



## Book Review

DINA KALLAY (2004) *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach*, Northampton: Edward Elgar.

Were it not for the subtitle, and the repeated appeals to the insights of Austrian economics, this book would be valuable simply as an interesting part-survey-part-analysis of the relationship between antitrust and intellectual property (IP). The author is, however, claiming to have done more; specifically to have produced a new and superior approach to understanding this intersecting relationship and implementing policy to deal with it. That this claim has been fulfilled may be seriously doubted.

The relationship between IP and antitrust is fairly easy to understand. A copyright, and especially a patent, is basically the creation of a legal monopoly to the use of a particular formula of expression or device. As such it potentially conflicts with the stated aims of antitrust—it is essentially uncompetitive in that it creates a barrier to competition for those who might compete by using the monopolized patent or copyrighted material. Those wishing to compete with Microsoft, for example, by producing software applications that use a Microsoft operating system, are at a disadvantage since Microsoft owns the code. Kallay provides a detailed analysis of the essentials of antitrust and IP, how they are related, where they overlap and where they might conflict. Sometimes the analysis is a bit tortured, for example, when she claims that IP and antitrust have in common that both address the question of property rights failures.<sup>1</sup> The claimed novelty in her approach is that by reinterpreting the aims of antitrust (and competition) along Austrian lines, she has removed any real conflict. If competition is understood as a Hayekian discovery process, rather than as a perfectly competitive situation, and if it is remembered that IP rights may be defended insofar as they encourage innovation, then IP is not antithetical to antitrust.

The problem is that Kallay's treatment of the Austrian position is rather spotty. Sometimes she displays an insightful appreciation, at other times she seems to miss the point. For example, she seems not to understand that an Austrian treatment of monopoly really has no place for barriers to entry that are not the result of some sort of legal barrier. She seems to think that such barriers may be found in the market conditions of particular products absent any government intervention. So she is led to a rather formulaistic, "constructivist" approach to antitrust policy which involves trying to apply a series of Austrian ingredients of competition when deciding whether monopoly is present.

She applies this to two interesting cases. The first case (the Magill case) involved the "refusal to license" TV listing information to would-be producers of TV-guides. She concludes that the European court correctly found the owners in violation of antitrust. The other case (the Dell case) involved Dell Computer Corporation's claim of a patent violation by members of the VESA<sup>2</sup> of its mechanical slot configuration (used on computer motherboards). She concludes that the court's dissenting opinion, affirming Dell's claim was correct, but for

the wrong reasons. An Austrian understanding of competition supported a finding affirming Dell's claim, since the patent was overall not inhibitive of competition and may have been stimulative of it.<sup>3</sup>

Clearly the status of IP in an Austrian worldview is not unambiguous. It is a difficult question. But I would hazard that a thoroughgoing Austrian approach would not go along with Kallay's "relativistic" approach. Rather, I believe that the way to go would be to first decide whether IP is valid or not. Can and should the notion of intellectual property be maintained. If it can, then the intellectual property-holder has the same rights as any property holder. More specifically, an Austrian approach to monopoly would not support a process in which the courts decide which such rights should be affirmed and which denied by considering which are favorable to competition and which not. In other words the notion of property is logically (and temporally) prior to the application of monopoly considerations. It should not be considered piecemeal on the basis of observed outcomes. The subtitle notwithstanding this is not "an Austrian approach."<sup>4</sup>

### Notes

1. "[A]ntitrust laws grant all market participants a private property right to a competitive environment in the wide dynamic competition sense of the term ..." (57).
2. An association of competitors, including Dell, that had previously set the standards for computer data buses.
3. In her analysis of the Dell case, Kallay surveys the economics of networks and standards. Her treatment relies primarily the legal literature and, therefore, fails to acknowledge many of the key contributors, most egregiously the authors who coined the concept "network effects" (which she uses) and provided definitive analyses of standards and networks, Stan Liebowitz and Steve Margolis (see for example Liebowitz and Margolis 1990).
4. To be fair, Kallay does seem to realize at various points that she is departing from a thoroughgoing Austrian approach.

### References

1. Liebowitz, Stan. J. and Margolis, Stephen E. (1990) "The Fable of The Keys." *Journal of Law & Economics*, XXXIII: 1-26.

### Peter Lewin

University of Texas at Dallas  
School of Management  
E-mail: plewin@utdallas.edu