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Using IP To Suppress Innovation (On Purpose)

Prof. Jim Gibson, University of Richmond

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In this “IP Viewpoints” post, I hope to combine two Uncontroversial Premises to reach a Counterintuitive Conclusion about the role that intellectual property can play in the regulation of innovation.

First Uncontroversial Premise: IP is a useful tool for creating incentives to innovate, but too much IP protection is counterproductive.

Giving innovators exclusive control over certain uses of their innovations allows them to commercialize their inventiveness and creativity, and thus helps ensure a return of the resources they invest in their craft. But IP protection also brings with it certain costs – and when IP rights reach a certain level of strength, these costs overwhelm the benefits in incentive.

When that happens, IP rights produce less production and innovation, not more. (So, for example, if copyright law gave authors control over not only their expression, but also their abstract ideas, the resulting costs to later authors might well outweigh the benefit of increased authorial incentive.)

Second Uncontroversial Premise: Innovation is not always good.

This is perhaps a less obvious point, but I think it is uncontroversial nonetheless. Not all innovation is created equal. Advances in the manufacture of anti-malaria medicine? Good. Advances in the manufacture of crack cocaine? Not so much. Reasonable people can disagree about which innovation is good and which is bad, but the basic premise is undeniable: There is some innovation society would rather do without.

So (1) too much IP can inhibit innovation, and (2) some innovation is bad. Here’s the Counterintuitive Conclusion that follows: *We can use IP rights to stifle innovation that we don’t like.*

Suppose, for the sake of argument, that society decides that the distribution and use of pornography is a social evil that should be discouraged. Banning pornography directly has proved difficult, due to free speech concerns. But if pornographers were instead given overly strong IP rights, would we see *less* production and innovation in pornography? If so, wouldn’t the industry’s critics want to argue (counterintuitively) for *more* IP protection for pornographers?

Or take the fashion industry. Recent research has shown that fashion designers innovate very robustly despite the lack of strong IP protection for their designs. Yet longstanding economic analysis suggests that this innovation might not be a good thing, because spending money on fashion trends is a form of socially wasteful positional competition. If we combine these two points, we see that granting strong IP rights to fashion designers might be bad for the industry – and thus good for society.

In the space available here, I cannot address all the caveats and counterarguments that attend this argument. (For example, why would an industry use IP rights that were bad for it? And why not just ban the activity directly, or tax it to death, rather than use IP’s more roundabout regulation to suppress it?)

Those of you interested in the issue can read an upcoming article I've written with my colleague Chris Cotropia: "The Upside of Intellectual Property's Downside," a draft of which is available at <http://ssrn.com/abstract=1398845>. For now, suffice it to say that IP rights may be more versatile than we think. They can be an instrument of promotion, yes, but they can also be an instrument of suppression – on purpose.

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