

# *Justifying Intellectual Property*

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*Justifying Intellectual Property* establishes a sophisticated and balanced rationale for the most vital form of modern property, IP rights. This book answers the many critics who contend that these rights are inefficient, unfair, and theoretically incoherent. The author of this volume argues instead that IP rights are based on a solid ethical foundation, and that, when subject to judicious equitable limits, these rights form an indispensable part of a well-functioning socio-economic system. The result is a vigorous and thorough defense of IP, but also a call for appropriate constraints and boundaries in this crucial field of law: IP as *real rights*, but with *real limits*.

Slicing through the complexity and confusion that have long surrounded the IP field, the author separates his analysis into three distinct, interlocking strands. He begins at the bedrock level, drawing on classic works by John Locke, Immanuel Kant, and other philosophers, crafting an original theory explaining why IP rights make sense as a reward for effort and a way to encourage individuals to thrive and flourish. This book shows how the limits and constraints built into Lockean and Kantian conceptions of property provide an ideal grounding for a balanced approach to IP rights. The author also provides a novel and comprehensive explanation of why awarding IP rights to creative people is fair for everyone in society – how IP rights contribute to a just distribution of resources, in accordance with the ideas of philosopher John Rawls.

Next, the book lays out four primary principles that tie together many of the diverse and far-flung doctrines operating in the field of IP law. These “mid-level principles” are (1) proportionality; (2) efficiency; (3) nonremoval or public-domain-building; and (4) dignity. Although these principles flow naturally from the normative theories of Locke, Kant, and Rawls, they are also completely consistent with other foundational conceptions of IP rights, such as efficiency-based (or utilitarian) theories. The mid-level principles are therefore a significant contribution: they represent a common normative framework that permits policy debates without requiring agreement on ultimate foundational issues. The mid-level principles open the way to fruitful debate at a level beyond specific disputes and detailed doctrines, while leaving “room at the bottom” for divergent understandings of why society is committed to the institution of IP protection.

Finally, the book deploys normative concepts, together with these mid-level principles, in original and creative discussions of three leading-edge issues in the IP field today: the care and feeding of creative professionals, those who make a living producing original creative works; the continuing relevance and vitality of IP rights in the online/digital world; and access to patented drugs that

could save lives in poor countries. The goal is to demonstrate practical payoffs to the normative ideas developed earlier in the book.

The author argues, for example, for the importance of IP rights in the material livelihood of those who make a profession of creating original works. He also admonishes those who would de-emphasize individual, original authorship in the digital realm. While digital manipulation of existing works, and decentralized “collective” creativity are new and worthwhile developments, traditional property theory still makes sense in the digital realm. One important concept here, present for example in Kant’s theory of property, is the centrality of waiver of rights. In conformity with Kant’s ideas about property and individual autonomy, it is crucial that original creators be given the right and power to waive any property rights in their works, rather than be coerced into foregoing or losing those rights. A similar idea from canonical property theory – this time Locke’s – is developed and applied to the area of patents on drugs useful in the developing world. Locke’s notion of a “charity proviso,” or limitation on property, implies that where open access to patented drugs is justified when it could save actual lives in the immediate future. Outside these dire circumstances, however, the book argues that drug access policy must take account of complexities such as the losses future generations might suffer if immediate access to drugs reduces overall investment in drug development and thereby impairs the capacity to invent new drugs in the future.