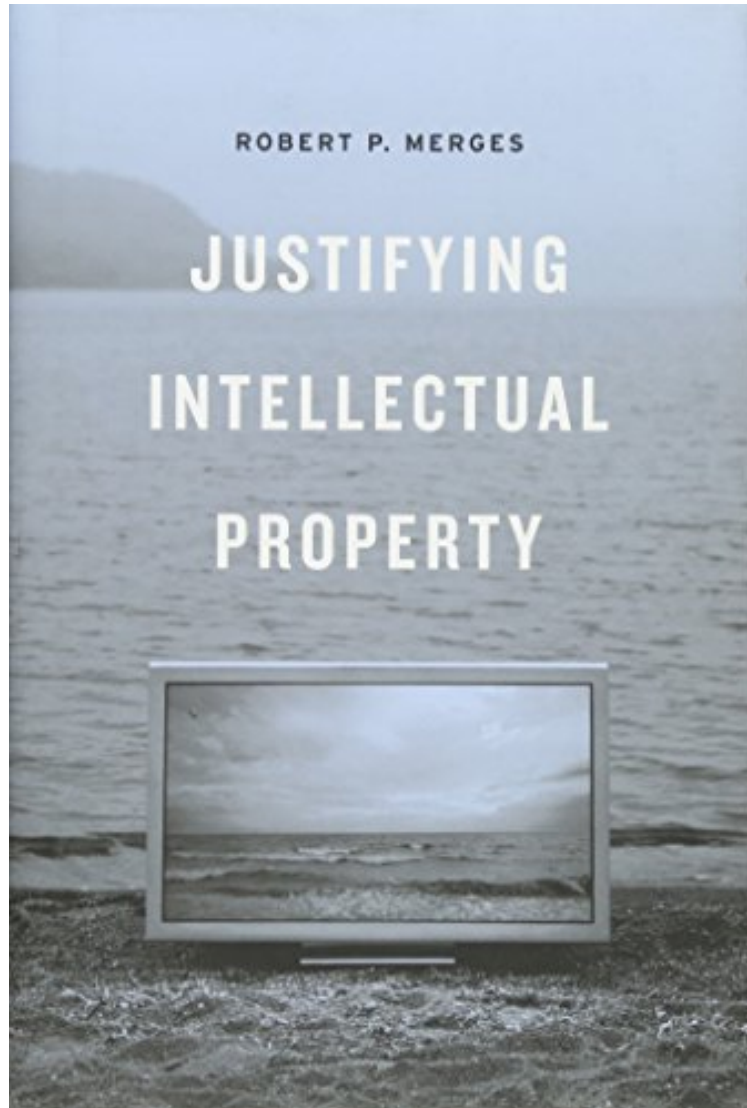


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Justifying Intellectual Property

Robert P. Merges

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Robert P. Merges : Justifying Intellectual Property before purchasing it in order to gage whether or not it would be worth my time, and all praised Justifying Intellectual Property:

11 of 11 people found the following review helpful. An engaging defence of IP that goes beyond mere utilitarianism By Thomas H. Burroughes Sometimes you read a book and come away with more questions than answers. This book, which is beautifully written (why cannot all such academics write like this?) takes on the controversial subject of intellectual property. As demonstrated by recent legal spats involving the likes of Apple and Blackberry, IP is hardly a arcane matter just for lawyers and executives - it affects all of us. We live in the age of file-

sharing; we can download books, films and other material in seconds. Meanwhile, the issue of patents has become an international hot issue due to demands from peoples in poor countries for access to patent-free drugs to deal with HIV, TB and other killers diseases and conditions. First of all, on the positive side, Merges is to be congratulated for defending IP in a way that goes far beyond the usual utilitarian, consequentialist arguments that are made in defence of IP. (That is not to say that he ignores those arguments out of hand). He realises that for some critics of IP, the issues are as much matters of ethics as they are of material benefit. So, in an interesting exercise, he seeks, not always convincingly, to knit together the ideas of Locke, Rawls and Kant to build an ethical foundation for IP, both in terms of justifying the rights of individuals to "propertise" their labour, while also using these men's ideas to justify restrictions on certain forms of IP (such as when he writes about waivers, or proportionality), and to justify things such as redistributive methods to ameliorate what are seen as cases where IP rights give "too much" benefit to an IP holder. Merges also deserves credit for seeking to show that even if one does not accept all of his lower-level, foundational defences for IP (Locke and Co), that there are important "mid-level" arguments to use for IP. In particular, he goes to a fair amount of effort to show how IP actually benefits individual creators/inventors, often in ways that might not be apparent to critics of IP who claim that IP only benefits Big Business. I thought this was the best part of the book. This is certainly one of the more impressive defences of IP I have read, not least because Merges has pitched his arguments as much against the anti-IPers on the egalitarian left like Larry Lessig as he has against the anti-IPers on the libertarian side, such as Tom Palmer of CATO or Stephan Kinsella at the Mises Institute. But for all the strengths of this book, there are several areas that require more work. First, Merges seeks to justify IP by talking about how a creator has a "core" of "desert" for his/her work that justifies IP, while there is also a periphery of socially-created forces that enable a person to create IP in the first place. While a nice theory (I think the desert issue is well worth making), it is very difficult to see how in practice one can distinguish between the value a person, such as a novelist, creates by his/her own efforts and will (the core) and the value that comes from say, having a good education, or living in a house full of books, or whatever (the periphery). Related to this contentious issue of "desert", Merges approvingly cites in the notes a criticism of the ideas of libertarian philosopher Robert Nozick. (Nozick wrote a powerful attack on John Rawls' ideas in the 1970s). Nozick once famously wrote of how, if people all started off from the same wealth distribution, and paid a few cents to watch their favourite basketball star, Wilt Chamberlain, that Wilt C. would end up very rich from such free exchange. This argument - which is often used to show how socialism can interfere with freedom - has been criticised on the grounds that someone like Wilt Chamberlain does not "deserve" all his/her talents and hence it is wrong that such a person should be paid in full, even though the payments are non-coerced. Merges seems to approve of this argument, and does not really seek to unpick it. But this argument is mistaken. Consider this: if a sports star, actress or whoever does not fully "deserve" their talents from which they can earn a good living in a free market, then why do we not also reflect that the people who pay a few pounds to see or hear these people also don't "deserve" to live in a world where such brilliant people work? And yet this question is often never asked by those who argue that the State, or "community" has some sort of claim on the "undeserved" wealth that a person has. I don't deserve my good looks and smart mind, but then again, you don't deserve the fruits of it, either. The idea of us deserving or not deserving high IQs, wealth, physical dexterity etc comes from the idea that some sort of Creator has bestowed these things upon us by a deliberate act of will. But unless one is religious, this argument does not follow. This might seem a bit of a long digression but it is a serious flaw in the book, or at least this argument about desert needs to be considered in more detail when desert is used to justify IP. Redistributive justice relies on a lot of assumptions - as in the case of the ideas of John Rawls - that have been subjected to a lot of serious criticism from the likes of Nozick, FA Hayek, and many others. And yet although Merges is clearly aware of these criticisms, he tends not to give a great deal of space for them. In fact, he treats Rawls' controversial idea of a presumption in favour of equality as if it were a self-evident truth. Another weakness in the book is that one of the strongest defenders of IP in recent years, Ayn Rand, is not mentioned at all. Neither are others influenced by her ideas, such as Adam Mossoff. This is a shame because Rand defended IP, very vigorously, on the grounds that, ultimately, all property - including physical property (or what economists call excludable goods) is intellectual property. All moves to take the stuff of nature and make it usable to Man is an intellectual effort, aimed at furthering human survival and flourishing through mental as well as physical labour. This fits quite well with some of the things that Merges says about Locke's and Kant's defences of property (which is ironic given that Rand famously criticised Kant's duty-based ethics). In general, I can recommend this book to anyone who wants to read an engaging book about IP and who is prepared to be taken a bit out of their mental comfort zones. I felt the book could have explored some issues in more detail, and I hope that the author continues to play an important role in the debate about IP. My criticisms in no way detract from what I regard as a noble and intelligent defence of IP in some respects. It deserves to be taken seriously.

5 of 8 people found the following review helpful. Excellent book for the theory and practical application of intellectual property. By Drew As the title claims, the purpose of this book is to provide a justification for intellectual property. In contrast to much of the work in this area, however, Justifying Intellectual Property does not build its case solely on economic or utilitarian grounds. Instead, the author attempts to make the ethical case for IP, arguing that these rights run deeper and are more fundamental than the conventional view of IP rights as policy tools to spur innovation. To

support this contention, the author brings in a significant amount of material from Locke, Kant, and Rawls to build his case. The first chapters of this book deal with these somewhat dense philosophical questions, but the later chapters move toward what the author refers to as "mid-level principles", the principles that are more familiar to those acquainted with IP. These include efficiency and proportionality among others. The author, however, does not abandon the ethical foundation laid in the first chapters. He builds upon it, incorporating these mid-level principles into his model and then, in the final chapters, addressing more contemporary issues in IP. The scope of this book is immense, and the first several chapters can be a bit daunting. If you have the requisite stamina though, the payoff is enormously satisfying, presenting a comprehensive and firmly rooted model for IP. In the end, the challenge to dig deeper for IP's foundations is perhaps the most important takeaway. I highly recommend it.

Why should a property interest exist in an intangible item? In recent years, arguments over intellectual property have often divided proponents who emphasize the importance of providing incentives for producers of creative works from skeptics who emphasize the need for free and open access to knowledge. In a wide-ranging and ambitious analysis, Robert P. Merges establishes a sophisticated rationale for the most vital form of modern property: IP rights. His insightful new book answers the many critics who contend that these rights are inefficient, unfair, and theoretically incoherent. But Merges' vigorous defense of IP is also a call for appropriate legal constraints and boundaries: IP rights are real, but they come with real limits. Drawing on Kant, Locke, and Rawls as well as contemporary scholars, Merges crafts an original theory to explain why IP rights make sense as a reward for effort and as a way to encourage individuals to strive. He also provides a novel explanation of why awarding IP rights to creative people is fair for everyone else in society, by contributing to a just distribution of resources. Merges argues convincingly that IP rights are based on a solid ethical foundation, and when subject to fair limits these rights are an indispensable part of a well-functioning society.

In this book, which promises to be a landmark in the field, Merges presents a wide-ranging and highly insightful synthesis of three strands of property-related philosophy in order to provide a grounding for mid-level principles of intellectual property. (Henry E. Smith, Harvard Law School) A new Bible for Intellectual Property... At the fundamental level, Merges relies upon deontological ethics derived from Locke (justification for appropriation), Kant (individual freedoms), and Rawls (distributive justice). By threading together these historic lines of thought, Merges provides an ethical foundation both for the establishment of property rights for creative contributions to society as well as for substantive limits to those rights. Justifying Intellectual Property is a fascinating book... [It] offers a new framework for understanding intellectual property with a particular focus on why it makes sense to offer property rights for creative enterprises. (Dennis Crouch PatentlyO.com 2011-10-14) About the Author Robert P. Merges is Wilson Sonsini Goodrich Rosati Professor of Law and Technology, University of California, Berkeley, School of Law, and co-founder of the Berkeley Center for Law and Technology.