Media Portrayals of the United States Patent System

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I. Introduction

The recent dramatic expansion of intellectual property rights (IPR) acquisition and exploitation in the United States has made IPR a pressing issue of policy debate and a regular item on the Supreme Court's docket. The surge in IPR activity has also drawn increased media attention, including extensive coverage of several high-profile IPR disputes. This study of how the national and international mass media portrays intellectual property rights assesses this coverage, examining the images of IPR constructed by the media as well as how these media images have shaped popular understanding and influenced judicial decisionmaking.

I am presently focusing on selected major newspaper coverage from the last few years, tracking the incidence and nature of errors and negative, positive, and neutral messages relating to the United States patent system. Ultimately, I plan to expand my research to include additional media sources, time periods, and even other categories of IPR, and to consider questions such as: Are different types of IPR owners represented favorably or unfavorably in the media? Which IPR-related conduct (e.g., acquisition, enforcement, licensing) does the media laud or condemn, and under what circumstances? Is there evidence that media portrayals influence judicial decisionmaking or legislative policy-making?

In the last few years, the U.S. patent system has undergone potentially significant development, and additional sweeping reforms are pending. The Supreme Court has decided important cases relating to the availability of injunctive[1] and declaratory relief,[2] the obviousness doctrine,[3] and the extraterritorial reach of U.S. patent law.[4] And proposed legislation would create

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[1] eBay Inc. v. MercExchange, LLC, 126 S.Ct. 1837 (2006).

[2] MedImmune, Inc. v. Genentech, Inc. , 127 S.Ct. 764 (2007).

[3] KSR Int'l Co. v. Teleflex Inc., 127 S.Ct. 1727 (2007).

[4] Microsoft Corp. v. AT&T Corp., 127 S.Ct. 1746 (2007).

first-to-file rights, limit patent damages and venue, and authorize post-grant opposition proceedings.[5]

Few, if any, would argue that the system is perfect. But some news and editorial coverage describes a system in serious disrepair. *"Patent Protection a Threat to Innovation."*[6] *"Patent Lunacy."*[7] *"Court Eases Patent 'Doomsday.'"*[8] *"Supreme Court Tackles US Patent Pandemic."*[9] *"U.S. Patent System Has Run Aground."*[10] These, admittedly, are some of the more apocalyptic among the headlines of news and editorial items discussing recent patent law developments and other aspects of the patent system. But to what extent does the media present the patent system as in need of reform? What problems – real or perceived – get the most media attention? What, according to the media, does the patent system do right?

These are some of the questions this study is intended to answer. The study will also facilitate consideration of such inquiries as:

(1) what is the prevalence and nature of erroneous coverage of the patent system?

(2) which patent law issues and patent disputes get the most – and the most positive or negative – media coverage?

(3) do major U.S. and international newspapers differ in the quality or tenor of their coverage of the patent system?

I will also look for evidence of the effects of media coverage on judicial decisionmaking and legislative activity.

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[5] *See* S. 1145, 110th Cong., 1st Sess. (2007); H.R. 1908, 110th Cong., 1st Sess. (2007) ("Patent Reform Act of 2007").

[6] Eric Reguly, *Patent Protection a Threat to Innovation*, GLOBE & MAIL, January 5, 2006, at B2.

[7] *Patent Lunacy*, ST. LOUIS POST-DISPATCH, April 8, 2006, at A45.

[8] Verne Kopytoff, *Court Eases Patent 'Doomsday'*, S.F. CHRON., May 16, 2006, at C1.

[9] Patti Waldmeir, *Supreme Court Tackles US Patent Pandemic*, FIN. TIMES, November 16, 2006, at 8.

[10] *U.S. Patent System Has Run Aground*, BOSTON HERALD, July 24, 2005, at 26.

II. Study Design

This study is examining media accounts – news stories and editorial pieces – relating to the U.S. patent system published during the thirty month period from January 1, 2005 through June 30, 2007. This period corresponds with the recent period of significant legislative and judicial reform activity described above, and thus provides a valuable window into the substance of the patent system-related content delivered to the public, including those who can potentially influence and effect change in the system, such as legislators, interest group members, and judges.

A. Study Population and Sampling

As noted above, the goal of this study is to analyze recent major newpaper coverage of the U.S. patent system. This study is based on news and editorial items from several major newspapers, specifically, the New York Times, Washington Post, Wall Street Journal, and Financial Times (UK). The first three are major U.S. newspapers, with significant readership and potential influence over public opinion and policy-making. In addition, some studies have found that the language employed by these three outlets displays a difference in political leanings among them, with the New York Times and Washington Post as comparatively liberal and the Wall Street Journal as comparatively conservative. To the extent that a difference in political ideology exists among these outlets, this study will consider whether the difference is reflected in their coverage of the U.S. patent system. The Financial Times is included as one example of how the U.S. patent system is portrayed in media outlets outside the country.

Several considerations influenced the sample definition. As noted above, the study period was selected because it corresponds with a period of newsworthy developments relating to the patent system. A sample which includes all instances of the word "patent" in the selected media sources is impracticably large (on the order of 5000 items), and includes a large number of irrelevant items, such as obituaries of patent professionals and inventors, and discussions of the resurgence of patent leather footwear. A search targeting coverage of patent litigation and other patent-related disputes yields a more manageable sample, and one that is potentially meaningful because a significant portion of media coverage of the patent system pertains specifically to development in patent disputes. However, a review of news and editorial items containing the word "patent" published during a randomly-selected several months-long period revealed that a selection focused on patent disputes omits a significant number of items relating to other aspects of the patent system. For example, such a sample definition excludes a significant quantity of coverage of the activities of the United States Patent and Trademark Office (USPTO), the federal agency responsible for the processing and issuance of patent applications.

Instead, a search 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 with principal responsibility for patent policy – 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 – was selected for this study. A number of items produced by the search are being excluded from the study, including, for example, obituaries and other personal tributes, newspaper section compilations of brief summaries of full-text news items (e.g., the New York Times "News Summary" and "Today in Business" summary sections), items pertaining to patent homonyms (e.g., features about patent leather pumps), items in which the reference to "patent(s)" appears only in keyword or other indexing features of electronic database versions of print news and editorial items, and other items that make only passing reference to patents (e.g., a March 17, 2006 New York Times article relating to the lobbying business of former Attorney General John Ashcroft, which includes mention that "the Ashcroft group will provide public relations advice for a patent infringement case to come before the Supreme Court." [11]) I estimate that the study will include approximately 700 news and editorial items.[12]

This study sample is not only sizeable. By virtue of its design, it includes significant and substantial coverage from the study period of all of the important aspects of the U.S. patent system, including patent procurement at the USPTO, the resolution of significant patent infringement disputes in the courts, and patent reform initiatives in the Congress.

B. Item Coding

Each item in the study sample is being independently coded by me and my research assistant.[13] We are collecting basic bibliographic information (e.g., publishing newspaper and date of publication) about each item, are coding the items so as to be able to distinguish between editorial discussion and news coverage, and are attempting to distinguish between general news and business/financial news. We are also tracking the particular patent disputes and technology areas to which the coverage relates.

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[11] Leslie Wayne, *Same Washington, Different Office: John Ashcroft Sets Up Shop As Well-Connected Lobbyist*, N.Y. TIMES, March 17, 2006, Section C.

[12] If it is necessary to reduce the number of items included in the study, the study will be based on a random sub-sample of this sample (e.g., sample items published on even-numbered dates).

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We are each independently and separately evaluating the headline and body of each item for how it portrays the patent system (i.e., as "neutral," "positive," "negative," or "balanced"). In addition, we are collecting data regarding the positive and negative "messages" contained in each item, such as:

Positive Message Examples	**Negative Message Examples**
• The patent system is important for contributes/has contributed to U.S. economic vitality/global competitiveness • The patent system is necessary to/does support/spur innovation/technology development • The patent system is sound/not in need of significant reform • Courts in patent cases rule in accordance with law/precedent • The patent system benefits consumers • The patent system appropriately balances needs of innovators/patent owners vs. users/public/competitors • The Federal Circuit has brought needed stability, consistency to patent law	• The patent system is broken/needs reform • Poor quality patents are being issued • The definition of what can be patented is too broad • The USPTO is overtaxed/ underfunded/understaffed • The patent system is skewed in favor of patent owners; patent rights are too strong • The patent system stifles or burdens innovation/research/technological progress/competition • Patents are (and shouldn't be) awarded to/enforceable by those who don't develop products/practice the invention • Patent litigation is too costly/too slow; there is too much patent litigation

Such evaluations are, of course, subjective to some degree. But several factors will contribute to the reliability of the reported results. First, the positive and negative message categories that we are using in our coding were developed from a preliminary review of a fairly extensive (~250 item) set of news articles and editorial pieces, which set overlaps with the study sample, but which includes items outside the sample. This preliminary work was conducted by my former research assistant[14] and me over the

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course of several months and facilitated the creation and refinement of a set of approximately 30 positive and negative message categories.[15] Although this effort does not eliminate the potential for subjective disagreement among coders, it did generate what we believe to be a reasonably "workable" set of message categories.

Further, as noted above, two coders are independently reviewing each news and editorial item included in this study. Most significantly, however, positive and negative "portrayals" and "messages" will only be reported to the extent my co-coder and me agree.[16] In other words, for example, unless my co-coder and I agree that a given news article or headline presents, overall, a positive or negative portrayal of the patent system, we are not including that item in our tabulation of positive or negative (respectively) articles or (headlines) about the patent system. Similarly, we are not "counting" an item as including a particular positive or negative message about the patent system unless my co-coder and I both agree that the item delivers that particular message. This method, of course, tends to skew my reported results toward greater neutrality or balance in the coverage, but this, I believe, is worth the resulting gain in reliability.

Finally, in addition to collecting basic bibliographic data and information relating to the prevalence and nature of positive and negative coverage of the patent system, we are tracking factual errors in coverage pertaining to the patent system, as well as reported damage verdicts and settlement amounts.

III. Conclusion

My goals are to collect meaningful data regarding, and provide useful analysis of, recent major media coverage of the U.S. patent system. This study should facilitate a variety of data analyses, and provide a useful baseline for comparative analyses regarding other media outlets, time periods, and aspects of intellectual property rights.

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[15] 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 (2002).

[16] The results of this study will be presented at an upcoming conference sponsored by the Institute for the Study of the Judiciary, Politics, and the Media at Syracuse University (http://jpm.syr.edu). The conference, entitled "Creators vs. Consumers: The Rhetoric, Reality and Reformation of Intellectual Property Law and Policy," is scheduled for October 26, 2007, and the conference proceedings will be published in a symposium issue of the Syracuse Law Review.