

Brand v. Miller Prevents Administrative Patent Judges From Using Their Common Sense in Inter Partes Proceedings¹

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In a previous article,⁴ we explained that, under *Brand v. Miller*, 487 F.3d 862, 82 USPQ2d 1705 (Fed. Cir. 2007), the Federal Circuit is using the wrong standard of review when reviewing factual findings by the Board of Patent Appeals and Interferences (“the BPAI”). In this article, we explain that, under *Brand*, the Federal Circuit will not allow Administrative Patent Judges (“APJs”) to use their com-

mon sense when deciding inter partes proceedings. We believe that the Federal Circuit’s decision directly contradicts *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1385 (2007), which explicitly allows patent examiners and district court judges to use their common sense.

Brand was an interference proceeding involving log cutting technology. A panel of the BPAI had unanimously entered a

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⁴ Robert C. Nissen & Charles L. Gholz, *Brand v. Miller Demonstrates that the Federal Circuit is Giving Insufficient Deference to the Factual Findings of the Patent and Trademark Office*, 89 J. PAT. & TRADEMARK OFF. SOC’Y 848 (2007).