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Issue 136

Dr. Rao Vepachedu⁽¹⁾, JD, PhD, LLM

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OBVIOUSNESS

(The Aftermath of *KSR Intl Co. v. Teleflex Inc*⁽²⁾)

"Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious, then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made anyone thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less because every other possesses the whole of it. He who receives an idea from me receives instruction himself without lessening mine, as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man and improvement of his condition, seems to have been peculiarly and benevolently designed by nature when she made them, like fire, expansible over all space, without lessening their density in any point, and, like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done according to the will and convenience of the society, without claim or complaint from anybody."

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“The law books abound with similar instances of the care the judges take of the public integrity. Laws, moreover, abridging the natural right of the citizen, should be restrained by rigorous constructions within their narrowest limits.” Thomas Jefferson⁽³⁾.

A lot has been written and thousands of hours have been spent discussing the aftermath of KSR and its implications in the past 8 years, since the KSR decision by the Supreme Court Of The United States (SCOTUS) chastised the Court of Appeals for the Federal Circuit (CAFC) invalidating the strict interpretation of the Teaching, Suggestion and Motivation (TSM) requirement⁽⁴⁾. The rejection of TSM requirement was consistent with the SCOTUS’s stand that nonobviousness cannot be precisely defined, because it was a question which cannot be answered by applying the test of any general definition^(4a).

Yet, after 8 years, obviousness is still a complicated and contentious subject matter, when in reality the SCOTUS did not deviate from, but reiterated, the time-honored Graham factor^{s(5)}:

1. The scope and content of the prior art,
2. The level of ordinary skill in the art,
3. The differences between the claimed invention and the prior art, and
4. Objective evidence of non-obviousness:
 - a) Commercial success,
 - b) Long-felt unsolved needs, and
 - c) Failure of others.

Also, the SCOTUS did not change the fact that the prima facie obviousness is a legal concept and a procedural tool of examination with the burden of production of evidence in the prosecution allocated to the USPTO⁽⁶⁾.

However, the SCOTUS found the CAFC’s analysis was flawed on three counts in applying the Graham’s factors:

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1) The CAFC erred in its holding that “patent examiners should look only to the problem the patentee was trying to solve,” because under the correct analysis, the SCOTUS stated, any need or problem known in the field and addressed by the patent can provide a reason for combining the elements in the manner claimed. Thus SCOTUS broadened the field of prior art and increased the possibility of obviousness through the combination of references.

2) The CAFC erred in assuming that a Person Having Ordinary Skill In The Art (PHOSITA)⁽⁷⁾ attempting to solve a problem will be led only to those prior art elements designed to solve the same problem⁽⁸⁾. Obviously, the SCOTUS has broadened the PHOSITA’s knowledge and skill by removing this limitation imposed by CAFC. Therefore, the PHOSITA gained some commonsense by losing the robust robotic mind with blinders imposed by the CAFC (automaton), and is no longer narrowly pigeonholed into a niche to find motivation to combine, thereby increasing the possibility of obviousness of a given claim; and

3) The CAFC erred in concluding that a patent claim CANNOT be proved obvious merely by showing that the combination of elements was obvious to try⁽⁹⁾. Therefore, a patent claim CAN be proved obvious merely by showing that the combination of elements was obvious to try.

Analysis

The Court envisioned that the hypothetical PHOSITA having access to the entire relevant prior art available to public anywhere in the world, at the time the invention was made, then the court or the examiner would step into the shoes of the hypothetical PHOSITA to find the alleged invention obvious or not. Further, the SCOTUS in KSR, declared that the PHOSITA is a person of ordinary creativity with commonsense and ingenuity, but not an automaton, and invalidated the patent in question by reiterating old rules and the patent obviousness test that the USPTO had misapplied to electromechanical technology of 1999 vintage.

The SCOTUS stated that when there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely to be an obvious product of ordinary skill and common sense, and not the product of innovation. To facilitate an inquiry into a reason to combine, the SCOTUS said that any obviousness analysis should be

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made explicit, though a non-automaton PHOSITA may take into account broad sources of prior art, commonsense and ingenuity for motivation to combine that prior art.

This doctrinal construction was considered an unacknowledged conceptual shift and the legal equivalent of trying to elevate oneself by standing in a bucket and pulling upward on the handle, undermining fundamental patent law objectives, because this shift of PHOSITA from the mechanic's perspective to the researcher's perspective is analogous to a unilateral change in the contractual terms⁽⁷⁾. These experts thought that the commonsense and ingenuity bestowed upon the PHOSITA makes this "entity" equivalent to an ordinary researcher, who apparently routinely elevates itself by standing in a bucket and pulling upward on the handle. Obviously, this is counterproductive, not only because the ordinary researcher PHOSITA will never go up and find something worth patenting, but also because the PHOSITA might find every novel combination invention to be obvious to try. Many experts⁽¹⁰⁾ thought that obvious to try to be an easy avenue for the USPTO in demonstrating obviousness of every alleged novel invention concocted by the ordinary researcher in the bucket.

Per anecdotal evidence⁽¹⁰⁾ shortly after the KSR decision, there was a drop in the number of cases granted by the USPTO, i.e., more obviousness rejections using newly minted PHOSITA concept. The USPTO issued new guidelines and protocols for examiners to deal with the situation, making it more challenging to obtain patents, including the biotech and pharmaceutical fields⁽¹¹⁾.

The USPTO has been trying to improve the quality of patents since then. This is the strength, which may be a problem for troll inventors, in theory. However, a recent survey⁽¹²⁾ by Intellectual Asset Management (IAM) identified the EPO as the best in granting quality patents, not the USPTO. This is a weakness that still needs to be fixed.

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The USPTO has provided guidelines to examiners in line with the KSR and post-KSR case law. However, the problem seems to be implementation of the guidelines, especially when the rules have to be applied on a case by case involving subjectivity.

Examples of Basic Requirements of a Prima Facie Case of Obviousness⁽¹³⁾:

Exemplary rationales that may support a conclusion of obviousness include:

- (A) Combining prior art elements according to known methods to yield predictable results;
- (B) Simple substitution of one known element for another to obtain predictable results;
- (C) Use of known technique to improve similar devices (methods, or products) in the same way;
- (D) Applying a known technique to a known device (method, or product) ready for improvement to yield predictable results;
- (E) "Obvious to try" – choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success;
- (F) Known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations are predictable to one of ordinary skill in the art;
- (G) Some teaching, suggestion, or motivation in the prior art that would have led one of ordinary skill to modify the prior art reference or to combine prior art reference teachings to arrive at the claimed invention.

Other rationales to support a conclusion of obviousness may be relied upon by Office personnel. Any rationale employed must provide a link between the factual findings and the legal conclusion of obviousness.

The rationale to support a conclusion that the claim would have been obvious is that all the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions, and the combination yielded nothing more than predictable results to one of ordinary skill in the art.

In the Omeprazole case⁽¹⁴⁾, in view of the expectations of those hypothetical PHOSITAs, adding the subcoating would not have been expected to confer any particular desirable property on the final product.

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Rather, the final product obtained according to the proposed modifications would merely have been expected to have the same functional properties as the prior art product.

The USPTO requires office personnel to note that although the Federal Circuit invoked the idea of common sense⁽¹⁵⁾ in support of a conclusion of obviousness, it did not end its explanation there. Rather, the court explained why a hypothetical PHOSITA at the time of the invention, in view of the facts relevant to the case, would have found the claimed inventions to have been obvious. The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason why the claimed invention would have been obvious.

By disclosing a device that inherently performs a function or has a property, operates according to a theory or has an advantage, a patent application necessarily discloses that function, theory or advantage, even though it says nothing explicit concerning it⁽¹⁶⁾. Instead of repeating some information contained in another document, an application may attempt to incorporate the content of another document or part thereof by reference to the document in the text of the specification. The information incorporated is as much a part of the application as filed as if the text was repeated in the application, and should be treated as part of the text of the application as filed⁽¹⁷⁾.

Although a rejection need not be based on a teaching or suggestion to combine, and contrary to the explicit rejection of such rejections by the SCOTUS as explained above, the USPTO suggests that it is preferred to provide such a teaching or suggestion⁽¹⁸⁾. This makes the SCOTUS formulation irrelevant, resulting in invalid claims being allowed, as before KSR. The USPTO has not changed the procedures, but reverted to what was before KSR, after acknowledging the SCOTUS guidance, and the commonsense of a hypothetical non-automaton PHOSITA in the USPTO guidelines⁽¹⁸⁾, by requiring the examiner to document the motivation to combine with “the need for caution in granting a patent based on the combination of elements found in the prior art” as required by the SCOTUS⁽¹⁸⁾, which practically makes “the commonsense” obsolete and substituted by “documentation of evidence” of such commonsense⁽¹⁸⁾,

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so that the examiner may not take the easy route of “conclusory statements,” and “Office personnel must therefore ensure that the written record includes findings of fact concerning the state of the art and the teachings of the references applied. In certain circumstances, it may also be important to include explicit findings⁽¹⁸⁾,” in light of CAFC guidance: The “use of common sense does not require a “specific hint or suggestion in a particular reference,” only a reasoned explanation that avoids conclusory generalizations⁽¹⁸⁾.” Due to the subjectivity and uniqueness of each claimed invention and considering the courts’ (juries’ and judges’) lack of technical knowledge, even the most knowledgeable examiner that field is forced to avoid appearance of a conclusory statement, for example, a claim containing a limitation of a “covalent bond⁽¹⁹⁾.”

In addition, obviousness argument is preferred over anticipation when inherency is involved. Rejections based on obviousness argument can be overcome by showing non-obviousness, when in fact, the invention is anticipated all along by the prior art, inherently. This USPTO policy also results in allowance of anticipated claims as novel and non-obvious due to non-obviousness indicia, defeating the public policy behind inherency doctrine.

Because the case law regarding inherency⁽²⁰⁾ is imprecise, the USPTO examiners often have trouble discerning a clear path to claim rejections in the face of inherent anticipation and inherent obviousness. Although one must use care in asserting inherent obviousness, it can be used successfully to invalidate or reject a claim. The Patent and Trademark Office provides instructions on the application of inherency to 35 USC 103⁽²¹⁾. Further, the burden is on the examiner to provide an explanation as to why the limitation is inherent in the prior art.

The public policy behind inherency is preventing removal of inventions available in the public domain from the public simply due to the recognition of its existence. Therefore, inherency is based on the maxim that “the discovery of a previously unappreciated property of a prior art composition, or of a scientific explanation for the prior art’s functioning, does not render the old composition patentably new to the discoverer⁽²²⁾.” Although the burden is on the examiner to provide a reason for the existence of an inherent feature, rationale is not required to provide absolute proof of the inherent feature’s presence⁽²³⁾. In anticipation analysis, there is no such requirement that a person of ordinary skill in the art would have recognized the inherent disclosure at the time of invention. Therefore, the recognition of the inherent

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property or feature in the prior art can occur after the filing date of the application to anticipate. The fact that a characteristic is a necessary feature or result of a prior-art embodiment is enough for inherent anticipation, even if that fact was unknown at the time of the prior invention.

When the claims are based on a structural or functional feature of the invention, and that structure or functional feature is identical or substantially identical to that taught in the prior art, then the claimed properties or functions are presumed to be inherent. Similarly, for compositions of matter, if the composition is physically the same, it necessarily has the same properties, i.e., a chemical composition and its properties are inseparable. A new use must be distinguished from a newly recognized result or outcome of a prior art use of a known compound. The previously unrecognized result of an existing method was already in the public domain and is therefore not patentable⁽²⁴⁾.

In addition, the inherent result of a prophetic example might serve as anticipatory prior art even though the inherent result of the constructive reduction to practice was unrecognized by the scientific community at the time of publication of the prior art. Likewise, anticipation by inherency requires only an enabling disclosure, not actual creation or reduction to practice⁽²⁵⁾.

Conclusion

As a result of the above discussed complex and murky policies contradicting each other, the USPTO has a tough time to improve the quality of granted patents⁽¹²⁾, awarding monopolies to entities that wrongfully take away the known inventions from the public domain.

However, the world at large, including applicants, inventors, examiners and third parties, can help the patent systems around the world by doing the following:

1) Using the opportunity to submit third party anonymous submissions⁽²⁶⁾ in the patent applications of your interest to make sure that the inventions dedicated to public remain in the public domain and improve the quality of granted patents in the US as well as Internationally.

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2) Inventors and Applicants may use the techniques used by trolls and other entities that use the loopholes in the system such as “applicant is the lexicographer,” “difficulty to articulate inherency⁽²⁷⁾,” “hindsight of inherency,” “the TSM requirement⁽²⁸⁾” and “common sense constrained and rendered useless by the TSM requirement making the PHOSITA (i.e., the examiner) an automaton,” that continue to be used so that patents are granted easily, as explained above.

See for example, Exytholate⁽²⁹⁾ and a process for making mar resistant organic material with alkylsilane that has a covalent bond⁽³⁰⁾. These examples may be used⁽³⁰⁾, (Caution: at the discretion of the reader through proper counsel⁽³¹⁾), to write patent applications and present claims in such a way that the examiners are forced to give positive opinions or obviousness rejections that can be easily overcome by showing non-obviousness indicia using affidavits/declarations⁽³²⁾.

However, it should be noted that deliberately misleading the examiners and the PTO is fraud and inequitable conduct⁽³³⁾ that may lead to invalidation of the patent grant. Infringers of patents routinely argue in patent infringement law suits against them that asserted patents are unenforceable due to inequitable conduct. Despite the understanding that the inequitable conduct has become an absolute plague and inequitable conduct defense continues to be raised in most cases, the plague continues to infect careless patent owners⁽³⁴⁾. Therefore, as the list of improper conduct and activities deemed sufficient to render a patent unenforceable has increased, patent applicants should avoid the conduct and activities that might ultimately render their patent unenforceable⁽³⁵⁾.

3) Avoid “patent profanity⁽³⁶⁾”, words and phrases, when used in the patent specification or in communications with the USPTO, may lead a court to attach an unfavorable meaning to a claim term leading to invalidation or narrowing of the claim, resulting in a finding of non-infringement.

4) Use an applicant’s right to be “a lexicographer⁽³¹⁾.” Courts assess the case by interpreting the claim language by reviewing the specification. However, as indicated above, patent applicants should avoid the conduct and activities that might ultimately render their patent unenforceable⁽³⁵⁾.

5) Third parties may also submit evidence, not only related to novelty and non-obviousness, but also related to issues of enablement, written description, lack of utility or indefiniteness could be addressed if the submitter's position is supported by appropriate documents in their observations in Protest and Pre-Issuance Oppositions⁽³⁷⁾.

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EFS-WEB, PRIVATE PAIR AND CHROME

In April 2015, Google Chrome removed the default ability to use the Java plug-in for browser version 42. This impacts access to EFS-Web⁽³⁸⁾ and Private PAIR⁽³⁹⁾ because Java is required for authentication into these systems. Chrome has a temporary workaround to use the Java plug-in to log into EFS-Web and Private PAIR, through September 2015. Chrome users using version 45 and above will no longer be able to use the workaround and thus will not be able to log into EFS-Web or Private PAIR. Oracle recommends alternative browsers such as Firefox, Internet Explorer, and Safari.

PTAB UPDATE

The AIA provides for the following post grant administrative trials by the Patent Trial and Appeal Board (PTAB): *Inter Partes Review* (IPR), Post-Grant Review (PGR), and Covered Business Method Review (CBM). The PTAB has issued over 2,200 decisions on institution and over 450 final written decisions, so far. A World Intellectual Property Review (WIPR) survey⁽⁴⁰⁾ of the proposed changes to rules governing PTAB trial proceedings⁽⁴¹⁾ indicates that the respondents unanimously thought the proposals would improve how the PTAB conducts trials. Under the current procedure, three administrative patent judges decide whether to institute an IPR, and the same judges then determine the validity of the patent in the trial phase. However, the USPTO indicated that IPRs could be instituted by a single judge with an additional two judges then drafted in to determine the validity of the targeted patent. The USPTO's proposals include: allowing patent owners to submit expert evidence before an examiner decides whether to institute an *inter partes review* (IPR) and requiring practitioners to submit a pleading, similar to rule 11 requirements in federal courts, that its petition is not abusive before filing an IPR.

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Collaborative Search Pilot Program (CSP)⁽⁴²⁾

The USPTO signed two independent collaborative search pilot Memorandum of Cooperation (MOC)s with the Japan Patent Office (JPO) and the Korean Intellectual Property Office (KIPO). The purpose of these two pilots is to provide our stakeholders with search results from two Offices early in the examination process so the applicant can determine their next steps in patent prosecution. Both pilots will run for two (2) years with the option to extend.

JPO Pilot⁽⁴³⁾ effective date: August 1, 2015

KIPO Pilot⁽⁴⁴⁾ effective date: September 1, 2015

The pilot program will run for two years from the effective date. The pilot program will be limited to 200 for each office each year, total 400 for both. The USPTO and JPO/KIPO will exchange search and evaluation results identifying the best prior art and provide a work product that incorporates the efforts of the two Offices – USPTO and one of JPO/KIPO appropriately.

The Potential Benefits:

- FREE to file Petition
- Your application will be taken out of turn resulting in expedited search results and final disposition

Applicant Requirements:

Applicant consents to permit the USPTO and its partner Offices to share information under portions of 35 USC 122:

- (a) for sending to and receiving from KIPO search results in US Applications, and
- (b) for receiving KIPO/JPO search results and commentary in published US Applications.

Application Requirements:

- Based on First Action Interview (FAI) Program
- Claim Limits – 3 Independent/20 Total
- Directed to a single invention

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- Claims must correspond between Offices (slight difference between JPO and KIPO)
- Earliest priority date must be post-AIA
- Application unexamined in both Offices
- Granted Petition in both Offices

REFERENCES AND NOTES

⁽¹⁾ Dr. Rao Vepachedu is the Managing Director at Cardinal Risk Management and registered patent attorney with extensive experience in the management of intellectual property and extensive experience in research and teaching. He currently works for Cardinal Intellectual Property (CIP), Cardinal Risk Management (CRM), and Cardinal Law Group (CLG). In addition, he is the president of Vepachedu Educational Foundation Inc. (www.vepachedu.org), a 501(c) (3) educational foundation. For more information visit: www.linkedin.com/in/vepachedu; and <http://www.crm-ip.com/vepachedu.html>.



<http://www.avvo.com/attorneys/60201-il-sreenivasarao-vepachedu-764535.html>

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⁽²⁾ *KSR Intl Co. v. Teleflex Inc.*, 550 US 398 (2007)

The Supreme Court noted that throughout the Court's engagement with the question of obviousness, its cases have set forth an "expansive and flexible approach," which was inconsistent with the TSM test that the Federal Circuit had been applying.

⁽³⁾ VI Writings of Thomas Jefferson at 180-181 (Washington ed.).

⁽⁴⁾ A) Teaching, Suggestion and Motivation (TSM)

B) *McClain v. Ortmyer*, 141 US 419, 427 (1891)

⁽⁵⁾ *Graham et al. v. John Deere Co. of Kansas City et al.*, 383 U.S. 1 (1966): In a suit for the infringement of a patent that consisted of a combination of old mechanical elements for a device designed to absorb shock from plow shanks in rocky soil in order to prevent damage to the plow, the Fifth Circuit ruled that a combination is patentable when it produces an "old result in a cheaper and otherwise more advantageous way."

In an opinion delivered by Justice Tom C. Clark, the SCOTUS held that the Patent Act of 1952 did not lower the standards required for the patentability of an invention by adding an inquiry into obviousness to the statutory requirements of novelty and utility. The Court found that section 103 of the 1952 Patent Act Congress added the statutory nonobvious subject matter requirement, and outlined the so-called Graham factors for the determination of obviousness.

⁽⁶⁾ The examiner bears the initial burden of factually supporting any prima facie conclusion of obviousness. *Princeton Biochemicals, Inc. v. Beckman Coulter, Inc.*, 411 F.3d 1332, 1336-37 (Fed. Cir. 2005); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976); *In re Linter*, 458 F.2d 1013, 173 USPQ 560 (CCPA 1972); *In re Saunders*, 444 F.2d 599, 170 USPQ 213 (CCPA 1971); *In re Tiffin*, 443 F.2d 394, 170 USPQ 88 (CCPA 1971), amended, 448 F.2d 791, 171 USPQ 294 (CCPA 1971); *In re Warner*, 379 F.2d 1011, 154 USPQ 173 (CCPA 1967), cert. denied, 389 U.S. 1057 (1968);

<http://www.uspto.gov/web/offices/pac/mpep/s2142.html>; accessed on August 31, 2015

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⁽⁷⁾Darrow, The Neglected Dimension Of Patent Law's PHOSITA Standard, Harvard Journal of Law & Technology, Volume 23, Number 1, Fall 2009 (<http://jolt.law.harvard.edu/articles/pdf/v23/23HarvJLTech227.pdf>); accessed on August 31, 2015

⁽⁸⁾The CAFC wrongly concluded that because Asano's primary purpose was solving the constant ratio problem, an inventor considering how to put a sensor on an adjustable pedal would have no reason to consider putting it on the Asano pedal. It is common sense that familiar items may have obvious uses beyond their primary purposes, and a PHOSITA often will be able to fit the teachings of multiple patents together like pieces of a puzzle. Regardless of Asano's primary purpose, it provided an obvious example of an adjustable pedal with a fixed pivot point, and the prior art was replete with patents indicating that such a point was an ideal mount for a sensor.

⁽⁹⁾A patent claim CAN be proved obvious merely by showing that the combination of elements was obvious to try. Prior to KSR, it was well-established that "obvious to try" was not the standard for evaluating patentability. Irving et al., Obviousness Developments in U.S. Patent Law, China IP News, July 2009, (<http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=20c9e617-794a-4ec3-b835-002729234f91>)

⁽¹⁰⁾*Id.*

⁽¹¹⁾Castanias et al., *KSR v. Teleflex*: Moving Toward a More Flexible Definition of Obviousness, (<http://www.jonesday.com/files/Publication/ec8c6973-eaf2-4585-bb64-4a559ff50ced/Presentation/PublicationAttachment/854236c5-85fc-472b-a5be-53cc18274bac/KSRvTeleflex.pdf>)

⁽¹²⁾The EPO has once again been rated number one for patent quality among the world's largest patent offices, according to a recent survey of patent professionals by Intellectual Asset Management (IAM) magazine: ([http://documents.epo.org/projects/babylon/eponet.nsf/0/4783c6465d9a2b5fc1257e5900242b3f/\\$FILE/IAM72_benchmarking_q_p_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/4783c6465d9a2b5fc1257e5900242b3f/$FILE/IAM72_benchmarking_q_p_en.pdf)); accessed on August 31, 2015

Although polls conducted by various organizations are inherently flawed and unscientific, it has become the norm and accepted practice to value and depend such statistical manipulations, e.g., in the above report there is no real comparison of granted patents' validity or invalidity. Many of the attorneys participated in the survey have known EPO and USPTO only, and never had the opportunity to review the work of any other new ISAs or PTOs, and yet were willing to judge based on their gut feelings and anecdotal evidence. Nevertheless, the USPTO is not the topper, despite the KSR, AIA and all the hoopla about quality in the recent years

⁽¹³⁾MPEP 2143 Examples of Basic Requirements of a Prima Facie Case of Obviousness:

<http://www.uspto.gov/web/offices/pac/mpep/s2143.html>; accessed on August 31, 2015

⁽¹⁴⁾*In re Omepirazole Patent Litigation*, 536 F.3d 1361, 87 USPQ2d 1865 (Fed. Cir. 2008)

Example 3: <http://www.uspto.gov/web/offices/pac/mpep/s2143.html>; accessed on August 31, 2015

⁽¹⁵⁾The SCOTUS in KSR noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit

⁽¹⁶⁾2163.07(a) Inherent Function, Theory, or Advantage: <http://www.uspto.gov/web/offices/pac/mpep/s2163.html#d0e215172>; accessed on August 31, 2015

⁽¹⁷⁾2163.07(b) Incorporation by Reference: <http://www.uspto.gov/web/offices/pac/mpep/s2163.html#d0e215172>; accessed on August 31, 2015

⁽¹⁸⁾Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103

THE KSR DECISION AND PRINCIPLES OF THE LAW OF OBVIOUSNESS

<http://www.uspto.gov/web/offices/pac/mpep/s2141.html>; accessed on August 31, 2015

What To Search For? "The search should cover the claimed subject matter and should also cover the disclosed features which might reasonably be expected to be claimed." (Not yet claimed or presented in claims, but at some point in future, may be presented in claims!)

Office Personnel As Fact finders: "Office personnel must therefore ensure that the written record includes findings of fact concerning the state of the art and the teachings of the references applied"

"use of common sense does not require a "specific hint or suggestion in a particular reference," only a reasoned explanation that avoids conclusory generalizations." *DyStar Textilfarben GmbH v. C.H. Patrick Co.*, 464 F.3d 1356, 1366 (Fed.Cir. 2006)

⁽¹⁹⁾Covalent Bond is a chemical bond that involves the sharing of electron pairs between two atoms bonded together. All molecules are made of two or more atoms, having covalent or ionic bonding. Most of the organic chemicals are molecules with two or more atoms covalently bonded together. Inorganic bonding is seen in inorganic materials such as salts in which ions are bonded by the attraction, the electrostatic attraction between oppositely charged ions. When dissolved in a suitable polar solvent such as water, ionic compounds or molecules dissociate into anions and cations. This is the inherent nature of chemicals, both covalent molecules and ionic molecules. However, "a lexicographer inventor or applicant" may write a claim against well-known covalent molecule by claiming the "covalent bond" between the two atoms in the known molecule, and examiner is forced to give +ve opinion or a rejection with obviousness argument against the claim using the exact compound, which has inherently the claimed covalent bond, the reference is silent about such bonding. See for

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example, various frivolous and inherent steps in the method of “coating an organic material with alkyl-silane, claims 1 and 8 in WO2015035361: ORGANIC SUBSTRATES HAVING IMPROVED WEATHERABILITY AND MAR RESISTANCE:

1. A process of forming a mar resistant organic material comprising: providing a substrate comprising a thermoplastic material, said substrate having a surface; infusing an adhesion promoter into said surface such that a first portion of said adhesion promoter penetrates said surface to form an infused substrate material, and a second portion of said adhesion promoter extends from said surface or is present at said surface, said first portion and said second portion covalently linked; and optionally depositing a mar resistant coating or hardcoat on said surface, said mar resistant coating or hardcoat adhering to said infused substrate material absent an intermediate layer.

mar resistant organic material = organic material coated with (alkyl silane that is) hydrophobic and scratch resistant coating providing a substrate = organic material (place it somewhere, wherever you want to color, paint, coat, spray, layer, etc. with something else)

“a thermoplastic material” = any polymer including cellulose derivatives known for hundreds of years such as paper or cellophane

“having a surface” = all substrates have surfaces, including paper or wood or whatever “thermoplastic”

“infusing an adhesion promoter into said surface” = coating with, immersing in, spraying with, etc., alkylsilane over the surface

“into said surface such that a first portion of said adhesion promoter penetrates said surface to form an infused substrate material, and a second portion of said adhesion promoter extends from said surface or is present at said surface” = silicon part bonding with the surface, alkyl part hanging like a tail

“said first portion and said second portion covalently linked” = silicon and alkyl group are bonded through a covalent bond

8. The process of any one of claims 1-4 wherein said adhesion promoter comprises the structure of formula II where R1, R2, and R3 are each independently an H, OH, Cl, F, C4-C20 alkyl, etc.

⁽²⁰⁾Rao Vepachedu, Doctrine of Inherency, <http://www.cardinal-ip.com/ip-news-strategy/doctrine-of-inherency/>; accessed on August 31, 2015

⁽²¹⁾MPEP 2112 (“The express, implicit, and inherent disclosures of a prior art reference may be relied upon in the rejection of claims under 35 U.S.C. 102 or 103.”)

⁽²²⁾*Atlas Powder, Co. v. INRECO, Inc.*, 190 F.3d 1342, 1347 (Fed. Cir. 1999)

⁽²³⁾In *Titanium Metals Corp. of Am. v. Banner*, 778 F.2d 775 (Fed. Cir. 1985), the claims to the composition were anticipated, despite the fact that the property of corrosion resistance was not previously recognized. “Congress has not seen fit to permit the patenting of an old alloy, known to others through a printed publication, by one who has discovered its corrosion resistance or other useful properties, or has found out to what extent one can modify the composition of the alloy without losing such properties.”)

⁽²⁴⁾In *Schering Corp.*, 339 F.3d at 1381, the court held that the metabolite of a known drug was the inherent product of administering the drug and, therefore, anticipated. However, the court stated, “finally, this court’s conclusion on inherent anticipation in this case does not preclude patent protection for metabolites of known drugs. With proper claiming, patent protection is available for metabolites of known drugs.”)

⁽²⁵⁾In *re Montgomery*, 677 F.3d 1375, 1382 (Fed. Cir. 2012), citing *Schering Corp.*, 339 F.3d at 1381; In *SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1343–44 (Fed. Cir. 2005), the Court held a chemical patent inherently anticipated and stated that it was irrelevant whether the inherently disclosed chemical was ever actually produced; In *Elan Pharm., Inc. v. Mayo Found. For Med. Educ.*, 346 F.3d 1051, 1052 (Fed. Cir. 2003)(*en banc*), the court stated “we clarify that invalidity based on anticipation requires that the assertedly anticipating disclosure enabled the subject matter of the reference and thus of the patented invention without undue experimentation.”)

⁽²⁶⁾A third party may submit any publication of potential relevance to a patent application before the earlier of (1) a notice of allowance; or (2) the later of six months after the date of first publication, or the date of the first rejection of any claim by the examiner. See for more information: <http://www.cardinal-ip.com/products-and-services/legal-process-outsourcing/professional-services/preissuance-submission-research/> and <http://www.cardinal-ip.com/ip-news-strategy/preissuance-submissions/>; accessed on August 31, 2015. A third party may submit references relevant to claims in many patent offices including the USPTO, EPO and PCT, within the allowed time period after the publication of a patent application

⁽²⁷⁾See above 20

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⁽²⁸⁾The TSM requirement: The CAFC continues to impose TSM requirement: “we required the PTO to identify record evidence of a teaching, suggestion, or motivation to combine references because omission of a relevant factor required by precedent is both legal error and arbitrary agency action. However, this did not preclude examiners from employing common sense. . . “that a patent claim cannot be proved obvious merely by showing that the combination of elements was ‘obvious to try. . .’” In addition, the USPTO interprets the caution “the need for caution in granting a patent based on the combination of elements found in the prior art” by the SCOTUS to require TSM with the “commonsense to avoid the risk of falling prey to hindsight bias”
<http://www.uspto.gov/web/offices/pac/mpep/s2141.html>; accessed on August 31, 2015

⁽²⁹⁾“Exytholate” is a term coined by the applicant for known word “ethoxylate.” See Rao Vepachedu, Novelty, <http://www.cardinal-ip.com/ip-news-strategy/novelty>; accessed on August 31, 2015

⁽³⁰⁾Mar Resistant Organic Material is a scratch resistant organic material. See above 19, 20 and 26

⁽³¹⁾The author abhors the improper use of the “lexicographer loophole” and DOES NOT advocate or practice such use of misleading or redefining the old, because he thinks this is deception and fraud on the public, patent office and the government of the state where patent monopoly is sought. However, this is his opinion and others may have different opinion, and hence the practice of using the lexicographer loophole in the system is presented here as a practice used by others. The reader is advised to seek assistance from a competent attorney

The author considers the judicious use of the right to be a lexicographer and prefers conformity with the accepted definitions such that there is no ambiguity, e.g., author would prefer to define a flowering plant and its flower called “rose” as “a woody perennial comprising stems that are erect, climber or trails, often with sharp prickles or thorns, and fragrant flowers of varying size, shape and color, belongs to the genus Rosa, including thousands of cultivars, within the species listed at <http://plants.usda.gov/java/ClassificationServlet?source=display&classid=ROSA5>; accessed on August 31, 2015

⁽³²⁾Affidavits or declarations, when timely presented, containing evidence of criticality or unexpected results, commercial success, long-felt but unsolved needs, failure of others, skepticism of experts, etc., must be considered by the examiner in determining the issue of obviousness of claims for patentability under 35 U.S.C. 103. The Court of Appeals for the Federal Circuit stated in *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538, 218 USPQ 871, 879 (Fed. Cir. 1983) that “evidence rising out of the so-called ‘secondary considerations’ must always when present be considered en route to a determination of obviousness.” Such evidence might give light to circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or unobviousness, such evidence may have relevancy. *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966); *In re Palmer*, 451 F.2d 1100, 172 USPQ 126 (CCPA 1971); *In re Fielder*, 471 F.2d 640, 176 USPQ 300 (CCPA 1973). The *Graham v. John Deere* pronouncements on the relevance of commercial success, etc. to a determination of obviousness were not negated in *Sakraida v. Ag Pro*, 425 U.S. 273, 189 USPQ 449 (1979) or *Anderson’s-Black Rock Inc. v. Pavement Salvage Co.*, 396 U.S. 57, 163 USPQ 673 (1969), where reliance was placed upon *A&P Tea Co. v. Supermarket Corp.*, 340 U.S. 147, 87 USPQ 303 (1950). See *Dann v. Johnston*, 425 U.S. 219, 226 n.4, 189 USPQ 257, 261 n. 4 (1976). Examiners must consider comparative data in the specification which is intended to illustrate the claimed invention in reaching a conclusion with regard to the obviousness of the claims. *In re Margolis*, 785 F.2d 1029, 228 USPQ 940 (Fed. Cir. 1986). The lack of objective evidence of nonobviousness does not weigh in favor of obviousness. *Miles Labs. Inc. v. Shandon Inc.*, 997 F.2d 870, 878, 27 USPQ2d 1123, 1129 (Fed. Cir. 1993), cert. denied, 127 L. Ed. 232 (1994). However, where a prima facie case of obviousness is established, the failure to provide rebuttal evidence is dispositive. 37 C.F.R. 1.132 Affidavits or Declarations Traversing Rejections Or Objections:
<http://www.uspto.gov/web/offices/pac/mpep/s716.html>; accessed on August 31, 2015

⁽³³⁾ Inequitable Conduct Post-Therasense: Two Important Recent Rulings:

http://www.finnegan.com/files/upload/Newsletters/Full_Disclosure/2013/November/FullDisclosure_Nov13_1.html; accessed on August 31, 2015

<http://www.law360.com/articles/602145/inequitable-conduct-still-exists-after-therasense>; accessed on August 31, 2015

How to Meet the Inequitable Conduct Standard after Therasense: <http://www.iplawalert.com/2014/08/articles/patent/how-to-meet-the-inequitable-conduct-standard-after-therasense/>; accessed on August 31, 2015

⁽³⁴⁾*Ferring B.V. v. Barr Labs., Inc.*, 437 F.3d 1181, 1196-97 (Fed. Cir. 2006); *Burlington Indus., Inc. v. Dayco Corp.*, 849 F.2d 1418, 1422 (Fed. Cir. 1988); *McKesson Info. Solutions, Inc. v. Bridge Med., Inc.*, 487 F.3d 897, 913-26 (Fed. Cir. 2007); *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1256-57 (Fed. Cir. 1997); *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1292 (Fed. Cir. 2011); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944)

⁽³⁵⁾ “patent may be rendered unenforceable for inequitable conduct if an applicant, with intent to mislead or deceive the examiner, fails to disclose material information or submits materially false information to the PTO during prosecution” . . . “In the absence of “smoking gun” evidence, intent to deceive is normally inferred from the facts” *Larson Mfg. Co. v. Aluminart Prods. Ltd.*, 559 F.3d 1317, 1326 (Fed. Cir. 2009) “information is material when a reasonable examiner would consider it important in deciding whether to allow the application to issue as a patent” *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1365 (Fed. Cir. 2008); “conduct sufficient to render a patent unenforceable is broader than deliberate fraud” *J.P. Stevens & Co. v. Lex Tex Ltd.*, 747

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F.2d 1553, 1559 (Fed. Cir. 1984); In *McKesson*, the court affirmed a finding of inequitable conduct based on the patentee's failure to fully disclose material information from related patent applications. *McKesson Info. Solutions, Inc. v. Bridge Med., Inc.*, 487 F.3d 897, 913-26 (Fed. Cir. 2007); See also, *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1256-57 (Fed. Cir. 1997); "where there is proof of "affirmative egregious misconduct" such as a "deliberately planned and carefully executed scheme[]" to defraud the [USPTO]," it is not necessary to prove that the information at issue was "but-for" material". *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1292 (Fed. Cir. 2011) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944))

⁽³⁶⁾ Tom Irving et al., Patent Claim Drafting and Construction, available at: <http://media.straffordpub.com/products/patent-claim-drafting-and-construction-2012-03-13/presentation.pdf>; accessed on August 31, 2015

Patent Drafting Taboos: I. Words that Limit, available at: http://www.4ipt.com/Vol2003_3.htm; accessed on August 31, 2015

<http://www.minncle.org/attendeemats/77413/77413%20PPT%20IRVING%2001%20Surviving%20Patent%20Litigation%20with%20Well-Crafted%20Claims.pdf>; accessed on August 31, 2015

⁽³⁷⁾ Protest and Pre-Issuance Oppositions: <http://www.uspto.gov/web/offices/pac/mpep/s1134.html>; accessed on August 31, 2015

USPTO ISSUES FINAL RULES FOR THIRD-PARTY PREISSUANCE SUBMISSIONS IN PATENT APPLICATIONS, July 24, 2012:

<http://www.oliff.com/wp-content/uploads/2012/07/USPTO-ISSUES-FINAL-RULES-FOR-THIRD-with-header-2-.pdf>; accessed on August 31, 2015

⁽³⁸⁾ EFS – Web Announcements: <http://www.uspto.gov/patents-application-process/applying-online/efs-web-announcements>; accessed on August 31, 2015

⁽³⁹⁾ PAIR Announcements: <http://www.uspto.gov/patents-application-process/checking-application-status/pair-announcements>; accessed on August 31, 2015

For eFiling topic, please visit the Patent Electronic Business Center webpage: <http://www.uspto.gov/learning-and-resources/support-centers/patent-electronic-business-center>; accessed on August 31, 2015

⁽⁴⁰⁾ WIPR survey: Readers welcome PTAB proposals: <http://www.worldipreview.com/news/wipr-survey-readers-welcome-ptab-proposals-8795>; accessed on September 1, 2015

⁽⁴¹⁾ PTAB Update: Proposed Changes to Rules Governing PTAB Trial Proceedings:

http://www.uspto.gov/blog/director/entry/ptab_update_proposed_changes_to; accessed on September 1, 2015

⁽⁴²⁾ Collaborative Search Pilot Program (CSP) <http://www.uspto.gov/patents-getting-started/international-protection/collaborative-search-pilot-program-csp>; accessed on August 31, 2015

⁽⁴³⁾ JPO Pilot: <http://www.uspto.gov/sites/default/files/documents/JPOUSPTO%20Pilot.pdf>; accessed on August 31, 2015

⁽⁴⁴⁾ KIPO Pilot: <http://www.uspto.gov/sites/default/files/documents/KIPOUSPTOCSP.pdf>; accessed on August 31, 2015

Additional Sources: The information published here is available from the primary sources cited above, and also from secondary sources such as: New York Times (NYT), Washington Post (WP), Mercury News, Bayarea.com, Chicago Tribune, USA Today, Intellihealthnews, Deccan Chronicle (DC), the Hindu, Hindustan Times, Times of India, AP, Reuters, AFP, womenfitness.net, about.com, mondaq.com, etc

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Om! Asatoma Sadgamaya, Tamasoma Jyotirgamaya, Mrityorma Amritamgamaya, Om Shantih, Shantih,
Shantih!

(Aum! Lead the world from wrong path to the right path, from ignorance to knowledge, from mortality to
immortality, and peace!)

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