

## *Merges on Just IP: Are IP Rights Basic?*

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**ABSTRACT (EN):** This chapter criticizes Robert Merges's attempts to show that current IP law is just on Rawls' politically liberal theory of justice as fairness. Merges argues that IP law is just because IP rights are basic rights that enjoy a priority over distributive concerns and, therefore, that the inequalities created by the current IP system are irrelevant to whether it is just. IP rights are basic, he says, because they are necessary to provide the career options for creative professionals that would further their autonomy and self-ownership. But such a strong right to an occupation is not necessary to the exercise and development of the moral powers necessary for social cooperation which, on Rawls's view, is a necessary condition for basic rights. So, IP rights are not basic rights on Rawls's view. This chapter suggests that, at most, a very small subset of current IP rights would qualify as basic within a politically liberal IP regime because a strong set of IP rights would generate inequalities that would strain people's commitment to society and to its IP rules. Most IP law would, thus, need to satisfy a principle of distribution in order to be just.

**RÉSUMÉ (FR):** Ce chapitre critique les tentatives de Robert Merges visant à démontrer que le droit de la PI actuel est juste au sens de la théorie politique libérale de Rawls, selon laquelle justice équivaut à équité. Merges soutient que le droit en matière de PI est juste parce que les droits reconnus par la PI sont des droits fondamentaux ayant préséance sur les préoccupations de nature distributive et que, par conséquent, les inégalités créées par le sys-

tème actuel de la PI ne sont pas pertinentes pour déterminer si ce dernier est juste ou non. Les droits de la PI sont fondamentaux, dit-il, parce qu'ils sont nécessaires pour offrir des perspectives de carrière à des professionnels créatifs en leur permettant d'accroître leur autonomie et leur réalisation de soi. Cependant, un droit aussi fort à une activité professionnelle n'est pas essentiel à l'exercice et au développement des pouvoirs moraux nécessaires à la coopération sociale qui, selon le point de vue de Rawls, est une condition indispensable pour les droits fondamentaux. Ainsi, les droits de la PI ne sont pas fondamentaux selon le point de vue de Rawls. Le chapitre indique qu'au mieux, on pourrait qualifier un très petit sous-ensemble des droits actuels de fondamentaux dans le cadre d'un régime politiquement libéral de PI, parce que sinon un vaste ensemble de droits de PI entraînerait des inégalités susceptibles de compromettre l'engagement de la population envers la société et ses règles en matière de PI. Le droit relatif à la PI doit ainsi, dans une large mesure, satisfaire à un principe de distribution afin de demeurer juste.

## A. INTRODUCTION: POLITICAL PHILOSOPHY AND IP LAW

As intellectual property (“IP”) rights have gradually seeped into virtually every area of our lives, the seemingly intractable disputes about the nature and justifiable scope of IP rights have become more polarized, hardened, and vitriolic and the stakes have become larger.<sup>1</sup> A key dispute is about what justice demands of IP law. Some would resolutely say that the grant of a right to exclude others from exploiting works, inventions, and other “intellectual” objects is just, without regard to its effects on the distribution of social goods. Others would say that justice would be done merely by granting an IP right to creators so long as it benefits the least advantaged in society. Still others would say a right of remuneration is more just than an IP right. The problem is not merely a moral one, as our Supreme Court does not give a consistent interpretation of what is just in IP law.<sup>2</sup> Does political

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1 As a sample, consider the heated debates over the legal protection of technological protection measures in copyright law; the ratcheting up of IP protection in bilateral trade agreements; the scope of fair dealing; P2P file sharing; the harmful use of trademarks by advertisers; the emerging right of association with an event; and the patenting of the human genome, DNA, stem cells, higher life forms, software, business methods, and pharmaceuticals.

2 See *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34. The Supreme Court of Canada explained that one of the objectives of copyright, “obtaining a just reward for the

philosophy offer any insight about whether IP is just? John Rawls, perhaps the most famous political philosopher of the twentieth century, hoped that political philosophy could play a practical role in our political culture.<sup>3</sup> That role could be to diminish the philosophical and moral differences at the base of political conflict to an extent that “social cooperation on a footing of mutual respect among citizens” could be attained despite the existence of irreconcilable comprehensive moral views.<sup>4</sup>

Rawls never wrote anything on IP rights, but Robert Merges, in his thoughtful book, *Justifying Intellectual Property*, attempts to justify IP rights as a just form of a property right granted by government.<sup>5</sup> Although Merges was initially an advocate of a utilitarian justification for IP law, he became dissatisfied with utilitarianism as a theory of IP and, in this book, attempts to develop a rights-based theory of IP.<sup>6</sup> In developing his theory, Merges draws upon ideas from the philosophers Locke and Kant in order to justify current IP law as a system of basic property rights grounded in self-ownership and autonomy respectively, rather than welfare. Although his argument is based on abstract political philosophy, he argues that the ability of creative professionals to earn a living by selling copies of their products is “the practical, workaday manifestation of the abstract-sounding value of ‘autonomy’ that philosophers (especially Kant and Hegel) have long associated with property rights.”<sup>7</sup>

Drawing upon Locke and Kant to justify IP rights is, of course, not new, but Merges simultaneously addresses what may be the most serious challenge to his property-based foundation for IP: that it conflicts with principles of distributive justice. In a nutshell, the challenge is that a grant of IP

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creator,” was more accurately described as “[preventing] someone other than the creator from appropriating whatever benefits may be generated” at para 30. This free-riding interpretation of “just reward” is clearly an “economic” or consequentialist type of justification of copyright rather than a deontological type as found in Locke; *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13. The Supreme Court implies, without stating, that the appropriate standard of originality must conform to “a natural rights or Lockean theory of ‘just desserts’ [sic], namely that an author deserves to have his or her efforts in producing a work rewarded” at para 15.

3 John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001) at 1–2 [Rawls, *Justice as Fairness*].

4 *Ibid* at 1–3.

5 Robert P Merges, *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011) [Merges, *Justifying Intellectual Property*].

6 *Ibid*, ch 1 and 4.

7 *Ibid* at xi.

in an object is not just when that IP right does not work to the benefit of the least advantaged position in society. So, on Merges's view, while IP rights are founded on self-ownership and autonomy, they are also constrained by principles of justice. In order to show that IP law is just, Merges draws on Rawls's theory of justice as fairness, while making certain modifications,<sup>8</sup> in order "to combine this traditional emphasis on the importance of property with Rawls's solicitude for social justice, particularly the plight of the most destitute."<sup>9</sup> While Merges adopts Rawls's theory of justice as fairness as a political conception, in order to justify current IP law, Merges is forced to provide a radically different interpretation of its principles than does Rawls. Merges's interpretation elevates IP rights to basic rights within the system, which have a priority over concerns regarding the distribution of goods.<sup>10</sup> Thus, on his view, IP rights are just because distributional concerns are ruled out.

How can Merges's perplexing view—a stated concern for the plight of the most destitute, together with the claim that justice does not require that IP rights work to their benefit—be motivated, apart from a dire need to justify current IP law? On my view, Merges has, in effect, adopted a hybrid political theory which has been called "market democracy," a kind of theory which attempts to reconcile classical and modern or "high" liberalism, two views which are generally regarded as inconsistent.<sup>11</sup> The central claim of market democracy is that economic rights and liberties are basic.<sup>12</sup> This view adopts the justificatory framework and constructed rights<sup>13</sup> of high liberalism (elaborated in its greatest sophistication by Rawls), but rejects the diminished status of economic rights (including property rights) within it.<sup>14</sup> Instead, it seeks to retain and justify the importance of economic liberty (and

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8 *Ibid.* Merges does not understand the resources that must be fairly distributed as Rawlsian primary goods—such as rights, liberties, powers, opportunities, income, and wealth—but as "tickets to an autonomous life," at 106.

9 *Ibid.* at 308.

10 *Ibid.* at 117.

11 John Tomasi, *Free Market Fairness* (Princeton, N.J.: Princeton University Press, 2012), develops market democracy as a hybrid between classical liberalism and high liberalism; Samuel Freeman, "Capitalism in the Classical and High Liberal Traditions" (2011) 28:2 *Soc Phil & Pol'y* 19, for a comparison of the role of the market in classical and high liberalism.

12 Tomasi, above note 11 at 121.

13 See Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002).

14 Tomasi, above note 11 at ch 4.

related notions of autonomy, desert, self-ownership, and property rights) of the classical liberals but rejects their justificatory machinery of natural rights and utilitarianism.<sup>15</sup> While this classification of Merges's view helps one to understand its motivation, it does not greatly assist his main claim. I will argue that IP rights, like other economic rights, are not, in general, basic rights on Rawls's view since they are not essential for persons to cooperatively engage with others throughout their lives. I suggest, without much argument in this paper, that a much smaller subset of IP rights may be basic, but the remainder of these rights would have to be justified in accordance with a principle of distribution, such as Rawls's difference principle.

Section B describes Merges's defence of contemporary IP law. It first describes Merges's view that IP rights are basic property rights grounded in autonomy and self-ownership; second, it very briefly describes Rawls's theory of justice as fairness and the role of property rights in it; and, third, it describes Merges's argument that IP rights are basic rights and, so, IP law is a just institution. Section C evaluates Merges's view.

## **B. MERGES'S DEFENCE OF CONTEMPORARY IP LAW**

### **1) Merges: IP Rights Are Basic Property Rights**

Merges takes his task to be to justify contemporary IP law by providing normative foundations for it.<sup>16</sup> Why have IP rights? For Merges:

The reason is that creative labor is valuable and important. It is noble work, work that is worthy of recognition and reward. It is work that should be dignified with the grant of a small dollop of state power — a property right.<sup>17</sup>

Merges thus starts with the (controversial) idea that patents, copyrights, and trademark rights are property rights. Of course, the idea that there are property rights in intangible objects has been strongly criticized as an

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<sup>15</sup> *Ibid.*

<sup>16</sup> Merges is speaking of contemporary US IP law. While Canadian IP law is similar to US IP law, in many ways, Canadian IP law possesses "stronger" IP rights than those found in the US: see Howard Knopf, "The Annual '301' Show — USTR Calls for Comment — 21 Reasons Why Canadian Copyright Law Is Already Stronger Than USA's" (17 February 2010), online: Excess Copyright <http://excesscopyright.blogspot.com/2010/02/annual-301-parade-ustr-calls-for.html>.

<sup>17</sup> Merges, *Justifying Intellectual Property*, above note 5 at 293.

inapt extension of property rights in tangible objects,<sup>18</sup> but Merges dismisses such “historical-essentialist” concerns as too narrow an understanding of the concept of property, which is not bound to its historical uses.<sup>19</sup> Setting aside such criticisms, it is natural for Merges to look to those who have attempted to justify property rights, such as Locke and Kant. Very briefly, from Locke, Merges takes the conditions under which initial appropriation is justified.<sup>20</sup> In order to make use of our resources for our benefit, we must appropriate them without common consent.<sup>21</sup> Since we own ourselves and our labour, therefore, we own those things that, subject to provisos, we appropriate.<sup>22</sup> For Locke, governments come together to protect this pre-political right to appropriation.<sup>23</sup> From Kant, he takes the idea that “extensive interaction with objects” is essential to developing a person’s full potential as an autonomous individual.<sup>24</sup> Merges claims that, for Kant, “[s]table possession permits the imprinting of some aspect of a person, what Kant called his will, onto objects so as to enable the person to more fully flourish.”<sup>25</sup>

There have been extensive critiques of Locke’s theory of appropriation in the context of IP law<sup>26</sup> and Merges’s interpretation of Kant has been questioned.<sup>27</sup> Much of the criticism of a Lockean view of IP rights has focused on the idea that, even assuming that Lockean theory justifies appropriation of (rivalrous) physical objects, which require property rights for their effective use, it does not apply well to intellectual objects, which are non-rivalrous.<sup>28</sup> As Seana Shiffrin concludes, “[t]he fully effective use of an

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18 See Mark Lemley, “Property, Intellectual Property, and Free Riding,” (2005) 83 *Texas L Rev* 1031, for sophisticated arguments against IP rights as property rights.

19 Merges, *Justifying Intellectual Property*, above note 5 at 4–5.

20 *Ibid* at 305.

21 *Ibid* at 34.

22 *Ibid* at 35.

23 *Ibid* at 35.

24 *Ibid* at 305.

25 *Ibid* at 75–76.

26 See, for instance, Carys J Craig, “Locke, Labour and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law” (2002) 28 *Queen’s LJ* 1 at 16, and references cited therein.

27 Anne Barron, “Kant, Copyright, and Communicative Freedom” (2012) 31:1 *Law & Phil* 1, contests Merges’s representation of Kant on the grounds that it is inconsistent with both the letter of Kant’s texts and the spirit animating his philosophical system, at 9; Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009) for a recent exposition of Kant’s legal and political philosophy.

28 Intellectual objects like a book are non-rivalrous in the sense that reading a copy of the book (i.e., a particular book) does not interfere with another person reading another token of the book. By contrast, eating a particular apple or reading a particular book

idea, proposition, concept, expression, method, invention, melody, picture, or sculpture generally does not require, by its nature, prolonged exclusive use or control.”<sup>29</sup>

Merges responds directly to Shiffrin’s critique saying, amongst other things, that “exclusive rights in creative works are necessary to permit creative professionals to thrive.”<sup>30</sup> One could go on at great length examining Merges’s views on Locke and Kant and whether IP rights are a form of property right within those justificatory frameworks. For the purposes of this paper, however, it is not necessary to do so. As Merges emphasized, his aim in developing his theory was to “translate these foundational writings of Kant, Locke and Rawls into the IP context — to write a liberal theory of intellectual property law . . . .”<sup>31</sup> He summarizes his view as follows:

This theory’s foundational components, as described by Locke, Kant, and others, are a commitment to individual ownership as a primary right, respect for third-party interests that conflict with this right, and, from the philosophy of John Rawls, an acceptance of redistributive policies intended to remedy the structural hardships caused by individual property rights.<sup>32</sup>

Thus, whatever rationale Merges might advance for the ownership of IP rights-based autonomy and self-ownership, the question that remains is whether IP rights are just based upon Rawls’s justificatory framework.

Merges’s way of melding together the views of Locke, Kant, and Rawls can be succinctly summarized in his claim that IP rights are basic rights.<sup>33</sup> Put more broadly, it is an attempt to retain the importance of economic rights and liberties (including private property rights in productive assets) of classical liberalism, with the justificatory apparatus of high liberalism. Thus, the defence of IP rights as basic rights faces a two-pronged challenge. From classical liberals, it faces the challenge that his approach abandons the forms of justification of property rights given by Locke and Kant because these views are, in Rawls’s terminology, comprehensive doctrines,

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will interfere with someone else eating the same apple or reading the same book (at the same time).

29 Seana Shiffrin, “Lockean Theories of Intellectual Property” in Stephen R Munzer, ed, *New Essays in the Political Theory of Property* (Cambridge: Cambridge Univ. Press, 2001) 138 at 156.

30 Merges, *Justifying Intellectual Property*, above note 5 at 321.

31 *Ibid* at 13.

32 *Ibid*.

33 *Ibid* at 117.

views which not all members of a pluralist society affirm.<sup>34</sup> From high liberals, the attack concerns the elevated value of property since, for high liberals, economic rights, such as property rights, are of lesser value than other rights.<sup>35</sup> As John Tomasi puts it, for high liberals “property rights are not guardians of equality but obstacles to its achievement.”<sup>36</sup> While the equal freedoms of Adam Smith’s market destroyed the “feudal practices of a status-based economic preferment,” the great concentration of property rights in a small number of private hands in the industrial age turned out to be “another device by which inequalities of status were coercively imposed upon the people.”<sup>37</sup> Today, similar concerns exist regarding IP rights.

## 2) Rawls’s Theory of Institutional Justice and IP

The challenge for Merges is how to fit his view that IP rights are basic within Rawls’s theory of justice as fairness. In order to explain how Merges attempts do this, it is necessary to describe Rawls’s theory of justice in very brief and selective terms in the context of IP.<sup>38</sup> To start with, Rawls’s philosophy of political liberalism acknowledges the fact of pluralism, that citizens will have diverse and conflicting world views bearing on whether IP is just.<sup>39</sup> For Rawls, IP laws would be legitimate only when they are exercised in conformity with principles “which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”<sup>40</sup> Fortunately, despite profound disagreement on world views, reasonable citizens are ready to abide by principles and standards given the assurance that others will as well.<sup>41</sup> On a politically liberal view, the justification of IP rights is accomplished not through determining the truth of various possible comprehensive principles, such as

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34 *Ibid* at 3.

35 Tomasi, above note 11, ch 2.

36 *Ibid* at 27.

37 *Ibid* at 32–33.

38 For useful overviews of Rawls’s mature views, see Leif Wenar, “John Rawls” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), online: <http://plato.stanford.edu/archives/fall2008/entries/rawls>; see also, Samuel Freeman, *Rawls* (London: Routledge, 2007); and see, Thomas Pogge, *John Rawls: His Life and Theory of Justice*, translated by Michelle Kosch (Oxford: Oxford University Press, 2007).

39 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at xviii–xix [Rawls, *Political Liberalism*].

40 *Ibid* at 137.

41 *Ibid* at 49.



those of Locke or Kant on property, but on the basis of a political conception of justice, a conception that is generated from the fundamental ideas implicit in the public political culture.<sup>42</sup> An “overlapping consensus” on such principles exists when each citizen supports a political conception of justice for (moral) reasons that are internal to that persons’ own comprehensive moral doctrine.<sup>43</sup>

Rawls’s theory of justice as fairness is a political conception of justice in the above sense. It is about the basic structure of society: the arrangement of its basic institutions, such as the constitution, the economic structure, recognized forms of property, and the family.<sup>44</sup> In a well-ordered society, “everyone accepts, and knows that everyone else accepts, the very same political conception of justice.”<sup>45</sup> This conception is that society is a “fair system of social cooperation over time from one generation to the next.”<sup>46</sup> In order to engage in social cooperation during a complete life, citizens must possess two moral capacities or powers to be so engaged.<sup>47</sup> First, they must have a sense of justice: “the capacity to understand, to apply and to act from . . . the principles of political justice that specify fair terms of cooperation”; and, second, persons must have a conception of the good: “the capacity to have, to revise, and rationally to pursue a conception of the good.”<sup>48</sup> Citizens are equal in that they regard each other as having the necessary moral powers for social cooperation.<sup>49</sup> They are free insofar as they regard each other as having the moral powers that are necessary to possess a conception of the good and the right to make claims on their institutions in order to further their conceptions of the good.<sup>50</sup>

For Rawls, the question that a theory of distributive justice must address is, “how are the institutions of the basic structure to be regulated as one unified scheme of institutions so that a fair, efficient, and productive system of social cooperation can be maintained over time, from one generation to the next?”<sup>51</sup> This question is answered by the idea of the origin-

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42 Rawls, *Justice as Fairness*, above note 3 at 32–33.

43 *Ibid* at 32–38.

44 *Ibid* at 10–12.

45 *Ibid* at 8.

46 *Ibid* at 5.

47 *Ibid* at 18–24.

48 *Ibid* at 18–19.

49 *Ibid* at 20.

50 *Ibid* at 21–24.

51 *Ibid* at 50.

al position, a thought experiment in which free and equal representative members of society come together to freely make an agreement on principles of justice.<sup>52</sup> It is because citizens do not agree on any moral authority, whether it be a sacred text, religious institution, or natural law, that justice as fairness sets the fair terms of social cooperation by *agreement*.<sup>53</sup> Fairness requires that this agreement be made under conditions where no one may have an unequal bargaining position.<sup>54</sup> In the original position, persons are veiled from knowledge of their various natural endowments, such as strength, intelligence, and *talents*.<sup>55</sup> The original position, therefore, represents the idea that fairness demands that persons do *not* deserve their intellectual talents, such as inventiveness, originality, and creativity, the use of which are sometimes necessary for obtaining IP rights in various intellectual objects.<sup>56</sup> Merges believes that persons *do* deserve their intellectual talents,<sup>57</sup> but his discussion confuses moral desert (in one's talents) with desert of rights (e.g., patent rights) in the results of the application of our talents. According to Rawls, people *are* rewarded in an institution that satisfies the difference principle for educating and training their talents and exercising them in a way that contributes to the good of others and themselves.<sup>58</sup>

Within the original position, persons have a fundamental interest in developing and exercising their moral powers for the purpose of social cooperation; satisfying this interest is one of the main aims in coming to an agreement within the original position.<sup>59</sup> Citizens (or their representatives) would choose two principles of justice as fairness in the original position: the first sets out that each person has the same entitlement to “a fully adequate scheme” of basic rights and liberties (compatible with the same rights and liberties for all), and the second adds equality of opportunity and the distributional requirement that any social and economic inequalities are “to be to the greatest benefit of the least advantaged members of society

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52 *Ibid* at 14–18.

53 *Ibid* at 15.

54 *Ibid*. Thus, there is no force, fraud, coercion, or deception nor do the representatives have any knowledge of the particular circumstances of the basic structure of society such as one another's social positions, particular comprehensive moral beliefs, race, ethnicity, or sex.

55 *Ibid*.

56 *Ibid* at 74–75.

57 Merges, *Justifying Intellectual Property*, above note 5 at 107–9.

58 Rawls, *Justice as Fairness*, above note 3 at 75.

59 Rawls, *Political Liberalism*, above note 39 at 74.

(the difference principle).<sup>60</sup> One reason for choosing the difference principle in the original position, though not the only one, is that individuals behind the veil of ignorance would want to ensure that they maximize their position in the worst off possible socio-economic scenario.<sup>61</sup> These principles are ordered so that the claims to basic liberties have priority over distributional concerns. As Merges recognizes,<sup>62</sup> though, on Rawls's view, the right to private, productive property is not a basic right.<sup>63</sup> Thus, assuming that IP rights are property rights, on Rawls's view, IP rights are not basic rights either. Rather, Rawls limits basic rights and liberties to include only *personal property* such as dwellings, but not *productive property*.<sup>64</sup> For Rawls, "the right to private property in natural resources and means of production generally, including rights of acquisition and bequest" are not basic rights.<sup>65</sup>

For Rawls, the issue of the ownership of productive property cannot be settled through philosophical discussion.<sup>66</sup> In short, Locke's and Kant's ideas about property are not shared fundamental ideas of our political culture that can be a common basis of agreement. Rather, they are highly contested ideas that need to be resolved in conformity with our political conception of justice. For Rawls, a necessary criterion of a basic right or liberty is being "essential for the adequate development and the full and informed exercise of [the] two moral powers" (so that persons can cooperate).<sup>67</sup> However, for Rawls, the rights to ownership of the means of production and natural resources are not "necessary for the development and exercise of the moral powers."<sup>68</sup> At the same time, Rawls says that "among the basic liberties of the person is the right to hold and to have the exclusive use of personal property . . . [so as] to allow a sufficient material basis for a sense

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60 Rawls, *Justice as Fairness*, above note 3 at 42–43.

61 This maxim in principle has been subject to criticism by some game theorists, but a discussion of this point is beyond the scope of this paper.

62 Merges, *Justifying Intellectual Property*, above note 5 at 105.

63 Rawls, *Justice as Fairness*, above note 3 at 114.

64 *Ibid.* Productive property rights are usually considered to be rights in certain physical inputs, such as factories and tools that produce tangible products that can be sold. IP rights are also productive in the sense that their exercise can result in royalties paid to the IP owner.

65 *Ibid.* at 114. Nor is the equal right to participate in the control of the means of production and of natural resources taken to be a basic right.

66 Rawls, *Political Liberalism*, above note 39 at 338–39.

67 Rawls, *Justice as Fairness*, above note 3 at 112–13.

68 Rawls, *Political Liberalism*, above note 39 at 298.

of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers.”<sup>69</sup>

This is not to say that justice as fairness does not permit property rights in productive assets, including IP rights. Justice as fairness, Rawls says, favours either a property-owning democracy or a form of democratic socialism, both of which permit ownership of productive assets.<sup>70</sup> A property-owning democracy encourages broad ownership of productive assets, whereas liberal democratic socialism emphasizes collective ownership and worker-managed firms.<sup>71</sup> In justice as fairness as espoused by Rawls, property rights are not basic rights (that are not subject to distributive considerations but only to other basic rights) but *are* justified only to the extent that they satisfy the difference principle *and* the first principle of justice.<sup>72</sup> Satisfying the first principle is important, since even if the grant of a property right in a work, for example, benefited the least advantaged, it would still have to do so in a way that does not violate the basic rights and liberties of persons.<sup>73</sup>

### 3) Merges’s Argument for Basic IP Rights

Merges’s aim is to show that the current IP system conforms to Rawls’s theory of justice as fairness. However, Merges *denies* that IP can meet the difference principle<sup>74</sup> and his main move is to claim that IP is a basic right that is not subject to the requirements of the second principle of justice — it need not benefit the least advantaged.<sup>75</sup> Merges cannot merely argue, of course, from Locke’s or Kant’s comprehensive views about self-ownership, autonomy, and property rights directly, since they are particular moral views

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69 *Ibid.*

70 Rawls, *Justice as Fairness*, above note 3 at 138–40.

71 *Ibid.*

72 *Ibid.* at 135–38.

73 Speratua Dumitru, “Are Rawlsians Entitled to Monopoly Rights?” in Axel Gosseries, Alain Marciano, & Alain Strowel, eds, *Intellectual Property and Theories of Justice* (Palgrave MacMillan: New York, 2008), on the liberty to imitate.

74 Merges, *Justifying Intellectual Property*, above note 5. “From a Rawlsian perspective, the question is whether IP rights represent incentives designed solely to encourage the development of native endowments in a way that will benefit the least well off. In honesty, I do not think that IP can meet the stringent justificatory standards of Rawls’s second principle” at 354.

75 *Ibid.* at 117.

that are not widely shared. Instead, Merges argues that rational persons in the original position would agree to the current IP system.<sup>76</sup> As he puts it:

The argument flows from Rawls's first principle: IP is a basic liberty for those who would most benefit from creative independence and the career fulfillment that follows. Everyone in the original position faces the possibility that he or she will have the talent to enjoy these benefits.<sup>77</sup>

Of course, in the original position, persons are tasked to choose principles of justice, not whether they would agree to the current IP system or not. They don't even have enough information to do that. Regardless, taking the argument as it is given, Merges emphasizes that IP is a basic right because it furthers personal autonomy and the development of an overall life plan.

Property, including IP, forms a much larger part of the "total system of basic liberties" than Rawls himself believed. Because at least some form of property is essential to the development of a person's unique individual life projects, or overall life plan, it forms part of the system of basic liberties that any fair society must guarantee. Even if the broadest and most sweeping types of property are not required under Rawls's first principle — even if, that is, only a subset of all potential property rights are truly essential for the sake of fairness — IP surely forms part of the subset of property rights that *are* basic and essential. This is due to its more personal nature, and its close relationship to individual personalities and the need for individual autonomy.<sup>78</sup>

IP is essential to those who want to become creative professionals because it gives them career options which would not otherwise exist.<sup>79</sup> Merges comments that IP functions like the incentives that are necessary to attract well-positioned persons into socially beneficial roles.<sup>80</sup> Although Merges believes that such basic IP rights will create inequalities, "[p]eople in the original position would permit the 'inegalitarian' distribution resulting from the incentives offered by an IP system, because these incentives . . . give creative people career options, which in turn affect the overall distribution of society's resources."<sup>81</sup>

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76 *Ibid* at 109–12.

77 *Ibid* at 110.

78 *Ibid* at 117.

79 *Ibid* at 111.

80 *Ibid* at 110.

81 *Ibid* at 111.

But why have IP rights as basic rather than non-basic? For one thing, Merges would say in response that the interest that creative professionals have in their careers morally “outweighs the operation of the ‘difference principle.’”<sup>82</sup> Secondly, “[w]idespread redistribution of economic resources simply creates massive disincentives for people to work hard and improve their individual lives.”<sup>83</sup> While one might think that non-basic rights (those that guarantee that the worst off benefit from any inequalities) might be regarded as more economically valuable than basic rights that do not have such a guarantee, it could be argued that this view ignores the magnitude of the effect of economic growth over the last century on the well-being of individuals.<sup>84</sup> Ironically, the prosperity that results from economic growth makes the exercise of economic rights, such as IP rights, more valuable to their holders;<sup>85</sup> more valuable, Merges could say, than distributional guarantees.

As mentioned, Merges does not believe that current IP law conforms to the difference principle.<sup>86</sup> He provides no evidence for his view, but there is a consensus that strengthening IP rights is positively correlated with income inequality in developing countries,<sup>87</sup> and given the increase in inequality amongst many OECD countries during the last decades,<sup>88</sup> a period when the value of international royalty and licensing fees and receipts has dramatically increased<sup>89</sup> and economies have grown,<sup>90</sup> it is a credible view.<sup>91</sup> Nevertheless, Merges argues that current IP law is justified because

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82 *Ibid.*

83 *Ibid* at 106.

84 Tomasi, above note 11 at ch 3.

85 *Ibid* at 61.

86 Merges, *Justifying Intellectual Property*, above note 5 at 354.

87 Samuel Adams, “Globalization and Income Inequality: Implications for Intellectual Property Rights” (2008) 30:5 *J Pol’y Modeling* 725 at 730–31.

88 Organisation for Economic Co-operation and Development, *Growing Unequal? Income Distribution and Poverty in OECD Countries* (21 October 2008) at ch 1, online: [www.oecd.org/social/socialpoliciesanddata/growingunequalincomedistributionandpovertyinoecdountries.htm](http://www.oecd.org/social/socialpoliciesanddata/growingunequalincomedistributionandpovertyinoecdountries.htm).

89 World Intellectual Property Office, *World Intellectual Property Report: The Changing Face of Innovation* (14 November 2011) at 60–61, online: WIPO [www.wipo.int/econ\\_stat/en/economics/wipr](http://www.wipo.int/econ_stat/en/economics/wipr).

90 World Bank, *GDP growth (annual %)*, online: <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG>.

91 Recent studies have emphasized the positive correlation between the strength of IP rights and economic growth in high and low (though not middle) income countries; see Rod Falvey, Neil Foster, & David Greenaway, “Intellectual Property Rights and Economic Growth” (2006) 10:4 *Review of Development Economics* 700.

it has provided “significant benefits,”<sup>92</sup> such as television, the telephone, agricultural technology, air conditioning, cellphones, and pharmaceuticals to the poor.<sup>93</sup> He concludes:

So the extremely high salaries at the top of the entertainment industry, the profits of consumer electronics companies, and the like, may benefit the poorest members of society enough to justify the way that these industries are set up — including, of course, the availability of IP rights and the profits that flow from them.<sup>94</sup>

Further, the justice of the IP system is evidenced by the internal structure of the rights themselves<sup>95</sup> and externally by the taxation system which redistributes income from IP right exploitation.<sup>96</sup> In terms of their internal structure, Merges relates this theory of IP back to the role of desert by saying that:

. . . [E]very IP right includes two separate components: an inviolable individual contribution, which I call the “deserving core” of the work covered by the right; and a component that can best be thought of as owing its origins to social forces and factors, which I call “the periphery.”<sup>97</sup>

Given this notion of the core, it seems that Merges intends all and only IP rights in the core to be basic rights, because neither basic rights nor the core deserved rights are subject to redistribution.<sup>98</sup>

### C. EVALUATION OF MERGES’S THEORY OF IP

The main task that Merges faces is to establish that IP rights are basic rights. On his view, IP rights are basic because they are necessary for self-ownership and autonomy.<sup>99</sup> The biggest problem for Merges in this regard is to show how these robust, property-generating, moral conceptions of self-ownership and autonomy are relevant to justice as fairness, a political conception of justice. The point of a political conception of IP (which Merges purports

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92 Merges, *Justifying Intellectual Property*, above note 5 at 120.

93 *Ibid* at 118–20.

94 *Ibid* at 118.

95 *Ibid* at 121–23.

96 *Ibid* at 132–33.

97 *Ibid* at 121.

98 *Ibid*.

99 *Ibid* at 117 and ch 2–3.

to be developing) is not that it is morally legitimate, but that people will accept it despite the existence of irreconcilable moral views on IP rights. According to Rawls's theory, there is moral disagreement regarding the value of autonomy and self-ownership, so, these ideas cannot be a basis upon which persons in the original position would make decisions about the choice of principles of justice. Rather, the basis for decisions is the (less robust) shared idea that persons are free and equal and that a well-ordered society is a "fair system of social cooperation" in the senses defined earlier.

As discussed above, for Rawls, determining what rights are basic is done on the basis of elements from our public political culture, particularly the shared ideals of freedom, equality, and social cooperation.<sup>100</sup> In political liberalism, rights are basic only if they are a necessary condition of the "full and informed exercise" and "adequate development" of the moral powers of *all* citizens.<sup>101</sup> As Samuel Freeman points out, generally, it is not the case that merely because a particular right or liberty is an essential condition for a *class of persons* (say creative professionals) to pursue and develop *their* particular choice of life plan that it is a sufficient reason to make them basic rights and liberties for everyone.<sup>102</sup> The fact that IP rights further the self-ownership and autonomy of creative persons is not determinative of whether they are basic rights. Merges could counter, at this point, that if the freedom to choose an occupation is necessary for *everyone* to develop their moral powers, then this is also true of the ownership of productive property, such as IP rights.<sup>103</sup> As Tomasi has argued, further, economic rights provide all persons with the chance for responsible self-authorship and identity, economic independence from the state, and personal security.<sup>104</sup>

Merges's interpretation of the original position suggests that the right to a career as a creative professional could rest upon a basic right to a choice of occupation<sup>105</sup> that is much stronger than the traditional understanding that no one should be forced to work in a particular job. The stronger principle is that society should create job opportunities which match the aspirations of each individual. But many individual career aspirations may

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100 Rawls, *Justice as Fairness*, above note 3 at 5.

101 *Ibid* at 112–13.

102 Samuel Freeman, "Can Economic Liberties Be Basic Liberties?" *Bleeding Heart Libertarians* (13 June 2012) online: Bleeding Heart Libertarians <http://bleedingheartlibertarians.com/2012/06/can-economic-liberties-be-basic-liberties>.

103 Tomasi makes the more general point in Tomasi, above note 11 at 77.

104 *Ibid* at 77–81.

105 See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) at 274.



be unworkable, like the choice of a three-day workweek or seasonal work with strong unemployment benefits during a long off-season. More to the point, the basic right of IP would require creating a market of artificially scarce “intellectual” goods to create the opportunity for creative professionals. This principle would justify much broader IP rights than does the current system, so as to benefit talented home gardeners, buskers, and others whose creations would otherwise be uncompensated positive externalities.

Even if IP rights could be regarded as basic on some workable conception, their very alienability would appear to undermine their importance, as would the alienability of voter rights, and other political and civil rights and liberties.<sup>106</sup> Further, basic IP rights would operate regardless of potential massive inequalities resulting from them. Merges’s answer, that there is no need to justify unequal distributions of the benefits of IP rights given that it is a basic right,<sup>107</sup> is inadequate. Economic rights are unlike basic civil or political rights since a basic right by itself offers no guarantee of the distribution of social goods. On the one hand, without such a guarantee, the commitment to society of hard-working creators, both talented and untalented, who could not earn a living from exploiting their IP rights, would become strained,<sup>108</sup> causing them to dishonour their agreement, believing that their life prospects have been sacrificed to make the advantaged even better off. On the other hand, creators, both talented and untalented, whose works are highly marketable, could make a fortune, with little redistribution of their gains to others, straining the commitment of those who use the creations, and resulting in widespread infringement of IP rights through the use of disruptive technologies, such as peer-to-peer file sharing. Given these economic implications, it is suggested that it is doubtful that those in the original position would choose principles which would result in anything but a small and weak subset of existing IP rights as basic rights. These basic rights would at most allow for a decent living rather than the fortune of JK Rowling, a heroine of Merges’s book.<sup>109</sup>

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106 Merges, *Justifying Intellectual Property*, above note 5, argues that alienability to corporations is in the interests of persons, at 206–13.

107 *Ibid* at 117.

108 Rawls, *Justice as Fairness*, above note 3 at 103–4.

109 It is beyond the scope of this paper to describe in detail the nature of non-basic IP rights that would be justified. My hunch is that such “property” rights would be much weaker in scope, duration, and excludability than those that exist currently, in order to conform to an egalitarian principle of distribution.

Merges's answer to the problem of distributional inequity, recall, was to point to evidence that IP has provided significant benefits to the poor, even if it does not satisfy the difference principle.<sup>110</sup> But an advocate of a market democratic theory of IP need not concede that the difference principle is not satisfied by IP law. Indeed, the difference principle is premised upon the idea that social and economic inequalities can work to the advantage of the least advantaged because the incentive structures involved will increase growth, which can then benefit the least advantaged through state-operated social services and "an aggressive system of redistributive taxation."<sup>111</sup> But market democracy need not take such a direct approach to the satisfaction of the difference principle. Instead, as Brenner and Tomasi have argued, a market democracy can seek to benefit the least advantaged by "creating the conditions for a robustly growing commercial society"<sup>112</sup> using individual incentives rather than state coercion.<sup>113</sup> The result on their view is that, paradoxically, a society that aims at benefitting the worst off position (e.g., high liberalism) ends up worse off over time because less economic freedom slows the growth of the economy.<sup>114</sup> Still, the basic problem with the market democracy approach is that it assumes the possibility of future economic growth, which is becoming more questionable given the increasing cost of extracting oil.<sup>115</sup> Rawls himself dismissed as unreasonable a theory of justice which requires continual economic growth.<sup>116</sup> Moreover, while conventional wisdom was that economic growth resulted in greater income equality, recent studies show a positive correlation between economic growth and income inequality.<sup>117</sup>

## D. CONCLUSION

In his book *Justifying Intellectual Property*, Robert Merges attempts to show that IP rights grounded in autonomy and self-ownership are just on Rawls's

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110 Merges, *Justifying Intellectual Property*, above note 5 at 120.

111 Tomasi, above note 11 at 231.

112 *Ibid* at 232.

113 *Ibid* at 231–33.

114 *Ibid* at 233–37.

115 Jeff Rubin, *The End of Growth* (Toronto: Random House, 2012) at 43–45.

116 Rawls, *Justice as Fairness*, above note 3 at 63–64. Of course, much of the discussion that criticizes the goal and possibility of future economic growth is based upon the assumption of the scarcity of tangible resources, rather than intangible resources.

117 Kristin J Forbes, "A Reassessment of the Relationship Between Inequality and Growth" (2000) 90:4 *Am Econ Rev* 869.

politically liberal theory of justice as fairness. His failure to do so is illuminating. First, he fails to appreciate sufficiently that a politically liberal theory of IP does not attempt to *morally* justify IP rights, but rather to provide principles of *political* justice that provide a basis for social cooperation involving intellectual objects, despite irresolvable conflicts about the moral justification of IP rights. Second, on Rawls's view, basic rights, like the right to vote, enjoy a priority over distributive principles, and must be necessary to enable persons to engage in mutually beneficial social cooperation using their moral powers. Merges argues that current IP law is just because IP rights are basic rights and, therefore, that the inequalities created by the current IP system are irrelevant to whether it is just. IP rights are basic, Merges says, because they are necessary to provide the career options for creative professionals that would enhance their autonomy and self-ownership. But such a strong right to an occupation — and the autonomy and self-ownership it seeks to further — is not necessary to develop the moral powers necessary for social cooperation. So, IP rights are not basic rights on Rawls's view. Furthermore, at most, a very small subset of current IP rights would be justifiable as basic rights within a politically liberal IP regime because an overly strong IP right could generate inequalities that would strain people's commitment to society and its IP rules. Thus, most IP rights would need to satisfy a principle of distribution, such as, perhaps, the difference principle, in order to be just.<sup>118</sup>

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118 I offer my sincere thanks to the editors, and to Maria Lavelle and two anonymous reviewers for comments on an earlier draft.