CAN YOU PATENT AN INVENTION JUST TO PREVENT THE WORLD FROM USING IT?

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Eric Goldman blogged about a case where a person purchased a copyright to an unflattering photograph of himself with the intention of using copyright law to make the photograph disappear from the internet. Eric writes "Due to the decisive appellate ruling and the district court's stinging rebuke and fee-shift, the results of this lawsuit should deter other people from buying up copyrights to manufacture a right to forget."

Copyright law is different from patent law in one critical respect: There is no (normally) no First Amendment right to practice an invention, whereas there is a First Amendment right to publish specific expressions of ideas, even verbatim, for certain purposes. As a result, the Copyright Act provides a four factor test (nature of use, nature of work, amount of work copied, marketplace impact) that functionally creates an exception large enough that copyright law and First Amendment law can co-exist.

The other part of the case that Eric blogged about is the implied public policy issue. Eric writes that "copyright law principally serves as an economic policy by protecting creators' ability to recoup the investments they make in generating new works that have value to society." I agree with Eric's implication that what made this an easy case to decide was that the copyright holder was using copyright law to censor, rather than enhance, the body of work available to the world.

Put another way, the basis of all copyright and patent law is found in Article 1, Section 8, Clause 8 of the Constitution and grants legislative power to Congress as as follows: "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".

So there it is. I suspect that a constitutional argument, rather than a statutory one, would also have prevailed against an effort to bury content using copyright law — burying content does not "promote the Progress of Science and useful Arts". This is an even more powerful constitutional argument when the First Amendment is considered.

The argument is significantly weaker when it comes to patent law, because preventing use of a technology under patent law can be used to promote technological progress. For example, if I held a patent that covered varying internet connection speed based on the sender, I could insist on net neutrality simply by seeking injunctions against anybody who favored some senders over others. Of course, this is made all the more complex by the Supreme Court's decision to make injunctive relief harder to obtain in patent cases. Nonetheless, I suspect that at some point, courts will face the question of whether it is unconstitutional (or patent misuse) to use a patent, with no economic benefit to the patent holder, to simply prevent a disliked technology from being used at all.

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