Patent Law and the First Amendment

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There is an enormous scholarly literature, and substantial body of case law, addressing the intersection between copyright law and the First Amendment. There is almost no literature, and absolutely no case law, addressing the analogous question of patent law's relationship to the First Amendment. The implicit reason behind this disparity seems to be a widespread belief that patents cannot restrict speech. But this assumption is untrue. As I will explain, patents can restrict speech in just the same way as copyrights can, and speech-restrictive patents are neither particularly rare nor confined to limited areas such as software. In fact, patent law may well pose a greater threat to free speech than copyright law because patents confer stronger monopoly rights and lack the internal speech-protections of copyright law such as the fair use defense. What follows is that the current state of affairs -- where courts and scholars pay great attention to free speech concerns in copyright law but pay no attention to the issue in patent law -- is badly unbalanced. This Article aims to recalibrate this balance. Patent courts need to think more carefully about how patent protection interacts with the First Amendment. In this vein, the Article proposes some doctrinal reforms that help ameliorate the tension between patent law and free speech.

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