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Intellectual property law, technology flow and licensing opportunities in the People's Republic of China

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Abstract

This study explores the interrelationship between intellectual property (IP) law and technology transfer via licensing activity in China. In the absence of patent, trademark, design and utility model laws, and their effective enforcement, advanced country firms will be rarely willing to license technology to developing countries. The enactment and enforcement of such laws in developing countries, therefore, should result in greater international IP flows from advanced nation firms seeking to exploit market opportunities by exporting, licensing and direct foreign investment. Within just 20 years, China has moved from viewing IP as public property to having in place a raft of modern IP legislation. We relate these changes to the upsurge in IP activity in China since 1985, both in aggregate and by country of origin, and to technology flows from Japan and the USA. We then discuss remaining weaknesses in China's legislative framework and enforcement procedures.

Keywords: Patents; Trademarks; Intellectual property legislation; Licensing; China; Technology transfer

1. Introduction

Many if not most countries today have policies in place to obtain information and technology from abroad. For developing countries, with comparatively weak internal mechanisms for the generation and successful application of new products and processes, this need can be particularly acute. The international firm, through its inbound

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foreign direct investment (FDI) and licensing activities, represents to developing countries a ready conduit through which technology can flow from the more advanced economies. However, the willingness of advanced country firms to exchange technology with developing countries often depends crucially on the existence of a legal framework of intellectual property rights (IPRs) that protects locally the interests of technology owners. Indeed, the protection of intellectual property (IP), as patents, trademarks, service marks and copyright, is now at the forefront of the globalisation of markets in ideas, technology and economics (Rader, 1996). Nevertheless, the existence of IP laws is not sufficient to bolster technology transfers to developing countries. With the exception of a few areas of technology where trade secrets are adequate protection, IP laws need to be strong, effective, and most importantly, enforced, if both affiliate and non-affiliate licensing from abroad is to be encouraged.

Nevertheless, from the perspective of the developing country, there is a delicate balance between the protection of IP and the promotion of an indigenous stock of knowledge to aid economic development. It is logical to expect countries that are predominantly users of externally generated IP to be less likely to protect it than countries that are net producers of IP (Pasco, 1998). Anecdotal evidence from a number of countries that have moved to developed status suggests that "copying", often illegally, is important in the early stages of this process, with Japan perhaps being a good case in point (Cheetham, 1998). However, a country's preparedness to continue "copying" during its early development is mollified by the importance to economic growth of participating in world trade, in terms of both imports of technology and exports to advanced countries. The central role of strong, local IPR in lowering barriers to global markets for technologies became clear during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Seven years of negotiations eventually resulted in the Agreement on Trade-Related Aspects of Intellectual Property Rights: Including Trade in Counterfeit Goods (henceforth, the TRIPs Agreement) (Beier & Schricker, 1989). Today, the protection of IP is a key element of international trade negotiations (Lin, 1996).

Of course, the introduction of strong IP protection, through new legislation and its enforcement, is not without cost to the country concerned. It implies that copying will result in infringement and, by implication, the use of extra-mural technology involves the negotiation of an economic payment to licence or purchase the technology. Nevertheless, without such legislation and appropriate enforcement, a developing country erects a barrier that restricts the inflow of more advanced technology. The greater willingness of developing countries to introduce IP protection reflects the growing recognition of the crucial need to access advanced technology to improve competitiveness and promote development.

The People's Republic of China (PRC) provides a particularly interesting case in which to study the interrelationship between IP protection legislation and the promotion of inbound technology flows through foreign licensing. At different times, the PRC has held diametrically opposed views with respect to the treatment of IP. Legal protection of IP has been available in most Western countries for many years: UK patent laws, for example, are argued to date back to the 20 year monopoly for