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The Sangamon River as Abe Lincoln's Mother of Invention

“Then, I said, let us begin and create in idea a State; and yet the true creator is necessity, who is the mother of our invention.”

In tracing the lineage of perhaps the most popular bromide about the inventive process, I discovered (somewhat to my surprise) that the saying “necessity is the mother of invention” finds its origins in a Socratic dialogue in Plato’s *The Republic* about the nature of an ideal state.

What started out as a discussion about political structures has become a catch-all description for what often motivates the inventive process.

Like this transmogrified quotation from Plato’s *The Republic*, much of United States' patent history in the late 18th and 19th centuries is recounted in nostalgic, patriotic terms. The fondness of our earliest American presidents for our patent system (especially Thomas Jefferson and James Madison) is often duly emphasized.

President Lincoln’s love of inventions is emblematic. His experiences in navigating to and from his homestead on the Sangamon River in Illinois led directly to the inventive work forming the basis for [U.S. Patent No. 6,469](#), entitled “Buoying Vessels Over Shoals.”

He states, “Be it known that I, Abraham Lincoln . . . have invented a new and improved manner of combining adjustable buoyant air chambers with a steamboat or other vessel for the purpose

of enabling their draught of water to be readily lessened to enable them to pass over bars, or through shallow water, without discharging their cargoes”

Should patent practitioners care about what potential jurors can (or cannot) call to mind about our collective American history of patenting in previous centuries? Or is it just dusty, musty history, best forgotten?

This post examines some of the “mythology” of patents and inventors and how those ideas may subtly impact a jury’s expectations about inventors and inventions. Patent litigators, especially, ignore the inherited mindset of jurors at their peril.

Everything I Learned About Inventive Genius I Learned in Mrs. Sunda's Grade School Class

For a portion of a typical patent jury pool, elementary school may well be the last time they gave any serious thought to our American history of inventors and invention.

The [“Inventive Genius” website](#), prepared by the classmates in Mrs. Sunda's Gifted Resource Class at Brisas Elementary School (in Chandler, Arizona), offers some keen insights into our primordial understanding of inventions and patents.

What trial advocacy lessons can we glean from from the “Inventive Genius” website?

Mrs. Sunda’s students studied the usual laundry list of famous inventors. The American inventors are stacked with with 18th and 19th century notables such as Eli Whitney, Benjamin Franklin, Robert Fulton, Alexander Graham Bell, John Deere, Samuel Morse and Thomas Edison. When we reach the 20th century, the list veers towards theoretical research scientists, such as Albert Einstein and Enrico Fermi.

Biographical sketches created by Mrs, Sunda’s students highlight the personal foibles of famous inventors and the various challenges they faced in their lives.

In a “Who am I” poem, a student named “Jake” describes his pastiche impressions of John Deere, the inventor in part as follows: " Write like a five year old who never went to school. Work well with your hands, even when they’re next to burning coals. Never have any pictures taken because you always have ash on your face."

Another student, Amy, portrays the life of Thomas Alva Edison in this manner: "Don’t feel disappointed when you almost get put in special education classes. Read Shakespeare’s plays at the age of eight. Sell newspapers and snacks on the local train at the age of twelve. Create the first vote counter in 1869 and hope Florida doesn’t misuse it."

Thus, early on, we develop a romantic understanding of the individual inventors. We invest famous inventors with “inventive genius,” a concept that is never really explained, but usually portrayed through photographs—with Einstein’s frizzy hair image being the most resonant in

modern times, followed closely by Ludwig Beethoven's. (Bill Gates may well have already overtaken these personages; he is venerated as a genius in many parts of the world.)

These indelible, grade school impressions regarding the nature of inventors and inventions cannot help but shape a jury's deliberations in a patent case. Our grade school sensibilities, however, can clash with key patent principles. Hence, patent litigators need to be alert to a jury's unconsciously formed expectations about the attributes of "true" inventors.

Observation One: Whether proper or not, jurors will conflate the inventor and the invention.

We instinctively imbue inventors with "genius" as a way to distinguish ordinary innovation from that which is worthy of being patented.

Abraham Lincoln is famously quoted as stating that the patent system "added the fuel of interest to the fire of genius, in the discovery and production of new and useful things." (Second Lecture on Discoveries and Inventions, February 11, 1859.)

In *KSR v. Teleflex*, the Supreme Court characterized the process of invention, and could not resist adding in a reference to the possible role of genius:

"We build and create by bringing to the tangible and palpable reality around us new works based on instinct, simple logic, ordinary inferences, extraordinary ideas, and sometimes even *genius*. These advances, once part of our shared knowledge, define a new threshold from which innovation starts once more. And as progress beginning from higher levels of achievement is expected in the ordinary course, the results of ordinary innovation are not the subject of exclusive rights under patent laws."

United States courts have long struggled to differentiate patentable inventions from ordinary innovation. The "spark of genius" of the inventor provided a comforting barometer of relative merit of his or her invention in the 19th century. It became a shorthand way of expressing the notion that the patent laws seek to benefit an inventor's genius, not a scrivener's talents (whom one envisions hunched over a poorly lit desk in Dickensonian London).

The problem with these rather thoughtless references to genius is that the vague concept conflates the inventor with the invention. Section 103 of the Patent Act of 1952 sought to eliminate this cause of patent confusion by providing that "Patentability shall not be negated by the manner in which the invention was made." The legislative history notes that the last sentence of § 103 makes it "immaterial whether [an invention] resulted from long toil and experimentation or from a flash of genius."

As the Hon. Giles S. Rich stated in his seminal article, *The Principles of Patentability*, "Patents are not Nobel or Pulitzer prizes. They are not for exceptional inventors, but for average inventors and should not be hard to get."

Even though a “spark of genius” is not required for patentability purposes, presenting a compelling “inventor’s” story is oftentimes critical. Embellishing the status of the individual inventor for “story” purposes understandably may be difficult, since most inventions now arise in a corporate, bureaucratic setting. Nevertheless, patent litigators will need to satisfy the juror’s almost unconscious desire that the inventor’s discovery rise above ordinary innovation.

Observation Two: Judges and Juries Seem to Expect ALL Inventors to Act Like Scientists

When the attention turned to the 20th century. Mrs. Sunda’s class concentrated on theoretical research scientists, rather than on inventors who got their fingernails dirty making plows, steam engines, cotton gins, and other mechanical devices.

Likewise, the Supreme Court’s catch-all description of the process of innovation in *KSR v. Teleflex* sounds more like a process of scientific discovery than how would-be inventors might tinker about creating gadgets in their garage or home shop.

In a recent Federal Circuit case, *Media Technologies Licensing, LLC, v. The Upper Deck Co.*, Judge Rader’s [dissent](#) criticized the majority panel for its “bias against non-technical arts.” The case involved an obviousness dismissal of an invention in which cut-up pieces of memorabilia are provided with a trading card. Judge Rader observed:

“No doubt, the invention of the transistor or of the polio vaccine came from more scientific fields and contributed more to the welfare of humanity. This court cannot overlook that many individuals invest vast energies, efforts, and earnings to advance these non-technical fields of human endeavor. Those investments deserve the same protection as any other advances. The incentives for improvement and the protection of invention apply as well to the creator of a new hair-extension as to a researcher pursuing a cure for cancer.”

Obviously not all patents are created equal in the minds of judges or juries. Because of the science involved in many technological inventions, and the fact that the patent bar and USPTO examining corp are themselves composed of individuals with advanced university degrees, the chasm between non-technical vs. “scientific-sounding” patent applications is only growing.

To lessen a potential, innate bias against inventors in the non-technical arts, patent litigators may want to consider developing a special jury instruction formulated along the lines of the Judge Rader’s quotation from his dissenting opinion in the *Media Technologies Licensing* case.

There are doubtless many other lessons to be learned from analyzing Mrs. Sunda’s “Inventive Genius” website. Patent juror comprehension issues promise to be a continuing object of discussion in Lane Powell’s *Patent Practice Professional Liability Reporter*.

Note: the photo of the Sangamon River near President Lincoln's first home is subject to the [Creative Commons Attribution ShareAlike 3.0](#) License.

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