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most recent version of the draft law.²⁶ Whatever the outcome on this issue, the controversy over whether China should recognize foreign copyright will continue, even after a specialized copyright law is adopted.

Practical Aspects of Technological Transfer in China

THEODORE W. WU*

In the realm of international political and economic relations since 1950, perhaps the most dynamic change occurred in the area of Sino-United States relations. During the last ten years, the relationship between the United States and the People's Republic of China has grown from one of mutual toleration to one of friendship and mutual respect. If the dichotomy seems too stark and dramatic, it is because the change is undeniably dramatic and dynamic; the relationship is of a miraculous nature in light of the fact that it was not so long ago that the two countries barely acknowledged each other.

Politics, trade and commerce, and scientific and cultural exchange are the areas of Sino-United States relations which have experienced the most remarkable transformation. Regarding trade and commerce, the United States has, in a few short years, become a major trading partner with China. In 1987, the United States became China's third largest investment partner. Since the open-door policy was established in 1979, the total dollar value of United States investments in China has grown to more than \$10 billion.

This remarkable change was the result of two primary factors. The first was the change in the technology export control policy of the United States toward the People's Republic of China. The second involved the important progress made by the government of the People's Republic of China in its promulgation and implementation of

26. The current draft law has not been officially published, although it has been widely circulated among scholars and publishers in China. Copies are available to foreign governments, publishers and lawyers. See generally Simone, *Copyright in the People's Republic of China: A Foreigner's Guide*, 7 CARDOZO ARTS & ENT. L.J. 1 (1988).

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laws, regulations and administrative mechanisms necessary to encourage foreign investors and traders to do business with China.

The United States still faces many challenges. Nevertheless, the United States can find encouragement in taking note of what has taken place in the last decade and in recognizing some of China's major achievements. Americans should recognize that doing business with China is a long-term proposition and that a similarity exists between engaging in business with China, on the one hand, and socio-political reforms and fruitful courtships, on the other: each requires time. So, as in all bilateral relations and human affairs, a truism exists: success takes time. Even so, let us very briefly recall some of the United States' major accomplishments in the regulation of technological exports to China.

Sino-United States technological trade is a two-way street; both parties receive benefits. The United States transfers technology to China and, in exchange, receives Chinese goodwill and a chance to establish new markets. In this regard, we see that both countries were able to reach major milestones in a relatively short time. Most noticeably, the 1979-89 era reflects a decade of hope and reality in Sino-United States technological security and intellectual property protection joint ventures. It has been a decade of courtship and of improving trade relations.

First, in 1979, the United States' recognition of the People's Republic of China as a legitimate government suddenly changed the Sino-United States relationship. Almost immediately after the United States established official recognition, the door was opened for technological exports. While the United States did not liberalize export controls to the dramatic level that the Chinese might have hoped for at the time, the degree of technology that the United States allowed to go to China was twice the level of technology it permitted to go to the Soviet Union at that time. Almost overnight, the United States created the special category "P" in its export control system as a special consideration for China, and as a special effort on its part to help bring China into the modern age through economic modernization.

Second, it was not long after establishing export control category "P" that the United States created the 1983 "Green Zone." In the context of technology export to China, if a particular technology falls within the "Green Zone," the Commerce Department can, for all practical purposes, unilaterally approve the exporter's license application without referring the matter to the Defense Department, or to

the Paris-based Coordinating Committee for Multilateral Export Control ("CoCom") for approval.

Initially, the "Green Zone" covered seven categories of technologies legally exportable to China. Two years after its creation, the Green Zone was expanded to include twenty-seven technology categories. Shortly thereafter, in early 1986, the United States further expanded the licensable spectrum. The United States believed, and was genuinely committed to the notion, that a secure and economically modernized China would be a major key to both a peaceful world and international harmony in the East Asia region. In that respect, I believe the United States has accomplished a great deal in a short time.

With regards to the immediate future, Americans can anticipate three things. First, in 1989, under the 1988 Omnibus Trade and Competitiveness Act, the United States should establish a Distribution License system with respect to China. The Distribution License system most likely will be in place by the end of 1989, absent any adverse political developments in Sino-United States relations. This is a very important development for the business sector because, with a distribution license, one can export large volumes of technologies within the allowed parameters without applying to the Commerce Department for an individual validated license for each intended export.

Second, a United States regulatory change is anticipated which would allow people to export technology for trade show exhibition without having to obtain a special license. The exporter would, however, have to meet the following two conditions: (1) the United States exporter/exhibitor must retain title, and (2) the United States exporter must bring back the technology upon his or her return to the United States.

Third, there are the uncertain changes that may occur with regards to the United States' economic and foreign relations with Hong Kong after 1997. Although this is further down the road, it is not too early to think about it. In this regard, let me assure you that resolution of this complicated issue will not come easily, especially with respect to American technological exports. In 1997, when Hong Kong lowers the British flag and raises the flag of the People's Republic of China, how will the United States and CoCom treat Hong Kong? Is Hong Kong going to retain the status it now enjoys, or is it going to occupy the same status as the People's Republic of China? This prospect is a chilling question for the business community and govern-

ment sector because it has enormous implications for international technology trade and is not susceptible to quick resolution.

Returning to the present, I would like to offer some practical observations. When one applies for an export license on behalf of a client, or when one engages in corporate strategic technology transfer planning, how should one prepare? To what should you pay attention?

First, always consider the nature of the product. This factor can be only partially controlled by the manufacturer-exporter. It is virtually a non-variable factor, because the customer-purchaser, or end-user, is the one who ultimately determines the technical criteria and specifications for the product. Nevertheless, to be effective, an exporter must understand and know the nature of the product and its export control classification. Also, the end use and the end user must be clearly identified. Most importantly for the lawyer or consultant, the preparation of the license application must be thorough.

Additionally, one must be able to count on the reliability and cooperation of the Chinese side. These factors depend on whether you know with whom you are dealing and how well you know them. In that regard, I have heard surprising stories about businessmen successfully negotiating joint ventures which were ultimately frustrated and came to nothing because their Chinese partners did not have the infrastructure to provide the necessary utilities, water and power for the agreed projects. Therefore, it is critical that one knows the partner with whom he or she is dealing. Such knowledge is extremely important. It involves more than mere legal niceties and knowledge. One must know the people. Can they be trusted? Is it easy to communicate with them?

Furthermore, remember that when one talks about technology exports, contrary to common belief, the sensitivity of the technology in and of itself is not dispositive of whether prior government authorization is necessary. Many people tell me — lawyers, consultants, and corporate personnel alike — “We don’t need a license,” or, “We should have no problem because the technology intended for export is not really sophisticated technology.” Friends, it is not a question of whether the concerned technology is sophisticated technology. The ultimate question is, “Is the technology to be exported subject to export control and does it require prior government approval?”

Another factor to remember is that the military or non-military purpose or the nature of the end use, in and of itself, is not dispositive

of the question of whether authorization will be granted. Similarly, whether the end user is a military entity or non-military organization, is not always determinative. Apart from national security, export of technology may be prohibited by the United States government for many reasons involving foreign policy.

Consequently, in applying for export licenses, a number of factors must be kept in mind. But the things that really count are: knowledge, experience, and preparation, and more preparation.