

ARTICLE

DOES THE FREEDOM OF SPEECH COVER PATENT LAW?*

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I. INTRODUCTION

Imagine Twitter sues a company for infringing its “tweeting” patent.¹ Twitter is an online platform where users can instantly publish their opinions to a wide audience via 140 character “tweets.”² Twitter’s tweeting patent claims, *inter alia*, a method for sending a message from any device (e.g. a cell phone or computer) to an end user who may view that message from any device.³ This could be a strong patent—giving Twitter the exclusive right to exchange information via social media.⁴ This might be a cause for concern because social media is very important to the dissemination of ideas and speech.⁵ If Twitter enforced their patent against other social media giants,⁶ it could be viewed as a restriction of essential channels of online communication, and thus a free speech violation.⁷

At the end of 2016, Judge Mayer of the United States Court of Appeals for the Federal Circuit wrote a concurrence outlining how patents may violate the First Amendment if they could be used to disrupt mass online communication.⁸ The three patents at issue broadly claimed using telephone networks to execute

1. U.S. Patent No. 8,401,009 (filed Jul. 22, 2008) (issued Mar. 19, 2013). See Renee Quinn, *Twitter Awarded Patent on Tweeting*, IP WATCHDOG (Apr. 6, 2013), <http://www.ipwatchdog.com/2013/04/06/twitter-awarded-patent-on-tweeting/id=38758/> (describing Twitter’s tweeting patent).

2. See Fresh Air, *The Twitter Paradox: How a Platform Designed for Free Speech Enables Internet Trolls*, NPR (Oct. 26, 2016, 1:43 PM), <http://www.npr.org/2016/10/26/499442453/the-twitter-paradox-how-a-platform-designed-for-free-speech-enables-internet-tro> (Twitter is “a place where you can broadcast your raw opinion.”).

3. See ‘009 Patent, *supra* note 1, at col. 9 ll. 30-61.

4. See Quinn, *supra* note 1 (Twitter may have patented “social media at its core.”).

5. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 16-18 (Apr. 2004) (outlining how digital content adds to a “growing tension between intellectual property and freedom of speech.”).

6. Twitter is privy to the “Innovator’s Patent Agreement,” a contract between Twitter and its employees where Twitter promises that any patent obtained from an employee’s contributions to the company will only be used defensively. Adam Messinger, *Introducing the Innovator’s Patent Agreement*, THE OFFICIAL TWITTER BLOG (Apr. 17, 2012, 5:00 PM), <https://blog.twitter.com/2012/introducing-the-innovator-s-patent-agreement.html>

7. See *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1322 (Fed. Cir. 2016) (Mayer, J., concurring) (“Patents constricting the essential channels of online communication run afoul of the First Amendment”). Although the state action doctrine dictates that the Fourteenth Amendment does not apply to private entities, this doctrine has been substantially narrowed and, for the purposes of this paper, will not be considered a limiting principle. See Sapna Kumar, *Life, Liberty, and the Pursuit of Genetic Information*, 65 ALA. L. REV. 625, 637 (2013) (discussing the state action doctrine’s application to patent law).

8. *Intellectual Ventures*, 838 F.3d at 1322.

methods of screening emails for viruses.⁹ The broad claim language, alleges Mayer, gives the patentee the potential to reach every single email, and that makes for ineligible subject matter.¹⁰ In Mayer's view, the Patent and Trademark Office violates the First Amendment when it grants patents that could pose restrictions on a widely used medium for expression, like email.¹¹

Like the claims in *Intellectual Ventures*, Twitter's patent claims could cover ineligible subject matter. Hindrance of free speech is a pestilence no matter the form of communication.¹² By having such broad claims, could the tweeting patent also run afoul of the First Amendment? Does the First Amendment belong in patent law whatsoever? First, this comment reviews how trademark and copyright accounts for First Amendment concerns. Then, these doctrines are analogized to patent law to critique Mayer's concurrence.

II. FREEDOM OF SPEECH MEETS INTELLECTUAL PROPERTY

Freedom of speech is one of the most valued and protected rights in America (to say otherwise would be "un-American").¹³ Freedom of speech, referred to as freedom of expression in some contexts,¹⁴ protects the right to speak,¹⁵ to express oneself and to receive information,¹⁶ and burn flags.¹⁷ Intellectual property law restricts speech by granting an applicant exclusive rights to a form of expression, who may then keep others from "publishing, producing, and performing the speech that they want to publish, produce, and perform."¹⁸ Because intellectual property rights are essentially a constitutionally sanctioned speech restriction, courts

9. *Id.* at 1323.

10. *Id.*

11. *Id.*

12. *See* *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech . . . do not vary' when a new and different medium for communication appears.") (quoting *Joseph Burnstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)).

13. William O. Douglas, *The One Un-American Act*, 7 NIEMAN REP. 20, 20 (Spring 1953), http://1e9svy22oh333mryr83l4s02.wpengine.netdna-cdn.com/wpcontent/uploads/2014/03/Spring-1953_150.pdf.

14. *See* *Consolidated Edison Co. v. Public Svc. Comm'n*, 447 U.S. 530, 533-535 (1980).

15. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . .").

16. *See supra* note 14 and accompanying text.

17. *See* *Texas v. Johnson*, 491 U.S. 397 (1989) (using the First Amendment to protect flag burning).

18. Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts after Eldred, 44 Liquormart, and Bartnicki*, 40 HOUS. L. REV. 697, 698 (2003).

must identify the outer constitutional boundaries of these rights.¹⁹ This section examines the content-neutral/content-based distinction of speech regulations.

A. *The Content-Neutral/Content-Based Distinction*

In *Police Department of Chicago v. Mosley*, a protestor challenged the constitutionality of a city ordinance banning all picketing outside of schools except for peaceful protests involving labor disputes.²⁰ The ordinance “describe[d] permissible picketing in terms of its subject matter,” which the Court found unacceptable because “[a]ny restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”²¹ Justice Marshall stated the guiding principle: “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²²

Since *Mosley*, content-based regulations are presumptively invalid.²³ Therefore, distinction between content-based regulations and content-neutral regulations is crucial. Content-based regulations are tested under strict scrutiny, while content-neutral regulations are tested under an intermediate scrutiny standard.²⁴

A regulation is content-neutral if it is both viewpoint and subject matter neutral.²⁵ A regulation is viewpoint neutral when it does “not discriminate against a particular viewpoint based simply on its disagreement with that viewpoint.”²⁶ Subject matter neutrality means the regulation cannot prohibit speech based on the topic.²⁷ Put simply, the “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”²⁸ For instance, in *Boos v. Barry*, the U.S. Supreme Court found an ordinance to be viewpoint neutral that banned the display of signs critical of a foreign government because it banned

19. *Id.* at 699.

20. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 92 (1972).

21. *Id.* at 95-96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

22. *Id.* at 95.

23. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

24. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 653 (1994).

25. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 978 (3d ed. 2009).

26. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 703 (2011).

27. CHERMERINSKY, *supra* note 25, at 978.

28. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

all criticism regardless of viewpoint.²⁹ However, the regulation still targeted speech based on the subject matter—foreign governments.³⁰ The court applied strict scrutiny and found the regulation was not narrowly tailored to the interest of maintaining good relations with foreign countries.³¹ The role of the First Amendment in trademark law is examined in the next part.

III. TRADEMARKS AND FREE SPEECH

Trademarks can be of “any word, name, symbol, or device, or any combination thereof.”³² To qualify for protection, the mark must be distinctive,³³ non-functional,³⁴ and adopted and used in connection with goods or services.³⁵ Valid trademark rights may be enforced through infringement proceedings.³⁶

Courts recognize the possibility for trademark law to “intrude on First Amendment values.”³⁷ By granting exclusive rights to protectable marks, the Patent and Trademark Office is preventing the public from using certain words. The First Amendment requires courts to enforce these rights while not impermissibly chilling speech.³⁸ The proceeding sections discuss how two aspects of trademark law, distinctiveness and enforcement, interact with the First Amendment and address concerns with their underlying rationales.

A. *Distinctive Trademarks and Free Speech*

A word must “identify and distinguish” one’s goods from another and “indicate the source” to be a valid trademark.³⁹ This is known as the “source identification function” of trademark and is the concept behind distinctiveness.⁴⁰ Words likely perceived as source-identifying by consumers based solely on the nature of the mark and the context of its use are “inherently distinctive.”⁴¹ Words that, over time, become perceived as such by consumers

29. *Boos v. Barry*, 485 U.S. 312, 319 (1988).

30. *Id.* at 319-321.

31. *Id.* at 324.

32. 15 U.S.C. § 1127 (2012).

33. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9-10 (2d Cir. 1976).

34. *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001).

35. *Central Mfg., Inc. v. Brett*, 492 F.3d 876, 881 (7th Cir. 2007).

36. 15 U.S.C. §§ 1114(1)(a), 1125(a)(1)(A).

37. *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989).

38. *See infra* Section III.B.

39. *See* 15 U.S.C. § 1127 (defining “trademark”).

40. WOLFGANG SAKULIN, TRADEMARK PROTECTION AND FREEDOM OF EXPRESSION 42 (2010).

41. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13(a) (1995).

have “acquired distinctiveness.”⁴² There are four categories of distinctiveness.⁴³ The two lowest levels of distinctiveness are generic and descriptive terms.⁴⁴ Generally, generic terms are never protectable.⁴⁵ Descriptive terms are not inherently distinctive, but can acquire distinctiveness through a showing of secondary meaning.⁴⁶

Granting exclusive rights to a word comes with a cost to speech—the word is removed from the public domain.⁴⁷ Courts and scholars agree that free speech compels prohibiting rights to generic terms.⁴⁸ While courts and most scholars similarly agree about descriptive terms,⁴⁹ some speech problems remain.⁵⁰ The following two subsections discuss speech issues with generic and descriptive terms as well as enforcement.

1. Generic Terms

Generic terms refer “to the genus of which the particular product is a species” and are incapable of ever acquiring distinctiveness.⁵¹ For example, the designation CHOCOLATE FUDGE applied to diet soda is generic because it encompasses all diet sodas that taste like chocolate fudge and leaves no room for competitors to describe a similar product.⁵²

Courts and scholars agree that protecting generic terms would unduly burden free expression in the marketplace and harm competition. The Fourth Circuit recognizes that trademark law “protects for public use those commonly used words and phrases that the public has adopted, denying to any one competitor a right to corner those words and phrases by expropriating them from the public ‘linguistic commons.’”⁵³ Likewise, the Second Circuit reasons that there are no justifiable circumstances to bar a competitor from “call[ing] an article by its name.”⁵⁴ Professor

42. *Id.* § 13(b).

43. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

44. *Id.*

45. *See* *Murphy Door Bed Co., Inc. v. Interior Sleep Systems, Inc.*, 874 F.2d 95, 101-03 (2d Cir. 1989) (denying protection for a generic term under the Lanham Act).

46. *Abercrombie*, 537 F.2d at 9.

47. Volokh, *supra* note 18, at 698.

48. *See* Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1098 (2002) (stating this proposition); *see also* William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 72 (2008) (discussing problems with preventing the public from using generic terms).

49. McGeeveran, *supra* note 48, at 82; *see infra* Section III.A.2.

50. Ramsey, *supra* note 48, at 1099; *see infra* Section III.A.2.

51. *Abercrombie*, 537 F.2d at 9.

52. *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 307-08 (3d Cir. 1986).

53. *America Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 821 (4th Cir. 2001).

54. *Abercrombie*, 537 F.2d at 9.

William McGeeveran echoes sentiments that the loss of rights in generic terms inherently accommodates speech concerns.⁵⁵ Robert N. Kravitz argues that disallowing registration of generic marks “buffer[s] it from intruding on First Amendment values” because, otherwise, the interference caused by removing generic words from the public domain would “severely intrud[e] on others’ freedom of expression.”⁵⁶ Interestingly, Kravitz notes a similarity between this doctrine and “the idea/expression dichotomy in copyright, which is widely regarded as embodying the definitional balance between protecting speech rights and guarding the rights of creators of intellectual property.”⁵⁷

2. Descriptive Terms

Descriptive marks acquire distinctiveness through a showing of secondary meaning.⁵⁸ Achieving secondary meaning means a mark has achieved a source-identifying function.⁵⁹ For example, the designation EVER-READY on batteries is descriptive because it describes the product’s quality of being ever-ready, but has secondary meaning because its use creates a public awareness of the product coming from a single source.⁶⁰ Many courts and scholars believe showing secondary meaning is necessary to alleviate speech concerns.⁶¹

B. Trademark Infringement

Trademark infringement requires the plaintiff to show, *inter alia*, the defendant’s mark is “likely to cause confusion.”⁶² Trademark law exists to prevent customer confusion, so “the requirement that a plaintiff prove confusion insulates most run-of-the-mill trademark actions from First Amendment challenges.”⁶³

The inconsistent application of likelihood of confusion tests

55. McGeeveran, *supra* note 48, at 72.

56. Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131, 136 (1989).

57. *Id.*; see *infra* Part IV.A.

58. See *supra* note 46 and accompanying text.

59. See *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 795 (5th Cir. 1983) (Secondary meaning is “the necessary link in the minds of consumers between a product and its source.”).

60. *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 378-81 (7th Cir. 1976).

61. McGeeveran, *supra* note 48, at 72-73.

62. 15 U.S.C. §§ 1114(1)(a), 1125(a)(1).

63. Kravitz, *supra* note 56, at 136. See also Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 797-98 (2004) (“Traditional federal trademark law doctrinally averted collision with free speech interests [unless] . . . consumers were likely to be confused.”).

amongst courts conflicts with speech values.⁶⁴ Professor Ann Bartow notes the subjectivity of judges in confusion analysis.⁶⁵ An empirical study performed by Professor Barton Beebe partly confirms Bartow's grievances.⁶⁶ Albeit, in response to *eBay v. MercExchange*,⁶⁷ courts are increasingly looking to actual evidence of harm before deciding to enjoin.⁶⁸ The result of inter- and intra-circuit inconsistency is a series of rulings that notable scholars regard as free speech violations.⁶⁹

Also, enforcement threats can chill speech. Competitors may choose silence over risking an expensive lawsuit.⁷⁰ A lot of time and expense are required to perform the likelihood of confusion test, and blackletter trademark law prevents early resolution of cases.⁷¹ In turn, producers may avoid providing information on their products, especially through the use of descriptive terms, for fear of an infringement suit.⁷² Fortunately, organizations like Lumen post cease-and-desist letters online to shame chilling practices and promote discussion.⁷³

IV. COPYRIGHT AND BUILT-IN FIRST AMENDMENT PROTECTIONS

The Constitution permits exclusive ownership of copyrights.⁷⁴ Modern copyright law is codified in the Copyright Act of 1976.⁷⁵ Copyrightable material includes literary, musical, or dramatic works and excludes ideas, processes, or systems.⁷⁶ When someone violates a copyright, the holder may enjoin them.⁷⁷ Therefore, copyright can limit certain forms of expression.⁷⁸ This suggests the IP Clause of the Constitution is incompatible with the First

64. See McGeveran, *supra* note 48, at 61 (noting how the "lack of clarity" in applying likelihood of confusion standards increases risks to free speech).

65. Bartow, *supra* note 63, at 764 (The standard has reduced to whether the plaintiff can articulate "plausible scenarios in which some unquantified cohort of harried, inattentive, and uninformed consumers are likely to experience confusion.").

66. See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581 (2006) (surveying the thirteen circuits and finding significant variation amongst them).

67. *eBay v. MercExchange*, 547 U.S. 388 (2006).

68. Rebecca Tushnet, *What's the Harm of Trademark Infringement?*, 49 AKRON L. REV. 627, 627-28 (2016).

69. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1710-13 (1999) (citing several case decisions violating free speech).

70. Ramsey, *supra* note 48, at 1163-64.

71. McGeveran, *supra* note 48, at 61-66.

72. Ramsey, *supra* note 48, at 1166-67.

73. Lumen Database, <https://lumendatabase.org> (last visited May 3, 2017).

74. U.S. CONST. art. I, § 8, cl. 8.

75. Copyright Act of 1976, Tit. I, § 101.

76. *Id.*

77. 17 U.S.C. § 502 (1976).

78. *Eldred v. Ashcroft*, 537 U.S. 186, 187 (2003).

Amendment. However, “copyright law contains built-in First Amendment accommodations,” the fair use defense and idea/expression dichotomy, that shield it from First Amendment scrutiny.⁷⁹ For brevity, only the idea/expression dichotomy is detailed in the following section.

A. *Idea/Expression Dichotomy*

The scope of copyrightable subject matter is often defined by free speech principles.⁸⁰ Facts, data, and ideas are not eligible for copyright protection, but expressions concerning them are.⁸¹

The idea/expression dichotomy is one of the most omnipresent principles in copyright law.⁸² Courts generally use “an ‘abstractions’ test or a ‘patterns’ analysis, which purports to place a given work along a continuum between idea and expression.”⁸³ The tests are imprecise and require courts to look into each case with context.⁸⁴ For example, the Ninth Circuit in *D.C. Comics v. Towle* found comic book characters copyrightable because the characters are “sufficiently delineated” with “consistent, widely identifiable traits.”⁸⁵

Separating ideas from expressions helps protect nonliteral elements of a work.⁸⁶ But at what point does an idea become a form of expression? The movie “Avatar” is arguably a plot-point for plot-point copy of “Ferngully: The Last Rainforest.”⁸⁷ The idea/expression line is regarded as an acceptable balance between copyright and free speech interests.⁸⁸ However, this line makes it difficult and risky to reproduce other people’s expressions despite a general need to encourage creative works.⁸⁹

David Olson argues that courts should reject the idea that copyright is protected due to just “a couple of safeguards.”⁹⁰ These

79. *Eldred*, 537 U.S. at 219.

80. *Id.* at 218-19.

81. *Mazer v. Stein*, 347 U.S. 201, 214; 17 U.S.C. § 102(b).

82. Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 322 (1988).

83. *Id.* at 324.

84. *Id.*

85. *D.C. Comics v. Towle*, 802 F.3d 1012, 1019 (2015); *but see Baker v. Selden*, 101 U.S. 99, 102 (1879) (holding that the owner of a copyright on a book describing his system of accounting could not prevent people from using it).

86. MARY LAFRANCE, *COPYRIGHT LAW IN A NUT SHELL* 30 (3d ed. 2011).

87. Sam Adams, *Just How Unoriginal are Hollywood Movies—And Does it Matter?*, INDIEWIRE (June 9, 2015, 3:49 PM), <http://www.indiewire.com/2015/06/just-how-unoriginal-are-hollywood-movies-and-does-it-matter-130883/>.

88. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192 (1969).

89. *Id.*

90. David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50

are not sufficient to protect against all First Amendment claims.⁹¹ Courts only use this reasoning as a practice in judicial economy.⁹² Copyright law’s two-hundred-year development is what makes it comport with the demands of the First Amendment. If copyright law [happens to] conform to “these traditional contours,” then “a court may presume that the law adequately protects speech interests, and may forgo First Amendment review.”⁹³

V. DOES THE FREEDOM OF SPEECH COVER PATENT LAW?

A. Judge Mayer’s First Amendment Proclamation in *Symantec*

Intellectual Ventures v. Symantec was a case before the Federal Circuit regarding three patents owned by Intellectual Ventures and directed towards rerouting and screening emails for viruses.⁹⁴ The Federal Circuit held that all asserted claims of all three patents contained ineligible subject matter under 35 U.S.C. § 101.⁹⁵

What is remarkable about the court’s opinion is not its invalidity determination,⁹⁶ but the concurrence from Judge Mayer. In it, Mayer boldly claims that all appealed claims are ineligible because they constrict the essential channels of online communication and thus “run afoul of the First Amendment.”⁹⁷ The concurrence starts off with the fundamental principle that “[t]he Constitution protects the right to receive information and ideas”⁹⁸ “Patents, which function as government-sanctioned monopolies, invade core First Amendment rights when they are allowed to obstruct the essential channels of scientific, economic, and political discourse.”⁹⁹ In support of this proposition, Mayer cites to *United States v. Playboy Entertainment Group, Inc.*, which says the difference between laws banning and those burdening

B.C.L. REV. 1393, 1414 (2009).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1311 (Fed. Cir. 2016).

95. *Id.* at 1313, 1316, 1322.

96. Daniel Nazer, *Stupid Patent of the Month: Mega-Troll Intellectual Ventures Hits Florist with Do-It-On-A Computer Scheduling Patent*, ELECTRONIC FRONTIER FOUNDATION (March 31, 2016), <https://www.eff.org/deeplinks/2016/03/stupid-patent-month-mega-troll-intellectual-ventures-hits-florist-do-it-computer> (talking about how big of a “patent troll” Intellectual Ventures is).

97. *Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1322 (Fed. Cir. 2016) (Mayer, J., concurring)

98. *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557 (1969)).

99. *Intellectual Ventures*, 838 F.3d at 1322.

speech is merely “a matter of degree.”¹⁰⁰

Mayer objects to these patents because of their “potential to disrupt, or even derail, large swaths of online communication.”¹⁰¹ All three patents contain vague claims that could reach nearly all email traffic.¹⁰² Mayer argues that the subject matter requirement is like the “built-in” protection of copyright law in that it keeps patents from abridging the freedom of speech.¹⁰³ Given the pervasiveness of online communication in modern life,¹⁰⁴ section 101 can preserve the openness of the Internet and prevent chilling effects that could result from a patent reaching all email traffic. Nowhere is the interest in keeping patent monopolies within their scope “more compelling than in the context of claims that threaten fundamental First Amendment freedoms.”¹⁰⁵ Mayer concludes that “[a] robust application of section 101 at the outset of litigation will ensure that the essential channels of communication remain ‘free to all men and reserved exclusively to none.’”¹⁰⁶

Judge Mayer suggests section 101 functions like the idea/expression dichotomy in copyright law by addressing First Amendment concerns. The next section looks at how freedom of speech could function in patent law and makes further analogies between patent law and the First Amendment in other areas of intellectual property.

B. How Freedom of Speech Could Function in Patent Law

The obvious problem with Judge Mayer’s concurrence is it unnecessarily invokes the First Amendment. The Supreme Court has long held that a case should not be decided on constitutional grounds if there are other grounds for decision.¹⁰⁷ Deciding on constitutional grounds is “the ultimate heavy weapon of judicial interpretation.”¹⁰⁸ The patents in *Intellectual Ventures* were invalidated by the majority on eligibility grounds.¹⁰⁹ Despite potential constitutional issues, there is no reason to bring up the

100. *Id.* (quoting *U.S. v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000)).

101. *Id.* at 1322.

102. *Id.* at 1322-23.

103. *Id.* at 1323-24 (“Section 101 creates a ‘patent-free zone’ and places within it the indispensable instruments of social, economic, and scientific endeavor.”).

104. *Id.* at 1324 (saying it drives innovation and supplies a widely-used platform for political dialogue).

105. *Id.*

106. *Id.* at 1325 (quoting *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127 (1948)).

107. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (“The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.”).

108. McGeveran, *supra* note 48, at 98.

109. *See supra* Part V.A.

First Amendment in this context.

But perhaps there is a free speech issue ripe for judicial review in current patent doctrine. After all, Congress's ability to issue patents is circumscribed by the First Amendment.¹¹⁰ The answer to the title of this paper, does the First Amendment cover patent law, is a simple yes, but the question then becomes: does the First Amendment belong in patent law jurisprudence?

In his concurrence, Judge Mayer suggests that section 101 should function the same way the idea/expression dichotomy functions in copyright.¹¹¹ It should be considered a "built-in" protection, balancing First Amendment issues with the grant of exclusive rights to a patent.¹¹² Litigants must pass the "threshold test" of section 101 before proceeding to other validity arguments, so this seems like a good place to assess whether a patent has the potential to run afoul of First Amendment principles.¹¹³ This argument makes sense because as more patents are issued, more technology is covered, and society becomes more reliant on using it to communicate.¹¹⁴ This may even be an extension of Kravitz's comparison of generic terms to the idea/expression dichotomy.¹¹⁵ Perhaps it is time to consider First Amendment principles when defining patentable subject matter.

Arguing in favor of Judge Mayer, he missed an apt analogy to protectability in trademark law.¹¹⁶ Only marks with a certain degree of distinctiveness are protected.¹¹⁷ The compelling public interest in source identification justifies restrictions on speech via prohibition of exclusive rights in generic and descriptive terms.¹¹⁸ Generic and descriptive terms are not protectable because they restrict speech and make it difficult for competitors to compete.¹¹⁹ Similarly, the compelling interest "in seeing that patent monopolies . . . are kept within their legitimate scope" may justify restricting a patent covering forms of speech.¹²⁰ Like how generic marks are unprotected because they are incapable of denoting source and prevent others from using common language, patents

110. *Eldred v Ashcroft*, 537 U.S. 186, 218-21; *see supra* Part II.

111. *See supra* note 103 and accompanying text.

112. *Intellectual Ventures*, 838 F.3d at 1323-24.

113. *Id.* at 1323.

114. *See* Calendar Year Patent Statistics, USPTO, <https://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports.htm> (showing an increase in the number of patents being issued over the years).

115. *See supra* note 56 and accompanying text.

116. *See supra* Section III.A.

117. *See supra* notes 39-46 and accompanying text.

118. *See supra* Sections III.A.1-2.

119. *See supra* Section III.A.1-2.

120. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016).

covering an entire mode of communication should be invalid because public interest compels access to these channels. It would be unfair to forbid others from developing technology within similar communication channels.

Furthermore, patent enforcement may need First Amendment balancing. Like how threats of trademark enforcement chill speech,¹²¹ threats of patent infringement may lead others to abandon legitimate, noninfringing products.¹²² If the noninfringing product involved a technology associated with speech, like the tweeting patent, Twitter could chill speech by threatening an infringement action against a company working to improve upon social media communication. The public then loses out on the technological benefit whether Twitter's claim is viable or not. Accordingly, eligibility should also account for the ability of a patent to chill speech.

Finally, if Intellectual Ventures proved validity and infringement, should Symantec be able to defend by arguing that the patent is so closely tied to speech that the infringement laws are functioning as impermissible regulations on speech? Viewed this way, infringement laws could be content-based restrictions on speech because they are looking to the content of the defendant's alleged infringement.¹²³

Today, patent law's indifference to the First Amendment is compounded by the fact that courts are invalidating software patents in droves.¹²⁴ Furthermore, the seventy-years-plus term of a valid copyright creates much more potential for harms to free speech than patent law's limit of twenty years of enforceability. But, referring to the majority's opinion in *Intellectual Ventures*, it seems that current eligibility law functions well enough to invalidate patents without the need to explicitly invoke the First Amendment. Some of the arguments in favor of Judge Mayer are tenuous and could pose a large threat to the patentee's exclusive right to their inventions. Ultimately, the current patent system adequately handles free speech concerns.

121. See *supra* Section III.B.

122. See Rudy Telscher, *Patent Fee Shifting Stops Not Only Patent Trolls But Industry Bullies Too*, IPWATCHDOG (Sept. 16, 2015), <http://www.ipwatchdog.com/2015/09/16/patent-fee-shifting-stops-not-only-patent-trolls-but-industry-bullies-too/id=61575/> (describing a "kind of abusive patent litigation; namely, a large company asserting a patent it pulled 'off the shelf' against a small start-up competitor").

123. See *supra* Section II.A.1; see also Danton Bryans, *Unlocked and Loaded: Government Censorship of 3D-Printed Firearms and a Proposal for More Reasonable regulation of 3D-Printed Goods*, 90 IND. L.J. 901 (2015) (recommending "treating CAD files as expressive free speech").

124. See Susan Decker, *When a Tech Patent is Neither*, BLOOMBERG (Aug. 17, 2016), <https://www.bloomberg.com/news/articles/2016-08-17/why-hundreds-of-software-patents-are-being-thrown-out> (describing the post-Alice fate of many software patents).

VI. CONCLUSION

The First Amendment debuted in patent law jurisprudence with Judge Mayer's concurrence in *Intellectual Ventures v. Symantec*, although free speech already occupies other areas of intellectual property. Judge Mayer suggests built-in protections for patent law when defining eligible subject matter like how the idea/expression dichotomy functions in copyright law. Although seemingly unnecessary, it is possible that First Amendment doctrine may accumulate real estate in patent law similar to its gradual development in trademark and copyright law. However, patent law currently functions well enough to obviate the need for invoking First Amendment doctrine.

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