. 2. c. 1. p. 8.

Puffendorf, lib. 4. c. 6. s. 2. and 10. defines occupancy of beasts feræ naturæ, to be the actual corporal possession of them, and Bynkershoek is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.
It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *ferae naturae* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the English reporters.

Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them. . . . The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy. . . .

We are the more readily inclined to confine possession or occupancy of beasts *ferae naturae*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.
However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous, and ought to be reversed.

LIVINGSTON, J. [dissenting]

My opinion differs from that of the court. Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question.

Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor reynard would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a “wild and noxious beast.” Both parties have regarded him, as the law of nations does a pirate . . . and . . . the memory of the
deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together . . . pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this case, "with hounds and dogs to find, start, pursue, hunt, and chase," these animals, and that, too, without any other motive than the preservation of Roman poultry . . . If any thing, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say *tempora mutantur*, and if men themselves change with the times, why should not laws also undergo an alteration?

It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favoured us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment among them, some conclusion must be adopted on the question immediately before us . . .

Now, as we are without any municipal regulations of our own . . . we are at liberty to adopt . . . the learned conclusion of Barbeyrac, that property in animals *ferae naturae* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a *reasonable* prospect (which certainly existed here) of taking, what he has thus discovered an intention of converting to his own use.

When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious
and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily seizing, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The justice's judgment ought, therefore, in my opinion, to be affirmed.

Points for Discussion

a. Why Did Post Sue?

If successful, Post would have recovered damages equal to the fair market value of the fox carcass. The carcass was worth perhaps four shillings, but local legend says that the parties spent over 1,000 pounds on the case—more than 5,000 times the amount at issue. Bethany R. Berger, It's Not About the Fox: The Untold History of Pierson v. Post, 65 Duke L.J. 1099, 1130, 1133 (2006). The dissent's suggestion that Pierson violated a "custom which the experience of ages has sanctioned" may provide a useful clue. Or perhaps personhood theory is helpful.

b. A Case of First Impression

The principal sources of law in our legal system, in priority, are (1) constitutions, (2) statutes, and (3) reported cases. But neither the majority nor the dissent relies on any of these key sources. The reason for this omission is simple. In 1805, the legal system of the young United States was relatively undeveloped, so there were no binding sources of law that directly resolved this particular case. Rather, it was a case of first impression, a situation where a court has considerably more latitude to reach an appropriate decision. Both the majority and the dissent rely on various treatises—summaries of the law written by venerable legal scholars such as Barbeyrac, Fleta, and Puffendorf—which may be persuasive to a court, but are not binding. Which side uses legal authority most persuasively?

c. First Possession

Pierson is a leading example of the first possession approach to property. Both sides agree that property rights in a wild animal are acquired by the first person to take possession of the animal, a principle called the rule of capture. So what issue did the parties differ on? And would it have made any difference if Post owned the land where Pierson killed the fox? Partly influenced by Pierson, later American courts adopted a first possession approach to allocating property rights in a variety of natural resources. For example, nineteenth-century judges reasoned that oil was like a wild animal because it moved underground in unknown ways in response to the laws of nature; therefore, by analogy to cases such as Pierson, ownership in oil should be given to the first person who physically possessed it.
What are the benefits and costs of adopting a first possession approach to ownership of natural resources like wild animals or oil?

d. When Does Labor Matter?

Both Post and Pierson labored to catch the elusive fox: Post chased, and Pierson killed. Note that Post was aided in his chase by “dogs and hounds”—presumably dogs that were specially trained for hunting—so we might say that Post's labor included his prior investment in hunting technology. How should the case be resolved if we apply Locke's labor theory? And how much labor is needed? One scholar asks: “If I own a can of tomato juice and spill it in the sea so that its molecules . . . mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?” Robert Nozick, Anarchy, State and Utopia 175 (1974).

e. A Utilitarian Perspective

Both the majority and the dissent rely to some extent on public policies, which invoke the utilitarian approach. Which side makes the most convincing policy arguments? For example, the majority claims that its rule will benefit society in general by providing certainty. How so? To what extent are clear rules important in property law? See Carol M. Rose, Crystals and Mud in Property Law, 49 Stan. L. Rev. 577 (1987).

f. Civic Republican Theory?

There may be a thin strand of civic republican theory in the dissent’s focus on protecting farmers’ poultry from attacks by foxes. After all, the economic health of Jefferson’s yeoman farmer was viewed by some as the keystone to effective democracy. The dissent argues for a rule that will provide “the greatest possible encouragement to the destruction” of foxes—and thereby promote American agriculture. Is the dissent’s rule more effective than the majority’s approach?

g. Capture Hypotheticals

Using the majority approach in Pierson, who holds title to the animals below?

(1) Post shoots at a deer from a location 200 feet away; the shot grazes the deer's ear and temporarily stuns it. Pierson immediately catches the deer and puts it in a large sack. Post arrives on the scene one minute later, while the deer is still stunned.

(2) Motivated by environmental concerns, Post nets a wild rabbit, paints “Property of Post” on it, and then allows it to run free. Pierson shoots and kills the rabbit.
(3) Post’s dogs chase a fox into a shallow cave. But before Post can get to the cave, Pierson shoots the fox and mortally wounds it. Post arrives at the cave two minutes later.

(4) Post’s cow strays onto unowned land. Pierson finds the cow, places a rope around its neck, and leads it back to his own farm. Two days later, Post discovers the cow on Pierson’s farm.

h. Aftermath of Pierson

Today the “waste land” involved in Pierson is part of Southampton, New York—one of the nation’s wealthiest resort communities. And although Pierson and Post are long dead, the famous case that bears their names lives on in American law: “Scholars cite it to illustrate everything from discrimination against transgendered persons to rights in fugitive home run balls. Outside the ivory tower, courts and lawyers use it to argue for contested forms of property from groundwater aquifers to the America’s Cup trophy.” Bethany R. Berger, It’s Not About the Fox, supra at 1091–92.

Our second dispute concerns Vanna White, co-star of the television game show Wheel of Fortune. In many ways, White is the antithesis of Pierson. It arises almost two centuries later, in a high-tech industry located on the opposite side of the country, and concerns a type of intangible property—a celebrity’s right of publicity. Yet the same perspectives on property that we explored in Pierson are key to understanding this quite different case. Is White entitled to control the use of her name and likeness? Why?

White v. Samsung Electronics America, Inc.

United States Court of Appeals, Ninth Circuit

Goodwin, Senior Circuit Judge.

This case involves a promotional “fame and fortune” dispute. In running a particular advertisement without Vanna White’s permission, defendants Samsung Electronics America, Inc. (Samsung) and David Deutsch Associates, Inc. (Deutsch) attempted to capitalize on White’s fame to enhance their fortune. White sued, alleging infringement of various intellectual property rights, but the district court