**THE PATENT CONVERSATION**

*Krissten Osenga*  

* N.B. – I have been working on two papers this summer that address claim construction from different aspects of linguistics. In writing the paper I planned to present (*The Fuzzy Logic of Patent Law*, which analyzes claim construction at the semantic, or word, level using fuzzy logic), I was intrigued by a second approach that I discuss in *The Patent Conversation*. It seemed that the second paper needed to come first, and so I will instead present *The Patent Conversation* and save fuzzy logic for another day.

**ABSTRACT:**

In everyday conversation, information is routinely conveyed from one party to another. As such, conversation can be viewed as a cooperative effort to exchange information. The content of the information received is more than just understanding the words uttered; meaning is enhanced by context that comes from circumstances surrounding the conversation as well as the parties’ shared background knowledge. The linguistic field of pragmatics recognizes this context and has developed a set of maxims that allow us to quantify and qualify this unspoken contextual information. Legal scholars that have used pragmatics in the field of statutory construction have viewed legislative enactments as a legal conversation between the legislature and the populace. Despite the extensive body of scholarship that addresses patent claim construction, very little work has been done with the field of linguistics. Yet if a statute can be viewed as a legal conversation between the legislature and the populace, so too a patent can be viewed as a conversation, although the definition of parties to the conversation is more complex. Further, like legal conversation, patent speech is, at times, unilateral and is certainly strategic rather than cooperative. I contend that the maxims of everyday conversation can be used to enhance our understanding of the patent conversation and lead to more fulsome claim construction methodology.

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* Assistant Professor, University of Richmond School of Law. This article is an unexpected prequel to the paper “The Fuzzy Logic of Patent Law,” *forthcoming*, which was presented at the 2008 Drake IP Roundtable and VA Jr. Faculty Forum. I appreciate the comments from the participants at those workshops which made me realize that something else needed to come first. I am also grateful for the research assistance of Heather Walczak and Randa Zakhour.
In law as everywhere, we can know and yet not understand.¹

I. Introduction

Claim construction, or the process of establishing the meanings of terms used in the claims of a patent, is critical to many aspects of patent law. The purpose of the claims is to delineate the extent of the patent’s scope, which must be determined both prior to the grant of the patent over the invention, as well as post-grant to evaluate the patent’s validity and infringement of the patent.² The territory protected by a patent is not important just for patent acquisition and litigation, but also to provide a competitor with


² See, e.g., Christopher A. Cotropia, Patent Claim Interpretation and Information Costs, 9 Lewis & Clark L. Rev. 57, 62-63 (2005) (describing how the scope of the invention is critical to the inventor, the patent attorney, the examiner at the U.S. Patent & Trademark Office, the holder of the issued patent, the competitor, and the courts); John M. Golden, Construing Patent Claims According to their “Interpretive Community”: A Call for an Attorney-Plus-Artisan Perspective, 21 Harv. J. L. & Tech. 321, 322 (2008).
adequate information to shape its own business. Although the importance of claim construction is undisputed, the correct procedures for performing the task are the subject of much debate and critique, and the problems arising from the difficulties of uncertain claim construction have been well-documented.

Although some claim construction errors can certainly be blamed on lack of effort or ability by the district court judges rendering the determination, the problem is likely more basic and widespread. Many commentators, for example, have attributed errors in claim construction to a lack of guidance provided by the United States Court of Appeals for the Federal Circuit, the reviewing court for patent cases. Because of this supposed provenance of the problem, many proposed solutions suggest a more formalized approach to claim construction—that is, the Federal Circuit should provide a clear algorithm for construing claims.

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3 See Cotropia, supra note ___ at 63 (also noting the involvement of potential investors or purchasers of the patented technology); Golden, supra note ___ at 322-23.

4 The articles that support this point are legion. For just a few examples, see Jeffrey A. Lefst in, A Measure of Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit, 58 HASTINGS L.J. 1025, 1030 (2007) (“[T]he debate over claim construction has not been about outcomes; . . . [t]he debate has been over the claim construction process itself.”); Kelly Casey Mullally, Patent Hermeneutics: Form and Substance in Claim Construction, 59 FLA. L. REV. 333, 343 (2007) (“A perceived lack of certainty, in the sense of predictability of results (e.g., claim, scope, or meaning), has been the basis for much criticism of patent law in general, and of claim construction specifically.”); see also, Kimberly A. Moore, Markman Eight Years Later: Is Claim Construction More Predictable?, 9 LEWIS & CLARK L. REV. 231 (2005); Gretchen Ann Bender, Uncertainty and Unpredictability in Patent Litigation: The Time is Ripe for a Consistent Claim Construction Methodology, 8 J. INTELL. PROP. L. 175 (2001); Golden, supra note ___; Cotropia, supra note ___.


6 See Schwartz, supra note ___ at ___ (“The Federal Circuit needs to set forth a more coherent and clear doctrine. The Federal Circuit decisions . . . have not provided sufficient clarity in the area of claim construction.”); Nard, supra note ___; Holbrook, supra note ___; Osenga, supra note ___; Mullally, supra note ___. The Federal Circuit, however, has
But maybe the solution to this problem is even more fundamental and requires more than a simple recipe or process. Instead, to really understand claim construction, perhaps we need to reconsider how we view the task at hand. Claim construction is simply the search for meaning; yet there is nothing simple about meaning, however, which is itself “an extraordinarily difficult concept.” Most typically, claim construction is performed with respect to a term or phrase used in a patent – what does it mean when the patent claim says “baffle” or “inventory”? In the field of linguistics, this method of determining meanings of abstract words or phrases is called semantics. Semantics is the branch of linguistics that is most implicated expressly declined to formalize the claim construction procedure. See Phillips v. AWH Corp., 415 F.3d 1303, 1324 (Fed. Cir. 2005) (en banc) (“[T]here is no magic formula or catechism for conducting claim construction.”).

Other commentators, perhaps doubting that the Federal Circuit can or will provide sufficiently clear guidelines, have argued for alternative solutions, such as increasing deference afforded to district court determinations, see, e.g., Tom Chen, Patent Claim Construction: An Appeal for Chevron Deference, 94 VA. L. REV. 1 (2008) (forthcoming), or permitting interlocutory appeals of claim construction rulings, see Schwartz, supra note __ at __.

7 See Paul F. Kirgis, Meaning, Intention & the Hearsay Rule, 43 WM. & MARY L. REV. 275, 276 (2001). Kirgis continues, “No single theory of meaning has been accepted for all purposes.” See id.

8 See Dan L. Burk & Mark A. Lemley, Quantum Patent Mechanics, 9 LEWIS & CLARK L. REV. 29, 30 (2005) (“Determining [the meaning of a patent term] necessarily requires the judge to break the text of a claim into discrete “elements” or units of text corresponding to the elements or units that comprise the claimed invention – essentially, organizing the language of the claims into “chunks” or “quanta” of text.”).

9 These two terms were at issue in two of the more noted claim construction cases in Federal Circuit jurisprudence. “Baffle” was the disputed term construed in Phillips v. AWH Corp., 415 F.3d 1303, 1324 (Fed. Cir. 2005) (en banc) (holding a “baffle” to be, generally, “objects that check, impede, or obstruct the flow of something”); “inventory” was the disputed term construed in Markman v. Westview Instruments, Inc., 52 F.3d 967, 982 (Fed. Cir. 1995) (holding “inventory” in the dry cleaning context to include “articles of clothing”).

10 See “Semantics”, Wikipedia, http://en.wikipedia.org/wiki/semantics (visited June 30, 2008). Although this article takes a different direction and seeks to explain aspects of claim construction from a pragmatic point of view, I do not diminish the relevance of semantics in claim construction, particularly the application of prototype theory. A detailed discussion based on semantics forms the heart of another paper by this author, The Fuzzy Logic of Patent Law, forthcoming.
by the “plain meaning” or “textual” method of interpretation – determining what the words in question mean without resorting to external sources.\textsuperscript{11}

By looking beyond the words themselves to context, however, a more rich meaning can usually be developed. Pragmatics is the branch of linguistics that studies how context enhances meaning; this field looks beyond the meaning of the words themselves and considers also the meaning the speaker intends to convey and the particular circumstances of the utterances.\textsuperscript{12} The field of pragmatics holds that there is more to communication than “that which is explicitly stated” and provides tools for finding the unwritten, underlying information.\textsuperscript{13}

One place that context can be found is from the “conversation” or dialog that occurs between the speaker and the hearer. In everyday conversation, speakers leave much unsaid and rely on information provided by the circumstances surrounding the conversation – who is participating, when the conversation occurs, where the conversation occurs, and so on – as well as information existent in the speaker’s and hearer’s shared background.\textsuperscript{14} Linguists and philosophers have studied what can be understood from the context of everyday conversations.\textsuperscript{15} Legal scholars have also analyzed

\textsuperscript{11}See Paul F. Kirgis, \textit{Meaning, Intention, and the Hearsay Rule}, 43 WM. \& MARY L.REV. 275, 289-90 (2001) ("Linguistic meaning is a semantic concept referring to the meaning a lexical form has outside the context of its utterance. When statutory interpretation theorists refer to ‘plain meaning’ or ‘textualism,’ they are referring to linguistic meaning."). See id. at 292 ("Linguistic meaning . . . bypasses the speaker’s subjective intention in favor of a search for the most conventional ‘literal’ meaning of the words used.").

\textsuperscript{12}See “Pragmatics”, Stanford Encyclopedia of Philosophy, \texttt{http://plato.stanford.edu/entries/pragmatics} (visited July 3, 2008) ("Pragmatics is sometimes characterized as dealing with the effects of context.").


\textsuperscript{14}See Paul E. McGreal, \textit{Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation}, 52 KANS. L.REV. 325, 325 (2004). Because speakers and hearers have expectations about the content of everyday conversation, the fact that much is left unsaid does not cause problems, as discussed below. See id. at 346 ("These expectations help to winnow out the inappropriate readings of an ambiguous sentence, to piece together fractured utterances, to excuse slips of the tongue, to guess the referents of pronouns and descriptions, and to fill in the missing steps of an argument.").

\textsuperscript{15}See Section II.C., infra.
whether legal documents, such as statutes, can be viewed as a special type of conversation, thus permitting greater understanding of the words based on the context. This idea, however, has not been extended to the patent document.

This article examines the patent document as a speech act and the obtaining and enforcing of this document as a conversation. Within the parameters of the patent document as a conversation, this article then tries to develop some implications that can be drawn from the pragmatic aspects of the speech.

In Section II of this article, I will discuss how context and meaning can be derived from everyday conversation, with particular emphasis on conversational implicatures, developed by philosopher H. Paul Grice. In Section III, I will discuss how the idea of conversational context and implicatures applies to legal documents, such as statutes. In particular, I review how legal documents are dissimilar to everyday conversation and how various scholars have used these differences to modify the work of Grice. In Section IV, I apply the ideas presented in Sections II and III to the patent document as and analyze what conversations arise in the context of patent law. From here, I discuss what context can be derived from the patent conversation and consider how this may enrich the plagued process of claim construction.

II. Context and Meaning in Everyday Conversation

In [everyday] speech, we simply use words without resort to definitions, rules, or reasons governing their use. Communication continues, and the hearer understands, because use and meaning are constituted by the life and practices of a community. Put simply, meaning is descriptive of practice, not deduced from reason or logic.\footnote{See Section III.C., infra.}

\footnote{One author in the intellectual property arena, Joseph Scott Miller, has acknowledged the conversational linguistic aspects of the patent document; Miller doesn’t contemplate the differences between a patent and ordinary conversation, however; rather he relies on the basic conversation implicatures (discussed below) to bolster the need for ordinary meaning in the claim construction process. See Joseph Scott Miller, \textit{Enhancing Patent Disclosure for Faithful Claim Construction}, 9 LEWIS & CLARK L. REV. 177, 189 (2005).}

\footnote{McGreal, \textit{supra} note ___ at 334.}
Communication occurs constantly in the form of everyday conversation. Information passes from speaker to hearer, and yet that information is not limited by simply the utterance, or words used by the speaker. The context of the conversation as well as the shared knowledge between the speaker and the hearer convey greater meaning than simply the words.\(^{19}\)

For example, if a wounded person asks the doctor if he is going to die and the doctor responds, “No, you are not going to die,” both parties to the conversation understand that the wounded person is not immortal.\(^{20}\) The information conveyed in the conversation is simply that the person will not die from his current wounds – and yet, that is not the plain meaning of the words spoken.

Also, consider these contrasting examples:\(^{21}\) If a person is asked if he has two kids and he responds positively, the meaning is that he has exactly two kids, no more and no less. Yet, if the person is then asked if he has two beers in the refrigerator and he responds positively, the meaning is that he has at least two beers and maybe more.\(^{22}\) In these cases, the extra information conveyed by context is more subtle, and yet it shows that context and shared background can only be ignored at the risk of not fully understanding the meaning of the utterance.

A. The Search for Meaning in Conversation

Despite the lesson learned from the above examples, there certainly is appeal to relying on words at their face value. The old adage “Say what you mean and mean what you say” pops up in various forms in quotes from *Alice’s Adventures in Wonderland*\(^{23}\) to Dr. Seuss\(^{24}\) to General George S.

\(^{19}\) See Soames, *supra* note ___ at 11.

\(^{20}\) Marmor provides this example, *see supra* note ___ at 5, as well as the example of a bartender who tells a teenager that he must be 21 years old to drink. Both parties understand that you need to be 21 or older to drink, not precisely 21. *See id.*

\(^{21}\) Both of these examples, and others, are found in Soames, *supra* note ___ at 11.

\(^{22}\) *See Soames, supra* note ___ at 11 (“‘Exactly’, ‘at least’ . . . – these additions to what is asserted, are generated by special features of the context of utterance, over and above [the words themselves]. In all these cases, what is communicated isn’t the semantic content of the sentence uttered, but something richer, to which meaning and obvious background assumptions contributed.”).

\(^{23}\) *See Lewis Carroll, Alice’s Adventures in Wonderland*, chapter 6.
Patton.\textsuperscript{25} If communication can really be as simple as this, why should we resort to context at all?

Context is necessary because relying on objective, semantic meanings of the words of the utterance can result in difficulty.\textsuperscript{26} There are problems of ambiguity and vagueness; in fact, even the rare word that only has one meaning can acquire additional meaning based on context.\textsuperscript{27} There are problems of stability; meanings of words change regionally, temporally, and individually. Finally, there are certainly arguments that the search for semantic meaning does not avoid searching for the speaker’s intent, it merely relocates it to another aspect of the analysis.\textsuperscript{28} One reason to focus on context is that the alternative is unattractive – where an utterance is taken without context, the hearer is left to “invent” a context in order to understand what is being said.\textsuperscript{29} Whether we admit that we are using context or not, “all interpretations of language necessarily entail a

\begin{quote}
“Then you should say what you mean,” the March Hare went on.
“I do,” Alice hastily replied; “at least – at least I mean what I say – that’s the same thing you know.”
“Not the same thing a bit!” said the Hatter. “Why you might just as well say that ‘I see what I eat’ is the same thing as ‘I eat what I see’!”
\end{quote}

\textsuperscript{24} Although the quote “Say what you mean and mean what you say, because those who mind don’t matter and those who matter don’t mind.” appears in multiple places on the Internet attributed to Dr. Seuss, it is possible that the quote is actually a conflation of two quotes by Dr. Seuss – “I meant what I said and I said what I meant” from HORTON HATCHES AN EGG and “Be who you are and say what you feel, because those who mind don’t matter and those who matter don’t mind.” attributed generally to Dr. Seuss. See \url{http://simple.wikiquote.org/wiki/Dr_Seuss} (last visited July 21, 2008).

\textsuperscript{25} It also appears as a famous quote by General George S. Patton Jr. See \url{http://www.generalpatton.com/quotes.html} (last visited July 18, 2008).

\textsuperscript{26} See Kirgis, supra note ___ at 292-3 ("Linguistic meaning’s promise of simplified objective interpretations is illusory.”).

\textsuperscript{27} See Peter Meijes Tiersma, \textit{Comment: The Language of Offer and Acceptance}, 74 CALIF. L. REV. 189, 207 (1986) ("[E]ven words which have only one dictionary meaning can develop other meanings through metaphorical extension. At the other extreme, a word such as ‘right’ has a large variety of dictionary meanings. Context will usually allow the hearer to extrapolate the intended meaning.”).

\textsuperscript{28} See Kirgis, supra note ___ at 293.

\textsuperscript{29} See McGreal, supra note ___ at 338.
context."\textsuperscript{30} Therefore, to truly determine meaning, we need to consider the context of the utterance; it is not enough to consider simply the semantics, or text.\textsuperscript{31}

The idea that meaning cannot be derived based solely on the words of the utterance is behind the pragmatics branch of linguistics. Linguistics is “the scientific and philosophical study of language” and encompasses all aspects of language, from how speech is formed by the body to how language is used in communication and texts.\textsuperscript{32} Of particular interest in determining meaning are the linguistic branches of semantics (the study of the meanings of words) and pragmatics (the study of how utterances become communication, particularly in context).\textsuperscript{33}

The field of linguistic pragmatics is diverse and many of the sub-areas have potential application to patent claim construction. One way to consider pragmatics is as near-sided or far-sided. Near-sided pragmatics are concerned with “the nature of certain facts that are relevant to determining what is said.”\textsuperscript{34} A simple example of near-sided pragmatics is the use of indexicals, such as “I,” “now,” “today,” “here,” or “next year.”\textsuperscript{35} Interpretation of an indexical typically relies on context provided by some objective feature of the conversation – in the case of “I,” it depends on who is speaking; in the case of “today,” it depends on the time of the utterance;

\textsuperscript{30}\textit{See McGreal, supra note ___ at 338.}

\textsuperscript{31}\textit{See Andrei Marmor, The Pragmatics of Legal Language (forthcoming) 1 (“It has been long noticed by linguists and philosophers of language, however, that the content of linguistic communication is not always fully determined by the meaning of the words and sentences uttered.”).}

\textsuperscript{32}\textit{See “Linguistics”, Wikipedia, http://en.wikipedia.org/wiki/linguistics (visited June 30, 2008). Phonetics is the study of how speech is produced, and is outside the scope of this article, as are phonology (the study of sounds), morphology (the study of internal structures of words), and syntax (the study of how words are combined into sentences). The remaining branches of linguistics are relevant to this article and will be discussed.}


\textsuperscript{35}\textit{See Sinclair, supra note ___ at 381-82.}
and finally, in the case of “here,” it depends on where the utterance is made.36

Far-sided pragmatics, on the other hand, focuses on context, or what lies beyond the utterances.37 This article will focus on far-sided pragmatics and specifically the distinction between “what words mean, what the speaker literally says when using them, and what the speaker means or intends to communicate by using those words, which often goes beyond what is said.”38 One way of considering the meaning and context that can be derived by viewing the speech as a conversation. “Communication is an act, and it is an act motivated by an intention to produce certain beliefs in the audience. Meaning is thus a function of the utterer’s intention and the belief in the audience that the utterer seeks to produce.”39 One way to derive context is through the most common, ordinary speech act: the conversation.

B. What Does Everyday Conversation Look Like?

Communication (and conversation) can be viewed as an exchange of information between a speaker, or sender, of information and a hearer, or receiver, of information.40 Oftentimes, in everyday conversation, the parties may take alternating roles in communicating; however this is not necessary. The communication may take place in any number of places and at any number of times. Furthermore, the conversation may take place for

36 See Marmor, supra note ___ at 4.
39 See Kirgis, supra note ___ at 297. See also Georgia M. Green, PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING 1 (1996):

Pragmatics is the study of the mechanisms that [allow us to] use the term communicate interchangeably with speak or write, never noticing that the term communication presupposes achievement of the intended effect of verbal action upon the address, while speaking and writing do not. . . . Communication is, rather, the successful interpretation by an addressee of a speaker’s intent in performing a linguistic act.

any number of reasons; however, it is assumed that the speaker intends to convey information.

Because the purpose of the conversation is, at bottom, to exchange information, the speaker implicitly guarantees to convey information to the hearer that is not already known and that is relevant, or closely enough related to what the hearer already knows that he can make a connection.\textsuperscript{41} The hearer expects that the speaker will be “informative, truthful, relevant, clear, unambiguous, brief, and orderly.”\textsuperscript{42} This mutual pairing of guarantees and expectations allows for efficient conversation, free from ambiguity and missing pieces.\textsuperscript{43} It also means that it should be obvious to the parties when the information being conveyed differs from the speech’s semantic content (or the plain meaning of the words of the utterance).\textsuperscript{44}

Although a conversation can occur between any two or more people or parties, subject to the above assumptions, the speaker’s style may vary based audience. In every conversation, the audience (or hearers) can be classified into four categories: addressees, auditors, overhearers, and eavesdroppers.\textsuperscript{45} An addressee is the intended hearer of the speaker’s utterance.\textsuperscript{46} An auditor is known to be listening by the speaker and his presence is ratified by the speaker, but he is not the target of the speaker’s utterance.\textsuperscript{47} An overhearer is known to be listening by the speaker, but his presence is not ratified.\textsuperscript{48} An eavesdropper is unknown by the speaker to be

\textsuperscript{41} See McGreal, supra note ___ at 346.

\textsuperscript{42} See McGreal, supra note ___ at 346.

\textsuperscript{43} See McGreal, supra note ___ at 345-46 (“Cooperation is not simply a matter of style, making conversation more concise; it makes communication more efficient by increasing the speaker’s speed and clarity. Speed affects a conversation’s cost because, as economists know, time is money.”).

\textsuperscript{44} See Marmor, supra note ___ at 7-8 (“A speaker would normally succeed in conveying assertive content that differs from what he says, when it would be obvious to the hearer, in the particular context of the conversation, that it just cannot be the case that the speaker asserts exactly what he says.”).

\textsuperscript{45} See Smith, supra note ___ at 1134.

\textsuperscript{46} See Smith, supra note ___ at 1134.

\textsuperscript{47} See Smith, supra note ___ at 1134.

\textsuperscript{48} See Smith, supra note ___ at 1134.
listening. For example, in conveying the same information, a speaker may use a different style to talk to adult addressees versus child addressees – to the adult, the speaker may simply say “This place is a mess!”, whereas to the child, the speaker may need to spell out that he needs to pick up. Similarly, if a speaker is trying to convey information, such as the notion that ice cream may be involved after dinner, to an adult addressee in the presence of a child auditor (or perhaps overhearer, as children go), the speaker may be more abstruse and indirect in conveying the information.

There is also a difference between formal conversation and informal conversation, even in everyday situations: formal situations generally call for less reliance on context by using more nouns and fewer pronouns, as well as leaving less to the hearer’s imagination. Formal situations also are more likely to extend beyond the two-party familiar conversation and to include additional parties, such as overhearers and eavesdroppers. This too will increase the amount of context required to convey the information, depending on what is known about the audience’s background knowledge. Although not usually considered a “conversation,” everyday writing is also a means of communicating information and can be viewed as a conversation subject to the same concerns as mentioned above.

C. What Do We Know from Everyday Conversation?

In viewing context through the lens of a conversation, we learn “an important truth about ordinary speech” – speakers in every day conversation leave much unsaid and rely on context, either provided by the situation

49 See Smith, supra note ___ at 1134.

50 See Smith, supra note ___ at 1135.

51 See Smith, supra note ___ at 1136 (“Speakers are more explicit in more anonymous, communicative settings.” This need for extra explicit speech comes at a cost to the speaker, who is required to choose his words more carefully and cannot rely on any extra-speech signals.).

52 See Elizabeth Fajans & Mary R. Falk, Teaching Lawyers to Write: Linguistics and the Composition of Legal Documents: Border Crossings, 22 LEGAL STUD. FORUM 697, 718-19 (1998) “Because writing is a communicative act, a writer must assess the audience’s knowledge and inferencing capacities and supply what the audience needs to decode or discern the text’s purpose and meaning. This suggests that no text is sufficient unto itself; all texts rely on a reader’s extra-textual knowledge, knowledge that helps the reader process the text.”).
surrounding the conversation or existent in the speaker’s and hearer’s shared background, to carry the intended meaning.

The idea that this context could be quantified and qualified began with the work of H. Paul Grice, whose significant work focused on the study of the meaning intended by the speaker, the linguistic meaning of the utterance, and the interrelations between the two meanings. Grice advanced the idea of pragmatics by analyzing the bounds of conversation, observing that everyday conversation is typically about a topic known to the participants, about which they have shared general knowledge, and to which the conversation adds and refines the shared general knowledge. The enhanced meaning that this context provides is termed “conversational implicatures.”

Everyday conversation with the existent expectations and guarantees, in its idealized form as Grice observes it, is a cooperative enterprise: “Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.” Professor Georgia Green has slightly recast this theme: “Agents will not speak obscurely in attempting to communicate.” The reason for this cooperation is largely efficiency.

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54 See Sinclair, supra note ___ at 384-5. See also Paul Grice, Logic and Conversation, STUDIES IN THE WAY OF WORDS 22, 29 (1989) (referring to ideal cooperative conversations as those in which the participants “have some common immediate aim,” the participants’ contributions should be “dovetailed, mutually dependent,” and the “transaction should continue in appropriate style”).

55 See Grice, Logic and Conversation, supra note ___ at 26.

56 See Miller supra note ___ at n62, citing Georgia M. Green, PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING 91 (2nd ed. 1996).

57 See McGreal, supra note ___ at 343 (“The efficiency . . . depends on the participants’ sharing a lot of background knowledge about the events and about the psychology of human behavior. They must use this knowledge to cross-reference the names, pronouns, and descriptions with a single cast of characters, and to fill in the logical steps that connect each sentence with the next. If background assumptions are not shared—for example, if one’s conversational partner is from a very different culture, or is schizophrenic, or is a machine—then the best parsing [of grammar] in the world will fail to deliver the full meaning of a sentence.”).
From the generally stated principle of cooperation, Grice provides four categories of maxims that relate to everyday conversation: quantity, quality, relation, and manner. Under the maxims of quantity, the speaker’s contributions should be as informative as required for the current purposes of the conversation, while not providing too much information. The maxims of quality discourage the speaker from making statements that he believes to be false or for which he lacks adequate evidence. The maxim of relation is simply that the speaker should strive to be relevant. Finally, the maxims of manner are related to the form, rather than the substance, of speaking: the speaker should avoid using obscure expressions, avoid ambiguity, be brief, and be orderly.

Of course, speakers are not bound by these maxims; in fact the rules may even conflict. However, in the complete absence of these rules, conversation would be impossible. If we can assume that the speaker is acting in accord with the general principle of cooperation and the maxims that flow from it, then we can also make inferences that extend beyond the semantic context of the words. The fact that the speaker used these particular words and used them at this point in the conversation provides additional context to the words.

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58 See Grice, Logic and Conversation, supra note ___ at 26-27.

59 See id. at 27.

60 See id.

61 See id. These maxims of manner are, not surprisingly, the most often violated. See Sinclair, supra note ___ at 380.

62 See Sinclair, supra note ___ at 382. This is a unique feature of pragmatics. In contrast, consider syntax or semantics. If a speaker violates rules of syntax or semantics, the speaker will fail to communicate anything. Absent English syntax, the speaker is not speaking English. Id. at 383. Further, while the rules of pragmatics, or Grice’s maxims, should be violated in certain contexts (e.g., in the event of cross-examination, the maxim of quantity is often a deliberate casualty), the rules of syntax and semantics cannot be. Id. at 384-5.

63 See Sinclair, supra note ___ at 382.

64 See Sinclair, supra note ___ at 380-81.

65 See Sinclair, supra note ___ at 381.
Grice provides a number of examples on how the conversational implicatures are used to provide context and enhance the understanding of utterances. Consider two people talking about a mutual friend who has gotten a job in the bank. One of the people asks the other how the friend likes his new job, and the other person replies, “Quite well, I think; he likes his colleagues and he hasn’t been to prison yet.”66 This may seem like an unusual remark, but it provides more information than is contained in the words themselves. It appears that the second person is communicating to the first that their friend is potentially dishonest. The first person may be aware of this peculiar quality in the friend; if not, he is entitled to ask the second exactly what he means. If the friend were known by both people to be an honest person, then the second person’s remark would have violated the maxim of relevance or perhaps quality. However, to reach the implicature that the second person’s remark is exposing the friend’s dishonesty, we have to assume that the speaker is observing the conversational maxims.67

A second example Grice offers is this: Man X is standing near his car which has run out of gas. He asks for help from man Y, a local person who is passing by. Knowing this, Y says to X “There is a gas station in the next village.”68 While Y has not actually said that the station is open and has gas to sell, it can be assumed (if Y is following the maxims of conversation) that this is what Y intends to convey.69

A final, more complicated example Grice provides is this: Two persons, A and B are planning a vacation in France, where A hopes to visit a third person, C. If A asks B, “Where does C live”, and B replies, “Somewhere in the south of France,” then we (and A) can deduce that B does not know exactly where C lives.70 If B knew more precisely where C lived, he would be required by the maxim of quality to indicate as much.71 If he did not

66 See Grice, Logic and Conversation, supra note ___ at 24.

67 See id.

68 See id. at 32. Grice provides this example in more continental terms (petrol, garage), but the gist of the exchange remains the same.

69 See id.

70 See id. at 32-33.

71 See id.
know but had guessed, he would have violated the maxim of quality.\textsuperscript{72} Thus, the conversational implicature is that B does not know precisely where C lives.\textsuperscript{73}

In order to arrive at the implicatures in the above examples, and in general, three conditions must be true: First, the speaker should have certain intentions for the communication.\textsuperscript{74} Second, the speaker and the hearer should share a conversational context that is (at least to some extent) common knowledge.\textsuperscript{75} Third, the relevant conversational maxims can be applied to the situation.\textsuperscript{76} These conversational implicatures are cancelable,\textsuperscript{77} and they are generally quite context specific.\textsuperscript{78}

There are some implicatures that are not conversational implicatures. First, some implicatures have been used so frequently that the term becomes instead an idiomatic expression with a common meaning that differs from the literal meaning of the words, such as “Do you have the time?”\textsuperscript{79} There is also a difference between conversational implicatures and conventional implicatures. Conventional implicatures arise from the use of terms like “but” or “therefore” that add context through the usual use of those words.\textsuperscript{80}

\textsuperscript{72} See id.
\textsuperscript{73} See id.
\textsuperscript{74} See Marmor, supra note ___ at 17.
\textsuperscript{75} See id.
\textsuperscript{76} See id.
\textsuperscript{77} The notion that a conversational implicature is cancelable means that to the utterance that means $p$, it is possible to add “not” to convey that the speaker does not mean to imply $p$. See “Pragmatics”, Stanford Encyclopedia of Philosophy, \url{http://plato.stanford.edu/entries/pragmatics} \S2 (visited July 3, 2008).
\textsuperscript{78} See Marmor supra note ___ at 14.
\textsuperscript{79} See Marmor, supra note ___ at 14-15.

The example Grice gives are the following three statements:

1) He is an Englishman, therefore he is brave.
2) He is an Englishman, and he is brave.
3) His being brave follows from his being English.
Finally, Grice also asserts that semantic notions are ultimately based on the speaker’s intent. The speaker means something if he intended, by uttering $x$, to induce a certain response from the hearer; if he intended the hearer to recognize from $x$ that the speaker sought a response; and he intended the fulfillment of the intention to be part of the hearer’s response. “The understanding of the force of an utterance in all cases involves recognizing what may be called broadly an audience-directed intention and recognizing it as wholly overt, as intended to be recognized.”

III. Context and Meaning in Legal Conversations

Law is based on language and, in fact, requires language; this is what separates law from custom. The field of law involves, to a great extent, the communication of information. Sometimes the communication is direct, such as a statute – which directly communicates information from the law maker (the legislature) to those who are governed by the law. Other times, however, the communication is indirect – such as when lawyers serve as mediators between courts, agencies, and legislatures on one side and

Although the utterances 1 and 2 mean the same thing, utterance 3 is implicated by utterance 1. See id. This type of implicature is actually more controversial than Grice’s conversational implicature. See id.


82 See Grice, Utterer’s Meaning and Intentions, supra note ___ at 94.


84 See Peter Meijes Tiersma, The Judge as Linguist, 27 LOY. L.A. L. REV. 269, 269 (1993) (“Law is made possible by language. In contrast to custom, which can often be transmitted simply by observing the adherence of a community to an unspoken norm, law virtually by definition is articulated in speech or writing. . . . Thus, for the legal profession and particularly for judges, language is not merely a means of communication, but an object of analysis.”).

85 See Smith, supra note ___ at 1126.
clients and the public on the other. Law can thus be viewed as a series of numerous conversations between varying parties.

Yet, despite the centrality of language and communication, most legal studies have shown “surprisingly little interest in linguistics,” and even less interest in pragmatics. Yet, context is becoming more important in many areas of law. Commentators who have considered the utility of linguistics for legal interpretation, however, have raised some compelling points of applicability with respect to context. Of particular interest are a couple who have studied the application of Grice’s conversational pragmatics to various legal situations, for example, by analogizing statutes to conversations between a legislature and the populace.

Although, as mentioned above, there are both direct and indirect legal conversations, this section will focus largely on the statutory conversation, as legislation represents the primary means of communicating legal information from law maker to the populace. Other types of legal conversation will be addressed briefly at the end of this section.

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86 See Smith, supra note ___ at 1126.

87 See id.

88 See Fajans & Falk, supra note ___ at 697.

89 See Smith, supra note ___ at 1106.

90 To be fair, there are also linguists and philosophers that have considered the application of their art to the field of law. For example, see Scott Soames, Interpreting Legal Texts: What is, and What is not, Special about the Law, at 8 (“Since the content of the law includes everything asserted and conveyed in adopting the relevant legal texts, meaning is sometimes merely a guide to interpretation, to be supplemented by other things.”).


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A. The Search for Meaning in Law

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.\(^\text{92}\)

Generally, in determining meaning in legal conversation, words are given their “plain” or ordinary meaning.\(^\text{93}\) But even in determining the ordinary meaning, there is controversy. Just as there is a schism in everyday conversation in determining meaning based on the words uttered versus enhanced by context, a similar (albeit more divisive) wedge is found in the interpretation of legal conversation.\(^\text{94}\) Textualists purport to look only to the language of the statutes and argue that resort to legislative intent or history is inappropriate.\(^\text{95}\) The other side, holistics or intentionalists, maintain that interpretation cannot occur in a vacuum and thus resort to external sources is useful and proper.\(^\text{96}\) However, similar to the position maintained by linguists that even a semantic interpretation will, at some point, refer to context, there are legal scholars that believe the divide between textualists and holistics is not so great.\(^\text{97}\) Moreover, as Lawrence Solan explains, an enriched approach to understanding legal speech that

\(^{92}\) See 242 U.S. 470, 485 (1917). The “plain meaning” rule is just as vibrant today as it was nearly a century ago. See, e.g., Lamie v. United States Tr., 540 U.S. 526, 536 (“Where there are two ways to read the text, . . . [w]e should prefer the plain meaning.”).

\(^{93}\) See McGreal, supra note ___ at 356.

\(^{94}\) See, e.g., Lawrence M. Solan, The New Textualists’ New Text, 38 LOYOLA L.A. L. REV. 2027, 2027-28 (2005) (“These issues have generated a polarized debate in both the courts and legal academic literature between those who regard themselves as textualists on one hand, and those who advocate for courts using a broader range of evidence on the other.”).

\(^{95}\) See Solan, supra note ___ at 2028.

\(^{96}\) See id.

\(^{97}\) See, e.g., Solan, supra note ____ at 2028-2030 (stating that “both sides in the debate agree upon almost everything when it comes to statutory interpretation” and arguing that holistics rely on the language of the statute except in hard cases and that textualists do rely on external sources, even if typically eschewing legislative intent).
relies on the text as well as contextual information can yield the best understanding.\textsuperscript{98}

The text, or utterance, in legal speech is usually easy to find – it is the statute itself. The question is how we determine the ordinary meanings of the words used. There is, of course, legislative history and intent, as mentioned above. Just as with words in everyday conversation, one option for determining meaning is a dictionary; however, this is just as problematic in legal speech as it is in everyday speech.\textsuperscript{99} Similar to using a dictionary, there is the option of seeking a paradigm case, where there is an example to which the word refers; this suffers similar disadvantages as dictionaries.\textsuperscript{100} Just as in everyday conversation, the context surrounding the speech and the conversation itself can be very useful.

B. What Does Legal Conversation Look Like?

Consider the example of a legislative statute as a legal conversation; a


Even the strictest modern textualists properly emphasize that language is a social construct. They ask how a reasonable person, conversant with relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of the language and, in particular, of legal language. Accepting this more modern understanding of textual interpretation, I believe, offers a firmer and more legitimate basis for cutting off many problems of absurdity at the threshold.

\textsuperscript{99} See McGreal, supra note ___ at 330-31. (“For many, the first instinct might be to consult a dictionary or some other source for a word’s definition. . . . Yet, any such rule itself consists of more words, which require further definitions which, in turn, consist of more words that require more definitions, and so on.”).

\textsuperscript{100} See McGreal, supra note ___ at 331-32 (“A paradigm case is an example—an object or instance or event—to which the word refers.”). McGreal notes that the paradigm case approach is problematic because 1) it does not accurately depict all the ways in which people use words (the word does not always refer to the object); 2) a single picture cannot account for all uses of the word; and 3) a word will not have a single paradigm to which all other uses can be analogized. See id.

In slight disagreement with McGreal, this author believes the paradigm case method of finding meaning does have utility, at least in the patent law context; this idea is the topic of The Fuzzy Logic of Patent Law (forthcoming).


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legislature, in enacting statutes, is communicating information, typically about behaviors prohibited or behaviors required, with the persons subject to its jurisdiction. Each provision of a statute represents a legislative utterance, much in the same way a sentence of a conversation is an utterance. Although the legislature does not speak in the literal sense, as it has no “oral voice” – the printed word is expressly put forward to communicate. We can thus analyze legal conversation in much the same manner as everyday conversation.

It is important before beginning, though, to determine how legal conversation differs from everyday conversation, as this can affect the analysis. Clearly, the most palpable similarity is that both statutes and conversation depend on the use of language to communicate, and in both cases, it is assumed the parties to the conversation speak the same language. Another similarity between legislation and conversation is that both are typically confined to a particular topic; in fact in this respect, legislative speech acts often more closely align with ideal conversation than everyday conversation that may wander from topic to topic.

The differences between everyday conversation and legal conversation are more important and probably more striking than the similarities. At a superficial level of differences, statutes are limited to the printed language and cannot rely on extra-lingual clues, such as gestures or facial expressions, which often provide context in everyday conversation. Legal conversation tends to avoid indexicals or other objective, context

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101 See Sinclair, supra note ___ at 374-5.

102 See Sinclair, supra note ___ at 374-5.

103 See Sinclair, supra note ___ at 385. Of course, some legislatures are not as confident in their constituency’s ability to understand the same level of language as the legislature is capable of speaking. For example, Oklahoma requires all ballot initiatives and statutes to be written for an eighth-grade reading and comprehension level. See 34 Okla. Stat. Ann. Tit. 34, 9 (West 1998) (cited in Robert Henry, Deliberations about Democracy: Revolutions, Republicanism, and Reform, 1998 WILLAMETTE L.REV. 533, 569 n. 125).

104 See Sinclair, supra note ___ at 385. Legislatures, too, have legal conversation that rambles – see any one of the various omnibus bills that cover multiple, unrelated topics.

105 See Sinclair, supra note ___ at 385. However, as noted above, it is not inappropriate to view written conversation in the same light as oral conversation, and so this limitation is not merely a by-product of being a legal conversation.
dependent content; for example, deadlines are generally phrased as dates certain (e.g., January 1, 2009), rather than “next week” or “by the end of the year” to avoid ambiguity.106

Moving beyond the superficial, one significant difference between legal conversation and everyday conversation is the unilateral aspect of statutes; the legislature speaks to the populace, but the people generally do not have the opportunity to speak back.107 A second significant difference is that, unlike in regular conversation, it is typically irrelevant whether the legislature’s utterances are true, because the purpose of the utterance is to set boundaries on behavior, not convey information on which a response need be based.108 To be fair, however, even though legislation need not be true, it must be consistent.109

At the highest level, it is important to understand that everyday conversation is presumed to be cooperative, while legal conversation is a form of strategic behavior.110 Everyday conversation assumes that the speaker is making a “relevant contribution to the conversation, given the stage a conversation is in and the prior background knowledge of the relevant parties.”111 Law, on the other hand, does not simply assume non-

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106 See Marmor, supra note ___ at 5.

107 See Marmor, supra note ___ at 5 (“To be sure, the legislation is often informed by two-sided conversations in the form of preliminary hearings and floor debates; however, this is preliminary to the speech act of the statute. That speech act is unilateral.”).

108 See Sinclair, supra note ___ at 386-87.

109 See Sinclair, supra note ___ at 387. Two legal utterances are inconsistent if complying with one requires violating the other. Additionally, legislation is strongly purposive – a statement that is antithetical to the purpose of the statute violates the requirement of consistency. See id. at 387-88.

110 See Marmor, supra note ___ at 10.

111 See Marmor, supra note ___ at 10. See also Philip P. Frickey, Faithful Interpretation, 73 WASH. U. L.Q. 1085, 1086 (1995).

The law is attempting to accomplish two rather contradictory things. It is attempting, first, to communicate duties to the citizenry in general and to officials in particular, a use of language perhaps substantially captured in the linguist’s focus on conventional understandings. Simultaneously, the law seeks to channel the discretion of enforcement officers and judges to maximize justice in widely divergent circumstances. Accordingly, the law superimposes on ordinary meaning all manner of cannons of interpretation, maxims, and exceptions (e.g., purpose trumps plain
cooperative behavior; the legal world depends on adversarial or strategic behavior.\footnote{See McGreal, supra note ___ at 348. McGreal, in fact, makes the point that zealous representation is available in large part because of ambiguities and non-cooperation in the law. See id. at 349-53.}

This difference manifests in a number of ways. First, there is a second conversation underlying most legal conversation that occurs between legislators during the enactment process, which is fully strategic, undoubtedly affects the content of the legal conversation, and rarely abides the Gricean maxims discussed above.\footnote{See Marmor, supra note ___ at 20 ("Legislation is often the result of compromise that arises from ‘tacitly acknowledged incomplete decisions’ or decisions to deliberately leave issues undecided.").} Second, the strategic behavior may then extend to the legal conversation between the legislature and the populace, for example, when the legislature purposely and intentionally conveys different messages to different audiences.\footnote{See Marmor, supra note ___ at 22. Marmor gives the example of the duress defense in the criminal law context. Although the message to the public is that it is not permissible to commit torts, the duress defense tells the agencies and courts to be lenient against offenders in certain circumstances. See id.} Finally, there are certainly instances, hopefully rare, where the legislature is purposefully using the language of the legal conversation to obscure what is actually being done.\footnote{See Marmor, supra note ___ at 23. Marmor provides the example of campaign finance reform legislation; the legislature’s speech act in reforming the law gives the illusion that the body is trying to make changes in the public’s interest, but a closer look reveals that none of the concerns are actually addressed. See id.}

\begin{quote}
Although the example may be slightly off-color, it is clear this problem is not of recent vintage and is not limited to lawmakers:

When a diplomat says \textit{yes}, he means ‘perhaps’;
When he says \textit{perhaps}, he means ‘no’;
When he says \textit{no}, he is not a diplomat.

When a lady says \textit{no}, she means ‘perhaps’;
When she says \textit{perhaps}, she means ‘yes’;
When she says \textit{yes}, she is not a lady.
\end{quote}


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Because the legal conversation is strategic, and non-cooperative, the party conveying the information is more likely to include the information in the utterance itself and less likely to leave as much for interpretation by context. Further, the context of the legal conversation creates additional impediments to contextual interpretation. First, the parties charged with interpreting the legal speech, such as judges and litigants, were not party to the conversation that gave rise to the utterance and thus have insufficient first-hand information. Second, the boundaries of the conversation are unclear; while everyday conversation is bounded by the situation or instance in which the conversation occurs, the beginning point of the legislative conversation is unknown.

Legal conversation also suffers from difficulty in determining the parties to the conversation, both on the speaking end and the hearing end. Perhaps the participants should be limited to the legislature (as the speaking body) and the populace (as the hearing body), but that definition may be too narrow, because there are often many parties that, while not directly involved, affect the conversation. There is also a concern when the speaker is not a single person, but a legislative body. This issue has been

http://plato.stanford.edu/entries/pragmatics (last visited July 3, 2008)).

116 See McGreal, supra note ___ at 347 (“When a receiver of a message is not cooperative but adversarial, all of this missing information [i.e., the context] must be stated explicitly, which is why we have the tortuous language of legal contracts with their ‘party of the first part’ and ‘all rights under said copyright and all renewals thereof subject to the terms of this agreement’”; id. at 326 (“[O]rdinary speech depends heavily on shared context. And that is precisely why ordinary conversation is not part of the legal drafter’s tool kit. . . . The more [a lawyer] leaves to context—the unspoken assumptions supplied by the reader—the more the drafter risks later manipulation of her work product. Specifically, she risks that the reader will apply a different context. . . . This leads the legal drafter to write into text information that an ordinary speaker would leave to context.”)).

117 See Marmor, supra note ___ at 18.

118 See Marmor, supra note ___ at 18. Although the end of the legislative conversation can be set at the enactment of the statute, the beginning point is difficult to ascertain. See id.

119 See Marmor, supra note ___ at 18. For example, lobbyists and administrative agencies have the ability to affect the legal conversation but are not direct speakers.

120 See Marmor, supra note ___ at 17 (“Attributing communication intentions to a collective agency raises conceptual problems.”)
addressed elsewhere, and so we can work with the generalization that a
group of people can share intentions in such a way that intention can be
attributed to the group.

There are also difficulties ascertaining the audience for the utterance;
the addressee may be the populace, but it is too simplistic to lump the
various constituencies of the general public into one. There are the law
enforcement agents who enforce the legal speech, the judges who interpret
the law, the lawyers who work with and against the law, and the public who
is bound to follow the law, not to mention other law makers who may view
the law as strategic fodder for their own activities. Each of these
audiences has a different background and thus interprets the laws with a
different context, which can affect the meaning as well as the utterance
itself.

C. What Do We Know From Legal Conversations?

Similar to everyday conversation, three levels of content or information
are also asserted by legal speech: what has actually been said, what has
been asserted, and what has been implicated. The first level, what has
actually been said, is a matter of syntax and semantics; this is generally
the focus in statutory interpretation. What is more interesting is what has
been asserted and what has been implicated.

Some commentators have analyzed the application of Grice’s maxims to
the legal conversation and pointed out a number of modifications that must

See Andrei Marmor, INTERPRETATION AND LEGAL THEORY (2nd ed.), chapter 8.

See Marmor, supra note ___ at 17.

See Soames, supra note ___ at 24 (“The issue of who constitutes the audience for
language use in the legislative context is up for grabs in a way it isn’t in ordinary
contexts.”).

See Soames, supra note ___ at 24.

See Smith, supra note ___ at 1108 (“Because audiences of different types have
different abilities to process messages, the nature of the audience has implications for the
amount and form of the information communicated.”).

See Marmor, supra note ___ at 3.

See Marmor, supra note ___ at 3.
be made because of the unique nature of legislation over regular conversation.\textsuperscript{128} In legal conversation, it is often not entirely clear what the asserted content of the speech act is, let alone the message intended to be conveyed.\textsuperscript{129} The biggest difficulty in viewing the legislative conversation under the maxims present in everyday conversation is the problem of cooperation.

Of all the maxims, the maxim of manner is the easiest to apply to legislative speech, because it is concerned with the form, rather than the substance, of speech. Certainly, in an ideal world, legislative speech should be orderly and not overly verbose.\textsuperscript{130} Because legislative speech is unilateral and must be interpreted without the typical extra-linguistic aids, such as gesture or emphasis, then legislative speech should be written even more clearly and eloquently.\textsuperscript{131} Because of the unilateral nature, some have proposed an additional maxim of manner to apply to legal conversations: “Use words the literal meaning of which gets closest to what you actually mean.”\textsuperscript{132} Essentially, because the hearer is unable to easily seek clarification of meaning for legislative speech, the speaker should pick its words carefully and use the most ordinary meaning.\textsuperscript{133}

The maxim of relevance is also easily applied to legislative speech, in part because the original maxim is so broadly written – “be relevant.” The main difficulty in applying the relevance maxim is determining to what the

\textsuperscript{128} However, at least one commentator says that Grice’s maxims should not be used at all in the context of legislative conversation: “While ordinary conversation is a poor model for understanding legal texts, some judges and commentators take precisely that approach to statutory interpretation.”\textsuperscript{128} See McGreal, \textit{supra} note ___ at 326.

\textsuperscript{129} See Marmor, \textit{supra} note ___ at 9.

\textsuperscript{130} See Sinclair, \textit{supra} note ___ at 391. Of course, there are numerous examples of legislation that violate both the ideals of orderly and concise. But violation of the maxim does not render the maxim inapplicable, and even in ordinary speech, this maxim is regularly violated.

\textsuperscript{131} See Sinclair, \textit{supra} note ___ at 391-92.

\textsuperscript{132} See Sinclair, \textit{supra} note ___ at 392 (citing Allwood, \textit{Negation and the Strength of Presuppositions}, 2 \textit{LOGICAL GRAMMAR REP.} 3 (1972)).

\textsuperscript{133} See Sinclair, \textit{supra} note ___ at 392 (“If we could not, absent clear contrary indicia, rely on the legislature to have intended exactly the choice of words it made, we could have no basis for understanding its enactment.”).
speech should be germane. Should the speech simply be relevant to the topic of the statute, or does the goal or objective of the legislation play some part in determining significance? This maxim is present in many of the canons that govern statutory interpretation, such as those that apply to the relationship between a particular provision of the statute and the surrounding provisions.

The maxims of quantity and quality do not transfer so easily to legislative speech; however, Sinclair has proposed modifications of these maxims to be more applicable in this situation. As to the maxims of quantity, Sinclair provides two modifications: 1) “Make each provision cover all the persons and actions you intend it to” and 2) “Make each provision cover only the persons and actions you intend it to and no more.” These revisions allow similar implications to be made about legal conversation as with everyday conversation. If each provision is to cover all the persons and actions, but no more, then we can presume that each provision has a point, each provision is intended to control behavior, and that silence is deliberate.

Sinclair has also reformulated the maxims of quality. First, do not enact a provision that can be shown not to further the legislative purpose. And second, do not enact a provision when there is no adequate evidence that it

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134 See Sinclair, supra note ___ at 399-400.
135 See Sinclair, supra note ___ at 400.
136 See Sinclair, supra note ___ at 400. Sinclair also uses the maxims, as he modifies them, to explain other canons of construction, such as ejusdem generis, which states that general words that follow a list of specific items should be interpreted as applying to items similar to those specifically enumerated, and expression unius est exclusion alterius, which states that if some things are explicitly listed, other things should be presumed excluded. See id. at 408-420.
137 See Sinclair, supra note ___ at 393.
138 See Sinclair, supra note ___ at 396.
139 See Sinclair, supra note ___ at 394-95. This also corresponds to the canon that states that a correct interpretation should not render the provision redundant or superfluous. See id.
140 See Sinclair, supra note ___ at 397-8.
furthers the legislative purpose. From these maxims, we are similarly able to draw implications about the unstated meaning of legislative speech.

It is also possible that other maxims or norms can be derived to aid in interpreting the meaning of legislative speech. Marmor suggests that instead of a cooperative exchange of information, legal conversation should be viewed as a competitive game. The problem with this approach is that games typically require the players to be aware of the rules—what conduct is allowed and what conduct is not. Yet, the rules of statutory interpretation remain unclear, and sometimes even controversial. If the courts actually follow a method of statutory interpretation such that it becomes standard, then this new norm may determine a conversational maxim for legislative speech. In general, the more the legal conversation looks like a cooperative dialogue, or at least like a competitive game with set rules, the more likely implicatures can be used for interpretation as they are in ordinary conversation.

D. Other Types of Legal Conversations

Although much of the relevant legal scholarship has focused on statutes as legal conversation, there are other legal speech acts that lie somewhere between statutes and everyday conversation. Take, for example, a contract. While it has some features in common with a statute, in that it must be interpreted on the words (without extra-lingual clues), it is also akin to everyday conversation because “a contract is meant to be a cooperative

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141 See Sinclair, supra note ___ at 398. These maxims correspond to the canon of construction that states if two interpretations are plausible in the abstract, the one that furthers legislative purpose is the correct choice. See id. at 398-99.

142 See Marmor, supra note ___ at 24.

143 See Marmor, supra note ___ at 25. If the rules are not clear, Grice’s maxims cannot be used: “conversational norms…can only play the role that they do in generating implicatures if the parties to the relevant conversation actually follow them and are known to do so by the conversational parties.” See id. at 26.

144 See Marmor, supra note ___ at 25. For example, there is the ongoing debate about the relevant of legislative history in the interpretation process. See id.

145 See Marmor, supra note ___ at 26.

146 See Marmor, supra note ___ at 28.
venture.”147 Also, like the idealized everyday conversation, many contracts are negotiated and agreed to in commercial contexts that have a rich contextual background shared by the parties.148 For these reasons, Grice’s maxims may be useful in interpreting the contextual information conveyed by contracts.

Still in the area of contracts, Professor Tiersma has used speech act theory to analyze the relationship between words and their legal effect with respect to the offer and acceptance acts of contract formation.149 He makes two main remarks: first, offer and acceptance are not matters of expression or manifestation of intent, but rather they are speech acts that commit the speaker to a particular conduct. Second, he notes that although the intent of the speaker does not create the obligation, it is necessary that the act be accompanied by some state of mind.150

Finally, legal commentators have looked at pragmatics and the legal conversation in different arenas. For example, Ferguson uses the theory of conversational implicatures to determine when a statement is “false” in the realm of bankruptcy discharge. (A false statement is an element of denial of discharge, perjury, and bankruptcy crime.)151 Traditional bankruptcy analysis asked first whether the statement was responsive to the question, and second, whether the statement was literally true. An unresponsive statement that is true in the literal sense will not constitute a false statement.152 Ferguson suggests that a key question is instead how the speaker intended the recipient to understand the statement and whether the speaker intended the hearer to understand the meaning in the literal true

147 See Marmor, supra note ___ at 28.

148 See Marmor, supra note ___ at 28.

149 See Peter Meijes Tiersma, Comment: The Language of Offer and Acceptance, 74 CALIF. L. REV. 189, 189 (1986). Although this particular paper was written when Prof. Tiersma was a student at Boalt, he is currently a professor at Loyola-LA Law School and continues to write on the intersection between language and the law.

150 See Tiersma, supra note ___ at 189.


152 See Ferguson, supra note ___ at 82-83.
sense of in the implied false sense. Tiersma has also applied linguistic analysis to speech acts that violate the law, such as, crimes (bribery, conspiracy, perjury, solicitation) and torts (defamation), as well as areas where the language creates rights (contracts, wills). He also looks at speech acts as protected by, among other things, the First and Fifth Amendments. Kirgis looks at the hearsay analysis using a linguistic framework.

IV. Context and Meaning in Patent Conversation

Patents, not unlike statutes, rely nearly completely on language to communicate information. Similar to legislation, “issued patents are themselves a form of commercial regulation, . . . and the public is entitled to see them made as clear and predictable in scope as practicable.” As noted above, the patent conveys the scope of the inventor’s (or patent holder’s) territory of exclusion – come within this scope and you will be liable for infringement. Competitors view the scope as the area around which they must design their products and business. The patent also provides other, non-scope related information – the patent may signal that the patent holder is technologically savvy or a “player” in the field. The focus of this section will be on the exclusion information, although it is imagined that alternative information conveyed by the patent may also be enhanced by understanding the circumstances surrounding the patent conversation.

A. The Search for Meaning in Patents

The patent claims define the scope of exclusion, and so claim

153 See Ferguson, supra note ___ at 83.

154 See Tiersma, Judge as Linguist, supra note ___ at 269-273.

155 See Tiersma, Judge as Linguist, supra note ___ at 275-283.


157 See Miller, supra note ___ at 194.

158 See, Clarisa Long, Patent Signals, 69 U. CHI. L. REV. 625, 627-28 (2002). The punctuation of the word “player” is my own to set off the slang language and should not be attributed as a quotation to Professor Long.

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construction must begin with the words of the claim.\textsuperscript{159} Words are given their “ordinary and customary” meaning that would be given them by a person having ordinary skill in the art (PHOSITA).\textsuperscript{160} The language chosen by the inventor is key, because “[t]he conventions of word meaning and syntax enable us to express … meanings with great accuracy and subtlety and the skilled man will ordinarily assume that the patentee has chosen his language accordingly.”\textsuperscript{161}

Although the words of the patent claim are most important, claim construction never occurs in a vacuum – the ordinary and customary meaning must come from somewhere. Just as statutory interpretation includes textualists and holistics, patent claim construction has also developed two camps. The standard claim construction procedure is that we look to the words of the claim, and then to intrinsic evidence (the claims, the written description, the drawings, and the prosecution history, if in evidence), and then finally to extrinsic evidence (such as treaties, dictionaries, and experts). Textualists tend to look beyond the intrinsic evidence only in extreme cases, where holistics prefer to view all the relevant evidence. But also like statutory interpretation, these two positions are not so different – at some point, both are looking for the interpretation of the PHOSITA.

B. What Does Patent Conversation Look Like?

Consider, then, the patent document as a conversation between the inventor (as the speaker) and a variety of audiences. The initial conversation occurs between the inventor and the US Patent Office during the patent acquisition process, where the inventor is communicating information about his invention in hopes of obtaining a patent. The subsequent conversations occur between the inventor and competitors, courts, and the public as the inventor communicates the scope of his

\textsuperscript{159} Renishaw PLC v. Marposs Societa’ Per Azioni, 158 F.3d 1243, 1248 (Fed. Cir. 1998).

\textsuperscript{160} Multiform Dessicants, Inc. v. Medzam, Ltd., 133 F.3d 1473, 1477 (Fed. Cir. 1998) (“It is the person of ordinary skill in the field of invention through whose eyes the claims are construed. Such person is deemed to read the words used in the patent documents with an understanding of their meaning in the field, and to have knowledge of any special meaning or usage in the field. The inventor’s words that are used to describe the invention – the inventor’s lexicography – must be understood and interpreted by the court as they would be understood and interpreted by a person in that field of technology.”).

\textsuperscript{161} Kirin-Amgen, Inc. v. Hoechst Marion Roussel, Ltd., [2004] UKHL 46 para. 34.
exclusive right. These conversations can also be analyzed in much the same manner as everyday conversation.

Patent conversation is, of course, different from everyday conversation in many ways. Just as with legal conversation, patents rely on the use of language to communicate and it is assumed that the parties speak the same language. Patents, like legal conversation and everyday conversation, are typically confined to a single topic. Patents, in fact, are required to be limited to a single invention and in this way are more ideal than everyday conversation.

The differences between everyday conversation and patent conversation are, of course, more compelling than the likenesses. Just like legal conversation, patent conversation is limited to the printed language and cannot rely on extra-lingual contextual clues. In the initial patent conversation, between the inventor and the US Patent Office, there is bilateral, or two-way, conversation. The Patent Office can seek clarification of the inventor’s speech and can challenge the inventor’s assertions; the inventor can then respond with clarifications or arguments to the contrary. In the subsequent patent conversation, between the inventor and the public, the conversation is unilateral.

At both the initial and the subsequent levels, it is certain that the conversation is strategic, not cooperative. The initial conversation is fully strategic, with the inventor attempting to obtain the broadest possible scope for the patent and to overcome any objections by the Patent Office. The subsequent conversation is also strategic, both because of the underlying initial conversation as well as the fact that the inventor may be sending differing messages to different audiences. And although interpretation of the patent claim is not supposed to differ based on the audience interpreting the words, the fact is that some audiences are more adept than others at determining the meaning a PHOSITA would give to the terms. Patents often typically contain much patent specific jargon that may not be readily understood by different audiences.\(^{163}\)

\(^{162}\) Patents do have the advantage of having diagrams to aid with communication; however, diagrams are static and impersonal, as opposed to gestures and facial expressions that can change based on the tone and tenor of the conversation.\(^{163}\) See McGreal, supra note ___ at 335 (“Linguistic communities also exist within groups that share a common language. For example, lawyers and other professionals use some words in distinct ways. These words are the group’s jargon. It is high praise to say that the member of a profession can explain her work to non-members without using jargon. To avoid jargon, the speaker must choose words with a shared usage among different linguistic communities (e.g., lawyers and non-lawyers).”).
In patent law, because of the dynamic of trying to get a broad reading (to have the widest exclusionary berth), there is tension between typical strategic behavior and the amount of information disclosed. As discussed with respect to legal conversation, the fact that the conversation is strategic results often in a greater amount of information being included for fear that leaving information to context will result in sub-optimal interpretation by someone with a different strategic interest. In the case of patent law, there is some strategy to omitting information to obtain a broader reading, while still providing enough information to satisfy the requirements of the Patent Office and to allow competitors to design around.164

Patent conversation, like legal conversation, imposes additional hindrances to contextual interpretation beyond the non-cooperation involved. Like legal conversations, the parties who must interpret the patent claims are not party to the conversation that gave rise to the patent; however, unlike in law, there is a written record of that initial conversation between the inventor and the Patent Office in the prosecution history. The boundaries of the conversation are clearer than in legal conversation, although they may not be as defined as in everyday conversation. The initial conversation with the Patent Office begins when the patent application is filed and ends when the patent document is issued. The subsequent conversation may be said to begin when the initial conversation ends; this may not be accurate, however, because the initial conversation becomes an integral part of any subsequent conversation’s context.

C. What Do We Know from Patent Conversation?

This section forthcoming...

- Applying Grice’s maxims to patent claim construction
- Problems with applying the maxims as written

164 See Miller, supra note ___ at 184—5 (“Patentees, who are responsible for the text in their claims, can choose words of greater or lesser generality to define their inventions. … After all, if claim text does not help confine claim scope, claims are not worth the trouble it takes to write them. On the other hand, if a patent’s power to exclude reached no further than its claim’s literal terms, patent protection would unfairly ‘place the inventor at the mercy of verbalism’ and thus, too weak to attract investments in innovation, would fail of its essential purpose.”).
• Modifications to account for the differences in patent conversation

• Coherence with the canons of construction, practice

• Implications for claim construction, for claim drafting

V. Conclusion