

Beyond Intellectual Propertyby **William Kingston**

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Dr. Kingston, of Trinity College Dublin Ireland, lectures on industrial innovation. His research contributions include originator behind the successful business expansion schemes (BES) for the UK Cabinet Office (since emulated in other countries) and “enforcing small firms’ patent rights” to the European Commission. He holds a DLitt and two MAs from TCD and NUI, having published extensively in the overlapping fields of politics, economics and law.

“Innovation is turning information into tangible realities ... individual property rights ... the most effective way to make this possible”. Twelve chapters divided in sections (e.g. MacKay’s Insights) yield recommendations to improve the *status quo*. Vignettes throughout use primary and secondary references, e.g. USPTO MPEP sec2143.01, http://ec.europa.eu/internal_market/indprop/patent/index_en.htm#studies, “Antibiotics, invention and innovation” Kingston W. (2000) Research Policy 29 (6) pp679-710.

Progress by innovation is modeled by Schumpeter’s creative destruction (1911), Kondratieff’s long economic cycles/waves (1935) and Mensch’s S-shaped forward thrusts (1975). Company-structure evolution is crucial – partnerships (joint & severally liable), limited liability partnerships (IRL 1782) and joint stock companies (UK 1855/6; so successful that every country in Europe copied within a decade). “Since the beginning of the Industrial Revolution, every country that became economically great started by copying – the Germans copied the British, the Americans copied the British and the Germans, and the Japanese copied everybody”. Countries tuned their protection regimes to optimize local industrialization – India’s 1970 Patent Act denied product patents to food, pharmaceutical and agrichemical products, granting them for associated processes only for 5yrs from grant/7yrs from application. Japan, after WW2, changed its patent law 18X over 40yrs to suit its own firms. Harmonization is a Trojan-horse. IPC (Intellectual Property Committee), founded by the heads of Pfizer, IBM & DuPont to lobby for change in international protection arrangements, allied with UNICE (union of industrial and employers confederations of Europe) covering 22 countries. In 1994 they, with Japan, effectively crafted TRIPS. “In effect 12 corporations made public law for the world”. It’s a “polite form of economic imperialism” condemning the World’s poorer countries to remain derivative economies indefinitely.

“Successful innovation ... is a feat, not of intellect, but of will. It is a special case of social phenomenon of leadership”. Abraham Lincoln said of the patent system “it adds the fuel of interest to the fire of genius”. Prizes are another way of using public money to encourage invention, e.g. John Harrison’s chronometer and Appert’s invention of canning food and preserving it by heat treatment. US SBIR (Small Business Innovation Research) grants support three investment tranches – the first (1-in-9 chance) an irrational investment of \$100k for 6months taken with insufficient risk information (\$2B/yr). 2nd stage grants (1-in-2) up to \$750k for 2yrs research and 3rd stage (1-in-8) VC expected to take over. 1-in-131 resulted in a new technology product on the market. Over 2/3 the value of worldwide patents accrues to firms in the chemical and Pharma-industries. \$800M/product investment on average in drug industry; 8-of-10 investments in new drugs fail to return even research costs, one recovers its R&D, and one blockbuster must then pay for all the other losses and the firm’s profit. The 1952 US Patent Act (widely copied by other countries) was essentially designed for that industry due to the evolving legal arguments of novelty. In 1941 the US Supreme Court ruled novelty as a “flash of genius”, redefined by the 1952 Act as “not obvious to one of ordinary skill in the art” thus removing the impact of how the discovery was made (mindless labor vs. creative vision). Germany’s 1877 Patent Act had defined the age – corporate research labs, lead by professional managers.

Chapter6 is the pivot between the lead-up and how to move forward – “rescuing a dysfunctional system”. We are “drowning in a sea of intellectual property”. One size does not fit all. Computer program protection via copyright and patents is described as “30yrs of bad logic and bad law”. Likewise database protection in the EU is excessive. Biotechnology is badly served, with patents being inappropriate for genomics (1980 Supreme Court ruling *Diamond v Chakrabarty* “anything under the sun that is made by man”) – if even constitutional. Separately business method

patents unsuccessfully try to reconcile the “results of individual creativity and their application to the results of corporate investment”. All leads to “enclosures” and the “commons’ problem”.

Recommendations – Compulsory technical arbitration with legal aid for dispute settlement giving weight to expert opinions (e.g. UKIPO). Use money, not time, as the reference variable for measuring economic privilege. Use capital payments instead of royalties, or mix. Compensatory Liability Regime (CLR) with obligatory licensing to all comers, 3-9% royalties settled by mediation and arbitration, similar to the 200,000 private music licenses/yr in the US. Let the Third World copy whatever they want and compensate originators from a percentage of the national aid budgets. Emphasize small firm protection by expanding existing schemes – e.g. PCT application cost is high (~\$8k) but there are large discounts for Third World applicants. The USPTO gives 50% discount to small companies (<500 employees), and in *pro se* applications the examiner crafts one or more claims for the applicant. UKIPO supports via “expert opinions”, free filings, low cost search and official reports, whilst offering 3D functional designs (from car industry) in the Copyright, Designs and Patents Act 1988. Britain also gives tax relief on equity investment in new businesses via BES. The simplified procedure fixed recoverable costs legal-regime in Germany is more successful than Britain’s in that SMEs litigate patent matters more readily and often there. Improve patent quality by allowing pre-examination opposition. The NYU/USPTO Community Patent review project involves several firms like IBM, Microsoft, Intel & HP allowing 250-400 of their software patent applications to be published immediately for the world to evaluate. The Danish Patent Office proposed litigation insurance, studied by the EU – premiums as proportion of patenting costs over a decade would be 15.5% in Germany, 8% in UK, 4% in France. Given average patent life in Germany & UK is 8yrs, 6 in France – a 5yr period of incontestability should be enough, like under the 1983 US Orphan Drug Act (under FDA control) which gives 7yrs exclusivity and caused a 12X annual increase in new orphan drugs. Direct Protection of Innovation (DPI) where innovation (not invention) is afforded a temporary monopoly – legally similar to the “not stable or commonplace” provisions in boat hull design Ch15 of the US Copyright Act. Infringement, *lèse majesté*, would be a crime similar to “passing-off” one’s own product in place of another’s in the British Act 1862. One would use project & firm related risk to calculate a matrix of appropriate investment multiple/years of protection – ranging from 4 to 17yrs. Options based on 1/20th the protection period also proposed to close gap between application, tentative grant and raising finances to do project. Investment must be made within 1/8th of the term. Incentives might include 1.5-2X protection for investments in specific subjects or geographic regions to stimulate the economy.

Being Dr. Kingston’s *magnum opus* other *rapportage* explicates details further, e.g. penicillin’s mass production was the next largest American WW2 project after Manhattan (atom bomb), the Xerox914 copying machine was perhaps the most profitable product of any kind ever put on the market. One would like to see that here, along with more extensive referencing and a bibliography – all-in-one so to speak – for it is clear it would be worthwhile and most certainly adds to the art’s body-of-knowledge.

Overall – excellent thought-provoking yet easy read packed with perspectives non-standard to the usual IP-milieu. Recommendations make sense, though DPI is a harder sell. A genre masterpiece tying together the puzzle pieces illuminating what does it (IPR) all mean, and so what.