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**Beyond intellectual property. Matching information protection to innovation**, by William Kingston, Cheltenham, Edward Elgar, 2010, viii + 247 pp., £65.00, ISBN 978 1 84844 992 3

In many ways, this book marks the pulling together of the breadth and depth of knowledge acquired during Kingston's lengthy career studying innovation. It is firmly rooted in an academic consideration of the nature of information and how this contrasts with (and does or does not impact on) knowledge. Yet, it also takes as a starting point the many cogent criticisms of the state of government intervention to provide monopolies for information and focuses on practical means of improving outcomes for smaller firms. Kingston considers that, despite a clear need for radical reform, political impediments mean that the existing broken systems of patents, copyright and trademarks must be accepted. He also takes as a given that 'protection' is required for new information used in the marketplace. He proposes solutions that work around – or undermine – these systems.

After reminding readers that information has several characteristics often glossed over – particularly that information as it is received and acted on differs between each recipient – he notes the important distinction between information and knowledge. In discussing creativity and copying, his focus is very much on the economic use of new meanings attached to information. He accepts, perhaps too readily, Hardin's version of the 'tragedy of the commons' – though in practice, the commons were always subject to social norms and controls that prevented over-grazing. The real tragedy can be seen as the enclosure of the commons. However, given his take on over-grazing, Kingston makes the presumption that protection is essential

when it comes to investors making decisions that are predicated on new uses of information. Indeed, he goes further than some in noting that a successful innovation not only discloses specific technical information, but also that something new can be done and that there is a market for it.

Kingston concludes his opening with the notion of long waves of innovation, but adds his own view of the driver of this phenomenon – the clustering of innovations following changes to legal structures that affect the incentives to invest. This view of the cycle of technological innovation, with its stages of over-investment and subsequent crashes, contrasts with that of Perez (2002), who sees the renegotiation of social institutions and laws as an *outcome* of crashes. Kingston sees the renegotiated legal structures as *initiating* a new cycle of incentives and investment. While not fully fleshed out here, the argument is persuasive. The notion of long waves of innovation reminds us of the importance of getting the framework for economic activity right – if innovation is stifled, either through too much or too little monopoly power (protection), then society will be worse off.

In three well-argued chapters, Kingston then takes the reader through two key market and regulatory factors that create an environment in which large firms are able to dominate global markets (chapter 2); the evolution of a range of government regulations providing monopoly rights for innovators and creators (chapter 3); and the internationalisation of these regulatory regimes (chapter 4).

He reminds us, in chapter 2, that what Kingston calls ‘capability’ – roughly what Teece (1986) calls ‘complementary assets’ – underlies the ability of larger and more established firms to ensure a good return from their investment in new products and services. This story is interwoven with the history of the development of new legal structures to protect larger investments, including corporate structures and particularly limited liability. Then Kingston moves to another – but much-neglected – regulatory change that has also been critical to ensuring a good return to innovative investment – registered trademarks. The importance of registered marks to effective mass marketing is nowhere more vividly shown than in the case of one of the earliest registered marks, Sunlight soap. Within a few years of registering this mark, Lever had wiped out 90% of his competition (p.36). Together, capability and trademark-based marketing provide a means of ensuring a return to innovation – but only for those that have them, not for new entrants with new ideas.

Chapters 5 to 7 deal with the impact of special interests on the current design of the regulatory systems for providing monopolies for information. There is a good discussion of the changes to the nature of government bureaucracies over the past century and more, and a focus on the role of the US constitution as an impediment to reform in the US. As is often the case, Kingston perhaps reads more into the existence of the intellectual property clause in the US constitution than is warranted. Where sovereign states come together to agree on a federation, the major issue is what laws should move to the new jurisdiction and what remain with the constituent sovereign states – a similar clause exists in the Australian constitution, for example. The US constitution was drafted concurrently with the steamboat patent wars, and the impracticality of retaining patent monopolies at the state level would have been fairly clear to all (Walterscheid, 1994, 1996).

Kingston takes a longer view on the international development of laws governing intellectual property than is usual (chapter 6). He points to the 1925 change removing the requirement for local working from the Paris Convention as the earliest harmonisation move and one with very important consequences. Indeed, if this

clause had not been removed, the Trade-related Aspects of Intellectual Property Rights (TRIPS) treaty would have a far less negative impact on lower income signatories. He also notes the important role played by the secretariat of the World Intellectual Property Organisation, especially under the leadership of Arpad Bogsch, including the development of training for intellectual property teachers, a critical means through which to proselytise a particular view of the intellectual property system. This discussion is more comprehensive than usual, not only in the time period covered, but also in the subject matter considered. It includes a section on trademark law, particularly the important but neglected issue of whether the trademark regulations included in TRIPS will prevent sovereign governments from taking action to reduce smoking through tighter controls on tobacco advertising.

Kingston's final chapter in this section considers actions that might be taken to rescue a dysfunctional system (chapter 7). He notes some of the important recent critiques of patent law, and comments on the slow-down in the process of 'creative destruction' so central to Schumpeter's positive take on the role of larger businesses. Throughout this discussion, Kingston's central concern with new innovators and the incentives for investment by new entrants becomes clear. He considers a number of key issues, such as the perspectives taken by entrepreneurs and innovators, before discussing government interventions that might offer better support to new entrants.

In the next four chapters, Kingston turns his attention to a range of alternative approaches that would be compatible with the compulsory (that is, if you want to be part of the General Agreement on Tariffs and Trade) TRIPS system, but which would lead to improved outcomes for smaller innovators. The chapter on compulsory arbitration (chapter 8) is most persuasive, and Kingston deals well with the challenge that larger firms would be reluctant to agree to this because they do so well out of the opportunities to intimidate and bully that exist in the current legal system. A useful addition would have been some consideration of lessons to be learnt from the arbitration system attached to international investment treaties. Such arbitration occurs within the context of public law, yet takes no account of public interests.

In chapter 9, Kingston points out that the metric used to provide a regulated return to investment in innovation – years of protection – is entirely inappropriate. He is right. The key matter is *financial* return on uncertain investment. He also rightly notes that the one-size-fits-all requirement of TRIPS simply does not work well in the real-world context of myriad different new ideas. He points out that, from the 1952 redraft of the US patent law, the patent system has been designed for, and by, the pharmaceutical industry. The spread of this industry-specific design does not serve either small firms or other industries well. As a solution to the problems of other industries, Kingston provides a detailed exposition of an alternative model originally proposed by Reichman as a compensatory liability scheme (p.164). This focuses on licenses of right, with a capital payment to the innovator of a multiple of the cost of the original Research and Development. Multiple licensees mean increased returns to the first innovator. He considers this would not work as an incentive for small firms as at the time their technology is licensed, they may not yet have incurred all development costs.

In chapter 10, Kingston turns his attention to solutions for small firms, discussing some initiatives taken by the UK and Danish patent offices, including expert technical opinions, inexpensive means of obtaining convention priority dates, and

encouraging rapid abandonment of poor ideas. He notes the UK functional design system, introduced to remove lengthy copyright protection from spare parts, and discusses in some detail the (probably insuperable) challenges of designing a patent litigation insurance scheme. Following a review of these alternatives, he concludes that the key need for smaller firms is a *period of guaranteed incontestability* in the market for their new products. This radical alternative would require highly effective searching of existing markets, partly achieved through effective pre-examination opposition. He concludes with a brief consideration of the particular needs of lower income countries to access the paths used by now rich countries in their early development – the ability to copy.

The central proposal Kingston puts forward to meet the needs of innovative small firms for protection of their new technologies is a system of direct protection of innovation (DPI), described in detail in chapter 11. Such a system has been investigated under European Union auspices based on Kronz's Innovation Patent and Kingston's own earlier Innovation Warrant proposal (pp.207–8). In line with his focus on the need for a financial return to investment, Kingston works backwards from the degree of risk and the scale of innovation to propose a scale of periods of exclusive market protection for things that are not currently available in the ordinary course of trade. He proposes that this system runs parallel to the current patent system, be separately administered, use the opportunity of opposition to replace the right of litigation, and be publicly enforced. He anticipates that smaller firms would actively choose this system rather than the patent system. He argues that the US experience with the 1983 Orphan Drug Act shows the potential for such a system to be effective. However, Kingston does not assess whether the success of this Act is perhaps attributable to the special characteristics of pharmaceuticals, and whether, like the existing patent system, will work well for chemical information, but not for new information in other fields. He does, however, note that this alternative approach to providing government-sanctioned market exclusivity also protects the innovator in terms of the knowledge that something can be done, and that there is a market for aspects of innovation that lie outside the protection of the patent system.

Kingston wraps up this extensive foray into government intervention in the innovation market and alternatives that might better suit small firms in a tight argument that there are two markets where regulation must be different from the general case (chapter 12). These are markets for money and markets for information. He persuasively puts the case that these two markets are radically different from markets for other goods and services, and so require quite different regulatory approaches for a well-functioning society and economy. His hope is that the dysfunctional patent system can be undermined by developing an alternative, preferred system that will gradually reduce the demand for patents.

Overall, this is an enjoyable and thought-provoking review of the challenges surrounding market intervention to provide monopolies for information. Because it draws on a lengthy period of study and thoughtful reflection acquired during Kingston's lengthy career, it provides even a well-informed reader with new information and insights. Kingston remains surprisingly optimistic about the possibilities for reform, given the extremely negative picture he paints about how the current patent and trademark systems benefit very large companies that then invest part of these returns in ensuring the rules maximise their benefits.

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**The cost of bad behavior: how incivility is damaging your business and what to do about it**, by Christine Pearson and Christine Porath, London, Portfolio, 2009, xiv + 224 pp., \$25.95, ISBN 978-1-59184-261-3

*The Cost of Bad Behavior* may seem an odd book review choice in *Prometheus*, which has an emphasis on innovation. However, the link becomes apparent if one is prepared to accept that incivility in the workplace can interfere with communication flows, and hence possibly damage the processes underpinning innovation. Having said this, innovation is not a central theme in Pearson and Porath's book. Rather, their concern is with incivility and its costs. Consequently, there are themes in this book that are of value to innovation researchers and innovation managers.

Incivility is defined as the 'exchange of seemingly inconsequential inconsiderate words and deeds that violate conventional norms of workplace conduct' (p. 21). The bulk of incivility is considered to be 'top down', part of a power play, but there can be upwardly aimed incivility that is covert, frequently achieved through subtle sabotage. Pearson is from the Thunderbird School of Global Management and Porath from the University of Southern California. They have a lengthy history of writing and research about incivility, which at least some readers of this review may find an almost everyday occurrence in the workplace. As the authors note, 'As anyone who has worked in an office knows, incivility doesn't have to involve a lot of drama' (p.13). My own experience with universities and that of many colleagues suggests this is so. The commonplace nature of incivility presents a challenge to Pearson and Porath that underpins the emphasis on cost in the book. The authors claim that while their academic work was being accepted by top theoretical journals, their work was not being accepted by empirical journals. They claim that editor's comments often reflected the following: fascinating topic, relevant to anyone who studies management or manages people, but you have collected extensive data from just one source, the target (of incivility). In response to this, *The Cost of Bad Behavior* explores the cost of incivility, largely to the organization as opposed to the individual (although this is not neglected). Putting a dollar figure on incivility in terms of how it affects performance is, I suspect, an attempt to give the theme some credibility as a business