Remixing Obviousness

Joseph Miller

In April 2007, the Supreme Court, for the first time in 41 years, decided a case about the basic contours of patent law's nonobviousness standard. The case, *KSR*, upends 25 years of Federal Circuit jurisprudence, and on a legal requirement that *every* patent must satisfy. In this essay, *Remixing Obviousness*, I show how *KSR* dismantles two predicates that have shaped Federal Circuit nonobviousness cases for 25 years—namely, the intertwined that hindsight-driven distortion is the gravest risk to an accurate nonobviousness requirement, and that the person of ordinary skill in the art (from whose perspective nonobviousness is judge) is singularly uncreative. In place of hindsight dread and the dullard artisan, the Supreme Court gives us overpatenting concern and the creative artisan. Perhaps most important is that, consistent with these new predicates, the Supreme Court revives its holding from 1950 that a combination claim, *i.e.*, a claim that simply remixes prior art technologies according to their established functions, must be scrutinized with great caution because it is likely unpatentable. I propose an evidentiary presumption framework to regularize *KSR*'s mandate.