Matthews Law
COMPETITION · REGULATION · POLICY · STRATEGY

Level 33, Vero Centre
48 Shortland St
Auckland 1010

Matthews Law submission

Guidelines on the Application of Competition Law to Intellectual Property Rights (Guidelines)

1. Thank you for the opportunity submit on the draft Guidelines.

2. Matthews Law is a specialist competition law firm. We regularly advise on matters involving the application of competition law to intellectual property rights (**IPR**), particularly regarding access to IPR and terms of access.

3. We commend the Commerce Commission (**Commission**) for issuing the Guidelines and its work in developing the draft. The application of competition law to IPR is a complex area. We welcome the additional guidance, particularly with the removal of IPR exceptions from the Commerce Act from 5 April 2023. It is particularly helpful that the Commission have highlighted some clear areas of concern such as: licensing back, settlements, bundling, rebates, long-term agreements, pooling and licensing societies.

4. Our submission recommends greater recognition of incentives to innovate and identifies some other areas the Commission could consider expanding on in the Guidelines.

Greater recognition of incentives to innovate

5. The Guidelines are consistent with modern international practice in recognising that intellectual property law and competition law share a common purpose of promoting innovation and dynamic efficiency and enhancing consumer welfare.[1]

6. In line with this theme, we encourage the Guidelines to consider effects on innovation and dynamic efficiency as part of the competition analysis. It is important not to overlook dynamic competition, even if it means there is a trade-off with competition from an infringing product in the short-term:[2]

> *consumers often benefit most from dynamic competition, as driven by investment and innovation in new products, inventions, and technologies. Intellectual property rights—such as patents, trademarks, and copyrights—limit competition from infringing products in order to encourage this dynamic competition.*

7. We **recommend** considering adding "incentives to innovate" to the factors relevant to considering whether conduct involving IPR is likely to substantially lessen competition in paragraph 45. Conduct which promotes or preserves incentives to innovate should be less likely to result in anti-competitive harm.

8. In our view it would be a key omission if the Guidelines do not explicitly state the Commission will consider incentives to innovate at the time the intellectual property was developed when considering competition issues involving IPR. The Commission should take a long term perspective when assessing purpose and likely effect to give appropriate consideration to the important role IPR plays in creating incentives to invest.

---

[1] See for example DOJ & FTC *Antitrust Guidelines for the Licensing of Intellectual Property* (January 2017): https://www.justice.gov/atr/IPguidelines/download at 2, ACCC *Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)* (August 2019): https://www.accc.gov.au/system/files/1619RPT_Guidelines%20on%20the%20repeal%20of%20subsection%2051_FA1.pdf at [2.2]-[2.3], CCCS *Guidelines on the Treatment of Intellectual Property Rights* (February 2022) at [1.7].

[2] Council of Economic Advisers *Economic Report of the President* (February 2020): https://www.whitehouse.gov/wp-content/uploads/2021/07/2020-ERP.pdf at 225.

9. For example paragraph 38.2 notes a pharmaceutical company may enjoy market power by virtue of holding the patent for the only approved drug for a particular disease or condition. This may have acted as an important incentive for that company to develop that intellectual property, and may continue to act as a powerful incentive on other companies to innovate, creating competitive pressure between the firms. Forcing access or making the IPR more readily available without taking into account this dynamic competition may adversely affect incentives to invest in competing alternatives and lead to worse outcomes for consumers in the long term. In our view this must be explicitly recognised as part of the balancing exercise.

10. We **recommend** the Guidelines give greater recognition of the pro-competitive (and competitively neutral) bases for refusing to supply IPR, and for setting supply prices and related conditions. This is implicitly recognised in paragraph 51 of the Guidelines which states licensors are generally free to refuse to license.

11. As we have previously submitted,[3] IPR have unique characteristics including high fixed costs to develop often accompanied by low marginal costs to produce, a potential broad range of applications, ease of free-riding, ease of reproduction, and difficulties policing theft. The DOJ and FTC's guidelines recognise "*Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property*".[4] It would be helpful for the Guidelines to similarly recognise these characteristics in paragraphs 11-12.

12. These factors necessitate a more nuanced analysis and mean there will often be pro-competitive grounds for refusing supply. Competition to develop IPR is critical in healthcare, bioscience, technology, and many other fields, and should be encouraged.

Other areas where further guidance would be helpful

13. We **recommend** considering including guidance on what the Commission considers is "fair" and "reasonable" in the context of licensing on "FRAND" terms. Introducing this language in paragraph 55 without any additional guidance could risk confusion.

14. We **recommend** explicitly noting market power is not the same as substantial market power in paragraphs 36-39. These paragraphs refer to both substantial market power and market power.

15. We also encourage the Guidelines to include more assessment in its examples.

16. For example, the first refusal to license and exclusive licensing (restraint on licensor) examples include factors the Commission would consider but does not explain whether, given these factors, the Commission would overall view the conduct to be anti-competitive and why. These examples are thought provoking, but may provide limited guidance to self-assessing firms on whether the conduct in the example is permissible or not.

17. In comparison, the settlement of intellectual property dispute example provides a greater degree of assessment on the scope and duration of the settlement agreement, commenting it appears to go beyond the IPR. Examples in the ACCC's guidelines also tend to provide a greater degree of assessment, sometimes providing the ACCC's view on the risk of breach.[5]

Matthews Law
14 February 2023

[3] In our submission on the Commission's draft Misuse of Market Power Guidelines.
[4] DOJ & FTC *Antitrust Guidelines for the Licensing of Intellectual Property* (January 2017) at 3.
[5] For example ACCC *Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)* (August 2019): at 8 (example 1).