Clarifying the Analogous Arts Test

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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 have been obvious ... to a person having ordinary skill in the art *to which said subject matter pertains.*
Analogous Arts

(1) whether the art is from the **same field** of endeavor, regardless of the problem addressed (**unnecessary**), and

(2) if the reference is not in the field of the inventor’s endeavor, whether the reference is still **reasonably pertinent** to the particular **problem to be solved**.
Is the Analogous Arts test necessary?

Anticipation

v.

Obviousness
PHOSITA (Person Having Ordinary Skill in the Art)

PHOSITA

+ ______ KSR

Person
Having
Ordinary
Skill and
Creativity and Common Sense
In
The
Art
Analogous Arts

(1) whether the art is from the same field of endeavor, regardless of the problem addressed (unnecessary), and

(2) if the reference is not in the field of the inventor’s endeavor, whether the reference is still reasonably pertinent to the particular problem to be solved.
Same Field?

Yes.

No.
Analogous Arts

(1) whether the art is from the same field of endeavor, regardless of the problem addressed (unnecessary), and

(2) if the reference is not in the field of the inventor’s endeavor, whether the reference is still reasonably pertinent to the particular problem to be solved.
What is the Problem Solved?

Determine the problem solved by the invention as claimed in the patent.
Analogous Arts: Problem Solved: In re Klein

Figure from Klein patent

Nonanalogous Prior Art
Analogous Arts

(1) whether the art is from the same field of endeavor, regardless of the problem addressed (unnecessary), and

(2) if the reference is not in the field of the inventor’s endeavor, whether the reference is still reasonably pertinent to the particular problem to be solved.
Analogous Arts

What is reasonably pertinent?

Determine whether the PHOSITA actually would have considered the reference at the time in question.
Analogous Arts:  Innovention Toys vs. MGA

Figure from patent

Allegedly infringing product

Prior Art = Video Games (not shown)
**Problem Solved?**

Determine the problem solved by the invention as claimed in the patent.

**Reasonably Pertinent?**

Determine whether the PHOSITA actually would have considered the reference at the time in question.
Concerns
Determine analogous art by assessing whether PHOSITAs actually would have considered a reference in addressing the problem solved by the invention (as claimed in the patent).
Questions?