

**The natural anteriority
of a *Work of the Mind* over patent
or
"PRIOR PERSONAL POSSESSION"**

Work based on an analysis of the American and Canadian texts
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REMINDER

Much like the law of gravity, a natural phenomenon, *the rules governing Intellectual Property are based on the principle of anteriority*, or more specifically, on the natural order in which things occur and develop.

Following this simple principle, intuitive thought precedes *creation* (the materializing of a *Work of the Mind*), which in turn leads to *invention* (a research, discovery and/or development process), resulting in innovation (successful commercialisation of an innovative product)... This principle of 'sequential order' is emulated in the business world as: *conceptual design* → *research & development* → *production* → *commerce*, as well as in our traditions and ancestry: *procreation* → *education* → *evolution*... (ancestors, parents, children)...etc...

It is specifically by acknowledging and respecting this sequential order: **anteriority** (the past) → **actuality** (the present) → **posteriority (the future)**, based on the *preponderance of the principle of anteriority (prior art)* (a principle followed by every jurisdiction¹ worldwide), that the international consortium **USD-System Editions** publishes various documents that are able answer the questions of just about every expert in his field with regards to matters of intellectual property and its commercial consequences.

Unfortunately, by obliging the inventor (and not the financier, entrepreneur or industrialist) to personally register a patent or a design patent, the basic principle of anteriority has been purely and simply transgressed... Ultimately, the confusion that ensues impedes progress.

¹ By restricting this notion to the realm of invention, in other words, by wilfully ignoring the natural priority of creation over invention, jurisdictions worldwide have denied the inventor his creative virtues, without which he would never have conceived anything... Their mistake, is to have arbitrarily restricted copyright and royalties to artists and titles of monopolistic commercialization to inventors. This erroneous choice results from incoherence, since, by definition, a commercial title is only suitable to a developer (*i.e. not the author*).

After reading this short preamble, hopefully everyone has understood that in matters of intellectual property the principle of anteriority is fundamental. It is therefore imperative to analyse the actual use of anteriority by the legal profession, and most notably the definition of the following notion: *prior personal possession*.

* * *

Prior personal possession

Up to now, the laws governing copyright have implicitly excluded inventions since the lawmakers failed to perceive an invention as a *Work of the Mind*. And this, despite the fact that prior to reaching such an end result, one must perforce create a kind of work specifically recognized as originating "*from the mind*". For example, as a first step one may write a text that represents the original vision, or a first drawing that gives the inspiration its spatial form; such creative work constitutes the *first indubitable and personal expression* of the invention: a representation of a *virtual image or mental prototype* of the tangible object that one ultimately wants to create. All this occurs prior to actualising its form as a *disclosed prototype*, which is inevitably required to commercialise the inventor's work.

As previously noted, patent attempts to circumvent the natural sequential order: **creation → invention → innovation**.

The relentless practice of imposing monopolistic right of production onto inventors rather than merely acknowledging their ownership of a *Work of the Mind*, maintains a confusion that is sometimes difficult to overcome. This is shown in an almost comical light by the many treaties on this thorny matter. In the general context of cases involving counterfeit, the question of whether or not one can transact (*licence, etc.*) the rights of production resulting from personal "*knowledge*" of an invention is not really answered.

An individual who chooses not to or cannot afford to patent his invention is well advised to keep it secret. Should this individual later choose to disclose his unpatented invention, he will lose the right to patent it, hence the importance of maintaining secrecy. (*American and Canadian law grant the author of an invention a delay of one year following the date of the disclosure or publication of his concept to register an application for a patent or a design patent.*)

As a consequence, a patent registered subsequently by a third party who acquired this invention by any means, cannot be used legally against the true inventor in so far as the latter can prove his **prior personal possession**: *personal*, meaning that it came from him.

Everywhere in the world ~ *except in the United States/Canada* ~ two such individuals can commercialise the same invention without having any recourse against one another. Thus, the internal laws tried somehow or other to regulate this situation, inevitably drawing conclusions that violate basic human rights, since the related judiciary procedures were based exclusively on industrial/commercial titles.

Confusion stems from trying to determine an individual's right to commercialise his invention without a patent when another individual has patented this same invention... In either case, there must necessarily be a **fundamental right**, referred to implicitly, that unquestionably belongs to the original possessor.

Therefore, what kind of "*knowledge*" does the "*original possessor*" have? Intellectual, of course, as clearly indicated in the preface of the *Intellectual Passport C.B.*

The original possessor's right to commercialise his invention results logically and solely from the prior possession of such knowledge. Indeed, how could it be otherwise? Such knowledge obviously results from the workings of the mind, regardless of its shape or form.

This confusion, maintained for two centuries, is the cause of endless misunderstandings and injustice. At the very root of this confusion is a constant and omnipresent failure to acknowledge the fact that the inventiveness associated with industrial titles **depends** on the creative nature of a *Work of the Mind*. The latter occurs first, the former afterward. Short of being abusive, one can scarcely create regulations that are concerned with the resulting commercialisation but deny and/or restrain its preliminary source (i.e. human creativity expressed in tangible form).

And yet, this is exactly what these texts of law stipulate, thereby arbitrarily reducing the original possessor's rights without the slightest consideration for his intellectual property. Nowadays, legislators can scarcely do otherwise, since the very notion of the actual existence of the initial property has remained concealed for the last two hundred years.

The lawmakers unconsciously and naturally think in terms of "*Work of the Mind*", therefore **inalienable property**. Nevertheless they feel compelled to limit the transacting of commercial rights to the regime of patent, hence their unease. This policy contradicts the underlying principles of Franchise, of covenants for the transfer of confidential information and non-disclosure, as well as the basic notion prevalent in the United States, according to which the first or "true" inventor has priority in claiming a patent. If, on the other hand, the original inventor's work were recognized officially as intellectual property, there would not be an issue.

Let us then proceed one step at a time. What do the legal texts stipulate? To paraphrase one such legal text on the subject: "*Prior personal possession of an invention occurs when a person, without patenting it, has been keeping it secret prior to the patent registration date of the same invention by a third party.*" It would be clearer to say that the intellectual property of one party has natural priority over the industrial claim made subsequently by the other party.

Comment: no where in these provisions is it stipulated that, once the prior possession of the author is acknowledged, the two parties interested in the same invention may agree on mutual conditions which would, of course, respect the former's rights of priority without causing prejudice to the latter's industrial claims...

While describing the circumstances under which the initial possessor can make a claim, the said legal texts state that if the first inventor commercialises his invention without seeking a patent-related monopoly, the second party's claim will be dismissed. However, if the first possessor keeps his invention secret and therefore fails to commercialise it, any other party is entitled to patent the said invention; in this case, the first possessor has the right, if he so wishes, to use his invention "*for himself only*" (*except in the North America*).

Two remarks concerning these matters:

First of all, why does the first inventor have a right to his invention only for his own personal use purely on the basis that he didn't purchase a title of monopolistic commercialisation? And why such an obsessive tendency to favour the commercial developer at the expense of the originator, especially when the latter's vocation as a physical or moral person (*i.e. creating*), is often outside of the competences of entrepreneurs, industrialists, financiers and others? **Can such a relentless practice really be unmotivated?**

As opposed to other possessions, the possession of one's intellectual work is recognized implicitly, one might say secretly, as superior and fundamental, unquestioned even by the power of the State that grants industrial monopolies. Indeed, such monopolistic rights results from an intellectual property, which owes nothing either to the State or to financial and industrial powers. Yet, against all justice, it is not recognized officially and entirely, for fear that such recognition might become fully operative. Such reasoning inevitably condones a form of abuse.

Second of all, without, in good faith, being aware of the source of the first invention, a patent holder will inevitably end up being associated to the invention. However, it is equally inevitable that one's monopolistic rights result solely from intellectual property. One must therefore assume that a second party's patent originates from the first party's Work of the Mind, even if such a source is originally unknown (*the reason for this becomes more clear in the case where, without admitting it, the second party was clearly aware of the source...*). Needless to say, if kept secret, the original inventor's claim cannot be used to annul the second party's patent. The second party should nevertheless have the obligation to recognize the first party's intellectual property and its resulting **copyright**, with all its implications. Hence our suggestion that one apply patent to **innovation rather than invention**.

In general, the internal laws of most Nations only superficially discuss the limits and conditions of *prior personal possession*, since the legislator bases himself solely on the (*secondary*) principles of industrial/commercial rights. According to such texts, the **first**

(i.e. true) **inventor** must be acting in good faith. Obviously, neither false representation nor a vague knowledge of the invention is acceptable as evidence...

Good faith must therefore be proven (*for that matter, as in the United States, the second patent claimant should have the same burden of proof, which explains why each patent is delivered without any government guaranty to anyone claiming to be the inventor...*) The texts stipulate that "*the prior possession must clearly reflect the technical content of the patent*", which is only normal... One must have complete knowledge of the invention: one might add, "*of its origin as well as its function*". By reading such technical documents (*produced prior to depositing the patent claim*), a professional other than the inventor must be able to produce the invention.

Even though the notion of having to prove good faith is far from being applied systematically, it is one of patent's basic rules, which, if not respected, may lead to the title's annulment.

A such prior possession (*i.e. technical documents*) must remain out of the public domain; otherwise the patent would theoretically be annulled right from the start. Ironically, such an anterior possession does not imply the benefits that result from intellectual property, even though such benefits should be a natural consequence. In contrast, patent is granted several benefits "*without the burden of irrefutable proof*", which is what makes it attractive to some.

Furthermore, the invention must be presented with irrefutable proof as a technically viable product (*i.e. with sufficient technical detail*), on the day of the patent application. Why not simply present it as a conceptual design ~ an original work put into tangible form?

The situation becomes all the more confused when official doctrine tries to explain the extent of such proof. Most democratic States consider that it is necessary and sufficient to provide documents that make the "*intellectual possession*" (*e.g. article 34.1 of the Canadian Patent Act, regarding opposition to a patent claim*) fully explicit ~ the emphasis is our own ~ while others, obviously oblivious to the inherent intellectual property, insist on the need to prove that "*serious steps were taken towards commercial development*".

Jurisprudence supporting both views certainly does not make things any clearer. In order to prove intellectual property, must one also prove, by the same token, that he is an industrialist? Does a writer or a musician also have to publish, print and distribute his works in order to justify the ownership of his work? Have the publication, music, film or entertainment industries ever suffered from the fact that an author is recognized as the owner of his creations? There is therefore no economic reason to deny the same rights to the author of an invention.

Furthermore, the legislator seems simply (*and fatally*) to lose track of reality when he states that "*mere knowledge may prove too fragile a basis for law*"; however, given the current state of industrial/commercial rights, he could scarcely have written the texts

otherwise. Indeed, the word "may" implies doubt, and therefore, one inevitably suspects abuse on the legislator's part.

Moreover, what is meant by "*mere knowledge*"? More explicitly, either the knowledge is original ~ implying that it is "complete" ~ or else it is secondary, for example, journalistic, industrial or commercial. Without the original knowledge, secondary knowledge could simply not exist.

There can be no surer basis for a right than this **original and intellectual knowledge**, which, as the source of all that follows including other forms of knowledge (*secondary by comparison*), offers new horizons for mankind. One must conclude that all future rights to further develop, whether industrially or commercially, are based on this original knowledge.

Even at the preparatory stage, under no circumstance can industrial development prevail over that which allowed its existence. If anything, it makes such original and intellectual knowledge even more indubitable.

The absurdity does not end here. It could hardly strike one as "*dangerous to admit simple documents in order to prove that, at a given date, one had precise knowledge of an invention*" ~ let us emphasize how inadequate the adjective "simple" is in this context ~. We must therefore reconsider the expression "*simple documents*". Such an expression can only serve one purpose. Such documents, whether simple or not, are either sufficient or insufficient proof that one has complete ~ and therefore, in its broadest sense, precise ~ knowledge.

In the second case, property cannot be established, and in the first, it is clearly established! Simply put, the credibility of a document depends on its content. Such a document must adequately prove "**the precise knowledge**". To demand more than this in order to recognize such a right, only serves to show how far one is from respecting rights of ownership, while encouraging further injustice.

It is necessary and sufficient that both the date and content be proven indubitably. Once this evidence has been admitted, it becomes clear who the author of the invention is, whether or not he has a patent.

In current practice, not only is this author denied his intellectual property, he is not even associated ex officio to patent (i.e. at least in countries that have a "first to patent" policy). Worse than all that, **in utter violation of an abundant jurisprudence, which recognizes the validity of transfers of secret technology through non-disclosure agreements**, he is arbitrarily denied the essential right, which the legal holder of a patent enjoys, namely the right to transfer. All of this on account of the legal notion of *prior personal possession* as opposed to intellectual property.

The words "arbitrary" and "incoherent" come to mind.

In contrast, let us now look at an example involving copyright. A writer dies, leaving a novel, which his rightful heirs neglect to publish thereafter. Unaware of the heirs' existence, a third party discovers (*therefore "invents" literally speaking²*) and publishes the novel at his own costs. What happens next? The author's natural heirs will have no difficulty in establishing their rights. Can they not also claim the industrial right to print the novel? Once the copyright of the author's work is recognized as their rightful legacy, they will have the right to choose their own publisher and order the third party to cease his unauthorized publication.

This novel is indeed an *anterior personal possession*, with a personal right attached to it. The publication of the work needs no other approval than that of the rightful heirs; without formal transaction of such rights, the latter holds the author's legacy overnight along with all the rights of literary property, including the secondary aspects of large-scale publication (*i.e. commercialisation*). ***This example supports without ambiguity the notion that the inventor should, as a pre-emptive strategy, create a Work of the Mind (literary and/or artistic) prior to any other consideration.***

There cannot be two laws or two ways of dealing with *Works of the Mind*. This should go without saying.

Comment: Two or more individuals can jointly apply for the same patent; indeed, every authority on the matter accepts such practice. As everyone knows, in most cases, only one of the applicants is **the true author**, and his associates likely have a vested interest in the venture (e.g. financial, industrial, commercial, etc.,) and may even seek to achieve political or financial control of the product commercialisation. Though frustrating for the inventor, such practice has always been welcome by registration institutes and sanctioned by judicial authorities. By using the *Intellectual Passport C.B.*, the author of an invention becomes the definitive owner of an inalienable work, and thus can choose his partners freely, without any fear of losing the legitimate authorship of his intellectual concept. (*One must not mistake ownership of a work for copyright, which can be assigned or licensed*).

This method creates a new relationship between the inventor and his former nemeses; indeed, the latter now collaborating as motivated partners who even act as "**true protectors**" in the literal sense of the word, each having the right, through contracts to acquire copyright, to patent **for himself** and thus to claim his rightful share of the commercial rights commensurate with his own means and competence.

It therefore seems urgent that moral interest (*i.e. copyright*) be restored to its actual place ~ namely the first in nature's sequential order ~ since it necessarily precedes material interest (*i.e. titles of monopolistic rights*). Indeed, material interest results from copyright, and thus is a secondary right.

² Reminder: a discoverer, hence a finder, is literally an inventor. Discovering something new represents an inventive process, while expressing this invention in writing is creative.

Comments with regards to prior personal possession:

1) In Europe: "a literary text by Pliny the Elder (50 A.D.) was used in court to annul a twentieth century patent" (Encyclopædia Universalis, volume 3, page 597, editions 1971).

2) More recently, a European industrialist manufactured a three-dimensional version of the shark-like submarine based on Hergé's 1948 illustrated book entitled "The Treasure of Rackham the Red" without authorization. This industrialist assumed in good faith that he could freely manufacture and sell three-dimensional versions of the shark-like submarine in mass quantities, since Hergé had not registered a patent or a design patent (*industrial design*) on his creation. His legal counsels had failed to understand: 1) that a patent registered in 1948 would have expired in 1968 – 2) that by not registering a patent or design patent, Hergé kept his copyright on his creation; such a right prevents a third party from reproducing all or part of the author's work for commercial purposes... Walt Disney studios have won numerous cases worldwide based on the same rights and supported by similar evidence.

3) In North America: article 34.1 of the Canadian Patent Act (for example) states that any one can submit prior art to the Commissioner's Office (*including patents, patent claims available for public use or printed materials*) which might challenge a patent application's validity.

4) In the United States, several professors from the University of Colorado conceived an invention. Without their authorisation, the multinational American Cyanamid Company (& Leon Ellenbogen) later registered a patent on the same invention. (*see pages 120 and 121*).

Having ruled that the multinational had unjustly benefited from their work, the professors claimed damages; moreover, they asked to be included as inventors in the patent application.

The Court of Appeal ruled that the professors were entitled to take action according to the state laws of Colorado in order to obtain damages for the illegal appropriation of their invention. In the end, the Court ordered that the case be heard a new by Superior Court that had previously dismissed the original action (*i.e. that of Colorado*).

From a more technical point of view, the Court of Appeal ruled that, by using part of an article written and published by the professors in its patent application, the multinational had committed an act of plagiarism (*infractio by virtue of the Copyright Act*). In some cases, damages can even be granted to the author.

Comment - This jurisprudence reaches a major conclusion which can be summed up as follows: An American court has ruled that registering a patent application by plagiarizing a third party's literary work is illegal: this proves that plagiarism (*moral interest*) is far more effective than counterfeit, provided the inventor establishes his copyright prior to registering a patent or another monopolistic title...

In agreement with articles 17 and 27 of the Universal Declaration of Human Rights and the internal laws of truly democratic nations, the author of a *Work of the Mind* can therefore legally use any proof of anteriority, in order to contest the delivery or validity of a title of monopolistic commercialisation granted by the State to one or several persons. This proof of anteriority is even stronger when, in addition to being a **private seizable property**, it is intrinsic to an inalienable, universal and permanent *property*, namely, a **Work of the Mind that no one can arbitrarily deny its author...** (see the *Tri-TEX* case, page 189).

What is a literary and/or artistic Work of the Mind?

According to international conventions on copyright and the internal laws of Nations, it is exclusively the specific use of words (*belonging to everyone*) in an original story written in an aesthetic style and with proper grammar (*applying the rules of art*), which represents a literary creation and therefore is the property of its author. According to the same laws and conventions, it is exclusively the particular use of ordinary things (*belonging to everyone*) included in an original graphic work (*applying the rules of art*), that represents an artistic creation and is therefore the property of its author. In both cases, the technical aspect of an invention (*whether product or service-oriented*) that is part and parcel of a literary and/or graphic creation provides its author with the ownership of a *Work of the Mind*. Logically, any other criterion is purely arbitrary.

The unity of art is similar to the organic constitution of a body...

Unauthorized copy of all or part of an author's work for a commercial purpose is therefore illegal; this is why the American notion of © copyright is recognized as one of the most effective means of dissuading and defending oneself against fraudulent copy.

"In any State respectful of its constitution, its judiciary codes and the Universal Declaration of Human Rights, no one has the right by a ruling to deny or ignore the relationship, based on consubstantial rights, between the product of an invention emanating from an original idea put into tangible form, and the initial intellectual concept that originated in the Author's Mind."

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With regards to the texts of the present publication

The authors of the present publication aim first and foremost to liberalize access to intellectual property by making it affordable to the general public and to distribute its benefits equitably among people, in consideration of their material or moral interests, in accordance with articles 1, 17, 22 and 27 of the Universal Declaration of Human Rights.

This published work is the result of its authors' research and analysis as well as a logical and philosophical approach used to formulate the criteria for validating a Work of the Mind, based on principles established by the Berne Convention and the Universal Convention on Copyright.

In accordance with the policy of Intellectual Property institutes and offices worldwide to disclaim responsibility of their texts in official documents, the information contained in the present work is for guidance purpose only, and should not be quoted or interpreted as texts of law. All or part of the present work can become obsolete at any time, without prior notice. The legal basis for this work can be found in the laws governing patents, design patents (industrial designs and/or models), trademarks and copyright, the regulations related thereto as well as the judicial interpretation of such texts by tribunals.

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