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Should a Silicon Valley Branding Agency author Canadian Patent Law Doctrine?

In patent law, inventive ingenuity (also referred to as non-obviousness) is not easy to define. Judicial attempts have proved elusive.

In *Samuel Parks & Co Ltd v Cocker Brothers Ltd (1929) 46 RPC 241*, Justice Tomlin described the problem as “Day is day, and night is night, but who shall tell where day ends or night begins?”

In 1935, Maclean J. of the Exchequer Court observed “there is an impalpable something which distinguishes things invented from things otherwise produced” *(Crosley Radio v. Can. Gen. Elec. Co. [1935] Ex. C.R. 190, aff’d [1936] S.C.R. 551)*.

In the 80 years since Maclean J. uttered those words, which are perhaps a less quotable version of Justice Potter Stewart’s comments about obscenity in *Jacobellis v. Ohio 378 US 184 (1964)*, courts have struggled to articulate a definition of invention. The latest word from the Supreme Court of Canada is of course, the four-part test in *Apotex v. Sanofi-Synthelabo 2008 SCC 61* which includes a nested three part sub-test and further factors to be considered.

So, in light of that formulation from Canada’s highest court, it came as some surprise when a judge of the Federal Court, during argument in *Amgen v. Apotex Inc. 2015 FC 1261*, recently provided counsel with an article in the then-current issue of Canadian Lawyer magazine, about the so-called “robot curve." The article in question, a nice piece of work by Kate Simpson, was not about patent law, but rather, about automating legal process workflows in knowledge management systems.

If you are thinking the “robot curve” was originally the product of deep judicial thought and academic doctrine, you might be wrong. It is the product of a Silicon Valley branding agency, *Liquid Agency*. It is described by the branding agency as a “constant waterfall of obsolescence and opportunity”, and is depicted as a continuum or waterfall between creative work and robotic work.

Robot Curve

This image was incorporated into the Federal Court decision in *Amgen v. Apotex*

, and used to frame the finding (at para. 101 of the decision) that the research work conducted by Amgen amounted to “skilled work” rather than “creative work” on the robot curve.

Unfortunately, as this is a PMNOC decision decided in favour of the generic, no appeal will be permitted by the Federal Court of Appeal. Whether or not the “robot curve” is taken up by other judges of the Federal Court remains to be seen, and whether or not it can co-exist with the binding authority of the Supreme Court of Canada also remain to be seen.