



# The US-China Trade Deal: Key Provisions for Intellectual Property Owners

## 中美贸易协议: 关于知识产权保护的主要条款

On January 15, 2020, the United States and China entered into the Economic and Trade Agreement Between The Government Of The United States Of America And The Government Of The People's Republic Of China.

2020年一月十五日, 美国和中国签署了中美经济与贸易协议。

This landmark agreement is the first phase of a major trade deal and seeks to remedy tensions between China and the United States relating to infringement and disregard of intellectual property, mandated technology transfers and an increase in Chinese purchases of U.S. goods. Chapter 1 of the agreement is dedicated specifically to intellectual property and is intended to provide greater security to foreign investors and businesses with respect to their intellectual property in China and address significant issues that are of concern to rights holders. Online infringement, bad-faith trademark applications, piracy, counterfeit goods, and the protection of valuable trade secrets are all included in this chapter.

这一里程碑式的协议是两国缓解关于知识产权侵权以及强制技术转让的争议迈出的第一步。这一协议还确定中国将增加从美国的商品进口。该协议的第一章以知识产权作为主题向外国投资者和企业提供了更强的知识产权保护以及解决了知识产权持有者特别关注的其他问题, 譬如网络侵权, 恶意商标申请, 盗版, 假冒商品, 以及商业秘密的盗用等等。

A key objective of the agreement is enforcement of intellectual property protections for foreign inves-

tors and businesses that operate or seek to expand into the global marketplace in either China or the United States. The agreement includes a number of provisions aimed at addressing this shared objective, namely stricter legal protections for intellectual property in China (including criminal and civil liability for the misappropriation of intellectual property), objectives to combat online infringement and counterfeit goods on e-commerce platforms, and commitments by both countries against mandated technology transfers as a condition of market access.

该协议想要达成的主要目标是确定两国投资者及企业在对方国内的知识产权可以获得有效的保护。该协议包含了一系列条款来达成这一共同的目标, 比如将提供更严格的知识产权保护 (包括知识产权盗用的刑事及民事责任)。除此之外, 该协议还体现了两国对于打击网络侵权和电商平台上的假冒产品售卖的共识。两国进一步确定了双方将不会把技术转让作为市场进入的前提条件。

### TRADE SECRETS AND TECHNOLOGY TRANSFERS

#### 商业秘密与技术转让

Articles 1.3 through 1.9 of the agreement require China to expand protections for trade secrets. The agreement requires China to: (i) expand the definition of misappropriation to include additional acts, such as electronic intrusions and the "breach or inducement of a breach of duty not to disclose trade secrets"; (ii) lower evidentiary burdens for plaintiffs

seeking redress from trade secret misappropriation; (iii) consider trade secret misappropriation an “urgent situation” that allows for preliminary injunctive relief; and (iv) lower barriers to initiating criminal proceedings. See generally Articles 1.3-1.8. China has, however, implemented additional protections for trade secrets that addresses some of these areas through the enactment of its Anti-Unfair Competition Law in April 2019, and will be required under the agreement to bring its current legislation into compliance with the additional protections and requirements purported in the agreement.

该协议的条款1.3至1.9要求中国政府提供更广泛的商业秘密保护：(一)将电子入侵以及违反或教唆违反保密责任包含进“盗用”的定义中，(二)降低原告商业秘密盗用诉求需要满足的举证责任，(三)将商业秘密盗用作为获得禁令式救济所需的“紧急情况”中的一种，(四)降低刑事程序的启动门槛。见条款1.3至1.8。事实上，中国政府在其2019年四月通过的反不正当竞争法中已经提供了更多的商业秘密保护措施，实质上已经解决了这些方面中的一部分。至于那些还没有解决的部分，该协议要求中国政府根据该协议的条款对其法律进行更新立法。

Although not addressed in Chapter 1, Chapter 2 of the agreement addresses the issue of technology transfers. Technology transfers was a previous area of contention for U.S. businesses seeking to do business in China, which required sharing highly confidential information containing a company’s intellectual property to Chinese competitors or government officials as a condition of conducting business in China. Notably, both China and the United States agreed that people from either country will not be required or pressured to transfer their technology, and any transfer of technology or licenses between each country must be voluntary. Furthermore, the provisions in Chapter 2 seek to prevent leaks of confidential business information by imposing stricter penalties for involuntary disclosures of a foreign investor’s confidential business information. Although this provision is not included under the intellectual property chapter, Chapter 1, this chapter will provide greater assurance to foreign investors from both countries in the security of their confidential business information, and in particular, their patents or trade secrets.

该协议的第二章更多的围绕着技术转让这一主题。技术转让指的是此前中国政府曾争议性地要求外国企业向其中国竞争对手或政府官员分享其高度机密的商业信息，很多情况下包括技术产权。如果外国企业拒绝技术转让，中国政府会拒绝其进入中国市场。值得一提的是，中美已达成一致将不会再要求强制性的技术转让。未来的所有技术转让或授权将只会是以自愿为基础的。除此之外，该协议的第二章对强迫外国企业进行商业机密信息披露的行为提供了强力的处罚，并以此来防止商业机密信息

的泄漏。尽管这一条款没有被放在关于知识产权的第一章下，这一章将进一步保证两国的外国投资者会得到应有的商业机密信息保护，特别是专利与商业秘密。

## **BAD-FAITH TRADEMARKS** 恶意商标

The U.S.-China trade agreement also seeks to target bad-faith trademarks and includes a section on this issue, Section H, where both the United States and China “shall ensure adequate and effective protection and enforcement of trademark rights, particularly against bad faith trademark registrations.” Although this section does not expand upon the measures or actions for this section, it is an assurance by both countries to target bad-faith filers. 中美贸易协定还特别在章节H中强调了针对恶意商标的打击。根据这一章节，中美“将保证足够和有效的商标权保护措施及执行程序，特别是针对恶意商标注册。”尽管这一章节并没有详细列举对应的举措，其充分展示了两国对恶意商标打击的决心。

The United States Patent and Trademark Office has recently introduced changes to its examination procedures for trademarks to target a rise in bad faith filing behavior, and China has also implemented amendments to its trademark law that include a provision allowing for administrative fines against bad faith filers and their agents. This pledge, in conjunction with the parallel efforts to target bad faith filers in both the United States and China, demonstrate that addressing bad-faith trademarks is a priority. 在该协议之外，美国商标局最近已经针对恶意注册的增多对其商标审理的程序进行了修改。中方最近也已经修改了其商标法，允许对恶意注册者及其代理机构进行行政罚款。这些措施加上这一贸易协定中的许诺，充分说明了两国均认为打击恶意商标注册是重中之重。



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## COUNTERFEIT GOODS AND PIRACY ON E-COMMERCE PLATFORMS

### 电商平台上的假冒品销售打击

Another key issue addressed by the agreement is to combat online intellectual infringement, and what actions should be taken when they fail to stop the infringing activity in Articles 1.13 and 1.14. Article 1.13 requires China to establish an “expeditious and effective takedown notice system” to fight counterfeit goods being sold online, and “eliminate liability for erroneous takedown notices submitted in good faith.” Additionally, this article also extends the deadline for intellectual property owners by 20 days to file a judicial or administrative online infringement complaint with the Chinese government after receiving a counterfeit notification. Moreover, the agreement also includes provisions that seek to help combat the sale of counterfeit consumer goods on e-commerce platforms. Some online marketplaces, such as Amazon, eBay and Alibaba, have faced increasing criticism over their failure to address and stop the sale of counterfeit products. Although major e-commerce companies may have a “zero tolerance” policy for counterfeit goods and have developed strategies to address anti-counterfeiting measures, the marketplace of third-party sellers continues to advertise and sell those type of goods. Because of these issues with online infringement and counterfeiting, the agreement requires both countries to take effective action against online platforms that have failed to prevent and take necessary measures against the infringement of intellectual property rights to address this issue in a more meaningful way. An example of one of these measures is that China may revoke the operating license of the online marketplace at issue if the provider repeatedly fails to stop the sale of counterfeit and infringing goods. 该协议的另一主要目标是打击网络侵权，以及明确当条款1.13和1.14下的侵权行为没有被成功制止时应当采取怎样的措施。条款1.13 要求中国建立一个“快速有效的下架通知系统”来对抗假冒品的网络销售，并且“删除对非恶意错误下架通知的处罚。”除此之外，这一条款将知识产权持有人在收到假冒通知后提交中国司法或行政申

诉的期限延长20天。该协议还包括了一个惩罚电商平台持续销售假冒品的条款。像亚马逊，eBay，阿里巴巴等电商平台现如今正受到越来越多的关于打假不作为的批评。尽管主要的电商公司可能已经有了“零容忍”的打假政策并且设立了一些打击假冒的措施与策略，一些第三方销售者仍旧在散布广告和售卖假冒商品。正因为这些网络侵权和假冒伪劣的问题，该协议要求两国采取有效的措施来惩罚不作为的电商平台，强迫他们采取更有实效性的侵权打击方式。譬如中国政府可以吊销那些持续不作为的电商平台的营业执照。

## CONCLUSION

### 结论

The agreement will take effect no later than 30 days of signing the agreement (February 14, 2020) or once the United States and China have notified each other that they have implemented the “applicable domestic procedures”—whichever is earlier. The provisions in Chapter 1 and 2 of the agreement align with each country’s objective in achieving greater intellectual property protection for foreign investors and comports with the initiatives each country have or are working towards in providing greater protection. This agreement is a positive development for businesses that operate in or seek to expand into the Chinese market as it eases tensions between the world’s two biggest economies. The intellectual property measures in the agreement provide more protection for intellectual property owners and ultimately will be beneficial to both the economics of the United States and China by increasing investment and international commerce.

中美协议将最晚在签署后的三十天内生效，也就是2020年二月十四日，或者当两国更早告知对方相应的本地法律已经合规时生效。该协议的第一和第二章与两国想要加强对外国投资者的知识产权保护的意见相一致，并且两国在该协议的签署前就已经分别采取了相应的举措。该协议将会修复全球两个最大经济体的合作关系并增加对中国的外国投资。协议中的知识产权保护措施将为知识产权持有者提供更强的保护，并由此增加两国间的跨国投资与国际贸易，而两国的经济都将从中受益。