

**Patently Non-Obvious:
KSR v. Teleflex and Empirical Studies on the Hindsight Bias**

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Abstract

The Supreme Court in *KSR v. Teleflex* is considering, for the first time in thirty years, the core patent requirement that an invention be non-obvious. At the heart of this case lies the challenge of how to insulate non-obvious decisions from the distortion of the hindsight bias. The experimental studies reported here reveal that hindsight distorts patent decisions far more than anticipated. The implications of these studies for *KSR*, however, is not straight-forward. *KSR* concerns a challenge to the Federal Circuit's suggestion, teaching, or motivation requirement (a doctrine developed to combat the hindsight bias), on the basis that the doctrine unintentionally lowers the non-obvious standard. The study results indicate that the suggestion test does not produce erroneous non-obvious outcomes, but also that the suggestion test does not ameliorate the hindsight bias in the manner usually claimed by its supporters. Additional results indicate that the Supreme Court's *Graham* framework also does not resolve the hindsight problem. The hindsight studies, their implications for the outcome of *KSR v. Teleflex*, and recommendations for changes in patent doctrine and litigation to mitigate the impact of the hindsight bias all are discussed.