

Intellectual Property and the Constitution
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Abstract
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This presentation will address a crucially important piece of the relationship between intellectual property and the Constitution: the role of the free speech clause in defining boundaries to the creation and definition of property and property-like rights in communicative materials. In recent years, there has been much debate on one hand about the extent to which copyright is an independent source of speech-enhancement and on the other about how to resolve the existing tension between granting copyright and effectuating the first amendment. Unless, however, one takes the position that the first amendment abrogates the copyright clause – which I do not -- some degree of control over communicative works clearly can be awarded to private entities consistent with the Constitution. Free speech principles may play some role in dictating how the rules that protect ownership in expression are shaped (fair use, for example), but, as recent disputes like that in *Eldred* show, once copyright protection for a kind of material is agreed to be legitimate, the first amendment, for better or for worse, is unlikely to come heavily into play.

Where free speech principles ought clearly to have the most bite – and where they badly need more vigorous scholarly consideration – is not inside the copyright clause, but on its outside, patrolling those borders that keep ownership from eating up the public domain. This means, however, that the constitutional conversation about speech rights versus property rights must properly extend well beyond the boundaries of traditional copyright and be generalized to include the entire array of existing and proposed types of intellectual property interests in

communicative material.

The need to expand the horizon of discussion in this way is clear from the history of recent decades. An increasingly common response to the conclusion that the copyright clause is too narrow to protect something that is potentially valuable is to expand (or even create new) doctrines – examples included broadened trademark laws, the creation of publicity rights, reliance on vague notions of misappropriation, the drafting of sui generis statutes, and the stretching of trade secrecy law – to fill the blanks. But, arguably, the default position is that, with the exception of copyright for which the Constitution provides, speech must be free. That default position, however, cannot be maintained if, at the same time, IP rights also freely proliferate. A coherent theory of free speech is not limited only to such traditional interests as avoidance of state censorship; what must rationally be part of free speech is protection for those things that are the fundamental inputs without which meaningful speech activities cannot occur. In other words, freedom of speech depends on, and necessarily defends, a rich public domain. Or as I have termed it, free speech includes a right to have something to say. Although this aspect of free speech theory is underdeveloped, intimations of its existence are plentiful, and only by factoring it into our analysis can we arrive at principled standards for determining which aspects of content can and cannot legitimately be owned.

If a fundamental purpose of the first amendment is ensure the protection of a strong public domain, it would mean that communicative materials could be assigned to private control only if they are legitimately the subject of copyright or if the noncopyright intellectual property regime is used to achieve ends that would muster under general first amendment principles (prevention of fraud or misrepresentation, for example). Material in the public domain could

not – absent extraordinary circumstances – be withdrawn from it and subjected to private rights.

Much in free speech doctrine and theory supports the claim that the first amendment is a bulwark of protection for a rich public domain. There are, however, chips in the supporting structure. They exist, I would argue, not because the theory is wrong, but because courts and legislators that have failed to view proliferating demands for broad or new property rights through a consistent free speech lens. Instead, they have come up with ad hoc solutions to specific disputes, often failing even to acknowledge the possibility that the property rights in the speech in question could have first amendment implications. As a result, responses to claims for commodification have been somewhat contradictory and confusing. Although application of a set of consistent first amendment principles to such claims will not eliminate all controversy, it would go far toward introducing a coherence that seems unachievable at present from any other source.