Department of Defense

INSTRUCTION

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GC, DoD

SUBJECT: International Interchange of Patent Rights and Technical Information

References: (a) DoD Directive 2000.03, "International Interchange of Patent Rights and Technical Information," March 11, 1959 (hereby canceled)
(b) Acting Deputy Secretary of Defense Memorandum, "DoD Directives Review – Phase II," July 13, 2005
(c) DoD Directive 5145.01, "General Counsel of the Department of Defense," May 2, 2001
(d) DoD Directive 5230.11, "Disclosure of Classified Military Information to Foreign Governments and International Organizations," June 16, 1992
(e) through (m), see Enclosure 1

1. REISSUANCE AND PURPOSE

This Instruction:

1.1. Reissues reference (a) as a DoD Instruction according to the guidance in reference (b) and pursuant to reference (c).

1.2. Establishes DoD policy in the international interchange of patent rights and technical information for defense purposes.

2. APPLICABILITY

This Instruction applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the "DoD Components").

3. POLICY

3.1. The policy prescribed in this Instruction applies to unclassified and classified information owned by the U.S. Government or privately owned, but excludes patents, patent applications, and technical information in the field of atomic energy.

3.2. The Department of Defense encourages and facilitates international interchanges of patent rights and technical information to further the common defense of the United States and friendly nations. In achieving this purpose, the following principles shall be observed:

3.2.1. Classified military information shall be released only through Government channels and only when consistent with DoD Directive 5230.11 (reference (d)).

3.2.2. Consistent with the policy stated in Section 2351 of 22 United States Code (USC) (reference (e)), and pursuant to the bilateral agreements referred to in Enclosure 2, or any other scientific and technical bilateral agreements as may be negotiated, commercial relationships shall be used whenever appropriate and to the maximum extent feasible in order to encourage free enterprise and private participation in programs carried out under the Foreign Assistance Act of 1961, as amended (reference (e)) (including the use of private trade channels to the maximum extent practicable), to relieve the Department of Defense of administrative burdens, and to reduce the costs to the United States of such interchanges.

3.2.3. According to Section 2778 of 22 USC (reference (f)), the use of commercial channels for the exportation of unclassified, privately owned technical information relating to items designated as defense articles and defense services on the U.S. Munitions List (22 CFR, Part 121), included in reference (f), shall be subject to 32 CFR, Part 264 (reference (g)), pursuant to reference (e). (The term “technical data” in the International Traffic in Arms Regulations (ITAR), detailed in reference (g), means articles on the U.S. Munitions List.)

3.2.4. Privately owned technical information may be released by the Department of Defense to foreign governments under the conditions of subparagraphs 3.2.6.1. or 3.2.6.2., if any one of the following conditions is met:

3.2.4.1. The owner expressly consents to the proposed release;

3.2.4.2. The United States, by contract or otherwise, has acquired or is entitled to acquire, the information under circumstances permitting the proposed release; or

3.2.4.3. The Secretary of the Military Department concerned, or his or her designee, determines that:

3.2.4.3.1. The demands of the requirement for release to further the common defense do not allow sufficient time to obtain the consent of the owner; or

3.2.4.3.2. The owner refuses consent and the best interests of the United States would be served by the release.

3.2.5. With respect to a privately owned trade secret, as defined by Section 1 of the Uniform Trade Secrets Act (National Conference of Commissioners on Uniform State Laws, 1970 and amended in 1985) (reference (h)), subparagraph 3.2.4.3. does not apply.

3.2.6. According to the provisions of the agreements referred to in Enclosure 2 or any other scientific and technical bilateral agreements that may be negotiated, the Department of Defense's release of privately owned technical information to foreign governments shall normally be allowed:

3.2.6.1. For information only; or

3.2.6.2. By permission for manufacture or use for defense purposes.

3.2.7. All technical information, whether privately owned or Government-owned, released to a foreign government by DoD Agencies shall be marked with the following restrictions, except that technical information released under an international agreement shall be marked according to the provisions of that agreement:

3.2.7.1. This information is accepted for [insert the rights of use of the receiving government.]

3.2.7.2. This information shall be accorded substantially the same degree of security protection as such information has in the United States.

3.2.7.3. This information shall not be disclosed to another country without the consent of the United States.

3.2.8. When privately owned technical information is released for information only, the restrictive marking shall also contain these additional notations, except that technical information released under an international agreement shall be marked according to the provisions of that agreement:

3.2.8.1. This information is accepted with the understanding that it is privately owned.

3.2.8.2. This information is accepted solely for the purpose of information and accordingly shall be treated as disclosed in confidence. The receiving government shall use its best efforts to ensure that the information is not dealt with in any manner likely to prejudice the rights of the private owner to obtain patent or other statutory protection.

3.2.8.3. The receiving government shall obtain the consent of the United States if it desires that this information be made available for manufacture, or use, for defense purposes."

3.2.9. When privately owned technical information is released according to subparagraph 3.2.6.2., the restrictive marking shall also contain these additional notations, except that technical information released under an international agreement shall be marked according to the provisions of that agreement:

3.2.9.1. This information is accepted with the understanding that it is privately owned.

3.2.9.2. Best efforts will be made to notify the owner of this information of such manufacture or use for defense purposes prior to public use, disclosure without a confidentiality agreement restricting such information to the receiving government's employees, or manufacturing of an item incorporating technical elements disclosed in this information.

3.2.10. When information is generated in performance of a contract, or according to subparagraph 3.2.4.2., the information shall also be marked clearly with the relevant contract number.

3.2.11. Except with respect to technical information that falls within subparagraph 3.2.4.2., when technical information constitutes "technical data" as defined in 22 CFR, part 120.10 (reference (i)), it shall be marked with the following restrictions:

3.2.11.1. International Traffic in Arms Regulations (ITAR)-controlled.

3.2.11.2. The recipient government shall obtain the consent of the United States if it desires to release this information to any entity that is not a part of the receiving government."

3.2.12. Except with respect to technical information that falls within paragraph 3.2.4.2., when privately owned technical information is released under the procedures set forth in this Instruction, the owner, if known, shall be furnished:

3.2.12.1. Notice of the release;

3.2.12.2. The identity of the government, if not contrary to security regulations;

3.2.12.3. Notice that the receiving government has been advised that the information is privately owned;

3.2.12.4. Notice of any intent on the part of the receiving government to use or manufacture such technical information for defense purposes; and

3.2.12.5. Notice of the restrictions associated with the release.

3.2.13. Each of the agreements referred to in Enclosure 2 establishes a Technical Property Committee, consisting of a representative of each contracting government, the function of which is to consider, and make recommendations to the contracting governments concerning, all matters relating to the subject of the agreement, and to assist where appropriate in the negotiation of commercial or other agreements for the use of patent rights and technical information in the security cooperation program.

3.2.14. Any claim of infringement arising out of use or release of privately owned technical information through implementation of this Instruction shall be administered according to Enclosure 3.

4. RESPONSIBILITIES.

4.1. The General Counsel of the Department of Defense shall oversee the international interchange of patent rights and technical information, which includes:

4.1.1. The Patent Advisor assigned to the Defense Staff of the U.S. Mission to NATO and European Regional Organizations (USRO), Paris, France. The Patent Advisor is the U.S. representative to the Technical Property Committees for NATO countries.

4.1.2. The Deputy Director for Logistics (J-4), U.S. Forces Japan (USFJ), Tokyo, Japan, who is the U.S. representative to the United States-Japanese Technical Property Committee.

4.1.2.1. These representatives receive policy guidance from the Department of Defense. Guidance transmitted for the U.S. representative for NATO countries shall be forwarded to the Defense Advisor, USRO; guidance transmitted for the U.S. representative in Japan shall be transmitted to the USFJ Deputy Commander, USFJ.

4.1.3. A member of the Office of the Deputy General Counsel, International Affairs, Department of Defense, is the U.S. representative to the United States-Australian Technical Property Committee and to other Technical Property Committees, convened as necessary. The appropriate representative should be consulted on all problems dealing with patent rights, technical information, and related matters under the agreements.

4.2. The Assistant Secretary of Defense for ~~International~~ *Asian and Pacific* Security Affairs, under the Under Secretary of Defense for Policy (USD(P)), shall transmit policy guidance through appropriate channels within the Department of Defense with respect to the interchange of patent rights and technical information in Asian countries.

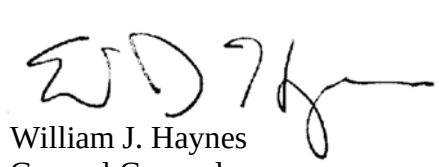
4.3. The Assistant Secretary of Defense for International Security ~~Policy~~ *Affairs*, under the USD(P), shall transmit policy guidance through appropriate channels within the Department of Defense with respect to the interchange of patent rights and technical information in European countries.

4.4. The Secretaries of the Military Departments shall exercise the power and authority conferred by Section 2356 of 22 USC (reference (j)) to enter into agreements with claimants in full settlement and compromise of any claim against the United States, subject to such rules and regulations, if any, as the Secretary of Defense may promulgate. The Secretaries of the Military Departments are authorized to make successive re-delegations in writing of this power and authority to any officer, employee, board or agent of their respective Departments.

4.5. Department of Defense issues arising in the United States in connection with the interchange of patent rights and privately owned technical information shall be referred to the patent personnel of the appropriate Military Department.

5. EFFECTIVE DATE.

This Instruction is effective immediately.



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Enclosures
- E1. References
- E2. Background
- E3. Claims for Compensation

ENCLOSURE 1

REFERENCES

(e) Section 2351 of title 22, United States Code
(f) Section 2778 *et seq.* of title 22, United States Code
(g) Title 32, Code of Federal Regulations, Part 264, "International Interchange of Patent Rights and Technical Information," current edition
(h) Section 1 of the Uniform Trade Secrets Act, "National Conference of Commissioners on Uniform State Laws," 1970 and amended in 1985
(i) Title 22, Code of Federal Regulations, Parts 120-130, "International Traffic in Arms Regulations," current edition
(j) Section 2356 of title 22, United States Code
(k) Section 2386 of title 10, United States Code
(l) North Atlantic Treaty Organization (NATO) Membership Action Plan (1999)
(m) Section 102 of title 35, United States Code

ENCLOSURE 2

BACKGROUND

E2.1. Pursuant to references (e), (f), (g), (i), (j), and (k) the United States has entered into agreements for the interchange of patent rights and technical information for defense purposes with North Atlantic Treaty Organization (NATO) countries: Belgium, *Bulgaria*, Canada, *Czech Republic*, Denmark, *Estonia*, France, Germany, Greece, *Hungary*, Italy, *Latvia, Lithuania*, Luxembourg, the Netherlands, Norway, ~~Portugal,~~ *Poland, Romania, Slovak Republic, Slovenia*, Spain, Turkey, and the United Kingdom; as well as non-NATO countries: Australia, Japan, the Republic of Korea, and Sweden. All NATO countries are obligated to accede to the 1970 NATO Agreement on the Communication of Technical Information for Defense Purposes under the 1999 Membership Action Plan (MAP) (reference (l)). Accordingly, agreements with additional NATO countries are anticipated. These agreements, published in Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force as of January 1, 2005, are similar in substance but are not identical. Under the agreements:

E2.1.1. Each government facilitates the interchange of privately owned patent rights and technical information through commercial relationships to the extent permitted by the laws and the security requirements of the contracting governments.

E2.1.2. When technical information is supplied by one government to another for information only, the receiving government treats the information in confidence and uses its best efforts to ensure the information is not used in any manner likely to prejudice the owner's right to obtain patent or similar statutory protection, such as provided in Section 102 of 35 USC (reference (m)).

E2.1.3. When technical information supplied by one government to another discloses an invention that is the subject of a patent or patent application held in secrecy in its country, the receiving government gives similar treatment to a corresponding patent application filed in that country.

E2.1.4. When one government releases privately owned technical information to another government, and the receiving government uses or discloses that information, subject to applicable law and arrangements between the contracting governments regarding compensation for liability, the private owners shall receive prompt and fair compensation for its use or disclosure, and any resulting damages.

E2.1.5. For defense purposes, each government is entitled to use any invention the other government (including government corporations) owns, or to which it has licensing rights, without cost, except to the extent that there may be liability to a private owner having an interest in the invention.

E2.2. Other bilateral scientific and technical agreements may also be relevant in part, and should be referenced as applicable.

ENCLOSURE 3

CLAIMS FOR COMPENSATION

E3.1. According to reference (j), a suit for money damages against the U.S. Government is the exclusive remedy for:

E3.1.1. Infringement within the United States of a patent issued by the United States Patent and Trademark Office; and

E3.1.2. Unauthorized disclosure by the U.S. Government of information it held that was subject to restrictions imposed by the owner of that information.

E3.2. Before a suit may be instituted against the U.S. Government, the head of the relevant U.S. Government agency is authorized to settle and pay any claims arising under the circumstances.

E3.3. The Secretaries of the Military Departments are hereby authorized to exercise the power and authority conferred by reference (j) to enter into agreements with claimants in full settlement and compromise of any claim against the United States, subject to such rules and regulations, if any, as the Secretary of Defense may promulgate. The Secretaries of the Military Departments are authorized to make successive re-delegations in writing of this power and authority to any officer, employee, board or agent of their respective Departments.

E3.4. Funds appropriated for security assistance under reference (e), which have been made available to a Military Department, may be used to settle claims under reference (j). In addition, in those cases where the provisions of Section 2386 of 10 U.S.C. (reference (k)), are applicable, funds appropriated for a Military Department for making or procuring supplies may be used to settle such claims.