

THE UNITED STATES PATENT SYSTEM IN THE MEDIA MIRROR

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INTRODUCTION

The recent media coverage of the United States’ patent system has caught the attention of scholars, practitioners and entrepreneurs.¹ In particular, commentators have referenced media coverage that casts the patent system in a negative light.² While some commentators seem to suggest that the coverage accurately reflects fundamental systemic problems,³ others believe that some media accounts are inaccurate, or at

1. See, e.g., Matthew Sag & Kurt Rohde, *Patent Reform and Differential Impact*, 8 MINN. J. L. SCI. & TECH. 1, 3 (2007) (“Calls for reform from the technology sector have begun to resonate in the media and in the Supreme Court . . .”); Robert A. Armitage, *The Conundrum Confronting Congress: The Patent System Must be Left Untouched While Being Radically Reformed*, 5 J. MARSHALL REV. INTELL. PROP. L. 268, 269 (2006) (“From the vantage point of some elements in the media, there is much that appears to be wrong with our patent laws—and much to be fixed.”).

2. See, e.g., Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 834 (2007) (“In the public health debate, the pharmaceutical industry and the intellectual property system are often demonized, and the mass media are filled with ‘sound bites’ describing the patents system as ‘evil’ and Big Pharma as ‘greedy.’” (citations omitted)); Doug Lichtman & Mark A. Lemley, *Rethinking Patent Law’s Presumption of Validity*, 60 STAN. L. REV. 45, 47 n.5 (2007) (“Even the mass media has picked up on the theme, frequently poking fun at PTO mistakes that are so obvious that a lay audience can appreciate the errors.”).

3. See, e.g., William A. Drennan, *The Patented Loophole: How Should Congress Respond to this Judicial Invention?*, 59 FLA. L. REV. 229, 286 (2007) (“The popular press frequently comments on the bad patent problem.”); Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One Not To)*, 48 B.C. L. REV. 149, 149 (2007) (“The U.S. Congress, the courts, scholars, and the press have focused more and more attention on what is shaping up to be the central public policy problem in intellectual property (‘IP’) law today: the problem of holdup by patent owners, particularly but not exclusively in the context of standard setting.”).

least overstate problems in the system.⁴

Implicit in all of this commentary is the notion that what the media says about the patent system matters—that it shapes public understanding and may even influence the development of legal policymaking.

Such concepts are not new or particularly controversial. The study of media effects extends back over a century, although scholarly attitudes about the effect of media influence on public opinion have fluctuated.⁵ The essence of the extant theory is that the media constructs, or at least shapes, the frame of reference within which media consumers understand and debate public issues and events.⁶ Journalists “frame” the news, although perhaps not deliberately,⁷ by “select[ing] some aspects of a perceived reality and mak[ing] them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described.”⁸

Scholars have considered the effects of mass media on a wide variety of public issues, such as campaign agendas,⁹ foreign policy,¹⁰ public health policy,¹¹ and European integration.¹² In the realm of law, researchers have

4. See, e.g., Raymond P. Niro, *Who is Really Undermining the Patent System—“Patent Trolls” or Congress?*, 6 J. MARSHALL REV. INTELL. PROP. L. 185, 185-87 (2007) (illustrating how the debate about patent “trolls” (see *infra* note 108 and accompanying text) is playing out in the press by citing, and addressing, media critiques); Posting of Dennis Crouch to Patently-O, Patent Law Blog, http://www.patentlyo.com/patent/2006/03/does_the_wall_s.html (Mar. 1, 2006) (critiquing an editorial in the Wall Street Journal).

Some headlines, in particular, have invoked significantly negative imagery. See, e.g., Patti Waldmeir, *Supreme Court Tackles US Patent Pandemic*, FIN. TIMES (London), Nov. 16, 2006, at 8; Verne Kopytoff, *Court Eases Patent ‘Doomsday’*, S.F. CHRON., May 16, 2006, at C1; Editorial, *Patent Lunacy*, ST. LOUIS POST-DISPATCH, Apr. 8, 2006, at A45; Eric Reguly, *Patent Protection a Threat to Innovation*, GLOBE & MAIL (Canada), Jan. 5, 2006, at B2; Editorial, *U.S. Patent System Has Run Aground*, BOSTON HERALD, July 24, 2005, at 26.

5. See generally DENIS MCQUAIL, *MASS COMMUNICATION THEORY: AN INTRODUCTION* (1994).

6. GAYE TUCHMAN, *MAKING NEWS: A STUDY IN THE CONSTRUCTION OF REALITY* 182-217 (1978).

7. Julie L. Andsager & Angela Powers, *Social or Economic Concerns: How News and Women’s Magazines Framed Breast Cancer in the 1990s*, 76 JOURNALISM & MASS COMM. Q. 531, 533 (1999).

8. Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM. 51, 52 (1993).

9. See generally Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OPINION Q. 176 (1972).

10. See generally ROBERT M. ENTMAN, *PROJECTIONS OF POWER: FRAMING NEWS, PUBLIC OPINION, AND U.S. FOREIGN POLICY* (2004).

11. See generally Andsager & Powers, *supra* note 7.

12. See generally Jochen Peter, *Our Long ‘Return to the Concept of Powerful Mass Media’—A Cross-National Comparative Investigation of the Effects of Consonant Media*

documented and analyzed media effects on public understanding of such issues as tort reform,¹³ the scope and significance of United States Supreme Court opinions,¹⁴ and criminal justice policy.¹⁵ Beyond shaping the public's "legal knowledge,"¹⁶ media coverage can directly or indirectly influence legal policy.¹⁷

Even in the absence of evidence that media coverage has fueled a particular law reform movement, examinations of media content pertaining to the law are constructive, given the extent to which the public experiences and perceives legal culture from and through the media.¹⁸ And the more esoteric the subject, the more integral the role of the media in constructing public understanding.¹⁹

This study examines recent major newspaper coverage of the U.S.

Coverage, 16 INT'L J. PUB. OPINION RES. 144 (2004).

13. See generally WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

14. See generally Paul W. Jamieson, *Lost in Translation: Civic Journalism's Applicability to Newspaper Coverage of the U.S. Supreme Court*, 20 COMM. & L. 1 (1998).

15. See generally Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006); Susan Bandes, *Commentary, Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004).

16. HALTOM & MCCANN, *supra* note 13, at 11 ("[K]nowledge of and about law is routinely produced, reproduced, and reconstructed through the complex circuitry of mass-mediated culture.").

17. See, e.g., *id.* at 272-81 (concluding that mass media-produced legal knowledge has shaped the public tort reform agenda by influencing the general public and policy-maker elites alike); Beale, *supra* note 15 at 446-52 (arguing that the news media are significantly responsible for increased public support for punitive criminal justice policies).

In their analysis of the media's role in shaping the tort reform debate, Haltom and McCann conclude that, "the 'national mood' itself is hardly authentic or natural, but is itself a product of ubiquitous processes by which mass media manufacture knowledge. And through this process the familiar narratives *about* law have increasingly become translated through reform measures *into* official law itself." HALTOM & MCCANN, *supra* note 13, at 280-81 (emphasis in original) (footnote omitted).

18. See, e.g., Daniel E. Ho & Kevin M. Quinn, *Assessing Political Positions of Media*, at 6, available at <http://ssrn.com/abstract=997428> (noting that "much of what the public learns about the [Supreme] Court comes from media outlets interpreting the decisions and workings of the Court" and that therefore, newspaper editorials about Court decisions "shed considerable light on the public's understanding of the Court."); Bryna Bogoch & Yifan Holzman-Gazit, *Mutual Bonds: Media Frames and the Israeli High Court of Justice*, 33 L. & SOC. INQUIRY 53, at 54 (2008) ("Because the media shapes the public agenda and constructs the legitimacy of substantive issues and institutions through the frames it uses, public knowledge, awareness, and respect for judicial institutions are associated with the scope and nature of media coverage." (citations omitted)). Bogoch and Holzman-Gazit note that the media is "an important resource for legal professionals and members of the political elites as well." *Id.*

19. See Andsager & Powers, *supra* note 7, at 534 ("For the most part, the media are the public's only contact with technical fields.").

patent system. The system is currently undergoing significant scrutiny by legislative and judicial policy-makers. Policy debates are playing out in the media²⁰ as well as in the halls of Congress²¹ and Supreme Court amicus briefs.²² Because of the “power of legal lore”²³ in shaping public understanding, and the potential effects on law reform, it is worth knowing what the public is learning from the media about the patent system.

We thus set out to systematically study major newspaper coverage of the patent system, with particular emphasis on the nature and extent of positive and negative portrayals of, and particular messages about, the patent system. We sought to learn, for example:

- Does the media portray the patent system as in need of reform? In what way(s)?
- What issues receive the most media attention?
- Does coverage of the patent system vary among individual newspapers?

To answer these questions, we attempted to isolate a large sample of news and editorial items that pertained to the United States patent system from a diverse selection of newspapers. Our study methodology is described in detail below.

I. STUDY DESIGN/METHODOLOGY

This study employed content analysis methodology.²⁴ Content analysis techniques have been used to examine the content of a wide range of works, including news accounts, advertisements, music videos, children’s television,²⁵ political communications, electronic messages,²⁶

20. See *supra* notes 1-4 and accompanying text. A recent examination of the LexisNexis Major Newspaper database revealed a significant increase in the number of articles discussing “patent reform” during 2006 and 2007 as compared with the previous 15 years. Posting of Dennis Crouch to Patently-O, Patent Law Blog, <http://www.patentlyo.com/patent/2007/07/patent-reform-2.html> (July 19, 2007) [hereinafter Patently-O, July 19, 2007].

21. See *infra* note 35.

22. As discussed *infra*, the Supreme Court has accepted a total of eight patent cases for review during its last three (2004-05, 2005-06, and 2006-07) terms. See *infra* notes 31-34 and accompanying text.

23. HALTOM & McCANN, *supra* note 13 at 277.

24. “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).

25. DAVID DEACON ET AL., RESEARCHING COMMUNICATIONS: A PRACTICAL GUIDE TO METHODS IN MEDIA AND CULTURAL ANALYSIS 116 (1999).

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

and legal texts, such as judicial opinions.²⁷

We examined major newspaper content—news accounts and editorial pieces—published during the last several years, relating to the U.S. patent system.²⁸ Specifically, we reviewed news and editorial items²⁹ from selected major newspapers published during the period of January 1, 2005 through June 30, 2007.³⁰ This recent two-and-a-half-year period has seen significant legislative and judicial activity relating to key aspects of the U.S. patent system.

In its last two terms (2005-06 and 2006-07), the Supreme Court has decided important cases relating to the availability of injunctive³¹ and declaratory relief,³² the obviousness doctrine,³³ and the extraterritorial reach of U.S. patent law.³⁴ And during each of the present and immediate-

27. See generally Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions* (Wake Forest Univ. Legal Studies, Working Paper No. 913336, 2006), available at <http://ssrn.com/abstract=913336> (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).

28. Haltom and McCann point out that “the print media shape the agenda for other news media and for mass culture generally” and observe that scholars have argued that “newspaper accounts are viewed as far more serious and reliable, more true and objective” as compared with television news. HALTOM & MCCANN, *supra* note 13, at 18. As they further observe, newspaper content is electronically accessible, facilitating systematic study. *Id.*

29. “Item” as used herein means an individual news article or editorial piece. For example, an unsigned editorial by a newspaper editorial board, an op-ed, or a single letter to the editor each qualifies as an “item.”

30. We have begun a retrospective longitudinal study of patent system-related media coverage. Our longitudinal study will facilitate a comparative historical analysis regarding the data reported here.

31. *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1841 (2006).

32. *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 777 (2007).

33. *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1733 (2007).

34. *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1751-52 (2007).

In addition to these four decisions, the Court decided three other patent cases during the period of our study. See *Illinois Tool Works, Inc. v. Indep. 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); *Merck KGaA v. Integra LifeSciences I, Ltd.*, 545 U.S. 193, 208 (2005) (interpreting the patent statute’s safe harbor provision relating to the development and submission of data to the Food & Drug Administration). The Court also granted certiorari in an eighth patent case during this period, but ultimately dismissed the writ of certiorari as “improvidently granted.” *Lab. Corp. of Am. v. Metabolite Lab., Inc.*, 126 S. Ct. 2921, 2921 (2006) (per curiam). Even the latter case, however, resulted in an opinion on the merits by three justices. *Id.* (Breyer, J., dissenting).

past congressional sessions, comprehensive patent reform legislation has been proposed, revised, and debated.³⁵ The current pending 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.³⁶ There has not been a more significant period of change—and potential change—in the U.S. patent system in at least forty years.³⁷

The study period thus provides a valuable window into the substance of the patent-system-related media content delivered to the public. As noted above, the more esoteric the subject, the more media representations influence public perceptions.³⁸ Patent law and policy certainly qualify as subjects that most people encounter only through the media,³⁹ and some mass media outlets have recently given increased attention to the patent system.⁴⁰ Thus, it is likely that some members of the public received their

35. See, e.g., Patent Reform Act of 2007, S. 1145, H.R. 1908, 110th Cong. (1st Sess. 2007); Patent Reform Act of 2006, S. 3818, 109th Cong. (2d Sess. 2006); Patents Depend on Quality Act of 2006, H.R. 5096, 109th Cong. (2d Sess. 2006); Patent Reform Act of 2005, H.R. 2795, 109th Cong. (1st Sess. 2005).

36. H.R. 1908.

37. See, e.g., Kevin W. Kirsch & David A. Mancino, *Winds of Change in US Patent Law*, 19 INTELL. PROP. & TECH. L.J. 1, 1 (2007) (“US patent law may be experiencing its most drastic upheaval in history. There recently have been, and there continue to be, a number of legal decisions, proposed statutory changes, and rule changes enormously affecting US patent laws.”); Susan Decker, *Microsoft Verdict, Congress May Spur Patent Changes*, BLOOMBERG, Mar. 13, 2007, available at <http://www.bloomberg.com/apps/news?pid=20601103&sid=aQD2BNMau7jM> (“A record \$1.52 billion verdict against Microsoft last month, the Democrats’ takeover of Congress and U.S. Supreme Court rulings are building momentum for the biggest changes in U.S. patent law since 1952.”).

38. “Media images are especially potent when they involve aspects of life that people experience only through the media. . . . [P]opular perceptions of these aspects of life take shape largely in response to news and fictional stories in media.” DORIS A. GRABER, *MASS MEDIA & AMERICAN POLITICS 2* (2006) (noting, for example, that “thanks to a heavy focus on crime news and fiction stories, television exaggerates the likelihood of an individual becoming a victim of crime. Viewers therefore fear crime excessively . . .”).

39. See, e.g., David E. Martin, *Patent Valuation: Is Fair Market Fair?*, 803 PLI/PAT 165, 171 (2004) (“Historically, intellectual property has been viewed as the domain of the esoteric professional—attorneys, patent agents, courts, and the innovation intelligentsia.”); Raj Bawa, *Nanotechnology Patenting in the US*, 1 NANOTECH. L. & BUS. 31, 36 (2004) (“Patent law is a subtle and esoteric area of the law that has evolved in response to technological change.”); Rochelle Cooper Dreyfuss, *Are Business Method Patents Bad for Business?*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 263, 263 (2000) (noting that until the early 1990s, “patent law was so esoteric, practitioners were historically among the very few lawyers ethically permitted to advertise their specialty.”).

40. As discussed *infra* notes 49-52 and accompanying text, in this study we looked at news and editorial content from five newspapers: the *Financial Times*, *Los Angeles Times*, *New York Times*, *Wall Street Journal*, and *Washington Post*. The number of news and

introduction to the patent system via recent mass media content. For these reasons, it is important to systematically study that content.

The recipients of this content include those who can potentially influence and affect change in the system, such as legislators, interest group members, and judges. Media scholar Doris Graber has argued that media influence on “political elites” is more important than media effects on “ordinary individuals.”⁴¹ She expressly asserts that media-constructed public perceptions may affect judicial outcomes, “because [Supreme Court] justices are influenced in their work by what they read and hear from the media.”⁴²

Various studies have shown that media accounts influence legislative

editorial items containing the word “patent” in the Westlaw or Lexis database employed in this study (*see infra* note 54) for each of those papers during the period of this study (January 1, 2005 through June 30, 2007) and for the corresponding periods one and two decades earlier are shown in the following table:

Newspaper	Number of Items Including the Word “Patent”		
	1/1/1985–6/30/1987	1/1/1995–6/30/1997	1/1/2005–6/30/2007
<i>Financial Times</i>	650	2929	2934
<i>Los Angeles Times</i>	773	854	857
<i>New York Times</i>	1639	1207	1497
<i>Wall Street Journal</i>	724	1159	1649
<i>Washington Post</i>	657	951	1295

This table provides only a rough depiction of these outlets’ coverage of the patent system, as it takes no account of the context in which the word “patent” appears. *See, e.g., infra* notes 56-59. However, as noted above, commentators have taken note of recent media coverage relating to the patent system. *See supra* notes 1-4; *see also* Craig P. Opperman, *Business Method Patents (Enter the Debate or Seize the Opportunity?)*, 637 PLI/PAT 1027, 1029 (2001) (“The popular press, usually leery of reporting on esoteric subjects like patents have entered the fray with gusto.”). *See also* Patently-O, July 19, 2007, *supra* note 20 (noting recent significant increase in focus on “patent reform” in major newspapers).

41. GRABER, *supra* note 38, at 16-17 (“The average individual, despite contrary democratic fictions, is fairly unimportant in the political process. Mass media impact on a handful of political decision makers usually is vastly more significant because it influences how they conduct political affairs.”).

42. *Id.* at 290-91 (lamenting the “superficial and flawed” reporting of Supreme Court decisions). To support her link between media coverage and judicial policy-making, Graber notes, for example, that “[m]edia reports of crime waves, or price gouging by business, or public opposition to aid for parochial schools are likely to set boundaries to judicial policy making.” *Id.* at 291.

policy-making as well.⁴³ The relationship between media coverage and policy-making is complex and difficult to assess.⁴⁴ For example, Itzhak Yanovitzky concluded from his study of media coverage of drunk-driving-associated problems and legislative activity that while “intensive periods of media attention to issues are instrumental in attracting policy attention to public problems that are low on policy-makers’ agendas while creating a sense of urgency among policy makers to generate immediate, short-term solutions to public problems[,]” the “media-policy connection [is] a dynamic process” involving several factors.⁴⁵ These factors include the “media issue attention cycle,” (i.e., that “policy outputs” vary with the intensity of media coverage around an issue), “the specific characteristics of the issue at hand,” (e.g., the fact that some issues, like drunk-driving, tend to generate collective public condemnation whereas others, such as gun control and abortion, are “surrounded by social debate”), and an individual policy-maker’s own pre-existing stance on the issue in question.⁴⁶ Nonetheless, given the considerable evidence linking media content with policy-making on a variety of issues,⁴⁷ it is at least worth considering the possible effects of recent media coverage on patent policy-makers as we examine the substance of that content.⁴⁸

This study’s systematic assessment of the content of recent media

43. See, e.g., ITZHAK YANOVITZKY, *MEDIA POWER IN POLITICS* 278, 279-80 (Doris A. Graber ed., 2007) (citing studies in Chapter 1, *The Dynamics of the Media-Policy Connection*). Regarding exposure to media in particular, Yanovitzky cites to one study showing that “on average, [members of Congress] spend 1.8 hours each day reading a daily newspaper and 1.5 hours a day watching television news programs.” *Id.* at 278.

44. See GRABER, *supra* note 38, at 15 (discussing the difficulties associated with measuring mass media effects on individuals and on public policy-making).

45. Itzhak Yanovitzky, *Effects of News Coverage on Policy Attention and Actions: A Closer Look into the Media-Policy Connection*, 29 COMM. RES. 422, 444-46 (2002).

46. YANOVITZKY, *supra* note 43, at 287-88.

47. See *supra* notes 7-17 and accompanying text.

48. In what may be a recent example of media-influenced legal policy-making, legal and media commentators have noted a possible connection between media coverage of the Supreme Court’s decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), and subsequent legislative activity aimed at limiting the decision’s effects. See, e.g., Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 711 (“[N]ews reports and editorials declared throughout the fall of 2005 that [the *Kelo*] backlash was inspiring statutory reforms in many state legislatures.”) (citing Tim Jones, *Walls Built Against Eminent Domain*, CHI. TRIB., Nov. 22, 2005, at 1; Diane Mastrull, *Eminent Domain Ruling’s Backlash*, PHILADELPHIA INQUIRER, Nov. 14, 2005, at A1); Patricia E. Salkin, *Swift Legislative (Over)Reaction to Eminent Domain: Be Careful What You Wish For*, SM004 ALI-ABA 865, 867 (2006) (“The media frenzy in the aftermath of *Kelo* . . . has led to the introduction of hundreds of pieces of legislation in approximately 40 states and to attempts by Congress to either overturn or severely curtail the effect of the U.S. Supreme Court’s holding.”).

coverage of the U.S. patent system is the first step in evaluating whether, and in what ways, media content is shaping public perception and patent policy.

A. Sample Selection

1. Selected Major Newspapers

Because the goal of this study was to assess coverage by major newspapers of the U.S. patent system, the study sample included items from a subset of major U.S. and international newspapers. Specifically, 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 for U.S. newspapers.⁴⁹ 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 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

49. 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 Daily Newspapers in the United States by Circulation	2005		2006		2007	
	Mon.-Sat.	Sun.	Mon.-Sat.	Sun.	Mon.-Sat.	Sun.
<i>USA Today</i>	2,281,831	-	2,272,815	-	2,278,022	-
<i>The Wall Street Journal</i>	2,070,498	-	2,049,786	-	2,062,312	-
<i>The New York Times</i>	1,121,623	1,680,582	1,142,464	1,683,855	1,120,420	1,627,062
<i>Los Angeles Times</i>	907,997	200,065	851,832	1,231,318	815,723	1,173,096
<i>Washington Post</i>	740,947	1,000,565	724,242	960,684	699,130	929,921

BurrellesLuce—Top 100 Daily Newspapers, <http://www.burrellesluce.com/top100> (last visited Jan. 17, 2008).

readers employed in professional occupations.⁵⁰ This study thus includes major newspapers having the potential to influence both public opinion and policy-making.

Some studies have found that the content or language employed by these three outlets reveals a difference in political leanings among them; they have found that the *New York Times* and the *Washington Post* are comparatively liberal and the *Wall Street Journal* is comparatively conservative.⁵¹ To the extent that a difference in political ideology exists

50. 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:

	<i>New York Times</i> (for the period 2/05 – 3/06)	<i>Washington Post</i> (for the period 3/05 – 2/06)	<i>Los Angeles Times</i> (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)

Audit Bureau of Circulations—Reader Profile—Released Reports, <http://abcas3.accessabc.com/readerprofile/released.asp> (last visited Jan. 21, 2008). No data was available from the Audit Bureau of Circulations for the *Wall Street Journal*.

See also Ho & Quinn, *supra* note 18, at 20-21 (plotting measures of newspaper political positions against education and income “proxies for elitism”).

51. For example, in their study of major newspaper editorials on U.S. Supreme Court justices from 1994-2004, Daniel Ho and Kevin Quinn ranked newspapers on a probability scale ranging from conservative to liberal, and found “a greater than 60% chance that the *New York Times* is the most liberal newspaper amongst all papers examined.” Ho & Quinn, *supra* note 18, at 13-15 (emphasis in original). They found the *Washington Post* and *Los Angeles Times* to be comparatively more conservative than the *New York Times*, ranking them the fifth and sixth most liberal papers in their study (behind the *Detroit Free Press*, the *San Francisco Chronicle*, and the *Minneapolis Star Tribune*). *Id.* at 14. By comparison, they concluded that the *Wall Street Journal* was the fourth most conservative among the twenty-three newspapers they evaluated, with only the *Investor’s Business Daily*, the *New York Post*, and the *Washington Times* ranking comparatively more conservative on their scale. *Id.* Matthew Gentzkow and Jesse M. Shapiro compared the language of U.S. daily newspapers with that of congressional Republicans and Democrats, and found that “the *New York Times*, *Los Angeles Times*, and *Washington Post* are similar to one another and to a fairly liberal congressperson . . . [and] identify the *Wall Street Journal* as fairly right-leaning.” Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, University of Chicago National Bureau of Economic

among these outlets, this selection of newspapers facilitates consideration of whether and how the difference is reflected in their coverage of the U.S. patent system. Similarly, by including the *Los Angeles Times*—the West-coast newspaper with the highest circulation—we can consider whether its coverage differs from that of the other East-coast and “national” U.S. newspapers in the study.⁵²

2. Sample Definition

The next step was to determine which news and editorial items, published in the selected newspapers during the study period, to review. A sample which includes all instances of the word “patent” in the selected media sources is impracticably large (on the order of 5,000 items), given the subsequent steps taken to enhance the reliability of the content-review process.⁵³ 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 developments in patent disputes. However, a search 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, the searches employed were 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 USPTO.⁵⁴ These

Research, at 17 (Nov. 13, 2006), available at <http://ssrn.com/abstract=947640>. In contrast, in their study of *news* content—editorial content was purposefully excluded—Tim Groseclose and Jeffrey Milyo found the *Wall Street Journal* to be “the most liberal of all twenty news outlets” studied. Tim Groseclose & Jeff Milyo, *A Measure of Media Bias*, 120 Q. J. ECON. 1191, 1212 (2005).

52. The *Wall Street Journal* is classified as a “National Daily.” See EDITOR & PUBLISHER INTERNATIONAL YEARBOOK: THE ENCYCLOPEDIA OF THE NEWSPAPER INDUSTRY 2006, at 453 (86th ed.) (defining “national dailies” as “newspapers published in the United States for nationwide distribution.”).

53. As discussed in greater detail below, we each reviewed every item in the dataset, and the reported results and conclusions relating to subjective characterizations (*i.e.*, item headline and body portrayals and positive and negative messages) are based on data on which we agreed. See *infra* Sections I.B. and II.A.3.

54. The Westlaw databases including full-text coverage, throughout the study period

searches produced a total of 1,216 items.⁵⁵

Next, irrelevant and duplicative items produced by the search were excluded, such as obituaries of inventors or persons once employed by the USPTO,⁵⁶ compilations of brief summaries of same-day full-text news items,⁵⁷ items pertaining to patent homonyms (e.g., features about patent leather pumps),⁵⁸ and other items that make only passing reference to patents.⁵⁹ This “culling” process produced a dataset having a total of 607

for each of the *New York Times* (“NYT”), the *Los Angeles Times* (“LATIMES”) and the *Financial Times UK* (“FTF”) 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 “FTF” 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 *Wall Street 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”)

55. As noted, *supra* note 29, 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.

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

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

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

59. *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, Mar. 17, 2006, at C1 (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 those 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 D3, to the

items for review in the study.⁶⁰

This database is more than just 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. Coding and Data Collection

Consistent with the research questions outlined above, our principal goal was to collect and analyze data from each dataset item regarding the item's portrayal of the U.S. patent system, including whether it presented positive and/or negative messages about the patent system and, if so, which messages.

We each independently reviewed and coded every item in the study dataset. We used a coding manual which contained coding definitions and instructions designed to guide our coding decisions.⁶¹ For each item, we collected basic bibliographic information,⁶² including:

trademark application processing functions of the USPTO, *see, e.g.*, Raymund 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 D5, 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.

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

Newspaper	Search-generated Items	Irrelevant and Duplicative Items Eliminated	Items Included in Study Dataset
<i>Financial Times</i>	120	57	63
<i>Los Angeles Times</i>	160	61	99
<i>New York Times</i>	253	110	143
<i>Wall Street Journal</i>	257	64	193
<i>Washington Post</i>	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 T47.

61. A copy of the coding manual has been placed on file with the Syracuse Law Review.

62. We each recorded all coding data for an individual item on an item "coding form"

- publishing newspaper
- date of publication, and
- item type⁶³

We then evaluated each item headline and each item body—separately—for how it portrayed the U.S. patent system. In particular, as to each item, we (independently) answered the following questions:

How is the patent system portrayed in the item headline (based on your quick impression after reading the item headline)—would it be likely to make an average person view the patent system more favorably, less favorably, or neither; and if “neither,” is it because the headline is neutral?⁶⁴ Or balanced?

or “coding schedule.” See NEUENDORF, *supra* note 26, at 124 (sample coding form); DEACON et al., *supra* note 25, 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.

63. We initially sorted the items into three categories: “editorial” (items presenting opinion or commentary), “news” (items classified as objective stories by the study newspapers, based on publication page placement, or those whose content was otherwise presented as an objective report), and “other” (those items we could not classify as “news” or “editorial”). Within the “editorial” category, we divided items among five subcategories: newspaper publisher/editorial board items (“unsigned editorials”), columns, op-ed pieces, letters to the editor, and “other editorial items.” We sorted “news” items into “general news,” “financial news,” and “other news” subcategories. See *infra* Section II.A.2 and accompanying text.

We also kept track of which litigated patent disputes were referenced or discussed in the news and editorial items in our study. We have compared the coverage of the *eBay* litigation (see *supra* note 31) and the litigation between *NTP, Inc. and Research In Motion, Ltd.* relating to the BlackBerry® wireless communications service, *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1157 (2006), focusing, in particular, on *NTP*-related coverage during the pendency of *eBay* at the Supreme Court. See Lisa A. Dolak & Blaine T. Bettinger, *eBay and the BlackBerry®: A Media Coverage Case Study*, 2 AKRON I.P. J. 1 (2008). A report of our other findings relating to media coverage of particular disputes is in process.

In addition, we recorded the name of the author of each item and collected data relating to coverage of interest groups, general technology categories (e.g., software patents, pharmaceutical patents), and relevant institutions (e.g., Supreme Court, Federal Circuit, USPTO). This data is currently under review.

64. One of us (Dolak) is a registered patent attorney and patent law professor, with nearly twenty years of experience (practice, consulting, teaching) in the field of patent law. The other (Bettinger) is a Ph.D. scientist and a second-year law student. He plans to practice patent law, and began his formal study of patent law at the same time he began coding the items in the study dataset. Thus, at the time the coding was done, neither of us qualified as an “average person” as contemplated by this question. However, one of us (Bettinger) had no or little formal training in patent law at the time the coding was carried out. Further, as discussed in Section II.A.3, *infra*, we took measures designed to “wring as much subjectivity from the process as possible.” Wagner & Petherbridge, *supra* note 27, at 1139.

How is the patent system portrayed in the item body (based on your quick impression after reading the item body)—would it be likely to make an average person view the patent system more favorably, less favorably, or neither; and if “neither,” is it because the headline is neutral?⁶⁵ Or balanced?⁶⁶

In addition, we collected data regarding the positive and negative “messages” contained in each item about the patent system.

Such evaluations (as our “headline portrayal,” “body portrayal,” “positive message,” and “negative message” 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.⁶⁷ Specifically, the positive and negative message categories that we used in our coding were developed, in large measure, from a preliminary review of a fairly extensive set (approximately 150 items) of news articles and editorial pieces.⁶⁸ This preliminary work was conducted by one of us (Dolak) and her former research assistant over the course of several months.⁶⁹ The preliminary work facilitated the creation and refinement of a total set of twenty-nine positive and negative message categories.⁷⁰ 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

65. The coding manual further provides that the “neutral” characterization should be used when the headline of the item includes no, or insignificant, positive or negative messages about the patent system.

66. The coding manual further provides that the “balanced” characterization should be used when the headline of the item can fairly be regarded as including both positive and negative messages about the patent system, in relatively equal significance.

67. See, e.g., Wagner & Petherbridge, *supra* note 27, at 1133-36 (describing the “bottom up” measurement design they employed to analyze Federal Circuit claim construction opinions).

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

69. 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.

70. 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).

“bottom up” approach to designing the study.⁷¹ Given that the preliminary review set of items contained fewer and some different items than the study dataset, it was to be expected that our review of the study dataset items 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, it 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, eleven of the final set of twelve positive messages and twenty-one of the final set of twenty-eight negative messages were generated during and retained from the preliminary review. Tables A1 and A2, which can be found in the appendix, list the positive and negative message definitions we employed in coding the dataset items.

Second, as noted above, we independently reviewed and coded each item in the dataset. As discussed in greater detail below, for the subjective aspects of our evaluations (i.e., the headline and body portrayals, and the presence of particular positive or negative messages in individual items), we confined our data analyses to instances of 100% agreement between us.⁷²

II. RESULT AND DISCUSSION

A. General Data Analysis Assumptions

1. Newspaper “Items” and “Messages” as Units of Analysis

As noted above, we use the term “item” to refer to an individual news story or editorial piece.⁷³ In the data analysis which follows, we indicate when we treat items as our units of analysis.⁷⁴ For example, in our tabulations relating to headline and body portrayals of the patent system,

71. See *supra* notes 67-70 and accompanying text.

72. Cf. Hall & Wright, *supra* note 27, 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.”).

73. See *supra* note 29.

74. See NEUENDORF, *supra* note 26, at 71-73 and DEACON ET AL., *supra* note 25, at 118-23 (discussing considerations that guide choices regarding sampling, counting, and analysis units in content analysis).

we used items as our units of analysis.⁷⁵

In the separate aspects of our study relating to the relative prevalence of positive and negative messages in coverage relating to the patent system,⁷⁶ however, we based our calculations on the presence, in accordance with our message discernment conventions, of distinct messages in the items we reviewed.⁷⁷ Some items presented no messages, some presented a single distinct message, and some presented more than one message. In this regard, we counted a particular positive or negative message appearing within a given item only once, even if the item presented that particular message more than once. In those cases in which individual items presented more than one distinct message, we counted each distinct message as a unit of analysis, consistent with our goal of identifying and measuring individual distinct messages relating to the patent system that appeared in the studied coverage.

2. *Item Categories*

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. Further, with a few exceptions, we were readily able to distinguish objective stories—news items—from non-objective opinion or commentary pieces,⁷⁸ and to further sub-divide the latter items into the following categories: a newspaper's own editorials (“unsigned editorials”),⁷⁹ columns,⁸⁰ op-ed pieces,⁸¹ and letters to the editor.⁸² However, our efforts to distinguish among the various types

75. See *infra* Section II.B.2.A.

76. See *infra* Section II.B.2.B.

77. See *infra* Section II.A.3.

78. See, e.g., Gaye Tuchman, *Objectivity as Strategic Ritual: An Examination of Newsmen's Notions of Objectivity*, 77 AM. J. SOC. 660, 671 (1972) (describing the division of newspapers into pages containing “‘straight objective’ general stories,” “[s]pecialized news,” and “[g]eneral stories which are not ‘objective[,]’ [which] are placed on either the editorial page or the ‘Op Ed’ (the page opposite the editorial page).”).

79. An editorial is defined as “a newspaper or magazine article that gives the opinions of the editors or publishers.” Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/editorial> (last visited Feb. 10, 2008).

80. A column is defined as “one in a usually regular series of newspaper or magazine articles,” Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/column> (last visited Feb. 10, 2008), or alternatively as “an article giving opinions or perspectives.” WordReference.com Dictionary, <http://www.wordreference.com/definition/column> (last visited Feb. 10, 2008).

81. An op-ed is defined as “a page of special features usually opposite the editorial page of a newspaper; *also*: a feature on such a page.” Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/op-ed> (last visited Feb. 10, 2008).

82. We created a fifth non-objective “other editorial item” category, which was

of news items (i.e., “general news” vs. “financial news”) yielded unsatisfactory results, and so, for purposes of this data analysis, we collapsed our three “news” categories⁸³ into a single “news” category.⁸⁴

In those rare instances where we were unable to agree as to the fundamental “news” vs. “editorial” distinction, we assigned the items to our “other or unknown/unclear” category. We placed a total of eight—out of 607—items in this third “other” type category either because we both agreed that we could not discern whether the item was a “news” item or “editorial” item, or because we “agreed to disagree” on that issue.⁸⁵

3. Subjectivity Controls

Regarding the subjective aspects of our evaluation—the headline and body portrayals, and 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 (i) to reduce the subjectivity of the initial coding decisions, and (ii) 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 “portrayal” questions,⁸⁶ the coding manual definitions of “neutral” and “balanced,” and the positive and negative message descriptions and associated instructions. With respect to the latter, the conclusions reported herein relating to the subjective aspects

reserved for items which clearly presented a point of view, but which could not readily be slotted into one of the other “editorial” categories. Only fifteen items were categorized as “other editorial item.”

83. “General News/Feature/Investigative Report,” “Business/Financial News/Feature Investigative Report,” and “Other News/Feature/Investigative Report.”

84. This process is consistent with content analysis “best practices.” As Professors Hall and Wright have noted:

Coding experts advise researchers to create more coding categories, and to make coding more fine-grained, than they may ultimately use. Even though this produces more information than the project will eventually require, the advantage is allowing the researcher to test different categorization schemes to learn through trial and error which work best.

...

It is a better practice to be overinclusive at the coding stage, waiting until the analysis stage to collapse and bifurcate the various categories into discrete [categories].

Hall & Wright, *supra* note 27, at 35.

85. We did not include these items in our data tallies pertaining either to the “news” or “all editorial” subcategories of our entire dataset.

86. See *supra* Section II.B.

of our study—the headline and body portrayals and presence of negative and positive messages—are based only on data on which we independently agreed. In other words, for example, unless we agreed that a given news article or headline presented, overall, a positive or negative portrayal of the patent system, we do not include that item in our tabulation of positive or negative, respectively, item portrayals of the patent system. Similarly, we did not “count” an item as including a particular positive or negative message about the patent system unless we independently concluded 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.

4. Message Attribution and Other Media Presentation Factors

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.”⁸⁷ 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.⁸⁸

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

87. W. LANCE BENNETT, *NEWS: THE POLITICS OF ILLUSION* 5 (2007) (emphasis omitted).

88. *Id.*; see also GRABER, *supra* note 38, at 92-93 (noting that media “[g]atekeepers also select the sources through whose eyes the public views the world” and citing a study of sources for stories on a variety of subjects which found that “journalists favor sources that reflect their own inclinations.”).

matters of editorial discretion and are relevant to an item's influence on the reader.⁸⁹ 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.

5. Study Goals

As discussed above, our principle objective was to systematically examine recent major newspaper content pertaining to the U.S. patent system for the purpose of illustrating its tenor and relative emphasis on particular issues and disputes. We did not intend, and do not present, a critique of the news media. We recognize and acknowledge the constraints within which news is gathered and coverage is produced and published.⁹⁰ As Haltom and McCann note in the introductory chapter of their analysis of media representations of tort litigation,

reporters must regularly operate under constraints of severely limited time, money, and access to information. News reporting is a high-pressure, short-deadline job that privileges reliance on work routines, conventions, and formulas to simplify the choices that must be made and to standardize the operating procedures of information gathering and presentation.⁹¹

In addition, economic pressures motivate reliance on story presentation techniques designed to increase audience appeal.⁹² For example, newspeople tend to personalize and dramatize news events in order to engage readers, sometimes at the expense of in-depth illumination of the political or social significance of the events in question.⁹³ We neither deny the realities of news production nor pass judgment on the quality of the product. We sought, instead, to illustrate and describe the content that was presented to media consumers during this recent period of judicial and legislative activity relating to the U.S. patent system.

89. 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.").

90. See, e.g., GRABER, *supra* note 38, at 106-08 (discussing factors that guide story selection, including time pressures, space constraints, breaking news, and staffing considerations).

91. HALTOM & MCCANN, *supra* note 13, at 19.

92. See GRABER, *supra* note 38, at 98-102; BENNETT, *supra* note 87, at 40-59.

93. See GRABER, *supra* note 38, at 99-101; BENNETT, *supra* note 87, at 40-42, 49-59.

B. Quantitative Descriptive Analysis and Discussion

1. Basic Dataset “Demographics”

As noted above, the dataset included a total of 607 items. These items were distributed over our three principal “type” categories as follows:⁹⁴

Type of Item	No. of Items	Percent of Total Items ⁹⁵
News	487	80%
Editorial	112	18%
Other	8	1%

Of the 112 “editorial” items, thirty-three (29%) were unsigned (editorial board) editorials, twenty (18%) were newspaper columns, nineteen (17%) were contributed op-eds, twenty-five (22%) were letters to the editor, and fifteen (13%) were “other editorial items.”

2. Summary of Findings

In the following discussion, we describe our findings regarding four aspects of our data analysis. Specifically, (i) we present our data relating to headline and item body portrayals of the patent system, (ii) we identify which positive and negative “messages” were most prevalent in the dataset and among various (e.g., news, unsigned editorial) item categories and consider the significance of their presentation in context, (iii) we compare the study newspapers with respect to their overall relative positive and negative depictions of the patent system, and (iv) we summarize our findings regarding the general relative negativity of recent patent system-related media coverage.

A. Headline and Body Portrayals

As noted above, we each evaluated every item headline, asking “would it be likely to make an average person view the patent system more favorably, less favorably, or neither, and if ‘neither,’ is it because the headline is neutral? Or balanced?” We asked a similar question of each item body; after reading the item we asked whether the body, separate and independent from the headline, “would be likely to make an average person

94. See *supra* note 63 and Section II.A.2.

95. Throughout this draft, calculated percentages have been rounded to the nearest whole number.

view the patent system more favorably, less favorably, or neither, and if ‘neither,’ is it because the headline is neutral? Or balanced?”

We agreed on 93% of our headline portrayal categorizations and on 84% of our body portrayals employing the four (positive, negative, neutral, balanced) characterizations. We ultimately concluded, however, that our level of agreement as to whether a given (non-positive, non-negative) headline or body was “neutral” or “balanced” was unsatisfactory. Although one or both of us coded an item body as being “balanced” a total of seventy times in our dataset, we only agreed on a total of seven items (10%). We were never in agreement the nine times one of us coded an item’s headline as “balanced.” Accordingly, we collapsed the “neutral” and “balanced” headline and body portrayal categories into a single “neutral” category,⁹⁶ which produced overall levels of inter-coder agreement as to headline and body portrayals of 95% and 88%, respectively.

Further, because our coding scheme required us each to assign a neutral, positive, or negative characterization to each item headline and body, and because we only counted headlines and bodies as positive or negative to the extent we had independently so concluded, we counted those headlines and bodies as to which we did not agree as neutral for purposes of our analysis.

We found that 95% of all items in the dataset that we agreed upon carried a “neutral” headline,⁹⁷ 4% bore a “negative” headline, and less than 1% portrayed the patent system positively. A similar breakdown was observed among each of the study newspapers, with the exception of the *Financial Times*, as shown in Table 1.

96. See *supra* note 84.

97. Some items which included patent system-related coverage also pertained additionally to subjects other than the patent system, and bore headlines that did not pertain in any respect to the patent system. See, e.g., *Stocks Are Flat as Consumer Confidence Falls*, L.A. TIMES, Sept. 28, 2005, at C4; Mark A. Stein, *Shoppers Seem Hesitant, But Ford Bets It All*, N.Y. TIMES, Dec. 2, 2006, at C2; Geoff Dyer, *China Overtakes Japan for R&D*, FIN. TIMES (London), Dec. 4, 2006, at 10; Jeffrey H. Birnbaum, *Lobbying is Lucrative. Sometimes Very, Very Lucrative*, WASH. POST, Mar. 27, 2007, at A11; Karen Talley, *Microsoft and Verizon Aid Indexes*, WALL ST. J., May 4, 2007, at C2. Accordingly, a “neutral” headline, for purposes of this study, is one which either pertains to, and presents a neutral portrayal of, the patent system or does not pertain to the patent system.

TABLE 1: HEADLINE PORTRAYALS IN ALL ITEMS FROM INDIVIDUAL NEWSPAPERS

Newspaper	Total Number of Items	% Neutral Headlines	% Positive Headlines	% Negative Headlines
<i>Financial Times</i>	63	87	0	13
<i>Los Angeles Times</i>	99	97	0	3
<i>New York Times</i>	143	97	1	3
<i>Wall Street Journal</i>	193	95	2	3
<i>Washington Post</i>	109	97	1	2
<i>All Newspapers</i>	607	95	1	4

Overall, the body portrayals were more negative than the headlines. Specifically, we found that while 2% of all of the body portrayals in the dataset were positive, the percentage of items which portrayed the patent system negatively was 15% (vs. 4% of the headline portrayals). In each newspaper, the body portrayals were more negative than the newspaper's headlines, overall, although there was slightly greater variation among the study newspapers' body portrayals. Table 2 itemizes the body portrayal data across all dataset items published in each newspaper.

TABLE 2: BODY PORTRAYALS IN ALL ITEMS FROM INDIVIDUAL NEWSPAPERS

Newspaper	Total Number of Items	% Neutral Body Portrayals	% Positive Body Portrayals	% Negative Body Portrayals
<i>Financial Times</i>	63	70	0	30
<i>Los Angeles Times</i>	99	93	0	7
<i>New York Times</i>	143	81	2	17
<i>Wall Street</i>	193	83	3	14

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<i>Journal</i>				
<i>Washington Post</i>	109	87	1	12
<i>All Newspapers</i>	607	84	2	15

Once again, the *Financial Times* was the “least neutral” and “most negative” in its portrayal of the patent system.

The data presented in Table 1 and Table 2 were obtained by analyzing all items, “news,” “editorial,” and “other.” To examine the headline and body portrayals of the news items alone, we removed the editorial items (a total of 112 items) and “other” items (eight items) and repeated the analysis. As shown in Table 3, with the exception of a few news items in the *Financial Times* and the *New York Times*, almost all the news items in our dataset contained neutral headlines.

TABLE 3: HEADLINE PORTRAYALS IN NEWS ITEMS FROM INDIVIDUAL NEWSPAPERS

Newspaper	Total Number of Items	% Neutral Headlines	% Positive Headlines	% Negative Headlines
<i>Financial Times</i>	42	98	0	2
<i>Los Angeles Times</i>	86	100	0	0
<i>New York Times</i>	112	99	1	0
<i>Wall Street Journal</i>	154	100	0	0
<i>Washington Post</i>	93	100	0	0
<i>All Newspapers</i>	487	100	0	0

The “news” item body portrayals were slightly more negative than the headline portrayals, as shown in Table 4. Once again, the *Financial Times* contained the highest percentage of negative body portrayals and the lowest percentage of neutral body portrayals. Only the *Wall Street Journal* and the *New York Times* contained any news items with positive body portrayals.

TABLE 4: BODY PORTRAYALS IN NEW ITEMS FROM INDIVIDUAL NEWSPAPERS

Newspaper	Total Number of Items	% Neutral Body Portrayals	% Positive Body Portrayals	% Negative Body Portrayals
<i>Financial Times</i>	42	86	0	14
<i>Los Angeles Times</i>	86	98	0	2
<i>New York Times</i>	112	93	0	7
<i>Wall Street Journal</i>	154	92	1	7
<i>Washington Post</i>	93	91	1	8
<i>All Newspapers</i>	487	93	0	7

Comparison of the data in Table 2 and the data in Table 4 suggests that the 112 editorial items in our dataset provided a significant percentage of both the negative headline and negative body portrayals. Presumably, each newspaper's editorial position is most accurately reflected in its own unsigned editorials. We found that 70% of all the unsigned editorials in the dataset had a neutral headline while 30% communicated a negative headline. None of the headlines from the unsigned editorials portrayed the patent system in a positive light. Interestingly, the breakdown of headline portrayals among the unsigned editorials in each individual newspaper (Table 5) was similar to the breakdown of all items in total (Table 1), with the *Financial Times* having the most negative headlines and the *Washington Post* having the fewest.

TABLE 5: HEADLINE PORTRAYALS IN UNSIGNED EDITORIALS FROM INDIVIDUAL NEWSPAPERS

Newspaper	Total Number of Items	% Neutral Headlines	% Positive Headlines	% Negative Headlines
<i>Financial Times</i>	9	44	0	56
<i>Los Angeles Times</i>	5	60	0	40
<i>New York Times</i>	5	80	0	20

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<i>Times</i>				
<i>Wall Street Journal</i>	12	83	0	17
<i>Washington Post</i>	2	100	0	0
<i>All Newspapers</i>	33	70	0	30

Similar to the previous findings, the body portrayals of unsigned editorials were significantly more negative than the headline portrayals. We found that only 36% had a neutral portrayal of the patent system, while 64% had a negative portrayal. Again, none of the items portrayed the patent system in a positive manner. The breakdown of body portrayals in unsigned editorials was similar to the breakdown of body portrayals for all items in our dataset. As Table 6 shows, the *Financial Times* had the highest percentage of negative body portrayals in unsigned editorials, while the *Washington Post* had none.

TABLE 6: BODY PORTRAYALS IN UNSIGNED EDITORIALS FROM INDIVIDUAL NEWSPAPERS

Newspaper	Total Number of Items	% Neutral Body Portrayals	% Positive Body Portrayals	% Negative Body Portrayals
<i>Financial Times</i>	9	22	0	78
<i>Los Angeles Times</i>	5	40	0	60
<i>New York Times</i>	5	40	0	60
<i>Wall Street Journal</i>	12	33	0	67
<i>Washington Post</i>	2	100	0	0
<i>All Newspapers</i>	33	36	0	64

Taken together, the headline and body portrayals from all the items, from the news items alone, and from the unsigned editorials reveal some differences in the “tone” of the coverage among individual newspapers that we examined. In each of the three headline analyses, the *Financial Times* had the fewest “neutral” headlines and the most “negative” headlines of all

five newspapers. In contrast, when looking at all items (“news,” “editorial,” and “other” combined), as well as unsigned editorials alone, the *Washington Post* had the fewest “negative” headlines and the most “neutral” headlines. When looking at the “news” items alone, only the *Financial Times* had any headlines that both coders counted as “negative.”

Analysis of the body portrayals revealed a similar pattern. The *Financial Times* had the fewest “neutral” body portrayals, as well as the most “negative” body portrayals in each of the three body portrayal analyses. When all the items, both “news” and “editorial,” were analyzed, in addition to when the “news” items alone were analyzed, the *Los Angeles Times* had the fewest “negative” body portrayals and the most “neutral” body portrayals. When just the unsigned editorials were analyzed, the *Washington Post* contained the fewest “negative” and the most “neutral” body portrayals. It is likely, however, that the small number of unsigned editorials in some of these newspapers, such as the *Los Angeles Times*, the *Washington Post*, and the *New York Times*, skewed the numbers to some degree.

B. Positive and Negative Messages

(i) Key Issues in the Dataset Media Content

As noted above, we independently reviewed each item and noted the positive and negative “messages” each presented about the patent system. A total of 24% of the 607 items in our dataset contained a positive and/or negative message. While most (85%) of the “news” items did not contain positive or negative messages about the patent system, a majority (61%) of the “editorial” items (all editorial categories combined) contained a positive and/or negative message.

The most prevalent positive message⁹⁸ in the fifty items⁹⁹ that contained any positive message was that “institutional actors are taking steps to improve the patent system.”¹⁰⁰ The relative prevalence of that message across all items in each newspaper and in relation to the next several most prevalent positive messages is shown in Table 7.

98. In some cases, an item presented repeated instances of a given positive or negative message. For purposes of this data analysis, we counted only one instance of a given message per item.

99. These fifty items included twenty-three news items, twenty-six editorial items, and one “other” item.

100. Nearly one-third (30%) of all positive messages contained in all items were in this category.

TABLE 7: RELATIVE PREVALENCE OF POSITIVE MESSAGES IN ALL ITEMS, IN TOTAL AND BY NEWSPAPER

Positive Message ¹⁰¹	All Papers (60) ¹⁰²	FT (6)	LAT (5)	NYT (14)	WP (12)	WSJ (23)
“Institutional actors are taking steps to improve the patent system.” (8)	30%	50%	60%	29%	42%	13%
“The patent system is necessary to spur innovation.” (1)	27%	33%	20%	21%	25%	30%
“The patent system is not in need of significant reform.” (3)	22%	17%	20%	29%	8%	26%
“The patent system is important for U.S. economic vitality.” (0)	13%			21%	17%	13%
“The Federal Circuit has brought needed stability to patent law.” (10)	3%					9%
“The patent system fosters disease cures.” (2)	2%				8%	

Of course, inherent in the most prevalent positive message—that “institutional actors are taking steps to improve the patent system”—is the notion that the patent system needs improvement. Interestingly, in this regard, we observed a difference among the study newspapers with regard to the relative prevalence of this particular positive message. It was the most prevalent positive message—across all item types—in each of the *Financial Times*, the *Los Angeles Times*, and the *Washington Post*, and was “tied for first” in the *New York Times*, but three other positive messages appeared with equal or greater frequency in the *Wall Street Journal*. We consider below the implications of “counting” this message as a positive message and the presentation of this and other positive and negative messages in context.¹⁰³

101. These are abbreviated versions of the positive messages identified in Table A1 (Appendix). The numbers in parentheses correspond to the message numbers in Table A1.

102. The fifty items from which these data were generated included a total of sixty positive messages. See *supra* Section II.A.1.

103. See *infra* Section II.B.2.B(ii).

The dataset contained 131 items which included one or more negative messages about the United States patent system.¹⁰⁴ The most frequently mentioned negative message was that patent quality is poor, followed closely by “patents shouldn’t be enforceable by those who don’t practice the invention” (i.e. “patent trolls”). Table 8 lists the ten most frequently occurring negative messages in all study newspapers (across all item types) and compares the relative prevalence of those messages among the study newspapers.

TABLE 8: RELATIVE PREVALENCE OF NEGATIVE MESSAGES IN ALL ITEMS, IN TOTAL AND BY NEWSPAPER

Negative Message ¹⁰⁵	All Papers (278) ¹⁰⁶	FT (49)	LAT (22)	NYT (68)	WP (48)	WSJ (91)
“Poor patent quality.” (2)	17%	18%	32%	16%	15%	14%
“Patents shouldn’t be enforceable by those who don’t practice the invention.” (13)	15%	18%	14%	16%	19%	11%
“The patent system needs reform.” (0)	11%	14%	18%	6%	4%	15%
“The patent system stifles innovation.” (11)	10%	12%		10%	8%	11%
“The USPTO is overtaxed/underfunded.” (4)	7%	6%	5%	10%	8%	4%
“Patent litigation is too prevalent/costly/slow.” (16)	6%	2%	5%	6%	13%	7%
“The patent system permits extortion/litigati	6%	6%		7%		9%

104. These 131 items included seventy news items, fifty-eight editorial items, and three “other” items.

105. These are abbreviated versions of the negative messages identified in Table A2 (Appendix). The numbers in parentheses correspond to the message numbers in Table A2.

106. The 131 items from which this data were generated included a total of 278 negative messages. See *supra* Section II.A.1.

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<i>on abuse.” (8)</i>						
<i>“The definition of what can be patented is too broad.” (3)</i>	5%			9%	4%	5%
<i>“A patent on a single invention can result in an out-of-proportion injunction/damage award.” (10)</i>	5%	12%	9%	1%	4%	3%
<i>“The patent system is skewed in favor of patent owners.” (6)</i>	4%	2%	9%	3%	4%	5%

These data suggest there was considerable agreement among the newspapers, as reflected in their overall content during the study period, as to the most significant problems in the patent system (aside from general calls for reform), namely, patent quality and “patent trolls.”¹⁰⁷ These two messages were the most prevalent negative messages—or among the top three most prevalent—across all content in all papers and in each individual paper. A significant amount of the news and editorial content presenting these messages pertained to the *eBay, Inc. v. MercExchange, L.L.C.*¹⁰⁸ and *Research in Motion, Ltd. v. NTP, Inc.*¹⁰⁹ litigations. These two decisions were heavily covered in the study newspapers during the relevant period.¹¹⁰

The following Tables 9 and 10 isolate the dataset news content and show how positive and negative messages, respectively, were distributed among the study newspapers. The dataset contained twenty-three news items which presented one or more positive messages, with a total of thirty-five positive messages. The most prevalent positive message in news items was that “the patent system is necessary to spur innovation.” Table 9

107. “Troll” is a controversial term which means different things to different people, but is generally used to describe people or entities that enforce their patent rights but do not practice the patented invention. See, e.g., Jennifer Kahalelio Gregory, Comment, *The Troll Next Door*, 6 J. MARSHALL REV. INTELL. PROP. L. 292, 292 (2007); Steve Seidenberg, *Troll Control: The Supreme Court’s eBay Decision Sets Back Pesky ‘Patent Trolls’ or American Innovation, Depending Upon Which Side You’re On*, 92 A.B.A. J. 50, 50 (2006).

108. 547 U.S. 388 (2006).

109. 418 F.3d 1282 (Fed. Cir. 2005), cert. denied, 546 U.S. 1157 (2006).

110. See Dolak & Bettinger, *supra* note 63, at 23-24.

shows the relative prevalence of the top six positive messages among all the news items in each newspaper.

TABLE 9: RELATIVE PREVALENCE OF POSITIVE MESSAGES IN NEWS ITEMS, IN TOTAL AND BY NEWSPAPER

Positive Message ¹¹¹	All Papers (35) ¹¹²	FT (3)	LAT (1)	NYT (14)	WP (9)	WSJ (8)
"The patent system is necessary to spur innovation." (1)	34%	67%		29%	33%	38%
"Institutional actors are taking steps to improve the patent system." (8)	23%	33%		29%	33%	
"The patent system is important for U.S. economic vitality." (0)	20%			14%	22%	38%
"The patent system is not in need of significant reform." (3)	17%		100%	29%		13%
"The patent system fosters disease cures." (2)	3%				11%	
"The Federal Circuit has brought needed stability to patent law." (10)	3%					13%

The data suggest that there was a wide degree of variance among the newspapers as to the most frequently mentioned positive message in news items alone. The positive message that "the patent system is necessary to spur innovation" was the most significant message in the *Financial Times*, but only tied for the most significant message in the *New York Times*, *Washington Post*, and *Wall Street Journal*.

Similar results were obtained from the analysis of the 134 negative messages contained in the seventy news items that presented one or more negative messages. While the most prevalent overall messages were related to concerns that there is "poor patent quality" and that "the patent system stifles innovation," only the *Financial Times* had these as its top

111. See *supra* note 101.

112. The 487 items from which these data were generated included a total of thirty-five positive messages. See *supra* note 63.

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two messages in news items. Table 10 shows the ten most prevalent negative messages contained within the news items alone.

TABLE 10: RELATIVE PREVALENCE OF NEGATIVE MESSAGES IN NEWS ITEMS, IN TOTAL AND BY NEWSPAPER

Negative Message ¹¹³	All Papers (134) ¹¹⁴	FT (19)	LAT (9)	NYT (32)	WP (31)	WSJ (43)
<i>"Poor patent quality."</i> (2)	16%	32%	22%	16%	13%	12%
<i>"The patent system stifles innovation."</i> (11)	16%	26%		3%	13%	19%
<i>"Patents shouldn't be enforceable by those who don't practice the invention."</i> (13)	14%	11%	22%	16%	16%	12%
<i>"Patent litigation is too prevalent/costly/slow."</i> (16)	10%	5%	11%	13%	13%	7%
<i>"The patent system needs reform."</i> (0)	8%	11%		6%	3%	14%
<i>"The patent system permits extortion/litigation abuse."</i> (8)	7%	5%	11%	13%		7%
<i>"The patent system is skewed in favor of patent</i>	7%		22%		10%	9%

113. See *supra* note 105.

114. The 487 items from which these data were generated included a total of 134 negative messages. See *supra* note 63.

<i>owners.” (6)</i>						
<i>“The USPTO is overtaxed/underfunded.” (4)</i>	6%	5%		9%	10%	2%
<i>“The definition of what can be patented is too broad.” (3)</i>	4%			9%		7%
<i>“A patent on a single invention can result in an out-of-proportion injunction/damage award.” (10)</i>	4%	5%	11%	3%	3%	5%

The positive and negative message analysis presented above relates to all items for each newspaper in the dataset and to news items for each newspaper in the dataset. As stated above, it is reasonable to conclude that a newspaper’s editorial position on the patent system might be most succinctly or accurately reflected in its unsigned editorials. As compared against the dataset as a whole, a larger percentage of the unsigned editorials contained positive messages (27% of unsigned editorials vs. 8% of all items). However, the unsigned editorials only conveyed two types of positive messages:

“Institutional actors are taking steps to improve the patent system.” 80%

“The patent system is necessary to/does support/spur innovation/technology development.” 20%

As noted above, however, the message that “institutional actors are taking steps to improve the patent system” inherently suggests that there are problems associated with the system. And, as we discuss below, every unsigned editorial presenting that message also included one or more of the

negative messages we tracked.¹¹⁵

The unsigned editorials also contained a significant number of negative messages. While only 21% of all the items in our dataset contained one or more negative messages, 70% of the unsigned editorials contained at least one negative message and 78% of those contained more than one negative message. Although the unsigned editorials represented just 5% of the total items in our dataset, they contained 22% of all the negative messages. The breakdown of the ten most frequently occurring negative messages in the unsigned editorials in all newspapers and among the individual newspapers is shown in Table 11.

TABLE 11: RELATIVE PREVALENCE OF NEGATIVE MESSAGES IN UNSIGNED EDITORIALS, IN TOTAL AND BY NEWSPAPER

Negative Message ¹¹⁶	All Papers (60) ¹¹⁷	FT (19)	LAT (11)	NYT (10)	WP (2)	WSJ (18)
<i>"Poor patent quality."</i> (2)	23%	16%	36%	30%		22%
<i>"The patent system needs reform."</i> (0)	17%	16%	18%	20%		17%
<i>"Patents shouldn't be enforceable by those who don't practice the invention."</i> (13)	12%	16%	18%	10%		6%
<i>"A patent on a single invention can result in an out-of-proportion injunction/damage award."</i> (10)	8%	21%	9%			
<i>"The patent system permits extortion /litigation abuse."</i> (8)	7%	5%		10%		11%

115. See *infra* Section II.B.2.B(ii).

116. See *supra* note 105.

117. The thirty-three items from which this data were generated included a total of sixty negative messages. See *supra* note 63.

"The USPTO is overtaxed/underfunded." (4)	5%	5%	9%	10%		
"The patent system is a source of uncertainty." (5)	5%	5%			50%	6%
"The patent system is skewed in favor of patent owners." (6)	5%	5%	9%	10%		
"The patent system stifles innovation." (11)	5%	5%				11%
"Patent litigation is too prevalent /costly/slow." (16)	5%				50%	11%

As we observed when we examined the negative messages presented across all items, the unsigned editorials from each individual newspaper were largely in agreement about the most important problems with the current patent system. Aside from the general need for patent reform, the newspapers were most concerned about patent quality (negative message 2), with the exception of the *Financial Times* which was slightly more concerned about the "out-of-proportion" injunctions or damage awards given to patent holders of a small or relatively insignificant invention.

(ii) *The Media Messages in Context*

As shown above (compare Table 7 with Table 8), there were far more items containing negative messages than there were items containing positive messages, including in almost every subcategory in our classification system (with the exception of "letters to the editor," of which there were an equal number of items with a positive message and items with a negative message). Table 12 contains a summary for each item category of the number of items presenting at least one positive or negative message.

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TABLE 12: TOTAL NUMBER OF POSITIVE AND NEGATIVE MESSAGES IN ALL ITEMS, NEWS ITEMS, ALL EDITORIAL ITEMS, AND UNSIGNED EDITORIAL ITEMS

	Items Containing At Least One Positive Message	Items Containing At Least One Negative Message
All Items (607 items)	8%	22%
News Items (487 items)	5%	14%
All Editorial Items (112 items)	23%	52%
Unsigned Editorial Items (33 items)	27%	70%
Columns, op-eds, letters to the editor, and "other editorial items," combined (79 items)	22%	44%

The next step in the analysis was to examine the overlap of items containing a negative message with items containing a positive message, and vice versa. This analysis would potentially reveal the extent to which positive messages were "drowned out" by negative messages, or negative messages were "drowned out" by positive messages.

There were 145 items that contained a positive message, a negative message, or both. Of the fifty items that contained a positive message, only fourteen items, or 28%, contained only positive messages. The percentages are even smaller for the news items alone and the unsigned editorial items alone, as shown in Table 13.

TABLE 13: ITEMS PRESENTING EXCLUSIVELY POSITIVE MESSAGES ABOUT THE PATENT SYSTEM

	All Items	News Items	Unsigned Editorials

Of items containing any positive message, those without any negative message	28% (14/50) ¹¹⁸	17% (4/23)	0% (0/9)
Of all items containing any message, those containing any positive message without any negative message	10% (14/145)	5% (4/74)	0% (0/23)

Of the 145 items in our dataset that presented *any* message about the United States patent system—positive or negative—only 10% presented one or more positive messages without any accompanying negative message. In comparison, 66% of those items contained a negative message without a positive message, as shown in Table 14.

TABLE 14: ITEMS PRESENTING EXCLUSIVELY NEGATIVE MESSAGES ABOUT THE PATENT SYSTEM

	All Items	News Items	Unsigned Editorials
Of items presenting any negative message, those without any positive message	73% (95/131) ¹¹⁹	74% (53/72)	61% (14/23)
Of all items presenting any message, those presenting any negative message without any positive message	66% (95/145)	72% (53/74)	61% (14/23)

The data suggest that the positive messages about the United States patent system were most often presented in items that contained one or more negative messages. In fact, of the 607 items in our dataset, only

118. The number of “all items” here is greater than the number of “news items” and “unsigned editorials” combined because the “all items” category includes, in addition, the other editorial items (columns, op-eds, letters to the editor, and “other editorial items,” as well as those “other” items we were unable to classify as either news or editorial). *See supra* note 63.

119. *Id.*

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fourteen contained a positive message without a negative message.

This analysis is skewed, however, because the “positive” message that “institutional actors are taking steps to improve the patent system” is inherently a negative statement about the patent system. If this positive message was counted as a negative message, it would tie for the seventh most frequently mentioned negative message (see Table 8, above). Additionally, if it was counted as a negative message, there would be one positive message for every 7.0 negative messages in our dataset, rather than one positive message for every 4.6 negative messages.

As shown in Table 15, the overwhelming majority (17 out of 18) of the items in which this “positive” message appeared also included one or more negative messages.

TABLE 15: ITEMS PRESENTING POSITIVE MESSAGE “8” WITHOUT ANY NEGATIVE MESSAGE

	All Items	News Items	Unsigned Editorials
Items presenting positive message 8 (“institutional actors are taking steps to improve the patent system”) without any negative message	6% (1/18) ¹²⁰	14% (1/7)	0% (0/8)

By isolating those items that presented any message about the patent system, and by illustrating and comparing the extent to which positive and negative messages appeared in context with one another, the data presented in Tables 13 through 15 provide an alternative window into media portrayals of the patent system during the study period. Whether we consider the dataset as a whole, isolate just items presenting any message, or focus only on those items that presented both positive and negative messages, negative messages still outnumbered positive messages. And, that this pattern holds even when we segregate and examine just the news items in each of these categories is noteworthy given that professional journalism norms encourage reporters to present “both sides” and give “equal time” in the pursuit of balance and fairness.¹²¹

120. *Id.*

121. *See, e.g.,* BENNETT, *supra* note 87, at 189-90 (noting the practical challenges of achieving these goals, and the “dubious assumptions” which underlie them).

C. The Dataset Newspapers Compared

Analysis of the patent system's portrayal in each of the individual study newspapers revealed a number of striking similarities and differences. We found the newspapers to be most similar when we compared their positive portrayals of the patent system, as shown in Table 16. The East Coast (*New York Times* and *Washington Post*) and national (*Wall Street Journal*) newspapers, as well as the *Financial Times*, all had a very similar proportion of positive headline and body portrayals as well as a similar percentage of items containing a positive message. These four newspapers also had a similar number of positive messages relative to the number of items each newspaper contributed to the dataset (a ratio of approximately 0.10). The *Los Angeles Times*, in contrast, had relatively fewer items containing one or more positive messages and a lower ratio of positive messages per item (0.05).

TABLE 16: SUMMARY OF POSITIVE HEADLINE PORTRAYALS, BODY PORTRAYALS, AND MESSAGES FROM INDIVIDUAL NEWSPAPERS

Newspaper	Total Number of Items	Positive Headline Portrayals	Positive Body Portrayals	Items Containing a Positive Message	Total Number of Positive Messages
<i>Financial Times</i>	63	0%	0%	10%	6 (0.10/item)
<i>Los Angeles Times</i>	99	0%	0%	4%	5 (0.05/item)
<i>New York Times</i>	143	1%	2%	8%	14 (0.10/item)
<i>Wall Street Journal</i>	193	2%	3%	9%	23 (0.12/item)
<i>Washington Post</i>	109	0%	1%	10%	12 (0.11/item)
<i>All Newspapers</i>	607	1%	2%	8%	60 (0.10/item)

In contrast, the papers were the most dissimilar when comparing their negative portrayals of the patent system, as shown in Table 17. The *Financial Times* contained the highest percentage of items with negative headline portrayals and negative body portrayals, as well as the highest percentage of items containing a negative message. The *Financial Times*

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also contained the highest number of positive messages relative to the number of items it contributed to the dataset (0.78 per item).

TABLE 17: SUMMARY OF NEGATIVE HEADLINE PORTRAYALS, BODY PORTRAYALS, AND MESSAGES FROM INDIVIDUAL NEWSPAPERS

Newspaper	Total Number of Items	Negative Headline Portrayals	Negative Body Portrayals	Items Containing a Negative Message	Total Number of Negative Messages
<i>Financial Times</i>	63	13%	30%	40%	49 (0.78/item)
<i>Los Angeles Times</i>	99	3%	7%	10%	22 (0.22/item)
<i>New York Times</i>	143	3%	17%	20%	68 (0.48/item)
<i>Wall Street Journal</i>	193	3%	15%	22%	91 (0.47/item)
<i>Washington Post</i>	109	2%	12%	23%	48 (0.44/item)
<i>All Newspapers</i>	607	4%	15%	22%	278 (0.46/item)

Our data suggest that although the *Financial Times* presented percentages of positive headlines, positive body portrayals, and positive messages that were similar to the *New York Times*, *Wall Street Journal*, and *Washington Post* (Table 16), the *Financial Times* presented the least neutral representation of the United States patent system, especially in light of the strongly negative portrayal of the patent system in that newspaper.

As we observed when we analyzed the relative prevalence of positive messages, the *Los Angeles Times* had the fewest number of items containing a negative message and the lowest ratio of negative messages to overall items (0.22). Together, these data suggest that the *Los Angeles Times* presented the most neutral analysis of the United States patent system.

Finally, when considering the relative negativity of the patent system coverage in each of our study newspapers, we found that the East Coast and national newspapers were once again nearly identical. Each paper had similar percentages of negative headline and body portrayals, as well as similar percentages of items containing a negative message. The ratio of

negative messages per item for each newspaper was very similar, falling between 0.44 and 0.48 per item. Thus, our data suggest that over the time period covered by our dataset, the East Coast and national newspapers all presented a similar appraisal of the patent system.

D. Portrayal of the United States Patent System in the Dataset

Taken together, our data support the conclusion that the media's coverage of the patent system was significantly more negative than positive, as shown in Table 18. For instance, there were nearly five times as many negative headline portrayals as positive headline portrayals in the dataset. The difference between positive and negative body portrayals was even more significant, with nine negative body portrayals for every positive body portrayal. Although Table 18 is a summary of the entire dataset, each individual newspaper also had more negative headline and body portrayals than positive headline and body portrayals (see Tables 1 and 2, above), suggesting that consumers of any one of the newspapers from our dataset would have experienced a similar pattern.

There was also a significant difference between the frequency of positive and negative messages in our dataset. A total of fifty items from our dataset (8%) contained sixty positive messages, while a total of 131 items from the dataset (22%) contained at least one negative message. Not only were there more items containing negative messages than positive messages, but our data show that the number of negative messages in items containing at least one negative message was higher than the number of positive messages in items containing at least one positive message. In addition, the frequency of positive messages per item was 0.10 for all items in our dataset, compared to 0.46 negative messages per item.

TABLE 18: SUMMARY OF POSITIVE AND NEGATIVE HEADLINE PORTRAYALS, BODY PORTRAYALS, AND MESSAGES IN ALL ITEMS

All Items	Total Number Scored as "Positive"	Total Number Scored as "Negative"
Headline Portrayals	5	23
Body Portrayals	10	90
Items Containing a Positive or Negative Message	50	131
Positive or Negative Messages	60	278

Table 19 shows that the patent system was portrayed more negatively in editorial items—especially unsigned editorials—than in news items. For instance, there were no negative headline portrayals in the 487 news items, but 20% of the editorial items and 30% of the unsigned editorials contained headlines that portrayed the patent system negatively. Additionally, while the bodies of 64% of unsigned editorial items and 47% of all editorial items portrayed the patent system in a negative light, only 7% of the news items did the same. And finally, despite there being nearly four times as many news items as editorial items, the two groups contained nearly the same number of negative messages (134 and 139, respectively). Unsigned editorials contained the highest frequency of negative messages at more than 1.8 negative messages per item, compared to 1.2 for all editorial items and 0.3 for all news items.

TABLE 19: SUMMARY OF NEGATIVE HEADLINE PORTRAYALS, BODY PORTRAYALS, AND MESSAGES IN ALL ITEMS, NEWS ITEMS, EDITORIAL ITEMS, AND UNSIGNED EDITORIAL ITEMS

	All Items (607 Items)	News Items (487 Items)	Editorial Items (112 Items)	Unsigned Editorials (33 Items)
Negative Headline Portrayals	4%	0%	20%	30%
Negative Body Portrayals	15%	7%	47%	64%
Items Containing a Negative Message	8%	14%	52%	70%
Total Number of Negative Messages	278 (0.46/item)	134 (0.28/item)	139 (1.2/item)	60 (1.8/item)

Given the journalist's commitment to objectivity in news coverage,¹²²

122. See, e.g., BENNETT, *supra* note 87, at 188-91 (critiquing reporting standards designed to produce objective media reports, including "presenting the facts offered by both

the comparatively subjective portrait of the patent system presented in the editorials was to be expected.¹²³ It is reasonable to expect that both news and editorial coverage drawn from any “snapshot in time” would skew negative, given the media’s well-recognized penchant for drama and conflict.¹²⁴ So, to some extent, it is not surprising that the patent system would reflect negatively in the “media mirror” during a period of relatively concentrated law reform activity. After all, the recent concentration of important judicial and legislative patent reform developments suggests at least some level of policy consensus that reform is warranted.

However, there is vigorous debate about the need for reform, the nature of reform that is warranted, and the merits of various reform proposals.¹²⁵ Accordingly, it is worth considering the possibility that recent media coverage has gone beyond merely mirroring calls for reform and recent developments. We cannot, of course, know whether or to what extent patent system-related media coverage may have influenced individual Supreme Court justices’ views regarding whether to hear or how to decide particular cases.¹²⁶ In addition, as

sides and giving them equal time”); Tuchman, *supra* note 78, at 662-71 (describing “strategies” that “enable the newsman to claim objectivity” and “minimize the risks imposed by deadlines, libel suits, and superiors’ reprimands,” including “[p]resentation of conflicting possibilities,” “[p]resentation of supporting evidence,” “[t]he judicious use of quotation marks,” and “[s]tructuring information in an appropriate sequence.” (emphasis omitted)).

123. As shown in Table 12, we similarly observed a higher number of items with a positive message in editorial items (23%) as compared to news items (5%), as well as a higher relative proportion of positive messages per item in editorial items (0.29/item) as compared to news items (0.07/item).

124. See *supra* note 93 and accompanying text.

125. See, e.g., Robert A. Armitage, Commentary, *Now That the Courts Have Beaten Congress to the Punch, Why is Congress Still Punching the Patent System?*, 106 MICH. L. REV. FIRST IMPRESSIONS 43 (2007) (describing the reform-related debate among different constituencies, and arguing that the current pending legislation is unnecessary and ill-advised); Matthew Sag & Kurt Rohde, *Patent Reform and Differential Impact*, 8 MINN. J. L. SCI. & TECH. 1 (2007) (suggesting that there are too many patent reform proposals and proposing the use of differential impact analysis to evaluate the validity of those proposals); Raymond P. Niro, *Who is Really Undermining the Patent System—“Patent Trolls” or Congress?*, 6 J. MARSHALL REV. INTELL. PROP. L. 185 (2007) (concluding that the current pending legislation is based on misinformation); Robert A. Armitage, *The Conundrum Confronting Congress: The Patent System Must Be Left Untouched While Being Radically Reformed*, 5 J. MARSHALL REV. INTELL. PROP. L. 268 (2006) (arguing that Congressional legislation should address the underlying problems in the patent system without disrupting the effective current system); Claude Barfield & John E. Calfee, *Congress’s Patent Mistakes*, WALL ST. J., Oct. 29, 2007, at A18 (“Congress should not overlook the surprising ability of self-correcting forces in the patent system and elsewhere to adapt to change in ways less susceptible to the unintended, negative consequences of the blunt-force—and heavily lobbied—legislative process.”).

126. See Paul W. Jamieson, *Lost in Translation: Civic Journalism’s Applicability to*

noted above, it can be difficult to draw conclusions about media influences on legislative policy-making.¹²⁷ Nevertheless, it may be the case that recent media coverage of the patent system has influenced and continues to influence patent policy development, as scholars have found with respect to other matters of policy.¹²⁸

CONCLUSION

The last several years have produced important changes affecting U.S. patent owners and those who use or seek to use patented inventions. During that same period, the foundation has been laid for a significant, additional, potential transformation of the patent system. The presentation of these events in the associated media coverage has presumably shaped public understanding and, perhaps, influenced public policy-making.

Recent major newspaper content presents, overall, a considerably negative depiction of the U.S. patent system. We observed some anticipated differences between news and editorial coverage, in this regard, and some not-so-expected similarities and differences among the newspapers we examined. By systematically cataloguing and analyzing media representations relating to particular issues, we also gained insight into what the media-consuming public learned about perceived problems and attributes associated with the patent system.

Given the esoteric nature of patent law, media portrayals have particular “sway” over public attitudes about the patent system.¹²⁹ This study provides a unique analysis of the media’s recent representations of the patent system to reveal, perhaps for the first time, a glimpse into the public’s “legal knowledge”¹³⁰ of the system, based upon those portrayals. This information will be of particular use to attorneys, legislators, or other individuals who will interact with a media-consuming public that has been exposed to a primarily negative portrayal of the patent system.

Newspaper Coverage of the U.S. Supreme Court, 20 COMM. & L. 1, 3 (1998) (noting that conjecture regarding “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.”).

127. *See supra* notes 45-46 and accompanying text.

128. *See supra* notes 9-17 and accompanying text.

129. *See supra* note 19.

130. *See supra* note 16.

APPENDIX

TABLE A1: POSITIVE MESSAGE DEFINITIONS EMPLOYED IN CODING

0. The patent system¹³¹ 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 versus users/public/competitors.
7. The patent system rewards/encourages small inventors as well as large companies.
8. 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.

131. 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 EMPLOYED IN CODING¹³²

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 should not 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 a single (even incremental) invention can shut down sales of complex products / result in a damage award out-of-proportion-to the contribution of the patented component.
11.	The patent system stifles or burdens innovation/research/technological progress/competition.
12.	Patents are associated with dangerous/immoral/unethical technologies (e.g. patents on humans).
13.	Patents are (and should not be) awarded to/enforceable by those who do not 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

132. 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 should not be granted (or enforced) on certain categories of subject matter, such as natural phenomena, genes, basic ideas, software, drugs/medicines, business practices, etc.)”).

- 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 and pressure.
 21. The patent system is skewed in favor of larger companies.
 22. International Trade Commission (“ITC”) proceedings are inappropriately expeditious/serve as an end-run around the judicial process.
 23. The patent application process is too expensive.
 24. The patent system has been adversely affected by the specialized court (Federal Circuit) and/or specialized bar.
 25. The damages awarded in patent cases are excessive.
 26. The patent system is not well-suited to the modern economy.
 27. Patent examiners are unqualified (underpaid, inexperienced).
 28. Juries are ill-suited/unqualified to resolve patent/technical questions.

Codifying Positive and Negative Messages

The following are excerpts from items within our dataset which both coders interpreted as communicating a specific positive or negative message. Wherever possible, two samples of each positive and negative message are provided. When a message code was only agreed upon once (positive messages 11 and 12; negative messages 15, 17, 22, and 24), only that excerpt is provided. No excerpt is provided for message codes that were either never identified or were never agreed upon by both coders (positive messages 4, 5, 6, 7, and 9; negative messages 7, 12, 23, 27, and 28).

Positive Messages:

0. Patent system is important for/contributes to/has contributed to U.S. economic vitality/global competitiveness:
 - a. “The fight is casting a spotlight on the patent office, an often-overlooked entity that plays a top role in the operation of the U.S. economy. ‘Much of the growth of our economy comes from growth in intellectual property,’ says Jon Dudas, undersecretary of commerce [sic] for intellectual property and director of the patent office.”¹³³
 - b. “‘Punishing the holders of pharmaceutical patents in this manner flies directly in the face of a system of rewards calculated by Congress to insure the continued strength of an industry vital to our national interests,’ [U.S. District Judge Richard J.] Leon wrote.”¹³⁴
1. The patent system is necessary to/does support/spur innovation/technology development:
 - a. “By granting innovators an exclusive right to their writings and discoveries, Congress provided a strong incentive to engage in innovation. As Abraham Lincoln put it, the patent system added ‘the fuel of interest to the fire of genius.’”¹³⁵
 - b. “When the patent system works, it rewards entrepreneurs and inventors, encourages innovation and serves as a bulwark of property rights.”¹³⁶
2. The patent system may lead to/foster disease cures:

133. Anne Marie Squeo & Elena Cherney, *BlackBerry Gambles Patent Office Will be on its Side in Court*, WALL ST. J., Jan. 17, 2006, at B1.

134. Eric M. Weiss, *Prescription Drug Plan in D.C. Barred*, WASH. POST, Dec. 23, 2005, at B1.

135. Hal R. Varian, Op-Ed., *Why That Hoodie Your Son Wears Isn't Trademarked*, N.Y. TIMES, Apr. 5, 2007, at C3.

136. Editorial, *The Problem with Patents*, WALL ST. J., Mar. 29, 2006, at A18.

- a. “Representatives of the pharmaceutical industry chafe at the accusation their companies are blocking reform, insisting instead that they are trying to protect the durability of patents vital for producing life-saving drugs.”¹³⁷
- b. ““The end of an era (of DNA sequence patenting) is in view . . . this will benefit researchers, the innovation process and patients in the longer run.””¹³⁸
3. The patent system (or some aspect thereof, such as the USPTO, or a particular category of patents) is/are sound/not in need of significant reform:
 - a. “But this is not a system gone awry. Where to draw the line on patentability is a problem that courts and Congress have grappled with for more than 200 years, and there are no easy solutions.”¹³⁹
 - b. “Moreover, the patents held by Stout and Woolston are entitled to the same legal protection whether they aim to build operating businesses around the patents or merely license them to others.”¹⁴⁰
4. Courts in patent cases rule in accordance with law/precedent:
 - a. This positive message was never identified in a single item by both coders.
5. The patent system benefits consumers (e.g., lowers prices, helps get beneficial products to market):
 - a. This positive message was never identified in a single item by both coders.
6. The patent system appropriately balances needs of innovators/patent owners versus users/public/competitors:
 - a. This positive message was never identified in a single item by both coders.
7. The patent system rewards/encourage small inventors as well as large companies:
 - a. This positive message was never identified in a single item by both coders.

137. Alan Sipress, *Patently at Odds: Drug and Tech Sectors Battle with Reform High on Agenda*, WASH. POST, Apr. 18, 2007, at D1.

138. Clive Cookson, *Study Allays Fears Over Rush to File Gene Patents*, FIN. TIMES (London), Jan. 29, 2007, at 6.

139. Peter A. Sullivan, Letter to the Editor, *Need for Patent Protection*, N.Y. TIMES, Mar. 29, 2006, at A22.

140. Steven Pearlstein, Op-Ed., *Big Firms Caught with their Patents Down*, WASH. POST, Dec. 2, 2005, at D1.

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8. Patent system institutional actors are taking steps to improve the patent system:
 - a. “IBM said a joint effort with the U.S. Patent and Trademark Office aims to make it easier for government examiners to decide whether software is truly new.”¹⁴¹
 - b. “The US Supreme Court has already done much to transform the innovation landscape with a series of landmark patent rulings that have undermined the excessive [sic] clout wielded by patent holders.”¹⁴²
9. The patent system is important/matters:
 - a. This positive message was never identified in a single item by both coders.
10. The Federal Circuit has brought needed stability/consistency to patent law:
 - a. “The Federal Circuit’s chief judge, Paul Michel, declined to discuss such critiques [of the Federal Circuit]. ‘I’m not in the business of responding to what a few professors say,’ he said in an interview. But, he added, in its history the court has ‘added considerably greater clarity to the patent law, and a great deal more consistency and maturation to many patent doctrines.’”¹⁴³
 - b. “Since the Supreme Court couldn’t possibly handle the case load needed to adequately address the often quickly changing intellectual property issues relative to technology, law and business, the creation of the federal circuit has provided the much needed stability to our judicial system and helped rein in the inconsistencies previously prevalent among the regional circuits.”¹⁴⁴
11. Patent proceedings are not unduly expensive/lengthy/complicated:
 - a. “You seem to find the district court process to be exemplary because its proceedings on patent validity ‘can take years and are subject to lengthy appeals’ while condemning the ITC process for reaching the same issues of patent validity and infringement in a relatively expeditious 12 to 15 months. From a commercial

141. *Technology Briefing*, WASH. POST, Jan. 11, 2006, at D4.

142. *Patent Revolution: The U.S. Congress Should Act on Patents Before it is Too Late*, FIN. TIMES (London), May 14, 2007, at 14.

143. Jess Bravin, *As Patents Grow More Contentious, Battleground Shifts to High Court*, WALL ST. J., Nov. 28, 2006, at A1.

144. Arlen L. Olsen, Letter to the Editor, *Federal Circuit Provides Consistent Patent System*, WALL ST. J., Dec. 11, 2006, at A19.

standpoint, it is not at all clear that having a slower process is helpful to the owners of intellectual property.”¹⁴⁵

12. There is not too much patent litigation:

- a. “[Big technology companies] claim patent litigation is exploding; but the actual figures show just the opposite. There are fewer patent lawsuits than copyright, trademark or other major forms of commercial litigation.”¹⁴⁶

Negative Messages:

0. The patent system is broken/needs reform:

- a. “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.’”¹⁴⁷
- b. “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.”¹⁴⁸

1. Too many patents are being granted/increase in the number of patents as negative:

- a. “‘We now have a string of decisions that say the Supreme Court thinks we have too many patents and it’s too hard to invalidate them,’ said Thomas C. Goldstein, a lawyer for Teleflex. ‘It’s hard to miss that message.’”¹⁴⁹
- b. “The avalanche of patents—many making broad and vague claims—has produced an environment of uncertainty, rich in opportunity for litigation and patent speculators.”¹⁵⁰

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):

- a. “‘Everybody knows there are a lot of weak patents out there,’ [Professor Pamela Samuelson] said. ‘A lot of

145. Daniel R. Pearson, Letter to the Editor, *Telecom Cases Deserve a Speedy Resolution*, WALL ST. J., Sept. 7, 2006, at A21.

146. Nathan Myhrvold, *Inventors Have Rights, Too!*, WALL ST. J., Mar. 30, 2006, at A14.

147. 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.

148. Editorial, *Patent Sanity is Pending*, L.A. TIMES, Dec. 4, 2005, at M4.

149. Robert Barnes & Alan Sipress, *Rulings Weaken Patents’ Power: High Court Decides on Two Key Cases*, WASH. POST, May 1, 2007, at D1.

150. Steve Lohr, *Hoping to Be a Model, I.B.M. will put Its Patent Filings Online*, N.Y. TIMES, Sept. 26, 2006, at C5.

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.”¹⁵¹

- b. “The US Supreme Court yesterday attacked America’s glut of poor-quality patents by writing new rules that would make it harder to obtain and defend patents.”¹⁵²
3. The definition of what can be patented is too broad (e.g. patents should not be granted (or enforced) on certain categories of subject matter, such as natural phenomena, genes, basic ideas, software, drugs/medicines, business practices, etc.):
 - a. “One solution would be to make more things unpatentable. Just as you can’t—or shouldn’t—be able to patent a mathematical equation, in this scenario you wouldn’t be able to claim ownership of things like the general workings of software (any individual program is already protected by copyright) or business methods. The U.S. has been a pioneer in turning those things into new types of intellectual property; perhaps it’s time to declare this experiment a failure.”¹⁵³
 - b. “‘Abolishing software patents would be a very good thing,’ says Daniel Ravicher, executive director of the Public Patent Foundation, a nonprofit group in New York that challenges what it calls ‘wrongly issued’ patents. Mr. Ravicher, a patent lawyer himself, says he believes that the current system actually impedes the advance of software technology, at the same time that it works quite nicely to enrich patent holders.”¹⁵⁴
4. The USPTO is overtaxed/underfunded/understaffed:
 - a. “In part, that happens because the Patent and Trademark Office is understaffed and overwhelmed. A good first step would be to beef up the patent agency.”¹⁵⁵

151. Jess Bravin & Marilyn Chase, *Politics & Economics: High Court Eases Way for Patent Challenges*, WALL ST. J., Jan. 10, 2007, at A8.

152. Patti Waldmeir, *Supreme Court Sets Higher Threshold for Patents*, FIN. TIMES (London), May 1, 2007, at 10.

153. Rob Pegoraro, Op-Ed., *BlackBerry Lawsuit is Patently Absurd*, WASH. POST, Feb. 25, 2006, at D1.

154. Randall Stross, Op-Ed., *Why Bill Gates Wants 3,000 New Patents*, N.Y. TIMES, July 31, 2005, at 3.

155. Alan Murray, *War on ‘Patent Trolls’ May be Wrong Battle*, WALL ST. J., Mar. 22, 2006, at A2.

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future big pharmaceutical companies routinely will extend the effective life of their patents by buying off generic competitors.”¹⁶¹

8. The patent system permits extortion/windfall extraction/litigation abuse/terrorizing opponents/stealing the ideas of others:
 - a. “A Supreme Court ruling last week that appeared to limit the power of litigious opportunists to hold the industry’s richest companies to ransom was widely greeted as a breakthrough in the fight against abuses of the country’s intellectual property system.”¹⁶²
 - b. “Patent laws came under widespread criticism following the huge windfall won by little-known patent-holding company NTP Inc. in March 2006 from Research in Motion Ltd., maker of the popular BlackBerry wireless email device.”¹⁶³
9. The patent system threatens healthcare (or other vital systems) (“scare messages”):
 - a. “Royalty costs now influence the direction of research in basic diseases, and often even the testing for diseases. Such barriers to medical testing and research are not in the public interest. Do you want to be told by your doctor, ‘Oh, nobody studies your disease any more because the owner of the gene/enzyme/correlation has made it too expensive to do research?’”¹⁶⁴
 - b. “The failure to decide the [LabCorp v. Metabolite Laboratories] case ‘threatens to leave the medical profession subject to the restrictions imposed by this individual patent and others of its kind,’ Justice Stephen G. Breyer wrote in the dissent, which was joined by Justices John Paul Stevens and David H. Souter.”¹⁶⁵

161. Steven Pearlstein, *Some ‘Activist’ Judges Wear Republican Robes*, WASH. POST, Aug. 24, 2005, at D1.

162. Chris Nuttall et al., *Supreme Court Ruling for Tech Giants Fails to Kill ‘Patent Trolls’*, FIN. TIMES (London), May 22, 2006, at 12.

163. Jess Bravin, *Patent Holders’ Power is Curtailed—High Court Rules Intent of Original Law Exceeded: More Disputes May Arise*, WALL ST. J., May 1, 2007, at A3.

164. Michael Crichton, Op-Ed., *This Essay Breaks the Law*, N.Y. TIMES, Mar. 19, 2006, §4, at 13.

165. Andrew Pollack, *Justices Drop Consideration of Boundaries for Patents*, N.Y. TIMES, June 23, 2006, at C3.

10. A patent on a single (even incremental) invention can shut down sales of complex products/result in a damage award out-of-proportion-to the contribution of the patented component:
 - a. “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.”¹⁶⁶
 - b. “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.”¹⁶⁷
11. The patent system stifles or burdens innovation/research/technological progress/competition:
 - a. “[Critics of the U.S. patent system] say that protection for common things such as operating call centers or the method of moving side-to-side on a swing—both patented in recent years—are stifling innovation and increasing product costs for consumers.”¹⁶⁸
 - b. “Ordinarily, we imagine patents promote innovation, but that’s because most patents are granted for human inventions. Genes aren’t human inventions, they are features of the natural world. As a result these patents can be used to block innovation, and hurt patient care.”¹⁶⁹
12. Patents are associated with dangerous/immoral/unethical technologies (e.g. patents on humans):
 - a. This negative message was never identified in a single item by both coders.
13. Patents are (and should not be) awarded to/enforceable by those who do not develop products/practice the invention:
 - a. “‘Patent trolls’ are typically companies that buy patent rights from inventors, then receive royalties from other companies who actually use the patents.”¹⁷⁰

166. Linda Greenhouse, *Justices Agree to Consider EBay Appeal in Patent Case*, N.Y. TIMES, Nov. 29, 2005, at C9.

167. Editorial, *Patent Sanity is Pending*, L.A. TIMES, Dec. 4, 2005, at M4.

168. Sara Schaefer Munoz, *Patent No. 6,004,596: Peanut Butter and Jelly Sandwich*, WALL ST. J., Apr. 5, 2005, at B1.

169. Michael Crichton, Op-Ed., *Patenting Life*, N.Y. TIMES, Feb. 13, 2007, at A23.

170. Laura Peter, *The Virtue of Patents*, WALL ST. J., Feb. 20, 2007, at A17.

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- b. “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.”¹⁷¹
14. Patent owners “own” people or parts of their bodies:
- a. “In fact, you can’t even donate your own breast cancer gene to another scientist without permission. The gene may exist in your body, but it’s now private property.”¹⁷²
- b. “What a shock. I still can’t get over the fact that my medications can be patented, and now I read that my genes may also be patented.”¹⁷³
15. The patent system illegitimately reaches beyond U.S. territorial borders (e.g., U.S. patent system as “imperialist”):
- a. “Moreover, more than half the damages reflected Microsoft’s sales worldwide instead of just within the United States, which tech executives said was an improper application of U.S. law beyond the borders.”¹⁷⁴
16. Patent litigation is too costly/too slow; there is too much patent litigation:
- a. “Meeting [the teaching-suggestion-motivation test for obviousness] often requires a jury trial, making patent litigation prolonged and expensive.”¹⁷⁵
- b. “‘U.S. patent law needs to encourage an innovation environment,’ said Mark Chandler, general counsel and senior vice president for Cisco Systems. ‘Lately it’s been encouraging a litigation environment.’”¹⁷⁶
17. The patent system lags behind science and technology development:
- a. “The [Stuart] Newman case reveals how far U.S. intellectual-property law has lagged behind the art and science of biotechnology. The Supreme Court has

171. Pegoraro, *Buying*, *supra* note 157, at D1.

172. Crichton, *Patenting Life*, *supra* note 169, at A23.

173. Jack Bray, Letter to the Editor, *Whose Genes are They Anyway*, N.Y. TIMES, Feb. 19, 2007, at A14.

174. Alan Sipress, *Patently at Odds: Drug and Tech Sectors Battle with Reform High on Agenda*, WASH. POST, Apr. 18, 2007, at D1.

175. Linda Greenhouse, *Supreme Court Weighs The Meaning of ‘Obvious’*, N.Y. TIMES, Nov. 29, 2006, at C3.

176. Puzzanghera, *supra* note 159, at C1.

addressed the issue of patenting life only once, and that was 25 years ago.”¹⁷⁷

18. The USPTO and its employees have financial incentives to accept/grant too many patents; patent examiners have the wrong productivity incentives:
 - a. “According to Josh Lerner, a Harvard Business School professor and the co-author of “Innovation and Its Discontents,” a tough-minded book about patents, the issuance of patents like the ‘823 has become an ever bigger problem in recent years. He attributes that in part to overworked patent examiners—who also work for the one part of the federal government that earns its keep through the fees it collects, and so have every incentive to grant patents.”¹⁷⁸
 - b. “Second, the patent office encourages examiners to approve patents, not reject them, so many that don’t really meet the eligibility criteria slip through.”¹⁷⁹
19. The courts ignore congressional intent/controlling precedent:
 - a. “But the Court of Appeals for the Federal Circuit (CAFC) was blind to any such line. They checked the federal code for the definition of patentability, saw that it did not use the word ‘physical,’ and concluded that Congress intended for non-physical designs of all types to be patentable. The Supreme Court’s distinction between a significant and an insignificant physical step was simply ignored.”¹⁸⁰
 - b. “Why would Congress pass a law allowing such a thing? The answer is that it did not. But a federal appeals court ruled in 1998 that business methods can be patented, and since then the Patent Office has issued 49 tax-strategy patents, with many more pending.”¹⁸¹
20. The USPTO improperly responds to lobbying/political influence and pressure:

177. Rick Weiss, *U.S. Denies Patent for a Too-Human Hybrid: Scientist Sought Legal Precedent to Keep Others from Profiting from Similar ‘Inventions’*, WASH. POST, Feb. 13, 2005, at A3.

178. Nocera, *supra* note 160, at C1.

179. Jennifer Washburn, Op-Ed., *The Legal Lock on Stem Cells: Two Patents That Cover Key Research Areas are Setting Back Science*, L.A. TIMES, Apr. 12, 2006, at B13.

180. Ben Klemens, Letter to the Editor, *The Gravity of the U.S. Patent Swindle*, WALL. ST. J., Mar. 25, 2006, at A9.

181. Floyd Norris, *You Can’t Use That Tax Idea. It’s Patented.*, N.Y. TIMES, Oct. 20, 2006, at C1.

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- a. “‘It goes to show the uncommon nature of the process, and how very politicized it’s become,’ said Susan Dadio, a patent attorney and former patent agency examiner based in Alexandria.”¹⁸²
 - b. “‘NTP believes that RIM has utilized its money, power and political influence to overcome its complete defeat in the court system and to inappropriately influence the U.S. Patent Office process,’ Arlington-based NTP said in a statement.”¹⁸³
21. The patent system is skewed in favor of larger companies:
- a. “‘Mr. Smith also called for the patent office to abolish fees for individuals, as a way to counterbalance what he said is a system that favors large companies.’”¹⁸⁴
 - b. “‘In failing to employ language that excludes software from patent protection once and for all, the European software industry risks falling into the same trap as the US in this area where large corporations have been able to use ‘blanket’ patenting strategies in order to monopolise entire fields and push smaller competitors out of the market.’”¹⁸⁵
22. ITC proceedings are inappropriately expeditious/serve as an end-run around the judicial process:
- a. “‘Incredibly, all of this takes place separately from normal judicial proceedings on patent infringement or validity. Most of the cell-phone cases mentioned above are also in court on patent-infringement grounds, but these cases can take years and are subject to lengthy appeals. The ITC tries to discharge Section 337 cases in about a year, and will not wait for the courts. Once the ITC votes on the judge’s order, there is only one avenue of appeal: The President has 60 days to override the ITC’s order. If he doesn’t act, the import ban takes effect.’”¹⁸⁶
23. The patent application process is too expensive:
- a. This negative message was never identified in a single item by both coders.

182. Yuki Noguchi, *Canada Lobbies for Maker of BlackBerry: Officials Contacting U.S. on Patent Review*, WASH. POST, Feb. 22, 2006, at D1.

183. *Technology Briefing*, WASH. POST, Feb. 24, 2006, at D5.

184. Robert A. Guth, *Microsoft Adds Its Voice to Call For Overhauling Patent System*, WALL ST. J., Mar. 11, 2005, at B5.

185. Kathy Fairlamb, Letter to the Editor, *Industry’s ‘Satisfaction’ is by No Means Widespread*, FIN. TIMES (London), June 23, 2005, at 18.

186. Editorial, *Smoot-Hawley’s Revenge*, WALL ST. J., Aug. 23, 2006, at A10.

24. The patent system has been adversely affected by the specialized court (Federal Circuit) and/or specialized bar:
 - a. “For years now, patent law has been a case study in what happens when a specialized bar and specialized magistrates get hold of an area of economic activity: Common sense gives way to precedent, and public interest gives way to private.”¹⁸⁷
25. The damages awarded in patent cases are excessive:
 - a. “Things got so lopsided in the world of patent litigation not on account of the patent statute itself but from case law, which has become increasingly protective of patent owners and tolerant of excessive damages arguments by plaintiffs’ lawyers.”¹⁸⁸
 - b. “Later this week, the patent reform revolution could pass another milestone, when a key congressional subcommittee votes on legislation to tackle some of the biggest problems with American patent litigation, including excessive damages.”¹⁸⁹
26. The patent system is not well-suited to the modern economy:
 - a. “The proposed legislation reflects years of criticism from judges and businesses that the nation’s current system of protecting intellectual property is ill-suited to the modern economy, where new inventions crop up quickly and often involve the marriage of hundreds of potentially patentable technologies and ideas.”¹⁹⁰
 - b. “Every technological leap forward brings its own legal crisis: now the Supreme Court is being asked to figure out how ancient patent laws should be reinterpreted to cope with the digital economy.”¹⁹¹
27. Patent examiners are unqualified (underpaid, inexperienced):
 - a. This negative message was never identified in a single item by both coders.
28. Juries are ill-suited/unqualified to resolve patent/technical questions:

187. *Patent Law Comes Back to Earth*, WASH. POST, May 6, 2007, at F03.

188. Bruce Sewell, *Troll Call*, WALL ST. J., Mar. 6, 2006, at A14.

189. *Patent Revolution*, *supra* note 142, at 14.

190. Greg Hitt, *Industries Brace for Tough Battle Over Patent Law—Drug Makers Oppose Overhaul Plan Backed by Tech, Finance Firms*, WALL ST. J., June 6, 2007, at A1.

191. Patti Waldmeir, *Get it Now from eBay, Hostage to the Patent Trolls*, FIN. TIMES (London), Mar. 16, 2006, at 15.

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- a. This negative message was never identified in a single item by both coders.

Codifying Headline Portrayals

The following citations are representative samples from the data set which were interpreted by both coders as communicating either a neutral/balanced, positive, or negative portrayal of the patent system in the headline of the item.

0. These items communicated a neutral or balanced portrayal of the patent system in the headline:
 - a. Alan Sipress, *Vonage Wins Stay in Verizon Dispute*, WASH. POST, Apr. 25, 2007, at D3.
 - b. *Google Wins Dismissal of Patent Lawsuit*, N.Y. TIMES, Dec. 28, 2006, at C4.
1. These items communicated a positive portrayal of the patent system in the headline:
 - a. Laura Peter, *The Virtue of Patents*, WALL ST. J., Feb. 20, 2007, at A17.
 - b. Arlen L. Olsen, Letter to the Editor, *Federal Circuit Provides Consistent Patent System*, WALL ST. J., Dec. 11, 2006, at A19.
2. These items communicated a negative portrayal of the patent system in the headline:
 - a. Editorial, *Patently Out of Date: The System that Protects Ideas, Innovations and Inventions is in Desperate Need of an Overhaul*, L.A. TIMES, May 3, 2007, at A22.
 - b. Jonathan Krim, *Evaluating a Patent System Gone Awry*, WASH. POST, May 5, 2005, at E1.

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Codifying Body Portrayals

The following citations are representative samples from the data set which were interpreted by both coders as communicating either a neutral/balanced, positive, or negative portrayal of the patent system in the body of the item.

0. The body of the following items communicated a neutral or balanced portrayal of the patent system:
 - a. Barnaby J. Feder, *Harvard is Licensing More Than 50 Patents to a Nanotechnology Start-Up*, N.Y. TIMES, June 4, 2007, at C5.
 - b. Mark Drajem & Ryan J. Donmoyer, *Senators Set Sights on Overseas Tax Havens*, WASH. POST, Feb. 18, 2007, at A10.
1. The body of the following items communicated a positive portrayal of the patent system:
 - a. Nathan Myhrvold, Op-Ed., *Inventors Have Rights, Too!*, WALL ST. J., Mar. 30, 2006, at A14.
 - b. Peter A. Sullivan, Letter to the Editor, *Need for Patent Protection*, N.Y. TIMES, Mar. 29, 2006, at A22.
2. The body of the following items communicated a negative portrayal of the patent system:
 - a. Linda Greenhouse, *Justices Agree to Consider EBay Appeal in Patent Case*, N.Y. TIMES, Nov. 29, 2005, at C9.
 - b. Jim Puzzanghera, *High Court Tempers Patent Prosecutions*, L.A. TIMES, May 1, 2007, at C1.