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PATENTS, TRADEMARKS, COPYRIGHTS, AND UNFAIR COMPETITION

OVERVIEW

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The Tenth Circuit considered five cases on appeal this term involving patents, copyrights, and unfair competition. There were no cases involving trademarks. First, in *Eggenhofer v. Koury*,[1] the court remanded Eggenhofer's appeal from the denial of a preliminary injunction to the district court for a written statement of findings of fact and conclusions of law. Eggenhofer, a well-known western artist, sought to enjoin the appellees from advertising and publishing a book entitled *Eggenhofer: The Pulp Years*. The district court found from the evidence presented that Eggenhofer suffered no irreparable harm. The Tenth Circuit inquired why Eggenhofer did not argue infringement of his common law copyright rights, which, once established, requires no showing of irreparable harm in order to warrant injunctive relief. Rather, Eggenhofer had argued a contractual breach in the publishing contract and a tortious compromise of his name. Unfortunately, the district court had not written an opinion, and, because the record presented no means of ascertaining the true basis of the district court's denial of injunctive relief, the Tenth Circuit remanded.

In *Maloney-Crawford Tank Corp. v. Sauder Tank Co.*,[2] the Tenth Circuit refused to disturb the trial court's award of damages, interest from the date of judgment, and denial of an award of attorney's fees. The Tenth Circuit reiterated its position that attorney's fees are awarded in patent cases only in "exceptional cases" and not as a "matter of law."

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[1] No. 73-1926 (10th Cir., Sept. 24, 1974) (Not for Routine Publication).

[2] 511 F.2d 10, 185 U.S.P.Q. 80 (10th Cir. 1975).

In *Telex Corp. v. IBM Corp.*[3] the Tenth Circuit, in a lengthy opinion, upheld IBM's counterclaim of trade secret theft. Telex was found to have lured key employees from IBM. Telex was, thus, able immediately to penetrate the marketplace with a competing product, completely bypassing the research and development stage. The Tenth Circuit upheld the award to IBM of (1) $4.5 million representing lost IBM monthly rentals, (2) $3 million representing replaced IBM units, and (3) $10 million representing the savings to Telex from bypassing the research and development stage. The Tenth Circuit, however, found the following awards to IBM to be too speculative: (1) $3 million for increased security costs and (2) $400,000 for increased manufacturing costs. The further award to IBM of $1 million in punitive damages was upheld. Both sides have now settled this case, with no damages being due to either side.

Finally, since last term's decision in *Moore v. Schultz*,[4] the Tenth Circuit has had occasion to reaffirm its position on the non-obviousness requirements of patentability in *Price v. Lake Sales Supply R. M., Inc.*[5] and *Halliburton Co. v. Dow Chemical Co.*[6] The following comment examines the sequence of events since *Moore* in light of the firm stance to which the Tenth Circuit has adhered regarding non-obviousness determinations despite a strong dissent by Mr. Justice Douglas in the Supreme Court's denial of certiorari in *Moore*.[7]

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[3] 510 F.2d 894, 184 U.S.P.Q. 521 (10th Cir. 1975). For an extended analysis of this case, see Norgaard, *Relevant Market in Computer Monopolization*, 53 DENVER L.J. ___ (1976).

[4] 491 F.2d 294, 180 U.S.P.Q. 548 (10th Cir.), *cert. denied*, 419 U.S. 930, 183 U.S.P.Q. 385 (1974).

[5] 510 F.2d 388, 183 U.S.P.Q. 519 (10th Cir. 1974).

[6] 514 F.2d 377, 185 U.S.P.Q. 769 (10th Cir. 1975).

[7] 419 U.S. 930, 183 U.S.P.Q. 385 (1974).

PATENT LAW—NON-OBVIOUSNESS—QUESTION OF LAW OR QUESTION OF FACT?

Moore v. Schultz, 491 F.2d 294, 180 U.S.P.Q. 584 (10th Cir. 1974)

Halliburton Co. v. Dow Chemical Co., 514 F.2d 377, 185 U.S.P.Q. 769 (10th Cir. 1975)

INTRODUCTION

The culmination of a recent scenario of three cases dealing with the question of non-obviousness (one of three requirements for granting a patent) leaves the Tenth Circuit standing alone in its view that the question of non-obviousness includes factual determinations which may be made by a jury, with the court deciding as a matter of law whether or not non-obviousness is present.

The importance of this position becomes critical as, under rule 52(a) of the Federal Rules of Civil Procedure, such fac-factual findings by the jury will not be overturned unless "clearly erroneous." The prevailing view in other circuits deems the elements of non-obviousness a question of law in toto, effectuating a de novo standard upon appellate review. Despite its unique position, the Tenth Circuit has adopted a view of patent law more consistent with the traditional role of a jury in the American system of justice.

The trio of cases began in January 1974 with *Moore v. Schultz,*[8] wherein the court reaffirmed its position that "within the Tenth Circuit, novelty, utility and non-obviousness are held to require factual determinations."[9] Schultz applied to the United States Supreme Court for a writ of certiorari. Pending the Court's decision as to whether certiorari should be granted in *Moore*, the Tenth Circuit reiterated its position in *Price v. Lake Sales Supply R. M., Inc.,*[10] although no jury was involved there. Shortly thereafter, the Supreme Court denied certiorari for *Moore,* but Mr. Justice Douglas rendered a scathing dissenting opinion in complete derogation of the Tenth Circuit position.

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[8] 491 F.2d 294, 180 U.S.P.Q. 548 (10th Cir.), *cert. denied,* 419 U.S. 930, 183 U.S.P.Q. 385 (1974).

[9] *Id.* at 300, 180 U.S.P.Q. at 552.

[10] 510 F.2d 388, 183 U.S.P.Q. 519 (10th Cir. 1974).

Despite Mr. Justice Douglas' dissent, the Tenth Circuit once again adhered to its position regarding non-obviousness in *Halliburton Co. v. Dow Chemical Co.*[11] It seems that the Tenth Circuit presents the better view on non-obviousness, contrary to Justice Douglas' views and the weight of other federal circuits. In order to best understand the current importance of non-obviousness in the role of patent validity, however, a brief background discussion is necessary.

I. THE THREE HURDLES TO A VALID PATIENT

An inventor of a successful product is often frustrated to find that he has three hurdles to overcome in receiving a truly valid and enforceable patent. The first hurdle occurs in the Patent and Trademark Office where, for a period often greater than 2 years, an inventor vies with an examiner, who determines whether or not the invention is entitled to a patent. The examiner is an expert in the area of art in which the invention lies; although he exercises discretion, he must adhere to certain statutory requirement set forth in the Patent Act.[12] These requirements embrace the following three areas: (1) Novelty;[13] (2) usefulness;[14] and (3) non-obviousness.[15]

A patent cannot be obtained if the submission lacks novelty, *i.e.*, if it is identical to a prior art. "Prior art" may be defined as certain statutorily defined categories, or types, of knowledge or acts which predate the invention or the application. Such prior art categories include patents of any country, printed publications throughout the world, and a public use or sale in this country by anyone, including the inventor, more than 1 year prior to the application filing date.

Additionally, the item patented must serve some useful function. Finally, the Patent Act mandates that a patent may not be obtained if

> the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would

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[11] 514 F.2d 377, 185 U.S.P.Q. 769 (10th Cir. 1975).

[12] 35 U.S.C. §§ 1-293 (1970) [hereinafter cited as the Patent Act].

[13] *Id.* § 102.

[14] *Id.* § 101.

[15] *Id.* § 103.

> have been *obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.*[16]

The elements necessary for a finding of non-obviousness are, in other words, that the invention (1) was not obvious, (2) at the time of the invention, (3) to one having ordinary skill in the art. In addition to applying this test of non-obviousness, the courts have asked the following questions: (1) Was a long-felt demand for the subject matter satisfied?[17] (2) Did the marketplace make rapid use of the subject matter?[18] (3) Did the commercial success of the invention stem from the nature of the device itself or did it result from such factors as low price or extensive advertising?[19]

In *Graham v. John Deere Co.*,[20] the Supreme Court held that the existence of non-obviousness is a question of fact, and that section 103 permits a practical test of patentability that is functional in approach to questions of invention.[21] The Court held that the examiner must be persuaded during the prosecution of the application that the submission is not merely an obvious improvement to the prior art. The examiner must evaluate the prior art, not at the time of the prosecution of the application, but rather at the time the invention was made.

If the examiner is persuaded, the inventor receives a patent which, in effect, provides a constitutionally protected monopoly for 17 years. This presumably prevents others from making, using, or selling his device. If the inventor is more fortunate than most and has a commercially successful product, he will often be faced with a second hurdle: He will be required to defend the validity of his patent when a competitor copies his invention and exploits it commercially. At this juncture, the inventor may sue for infringement of his patent, or, after receiving a letter from the inventor threatening to sue, the competitor may effectuate an action for declaratory judgment to have the patent declared invalid.

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[16] *Id.* (emphasis added).

[17] Otto v. Koppers Co., 246 F.2d 789, 114 U.S.P.Q. 188 (4th Cir. 1957), *cert. denied*, 355 U.S. 939, 116 U.S.P.Q. 602 (1958).

[18] Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U.S. 45 (1923).

[19] Ling-Temco-Vought, Inc. v. Kollsman Inst. Corp., 372 F.2d 263, 152 U.S.P.Q. 446 (2d Cir. 1967).

[20] 383 U.S. 1, 148 U.S.P.Q. 459 (1966).

[21] *Id.* at 17, 148 U.S.P.Q. at 466-67.

It is by no means certain that the inventor can successfully overcome the second hurdle. During the 20-year period from 1953 to 1972, 15,127 patent cases were commenced, of which 2,131 reached trial.[22] In these cases, 38.2 percent of the patents were held valid, 53.3 percent were held invalid, and in 8.5 percent the validity of the patent was not decided. During that same 20-year period, 1,074,538 patents were issued. Thus, just over 0.2 percent were adjudicated in the district courts.

An inventor who overcomes the second hurdle and is successful in the district court encounters a third hurdle upon appeal by the infringer to the circuit court. During the same 20-year span, decisions involving 1,232 patents, or just over 0.1 percent of all patents issued during that 20-year period, were appealed. The circuit courts have held 34.6 percent of these appealed patents valid with 65.4 percent being held invalid.

Most findings of patent invalidity in both the district court and the circuit court are based on non-obviousness. Using the non-obviousness standard, the courts have consistently held invalid approximately 60 percent of all patents litigated.[23]

Clearly, the non-obviousness standard is a most difficult test for the inventor to overcome. A heavy burden is placed on the inventor, as he must prove the level of skill or knowledge of a fictitious "ordinary person skilled in the art," who is presumed by law to have knowledge of all prior art. Without doubt, this ordinary person is quite an exceptional non-ordinary person.[24]

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[22] The following patent statistics utilized in this and following paragraphs were taken from Gloria K. Koenig's excellent treatise, PATENT INVALIDITY (1974). For the analysis of patents over the past 20 years, see *id.* § 4.02, Table 17 at 4-32.

[23] *See* Horn & Epstein, *The Federal Courts' View of Patents—a Different View*, 55 J. PAT. OFF. SOC'Y 134, 139 (1973).

[24] *See* Leonard, *The Man Skilled in the Art—or—Goodness Gracious, A Ghost!*, 56 J. PAT. OFF. SOC'Y 599 (1974).

> The lithe and ageless phantom of the "man skilled in the art" makes it quite difficult for the Attorney to know what course to follow in supporting arguments before or after a final rejection. How does one attack a fictitious presence, who is endowed with fictitious knowledge and employs his fictitious knowledge in a fictitious manner and, by fictitious reasoning from this fictitious knowledge, creates a fictitious concept, and derives therefrom a fictitious and wholly synthetic reduction to practice.
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> . . . .
>
> It is time, therefore, that this phantom, a most distracting chimera, born out of Deficiency and sired by Doubt, should be relegated promptly and

Presumably, the patent examiner, who has experience and expertise in his area of art, should qualify as an "ordinary person skilled in that art." It seems that when this standard is applied to a litigated patent, the courts rarely would have the background, skill, and expertise to be such "ordinary person[s] skilled in the art." That the standard of invention varies widely in the different federal circuits is indicative of the courts' struggle to apply this standard. For example, for the period from 1968 to 1972, the Second and Eighth Circuit Courts of Appeals held less than 25 percent of the patents valid.[25] The First, Third, Fourth, and Ninth Circuits held less than 35 percent valid, while the Fifth, Sixth, Seventh, and Tenth Circuits held approximately 50 percent valid.

From these statistics and the resulting awareness of the high mortality rate of all patents issued, it is clear that the method of determining obviousness is crucial to a litigant's ability to sustain or overturn a verdict upon appeal. From an examination of the Tenth Circuit's position, one may see why the "clearly erroneous" standard upon review is favorable to a successful claimant. The authors herald the Tenth Circuit's stance as that best reflecting the intent of Congress and the more rational means of determining obviousness.

II. The Tenth Circuit View of Non-Obviousness

A. Halliburton *and* Moore

The recent Tenth Circuit decision in *Halliburton* involved an action for declaratory judgment brought by the plaintiff-appellee, Halliburton Co., who claimed invalidity and non-infringement of a patent owned by the defendant-appellant, Dow Chemical Co., who counterclaimed for infringement. Dow appealed from the district court's holding of a patent invalid and its award of attorney's fees to Halliburton.

The Dow patent pertained to a one-step process for cleaning, within a 6-hour period, more than a ton of oxide scale from large boilers used for steam generation of electricity. The prior art pro-

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permanently to the Elysian Fields of long discredited myths by the simple step of admitting that the peculiar ability and knowledge attributed to him are, in the end, only the personal beliefs of the tribunal itself.

Id. at 603-04.

[25] Koenig, *supra* note 22, at App.-172.

cess required several days and many steps. The downtime of such a boiler costs more than $40,000 per day due to the necessity of securing electricity from other sources during that period. The Dow patent was a vast improvement over the prior method in terms of time and expense. The Tenth Circuit, with Judge Breitenstein writing the majority opinion, upheld the district court as to patent invalidity, but reversed the award of attorney's fees.

In *Halliburton* the circuit court followed its prior ruling in *Moore v. Schultz*,[26] in which Judge Seth emphatically held the obviousness tests of *Graham v. John Deere Co.*[27] to be issues of *fact* that are to be determined by the jury. Thus, *Moore* separated the Tenth Circuit from the Fourth,[28] Fifth,[29] Sixth,[30] Seventh,[31] and Ninth[32] Circuits. The Tenth Circuit in *Moore* stated:

> The Supreme Court has observed that this matter "lends itself to several basic factual inquiries" and compared it in that respect to concepts of negligence and scienter. . . . Although the Fifth and Ninth Circuits have taken a different view, we have held those observations to mean that non-obviousness is itself a factual question. . . . Thus, within the Tenth Circuit, novelty, utility, and non-obviousness are held to require factual determinations.[33]

Judge Seth further stated, however, that "it is clear that the ultimate question of validity of a patent is one of law."[34]

B. *A Critical Analysis of Justice Douglas' Views*

Subsequent to Judge Seth's opinion in *Moore*, Mr. Justice Douglas had occasion to interpose his comments upon denial of

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[26] 491 F.2d 294, 180 U.S.P.Q. 548 (10th Cir.), *cert. denied*, 419 U.S. 930, 183 U.S.P.Q. 385 (1974).

[27] 383 U.S. 1, 148 U.S.P.Q. 459 (1966). *See* text accompanying note 20 *supra*.

[28] Tights, Inc. v. Stanley, 441 F.2d 336, 169 U.S.P.Q. 578 (4th Cir. 1971).

[29] Swofford v. B & W, Inc., 395 F.2d 362, 158 U.S.P.Q. 72 (5th Cir. 1968).

[30] Deyerle v. Wright Mfg. Co., 496 F.2d 45, 181 U.S.P.Q. 685 (6th Cir. 1974); *contra* Hieger v. Ford Motor Co., 516 F.2d 1324, 186 U.S.P.Q. 374 (6th Cir. 1975).

[31] Gettelman Mfg., Inc. v. Lawn 'N' Sport Power Mower Sales & Serv., Inc., 517 F.2d 1194, 186 U.S.P.Q. 376 (7th Cir. 1975). Senior District Judge Jameson severely criticized the majority by stating:

> In resolving the obviousness issue the district court considered the three basic factual inquiries outlined in *Graham*. The findings of fact made by the district court with respect to those inquiries may not be overturned unless clearly erroneous.

Id. at 1200, 186 U.S.P.Q. at 380.

[32] Hensley Equip. Co. v. Esco Corp., 375 F.2d 432, 152 U.S.P.Q. 781 (9th Cir. 1967).

[33] 491 F.2d at 300, 180 U.S.P.Q. at 552 (citations omitted).

[34] *Id.*

certiorari by the Supreme Court.[35] Mr. Justice Douglas dissented and argued that an obviousness determination is a question of law for the court to decide. The essential points of his dissent are summarized below:

> (1) Article 1, section 8, clause 8 of the Constitution authorizes Congress to provide for the granting of patents. This clause was written "against the back-drop of abuses by the Crown in granting monopolies;"[36] the framers of the Constitution did not intend these exclusive rights to be granted freely.
>
> (2) Supreme Court cases characterizing the correct standard of invention are now embodied in section 103 of the Patent Act, which requires non-obvious subject matter. A court is required in every patent infringement suit to enforce obedience to this constitutional standard. Such cannot be delegated to the jury "on the supposition that only a question of fact is involved."[37]
>
> (3) The determination whether a patentee's contribution justifies the patent monopoly requires "reasoned elaboration" and, therefore, "treatment as a question of law."[38]
>
> (4) "Findings that identify the unique features of the patented device and explain why they advance the art are essential, to permit appellate review to insure that constitutional limitations have not been exceeded. The responsibility belongs to the courts. It will not do to leave such matters to unarticulated resolution by the jury."[39]
>
> (5) "The decision below holding patentability a question of fact for the jury represents an abdication which is likely to produce haphazard application of the statutory and constitutional standard."[40]

The Douglas dissent reads well on the surface. However, a critical analysis indicates that the reasoning and arguments used

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[35] 419 U.S. 930, 183 U.S.P.Q. 385 (1974).
[36] *Id.* at 930-31, 183 U.S.P.Q. at 385.
[37] *Id.* at 931, 183 U.S.P.Q. at 385.
[38] *Id.* at 932, 183 U.S.P.Q. at 385.
[39] *Id.*
[40] *Id.*

by Mr. Justice Douglas are not unassailable, as matters either of law or of common sense.

1. The Commerce Clause or Article I, Section 8, Clause 8?

Relying upon article I, section 8, clause 8, the patent and copyright clause of the Constitution, Justice Douglas first asserted that a patent is justified only if it "makes a distinctive contribution to the advancement of scientific knowledge."[41] By such terms, Douglas demanded an extremely high standard of invention as a constitutional necessity. He stated that this is "a constitutional restraint on the dispensation of patents."[42] Such statements have been made often in recent years, and, unless they are challenged in the near future, they will probably become the law of the land by way of default.

Certainly, the prerogative of the Court includes the right to set a high standard of invention so long as the Patent Act is based on the patent and copyright clause of the Constitution. However, no reason is seen why Congress could not authorize the granting of patents based on its powers under the commerce clause. Congress in recent years has relied upon the commerce clause to affect many activities of every day life. Specifically, Congress could set the level of invention, even if very low, that it considers appropriate for the granting of patents.[43]

2. Law or Fact?

Douglas' third point was that the requisite "reasoned elaboration" in determining the grant of a patent also mandates treatment of the same "as a question of law."[44] That argument is not self-proving and, in fact, is open to serious question. Arguably, Congress, in enacting section 103 of the Patent Act, provided a constitutionally acceptable test whereby a jury may determine obviousness by answering questions of fact. One can respond to specific interrogatories and articulate why an invention is or is not obvious—at the time the invention was made—to one having ordinary skill in the art. This function can be performed by the

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[41] *Id.* at 930, 183 U.S.P.Q. at 385.

[42] *Id.*

[43] A similar position has been advocated by Professor Nimmer regarding copyright legislation. *See* NIMMER ON COPYRIGHT § 9.1 at 27 (Supp. 1972).

[44] 419 U.S. at 932, 183 U.S.P.Q. at 385.

jury listening to expert testimony including testimony characterizing what the ordinary skill in the art is. These factual questions may be submitted to a jury; the court can then take the jury's factual determinations regarding the three-part question posed by section 103 and hold the patent to be valid or invalid, as the case may be. This line of reasoning is submitted to be as fully persuasive as Justice Douglas' unproven assertion that a case cannot be delegated to the jury when a question of law is involved.

3. Nonarticulation or Jury?

Douglas' fourth point, the statement that it will not do to leave such matters "to unarticulated resolution by the jury,"[45] is also open to serious question. Unfortunately, Mr. Douglas did not make clear to what he was objecting. Was he objecting to the nonarticulation of the jury's decision per se, or was he objecting to the fact that the question of obviousness had been left to the jury to begin with? If he merely desired improved articulation, this could easily be accomplished by having the court submit special charges requiring the jury to specify: (1) The unique features of the patented device, and (2) explanations as to why the advance in the art is not obvious. Such charges should satisfy Mr. Douglas in the event that his only objection was to nonarticulation. On the other hand, if Justice Douglas were dissatisfied with the fact that juries are permitted to determine such questions, no matter how eloquent their articulation, then he should have so stated.

4. Haphazard or Lacking Uniformity?

With respect to the fifth point, the merits of Justice Douglas' arguments again are questionable. He stated that "holding patentability a question of fact for the jury represents an abdication which is likely to produce haphazard application of the statutory and constitutional standard."[46]

This objection fails in the absence of a showing that jury decisions in patent cases are any more "haphazard" than they are in any other type of case. Certainly, the defendant in a criminal case is as concerned over "haphazard" jury decisions as are the

[45] *Id.*
[46] *Id.*

parties of a patent suit; yet the authors can recall no instance in which Justice Douglas has complained of "haphazard" results from jury decisions in criminal cases.

If by "haphazard" Mr. Douglas meant that the decisions of different juries are not uniform, he is correct. Admittedly, no two juries will always decide the same set of facts identically. This is true in patent cases as well as in other types of cases. However, this does not render their decisions constitutionally haphazard. The same observation may be made of trials without juries. Are the decisions of the courts haphazard if they are not in monolithic uniformity? Obviously, there is nothing constitutionally haphazard about a jury decision as long as the required instructions are put to the jury to decide the facts in issue, so that the court can take the jury's findings and decide the proper issues of law involved.

As a matter of practicality and common sense, it is submitted jurors are fully as capable as courts to determine questions of obviousness. The members of a jury may not be specialists in the field of art to which the invention pertains, but neither are most judges. Further, a judge is neither intrinsically, nor by training, more qualified than a jury to decide the technical issues required in patent cases.

If Justice Douglas was concerned with the skill of the person or persons making determinations of obviousness, then the compelling conclusion is that the ideal jury or the ideal arbiter of the issues would be either patent attorneys or scientists skilled in a particular art. Alternatively, a national court to try patent cases, comparable to the Court of Customs and Patent Appeals perhaps would satisfy those who argue that the questions of obviousness are so complex in patent cases that they cannot be left to the "unarticulated" opinions of juries, but rather should be decided by federal judges who, for some reason, are thought to be more capable of making such determinations.

5. What of Section 103?

A more fundamental criticism of the Douglas dissent is that it avoids any reliance on section 103 of the Patent Act in resolving whether obviousness is a question of fact or law. This section specifies that obviousness is to be determined by "a person having ordinary skill in the art" to which the invention pertains. Any

serious discussion of the method of determining obviousness is meaningless without reference to the source of this requirement.

Since the statute explicitly requires that this determination be made by "a person having ordinary skill in the art," it would appear:

> (1) That the language does not exclusively vest the powers of determination with federal judges unless one reaches a prior conclusion that they, and they alone, are the only ones who can be said to be "ordinary persons skilled in the art;"
>
> (2) that Congress could have specified federal judges in section 103 if it had so intended;
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> (3) that since Congress did not mention federal judges in section 103, there was no intention to limit to them the rights of determination. Therefore, this right of determination can be given to others, including juries;
>
> (4) that since juries cannot decide questions of law, a determination of obviousness includes a question of fact.

Conclusion

It is maintained that Judge Seth's opinion in *Moore* presents a better treatment of non-obviousness than that espoused by Mr. Justice Douglas. Certainly, during the course of a trial by jury or by judge, expert witnesses can be called and testimony can be entered into the record to establish the level of skill which would be possessed by one with ordinary skill in the art. An analogous procedure occurs routinely in negligence cases where, rather than applying the reasonable person standard, a jury must determine the duty of care imposed on one having special skills. In such cases, the jury can articulate judgments concerning the duty of such skilled persons based on the evidence and testimony. It seems that in cases like *Moore*, if special interrogatories are submitted to the jury covering the three tests established in *Graham v. John Deere Co.*,[47] then patent validity or invalidity can be decided as a matter of law. Determinations of fact should properly be overturned by an appellate court only if such findings of

fact are "clearly erroneous" under rule 52(a).

Judge Breitenstein in *Halliburton* reiterated the *Moore* view by stating that "the findings of the issue of obviousness are entitled to the usual respect accorded determinations of fact. . . . An appellate court does not try factual issues *de novo*. The clearly erroneous rule applies."[48] Thus, in the Tenth Circuit, the inventor actually has only two hurdles to overcome in pursuing a constitutionally valid patent. The third level of a de novo situation in the appellate court has been eliminated.

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[48] 514 F.2d at 379, 185 U.S.P.Q. at 770-71 (citations omitted).