

Ordinary Creativity in Patent Law: The Artist Within the Scientist

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This work will trace the origin, meaning and significance of the phrase “ordinary creativity” as a legal construct. This principle derives from a statement made in the U.S. Supreme Court’s 2007 decision *KSR v. Teleflex*, which considered the appropriate standard for assessing nonobviousness under 35 U.S.C. § 103. To decide which prior art references may be considered for nonobviousness, the Court stated, “a person of ordinary skill is a person of ordinary creativity, not an automaton.” *KSR*’s choice of the phrase “ordinary creativity” is intriguing, particularly because creativity as a human attribute is notoriously difficult to define.

Creativity is a well-established construct in copyright law to assess the result of a creative process—that is, whether copyright protection should be extended to particular works by artists and authors. By comparison, infusing a hypothetical scientist or engineer with “ordinary creativity” interjects a phrase that lacks a clear source in either statutory or decisional law. Since *KSR* was decided, the Federal Circuit has applied this phrase in assessing at least one other patentability requirement. On this basis, the phrase appears to be becoming part of patent jurisprudence and thus promises to have widespread implications throughout a number of patent doctrines. On one hand, *KSR* brings the hypothetical person of ordinary skill in the art closer to the mindset of those working in particular disciplines. On the other, the phrase’s indeterminacy ensures some uncertainty in making patentability assessments.

Drawing on existing cases and conceptions of creativity from a variety of literatures (science, art and psychology), I will argue that the “ordinary creativity” standard derives from the Court’s effort to ensure flexibility in assessing patentability. Further, I will explore the types of insights, analogies and qualities that may be appropriate for consideration of creative attributes in the sciences.