

## JD STUDENT, LAW, JAPAN

The purpose of my project is to gain insight into the legal structure of Japan which regulates the transfer of technology. I seek to focus my study on the body of law which monitors technology licensing agreements in Japan, a method by which inventors share their inventions with others, and compare the Japanese system to the laws of the United States. By immersing myself in scholarship I hope to become better able to contribute to increased understanding, friendship and knowledge between the United States and Japan.

In order to emphasize the importance of this research, I will first describe the central role that the regulation of technology has played in the economic strength and stability of Japan and the implications this role has on the global marketplace. I will then define technology licensing agreements and its function and suggest the existence of two distinct legal environments which reflect different approaches taken by the U.S. and Japan to regulate technology licensing. I will note the specific Japanese laws that I wish to evaluate. And finally, I will list the resources available and the relationships that I have established in order to pursue this project in Tokyo, Japan, and suggest the ways in which I intend to put my research to use.

Japan has a technology policy. Led by the Ministry of International Trade and Industry, rules, regulations and procedure have been created to “promote the distribution and transfer of science and technology, aiming for technoglobalism”. The close relationship formed between the government and industry by this plan is one reason cited for the tremendous strength of Japanese enterprises in several key technology driven industries. The United States has never had such a policy or comprehensive plan. Rather, the U.S. government maintains a well-known hands off and deregulated approach to industry. As the Japanese have gained a greater role in developing the standards for technology like microelectronics and computers, their willingness to become the leaders in managing the rules being developed to govern technology transfer in this new global marketplace will take effect. A study of the legal structures implemented to control technology transfer in Japan’s domestic market is thus a window into the way that Japan might influence the rules of the global market. In addition, by examining the way Japan executes the relationship between government and industry many lessons may be learned that might be applicable to the United States and other countries.

The exclusive right of an inventor to make, sell, and use their invention is protected by a similar structure of law in the United States and in Japan called Patent Law. However, Japan has constructed distinct laws to regulate the licensing of an invention. As a result of this approach, Japan is in a position to control the extent to which technology is shared and thus control the shape and direction of their industry.

A license is simply an agreement in which the inventor agrees to allow another to make, sell or use the invention in exchange for something, usually money or another invention. Technology licensing agreements also allow inventors to enter a new market by exchanging rights to their invention for assistance in distribution or manufacturing. However, significant risks to innovation and competition exist when patents are licensed to another person or enterprise. Licensing can discourage intimate relations among competitors that facilitate price-fixing, reduces challenges to invalid patents, and discourages the invention of more efficient alternatives. Since the licensing and sharing of technology has the ability to propel the status quo at which industries operate, licensing agreements and their regulation have a key role in the development of technology.

Japan is an important market to study because since the early 1980’s more than two thousand technology licensing agreements a year have been registered in Japan between Japanese and foreign entrepreneurs.

Two distinct legal environments may exist in the United States and Japan creating different rights that effect the transfer of technology differently. U.S. courts regulate the marketplace by noting in case law those restrictions, contained in or actions resulting from licensing agreements, which violate U.S. patent or anti-trust law. However, there is no overlying plan or guide which industry is asked to follow. Insulation from political policy and process in the United States’ judicial system is not pure but it is presumed. Still, the rules remain difficult to interpret and reconcile.

In Japan’s civil law system, the government writes the rules. And through a process of consultation industry is involved in the process. This role is filled by the Japanese Fair Trade Commission. On direct mandate from the

Prime Minister they have the authority to legislate, interpret and make binding judicial decisions to ensure a free and fair domestic marketplace in line with the general technology policy; this includes regulating licensing agreements (The Anti-Monopoly Act Sec. 19).

I seek to study the following two bodies of law, which the Japanese Fair Trade Commission administers for the purpose of controlling the transfer of technology:

- (1) Rules on Filing Notification of International Agreements or Contracts (JFTC Rule No.3 Of 1982); and
- (2) Guidelines for the Regulation of Unfair Trade Practices with Respect to Patent and Know-How Licensing Agreements (February 15, 1989).

There are two levels on which the Japanese system should be investigated and the comparisons made. The regulations must be examined in terms of the substantive rights made. The regulations must be examined in terms of the substantive rights created, protected and enforced and affected when technology is licensed in Japan. In addition, the structure and procedure of the Japanese system must be understood. In this regard, my investigation will seek to discover whether the different structures and procedures reflect simply a different cultural and political history and/or whether these structures effect the outcome of technology transfer and the rights therein.

For example, price-fixing in licensing agreements denies the benefits of efficiency and progress to consumers. On its face, the United States and Japan deal with this important issue differently. The U.S. Supreme court has repeatedly reevaluated the right of the "patentee to enforce...the price at which the patent is sold...in licensing agreements" Bement v. National Harrow Co., 186 U.S. 70 (1902). The inventor should be entitled to "secure... the pecuniary reward of the lawful monopoly" of a patent United States v. General Elec. Co., 272 U.S. 476 (1926).

The Japanese Fair Trade Commission's regulation of price fixing takes a more direct approach. It states that "restricting the price at which the licensee may sell the invention is an unfair trade practice". I seek to study and compare these rules, the interpretations of the Japanese Fair Trade Commission, and the rules created by the courts. Examination, comparison and evaluation is essential to understand exactly how Japan regulates technology transfer and the effect that this approach has on the marketplace.

The registration provisions in the Japanese rules provide an excellent opportunity to study the effects of these rules, the players and their marketplace. The "Rules" require parties to submit to the Japanese Fair Trade Commission, within thirty days, "agreements or contracts between domestic entrepreneur and a foreign entrepreneur involving transfer patent rights..." The "Guidelines" require "contracting parties" to submit their licensing agreement for a "clearance request" conducted by the Japanese Fair Trade Commission to determine whether any restrictions exist in the agreement that represent "unfair trade practices" and are thus prohibited. Publication of these agreements is available at the Japanese Fair Trade Commission.

A ripe environment for scholarship in this area presently exists due to the on-going discussions between U.S. and Japanese lawmakers to determine the most effective method for maintaining free access to both markets while protecting intellectual property rights.

In order to proceed successfully with my project I have prepared and established the following contacts and resources: I have obtained an invitation from Dr. Mitsuo Matsushita, Professor of Anti-Monopoly and International Trade Law at Tokyo University, Main Campus(see attached). With his assistance I will undertake an analysis and then compare the rules and behavior proscribed in the regulations above to the rules created by the interpretations of the Japanese courts and the Japanese Fair Trade Commission, in administrative judicial hearings. His expertise will be extraordinarily valuable to my selection of resources, analysis of interpretation and thoroughness.

While in Tokyo I visited the libraries of Tokyo University and the Library of the Parliament and have prepared an initial list of resources which are available. Tokyo University has one of the most extensive collections of legal materials relating to my project area. My ability to read and do research in Japanese will prove to be a valuable tool in the examination of case law, legal commentary and analysis that are seldom accessed by foreign scholars. I am also comfortable speaking Japanese and look forward to pursuing in depth discussions with Dr. Matsushita, and other specialists to build an accurate and thorough understanding during my studies.

In addition, I have reviewed a list of courses offered at Tokyo University. As a supplement to my desire to pursue guided research, I will attend course lectures in the subjects of intellectual property rights, the Anti-Monopoly Act,

technology licensing and administrative procedure. Professor Matsushita suggested that my status as a research student would allow me to attend various courses and seminars at Tokyo University and in the academic community. My relationship with Attorney Kenji Kawagoe, in Tokyo, who practices in the area of the Anti-Monopoly Law and technology licensing, will enable me to pursue my analysis from the perspective of the current marketplace.

I seek also to take advantage of relationships that I have made in the Japanese Fair Trade Commission and the Ministry of International Trade and Industry, the two principle government bodies in the area of trade and Japan's technology policy. People I have met and those with whom I became acquainted have invited me to pursue discussion of these guidelines, to attend relevant proceedings and to seek advice. Specifically, I have discussed my project proposal with Administrative Judge Suzuki and Director Itoda, of the JFTC, who said they will make themselves available to me during my studies. Mr. Akira Senoh, vice-chairman of the Japanese Fair Trade Institute, a research institute, has also extended a formal invitation to pursue discussion and study. This rare opportunity to gain access to the decision-makers of these laws will allow me to understand better the legal structure regulating technology licensing agreements, the rules, the rulers and their process.

I have contacted the University House in Hachioji, Japan which has informed me of its annual plan to conduct several seminars in the area of international trade and policy with attendants from all over the world. I would like to attend such a seminar in order to engage in discussion and to establish relationships with other scholars.

During my legal education I have taken specific steps to ensure my ability to carry out this project. Currently, I am studying U.S. Antitrust Law in order to familiarize myself with the approach and priority taken in the United States. In order to gain a more in-depth understanding of that approach to technology licensing, I am pursuing guided research in this area. I have read extensively on the subject of Japan's Anti-Monopoly Law, its history and its dynamic role in Japanese society. Last semester, I researched and wrote a paper on Japan's Patent Law titled, "America's Competitiveness and Japan's Patent Law", under the supervision of Robert J. Reinstein, Vice President and Dean of Temple Law School. This undertaking allowed me to compare the U.S. and Japanese patent systems and to become aware of the rules and issues confronting intellectual property in both markets. I am confident that these preparations will help me to locate the necessary resources and to conduct an intensive study project within one year.

I have three objectives which I hope to achieve by pursuing this project. First, I intend to publish my findings to educate, inform and influence innovators and policy makers in the area of technology transfer. I have spoken with the current editors and faculty of the Temple International & Comparative Law Journal. They and other legal journals have shown an interest in publishing my findings. Second, in the future I will seek to apply my legal education in a policy role in order to breathe a creative approach into the way the United States deals in its relationship with U.S. domestic industry and with Japan. The more I get to know about Japan the more determined I have become to work to harmonize our relationship through constructive dialogue. Finally, I want to be a student in Japan in order to become better able to nurture mutual understanding between the American and Japanese governments, enterprises and people. By gaining a substantive knowledge of the rules that govern the Japanese market and by becoming more familiar with the Japanese people, their motivations and their beliefs, I will have the tools necessary to be successful in these goals.