

Who Should Pay for Progress?

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This article begins from the proposition that societies have a moral obligation to individuals who create new knowledge, and investigates the nature of that obligation and how societies can and do allocate the burdens of satisfying it. I attempt to describe the normative commitments underlying various regimes' allocation of these burdens, considering not only extant doctrines of copyright and patent law, but also frequently offered alternatives such as prizes, government procurement, and commons-based production. Several familiar criteria for burden-allocation emerge, including ability to pay, intergenerational equity, the nature and distribution of the benefit derived from use of the new knowledge, and preferences revealed through market interactions. Disputes over the relevance or weight of these various criteria in turn suggest that typical distributive-justice critiques of the extant intellectual property (IP) regime reflect competing conceptions of justice, rather than a tension between justice on the one hand and efficiency or other values on the other. In this view, the American IP regime can be understood as embodying a conception of distributive justice that rests on notions of individual duty and desert, and distinguishes sharply between legal and ethical obligations. Such a conception can be contrasted with conceptions under which all individuals have a right, enforceable by the state, to some share or basket of goods simply by virtue of their humanity. Even if it does not resolve the debate as to what distributive justice requires, a clearer delineation and appreciation of IP's conception of distributive justice helps explain the difficulty of certain doctrinal problems that involve competing claims of desert or the breach of a non-legal duty. Such problems include the scope of the experimental use defense to patent infringement, the interface between fair use and the derivative works right in copyright, and the tailoring of remedies in IP cases generally.

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