
The WilmerHale Obviousness Report: One-Hundred Decisions of the Federal Circuit Post-KSR

2012-05-31

In April 2007, the Supreme Court's decision in *KSR Int'l v. Teleflex Inc.* heralded an important potential shift in the law of obviousness. The Federal Circuit has now delivered 100 post-KSR opinions (excluding summary affirmances) that address obviousness.¹ As in the past, we have continued to follow and analyze these decisions. The charts attached provide a breakdown of the cases by holding, affirmance or reversal, and patented subject matter. The cases fall into three main categories: (1) The Life Sciences and Chemical Arts; (2) Computers, Software, Internet, and Electronics; and (3) Mechanical Arts and Miscellaneous Cases. Each major category is subdivided down into additional industrial subcategories. Aggregate results follow each table and section.

Some highlights from the overall statistics and emerging trends include:

- The Federal Circuit has held the claims at issue obvious in 52% of cases. This percentage has held relatively steady over the past two and a half years with obviousness holdings in 53% of cases through the end of 2010 and 52.1% of cases through the end of 2011.
- Patent claims in the Life Sciences and Chemical Arts have emerged as the most difficult to render obvious with non-obviousness holdings from the Federal Circuit in 60.8% of cases (up from 55.3% through the end of 2010).
- Patent claims in the Mechanical Arts and Miscellaneous category were invalidated as obvious in 80% of decisions from the Federal Circuit.
- In the Computers, Software, Internet, and Electronic Arts Cases context, claims were invalidated as obvious in 52.2% of cases.
- Within the pharmaceutical subcategory, new chemical entity (NCE) cases were the most likely to result in a non-obviousness holding at 76.9%; in sharp contrast, 60% of non-NCE pharmaceutical cases resulted in an obviousness holding.
- Of the 100 cases analyzed, 28 decisions were reversals in chief of the district court decision on obviousness, whereas 72 decisions were affirmances.
- Among the 28 reversals were 19 decisions (67.9%) that held the claim(s) obvious in contravention of the decision below.
- The Federal Circuit reversed the holding by the lower court on the issue of obviousness in only one out of 23 cases (4.3%) in the Computers, Software, Internet, and Electronic Arts

area, whereas the reversal rate in the Mechanical Arts and Miscellaneous cases was 52%.

Please click on the PDF attachment above to view the charts.

¹ Decisions on appeal from the Board of Patent Appeals and Interferences have been excluded from this analysis, as those cases implicate a different standard of proof.