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NONOBTVIOUSNESS: A COMMENT ON THREE LEARNED PAPERS

by
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This Article, a comment on the contributions of John Duffy, Rebecca Eisenberg, and Gregory Mandel, addresses three areas where improvements could be made in the law on nonobviousness. First, the quantum of inventiveness required for patentability should reflect the capabilities of the ordinary artisan. Second, the asymmetry in the error rate of nonobviousness determinations should be taken into account in setting the standard of nonobviousness. Third, the concept of nonobviousness—or, better, inventive step—should be operationalized by considering the opportunities, risks, and nonpatent incentives the inventor faced at the time of the innovation.

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The Supreme Court's decision in *KSR v. Teleflex*¹ provides an opportunity to reconsider the nonobviousness requirement. Professors Gregory Mandel, Rebecca Eisenberg, and John Duffy have each done an admirable job taking up the Court's invitation. As they make clear, the nonobviousness "question" actually encompasses three related issues. The first is the standard of nonobviousness—the quantum of inventiveness, which appears as the "nonobviousness threshold" in Professor Mandel's figures.² The second is the indeterminacy of the nonobviousness decision—a problem that has plagued the patent system from the moment the requirement was introduced by Thomas Jefferson.³ The third is the procedure for determining nonobviousness and for reviewing decisions applying it.

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¹ 127 S. Ct. 1727 (2007).

² Gregory N. Mandel, *Another Missed Opportunity: The Supreme Court's Failure to Define Non-Obvious or Combat Hindsight Bias in KSR v. Teleflex*, 12 LEWIS & CLARK L. REV. 323, 329 (2008).

³ *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966).