



二零一八年八月二十一日

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主题: 对商务部关于《中国禁止进口限制进口技术目录》和《中国禁止出口限制出口技术目录》修订公开征求意见的反馈意见

尊敬的冼司长您好:

美国知识产权所有人协会(下称“IPO 协会”)对《中国禁止进口限制进口技术目录》和《中国禁止出口限制出口技术目录》修订公开征求意见(下称“禁止及限制进出口技术目录修订草案”或“修订草案”)提交意见的机会。

IPO 协会是一家代表各行业、各技术领域内拥有知识产权或相关权益的公司和个人的国际性行业协会。它拥有大约两百家会员以及超过一万两千多名个人会员。这些个人会员有些从属于公司会员或律所成员,有些是发明人、作者或律师会员。IPO 协会的会员遍及三十多个国家。

IPO 协会提倡有效和实惠的知识产权,为会员提供广泛的服务,包括支持会员在立法和国际事务中的利益、分析当前知识产权问题、提供教育和信息服务、以及向公众传播知识产权的重要性。

禁止及限制进出口技术目录修订草案明显扩大了限制出口的技术范围。举例说明,限制出口的包括了广泛类别的计算机技术,如“人工智能交互界面技术”和“巨型计算机[运算次数≥1300 亿次]软件技术”。这既会影响到中国国内公司,也会影响到国外公司—尤其会影响 IPO 协会成员公司。IPO 协会希望借此机会对修订草案以及中国技术进出口法规的其他方面进行评论并寻求澄清。

IPO 协会希望澄清,关于禁止和限制技术进出口的规定不适用于公司内部由身处于不同国家(包括中国)的雇员共同进行的团队开发工作,在这些雇员受雇于百分之百相关的子公司(即完全隶属于同一母公司)的情况下。否则,外国技术投资者将被迫削减其在中国的高端工作岗位,因为就实际而言他们无法将工程师团队置于中国境内。这将减少中国知识经济中的高收入就业机会,还将减少外国技术与中国的互惠交流,因为有机会接受培训和使用外国技术的高端员工数量将会减少。

IPO 协会还建议,对修订草案中的限制条款的执行应排除任何在修订目录正式生效之前签订的现有许可和共同开发协议。为了共同的发展和利益,外国公司与中国国内企业合作,签订交叉许可协议,以分享

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技术和诀窍。如果撤销现有的合作，抑制对未来合作的物质鼓励，很可能会打击投资者的信心，并阻碍国内企业本身对外国技术的获取。

此外，根据《技术进出口管理条例》（下称“条例”），出口属于限制出口的技术需要经过申请技术出口许可证的程序。而国务院办公厅最近印发的《知识产权对外转让有关工作办法(试行)》（下称“工作办法”）关注以下四类知识产权的对外转让审查：专利权、集成电路布图设计专有权、计算机软件著作权、植物新品种权。工作办法中还增加了由知识产权管理部门、科技主管部门、农林业主管部门等负责的实质性审查。根据工作办法，审查的内容是：“（一）知识产权对外转让对我国国家安全的影响。（二）知识产权对外转让对我国重要领域核心关键技术创新发展能力的影响。”

考虑到工作办法中新规定的实质性审查将由不同的管理部门进行，我们期待能够发布使得审批流程标准化的更详尽的准则，以确保申请和审查结果的一致性以及各部门审查过程的透明度。我们尤其建议，审查过程应着重与进出口的技术本身，而不是对双方协商的合同条款仔细检查。此外，我们认为有需要对“国家安全影响”以及“重要领域核心关键技术创新发展能力的影响”有明确的定义。

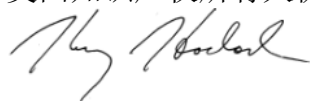
我们注意到，条例规定，审查部门及其工作人员在履行技术进出口管理职责中，对所知悉的商业秘密负有保密义务。考虑到工作办法新规定的实质性审查，也考虑到技术出口协议通常包含申请人的高度敏感保密信息，我们建议出台更具体的对审查部门工作人员保密工作的指导方针。一个具体的建议是，将商业秘密在审查部门内的传播限制在按需知情的基础上，并将对申请人的商业秘密信息的使用限制于仅供审查过程。这些加强保护商业秘密信息的措施将会鼓励申请人更加主动和配合。

关于上文中提到的管理部门对合同的实质审查，IPO协会还想借此机会强调一下，允许公司之间根据市场的运行及对行业的经验和知识来设定自己的合同条款使之符合其业务性质，这一点非常重要。这将鼓励跨国公司继续投资于中国的研发和技术转让活动。

IPO协会再次感谢商务部给予IPO协会此次机会提出反馈意见。我们也非常愿意与贵部进一步交流或能有机会为贵部提供更多的信息。

此致

美国知识产权所有人协会谨启



Henry Hadad 亨利·哈达

会长

附件：IPO反馈意见(英文版)



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21 August 2018

Ministry of Commerce
No. 2 East Chang'an Street
Beijing 100731
People's Republic of China

VIA EMAIL ONLY (xuysh@mofcom.gov.cn)

Re: Request for Public Comments on China's Revised Draft Catalogue of Technologies Prohibited and Restricted from Import and Revised Draft Catalogue of Technologies Prohibited and Restricted from Export (关于《中国禁止进口限制进口技术目录》和《中国禁止出口限制出口技术目录》修订公开征求意见)

Dear Sirs/Madames:

Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the request for public comments on China's Revised Draft Catalogue of Technologies Prohibited and Restricted from Import and Revised Draft Catalogue of Technologies Prohibited and Restricted from Export (关于《中国禁止进口限制进口技术目录》和《中国禁止出口限制出口技术目录》修订公开征求意见).

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes about 200 companies and close to 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans over 30 countries.

IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

The revised draft Catalogues of Technologies Prohibited and Restricted from Import and Export significantly expand the scope of technologies restricted from export. (For example, restricting from export broad categories of computer technology, for example "[a]rtificial intelligence interactive interface technology" and "[s]oftware technology of supercomputer.") This will impact both domestic and foreign entities — and in particular will affect the members of IPO. IPO

would like to use this opportunity to comment and seek clarification on the revised draft catalogues and on other aspects of China's technology import and export regulations as well.

IPO would appreciate clarification that the regulations do not apply to intercompany development work where teams work across different countries, including China, but are all employed by entities that are 100% related (*i.e.*, each wholly belong to the same parent company). Otherwise, foreign technology investors will be forced to cut back their high-end workforce in China, as they will not be able as a practical matter to put engineering teams inside China. This would reduce high-income job opportunities in the knowledge economy. It would also reduce the reciprocal exchange of foreign technology with China insofar as there would be a reduced high-end workforce to train and work with foreign technology.

We also propose excluding export and import activities for existing licensing and co-development agreements that were executed prior to any catalogues' amendment coming into force insofar as it relates to the 'Restricted' catalogue. Foreign companies are open to collaborating with China's domestic players by entering into cross-licensing agreements in order to share know-how and technology for mutual growth and benefit. Undoing existing collaborations and disincentivizing future collaborations might hamper investor confidence and block domestic players' own access to foreign technology.

In addition, per the "Regulations on Technology Import and Export Administration" (the "Regulations"), restricted technology needs to undergo a licensing application process before it can be exported. The recently released "Relevant Work Measures on Foreign Transfer of IP Rights" (the "Work Measures") focuses administrative review on the transfer of at least four types of IP rights to foreign entities: patent rights, integrated circuit layout designs, computer software copyrights, and new plant varieties. A substantive examination is added which will be carried out by SIPO, science and technology administrations, and the Agricultural Ministry and Forestry Bureau. According to the Work Measures, the review will be focused on: (i) "impact of foreign transfer of IP rights on China's national security" and (ii) "impact of the foreign transfer of IP rights on the innovation and development capacity of core and key technology in China's important fields."

Considering that additional reviews prescribed in the Work Measures will be conducted by different agencies, we look forward to the issuance of more detailed guidelines standardizing the approval process to ensure consistency in application and outcome, and transparency in the review process across agencies. In particular, we recommend that the review process focus on the subject matter of the technology being imported or exported, rather than substantive scrutiny of the contractual terms negotiated between the parties. In addition, we believe a clearer definition of what constitutes impact on national security and impact on innovation

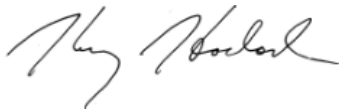
and development capacity of core and key technology in China's important fields would be helpful.

We note that the “Regulations on Technology Import and Export Administration” state that reviewing agencies are under an obligation to keep confidential any trade secret information they encounter during the review process. Considering the additional substantive reviews mandated by the Work Measures, and that technology export agreements often include an applicant’s highly sensitive information, we recommend more specific guidelines on the protection of confidentiality by agency employees. In particular, we suggest limiting dissemination within an agency to a need-to-know basis, and restricting use of an applicant’s confidential information so that it may only be utilized for the purpose of the review process. Stronger measures to protect confidential information will encourage applicants to be more forthcoming and cooperative.

On a related note pertaining to substantive contract reviews by administrative agencies, we would like to take the opportunity to emphasize the importance of allowing entities to set their own contractual terms based on market forces and the parties’ experiences and knowledge of the industry, consistent with the nature of their businesses. This will encourage multi-national companies to continue to invest in technology transfer and research and development activities in China.

We again thank the Ministry of Commerce for permitting IPO to provide comments and would welcome any further dialogue or opportunity to provide additional information.

Sincerely,



Henry Hadad
President