

Identifying Information

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Paper Information

Title:	Intellectual Property, Independent Creation, and the Lockean Commons
Abstract:	Copyright and patent law – which are lumped together under the phrase "intellectual property", but in fact grant exclusive rights in two very different kinds of subject matter – are predominantly regarded by U.S. scholars as having the same normative foundations. This manifests in recent caselaw, as courts have ruled in a number of ways aiming to further unify the rules of these two areas of law. One example of this tendency to theoretically unify copyright and patent law is Seana Shiffrin's paper Lockean Arguments for Private Intellectual Property, which argues against Lockean understandings of intellectual property, but also does not distinguish between copyrights and patents. This paper argues that Shiffrin's challenge is successful in the context of patent law, but not in the context of copyright, due to a significant doctrinal difference between the two. It then outlines the more general normative questions regarding what justifies intellectual property rights which are raised by this dialectic, as well as potential doctrinal implications that would result if copyright and patent law are ultimately shown to have distinct normative foundations.