

Economic Approaches to Intellectual Property, by Nicola Searle and Martin Brassell

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Book Review



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Abstract

Intellectual property (IP) is well recognized as an important economic asset. Many companies rely heavily on their IP to contribute value to their enterprise: Apple has built an empire on its trademarked logo and branding, Coca-Cola on its secret soft drink formula, and Pfizer on its pharmaceutical patents (to name just a few). The economic value of IP and its strong relationship to business is even reflected in IP legislation. For example, trademark statutes in various jurisdictions share an underlying policy of promoting free and fair competition in trade.

Book Review

***Economic Approaches to Intellectual Property*, by Nicola Searle and Martin Brassell¹**ALEXANDRIA CHUN²

INTELLECTUAL PROPERTY (IP) is well recognized as an important economic asset. Many companies rely heavily on their IP to contribute value to their enterprise: Apple has built an empire on its trademarked logo and branding, Coca-Cola on its secret soft drink formula, and Pfizer on its pharmaceutical patents (to name just a few). The economic value of IP and its strong relationship to business is even reflected in IP legislation. For example, trademark statutes in various jurisdictions share an underlying policy of promoting free and fair competition in trade.³

When it comes to assessing value, however, business assets that are more tangible than IP predominate. Because of its intangible nature, the value IP adds to a firm's business is difficult to quantify, and often slides into companies' balance sheets under various headings without further detail.⁴ Yet at the same time, IP is only valuable if it is properly recognized as a protectable asset. As technology becomes more advanced and information more easily accessible in a global marketplace, companies rely more on their IP rights. In order to

1. (Oxford: Oxford University Press, 2016).

2. JD Candidate 2018, Osgoode Hall Law School.

3. Bitá Amani & Carys Craig, *Trade-marks and Unfair Competition Law in Canada: Cases and Commentary*, 2nd ed (Toronto: Carswell, 2014) at 6.

4. *Supra* note 1 at 239-41.

effectively protect IP rights, it is important to investigate the economic impact IP rights have not only on individuals and firms, but on the economy as a whole.

This is the exact inquiry that Nicola Searle and Martin Brassell undertake in *Economic Approaches to Intellectual Property*. Their analysis of the economics of IP aims to provide a high-level understanding of how IP rights generate value and impact the economy without requiring prior knowledge of either law or economics. While this book provides more in-depth commentary on economic theory than IP law, the treatment of the subject matter makes it useful as both an IP book for economists and an economics book for IP lawyers.

The relationship between economics and IP is not an emerging area of study. The earliest observations on the relationship between economics and IP reach back to the 1900s, and many have since examined the effects IP rights have on the economy. For example, Judge Richard Posner has written notable commentary on the economics of IP rights.⁵ But while Posner's work provides an in-depth analysis, it is often dense and requires a prior understanding of economics. By contrast, Searle and Brassell's book does not assume its readers to have such pre-existing knowledge. The strength of their book, therefore, lies in its simplicity. The authors distill the key points of the relationship between IP and economics and contextualize their arguments using current examples, not mathematical formulae. This provides the reader with a more practical rather than theoretical understanding of the economics of IP rights.

Searle and Brassell's book functions as both a textbook and a critique. It proceeds in three parts. Part I begins by reviewing basic concepts of economics, such as supply and demand and competition, to help those with little background in economics and to facilitate an understanding of how these concepts are later applied to IP. Throughout Part I, the authors introduce IP by explaining how concepts like incentives and market structure relate to IP rights. The most important aspect of Part I is found in Chapter 2, where the authors explain the three main theories used to justify IP rights: social contract theory (where IP rights are a result of a bargain between the creator and society, the former providing knowledge and innovation to the latter in exchange for a state-sanctioned monopoly), labour desert theory (where IP rights are earned by inventors because they are the ones who put in the time, effort, and skill to create), and the rejection of IP. These three theories play an important role in Searle and Brassell's later justification for the protection of IP rights.

5. See e.g. William M Landes & Richard A Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, Mass: Belknap Press, 2003) .

The book becomes more analytical in Part II. Each chapter in this part focuses on a specific area of IP, such as patents, copyright, and trademarks, and points out economic considerations that are unique to each area. The authors weave current examples of IP rights into their theoretical explanations to provide context and to make the issues more accessible. They also include timely discussions on how specific industries are affected by particular IP rights, making reference to the three theories of IP rights justification introduced in Part I.

Searle and Brassell close on a practical note. Part III reviews the ways in which IP generates value for businesses and the methods commonly used to measure that value. The authors return to a more textbook-like tone and provide a practical reference for determining the value of IP rights.

Searle and Brassell take a comprehensive approach in their analysis of the economics of IP rights. After outlining the different perspectives of economic analysis in Part I (micro- versus macroeconomic, and theoretical versus empirical), the authors examine the economic implications of IP rights from all four perspectives. As a general structure, the discussion of each IP right begins with an explanation of which theory best justifies the right and why, followed by an evaluation of the theory on a microeconomic level (*i.e.*, for individual firms) and on a macroeconomic level (*i.e.*, for the economy as a whole) using available empirical data. This systematic analysis is highly beneficial. It helps the reader by taking very broad economic concepts and reducing them in a way that allows for comparison between individual IP rights.

Two main themes run throughout *Economic Approaches to Intellectual Property*. The first theme, and the thrust of the authors' argument, is that IP rights provide incentive for innovation. This stems from social contract theory, wherein innovators exchange their knowledge and innovation with society for a time-limited monopoly on their work.⁶ This contract results in a number of economic benefits for both society and the innovator; for the former, improvements that can be used to develop the economy, and for the latter, the ability to recoup costs.

For each of the IP rights described in Part II, the authors evaluate the suitability of the social contract theory in justifying the existence and nature of the right. They succeed in their argument that IP rights in general can be justified by social contract theory and its incentive to innovate, but the extent to which their argument succeeds depends on the specific IP right in question. Some IP

6. *Supra* note 1 at 32.

rights, like trademarks⁷ and geographic indications,⁸ do not fit neatly into the social contract framework because there is relatively less innovation involved with these forms of IP. In these situations, the authors acknowledge that it may not be possible to use social contract theory to justify all forms of IP and look to alternative explanations.

The second theme is that IP rights are anti-competitive in nature, which creates an inherent tension with the economic justification for IP rights outlined by the first theme. Economists prefer competition because, the theory goes, it allows the market to be in its most efficient state.⁹ In an ideal world with all suppliers in perfect competition with one another, single suppliers will be discouraged from selling goods and services at higher prices than what consumers are willing to pay. However, IP rights, by definition, reduce competition by granting monopolies to IP owners. These monopolies allow suppliers to sell at higher prices because there is no one competing with them, which in turn creates inefficiencies in the market.

Although this second theme appears to be at odds with the first, the authors deal with this conflict well in Chapter 7 where they address competition and IP rights.¹⁰ They make the argument that legal IP monopolies do not necessarily give rise to corresponding market monopolies, and that social contract theory remains intact despite the existence of legal monopolies. This is an important point because it highlights the balance IP rights strike between rewarding creators and providing public access to new knowledge and innovation (*i.e.*, IP considerations) without creating unreasonable monopolies in the market (*i.e.*, economic considerations). Factors that determine the scope of an IP right, such as the term and the nature of the right, help to achieve this balance between economics and IP rights.

Throughout their book, Searle and Brassell explain the relationship between economics and IP rights by alternating between theoretical and practical perspectives. This is particularly helpful in allowing the reader to understand how the two fields interact. The theoretical perspective is important on a policy level because it informs the extent to which monopolies should be granted for each type of IP right. The practical perspective is important for understanding the implications IP rights have on a micro- and macroeconomic level. In other

7. *Ibid* at 100.

8. *Ibid* at 135.

9. *Ibid* at 142-43.

10. *Ibid* at 141-58.

words, economic analysis plays a role in shaping the nature of IP rights, and the nature of IP rights play a role in shaping the economy.

A key observation made by Searle and Brassell is that the intangible nature of IP makes it difficult to gather empirical evidence on the effects of IP rights. This in turn makes it difficult to evaluate economic justifications for these rights. For example, many copyrights, which provide creators with relatively long monopolies over their works, are unregistered and privately held. Is this long monopoly justified by social contract theory or labour desert theory? And to what extent? These questions can be answered by empirical data, but such data are difficult to gather because most copyrights are not registered. Some scholars have used a theoretical approach and built mathematical models to explain IP rights.¹¹ But this only answers the question of how IP rights are *supposed* to function in the economy. To see how they *actually* function, Searle and Brassell take an empirical approach. They evaluate economic theories for IP rights using real data where it is available. While this sometimes prevents the authors from reaching a definitive conclusion, these unsettled questions leave open avenues for further investigation.

An important strength of Searle and Brassell's book is how accessible it is to a wide range of readers. For lawyers and others in the legal field, this book is a good starting point for understanding the economics of IP rights and for providing practical guidance that can help practitioners address their clients' IP-related needs. For scholars and policymakers, this book provides a survey of the relevant justifications for IP rights, as well as theoretical and empirical methods of analysis that can be used to evaluate those justifications. For entrepreneurs, it provides an overview of how a business can quantify and protect their economic interests in IP. Part III of the book is particularly useful in this regard, as it outlines how IP rights generate value and the best ways to account for this value.

The book's greatest potential drawback is its limited discussion of how courts have considered the role IP rights play in the economy. However, this is not a serious problem for two reasons. First, the authors are economists, not legal scholars. They are merely providing an economist's perspective on IP rights. So while they do not go into the history and nuances of individual IP rights, they supply enough information that little background in IP is necessary for a reader to understand how IP rights are created and protected by the law. And second, considering the intended audience of the book, it is not necessary to analyze individual court decisions. Searle and Brassell aim to reach an international audience, and limiting legal discussion to any particular jurisdiction would not

11. *Supra* note 5 at 71-84.

help to achieve this goal. The book allows readers to gain an understanding of the economics of IP that they can then use to explore IP rights in their particular jurisdiction, regardless of where they are located.

Economic Approaches to Intellectual Property provides a timely survey of possible economic justifications for IP rights. In a global marketplace, more companies are turning to IP to generate value. As Searle and Brassell observe, the intangible nature of IP makes it difficult to quantify its value, and as a result makes IP difficult to protect. Because of the scope of their inquiry and the difficulty in quantifying IP rights, Searle and Brassell's analysis does not delve deeply into any particular area of IP. But what this book lacks in depth, it makes up for in breadth, making it an excellent starting point for anyone wishing to further investigate the relationship between IP and economics.