

Book Review

THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW,
William M. Landes & Richard A. Posner. Cambridge, Mass: Belknap Press of
Harvard University Press, 2003. ISBN # 0-674-01204-6. \$39.95 USD.

Introduction

The most interesting part about *The Economic Structure of Intellectual Property Law* is one of its co-authors, the Reagan-appointed, U.S. Seventh Circuit Court of Appeal Judge Richard Posner. Everything said in the book must be understood in the context of a sitting judge, ruling from one of the most powerful positions in the heartland of the world's sole "hyperpower."

Judge Posner is not bashful, happily. He makes for a very interesting read, especially when he criticizes his fellow judges, including the U.S. Supreme Court. For example, at one point, Landes & Posner condemn "one of the all-time economically dumb Supreme Court decisions."¹

Several times, Landes & Posner castigate Judge Posner's peers on the U.S. Court of Appeals for the Federal Circuit, which has had exclusive appellate jurisdiction over American patent cases for over two decades now, as blatantly biased in favor of patents.

Judge Posner is known for taking high-profile stands, and cases. He was appointed to mediate the antitrust case brought against Microsoft by the U.S. Department of Justice, and even wrote a book shortly after President Clinton perjured himself about committing adultery with that woman, Monica Lewinsky. In that book, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*, Judge Posner did not shy away from criticizing a sitting President, for being "felonious," viciously slanderous, and committing "desecration of revered national symbols."

A sitting federal judge, Posner also makes time to teach at the University of Chicago, and manages all of the above, as well as writing such recent discourses as *Public Intellectuals: A Study of Decline*, where he complains about post-modern multiculturalism.

The other author, William M. Landes, is the Clifton R. Musser Professor of Law and Economics at the University of Chicago Law School, and not as controversial, though no less a scholar. Both Landes and Posner won renown as leading proponents for the economic analysis of law, a methodology that built on the Nobel Prize-winning work of the University of Chicago in the field of economics by luminaries such as Milton Friedman.

Area of Coverage

Landes & Posner have written a previous book about the economic structure of another area of law, torts, but their economic analysis of intellectual property law bears little relation to their former work, other than a nearly identical title. Much of

¹ P. 418.

The Economic Structure of Intellectual Property Law concerns copyrights. Trademarks and patents are covered as well, with a comment or two about trade secrets and antitrust law at the end, but for the most part, this book concentrates on copyrights.

Landes & Posner apply the now familiar paradigm of whether and how intellectual property law is efficient or not. Rarely do they stop to consider justice qua justice. Implicit in virtually the entirety of their analysis, economic efficiency is their sole criterion for considering how intellectual property should be governed. That is why *Brulotte v. Thys* is one of the dumbest U.S. Supreme Court decisions ever, in the estimations of Landes & Posner. Having decided that holders of American patents could not negotiate royalties payable beyond the expiration of the patent's term, the Supreme Court had failed to take into account the optimal economics of the case.

For all the learnedness Landes & Posner indubitably possess, one wonders, while reading this book, whether they admit to economics being "the miserable science." For example, in reviewing the U.S. Supreme Court precedent, *Feist Publications, Inc. v. Rural Telephone Service Co.*, Landes & Posner state, "Since Rural distributed its phone book free of charge, it is hard to see how it could have been injured by Feist's copying."² It is hard to see how such smart men as Landes & Posner could fail to appreciate what a threat Feist Publications posed to Rural Telephone Service. The European Union, with its database directive, has not failed to appreciate what Feist deemed unworthy of protection. Clearly, Rural Telephone Service made a business decision, in distributing its phone book gratis, and all sorts of economic interests were at stake, starting with goodwill, yet Landes & Posner think they know it all, when it comes to running a telephone company.

Conclusion

So long as *The Economic Structure of Intellectual Property Law* is accepted for its limitations, as a portrayal of only one aspect of what informs an analysis of intellectual property law, Landes & Posner are authoritative. Merely as spectacle, it is quite bemusing to see such a powerful man lambaste other, sometimes even more powerful men and women. It can be almost scary to see Landes & Posner propose a transparently unconstitutional law such as perpetual copyrights, but they make some very good points, too. In particular, they note how science and technology have advanced so spectacularly, yet intellectual property law remains largely a product of the Enlightenment. They come to the conclusion, "A more radical restructuring of intellectual property law than considered in this book [...] may be overdue."³

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² P. 104.

³ P. 424.