

James Boyle, “The Why of Intellectual Property”

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Background

Understanding why the idea of “intellectual property” exists is a critical first step on the way to understanding the open education movement. James Boyle’s book, *The Public Domain*, provides an excellent starting point for developing this understanding.

James Boyle is one of the founding board members and former board chairman of Creative Commons, the most commonly accepted and popular form of open licenses used in the world, which are discussed later in this book. As one of the key members of the modern movement to change the way intellectual property is protected and distributed, Boyle’s views on the subject are fundamental to understanding the societal context of other historically significant developments like the introduction of the free/libre copyright by Richard Stallman, which will also be included in later readings. By understanding these articles, the stage is set for understanding the movements of open education for the past 50 years. The incredible progress of technology has dramatically

changed choices society can make regarding intellectual property, but it is important to understand the theory, the history, and the reality of intellectual property if society hopes to make changes that actually lead to progress and truly impactful education.

Key Points

This first chapter provides an introduction to the history of intellectual property concepts. It also explores what property is, what it is not, and why that matters.

In this chapter, Boyle focuses on the economic theory that created intellectual property. He starts by explaining that since the early days of western civilization, clearly defined and protected property rights have been critical to societal progress. Citizens with property rights could spend time in education, scientific pursuits, and money-generating activities without having to spend a majority of their time sharpening their swords to ward off thieves who came to plunder the profits from those educational, scientific, or money-generating pursuits. With good property rights and good government, societies could focus on productive activities instead of spiraling into anarchy.

Key points about property:

- It is generally “rivalrous,” meaning that it can not be used by more than one person at a time, so stealing is taking away another’s opportunity to use the material.
- Well-protected property rights incentivize individuals to produce by helping them capture the future benefits produced by their creation.
- Property rights are especially needed to incentivize individuals when the good they are creating is very expensive to produce and very cheap to reproduce (such as medicine.) Without property rights, the individual would bear all the costs of research necessary to achieve first production but lose future benefits to copycats who reproduce without any initial

investment. If this situation prevailed, inventors would be disincentivized from creating in the first place and society overall would suffer.

- The system of property rights in place to create the former incentives are patents, trademarks, and copyrights.

While the theory of “intellectual property rights” is very useful to society, Boyle shows how the application of these protections has become warped and questions their application in the online space. Boyle delves into the following key points about the detrimental effect of misapplied intellectual property regimes:

- Currently in America, corporate copyrights are protected for 95 years and personal rights are life plus 70 years.
- Current copyrights and patents long outlast their purpose of incentivizing creation of society-benefiting works. By extending IP rights to decades after the creation of the work and death of the author, IP actually limits the influence of the creation by restricting reuse, remixing, remaking, or redistribution of works.
- The current policy of instantaneous copyright creates a cultural dead ground by preventing artists or publishers (other producing entities) from using contemporary works even if the artist is dead or doesn't care.
- Patents are only supposed to be given for inventions that were novel, nonobvious, and useful. Many current patents don't meet those criteria.
- There are some fundamental differences between ideas and physical property that should change the way we view “intellectual property.” In many ways ideas and digital creations are non-rivalrous, which means that taking from a producer like downloading a movie from Disney doesn't reduce the supply available to Disney at all. The non-rivalrous nature of digital materials should change the way some laws are structured and applied.

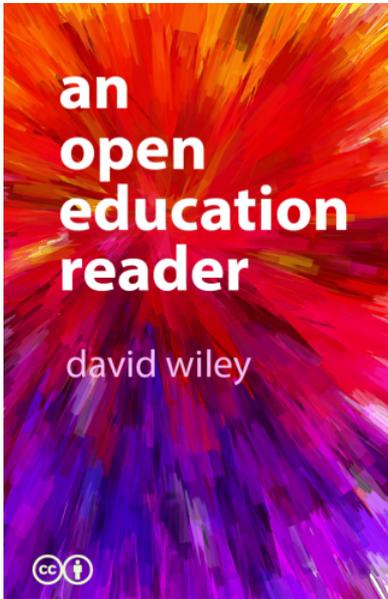
- The internet makes many goods behave more like public goods than private goods.

Discussion Questions

1. Is it appropriate to use the language of tangible property when referring to ideas and other non-rival goods (like property, theft, or piracy)? What are the similarities? What are the differences? How should they affect intellectual property law?
2. In what ways is an idea rivalrous? In what ways is it not?
3. What are other systems or IP systems that can incentivize creation that avoid the former problems?
4. What is the optimal length of a copyright?
5. How can we balance the personal benefit of the creator of the work with the benefit of the public good?
6. What measures are currently being taken legislatively to reduce copyright restrictions?
7. Who are the stakeholders lobbying for longer copyrights?
8. What are competing incentives to create? Volunteer? Compulsion to create?

Additional Resources

Wikipedia articles for “Public Goods,” “Private Goods,” “Berne Convention,” “WIPO”



Wiley, D. (2016). *An Open Education Reader*. EdTech Books. <https://edtechbooks.org/openedReader>