

# Industry's View of Licensing

*Developing nations must recognize that technology transfer must be good business for both parties*

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The gap between developed and developing nations is well recognized — whether measured by standard of living or by industrial development or by per capita income or by research and development effort or by some combination of these measures.



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Efforts to bridge this gap have been the subject of extensive proposals and debate in international forums, and for political and economic background, one need only refer to recent international sessions in New York and in Lima.

For purposes of this discussion on technology transfer, let us define a developing nation as a nation that needs industrial technology. Most of the technology transfer to date has occurred between industrial firms in developed nations. The need for effective technology transfer to developing nations is recognized by both developed and developing nations as essential to rapid industrial development, particularly in those nations that have a small or essentially nonexistent industrial base.

How should this be accomplished?

What are some of the viewpoints and considerations of a developed nation?

In a developed nation, most industrial research and development is made by private investment from which the investors expect a profit, i.e., the technology is owned by individuals or, in most cases, by industrial firms.

Those in a position to furnish technology view technology transfer with concepts and viewpoints including the following:

- Technology is the result of investment.
- Technology is usually privately owned.
- Profit should be realized from technology by using it to manufacture and sell products or services, either by manufacture or use by the developer of the technology — or by licensing others to use the technology.
- Most development efforts are failures so that profits on the few successful development efforts

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must be used to finance new investment to develop improved technology; this is analogous to saving some of a harvest for next year's seeds. Private industry cannot give technology away and stay in business.

— Technology transfer (licensing) must be prof-

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itable — license by license; this is fundamental.

— Licensing must be a fair/equitable/reasonable and attractive arrangement as seen through the eyes of both the licensor and licensee.

— A licensor needs to be assured of "certainty of contract," at least to a reasonable degree, i.e., contract terms will be honored.

— The rules for governing transfer of technology, for example, the proposed UNCTAD Code of Conduct on Transfer of Technology are a mechanism for reducing the *cost* and controlling the flow of technology — and may be *counter productive* in that in many circumstances, such rules discourage rather than encourage technology transfer.

## Developing Nation Views

Based on observation, some of the following views seem to be shared by representatives of developing nations:

— Technology is the result of investment for use by the developer of the technology and use by the developer returns investment so licensing can be at the nominal rate.

— Firms in developed nations have exploited developing nations by "abusive" licensing practices — and developed nations have a special obligation to give developing nations an opportunity to "catch up" by furnishing technology at low or no cost.

— Developed nations have an obligation to transfer technology to developing nations.

— The rules for governing transfer of technology, for example, the UNCTAD Code of Conduct on Transfer of Technology, are a mechanism for reducing the *cost* of technology.

The foregoing suggests there are vast differences in economic viewpoint and philosophy, and there are! However, if these differences are recognized, it should then be easier to develop practical approaches to effective technology transfer.

Developing nation needs seem clear.

How can developing nations encourage industrial firms

in developed nations to fulfill those needs?

I believe one can generalize that most industrial firms:

1. Are generally sympathetic to the industrial needs of developing nations and are prepared to do business on reasonable terms, and

2. need an incentive to do business with or in a developing nation, e.g. to license their technology.

In my view, each licensing situation involves special considerations — and only a pragmatic/flexible approach by both prospective licensor and licensee can result in a mutually satisfactory technology transfer arrangement.

With flexibility, we can do business.

Some suggestions for developing nations' consideration:

1. Retain experienced counsel to assist and advise on negotiations.

2. Licensing practices characterized by some as "abuses" — are not always abuses — some may benefit and be needed by a licensee for effective use of technology. Some may be essential for the licensee in certain circumstances (e.g. an exclusive licensee in Country A cannot justify investment in manufacturing facilities in A if a licensee in Country B can export into A. Licensee in Country A wants assurance of exclusivity — by restrictions imposed on licensee in Country B.)

3. Be flexible — recognize the furnisher/licensor of technology wants a reasonable price — the more use the user/licensee can make of the technology — the higher the price. (Conversely, the seller/licensor must realize that he cannot impose too many restrictions on the recipient/licensee, i.e. demand "too high a price.")

Is the Code of Conduct on Transfer of Technology counter-productive to the objective of encouraging and aiding the transfer of technology?

#### Example

From the viewpoint of many industrial firms, it would be, should it become "mandatory" or part of national legislation. Let me outline an example.

Guarantees, royalty rates, and license terms are obviously interrelated. Assume a technology with a useful life of 10 years, the products from which should return to licensee a before-tax profit of 20 percent. Licensee personnel must be trained in general technical skills and knowledge as well as the specific technology to be licensed. Licensor judges its estimated cost to transfer the technology and train licensee personnel to be 5 percent of the selling price of product expected to be made by licensee over a 10-year period. The value of guaranteeing licensee's ability to make marketable product when licensor cannot control conditions of work, technical competence of manpower, etc. can only be speculated. Licensor asks for 10 percent royalty for 10 years. Licensee's government or a local or international code says the royalty cannot exceed 5 percent for 5 years. Does the licensor have any interest/incentive in continuing negotiations?

I urge that those from developing nations consider carefully the benefits of using a "code" for transfer of technology solely as a *guide* or a *checklist* to test the value of a proposed license — not as a set of firm prohibitions/requirements. The proposed UNCTAD Code of Conduct on Transfer of Technology could be used as a guide/checklist, and used as such, should assist in reaching fair and equitable licensing arrangements. Used as a "law", it can only dry up incentive to license and thereby

tend to injure rather than help the very nations the Code purports to aid.

Industry in developed nations will not knowingly and willingly give its technology away.

An arms-length business arrangement negotiated between an industrial firm and a firm in a "developing nation" can be mutually worthwhile. Moreover, investment in research, development and engineering can bring returns and is essential to achieve relative and industrial independence. For example:

Company A, through extensive research, development and investment in the design and manufacture of communication cable was in a position in the early 1950's to offer valuable technology, technical assistance, and licenses for the manufacture and sale of communications cable.

In the early 1950's, Company A licensed a Japanese firm to manufacture communications cable. The license included the furnishing of technical information, technical assistance, and licenses under applicable patents. The initial license was for a limited number of years and from year-to-year thereafter; however, because of the desire of the licensee, the license continued until approximately 1970 (with periodic amendments to accommodate licensee's increasing technical competence).

Under the license, Company A initially furnished very extensive technical assistance on how to purchase and set up machinery, how to purchase materials, how to manufacture and test cable — in fact, all the information necessary to manufacture a successful commercial product. The fee/royalty received by Company A made the license a good business deal for Company A, and for the licensee. This total package was precisely what the licensee wanted — and the Japanese Government wanted and approved. The licensee was established as a major and profitable manufacturer of the licensed cable.

Based on the licensed technology, the licensee made significant investments in personnel, training, and in research and development on cable design and manufacture. The result of this investment in research and development was that by the early 1960's, the amount of technical assistance desired by the licensee from Company A dropped significantly and the license fees dropped significantly. By the mid-to-late 1960's, Company A and licensee had arrived at relative equality in the cable technology and, therefore, entered into a simple exchange of each other's technical experiences — with an option to acquire manufacturing licenses under each other's new technology, should either party desire a license.

Thus, this licensee, from a position of technical dependence moved to a position of relative technical independence. It was a good business for Company A, for the licensee, and for Japan.

In *summary*, effective technology transfer requires flexibility in recognizing the interests and motivations of the parties to a proposed technical transfer arrangement. Moreover, to be effective, a *technology* transfer arrangement must be attractive (good business) for both the furnisher/licensor of the technology and the recipient/licensee. Finally, local investment by licensee in personnel, training, and in research, development and engineering is essential to achieve relative technical independence.

Advocacy, no matter how sincere, pursued too far may frustrate realization of the professed object.