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## ***EBAY AND THE BLACKBERRY®: A MEDIA COVERAGE CASE STUDY***

*Lisa A. Dolak\* & Blaine T. Bettinger, Ph.D.\*\**

### I. INTRODUCTION

On May 15, 2006, the Supreme Court issued its decision in *eBay Inc. v. MercExchange, L.L.C.*<sup>1</sup> The Court rejected the Federal Circuit's "general rule . . . that a permanent injunction will issue once infringement and validity have been adjudged."<sup>2</sup> It unanimously held, instead, that the four-factor test that governs the availability of permanent injunctive relief generally<sup>3</sup> "appl[ies] with equal force to disputes arising under the Patent Act."<sup>4</sup>

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1. 126 S.Ct. 1837 (2006).
2. *Id.* at 1841 (quoting *MercExchange, L.L.C. v. eBay Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005)(vacated and remanded by 126 S.Ct. 1837).
3. "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 1839.
4. *Id.* at 1839.

This bottom-line holding was consistent with the Court's approach in several of its other recent patent-related decisions, where the Court held, in effect, that litigation rules applicable generally, apply in patent cases.<sup>5</sup> According to the Court, its holding is also consistent with the language of the applicable statute, which "expressly provides that injunctions 'may' issue 'in accordance with the principles of equity.'"<sup>6</sup>

However, because the essence of the patent right is the "right to exclude others from making, using, offering for sale, or selling" the invention,<sup>7</sup> the *eBay* decision is controversial. And, although the precise contours of the *eBay* doctrine will be refined over time, the decision, without a doubt, is significant. By abolishing the virtually automatic injunction in patent cases, *eBay* effectively de-valued at least some number of issued and to-be-issued patents and potentially diminished innovation and disclosure incentives.<sup>8</sup> And by increasing the emphasis on evidence and arguments relating to the individual permanent injunction factors, the decision will have the effect of increasing the cost and complexity of patent litigation.<sup>9</sup>

*eBay* was one of six patent cases decided by the Supreme Court during its 2005-06 and 2006-07 terms.<sup>10</sup> In addition to revising the law

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5. See, e.g., *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 45-46 (2006) (rejecting the premise that a patent necessarily confers market power on its owner, and holding that "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product"); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 407 (2006) (applying the requirements of Fed. R. Civ. P. 50(b) to foreclose review of the sufficiency of the evidence). See also Gregory A. Castanias, Lawrence D. Rosenberg, Michael S. Fried & Todd R. Geremia, *Survey of the Federal Circuit's Patent Law Decisions in 2006: A New Chapter in the Ongoing Dialogue With the Supreme Court*, 56 *Am. U. L. Rev.* 793, 814-815 (2007) (identifying, from "the recent dialogue between the Federal Circuit and the Supreme Court", the "lesson" that "[t]he same rules apply to litigation involving patents as in ordinary, non-patent litigation[.]" citing *Unitherm and MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007)).

6. *eBay*, 126 S.Ct. at 1839 (quoting *Injunction*, 35 U.S.C. § 283 (1952)).

7. *Contents and Term of Patents; Provisional Rights*, 35 U.S.C. § 154(a)(1) (2002).

8. See, e.g., Jetti Gibson, *Almost Quiet on the Copyright Front: eBay's False Alarm*, 14 *RICH. J.L. & TECH.* 6, 32 (2007) ("The impact of the eBay decision in the realm of patent law could mean increased lawsuits with increased time periods in order to battle out monetary remedies in court, as well as decreased incentives for inventors to innovate on their own."); Jeremiah S. Helm, *Comment, Why Pharmaceutical Firms Support Patent Trolls: The Disparate Impact of eBay v. MercExchange on Innovation*, 13 *MICH. TELECOMM. & TECH. L. REV.* 331, 343 (2006) ("[M]oving away from an automatic injunction will almost certainly reduce the incentive for pharmaceutical firms to innovate, especially as compared to firms in other areas."); see also *infra* notes 80-81 and accompanying text.

9. Jay Dratler, Jr., *eBay's Practical Effect: Two Differing Visions*, 2 *AKRON INTELL. PROP. J.* 33 (Mar. 2008).

10. *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727 (2007); *Microsoft Corp. v. AT&T Corp.*, 127 S.Ct. 1746 (2007); *MedImmune, Inc. v. Genentech, Inc.*, 127 S.Ct. 764 (2007); *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006); *Illinois Tool Works v. Independent Ink, Inc.*, 547

relating to the availability of injunctive relief, the Court expanded access to declaratory relief,<sup>11</sup> introduced greater flexibility into obviousness analysis,<sup>12</sup> and limited the extraterritorial reach of U.S. patent law.<sup>13</sup> We examined media coverage of these and other developments relating to the patent system<sup>14</sup> to determine, *inter alia*,<sup>15</sup> which issues and disputes received the most media coverage, and to assess – in a systematic way – the nature of that coverage.

This paper centers on media coverage relating to *eBay* and related patent system developments. In particular, it provides a quantitative comparison between media coverage of *eBay* and that relating to another recent patent case: the litigation between NTP, Inc. and Research in Motion, Ltd. involving the popular BlackBerry® handheld wireless communications device,<sup>16</sup> and examines the extent and nature of the *NTP*-related coverage in light of the co-pendency of the two cases and the issues they share in common. In so doing, it facilitates consideration of the experience of news coverage consumers – including, presumably, Supreme Court Justices – while *eBay* was pending at the Court.

## II. STUDY DESIGN/METHODOLOGY

This study relied, in part, on content analysis<sup>17</sup> methodology. Content analysis techniques have been used to examine the content of a wide range of works, including news accounts, advertisements, music

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U.S. 28 (2006); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006).

11. *MedImmune*, 127 S.Ct. 764.

12. *KSR*, 127 S.Ct. 1727.

13. *Microsoft*, 127 S.Ct. 1746.

14. In addition to these judicial developments, the last few years have seen the submission, revision, and debate regarding comprehensive patent reform legislation proposals. *See, e.g.*, S. 1145, 110th Cong., 1st Sess. (2007); H.R. 1908, 110th Cong., 1st Sess. (2007); S. 3818, 109th Cong., 2d Sess. (2006); H.R. 5096, 109th Cong., 2d Sess. (2006); H.R. 2795, 109th Cong., 1st Sess. (2005). The pending proposed legislation – passed by the House of Representatives on September 7, 2007 – would significantly change fundamental aspects of U.S. patent law, by, for example, creating first-to-file rights, limiting patent damages and venue, and authorizing post-grant opposition proceedings. *See* S. 1145, 110th Cong., 1st Sess. (2007); H.R. 1908, 110th Cong., 1st Sess. (2007); *see also* Paul M. Janicke, *The 2007 Patent Law Reform Effort in the United States*, published at *Die Reform des U.S. Patentrechts im Jahr 2007*, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 791 (Oktober 2007).

15. This study is one aspect of a larger project relating to media portrayals of the United States patent system. Additional results relating to other aspects of that ongoing study will be published in volume 58 of the *Syracuse Law Review*.

16. *Research in Motion, Ltd. v. NTP, Inc.*, 546 U.S. 1157 (2006) (denying the petition for certiorari of *Research in Motion, Ltd.*).

17. Content analysis is a “research technique for the objective, systematic and quantitative description of the manifest content of communication.” BERNARD BERELSON, *CONTENT ANALYSIS IN COMMUNICATION RESEARCH* 18 (1952).

videos, children's television,<sup>18</sup> political communications, electronic messages,<sup>19</sup> and legal texts, such as judicial opinions.<sup>20</sup>

We examined major newspaper content – news accounts and editorial pieces – published during the last several years, relating to the United States patent system. Specifically, we reviewed news and editorial items<sup>21</sup> from selected major newspapers published during the period of January 1, 2005 through June 30, 2007. As noted above, this recent two-and-a-half year period has seen significant patent-related legislative and judicial activity,<sup>22</sup> including the Supreme Court's consideration of the *eBay* case.

### A. Sample Selection

#### 1. Selected Major Newspapers

The study sample included items from a subset of major U.S. and international newspapers. In particular, we examined recent news and editorial items from four major U.S. newspapers: the *New York Times*, the *Washington Post*, the *Wall Street Journal*, and the *Los Angeles Times*. These papers enjoy some of the very highest circulation numbers

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18. DAVID DEACON, MICHAEL PICKERING, PETER GOLDING & GRAHAM MURDOCK, RESEARCHING COMMUNICATIONS: A PRACTICAL GUIDE TO METHODS IN MEDIA AND CULTURAL ANALYSIS 116 (1999).

19. KIMBERLY A. NEUENDORF, THE CONTENT ANALYSIS GUIDEBOOK 205-07 (2002).

20. Mark A. Hall and Ronald F. Wright, Systematic Content Analysis of Judicial Opinions, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=913336](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913336) (2006) (collecting 122 examples of the application of content analysis techniques to judicial opinions); R. Polk Wagner & Lee Petherbridge, Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance, 152 U. PA. L. REV. 1105 (2004) (evaluating judicial claim construction methodology by analyzing the content of judicial opinions).

21. "Item" as used herein means an individual news article or editorial piece, for example, an unsigned newspaper editorial board editorial, an op-ed, or a single letter to the editor.

22. See *supra* notes 10-14 and accompanying text.

for U.S. newspapers.<sup>23</sup> We also included the *Financial Times* as one example of U.S. patent system-related coverage published outside the country.

Reader demographics also influenced our choice of study newspapers. Data available for the *New York Times*, the *Washington Post*, and the *Los Angeles Times* suggests that these, at least, are among the newspapers read by the “elites;” each has a substantial and comparatively large percentage of highly-educated and highly-paid readers, and a substantial percentage of readers employed in professional

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23. This table presents the circulation data for the five most widely-circulated newspapers in the United States using information from the Audit Bureau of Circulations as summarized by BurrellesLuce:

The Top Five Newspapers in the United States	2005		2006		2007	
	Mon.-Fri.	Sun./Wknd	Mon.-Fri.	Sun./Wknd	Mon.-Fri.	Sun./Wknd
USA Today	2,281,831	-	2,272,815	-	2,278,022	-
Wall Street Journal	2,070,498	-	2,049,786	-	2,062,312	1,968,413
New York Times	1,121,623	1,680,582	1,142,464	1,683,855	1,120,420	1,627,062
Los Angeles Times	907,997	1,253,849	851,832	1,231,318	815,723	1,173,096
Washington Post	740,947	1,000,565	724,242	960,684	724,748	439,202

BurrellesLuce Top 100 Daily Newspapers, <http://www.burrellesluce.com/top100/> (last visited October 10, 2007).

occupations.<sup>24</sup> The study thus includes major newspapers having the potential to influence both public opinion and policy-making.

## 2. Sample Definition

To construct our sample,<sup>25</sup> we employed database searches designed to include at least a significant number (if not most) of the news and editorial items, in the selected media sources, discussing patents in the context of at least one of the federal institutions having responsibility for patent policy development: the United States Congress, the United States Supreme Court, the United States Court of Appeals for the Federal Circuit, and the United States Patent and Trademark Office (“USPTO”).<sup>26</sup> These searches produced a total of

24. This table summarizes the relevant data from the most recent publicly available “Reader Profile Study” for each of the identified papers from the Audit Bureau of Circulations:

	New York Times (for the period 2/05 – 3/06)	Washington Post (for the period 3/05 – 2/06)	Los Angeles Times (for the period 2/06 – 1/07)
% “Graduated college/university”	60 (Mon.-Fri.) 61 (Sunday)	52 (Mon.-Fri.) 49 (Sunday)	42 (Mon.-Fri.) 38 (Sunday)
% with Household Income of “\$75,000 and over”	59 (Mon.-Fri.) 57 (Sunday)	65 (Mon.-Fri.) 64 (Sunday)	52 (Mon.-Fri.) 51 (Sunday)
% where Occupation of employed respondent is “Professional and Related”	27 (Mon.-Fri.) 26 (Sunday)	27 (Mon.-Fri.) 25 (Sunday)	17 (Mon.-Fri.) 17 (Sunday)

Reader Profile Studies available at <http://abcas3.accessabc.com/readerprofile/released.asp> (last visited January 21, 2008). No data was available from the Audit Bureau of Circulations for the Wall Street Journal. See also Daniel E. Ho & Kevin M. Quinn, Assessing Political Positions of Media, at 20-21, available at <http://ssrn.com/abstract=997428> (plotting measures of newspaper political positions against education and income “proxies for elitism”).

25. As noted *supra* (note 15), this paper reports data relating to one aspect of a larger project evaluating media coverage of the U.S. patent system. Accordingly, although this paper relates particularly to coverage of the eBay decision and related developments, the data reported here was generated from searches designed to include coverage of those and additional developments.

26. The Westlaw databases including full-text coverage, throughout the study period for each of the *New York Times* (“NYT”), the *Los Angeles Times* (“LATIMES”) and the *Financial Times UK* (“FTI”) were searched using the following string:

(PATENT /P CONGRESS) (PATENT /P "SUPREME COURT") (PATENT /P "FEDERAL CIRCUIT") (PATENT /P (PATENT /3 OFFICE))

The “*Financial Times UK*” (FTI) database was employed after a series of comparative searches were run in it and the other *Financial Times* databases available on Westlaw. The comparison revealed that the “FTI” database appeared to be the most comprehensive among them, without including duplicate items.

It was not possible to run the identical search string in the *Washington Post* and the *Wall Street*

1216 items.<sup>27</sup>

Next, irrelevant and duplicative items produced by the search were excluded, including, for example, obituaries of inventors or persons once employed by the USPTO,<sup>28</sup> compilations of brief summaries of same day full-text news items,<sup>29</sup> items pertaining to patent homonyms (e.g., features about patent leather pumps),<sup>30</sup> and other items that make only passing reference to patents.<sup>31</sup>

This “culling” process produced a dataset having a total of 607 items for review in the study.<sup>32</sup>

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*Journal* databases available on Lexis because of search connector methodology differences between Westlaw and Lexis. Instead, the Lexis full-text databases for *the Washington Post* and *the Wall Street Journal* were searched using the following overly comprehensive string:

(PATENT /P CONGRESS) OR (PATENT /P SUPREME COURT) OR (PATENT /P FEDERAL CIRCUIT) OR (PATENT /P "PATENT OFFICE" OR "PATENT AND TRADEMARK OFFICE")

27. As noted *supra* (note 21 ), each individual news article and editorial piece, including each individual “letter to the editor”, was counted as a separate “item”. However, the electronic databases for each of the four study newspapers in which patent system-related letters to the editor appeared (*the Los Angeles Times*, *the New York Times*, *the Wall Street Journal*, and *the Washington Post*) group all of the “letters to the editor” published on a given day relating to the same subject as a single database entry. Accordingly, the total number of search-generated “items” reported here does not precisely correspond with the “results” totals reported by Westlaw and Lexis for these searches.

28. E.g., Obituaries; Robert Adler, 93; Credited as Co-Inventor of TV Remote, L.A. TIMES, Feb. 17, 2007, at B12; Matt Schudel, William Brooks Jr., 93; Draft Official, WASH. POST, Aug. 12, 2006, at B6.

29. E.g., Today in Business, N.Y. TIMES, Nov. 29, 2006, at C2; News Summary, N.Y. TIMES, Sept. 13, 2006, at A2.

30. E.g., Rachel Dodes, Style – Shopping With: Stuart Weitzman: Sizing Up Fall Shoes, WALL ST. J., August 12, 2006, at P4; Andrew Jacobs, A Moment of Fame, Then Rikers, N.Y. TIMES, Sept. 30, 2005, at B5.

31. E.g., Charles Krauthammer, Get in Line, Einstein, WASH. POST., June 1, 2007, at A15 (in an editorial piece on immigration reform, noting that Albert Einstein “was a patent office clerk”); Leslie Wayne, Same Washington, Different Office: John Ashcroft Sets Up Shop As Well-Connected Lobbyist, N.Y. TIMES, March 17, 2006, Section C (relating to the lobbying business of former Attorney General John Ashcroft, and including mention that “the Ashcroft group will provide public relations advice for a patent infringement case to come before the Supreme Court”). Other categories of excluded items include items relating to the construction, opening, refurbishment and redeployment of patent office buildings (*see, e.g.,* Dana Hedgpeth, Anacostia Group Looks Beyond the Ballpark, WASH. POST., June 26, 2006, at D03), to the trademark application processing functions of the USPTO (*see, e.g.,* Raymond Flandez, A Tiny Firm Wins ‘Chewy Vuiton’ Suit, But Still Feels a Bite, WALL ST. J., Nov. 28, 2006, at B1; Sewell Chan, You Can Take the A Train, but Don’t Take Its Logo, N.Y. TIMES, June 5, 2005, at 11), and to foreign patent systems (*see, e.g.,* Jan Sliva, E.U. Parliament Rejects Software-Patent Law, WASH. POST., July 7, 2005, at D05), as well as a letter to “Miss Manners” regarding how to properly address a patent examiner in correspondence (*see* Judith Martin, To Madam, With Sincerely, WASH. POST, June 21, 2006, at C11).

32. These 607 items were distributed among the five study newspapers as shown in the following table:



### B. Coding and Data Collection

We each independently reviewed every item in the dataset. In addition to tracking which litigated patent disputes were referenced or discussed in the news and editorial items in our study,<sup>33</sup> we collected and analyzed data from each dataset item regarding the item's portrayal of the U.S. patent system, including whether and which positive and negative messages it presented about the patent system.

Our coding manual contained coding definitions and instructions designed to guide our coding decisions.<sup>34</sup> For each item, we collected basic bibliographic information,<sup>35</sup> including:

- publishing newspaper
- date of publication
- item type (news, newspaper (unsigned) editorial, column, op-ed, letter to editor, other editorial item, or "other or unknown/unclear")

We then collected data regarding the positive and negative "messages" contained in each item about the patent system. Such evaluations are, of course, subjective to some degree. But we took several steps to enhance the reliability of the reported results.

First, we let the dataset items themselves generate the positive and negative message measurement criteria.<sup>36</sup> Specifically, the positive and

Newspaper	Search-generated Items	Irrelevant and Duplicative Items Eliminated	Items Included in Study Dataset
Financial Times	120	57	63
Los Angeles Times	160	61	99
New York Times	253	110	143
Wall Street Journal	257	64	193
Washington Post	426	317	109
TOTALS	1216	609	607

The comparatively high number of search-generated items and eliminated items for *the Washington Post* is attributable to the inclusion, in our electronic database search results, of a large number of items relating to the past and present patent office facilities, including regular event listings for the U.S. Patent & Trademark Office Museum. See, e.g., Museums Openings, WASH. POST., Dec. 15, 2006, at T35.

33. The patent dispute reference data was collected by one of us (Bettinger).

34. A copy of the coding manual is on file with the Akron Intellectual Property Journal.

35. We each recorded all coding data for an individual item on an item "coding form" or "coding schedule." See Neuendorf, *supra* note 19, at 24 (sample coding form); Deacon et al., *supra* note 18, at 124-25 (describing the design and function of a sample coding schedule). The data on each coding form was then entered into a software spreadsheet program to facilitate data analysis.

36. See, e.g., Wagner, et al., *supra* note 20, at 1133 (describing the "bottom up" measurement

negative message categories that we used in our coding were developed, in large measure, from a preliminary review of a fairly extensive (~150 item) set of news articles and editorial pieces.<sup>37</sup> This preliminary work was conducted by one of us (Dolak) and her former research assistant<sup>38</sup> over the course of several months. It facilitated the creation and refinement of a set of 29 (total) positive and negative message categories.<sup>39</sup> Although this process did not eliminate the potential for subjective disagreement among coders, it did generate what we believe to be a reasonably “workable” set of message categories.

As we coded the study dataset items, we added (at the suggestion of one or the other of us) additional positive and negative messages to the coding manual. This additional refinement was consistent with our “bottom up” approach to designing the study.<sup>40</sup> Given that the preliminary review set of items contained fewer and some different items than the study dataset, it was to be expected that review of the study dataset would prompt us to add positive and negative messages to the coding manual, as we perceived those messages in the study texts. This refinement process also served to reinforce the validity/workability of the message definitions generated during the preliminary review work, because: (i) although the study dataset was approximately four times as large as the preliminary review set, was generated by a different search string, and included items from a newspaper (the *Los Angeles Times*) not represented in the preliminary review set, and; (ii) although one of us (Bettinger) participated in only the study dataset coding, 11 of the final set of 12 positive messages and 21 of the final set of 28 negative messages were generated during and retained from the preliminary review. Tables A1 and A2 (Appendix) list the positive and negative message definitions we employed in coding the dataset items.

Second, as noted above, we each independently reviewed and coded every item in the dataset. As discussed in greater detail below, for the subjective aspects of our evaluations (i.e., the presence of particular

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design employed to analyze Federal Circuit claim construction opinions).

37. This preliminary review set overlaps but is not co-extensive with the study dataset.

38. Cara Grisin is a 2007 magna cum laude graduate of the Syracuse University College of Law. She is currently a first-year associate with the firm of Potter Anderson & Corroon LLP in Wilmington, Delaware.

39. Throughout the process of designing this study, we tried to follow the guidance of Professors Epstein and King, who noted that such work is a “[d]ynamic [p]rocess”, requiring “the flexibility of mind to . . . revise . . . blueprints as necessary.” Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 54 (2002).

40. See *supra* notes 36-39 and accompanying text.

positive or negative messages in individual items), we confined our data analyses to instances of 100% agreement between us.<sup>41</sup>

### III. RESULTS AND DISCUSSION

#### A. Preliminary Data Analysis Assumptions

The basic bibliographic data (publication date and publishing newspaper) collected for each item in the dataset was objectively verifiable and thus not subject to inter-coder disagreement. And although for other aspects of our media analysis project<sup>42</sup> we distinguish between news and editorial coverage, we make no such distinction here. As noted above,<sup>43</sup> and as discussed in further detail below,<sup>44</sup> our goal was simply to provide a systematic description of *NTP*-related media coverage during the pendency of *eBay* at the Supreme Court, and to make some related observations. Given the characteristics in common between the two cases,<sup>45</sup> we wanted to show what a consumer of major newspaper content might have experienced from the *NTP*-related coverage, in terms of quantity and quality, at and around the time that the Supreme Court was deciding to hear – and deciding – the *eBay* case. For this purpose, we regarded the coverage as monolithic, because we assumed that even a sophisticated reader with a particular interest in the *NTP* case would not systematically distinguish between pertinent news and editorial coverage. Rather, we assumed that an interested reader would read every *NTP*-related item in the paper or papers he/she reviewed in a routine, unexceptional fashion, i.e., along with other items of interest to the reader in those paper(s), as he/she happened upon them in casual fashion.

Regarding the subjective aspects of our evaluation – the presence of particular positive and negative messages – we recognize that a certain level of ambiguity will persist in a human coding scheme even after the coding definitions have been revised and refined through preliminary testing. Accordingly, inter-coder discrepancies are inevitable. As noted above, we took steps both (1) to reduce the subjectivity of the initial

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41. Cf. Hall, et al., *supra* note 20, at 41 (noting that efforts to resolve discrepancies among coders that result from “judgment calls or inevitable ambiguities” can “compromis[e] the independence of individual coders”).

42. *See supra* note 15 and accompanying text.

43. *See supra* Part I.

44. *See infra* Part III.B.4.

45. *See infra* Part III.B.3.

coding decisions and (2) to minimize the adverse effects of the inevitable inter-coder disagreement.

As to the former, we refined, through the pre-coding preliminary review process described above, the positive and negative message descriptions and associated instructions. The conclusions reported herein are based only on data on which we independently agreed. In other words, for example, we did not “count” an item as including a particular positive or negative message about the patent system unless we each independently concluded during our respective reviews of the dataset items that the item in question delivered that particular message. This method, of course, tends to skew our reported results toward greater neutrality or balance in the media coverage, but we believe the tradeoff is worth the resulting gain in study reliability.

We did not distinguish between messages presented in the quotes of interviewed sources and content written by a given story’s author(s). Rather, we treated the responsible news organizations and journalists as “gatekeepers” who decide “whose voices and what messages get into the news.”<sup>46</sup> As Lance Bennett has noted:

Each news story can only contain some of the voices, facts, and organizing ideas that might have been included. . . . Journalists and, more important, their news organizations make choices about what to cover and how to report it. Some stories feature statements by ordinary citizen-activists and interest organizations, whereas other news reports leave most of the talking to government officials. Gatekeeping decisions are made in part by individual journalists, but they are also shaped by editors and executives in news organizations. Those organizations, in turn, are influenced by economic pressures, audience reactions, and a host of other considerations that all go into the construction of the daily news.<sup>47</sup>

Accordingly, we did not differentiate among messages based on who (i.e., which particular individual) was doing the speaking.

In addition, we recognize that factors such as where news and editorial items are placed in the print version of the newspaper, the amount of space allocated for particular items, and other emphasis variables are matters of editorial discretion and are relevant to the item’s

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46. W. LANCE BENNETT, NEWS: THE POLITICS OF ILLUSION 5 (2007).

47. *Id.*

influence on the reader.<sup>48</sup> However, we did not account for these factors. The electronic databases through which we accessed our dataset items did not facilitate systematic consideration of item placement and we chose not to factor item length into our analysis.

### B. *eBay at the Supreme Court; NTP in the Media*

#### 1. Media Coverage of *eBay* and *NTP*: a Quantitative Comparison

The media coverage of the *eBay* case was significant. Between January 1, 2005 and June 30, 2007, *eBay* was discussed in 78 of the 607 items (13%) in our dataset. During that time period, the case was featured in items from each of our five study newspapers with the following frequency:

- *Financial Times* 21%
- *Los Angeles Times* 11%
- *New York Times* 6%
- *Wall Street Journal* 13%
- *Washington Post* 17%

Further, in each newspaper, *eBay* received more coverage<sup>49</sup> than any of the other Supreme Court cases pending or decided during the study period.

But one patent case received far more media coverage during the 2 ½ year period of the study than did *eBay*: the litigation between *NTP, Inc.* and *Research in Motion, Ltd.* that could have resulted in an injunction against continued operation of the popular BlackBerry® handheld wireless communications device and network. In each of our study newspapers, *eBay* was the second-most frequently covered case. However, compared with *eBay*, the *NTP* case<sup>50</sup> was discussed in more than twice as many of all of the news and editorial items (taken together) in our dataset, and more than twice as many of the total items from each individual newspaper, except the *Financial Times* and the *Washington Post*.<sup>51</sup> Specifically, 166 of the 607 total items (27%) referenced *NTP*,

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48. See, e.g., Walter Lippmann, *Newspapers*, in *MEDIA POWER IN POLITICS* 48, 51 (Doris A. Graber ed., 2007) (“It is in a combination of these elements that the power to create opinion resides.”).

49. *eBay* was discussed in more items than any of the other Supreme Court cases relating to patents that were pending during the study period. See *supra* notes 10-14 and accompanying text, and *infra* note 65 and accompanying text.

50. *Supra* note 16 and accompanying text.

51. In the *Financial Times* and the *Washington Post*, *NTP* was only featured 1 ½ times more frequently than *eBay*.

which was prominently featured in each of the other study newspapers as follows:

- *Financial Times* 30%
- *Los Angeles Times* 24%
- *New York Times* 21%
- *Wall Street Journal* 33%
- *Washington Post* 28%

Table 1 compares the news, unsigned (newspaper) editorial, and total editorial (combined unsigned editorial, column, op-ed, letters to the editor, and “other editorial”) coverage of *NTP* and *eBay* across all newspapers and in each individual newspaper, during the study period:

*Table 1: Relative Prevalence of NTP vs. eBay coverage in News and Editorial Coverage, in Total and by Newspaper*

Newspaper	<i>NTP v. Research in Motion</i>			<i>eBay v. MercExchange</i>		
	News	Unsigned Editorial	All Editorial	News	Unsigned Editorial	All Editorial
<i>All Newspapers</i>	28%	30%	25%	11%	27%	21%
<i>Financial Times</i>	26%	44%	32%	19%	22%	26%
<i>New York Times</i>	25%	20%	7%	6%	20%	26%
<i>Los Angeles Times</i>	22%	40%	45%	9%	40%	27%
<i>Wall Street Journal</i>	33%	25%	31%	9%	33%	31%
<i>Washington Post</i>	29%	0%	21%	17%	0%	14%

Although *eBay* was mentioned in far fewer news items than *NTP* across all newspapers, 11% and 28% respectively, the coverage of the cases in unsigned editorials across all newspapers was roughly equal at 27% and 30% respectively. The total editorial coverage was also similar, with 21% of editorial content in all newspapers mentioning *eBay* and 25% mentioning *NTP*.

## 2. Media Interest in *NTP*

Why did *NTP* garner such extensive media attention? When we consider the factors which influence news coverage choices, neither the amount nor the nature of the coverage the case received is particularly surprising. Media scholars have identified several criteria that influence which stories are presented and how events are covered.<sup>52</sup> Bennett, for example, identifies “personalization” and “dramatization” as two such criteria.<sup>53</sup> He defines “personalization” as “the journalistic bias that give preference to individual actors and human-interest angles in events over larger institutional, social, and political contexts.”<sup>54</sup> Doris Graber explains:

[S]tories must picture conditions that could have a strong impact on readers or listeners. Stories about health hazards, consumer fraud, or pensions for the elderly influence people more than do unfamiliar happenings with which they cannot identify. To make stories attractive, newspeople commonly present them as events that happened to ordinary people. Inflation news becomes the story of the housewife at the supermarket; foreign competition becomes the story of laid-off workers in a local textile plant.<sup>55</sup>

Drama is another characteristic which influences newsworthiness.<sup>56</sup> Dramatic stories are engaging, exciting, and memorable.<sup>57</sup> And drama can reinforce the extent to which readers can connect personally and emotionally with the news.<sup>58</sup>

At least for the readers of the papers in our study, the potential that a court would shut down a communications system used by millions of people<sup>59</sup> – a theme reiterated in an overwhelming number of the news

52. See, e.g., BENNETT, *supra* note 46, at 40-67; DORIS A. GRABER, *MASS MEDIA & AMERICAN POLITICS* 98-102 (2006).

53. BENNETT, *supra* note 46, at 40-42.

54. *Id.* at 49.

55. GRABER, *supra* note 52, at 99. Both Graber and Bennett decry the media’s tendency to personalize the news on the ground that it trivializes and oversimplifies events of potential social or political significance. *Id.*; BENNETT, *supra* note 46, at 40-41, 53.

56. BENNETT, *supra* note 46, at 53 (“It is no secret that reporters and editors search for events with dramatic properties and then emphasize those properties in their reporting.”); GRABER, *supra* note 52, at 99 (“Violence, conflict, disaster, or scandal is the second criterion of newsworthiness.”).

57. See BENNETT, *supra* note 46, at 42; GRABER, *supra* note 52, at 99-101.

58. See BENNETT, *supra* note 46, at 54 (noting that “[d]rama, after all, is the quintessential medium for presenting human conflict.”).

59. See, e.g., Ken Belson, *The Basics: Not the End of the World After All*, N.Y. TIMES, Feb. 26, 2006, at 42 (noting that the BlackBerry “has more than three million subscribers in the United States”); Research in Motion, *Maker of the BlackBerry, Says Sales More Than Double*, N.Y. TIMES,

and editorial items pertaining to the *NTP* case<sup>60</sup> – fits tidily into the personalization rationale.<sup>61</sup> In addition, other aspects of the “*NTP* story”, including the parties’ perspectives on the propriety of each other’s actions in the case,<sup>62</sup> and the controversy over infringement suits by patent owners who do not manufacture or sell products,<sup>63</sup> facilitated the presentation of drama in what might otherwise have been ho-hum accounts of developments in a patent infringement case.

These considerations may well explain why the *NTP* case received such significant media attention. Whatever the reasons, however, the result was that a case that the Supreme Court declined to review – *NTP*<sup>64</sup> – received more than twice as much coverage in our study newspapers than any of the eight patent cases that *were* considered by the Supreme Court during the period we examined.<sup>65</sup> More relevant here is the overlap in the pendencies of the *NTP* and *eBay* cases and, in particular, the prevalence and content of the media coverage of developments in *NTP* during the 2006-07 Supreme Court term, in which it granted review in, and decided, *eBay*.<sup>66</sup> As discussed below, this overlap was potentially significant, and is, at the very least, interesting.

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Dec. 22, 2004, at C6 (“The company said that it had signed up more than two million subscribers since the BlackBerry was introduced in 1999.”).

60. See *infra* Part III.B.4.

61. See Richard S. Levick, *The Other Dimension: Managing Public Communications in IP Litigation*, *The IP Litigator* (“The importation of generic drugs that infringe or threaten pharmaceutical companies certainly affects mass audiences at a very personal level. So does the prospect of losing BlackBerry [sic] service . . .”), available at [http://www.levick.com/resources/topics/articles/ip\\_litigation\\_communications.php](http://www.levick.com/resources/topics/articles/ip_litigation_communications.php) (last visited Dec. 10, 2007).

62. See, e.g., Ian Austen, *BlackBerry Service to Continue*, *N.Y. TIMES*, Mar. 4, 2006, at C1 (discussing the “bad feelings” between the parties); Joshua Brockman, *Judge Lets BlackBerry Stay in Play for Now*, *N.Y. TIMES*, Feb. 25, 2006, at C1 (referencing the parties’ “verbal jousting” leading up to a hearing in the case).

63. See, e.g., Bernard Stamler, *Legal Issues; Battles of the Patents, Like David v. Goliath*, *Feb. 21, 2006*, at G2 (referencing the controversy over “patent trolls”). See also *infra* Part III.B.3.

64. *Research in Motion, Ltd. v. NTP, Inc.*, 546 U.S. 1157 (2006) (denying certiorari).

65. In addition to the six cases identified in notes 10-14, *supra*, the Supreme Court accepted review in two additional patent cases during the period of our study. *Laboratory Corp. v. Metabolite Lab., Inc.*, 546 U.S. 975 (2005) (granting certiorari); *Merck KGaA v. Integra Lifesciences I, Ltd.*, 543 U.S. 1041 (2005) (granting certiorari). The Court issued its decision in *Merck* on June 13, 2005. *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193 (2005) (interpreting the patent statute’s safe harbor provision relating to the development and submission of data to the Food & Drug Administration). It ultimately dismissed the *LabCorp.* case, which related to statutory subject matter under 35 U.S.C. § 101. *Laboratory Corp. v. Metabolite Lab., Inc.*, 126 S.Ct. 2921 (2006) (dismissing the writ of certiorari as improvidently granted).

66. See *infra* Part III.B.4.



### 3. *eBay*, *NTP*, and the Non-Practicing Patentee

One sub-issue in *eBay* was whether a patentee who does not compete with the infringer in the marketplace – such as one who “does not practice its inventions and exists merely to license its patented technology to others”<sup>67</sup> – is eligible for injunctive relief. The issue was vigorously debated in the briefs of the parties and the amici,<sup>68</sup> and the district court and Federal Circuit had expressly split on the issue.<sup>69</sup>

In *eBay*, the Supreme Court rejected the district court’s sweeping conclusion that “a ‘plaintiff’s willingness to license its patents’ and ‘its lack of commercial activity in practicing the patents’” suffices to establish that the patentee would not suffer irreparable harm in the absence of an injunction.<sup>70</sup> According to the Court:

[S]ome patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves. Such patent holders may be able to satisfy the traditional four-factor test, and we see

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67. *MercExchange, L.L.C. v. eBay Inc.*, 275 F. Supp. 2d 695, 712 (E.D. Va. 2003) aff’d in part, rev’d in part by 401 F.3d 1323 (Fed. Cir. 2005), vacated and remanded by 126 S.Ct. 1837 (2007)

68. See, e.g., Brief of Petitioner at 30-31, *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006) (No. 05-130); Brief of Business Software Alliance, et al. as Amici Curiae in Support of Petitioners at 12-18, *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006) (No. 05-130); Brief of American Innovators’ Alliance as Amicus Curiae in Support of Petitioners at 22-25, *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006) (No. 05-130); Brief of Respondent at 36-37, *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006) (No. 05-130); Brief for the United States as Amicus Curiae Supporting Respondent at 23-26, *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006) (No. 05-130); Brief of Amicus Curiae Pharmaceutical Research and Manufacturing of America in Support of Respondent at 20-23, *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006) (No. 05-130).

69. *MercExchange*, 275 F. Supp. 2d at 712 (“In the case at bar, the evidence of the plaintiff’s willingness to license its patents, its lack of commercial activity in practicing the patents, and its comments to the media as to its intent with respect to enforcement of its patent rights, are sufficient to rebut the presumption that it will suffer irreparable harm if an injunction does not issue.”); *MercExchange, L.L.C., v. eBay Inc.*, 401 F. 3d 1323, 1339 (Fed. Cir. 2005) (“The fact that *MercExchange* may have expressed willingness to license its patents should not, however, deprive it of the right to an injunction to which it would otherwise be entitled. Injunctions are not reserved for patentees who intend to practice their patents, as opposed to those who choose to license. The statutory right to exclude is equally available to both groups, and the right to an adequate remedy to enforce that right should be equally available to both as well. If the injunction gives the patentee additional leverage in licensing, that is a natural consequence of the right to exclude and not an inappropriate reward to a party that does not intend to compete in the marketplace with potential infringers.”)vacated and remanded by 126 S.Ct. 1837 (2007).

70. *eBay*, 126 S.Ct. at 1840.

no basis for categorically denying them the opportunity to do so.<sup>71</sup>

But three Justices joined Justice Kennedy in writing separately to advise trial courts to “bear in mind that in many instances the nature of the patent being enforced and the economic function of the patent hold present considerations” that may justify a departure from the traditional approach of granting injunctions “almost as a matter of course.”<sup>72</sup> Regarding patent licensing companies, in particular, these four Justices wrote:

An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees. For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.<sup>73</sup>

As with all aspects of *eBay*, the issue of what the decision says (or doesn't say) about whether non-manufacturing patentees can satisfy the four-factor test for injunctive relief will continue to play out in the lower courts. But based on the injunction requests the trial courts and the Federal Circuit have resolved thus far post-*eBay*, the Supreme Court's decision seems to have spawned a trend, at least, toward a rule that patent owners who do not compete in the marketplace with the infringer are unlikely to win on the injunction issue.<sup>74</sup> Recently, for example, the Federal Circuit affirmed a district court order imposing an “ongoing royalty” in place of a permanent injunction,<sup>75</sup> where the district court's ruling was based in part on the fact that the patentee “does not actually manufacture any goods.”<sup>76</sup>

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71. *Id.*

72. *Id.* at 1842 (Kennedy, J. et al., concurring).

73. *Id.* (internal citations omitted).

74. *See, e.g.,* *z4 Technology, Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 440 (E.D. Tex. 2006) (relying, in part, on the absence of direct marketplace competition between the products sold by the patentee and the infringer to deny the patentee's request for a permanent injunction); *Finisar Corp. v. DirecTV Group Inc.*, 2006 U.S. Dist. LEXIS 76380 (E.D. Tex. July 7, 2006). In *Finisar*, the district court relied on the fact that the patentee did not practice the invention to find that the patentee had not succeeded in establishing that irreparable harm would result if no injunction were granted. *See* Yixin H. Tang, *The Future of Patent Enforcement after eBay v. MercExchange*, 20 HARV. J. OF LAW & TECH. 235, 247 (2006) (discussing *Finisar*); Dennis Crouch, *Injunction Denied – Compulsory License Granted* (August 1, 2006), available at [http://www.patentlyo.com/patent/2006/08/injunction\\_deni.html](http://www.patentlyo.com/patent/2006/08/injunction_deni.html).

75. *Paice LLC v. Toyota Motor Corp.*, 504 F. 3d 1293, 1313-1316 (Fed. Cir. 2007).

76. *Id.* at 1303.

By one measure, the effect of *eBay* has been modest. A recent *National Law Journal* article noted that 77% of post-*eBay* permanent injunction requests were granted, compared with 84% for pre-*eBay* cases.<sup>77</sup> As noted above, however, and as evidenced by the existence of this symposium, the case is significant. The decision conflicts, to some extent, with the principle that a patent confers the right to exclude.<sup>78</sup> And a clear trend dramatically affecting one category of cases has emerged in the post-*eBay* decisions: a patentee who is not engaged in direct marketplace competition with the infringer is unlikely to win an injunction.<sup>79</sup>

For these and other reasons, the *eBay* decision is not without controversy. The merits and likely effects of the decision are being debated elsewhere, but some examples of the extant scholarship will serve to provide a sense of the issues under discussion. One group of scholars has concluded that a system of categorical denials of injunctions for “non-practicing” patentees is undesirable as a matter of innovation policy.<sup>80</sup> Another commentator has noted the difficulties inherent in drawing distinctions between non-practicing patentees, on the one hand, and manufacturers who derive some significant portion of revenue strictly from patent licensing activities.<sup>81</sup> Our point is not to join the debate about the merits of *eBay*; rather, simply to note its significance.

In both *eBay* and *NTP*, the patentee did not practice the patented invention. Thus, both cases involved the issue of whether a patentee who does not compete in the marketplace with the infringer should be able to obtain an injunction that would potentially deprive the public of access to a technology in widespread use. Not surprisingly, as discussed below,<sup>82</sup> some of the coverage of both cases included the message that “patents are (and shouldn’t be) awarded to/enforceable by those who don’t develop products/practice the invention,”<sup>83</sup> and most items

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77. Robert M. Isackson, After ‘*eBay*,’ injunctions decrease, NAT’L L. J., Dec. 3, 2007, at S1.

78. See *supra* note 7 and accompanying text.

79. See, e.g., Andrew Beckerman-Rodau, The Aftermath of *eBay v. MercExchange*, 126 S.Ct. 1837 (2006), 89 J. PAT. & TRADEMARK OFF. SOC’Y 607, 654-56 (2007) (noting the potential exception for non-practicing patentees who are “non-profit enterprises such as universities and research institutes”); Benjamin H. Diessel, Note, Trolling For Trolls: The Pitfalls Of The Emerging Market Competition Requirement For Permanent Injunctions In Patent Cases Post-*eBay*, 106 MICH. L. REV. 305 (2007).

80. Vincenzo Denicolò, et al., Revisiting Injunctive Relief in High-Tech Industries with Non-Practicing Patent Holders, available at <http://ssrn.com/abstract=1019611>.

81. See Jennifer Kahualelio Gregory, Comment, The Troll Next Door, 6 J. MARSHALL REV. INTELL. PROP. L. 292, 301 (2007) (citing IBM’s patent licensing revenues as an example).

82. See *infra* Part III.B.4.

83. Our “negative message 13”. See Table A2, Appendix.

discussing *NTP* referenced the possibility of an injunction that would discontinue (or could have discontinued) BlackBerry® service.

#### 4. *NTP* in the Media: What Newspaper Readers Experienced

Given the extent of the *NTP*-related media coverage during the study period, the commonality of the issues raised in *NTP* and *eBay*, the overlap in the pendencies of the two cases, and the significance of the issue before the Supreme Court in *eBay*, it is worthwhile to consider the possible interplay between the media coverage of *NTP* and the Supreme Court's consideration and resolution of *eBay*. We cannot, of course, know whether or to what extent media coverage of *NTP* might have influenced individual Justices' decisions to support or oppose accepting the *eBay* case for review, or their views, ultimately, on the merits of the case.<sup>84</sup> We can, however, examine what a consumer of relevant major newspaper coverage would have seen during the time periods in question.

First, and by way of background, Figure 1 represents the media coverage of the U.S. patent system, as defined in our study,<sup>85</sup> on a weekly basis in all study newspapers over the study period. In Figure 1 and in each of the following Figures, individual weeks in which significant developments relating to the patent system occurred during the study period are represented by the letters A-I, as set forth in Table 2:

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84. See Paul W. Jamieson, *Lost in Translation: Civic Journalism's Applicability to Newspaper Coverage of the U.S. Supreme Court*, 20 COMM. & L. 1, 3 (1998) (noting that conjecture regarding the "the effect of press coverage on the content of the Court's opinions" . . . is nothing more than "pure speculation probably unknowable except to the justices themselves.").

85. See *supra* Part II.A.2.

*Table 2: Weeks During the Study Period in which Significant Patent-System-Related Events Occurred*

Label	Week	Corresponding Period	Event(s)
A	12	Mar. 13 - 19, 2005	First NTP v. Research In Motion Settlement <sup>86</sup>
B	49	Nov. 27 - Dec. 3, 2005	<i>eBay v. MercExchange</i> cert. Granted; <sup>87</sup> First NTP v. Research in Motion Settlement Rejected. <sup>88</sup>
C	63	Mar. 5 - Mar. 11, 2006	<i>NTP v. Research in Motion</i> Final Settlement <sup>89</sup>

86. In early 2005, NTP and Research in Motion reportedly reached an agreement to settle the case. The agreement required Research in Motion to pay NTP \$450 million. *See, e.g.*, Mark Heinzl, BlackBerry Maker Agrees to Settle Patent Dispute – Research in Motion to Pay NTP \$450 Million, Ending Threat of U.S. Shut Down, WALL ST. J., Mar. 17, 2005, at B4 (“BlackBerry maker Research In Motion Ltd. agreed to pay \$450 million to wireless e-mail patent holder NTP Inc., in one of the largest patent-dispute settlements ever.”); Ian Austen & Lisa Guernsey, A Payday for Patents ‘R’ Us; Huge BlackBerry Settlement is Grist for Holding Company, N.Y. TIMES, May 2, 2005, at C1 (“Research In Motion, the Canadian maker of the popular BlackBerry wireless e-mail devices, agreed to pay NTP \$450 million to settle a long-running and sometimes bitter patent dispute between the companies.”).

87. *eBay Inc. v. MercExchange, L.L.C.*, 546 U.S. 1029 (2005) (granting certiorari).

88. The NTP trial court ultimately refused to enforce the parties’ first settlement agreement. *See, e.g.*, Yuki Noguchi, Ruling Puts BlackBerry Maker at Crossroads; Patent Settlement Invalidated; Service Could Be Stopped, WASH. POST, Dec. 1, 2005, at D1 (“Research in Motion Ltd., was dealt legal blows yesterday when a judge invalidated an earlier settlement with Arlington-based NTP, Inc., which holds the patents to the wireless technology.”); Ian Austen, BlackBerry Patent Case Is Nearer Showdown, N.Y. TIMES, Dec. 1, 2005, at C1 (“Research In Motion moved closer Wednesday to a showdown with NTP, a patent holding company, over BlackBerry service after a court dismissed its request to impose a failed settlement agreement on the two companies.”).

89. Ultimately, the parties reached a final settlement, with Research in Motion agreeing to pay NTP \$612.5 million. *See, e.g.*, Ian Austen, BlackBerry Service to Continue, N.Y. TIMES, Mar. 4, 2006, at C1 (“Just days before a judge was expected to issue an injunction shutting the popular e-mail service, the patent holder, NTP, dropped its infringement lawsuit against the device maker, Research in Motion, in exchange for \$612.5 million.”); Yuki Noguchi, BlackBerry Patent Dispute Is Settled; \$612.5 Million To Va. Firm Keeps Devices Working, WASH. POST, Mar. 4, 2006, at A1 (“The maker of BlackBerry wireless e-mail devices agreed yesterday to pay \$612.5 million to a McLean firm to re-solve a long-running patent dispute and put to rest concerns that the popular gadgets might be shut off.”).

Label	Week	Corresponding Period	Event(s)
D	65	Mar. 19 - Mar. 25, 2006	LabCorp v. Metabolite Oral Argument <sup>90</sup>
E	66	Mar. 26 - Apr. 1, 2006	eBay v. MercExchange Oral Argument <sup>91</sup>
F	73	May 14 - May 20, 2006	eBay v. MercExchange Decision <sup>92</sup>
G	101	Nov. 26 - Dec. 2, 2006	KSR v. Teleflex Oral Argument <sup>93</sup>
H	113	Feb. 18 - Feb. 24, 2007	Microsoft v. AT&T Oral Argument <sup>94</sup>
I	123	Apr. 29 - May 5, 2007	KSR <sup>95</sup> & Microsoft <sup>96</sup> Decisions

Figure 1

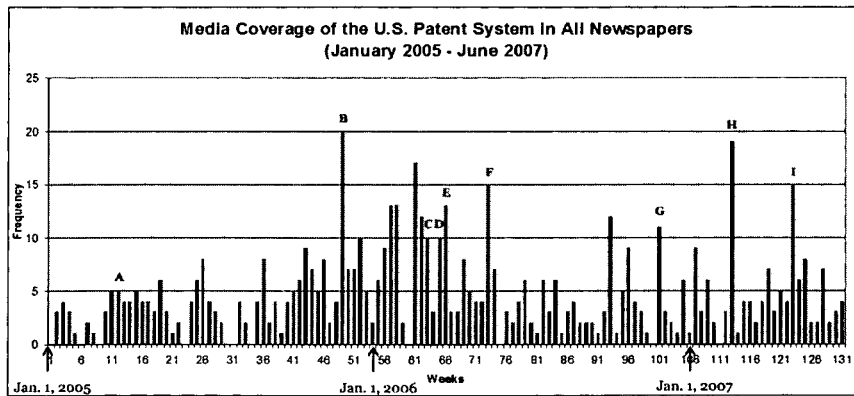


Figure 1 shows that a total of 20 articles relating to the U.S. patent system appeared in our study newspapers, combined, during the week

90. See Andrew Bridges, Justices hesitate to decide what can be patented, *Charlotte Observer*, Mar. 22, 2006, at 3A. The Court ultimately declined to decide the case. See *supra* note 65.

91. *eBay Inc. v. MercExchange, LLC*, 126 S.Ct. 1837 (2006).

92. *Id.*

93. *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1727 (2007).

94. *Microsoft Corp. v. AT&T Corp.*, 127 S.Ct. 1746, 1746 (2007).

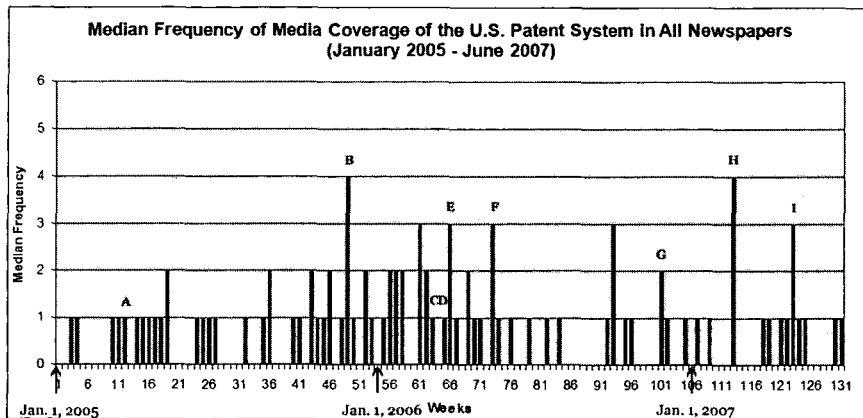
95. *KSR*, 127 S.Ct. at 1727.

96. *Microsoft*, 127 S.Ct. at 1746.

(week 49 of our study period, labeled “B” in Figure 1) in which the Supreme Court agreed to hear the *eBay* case, which was also the week in which the district court refused to enforce the initial settlement agreement in *NTP*. The level of newspaper coverage – as measured by the number of news and editorial items appearing in our study newspapers, combined – was also relatively high during week 66 (week “E”), the week in which the Supreme Court oral argument in *eBay* was held, week 73 (“F”), the week in which the Supreme Court issued its decision in *eBay*, week 113 (“H”), the week in which the Supreme Court held the oral argument in *Microsoft*, and week 123 (“I”), the week in which the *Microsoft* and *KSR* decisions were issued.

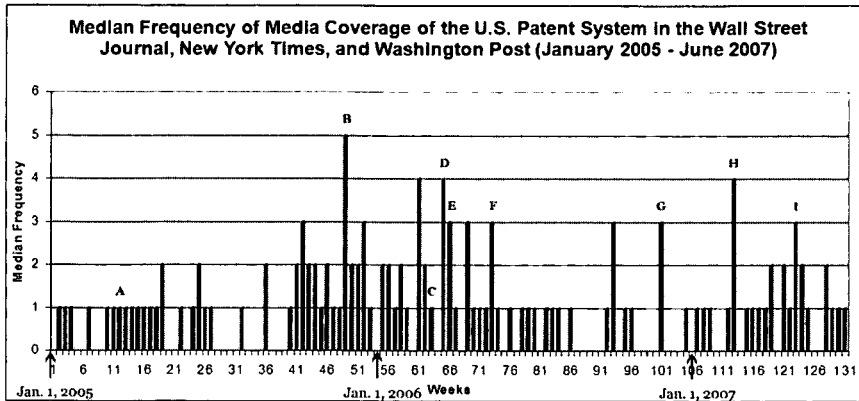
Figure 2 shows the median frequency of U.S. patent system coverage across all study newspapers, and thus presents a better picture of what a reader of one of the study newspapers would have seen over the course of the study period:

Figure 2



If, however, we assume a reader who reads at least one of the *New York Times*, *Wall Street Journal*, and *Washington Post* each day, then, presumably, Figure 3 presents an even better picture of the extent of patent system coverage he or she saw during the study period:

Figure 3



In each of Figures 1, 2, and 3, which provide general depictions of the level of U.S. patent system-related media coverage during the study period, two several-months-long periods of generally greater relative coverage are observed. During the first, which ran from approximately the end of November, 2005 (Week 49) through the middle of May, 2006 (Week 73), several significant events occurred, including the grant of certiorari in *eBay* (B), the trial court's refusal to enforce the first announced settlement in *NTP* (B), the announcement of the final *NTP* settlement (C), the Supreme Court oral argument in *Lab. Corp. v. Metabolite Lab., Inc.* (D), and the oral argument and decision in *eBay* (E and F, respectively). During the second "high-coverage" period, from roughly early October, 2006 (Week 93) through early May, 2007 (Week 123), *KSR* was argued and decided (G and I, respectively), and the Supreme Court issued its decision in *Microsoft Corp. v. AT&T Corp.* (H).

Isolating the study data relating to the media coverage of *NTP* and *eBay* over the study period permits a comparison of the extent of media coverage of the two cases and the opportunity to consider how the coverage of particular developments in *NTP* corresponded over time with developments in *eBay*. Figure 4 illustrates the relative frequency of, and correspondence over time between, the media coverage of *NTP* and *eBay* in all newspapers over the study period:



Figure 4

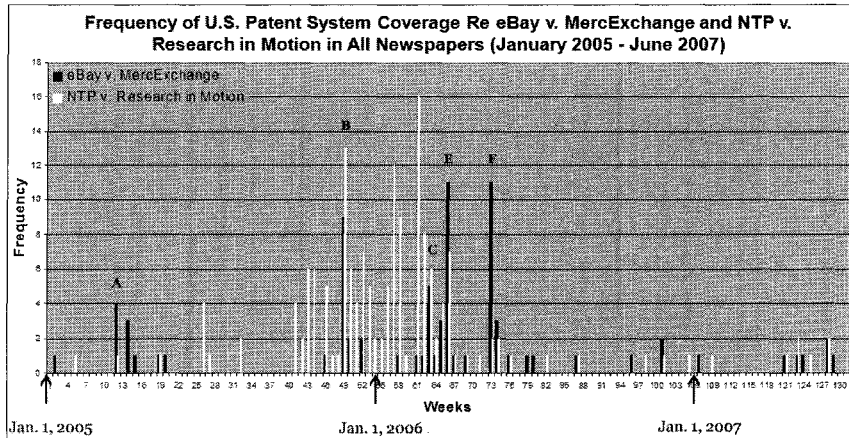


Figure 4 clearly illustrates not only the relative prevalence of the coverage of *NTP* vs. that pertaining to *eBay* over the course of the study period, but also the high concentration of *NTP* coverage during (1) the weeks (weeks 41 through 48) leading up to the grant of certiorari in *eBay* (week 49), and (2) the period between the grant of certiorari in *eBay* (B) in November, 2005 (Week 49) and the oral argument in *eBay* (E) on March 29, 2006 (Week 66).

Figure 5 presents the same comparison between the *NTP* and *eBay* coverage during the study period, limiting the data to items appearing in the *New York Times*, *Wall Street Journal*, and *Washington Post*, combined, and thus simulates the experience of someone who read all three newspapers every day:

Figure 5

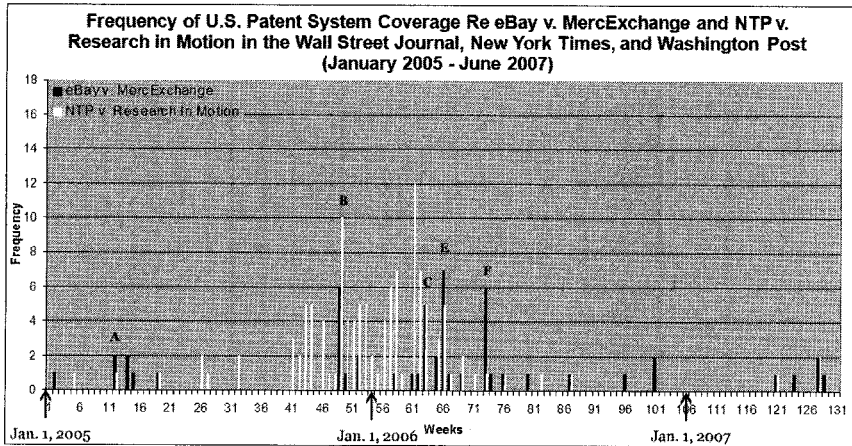
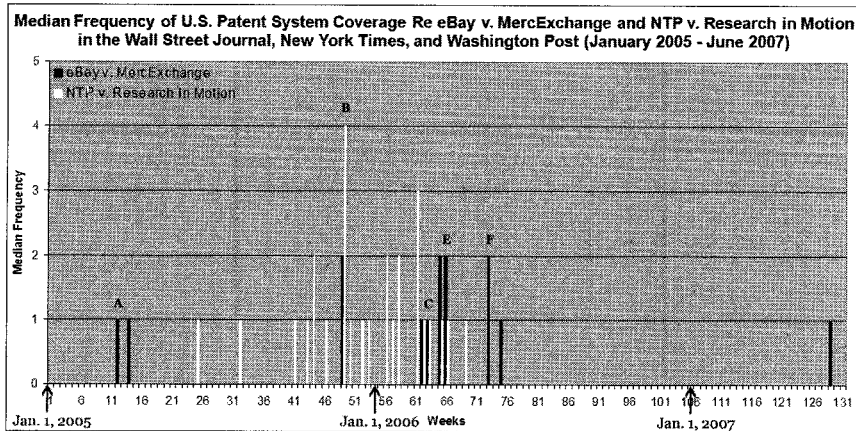


Figure 6, in contrast, assumes a reader who is reading only one of the *New York Times*, *Wall Street Journal*, and *Washington Post* during the study period (albeit not necessarily the same paper every day), as it shows the median relative frequency of, and correspondence over time between, *NTP* and *eBay* coverage during the study period:

Figure 6



From each of these three vantage points (Figures 4-6), however, the *NTP* coverage – during the entire period of the study – was the most concentrated and most extensive in the weeks leading up to the grant of certiorari in *eBay* (B) in November, 2005 (Week 49) and between the date of the certiorari grant and the oral argument in *eBay* (E) in late March 2006 (Week 66). The *NTP* coverage had declined significantly

by the time of the *eBay* decision, and the number and frequency of items discussing *NTP* were notably lower during the period between the *eBay* oral argument (E) and the decision (F) than during the period leading up to the oral argument. However, given the dates of the *eBay* certiorari grant and oral argument, it is reasonable to assume that at least some of the Supreme Court Justices were focused, to some extent, on the issues presented in *eBay* during the periods of intense media coverage of *NTP*. Notably, that coverage included pervasive references both to the status of the patentee (*NTP, Inc.*) as a “patent-holding company,”<sup>97</sup> or similar descriptor,<sup>98</sup> and to the potential injunction that would make “all our BlackBerry technology . . . go dark.”<sup>99</sup>

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97. See, e.g., Ian Austen, BlackBerry Patent Case is Nearer Showdown, *N.Y. TIMES*, Dec. 1, 2005, at C1 (“Research in Motion moved closer Wednesday to a showdown with *NTP*, a patent holding company, over BlackBerry service after a court dismissed its request to impose a failed settlement agreement on the two companies.”); Bruce Sewell, Troll Call, *WALL ST. J.*, Mar. 6, 2006, at A14 (“[Research in Motion, Ltd.] paid *NTP*, a small patent holding company reputedly comprised of just one inventor and one patent lawyer, \$615 million to settle a four-year patent dispute.”).

98. See, e.g., Mark Heinzl & Amol Sharma, Getting the Message: RIM to Pay *NTP* \$612.5 Million to Settle BlackBerry Patent Suit, *WALL ST. J.*, Mar. 4, 2006, at A1 (“The settlement, announced after markets closed on Friday, ended all court proceedings in the nearly five-year legal battle that saw a tiny patent-holding firm take on one of technology’s hottest companies and threaten to disrupt service to BlackBerry users in the U.S.”); Mark Heinzl & Amol Sharma, Insistent Message: Facing Shutdown Threat, Maker of BlackBerry Digs in for Battle, *WALL ST. J.*, Feb. 24, 2006, at A1 (“Late last year, a tiny patent firm threatening to shut down BlackBerry maker Research in Motion Ltd. offered a deal: For about \$1 billion, it would go away.”); *NTP Gets Extension in BlackBerry Case*, *L.A. TIMES*, Jan. 18, 2006, at 4 (“The patent office gave *NTP*, a patent licensing firm in Arlington, Va., until Feb. 28 to submit responses to nonfinal rejections of three of its patents, according to the agency’s website.”); In Brief/Virginia, *L.A. TIMES*, Dec. 18, 2005 (“The patents are owned by *NTP Ltd.*, a licensing company from Arlington that won a 2001 patent-infringement suit against Research in Motion.”); Appeals Court Denies Motion For a Stay in *NTP* Lawsuit, *WALL ST. J.*, Oct. 24, 2005, at B6 (“[Research in Motion, Ltd.] is hoping the Supreme Court will hear an appeal of a patent-infringement case it is fighting against *NTP, Inc.*, a Virginia patent-holding firm that won a judgment that BlackBerry infringes on its patents.”).

99. See, e.g., Lisa Belkin, A Chill at the Specter of BlackBerry Winter, *N.Y. TIMES*, February 12, 2006, Section 10. See, e.g., Mark Heinzl, Crunch Time Approaches for the BlackBerry Crowd – An Injunction in Patent Dispute Could Stop Service for U.S. Users, But Other Scenarios Are Possible, *WALL ST. J.*, Mar. 3, 2006, at B1 (“Millions of BlackBerry users are anxiously awaiting word from a federal judge who is expected to rule soon on whether the company’s wireless email system should be shut down in the U.S.”); Judge Seeking End to BlackBerry Case, *L.A. TIMES*, Feb. 20, 2006, at 2 (“A federal judge, clearly impatient with the long-running case, could issue an injunction soon on U.S. sales and service of the wireless e-mail device.”); Anne Marie Squeo & Mark Heinzl, Patent Office Sides with BlackBerry, *WALL ST. J.*, Feb. 2, 2006, at A2 (“The U.S. Patent and Trademark Office rejected all of the claims of an *NTP Inc.* patent at the heart of an infringement case that threatens to shut down BlackBerry email service in the U.S. as soon as this month.”); BlackBerry Maker Asks Court Not to Ban Service in the U.S., *WALL ST. J.*, Jan. 19, 2006, at D6 (“BlackBerry maker Research in Motion Ltd. returned fire in the latest installment of its long-running dispute with *NTP Inc.*, asking a Virginia court not to issue a ban on BlackBerry service in the U.S. given the ‘exceptional public interest in the continued and uninterrupted availability’ of the BlackBerry system.”); Yuki Noguchi, BlackBerrys Will Keep Working Despite Suit, RIM

Specifically, 48% of the news and editorial items discussing the *NTP* case in our dataset identified the patentee as a “patent-holding company,” “holding company,” “licensing company,” “patent firm,” company whose only asset is intellectual property, or even a “patent troll.”<sup>100</sup> A significantly larger proportion – 80% – of the 166 items relating to the *NTP* litigation mentioned the possibility that an injunction barring continuation of BlackBerry® service would issue, or might have issued, had the case not settled. And of those 80% (132) of the study items relating to the *NTP* case, 76% (100) of them mentioned the possibility of such an injunction in the first five paragraphs of the item.

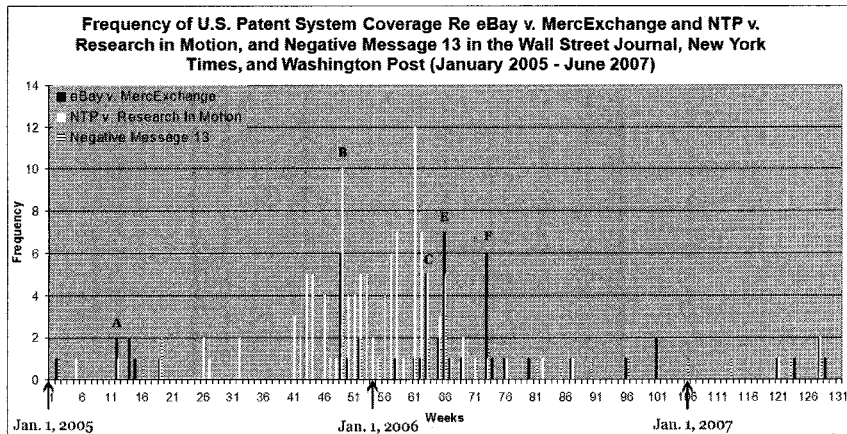
Additionally, beyond descriptive references to the *NTP* plaintiff as a “patent-holding company,” and mentions that a BlackBerry®-service-ending injunction could issue/might have issued, the media coverage leading up to and during the pendency of *eBay* at the Supreme Court also delivered the (negative) message that such companies should not be entitled to enforce their patents, or to enforce them on the same terms as other patentees, as shown in Figure 7:

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Executive Says, WASH. POST, Dec. 20, 2005, at D5 (“A top executive of Research in Motion Ltd., which makes BlackBerry e-mail devices, said yesterday that he is confident that the service will continue to work despite a high-profile patent dispute that threatens to shut down the company’s U.S. operations.”); In Brief/Virginia, L.A. TIMES, Dec. 18, 2005 (“The U.S. Patent and Trademark Office said it would try to complete with “special dispatch” a review of patents that could result in the shutdown of Research in Motion Ltd.’s BlackBerry e-mail device in the U.S.”); Ian Austen, BlackBerry Patent Case is Nearer Showdown, N.Y. TIMES, Dec. 1, 2005, at C1 (“The ruling by Judge James R. Spencer of Federal District Court in Richmond, Va., means R.I.M. will either have to renegotiate a settlement with NTP or face a shutdown of its BlackBerry wireless e-mail service in the United States, perhaps within the next month.”); Ian Austen, Court Ruling in BlackBerry Case Puts Service to U.S. Users at Risk, N.Y. TIMES, Oct. 8, 2005, at C3 (“A court decision Friday renewed the possibility that service to Blackberry wireless e-mail devices might be cut off for most users in the United States.”).

100. We included all items describing NTP, Inc. with one or more of the descriptors in this paragraph in our count of items identifying NTP, Inc. as a “patent-holding company.” 48% of the items relating to the *NTP* litigation published during the period of January 1, 2005 – the starting date for our data collection in this study – and May 15, 2006 – the date of the Supreme Court’s decision in *eBay* – and 44% of the *NTP*-related items published during the period of November 28, 2005 through May 15, 2006 (the date of the decision in *eBay*), identified NTP, Inc. as a “patent-holding company.”

Figure 7



Overall, 17% of all *NTP*-related news and editorial items in our dataset – distributed as shown in Figure 7 – included the negative message that “patents are (and shouldn’t be) awarded to/enforceable by those who don’t develop products/practice the invention.”<sup>101</sup> This was the most prevalent “message” – positive or negative – in the *NTP*-related items in our dataset.<sup>102</sup>

The next several most prevalent messages in the *NTP* coverage were also “negative.” Those messages, in order of prevalence, were:

“Poor patent quality (e.g. USPTO is too willing to grant patents, patents are too easy to get, unduly/overly broad, not reserved for genuine innovations, granted/maintained for obvious/incredible inventions.)”<sup>103</sup> 10%

101. The following excerpts from items in our dataset as a whole (i.e., including but not limited to *NTP*-related coverage) are examples of content we agreed presented this message:

“The most grating fact about many of these lawsuits is that they were brought by companies with little or no record of doing much with their patented inventions. It can seem that patent lawsuits are the last refuge of the incompetent – and an annoyingly effective refuge at that.” Rob Pegoraro, *Buying Into Patent Lawsuits*, WASH. POST, May 3, 2007, at D1.

“‘Patent trolls’ are typically companies that buy patent rights from inventors, then receive royalties from other companies who actually use the patents.” Laura Peter, *The Virtue of Patents*, WALL ST. J., Feb. 20, 2007, at A17.

102. Measured by the number of *NTP*-related items which included this message. This message was even more prevalent in *eBay*-related items. Of all the *eBay*-related news and items in our dataset, a total of 33% included the negative message that “patents are (and shouldn’t be) awarded to/enforceable by those who don’t develop products/practice the invention.”

103. The following excerpts from items in our dataset as a whole (i.e., including but not limited to *NTP*-related coverage) are examples of content we agreed presented this message:

“The U.S. Supreme Court yesterday attacked America’s glut of poor-quality patents by writing new

<i>“The patent system is broken/needs reform.”</i> <sup>104</sup>	9%
<i>“A patent on single (even incremental) invention can shut down sales of complex products / result in damage award out-of-proportion-to the contribution of the patented component.”</i> <sup>105</sup>	7%

Interestingly, several of these themes resonated in Justice Kennedy’s *eBay* concurrence. He and the three other Justices who joined his concurring opinion identified several “circumstances” which in their view “present considerations quite unlike earlier cases,” and which may justify deviating from the “traditional practice of issuing injunctions against patent infringers.”<sup>106</sup> As noted above, one such specifically identified situation involves the non-practicing patentee.<sup>107</sup> The other two “circumstances” identified in the Kennedy concurrence are cases where a product might be enjoined based on a small infringing component, and cases involving business method patents, in part, at least, because of concerns about their quality:

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rules that would make it harder to obtain and defend patents.” Patti Waldmeir, Supreme Court Sets Higher Threshold For Patents, *FIN. TIMES*, May 1, 2007, at 10.

“‘Everybody knows there are a lot of weak patents out there,’ [Professor Pamela Samuelson] said. ‘A lot of inventors take very substantial risks going out into a field of technology, and sometimes they get their foot blown off when some patent is out there like a land mine.’” Jess Bravin & Marilyn Chase, High Court Eases Way For Patent Challenges, *WALL ST. J.*, Jan. 10, 2007, at A8.

104. The following excerpts from items in our dataset as a whole (i.e., including but not limited to NTP-related coverage) are examples of content we agreed presented this message:

“Settling was a ‘pragmatic’ decision, [Jim Balsillie] said. ‘It’s not something you feel good about,’ he said, adding ‘there’s an urgent need for patent reform.’” Mark Heinzl & Amol Sharma, Getting the Message: RIM to Pay NTP \$612.5 Million to Settle BlackBerry Patent Case, *WALL ST. J.*, Mar. 4, 2006, at A1.

“Patent laws may be an inventor’s best friend, giving someone with a groundbreaking idea the means to capitalize on it. But on many levels, the U.S. patent system is profoundly flawed.” Editorial, Patent Sanity is Pending, *L.A. TIMES*, Dec. 4, 2005, at 4.

105. The following excerpts from items in our dataset as a whole (i.e., including but not limited to NTP-related coverage) are examples of content we agreed presented this message:

“As a consequence, someone who holds a patent over even a small piece of a product, service or business model could shut an entire operation down – a nice bit of leverage when it comes to negotiating a licensing fee.” Editorial, Patent Sanity is Pending, *L.A. TIMES*, Dec. 4, 2005, at 4.

“Patents that are nearly worthless by themselves can be enormously expensive to disentangle once embedded in a production process or complicated technology, the *eBay* brief asserts, giving patent owners the upper hand in extracting license fees that are higher than the patent itself is worth.” Linda Greenhouse, Justices Agree to Consider *eBay*[sic] Appeal in Patent Case, *N.Y. TIMES*, Nov. 29, 2005, at C9.

106. *eBay*, 126 S.Ct. at 1842 (Kennedy, J. et al., concurring).

107. See *supra* Part III. B. 3.

When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest. In addition injunctive relief may have different consequences for the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times. The potential vagueness and suspect validity of some of these patents may affect the calculus under the four-factor test.<sup>108</sup>

We do not suggest that Justice Kennedy's identification of non-practicing patent owners, patented components, and business method patents as potential exceptions to the "traditional practice of issuing injunctions against patent infringers"<sup>109</sup> is the direct result of media coverage relating to *NTP*. Indeed, each of Justice Kennedy's identified "circumstances" relates to an issue about which there has been significant discussion and controversy in the mass media<sup>110</sup> and elsewhere.<sup>111</sup> Our data merely shows that the newspapers we examined ran numerous stories relating to *NTP*, a company that was repeatedly described as a patent-holding firm using a patent as leverage in costly and potentially disruptive litigation. As a result of this extensive coverage, it is certainly possible that one or more of the Supreme Court Justices encountered articles relating to *NTP* in the period of time leading up to and during the *eBay* case.

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108. *eBay*, 126 S.Ct. at 1842 (Kennedy, J. et al., concurring).

109. *eBay Inc. v. MercExchange, LLC*, 126 S.Ct. 1837, 1842 (2006) (Kennedy, J. et al., concurring).

110. See *supra* notes 101, 103, and 105 and accompanying text.

111. See, e.g., Katherine E. White, Preserving the Patent Process to Incentivize Innovation in Global Economy, 13 SYRACUSE SCI. & TECH. L. REP. 27, n. 11 (2006) (quoting 151 CONG. REC. E1160-01 (Jun. 8, 2005) (statement of Rep. Berman regarding awarding injunctions to "patent trolls")); Christopher M. Holman, Biotechnology's Prescription for Patent Reform, 5 J. MARSHALL REV. INTELL. PROP. L. 318 (2006) (discussing the potential for "holdup" where the patented invention is a small component of a complex product); John R. Allison & Emerson H. Tiller, The Business Method Patent Myth, 18 BERKELEY TECH. L.J. 987 (2003) (recounting the debate over the quality of business method patents).

#### IV. CONCLUSION

It is remarkable, in and of itself, that during a two-and-a-half-year period in which the Supreme Court granted certiorari in eight patent cases, and decided seven of them, the coverage of a case it did not accept for review outstripped the coverage of each of the Supreme Court cases by more than a factor of two. And while it is not possible to determine what an individual consumer of major newspaper coverage during the pendency of *eBay* would have read or perceived about the *NTP* case or the patent system generally, this study provides a window into the general extent and content of that coverage during the period in question. That coverage, which was heavily concentrated in the seven weeks leading up to the grant of certiorari in *eBay*, and in the several months between the certiorari grant and the oral argument, contained significant discussion of particular considerations that were potentially relevant to the resolution of the question at issue in *eBay*, and ultimately expressly regarded as relevant by four of the Justices.

Regardless of any effect the media coverage of *NTP* might have had on the outcome of the *eBay* case, it is clear from our study that many of the issues raised in *eBay* and *NTP* were considered to be important by the newspapers we examined, especially those issues relating to non-practicing patent owners. As the decision in *eBay* plays out in the lower courts, these issues will continue to be analyzed and discussed in the media, creating further opportunity for the media's coverage to influence the direction of the patent system.



APPENDIX

TABLE A1: POSITIVE MESSAGE DEFINITIONS EMPLOYED IN CODING

0. The patent system<sup>112</sup> is important for/contributes to/has contributed to U.S. economic vitality/global competitiveness.
1. The patent system is necessary to/does support/spur innovation/technology development.
2. The patent system may lead to/foster disease cures.
3. The patent system (or some aspect thereof, such as the United States Patent and Trademark Office (USPTO), or a particular category of patents) is/are sound/not in need of significant reform.
4. Courts in patent cases rule in accordance with law/precedent.
5. The patent system benefits consumers (e.g., lowers prices, helps get beneficial products to market).
6. The patent system appropriately balances needs of innovators/patent owners vs. users/public/competitors.
7. The patent system rewards/encourage small inventors as well as large companies.
8. Patent system institutional actors are taking steps to improve the patent system.
9. The patent system is important/matters.
10. The Federal Circuit has brought needed stability/consistency to patent law.
11. Patent proceedings are not unduly expensive/lengthy/complicated.
12. There is not too much patent litigation.

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112. The coding manual instructs the coders to include within “the patent system” (for purposes of identifying positive or negative messages in sample items) patents, the patent law, and the institutional actors (courts, Congress, PTO) in the system. Thus, for example, in the course of coding the sample items, we read the first message in Table 2 as “The patent system/law/courts or Congress acting in patent matters/USPTO is important for/contributes to/has contributed to U.S. economic vitality/global competitiveness.”

TABLE A2: NEGATIVE MESSAGE DEFINITIONS<sup>113</sup> EMPLOYED IN CODING

0. The patent system is broken/needs reform.
1. Too many patents are being granted/increase in the number of patents as negative.
2. Poor patent quality (e.g. USPTO is too willing to grant patents, patents are too easy to get, unduly/overly broad, not reserved for genuine innovations, granted/maintained for obvious/incredible inventions).
3. The definition of what can be patented is too broad (e.g. patents shouldn't be granted (or enforced) on certain categories of subject matter, such as natural phenomena, genes, basic ideas, software, drugs/medicines, business practices, etc.
4. The USPTO is overtaxed/underfunded/understaffed.
5. The patent system is a source of uncertainty (e.g., law is too complex, what infringes is too difficult to determine), unworkable complexity (e.g. complaints about "patent thickets" or need for licenses from multiple owners), etc.
6. The patent system is skewed in favor of patent owners; patent rights are too strong/too difficult to invalidate.
7. The patent system permits collusion to reduce competition.
8. The patent system permits extortion/windfall extraction/litigation abuse/terrorizing opponents/stealing the ideas of others.
9. The patent system threatens healthcare (or other vital systems) ("scare messages").
10. A patent on single (even incremental) invention can shut down sales of complex products/result in damage award out-of-proportion-to the contribution of the patented component.
11. The patent system stifles or burdens innovation/research/technological progress/competition.

TABLE A2 CONTINUES, NEXT PAGE

113. The coding manual includes additional explanatory instructions for a number of the positive and negative message categories, but the basic, essential instruction was to employ/apply the most specific message appropriate under the circumstances. For example, if the item presents the message, "gene patents interfere with research," the coder was instructed to use negative message code 11 ("The patent system stifles or burdens innovation/research/technological progress/competition") and not negative message code 3 ("The definition of what can be patented is too broad (e.g., patents shouldn't be granted (or enforced) on certain categories of subject matter, such as natural phenomena, genes, basic ideas, software, drugs/medicines, business practices, etc.>").

12. Patents are associated with dangerous/immoral/unethical technologies (e.g. patents on humans).
13. Patents are (and shouldn't be) awarded to/enforceable by those who don't develop products/practice the invention.
14. Patent owners "own" people or parts of their bodies.
15. The patent system illegitimately reaches beyond U.S. territorial borders (e.g., U.S. patent system as "imperialist").
16. Patent litigation is too costly/too slow; there is too much patent litigation.
17. The patent system lags behind science and technology development.
18. The USPTO and its employees have financial incentives to accept/grant too many patents; patent examiners have the wrong productivity incentives.
19. The courts ignore congressional intent/controlling precedent.
20. The USPTO improperly responds to lobbying/political influence, pressure.
21. The patent system is skewed in favor of larger companies.
22. ITC proceedings are inappropriately expeditious/serve as an end-around the judicial process.
23. The patent application process is too expensive.
24. The patent system has been adversely affected by the specialized court (Fed. Cir.) and/or specialized bar.
25. The damages awarded in patent cases are excessive.
26. The patent system isn't well-suited to the modern economy.
27. Patent examiners are unqualified (underpaid, inexperienced).
28. Juries are ill-suited/unqualified to resolve patent/technical questions.