Some time in the early nineties when China embarked on the path towards adopting western education standards, a Canadian team of deans and business school instructors introduced the concept of MBA (Master of Business Administration) in one of the provinces. The programme, they explained, was a particularly powerful tool of management education, comprising the best teaching methods, a selection of fundamental academic yet relevant subjects, offering a spectrum of typical managerial competencies but allowing for specialisation, etc. And, of course, such education had to be charged for. With this message (delivered through interpreters) they travelled through a number of academic centres giving MBA level classes. At the end of each class came the routine moment of asking “any questions?” To the surprise of North American instructors who expected assertive questioning they always met with stone silence. Puzzled, they inquired with the interpreters. “When you said that in North America students pay for their higher education, our participants expected you to charge for each response to any of the questions” came the answer. (since I do not remember the source of this anecdotal story I retell it in my own clumsy way, A.S.)

Few would deny that some stimulus and protection has to be offered in some sectors to encourage production of goods that are easily appropriable, where copying avoids the producer’s initial investment and deprives the producer of the opportunity of recoupment and making a fair profit. The question is what stimulus and what protection should be offered. ... The broad questions to be asked [should] be:

- What activities do we as societies desire to encourage?
- What degree of stimulus needs to be offered for the activities to occur?
- Who should benefit from the stimulus? The initial producer(s)? Later distributors? In what proportions and to what degree? And who deserves to be called a “producer” in the first place?


The marathon endeavour of creating The International Library of Critical Writings in Economics reached its 145th lap. These previous two quotations may serve, perhaps, as a good introduction into the monumental four-volume Economics of Intellectual Property which adds to the long list of EE compendia containing crowning achievements of economic scholarship in a multitude of economic sub-disciplines. The whole work on IP is divided into four separate volumes of copyright, patent, trademark (with trade secrets and empirical research on patents), and competition and international trade.

The papers collected in the last, fourth volume are put into four parts: general issues of competition, parallel imports, World Trade Organization and TRIPs, and, finally, standardization. As with most previous EE attempts the current editors have managed the difficult task very well assembling in this case 22 papers spanning some 25 years of academic scholarship, international policy advocacy, private and public legal coun-selling. A somewhat arbitrary classification would suggest the presence of 8 papers in the area of economics (microeconomics and industrial organisation), 7 in law, and 7 in law & economics. All this is a matter of emphasis rather than methodological or theoretical difference of much significance. Still, the balance struck in the volume points to the selection of an “established” problématicque. More adventurous texts are avoided as are evolutionary economics, much neo-institutional thinking or development economics.

The first part devoted to competition is, as usually the case, framed between the patent policy, i.e. promotion of monopoly and competition policy, i.e. struggle against monopoly. As restated by Thomas Cotter in the volume reviewed, the tension between antitrust and IP law is with respect to the monopolist’s right to engage in exclusionary practices while the tension within intellectual property law itself is between the need to provide exclusive rights so as to preserve the incentive to create, and the need to insure access so as to facilitate the creation of new intellectual products. This theme runs through most of the papers selected which adds to the cohesion of argumentation of the otherwise widely stretched thought canvass. On the other hand, it would be next to impossible to find a topic that does not relate to competition, so that competition is present in all four volumes. Hence “competition” in this volume is used in a much narrower sense of competition policy/law. Altogether it covers 216 out of 561 pages.

Posner’s is a general introduction. Gallini and Trebilcock paper, extracted from a very good book in its own right, provide an excellent overview of the issues of competition and IP law. Overall they argue for more lenient competition policy in cases involving IP goods suggesting a move from per se to a rule-of-reason standard in a greater number of situations. Epstein complains that
economics sheds insufficient light on the difficult questions of coordination of private and public domain and warns us against a priori traditional anti-trust reasoning. His categorical statement is that “the antitrust laws represent deprivation of property rights” (91).

The next two papers are concerned with inter-firm cooperation, notably in the area of R&D. Alexis Jacquemin’s short sketch indicates a paradox whereby “there are more obstacles to cooperative R&D than to collusion in other areas in spite of the positive social welfare effect often associated with such cooperation” (129). He argues that explicit trade-offs allowed in EU legislation (Treaty of Rome Article 85, para 3) fare better than the US tradition where the “univocal definition of the ‘efficiency’ criterion is more apparent than real” (136). Alan Guterman, on the contrary, defends the US IP Guidelines of 1995 in this area as more liberal and better mitigating the tension.

Baxter and Kessler tackle a more technical issue of tying arrangements. They illustrate how, over the years, American law (initially hostile to tying and declaring these illegal per se) and economics (suggesting they had welfare enhancing motivations and effects) have come closer together. Thomas Cotter alluding to the recent litigation involving Microsoft and Intel concludes that “it is preferable to modify the IP doctrine than to rely upon hazy and uncertain contours of the essential facility doctrine” (180). While he acknowledges this response to “the temptation to use the essential facility doctrine to require a monopolist to share its intellectual property” to be socially desirable is some cases (216), the applicability of such greater access in cases of Microsoft and Intel, remain, on his account, to be proven.

Determining the duration and scope of the patents is traditionally not the prerogative of competition authorities. Hence a question naturally arises as to whether or not such bodies are the most able to set policy guidelines and settle disputes in this area. Yet, the patent authorities are – rather com-monsensically – not the ones to evaluate the trade-off between the short-run static efficiency losses and long-run dynamic gains from innovation. Government issue guidelines themselves to manage the interface. The international dimension od such attempted management is the suff of the second part devoted to parallel imports. These indicate “goods which are authorized by the owner of intellectual property rights (patents, trademarks, copyright and design rights) for sale in one country, but which are then subsequently imported into another country (possibly the country of origin) without his authorization”. (219) The issue takes a surprisingly large space of 170 pages in the volume, but it has a crucial North-South dimension that does not lend itself to neat modeling and consise theorizing.

Chard and Mellor, consider that, as parallel trade is detrimental, an “extension of the exhaustion doctrine would lead to some increase in the volume of parallel trade and, as a consequence, there would be a reduction in economic welfare”. (232) Lars Liebeler recognized that “while recent court cases have been litigated, the volume of grey-market imports has increased dramatically”. (235) It would appear that consumers are better off, otherwise they would not buy the grey goods. Yet, he asserts that “[t]otal ban is the most efficient solution. … It is less costly to exclude the good in question by the customs office than to allow the goods to enter and have the trademark holder pursue litigation in different forums”. (258)

John A. Young Jr argues for flexibility: if gray market imports were barred, trademark owners would be protected from free riding (by parallel importers), but consumers would be denied the availability of lower priced grey market goods without any corresponding de-

creases in prices of authorised goods. In contrast, allowing unrestricted gray market importation under the status quo does not adequately protect trademark owners from free riding and promotes consumer deception and confusion. The most practical solution is a stringent labelling requirement that educates consumers regarding all of the ramifications of the purchase of the gray market goods”. (287)

A stronger argument is provided by John C. Hilke: reviewing available empirical evidence he is led to conclude that it is inconsistent with the strong form of the hypothesis that the gray market imports are motivated by free-riding on the promotional and service efforts of authorized importers (304) “Investigations conducted by FTC... failed to substantiate claims of consumer injury resulting from the warranting practices of gray market importers”. (299) In other words, a rule of reason might be adopted and a general ban is (probably) unjustified. For Frederick M. Abbott: “evidence of benefits that might flow from allowing parallel imports to be blocked is insufficient to justify the potential inhibition of trade”. (305) While the report is to suggest that WTO adopt a rule precluding governments from blocking parallel imports it also argues against allowing rules on parallel importation such as to enforce price discrimination in favour of developing countries.

A NERA survey indicated unsurprisingly that “parallel traders and the transport sector are generally seen as gainers from parallel trade, and official importers/exporters as the losers. More surprising is that the effect on retailers and on consumers was largely seen as ‘neutral’”. (348). But the final word in this sequence of papers is again given to opponents of parallel trade. Patricia Danzon considers price discrimination issues and presents arguments for Ramsay pricing (optimal price differentials) while warning at the same time of the threat of international diffusion.
of low prices. (sic! 370) H.E.Bale jr sides with her in arguing against parallel trade, i.e. for restricting entry to promote innovation. He adds that restricting parallel trade is necessary for protection of consumers against inadequate supervision of “secondary markets” and even for price discrimination favouring LDCs, if it were contemplated (explicitly against Abbott).

Part III takes up the WTO/TRIPs discussions. Michael McKee’s paper is a comment on the 1970s/80s failure of the international negotiations on IP. He discusses Hay’s conjecture that the failure was due to the requirement that negotiations take place within an artificial group structure (of countries) wherein consensus would be difficult to achieve. His own hypothesis is that the bargaining process stalled because of the nature of the decision rule imposed by the Rule of Procedures. Carlos A.P. Braga usefully summarizes and weighs mid-80s argumentation of the developing countries on the stricter regime of IP. “The impact of enhanced IPR protection upon Third World economies may vary significantly among different countries. There is no a priori strong evidence that these countries will necessarily benefit or lose from a reform of their intellectual property systems.” (420)

R.D.Anderson’s judgement after having compared “Quad” jurisdictions (US, EU, Japan, Canada) is that “while competition policy interventions may indeed be desirable to strike down anti-competitive arrangements in particular cases, there is also no doubt that an excessively strict approach to the regulation of licensing or other arrangements, whether domestically or internationally, would run a serious risk of impeding efficient contracting practices that facilitate technology transfer and benefit both parties to the contract.” (441) A long piece by J.H.Reichman seems to restore somewhat the balance towards the development concerns. “Reliance on mindless proliferation of exclusive property rights represents an overprotective response that could prove socially more harmful than the underlying threat of market failure”. (457)

The fourth part is entitled “Standardisation Issues” and contains only two short papers. Dynamic aspects of competition are continued in a sense in R.C.Levin’s who sketches modelling of the the continuous reproduction by (usually) incumbent firms of entry barriers (and thereby quasi rents) through research and development effort. Together with the paper by Joseph Farrell it provides an introduction into a wide and growing subject matter of economic strategy generally. Farrell’s text is explicitly related to the IP. He suggests that stronger protection of IP may retard or may advance de facto informal standardization, it plausibly does retard formal standardization because it tends to increase vested interests. As compatibility grows more important in information industries, formal standardization is likely to predominate, and standardization may be slowed or even prevented by strong protection of certain aspects of intellectual work. As some aspects of the product should be imitated (for efficiency and for the creation of an industry standard) Farrell suggests that “patent protection for software should perhaps be expanded, and copyright protection curtailed”. (561)

Generally speaking, the presented mix of mainstream microeconomics, law and economics, industrial organisation (“old” and “new”), some policy analysis (with relation to international trade) seems roughly right. It is impossible to cater to everyone’s tastes. Without getting into substantive discussion, where we cannot do justice to any argumentation in this short piece, let me just indicate some issues worthy of inclusion in a more visible format: foreign direct investment rather than just foreign trade (two contradictory effects seem to be at work: a) weak IPR act as induce-ment to control through local production raising FDI levels, b) strong IPR are seen as a pre-requisite for FDI); a set of issues concerning cultural/traditional knowledge and biological diversity and related proposals of alternative methods of protection.

There are no neat theoretical results in this contentious area of policy, so it is...neglected.

The economic history of IP, the determination of IPRs (political economy of IP, institutionalisation of PR, mutual conditioning of development of technology and evolution of IP concepts) and their relation to economics and business strategy are full of interesting issues. One hundred years ago some Swiss firms reportedly argued with as much vehemence for weak property rights as today they argue for strong property protection. Copyright was restricted to the US citizens until 1891, on the argument that it needed such a facility to educate its own citizens.

At a microlevel, a firm wishing to protect its intellectual property from imitation has different options – patents, first mover advantage, lead time, secrecy. Patents are quite often thought to be less effective at enabling the inventor to benefit from the invention than other alternatives (R.C.Levin, A.K.Klevorick, R.Nelson, S.G.Winter, Appropriating the returns from industrial R&D, Brookings Papers on Economic Activity 14, 1987. W.Cohen, R.Nelson, J.Walsh, Protecting their intellectual assets: appropriability conditions and why US manufacturing firms patent (or not), NBER Working Paper 7552, 2000). Quite a few “anomalies”, overlapping protection, pooling of patents, patent races (and the winner-take-all logic), patent renewal, etc. are being increasingly discussed in the literature. It seems safe, and in tune with a number of papers in the volume, to conclude that, in different industries, firms use patents (and generally IP) in different ways. Their value (valuation of IP is a separate topic omitted) is inextricably linked to strategic considerations of business management. Such issues of
strategic competition have been investigated by a number of authors featured in the volume. This only testifies that the compendium provides a solid foundation for further studies.

Rating

Rating Criteria                                      Rating
Theoretical Approach / Methodology                  +++++
Structure                                           ++++
Depth of the Analysis                                +++++
Contribution of new Knowledge                        +++
Applicability                                        +++
Clarity and Style of Writing                         +++++
Rating Points: excellent: +++++ poor: +

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