

Exhausted? The Effect of Post-Sale Restrictions and Location on Patentees’ Rights

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I. OVERVIEW

Impression Products, Inc. (Impression), one of many remanufacturing companies, seized an opportunity to reduce the hefty price of printer ink cartridges by refilling and reselling empty toner cartridges originally sold by Lexmark International, Inc. (Lexmark).¹ Lexmark obtained several patents protecting the design and manufacturing of these cartridges, which it sells globally.² Concerned that Impression was capitalizing on this business problem, Lexmark developed a strategy to combat the lost profits by giving consumers two options: first, customers could buy a toner cartridge at full price, or second, customers could buy a discounted cartridge through the “Return Program.”³ The Return Program allowed for the purchaser to buy the cartridge for 20% off but required that she sign a contract restricting the purchaser from using the cartridge once and then reselling the empty cartridge to anyone but Lexmark.⁴ Lexmark installed microchips into the cartridges to enforce the purchase agreement.⁵ However, Impression undermined Lexmark’s strategy by developing technology that rendered the microchip ineffective.⁶

Lexmark brought suit claiming two specific patent infringements.⁷ The first was for Impression’s remanufacturing of Lexmark’s cartridges purchased in the United States, an alleged violation of the specific restrictive clause in Lexmark’s contracts prohibiting reuse and resale.⁸ The second was for Lexmark cartridges sold abroad that Impression

1. Impression Prods., Inc. v. Lexmark Int’l, Inc., 137 S. Ct. 1523, 1529 (2017).

2. *Id.*

3. *Id.* at 1529-30.

4. *Id.*

5. *Id.* at 1530.

6. *Id.*

7. *Id.*

8. *Id.*

remanufactured and imported back into the United States without authorization.⁹ Essentially, the court had to determine how much control a manufacturer could exert over products that had already been sold.¹⁰ Impression filed a motion to dismiss the claims on the basis that Lexmark had exhausted its patent rights over both sets of cartridges.¹¹

The United States District Court for the Southern District of Ohio granted the motion dismissing the claim over the domestically sold cartridges but denied the motion pertaining to the cartridges sold abroad.¹² On appeal, the United States Court of Appeals for the Federal Circuit relied on precedent to determine that Lexmark had not exhausted its patent rights over cartridges sold in the United States, reasoning that a patentee may enforce post-sale restrictions that have been lawfully and clearly communicated.¹³ Furthermore, the Federal Circuit held that Lexmark had not exhausted its patent rights for the cartridges sold abroad because, as the court opined, the patentee must benefit from selling in the American market for exhaustion to apply.¹⁴ On appeal, the Supreme Court of the United States *held* that a patentee exhausts its patent rights upon first sale—domestically as well as abroad—regardless of any contracted restriction. *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 1523, 1531 (2017).

II. BACKGROUND

The United States Congress has the sole authority to regulate patents and copyrights in the United States through Article I, Section 8, Clause 8 of the United States Constitution, which states that Congress has the power “to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁵ Article I, Section 8, Clause 8 provides constitutional authority for Congress to regulate patents and copyrights by giving authors and inventors a limited monopoly over their respective ideas.¹⁶ The Patent Act provides that this limited monopoly grants inventors the ownership right to exclude all others from making, using, or vending their invention without their

9. *Id.*

10. *See id.* at 1529.

11. *Id.* at 1530.

12. *Id.* at 1530-31.

13. *Id.* at 1530.

14. *Id.* at 1531.

15. U.S. CONST. art. I, § 8, cl. 8.

16. *See id.*

authority.¹⁷ This exclusive property right incentivizes inventors and authors to create for the benefit of society in return for a financial award when another, upon permission, buys, uses, or sells said creation.¹⁸ A patent infringement case can only be brought when the patentee still possesses rights over her invention and someone makes, uses, or sells her invention without her authority.¹⁹

Patent law and copyright law have had a long, historical relationship and possess a “strong similarity . . . and identity of purpose.”²⁰ For example, both patent law and copyright law have been shaped by the common law principle against restraints on alienation.²¹ A restraint on alienation is a common law principle that voids a sale of real property when there are restrictions on the conveyance prohibiting the buyer from selling or transferring interest.²² This public policy concept prevents ownership rights from lingering as property flows through the market as it would not only be inconvenient, but very confusing.²³

Restraints on alienation have provided the foundation for an essential feature of copyright law—the first sale doctrine.²⁴ Copyright law secures a limited monopoly over an author’s work.²⁵ The owner of a copyright has the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership.”²⁶ Copyright ownership is limited by the first sale doctrine, which gives the owner of a copy of a copyrighted work the right to sell or otherwise dispose of her copy.²⁷ Furthermore, the first sale doctrine is not restricted by geographical location as it applies to copies lawfully made in the United States as well as abroad.²⁸ Therefore, courts do not have to try to “enforce restrictions upon difficult-to-trace, readily movable goods.”²⁹

Like copyright law’s manifestation of restraints on alienation through the first sale doctrine, patent law has its own method for

17. See 35 U.S.C. § 154 (2012).

18. *United States v. Unis Lens Co.*, 316 U.S. 241, 250 (1942).

19. 35 U.S.C. § 271(a).

20. *Bauer & Cie v. O’Donnell*, 229 U.S. 1, 13 (1913).

21. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013); see also *Straus v. Victor Talking Mach. Co.*, 243 U.S. 490, 501 (1917).

22. RESTATEMENT (FIRST) OF PROPERTY § 404 (AM. LAW INST. 1944).

23. See *Straus*, 243 U.S. at 501; see also *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659, 661 (1985).

24. See *Kirtsaeng*, 568 U.S. at 538.

25. See U.S. CONST. art. I, § 8, cl. 8.

26. 17 U.S.C. § 106(3) (2012).

27. See 17 U.S.C. § 109(a).

28. See *Kirtsaeng*, 568 U.S. at 530.

29. See *id.* at 538.

ensuring that full ownership rights are transferred in a conveyance of real property. Patent law's right to exclude is not unlimited, for its purpose is not "the creation of private fortunes for the owners of patents"—which would undermine the purpose of patent law.³⁰ Once a patent owner sells an item and secures the financial reward, "the purpose of the patent law is fulfilled," and there is "no basis for restraining the use and enjoyment of the things sold."³¹ In other words, once ownership has passed from the inventor to the purchaser through a sale, all patent rights over that item are terminated.³² This is known as the doctrine of patent exhaustion.³³

The doctrine of patent exhaustion has limited a patentee's rights for almost two centuries.³⁴ Case law has determined that express provisions allowing the patentee to retain rights in the product do not defeat the doctrine of patent exhaustion.³⁵ In *United States v. Univis Lens Co.*, an eyeglass lens company authorized the sale of its lenses on the condition that the items were sold at a fixed price.³⁶ The Supreme Court ruled that the restrictive conditions were extinguished by patent exhaustion, stating that the law, historically, "affords no basis for restraining the use and enjoyment of [a] thing sold" after a patentee "receive[s] his reward for the use of his invention by the sale of the article."³⁷ The Court reasoned that if the manufacturer had been allowed to control the price after the initial sale, his monopoly would have been extended far beyond the right granted in the patent statute.³⁸

Patent exhaustion is not invulnerable and can be circumvented in certain circumstances. Courts have applied the doctrine less fervently in licensing agreements. For example, in *United States v. General Electric Co.*, the Supreme Court ruled that a patentee may fix the price at which a product can be sold when a patentee grants the right to sell to a licensee.³⁹ Furthermore, in *General Talking Pictures Corp. v. Western Electric Co.*, the Supreme Court held that a licensee's sale of a product cannot exhaust the rights of the patentee/licensor when the licensee does not have the authority to make a sale.⁴⁰ Then, in *Mallinckrodt, Inc. v. Medipart, Inc.*,

30. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917).

31. *United States v. Univis Lens Co.*, 316 U.S. 241, 251 (1942).

32. *See Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008).

33. *Univis*, 316 U.S. at 250.

34. *See Quanta*, 553 U.S. at 625. The first application of the doctrine of patent exhaustion was in 1853 in *Bloomer v. McQuewan*, 55 U.S. 539, 549 (1853).

35. *See Bos. Store of Chi. v. Am. Graphophone Co.*, 246 U.S. 8, 20, 25 (1918).

36. *Univis*, 316 U.S. at 249-51.

37. *Id.* at 251.

38. *Id.* at 252.

39. *United States v. Gen. Elec.*, 272 U.S. 476, 489 (1926).

40. *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 305 U.S. 124, 127 (1938).

the Supreme Court extended the scope of its patent exhaustion rulings on licensing agreements and applied them to the sale of “single use only” patented medical devices.⁴¹ There, the Supreme Court held that a patentee may lawfully restrict a post-sale use or resale if the restriction is communicated and it is within the scope of the patent.⁴²

Despite the limited exception in *Mallinckrodt*, the Supreme Court has generally held that patent exhaustion applies regardless of an express and/or lawful restriction. For example, in *Quanta Computer, Inc. v. LG Electronics, Inc.*, the technology company LG Electronics licensed to sell its microprocessors to Intel Corporation but required Intel to inform its purchasers that they could only use its product with other specified products it manufactured.⁴³ However, because Intel was authorized to sell, the Supreme Court held that the initial authorized sale “[takes] its products outside the scope of the patent monopoly,” regardless of any post-sale restriction, and patent rights can no longer be asserted.⁴⁴

While there is a long history of precedent applying the patent exhaustion doctrine in the United States, there is not an extensive history of courts, in general, ruling on international exhaustion. Over 125 years ago, the Supreme Court decided that a patentee’s rights do not exhaust upon resale of its product when the transaction takes place abroad and the patentee has nothing to do with the resale.⁴⁵ The Supreme Court did not revisit the issue until 2001, in *Jazz Photo Corp. v. International Trade Commission*.⁴⁶ In *Jazz Photo*, Fuji Photo Film Co. manufactured and sold “single-use” cameras overseas, which had been remanufactured and imported back into the United States.⁴⁷ The court reasoned that exhaustion only applies when “the authorized first sale . . . occurred under the United States patent” because the patentee must receive the reward for selling in American markets.⁴⁸ Thus, the Court held that a foreign sale does not trigger the doctrine of patent exhaustion.⁴⁹

While the case law on international patent exhaustion is sparse, under the first sale doctrine, copyright law has been more comprehensive regarding the making, use, and vending of copyrighted works abroad. For example, in *Kirtsaeng v. John Wiley & Sons*, a student purchased

41. *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 701 (1992).

42. *Id.* at 709.

43. *Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 623-24 (2008).

44. *Id.* at 638.

45. *See Boesch v. Graff*, 133 U.S. 697, 702 (1890).

46. *Jazz Photo Corp. v. Int’l Trade Comm’n*, 264 F.3d 1094, 1105 (Fed. Cir. 2001).

47. *Id.* at 1098.

48. *Id.* at 1105.

49. *Id.* at 1110-11.

textbooks in Thailand that were published by John Wiley & Sons, Inc., but they were printed outside of the United States.⁵⁰ When the student then moved back to the United States, he imported the books he bought and resold them.⁵¹ The Supreme Court held that the “first sale doctrine applies to protect a buyer or other lawful owner of a copy (of a copyrighted work) lawfully manufactured abroad.”⁵² The Court reasoned that although the first sale doctrine does not mention specific restrictions on sales geographically, it arises out of the “common law doctrine [of restraints on alienation, which] makes no geographical distinctions”; therefore, based on a “straightforward application,” location should not restrict the first sale doctrine abroad.⁵³

III. COURT’S DECISION

In the noted case, the Supreme Court applied the patent exhaustion doctrine and the first sale doctrine to analyze whether contracted restrictions or location could affect post-sale rights of the patentee.⁵⁴ The first issue this Court examined was “whether a patentee that sells an item under an express restriction on the purchaser’s right to reuse or resell the product may enforce that restriction through an infringement lawsuit.”⁵⁵ The Court first applied years of historical precedent to illustrate why an express restriction on a sale does not reserve ownership rights to the patentee.⁵⁶ Then, the Court distinguished *Mallinckrodt, Inc. v. Medipart, Inc.* and described why the Federal Circuit ruling was in error—ultimately abrogating *Mallinckrodt*.⁵⁷

The Court began its analysis with a declaration by Lord Coke in 1628 that a restriction on the resale placed by an owner after he has sold the item “is void, because . . . it is against Trade and Traffique, and bargaining and contracting betweene man and man.”⁵⁸ The declaration illustrates the extent of historical precedent on the disdain of post-sale restrictions as it undermines the basic relationship between property

50. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 525-27 (2013).

51. *Id.*

52. *Id.* at 525-26.

53. *Id.* at 539-40.

54. *Impression Prods, Inc. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1529 (2017).

55. *Id.* at 1529.

56. *See id.* at 1531-33; *see also* *Quanta Comput. Inc. v. LG Elecs. Inc.*, 553 U.S. 617 (2008); *United States v. Univis Lens Co.*, 316 U.S. 241 (1942); *Keeler v. Standard Folding-Bed Co.*, 157 U.S. 659 (1895); *Bloomer v. McQuewan*, 55 U.S. 539 (1853).

57. *Impression*, 137 S. Ct. at 1531; *see* *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (1992).

58. *Impression*, 137 S. Ct. at 1532 (quoting 1 EDUARDO COKE, INSTITUTES OF THE LAWS OF ENGLAND § 360, at 223 (London, Adam Islip 1628)).

and ownership.⁵⁹ Case law complements this common law principle.⁶⁰ Though the Court pointed to many examples, it relied on precedent from its most recent decision on the matter, *Quanta Computer*, in which the patentee sued for infringement when a buyer disregarded a specified restriction.⁶¹ Here, the Supreme Court did not consider the contract to determine if it was lawful because the *Quanta Computer* Court held the “authorized sale . . . took its products outside the scope of the patent monopoly”; thus, a patent infringement suit could not be brought.⁶²

The Supreme Court found the Federal Circuit made two errors in its ruling.⁶³ First, the Federal Circuit regarded the exhaustion doctrine as an interpretation of the infringement statute, which states, in relevant part, that the use or vending of a patented article “without authority” from the patentee is prohibited.⁶⁴ However, the doctrine of exhaustion is a limitation on the scope of a patentee’s rights—it is not a rule giving the patentee the authority to grant a purchaser the right to use and/or resell an item.⁶⁵ Therefore, the Court stated, “As a result, the sale transfers the right to use, sell, or import because those are the rights that come along with ownership, and the buyer is free and clear of an infringement lawsuit because there is no exclusionary right left to enforce.”⁶⁶ In other words, once a patentee sells an item, she no longer has rights over said item.

The second error in the Federal Circuit’s reasoning pertained to its concern that preventing restrictions would confuse sales and sales by licenses; however, the two remain distinct.⁶⁷ A patentee can place restrictions on licenses because the patentee is not exchanging the physical good but the right to said good.⁶⁸ When a sale is made, the title of the good—the ownership—is passed on, but said transfer does not occur when a patentee licenses its item.⁶⁹ Therefore, a restriction may be placed on a license but not on a sale.⁷⁰ As seen in *General Talking*

59. *See id.*

60. *See id.* at 1531-33.

61. *See Quanta*, 553 U.S. at 624; *see also, e.g.*, *United States v. Univis Lens Co.*, 316 U.S. 241 (1943); *Bos. Store of Chi. v. Am. Graphophone Co.*, 246 U.S. 8 (1918); *Bloomer*, 14 U.S. at 539.

62. *Quanta*, 553 U.S. at 638.

63. *See Impression*, 137 S. Ct. at 1533-34.

64. *Id.* (citing 35 U.S.C. § 271(a) (2012)).

65. *See id.*

66. *Id.* at 1534.

67. *Id.* at 1534-35.

68. *Id.*

69. *Id.*

70. *Id.*

Picture, the patentee could bring an infringement suit because the licensee was granted a license to use the computer for non-commercial use—not a license to sell the computer.⁷¹ Had the licensee been licensed to sell the computer, the initial sale would have been the equivalent of the patentee making a sale directly, which would exhaust patentee rights.⁷²

The Court's analysis of international exhaustion was based on copyright law.⁷³ The Court extended its *Kirtsaeng* reasoning, in regard to international exhaustion of copyright works, to patent exhaustion.⁷⁴ The first sale doctrine states “when a copyright owner sells a lawfully made copy of its work, it loses the power to restrict the purchaser's freedom to ‘sell or otherwise dispose of . . . that copy.’”⁷⁵ The *Kirtsaeng* Court held that the first sale doctrine applies to copyrighted work in the United States as well as abroad; it is not restricted geographically.⁷⁶ The Court reasoned that due to the philosophical similarities between copyright law and patent law, such as the combative nature against restraints on alienation and the purpose of promoting creation, patents should not be defined geographically.⁷⁷ Furthermore, the Court stated there is “nothing in the text or history of the Patent Act that shows that Congress intended to confine that borderless common law principle to domestic sales.”⁷⁸ Therefore, the Court held that:

[P]atent exhaustion is uniform and automatic. Once a patentee decides to sell—whether on its own or through a license—that sale exhausts its patent rights, regardless of any post-sale restrictions the patentee purports to impose, either directly or through a license [Furthermore,] [a]n authorized sale outside the United States, just as one within the United States, exhausts all rights under the Patent Act.⁷⁹

The majority stated that “exhaustion occurs because, in a sale, the patentee elects to give up title to an item in exchange for payment.”⁸⁰ Furthermore, the Court stated the purpose of patent law would be undermined, as well as prove inefficient, if rights were to stick to items as they flowed through the market.⁸¹

71. *See* Gen. Talking Pictures Corp. v. W. Elec. Co., 305 U.S. 124, 127 (1938).

72. *See id.*

73. *See Impression*, 137 S. Ct. at 1536.

74. *Id.* at 1536 (discussing *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013)).

75. *Id.* (quoting 17 U.S.C. § 109(a) (2012)).

76. *Kirtsaeng*, 568 U.S. at 525, 528-33.

77. *See Impression*, 137 S. Ct. at 1536-37.

78. *Id.* at 1536.

79. *Id.* at 1535.

80. *Id.* at 1538.

81. *Id.*

While Justice Ginsburg concurred with the majority in that the rights of the patentee are exhausted after an initial domestic sale, she dissented from the majority’s holding on international exhaustion.⁸² In her opinion, she referenced the patent statute, which only establishes liability over acts of infringement in the United States and over items imported into the United States—there is no mention of any protection abroad.⁸³ Furthermore, she noted that just because there is a “historical kinship” between patent and copyright law, the Copyright Act cannot substitute the Patent Act.⁸⁴ Copyrights, unlike patents, are coordinated across the world under the Berne Convention; therefore, copyright protections are likely to be similar in the United States as well as abroad.⁸⁵ In contrast, patents are not harmonious across the world—a U.S. patentee has to get a separate patent, which may be very different, in every country she hopes to sell in.⁸⁶

IV. ANALYSIS

The facts of the *Impression* case may only involve the fascinating world of printer ink, but the implications of its holding extends to how United States patented inventions are distributed not only in the domestic context but throughout the world. While the Court’s decision over domestically sold cartridges does not come as a surprise due to years of precedent, the ruling over internationally sold cartridges imported back into the United States did come more as a shock. However, both holdings will have various implications. From a patent law standpoint, patentees may shift from patent protection to keeping ideas under trade secrets, which can be better protected internationally as well as for a longer duration—essentially forever as long as the idea remains a secret.⁸⁷ Furthermore, patentees may use contract law or complex business structures in order to enforce restrictions.⁸⁸

82. *See id.* at 1538-39 (Ginsburg, J., dissenting).

83. *Id.* (majority opinion); *see* *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531 (1972); *see also* 35 U.S.C. § 271(a) (2012).

84. *See Impression*, 137 S. Ct. at 1539 (Ginsburg, J., dissenting); 35 U.S.C. §§ 1-390; Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).

85. *See Impression*, 137 S. Ct. at 1539 (Ginsburg, J., dissenting).

86. *See id.*

87. Gene Quinn, *Patent Exhaustion at the Supreme Court: Industry Reaction to Impression Products v. Lexmark, IP WATCHDOG* (May 30, 2017), <http://www.ipwatchdog.com/2017/05/30/patent-exhaustion-supreme-court-industry-reaction-impression-products-v-lexmark/id=83822/> (citing Todd Dickinson).

88. *Id.* (citing Robert Gerstein); Kyle Wiens, *The Supreme Court Just Bolstered Your Right To Repair Stuff*, WIRE (June 1, 2017, 6:45 AM), <http://www.wired.com/2017/06/impression-v-lexmark/>.

Aside from legal implications, this decision will assist in the success of smaller companies who repair consumer-owned goods because the manufacturers' permission is no longer needed.⁸⁹ For example, a specific positive consequence of this particular ruling is that the cost of expensive toner cartridges can be kept down.⁹⁰

However, there are consequences that could have a negative impact on global economics. Many existing contracts between patentees and foreign distributors may have to be renegotiated.⁹¹ There is the possibility of regional pricing being eliminated because many goods are sold abroad at a lower price.⁹² Companies may have to raise their price for those in order to prevent their goods being bought abroad and sold back into the United States at a higher price.⁹³ The companies could stop selling those goods altogether.⁹⁴ More specifically, this could be an issue for pharmaceutical companies who sell their medicines at a discounted rate to underdeveloped country; however, regulatory bodies like the FDA could mitigate this issue.⁹⁵

The majority has a compelling argument, and there are positive public policy implications in allowing consumers to use purchased products the way they want. However, it is a bit attenuated to apply copyright law, which is for the most part homogenous across the world, to patent law. Most notably, though copyrights and patents contain similar characteristics, they are regulated differently. As Justice Ginsburg stated, the U.S. patent system does not speak to U.S. patents abroad; it specifically only mentions the United States—a U.S. patentee must apply for a patent in every country she wishes to sell.⁹⁶ In contrast, through international treaties, a copyright holder in the United States generally can claim protection under any country also privy to the treaties.⁹⁷ Furthermore, in order to receive a patent, a patentee must go through a rigorous process with the United States Patent and Trademark Office, whereas copyright protection is automatic.⁹⁸ If

89. Quinn, *supra* note 87 (citing Robert Gerstein).

90. *Id.*

91. *Id.* (citing Melissa Brand).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See id.*

97. *International Copyright*, COPYRIGHT.GOV, <http://www.copyright.gov/fls/fl100.html> (last updated Nov. 2009).

98. *General Copyright*, COPYRIGHT.GOV, <http://www.copyright.gov/help/faq/faq-general.html> (last visited Oct. 29, 2017). *See generally Patent Process Overview*, USPTO, <http://www.uspto.gov/patents-getting-started/patent-process-overview#step1> (last updated July 9, 2017).

granting copyrights and patent rights are entirely different processes, it makes little sense that the termination of those rights should be the same.

Additionally, the Supreme Court is not entitled to regulate patents—Congress, solely, has the authority to define the scope of patent law.⁹⁹ While the majority mentions that Congress has modified the patent statutes over the years in response to technology and the “hostility toward restraints on alienation,” the Court also concedes that Congress has not altered the rules of patent exhaustion.¹⁰⁰ It seems odd that throughout considerable rounds of Patent Act revisions, Congress would not clarify the extent of patent rights abroad, if they had so wanted. In other words, had Congress wanted the doctrine to patent exhaustion to apply internationally, it would be likely they would have modified the statute. However, as the statute remains fixed on patents governed in the United States, maybe Congress will amend the statute in light of this ruling.

Kathryn Penick*

99. See U.S. CONST. art. I, § 8, cl. 8.

100. *Impression Prods. Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1532, 1536 (2017).

* © 2017 Kathryn Penick. J.D. candidate 2019, Tulane Law School; B.A. cum laude 2014, International Affairs, University of Georgia. Junior Member, Volume 20, *Tulane Journal of Technology and Intellectual Property*. The author dedicates this piece to her father, who has always inspired her to study law. She would like to thank him for his unending love and support.