

Illegal, Immoral, Unethical . . . Patentable? Issues in the Early Lives of Inventions

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What role, if any, should the fact that an inventor has engaged in illegal, immoral, or unethical activities in creating an invention play in its patentability, or in the enforceability of any resulting patent covering the invention? While questions of the illegality or morality of the nature and/or use of an invention have often come into play throughout history and up to the present time, the rightness or wrongness of invention creation activities traditionally has been irrelevant in light of patent law's utilitarian focus. But should it be?

Several countries and patent offices are, or will soon be, including such considerations in patentability determinations. For example, the European Union Biotechnology Directive prohibits patents on industrial uses of human embryos as morally wrong. Preliminarily, at least, this prohibition has been broadly interpreted in Germany and the European Patent Office to prevent patents on cell cultures derived from human embryos. In other words, engaging in immoral activity in invention creation (i.e. destroying human embryos) is providing a basis for denying patent protection to the inventive effort.

Moreover, several countries rich in genetic resources, such as China and Brazil, are modifying their laws to make the disclosure of origin of materials used to create inventions a patentability requirement, and violation of laws relating to acquiring genetic resources grounds for invalidating a patent. In other words, engaging in illegal activity in invention creation (i.e. using genetic resources obtained without proper authorization) is providing a basis for denying patent protection to the inventive effort.

This issue is not limited to inventions in a particular technological field nor is it restricted to questions of patentability. A plethora of U.S. doctrines are rooted in equity and designed to effectuate notions of fairness, in the judicial system broadly and in the patent system in particular. As the purview of patent protection has expanded, it seems reasonable to consider whether traditional legal concepts, such as the doctrine of "unclean hands," should be available to challenge or defend against the assertion of patents on inventions with troubled beginnings.