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JUSTICE IN INTELLECTUAL PROPERTY

DA JUSTIÇA NA PROPRIEDADE INTELECTUAL

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Abstract. *Intellectual property (IP) rights represent an anomaly within a free market economic system. IP rights, that is, necessarily constrain the actions of individuals within the market. In response to this anomaly, IP scholars have offered various justifications for the application of such supposed constraints within a free market economy. Chief among these justifications is the widespread appeal to utilitarianism via incentivization. Yet, it is not exactly clear that this incentivization is actually producing the benefits required for the utilitarian justification. Rather than abandoning the IP system, however, some have simply suggested an alternative justification. These scholars argue that IP rights are actual, moral rights that deserve protection as moral rights. Further, scholars argue that any distributional inequality generated by the IP system are nonetheless justified under Rawls's theory of justice. I argue, however, that Rawls's theory of justice cannot "justify" a selective, IP regime.*

Keywords: *Rawls; Intellectual Property; Difference Principle.*

Sumário. *Os direitos de propriedade intelectual (PI) representam uma anomalia dentro de um sistema económico de livre mercado. Isto é, os direitos de PI necessariamente restringem as ações dos indivíduos no mercado. Em resposta a essa anomalia, os estudiosos da PI ofereceram várias justificações para a aplicação de tais supostas restrições numa economia de mercado livre. A principal forma de justificação funda-se na popular visão utilitarista sobre a importância dos incentivos. No entanto, não está perfeitamente claro que esses incentivos estejam realmente a produzir os benefícios necessários para fundamentar a justificação utilitarista. Em vez de abandonar o sistema de PI, no entanto, alguns autores simplesmente sugeriram uma justificação alternativa. Esses estudiosos argumentam que os direitos de PI são verdadeiros direitos morais que merecem proteção enquanto direitos morais. Além disso, os estudiosos argumentam que qualquer desigualdade distributiva gerada pelo sistema de PI é justificada pela teoria da justiça de Rawls. No entanto, eu argumento que a teoria da justiça de Rawls não pode "justificar" um regime seletivo de PI.*

Palavras-chave: *Rawls; Propriedade Intelectual; Princípio da Diferença.*

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0. Introduction

Intellectual property (IP) rights represent an anomaly within a liberal democracy and free market economic system. In many such places, IP rights are not considered inherent, but are instead granted to only those individuals that qualify under the state requirements. This selective granting of IP rights to particular individuals or entities, that is, necessarily constrains the actions of other individuals or entities wishing to freely enter the market. (Lemley, 2015, p. 1330) To put it in stark terms, the rights such individuals would otherwise enjoy are restricted under a selective granting system.[1]

Without justification, then, this restriction would amount to a violation of one's individual rights. What's more, the selective granting of IP rights in the United States has led to significant, economic disparity between those who have been granted IP rights and those without such rights. Moreover, such a system also incentivizes IP rights holders to increase their holdings and prevent market participation of competitors.

In response to this anomaly, IP scholars who favor this type of IP regime have offered various justifications for the application of such constraints within a liberal democracy and free market economy.[2] Chief among these justifications is the reliance upon utilitarianism. On this view, the apparent constraints on other potential IP users in the market are offset by the overall social utility that is gained from selectively granting IP rights to certain IP creators (Lemley, 2015, p. 1331). On this view, IP rights "incentivize" IP creation and this IP creation ultimately leads to the production of greater social goods (Gallini & Scotchmer, 2002, p. 53). Remarkably, this view largely assumes that rights violations can be overcome by simply increasing overall utility.

It is not exactly clear, however, that incentivizing IP creation through the selective granting of IP rights is actually producing the benefits required for the utilitarian justification (Merges, 2011, p. 3). Indeed, it may be that IP rights may

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[1] Throughout, I will refer to such systems as "selective granting" IP systems or as "selective IP regimes." Specifically, the IP regime in the United States is more or less the subject of this debate.

[2] *See* William Fisher, *Theories of Intellectual Property*, in New Essays in the Legal and Political Theory of Property 168 (Stephen R. Munzer ed., 2001).

actually fail to achieve the utilitarian goals upon which so many scholars suggest IP rights rest.[3] Rather than rebuking this IP system, however, some have simply suggested an alternative justification (Hughes & Merges, 2017, pp. 526-528). In other words, rather than arguing for changes to the selective IP regime, some scholars have instead sought to simply find another argument to justify its existence (Merges, 2011).

Rob Merges and Justin Hughes are two such defenders of the kind of IP regime that selectively grants IP rights to particular individuals and entities. (Hughes & Merges, 2017). Their defense of such a system then, is not grounded in the traditional utilitarian incentive argument. Rather, Merges and Hughes argue that IP rights are actual, moral rights that deserve protection *as moral rights* (Hughes & Merges, 2017). Merges and Hughes recognize, however, that this defense of IP rights carries with it the burden to explain or justify the problems that the selective IP regime creates. Specifically, it is now largely recognized that a selective IP regime produces wide, distributional inequalities. Merges and Hughes take on the burden of justifying these inequalities by bringing the selective IP regime under John Rawls's theory of justice. Together, Merges and Hughes argue that a selective IP regime, even with the inequality it produces, is nonetheless distributionally just under Rawls's theory of justice (Hughes & Merges, 2017). Unfortunately, Merges and Hughes fail in their attempt to construct a justification for IP rights. Rawls's theory of justice simply cannot "justify" the type of selective IP regime that Merges and Hughes wish to defend.

In Section I, I provide a brief sketch of Rawls's approach to distributive justice. In Section II, I present Merges and Hughes's arguments that IP rights are basic, moral rights under Rawls's theory of justice. Then, in Section III, I argue that IP rights cannot be basic, moral rights according to Rawls's principles of justice. Section IV presents Merges and Hughes's Rawlsian justification for the distributional inequalities within a selective IP system. And finally, in Section V, I argue that this argument also fails. Taken as a whole, a selective IP regime simply cannot be justified, in the way Merges and Hughes suggest, under Rawls's theory of justice. Moreover, throughout this discussion a unique and pervasive

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[3] "The traditional justification for intellectual property (IP) rights has been utilitarian. We grant exclusive rights because we think the world will be a better place as a result. But what evidence we have doesn't fully justify IP rights in their current form." (Lemley, 2015)

theme emerges. Throughout their Rawlsian "defense" of a selective IP regime, Merges and Hughes routinely make claims regarding Rawls's work that are at best misguided, or, at worst, deceitful. In working through their arguments, I also attempt to disentangle the legitimate, Rawlsian view from the contrived version presented by Merges and Hughes.

1. Rawls and Distributive Justice

The most recognizable aspect of Rawls's theory of justice is his two principles of justice. Together, they are known as the Equal Liberties Principle and the Difference Principle. These principles, Rawls argues, provide the basis for a just society. Merges argues that a selective IP regime could be grounded in both the Equal Liberties Principle and the Difference Principle. Merges and Hughes together also argue specifically that a system of selective copyright protection (like the kind in the United States) would be just according to these two principles as well. It is these two principles, then, that create the backbone of Merges and Hughes's defense of a selective IP regime.

1.1. The Two Principles of Justice

Famously opening his *A Theory of Justice*, Rawls says that "[j]ustice is the first virtue of social institutions, as truth is of systems of thought" (Rawls, 1971, p. 3). Rawls, here, is signaling that he is taking on the great question, asked over two thousand years ago by Socrates, of *what is justice?* (Plato, 376 BC). In short, Rawls is simply stating the obvious: justice is the primary virtue we want our social institutions to exemplify. If given the choice of societies, we would pick to live in a *more* just society rather than in a *less* just society. But what kind of society would we actually *want* to live in? What would this kind of just society look like? It will not, Rawls suggests, resemble an arrangement generated by utilitarian principles (Rawls, 1971, p. xviii). Rather, it is the social contract tradition, Rawls says, that "best approximates our considered judgments of justice and constitutes the most appropriate moral basis for a democratic society" (Rawls, 1971, p. xviii). Rawls thus builds upon the social contract tradition to then arrive at a theory of justice more defensible than its predecessors while at the same time

demonstrating that utilitarianism cannot provide a sufficient basis for the liberal, democratic ideal.

Borrowing and generalizing from the social contract traditions, Rawls argues that justice is simply fairness according to what truly free and equal individuals would agree upon (Rawls, 1971, p. 13). This is not what some impersonal, external moral theory defines as just. Rather, it is simply what truly free and equal individuals would agree to. This conception of justice is, as Rawls puts it, political rather than moral (Rawls, 1985, p. 230). It is only the political conception of justice that can "serve as a basis of informed and willing political agreement between citizens viewed as free and equal persons" (Rawls, 1985, p. 230). And, as such, a political conception of justice can be accepted by all individuals within society. Rawls then uses this notion of justice as fairness to generate the particular political conception of justice that truly free and equal people would actually agree upon.

Rawls recognizes, however, that actual people, in actual society, will be poor representatives of what truly free and equal people would choose. Consider, for instance, if the particular conception of justice for a given society is to be decided by a group of rich, white men. It is likely (though not necessarily true) that these men will construct a conception of justice for society that tends to benefit rich, white men. Individuals, that is, are self-interested. So, Rawls famously articulates a theoretical device to avoid this problem. Rawls argues that the conception of justice that truly free and equal people would choose can be discovered using the hypothetical device of the so-called *original position* where individuals are situated behind a *veil of ignorance*.[4]

The original position is a hypothetical conference, where hypothetical representatives for society convene to construct and organize the political and social structures for the individuals they represent. In order to ensure that these representatives choose the arrangements that truly free and equal individuals would choose, the representatives make these decisions behind the veil of ignorance. The veil of ignorance is a hypothetical device that removes from the representatives any knowledge that would result in a biased decision about the

[4] This hypothetical adoption of a conception of justice, though while informative, is only hypothetical and non-historic (Rawls, 1985).

political and social arrangements. So, for instance, the veil of ignorance prevents the representatives from knowing their race, class, gender, age, and talents. From the original position, situated behind the veil of ignorance, Rawls argues that the representatives will ultimately agree to political and social arrangements that conform to two, particular principles:

> First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (Rawls, 1971, p. 53).

While all aspects of these two principles are important, only the first principle and part (a) of the second concern us here. The first principle, also known as the Equal Liberty Principle, effectively guarantees a set of basic, equal rights for individuals within society. So, for instance, political rights, like the right to vote, would be guaranteed for each citizen. The reasoning for why this is the case is obvious when we recall the status of the representatives in the original position. Consider the question among representatives in the original position regarding who should be allowed to vote. Without knowing one's race or gender, no representative would choose a scheme where some individuals enjoy rights based on race or gender while others do not. After all, once the veil of ignorance is lifted, the representative might be in one of those rejected classes. It would be irrational, that is, for the representative to restrict voting rights to only white males, since the representative might, in fact, be a black woman. So, the representatives will agree in the original position that whatever liberties are protected will be protected for everyone.

The second principle is divided into two parts. The most influential portion of this principle is 2(a), the Difference Principle. Rawls imagines that representatives in the original position would be given various options for how social and economic liberties are to be arranged in society. Inequalities, though, are not necessarily unjust. Rather, if there is to be inequality, Rawls accepts that it can nonetheless be justified by agreement among representatives in the original position. Rawls argues that representatives within the original position would weigh various options and chose the arrangement that provides the maximum benefit for the least advantaged.

Rawls suggests that truly free and equal persons in the original position would reason as follows, when choosing between a utilitarian scheme and the Difference Principle: Under a utilitarian scheme, it is possible for the most well off in society to benefit from the scheme while the worst off would be harmed. This will be true so long as the overall benefits in society are increased. In other words, it can be perfectly just under a utilitarian scheme for the rich to get richer and the poor to get poorer so long as overall social utility is increased. However, Rawls argues that the representatives in the original position would not select this particular scheme. The reasoning, of course, is because each representative may actually be in the worst-off class once the veil of ignorance is lifted. So, the representatives will not choose a scheme that would likely harm them. Rawls thus claims that representatives would instead agree to a scheme of social and economic arrangements where the well-off and least well-off benefit together. The well-being of the well-off would increase only to the extent that well-being is similarly raised for the least well-off. On this scheme, no matter one's place in society, inequalities will always work toward his or her advantage. This, of course, is just the Difference Principle.

The takeaway, here, is crucial. These principles represent a means of action guidance for citizens in a society, not because they conform to some overarching moral theory, but because they are what truly free and equal individuals would agree to. It is the agreement, specifically, the agreement behind the veil of ignorance, that generates the action-guidance of these principles. This is the social contract nature of the Rawlsian framework. To apply these principles to a specific issue like intellectual property requires keeping the basis of these principles in mind. It will not be enough for a system of intellectual property to simply conform to the principles. It must be the kind of system that would be chosen by representatives in the original position behind the veil of ignorance.

2. Intellectual Property in the Original Position

So, why would representatives in the original position care about establishing a selective IP regime? Merges argues that the rights generated by a selective IP regime would be identified by representatives in the original position

as the kind of rights that required equal protection. Merges and Hughes also claim that copyright in particular conforms to the Equal Liberties Principles. Additionally, Merges also argues that a selective IP regime would also satisfy the Difference Principle. And, again, Merges and Hughes together argue that copyright in particular satisfies this principle. In this section, I present the arguments for their claims.

2.1. Intellectual Property and the Equal Liberties Principle

Merges argues that IP rights generated by a selective IP regime constitute the kind of rights that would fall under the Equal Liberties Principle. In other words, Merges argues that selective IP rights are justified and deserve protection as basic rights according to the Equal Liberties Principle. That argument is, ultimately, fairly brief. Here is the argument in full:

> In the *original position*, [emphasis added] no one knows what his talents and tastes will be. Thus anyone might potentially be a creative professional whose best and highest employment, and whose personal happiness, would lie in a job in which IP protection would give much greater freedom than is possible without these crucial rights. . . 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* [emphasis added] faces the possibility that he or she will have the talent to enjoy these benefits (Merges, 2011, p. 110).

About this argument, notice first that Merges is arguing squarely within Rawls's original position framework. So, according to Merges, IP rights would be considered basic rights because "[p]eople in the original position would permit the 'inegalitarian' distribution resulting from the incentives offered by [a selective] IP system, because these incentives are necessary for a creative person to achieve career fulfillment" (Merges, 2011, p. 111). Merges claims that "people in the original position would understand that creative freedom and autonomy are important enough values that they should join the list of essential liberties" (Merges, 2011, p. 111).

Not only, however, must a right be essential to come under the Equal Liberties Principle, it must also not restrict the rights of others. For IP rights in general, Merges gives no indication of how the selective IP scheme satisfies this aspect of the Equal Liberties Principle. However, Merges and Hughes briefly address the issue in relation to copyright (Hughes & Merges, 2017). They notice that it is possible to see copyright as restricting other rights that would otherwise

be enjoyed by individuals within a society. Namely, the freedom of speech. Yet, Merges and Hughes argue that copyright is not "intrinsically" opposed to freedom of speech (Hughes & Merges, 2017, pp. 527-28). Specifically, they claim that copyright contains internal limitations that limit its reach over rights to freedom of speech like those guaranteed by the First Amendment (Hughes & Merges, 2017, pp. 527-28). Additionally, they argue that "so much expression in cyberspace is uncopyrightable, uncopyrighted, or effectively free that copyright does not appear to undermine people's ability to participate culturally or politically" (Hughes & Merges, 2017, pp. 527-28). IP rights thus "compl[y]" with and do not "violate" the Equal Liberties Principle (Merges, 2011, p. 117; Hughes & Merges, 2017, p. 528).

In other words, since there are some creative individuals who would benefit from a selective IP regime, individuals in the original position would supposedly choose to ensure that those particularly creative individuals were thoroughly and completely protected.

3. IP Rights as Non-Basic

Since the publication of *Justifying Intellectual Property* (JIP), there has not been much criticism of Merges's use of Rawls to *justify* our current IP scheme.[5] So, in this section, I will present one of the most recent and sustained criticism of Merges's (and, by association, Merges and Hughes's) argument that IP rights are basic rights.

Gregory Hagen has recently argued that Merges fails to show that IP rights are in fact basic rights in Rawls's theory. To see this, it is worth noting that Rawls simply enumerates what rights he thinks will be agreed upon in the original position.

> . . . it is essential to observe that the basic liberties are given by a list of such liberties. Important among these are political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. These liberties are to be equal by the first principle. (Rawls, 1971, p. 53)

[5] See, however, (Blankfien-Tabachnick, 2013); and (Gordon, 2013).

And while it is true that Rawls includes a right to personal property among the basic liberties, he has a very narrow view of what personal property amounts to.

> As a political conception, then, justice, as fairness includes no natural right of private property in the means of production (although it does include a right to personal property as necessary for citizens' independence and integrity), nor a natural right to worker-owned and -managed firms. It offers instead a conception of justice in the light of which, given the particular circumstances of a country, those questions can be reasonably decided. (Rawls, 1971, p. xvi)

Hagen, then, takes Merges to task for attempting to overlook this clear restriction on property.

Specifically, Hagen argues that Merges has failed to sufficiently show why intellectual rights must be added to the list of basic rights, even though such rights will necessarily be limited to a particular class of individuals.

> [G]enerally, 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. (Hagen, 2014, p. 364)

Simply because such rights "further the self-ownership and autonomy of created persons" is not enough to make such rights *basic* rights under the Equal Liberty Principle (Hagen, 2014, p. 364). This would result in the absurd circumstance in the Original Position in which individuals agree to arrange society to "create job opportunities which match the aspirations of each individual" (Hagen, 2014, p. 364). However, given the diversity of views regarding our professional preferences, this is just not possible.[6] But, "[m]ore 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" (Hagen, 2014, p. 365). According to Hagen, this is just not an arrangement that individuals would seem to agree to in the Original Position, behind the Veil of Ignorance. It is unlikely, that is, that representatives would risk forfeiting their freedom of expression in order to bestow this freedom on only a select few. The same reasoning that would thwart a scheme of race or gender based suffrage in the original position would seemingly also thwart a scheme that would limit the freedom of expression to only a select group of individuals.

[6] For instance, I might want a three day work week and to have summers off.

Hagen's criticism is good as far as it goes, but seems to mostly remain at the surface. Hagen's argument is only that IP rights are not those that would be chosen in the original position. He supports this by noting, rightly, that IP rights would essentially be granting special privileges to only a select group of individuals within society. This seems to betray the idea that the *basic* liberties will be *equal for all citizens*. Hagen's criticism, then, is well taken. But, Merges may reply that IP rights actually *are* equal. After all, anyone may obtain IP protection for her creative endeavors. Yet, while this may be true in form, it is not true in substance. IP rights necessarily prohibit the creative endeavors of individuals. I cannot, for instance, start selling my own *Keebler* cookies. IP rights, then, can hardly be said to be equal for all citizens. Nonetheless, there is a deeper problem for Merges.

3.1. IP Rights - Not Necessary for Free and Equal Social Cooperation

One of the lasting insights of Rawls's project is the imagining of individuals situated as truly free and equal in the original position. The original position is simply a hypothetical version of the social contract concept of the state of nature made famous by Hobbes. Unlike the Hobbesian state of nature, however, where social order emerges from the threat of violence, Rawls believes that we can hypothesize a situation where the individuals purposefully organize society. In organizing society, individuals will accept some liberties as essential.

It will be "rational for people in the original position to give the basic liberties a privileged place because these basic liberties are extremely valuable to anyone" (Nickel, 1994, p. 765). But it is not as if the liberties agreed upon in the original position will be the *only* liberties granted in society. Rather, these liberties are simply those that will be essential for social cooperation and furthering each individual's sense of justice and conception of the good (Rawls, 1993, pp. 19–20). Or, in other words, the basic liberties are those that are necessary for *free and equal* individuals to live as free and equal with one another.

Other rights and liberties, of course, are important, but may not be *necessary* for free and equal individuals to live with one another. These other rights and liberties will instead be settled by working out the specifics for the

particular society (as Rawls describes for private property). For instance, it is not clear that a right to own natural resources will be a right that individuals see as *necessary* for free and equals to live in harmony with one another. Yet, this right may nonetheless be accepted *for a particular society*. The point is that the basic liberties will be accepted as necessary for social cooperation in general and so important for individuals to truly live as free and equals "that the parties in the original position will decide that [the basic liberties] must be equal for all citizens . . . and that they must never be sacrificed to secondary values such as greater prosperity or the advancement of scientific knowledge" (Nickel, 1994, p. 766). The basic liberties set the *necessary requirements* for a liberal society, but not the specifics for these societies.

Importantly, Merges fails to make the case for IP rights as rights that go beyond the rights necessary for individuals to live as *free and equals*. Consider, again, the list of basic rights and liberties enumerated by Rawls: political liberties, freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person, etc. These rights and liberties are, in a sense, *primary*. Without these basic freedoms, or rights, an individual would not be able to engage in activities consistent with living as a free and equal individual in society. The political liberties, for instance, just are those liberties that get political activity off the ground for a liberal society in the first place. I cannot be free and equal with my compatriots if I cannot engage in political activities. Or consider freedom of speech. Freedom of speech is not protecting an activity that is brought about through the exercise of some other liberty or right. Rather, freedom of speech *is* the right that permits me to engage in such activity. So, there is a distinction that can be made among possible, basic rights – those that are primary from those that are not.[7]

Among the non-primary rights, then, will be rights that further specify how the basic rights are to be fulfilled within the specific society. Consider, again, the right to own natural resources. This right is clearly non-primary. It depends on other, *primary* rights for generating the need for this additional right. A right to private property might partially accomplish this task. And this right might be

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[7] I hesitate to use "secondary" as the term for the other class, as some further rights might be embedded within other rights. Calling these rights "secondary," then may be inappropriate.

further specified to permit individuals to own natural resources. But the point is that a basic right to private property is *prior to* this additional, more specific right to own natural resources in particular. And, in this way, it is only the prior right that is basic since there may be multiple ways to spell out how this right is applied in a society. For instance, a society may decide to have community ownership of natural resources. "Since the veil of ignorance deprives [individuals] of much knowledge relevant to the choice and specification of liberties and rights, the basic liberties that they choose must be rather abstract" (Nickel, 1994, pp. 764–65).

In other words, IP rights cannot be chosen as basic behind the veil of ignorance. IP rights, rather, necessarily depend on other, more basic rights which *themselves* give rise to the kind of activity that IP rights are meant to protect. Merges's argument, then, is an elaborate exercise in hand waiving. He argues that IP rights are necessary for individuals to engage creative work, but he fails to make this showing. Since freedom of speech and freedom of conscience are both basic liberties that enable creative activity, IP rights are not *essential*. And how the creative work that emerges as a result of other, basic liberties is *additionally* protected is not something that can be settled behind the veil of ignorance.

IP rights simply do not enable creative activity. They only provide protection for the *products* of creative activity once that activity has already occurred. But whether or not the products of creative activity need additional protection over the freedom to engage in the creative activity itself is not a question that can be answered in the original position. This is a specific question to be addressed within the specifics of particular societies.

Of course, one might say that a creator will be less inclined to create if she knows her work will not be protected. Or, to put it another way, she will be less inclined to create if she is not recouping all of the positive externalities. But if this is the case, then the real issue is about whether there should be a right to monetize one's creative work. And it is not clear how to get a right like this off the ground. Since there is nothing in Rawls's two principles to prevent an individual from monetizing her work product, it would be odd to grant a special right for creators over *their* work product in particular. Once the right to autonomous expression is secured through the basic liberties, individuals in the original position would

have no legitimate reason to provide this extra right to just creative individuals. IP rights are simply not basic rights under the Equal Liberties Principle. If it is the case, though, that Merges and Hughes fail to establish IP rights as basic, they additionally attempt to justify IP rights under the Difference Principle.

4. Intellectual Property and the Difference Principle

In their defense of selective IP rights, Merges and Hughes also attempt to justify IP rights under the Difference Principle. Importantly, Rawls argues that the two principles that will be agreed upon in the original position will be lexically ordered. Meaning that the first principle takes priority over the second. Thus, if selective IP rights are truly basic rights that would come under the Equal Liberties Principle, then any distributional inequality that results from enforcing these rights would be unproblematic. These distributional inequalities would simply be the result of the necessity of enforcing and protecting basic liberties. And ensuring the fulfillment of the basic liberties would be more important than ensuring a complete just distribution of resources. So, if Merges and Hughes are correct, then there would be no need to consider the legitimacy of IP rights under the Difference Principle. Nonetheless, they do, in fact, take up this task.

First, recall what the Difference Principle requires. It requires that any inequality in society can be justified only to the extent that the inequality works to the advantage of the least well off in society. In JIP, Merges's defense of selective IP rights under this principle is, again, brief. Essentially, Merges argues that there are direct benefits that flow from a few "IP-intensive industries" that ultimately end up benefiting the poorest members of society (Merges, 2011, p. 118).

> 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 these industries are set up – including, of course, the availability of IP rights and the profits that flow from them. (Merges, 2011, p. 118)

As evidence to support this claim, Merges appeals to essentially consumer satisfaction surveys. Merges reports that the poorest people in the United States are "big fans of television shows" (Merges, 2011, p. 118). This, apparently, is how Merges understands how the least well-off are benefiting from a selective IP

regime. Aside from entertainment, though, Merges points out that successful inventions are often "aimed squarely at saving money for poor consumers" (Merges, 2011, p. 118).

So, in short, Merges basically claims that since the poorest members of society nonetheless benefit from various types of goods that flow from IP-intensive industries, a selective IP regime likely satisfies the Difference Principle. And when it comes to copyright in particular, Merges and Hughes provide an even more nuanced and more thorough consideration of the Difference Principle.

To be sure, Merges and Hughes's analysis of copyright is much more nuanced than Merges's own analysis of IP in general. However, their analysis relies almost exclusively on a unique reading of Rawls's Difference Principle. In Rawls's seminal work, *A Theory of Justice*, he presents the difference principle as was outlined above. But, he also describes the same principle in various ways, giving rise to considerable scholarship on exactly which particular version Rawls actually supported. The controversial nature of this discussion is that Rawls himself did not seem to see these different expressions of the principle as amounting to different, *actual* principles. Nonetheless, there is some general consensus that it is possible to read the various descriptions as expressing distinct versions of the Difference Principle.

Assuming that commentators are correct, there are, at minimum, two distinct versions of the Difference Principle that Rawls seems to endorse. The version noted above, and the following version:

> in a basic structure with n relevant representatives, first maximize the welfare of the worst off representative man; second, for equal welfare of the worst-off representative, maximize the welfare of the second worst-off representative man, and so on until the last case which is, for equal welfare of all the preceding n−1 representatives, maximize the welfare of the best-off representative man. (Rawls, 1971, p. 72)

This version is called by Rawls, the "lexical" version. It is lexical in the sense that the procedure for carrying out the difference principle is lexical. Start with the worst off individual and maximize that individual's welfare. Then, once that individual's welfare has been maximized, proceed to maximize each, particular individual's welfare from worst-off to best-off in the society. [8] Interestingly, it is

[8] Consider the following distribution of goods, where each column represents a particular distribution:

this lexical version that leads some philosophers, like G. A. Cohen, to *reject* the Difference Principle altogether (Cohen, 2008).

On a simple reading of the alternative versions of the Difference Principle, one version permits a greater level of inequality without any benefit to the worst off while the other version would not permit such an arrangement. Roughly, the lexical version allows the worst off individuals to be maximally benefited, yet remain worse off, while the better off are open to nonetheless *increase* their welfare. This would be prohibited by the other version of the Difference Principle. Nonetheless, this meta-theoretical discussion is somewhat tangential to Rawls's ultimate project. Ultimately, what matters is what, if any, version of the Difference Principle would be chosen in the Original Position.

Interestingly, Merges and Hughes utilize the non-standard, lexical version of the Difference Principle. Moreover, Merges and Hughes additionally seem to suggest that this version, and its application, is faithful to Rawls's overall project. Oddly, though, they suggest that copyright "has little positive impact on the income of the economically least advantaged" (Hughes & Merges, 2017, p. 529). This is an odd claim, given that they are attempting to justify copyright protection under the Difference Principle, which requires inequalities to work toward the benefit of the least advantage. Their claim, however, is that "copyright does have a positive impact on the income of individual citizens in the *middle income groups* [emphasis added] and, under the [lexical] Difference Principle, that may be enough to justify its distributive impact" (Hughes & Merges, 2017, p. 529). Yet, the only support Merges and Hughes offers for this claim is to point toward some benefits that creative individuals themselves have been able to accrue within the music industry as a result of copyright protection (Hughes & Merges, 2017, pp.

	Column 1	Column 2	Column 3	Column 4
Best off group	2	10	12	10
	2	4	8	4
	2	4	6	4
Worst off group	2	4	4	2

Column 1 is full equality. Column 2 would constitute a just distribution under the basic version of the Difference Principle, because every worst off group has their welfare increased along with the increase to the best off group. Neither Column 3 nor Column 4 would constitute a just distribution under this version, since the worst off group is no better in Column 3 or Column 4 than in Column 2. Out of these four distributions, the basic version of the Difference Principle would permit only Column 1 and Column 2. Importantly, Column 3 WOULD constitute a just distribution according to the lexical version. Similarly, Column 4 would ALSO constitute a just distribution under the lexical version.

528–39). Wendy Gordon, however, has objected to the use of similarly purported *support* for these IP arguments.

5. IP Rights Conflict with the Difference Principle

In discussing JIP, Professor Gordon takes Merges to task for appealing to flimsy evidence to support his selective IP rights argument (Gordon, 2013). Merges's focus, Gordon says, "on the need for better facts [ultimately] fails him in the chapter on Rawls" (Gordon, 2013). "[Merges] argues that broad IP rights are consistent with giving Rawlsian priority to the worst off in society. But the Rawls chapter is riddled with factual assumptions which, if empirically investigated, might well prove the opposite" (Gordon, 2013). Merges, Gordon argues, simply fails to realize that the benefits identified that supposedly help satisfy the Difference Principle may not be the right kinds of benefits to consider.

In her criticism, Gordon does not fully develop her argument, but we can generate one for her. We are considering whether a resource distribution, like that under our current social arrangement with a selective IP regime, constitutes a just distribution under the Difference Principle. To determine whether a distribution is just under the Difference Principle, the benchmark to be used for the determination is an "initial arrangement in which all the social primary goods are equally distributed: everyone has similar rights and duties, and income and wealth are evenly shared" (Rawls, 1971, p. 55). This benchmark is simply full equality. Just distributions will be those that move from full equality towards inequalities, justified according to the Difference Principle. Now, Gordon's criticism more clearly emerges.

Merges (and Merges and Hughes) indicate that the worst off (or the middle, worst off) are benefitted by the current IP scheme. Yet, these benefits seem to only be measured by Merges and Hughes against a total *lack* of benefits. Sure, color TV, reliable internet access, and iphones are all nice things that can potentially benefit the worst off in society. But what Merges and Hughes have failed to show is that these benefits go further than the benefits individuals would have under a system of full equality. Merges and Hughes have thus committed an embarrassing oversight. The mere existence of benefits does not indicate that the

system is justified. Without selective IP rights, Merges and Hughes seem to suggest, the worst off individuals in the United States would just be living in squalor. This, of course, is not the correct comparison. The benefits we are assessing must be judged according to their relation to the benefits individuals would receive under full equality. So, to the extent that Merges and Hughes fail to make this comparison, they cannot truly claim to have brought selective IP rights under the Difference Principle.

It may be possible, of course, for Merges and Hughes to provide more hand waiving at what the benefits of full equality might be. So, they have at least an avenue to reply to Gordon's basic criticism. In what follows, however, I will argue that attempting to justify IP rights under the Difference Principle is flawed from the start.

5.1. IP Rights are Not *Distributive*!

The interesting thing about Merges, and Merges and Hughes's application of the Difference Principle is how far they go out of their way to find an interpretation that conforms to their conclusion that a selective IP regime is morally justified. For philosophers, this is an odd approach. The guiding principle in philosophy, laid down by Socrates, declares that "the lover of inquiry must follow his beloved wherever it may lead him." That is, follow the argument where it leads. Merges and Hughes, however, seem to be working in reverse order.

Their complete lack of attention to Rawls scholarship is most clear in their presentation of their favored version of the Difference Principle. G. A. Cohen is the closest Merges and Hughes come to actually interacting with anyone who defends the general Rawlsian framework and the two principles of justice. But, tellingly, G. A. Cohen has famously rejected the Difference Principle! (Cohen, 2008). So, just to be clear, Merges and Hughes rely on a controversial interpretation of Rawls's Difference Principle from a scholar who actually uses that interpretation to show that the Difference Principle may be potentially unsound. Yet, the reason why Cohen finds the Difference Principle to be unsound is because he believes that it permits *too much inequality*! He presents the Difference Principle in such a way as to be repugnant to those concerned with equality. So, strangely, Cohen's project is completely antithetical to Merges and

Hughes. But he does provide Merges and Hughes with a version of the difference principle that would seemingly legitimize incredible inequality.

Nonetheless, there are still substantive reasons to reject Merges and Hughes's argument. Primarily, Merges and Hughes fail to understand the basic application of the Difference Principle. Let me explain. IP rights, in a selective IP regime like that in the United States and what Merges and Hughes defend, are treated *as rights*. This is important for their analysis of the IP regime in relation to the Difference Principle.

The Difference Principle, recall, is a distributive principle. It requires the primary goods in society to be distributed such that any inequalities in the society are maximally beneficial to the least advantaged. This requires the designing of institutions and schemes within society that can carry out this task. For instance, the Difference Principle may be satisfied through a taxation system, by establishing a basic income, through guaranteed employment programs, limits on high employment earnings, or subsidies for low earners. There is not necessarily one system that will satisfy the Difference Principle. The point, however, is that the Difference Principle requires the institutional arrangement to be explicitly aimed at maximizing the benefits to the least advantaged in society.

A selective IP regime, regardless of its overall benefits to the least advantaged, is not an institution *designed* or *intended* to satisfy the Difference Principle. If there are benefits that flow to the least advantaged, generated by a selective IP regime, this is not necessarily evidence of an institution aimed at satisfying the Difference Principle. To adhere to the Difference Principle, institutions themselves must be *aimed* at satisfying the principle. It is possible, that is, for a selective IP regime to have a negative effect on the least advantaged. This will not be a possibility for institutions *actually* arranged according to the Difference Principle.

Consider, as a stark example, prostitution. It can be argued that prostitution, at least as practiced in the United St[2]ates, provides benefits to the least advantaged in our society. Those that engage in this profession may have few other options to earn a living. And those who pay for these services also, presumably, benefit. So, does this show that prostitution is justified under the

Difference Principle? Certainly not. Not from these two facts alone. The profession of prostitution is not an institution designed to distribute primary goods in a way that permits inequalities by maximally benefitting the least advantaged in society. Prostitution is simply not itself aimed at satisfying the Difference Principle.

Merges and Hughes either mistakenly, or purposefully, assume that the mere existence of benefits flowing to non-well-off individuals from some particular social arrangement makes that social arrangement legitimate under the Difference Principle. This, however, is nothing more than a basic utilitarian conclusion. To satisfy the Difference Principle, institutions must actually be purposefully arranged to satisfy the principle. So, while outcomes justified under a utilitarian scheme will in many cases parallel outcomes coming under the Difference Principle, not all will. The IP scheme in the United States, for instance, is historically oriented toward utilitarianism. But simply producing outcomes that are potentially consistent with the Difference Principle does not change the status of the system itself. It is still oriented toward utilitarianism and does not aim at maximizing the benefits of the least advantaged. Merges and Hughes just cannot show that a selective IP regime is a uniquely *Rawlsian* arrangement.

6. A Final Objection

I have argued above that Merges and Hughes fail to recognize the Difference Principle as a distributive principle when analyzing a selective IP regime. This is true for both JIP and Merges and Hughes's project regarding copyright. In both instances, they simply appeal to benefits flowing from the IP scheme that appear to result in outcomes consistent with the Difference Principle. There is, however, a more serious objection to Merges and Hughes's argument regarding copyright.

In arguing that copyright protection satisfies the Difference Principle, Merges and Hughes make two, essential moves in the argument. First, they endorse what is known as the "lexical" version of the Difference Principle. Second, they claim that individuals in middle-income groups benefit from copyright protection as it is currently prescribed. I have argued that this second move does not actually support the claim that copyright protection is legitimate under the

Difference Principle. In this final argument, however, I will argue that Merges and Hughes have purposefully selected a particular and controversial interpretation of Rawls's Difference Principle to simply give the illusion of justification.

As mentioned above, Merges and Hughes endorse the *lexical* version of Rawls's Difference Principle. This version of the Difference Principle, however, is not the result of Rawls's sloppiness in articulating his views. Rather, it is the result of Rawls's attention to detail. The lexical version of the Difference Principle is simply a version of the principle that Rawls says replaces the normal Difference Principle when certain background assumptions fail to hold.

In his presentation of the Difference Principle, Rawls makes an important assumption that he refers to as "close-knitness": "it is impossible to raise or lower the expectation of any representative man without raising or lowering the expectation of every other representative man, especially that of the least advantaged" (Rawls, 1971, p. 70). In other words, the assumption is that any change to the outcomes of the most advantaged will necessarily affect the least advantaged. Yet, Rawls recognizes that it is possible for this assumption to not hold. Thus, he briefly presents the lexical version as the operative version when close-knitness fails to obtain. So, in order to actually employ this version of the Difference Principle, Merges and Hughes must make one of two additional arguments: 1. That close-knitness fails to obtain, or 2. That the lexical Difference Principle is the primary version of the Difference Principle. Let's consider each argument in turn.

To claim that close-knitness fails to obtain, Merges and Hughes must argue that it is impossible, for instance, to benefit some individuals without this affecting other individuals within society. Even though one cannot normally prove a negative, Merges and Hughes fail to make any mention of close-knitness. Additionally, for this argument to succeed, Merges and Hughes would need to argue that close-knitness fails to obtain in society in general, not just in relation to copyright. A monumental task, for sure. I take it, then, that Merges and Hughes are actually not intending to argue that close-knitness fails to obtain. Rather, they argue that the lexical Difference Principle just is the relevant version, regardless of the close-knitness assumption. This is a deeply troubling move.

Rawls specifically claims that the lexical Difference Principle will rarely be relevant for any discussion of distributive justice. "[I]n actual cases this principle is unlikely to be relevant, for when the greater potential benefits to the more advantaged are significant, there will surely be some way to improve the situation of the less advantaged as well" (Rawls, 1971, p. 70). In other words, it is nearly impossible to think about providing more benefits to one group without even the possibility of improving, say, the least advantaged. But Rawls drives this home by reminding us that the principles of justice are aimed at institutions. And "[t]he general laws governing the institutions of the basic structure [e]nsure that cases requiring the lexical principle will not arise" (Rawls, 1971, p. 70). Essentially, if we accept Rawls's argument for the two principles in the first place, we have no basis for accepting the lexical Difference Principle. Rawls scholar Rex Martin similarly notes that "Rawls regards the situation described in the lexical difference principle as unlikely because it goes against the background ideas with which the principle is bound up" (Martin, 2014).

Merges and Hughes thus employ a version of the Difference Principle that Rawls ultimately rejects. In fact, it cannot even be reasonably accepted along with the remainder of Rawls's project. Nonetheless, this version of the Difference Principle provides support to Merges and Hughes's favored position. This is simply sophistry at the highest level. Rawls could not both endorse his own view and accept their arguments.

7. A Brief Objection and Reply

There is, of course, a simple objection available for Merges and Hughes. Merges and Hughes are not providing a defense of selective IP rights according to Rawls. Rather, they are merely providing "a Rawlsian *approach* to [IP]" (Hughes & Merges, 2017, p. 518). As such, there is no need to be faithful to the Rawlsian framework. It is enough that Rawls's work simply *influences* their argument. The argument, Merges and Hughes might suggest, need not be directly supported by Rawls's two principles of justice. Yet, it is doubtful whether Merges and Hughes could willingly make such an objection.

If Merges and Hughes claim to have only been *influenced* by Rawls, then they would give away the game. They would be forced to admit that the elaborate Rawlsian "justifications" they provide are mere window dressings for just another, nuanced utilitarian argument for IP rights. They have failed to provide a faithful Rawlsian defense of selective IP rights.

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