

Rawls Versus Locke in a Justice-Based Intellectual Property Regime

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This paper seeks to probe intellectual property law with alternating lenses of justice and deserts based on the work of John Locke and John Rawls. In trying to see intellectual property law more clearly, I will take some inspiration from the phoropter – the eye doctor’s machine for flipping from one lens to the next and asking, Is it clearer now? ... Or now?

In the public’s imagination, in arguments designed for politics, and to the ears of those who make and shape IP law, the Lockean “labor-desert” idea holds great sway: You ought to own it because you put work into it. Sightings of Rawlsian justice are rarer. That conception is rooted in Rawls’s veil-of-ignorance metaphor: What system would you choose in advance if you didn’t know where you would find yourself among life’s circumstances?

In this paper, I will compare how the Lockean and Rawlsian concepts of justice map on to the intellectual property law we currently have. And then I will work up a picture of the IP law we would develop from scratch if we were committed to one view or the other. Then I move to the normative question: If choosing between the two, which would be the better lens to inform the evolution of intellectual property law going forward. For IP, it seems to me that Rawlsian justice more easily finds a theoretical footing in the IP context. It also appears more practically useful in guiding law and policy.