

People's Republic Of China Intellectual Property Rights Memorandum Of Understanding--1992

MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON THE PROTECTION OF INTELLECTUAL PROPERTY

In the spirit of cooperation embodied in their bilateral Agreement on Trade Relations and consistent with the principles of the relevant international agreements, the Government of the People's Republic of China (Chinese Government) and the Government of the United States of America (U.S. Government) have reached a mutual understanding on the following provisions:

Article 1

1. The Chinese Government will provide the following levels of protection under the Patent Law of the People's Republic of China:

(a) Patentable Subject Matter

Patents shall be available for all chemical inventions, including pharmaceuticals and agricultural chemicals, whether products or processes.

(b) Rights Conferred

A patent shall confer the right to prevent others not having the patent owner's consent from making, using, or selling the subject matter of the patent. In the case of a patented process, the patent shall confer the right to prevent others not having the patent owner's consent from using that process and from using, selling, or importing the product obtained directly by that process.

(c) Term of Protection

The term of protection for a patent of invention will be 20 years from the date of filing of the patent application.

(d) Compulsory Licenses

(i) Patent rights shall be enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

(ii) Where China's law allows for use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(1) authorization of such use shall be considered on its individual merits;

(2) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by the government in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(3) the scope and duration of such use shall be limited to the purpose for which it was authorized;

(4) such use shall be non-exclusive;

- (5) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;
- (6) any such use shall be authorized predominantly for the supply of China's domestic market;
- (7) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;
- (8) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;
- (9) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority;
- (10) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority;
- (11) the conditions set forth in sub-paragraphs (2) and (6) above are not required to be applied where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;
- (12) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent") , the following additional conditions shall apply:
 - (A) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;
 - (B) the owner of the first patent shall be entitled to a cross-license on reasonable terms to use the invention claimed in the second patent; and
 - (C) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

2. The Chinese Government will submit a bill to provide the levels of protection specified in subparagraph 1 of this Article to its legislative body and will exert its best efforts to have enacted and to implement the amended patent law by January 1, 1993.

3. Both Governments reaffirm their commitments to each other under the Paris Convention for the Protection of Industrial Property (Stockholm 1967) and their continued commitment to observe the principle of national treatment with respect to providing patent protection for the natural and legal persons of the other Party.

4. If the U.S. Government becomes a party to an international convention that requires the United States to provide a patent term of at least 20 years from the date of filing of the patent application, the United States will amend its laws to satisfy this obligation.

Article 2

Both Governments reaffirm that the principle of territoriality and independence of patents with regard to protection of patents as provided in the Paris Convention for the Protection of Industrial Property should be respected.

The Chinese Government agrees to provide administrative protection to U.S. pharmaceutical and agricultural chemical product inventions which:

- (i) were not subject to protection by exclusive rights prior to the amendment of current Chinese laws;

(ii) are subject to an exclusive right to prohibit others from making, using or selling it in the United States which was granted after January 1, 1986 and before January 1, 1993;

(iii) have not been marketed in China.

The owner of the exclusive right in the United States regarding such a product invention that meets the above requirements shall provide the competent Chinese authorities with an application for administrative protection including the following documents:

(1) a copy of the certificate issued by the competent authorities of the United States granting such exclusive right;

(2) a copy of the document issued by the competent authorities of the United States for the approval for manufacturing or sale of such product; and

(3) a copy of a contract for the manufacture and/or sale entered into between the owner of the exclusive right and a Chinese legal person (including foreign capital enterprises, joint venture enterprises, or cooperative enterprises) with respect to the manufacture and/or sale of the product in China.

The competent Chinese authorities will, in accordance with published Chinese laws and regulations relating to obtaining manufacturing or marketing approval, examine such application. No special rules or additional requirements for approval will be imposed. After examination and approval, which shall occur promptly, a certificate for administrative protection, which will provide the right to manufacture or sell the subject product, will be issued to the person seeking such protection. The competent Chinese authorities will prohibit persons who have not obtained a certificate for administrative protection from manufacturing or selling the subject product during the term of administrative protection. The term of administrative protection begins from the date on which the certificate for administrative protection of the product is obtained and remains in force for seven years and six months. The above administrative protection will become available on January 1, 1993.

Article 3

1. The Chinese Government will accede to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) (Paris 1971). The Chinese Government will submit a bill authorizing accession to the Berne Convention to its legislative body by April 1, 1992 and will use its best efforts to have the bill enacted by June 30, 1992. Upon enactment of the authorizing bill, the Chinese Government's instrument of accession to the Berne Convention will be submitted to the World Intellectual Property Organization with accession to be effective by October 15, 1992.

2. The Chinese Government will accede to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention) and submit a bill to its legislative body authorizing accession by June 30, 1992. The Chinese Government will use its best efforts to have the bill enacted by February 1, 1993. The Chinese Government will deposit its instrument of ratification and the Convention will come into effect by June 1, 1993.

3. Upon China's accession to the Berne Convention and the Geneva Convention, these Conventions will be international treaties within the meaning of Article 142 of the General Principles of the Civil Code of the People's Republic of China. In accordance with the provisions of that Article, where there is an inconsistency between the provisions of the Berne Convention and the Geneva Convention on the one hand, and Chinese domestic law and regulations on the other hand, the international Conventions will prevail subject to the provisions to which China has declared a reservation, which is permitted by those Conventions.

4. In so far as China's copyright law and its implementing regulations are inconsistent with the Berne Convention, the Geneva Convention or this Memorandum of Understanding (MOU), the Chinese Government will issue new regulations to comply with these Conventions and the MOU by October 1, 1992. These new regulations will also clarify the existing regulations and in particular will explain that the exclusive right of distribution that applies to all works and sound recordings includes making copies available by rental and that this exclusive right survives

the first sale of copies. Regulations implementing the Conventions and this MOU will prevail over regulations for domestic works where there is an inconsistency between the new regulations and existing regulations.

In addition to applying to works created by nationals of Berne Union members, these new regulations will apply to all works created in the context of a contractual relationship, joint venture, or commission from foreign capital enterprises, foreign joint venture enterprises, or cooperative enterprises in which such nationals, individually or jointly with others, are intended to be owners of copyright in the resulting works.

The Chinese Government will submit a bill to amend its copyright law to its legislative body and use its best efforts to have enacted and to implement this legislation within a reasonable period of time.

5. Both Governments will indicate the status of the Berne Convention and the Geneva Convention in their respective laws and notify judicial and administrative bodies responsible for the enforcement of the copyright law and regulations of the provisions of the Conventions within 30 days after signature of this MOU or 30 days after accession to each Convention, whichever is later.

Both Governments will publish and provide to each other copies of any guidance provided to administrative or judicial bodies regarding the administration or interpretation of any laws and regulations related to the implementation of the Conventions or this MOU no later than 30 days after such guidance is issued.

6. No later than the effective date of China's accession to the Berne Convention, the Chinese Government agrees to recognize and protect computer programs as literary works under the Berne Convention, and consistent with the protection provided under that Convention shall impose no formalities on the protection of computer programs and provide a term of 50 years.

7. After China's accession to the Berne Convention, all works originating in a member of the Berne Union that are not in the public domain in their country of origin will be protected in China.

(i) With regard to any uses of an original or a copy of a U.S. work on a commercial scale undertaken before establishment of bilateral copyright relations between China and the United States, there will be no liability.

(ii) With regard to such uses undertaken after establishment of bilateral copyright relations, the provisions of the law and regulations will fully apply. With regards to a natural or legal person who owned and used a particular copy of a work for a particular purpose prior to establishment of bilateral copyright relations between China and the United States, that person may continue to make such use of that copy of the work without liability, provided that such copy is neither reproduced nor used in any manner that unreasonably prejudices the legitimate interests of the copyright owner of that work.

8. The principles of paragraph 7 above, including the limitations on liability, shall apply to sound recordings.

9. The Chinese Government will recognize this MOU as an agreement under Article 2 of the Copyright Law of the People's Republic of China which shall provide a basis for protection of works, including computer programs, and sound recordings of U.S. nationals published outside of China until such time as China accedes to the Berne Convention and the Geneva Convention. Such protection shall become effective 60 days after signature of this MOU.

Based on the commitments set forth in this MOU, the U.S. Government will take the necessary steps to secure to Chinese nationals and their works eligibility for protection under the copyright law of the United States which shall become effective no later than 60 days after signature of this MOU.

Article 4

1. For the purpose of ensuring effective protection against unfair competition as provided for in Article 10 bis of the Paris Convention for the Protection of Industrial Property, the Chinese Government will prevent trade secrets from being disclosed to, acquired by, or used by others without the consent of the trade secret owner in a manner contrary to honest commercial practices including the acquisition, use or disclosure of trade secrets by third parties who knew, or had reasonable grounds to know, that such practices were involved in their acquisition of such information.

2. The term of protection for trade secrets shall continue so long as the conditions for protection are met.

3. The competent authorities of the Chinese Government will submit the bill necessary to provide the levels of protection specified in this Article to its legislative body by July 1, 1993 and will exert its best efforts to enact and implement this bill before January 1, 1994.

Article 5

Both Governments will provide effective procedures and remedies to prevent or stop, internally and at their borders, infringement of intellectual property rights and to deter further infringement. In applying these procedures and remedies, both Government's will provide safeguards against abuse and shall avoid creating obstacles to legitimate trade.

Article 6

Both Governments agree, at the request of either Party, to consult promptly on matters relating to the protection and enforcement of intellectual property rights, in particular with respect to the obligations of this MOU. Both Governments agree that the first consultations pursuant to this MOU will include discussions on the new implementing regulations for the Berne Convention and this MOU and that these discussions will be taken into consideration in the drafting of the regulations.

Article 7

In recognition of the progress in improving the protection of intellectual property rights that the Chinese Government has made and of further progress that will result from the steps that the Chinese Government has agreed to take, and in the expectation that these commitments will be fully implemented, the U.S. Government will terminate the investigation initiated pursuant to the "special 301" provisions of U.S. trade law and China's designation as a priority foreign country will be revoked effective on the date of signature of this MOU.

Signed in Washington, D.C., this seventeenth day of January, one thousand nine hundred and ninety-two, in two copies in the Chinese and English languages, both texts being equally authentic.

For the Government of The United States of America:

[signed Carla Hills]

For the Government of The People's Republic of China:

[signed Wu Yi]

TANC offers these agreements electronically as a public service for general reference. Every effort has been made to ensure that the text presented is complete and accurate. However, copies needed for legal purposes should be obtained from official archives maintained by the appropriate agency.