

Intellectual Property, Competition Law and Economics in Asia BY R. IAN MCEWIN, ed. [Oxford: Hart Publishing, 2011. xxxiii + 334 pp. Hardcover: US\$150.00]

This interesting and substantial book contains papers from a conference held in Singapore in 2009. Its focus is the problematic intersection between intellectual property and competition law and it looks at the issue from an Asian perspective. The area is one of tension in all jurisdictions but nowhere more so than in Asia, where both laws are relatively late arrivals on the scene. The subject matter is thus considered in the context of developing economies where the role of innovation is crucial to economic growth. The heavy representation of economists amongst the authors means that issues are thoroughly examined from an economic viewpoint. In addition, chapters consider issues of more general significance about the economic approach to competition law analysis and enforcement.

Chapter 1 is written by the conference organiser, R. Ian McEwin, who identifies clearly and succinctly the major issues for debate. He surveys a number of well-known economic theories on innovation, concluding that many factors affect the relationship between incentives to innovate and market power. While the laws themselves and the approach of economists are important, McEwin recognises that the interpretation and enforcement of even similar laws varies between jurisdictions. He notes that the Asian experience of competition law enforcement is one of differing laws with differing objectives against the Asian background of business dealings and relationships (including with the government), rule of law and national development goals, each of which has the capacity to substantially influence outcomes.

William E. Kovacic, an academic lawyer with a long history at the Federal Trade Commission (“FTC”), including a stint as Chairman from 2008-2009, is the author of Chapter 2. He approaches the intersection seeking regulatory balance and focusing on the important role of advocacy in government. Looking in particular at patent law and competition, he examines the recommendations of a 2003 FTC report on the U.S. patent system, which was aimed at restoring the balance between patent and competition laws. He emphasises the importance of periodic assessment and refinement of policies by regulatory agencies.

Chapter 3 by Douglas H. Ginsburg and Eric M. Fraser focuses on the crucial role of economic analysis in competition law, charting its rise in importance and the challenges to legal stability posed by recent rapid changes in economic thinking.

Chapter 4 by J. Gregory Sidak and David Teece, entitled “Favouring Dynamic Competition over Static Competition in Antitrust Law”, explores the changing focus of economic analysis from the traditional structuralist approach to the current focus

on the dynamic nature of markets. They note the lack of compelling evidence that antitrust based on a structural approach has benefited consumers, and suggest that, in fact, it may have done more harm than good. They argue that innovation theory pays little attention to factors inside the firm, and that scholars and practitioners need to look more carefully at the determinants of innovation and the impact of antitrust activity on it. Surveying evolutionary economics and behavioural theory, they conclude that (at p. 76):

Extensions of and revisions to the theory of the firm, if they recognise the firm as having the potential to create innovation. . . will assist in the development of new approaches to antitrust theory that will pave the way for the improvement of actual policy.

The authors recognise that adopting a dynamic view of competition will require significant changes to current law and merger policy, because dynamic analysis “focuses less on outcomes and more on process” (at p. 76). The authors conclude in particular that the antitrust enforcement agencies should review the U.S., Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (rev. 1997) to take dynamic competition concerns explicitly into account.

The “Country Chapters” (at pp. 95–320) take a variety of approaches to the subject matter.

The Australian material by Bob Baxt and Henry Ergas in Chapter 5 examines issues arising with respect to copyright and patent law, the way they are treated by Australian competition law, and open questions arising from the interaction between the two. The authors note the preference in Australia for dealing with the interface through intellectual property law, rather than through competition law. Exemptions in the Australian competition law, the *Competition and Consumer Act 2010* (Cth.) [CCA], including those in relation to intellectual property, have not been thoroughly explored by the judiciary, and general uncertainties about the application of the law and its enforcement militate against the authors recommending a more general exposure of intellectual property rights (“IPRs”) to the CCA. The authors argue that the treatment of joint ventures by competition law in Australia has been hedged “with suspicion” and that recent laws which introduce criminal liability for cartel conduct (alongside the existing civil liability) provide only limited protection for joint ventures (at p. 113), which is unsatisfactory.

Chapter 6 by Michael Jacobs and Xinzhu Zhang notes that the relatively recent enactment of anti-monopoly laws in China means that they have not, to date, been used to achieve the goals of promoting innovation and competition. The chapter focuses particularly on whether and on what terms courts will compel a dominant firm to license its intellectual property. This question is explored against the background of the very different approaches of the U.S. and the E.U. The authors note that the answer to the question involves the balancing of static gains and dynamic loss, and that any answer is country-specific since it depends upon factors such as the local “value of [intellectual property], the place of the dominant firm, the efficacy of market mechanisms, and the importance of long-term incentives for economic growth” (at p. 126). The authors conclude that approaches in the U.S. and E.U. differ because of the different political and cultural beliefs which inform them, and that for this reason

they are unlikely to be suitable for other jurisdictions. A myriad of laws affect competition in China, including the *Anti-Monopoly Law of 2007* [AML]. The AML contains art. 55 which stipulates that the AML does not interfere with the exercise of IPRs so long as the conduct does not constitute an abuse of power conferred by the rights. The authors conclude that China's legal framework may be incapable at this stage of dealing with compulsory licensing. Special issues linked to China's status as a developing country lead the authors to conclude also that it may be too soon to suggest an ideal approach for China, although they make some preliminary suggestions.

Chapter 7 deals with India. While the jurisdiction has had a lengthy history with both intellectual property and competition laws, the authors, Vinod Dhall and Augustine Peter, note that the most recent competition law, the *Competition Act, 2002*, became operative only in 2009. With no cases on the formal interface between the two areas of law, the authors focus on the wording. In summary, the authors state that the competition law "recognises the importance of IPRs and accordingly gives them special treatment in the assessment of their anti-competitive effects" while the intellectual property laws contain safeguards against anti-competitive use of IPRs (at pp. 174, 175). The authors call for coordination between the enforcement authorities in each area to prevent confusion and conflicting orders, and note the provision in the *Competition Act, 2002* allowing for competition issues to be referred to the Competition Commission of India when raised by another authority.

The chapter on Indonesia (c. 8) by Ningrum Sirait and Cento Veljanovski describes the protection of intellectual property in Indonesia as weak by global standards, illustrating this by a number of specific examples. It outlines the relevant intellectual property laws and the competition law, *The Prohibition of Monopolistic Practices and Unfair Business Competition* (Law No. 5/1999), and describes the specific exemption for agreements relating to IPRs in the competition law (art. 50(b)), which has been the subject of guidelines. A major question posed by the authors is whether competition law principles are appropriate to deal with IPRs and innovation markets. The authors address a number of additional questions related to the specific nature of Indonesian competition law, such as its multiple and sometimes conflicting objectives.

Chapter 9 on Japan by H. Stephen Harris, Jr. and Hiroshi Ohashi emphasises the importance of innovation in a country with an aging population and shrinking birth rates. The authors focus on art. 21 of the *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade* (No. 54 of 1947) (*Anti-Monopoly Act* [AMA]), which expressly exempts acts which constitute the exercise of rights under the specific intellectual property laws. The authors note that there are examples of the Japanese Fair Trade Commission ("JFTC") and the courts applying the AMA to conduct involving IPRs not categorised as an exercise of rights. The *Guidelines for the Use of Intellectual Property under the Anti-Monopoly Act* (2007) issued by the JFTC refer to refusals to license, excessive royalties, agreements not to challenge validity of rights, and provisions relating to platform functionality as areas of JFTC concern. The authors discuss the nature of the JFTC and its relationship with the government, and argue that private parties and the courts should be more actively involved in enforcement of the AMA.

The chapter on Singapore (c. 10) is contributed by Ashish Lall and Daryl Lim. It charts the development of intellectual property and competition laws, and the country's transition to an innovation-based economy. The authors argue in convincing fashion that the key to navigating the interface in this jurisdiction is understanding the nature of markets in Singapore and fostering synergies between the two regimes. They describe comprehensively the Singapore economy's place in world economic and innovation rankings, although they conclude that while the jurisdiction scores well on the innovation input side, it is less successful on the output side. In the context of detailing the competition law, the *Competition Act* (Cap. 50B, 2006 Rev. Ed. Sing.) and the Competition Commission of Singapore's *Guidelines on the Treatment of Intellectual Property Rights* (2007), they note that the law is concerned with total welfare rather than simply consumer welfare and also that the Singapore government is mindful of compliance costs and likely to be cautious in regulating the exploitation of IPRs. The authors conclude that "the actual contours of the law will not be known until the courts in Singapore have had the opportunity to decide on cases" (at p. 253).

Chapter 11 on South Korea by Sang-Seung Yi and Seong-wook Heo approaches the topic by examining the Korean Fair Trade Commission ("KFTC")'s track record on mergers through the lens of dynamic competition. The authors argue that where merging firms compete in Korea and overseas, the KFTC's focus on static effects in the domestic market pays insufficient attention to the dynamic competition which merging firms face in foreign markets.

Chapter 12 on Thailand by R. Ian McEwin and Sakda Thanitcul notes that debate on the intersection of competition and intellectual property laws is particularly acute in the context of access to medicines and the promotion of generic drug competition through compulsory licensing of drug patents. The authors detail the limited protection of IPRs and implementation of competition laws in the jurisdiction, the implications of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (Annex 1C to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 1869 U.N.T.S. 299) (more commonly known as the "TRIPS Agreement"), and provisions related to compulsory licensing in the *Patent Act* (B.E. 2522, 1979) as amended by the *Patent Act (No. 2)* (B.E. 2535, 1992) and the *Patent Act (No. 3)* (B.E. 2542, 1999). They describe a number of instances where compulsory licences have been issued in Thailand and one notable example where competition law was unsuccessful to remedy a refusal by a pharmaceutical company to register new drugs resulting from a decision to compulsorily license certain drugs.

The chapter on Vietnam (c. 13) by Doan Tich Phuoc and Bui Nguyen Anh Tuan reviews the interaction between intellectual property and competition laws in the jurisdiction against the background of its developmental stage, and makes policy recommendations which the authors propose are feasible to improve the balance between the two laws.

The stated aim of the book is to provide an overview of the relationship between the two areas of law and policy within a broader legal context. Overall it does this very well by approaching the issue from a variety of economic and legal angles and in the context of a range of jurisdictions within the region, using experienced authors who are generally able to effectively transcend more mundane discussion. In doing so, the book raises a number of extremely important issues about competition law and enforcement generally, albeit in the context of innovation surrounding intellectual

property law. The recent nature of much of the legislation considered means that a number of the ideas expressed are just that, but the book makes a substantial contribution to the further development of thinking in a crucial area of legal and economic debate in jurisdictions where the topic is particularly relevant.

DEBORAH **HEALEY**

Senior Lecturer

Faculty of Law, University of New South Wales