CONNECTING THE CIRCUIT: ANALYZING JURORS’ COGNITIVE GAPS AND DAMAGE AWARDS IN PATENT INFRINGEMENT TRIALS

L. Hailey Drescher, B.S.

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APPROVED:

Brian Richardson, Committee Chair
Jay Allison, Committee Member and Chair of the Department of Communication Studies
Zuoming Wang, Committee Member
Mark Wardell, Dean of the Toulouse Graduate School

Patent litigation is notorious for the technicality of evidence and the rhetoric of experts. Citizens selected to serve on the jury have no specialized training and have rarely been exposed to the technology or the patent process. This study provides insight into the field of jury decision-making in complex patent cases by analyzing the cognitive gaps and the tactics used by jurors to minimize them. Additionally, the study examines the justifications for the damage awards jurors provide. This analysis focused on jurors engaged in mock trial patent deliberations. The story model and sensemaking theory serve as the theoretical framework of this research and provide a structure for support and a lens for analysis. The results indicate that jurors rely on three distinct and dichotomous topologies when navigating cognitive gaps. Searching for answers either individually or as a group, relying on lists or stories, and turning to facts or emotions, jurors navigate through their uncertainty. Through the line-by-line analysis of mock jury transcriptions, three continuums regarding damage justifications emerged. Jury members found themselves navigating uncertainty versus certainty, rationality versus irrationality, and facts versus emotions. The theoretical implications broaden the story model to include cognitive gaps in all phases and increase the model’s efficacy in patent litigation through the addition of a fourth phase. This study also confirms and enhances the use of sensemaking to describe the jury decision-making process. The results of this study should be applied practically to the field of patent litigation. Results should be used to create a user-friendly environment where the high stakes of litigation demand increased juror understanding and are critical to justice.
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by

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CHAPTER 1

INTRODUCTION

Honest to God, I don’t see how you could try a patent matter to a jury. Goodness, I’ve gotten involved in a few of these things. It’s like somebody hit you between you eyes with a four-by-four. It’s factually so complicated.

–Judge Alfred V. Covello

The broad tort reform of the late 1990s limited the financial gains of civil lawsuits in the United States thereby changing the stakes for those involved. Caps were placed on damages for malpractice, and punitive damages sought by plaintiffs were limited. As a result, the windfalls once expected by injured plaintiffs and their warring attorneys were severely reduced. Instead, a new hotbed of litigiousness bred, and an influx in intellectual property suits began. Propelled forward by the “rocket docket” of the Eastern District, as well as the Ninth Circuit in California, some attorneys made the switch to litigate patent infringements, trade secret misappropriation, and validity arguments. With no financial cap, and no limit to damages, intellectual property [IP] suits come with high price tags and life-changing stakes. In 2011, the top ten intellectual property awards totaled $4.6 billion, nearly doubling the $2.4 billion awarded in 2010 (Fisk, 2012). The largest damage verdict in U.S. history, $2.3 billion, was awarded to St. Jude after an ex-employee used medical trade secrets to begin a start-up company in China (Fisk, 2012). In March 2011, Microsoft filed a lawsuit against Barnes and Noble, FoxConn, and Inventec for patent infringement claiming the three companies were illegally using its Android technology (Wilhelm, 2011). Alongside Microsoft, corporate giants such as Google, Texas Instruments, Motorola, and Chrysler found themselves embroiled in litigation. In 2011, 640 intellectual property cases were filed in the Eastern District of Texas alone. Weighted with the stress of high stakes, attorneys employ researchers, analysts, and trial consultants to strengthen their cases in court.
The 1997 movie *Amistad* contends that the “attorney who tells the best story wins.” Although a fictional cinematic reference, the film reflects opinions warranting investigation. After all, courtroom discourse is firmly grounded in argumentation and the rhetorical roots of its Grecian predecessors. The abilities to persuade through argument and actuate a jury are at their core communicative behaviors (Matlon, 1982). The style and structure of the competing attorneys’ presentations are often the text for analysis by communication scholars. Researchers (e.g., Hahn & Clayton, 1996; Hosman & Wright, 1987; Linz, Penrod, & McDonald, 1986) have confirmed the influence an attorney’s delivery, speech style, and nonverbal communication can have on a jury. Similarly, Spiecker and Worthington (2003) analyzed the structure attributed to an attorney’s opening and closing for its persuasive appeal. Voss and Van Dyke (2001) analyzed the narrative power of a prosecutor’s summary statement during criminal trial. Manipulating variables such as coherence, information uncertainty, emotional content, and gender, the authors found that strength of narrative cannot make up for poor or insufficient evidence; however, factors such as uncertain statements and emotional expressions can influence the decision-making of jurors.

While communication scholars have studied extra-legal factors attributed to attorneys, they have not paid as much attention to the communicative properties of juror deliberations. This small group communication phenomenon often relies on narrative to situate understanding and relate participants. Ryfe (2007) found that when deliberating, participants prefer to tell stories. These stories may relate to themselves, friends, or family, but storytelling is a key form of communicative discourse within jury deliberations. The content is due in part to the labor associated with deliberation. Men and women who were strangers just hours before are saddled with the burden of reaching a unanimous decision while negotiating how they are perceived by
others, or their “public face” (Ryfe, 2007). Borstein and Greene (2003) explained that because narratives also “influence pre-deliberation verdict preferences, jurors must reconcile their differing perspectives during deliberations” (p. 64). During this process, jurors look to what falls in line with their personal experience, values, and beliefs. As a result, jurors often remember the evidence which best fits within the constructs of their developing narrative, while either disregarding or distorting the remainder (Carlson & Russo, 2001).

The manner by which the narrative-based persuasive communication is delivered to an audience, processed through sensemaking, and then acted upon has long been studied in the field of communication (Mazzocco & Green, 2011). Beginning in opening statements, and continuing through witness testimony, a strong narrative structure aids the jury in decision-making (Mazzocco & Green, 2011; Pennington & Hastie, 1992). Indeed, narrative structure aids jurors in building cognition, framing context, and delineating motivations. Therefore, continued study of jury decision-making would aid in a heightened understanding of small group and narrative-based persuasive communication.

Deeper understanding of decision-making is especially important when the facts of the case are well out of reach of the juries’ daily observances. Civil cases brought to decide the validity of patents or analyze willful infringement come riddled with dense expert testimony, product specific lingo, and vague jury instructions. While the intricacies of the technology described may require engineers to construct, they are left to a jury of laymen to comprehend. There is not a minimum educational requirement for jury members, and ‘blue ribbon’ or “expert juries are not mandated, regardless of technical complexity” (Moore, 2000, p. 372). Juries are abandoned with vague instructions and very little fiduciary guidance, leaving them to wade through the evidence and potentially levy heavy monetary findings (Greene, 1989). Large
discrepancies in the judgments of similar civil suits have resulted in criticism of the jury system and the ability of jurors to decide complex cases (Borstein & Greene, 2000; Greene, 1989). Some attorneys fear that jurors face difficulties telling the difference between the product and the patent. Or, that jurors are inventor friendly and tend to be “mesmerized by their story” (Moore, 2000, p. 372). Unlike criminal trials, civil juries are given largely flexible parameters upon which to base their findings. Whereas a criminal jury’s duty is to return a finding of guilty or not guilty, a civil panel is free to assess damages ranging from one dollar to billions. In this high stakes environment, it is crucial to attempt to understand the jury deliberation process in order to aid in the efficacy of the system.

Pennington and Hastie developed the story model to explain the narrative structure jury members use during deliberations to reach verdicts in criminal trials. It includes three processing stages (Hastie, Penrod, & Pennington, 1983). First, jurors evaluate evidence through story construction. The theory suggests that jurors listening to the facts of a case and the testimony of witnesses attempt to synthesize the information and impose a narrative structure (Pennington & Hastie, 1992). The creation of the story is central to the theory, which turns on the belief that the story ultimately determines the decision the jury reaches (Pennington & Hastie, 1992). The second stage of the model introduces the jury to the possible verdict categories fitting their decision. While Pennington and Hastie (1992, 1993) apply the model to the strict confines of criminal punishment, it leaves a gap for the discussion of civil damages. Intellectual property (IP) damages are not capped, and juries may award any monetary sum they determine is appropriate. This immense freedom and power attributed to the absence of a verdict category for damage awards is guided only by “notoriously vague and ambiguous” jury instructions (Greene & Bornstein, 2000, p. 743). The last processing stage of the model requires the jury to reach “a
decision through the classification of the story into the best fitting verdict category” (Pennington & Hastie, 1992, p. 192). While specific categories are not given to the civil jury to allow for story alignment, a similar process can be applied. Both attorneys battling in IP cases are required to give the jury a recommended monetary damage assessment. Even while claiming a corporation did not infringe on a patent, the defense attorneys must present the jury with a number. These two estimates from the plaintiff and defense provide anchoring points for a jury’s deliberation and ultimate decisions.

Missing from the story model is an explanation for how jurors account for cognitive gaps, or moments of uncertainty. These holes in testimony, evidence, and instructions require jurors to forge their own bridges. Pennington and Hastie (1986) conceded that while the story nature may appear intuitive, it is not. Witnesses are rarely allowed to connect the dots and events are not presented in temporal or causal order. Therefore, it is still unclear how jury members make causal leaps, infer, or draw conclusions when linking information is missing from evidence or testimony. While Pennington and Hastie (1986) coded for explanatory statements made by jury members regarding universal truths about the world, personal statements, and general attitudes or beliefs, researchers should reflect on how jurors fill these cognitive gaps and the effects on deliberation. Specifically, this study addresses those moments when jurors express ignorance or uncertainty and what processes they use to make sense of it.

Theoretical Framework

This study relies on sensemaking theory (Weick, 1995) to understand how people deal with uncertain situations within jury deliberations, including cognitive gaps and the ambiguous process of deciding awards. Sensemaking theory is named appropriately “because, literally, it means the making of sense” (Weick, 1995, p. 4). Situated in communication, sensemaking is the
process by which people give meaning to an experience. Sensemaking theory has been used to
analyze crisis responses in a myriad of organizations and industries, make sense of sexual
harassment, and examine when it is appropriate to deviate from protocol (Doughtery & Smythe,
2004; Miller & Horsley, 2009; Murphy, 2001; Weick, 1993a). Members strive to ask questions,
tell stories, and interact with others, all of which optimally result in clear answers and
information to reduce uncertainty (Daft & MacIntosh, 1981). The process of jury deliberations
offers unlimited time for members to ask questions, review information, and talk through case
ambiguities. Working to create order and “make retrospective sense of what occur[ed],” jury
members sift through gathered evidence and testimony (Weick, 1993a, p. 635). The
sensemaking process works to reduce equivocality by taking into account and organizing the
multiple voices within the group (Weick, 1995). This communication and cognition linked
theory relies on a social context “that binds people to actions that they must then justify” (Weick,
1995, p. 53). Providing the appropriate framework for norms and expectations, the social context
works to limit explanations to the plausible. The context of jury deliberations are severely
limited in scope. Instructions given by the judge frame the breadth of discussion and regulate the
admissibility of information. These added constraints guide jury deliberations toward
appropriate findings and shape group dialogue. The social context inhabited by jury members
encourages conversation and relies on talk and discourse as a means of understanding the world
(Weick, 1995). Locked inside the jury room, eight chosen members of the community look to
eliminate uncertainty by answering questions with clear and plausible accounts.

Before deciding a verdict, jury members must first face the uncertainties due to temporal
constraints, lack of specified knowledge, or holes in testimony and evidence (Borstein & Greene,
2000; Moore, 2000; Ryfe, 2007). Making sense of these gaps is crucial to deliberations, verdict,
and damage awards. Sensemaking calls upon several elements such as past experiences, existing frameworks, ideologies, information, or the juxtaposition of multiple elements, to explain an event (Bryant & Sias, 2011; Weick, 1995). Working to reduce ambiguity, jurors rely on their previous commitments and values to navigate uncertainty. Instead of considering and analyzing all possibilities, people “make sense of things by seeing a world on which they already imposed what they believe” (Weick, 1995). Using communication as a tool to frame problems and reach solutions, sensemaking is a robust theoretical framework to analyze jury decision-making.

Purpose/Rationale

While the field of trial consulting has propelled the study of jury decision-making through the use of focus groups, surveys, and mock trials, no research has attempted to connect elements of the story model to a civil case setting. Instead, researchers (Pennington, 1981; Pennington & Hastie, 1986, 1998, 1992) have built, tested, and shaped the story model’s hypothesis almost exclusively through criminal test cases. By utilizing sensemaking theory, I hope to gain a deeper understanding of the decision-making process of intellectual property juries. At least two elements crucial to deliberations in IP trials remain unstudied. First, more information is needed for researchers to understand how jurors make sense of the complex and technical testimony they hear. Analyzing the methods jurors use to fill cognitive gaps further enhances the story model and aids in its adaptation for use in intellectual property cases. Second, researchers know little about the communicative accounts, or rationales provided by jurors when awarding damages. Researchers and practitioners need to explain how jury members account for the awards they propose and ultimately bestow.

Knowing more about how jurors make sense of, or address, cognitive gaps, as well as their rationales for the damage awards they dispense, provides lawyers, consultants, and scholars
insight into how to construct and craft persuasive arguments. The data yielded through this analysis has the potential to provide attorneys the ability to correct general misnomers, or combat thematic misconceptions prior to deliberation. Similarly, a strong understanding of jury sensemaking aids court officials and judges in creating a more user-friendly process for laypersons in complex trials. Increased understanding of sensemaking and juror decision-making strengthens the theory by providing additional breadth and depth of application. This study also serves to strengthen the story model by providing additional data for analysis and extending its efficacy to civil court.

Summary

In summary, while the communicative field of small group decision-making is rife with research, little attention has been paid to the jury deliberation process. Communication scholars know little about how jury members deal with uncertainty and, by extension, how they fill cognitive gaps that emerge throughout the story model. Similarly, the justification process for the damages awarded by jurors also remains enigmatic. With the number of filed cases rising, and the awarded damages exceeding multi-millions, this burgeoning field requires further study. Using sensemaking theory as a framework, further analysis should be conducted by communication scholars and applied to this nuanced field of law.
CHAPTER 2 
LITERATURE REVIEW

Using sensemaking theory as a framework, I described jury deliberations to enhance understanding of how members negotiate the uncertainties of trial. Specifically, I explored the ways in which jury members make sense of cognitive gaps as well as the justifications for awarding damages. To explain the context of jury decision-making, an explanation of the story model and the notion of anchoring points is detailed. Additionally, an overview of sensemaking theory further strengthens its inclusion as a theoretical lens for analysis.

The Story Model

After finding that past models focused on combination and computation did not wholly portray the process of jury decision-making, Pennington and Hastie (1986) constructed the story model hypothesis. Positing that decision-making is guided by an attempt to understand the evidence and produce a meaningful narrative from the presented pieces, the authors began to formulate a narrative model. The story model hypothesizes that “jurors impose a narrative story organization on trial information, in which causal and intentional relations between events are central” (Pennington & Hastie, 1986, p. 243). They construct their hypothesis in three crucial phases.

First, jurors evaluate evidence through story construction and describe, “what happened” (Pennington & Hastie, 1986, p. 243). Trials seldom follow a typical narrative structure. Attorneys do not always use opening/closing arguments to frame the narrative. Instead, they may use introductory moments to outline the evidence, or provide counterarguments to the prosecution. Witness testimony and presentations are rarely temporal, and witnesses often omit linking and causal information. As a result, jurors must use the evidence provided to construct a
narrative of “what happened.” Pennington and Hastie (1993) contend that jurors “impose a narrative structure on evidence” (p. 194). This context of evidential structuring is based on findings that “narrative discourse is comprehended through a basic conceptual schema that describes the structure of most human action sequences” (Pennington & Hastie, 1986, p. 243). As a result, jurors construct narratives based on three types of information: 1) specific evidence garnered through trial, 2) knowledge of events similar as to what is being described during trial, and 3) generic expectations of what makes a story complete (Pennington & Hastie, 1981, 1986, 1992).

While jurors rely on testimony and opening/closing statements, outside factors also influence the construction of the story. Pennington and Hastie (1993) explained “inferred events, and causal relations between them is the result of a wide variety of deductive and inductive reasoning procedures applied to the evidence and world knowledge” (p. 195). Their analysis of these inference chains revealed they are based on “deductions from world knowledge, analogies to experienced and hypothetical episodes, and reasoning by contradiction” (Pennington & Hastie, 1993, p. 195). While jurors hear the same testimony and evidence, their constructed narratives will not be identical. Pennington and Hastie (1981, 1993) contend these differences arise due to different world perspectives, experiences, and views. These varying beliefs regarding the social world may cause a juror to use analogies or draw inferences dissimilar from his/her colleagues. However, researchers know little about this process or the methods by which jurors fill the cognitive gaps they encounter, particularly when the evidence is highly technical in nature.

Pennington and Hastie (1993) further described the importance of the story structure. The structure plays a crucial role in a juror’s cognitive development and eventual decision-making. While analysts may divide stories into episodes, these episodes are grounded in causal
events and inferences made by the constructor. While attorneys make some of these inferences, and jurors make others, both are crucial to filling in the episodic structure of the story. Pennington and Hastie (1993) noted that jurors use prior knowledge as to what makes a story whole to fill in inferences and forge causal links and to determine completeness. Jurors may construct more than one story during this process, making it necessary to vet them prior to use. Pennington and Hastie (1992, 1993) detailed the elements of a story structure that give confidence to its degree of fit. Based on the theory, three elements impact whether a story is “best”: coverage, coherence, and uniqueness.

Coverage refers to how well the story utilizes the evidence presented at trial. Higher levels of evidence coverage result in increased jury confidence in the story’s goodness-of-fit. Should the story not adequately include evidence, or omit pieces from consideration, the coverage dwindles. Lack of coverage leads to decreased confidence in the story’s ability to fit the testimony presented. Coherence denotes whether the story constructed makes sense. This category is further expanded into three sub-categories for analysis: consistency, plausibility, and completeness (Pennington & Hastie, 1993). Internal fallacies or contradictions affect the consistency of a story and diminish its coherence. Similarly, if the story construction is not seen as plausible or capable of occurring, this negatively influences coherence. Finally, if the story is seen as incomplete or lacking necessary information for explanation, coherence is negatively impacted. Lastly, uniqueness refers to strength and exclusivity of one story. If more than one story exhibits ample coverage and coherence, then they cease to be unique. Loss of uniqueness diminishes the credibility of the story and the jury’s confidence in its goodness-of-fit. While multiple stories constructed by jurors may exist, the “best” story exhibits coverage, coherence, and uniqueness.
While the first phase of the story model details and explains the process jurors use to construct stories, it does not specifically analyze the methods jurors use to fill in story gaps. These “inferred events and causal relationships” are used to fill in episodic structure, but the story model does not provide in depth analysis of these cognitive gaps (Pennington & Hastie, 1993, p. 195). Instead, these analogies, deductions, and hypotheticals require further study to analyze how jurors utilize them in the deliberative process.

The second phase of the story model requires jury members to match their constructed story to the choices provided by the judge. This phase occurs near the end of trial and is informed by the judge’s definitions of verdict choices and their attributes. In this stage, jurors use descriptions of criminal sentencing to find parallels to their own findings. The attributes usually include: identity, actions, circumstances, and mental state. The goodness-of-fit between the constructed story and the attributes of the crime determine the verdict.

Pennington and Hastie tested the model in phases. In one study (1986) they looked to validate whether “juror’s mental representations of the evidence assume a form that is consistent with the structure of a well-formed story” (p. 245). To test this hypothesis, they selected 26 participants from a waiting 200-person Massachusetts’s jury pool (Pennington & Hastie, 1986). They selected four jurors/participants each day to view a taped criminal trial individually. Jurors were told that the trial had already been decided, but they were to act as if they had been jurors on the panel. During the video, participants were to offer spontaneous feedback about how they would decide the case. At the conclusion of the viewing and jury instructions, participants were asked to talk aloud as they deliberated. Participants were also asked probing questions testing their memories in regard to the judge’s instructions. Based on the findings, Pennington and Hastie (1986) arrived at four conclusions: First, juror deliberations professed in spontaneous
interviews exhibit story structures. Both individual and group structures contain causal and episodic structures. Second, the jurors who choose different verdict categories tell different stories. Thirdly, juror stories vary systematically by both content and structure. Lastly, verdict category structure and story classification procedures do not vary systematically by verdict group.

The last processing stage of the model required the jury to reach “a decision through the classification of the story into the best fitting verdict category” (Pennington & Hastie, 1992, p. 192). Using the characteristics attributed to the criminal indictment, jurors aligned their constructed narratives with the appropriate categories. This process guided jury members to delineate between manslaughter, first-degree murder, second-degree murder, etc. While Pennington and Hastie (1981) constructed the story model for use in criminal trials, these phases are adaptable to civil cases.

Understanding the ways in which jurors fill cognitive gaps during group deliberations would aid attorneys, researchers, and trial consultants in case preparation. Findings of common themes, misconceptions, or consistent concerns have the potential to shape courtroom strategy and impact the presentational methods of advocates in trial. Providing insight into these constructed causal links or inferences could ultimately provide a guide to avoiding pitfalls during civil suits.

Hastie (1999) analyzed the use of the first phase of the story model when applied in a civil case. Using mock juries, Hastie found that jurors used narrative construction in the first phase of the story model to process a civil suit filed by a small corporation against a larger corporation. Based on these findings, Hastie (1999) concluded that the “story model is a useful prototype of a general model for juror decision-making in all civil cases” (p. 238).
While little research has been conducted by scholars applying the story model to civil cases, no research indicates that the model has been used during IP trials. Narrative structures are helpful to cognition and are especially effective when the “characteristics of the trial evidence make it unwieldy” (Pennington & Hastie, 1992, p. 190). Given the complexity of intellectual property [IP] trials, and the depth and specialized nature of the evidence, the story model seems a strong and effective tool when evaluating juror decision-making. Sensemaking theory operates as a strong theoretical framework by which to analyze this process.

Sensemaking Theory

Described by Weick (1995) as fundamentally the process of making sense, sensemaking theory explains how people work to create meaning from experience. The social process centers on talk, during which members work to make sense of events that occurred retroactively. The process is ongoing, and employs past experiences, frameworks, and ideologies to aid in explanation (Bryant & Sias, 2011; Weick, 1995). This discursive process takes place across multiple contexts and in reaction to ambiguities, from minor uncertainties to significant crises.

For example, Weick (1993a) analyzed the sensemaking process of the firefighters who perished in the Mann Gulch disaster. Faced with a wall of flame, the commanding officer told the men to drop their tools and lie down. Because this directive was counterintuitive to their training, the men simply could not drop their tools. Their tools, crucial to their identities as emergency responders and firemen, signified their sense of self. Ultimately unable to escape the flames, the men who ran from the fire perished. Weick (1993a) described the crisis as a cosmological episode in which the world as it was known no longer function. Sensemaking in this context is the process used to work through ambiguities never before faced to understand the experience the men encountered.
Similarly, Murphy (2001) analyzed the sensemaking process flight attendants faced when asked to deviate from their normative training. Bound by a highly feminized role that adheres to service rather than dominance, flight attendants must negotiate when to manage a situation with demur service versus instructive authority. This labor often means managing outward messages and communication that is in direct conflict with internal messages. Murphy explained the sensemaking process these individuals undertook to understand how they negotiated this balance.

Researchers also analyze sensemaking in organizational settings to understand crises. Miller and Horsley (2009) applied sensemaking to the coal industry in an attempt to learn from past crises and prevent new incidents. In this context, the researchers studied how sensemaking works to decrease uncertainty by illuminating the causes of crises and thereby mitigating risks.

Grounded in talk, the constitutive practice of sensemaking constructs the world around us (Dougherty & Smythe, 2004). The sensemaking process can be deliberate and can, therefore, serve as a strong theoretical foundation for IP jury decision-making. After listening to testimony and evidence, a panel of eight jurors is sent to retroactively make sense of what they have heard. This reality becomes “an ongoing accomplishment that emerges from efforts to create order and make retrospective sense of what occurred” (Weick, 1993a, p. 635).

Doughtery and Smythe (2004) used sensemaking theory in this capacity to study individual attempts to understand sexual harassment they suffered at work. Three women working in academia were each approached individually by a visiting male donor and sexually harassed. Despite his effrontery, the women did not begin to understand what had transpired until they learned of each other’s incidents and socially began to deconstruct the experience retroactively. The uncertainties they faced previously were made meaningful through dialoguing with peers. Empaneled jurors face retroactive, socially shared experience directly during trial.
Therefore, it is reasonable to advance the following question:

RQ1: How do IP jurors make sense of uncertainty during deliberations?

Anchoring Points

The third phase of the story model calls for jurors to match their narrative to the sentencing category found to be the “best-fit.” In criminal cases, jury members are not given the breadth to construct or change verdict categories. However, in civil cases, including intellectual property, juries award damages at their own discretion. Given very little guidance detailing how damages should be awarded, jury members are left to consider multiple factors during the decision-making process (Greene, 1989; Greene & Bornstein, 2000). Although the law requires both the plaintiff and the defense attorneys to present a sum of money for consideration during IP cases, jury members are not required to stay within this range. Instead, jurors are given carte blanche to award any monetary sum they deem fit. Referred to as anchoring points, jury members assimilate to or contrast from the numbers provided by the opposing attorneys. Greene (1989) offered an overview of literature describing possible justifications for the awarding of damages. These justifications include: using the anchoring points as a place to begin juror negotiations (Broeder, 1958); taking the highest number as the ceiling and negotiating downward (Zuehl, 1982); endorsing the expert witnesses’ number (Raitz, Greene, Goodman & Loftus, 1990); cutting the asking price of the plaintiff’s attorney in half (due to the belief that attorneys double what they think they can win); providing a lump sum thought to be appropriate (Kalven, 1958); using components, factors, and formulas to determine a sum (Goodman, Greene, & Loftus, 1988); and, averaging the jurors’ damage findings into one number (Kalven, 1958). While these researchers have analyzed the phenomenon of structuring the damages awarded, Greene (1989) called for a qualitative “why?”
Ford, Ford, and D’Amelio (2008) noted, “sensemaking occurs in conversations that involved giving accounts or self-justifying explanations of events and activities” (p. 364). Scott and Lyman (1968) defined accounts as linguistic devices used when actions may face evaluation. The use of excuses or justifications serves as the basis of motivation by either renouncing ownership of the action entirely, or offering mitigating information. Although usually employed by speakers to defend untoward behavior, the notion of justification in an account could also be applied as a natural framework for decision-making.

During the social process of sensemaking, talk has the ability to “shore up the timbers of fractured sociation” (Scott & Lyman, 1968). While working through the process of reducing ambiguity, justifications for thoughts and rationales should be offered as bandages to these fractures. Weick (1995) further explained that the “social context is crucial for sensemaking because it binds people to actions that they must then justify (p. 53). The need to explain fully and defend a costly damage decision in the context of a judicial governing body may surface subconsciously. Rationalizing the denial of funds to a hypothetically injured party, or the stripping of immense damages from a corporation may seem inherently necessitating justification. If attorneys and theorists knew more about why jurors propose the awards they do, they could better ameliorate possible concerns or offer more specific evidence to justify a numerical value. Attorney tactics to actuate the jury toward a number could be modified to correct for foreseeable handicaps.

For these reasons, I propose the following research question:

RQ2: What justifications do IP jurors give for the awards they propose?
CHAPTER 3

METHODS

In order to analyze the decision-making process of jurors involved in patent infringement cases, I focused on mock jury participants whose cases were filed in the Eastern District of Texas. Specifically, I utilized a pre-existing data set that captures the deliberation comments of jurors in mock trial situations in Marshall, Texas.

The East Texas Rocket Docket

Once known only for its pottery and Christmas decorations, Marshall, Texas, birthed the Eastern District “rocket docket,” thereby transforming patent litigation. Marshall, Texas, located about 150 miles outside of Dallas and boasting a population of roughly 23,000 people is the self-proclaimed “Pottery Capital of the World.” Also, proud of its Fire Ant Festival, this small Texas town became the unlikely home of high stakes intellectual property disputes (Cresswell, 2006). In September 1999, Justice T. John Ward was sworn into the East Texas federal bench. The addition of Justice Ward and his set of “rules” transformed the manner in which intellectual property cases were handled, and consequently, the small town in which they were filed.

Wanting to move quickly through impending civil suits, Justice Ward placed patent lawsuits on a strict timetable and limited the length of courtroom briefs. He also required attorneys to turn over relevant information and evidence immediately and sanctioned those who did not comply (Decker, 2006). No longer could large companies drag out a case over the course of weeks. Instead, all evidence had to be presented in 7-10 days. Taking it a step further, Justice Ward’s chess clock prohibited lengthy open and closing statements by attorneys (Cresswell, 2006). Small companies suing for patent infringement were assured trial in within six months of filing, thereby reducing expensive court costs. As a result, smaller companies seeking suit against
variable giants pursued litigation in Marshall. On average, patent cases are estimated to cost each party in excess of a million dollars to litigate (Ryan, 2012). In this venue, smaller corporations were afforded the ability to push through discovery and pre trial motions without the process being dragged out by a company with deeper pockets.

Marshall juries also seemed to be sympathetic to patents holders making the Eastern District popular for filing plaintiffs. The research firm Legalmetric claims that the plaintiff/patent holder in Marshall wins 88% of their cases, as compared to the 68% national average (Williams, 2006). Due to Justice Ward’s amendments, the Eastern District has seen its patent docket increase tenfold since 1999 (Decker, 2006). Currently, a patent owner may file in any district where a product is sold. Additional tort reform being debated in Congress would require the patent holder or accused infringer to file in a district where they maintain “some sort of physical presence” (Decker, 2006). Marshall, Texas, has played host to lawyers and executives from Samsung, Google, Texas Instruments, Sony, Nintendo, etc. The residents of Marshall are called upon to render findings involving microchips, circuitry, analogue equipment, and the cutting edge of technological development. Panels of eight residents sit through the testimony of expert witnesses, engineers, and chief executive officers hoping to make sense of the dense information. Their verdicts decide the fate of companies, layoffs of workers, and the extinction of products. An increased understanding in the jury decision-making of intellectual property cases by researchers and legal professionals aids in the increased efficacy of the system.
Research Strategy

I designed this analysis rooted in the fundamentals of qualitative research and grounded theory (Strauss & Corbin, 1990). Grounded theory requires a constant comparison of data throughout the collection and analysis period (Glaser & Strauss, 1967; Strauss & Corbin, 1990). The process requires the researcher to build and connect categories from the emergent data. Working toward theoretical development, this method relies on the personal experience as reflected in data generated by informants to guide analysis (Strauss & Corbin, 1990).

Participants

This pre-existing data set is the work product of a trial consulting firm, McGee and Associates (pseudonym). As a part of their services, McGee and Associates perform mock trials at the request of clients to prepare for future litigation or to aid in settlement. The firm is predominately situated in civil torts and spends a large percentage of time aiding in patent litigation. Employed by one side of the suit, the firm constructs a mock trial made up of 24 potential jurors. These participants reside in the Eastern District where the case will be filed and fulfill the necessary legal requirements to be placed on a jury (i.e. age, no felonies, citizen of the United States, etc.). The firm utilizes a purposeful sampling technique to fulfill the demographics that proportionately reflect those of the district and include a variety of ages, races, and genders.

Recruitment

McGee employs a recruitment firm to find individuals matching the demographics of the area where the suit is filed. Associates work with outside screeners to prepare them with the needed demographics and exclusionary information. The screener performs the recruit, and associates handle final approval and juror reimbursement. McGee uses 24 jury members broken
into three deliberation groups of eight for one mock trial. The number of participants in each mock trial remains the same, with motivation rooted in cost effectiveness, strength of data, and observational design. Their use of 24 participants allows for the diverse flow of thoughts and ideas, while still allowing individuals verbal and nonverbal reactions to be recorded effectively through sound and video. Controlling the number of mock jurors also reduces the cost for the paying client while still providing effective data.

Procedure

For the purpose of this study, three cases involving patent litigation, resulting in damages, and filed in the Eastern District were analyzed. The three cases totaled nine deliberating groups of eight participants each. After witnessing testimony from both sides of the lawsuit, including some exhibits, deposition footage, and damage discussions, the three groups were sent into separate rooms to deliberate. The participants are not told which party employed the consulting team, or for what purpose. Each group of eight was provided with jury instructions paralleling what would be seen in court. In each of the three cases, except for one deliberation group, the deliberation groups found the defendant guilty of patent infringement and must award damages. The outlier group deliberated on damages, but ultimately decided not to award any. The nine deliberation groups were already recorded and transcribed for coding. These transcriptions were used for the data analysis in this study.

Data Analysis

Before data analysis began, discourse describing uncertainty and financial judgment justifications was bracketed to highlight the data that related to the research questions. In order to identify uncertainty, I relied on Levin’s (2005) definition that “uncertainty is not mere lack of knowledge, but rather derives from lack of knowledge” (p. 10). Using linguistic markers of
uncertainty as identified by Levin (2005) as “uncertainty indicators” (p. 20), expressions such as “I don’t know” and those appearing in the Appendix, were extracted from the applicable text for data analysis. Similarly, the section of deliberations requiring jurors to award a number for damages was culled in its totality. This process generated codable units or ‘tokens.’ Section selection ceased once the jury had agreed on a damage award. Using an open coding process, data analysis proceeded through the steps of the grounded theory process as outlined in Lindlof and Taylor (2011).

First, I employed open coding to read through the data unrestricted, line-by-line, and assign labels to capture textual meaning (Strauss & Corbin, 1990). When open coding for the first research question, I looked for the tactics jurors used to grapple with the uncertainty following an uncertainty indicator. Open coding for the second research question focused on the justifications jurors used to defend, explain, bolster, or introduce a damage award. The number of categories and labels were unlimited in an attempt to capture the essence of the text (Glaser & Strauss, 1967). En vivo coding was used when applicable to name the categories using participants own words (Bloor & Wood, 2006; Lindlof & Taylor, 2011). The open coding process resulted in 16 categories containing 400 coded tokens pertaining to uncertainty and 40 categories containing 841 coded tokens pertaining to damages. Next, a coder signed a confidentiality agreement and received training to review the data and conduct an intercoder reliability test. Sections of text were selected at random using a six-sided die with all faces labeled with 1, 2, or 3. For each of the research questions, the die was rolled three times to determine the case, the deliberation group, and the interval at which the text should be analyzed. The coder independently analyzed 5% of the uncertainty data (20 tokens) and 5% of the damage data (42 tokens) to verify frequency of agreement. Using Perreault and Leigh’s (1989) formula,
I computed a reliability score of .83, giving me confidence that the analysis process was sound. Reliability checks of this nature are not customary in interpretative analysis (Kirk & Miller, 1986); however, this process strengthens the belief that the final object achieved through the coding process is rooted in the data (Banks, Louie, & Einerson, 2000). To further establish the credibility of the findings, I employed expert verification (Lincoln & Guba, 1985). An experienced felony trial attorney conducted a review of the categories, tokens, and coding process. He verified that my results were parallel to his observations as an expert in litigation and law.

Next, axial coding was employed to identify interrelationships among the categories through constant comparison (Glaser & Strauss, 1967). Axial coding “further refines and systematically integrates previously generated topic categories into a limited set of ‘notional’ categories, or integrated sets of topics” (Banks, et al., 2000, p. 304). This structure continued until the data no longer required the addition or creation of new categories. No tokens were placed in multiple categories in either the open coding or axial coding phase. This process validates data incorporation by drawing conceptual connections. The 15 categories emerging from the first research question were collapsed into three representative themes: reliance on the known, acknowledging the uncertainty to work through it, and ignoring the uncertainty. Each of the open coding categories fit cleanly into these themes based on content, and none were omitted. The second research question yielded 40 open coding categories that were then subsumed based on thematic content and purpose. Upon further review, two of the open coding categories “jokes/humor” and “Struggling to do math” were omitted from the axial coding process because they fell outside the scope of the research question. The remaining 38 categories were collapsed into five notional categories: mistrust of both parties, concerns over
future imagined outcomes, struggling/absence of technical cognitive complexity, establishing worth, and emotions/non-factual, non-logical frames.
CHAPTER 4

RESULTS

I organized the following section around my “progressive refinement of coding categories” in order to illuminate my interpretive process (Banks, et al., p. 304). I display my coding categories in their entirety, as well as illustrative examples of the mock jury transcriptions to exemplify the coding process. This methodological transparency allows for further verification in a highly interpretive forum (Kirk & Miller, 1986).

Research Question 1: Dealing with Uncertainty

After reading the transcriptions of jury deliberations at least twice in totality, I began to bracket text for analysis based on Levin’s (2005) definition of uncertainty and uncertainty indicators. These tokens materialized in phrases, clauses, sentences, and paragraphs. After creating categories based on the theme and interpretation of the token, 15 categories containing 400 tokens emerged. These findings for RQ1 are presented in Table 1. The examples in Table 4.1 were taken from the raw data, and variables such as “X” and “Y” omit the names of the litigating parties or sensitive information disclosed in trial.

Table 4.1

Open Coding Categories

<table>
<thead>
<tr>
<th>Category number and description</th>
<th>Tokens in category</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Jurors refer back to jury instructions</td>
<td>9</td>
<td>“Yes, this says that to prove a claim invalid... [he reads]... So it’s the anticipation that they knew that it was coming or that it was obvious...”</td>
</tr>
</tbody>
</table>

(table continues)
<table>
<thead>
<tr>
<th>Category number and description</th>
<th>Tokens in category</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Story reconstruction from trial facts</td>
<td>17</td>
<td>“Sounds to me like he got a patent on it initially and when he presented it to X, they were apparently already working on something like it, and from a number of the documents and things presented, it sounded like this is what we are already working on. Although it appeared to me that he already had the patent. It sounded like they were both working toward the same technology, but he had the patent.”</td>
</tr>
<tr>
<td>3. Relying on another juror for affirmation</td>
<td>42</td>
<td>Juror 1: “X had the patent and sold it in bankruptcy and bought it back. Am I right?”&lt;br&gt;Juror 2: “That’s my understanding too.”</td>
</tr>
<tr>
<td>4. Narrative about another, past situation</td>
<td>11</td>
<td>“When this company goes bankrupt, from my understanding, you can’t come back with the same name. So he has to rename it. Cause I know a lot of contractors that we deal with in our company, we had one company file bankruptcy, three times, and I would go, okay, who are you this week? And they were trying to explain to me how they can still operate and file bankruptcy. And I’m going okay... but they just changed their name and applied for a new tax ID number.”</td>
</tr>
<tr>
<td>5. Asking questions</td>
<td>196</td>
<td>“Why didn’t they bring the hard evidence to them that would have gotten that patent thrown out?”</td>
</tr>
</tbody>
</table>
Table 4.1 (continued).

<table>
<thead>
<tr>
<th>Category number and description</th>
<th>Tokens in category</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>6. Drawing conclusions based on trial facts</td>
<td>17</td>
<td>“When I found out that they had sent it back, that sold me on the first question, because why are you trying to fight the PTO if you are not infringing? If you didn’t infringe why are you worried about whether it’s invalid?”</td>
</tr>
<tr>
<td>7. Speculation without clearly stated facts</td>
<td>26</td>
<td>“If they didn’t know about his, they might have had the patent in a few months or years later. Just speculation, but the technology-several companies might have been moving ahead in that direction.”</td>
</tr>
<tr>
<td>8. Reliance on facts presented in trial</td>
<td>19</td>
<td>“The hard facts... are there a whole lot of hard facts in this case? Not especially. If you want to go to that big number, the SEC number that she threw out there for damages, as far as just hard and fast facts...”</td>
</tr>
<tr>
<td>9. Openly admit uncertainty and perceived deficiency</td>
<td>24</td>
<td>“I’m going to be honest with ya. A lot of this is over my head ya know? It’s computers when you get in there like that. It’s too complicated for me.”</td>
</tr>
<tr>
<td>10. Blame uncertainty on the attorneys</td>
<td>7</td>
<td>“Well see, that was never made clear. Nobody ever said anything to that effect. We changed our procedures as of ‘99. When he came to us and said that he had a patent on this, we changed our system. That was never made clear.”</td>
</tr>
<tr>
<td>11. Restatement/rephrasing: hopeful of clarification</td>
<td>4</td>
<td>“How about you read it to us in your own words.”</td>
</tr>
</tbody>
</table>

(table continues)
Moving into the second phase of grounded theory, I was able to collapse the 15 categories pertaining to uncertainty into three distinct and new categories through axial coding. I did this by identifying causal patterns, linking themes, and grouping similar concepts (Strauss & Corbin, 1990). This procedure yielded three notional categories: reliance on the known, acknowledging the uncertainty to work through it, and ignore the uncertainty. The results of this exercise are displayed in Table 4.2.
Table 4.2

Categories Resulting from Axial Coding

1  Reliance on the Known (96 tokens):
   1- Jurors refer back to instructions (9)
   2- Story reconstruction from trial facts (17)
   4- Narrative about past situation (11)
   6- Drawing conclusions based on trial facts (17)
   8- Reliance on facts presented in trial (19)
   12- What I would do (2)
   13- Comparison through analogies (9)
   15- Reliance on worldly knowledge (12)

2  Acknowledging the Uncertainty to Work through it (273 tokens):
   3- Relying on another juror for affirmation (42)
   5- Asking questions (196)
   9- Openly admitting uncertainty (24)
   10- Blame uncertainty on the attorneys (7)
   11- Restatement/rephrasing for clarification (4)

3  Ignore the Uncertainty (31 tokens):
   7- Speculation without clearly stated facts (26)
   14- Draw conclusions based on perceived omissions (5)

(The numbers appearing to the left indicate the open coding subcategories, and the numbers contained in parenthesis refer to the number of tokens found in the data.)

Reliance on the Known

The 96 tokens appearing in this category exemplify jurors returning to a stable source of knowledge as a guide. By referencing items such as the jury instructions, facts given in trial, and reliance on one another, jury members look to eradicate their uncertainty by clinging to the few truths they have previously identified. Jurors turn to well-known comparisons, analogies, life lessons, and even insert themselves into the case narrative to illuminate how they might respond in a similar event. These themes are evident in the following examples:
The number assigned to jurors in each of the cases appears to the left.

17- “Do I need to read that section on willful infringement again to get a clear…?”

11-“ Yes, I think you should.” (Case 1: Deliberation 1)

7- “Doesn’t the patent office have to look to see if there is prior art to make it valid? Don’t they have to look for prior art involved?” (Case 2: Deliberation 1)

3- “Ok, another analogy. I bought a bicycle and you like that bicycle so you went and bought one just like it. And you made some modifications to it, and I understand that, but going into this conference it is the man’s idea. You’re going to steal it from him. That’s how I see it.” (Case 2: Deliberation 2)

3- “The patent was issued in 2005 and a letter was sent to X in 2006. It was willful infringement.” (Case 3: Deliberation 1)

8- “If I had a legal claim on something and someone was using my property, I believe the moment I found out about it I would jump on it in a heartbeat.” (Case 2: Deliberation 1)

Acknowledging the Uncertainty to Work Through It

The 273 tokens appearing in this category depict the jurors’ openness to admitting the existence of uncertainty. Working to grapple with these cognitive gaps by addressing them outright, jurors draw attention to their lack in knowledge or understanding by clearly admitting their perceived deficiencies, asking questions, relying on their peers for affirmation, or attempting to rephrase concepts to promote understanding. While jurors admit their gaps in understanding, they blame the root cause on both naiveté in the field and attorney culpability. This encompassing theme is present in the following examples:

21- “But when you go for a patent, you have the idea, and then they buy into the patent
and you go further with it. They develop it further. You know what I’m saying? A company will buy it from you and then develop it further. So your initial idea is what gets the whole ball started, you know what I mean?” (Case 3: Deliberation 3)

10- “I’m going to be honest with ya. A lot of this is over my head ya know? It’s computers when you get in there like that. It’s too complicated for me.”

15- “Oh, it is. It is complex. You know, I don’t understand everything… all the technical mumbo jumbo.” (Case 1: Deliberation 3)

1-“Well see that was never made clear. Nobody ever said anything to that effect. We changed our procedures as of ‘99. When he came to us and said that he had a patent on this, we changed our system. That was never made clear.” (Case 3: Deliberation 2)

1-“Yeah, direct infringement means, they have been invented…[reads definition]… In other words, it’s supposed to be explained in laymen’s terms so that you don’t go and make the same thing, unknowingly basically walk on his land.” (Case 2: Deliberation 2)

*Ignore the Uncertainty*

The 31 tokens appearing in this category evidence jury member’s attempts to ignore their gaps in knowledge to continue the deliberation process. This continuation leads members to speculate without admitted evidence, or to draw conclusions based on evidence that was omitted from trial. Jurors do not acknowledge these holes, but instead plow through them extricating them from dialogue or consideration. This theme is present in the following examples:

1-“That was when he approached them and tried to sell them this technology. And I think, I think, when they walked away, they all said, he opened the bag up, there’s not way we’re going to be able to get a patent on it right now. So they decided to go ahead and use it at that time.” (Case 3: Deliberation 2)
20-“I think at that time, they didn’t know that it was going to be of much use. They weren’t that far in their studies yet. They hadn’t progressed that much yet.” (Case 1: Deliberation 2)

4- “If they had, they would have made a point to say that we filed in 2002…” (Case 2: Deliberation 1)

The last step of axial coding was to link these themes on a dimensional level. After referencing the data, three pairs of dichotomous and topological indicators became apparent. One element from each of the pairs effectively encapsulates the process jurors enter to make sense of uncertainty. These include individual/group, lists/stories, and facts/speculation and appear in table 4.3.

Table 4.3

*Uncertainty Reduction Dichotomies*

<table>
<thead>
<tr>
<th>Individual</th>
<th>Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lists</td>
<td>Stories</td>
</tr>
<tr>
<td>Facts</td>
<td>Speculation</td>
</tr>
</tbody>
</table>

*Individual/Group*

This categorization explains where jurors seek information when faced with uncertainty. In each thematic category, jurors either turned inward, the individual approach, or to one another, the group approach, in an attempt to vanquish cognitive gaps. Looking to their own past experiences, personal narratives, or accumulation of facts, jurors use their knowledge to work through uncertainty. This self-reliance also
uses the tools available to reach understanding. Referencing the jury instructions, looking back through notes written during trial, or recalling facts previously heard also serve as individual reliance.

Sometimes in moments of uncertainty, jurors reference each other. Looking to be affirmed through another’s understanding, juror’s “check in.” Phrases like “did I understand this right?” and “is that what you thought?” invite assurance from others to the struggling juror that he/she is processing information similarly and reduces uncertainty. Some members also ask questions to bolster understanding. Checking facts, asking for clarification, and requesting explanation, jurors rely on each other’s knowledge to work through cognitive gaps. Once a juror begins answering the questions of the group, the others must decide whether the responses are credible and should be trusted. At this point, members either accept the response, continue to ask questions, or simply ignore their uncertainty and move forward.

Some jurors never reference the group, choosing instead to draw their own comparisons and answer the questions of others. Some jurors never assert themselves in the group through the use of personal narratives or beliefs, but instead look to garner affirmation. Working through uncertainty, jurors look both inwardly and to each other for clarification.

*Lists/Stories*

Attempts at negating uncertainty take the form of either lists or stories. Browning (1992) explained lists to be rooted in science and depicted as a formula that leads to action. Characteristically, lists employ standards, accountability, and certainty. The addition of lists applies structure and organization, and their power lies in their immediacy (Browning, 1992). Lists gain legitimacy from the “belief that technique—a set of specific steps—will lead to identifiable, predictable outcomes” (p. 281). In this legal context, lists refer to statements of
procedural fact, equations, and rules. Through these examples jurors bolster their knowledge. A list might reference the definition of a legal term under contention, the necessary procedures of a patent office to declare validity, or equations calculating the gross sales a company made from their product. These technical communications are not personal and do not involve or evoke emotion. Lists are often considered to be “the ultimate form of power/knowledge, because they list information (knowledge), and they have institutional approval (power)” (Browning, 1992, p. 282). This type of power/knowledge is critical to eliminating jurors cognitive gaps.

Contradictory to the list, the story is shared communication containing personal knowledge (Browning, 1992). While they should still be considered knowledge, they do not require an expert to deduce meaning. Unfolding sequentially, stories may utilize the romantic, humorous, tragic, or dramatic. Stories work to fill the holes in technical rationality (Browning, 1992). Jurors make sense of uncertainty through the telling of personal narratives taken to be congruous. Comparing facts of the trial to their jobs as electricians, business owners, and accountants, jurors construct personal stories relying on experience. Jurors often insert themselves hypothetically into the trial in order to explain what they would do in that situation. This personal insertion is also a form of story, as the juror becomes the lead character and progresses chronologically through the trial’s events. Extended metaphors, analogies, and comparisons also become stories as a juror builds a complex world with actions and consequences to equate to the litigation. These hypothetical comparative worlds are built on personal understanding and experience and often employ humorous and dramatic tenets.

The construction and implementation of lists and stories assist jurors as they make sense of uncertainty. Sometimes these elements come together in a similar statement, but usually occur separately. This story-list typology represents the factual and scientific in contrast to the
personal and emotional.

**Facts/Speculation**

Looking to reduce the uncertainty equated with cognitive gaps, jurors turn to either facts or speculation. Different from the scientific, procedural, or formulaic nature of lists, facts simply state the known. Relying on the known data such as jury instructions, factual testimony, numbers, and comparisons, jurors cling to what they can validate. They further corroborate the presence of facts by checking with one another or asking questions. This verification process displays the importance attributed to establishing the accuracy of details. Also turning to personal truths, jurors look to draw conclusion and make comparisons. Information outlining a previous lawsuit might be used as a factual comparison to the current case.

However, some jurors choose to ignore their uncertainty and use speculation to fill in the cognitive holes. Making sweeping statements about lawyers, procedures, and perceived omissions, some jurors arrive at conclusions with no factual interference. Inserting themselves into the narrative without the addition of legal constraints, knowledge of the technical workings, or an understanding of the field, jurors speculate as to what they would do in the given situation.

Incorporating the tools found in their arsenal, jurors battle uncertainty through the use of facts or speculation. This typology summarizes the three notional categories and provides insight into reducing uncertainty; I apply them to the story model in the next chapter.

**Research Question 2: Justifying Damage Awards**

The same open coding process was used to categorize justifications for damage awards (RQ2). Each trial group was asked to deliberate on the following question: “What sum of money, if paid now in cash, do you find by a preponderance of the evidence should be awarded to X as a reasonable royalty to compensate it for the infringement of Claim 1 of the x patent?” I
began analyzing the jury deliberation data after the introduction of this question and continued until an award number was unanimously reached. From these transcriptions, 40 categories containing 841 tokens developed. These findings are presented in Table 4.4. The examples in Table 4.4 were taken from the raw data, and variables such as “X” and “Y” omit the names of the litigating parties or sensitive information disclosed in trial.

Table 4.4

Open Coding Categories

<table>
<thead>
<tr>
<th>Title of Category</th>
<th>Number of Tokens</th>
<th>Example of Token</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Concerns of excessive award</td>
<td>34</td>
<td>“Well, I’m with her, I think that 140 is a little deep personally.”</td>
</tr>
<tr>
<td>2. Defendant didn’t do the right thing: This is how a company learns not to be…</td>
<td>64</td>
<td>“We need to set a precedent because you don’t want people coming back and continuing to do this.”</td>
</tr>
<tr>
<td>3. Plaintiff was protected with a patent</td>
<td>23</td>
<td>“I feel like since X had the patent and just the way the judicial system and just the way the United States in general is set up, and if you have something you are protected under the Bill of Rights and under the Constitution and amendments and people blatantly use you and misuse and get gain for that, then you should be compensated for that.”</td>
</tr>
<tr>
<td>4. Sympathy for the inventor</td>
<td>11</td>
<td>“What I feel bad about is he is the one that did everything; he caused them all to get all that money, he should get all of it.”</td>
</tr>
</tbody>
</table>

(table continues)
Table 4.4 (continued).

<table>
<thead>
<tr>
<th>Title of Category</th>
<th>Number of Tokens</th>
<th>Example of Token</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Reliance on (limited) knowledge of technology industry</td>
<td>19</td>
<td>“Now his claim is based on maintenance and consulting. Now if you regularly use software, it’s going to come with maintenance and consulting. His invention doesn’t have anything to do with those revenues streams I think. My opinion is it is really limited to those two modules.”</td>
</tr>
<tr>
<td>6. Compensation for loss of profit</td>
<td>12</td>
<td>“But at least what we’re saying is that to go back and compensate him for the years where they have been using his product and not compensating him for it.”</td>
</tr>
<tr>
<td>7. Fantasized financial and professional outcomes</td>
<td>16</td>
<td>“He would probably be up there with Microsoft now. If his patent hadn’t of been stolen, who knows where he would be...”</td>
</tr>
<tr>
<td>8. Narratives/ analogies of perceived similar situations</td>
<td>52</td>
<td>“It’s like buying a 4x4 truck, you may not use the 4x4, but you’re going to pay for it. If that’s the way the truck comes...”</td>
</tr>
<tr>
<td>9. A large company can handle a damage award</td>
<td>18</td>
<td>“140 million is a drop in the bucket to them”</td>
</tr>
<tr>
<td>10. All the plaintiff does is sue people</td>
<td>15</td>
<td>“He’s got a history of suing people. You know, he makes his living off of suing people. Now, you already got 20 million out of them two other outfits.”</td>
</tr>
<tr>
<td>11. Continuing use of patent</td>
<td>23</td>
<td>“They’ve drag this out over years and continued to use that product over the years and haven’t pulled it out.”</td>
</tr>
<tr>
<td>12. Patent worth in the time invented</td>
<td>27</td>
<td>“But I would have to go back to 2003 and see what it was worth.”</td>
</tr>
</tbody>
</table>

(table continued)
Table 4.4 (continued).

<table>
<thead>
<tr>
<th>Title of Category</th>
<th>Number of Tokens</th>
<th>Example of Token</th>
</tr>
</thead>
<tbody>
<tr>
<td>13. Concerns of “fairness”</td>
<td>21</td>
<td>“...it’s not fair to me that as a big company you can go and make all this money off of what you do. I don’t think that’s fair.”</td>
</tr>
<tr>
<td>14. Use of personal equation: averaging, median</td>
<td>26</td>
<td>“So I came up with 63 million because X is asking for 140 and Y is asking for 4. So split the difference and divide it by two-that’s what I came up with.”</td>
</tr>
<tr>
<td>15. The inventor/business was a failure</td>
<td>31</td>
<td>“And he had the opportunity to sell and nobody wanted it. And he went bankrupt because his invention, no one wanted to buy it. Now he goes bankrupt.”</td>
</tr>
<tr>
<td>16. Support for the lawsuit</td>
<td>3</td>
<td>“The only reason he is suing everybody is because everybody is using his stuff.”</td>
</tr>
<tr>
<td>17. Reliance on an economic expert</td>
<td>27</td>
<td>“Yeah, but that is 3 million less than what their CPA came up with on paper.”</td>
</tr>
<tr>
<td>18. The plaintiff asks for more than he expects</td>
<td>16</td>
<td>“I feel like you ask for more than you know you’re going to get.”</td>
</tr>
<tr>
<td>19. The defendant has more money than you think</td>
<td>2</td>
<td>“They’re going to put down bottom dollar. They’re going to say they lost this on this and that on that, but what they really made we don’t know.”</td>
</tr>
<tr>
<td>20. Inventor didn’t produce anything more than an idea</td>
<td>4</td>
<td>“He came up with an idea, he didn’t go through all the effort, money, time, he didn’t put any money in. He just had an idea.”</td>
</tr>
<tr>
<td>21. How much of the patent was a part v. whole of product/success?</td>
<td>39</td>
<td>“You don’t know what part/percentage of his part playing in the whole percent. There might have been 100 percent, but his might have just been one percent.”</td>
</tr>
</tbody>
</table>
Table 4.4 (continued).

<table>
<thead>
<tr>
<th>Title of Category</th>
<th>Number of Tokens</th>
<th>Example of Token</th>
</tr>
</thead>
<tbody>
<tr>
<td>22. He’s doing well with this amount of money- it’s a gift</td>
<td>16</td>
<td>“I think if someone offered me that much money I would take it in a heartbeat.”</td>
</tr>
<tr>
<td>23. Belief in principles</td>
<td>1</td>
<td>“It makes sense, but I’m still standing by my principles.”</td>
</tr>
<tr>
<td>24. Big company taking advantage of little man</td>
<td>7</td>
<td>“It’s just like hey I’m a big ole company and there’s not really much you can do to me”</td>
</tr>
<tr>
<td>25. Mistrust of legal teams</td>
<td>40</td>
<td>“Well the attorneys for both companies are going to make the jive how they want them to jive.”</td>
</tr>
<tr>
<td>26. Perceived value that patent brought product</td>
<td>66</td>
<td>“Even though using his product probably made them over a billion bucks we’re going to give them 4 million?”</td>
</tr>
<tr>
<td>27. Ambiguous feelings of too low or too high</td>
<td>53</td>
<td>“But don’t you think 75 is a little too low?”</td>
</tr>
<tr>
<td>28. Boosting American economy</td>
<td>7</td>
<td>“He’s American. It’s American.”</td>
</tr>
<tr>
<td>29. Concerns about future royalties</td>
<td>17</td>
<td>“I say 95, but I still have reservations about are they still going to get royalties after the fact?”</td>
</tr>
<tr>
<td>30. Time until suit was filed</td>
<td>3</td>
<td>“My question is why they waited so long, anybody understand that?”</td>
</tr>
<tr>
<td>31. Rounder, easier number</td>
<td>12</td>
<td>“Why can’t we round it off to a nice 30? Let’s do a nice 30.”</td>
</tr>
<tr>
<td>32. Uncertainty regarding the process</td>
<td>17</td>
<td>“Is there something in the middle? Can we ask that? Can we come up with a figure and write it down?”</td>
</tr>
</tbody>
</table>

(table continues)
Table 4.4 (continued).

<table>
<thead>
<tr>
<th>Title of Category</th>
<th>Number of Tokens</th>
<th>Example of Token</th>
</tr>
</thead>
<tbody>
<tr>
<td>33. Where is the money going?</td>
<td>22</td>
<td>“... how much money is he going to get off of this. What is his percentage of this, I mean these are questions that would have a direct impact on how much money anybody would award this thing.”</td>
</tr>
<tr>
<td>34. Struggling to do math</td>
<td>9</td>
<td>“15 million divided by 500 million... is that right... Do we have calculators? We’re just trying to figure out percentage.”</td>
</tr>
<tr>
<td>35. Jurors misunderstanding and miscommunication</td>
<td>12</td>
<td>“I didn’t think of that. Good point. I thought it was this or this. I thought it was the big one or the little one.”</td>
</tr>
<tr>
<td>36. Comparison to similar lawsuits</td>
<td>34</td>
<td>“So does he get a third of 3 billion? He got a third of one company, why not a third of another?”</td>
</tr>
<tr>
<td>37. Concern for the welfare of defendant’s company</td>
<td>10</td>
<td>“You’re going to put that company in risk. They’d have to do cut back and lose jobs.”</td>
</tr>
<tr>
<td>38. Concerns about inventor’s job</td>
<td>5</td>
<td>“We don’t know if he’s working or at another company higher up somewhere.”</td>
</tr>
<tr>
<td>39. Jokes/Humor</td>
<td>10</td>
<td>“Break me off a little piece of the fifty million.”</td>
</tr>
<tr>
<td>40. Perceived litigation fees</td>
<td>17</td>
<td>“Them lawyers, they’re going to make a killing.”</td>
</tr>
</tbody>
</table>

The open coding pertaining to justifications for damage awards were also analyzed through the axial coding phase. Although there were initially 40 categories at the conclusion of open coding, “jokes/humor” and “Struggling to do math” (19 tokens) were both omitted from
axial coding. While both categories seem to influence justification for damage awards, neither category fit the scope of the research question seeking to determine the justification for the award itself. The omission of these left 38 categories that collapsed into five axial categories.

Justification coding followed the same procedure used to axial code uncertainty, referencing Strauss and Corbin’s (1990) ‘paradigm model.’ This method yielded five notional categories: Mistrust of both parties, Concern over future imagined outcomes, Struggling/absence of technical cognitive complexity, Establish worth, and Emotions/Non-faction, non-logical frames.

These results are displayed in Table 4.5.

Table 4.5

*Categories Resulting from Axial Coding*

<table>
<thead>
<tr>
<th>Category</th>
<th>Resulting from Axial Coding</th>
<th>Tokens</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mistrust of both parties</strong> (122 tokens)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>18- The plaintiff asks for more than he expects</td>
<td>(16)</td>
<td></td>
</tr>
<tr>
<td>19- The defendant has more money than you think</td>
<td>(2)</td>
<td></td>
</tr>
<tr>
<td>24- Mistrust of legal teams</td>
<td>(40)</td>
<td></td>
</tr>
<tr>
<td>25- Big company taking advantage of little man</td>
<td>(7)</td>
<td></td>
</tr>
<tr>
<td>10- All the plaintiff does sue people</td>
<td>(15)</td>
<td></td>
</tr>
<tr>
<td>33- Where is the money going?</td>
<td>(22)</td>
<td></td>
</tr>
<tr>
<td>38- Perceived litigation fees</td>
<td>(17)</td>
<td></td>
</tr>
<tr>
<td>30- Time until lawsuit was filed</td>
<td>(3)</td>
<td></td>
</tr>
<tr>
<td><strong>Concerns over future imagined outcomes</strong> (73 tokens)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>37- Concerns about inventor’s job</td>
<td>(5)</td>
<td></td>
</tr>
<tr>
<td>36- Concern for the welfare of defendant’s company</td>
<td>(10)</td>
<td></td>
</tr>
<tr>
<td>29- Concerns about future royalties</td>
<td>(17)</td>
<td></td>
</tr>
<tr>
<td>28- Boosting American economy</td>
<td>(7)</td>
<td></td>
</tr>
<tr>
<td>9- A large company can handle damage awards</td>
<td>(18)</td>
<td></td>
</tr>
<tr>
<td>7- Fantasized financial and professional outcomes</td>
<td>(16)</td>
<td></td>
</tr>
<tr>
<td><strong>Struggling/Absence of technical cognitive complexity</strong> (41 tokens)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>34- Jurors misunderstanding and miscommunication</td>
<td>(12)</td>
<td></td>
</tr>
<tr>
<td>32- Uncertainty regarding the process</td>
<td>(17)</td>
<td></td>
</tr>
<tr>
<td>31- Rounder, easier number</td>
<td>(12)</td>
<td></td>
</tr>
<tr>
<td><strong>Establishing worth: Cost/benefit-reliance on expert</strong> (507 tokens)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1- Concerns of excessive award</td>
<td>(34)</td>
<td></td>
</tr>
</tbody>
</table>

(table continues)
Table 4.5  (continued).

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
<th>Tokens</th>
</tr>
</thead>
<tbody>
<tr>
<td>26-</td>
<td>Perceived value that patent brought product</td>
<td>(66)</td>
</tr>
<tr>
<td>22-</td>
<td>He’s doing well with this amount of money- it’s a gift</td>
<td>(16)</td>
</tr>
<tr>
<td>21-</td>
<td>How much of the patent was a part v. whole of product/success?</td>
<td>(39)</td>
</tr>
<tr>
<td>20-</td>
<td>Inventor didn’t produce anything more than an idea</td>
<td>(4)</td>
</tr>
<tr>
<td>17-</td>
<td>Reliance on an economic expert</td>
<td>(27)</td>
</tr>
<tr>
<td>15-</td>
<td>The inventor/business was a failure</td>
<td>(31)</td>
</tr>
<tr>
<td>14-</td>
<td>Use of personal equation: averaging, median</td>
<td>(26)</td>
</tr>
<tr>
<td>13-</td>
<td>Concerns of “fairness”</td>
<td>(21)</td>
</tr>
<tr>
<td>12-</td>
<td>Patent worth in the time invented</td>
<td>(27)</td>
</tr>
<tr>
<td>11-</td>
<td>Continuing use of patent</td>
<td>(23)</td>
</tr>
<tr>
<td>35-</td>
<td>Comparison to similar lawsuits</td>
<td>(34)</td>
</tr>
<tr>
<td>8-</td>
<td>Narratives/analogies of perceived similar situations</td>
<td>(52)</td>
</tr>
<tr>
<td>6-</td>
<td>Compensation for loss of profit</td>
<td>(12)</td>
</tr>
<tr>
<td>5-</td>
<td>Reliance on (limited) knowledge of technology industry</td>
<td>(19)</td>
</tr>
<tr>
<td>3-</td>
<td>Plaintiff was protected with a patent</td>
<td>(23)</td>
</tr>
<tr>
<td>27-</td>
<td>Ambiguous feelings of too low or too high</td>
<td>(53)</td>
</tr>
</tbody>
</table>

5 Emotions/ Non-factual, non-logical frames (79 tokens)

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
<th>Tokens</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-</td>
<td>Defendant didn’t do the right thing: Punitive Talk</td>
<td>(64)</td>
</tr>
<tr>
<td>4-</td>
<td>Sympathy for the inventor</td>
<td>(11)</td>
</tr>
<tr>
<td>16-</td>
<td>Support for this lawsuit</td>
<td>(3)</td>
</tr>
<tr>
<td>23-</td>
<td>Belief in principles</td>
<td>(1)</td>
</tr>
</tbody>
</table>

(The numbers appearing to the left indicate the open coding subcategories, and the numbers contained in parenthesis refer to the number of tokens found in the data.)

Mistrust of both Parties

The 122 tokens depicted in this category illustrate an inherent mistrust of both litigating parties. This distrust manifests itself through questions about the division of damage awards, the disclosure of funds, and perceptions of accumulating legal fees. Jurors express concerns that large companies take advantage of the “little man” and suspicions as to the length of time between alleged infringement and filing for litigation. This mistrust is displayed in the following examples:

22- “You know, you asked for 140 million dollars, you know that if you win the case you aren’t going to get what you ask.” (Case 1: Deliberation 1)
12-“Right, but did we see anything definitely proving that? I would have like a chart. I would have liked something specifically showing me that that’s what they got.” (Case 1: Deliberation 3)

6-“More than everyone else because they’re making them do this. They’re having to pay us, they are having to pay lawyers.” (Case 2: Deliberation 3)

20- “It sounds like there’s this big huge company and a bunch of little stores and merchants that provide them with their stuff and they don’t want to pay recognition to the little ones that help them with their stuff. It’s just like hey I’m a big ole company and there’s not really much you can do to me. That’s what it sounds like. It is a bigger company, they have more experience, they have more background, they have more money, they have more employees, and this one doesn’t. He just has this one little patent to stand behind.” (Case 1: Deliberation 2)

18- “They’re going to put down bottom dollar. They’re going to say they lost this on this and that on that, but what they really made we don't know.” (Case 1: Deliberation 1)

*Concerns over Future Imagined Outcomes*

While jurors have no clear knowledge detailing how their findings affect the future income of the defendant, the employment of those at the corporations, or the future job prospects of the plaintiff, these concerns permeate deliberations. Instead of relying on concrete facts, they speculate on the possible impact and potential futures their decisions could reap. These imagined outcomes bridge the micro and the macro levels addressing both the employment of individual workers as well as the American economy. Some jurors speculate on the financial and technological impact the plaintiff’s company might have been allowed to make in the world if their patent had not been infringed. These speculative beliefs about growth, prosperity, or
inevitable bankruptcy are encompassed in this category of imagined outcomes.

10- “I mean, ya’ll are throwing these millions away like that are chump change. This X does run a good business. They are making a profit, they are doing good. I don’t know whether they stole from this guy or not. You start hitting them up for millions and millions, somebody is going to lose their job.” (Case 1: Deliberation 3)

1- “I don’t think it would hit them that hard, I really don’t. Even at 1.6 billion, you’re only talking another 100-200 million dollars.” (Case 3: Deliberation 2)

23- “X is a foreign company. If you think about it, at least we’re taking foreign dollars and bringing them to America.” (Case 2: Deliberation 2)

13- I was just thinking, if we had done six- eight percent, something like 10%, even though X are a good, big company how many people are they going to have to layoff? For that big of a it? (Case 3: Deliberation 2)

13- “We don’t know if he’s working or at another company higher up somewhere.” (Case 3: Deliberation 2)

19- “And X can afford to show that that they made the mistake. Maybe someone else won’t. They are a big company. He would probably be up there with Microsoft now. If his patent hadn’t of been stolen, who knows where he would be, and 140 million dollars is a lot of money.”

Struggling/Absence of Technical Cognitive Complexity

During deliberations, jurors grapple with the highly technical testimony, courtroom procedures, and mathematical equations. Attempting to make sense of the testimony they heard, they often become confused and face correction from their peers. These moments of contextual or factual disagreement ultimately serve as the turning points in decision-making. Once
confronted, the corrected juror often joins the rest of the flock. These moments of clarification are built on the understanding of the rest of the jury pool and do not always reflect the evidence presented in trial. This theme is apparent in the following extended conversation held among jurors:

17- “That this guy took it and you want your part of it. I get that. I have no problem with that. But when it comes to 133 million, to me that seems steep when the lady broke it down. But if it’s 15 and I have to give up 7…”

12- “It was totally based on $137, there was nothing based on 15.”

13- “They were going by subscription, not by per month.”

17- “I get that, but when they said seven dollars a month, you can’t really see much profit range.”

21- “That can’t be right. If it’s 133 million and they made 2.9 billion just on that module and subscriptions that is still leaving them 2—something billion dollars. If it was based on half of everything they made, it would be way more than that.”

12- “The other lady threw in the 15 dollars and the 15 cents…”

21- “That was good trying to trick us. Like you said if X had just bought this when this started, they probably could have bought the whole patent for 5 or 600,000…”

13- “Looking at it that way are you cool with it now?”

15- “Yes, looking at it that way, I’m cool with it.” (Case 2: Deliberation 2)

Jurors also justify awards with fallacious deductions stemming from their lack of trial experience and knowledge of the process. Although the defense attorney is required by law to produce a potential number for damage awards to the jury, this does not mean the legal team is admitting infringement. While the attorney explains the legal necessity of their damage
presentation, some jurors misunderstand the impetus and perceive it as an admission of guilt. Later, this misunderstanding serves as a justification for damage awards.

26- “I noticed to, and I think this is germane to the question that we were asked, that the attorney for X opened the discussion with the amount owed, and he closed his day with the discussion for the amount they should pay. And that sounded to me like an admission of guilt.”

24- “Yes, I agree.”

12- “It sounded to me from the very beginning that they understand that they infringed just sounds to me like they are concerned with money.” (Case 2: Deliberation 2)

Similarly, in one instance, the jury did not understand the duty of the expert to testify truthfully under oath. This lack of knowledge in the process led the jury to question the expert’s credibility and the credibility of the attorney’s relying on expert testimony.

18- “When you have to pay people to talk in your favor, that is kind of icky to me. When you’re clear, you’re clear. You don’t need to pay people to talk for you.”

20- “Do we know that they did that?”

21- “That’s what they said.”

18- “One of the ladies said that one of the guys…”

23- “That was their opinion. Not fact, because if it was fact they would both be in jail for bribery.” (Case 2: Deliberation 2)

Working to apply percentages, figure in perspective royalties, and multiply income by number of units, jurors often find themselves struggling to do the math required. Working with numbers in the millions and billions, jurors attempt to deal with “a bunch of zeros” (Case 2: Deliberation 2). Referencing iPhone calculators, scratch pieces of paper, and each other, some
Establishing Worth: Cost/Benefit - Reliance on Expert

This category emerged as dominant, both in the frequency of tokens and its persuasive implications on damage awards. Jurors justified awards citing the percentage of profits that could be attributed to the contested patent, the portion of the invention that relied on the patent’s technology, the perceived worth of the patent in the year that it was first invented, and the equations and testimony provided by the economic experts. Jurors struggled to discern how much a patent was worth and what damage award would be “fair” to both parties. For some, the bankruptcy of a plaintiff reduced the worth of a patent. Others felt that patented ideas were not
to be held in the same regard as a patented invention or product. The continuing use of a patent under litigation seemed to increase its value. The adherence to a cost/benefit ratio, and the reliance on an expert to establish worth are exemplified in the following examples:

4- “He got 11 million out of 33 million, he got a third of what that company was worth. So does he get a third of 3 billion? He got a third of one company, why not a third of another?” (Case 1: Deliberation 1)

17- “But at least what we’re saying is that to go back and compensate him for the years where they have been using his product and not compensating him for it. So a CPA or someone would have to go back and figure out what dollar sum or percentage they should give him for the past seven years. That’s probably how they could get a dollar amount.” (Case 1: Deliberation 1)

17- “Thirty-two would be reasonable. And it would be fair based on the evidence of his company went under, his company was only valued at 100,000 I can’t say that continuing to use his product today he would have made million a year or even 100,000 on just that one little piece of his product.” (Case 1: Deliberation 1)

20- “I don’t think he should get what he’s asking for because of the fact of what I said before. He came up with an idea, he didn’t go through all the effort, money, time, he didn’t put any money in. He just had an idea. I think he should get what they offered him. The three percent.” (Case 3: Deliberation 1)

_Emotions/ Non-factual, Non-logical Frames_

Jurors also justify damage awards with emotional or passion-driven examples. Speaking in punitive terms, some jurors look to punish corporations or make an example of their perceived poor behavior. Similarly, sympathy for the inventor and the alleged abuses he suffered at the
hands of the infringing company also serves as justification for some awards. Punitive damages are not to be considered during patent infringement cases, and sympathy is not relevant; however, these non-factual, non-logical frames are still evident in data analysis.

19- “This has probably ruined this man’s life. And X can afford to show that that they made the mistake. Maybe someone else won’t. They are a big company.” (Case 1: Deliberation 1)

18- “This is how a company learns how not to be.” (Case 2: Deliberation 2)

12- “Because I think X should be penalized to a certain degree is what I think, if they had made the agreement in the beginning then what’s fair is fair, but I think they should be penalized for trying not to pay. When you are making billions of dollars, why can’t you be fair and upfront and make that deal with that smaller company.” (Case 2: Deliberation 2)

12- “We need to set a precedent because you don’t want people coming back and continuing to do this.” (Case 3: Deliberation 3)

22- “I think it should be more than that. I can kind of sympathize with her, I’m not sure I would call it pain and suffering, but… I guess we’re not supposed to take it personally, but I would really take it personal if I came up with an idea or software and a company used what I came up with and made all of these billions of dollars and my company went under because of nothing that they did.” (Case 1: Deliberation 1)

9- “What I feel bad about is he is the one that did everything; he caused them all to get all that money, he should get all of it.”

11- “That’s your sympathy playing…”

9- “No it’s not, it’s absolutely legal.” (Case 1: Deliberation 1)
With the identification of these five notional categories for RQ2, my last step in axial coding was to link them on a dimensional level (Strauss & Corbin, 1990). After reconsulting the data, three clear and distinct continuums emerged: Certainty versus Uncertainty, Rationality versus Irrationality, and Emotions versus Facts. Tokens falling under each of the five notional categories may be plotted in varying degrees on these continuums. They are not mutually exclusive, and together encapsulate the breadth of juror justifications. As jurors work to make sense of damage awards, they bounce back and forth through these polarized dimensions working to achieve stasis. These continuums are depicted in Table 4.6.

Table 4.6
Justification Continuums

<table>
<thead>
<tr>
<th>Certainty</th>
<th>---</th>
<th>---</th>
<th>---</th>
<th>---</th>
<th>---</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rationality</td>
<td>---</td>
<td>---</td>
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Certainty versus Uncertainty

This first continuum fuses the five notional categories through analyzing certainty versus uncertainty. Jury deliberations are a constant battle to eradicate uncertainty in the pursuit of a unanimous verdict. The eight jurors struggle to find stasis on a continuum that allows for the preponderance of evidence and fosters agreement. Damage justifications highlight the full length of this continuum using the five notional categories.

The mistrust of both parties negatively effects jury member’s certainty. Afraid of being misled by lawyers, experts, and witnesses, jurors openly admit their uncertainty regarding both the process and the information given. They call attention to alleged instances of obfuscating the
truth. By questioning the motives of the plaintiff, the avarice of the attorneys, and the bullying tactics of the defendant, jurors root themselves in varying degrees uncertainty.

These interests bleed seamlessly into concerns over future imagined outcomes. Lawyers and courtroom officials give jurors no information about the impact damage awards may have on the affected companies. Jurors are not told whether a large damage award may bankrupt a corporation or cause layoffs. It is also impossible to gauge how successful a plaintiff might have been had the patent been protected and enforced. Jurors are also often concerned about future royalties and protection for the patent going forward should the offending company continue its use. These levels of uncertainty versus certainty are present in discussions and could be mapped using this continuum.

Uncertainty is further apparent as jurors struggle or lack technical cognitive complexity. Caught in the midst of misunderstanding, jurors miscommunicate and rely on information they have misrepresented. Attempting to explain it to one another, the uncertain juror relies on the varying certainty of another. Gaps in knowledge regarding the process also lead to procedural uncertainty. As jurors struggle to execute mathematical equations, they turn to the levels of certainty provided by rounder, easier numbers. Sometimes the choice is made to round to 35 or 30 million instead of continuing the battle of mismatched and unverified sums.

Jurors also weigh certainty and uncertainty as they establish the worth of a patent. Looking to validate their claims with a form of cost/benefit analysis, jurors fix themselves to the certainty versus uncertainty continuum. Some jurors rely on the certainty that the inventor was a failure and therefore deserves little. Others rely on the certainty provided by an economic expert and reiterate the equation given in court. Jurors express levels of uncertainty as to whether the patent played a large part in the product’s success, and yet others vary in certainty that the
company only made money because of the patent’s ingenuity. Juror comments are not fixed at polar ends and extend the full range of the continuum.

Lastly, certainty and uncertainty extend into expressions of emotion, non-factual, and non-logical frames. Looking toward the certainty end of the continuum, jurors seek punitive damages for the wrongs incurred by the plaintiff. Clinging to the civil suit language of “pain and suffering,” jurors express a desire to punish the accused corporation. Paired with sympathy for the inventor, jurors express varying shades certainty in their decisions to award damages.

*Rationality versus Irrationality*

Question of rationality versus irrationality also permeate jury deliberations. Jurors turn to both rational and irrational justifications for their awards. Rational deductions, inferences, analogies, and equations are juxtaposed with irrational hypotheticals and fantasies. The more rational jurors turn to testimony and evidence for justification. The irrational tend toward sweeping generalizations, preconceived bias, and uncorroborated distrust. Rational in this context refers to the evidence the court deems appropriate for consideration. Jurors are instructed to look only to the evidence presented when deliberating. However, it is highly naïve to think that extra-legal notions do not affect damage justifications. Points are not permanently fixed, and the same juror may fall in multiple degrees on the continuum. Rationality versus irrationality is evident in each of the five notional categories.

The mistrust of both parties is a common theme and varies in degree of irrationality. Preconceived biases of attorney’s and the voracity of their arguments sometimes surface in damage justifications. Several jurors explained that attorneys are paid to argue and do so whether the information is true or not. Similarly, some jurors draw attention to the large amount of money the lawyers stand to make from trial. Although this information is not relevant and
may be completely false, it serves as a point of irrational justification. The plaintiff’s past legal history also surfaces during trial. Frequently, this information is admitted by defense in an attempt to discredit the plaintiff’s suit. If the plaintiff has engaged in previous litigation over the patent with other companies, he/she could be seen as a “patent troll.” This term is used in the field to define a person who takes out a patent with the intention of simply suing those who infringe. This juror mistrust of a plaintiff varies in rationality dependent on the surrounding facts and can be plotted on the continuum.

The fantasized future imagined outcomes used to justify damages also vary in irrationality. The amount of money the defendant can “handle” in damages is not relevant to the award. While juror concerns regarding bankruptcy and layoffs may be valid, and therefore rational to those involved, they are not within the confines of the trial. Several jurors express justifications relying on the continuance of royalties for defendants who would like to license the patent going forward. This justification ranges on the continuum dependent on the jury instructions provided at trial. Instructions may specifically instruct jury members not to consider royalties in the deliberations.

Jury members attempt to rationalize their way through the absence of technical cognitive complexity. Sometimes caught in misunderstanding and miscommunication without realizing it, jurors give justifications that are irrational. In these instances, they give the most rational justification possible given their lack of cognitive awareness. Met with a difficult proportional equation, some jurors attempt to rationalize the uncertainty by rounding to a safer or simpler number.

Other jurors seek to rationally establish worth through a cost/benefit analysis or the reliance on an expert. Using justifications regarding the perceived value a patent brought the
product or the worth of the patent at the time it was invented, a large portion of justifications can be placed on the rational side of the continuum. Analogies, equations, deductions, facts are also used here to determine a rational worth. Tokens in this category also reflect ambiguous feelings of “too high” or “too low.” This adherence to a feeling without a rational explanation reflects the opposite end of the continuum. The wide ranges of justifications which establish worth are well suited for the fluidity of the proposed continuum.

Lastly, it is difficult for some jurors to remove the irrationality of emotions from damage deliberations. Some believe strongly that the defendants were aware of the infringement and willfully continued to infringe. Believing that the defendant did not do what was right, some jurors look to punish the defendant with the depth of the damage award. These punitive measures are not relevant in this legal context and fall toward the irrational end of the continuum. Similarly, sympathetic jurors also struggle to omit their emotions for damage justifications. Feeling badly for the inventor is not relevant to deliberations and should not be considered during talk of damages. The proposed continuum encompasses these non-logical frames.

**Fact versus Emotions.**

Although jurors consistently mention the importance of weighing only the facts, justifications for damage awards may be measured on this continuum. Often persuaded by the pathos presented in trial, jurors give varying degrees of emotionally laden justifications for their awards. The justifications given in these five notional categories can be mapped on this continuum.

Fixed in gradations of emotion over fact, the mistrust of parties weighs heavily in deliberations. Negative feelings toward attorneys, paid experts, large corporations, and plaintiffs
pervade deliberations. Eschewing the facts leads some jurors to award damages based on these negative emotions. Ill feelings of betrayal, suspicion, and in extreme cases, loathing, are apparent in juror justifications.

Concerns over future imagined outcomes also give credence to emotion over fact. Although the jury is not provided any factual information regarding the future of either litigating party, it is a cause for concern in deliberations. Some jurors are empathetic toward job loss and feel guilt associated with the perception of bringing harm to another company. Jurors turn away from facts and move toward emotion when fantasizing about the bright future an inventor may have lost due to a corporation’s infringement. These factually uncorroborated concerns place some jurors heavily in the emotional end of the continuum.

Attempting to use facts in justifications, jurors sometimes find themselves struggling or lacking the technical cognitive complexity to understand. These misunderstandings or miscommunications should still be mapped in varying degrees of fact. The intent is to follow and abide by the factual restraints of the evidence and the process; however, it is the uncertainty of these aspects that lead to some justifications. Although beginning to constitute equations with facts, mathematical rigor sometimes leads jurors to make the more emotional choice to round to the easier number. The fact versus emotional continuum can be used to map the nuances of this notional category accurately.

The full continuum should be used to clearly illustrate the juror’s attempts at establishing worth as damage justifications. Some jurors face emotional questions of fairness and excess, while others draw analogies from the facts presented in past lawsuits. Attempting to establish the worth of the patent based on a cost/benefit analysis leads jurors to cling to the facts of equations, percentages, and gross incomes. However, emotional disputes over what constitutes
an invention or an idea are also present. The numbers presented by economic experts as evidence at trial are persuasive to some, while others vacillate between the emotional justifications of which numbers “feel” too high or too low. These nuanced shifts on an emotional versus factual continuum provide insight into damage award justification.

Lastly, the final notional category speaks to the purely emotional frames present in deliberations. These non-factual, non-logical tokens use a high degree of punitive language seeking to punish the defendant for perceived wrongs. Preparing to “send a message” through damage awards, these contextually emotional justifications frequently cite “pain and suffering.” Although this phrase is frequently used in civil tort cases such as medical malpractice, it has no legal standing in patent infringement cases. Instead, jurors are to consider only compensation for loss or compensatory damages for a plaintiff. The decision to award larger sums with punitive justifications is emotional. Sympathy for the inventor’s lost time, life, and assets also fall within this emotional range.

Tokens from each of the five notional categories can be tracked across all three continuums. The complete inclusion leads me to assert that these continuums should be used in dialogue when discussing the justifications for damage awards. Amendments to the story model to include these justification continuums are proposed in the following chapter.
CHAPTER 5

DISCUSSION

The purpose of this study was to increase understanding of the jury deliberation process during patent litigation. Specifically, I wanted to analyze how jurors made sense of uncertainty during the deliberation process when dealing with specified and technical information. Not only is the content difficult for a layperson to follow, but the legal process functions as foreign terrain as well. Unaccustomed to the intricacies of patent law, the rules of evidence, and the presence of irrelevant forces, juries are often affected by extra-legal factors (Hahn & Clayton, 1996). Also crucial to gaining insight into the deliberation process were the justifications given for damage awards. Lacking a clear structure as applied to criminal court by the second and third phases of the story model (Pennington & Hastie, 1981), damages awarded in patent cases do not operate within the confines of categories found in criminal sentencing. The examination of jury deliberations provided a fertile ground for analysis and poses interesting implications for the story model and its adaptation for patent law. The results of this study indicate that jury members employ multiple tactics to combat uncertainty to arrive at a decision. These strategies include the topologies individual/group, lists/stories, and facts/speculation. Analysis also indicates that attempts to justify damage awards can be tracked across three continuums: certainty versus uncertainty, rationality versus irrationality, and emotions versus facts. This section explicates the implications for the story model as related to the findings in patent litigation.

While the story model was introduced to account for the narrative structure used to understand, process, and deliberate during criminal cases, I suggest an adaption to include the recognition of cognitive gaps, as well as proposed tactics to diminish their presence. A fourth
phase focusing on damage deliberations should also be added to strengthen the story model by extending its efficacy to civil court. Similarly, this increased understanding of jury decision-making bolsters sensemaking by providing additional breadth of application. These findings also provide practical implications for the legal community. Limitations of this study and directions for future research conclude this section.

Implications for the Story Model

My findings strengthen the existing tenants of the story model (Pennington & Hastie, 1981, 1992, 1993) and further evolve its efficacy to extend into civil litigation. Pennington and Hastie (1981, 1992, 1993) explained in their description of the story model that although jurors hear the same information and evidence throughout the trial, the narratives that they construct can differ drastically from one another. They justify these differences through juror’s varying beliefs about the social world that can potentially cause each juror to use analogies or draw conclusions different from his/her colleagues. The first phase of the model explains the process jurors use to construct stories based on: the specific evidence garnered through trial, knowledge of similar events as to what is being described during trial, and generic expectations of what makes a story complete (Pennington & Hastie, 1981, 1986, 1992). However, Pennington and Hastie do not investigate the cognitive gaps in information or the varying tactics that jurors employ in order to arrive at a cohesive narrative. While gaps in understanding occur through the course of the trial, jury deliberations are the first time that jurors are legally allowed to bring voice to these uncertainties. The ramifications of the data collected during jury deliberations should impact all three phases of the model.

The first phase of the story model refers to juror story construction. Jurors use the information gleaned during trial to assess “what happened” (Pennington & Hastie, 1986, p. 243).
According to the model, evidence received during trial is placed into a narrative structure. The non-temporal presentation, gaps in testimony, and a lack understanding force jurors to make causal leaps and draw inferences. Pennington and Hastie (1981) addressed the “goodness of fit” principles that are necessary for a narrative to work (p.198). The authors go on to explain that coverage and coherence, referred to as “certainty principles,” are imperative for a story to be trusted (p. 198). Here, within the discussion of consistency, plausibility, and completeness, description should be expanded to introduce and include language describing cognitive gaps. While the story model clearly details the necessary tenets which make a narrative feel complete and acceptable to jury member, it does not outline tactics to improve its concreteness. The three categorizations of the typology, individual/group, lists/stories, and facts/speculation, should be outlined as tactics jury members practice to reduce uncertainty.

This new understanding of uncertainty management fills a void currently left by the story model. Jurors function either individually or in a group to bring clarity to cognitive gaps. For jurors who are self-reliant, the process of reducing uncertainty might begin prior to group deliberations. However, for those who rely heavily on the affirmation of others, or asking questions to conquer cognitive gaps, the group deliberation process is crucial. While these jurors have already progressed into formulating narratives, this tactic to alleviate uncertainty requires a social context.

The organizational communication concept of lists and stories also serves to strengthen the story model through additional juror tactics (Browning, 1992). Applied to all phases of the model, this new understanding brings increased relevance to the way jurors process narratives. Filling voids in understanding through either a list or story, jury member rely on perceived standards, accountability, and certainty, or alternatively, find comfort in personal narratives.
Functioning as a secondary tactic for alleviating uncertainty, lists/stories is also applicable during each phase of the current model and explains the tools jurors use as they encounter cognitive gaps.

The last tactical prong is fact/speculation. Used in conjunction with the previous two topologies, the evidence illustrates that jurors are filling holes by either returning to the facts presented, or instead, spackling gaps with their own baseless conjecture. The employment of speculation may mean that a juror ignores the uncertainty completely by pontificating over it. This topology may take shape in baseless claims, or hypotheticals presented as fact. Logically, it seems the tactic chosen to fill the cognitive gaps has great implications for the narrative construction of the trial. Just as narratives may differ from juror to juror based on varying beliefs and ideologies (Pennington & Hastie, 1993), narrative distinction should also be attributed to the topologies chosen to fill cognitive gaps. Jurors relying on the group rather than their individual processing may shape different narratives. Similarly, a juror who constructs a narrative by filling gaps with stories may build a vastly different vision than a juror relying on lists. The awareness brought by the discovery and implementation of these topological tactics increases the efficacy and applicability of the story model.

Uncertainty exists in all levels and genres of courtroom cases; therefore, this amendment to the story model should be used in criminal, civil, and intellectual property trials. Reducing cognitive gaps should be viewed as a necessary construct for “goodness of fit.” Although my study did not focus on the point in the trial when uncertainty occurs, it is a safe assertion that uncertainty can exist from the moment the jury is seated until they are released after verdict. It is crucial to acknowledge these uncertainties in each trial phase in order to produce proper strategies to abate them.
The second phase of the story model introduces the possible verdict categories to a jury. This process deviates from criminal law because civil categories are less structured. Juries are first asked to determine whether infringement occurred. Depending on the complexities of the case, jurors can also be asked to determine if infringement was willful, or whether the patent had been invalidated due to prior art or obviousness. While definitions of key terms are provided in the instructions, these concepts are not familiar to the majority of the jury pool. If the defendant is found guilty of infringement and the patent is left validated, juries then proceed to damages. Greene (1989) explains that juries are then abandoned with vague instructions and little fiduciary guidance. Again, cognitive gaps should be considered. Juries are grappling with the technical language of the instructions, the density of the information, and ignorance of procedures. Just as “goodness of fit” must be considered for a narrative to be impactful, cognitive gap reduction is necessary for jurors to follow jury instructions accurately. The tactics chosen to fill these gaps has a direct impact on the narrative creation, and therefore, on the verdict chosen. Tactic variation across jurors influences individual narrative construction that then must be negotiated in the construction of a master narrative.

The last phase of the story model calls for jurors to line up their constructed narrative with the closest verdict category presented by the court. The clear cohesion of a juror’s narrative with the verdict category cements deliberations. Cognitive gaps should also be addressed in this final phase of deliberation. The story model takes place on an individual level prior to group deliberation. Understanding the role of these uncertainties and working to negate them prior to introduction into the group increases confidence in a juror’s narrative and explanation.

The story model should acknowledge the existence of probable cognitive gaps during all phases. The results of this study suggest that “certainty principles” which include coverage and
coherence, should be amended to include cognitive gaps. The description should also detail the three topological tactics jurors use to reduce uncertainty: individual/group, lists/stories, facts/speculation. Embracing the existence of cognitive gaps and providing insight into the jury’s tactics for combating them might allow for their reduction prior to group deliberations.

While the story model has been applied to criminal and a few civil cases, the model should be amended to fit the needs of intellectual property law. This study’s findings can be applied to the final phase of the model. In the current model, jurors use the story they construct and attempt to fit it within the verdict categories provided by the jury instructions. Pennington and Hastie (1993) explained, “a juror may have to reason about whether a circumstance in the story such as ‘pinned against wall’ constitutes a good match to a required circumstance, ‘unable to escape,’ for a verdict of not guilty by reason of self-defense” (p. 200). These same definitions are applicable in intellectual property and include elements such as infringement, willingness, and invalidity. Similar to the description provided by Pennington and Hastie, stories constructed by jurors may contain details such as “this game existed before,” which would lead them to then invalidate a patent due to prior art. However, there is an additional step for patent infringement juries. They not only find defendant’s guilty or not guilty of infringement; they must also award damages. This additional duty requires a fourth step in the model.

The narratives jury members individually construct become their justifications for damage awards. These justifications can be mapped across three continuums and provide insight into how jurors process the information provided in trial. Each justification consists of a level of uncertainty versus certainty, rationality versus irrationality, and fact versus emotion. Attempting to reach stabilization, jurors bounce back and forth on these continuums. Narratives constructed which cast the inventor as a victim who was brutally stripped of his/her patent rights by a
corporate Goliath would reflect strong levels of certainty, irrationality, and emotion. Conversely, a narrative focusing on the profits a corporation made solely because of its utilization of an illegally obtained patent suggests certainty, rationality, and fact. This mapping should be applied to the final stage of damage deliberations and added as a final phase to the story model. This supplement further evolves the story model for use in intellectually property cases and increases its breadth of applicability.

**Implications for Sensemaking**

Weick’s (1993) theory of sensemaking focused on how people work to create meaning from experience. The findings of this study directly correlate and strengthen this notion. When faced with cognitive gaps, jurors chose to navigate them in three distinct manners. By relying on the known, jurors cling to the safety of experience and fact. Using certainty as a foundation, jurors continually returned to what could be proven. Weick (1995) describes the importance of the known and constructed identity during the sensemaking process. When thrust into a cosmological episode, participants no longer have the safety of the logical and orderly. Instead, they struggle to make sense of a context they have never seen or experienced before. Using the tragedy of Mann Gulch, Weick (1995) described a group of firefighters caught in a cosmological episode. To avoid burning to death, the leader told the men to drop their tools and lie down in a section of burned grass. This directive resulted in a crisis of identity and the collapse of sensemaking and structure. The men were asked to abandon their only sense of the known. Without their tools, they were no longer firefighters. Unable to part from them, and distrustful of their leader, they ran from the encroaching flames and 13 men perished. Much like the firefighters in Mann Gulch (1995), these jurors clung to the safety of their tools. Referring back to jury instructions, basing information on uncontested trial facts, and applying their knowledge
of the world, jurors relied on the known.

The process of sensemaking is also described as being a social experience that centers on talk (Weick, 1995). Weick (1995) contended that it is through shared stories and experiences that sensemaking occurs. Dougherty and Smythe (2004) used sensemaking to “explore the response of members of an academic department to an alumnus donor’s serial sexual harassment of three of its members” (p. 293). By sharing stories with each other, these three members were able to discover and acknowledge the presence of sexual harassment. This discursive space provided a context where sensemaking could occur. Prior to discussion and shared stories, the three women had not been able to give meaning to the events. Social optimization occurred when these women made their stories public. A further debriefing phase allowed for the intensive retelling of these stories and increased perspectives, giving meaning to experience.

Similarly, jurors also relied on their past experiences and comparisons to find a common source of truth. Using the tools with which they were comfortable, jurors worked to make sense of information and contexts that they had never experienced before. The shared stories, experiences, and comparisons aided both the speaker and the group in working through foreign concepts. Deliberations are the first opportunity jurors are given to discuss the case. They are strictly prohibited from talking to one another during breaks, in chambers, or discussing the trial with anyone outside of court. As a result, throughout the the trial jurors take in information and process individually. A civil trial can last for days, weeks, or months, leaving jurors to grapple and make sense of information in prolonged silence. When allowed to deliberate with others, jurors take the opportunity to address their cognitive gaps. They reach social optimization through this group deliberation. Attempting to deal with uncertainty, jurors often acknowledged their gaps in understanding in an effort to elucidate meaning. Relying on one another for
affirmation, asking questions, and rephrasing information in hopes of clarity jurors aided each other through dialogue. In several instances, the jurors opened deliberations with a series of questions. The addition of these social contexts allowed jurors to work retroactively to make sense of the information they received. This social sensemaking process is crucial to deliberations and verdict agreement.

Sensemaking should also be traced to the implementation of lists and stories. Weick (1980) argued narrative rationality plugs the gaps between intentions and outcomes (as cited in Browning, 1992). Lists and stories both serve as crucial tools in communication and understanding. These tactics work to disseminate information and power. While lists are formal structures, and stories are interaction, neither is privileged over the other (Browning, 1992). Rules juxtapose expert knowledge and accountability, thereby bolstering understanding and ethos. However, a story can be just as impactful. Through its use, participants both learn about and define themselves. Jurors use these tactics to fill cognitive gaps. Attorneys should remain cognizant of the impact of lists and stories on the sensemaking process and implement both tools throughout the course of trial by providing lists during opening/closing statements or telling stories that juror take within them into deliberations.

Social context is also critical to sensemaking because it “binds people to actions that they must then justify” (Weick, 1995, p. 53). Social context was apparent as jury members justified their damage awards during deliberations. In the midst of offering conflicting sums, jurors justified their thinking and mathematical products based on the three continuums. Ranges of certainty versus uncertainty, rationality versus irrationality, and fact versus emotion provided jurors a means to mend the fractures of their disagreements (Scott & Lyman, 1968).

The findings of this study further the tenants of sensemaking and increase its applicability
in a relatively nascent field. Sensemaking can and should be applied to juror decision-making in patent infringement cases. Rooted in a social context and using past experiences and knowledge to navigate a foreign situation, jurors work to make sense of their surroundings. The three justification continuums should be used to elucidate this method further. When making sense, jury members gauge their level of certainty, rely on levels of rationality and irrationality, and navigate the waters of facts versus emotions.

These results have vast theoretical implications for understanding the “why” of damage awards. Greene (1989) introduced the notion of “silent factors” that enter into jury deliberations. These points of debate surround information that the jury has purposefully not received, but still emerge during dialogue: attorney’s fees, the actual amount going toward the plaintiff, how long until a case goes to trial, etc. The impact of these silent indicators and the veracity of their supposed claims have been under analyzed according Greene (1989). However, based on my research, these types of uncertainty are used frequently in damage justifications and are well represented by the certainty versus uncertainty continuum. Similarly, silent factors are also encompassed in the rational versus irrational, and the fact versus emotions continuum. The implementation of these continuums as a way to explain and track the justification process during deliberations brings new clarity to a highly enigmatic process. Continued learning about this small group communication process allows for the evolution of the legal system to provide increased efficacy for those it serves.

Practical implications

While the implications for theory and communication are a driving force behind this study, I am also highly interested in application for the legal community. No one looks forward to jury duty, instead the dreaded slip results in juror calls to the courthouse claiming hardships
and posts on social media sites decrying the time spent in a holding room with poor coffee. Add to the equation the complex and soporific nature of testimony during patent litigation and very few are enamored with their hours spent in the box (Barro, 2012). Steps should be taken to change the system to provide a legal experience with increased understanding, fewer cognitive gaps, and enhanced knowledge of jury decision-making.

Eliminating Uncertainty

On July 1, 2012, a new rule went into effect allowing civil jurors to ask questions of witnesses while on the stand (Weinhold, 2012). The Illinois Supreme Court passed this rule and joined half of the United States and all of the federal circuits to allow this type of questioning. After an attorney finishes questioning a witness, the jury is then allowed to pass written questions through the bailiff to the judge. The judge then reads the questions in chambers deciding which, if any, of the questions to allow. Attorneys are given time to object privately to each question before returning to the presence of the jury. According to Chief Justice Thomas Killbride, “based on the comments of those who have used or seen the procedure at trials, such a rule enhances juror engagement, juror comprehension and attention to the proceeding and gives jurors a better appreciation for our system of justice” (Weinhold, 2012). It is clear that reducing the gaps in juror knowledge is crucial to increased confidence in understanding and verdict. Not all jury members ask questions during trial or feel confident in doing so. Instead, the majority sit silently waiting until deliberations to voice uncertainties for the first time. In an attempt to be proactive, attorneys should use this knowledge of how jurors manage cognitive gaps to address the jury providing useful tactics during voir dire and opening/closing statements.

The first practical implication enhances case construction. Knowing that juries rely on the known to alleviate uncertainty, attorneys should take steps to solidify information, reduce
credibility issues, and make certain testimony is intelligible to their audience. Aware that jurors often relate information to life experiences and employ analogies, attorneys should develop relatable analogies for use in trial. My research bolsters the belief that pre-meditated selection of comparative analogies, stories, and references to previous similar cases gives jurors something concrete to cling to during deliberations (Malphurs & Drescher, 2012). The use of these strategies has the potential to reduce the risk of unrealistic examples provided by jury members. Jurors sometimes make false analogies or comparisons in an attempt to clarify key issues but instead only murky the waters. Using an applicable analogy when interfacing directly with the jury might increase the chance that they incorporation the analogy presented instead of creating their own.

Attorneys should be aware of their implementation of lists and stories during trial. Since jurors use both of these tactics to battle uncertainty, attorneys need to speak in both languages. Using the narrative structures in opening and closing statements aids the jury in the creation of relevant stories. Attorney’s attempts to present witnesses and evidence in a chronological, narrative, order may also assist jurors in constructing a cohesive narrative and minimizing cognitive gaps. During closing arguments, attorneys should remind juries of the facts they wish them to spend time considering. This final list might resonate with some members and be used as a point of reference later.

The second implication has the potential to enhance the virility of voir dire. Although this process is sometimes very short relative to its importance, attorneys should use this time learning how jurors process gaps in information. Asking jurors questions geared to solicit whether they are liable to turn inward or to a group for assistance gives the attorney insight into how they are likely to handle the deliberation process. Jurors who rely on speculation, may not
be best suited for a factually intricate trial where the specifics of a law must be weighed.

Similarly, an incredibly assertive juror who relies on stories may be ill suited for trial depending on the narrative. Should this juror become the foreperson, his/her personal history and the comparisons he/she draws may be very persuasive for the rest of the pool. Depending on his/her perspective, this circumstance could be dangerous to the case.

The third implication could potentially impact deliberations. This is the first stage where jurors are legally allowed to discuss the case. For those who do not process uncertainty individually, this is a crucial opportunity to ask questions and seek affirmation from the group. Juries are given verbal instructions by the judge before proceeding to deliberations.

Traditionally, these instructions are only read by the judge and not provided in a tangible form. While it is up to the judge’s discretion whether to provide a written document to the jury, the instructions are usually legally dense in either capacity. The written verdict form provided to the jury contains questions that can be multi-faceted with sub points. While jurors are usually provided with legal definitions of terms, these can be highly technical leaving jurors to rephrase or ask questions to gauge meaning. Knowing that some jurors rely on the known in the form of facts or lists, these instructions and their definitions are crucial. While some legal experts have called to reduce the technicality of jury instructions to make them more user-friendly, there are credible concerns (Greene, 1989). Fearing that a verdict may be thrown out based on the verbiage used, many courts choose to stick with instructions upheld by precedent. Based on my findings, this issue should be revisited. Reducing the cognitive gaps in the instructional and deliberation phases would allow for a higher confidence in narrative and decision. Currently, legally ambiguous instructions run the risk of being misinterpreted and fallaciously rephrased by jurors utilizing stories and speculation.
Justifying Damages

While multiple theories (Broeder, 1958; Greene 1989; Kalven, 1958; Raitz, Greene, Goodman & Loftus, 1990; Zuehl, 1982) have been asserted as to how jurors produce a damage number, no researchers have endeavored to answer to Greene’s (1989) qualitative call, “why?” These findings answer that call. Attorneys and trial consultants should use the three damage justification continuums to increase the efficacy of voir dire, shape case construction, and increase knowledge of deliberations.

Using the award continuums presented in damage justifications, attorneys should create juror paradigms for use on screeners. Consultants and attorneys frequently use questionnaires to gauge the potential biases of a jury pool. Constructing questions around the three continuums may provide insight into whether a jury member is predisposed to certainty versus uncertainty, rationality versus irrationality, or facts versus emotions. Given the type of case and its details, attorneys could pick a jury more closely suited to its needs.

If the court does not allot time for a questionnaire, attorneys can also ask questions during voir dire to address the issues associated with these continuums. Knowing the background and facts of the specific case, attorneys would be able to discern the best approach for actuating damages. Producing hypothetical situations introduced with phrases such as “which statement do you find more compelling,” attorneys can flesh out a juror’s predilection for facts versus emotions. Attorneys can also use these questions to attempt to unearth any biases that undermine the credulity of the legal teams. Deep mistrust of law enforcement or attorneys can be viewed by the court as a strike for cause. A strike would remove the juror from the venire and could help eliminate the threat of undue bias. By determining which jurors score high on the irrationality end of the continuum, attorneys can also use strikes to remove those who might be a threat or
liability to the case. While a weak case might benefit from the choice of an irrational juror, using the continuums as the basis for voir dire questions gives attorneys the ability to make informed decisions. The earlier these jurors can be identified, the less legal teams have to manage them throughout trial.

Once a juror is assessed on these three continuums, the case could be shaped to use these predilections. Ideally, a fact heavy case would retain jurors who cling to facts more than emotions; however, should emotions-driven jurors be unavoidable, attorneys could knowingly mold a case to highlight the humanistic elements. Attorneys might also use their time face-to-face with the jury to remind them of their legal obligation to remove emotions and focus on the law. While judges instruct jurors to remove bias, prejudice, and sympathy from deliberations, it is evident through this research that these emotions still impact the process. Attorneys should take the time again during closing arguments to remind jurors of the legal parameters to which they have sworn to adhere. While the court may not allow the attorneys to mention specific examples of evidentiary outliers, they can remind jurors to focus on the facts and spend time going over the jury instructions.

Attorneys often hire trial consultants to bring added insight to the legal process. This addition of extra eyes, ears, and insight provide an added layer of experience to these highly specialized cases. This research is also beneficial to the tangential field of trial consulting. Attorneys rely on trial consultants to aid in voir dire, shape case narratives, and test case specifics during mock trials. The three continuums used to map the juror justification process bring enhanced knowledge to the enigmatic nature of deliberations. Trial consultants should use this new understanding of the process to test juror predilections during mock trials. Preliminary juror questionnaires should focus on pinpointing tendencies for certainty/uncertainty,
rational/irrational, and fact/emotion. Deliberation groups during mock trials could then be used to test which types of jurors may be best suited to the impending case. The new understanding of this crucial deliberation process aids in the strengthening of cases and improved attorney efficacy during trial.

Limitations

When conducting research in such a technically specific field, it is sometimes difficult to interpret the evidence the jury is referencing. In a few instances it was challenging to decipher which jury members were miscommunicating and which juror held the correct information. By continually referencing the trial information myself, I was able to discern the miscommunication in the majority of instances.

It was also sometimes difficult to gauge the veracity of a jury members claim to technical expertise. On occasion, a juror would pontificate about the technical workings of computer systems and data chips. Without an increased technical knowledge, it was difficult to discern whether the juror was truly knowledgeable about the field or simply ignoring uncertainty through speculation. However, these questions are very similar to what jurors face as they decide whether to find another juror’s justification credible or to negate it.

The videoed deliberations provided by McGee and Associates allotted an hour and half for jury deliberations. While juries seemed to finish easily within these time constraints, real juries are given no time limit for deliberations. It is difficult to know whether the juries analyzed would have continued or provided more insight had they been given more time.

Although mock jury members were being paid for their services and therefore had some vested interest in fulfilling their contract, the trial was not legally binding. Mock jurors were told that all evidence presented was true and the case was real; however, their decisions were not
binding. Consequently, the stakes were not as high for mock jury members. Each jury took their duties seriously and deliberated with the expected reverence, but the results might be different for an empaneled jury.

Future Research

This section identifies several areas where continued research is suggested and justified. Future research using these findings might continue to improve the ease and accessibility of the court system as well as unpack the mysteries of group deliberations. The proposed areas of research could help elicit a change in court policy, and empower attorneys to make strong choices during voir dire and case presentation.

Rules vary regarding whether jurors are allowed to use their notes during deliberation. Currently, the judge and litigating counsel determine whether jurors may reference the notes they took during proceedings. There is heated debated in the legal community surrounding whether juror notes aid or hinder the legal process. The American Judicature Society (2012) provided some jury instructions regarding this issue:

You should use your notes only to remind yourself of what happened during the trial. Do not let your note-taking interfere with your ability to listen carefully to all the testimony and to watch the witnesses as they testify. Nor should you allow your impression of a witness or other evidence to be influenced by whether or not the other jurors are taking notes. Your independent recollection of the evidence should govern your verdict and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember. The court reporter is making a record of everything that is said. If during the deliberations you have a question about what the witness said, you should ask that the court reporter’s records be read to you. You must accept the court reporter’s record as accurate.

Further research should be conducted to analyze the impact of notes used in deliberation on the uncertainty topologies. It would be beneficial to know whether jurors who took copious notes were more likely to be self-reliant than group reliant. Researchers should also determine whether
jurors with notes were more predisposed to lists or stories, facts or speculation. These findings would lend further credulity to the debate surrounding notes in deliberations and their impact. Further research should also be conducted to clarify the points during the trial process when uncertainty occurs, as well as which of the topologies jurors use to combat the gaps. During trial, jurors are not allowed to socialize, so their uncertainty presumably goes unanswered. When faced with cognitive gaps at these junctures, it would be useful to know whether those who face uncertainty best in groups mentally catalogue these holes for debate later, or whether they use one of the other topologies in the interim. While juries are instructed to wait until the conclusion of trial to begin weighing the evidence, it is difficult to gauge how many jurors enter deliberations already convinced. For those jurors especially, it is important to study at what points they became uncertain during the process and how they alleviated this uncertainty. This knowledge would further impact the presentational and persuasive techniques of the attorneys during trial.

Also, researchers should test the damage continuums as a possible predictor for damage awards. By first finding where mock jurors score on the continuums, researchers could then test to see if these scores impact the depth of the award. It would be fruitful to learn whether emotionally inclined jurors tend to produce higher awards when the case contains high levels of pathos. Similarly, it would be of interest to note whether fact driven jurors eschewed large damage awards when case pathos is high and factual information is scarce. Continued testing of the damage continuums could further cement them as an important addition to the story model and bolster their credibility. Using them as an additional tool during jury selection could increase attorneys and consultants understanding of their juries and aide in producing favorable selections.
Finally, the two open coding categories of “jokes/humor” and “Struggling to do math” were removed from the axial coding phase because I felt that although they seemed to impact damages, they were not justifications for damage awards. These themes should be tested to verify that judgment. Jokes and humor are often used to bring levity to a possibly heated experience. These jokes sometimes seem to signal a juror’s readiness to exit the process and simply choose a number. Jurors may also use them to mask their distaste for awarding a sum perceived to be outrageously large. Further testing is needed to confirm the impact of jokes and humor on damage awards.

Juror’s attempts to create and solve mathematical equations also seem to impact awards. While jurors did not explain their justifications in terms of “I don’t know how to find that proportion, so let’s give them X,” it was apparent that multiple groups of jurors struggled with the mathematical process. It would be interesting to learn how much the lack of mathematical skills impacted the awards jurors gave. In several circumstances, jurors arrived at different products for the same proposed equation. Asking for calculators, scribbling on papers, and often deferring to the one juror who proclaimed that he/she was “good at math,” jurors struggled to find the number they wanted. According to Greene (1989), punitive damages are often rounded which suggests that little math actually took place. It would be helpful to know the impact this onerous process has on the damages assessed. I offer the following model for use in continued research:
Figure 5.1. Justifications and decision-making affect one another throughout the deliberation process. It seems that jokes/humor and struggling to do math impact juror justifications and decision-making.

Conclusion

The legal system has continued to evolve since the days of orators and sophists, but the importance of painting a clear and convincing narrative remains central to persuasion. The high monetary stakes associated with intellectual property cases further the need to communicate in a clear and convincing manner. However, the system is riddled with potential cognitive roadblocks. Jury members with no specialized technological training fill the box to listen to weeks of testimony delivered by experts, inventors, competitors, and patent specialists. At the conclusion of trial, the judge reads the jury instructions that remind the members not to take into account any biases, prejudices, or sympathies that may emerge during deliberations. The court includes the burden of proof and description of claims, but a juror’s understanding relies on his/her auditory capacity for processing. This information may never be conveyed in a tangible form. While the jury members can take notes during trial, these notes may not be allowed in
deliberations, forcing members to recall from memory the specifics of patents and inventions. These circumstances set the tone for deliberations. Met with cognitive gaps and requiring justifications for the awards they determine, jurors begin the sensemaking process.

While the story model provides insight into the narrative structuring of the jury’s deliberations, it does not account for the cognitive gaps in understanding that members are sure to face. Neither does the model extend into the sensemaking process found in deliberations when jurors attempt to understand and justify damage awards. The results of this study call for an enhancement of the story model, which bolsters its efficacy through the inclusion of a topological description of tactics that can be used to diminish cognitive gaps. The addition of four deliberation phases uses three continuums to map the manner by which jurors justify their awards. These additions have the potential to evolve the story model into a tool germane for use in intellectual property [IP] cases as well as criminal.

On Wednesday, March 13, 2013, a jury found that Nintendo must pay former Sony employee Seijiro Tomita 30.2 million dollars for infringing his patent on 3D display technology found in Nintendo’s 3DS handheld gaming system. While Tomita’s attorneys initially requested ten dollars for every unit sold—approximately $292.4 million, the damage award came in quite a bit lower. Although this verdict may seem like closure, Nintendo attorney’s are confident that the verdict will be set aside. They claim the 3DS did not use any of the central aspects found in Tomita’s patent and jury simply did not understand the technology (Fitzpatrick, 2013).

Questions concerning the rigor of intellectual property litigation continue to surface and draw criticism about the jury system. The results of this research should be used to diminish cognitive gaps and provide a continuum for tracking damage justifications as a method to enhance the process. While I believe that the practice can and should be handled by an
empaneled venire of citizens, it is up to the system to provide jurors with the tools they need to avoid being smacked in the face by a looming four-by-four.
APPENDIX

UNCERTAINTY INDICATORS
<table>
<thead>
<tr>
<th>I don’t know</th>
</tr>
</thead>
<tbody>
<tr>
<td>I’m not sure</td>
</tr>
<tr>
<td>I’m pretty sure that</td>
</tr>
<tr>
<td>I could be wrong, but</td>
</tr>
<tr>
<td>What did that mean?</td>
</tr>
<tr>
<td>How did that work?</td>
</tr>
<tr>
<td>What was the difference?</td>
</tr>
<tr>
<td>I haven’t the slightest idea</td>
</tr>
<tr>
<td>I didn’t understand that</td>
</tr>
<tr>
<td>I believe that I’m correct, but</td>
</tr>
<tr>
<td>I am uncertain</td>
</tr>
<tr>
<td>I believe that X may be</td>
</tr>
<tr>
<td>Probably, ( p )</td>
</tr>
<tr>
<td>X is unlikely to be y</td>
</tr>
<tr>
<td>I didn’t get it</td>
</tr>
<tr>
<td>Did anyone understand</td>
</tr>
<tr>
<td>I’ve never done this</td>
</tr>
<tr>
<td>Did anyone understand</td>
</tr>
<tr>
<td>Were they the same?</td>
</tr>
<tr>
<td>Why did he say</td>
</tr>
<tr>
<td>Did they tell us</td>
</tr>
</tbody>
</table>
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