

Reference number CR1762

Contact name

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Is your submission confidential?

No

Submission type

Have Your Say

Comment

I am a technology commercialisation lawyer specialising in IP licensing. My comment relates to section 51(3).

IP rights are intended to create monopoly rights. The monopoly is a legal monopoly not a market monopoly; rarely does an IP monopoly translate to a market monopoly, if only because generally there exists an alternative of addressing the market need by doing or selling in that market, what was done or sold before the subject matter of the IP right existed.

The owner of an IP right that validly subsists, has a right to prevent others from doing certain acts. If the owner has the right to prevent the doing of those acts at all, then any permission granted by the owner, to do those acts but under limited circumstances, can only increase the freedom of action of the person to whom the permission is granted, and can only increase the possibility of competition in markets. The only way in which the licensing of a valid IP right can be used to inhibit competition or competitive conduct, below the level of competition that would exist in any event, is if conditions are included in the licence that relate to subject matter other than the subject matter of the IP right. For example, if it is a condition of a licence of patented subject matter A, that the licensee not compete in the market for product category B, in which A is not included.

In my view, this is exactly what section 51(3) prevents, and is intended to prevent, while allowing the imposition of conditions on licensees that do relate to the subject matter of the IP right. It provides certainty in the drafting of licences, at no cost to competition. For this reason it should be retained.

The very worst outcome of this review would be the institution of a European-style 'black list', 'white list' and 'grey list', as in the Technology Transfer Block Exemption, suggesting that all IP licences are anticompetitive and illegal unless drafted in some officially permitted form. In my view, such an approach is contrary to common law traditions, and unnecessarily interferes with freedom of contract, as well as fundamentally misconceiving the nature and intent of laws conferring IP rights on those who contribute to innovation and creativity.

Thank you for considering my submission.