

The Rhetoric of Reasonable and Non-Discriminatory: Conflicting Visions of Innovation in the Smart Phone Patent Wars

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In this article, I investigate the rhetoric of Reasonable and Non-Discriminatory (RAND) licensing agreements, which are used to share patented technologies. RAND agreements are an essential part of the so-called "Patent War" that took place between Microsoft, Google, and Motorola Mobility from 2010 to 2015. I view the rhetoric surrounding the RAND-related aspects of this conflict through two theoretical lenses: Charles Taylor's concept of the social imaginary and Perelman and Olbrechts-Tyteca's notion of rhetorical communion. Ultimately, I argue that the sides in this conflict use radically different rhetorical concepts to shape their discourse surrounding RAND agreements. These differences suggest different approaches to technological innovation. Microsoft's use of social imaginaries suggests a view of innovation as collaboration among firms, while Google's creation of rhetorical communion (especially through the device of allusion) depicts a view of innovation that is much more rooted in the notion of the inspired author.

Keywords: Charles Taylor, Google, Intellectual Property, Licensing Agreements, Microsoft, Motorola, Patent Wars, Perelman and Olbrechts-Tyteca

Smartphones have become nearly ubiquitous components of modern life. A 2015 Pew Research Center finds that 64% of Americans are smartphone owners, while more and more Americans depend on their phones entirely for access to the Internet.¹ Communications scholars are investigating the impact that mobile computing has on interpersonal relationships and on society writ large. For example, Bean et al. outline existing research into emergency alerts sent over mobile phones and argue that researchers still need to address "difficult theoretical and practical problems." They conclude with a call for more research into the topic.² Similarly Pettegrew and Day provide an empirical study investigating "how mobile devices ... may be fundamentally changing the very nature of the interpersonal communication process and outdated many of [communications scholars'] theories."³ However, the underlying communications processes that support smartphone technology itself have remained largely unaddressed.

The need to interrogate the processes and texts upon which mobile computing is built is similar in importance to understanding video games. Davisson and Gehm argue convincingly that the

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¹ Aaron Smith, "U.S. Smartphone Use in 2015," *Pew Research Center: Internet, Science & Tech*, n.p., accessed October 1, 2015, <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>.

² Hamilton Bean, Jeannette Sutton, Brooke F. Liu, Stephanie Madden, Michele M. Wood, and Dennis S. Mileti, "The Study of Mobile Public Warning Messages: A Research Review and Agenda," *Review of Communication* 15, no. 1 (2015): 75, doi:10.1080/15358593.2015.1014402.

³ Loyd S. Pettegrew and Carolyn Day, "Smart Phones and Mediated Relationships: The Changing Face of Relational Communication," *Review of Communication* 15, no. 2 (2015): 123, doi:10.1080/15358593.2015.1044018.

“rules and procedures” of video games help to constitute the “ideology” of such games. Consequently, understanding such rules and procedures is essential to understanding how a game shapes cultural relationships such as citizenship.⁴ Likewise, Hess argues that technologies such as search algorithms and browser cookies, seen through the lens of Burkean identification, form a “fundamental part of contemporary rhetorical training and critical reflection.”⁵ In other words, Hess’s work helps demonstrate how seemingly invisible texts help shape our actions in a technologically driven world. Furthermore, Hess argues that the technology we use constitutes a crucial part of our “rhetorical identity,” adding that “[t]o believe that humans can be separated from the machines discounts the actual use of convergent and locative technology in the everyday lives of millions.”⁶ My own research takes a similar track, in that I consider the processes by which technologies are developed and codified into patents and standards as essential to modern modes of innovation and collaboration. This article attempts to contribute to the scholarship on smartphones by investigating the rhetoric surrounding the intellectual property agreements that enable mobile computing technologies.

Specifically, this article studies the rhetoric underpinning Reasonable and Non-Discriminatory (RAND) licensing agreements, which constitute a substantial portion of the technology on which mobile computing is built. In fact, standards and licensing are at the heart of several of the complaints that constituted the so-called “Patent War” between Microsoft and Google (and Google’s former subsidiary, Motorola Mobility). The ways that each of the parties to this dispute talk about standards and licensing demonstrate profoundly different perspectives on innovation. These perspectives come into focus when viewed through two theoretical lenses: Charles Taylor’s social imaginary and Perelman and Olbrechts-Tyteca’s notion of rhetorical communion.

The philosopher Charles Taylor argues that “the ways in which people imagine their social existence [and] how they fit in with others” constitute a “social imaginary.”⁷ Taylor offers the economy as an example of a social imaginary that evolved from the elite theories of Adam Smith and others. Over the course of more than a century, this idea percolated into other spheres of human interaction. It is this percolation into the everyday ways in which we talk about our lives and work that constitutes a social imaginary. Thus, today the concept of the economy refers to more than just the buying and selling of goods in the marketplace. The economy pervades many spheres of social existence. In other words, we now “see society as an ‘economy,’ an interlocking set of activities of production, exchange, and consumption, which form a system with its own laws and dynamic.”⁸

Rhetorical communion is described by Perelman and Olbrechts-Tyteca in *The New Rhetoric* and analyzed by Graff and Winn.⁹ Communion in this sense is somewhat akin to solidarity, in that

⁴ Amber Davisson and Danielle Gehm, “Gaming Citizenship: Video Games as Lessons in Civic Life,” *Journal of Contemporary Rhetoric* 4, no. 3/4 (2014): 42.

⁵ Aaron Hess, “You Are What You Compute (and What Is Computed for You): Considerations of Digital Rhetorical Identification,” *Journal of Contemporary Rhetoric* 4, no. 1/2 (2014): 17.

⁶ Hess, “You Are What You Compute,” 17-18.

⁷ Charles Taylor, “Modern Social Imaginaries,” *Public Culture* 14, no. 1 (2002): 100.

⁸ Taylor, “Modern Social Imaginaries,” 105.

⁹ Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (Notre Dame, IN: University of Notre Dame Press, 1969); Richard Graff and Wendy Winn, “Burke’s ‘Identification’ and Perelman and Olbrechts-Tyteca’s ‘Communion’: A Case of Convergent Evolution?” in *The Promise of Reason: Studies in The New Rhetoric*, ed. John T. Gage (Carbondale, IL: SIU Press, 2011), 103-33.

it is one of the forces that holds a community together. But communion also performs “a constitutive function for rhetoric.”¹⁰ That is, communion can take on a constructive role in the forming and maintaining of the community itself. Graff and Winn (citing Perelman and Olbrechts-Tyteca) also describe three major methods that authors can deploy when trying to evoke a sense of communion. These are (1) maxim and proverb, (2) allusion and quotation, and (3) invitations to the audience to participate.¹¹

In this article, I argue that the ways in which Microsoft, Motorola, and Google write about RAND disputes contribute to constructing competing social imaginaries through metaphor and through the concept of rhetorical communion, especially when allusion plays a role. Generally speaking, those parties in this dispute that will benefit from the maintenance of the *status quo* seem to make greater use of metaphors involving patents as economic engine. Those with an interest in disrupting the patent system tend to use language that creates a sense of communion with the audience through the use of allusions and maxims.

The “Patent War” among Microsoft, Motorola Mobility, and Google

The conflict between Microsoft and Motorola Mobility began on October 1, 2010, when Microsoft filed two complaints involving nine patents against Motorola Mobility.¹² This original suit claimed that Motorola Mobility was infringing on Microsoft’s patents; Microsoft filed a second suit in November claiming that Motorola Mobility was not honoring its RAND commitments.¹³ The following day, Motorola Mobility counter-sued over many of those same RAND-related patents.¹⁴ Motorola Mobility filed a similar complaint with the International Trade Commission a few days later.¹⁵ Even at this early stage, the web of lawsuits, counter-lawsuits, and complaints was quite complex, involving more than twenty patents and four jurisdictions.¹⁶ However, this already contentious state of affairs was just the beginning. As lawsuit was met with counter-lawsuit, more and more patents and jurisdictions were drawn into the fray. In just a little more than a year, the conflict had expanded to involve approximately fifty patents and seven jurisdictions.

Although the parties in these lawsuits were originally limited to Microsoft and Motorola Mobility, Google became involved when they purchased Motorola Mobility in 2011. As the purchase underwent regulatory scrutiny, Google required that Motorola Mobility agree not to settle any outstanding intellectual property lawsuits.¹⁷ Finally, it is important to note that Microsoft itself

¹⁰ Graff and Winn, “Burke’s ‘Identification’ and Perelman and Olbrechts-Tyteca’s ‘Communion,’” 109.

¹¹ Graff and Winn, “Burke’s ‘Identification’ and Perelman and Olbrechts-Tyteca’s ‘Communion,’” 114.

¹² Cecilia Kang, “Microsoft Sues Motorola for Allegedly Violating Patents on Android Phones,” *Washingtonpost.com*, October 1, 2010, http://voices.washingtonpost.com/posttech/2010/10/microsoft_sues_motorola_for_al.html.

¹³ Josh Lowensohn, “Microsoft Files 2nd Suit against Motorola in Weeks,” *CNET*, November 9, 2010, http://news.cnet.com/8301-10805_3-20022294-75.html; Bill Rigby and Gerald E. McCormick, “Microsoft Sues Motorola over Xbox Patent Issue,” *Reuters*, November 9, 2010, <http://uk.reuters.com/article/2010/11/09/us-microsoft-motorola-idUKTRE6A84GR20101109>.

¹⁴ Motorola Mobility, “Motorola Mobility Files Patent Infringement Complaints against Microsoft” (Motorola Mobility, November 20, 2010), <http://mediacenter.motorola.com/Press-Releases/Motorola-Mobility-Files-Patent-Infringement-Complaints-Against-Microsoft-34d6.aspx>.

¹⁵ Josh Lowensohn, “Motorola Files ITC Complaint against Microsoft,” *CNET*, November 22, 2010, http://news.cnet.com/8301-10805_3-20023582-75.html.

¹⁶ Florian Mueller, “Microsoft vs. Motorola: The Patent Battlefield as of 11 Dec 11” (Scribd, December 11, 2011), 5, <http://www.scribd.com/doc/75443115/MicrosoftVsMotorola-11-12-11>.

¹⁷ Motorola Mobility, “Preliminary Special Proxy Statement” (Motorola Mobility, 2011), 66, <http://www.sec.gov/>

brought Google into the dispute when they expanded a claim against Motorola Mobility to include its parent company Google.¹⁸ In September 2015, Microsoft and Google announced an agreement, whereby they agreed to drop all of their pending patent litigation.¹⁹ Patent Analyst Florian Mueller called the agreement a strategic win for Google, but suggested that ultimately the standards-essential patent system itself may also have benefited from the truce.

Standards-Essential Patents and RAND Commitments

Standards are anything but neutral texts. Indeed, standards are built upon rhetorical foundations that can be as heavily laden with persuasion and contentiousness as any other negotiation of power. Therefore, it is useful to review the relationship between standards and patents, especially since that relationship constitutes a sort of rhetorical canvas, across which the images, metaphors, and allusions of this dispute are drawn.

Standards and intellectual property rights such as patents are essentially at cross purposes. Bekkers, Verspagen, and Smits maintain that standards can benefit producers and consumers alike. For producers, standardization can help to “increase economies of scale,” which in turn can benefit consumers through lower costs.²⁰ Although standards can also lock out smaller producers or disruptive technologies, standards can also help reduce format battles such as the struggle between the VHS and Betamax videotape recording formats of the late 1970s and early 1980s. Additionally, standards can benefit consumers by preventing them from getting “locked in” to a format or technology that will vanish from the marketplace. By way of contrast, Intellectual Property Rights (IPRs) are meant to foster development and innovation. In the United States, such rights are rooted in the Useful Arts clause of the US Constitution, which states that “Congress shall have the power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²¹ Although the patent system has seen a great many changes in the two centuries since the Constitution was written, the underlying principle that innovation should be supported by granting inventors limited-term monopolies for new ideas has remained intact.

However, Shapiro worries that, despite the intentions of the Useful Arts clause to promote innovation, the current patent system actually has the opposite effect:

Thoughtful observers are increasingly expressing concerns that our patent (and copyright) system is in fact creating a patent thicket, a dense web of overlapping intellectual property rights that a

Archives/edgar/data/1495569/000119312511246952/d224940dprem14a.htm. While it may be standard practice in corporate mergers to put such litigation settlements on hold as the company is changing hands, the Preliminary Proxy Statement makes it quite clear that whether or not Motorola would settle its intellectual property lawsuits was an important factor in the negotiations to purchase the company. See Motorola Mobility, “Preliminary Special Proxy Statement,” 27-30.

¹⁸ Bill Rigby, Steve Orlofsky, and David Gregorio, “Microsoft to Sue Google with Motorola in German Patent Row,” *Reuters*, October 12, 2012, <http://www.reuters.com/article/2012/10/12/us-microsoft-motorola-idUSBRE89B18F20121012>.

¹⁹ Susan Decker and Dina Bass, “Google, Microsoft Resolve Patent Fight Over Phones, Xbox,” *Bloomberg.com*, September 30, 2015, <http://www.bloomberg.com/news/articles/2015-09-30/google-microsoft-resolve-global-patent-fight-over-phones-xbox>.

²⁰ Rudi Bekkers, Bart Verspagen, and Jan Smits, “Intellectual Property Rights and Standardization: The Case of GSM,” *Telecommunications Policy* 26, no. 3–4 (April 2002): 172, doi:10.1016/S0308-5961(02)00007-1.

²¹ “U.S. Constitution, Art. I, Para. 8, Cl. 8,” <http://www.archives.gov/exhibits/charters/constitution.html>.

company must hack its way through in order to actually commercialize new technology. With cumulative innovation and multiple blocking patents, stronger patent rights can have the perverse effect of stifling, not encouraging, innovation.²²

Shapiro places much of the blame for this situation on a patent system that grants too many patents to too many owners, a situation that makes it nearly impossible to build anything without infringing on multiple patents. The complexity of building a device such as a cell phone in the midst of such an intellectual property “thicket” has been echoed by both Google and Microsoft. See Drummond’s blog post “When patents attack Android” for Google’s perspective; like Shapiro, Drummond considers the cost of cutting through the “250,000 (largely questionable) patent claims” involved in a typical smartphone to be a kind of tax.²³ For Microsoft’s viewpoint, see the Q&A with Gutierrez.²⁴ In this text Gutierrez echoes Shapiro’s metaphor of patents as web. However, unlike Shapiro, Gutierrez sees the system of patents and the licenses that enable companies to connect them not as something that must be cut through, but something that can be built upon: “It is that ‘invisible web’ of licensing agreements in the background that enables that device to be ‘cool.’ That’s a benefit of IP collaboration you rarely hear about, but that is very real.”²⁵ It should come as no surprise that these two competitors use language that demonstrates opposing views of the costs and benefits of the patent system. These perspectives illustrate the inherent tension between standards and intellectual property rights.

The possibility of patent “holdup” may be an even worse damper on innovation than patent thickets themselves. Holdup occurs after a product has been developed and produced, when a patent holder can file a lawsuit asking the court to prevent the allegedly infringing firm from producing, importing, or distributing the product in question.²⁶ During the patent war, both Microsoft and Motorola Mobility requested and were granted such injunctive relief. A German court ordered that Microsoft not be allowed to import several Microsoft products into Germany.²⁷ Note, however, that a US Court prevented this injunction from going into effect.²⁸ Similarly, on May 18, 2012, the International Trade Commission ordered that Motorola Mobility not be allowed to import into the United States devices that infringe on a Microsoft patent involving the synchronizing of calendar entries among various devices.²⁹

²² Carl Shapiro, “Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting,” in *Innovation Policy and the Economy, Volume 1*, ed. Adam B. Jaffe, Josh Lerner and Scott Stern, 119-150 (Cambridge, MA: MIT Press, 2001), 120.

²³ David Drummond, “When Patents Attack Android,” Corporate Blog, *Google: Official Blog* (August 3, 2011), <http://googleblog.blogspot.com/2011/08/when-patents-attack-android.html>, para. 5.

²⁴ “Microsoft Reflects on Five Years of Collaborative Intellectual Property Licensing,” *Microsoft News Center*, September 16, 2008, <http://www.microsoft.com/en-us/news/features/2008/sep08/09-16ipfiveyears.aspx>.

²⁵ “Microsoft Reflects on Five Years,” para. 5.

²⁶ Shapiro, “Navigating the Patent Thicket,” 121.

²⁷ “Motorola Wins Xbox Ban in Germany,” *BBC*, May 2, 2012, sec. Technology, <http://www.bbc.co.uk/news/technology-17924190>.

²⁸ Steven D. Jones, “Judge Denies Injunction in Microsoft, Motorola Patent Suit,” Newspaper Website, *Wall Street Journal* (December 3, 2012), <http://online.wsj.com/article/SB10001424127887324355904578157633497141880.html>.

²⁹ United States International Trade Commission, “Notice of a Commission Final Determination of Violation of Section 337; Issuance of a Limited Exclusion Order; Termination of Investigation” (U.S. International Trade Commission, May 18, 2012), http://www.usitc.gov/secretary/fed_reg_notices/337/337_744_notice05182012sgl_1.pdf.

Finally, standards-essential patents (SEPs) are those patents that have been used to help create a standard. Bekkers, Verspagen, and Smits describe SEPs as “protected knowledge that is indispensable for a product that has to comply with that standard.”³⁰ Once a patent is written into a standard as an SEP, it can either be shared freely or at a reasonable and non-discriminatory cost. Shapiro contends that such sharing agreements are created because without them, patent owners would be hesitant to contribute to the standard, since other contributors could potentially use their part of the standard as leverage against competitors.³¹ In theory, these agreements should balance intellectual property rights and the need for standards by giving patent owners some kind of fair compensation for their property, while at the same time preventing any single patent holder from using that property to dominate the market. However, not even RAND agreements can ease the tension between standards and patents completely, as the rhetorical analysis below helps demonstrate. In the pages that follow, I conduct a close rhetorical analysis of the following fourteen source documents:

- Three blog posts by different Microsoft executives.³² In these texts, Microsoft establishes its position on the relationship among standards-essential patents, licensing, and innovation.
- A report by the US Patent and Trademark Office that outlines various aspects of intellectual property and the US economy, as well a speech by President Obama that is referred to in that report.³³
- A report by the Department of Commerce that focuses on intellectual property and the economy.³⁴
- Five blog posts by various Google executives.³⁵ In these texts, the company Google stakes out its own perspective on patents and innovation.

³⁰ Bekkers, Verspagen, and Smits, “Making the Mobile Revolution: Standards and Other Legacies,” 173.

³¹ Shapiro, “Navigating the Patent Thicket,” 128.

³² Jason Albert, “Intellectual Property: The Engine of U.S. Economic Growth,” *Microsoft on the Issues: News and Perspectives on Legal, Public Policy and Citizenship Topics*, April 11, 2012, http://blogs.technet.com/b/microsoft_on_the_issues/archive/2012/04/11/intellectual-property-the-engine-of-u-s-economic-growth.aspx; David Howard, “FTC Speaks Out Against Standard Essential Patent Abuse,” *Microsoft on the Issues: News and Perspectives on Legal, Public Policy, and Citizenship Topics*, June 6, 2012, http://blogs.technet.com/b/microsoft_on_the_issues/archive/2012/06/06/ftc-speaks-out-against-standard-essential-patent-abuse.aspx; Brad Smith and Horacio Gutierrez, “Our Licensing Deal with Samsung: How IP Drives Innovation and Collaboration,” *Microsoft on the Issues: News and Perspectives on Legal, Public Policy and Citizenship Topics*, September 28, 2011, http://blogs.technet.com/b/microsoft_on_the_issues/archive/2011/09/28/our-licensing-deal-with-samsung-how-ip-drives-innovation-and-collaboration.aspx.

³³ “Remarks by the President in Presenting National Medals of Science and National Medals of Technology and Innovation,” *The White House of President Barack Obama*, November 17, 2010, <http://www.whitehouse.gov/the-press-office/2010/11/17/remarks-president-presenting-national-medals-science-and-national-medals>; US Patent and Trademark Office, “Intellectual Property and the U.S. Economy,” *Uspto.gov*, March 2012, http://www.uspto.gov/about/ipm/industries_in_focus.jsp.

³⁴ Economics and Statistics Administration and United States Patent and Trademark Office, “Intellectual Property and the U.S. Economy: Industries in Focus” (U.S. Department of Commerce, March 2012), http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf.

³⁵ Drummond, “When Patents Attack Android”; Google, “Facts about Google’s Acquisition of Motorola,” accessed December 20, 2012, <http://www.google.com/press/motorola/>; Michelle Lee, “Patent Reform Needed More than Ever,” *Google Public Policy Blog*, March 3, 2009, <http://googlepublicpolicy.blogspot.com/2009/03/patent-reform-needed-more-than-ever.html#uds-search-results>; Johanna Shelton and Michelle Lee, “Reforming Patents, Promoting Innovation,” *Google Public Policy Blog*, September 4, 2007, <http://googlepublicpolicy.blogspot.com/2009/03/patent-reform-needed-more-than-ever.html>; Kent Walker, “Patents and Innovation,” *Official Google Blog*, April 4, 2011, <http://googleblog.blogspot.com/2011/04/patents-and-innovation.html>.

- A letter from Google’s Deputy General Counsel to standard setting organizations.³⁶ This letter established Google’s position on how it will conduct itself without regard to the RAND commitments associated with the patents acquired in its purchase of Motorola Mobility.
- A press release from Motorola Mobility.³⁷ This text announces the earliest lawsuit that Motorola Mobility levied against Microsoft.
- The special proxy statement issued by Motorola Mobility describing its potential purchase by Google.³⁸

Patents as “Economic Engines”

In this section, I dissect the social imaginary of standards-essential patents and RAND agreements involved in the Patent Wars. Specially, I look at the *economic engine* metaphor that has come to shape discussions surrounding intellectual property in general and patent licenses specifically. It should come as no surprise that standards-essential patents and RAND agreements, with their deep connections to both the marketplace economy and other systems of social interaction, are also governed to a large extent by the social imaginary of the economy itself. Social imaginaries are often normative in nature, as Taylor makes clear: “We have a common sense of how things usually go, but this is interwoven with an idea of how they ought to go.”³⁹ However, the social imaginary is essentially dialectical in nature. In other words, the social imaginary, emerging as it does from the understandings and actions of people participating in it, is shaped by the very practices that it also creates and normalizes. Ultimately, as Taylor puts it, “the new practice, with the implicit understanding it generates, can be the basis for modifications of theory, which in turn can inflect practice, and so on.”⁴⁰ Thus, the normative and dialectic aspects of the social imaginary cannot help but be at odds with each other. As the people and organizations participating in a given social imaginary pursue their interests and agendas, the tension between normativism and dialectic becomes clear. This tension is well demonstrated by analyzing the rhetoric surrounding the Patent Wars.

One of the first examples of the “patent as economic engine” metaphor in my sample of documents occurs in a 2011 blog post from Microsoft’s General Counsel Brad Smith and Deputy General Counsel Horacio Gutierrez.⁴¹ In this post, Smith and Gutierrez announce a cross-licensing agreement between Microsoft and Samsung. The accompanying press release offers the details of the deal: Samsung agreed to pay royalties for its “phones and tablets running the Android mobile platform. In addition, the companies agreed to cooperate in the development and marketing of [Microsoft’s mobile operating system] Windows Phone.”⁴² In the blog post announcing the deal, Smith and Gutierrez take a broader view of what such deals mean, both for Microsoft as a company and for innovation writ large:

These agreements prove that licensing works. They show what can be achieved when companies sit down and address intellectual property issues in a responsible manner. The rapid growth of the

³⁶ Allen Lo, “Letter to Standard Setting Organizations,” February 8, 2012, <http://www.google.com/press/motorola/pdf/sso-letter.pdf>.

³⁷ Motorola Mobility, “Motorola Mobility Files Patent Infringement Complaints against Microsoft.”

³⁸ Motorola Mobility, “Preliminary Special Proxy Statement.”

³⁹ Taylor, “Modern Social Imaginaries,” 106.

⁴⁰ Taylor, “Modern Social Imaginaries,” 111.

⁴¹ Smith and Gutierrez, “Our Licensing Deal with Samsung.”

⁴² “Microsoft and Samsung Broaden Smartphone Partnership [press Release]” (Microsoft News Center, September 28, 2011), <http://www.microsoft.com/en-us/news/press/2011/sep11/09-28SamsungPR.aspx>, para. 11.

technology industry, and its continued fast pace of innovation are founded on mutual respect for IP. Intellectual property continues to provide the engine that incentivizes research and development, leading to inventions that put new products and services in the hands of millions of consumers and businesses.⁴³

In addition to the stability invoked by phrases such as “mutual respect for IP,” Smith & Gutierrez also cast intellectual property in terms of a technological metaphor: an engine. In this case, this metaphorical engine “incentivizes research and development.” Incentivization is a common argument in favor of intellectual property rights, emphasizing as it does the stated purpose of the Science and Useful Arts clause: “The Congress shall have power ... to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴⁴ But combining the incentivization argument with the technical metaphor of the engine may create a sort of harmonious circle in the mind of the reader. As “engine,” intellectual property has become its own kind of technology, one that makes possible the creation of more advanced intellectual property.

Microsoft also makes use of the engine metaphor to describe the relationship between patents and other intellectual property and the US economy as a whole. The company’s Associate General Counsel for IP Policy and Strategy, Jason Albert, wrote a blog post titled “Intellectual Property: The Engine of U.S. Economic Growth.”⁴⁵ Here Albert summarizes a report from two US government agencies: the Economics and Statistics Administration (ESA) and the US Patent and Trademark Office (USPTO). The report (hereafter referred to as the ESA/USPTO report) analyzes the effects that patents and other kinds of intellectual property have on the US economy. As the USPTO summarizes nicely on the web page that houses the report: “The entire U.S. economy relies on some form of IP, because virtually every industry either produces or uses it.”⁴⁶ In terms of dollars and jobs, the report found that “IP-intensive industries” added over \$5 trillion to the GDP in 2010 and represented more than 18% of the US workforce.^{47,48} However it should be noted that the lion’s share of the IP effect was related to Trademark; patent-intensive industries accounted for only 5.3% of the GDP and 2.7% of employment.⁴⁹

The “engine” metaphor is deployed several times in this report, even in the epigraph to the main body of the report, which features a quotation from President Obama. In this formulation, the harmonious circle I describe becomes even more apparent, in that here the relationship between the metaphorical engine and innovation has changed directions.

The key to our success—as it has always been—will be to compete by developing new products, by generating new industries, by maintaining our role as the world’s engine of scientific discovery

⁴³ Smith and Gutierrez, “Our Licensing Deal with Samsung,” para. 4.

⁴⁴ “U.S. Constitution, Art. I, Para. 8, Cl. 8.”

⁴⁵ Albert, “Intellectual Property.”

⁴⁶ US Patent and Trademark Office, “Intellectual Property and the U.S. Economy,” sec. Principle Findings, para 1.

⁴⁷ US Patent and Trademark Office, “Intellectual Property and the U.S. Economy,” sec. Principle Findings.

⁴⁸ The report defines IP-intensity as related to the use of “intellectual property protection,” while acknowledging that such a definition can be subject to criticism, since it may overemphasize IP used strategically (such as is often the case in the Patent Wars), and de-emphasize IP used for research and development. US Patent and Trademark Office, “Intellectual Property and the U.S. Economy,” 33.

⁴⁹ US Patent and Trademark Office, “Intellectual Property and the U.S. Economy,” fig. 5.

and technological innovation. It's absolutely essential to our future. —President Barack Obama, November 17, 2010.⁵⁰

In this case, the engine has moved from the intellectual property and patents to the country as a whole, so the relationship between innovation and the engine metaphor has flipped. Here it is innovation itself that allows the United States to function as “the engine of scientific discovery and technological innovation.” However, it is worth taking a glance at the context of Obama’s words. The epigraph is taken from remarks the President made when awarding National Medals of Science and National Medals of Technology and Innovation in 2010. The speech in its entirety focuses on the hard work and amazing talents that the recipients of these awards bring to their endeavors—both as individuals and as partners in collaboration. The passage from which the USPTO selected its epigraph provides a good sense of the remarks as a whole:

Yet it is in these labs—often late at night, often fueled by a dangerous combination of coffee and obsession—(laughter)—that our future is being won. For in a global economy, the key to our prosperity will never be to compete by paying our workers less or building cheaper, lower-quality products. That’s not our advantage. The key to our success—as it has always been—will be to compete by developing new products, by generating new industries, by maintaining our role as the world’s engine of scientific discovery and technological innovation. It’s absolutely essential to our future.⁵¹

Elsewhere in his remarks, the president spoke more directly to the work of the assembled scientists and inventors as individuals: “The achievements of the men and women who are onstage today stand as a testament to the ingenuity, to their zeal for discovery, and to the willingness to give of themselves and to sacrifice in order to expand the reach of human understanding.”⁵² But nowhere in his remarks does the president concern himself with intellectual property in its own right. In fact, although he does mention in paragraph six the collaboration involved in creating technologies as complex as semi-conductors, the president’s remarks tend to favor a rather romantic notion of authorship—the inventor or scientist as lone genius, toiling away in a lab, fueled by caffeine and inspiration. This is in stark contrast to the purpose of the ESA/USPTO report, which is to describe the ways in which intellectual property rights—not individual lone inventors—drive innovation and the US economy as a whole.

Returning now to the body of the ESA/USPTO report, the economic engine metaphor seems to be a foundational assumption of the report itself. For example, the authors argue that “IP is used everywhere in the economy, and IP rights support innovation and creativity in virtually every U.S. Industry.”⁵³ To use Perelman and Olbrechts-Tyteca’s terminology, the ESA/USPTO report takes as a *fact* the notion that intellectual property is an engine that drives the economy. In other words, the authors of the report seem to be assuming that everyone in the audience will agree with the notion that patents, trademarks, and copyright are engines that they observe driving the economy. This perspective would not admit to the possibility that there may be other ways of supporting inventors and creative work that is equally or more effective than the system anchored in intellec-

⁵⁰ Economics and Statistics Administration and United States Patent and Trademark Office, “Intellectual Property and the U.S. Economy: Industries in Focus” (U.S. Department of Commerce, March 2012), 1, http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf [emphasis in original].

⁵¹ “Remarks by the President,” para. 13.

⁵² “Remarks by the President,” para. 5.

⁵³ “Intellectual Property and the US Economy,” v.

tual property protections. Again, this is exactly the challenge that Google's rhetoric seems to imply. Google's writing makes use of allusion, creating a sense of rhetorical communion, as I discuss in the next section.

Creating Communion through Allusion

Allusion is one way that an author can strive to evoke a sense of communion and solidarity with the audience.⁵⁴ In the sample of documents I have collected involving the licensing disputes between Microsoft and the combined entity of Motorola Mobility and Google, these kinds of statements seem to be efforts to recall the historical roots of the patent system itself. Interestingly, when Google deploys such allusions, they can be read as support for a disruption of the current systems of licensing agreements. For example, the following lines come from the opening paragraph of a 2007 blog post made by Google's Johanna Shelton, Policy Counsel and Legislative Strategist, and Michelle Lee, the company's Head of Patents and Patent Strategy:

Many of our nation's founding fathers (most notably Ben Franklin) were inventors, and from America's earliest days we've been a country that has promoted innovation. To protect and promote invention, those same founding fathers gave Congress the power (in Article I, Section 8 of the U.S. Constitution) "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Inventors have relied on the patent system to protect those rights.⁵⁵

Note that the purpose of this post is made quite clear by its title: "Reforming Patents, Promoting Innovation." Interesting is the double-barreled allusion: not only do Shelton and Lee call to mind such an eminent inventor as Ben Franklin, but they also ground their allusion in the US Constitution itself. Although this blog post pre-dates the patenting and licensing disputes between Microsoft and Motorola Mobility discussed above, Shelton and Lee offer valuable insight into Google's perspectives on the patent system. Coming as it does two years after Google bought the Android operating system itself,⁵⁶ the company's rhetoric suggests a position regarding patents and licensing even a year before the release of the first Android-powered smartphone in 2008.⁵⁷

Lee repeats her allusion to the Constitution in 2009, a year after Android officially hit the marketplace. In this instance, the company's patent strategy leader comments on oral arguments at the Supreme Court in the case of *Bilski v. Kappos*. As Lee summarizes, the case involved a lawsuit brought by business partners who solicited a patent for a way they had devised to reduce risks when buying and selling certain commodities, calling it crucial to the future of intellectual property:

This case is critical to the future of innovation in the United States. A recent flood of patents on business methods and abstract software processes has contributed to uncertainty and an explosion of expensive lawsuits. The Constitution permits Congress to create patent laws "to promote the progress of science and the useful arts," and we support patent rules that effectively further that

⁵⁴ Graff and Winn, "Burke's 'Identification' and Perelman and Olbrechts-Tyteca's 'Communion,'" 109.

⁵⁵ Shelton and Lee, "Reforming Patents, Promoting Innovation."

⁵⁶ Ben Elgin, "Google Buys Android for Its Mobile Arsenal," *BusinessWeek: Technology*, August 17, 2005, http://www.businessweek.com/technology/content/aug2005/tc20050817_0949_tc024.htm.

⁵⁷ The purchase of Android and the release of the first Android phone are well documented in the business press. See Elgin, "Google Buys Android for Its Mobile Arsenal."

goal. But awarding patents on abstract ideas and processes, like the claim at issue in the *Bilski* case, poses a serious threat to innovation, job creation, and economic growth.⁵⁸

In this post, as in the post that Lee co-authored two years earlier, Google alludes to the Constitution in their bid to disrupt one aspect of the current patent system. In this instance, Lee takes a position against the further extension of patents into the realm of processes and abstractions, which began with one of the earliest court decisions allowing patents for software: *Diamond v. Diehr*.⁵⁹ As Lee makes clear in the 2009 post, Google sees reforming the patent system as crucial to something of fundamental importance: “the future of innovation in the United States.” The 2007 post suggests an attitude towards innovation not unlike President Obama’s. Invention and innovation can result from scrappy inventors who persist in following their dreams and ideas. Obama cites the example of a Texas high school student who “taught herself chemistry” so that she could “look at new cancer drugs.”⁶⁰ Google alludes to the founding fathers, and especially Benjamin Franklin. Neither Obama nor Google seems especially interested in the kind of innovation that involves patent pools and RAND agreements.

In Google’s case, the allusion to the past seems to imply that although they do see the need for patent system reform, patents should not be walked away from entirely. Citing the Useful Arts clause may be a recognition of patents as important tools for protecting intellectual property. By alluding to Ben Franklin, Google’s rhetoric seems to hearken back to a romantic notion of the inventor as lone, inspired genius. Setting aside the opportunity for critique that this idea of authorship offers, it seems clear that these allusions help create a sense of communion that adheres to a community that values individual creativity and abhors the notion that a non-creative entity—a “patent troll”—could profit from another’s ideas and hard work.

At the same time, it must be noted that allusions to the Useful Arts clause abound among texts that concern themselves with patents. For example, the ESA/USPTO report discussed above makes just such a move on page 1:

Protection of IP has been a critical function of the U.S. Government since the founding of this country. Indeed, Article I, Section 8, Clause 8 of the U.S. Constitution grants to Congress the power to “promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶¹

Clearly, in cases such as this one, the purpose of the allusion is not to cement community bonds while disrupting selected portions of the patent system. Instead the allusion seems to provide a historical context and justification for patents, trademarks, and copyright in their role as protectors of intellectual property—protections which the founding fathers saw as critical enough to the future of the country that they codified them into the US Constitution itself.

Invention as Commodity

The rhetorical analysis above suggests competing ways of understanding innovation. The debates over licensing agreements also help reveal a fundamental criticism leveled against the modern

⁵⁸ Lee, “Debating the Future of Innovation at the Supreme Court,” para. 3.

⁵⁹ *Diamond v. Diehr* - 450 U.S. 175 (1981), 1981.

⁶⁰ “Remarks by the President,” para. 19.

⁶¹ Economics and Statistics Administration and United States Patent and Trademark Office, “Intellectual Property and the US Economy,” 1.

patent system itself: that trolls have come to profit from the hard work of bona-fide inventors. Google's patent strategy leader Michelle Lee summarizes this view in a 2009 blog post:

Of the 20 patent lawsuits filed against Google since late 2007, all but two have been filed by plaintiffs who don't make or sell any real product or service—in other words, by non-practicing entities or “patent trolls.” Most of these cases seem to feature the same small set of contingent fee plaintiff's lawyers asserting patent claims against the same small set of companies. We've also noticed a more disturbing trend: in many of these cases, the patents being asserted against us are owned by—and in a surprising number of cases, are even “invented” by—patent lawyers themselves.⁶²

In essence, Lee's argument can be read as an attempt to resist the commodification of patents and intellectual property. This resistance is illustrated by Lee's allusion to Benjamin Franklin or President Obama's description of inventors discussed above. Such descriptions seem to imply invention as the inspired provenance of an inventor, not as commodities that can be bought and sold on the marketplace.

However, in the years following Lee's post, patent conflicts escalate and Android becomes involved in more and more disputes. The company finds itself in the odd position of being against the commodification of patents, but in need of a stronger patent portfolio. In April of 2011, Google general counsel Kent Walker wrote a blog post titled “Patents and innovation” that seems to be an attempt to bridge that gap. In the first paragraph, Walker echoes Lee's criticism of a system that enables commodification and trolling:

The tech world has recently seen an explosion in patent litigation, often involving low-quality software patents, which threatens to stifle innovation. Some of these lawsuits have been filed by people or companies that have never actually created anything; others are motivated by a desire to block competing products or profit from the success of a rival's new technology.⁶³

Here Walker makes a connection between what he seems to see as two similarly abhorrent practices: patent trolling on the one hand and anti-competitive use of patents on the other. Note that Walker's choice of words seems to associate the licensing disputes—“a desire to block competing products”—with “low quality patents.” Nevertheless, the purpose of Walker's post is to announce Google's bid for the Nortel patent portfolio:

But as things stand today, one of a company's best defenses against this kind of litigation is (ironically) to have a formidable patent portfolio, as this helps maintain your freedom to develop new products and services. Google is a relatively young company, and although we have a growing number of patents, many of our competitors have larger portfolios given their longer histories.⁶⁴

This statement set Google up to submit what would be an unsuccessful bid for Nortel's patents. After losing that bid, Google began the talks with Motorola Mobility that eventually led to the purchase of that company. However, it is worth repeating here that patent protection was a main

⁶² Lee, “Patent Reform Needed More than Ever,” para. 2.

⁶³ Walker, “Patents and Innovation,” para. 1.

⁶⁴ Walker, “Patents and Innovation.”

reason motivating the merger. In other words, Google was looking for patents that it could use to stave off lawsuits and “protect the android ecosystem.”⁶⁵

Part of the process of purchasing Motorola Mobility involved reassuring standards-setting organizations (SSOs) of Google’s intentions regarding the patents it received under the deal. To do this, Google’s Deputy General Counsel, Allen Lo, wrote a letter to the president of the IEEE.⁶⁶

In addition, while Google has no present intention to transfer any of the acquired MMI patents that include Essential Patent Claims to third parties, should Google do so in the future, it will use its best efforts to ensure that the transferees of any such MMI patents including Essential Patent Claims are contractually obligated to comply with MMI’s licensing commitments.⁶⁷

In this letter, the company seems to be even more open to the notion that patents can be bought and sold in a fashion similar to other commodities. The difference may arise from the inherently strategic purpose of purchasing the Motorola Mobility patents. Google’s interest in Motorola Mobility’s patents was always as a means to help “defend Android” from patent attacks, as Chief Legal Officer David Drummond put it.⁶⁸ Since the company wanted the patents for strategic reasons, it makes sense that they would be more open to the idea of trading them—these are not the patents describing the core ideas of Google’s search and advertising business. Instead, the Motorola Mobility patents are more like ammunition to be used in the Patent Wars.

Of course, the Patent Wars predate Google’s acquisition of Motorola Mobility. Even before Google began making overtures to buy Motorola Mobility, the cell-phone maker was in the midst of a licensing dispute with Microsoft. Although the cell-phone maker seems to have made far fewer public statements regarding its philosophical approach to patents and licensing, Motorola Mobility’s head of intellectual property Kirk Daily did make the following statement through a company press release, announcing an infringement case against Microsoft. In this statement, Daily argues that the lawsuit is needed to protect Motorola Mobility’s body of innovative research:

Motorola’s R&D and intellectual property are of great importance to the Company and are renowned worldwide. We are committed to protecting the interests of our shareholders, customers and other stakeholders and are bringing this action against Microsoft in order to halt its infringement of key Motorola patents. Motorola has invested billions of dollars in R&D to create a deep and broad intellectual property portfolio and we will continue to do what is necessary to protect our proprietary technology.⁶⁹

This statement also seems to run counter to a view that sees patents as a commodity. Although it is clear that intellectual property is an investment for the company, this statement positions the lawsuit as a bid to protect that investment from encroachment. Although Motorola Mobility clearly wants to make money from its investment in these inventions, it does not want to trade them away, as one would wheat or coffee. In other words, Motorola Mobility views its intellectual property as

⁶⁵ Google, “Facts about Google’s Acquisition of Motorola,” sec. Benefits of the deal, para. 2.

⁶⁶ It is worth noting that this is a letter which the Department of Justice found to be “ambiguous” in terms of clarifying Google’s position on SEPs and RAND commitments. Lo, “Letter to Standard Setting Organizations.”

⁶⁷ Lo, “Letter to Standard Setting Organizations,” para. 6.

⁶⁸ Drummond, “When Patents Attack Android,” sec. Update, para. 1.

⁶⁹ Motorola Mobility, “Motorola Mobility Files Patent Infringement Complaints against Microsoft,” para. 3.

an investment with a great deal of value added. This is in contrast to commodities and their fluctuating prices.

Interestingly, the company acknowledges in the following paragraph that Microsoft itself had already sued Motorola Mobility over patent infringement as well. Here Daily's description of Microsoft's actions seems to cast Microsoft in the role of the troll: "It is unfortunate ... that Microsoft has chosen the litigation path rather than entering into comprehensive licensing negotiations, as Motorola Mobility has mutually beneficial licensing relationships with the great majority of technology companies industry-wide."⁷⁰ Thus, although Daily acknowledges with this statement that Motorola Mobility's suit against Microsoft is essentially part of the over-arching patent dispute between the two companies, the press release suggests a view of intellectual property as a value-added investment—one that is not easily traded away. Indeed, this perspective is also made clear in the company's Special Proxy Statement explaining its proposed merger with Google:

At a July 6, 2011 meeting that occurred during this period, [Motorola CEO] Dr. Jha and [Google's Chief Business Officer] Mr. Arora discussed the protection of the Android ecosystem and, in the context of this discussion, Dr. Jha indicated to Mr. Arora that it could be problematic for Motorola Mobility to continue as a stand-alone entity if it sold a large portion of its patent portfolio.⁷¹

Motorola Mobility's position in this instance seems to imply a strategic perspective: in the context of the ongoing Patent Wars, the company would be defenseless against aggressors without its patent portfolio. As intellectual property expert Colleen Chien told journalist Steven Levy in a 2012 magazine article about patent trolls: "Patents are like bullets ... They're cheap to acquire but can cause a lot of damage."⁷² Whether or not the patents that Google acquired with its \$12.5 billion purchase of Motorola Mobility qualify as "cheap" is open to some debate. However it is clear that the company intended to use the patents in litigation, so the bullet simile seems appropriate.

Contrast this with the ways Microsoft talks about SEPs and licensing agreements. A blog post by David Howard, Deputy General Counsel for the company, demonstrates several key rhetorical differences between his company and Google. Here Howard is reacting to an FTC statement to the International Trade Commission. Howard maintains that the FTC's statement reflects a growing weariness among regulators with the involvement of SEPs in the Patent Wars. Additionally, he paints a picture of standards as crucial to the background fabric of our daily lives:

Industry standards don't sound like something you should spend a lot of time worrying about, and in normal times you'd be able to take the benefits of standards for granted. But industry standards are the behind-the-scenes underpinning to wireless connectivity and the Internet, indeed, a foundation on which virtually all modern electronic devices and networks are built. Without industry standards, your computer, smartphone, tablet, home wireless network and the Internet would be far more expensive and not work together the way you've become accustomed—if at all.⁷³

⁷⁰ Motorola Mobility, "Motorola Mobility Files Patent Infringement Complaints against Microsoft," para. 4.

⁷¹ Motorola Mobility, "Preliminary Special Proxy Statement," 27.

⁷² Steven Levy, "The Patent Problem," *Wired*, December 2012, 207, <http://www.wired.com/opinion/2012/11/ff-steven-levy-the-patent-problem/>.

⁷³ Howard, "FTC Speaks out," para. 3.

In other words, standards are part of a system that lets technology become invisible. Over time, this allows technology to become part of the common-sense way of doing things.

Conclusion

Ultimately, this debate that is about much more than any one patent or licensing agreement. In the analysis above, I have investigated a sample of texts using a rhetorical framework built upon metaphor and communion. This analysis made it possible to deconstruct the social imaginaries that constitute the background fabric of this debate, revealing the competing visions of innovation held by the various participants.

Each of the perspectives outlined above sees invention as something very different. Microsoft uses a rhetoric that suggests invention as collaboration among firms. From this perspective, the current system of patents and licensing works reasonably well. This is not to say that Microsoft's rhetoric suggests that the system is perfect. Instead, the process of inventing, patenting, standardizing, and licensing is depicted as having a proven track record of fostering innovation and technology for the betterment of all. This is a point of view that sees patents essentially as commodities—units that can be bought and sold on the market, much like agricultural products.

Google's use of rhetoric, however, points to a divided view of innovation, using language that paints a picture of invention as the work of an inspired author—allusions to inventors such as Benjamin Franklin make this clear. This view of innovation would resist the commodification of patents; however, as Google has moved into the smartphone marketplace and as the Android operating system has helped set off the patent wars, Google's patent rhetoric has shifted. In later texts, especially those texts written since Google began acquiring a patent portfolio of its own, the company's language has shown itself to be much more amenable to the commodification of patents. Finally, for its part, Motorola Mobility's rhetoric continues to rely on images of patents as leverage and even as ammunition. This may be due to the simple fact that Motorola Mobility is an established company with roots in hardware manufacturing, an area of innovation that has not seen as much controversy surrounding the patentability of its core inventions. As software companies, Google and Microsoft may have different views on the purpose of patents.