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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. The Court rejected the Federal Circuit’s “general rule . . . that a permanent injunction will issue once infringement and validity have been adjudged.” It unanimously held, instead, that the four-factor test that governs the availability of permanent injunctive relief generally “appl[ies] with equal force to disputes arising under the Patent Act.”

* Board of Advisors, Professor of Law, and Senior Associate Dean for Academic Affairs, Syracuse University College of Law (corresponding author). I acknowledge, with gratitude, the research grant support provided for this project by the Institute for the Study of the Judiciary, Politics, and the Media at Syracuse University (http://jpm.syr.edu) and the Syracuse University College of Law. I can be reached at ladolak@law.syr.edu.

** Ph.D. (2006), Biochemistry, SUNY Upstate Medical University, J.D. Candidate 2009, Syracuse University College of Law.

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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. 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.’”

However, because the essence of the patent right is the “right to exclude others from making, using, offering for sale, or selling” the invention, 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. 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.

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


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


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.


relating to the availability of injunctive relief, the Court expanded access to declaratory relief, introduced greater flexibility into obviousness analysis, and limited the extraterritorial reach of U.S. patent law. We examined media coverage of these and other developments relating to the patent system to determine, 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, 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 methodology. Content analysis techniques have been used to examine the content of a wide range of works, including news accounts, advertisements, music

12. KSR, 127 S.Ct. 1727.
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.
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,\textsuperscript{18} political communications, electronic messages,\textsuperscript{19} and legal texts, such as judicial opinions.\textsuperscript{20}

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\textsuperscript{21} 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,\textsuperscript{22} including the Supreme Court's consideration of the eBay case.

\textbf{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 \textit{New York Times}, the \textit{Washington Post}, the \textit{Wall Street Journal}, and the \textit{Los Angeles Times}. These papers enjoy some of the very highest circulation numbers

\begin{flushleft}
\textsuperscript{18} DAVID DEACON, MICHAEL PICKERING, PETER GOLDS \& GRAHAM MURDOCK, \textit{RESEARCHING COMMUNICATIONS: A PRACTICAL GUIDE TO METHODS IN MEDIA AND CULTURAL ANALYSIS} 116 (1999). \\
\textsuperscript{19} KIMBERLY A. NEUENDORF, \textit{THE CONTENT ANALYSIS GUIDEBOOK} 205-07 (2002). \\
\textsuperscript{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. \\
\textsuperscript{22} See supra notes 10-14 and accompanying text.
\end{flushleft}
for U.S. newspapers. 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

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

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: [BurrellesLuce Top 100 Daily Newspapers, http://www.burrellesluce.com/top100/](http://www.burrellesluce.com/top100/) (last visited October 10, 2007).
occupations. The study thus includes major newspapers having the potential to influence both public opinion and policy-making.

2. Sample Definition

To construct our sample, 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”). 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:

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


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

This “culling” process produced a dataset having a total of 607 items for review in the study.

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.


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 D03), 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, 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. For each item, we collected basic bibliographic information, 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. Specifically, the positive and negative message measurement criteria were generated by the dataset items themselves. This was done to ensure that the criteria were tailored to the specific context of the patent system being studied.

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. This preliminary work was conducted by one of us (Dolak) and her former research assistant over the course of several months. It facilitated the creation and refinement of a set of 29 (total) positive and negative message categories. 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. 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
positive or negative messages in individual items), we confined our data analyses to instances of 100% agreement between us. 41

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 42 we distinguish between news and editorial coverage, we make no such distinction here. As noted above, 43 and as discussed in further detail below, 44 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, 45 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

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." 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.

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

47. Id.
influence on the reader.\textsuperscript{48} 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:

- \textit{Financial Times} 21\%
- \textit{Los Angeles Times} 11\%
- \textit{New York Times} 6\%
- \textit{Wall Street Journal} 13\%
- \textit{Washington Post} 17\%

Further, in each newspaper, eBay received more coverage\textsuperscript{49} 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 \(\frac{1}{2}\) 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\textsuperscript{®} 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\textsuperscript{50} 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 \textit{Financial Times} and the \textit{Washington Post}\textsuperscript{51} Specifically, 166 of the 607 total items (27\%) referenced NTP,

\textsuperscript{48} See, e.g., Walter Lippmann, \textit{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.").

\textsuperscript{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.

\textsuperscript{50} Supra note 16 and accompanying text.

\textsuperscript{51} In the \textit{Financial Times} and the \textit{Washington Post}, NTP was only featured 1 \(\frac{1}{2}\) 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

<table>
<thead>
<tr>
<th>Newspaper</th>
<th>NTP v. Research in Motion</th>
<th>eBay v. MercExchange</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>News</td>
<td>Unsigned Editorial</td>
</tr>
<tr>
<td><strong>All Newspapers</strong></td>
<td>28%</td>
<td>30%</td>
</tr>
<tr>
<td><strong>Financial Times</strong></td>
<td>26%</td>
<td>44%</td>
</tr>
<tr>
<td><strong>New York Times</strong></td>
<td>25%</td>
<td>20%</td>
</tr>
<tr>
<td><strong>Los Angeles Times</strong></td>
<td>22%</td>
<td>40%</td>
</tr>
<tr>
<td><strong>Wall Street Journal</strong></td>
<td>33%</td>
<td>25%</td>
</tr>
<tr>
<td><strong>Washington Post</strong></td>
<td>29%</td>
<td>0%</td>
</tr>
</tbody>
</table>

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*. 

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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. Bennett, for example, identifies “personalization” and “dramatization” as two such criteria. 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.”

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.

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

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—a theme reiterated in an overwhelming number of the news

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\textsuperscript{60} – fits tidily into the personalization rationale.\textsuperscript{61} In addition, other aspects of the "NTP story", including the parties' perspectives on the propriety of each other's actions in the case,\textsuperscript{62} and the controversy over infringement suits by patent owners who do not manufacture or sell products,\textsuperscript{63} 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\textsuperscript{64} – received more than twice as much coverage in our study newspapers than any of the eight patent cases that \textit{were} considered by the Supreme Court during the period we examined.\textsuperscript{65} 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.\textsuperscript{66} As discussed below, this overlap was potentially significant, and is, at the very least, interesting.

\textsuperscript{60} See infra Part III.B.4.

\textsuperscript{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 (last visited Dec. 10, 2007).

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{64} Research in Motion, Ltd. v. NTP, Inc., 546 U.S. 1157 (2006) (denying certiorari).

\textsuperscript{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).

\textsuperscript{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” – is eligible for injunctive relief. The issue was vigorously debated in the briefs of the parties and the amici, and the district court and Federal Circuit had expressly split on the issue.

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.” According to the Court:

"Some 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

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.\textsuperscript{71}

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.”\textsuperscript{72} 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.\textsuperscript{73}

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.\textsuperscript{74} Recently, for example, the Federal Circuit affirmed a district court order imposing an “ongoing royalty” in place of a permanent injunction,\textsuperscript{75} where the district court’s ruling was based in part on the fact that the patentee “does not actually manufacture any goods.”\textsuperscript{76}

\textsuperscript{71.} Id.
\textsuperscript{72.} Id. at 1842 (Kennedy, J. et al., concurring).
\textsuperscript{73.} Id. (internal citations omitted).
\textsuperscript{75.} Paice LLC v. Toyota Motor Corp., 504 F. 3d 1293, 1313-1316 (Fed. Cir. 2007).
\textsuperscript{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.\(^\text{77}\) 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.\(^\text{78}\) 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.\(^\text{79}\)

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.\(^\text{80}\) 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.\(^\text{81}\) 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,\(^\text{82}\) 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,”\(^\text{83}\) and most items


\(^{78}\) See supra note 7 and accompanying text.


\(^{81}\) See Jennifer Kahaululio 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.84 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,85 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:

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

<table>
<thead>
<tr>
<th>Label</th>
<th>Week</th>
<th>Corresponding Period</th>
<th>Event(s)</th>
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<tbody>
<tr>
<td>A</td>
<td>12</td>
<td>Mar. 13 - 19, 2005</td>
<td>First NTP v. Research In Motion Settlement[^86]</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>First NTP v. Research in Motion Settlement Rejected[^88]</td>
</tr>
<tr>
<td>C</td>
<td>63</td>
<td>Mar. 5 - Mar. 11, 2006</td>
<td>NTP v. Research in Motion Final Settlement[^89]</td>
</tr>
</tbody>
</table>

[^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.").


[^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.").
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<tr>
<th>Label</th>
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<tr>
<td>D</td>
<td>65</td>
<td>Mar. 19 - Mar. 25, 2006</td>
<td>LabCorp v. Metabolite Oral Argument&lt;sup&gt;90&lt;/sup&gt;</td>
</tr>
<tr>
<td>E</td>
<td>66</td>
<td>Mar. 26 - Apr. 1, 2006</td>
<td>eBay v. MercExchange Oral Argument&lt;sup&gt;91&lt;/sup&gt;</td>
</tr>
<tr>
<td>F</td>
<td>73</td>
<td>May 14 - May 20, 2006</td>
<td>eBay v. MercExchange Decision&lt;sup&gt;92&lt;/sup&gt;</td>
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<tr>
<td>G</td>
<td>101</td>
<td>Nov. 26 - Dec. 2, 2006</td>
<td>KSR v. Teleflex Oral Argument&lt;sup&gt;93&lt;/sup&gt;</td>
</tr>
<tr>
<td>H</td>
<td>113</td>
<td>Feb. 18 - Feb. 24, 2007</td>
<td>Microsoft v. AT&amp;T Oral Argument&lt;sup&gt;94&lt;/sup&gt;</td>
</tr>
<tr>
<td>I</td>
<td>123</td>
<td>Apr. 29 - May 5, 2007</td>
<td>KSR&lt;sup&gt;95&lt;/sup&gt; &amp; Microsoft&lt;sup&gt;96&lt;/sup&gt; Decisions</td>
</tr>
</tbody>
</table>

**Figure 1**

*Media Coverage of the U.S. Patent System in All Newspapers (January 2005 - June 2007)*

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.

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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.
92. *Id.*
95. *KSR*, 127 S.Ct. at 1727.
96. *Microsoft*, 127 S.Ct. at 1746.
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 held its oral argument in eBay, 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:

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:
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 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 5 shows the frequency of U.S. Patent System coverage regarding eBay v. MercExchange and NTP v. Research in Motion in the Wall Street Journal, New York Times, and Washington Post (January 2005 - June 2007).

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

Figure 6 shows the median frequency of U.S. Patent System coverage regarding eBay v. MercExchange and NTP v. Research in Motion in the Wall Street Journal, New York Times, and Washington Post (January 2005 - June 2007).

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," or similar descriptor, and to the potential injunction that would make "all our BlackBerry technology . . . go dark."

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."100 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:

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

Research in Motion, and Negative Message 13 in the Wall Street Journal, New York
Times, and Washington Post (January 2005 - June 2007)

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.”101 This was
the most prevalent “message” – positive or negative – in the NTP-related
items in our dataset.102

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.)”103

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,

“‘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.

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
"The patent system is broken/needs reform."104

"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."105

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.”106 As noted above, one such specifically identified situation involves the non-practicing patentee.107 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:

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.\(^\text{108}\)

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"\(^\text{109}\) 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\(^\text{110}\) and elsewhere.\(^\text{111}\) 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.

\(^{108}\) eBay, 126 S.Ct. at 1842 (Kennedy, J. et al., concurring).


\(^{110}\) See supra notes 101, 103, and 105 and accompanying text.

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.
TABLE A1: POSITIVE MESSAGE DEFINITIONS EMPLOYED IN CODING

0. The patent system\textsuperscript{112} 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.

\textsuperscript{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\textsuperscript{113} EMPLOYED IN CODING

<p>| | |</p>
<table>
<thead>
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<tbody>
<tr>
<td>0.</td>
<td>The patent system is broken/needs reform.</td>
</tr>
<tr>
<td>1.</td>
<td>Too many patents are being granted/increase in the number of patents as negative.</td>
</tr>
<tr>
<td>2.</td>
<td>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).</td>
</tr>
<tr>
<td>3.</td>
<td>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.</td>
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<tr>
<td>4.</td>
<td>The USPTO is overtaxed/underfunded/understaffed.</td>
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<tr>
<td>5.</td>
<td>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.</td>
</tr>
<tr>
<td>6.</td>
<td>The patent system is skewed in favor of patent owners; patent rights are too strong/too difficult to invalidate.</td>
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<td>7.</td>
<td>The patent system permits collusion to reduce competition.</td>
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<td>8.</td>
<td>The patent system permits extortion/windfall extraction/litigation abuse/terrorizing opponents/stealing the ideas of others.</td>
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<td>9.</td>
<td>The patent system threatens healthcare (or other vital systems) (“scare messages”).</td>
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<td>10.</td>
<td>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.</td>
</tr>
<tr>
<td>11.</td>
<td>The patent system stifles or burdens innovation/research/technological progress/competition.</td>
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</table>

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