

The abject failure of IP PR

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Intellectual Property advocates are a group that all of you should be watching, as an example of how *not* to do public relations.

The best evidence of this is the emergence of the Swedish Pirate Party, an organization dedicated entirely to contravening what it sees as oppressive intellectual property laws. It's pretty bad news when people form political parties to oppose something nobody had ever heard of a few years before.

Since the technology is in place, IP holders need to win hearts and minds and show that they're reasonable people if they want people to stop copying their media, and the rise of groups like the Pirate Party show that they are very much not doing so. In fact, it seems like the more the public complains about IP laws, the more IP advocates push for more extreme measures and rhetoric.

The IP industries have been in the midst of this PR disaster for the last several years. The Sonny Bono act passed in 1998, extending copyright to 95 years, but at the cost of giving opponents an easy target. Is there an ethical argument for 95 years of copyright protection—that you can make to a twelve year old? The public doesn't see how such wide scope fosters new creative works, and begins to question whether more sensible copyright rules might be suspect as well.

The software/business method patent issue has perhaps been the worst thing to happen to patents in a century. Given that there are so many examples of patents that seem so obvious and only seem to block competition, stock arguments that Patents Foster Innovation are wearing thin. People who used to know nothing about patent law now regularly write their Congressperson demanding that the entire system be shut down, and our IP advocates have *In re Allappat* and *State Street* to thank for that. Advocates point out that there are subtleties in “one click”-style patents that make them useful and distinct from prior art—but are unable to explain that to a lay-voter.

Software and business methods have brought public focus to a corner of the law that used to manage itself; if we want patent law to survive, we should acknowledge that some things should not be patented. There are many IP advocates who (1) want patent law to remain a one size fits all system, (2) want it to remain strong for pharma and electronics, (3) want it to cover web site designs, and (4) want the public to be OK with it. You can have at most three out of those four. We used to have (1), (2), and (4), but then the patent courts got greedy and made up (3), and suddenly there are prime-time news

spots about the disaster that is patent law. (1) and (2) are therefore now under review by Congress and the Supreme Court, and (3) and will be soon.

The U.S. has had PR issues as a whole, with much of the world seeing it as an imperialist aggressor. E.g, the Pirate Party was originally organized around a BitTorrent-oriented web site. The Pirate Bay is royally pissing off U.S. IP-holders, but is doing nothing illegal under Swedish law. The police seized their servers a month or two ago, brought in their best prosecutors, and still failed to find reason to halt their operations. So, back to the PR disaster that is current IP law: how do you explain to a Swedish twelve year old why she has to comply with U.S. IP law?

And I'm not the first to point out that the RIAA is shooting itself in the foot with its never-ending lawsuit campaign, which wholeheartedly supports the caricature of IP as being written by and for Hollywood fat cats.

Oh, and a final note to the RIAA: Pirates of the Caribbean II has grossed \$361 million as of this writing. Calling kids pirates is not going to make them feel bad about illegally downloading their gangsta rap albums.

The best thing IP lawyers could do for themselves is to indicate that they are capable of moderation. I read many IP blawgs on a regular basis, and I can recall about one (1) instance where an IP lawyer said that IP law has tilted too far in favor of rights-holders.

I'm loathe to link to trolls, but here is a post about how dumb the Supreme Court is, and there are many more where that came from. I am not well-versed in every field of law blogging, but I have never seen so many lawyers insist that the Supreme Court is run by idiots. Sure, all of us have that one Supreme Court case that seems totally moronic (at least Dred Scott), but to say that the Justices have no comprehension of a major field of law seems a bit beyond the pale. The explanation for the rift is obvious: the trolling IP lawyers care only about patents, while Supreme Court justices care about patents and their effect on the economy at large.

My impression is that IP lawyers are happiest when they're left alone, and all those mean judges who try to balance economic outcomes and those dumb voters who write their Congressperson about copyright go back to fighting over abortion. The best way to go back to IP law being about the things IP lawyers love to debate, like the applicability of the exceptions of 35 USC §271(g) to hearings under 19 USC §1337, is for IP lawyers to concede ground on the recent expansions to IP protections that the public has found to be so onerous.

Policy recommendations: the various IP practitioners should acknowledge that they are in the midst of a PR disaster, and comport themselves accordingly, rather than continuing to berate the public for not seeing it their way. The RIAA would maybe improve its public perception if it stops suing children for violating laws that they don't understand. Patent attorneys need to start pointing out the frontiers of what should *not* be patentable. Anybody who says that artists won't produce unless they have a 95-year monopoly is just not credible. There are many steps to reversing the PR disaster, but I believe that the first step is for IP rights holders to publicly display that they have a reasonable view of what should be in the public domain and what is fair use.