
EXPORT LICENSES AND TECHNOLOGY TRANSFER

By

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Clearly in line with the impetus given by the Reagan Administration for marketing US products abroad, strong emphasis has been placed on the idea of American industry interacting directly with the foreign customer as contrasted to operating through the US government in the manner customarily associated with Foreign Military Sales (FMS). The stress is now placed on more and more business being done between US industrial enterprise and its international customers abroad. With the shift towards more international business, there has come to be concomitantly a growing concern over the transfer of technology. There has been much said of late about the hemorrhaging of US technology, and that fact is getting a great deal of attention in Washington. The concern about technology transfer appears to contradict the emphasis currently being placed on facilitating commercial international military sales. Technology transfer is something we are certainly going to have to continue to work on as we proceed to facilitate international trade opportunities for American enterprise.

Technology transfers can generally be categorized by the degree and method by which the transfer occurs. For instance, transfers can be considered at a "high" level when they include "turn-key" factories, joint ventures in which trade secrets are shared, and manufacturing know-how provided to foreign producers without significant restraint. A "medium" level transfer occurs through the provision of technical data, which are at times used by the competitors alike to "reverse engineer" a product or process, and thereby circumvent the patent or international copyright agreements. Other medium transfers take place through provision of manufacturing tooling machines and processes, and sale of technical assistance. "Low" level transfers occur through the sale of technically advanced and highly prized products to foreign countries, although some of them will gain through "reverse engineering" or outright copying and will unscrupulously manufacture in direct competition. Other sources of low level transfers stem from sales brochures and trade exhibits at domestic or foreign expositions.

The Department of Defense (DoD) focal point for these concerns is within the Office of the Assistant Secretary for International Security Policy, specifically in the Directorate of Munitions Control. The staff in that office acts as the primary DoD interface among the Department of State Director of the Office of Munitions Control, Defense offices and organizations (including the separate military services) and US industrial activities. Munitions control affects those items of a defense nature that are listed for control by the International Traffic in Arms Regulation (ITAR), which is under the jurisdiction of the Department of State. On the other hand, many items which are termed "dual use" are licensed for export by the Department of Commerce. This distinction is important in that the State Department jurisdiction pertains to those items that are for military application, whereas Commerce jurisdiction pertains to the

so-called "dual use" items. There are, however, gray areas where the exercise of export control becomes difficult, partly because of ill-defined applications of "dual use" items.

The Department of Defense anticipates that this year approximately 9,000 applications for licenses will be referred to DoD by the Department of State for consideration. For each and every one of these referrals, my Directorate of Military Technology is responsible for establishing the DoD technical position and providing it to the Munitions Control Directorate.

There are six main types of cases involved in the referrals:

1. Export of unclassified hardware or data,
2. Export of classified hardware or data,
3. Manufacturing licenses and technical assistance agreements,
4. Advisory opinion,
5. Temporary export, and
6. Commodity jurisdiction

Distinction is sometimes not made as to the unique license types involved, and yet it is important from the standpoint of the kind of review to be undertaken. It makes all the difference in the world if one is talking about an advance advisory opinion requested by a US company for the purpose of undertaking a marketing trip abroad, as contrasted with a request from that same company for license approval to provide information to a potential customer, ultimately leading to the sale of a product. An important type of licensing exists in which there are specific agreements. These agreements can be of two types, technical assistance or manufacturing license agreements. Such agreements go far beyond the simple proposition of a US manufacturer merely selling his hardware products abroad. Rather, they beg the question of how far we can go giving away US technology to a foreign customer, who in, turn would potentially apply that technology to his own production.

Upon receipt of the applications from the Department of State, the Munitions Control Directorate insures they're properly and adequately reviewed by those elements within the Department of Defense that have cognizance over the items for which a license is sought. From time to time the review will include any and all of a considerable number of offices. The results of the individual reviews are returned to the Munitions Control Directorate, whereupon consolidation takes place and the DoD position is established. It is in turn furnished to the Department of State for their consideration in determining whether or not to issue the license.

It is our national policy to promote the export of US manufactured products, because we want to see our industry have the benefit of international markets. However, despite this policy, there is not a "carte blanche" practice of licensing because of the importance that the United States ascribes to maintaining its technological lead. The good fortune this country has had for years can be attributed in part to its highly developed technological lead over other countries in the world. US international marketing notwithstanding, it is of great importance to our future well being that every effort be made to insure that the United States maintains its technological lead. This consideration can be and often is the overriding one governing the final decision as to whether an item may be exported.

The contrast between the different types of cases becomes readily apparent when drawing comparisons between advisory opinions or a technical data license. A request for a license to manufacture abroad, where US technology is transferred to a foreigner for the purpose of permitting that customer to apply the technology to his manufacturing, demands careful examination of all aspects of that request.

There are a number of pros and cons that are weighed in a final determination by DoD before establishing its position to the Department of State on license applications. Following is a partial listing of some of those factors:

| <u>PRO</u> | <u>CON</u> |
|--|--|
| - Strengthen an ally | - Promote nuclear proliferation |
| - Free world defense | - Increase chance of hostilities |
| - Self defense | - Upset balance of power |
| - Aid internal security | - Promote arms race |
| - Increase standardization | - Risk compromise of classified US information |
| - Obtain US military rights | - Risk loss of technological advantage |
| - Foster US influence | - Create excessive economic burden |
| - Indicate support for collective measures | - Add overly sophisticated weaponry |
| - Promote cordial relations | - Arm a dictator |
| - Foreign availability | |

The last item on the left column, "foreign availability," is in some ways more pertinent to the Department of Commerce; however, it must not be overlooked by the Department of Defense. The simple fact is that nowadays many countries around the world tend to be very competitive with the United States in terms of technology, price, production, and delivery. Thus the United States needs to be wary in making judgments when the goal is to prevent a certain capability from getting into the hands of an adversary or into a country where it could be used to fuel regional uneasiness or destabilization. It should be remembered that there are occasions when denying the release of technology will only result in the potential customer obtaining the very same thing from some other advanced country. In this case, the denial has not achieved its purpose. What has been accomplished instead is the denial of an American business opportunity to get in on an international sale. Although "foreign availability" has been abundantly evident for some time, its appreciation in the DoD release criteria has been fairly recent.

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