

LEVEL OF SKILL AND LONG-FELT NEED: NOTES ON A FORGOTTEN FUTURE

by Joseph Scott Miller*

The Supreme Court's KSR decision transforms the way we think about patent law's ordinary artisan. The ordinary artisan, the Supreme Court states, "is also a person of ordinary creativity, not an automaton." This transformation, which sweeps aside a contrary precept that had informed the Federal Circuit's nonobviousness jurisprudence for a generation, raises a key question: How do we fill out the rest of our conception, in a given case, of the ordinary artisan's level of skill at the time the invention was made? Reaching back to a large vein of case law typified by Judge Learned Hand's decisions about nonobviousness, as well as an all-but-forgotten nonobviousness bill that died in committee in 1948, the author shows that the modern "level of skill" inquiry can comfortably rely on evidence of long-felt, unmet need in the art and the failure of others to meet that need.

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[A]nd the best test of what persons of routine ingenuity can do is what they have done. Judge Learned Hand¹

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¹ Automatic Devices Corp. v. Cuno Eng'g Corp., 117 F.2d 361, 364 (2d Cir.), rev'd, 314 U.S. 84 (1941). See also W. States Mach. Co. v. S.S. Hepworth Co., 147 F.2d 345, 347 (2d Cir. 1945) (L. Hand, J.) ("As we have often repeated, in judging what