PRC Domestic Tech-Market

An analysis of workings of the domestic technology market operating in China

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With establishment of a patent system in China, technology began circulating throughout the country, which stimulated the formation of a nationwide tech-market. As recognized by law, the tech-market is regarded as an important part of China's commodity market. The main function is to promote circulation of technology and facilitate diffusion and utilization of technological achievements in the nation. Since the PRC adopted a centrally-planned economy with strict state control over foreign-related business, two parallel tech-markets have existed in China, i.e. a domestic tech-market and a foreign-related one. This article will analyze the former.

PARTIES IN THE MARKET

Sellers

Statistics of the Chinese Patent Office show that two-thirds of the domestic applications are filed by individuals. With the deduction of those from scientific research and higher-learning institutions, about 15% come from enterprises. The overwhelming majority of these aim at protecting the existing market by applying patents rather than licensing-out the patented technology to other firms. They thought licensing-out their patents would only breed competitors. However, sometimes they appeared on the tech-market as sellers selling the patented technology and know-how, which they are reluctant to exploit.

Individual inventors are quite different from enterprises. As stipulated in Article 95 of the Common Rules of Civil Law of the PRC, patents legitimately obtained by citizens and entities shall be protected by law. This means that individuals in China are entitled to the so-called nonservice inventions, i.e. they enjoy the right to possess, use, make money from and dispose their spare-time inventions. The promulgation and enforcement of the Chinese Patent Law provides individuals a solid foundation for exercising their legitimate rights. Ingenuity of individual inventors is brought into full play. This triggers the appearance of numerous petty inventions. Differing from that of enterprises, the aim of individual patentees is to license out their patented inventions, so as to make money to finance further research and development. It is no wonder that individual inventors have become major sellers in the tech-market in China.

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Buyers

Almost all buyers in the domestic tech-market are entities, state-owned enterprises or under collective ownership, large or small. Nevertheless, the most active buyers are medium or small collective manufacturers. Most are quite flexible in production and they orient themselves to the profitability of the product selected. The scope of products they manufacture varies with market demand. Such entities have strong interest in those petty inventions that need less investment and can be easily and quickly commercialized, and most importantly, are profitable. The combination of this sort of buyer with individual inventors makes the tech-market extremely brisk.

On the contrary, the larger and stronger in R&D the enterprise is, the more reluctant is it to buy technology from others. A conservative attitude in this regard prevents big state enterprises from developing rapidly.

Neither are medium and small state enterprises as brisk as collective enterprises, nor are they as conservative as large state-owned enterprises. Sometimes they buy while they sell.

Middlemen or Agents

More often than not, transactions are concluded through the service of middlemen or agents of buyers or sellers, most of whom are local information service centers of various forms, patent agents, organizations under the control of local science and technology administrative authorities, administrative authorities for patent affairs, as well as individual go-betweens. Frequently, local patent agents act as sellers' agents to negotiate (sometimes to conclude) licensing contracts while they are prosecuting patents for the licensed subject matters.

The PRC State Council Provisional Rules on Technology Transfer points out that the middleman, be it an entity or an individual, is entitled to reasonable remuneration for the go-between service. This kind of legal protection rapidly promotes the go-between service in the tech-market.

Administrative Authorities

The National Technology Market Coordinating Group is the authorized office for administrating the domestic technology market in China. It is responsible for the macro-guidance of the market according to law, administrative regulations, and relevant policies. Under the central Coordinating Group, subgroups have been

set up in provinces, autonomous regions, and major cities for supervising local markets, and administering registration of contracts of technology dealings. In addition, banks and tax authorities help coordinating groups to supervise the tech-market.

SUBJECT MATTER OF CONTRACTS

According to law, the subject matter of technology contracts is so-called technological achievements, which include patentable subject matter as well as unpatentable subject matter such as know-how, show-how, trade secret, certain technical innovations and improvements, and technical consultancy and technical service. Technology contributing to developing new products, raising the quality of products, lowering production cost, improving management, and boosting economic efficiency and benefit can be licensed or assigned in the tech-market.

In China today, most of the licensed subject matter consists of granted or pending patents for invention, utility model or design. It is not very often one sees know-how, show-how or trade secret being licensed out in the tech-market. As a result of a lack of a real understanding of the patent system, most of the buyers prefer patented technology to unpatented objects. They misunderstand that technology being patented is the one most advanced in the technical field to which it belongs, and unpatented objects are less reliable because they have not got strong legal protection. Additionally, cooperative development of technology, technology consultancy and technical service are often being contracted for by scientific research and higher learning institutions and end-users.

HOW SELLERS MEET BUYERS

There are a variety of ways for sellers and buyers to meet with each other:

1. *Direct contact.* Sometimes sellers know their buyers quite well. When the former have new technology which they want to license out, they come to the latter directly. Sometimes it is the other way round. Another way for buyers to look for potential sellers is to go through a patent gazette.

2. *Go-between service.* This is an important way for sellers and buyers to meet. As mentioned above, not a few middlemen are patent agent's firms or administrative authorities for patent affairs. They are well-informed of the nation's patented or unpatented technology, and more importantly, they realize the suitability of the potential technology. These middlemen have connections with various sellers and buyers and understand their supply and demand needs. Thus, meetings of sellers and buyers are arranged by these middlemen.

3. *National and local tech-fairs.* Since 1985, national and local tech-fairs of various forms have sprung up like mushrooms. For instance, in March this year, a national tech-fair was held in Shanghai, the largest industrial and commercial city in China, displaying some 1,600 items, of which more than 1,000 were licensed out. Approximately 16,000 people visited the fair. More frequent are local fairs.

4. *Mass Media.* Sellers or buyers often advertise for demands or supplies. Various newspapers would like to offer their ad columns to technology sellers or buyers. Most of the newspapers do not charge their clients of this sort for advertisements before the conclusion of dealings.

LEGISLATION

To stimulate scientific and technological development, push forward modernization, protect legitimate rights and benefits of parties to a technology contract, and control and regulate the tech-market in China the nation promulgated the Technology Contract Law of People's Republic of China on June 23, 1987. It is applicable to contracts of technology concluded between domestic entities or Chinese citizens, or between entity and citizen, defining each party's rights and obligations in technical development projects, technology transfer, and technological consulting service, as well as other kinds of technical service.

According to Article 6 of the Law, technological achievements are divided into two categories, i.e. service technological achievements and non-service ones. That made by a person in execution of the tasks of the entity to which he belongs or made by him mainly by using the material means of the entity is service technological achievement. The right to use and to transfer it belongs to the entity, which shall draw a certain portion from the fee derived from transferring the achievement and award it to the person who made the achievement. The person has the personal right of naming himself as creator in any of documents relating to the achievement. That which does not belong to service achievement is a non-service one. The ownership, including right to conclude a contract, belongs to the individual who made the achievement.

Similar to Article 14 of Chinese Patent Law, Article 7 of the Technology Contract Law also stipulates that the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government have the power to decide, in accordance with state interest or social and public interests, that any entity under ownership by the whole people that is within their system or directly under their administration and that holds right to an important technological achievement is to allow designated entities to exploit the achievement. The exploiting entities are liable to the confidentiality of the exploited subject matter, and obliged to pay for the exploitation. In case no agreement can be reached between two parties concerning the payment, the authorities made decision of exploitation has the right to finalize the payment. It is clear that the main purpose of promulgating Technology Contract Law is to, by legal means, protect and develop the domestic tech-market, to promote scientific and technological progress, and to speed up application and diffusion of technological achievements.

The law specifically states that contracts "illegally monopolizing technology thus preventing technological advance" or "infringing the legitimate right of others" are null and void. Therefore, contract by embezzling another person's achievement is retrospectively invalid, and the transferor is liable to the damage caused by exploiting the transferred subject matter, thus infringing the rights of others. In addition, neither transferor nor transferee shall put in the contract unreasonably re-

strictive clauses that impede market competition and further development of the technology. Nor shall the parties illegally monopolize the market and hinder technology advancement by entering into a patent pool or other kind of illegal combination.

Contract Validity

A technology contract shall not become valid until it is signed and sealed by the parties to it, and under certain circumstances approved by the authorities concerned. If the contract is under guaranty of a third party, it enters into force after it is signed and sealed by the guarantor and the guarantee. In addition to cases of breach of contract or force majeure, any of the parties is entitled to terminate the contract when the subject matter under a technology development contract is made public.

In case of a technology development contract, problems concerning ownership of achievements and how to share the benefit of the achievement are often involved. According to the law, general principles are as follows:

1. Except as agreed otherwise by parties to a contract of technology development under authorization of one party by the other, the right to apply for a patent for the invention developed under the contract belongs to the authorized party that made the research and development, whereas the authorizing party is entitled to free exploitation of the patent after it is granted. Under no circumstances shall the authorized party transfer the developed achievement to a third party before transferring the subject matter to the authorizing party.

2. Except as agreed otherwise by parties to a contract of cooperative technology development, the right to apply for a patent for the invention developed under the contract belongs to all parties. If one party declares to give up its right, the other party (parties) is (are) entitled to apply a patent for the invention while the giving-up party has the right to exploit, free of charge, the patented subject matter. However, if any of the parties does not agree to applying a patent for jointly-developed subject matter, the other party (parties) shall not.

3. Parties to a technology development contract shall make stipulations concerning the right to use and to transfer unpatentable subject matter developed under the contract, as well as the principle of benefit sharing. Where no such stipulations have been made in the contract, any party to the contract has the right to use and to transfer.

The market mechanism is fully recognized by law and prices in the tech-market are fixed according to market demand and supply. Taxation is also used to regulate the tech-market.

REGISTRATION OF CONTRACTS

As regulated by Article 12 of Regulations on Technology Market Administration promulgated by National Technology Market Coordinating Group on December 18, 1986, technology contracts shall be registered after their conclusion. After having registered their contracts, parties to the contracts may enjoy preferential tax treatment.

Since May 4, 1987, Beijing, capital of the country, has adopted a system of registration of technology contracts. According to the municipal regulations, it is the seller's or the middleman's obligation to register the concluded contract with local authorities. After being examined and approved, normally within seven days from the date of filing an application for registration, the seller shall get a registration certificate with which he can get a tax reduction and obtain from bank the portion of transfer fee being used as bonus awarded to the person(s) who made the technological achievement. People registering a contract by illegal means shall be punished by authorities concerned, while the registering authorities misusing its power shall be disqualified.