First! - a Case-Based Essay on the Importance of Being First in the Arts & Sciences.

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Two lawyers are running through the city at a furious speed. Their specialty is intellectual property (IP). One is on his way to court, the other to the registration office. They blindly know the shortest route to their destination. That's a necessary thing. One of them scrolls through Instagram like a madman while walking. He looks at the Twin Pix page, which juxtaposes quasi-identical modern design furniture. In this way, the man hopes to find inspiration for his arguments in a plagiarism case. The lawyer will argue that his client R. Kelly may not have been the first to write the contentious melody, but that Kelly did compose it all on his own.

The other lawyer is sweating in her designer suit on her way to the registration office. She wants to be the first to apply for a patent for the chemical composition of a medicine. Her client is *AstraZeneca*.[1] She doesn't have to scroll, because she knows the catastrophic consequences of arriving too late all too well. She thinks about the historical discussion about the first inventor of the telephone (was it Gray, Bell, or Meucci?) and Lotus' crumbling monopoly on caramelized biscuit spread.

The image of these two running lawyers is our answer to the question of what connects art and sciences. Intellectual property is an important concept and point of contention in both areas. However, each lawyer runs in a different direction: within art, authors' rights are created as a matter of course or naturally, whilst in science patents must be proven and applied for. Both areas seem to attach great value to who was—or appears to be—first. Authors' rights are granted to a work that is 'original'. The patents applied for must be 'new'.

This essay is largely case-based and more specifically uses continental (European and Belgian) case law, some of which was already introduced above. Applying basic legal concepts, we look for the importance of being or seeming to be 'first' in the arts and sciences—once they have passed the phases of *l'art pour l'art* or 'research for research's sake' and have steered into commercial and legal terrain. What crucial differences or similarities do we see once we have explored the concepts of 'new' and 'original'? What consequences are attached to being or seeming to be first? And what if the artist or scientist wasn't first?

Legal Introduction

To be protected by authors' rights (or copyright), a creation must be 'original'. The term 'originality' in copyright law depends on the intentions and mindset of the artist himself. For example, European case law states that the copyrighted work must be an "author's *own* intellectual creation".[2] That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices. By making these choices, the authors of a work stamp it with their personal touch.[3]

In the legal doctrine there is a lot of debate about how intense that personal note or stamp should be.[4] For this article, we can focus on the fact that the 'originality' of the work does not lie in literally being the first in history, but rather in the intention or spirit of the author. Do they seem to be the first to make these specific free and creative choices?[5] Novelty is not a prerequisite for copyright protection. Independence from others is.[6] Authors must to themselves seem to be the first to compose a melody, make a drawing, et cetera, in a certain way. After all, if authors deliberately allow themselves to be inspired too much by colleagues, then the work is more likely to be a reproduction or an adaptation of an already existing one.[7] This is an example of a copyright infringement (or in popular speech: plagiarism). Only the original author decides who, when, where and in what way their work will be copied, reproduced, adapted, translated, or performed.[8]

Patent law, on the other hand, is permeated by the requirement to be the objective first. The patent gives protection to an invention that is new and inventive.[9] An invention is regarded as new if it is not yet part of 'the state of the art'.[10] The state of the art includes everything that

has been made available to the public before the date of submission of the patent. Making things available to the public can happen in writing (e.g. in news reporting), orally (in an interview with a person who is not bound by a non-disclosure agreement) or in any other way (in a company tour, a contract meeting, and so on). Once one person has succeeded in hearing and understanding the information, the invention becomes part of the state of the art.[11] Everything that has already been filed as a patent will also belong to the state of the art, with the first patent applications taking precedence.[12] Furthermore, an invention is considered inventive if an expert considers that the invention provided is not obvious. In other words, the inventor must be the first to solve a certain problem in a certain way.[13]

Patent law tries to assess 'being the first' in a number of objective ways. From what date was the invention already part of the state of the art, because it was public information, had already been deposited or simply resulted from the state of the art? In contrast, if you want to benefit from copyright protection, you must only be 'original' from your own subjective point of view. Even more, copyright dares to discuss the intensity of the intellectual effort needed to be protected by copyright. Patent law only rewards those who are the first to see or work out a particular solution.

Is the result a world in which artists-authors can create freely without fear of being accused of plagiarism? Hardly. Through the legal theory of the independent creation, we see how the importance of being the first creeps into copyright law.

Who Was First? R. Kelly or the Van Passel Brothers?

Based on how 'originality' is defined, we can imagine—no matter how small the chance—two people creating similar or even exactly the same copyrighted works independently of each other. In response, judges have developed the theory of 'the independent creation'. This legal way of reasoning is used to indicate that two authors can come up with an original work completely separate from each other without one plagiarizing the other. In that case there is no question of a copy, reproduction, or adaptation, but simply of a new production protected by copyright.[14]

In most cases however, a heavy burden of proof—criticized by legal doctrine—is imposed on the 'youngest' creator. The creator of the first work is given priority for protection. The artist accused of plagiarism has to prove that they came to the same creation completely independently, without having had or could have had any knowledge of the first work.[15] This leads to illogical situations.

For example, in 1995 R. Kelly wrote the hit 'You are not alone' for Michael Jackson. A year later he received a copyright claim from the Van Passel brothers, professional and 'famous' songwriters from Belgium. They had written 'If we can start all over' in 1993 and deposited it with SABAM (a collective rights organization) that same year, but never commercialized it. According to them, the songs have strong similarities.

We prefer not to say too much about the abominable way in which a judge compared two songs and came to the conclusion that they were similar for 43.47%.[16] What is interesting are the judge's considerations about the theory of the independent creation. Among other things, he says that with their single registration at SABAM, the brothers had expressed the intention to publish the song and "not to leave it in a drawer". In this way, the judge finds it plausible that they played the song to third parties—and concluded from this that the work was somehow public. Therefore, it was not impossible to imagine that R. Kelly—as a musician—had had the opportunity to hear the song in some way or other. Especially considering that 21 months elapsed between the creation of both compositions. In addition, the American pop star failed to map out or prove his own work process: the judge could not 'see' that Kelly (through written compositions or demo recordings) had come up with the idea of the melody himself. The 'objective' first work therefore deserved protection, not Kelly's later melody, despite the fact that Kelly indicated that he had never heard of the brothers before.[17]

This example outlines the two ways in which authors can prove that they were not plagiarizing: by showing their own work process or intentions and thus their independence, or by making it plausible that they have never heard of the other author's work.[18] In this way they still seem to be the first, at least to themselves. However, proving this turns out to be more difficult than expected. Authors have already been found guilty of plagiarism because "professional musicians need to know all the global hits"[19] or the accused author was simply residing in a certain region where the accusing authors lived.[20]

The importance of being the first—and being able to prove this for example by means of a registration with a collective rights organization—creeps into copyright laws. It brings the arts a little closer to the same rat race to the registration office as in sciences.

Who Was first? Bell, Gray, or Meucci?

In patent law, a similar theory of the 'independent invention' is completely absent. The prerequisites for enjoying patent protection are always novelty and inventiveness. Being the first will always take precedence over seeming to be the first. The 'work process' is of no importance. The race is on. How important this race is, if only in the minds of IP-lawyers, is illustrated by one of the stories surrounding the invention of the telephone.

Allegedly, Graham Bell was able to declare himself the inventor of the phone because his lawyer appeared at the registration office a few hours earlier than his counterpart Gray's lawyer. The real story is much more complex, with charges of stealing each other's ideas and bribing employees of the registry.[21] But at least for the time being the patent remained valid: Bell did have a valuable economic monopoly on the phone. Those who wanted to attack the patent did not have to prove that they had also independently come up with the idea, but that the invention was not new or Bell was not the first to patent it.

Delving deeper, one will notice that the story has a hard economic side to it. Gray is said to have refrained from patenting his invention because no one could see economic benefits in a machine that would connect two voices. Neither his lawyer nor his patron was particularly interested in hastening the decision. They even advised him to drop his opposition to Bell because it would be too time- and money-consuming.[22]

If being the first doesn't pay off, is it even worth being the first? Or can only the wealthy be first? That's what the real end of the phone story seems to indicate. In 2002, the American Congress acknowledged that it was not Bell, not Gray, but Meucci who was first in inventing the telephone. However, he could not renew his provisional application (years before the Bell & Gray race) because he didn't have ten dollars to spend on it.[23]

Even today, the first consideration in patent applications is whether it is worth the time, effort and money. "The first, best (and only?) reason to patent something is 'because the market wants it', not 'because it is new'".[24] The Belgian government, estimating that a patent application can cost between ten and one hundred thousand euros, advises to think carefully about whether it is worthwhile to patent.[25] If Meucci could have read the Handbook of European Intellectual Property Management, he would have known that for those with a low budget, keeping inventions secret is the way to go.[26]

Sawing Women in Half and Eating Caramelized Biscuit Spread: in Patent Law, the Stakes Are Higher.

As the Camel cigarette brand campaign put it in 1933: "It's fun to be fooled, it's more fun to know." This slogan was accompanied by an image on which a magician sawed a woman in two and the explanation of the magic trick. Camel had found the explanation in the patent register of the United States. It had been registered there by Horace Goldin. This famous magician furiously tried to stop competitors from copying his trick by taking them to court for unfair competition. This often worked, but over and over again he had to prove that he was the first to invent and commercialize the trick. In order to protect his magic trick more easily, he decided to apply for the ultimate protection and to claim his 'being the first': a patent for the installation

that Goldin invented for his magic tricks. As a result, he had to explain the trick and put it in the public register. Camel took advantage of this to reveal Goldin's business secret. With his strategy, Goldin lost the most valuable thing as a magician: the secret and the amazement associated with it. The trick quickly lost popularity.[27] Does the art of magic benefit more from being or seeming to be first?

Economic considerations are so important that in patent law as well 'seeming to be first' is sometimes preferred to actually being first. Not all countries or regions will examine the novelty of a patent when it is issued. Belgium is an example of this. The novelty will only be examined in the event of any opposition to the patent. Applying for a patent becomes a negotiation strategy, a strategic position that forces competitors to litigate in order to be able to continue their own economic activities based on a particular technique. The description of the invention will often be regarded as too vague or not new, but the damage or advantage has already been done by being the first to submit the application. However, the stakes are also higher when it comes to going to court.

Caramelized biscuit spread illustrates how things can go wrong. Inventors Daniel and Dirk patented their invention (spreadable caramelized biscuits, which are normally difficult to spread because caramelized biscuits are a hard cookie) in 2004, before their participation in the TV show *De Bedenkers* (a bit comparable to *Lion's Den* or *Shark Tank*). At the end of the show, a similar caramelized biscuit spread won. The company Lotus commercialized the winner and attacked Daniel and Dirks patent for lack of novelty or inventiveness. Before reaching a verdict, Lotus bought the patent from Daniel and Dirk. With their new patent in hand, Lotus attacked competitor Willems, who had marketed a similar product. Willems defended itself in the only possible way: by trying to prove that the Lotus patent is not new or does not involve an inventive step.

Willems was lucky. In November 2003, a recipe for caramelized biscuit cake was uploaded on the website omawapsie.nl. That recipe solved the problem (the hard biscuit) in the same way as indicated in the patent: by making a mixture of caramelized biscuits and fat. Therefore, the patent was not new and could not be used to stop competitors.[28] Lotus lost its expensive monopoly on caramelized biscuit spread. Thanks to the judgment of the Ghent court, everyone in the world can now look up, use, or commercialize the recipe without restraint.

When a patent is regarded as not new or inventive, it is over and out for both the inventor and his competitors. The invention becomes part of the state of the art and can be used by anyone. Just look at the diversity of caramelized biscuit spreads on the market (at least in Belgium – yum!). In copyright, the author who thinks he was plagiarized, can ask each of his competitors time and time again to prove that they created their work in a completely independent way. The worst that can happen when the author loses, is a case of double paternity: two authors who have the same rights to a similar copyrighted work.

So what? Who, for example, came up with the idea to merge geometric figures, such as cylinders, and market them as furniture? The website (and Instagram account) *Twin Pix* doesn't give a damn. There you'll find a steady stream of design pieces—sometimes from the same period—that have translated the same idea into a similar piece of furniture. The value in designing (and making art in general?) however, does not lie in being the first to create a particular design, but in the context: the fashion of the day, the total oeuvre of the designer, the overall aesthetics or the way the piece of furniture or art is presented, marketed, or tied to the authors' persona.[29] Just think of Jeff Koons, who regularly 'integrates' other work into his own, dealing with the consequences later by settling, winning, or losing court cases, but still selling at record prices.[30]

Evergreening or Adaptation – Remaining the First

After copyright and patent have been fought over, established, protested, and paid off, the (economic) fight is not over. Being 'original' in copyright law is enough to obtain an irrevocable

protection until seventy years after the authors' death. Being the first in patent law is only temporary.

'Evergreening' is the strategy used by pharmaceutical companies to prolong the monopoly on a drug for as long as possible by modifying the composition of a drug or finding new uses for it.[31] The public domain, the moment, and the fictitious place in which the drug becomes generic, runs counter to the will to remain first. The monopoly on a patent also means that you are free to set your 'price', something that is made more difficult when competitors come onto the market[32].

This strategy was applied for the medicine Seroquel by Astrazeneca. The protection of this anti-psychotic drug ended in 2012. A variant was developed that provided a delayed release of the drug. In the United Kingdom, Spain, Germany, and the Netherlands, however, the judges decided that the variant was lacking in inventiveness and therefore could not benefit from protection.[33] In other words, the original formula was not adapted enough to gain new patent protection. Generic medicines with a similar composition and effect are now given free rein on the market.

The fear of the public domain is not specific to the sciences. In the past, the movie industry (for example the companies behind Mickey Mouse) in the United States has succeeded in changing legislation to prevent works from falling into public domain. The original length of copyright protection in the US was 28 years, now it is more than a century.[34]

Far, yet so Close.

At first sight, the arts and sciences seem to start from fairly similar criteria: originality versus novelty. When working out the legal processes behind these terms, they soon come to mean radically different things. For patent law, being the first is so important that even seeming to be the first is a viable economic choice. It creates a monopoly. For the question of authorship, copyright presents itself as a set of laws that can be applied dynamically and in which one seems to place one's trust in the artist who, on the basis of his own experiences, makes 'original works'. There is not necessary honour in being the first. Take John Cages *4'33"* for example. His silence was preceded by a few decades with Alphonse Allais' equally quiet but more unknown *Marche Funèbre composée pour les Funérailles d'un grand homme sourd*. For the latter it was a well-crafted joke; Cage on the other hand was making earnest and serious creative choices.[35] They take the double paternity in stride.

Yet in reality, judges find it difficult to settle for the legal figure of the independent creation. To be the first—once it comes to a conflict—seems to be a strategic position that is not easily conquered. The arts also dare to quickly enter the market and deal with the consequences later (we discussed Koons, but think about companies in the fashion industry such as Zara as well) or 'evergreen' their way out of public domain troubles (Mickey Mouse).

This first glance at legal and economical cases show that the arts and sciences may take a different route to get there, but end up surprisingly close to each other. Undiscussed but interesting to dive into are the many counter movements to 'classic' copyright the arts have spawn. From Barthes's 'Death of the Author' and the Situationists' *détournement* to copyleft, from creative commons to pop art: these are but a few of the many answers on the question (and myths?) of authorship out in the world. Trying to discover similar counterparts in science, we notice that extensive theories and sources on 'patentleft' are scarce. But at least a few authors seem to think that radically opening up technology and science might be the way to go to save our planet.[36] After all, shouldn't that always be the first thing on our mind?

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[1] This is a fictional example as an introduction. In reality, of course, patent applications are not filed by running around the city like a madman. The procedure is done on paper and the secrets of the invention are guarded by unconscionable contracts on secrecy. For a good introduction on secrecy in patent applications, see Hertoghe, Kris, Wauters, Davy. "Disclosure: too much too soon vs too little too late". *The*

Handbook of European Intellectual Property Management, edited by Adam Jolly. Kogan Page Limited, 2012, pp. 139-144.

[2] CJEU, 16 July 2009, Infopaq International v. Danske Dagblades Forening, C5/08, § 37.

[3] CJEU, December 1st, 2011, EvaMaria Painer v. Standard VerlagsGmbH and others, C145/10, § 88-92. See also Blomme, Peter, Flamme, Michel and Keustermans, Jeff, editors. *Auteursrecht – Capita selecta*. Larcier, 2016, pp. 26-28.

[4] Ibid., p. 29-33.

[5] In the United States, certain cases concerning appropriation art also discuss the intention of the artist when deciding if the work falls under a 'fair use' exception, although in those cases the artist of course knows he is not the first to create a certain (part of the) work. See: Jasiewicz, Monika Isia. "A Dangerous Undertaking: The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases". *Yale Journal of Law & the Humanities*, vol. 26, no. 1, Winter 2014, pp. 143-184.

[6] Blomme, Flamme, Keustermans, *op. cit*., p. 33-34.

[7] For an overview on how continental law deals with reproductions and adaptations: Cabay, Julien and Lambrecht, Maxime. "Remix prohibited: how rigid EU copyright laws inhibit creativity". *Journal of Intellectual Property Law & Practice*, Vol. 10, no. 5, 2015, pp. 359-377.

[8] Brison, Fabienne and Vanhees, Hendrik, editors. *De Belgische Auteurswet: Artikelsgewijze commentaar – Huldeboek Jan Corbet*. Larcier, 2009, pp. 8-15.

[9] Artikel 2, wet 28 maart 1984 op de uitvindingsoctrooien.

[10] Artikel 5, §1, wet 28 maart 1984 op de uitvindingsoctrooien.

[11] Ammendola, Paola. "The concept of novelty according to the case law of the boards of appeal of the EPO, part 2: State of the art and the proof of its existence." *E-course EPO*, https://ecourse.epo.org.wbts/caselaw_en/a001_popups_sub1_sub1_pers_a.html. Accessed 26 August 2019.

[12] Artikel 5, §3, wet 28 maart 1984 op de uitvindingsoctrooien.

[13] Artikel 6, wet 28 maart 1984 op de uitvindingsoctrooien.

[14] Buydens, Mireille. "Droit d'auteur et hasard: réflexions sur le cas de la double creation independante". *Auteurs & Media*, vol. 5-6, 2004, p. 481.

[15] Hallemans, Alexis. "De rechtsfiguur van de onafhankelijke creatie in het auteursrecht: Was Michael Jackson toch alleen?". *Intellectuele Rechten Droits Intellectuels*, vol. 1, 2008, p. 106.

[16]For those interested, the judgement (Brussels 4 september 2007) is published in *Intellectuele Rechten Droits Intellectuels*, vol. 1, 2008, p. 101-104.

[17] Ibid.

[18] Hallemans, *op. cit.*, p. 108; Strowel, Alain. "La contrefaçon en droit d'auteur: conditions et preuve ou pas de contrefaçon sans 'plagiat'". *Auteurs en Media*, vol. 3, 2006, p. 270.

[19] 'Cleaning out my Closet' by Eminem versus 'Daydream' by Wallace Collection, Rb. Brussel, 15 October 2004, A&M 2006, p. 264.

[20] 'Frozen' by Madonna, Vz. Rb. Eerste Aanleg Bergen, 18 November 2005, A&M 2006, p. 264.

[21] Evenson, A. Edward. *The Telephone Patent Conspiracy of 1876: The Elisha Gray - Alexander Bell Controversy*, McFarland, 2000.

[22] Hounshell, David Allen. "Two paths to the telephone". *Scientific American*, vol. 244, 1981, pp. 162-163.

[23] H.Res.269 — 107th Congress (2001-2002), https://www.congress.gov/bill/107th-congress/house-resolution/269/text.

[24] Philpott, Jeremy. "When is a patent right for you?". *The Handbook of European Intellectual Property Management*, edited by Adam Jolly, Kogan Page Limited, 2012, pp. 19-24.

[25] https://economie.fgov.be/nl/themas/intellectuele-eigendom/octrooien/van-uitvinding-naar-octrooi.

[26] Helke, Kimmo. "IP on a low budget." *The Handbook of European Intellectual Property Management* edited by Adam Jolly, Kogan Page Limited, 2012, pp. 201-204.

[27] Brown, Gary. "Sawing a woman in half". *Invention & Technology Magazine*, vol. 9, 1994.

[28] Kh. Gent (6e k.) 20 January 2011, *IRDI* 2011, vol. 1, 61 ; http://patentblog.kluweriplaw.com/wp-content/uploads/sites/52/2011/02/11-01-20-vonnis-Kh-Gent_A-09-02830-c.pdf

[29] The gaming and fashion industry have the same 'problem': Herpe, François and Rous, Rebecca. "The fashion industry". *The Handbook of European Intellectual Property Management* edited by Adam Jolly, Kogan Page Limited, 2012, pp. 127-132 and Engelstätter, Benjamin and Ward, Michael. "Strategic timing of entry: evidence from video games". *Journal of Cultural Economics*, vol. 42, 2018, p. 1. doi.org/10.1007/s10824-016-9276-7.

[30] For a legal analysis of Rogers v. Koons and Blanche v. Koons, see Jasiewicz, Monika Isia. "A Dangerous Undertaking: The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases". *Yale Journal of Law & the Humanities*, vol. 26, no. 1, Winter 2014, pp. 143-184.

[31] For use of the term see for example https://medicineslawandpolicy.org/2018/09/dutch-health-insurance-company-menzis-takes-astrazeneca-to-court-over-patent-evergreening/

[32] Wenzel, Stephan. "Strategic Variations". *The Handbook of European Intellectual Property Management* edited by Adam Jolly, Kogan Page Limited, 2012, pp. 206-211.

[33] For an overview of cases see https://www.internationallawoffice.com/Newsletters/Intellectual-Property/Spain/Grau-Angulo/Supreme-Court-confirms-revocation-of-AstraZenecas-Seroquel-Prolong-patent

[34] Lee, Timothy. "15 years ago, Congress kept Mickey Mouse out of the public domain. Will they do it again?". *The Washington Post*, https://www.washingtonpost.com/news/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/

[35] "Every something is an echo of nothing", Cage wrote about *4'33"*. See Larson, Kay. *Where the Heart Beats*. Penguin Books, 2012, p. 226.

[36] Wilbanks, John & Wilbanks, Thomas. "Science, Open Communication and Sustainable Development"". *Sustainability*, vol. 4, 2010, pp. 993-1015 ; see also the page on "Climate Change and Intellectual Property" by the World Intellectual Property Organization: https://www.wipo.int/policy/en/climate_change/