

THREE*Performatives constituting value:  
the case of patents*

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## INTRODUCTION

Some symbolic systems take certain symbols very seriously. These symbols are given great weight as the fundamental pieces in the game enacted within the system. Symbolic systems based on sacred texts grant great power to those utterances which are designated the words of god, so that all other utterances are held accountable to these divine utterances, which have a kind of trump value. In financial and other economic discourses, amounts of money are an essential referent; here the notorious bottom line is the discursive trump card. In commerce (and the regulating law of commerce), designation of property and ownership are powerful symbolic representations.

Each of these systems requires valid specific instances of these valued classes of symbols in order to continue as vital scenes of social action. A religion based on divine utterances would be in great difficulty if no words of god could be certified, so as to anchor the faith. Literary criticism without valued literature would have little to talk about. Finance with no dollars or kronor is bankrupt. A system of commerce with no designated property and no designated owners would negotiate precious few deals. Thus the symbolic systems depend on the creation or designation of instances of valued symbols.

Although in a symbolic system, a certain class of utterances may carry great weight, each instance must be accepted as belonging to that class and thus admitted as a powerful symbol in the discourse. Each dollar must be recognizable as legitimate – issued in the proper form by the proper authorities who continue to put full faith and credit behind the paper – and not counterfeit or child's play-money. In the Old Testament burning bushes and other miraculous occurrences are reported by Moses and his colleagues as authorizing

certain words as the words of god. Literary scholars have procedures for establishing the true text, which then becomes a referent of great power in critical discourse; similarly, accountants have well-known and regulated procedures for determining and certifying the figures that represent financial assets and liabilities.

## PROCEDURES FOR CREATING VALUED SYMBOLS

In some discourses the procedures by which powerful symbols are born into the discourse are left entirely invisible, and we simply trust the ethical probity of the utterer that the symbol indeed represents the valued commodity it purports to, as when emotions are reported within intimate conversations. Sometimes the creation of valued symbols is regulated by an external procedure enforced by some sort of discursive police, such as the Securities Exchange Commission. But sometimes the status of the symbol must be petitioned for within the symbolic system itself, perhaps through elaborated and regulated procedures. That is, the term or utterance must apply for a valued status within the discursive system by engaging in a set of discursive practices of application or value-seeking.

Law, both civil-commercial and criminal, provides many instances of such procedures for application for a status within the law. The nature of the law is such as to encourage precisely the activity of status-seeking. The law is a specialized discursive system that orders and regulates activities in many other spheres of life. However, for any life concern to be brought under the law it must be brought into the legal chambers with its legal talk and texts, first by the passage of legislation that brings that general class of affairs under some legal umbrella, and secondly by suit in individual cases claiming that this case falls under the law. Thus where there is no law concerning cheating at sports, there can be no legal discourse about such cheating, unless it were brought under some other class of activity which was covered by law, such as assault with a deadly weapon. Then, for trial to be brought, a case must be made, such as before a grand jury, that the events are potentially definable as those covered by law; the final determination of the definition of events and assignment of historical roles and responsibilities are then decided in the court proceeding. Moreover, in order to bring a case before the law, a complainant must establish legal standing in

the case; that is, that person must be legally definable as having a legitimate interest in the case. Then, ordinary events of life, in order to be converted into legally valid evidence, must be introduced through well-established procedures and must pass discursive tests, as specified in the rules of evidence. Thus representations of medical conditions would not exist within a legal proceeding unless deemed admissible by the court and then presented through records or witness testimony of the sort deemed valid. Further, in so far as the legal system makes a claim to be fair, equitable, and non-arbitrary, each of these translation and status-granting procedures must be held up for legal evaluation and review; for example, the legal standing of the complainant or the admissibility of any testimony may each be litigated.

Law in most countries is ancient (or based on ancient models), rife with precedent, procedures and rituals of authority, presenting an aura of stability and regularity. The methods by which individuals, events or statements obtain status or standing in the form of powerful legal symbols are well-established in formulas encased in rules. The use of any such formula can be considered a specific speech act (Austin 1962; Searle 1969; Danet, this volume). If the speech act meets all the appropriate general and local contextual considerations, abides by all the encasing rules and fulfils all its discursive activities, then the necessary status is obtained and the symbol or utterance enters into legal play.

#### THE PATENT AS LEGALLY CREATED VALUE

Patents are just such legal statuses granted to ideas through well-known procedures encased in regulations. Through the successful negotiation of the patent procedure, a person having an idea for some useful improvement in a product or process can have his/her idea deemed an ownable property and him/herself the owner for a prescribed period. During these years he/she owns a monopoly on the invention, and all who wish to use the idea must meet his/her terms for a licence. The advantage to be drawn from patents is in the system of commerce and finances, where patents can potentially be converted into money. However, because law regulates the commercial system and designates ownable property, eligible owners and methods for transfer of ownership and licensing, the status of patent must be established within the legal system before

any idea has any value as an owned property within the world of commerce.

That patents are of great commercial value is indicated by the frequency with which products or their wrappers are imprinted with patent numbers, a compact identification of the patent status. This numerical symbol, of course, indexes against more complete documentation and description on file with the patent offices of the issuing governments; however, short of any legal procedure that would question the validity or extent of the patent, the patent number counts sufficiently as full sign of the legal status.

In the early years of incandescent lighting, which I have examined in relation to a project in progress on the discursive activity surrounding the emergence of Edison's system of centralized power and light (Bazerman 1993, 1995, forthcoming), the development and control of the industry hung on which patents were granted to whom. In the 1880s, when the technology was being transformed from a laboratory experiment into a widely available commercial product, Edison companies frequently discussed in publications directed at investors and potential investors the security and extensiveness of their patents as well as litigation to maintain the strength of the patents. Ritual lists of the patent numbers were common. The designation of ideas as patented property and the assignment of that property is a weighty, valuable matter.

#### HISTORY OF THE PATENT SYSTEM AND FORMS OF DOCUMENTS

The system of patents in the Anglo-American world was the remnant of the Renaissance English royal practice of granting monopoly privilege, and the documents surrounding patents took the typical forms of royal petition and decree. In reaction to royal abuses, parliament outlawed all royal monopolies for the single temporary monopoly granted to the inventor of a new good, under the belief that invention would advance the economic well-being of the country. Moreover, since invention created new value, a monopoly was not sequestering a previously open part of the economy, but was only granting temporary privilege for a value that would not have existed without the invention.

Once the idea of privilege dependent on specific value to the state emerged, it became necessary to create a mechanism whereby

individuals might request this privilege and present their claim to it for evaluation. In England this led to a registration procedure followed by a litigation in the courts when the patent was contested. This system remained in effect until 1852.

In the Anglo-American colonies patents were granted on an individual basis by courts and local legislatures. The framers of the United States Constitution, to regularize and limit this practice, made patents and copyrights a federal responsibility. The first US patent law placed responsibility for approving patents on three cabinet members, determined that the application was to include a specification and drawing, and if possible a model, but did not prescribe anything further about the form of the application. The earliest extant application reveals that the rhetorical emphasis was on the deserving character of the petitioner and the great economic value to befall the United States, rather than the specific technical improvement. The actual patent grant consisted of a brief formal declaration signed by the president and the attorney general, containing only a one-sentence general description of the invention.

Because the burden of evaluating the applications was too much a drain on the time of the cabinet officers, in 1793 the law was revised to become simply a registration system with no evaluative procedures. The application, from the examples on file, turned to a description of the invented object, cross-referenced to a drawing. Models (not necessarily working) were also to be provided to the patent office. The grant consisted only of official testimony that the papers were filed and the fees were paid. Since no check was made of prior art and the putative inventor had to make no case beyond presenting the object and paying fees, many lawsuits developed. Apparently, within the litigation, two crucial issues emerged: the identity of the actual inventor and what exactly was being claimed as novel in the patent. Thus, in order to provide legal standing for these issues, by 1830 patent applications typically had two new elements: the formulaic opening identifying the putative inventor and a closing statement identifying the claim.

In 1836 a new patent law was passed, reintroducing examination and establishing a patent office with examiners. This law establishes the system we still have in effect, with some modifications from later law, most extensively in 1870 and 1952. The form of the patent in effect at Edison's time, was first specified in the 1836 legislation and was followed in practice. Moreover, the procedures and criteria for examination (aimed at preventing excessive litigation)

were established both by the law and the practices of the newly formed patent office. These examination procedures and criteria further focused the task of the application, which rhetorically was aimed at passing through procedures and criteria to gain approval (Bazerman 1995).

### THE FORM OF PATENTS AT EDISON'S TIME

Thus, by the time of Edison, the generic form of patent application and grant were stabilized in much like the modern form, spelled out in legal regulation and encased in bureaucratic procedures of evaluation. Now, as then, a patent, usually a printed document, describes an invention, identifies its inventor and declares particular aspects of the invention as original (the claim); it further carries some official designation of the patent-granting body, a patent number and a date from which the patent right begins. In late nineteenth-century United States, the patent typically opened with one or more technical drawings, signed by the inventor and two witnesses. The first page of text was headed by 'United States Patent Office', with subheadings identifying the inventor and the name of invention, followed by the formula 'Specification of Letters Patent [number], dated [date]'. The text then opened in the form of a letter 'to all whom it may concern', followed by the formulaic opening paragraph;

Be it known that I, [name], of [city and state], have invented a new and Improved [object or process]; and I do hereby declare that the following is a full and exact description thereof, reference being had to the accompanying drawing and to the letters of reference marked thereon.

A general elaboration of the invention and its improvements over prior art is followed by a detailed description of the invention and its operation, typically introduced by a formula such as 'To enable those skilled in the art to fully understand and construct my invention, I will proceed to describe it.' The description is usually cross-indexed to the illustration through reference letters. The patent then ends with precise claims of novelty, prefaced by some such language as 'I claim as new, and desire to secure by Letters Patent ...'. The signature of the inventor and two witnesses again appears at the end.

Then, as now, the reigning patent law identified the specific

elements to be put into the patent application, and thus the elements that will appear in the final patent grant which borrows the specification directly from the application. The law suggests the content, organization and even some of the phrasing of the patent.

Because the genre of application within the patent system establishes a single legal force of a coherent legal action (despite secondary multiple uses that may be made of this document), we can by-pass some of the usual complications when we try to consider both extended utterances and written texts as speech acts. If we consider patent applications as speech acts, we can most simply see that if one's application for a patent meets all the conditions for a patent, then one's application for a patent will be a success, and a patent should be granted, as the illocutionary force will be complete, and the patent examiner will be compelled to approve the application. If not, you can take the examiner to the appeals board or court. The courts and surrounding legal bodies then interpret and certify whether all conditions of success or felicity conditions are met, enforcing a relationship between *illocutionary* force and *perlocutionary* effect and thus bringing the interpretive procedures to the surface and making participants accountable for their interpretations. This makes patent and other similar legal procedures different from most speech acts, where illocutionary forces are not even linked to an anticipated perlocutionary effect (asserting that you are happy does not direct how your listener might respond); in any event, perlocutionary effect is usually up to the free choice of the hearer (as a call for help may be ignored).

#### CONDITIONS FOR A SUCCESSFUL PATENT APPLICATION

Now let us examine some of the conditions that must be met by a successful application and how the various parts or features of the text may be related to that success.

To obtain a patent you must have an idea for an object or process. This object or process must be useful. It must be novel. You must have invented it. Thus all these items must be asserted in the specification. As we have seen, in Edison's time the text of the patent opens with an identification of the inventor and the assertion of invention which is new and useful. A description of the invention follows, supported by an illustration. However, since you do not

yet have the patent, the patent requiring approval, you must cast the application in the form of a petitionary letter, closing with some petitionary language like 'I claim as new and wish to secure by letters patent ...'. This petitionary format would be further framed by a cover letter, a standard form of which is given in a Scientific American pamphlet of 1881:

To the Commissioner of Patents:

Your Petitioner, a resident of —, —, prays that letters-patent be granted to him for the invention set forth in the annexed specification.

signed

These petitionary features clearly identify that the person intends the document as a request, that the petitioner intends the receiver to understand this as a request, that the petitioner desires the receiver do what is requested, that the text is communicated to the receiver who is capable of interpreting the text, that the petitioner believes that the person receiving the request (the Commissioner of Patents) is able to grant such a request, that the request is for something that the receiver would not already have done in the normal course of affairs, and all the similar social and psychological conditions that must be met for a request to be granted, of the sort that Searle (1969) spells out.

The nature of the request, however, is that the receiver declare that a representation of an object or process be considered a patent. That is, the petitioner must assert that his/her idea meets the criteria of a patent so that the receiver will then declare the representation to be a patent protecting the idea. Therefore we must look into the propositions or representations embodied in the patent application.

#### PROPOSITIONAL ACTS IN THE PATENT APPLICATION

Searle (1969) points out that every speech act has a propositional content, and that proposition consists of acts of reference and acts of predication. On one level, the act of reference of the application is to the commissioner declaring a patent and the predication is that the commissioner will do it. That would be the standard propositional content of a request. However, the commissioner's declaration is based on an evaluation (to be performed by a patent

examiner) of the object or process represented in the specification and the claims predicated of that object or process. Thus, the key propositions are to the item for which patent status is sought. Because there is an examination process done by the receiver that extends beyond the representation created by the petitioner, we must consider the propositional acts in two stages – as represented and as received, and what conditions must be met in each instance for success of the patent application.

The patent refers to the self, the act of invention and the object or process which represents the invention. Thus the patent opens with the identification of the applicant, a representation of the act of invention and details of the object. The largest part of the patent is given over to the representation of the object in the form of illustrations, description of the parts of the object in relation to the illustrations and a description of its operation, use and/or construction. From the point of view of the writer, these representations rely on the writer indeed believing that these represent him/herself, his/her actions in inventing and, most importantly, the object or process he/she has conceived. The inventor need not have brought this idea to working perfection, so the reference is to an imaginative construction that the inventor is in the process of bringing into physical realization. These representations share information about the idea seeking patent status not only with the patent examiner for the purposes of evaluation, but also (after the patent is granted) with others, allowing them to use the idea after the period of protection.

The propositional act, however, also consists of predications as well as of reference. The inventor, in making a patent application, represents him/herself, therefore, as having of a certain date the idea for a particular kind of device or process, that he/she believes this idea is workable and useful, and that it is an improvement of a substantial kind and therefore is an invention; and that, moreover, the novel improvement can be characterized within specific claims. The applicant may always be in bad faith concerning any of these representations, but in forwarding the application the inventor must present him/herself as sincere in these representations. It is up to the patent examiner to evaluate these representations as accurate and inaccurate, and therefore give public, legal approval to the validity of these representations, turning the individual's belief about his/her ideas into publicly certified knowledge.

## PATENT EVALUATION PROCEDURES

The procedures for evaluation (whereby the illocutionary force of requesting a patent is converted to a state of belief on the examiner's part that will legally compel the desired perlocutionary effect of granting the patent) are, however, limited, attending only to specific aspects of the representations in the application. The inventor's representation of name and geographical location are accepted on the oath of the inventor. The date of filing is a matter of record of receipt. There is no procedure for determining whether the idea is workable, beyond obvious violations of physical laws (so that perpetual motion machines are not patented); the workability is left to the future of the product development. Similarly, the usefulness of the object is left to the later judgement of the marketplace. Thus, if the idea is unworkable or unuseful, the patent will be of no financial value and will be abandoned, making the patent monopoly moot and insignificant.

Since the patent does not represent actual produced and marketed objects, the representation is only of an idea. The idea itself is embodied in the patent description, so that there is no further examination of whether there is an idea here or whether this is the idea the inventor had. Patent descriptions are rejected usually only for lack of clarity or specificity, i.e. that the document is vague as to what the idea is.

The major forms of examination in patent office practice are primarily intertextual. The patent descriptions and claims are compared to the file of existing patents and to other representations of the current state of the art, such as textbooks and encyclopedia. Thus, only novelty is examined, leaving agnostic even the question of whether this novelty is an improvement (for improvement is equivalent to the usefulness of the novelty). The most sensitive item for novelty is the claim in which the breadth and generality of the intellectual property is defined, establishing the extent of the patent owner's rights.

Having passed through the defined procedures and intertextual examination, the patent is granted and the specification of the application becomes part of the patent grant. This successful speech act has passed tests of its perfection as a well-made symbol with due recognition of the contextual symbols of law, textbook knowledge and prior patents. In this manner, a new legal object of property is declared and assigned. All questions concerning the patent must then refer to the legal entity, for the life of that legal

entity. Any attempt to challenge the patent must attempt to undo the speech act creating the legal entity. After the patent expires, the symbolic value is officially dead and all legal suits, contracts, licensing payments, restrictions on use, and the like, expire. Residual effects on secondary communicative systems, such as the history of technology, may remain, as patent documents become historical artifacts, but their primary symbolic force vanishes and the legal object is no more.

#### THE CREATION OF VALUE WITHIN DISCURSIVE SYSTEMS

To conclude, I return to the larger puzzle for all symbolic systems: how various entities come to have place and significance within discursive systems such that they are attended to, amass privileges, acquire a stability of meaning and value, and serve multiple functions for people differentially located in the system. Discovering the procedures by which terms gain weight and meaning within a system will tell us much about the nature and character of reference. It will also tell us about the way in which different social systems are bound together and held accountable to each other, as well as to the way certain discourses become self-contained and self-perpetuating. Then, understanding how the status once obtained operates as a dynamic element in the discursive system will tell us much about what language does and how it does it. Finally, seeing how that status – granted, maintained and modified – then translates into other social systems will tell us much about the flow of discursive power among social systems. We will learn in greater detail how the world works, through language.

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