



MEMORANDUM

DATE: February 27, 2024

TO: All Patent Examiners

FROM: Brian E. Hanlon *Brian E. Hanlon*
Deputy Commissioner for Patents, Acting

SUBJECT: Updated Guidance for Making a Proper Determination of Obviousness

The purpose of this memorandum is to announce that the USPTO has published a notice titled “Updated Guidance for Making a Proper Determination of Obviousness” at 89 Fed. Reg. 14449 February 27, 2024 (notice). The notice provides a review of the flexible approach to determining obviousness that is required by *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 127 S.Ct. 1727 (2007) (*KSR*), especially in view of precedential cases of the Court of Appeals for the Federal Circuit (Federal Circuit) since the *KSR* decision.

The notice stresses that it does not announce any new policy or procedure with regard to the determination of obviousness, and that it is intended to be consistent with present examination practice. However, if any existing guidance is inconsistent with the notice, including the Manual of Patent Examining Procedure (MPEP), Office personnel are to follow the notice. The updates provided in the notice will be incorporated into the MPEP, as appropriate, in due course.

Substantive aspects of the obviousness determination that are discussed in the notice in view of post-*KSR* decisions of the Federal Circuit include the following:

- The continued applicability of the inquiries announced in *Graham v. John Deere Co.*, 383 U.S. 1, 86 S.Ct. 684 (1966)
- The flexible approach to understanding the scope of prior art, and to providing reasoning to support modification of the prior art
- The need for articulated reasoning and evidentiary support when making an obviousness rejection, despite the flexible approach
- The importance of proper consideration of evidence
- The recognition that a proper obviousness rejection will be characterized by findings of fact and a reasoned explanation showing why the claimed invention would have been obvious to a person of ordinary skill in the art

A copy of the notice can be found at [Updated Obviousness Guidance](#).