Nonobviousness and Nerd Culture

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A good test of nonobviousness in patent law requires attention to the context of invention. Occasionally, courts take note of context, but more often they have not. They have veered from a stringent "flash of genius" test to the lax "teaching, suggestion, motivation to combine" test recently rejected by the Supreme Court in *KSR v. Teleflex*. Both of these unsatisfactory approaches reflect an isolated inventor paradigm which, whatever validity it may have had in earlier times, is ill-suited to today's technology.

In fact, while a very few inventors may work alone in basements or garages, most inventors collaborate and participate in social and technological networks. Many inventors are guided by research managers, and participate in programs than span multiple research projects. Regardless of whether they collaborate, most inventors share information about tools and techniques, and they follow and feel the influence of market and social forces.

In *KSR v. Teleflex,* the Supreme Court set us on the path toward a more realistic approach to the obviousness inquiry. It directs us to look "to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art" (PHOSITA) to assess whether a patent should be granted. The Court recognizes that innovation is part of the "ordinary course" of a competitive market, whether or not patents are granted.

In this Article we craft new tools that will help patent law frame obviousness analysis in a realistic inventive context. We rely on economics and organization theory to improve our normative understanding of the nonobviousness test. Then we apply our insights to better integrate PHOSITA into obviousness analysis. We also address the proper role for secondary considerations and the analogous arts doctrine. We are guided in part by the Federal Circuit's very recent inquiries into the "nature of the problem to be solved," by the Federal Circuit's analysis of PHOSITA in the 1980s, and by the somewhat related inquiry into "undue experimentation" in the enablement context.