

# NONOBVIOUSNESS AND THE FEDERAL CIRCUIT: AN EMPIRICAL ANALYSIS OF RECENT CASE LAW

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## ABSTRACT

This Article reports the results of a much needed study on the United States Court of Appeals for the Federal Circuit's nonobviousness jurisprudence. The study takes a look at all Federal Circuit cases over a four year period considering the nonobviousness of a patent claim. The study first takes a macro-level look at collected data, investigating whether the Federal Circuit has lowered the nonobviousness requirement. The study also takes a micro-level look at the reasoning for the court's findings, focusing on the impact of the "suggestion test" on the court's nonobviousness analysis. The results of the macro-level study provide at most a weak inference that the nonobviousness requirement is still strong, particularly in the context of appeals from the United States Patent and Trademark Office ("USPTO"). The micro-level study, in contrast, provides strong evidence that the suggestion test plays a fairly small role in the court's nonobviousness jurisprudence.

These findings are significant for two reasons. First, two recent reports—one by the Federal Trade Commission in 2003 and the other by the National Research Council in 2004—and briefing in a currently pending Supreme Court case, *KSR International Co. v. Teleflex, Inc.*, all come to opposite conclusions. They assert that the Federal Circuit lowered the nonobviousness requirement and point to the Federal Circuit's suggestion test as the reason for this bias towards findings of nonobvious. Second, the study reported in this Article is one of the first to empirically

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assess these recent claims about the Federal Circuit's jurisprudence. Questions about the Federal Circuit's nonobviousness case law are currently being considered by the Supreme Court in *KSR* and will be considered by Congress, the USPTO, and court in the future, and this Article provides valuable data to inform the Court and future decision-makers.