

Should we Pluralize the PHOSITA in Patent Law?

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In the past, myself and others (e.g., Pedraza-Fariña; and Traficonte & Armstrong) have argued that the law *could* pluralize the PHOSITA, but there has not been a deep analysis of whether we *should* do so. The discussion arises because team-based inventions increasingly dominate patents. A logical step is to argue that patent law's PHOSITA should reflect reality, and thus the law must revise the PHOSITA to account for team-based innovation. The result would be a higher skilled Team Having Ordinary Skill in the Art (THOSITA) which would likely result in more inventions being held obvious.

But the analysis largely assumes the PHOSITA “should” reflect the reality of increasing team-based innovation. Yet others complain that raising the nonobviousness bar dampens innovation incentives by making it too difficult to obtain patents. At their core, obviousness and the PHOSITA are tools of patent and innovation policy. They should be changed, therefore, only if the result is better for society. Obviousness serves a variety of policy goals, typically headlined by preventing patents on inventions that would have occurred at roughly the same time without the patent incentive. Relatedly, obviousness prevents patents on trivial inventions, especially those that become economically significant based on exogenous developments.

So, should we raise the bar or not (and by how much)? In the end, that is an unanswerable empirical question that will vary by industry. But policymakers should keep several factors front-and-center. First, while those who complain about increasing obviousness standards are correct that obtaining patents becomes more difficult, obviousness is not about fairness. Obviousness is about optimizing innovation incentives.

Second, a blind assumption that teamwork always leads to faster and better outcomes conflicts with empirical evidence and could lead to an overly aggressive adjustment to obviousness. The THOSITA concept can and should be used to incentivize *good* teams and research into *how to construct* good teams.

Third, the rise of team-based innovation results from causes endogenous and exogenous to patent law, but exogenous causes dominate. From within patent law, an (uneven) historical trend of an increasingly stringent nonobviousness doctrine has likely contributed to the rise of team-based innovation. But much of the increase in collaboration has been driven by factors outside of patent law, including as a corrective to increasing specialization, the pursuit of breakthrough innovation, a rise in academic norms for collaboration across disciplines, and the pressure of global competition. If the rise of team-based innovation is primary due to factors outside of the patent system, the argument for the patent system to adjust to the changes gains force.

Fourth, an expressive theory of law suggests that changes to the law can themselves signal the desirability of certain behaviors. A change to a THOSITA concept would, under this theory, spur increasing team-based innovation.

Finally, a country's patent laws can create competitive advantages in a global marketplace. Nations succeed in a competitive global marketplace when they promote ongoing improvement and innovation instead of the easy life. Conversely, nations lose competitiveness where firms stop improving. To the extent that U.S. patent law can demand more – but not too much – of teams, U.S. competitiveness can be improved.