Accommodating the Evolution of Intellectual Infrastructure: Applying Lessons from Trademark and Copyright to Improve Patent Law

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Intellectual property distinguishes between foundational intellectual assets that reside in the public domain and particularized creations that are appropriate subjects of exclusive rights. In some sense, this is a distinction between assets that are "raw" and "cooked." Raw materials such as generic words, ideas, natural laws, and physical phenomena constitute intellectual infrastructure that anyone may freely use in commercial, creative, and inventive pursuits. Conversely, cooked assets such as coined terms, particularized expressions, and specific inventions are eligible for intellectual property protection.

In a curious process, intellectual assets can become so "cooked" that they become "raw." In other words, particularized intellectual assets that were once eligible for intellectual property protection can become so widely-used and necessary for downstream productivity that they become generalized assets freely available in the public domain. Thus trademark law prohibits exclusive rights over marks that become generic words. In copyright, the idea-expression dichotomy and the scenes a faire doctrine preserve expressions that society perceives as stock or standard in the public domain. Open access to these assets advances the utilitarian goals of productivity that lie at the heart of the intellectual property system

Patent law lacks this sensitivity to the evolution of intellectual infrastructure. A doctrine that could potentially address this deficiency is the prohibition against patenting natural laws, physical phenomena, and abstract ideas. However, courts have construed this doctrine in a very narrow and rigid manner. The doctrine does not recognize that certain *patented technologies* may become so widely-used and facilitative of downstream development that they attain the status of basic infrastructure, thus meriting liberalized access. The task remains for patent law to better accommodate this evolution.

The Supreme Court's recent decision in *eBay v. MercExchange* offers just this opportunity. Following *eBay*, courts must now consider factors such as the relative hardship of an injunction and the public interest in deciding whether to protected patented inventions with a property rule or liability rule. Drawing lessons from trademark and copyright, I argue for a two-tiered approach in which ordinary patented applications would continue to receive property rule protection, but courts would have the option of protecting patented intellectual infrastructure with a liability rule. This approach would enhance access to proprietary infrastructure while still maintaining incentives to invent.