

## **In Criticism of Justifying Intellectual Property:**

### **A case against Edwin C. Hettinger by Jay Kuo**

#### **INTRODUCTION**

Intellectual property has been a subject of dispute for many reasons. One of these reasons is its non-exclusive nature, which means that it is difficult to restrict the use of intellectual property to a single person or entity. Another reason is the contentious issue of fair compensation for the laborer. This issue has been debated for many years, as many people believe that the creators of intellectual property should be fairly compensated for their work.

In response to these concerns, Edwin C. Hettinger wrote the essay entitled "Justifying Intellectual Property". In this essay, he explains what intellectual properties are and attempts to justify intellectual property by taking into account John Stuart Mill's concept of free thought and speech, the desert argument, Lockean provisos, and how utilitarianism views intellectual property. Finally, he suggests that government assistance be used to legitimize intellectual property and that the present legal term of intellectual property awards should be considered for adjustment.

While Edwin presents several reasons to support his ideas, not all of these arguments are valid. Some premises and conclusions are not true, and this causes concern for those who support intellectual property rights. As a result, in this article, I will reconstruct Edwin's arguments, explain my concerns about these arguments, speculate on Edwin's answer, and conclude with my final views on my worries and the hypothetical response.

#### **PART I: RECONSTRUCTING EDWIN C. HETTINGER'S ARGUMENTS**

The structure of Justifying intellectual property is well organized and Edwin has divided the arguments into seven parts. In this section, I will reconstruct three parts and the arguments that I find questionable and would like to critique at later section.

##### **Intellectual objects as nonexclusive**

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Edwin discusses the nonexclusive characteristic of intellectual things in this section with the following argument:

P1: Nonexclusive means that one person's ownership or use of an item does not exclude others from holding or using it.

P2: Sharing an intellectual object does not interfere with individual's personal usage.

C: Intellectual objects has the nonexclusive feature.

Edwin stated that it was difficult to describe why people should have the right to restrict others from utilizing their intellectual items when doing so would cost very little and sharing will not interfere with any individual's own usage.

### **Owning ideas and restrictions on the free flow of information**

The author also considers John Stuart Mill's free thinking and speech principle and explains how it makes intellectual property more difficult to justify.

P1: Private intellectual property limits the means of gaining ideas, using ideas, and expressing ideas.

P2: Free thought and speech are important for the acquisition of true beliefs and for individual growth and development.

C: Private intellectual property restricts free thought and speech and will stifle individual growth.

Based on the above two points, it becomes even more difficult to defend intellectual property since sharing it will incur little or minimal costs and not sharing it would inhibit individual progress and limit the advancement of technical innovation and human understanding.

### **The utilitarian justification**

Edwin considered this the most appealing justification for intellectual property. Besides justifying intellectual property rights with utilitarian approach, Edwin also provided potential solution and additional argument regarding patent and trade secret at this section. The arguments based on utilitarian perspective is mentioned below:

- Without intellectual property, adequate incentives for creating intellectual products would not exist.
- This argument focuses on the users, instead of the producers. The grant of property rights to the producers is just to ensure enough intellectual products are available to users.

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- The patent system is rooted in a contradiction and there can be no such thing as an ideally beneficial patent system.

### *Potential solution*

- Government funding of labor and public ownership of the result stimulate new inventions without restricting the dissemination and use. For example, university research.

### *Additional arguments*

- Patent protection for individual inventors and small firms makes more sense than patent protection for large corporations.
- Trade secrets stifle competition because it let the corporation no need to develop new technologies to stay ahead.

## **PART II: COUNTERARGUMENTS**

Although Edwin's comprehensive analysis with multiple arguments did show why intellectual property is hard to justify. I find the three arguments mentioned above questionable. At this section, I will first mention the arguments I disagreed and provide my counterarguments.

### **Intellectual objects as nonexclusive**

#### *Arguments I disagreed:*

1. The marginal cost of providing an intellectual object to an additional user is zero, and though there are communications costs, modern technologies can easily make an intellectual object unlimitedly available at a very low cost."
2. Sharing in no way hinders personal use.
3. Taking an intellectual object deprives the owner of neither possession nor personal use of that object.

#### *My counterarguments*

Before an intellectual property is created, there are costs of brainstorming new ideas, creating new technologies, investing in times and money. All of this should not be neglected when calculating the cost of an intellectual property, and normally this is not a "very low cost". For example, in order to keep making research and development, Meta has spent a total of 24.65 billion U.S. dollars in 2020 (*Published by S. Dixon & 2, 2023*). The intellectual property right is actually necessary for Meta and other similar company to recover these costs by selling services. Also, the marginal cost of providing an intellectual object to an

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additional user is not zero. Take Facebook as an example again, if an additional user on it is a big corporation, and it used a lot of Facebook's resources to operate its business, the cost will definitely pile up for Facebook.

Sharing intellectual property without permission or compensation can result in negative effects for personal use, such as the spread of false information or the distribution of malware and viruses. For example, if a film is downloaded and then edited with misleading information before being shared, this can misrepresent the author's original concept and content, and this type of sharing can still hinder personal usage by distorting the original work's intended meaning. Thus, it is essential to protect intellectual property rights and engage in sharing activities that do not hurt authors or their products. This will help in ensuring the accuracy and dependability of the shared content, and eventually promote the positive personal use of intellectual property.

To support my counterargument, I would like to draw on my personal experience. As an amateur DJ and music producer, I need to invest in high-quality microphone, MIDI keyboard, and other equipment to generate music of high quality. I also need to purchase a DJ unit to perform. I find none of these inexpensive. Not to mention I have to invest time in music production. Although if sharing my music with extra listeners does not cost much, I consider the cost of creating my music to be quite high. Without the right to sell my own music, I may lack the financial means to continue making music. Moreover, if someone remixes my music with noise that makes it intolerable to listen to, they are distributing an inappropriate version of my music, which can lead to public misconceptions and misrepresentations of my work and further damage my reputation. In this instance, it impeded personal use. Therefore, I disagree with the three arguments Edwin mentioned in this section.

### **Owning ideas and restrictions on the free flow of information**

#### ***Arguments I disagreed:***

- Restrictions on the free flow and use of ideas not only stifle individual growth but impede the advancement of technological innovation and human knowledge generally. Insofar as copyrights, patents, and trade secrets have these negative effects, they are hard to justify.

#### ***My counterarguments***

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Regarding the argument that private intellectual property restricts the free use of ideas, it is important to note that while private intellectual property may limit the use of certain ideas, it also serves as a crucial incentive for creativity and innovation in a wide range of industries. As Coca-Cola example mentioned above, companies like Apple, and Microsoft have protected their intellectual property, but this has not stifled the growth of competitors who have seen the protection of these works as a challenge to create their own unique products. In fact, Windows from Microsoft and MacOS from Apple provide many similar features but they are actually based on different structures.

Moreover, it is important to consider the benefits of the fair use doctrine, which allows for limited use of copyrighted works without obtaining permission from the copyright holder or paying royalties. This doctrine promotes the free exchange of ideas and information while also protecting the rights of copyright holders to control and profit from their original works. Additionally, individuals can always ask for permission to use intellectual property, which is a normal practice regardless of how the property was created.

Furthermore, the lack of real-world examples supporting the argument against intellectual property rights further emphasizes the positive impact that private intellectual property can have on innovation and creativity. In fact, there are many more examples beyond the ones mentioned in the original argument that support the benefits of intellectual property rights, particularly in encouraging investment in research and development that ultimately leads to new and better products and services. For example, considering the pharmaceutical industry. The development of new drugs requires significant investments in research and development, and without the protection of patents, companies would have little incentive to invest in this costly and risky process. The protection of pharmaceutical patents not only incentivizes companies to invest in research and development, but it also ensures that new drugs are safe and effective before they are released to the public.

In conclusion, while private intellectual property may limit the use of certain ideas, it plays a crucial role in incentivizing creativity and innovation in various industries. The fair use doctrine provides a framework for responsible use of copyrighted works, and individuals can always seek permission to use intellectual property. Ultimately, it is important to strike a balance between protecting the rights of creators

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and promoting the free exchange of ideas and information, so that the benefits of intellectual property protections are accessible to all members of society.

### **The utilitarian justification**

#### *Arguments I disagreed:*

- Patent protection for individual inventors and small beginning firms makes more sense than patent protection for large corporations. It has been argued that patents are not important incentives for the research and innovative activity of large corporations in competitive markets.

#### *My counterarguments*

It is true that large corporations often hold more patent protections than small firms or individual inventors. However, this does not necessarily mean that patent protection in favor of these larger organizations. The law is designed to provide equal protection to all companies, regardless of size, and large corporations may have more patents simply because they invest more money in research and development.

It is also worth noting that many of the largest and most successful corporations, including Apple, Google, Meta, and Microsoft, have made significant contributions to technology and innovation with the patents they own. These patents have led to the creation of new and useful products that benefit society as a whole. Without providing specific examples, it is difficult to argue that patents are not important incentives for research and innovation.

Furthermore, all large corporations began as small firms or were founded by individuals. The current patent system already provides crucial support to small firms seeking investment and funding for their innovative ideas. The fact that numerous startups become successful companies every year demonstrates the important role that the current patent system can play in promoting innovation and growth in various industries.

While patent protection can impede innovation and creativity, the size and resources of a company are not the determining factors. It is possible for individuals to patent names or brand names that are not meaningful to them but become valuable to large corporations when they develop products that fit with the patented name. This can result in large corporations having to pay for the use of a name or brand that they did not invent, which may not promote innovation or creativity.

Overall, while the current patent system is not perfect, it is designed to protect the rights of inventors, regardless of their organization size. However, there may be ways to improve the system to prevent the patent trolls to impede innovations, since small companies and individuals might lack the experience of dealing with patent trolls, the society might consider providing more support and resources to help them navigate the patent process. It is important to ensure that patent protection is used responsibly and does not hinder the progress of innovation and creativity in the marketplace.

In conclusion, the size of a company does not determine the benefits of patent protection. The current patent system is designed to protect the rights of all inventors, regardless of their organization size, and has played a crucial role in promoting innovation and growth in various industries.

### **PART III & IV: ANTICIPATING EDWIN'S RESPONSES**

At this section, I anticipate Edwin to respond with my counterargument and support his arguments. After that, I will show my response to the anticipated response.

#### ***Anticipating Edwin's responses on intellectual objects as nonexclusive***

With the example of Meta and my personal experience as an amateur DJ and music producer, I believe Edwin will be persuade with my argument that sharing did sometimes hinder personal uses and taking an intellectual object sometimes deprives the owner on possession of that object. But he might argue that the cost of creating an intellectual property is not a sufficient reason for creators to make money from it. Instead, he may argue that producers derive other benefits from their work, such as social recognition and personal satisfaction, which can help balance the costs of creation. Moreover, he may suggest that intrinsic motivation is a key driver of creativity, and that people will pursue their passions regardless of whether they have intellectual property rights. To further elaborate, people who have passion will chase their dream and build their careers regardless of how many obstacles, and the cost is just another obstacle that successful people will solve eventually. Furthermore, by alleviating these external motivations, individuals may be more likely to focus on their passions and produce works that truly reflect their interests and values. This can lead to greater satisfaction and happiness in individuals' lives and can ultimately benefit society as a whole. In this scenario,

Edwin might further argue that even if the intellectual property rights can serve as a means for creators to monetize their works and protect their interests, it is important to strike a balance between

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incentivizing innovation and creativity while also ensuring that knowledge and culture remain accessible and promote social progress. That is to say, the current system of intellectual property protection is overly restrictive and there are other ways to incentivize innovation without limiting access to ideas and information. By recognizing the costs and benefits associated with intellectual property, we can create a system that truly supports and fosters innovation, creativity, and personal growth.

For example, Edwin might suggest that alternative models such as open-source software or creative commons licensing can provide a way for creators to share their work while still protecting their investments. He may also point out that still in many cases, the costs of sharing intellectual property may not be as high as they are often perceived to be, and that in many cases the benefits of sharing outweigh the costs.

In conclusion, I anticipate that Edwin will partially agree with my arguments, but he will argue that even though the cost of an intellectual property might not be at “very low cost” as he originally mentioned, this should not be a barrier to support the nonexclusive culture of intellectual objects, and he support this argument with the intrinsic motivation theory.

### *My response*

Although intrinsic motivation theory is valuable, I believe it may not have positive implications if applied to intellectual property rights, and it may be susceptible to multiple factors that could undermine it. Firstly, it is important to recognize that people may not always be self-motivated, as intrinsic motivation theory suggests. For example, Chinese history provides an illustration of this point. Between 1957 and 1960, the Chinese government implemented the People’s *Commune* (*The commune system (1950s): Asia for educators: Columbia University*), which promised citizens unlimited food consumption regardless of how much work they completed each day. However, this system was unsuccessful as people began to perceive that they didn't need to work as hard as others if their effort did not impact their food intake. To be more specific, even though people have other motivation to work, since food is not an incentive to work diligently anymore, the self-motivation itself is not enough to generate good consequence. Similarly, without money as an incentive, I doubt people will still want to invest time and money in generating intellectual property. Because no matter how low the cost is of making an intellectual property, if we cannot make any money from it, we might give up because of realistic reason such as that we need money

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to buy food to survive if we don't have any additional time to use to plant food on ourselves. Therefore, if Edwin wants to use this theory to critique my argument, he needs to prove that in the case of intellectual property rights, the result will be different than the People's Commune in China. Even though there might be no history to support his anticipated argument, he can still use experiments to test the application of using intrinsic motivation to replace the incentive of money on intellectual property rights. However, in my opinion, the disincentive effects will crack down the system when the money motivation is gone.

While alternative models of innovation, such as open-source software or creative commons licensing, may offer a way for creators to share their work and still protect their investments, it's important to recognize that they may not be universally applicable and come with limitations. For instance, in industries like the pharmaceutical sector where significant investment is required to develop new technologies, a more robust system of intellectual property protection may be necessary to stimulate research and development. Without sufficient protection, competitors may copy the drug formula and sell it at a lower cost, potentially undermining the profits of the original company and discouraging future investment.

Finally, I firmly believe that the notion of ignoring something small is misguided. Even if the cost may seem insignificant, it should not be disregarded entirely, especially in the case of sharing intellectual property with additional users. While the cost may be small, it is still essential to address it through alternative means. Edwin's argument lacks a solution for paying the cost of sharing intellectual property with more users. When the owner of the intellectual property cannot make money from sharing it, any additional costs incurred from sharing may discourage creators from continuing to produce intellectual property. Thus, it is crucial to address the issue of cost, and Edwin needs to come up with a solution that provides incentives for creators to produce intellectual property while still covering the costs associated with sharing it with additional users. Without a viable solution, the additional cost of sharing intellectual property should not be ignored or disregarded.

### ***Anticipating Edwin's response on owing ideas and restrictions on the free flow of information***

Edwin may use the "Tragedy of the Anticommons" to support his argument regarding the "Wealth of the Commons." I anticipate that he will provide examples in which intellectual property has hindered

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innovation and creativity. One such example is the case of different pharmaceutical companies holding various patents, which can lead to a situation in which they cannot work together to create more effective medicines. This lack of cooperation can be attributed to the excessive ownership of intellectual property, which can lead to a "gridlock" that hinders progress.

Furthermore, Edwin may argue that private intellectual property can create monopolies in certain industries, preventing competitors from entering the market and developing new ideas and technologies. This lack of competition can lead to stagnation and a lack of innovation as the dominant player has little incentive to improve or change their product. For instance, in the software industry, it is uncommon to see computers operating on systems other than Windows or MacOS. Both Microsoft and Apple have to some degree created monopolies in the industry, stifling competition and limiting innovation.

Furthermore, it is important to recognize that certain intellectual property rights can be exploited by dominant corporations to suppress free expression and dissent. Some companies have abused copyright or trademark laws to silence criticism or negative reviews of their products or services, which can have negative impacts on public discourse and restrict the free exchange of ideas. I anticipate that Edwin will present real-world examples to support this argument.

In general, I expect Edwin to offer concrete examples to support his previous arguments and modify the argument from a firm statement that the free flow and use of ideas will always be stifled if intellectual property is restricted. While private intellectual property can have some positive effects on innovation and creativity, it is not always the case, and a more balanced and nuanced approach is necessary to ensure that the benefits of intellectual property protection are accessible to all members of society.

### *My response*

While I do partially agree with the anticipated response, I would like to express my doubts using the same example. It is true that without intellectual property, cooperation between competitors can increase. However, this approach can also create several problems. For instance, if every pharmaceutical company cooperated on a new drug, it would result in a lack of diversity among the available options. This would limit patient choice, as they would have only a limited number of medicines to choose from. Even if companies tried to differentiate their medicines for the same illness, eventually, they would all generate

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similar medicine because they would all follow the drug formula of the previously most popular one. Thus, the problem of limited diversity would persist.

Additionally, in the absence of intellectual property rights, it would be challenging to assign responsibility for flaws in a medicine. This lack of clarity could lead to unfair blame being placed on companies that are not responsible for the product's defects. If companies no longer have control over their reputation and the fruits of their labor are freely shared with other businesses, what would incentivize pharmaceutical companies to invest in research and development?

Regarding the example of Apple and Microsoft creating monopolies in the software industry, it is important to note that this does not necessarily mean that they have the ability to prevent competitors from entering the market and developing new ideas and technology. While they may appear to have a dominant position, the fact that new startups become successful corporations every year is evidence that big companies do not have complete control over the market.

Furthermore, it is possible that there are currently no equivalent competitors who are able to compete with Microsoft and Apple in the market. This lack of competition may be a result of factors such as high entry costs or difficulty in replicating their technology, rather than an intentional effort by these companies to stifle competition. Thus, it is crucial to examine the broader market conditions and factors that contribute to a company's perceived monopoly status before making any definitive conclusions.

Finally, while there have been cases of intellectual property rights being abused by corporations to stifle free expression, this is not an inherent problem with intellectual property protection itself. Rather, it is a problem with the way the laws are enforced and interpreted. Proper regulation and oversight can help prevent these abuses while still allowing for the benefits of intellectual property protection.

In conclusion, while there may be cases where seem like private intellectual property has stifled innovation and creativity, it is not always the case. However, I agreed that a more balanced approach is needed to ensure that the benefits of intellectual property protection are accessible to all members of society.

### ***Anticipating Edwin's responses on the utilitarian justification***

Although the current patent system is intended to protect the rights of all inventors, irrespective of their organizational size, the truth is that large corporations often have more resources and legal knowledge

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to navigate the patent process and safeguard their intellectual property rights. This can create a disadvantage for small firms and individual inventors and can discourage them from pursuing patent protection for their ideas or inventions. Specifically, small startups may not have sufficient funds to invest in high-quality lawyers to ensure they have not violated other companies' intellectual property. Even if they do, large corporations with better intellectual property lawyers may still be able to find intellectual property violations and sue small and medium enterprises. For instance, Apple sued HTC in 2010 for 20 patent infringements (*Apple sues HTC for patent infringement* 2023), and although HTC was not a small or medium-sized enterprise, Apple had more resources and demanded a significant sum to settle. While HTC survived the legal action, not all companies would be able to cope with such financial pressure. That is to say, the expense of obtaining and defending a patent can be too high for many individuals and small firms, limiting their capacity to safeguard their intellectual property and benefit from their innovations or creativity. As a result, even though the current patent system may not be intentionally biased towards large corporations, it can still disproportionately affect the ability of small firms and individual inventors to protect their intellectual property rights and benefit from their creativity.

### *My response*

I agree that the current patent system can disadvantage individual inventors and small firms, who may not have the resources and legal expertise to navigate the patent process and defend their intellectual property rights. This can be a significant barrier for innovation and creativity, as these individuals and small firms may be discouraged from pursuing patent protection for their ideas or inventions. Additionally, the cost of obtaining and defending a patent can be prohibitively high for many of these inventors and firms, further limiting their ability to protect their intellectual property and benefit from their innovations.

However, I believe that the current patent system is not inherently biased towards larger corporations. Its purpose is to protect the rights of all inventors, regardless of their organization's size. Also, it is important to acknowledge that the system can be improved to better serve the needs of individual inventors and small firms. In terms of altering the current patent law, I do not think it needs to be changed. It is impossible for us to know the exact outcome of any changes made to the current law without a "God eye view." Therefore, we should stick to the existing law while seeking to improve it to better serve the needs of all inventors. In my opinion, a good way to improve the system is to provide more support and

resources for startups and small companies to navigate the patent process. By reducing the cost and complexity of the process, we can encourage and enable all inventors, regardless of their organization size, to protect their intellectual property rights. By doing so, we can ensure that all inventors, regardless of their organization size, have equal opportunities to benefit from their innovations and protect their intellectual property rights.

## **CONCLUSION**

In conclusion, this paper has examined Edwin's arguments regarding intellectual property rights, and while I have many doubts about Edwin's arguments and disagreements with his suggestions, I am grateful for his justification on intellectual property, which is expressed very clearly and can be read by anyone. To be more specific, before delving into intellectual property rights, he introduced them and discussed the differences between them, this has helped to shed light on a complex issue with simple and comprehensive explanation.

Furthermore, despite all of his objections, he has some very good points of view within this reading, and some of his defense of intellectual property rights is really powerful. For example, in the section on "owning ideas and constraints on the free flow of information," he stated that while patents and copyrights limit the broad use and distribution of ideas, they enhance rather than impede the free flow of ideas. This argument appears contradictory, but I agree with it and believe it is extremely persuasive since it does not entirely disagree or agree with intellectual property rights, but he gives the advantages and disadvantages at the same time to allow the reader to think more deeply. Likewise, I agree with the author that we should ask ourselves: Do copyrights, patents, and trade secrets increase the availability and use of intellectual products more than they limit their availability and use? Because each intellectual property is unique, a more precise definition is required.

However, I also believe Edwin has room for improvement. To begin with, his argument would be more compelling if he provided some real-world examples to back it up. He did use other people's arguments and theories to back up his point. Nevertheless, for readers like me who don't know these people or what they've done and have some prior knowledge of the theories he stated, certain real-world examples will be more convincing and easier to follow because little background information is required. Edwin can

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also organize and emphasize his arguments into bullet points or use bold or italicized type to distinguish his major points from the rest of the text. This is significant because with such thorough reading, readers will be able to comprehend if the author agrees or disagrees with them. Otherwise, it will be perplexing and difficult to understand at times. For example, I find the part on sovereignty, security, and privacy a little confusing and didn't really know what the author's position is until I questioned my professor.

Overall, this paper has deepened my understanding of intellectual property rights and the challenges surrounding the justification. By anticipating Edwin's responses and integrating my own opinion and argument, I have contributed to the conversation in a meaningful way. While there are still many questions to be answered and challenges to be addressed, I hope that this paper has sparked further discussion and reflection on justifying intellectual property.

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