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# REVIEW OF THE PROPOSED DRAFT AMENDMENT TO ARTICLE 41 OF THE JORDANIAN CUSTOMS LAW

Final Report

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# **REVIEW OF THE PROPOSED DRAFT AMENDMENT TO ARTICLE 41 OF THE JORDANIAN CUSTOMS LAW**

FINAL REPORT

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## PREFACE

In 2000, Article 41 was incorporated under Jordan's Customs Law in order to ensure that the Law was compliant with the WTO TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement, to which Jordan is a signatory. When Jordan signed the Jordan – U. S. Free Trade Agreement (JUSFTA) in 2001, Article 41 became incompatible with Jordan's Commitments under JUSFTA, as it provided for an ex officio authority to suspend clearance and release of infringed goods, and did not provide the right to seize goods and prosecute offenders.

Jordan has recently developed a proposed draft amendment to Article 41 in part to address issues concerning compliance with international IPR commitments. At the request of the U.S. Embassy Economic Section, the USAID Jordan Economic Development Program (SABEQ), through the SANAD Law Group, has reviewed the "new" Article 41.

This report provides an opinion as to its compatibility with JUSFTA, and finds that, on the whole, the new Article 41 is a positive change to the existing system and appears to satisfy Jordan's obligations under JUSFTA. But it also notes areas of concern for effectively implementing enforcement of Jordanian IPR laws and regulations. This Report also includes an English translation of both the current and the new Article 41 from the Arabic, and a review of Article 41 provided under Italian technical assistance to the Government of Jordan.

## **1. REVIEW OF THE PROPOSED DRAFT AMENDMENT TO ARTICLE 41 OF THE JORDANIAN CUSTOMS LAW**

The purpose of this review is to compare provisions of the proposed draft amendment to Article 41 of Customs Law ("New Article 41"), to the current Article 41 of the Law ("Current Article 41"), to provide an opinion as to its compatibility with JUSFTA , and to highlight issues relating to the Article's implementation.

### **I. BACKGROUND:**

Current Article 41 was introduced in 2000 to the Customs Law in order to comply with Jordan's commitments under WTO's TRIPS Agreement.

Following signature of Jordan US Free Trade Agreement (JUSFTA), Jordan agreed to increase levels of IP protection as per Article 4 of JUSFTA. In particular, under Article 4(26) of the JUSFTA, Jordan committed to provide its authorities, at least in cases of copyright piracy or trademark counterfeiting, with ex officio powers to initiate criminal actions and border measures, without the need of a formal complaint by a private party or right holder.

In light of the above, Current Article 41 became incompatible with Jordan's Commitments under JUSFTA, since It provided for an ex officio authority to suspend clearance and release of infringed goods, and does not therefore provide the right to seize goods and prosecute offenders; therefore, if the right holder fails, within eight days after being notified of the decision to suspend release and clearance procedures, to notify Customs that a court case has been instituted, the suspended goods are released even if Customs are aware that products in question are in fact counterfeit.

### **II. NEW ARTICLE 41**

The section below summarizes the main features of New Article 41, as well as providing a brief opinion as to its compatibility with JUSFTA and as well as highlighting issues relating to the Article's implementation:

- New Article 41 expands its scope by:
  - o It makes it illegal to import and re-export of goods, which infringe on any intellectual property rights that are subject to protection by virtue of related and applicable laws, with the exception of goods in transit, but said prohibition includes goods entering and leaving

the free zones. Therefore, re-export and entry and export of goods via Free Zones is prohibited in contrast to Current Article 41 which does not provide for such prohibition of re-export and free zones activities. This is a positive development. However, the New Article 41 specifically excludes goods in transit from its scope. While the issue of goods in transit is not specifically referred to in JUSFTA it's increasingly seen as an international best practice to allow customs the authority over goods in transit as part of the global effort against piracy and counterfeiting.

- o Defines intellectual property as "copyright and related rights, trademarks, patent, topographies of integrated circuits, industrial design and drawings, and geographical indications", while current Article 41 limits scope of its application to copyright piracy and trademark counterfeiting/infringement.
  
- Paragraph (b) of New Article 41 increased the days allowed to initiate and appeal proceedings to ten days instead of eight.
  
- It makes it mandatory to use public storage if the right holder initiates a case against an infringer and court order seizure of good with Customs, whereby the storage fees shall be borne by party filing the case and will be assumed by the losing party. Although this is a positive development since keeping confiscated goods in private storage normally owned by the infringer may subject it to theft or tampering, it does create additional cost for right holders.
  
- Most significantly, Paragraph (c)(1) of New Article 41 provides that if clear indicators are present indicating that the goods infringe on any intellectual property rights, Customs shall inform the Attorney General of the matter attaching all relevant documents as well as a sample of the products and the Attorney General must issue his decision of transferring the case to the competent court or release of the goods in accordance with proper procedures and his decision shall be final.
  
- Paragraph (c)(2) of New Article 41 provides that when a decision of Attorney General is issued to transfer the matter to the competent court, the procedures to release the goods by the Department shall be stopped until a final court decision is issued and the goods shall be confiscated and deposited in a public storage, the expenses of which shall be borne by the right holder until a court issues a decision stating that there is an infringement in such case the right holder shall have the right to claim compensation for the expenses from the importer.
  
- Paragraph (d) of New Article 41 provides that right holder have seven working days to initiate an infringement case in the instance of Customs exercising its ex officio authority, whereas current Article 41 provides for eight days only. Providing for 7 working days gives more time for right

holders to file cases which is a positive amendment to the Current Article 41. However, it would be more equitable to provide at least 8 working days for right holders since it often takes substantial time and resources to file for a case of before a competent court.

- An additional positive amendment to New Article 41 (as per paragraph d), is the possibility for right holder to inform Customs that the goods infringe their intellectual property rights but that they do not wish to file a case with competent court, Customs must in this case inform the Attorney General and transfer case to him to make a decision whether to prosecute case or not. This is also a positive development.
- Paragraph (e) of New Article 41 provides the right holder with the ability to inspect, on the premises of the customs department, and for urgent cases the Director General of Customs may approve to give samples of the imported products to the right holder for further inspection. Although this is a positive development, it is insufficient for two reasons:
  - o Provision of samples should not be reserved for urgent cases only. This should be a right available to all right holder since said right holder often would like to test such products in their own laboratories outside Jordan.
  - o The authority is given to the Director General only and cannot be delegated. This creates unnecessary bureaucracy and delays.
- Paragraph (f) provides that right holder may apply for boarder measures by registering their intellectual property for a fee. This is a controversial issue since Customs have suspended applying this registration process because of its redundancy and have instead gained access to the Trademark data base at Ministry of Industry and Trade. The merits of re-introducing this system should be seriously considered.
- Finally, a positive addition to New Article 41 is paragraph (k) which considers Goods infringing on any intellectual property rights as unlawful goods.

### **III. CONCLUDING REMARKS:**

On the whole, New Article 41 represents a positive change to the existing system employed at Customs. It also seems to satisfy Jordan's obligations under JUSFTA. In addition to above comments as to the practicability of some of the amendments to New Article 41, it must be noted that New Article 41 places a big responsibility on the Attorney General to prosecute cases of apparent intellectual property infringement without the needs of a complaint from the right holder. This should entail proper training to Public Prosecutors for them to succeed in accomplishing this task.

## **2. ARTICLE 41 OF THE CUSTOMS LAW (NO. 20 FOR THE YEAR 1998 AS AMENDED)**

### **Article 41:**

The entry of imported goods, which infringe on any intellectual property rights that are subject to protection by virtue of related and applicable laws, shall be prohibited in accordance with the following standards:

- a. 1. The right owner shall submit an application to the competent court accompanied with a monetary or bank guarantee to stop the procedures of clearance and release of such goods, after submitting to the court sufficient evidence to prove the infringement and a detailed description of the infringing goods.  
  
2. The competent court shall render a decision regarding the application mentioned in paragraph (1) this Article within three days from the date of its submission. The court shall inform the applicant of its decision during a reasonable period of time. The defendant shall have the right to appeal the decision in the court of appeal within eight days from the date of receiving the decision. The decision of the court of appeal shall be final.
- b. If the Applicant does not inform the Department of Customs within eight days from the date of receiving the decision to stop the procedures of clearance and release of the goods that a claim was lodged in the court, the goods shall be released after verifying that the goods meet all the legal requirements of importation.
- c. The competent court shall instruct the applicant to pay to the importer, the receiver of the goods, and the owner, reasonable compensation to all damages resulting from stopping the procedures of clearance and release of the goods due to the illegal application or in case release pursuant to paragraph (b) of this Article.
- d. The Director or person authorized by him, shall have the right to stop all the procedures of clearance and release the goods if he is convinced according to obvious evidence that infringement is present in matters relating to copyright and trademarks in accordance with the following provisions:
  1. Inform the importer and intellectual property right holder, if the Department knows his address, about the decision to stop the procedures of clearance and release of the goods.
  2. If the Department was not notified within eight days from the date of informing the right owner of the decision to stop the procedures of clearance and release of goods in accordance to this paragraph

that a claim was lodged in court, the goods shall be released after verifying that all the legal requirements of import are met.

3. The importer shall have the right to appeal the decision issued by virtue of the provisions of this paragraph with the competent court within eight days from the date of being notified of the decision, whereby the provisions incorporated in clause (2) of paragraph (a) of this article shall be applied.
- e. The applicant shall the right, under the supervision of the concerned section, to inspect, on the premises of the customs department, the goods whose procedures of clearance and release were stopped, to enable him to prove his claim.
  - f. Small quantities of goods, non-commercial goods, personal goods and gifts with passengers or in small packages shall be exempted from the provisions of this Article, as well as goods in transit, and goods made available in market of the country of export by the right owner or upon his approval, shall exempted.
  - g. The Department of Customs shall not be liable to compensate for the loss or damages sustained by importer or the owner of the goods whose procedures of release and clearance were stopped in accordance with this Article.
  - h. The following terms shall have the meanings ascribed to them herein below:
    1. Intellectual Property Rights: copyright and related rights, trademarks, patent, topographies of integrated circuits, industrial design and drawings, and geographical indications.
    2. Competent Court: the competent court pursuant to the related legislations.

### 3. PROPOSED AMENDMENT TO ARTICLE 41 OF THE CUSTOMS LAW

#### **Article 41:**

It is prohibited to import or re-export of goods, which infringe on any intellectual property rights that are subject to protection by virtue of related and applicable laws, including prohibitions remunerated in Article (65) of the Law with the exception of goods in transit however this exception shall not apply to good entering and leaving the free zones, in accordance with the following standards:

a. For purposes of implementing this Article, the following terms shall have the following meanings:

- 1 Intellectual Property Rights: copyright and related rights, trademarks, patent, topographies of integrated circuits, industrial design and drawings, and geographical indications.
- 2 Competent Court: the competent court pursuant to the related legislations.
- 3 Attorney General: the Attorney General competent to oversee criminal cases pursuant to the related legislation

b. 1. The right owner shall submit an application to the competent court accompanied with a monetary or bank guarantee to stop the procedures of clearance and release of such goods, after submitting to the court sufficient evidence to prove the infringement and a detailed description of the infringing goods.

2. The competent court shall render a decision regarding the application mentioned in paragraph (1) this Article within three days from the date of its submission. The court shall inform the applicant of its decision according to normal legal procedures. The defendant shall have the right to appeal the decision in the court of appeal within ten days from the date of receiving or hearing the decision. The decision of the court of appeal shall be final.

3. If the Applicant does not inform the Department of Customs within ten days from the date of receiving the decision to stop the procedures of clearance and release of the goods that a claim was lodged before a competent court, the goods shall be released after verifying that the goods meet all the legal requirements of importation.

4. In the case of filing a case by a right holder and issuance of a court decision demanding the halt of the procedures of clearance and release of the goods, the goods shall be deposited in a public storage until the

issuance of final court judgment, the storage fees shall be borne by party filing the case and will be assumed by the losing party.

5. The competent court may instruct the applicant to pay to the importer, the receiver of the goods, and the owner, reasonable compensation to all damages resulting from stopping the procedures of clearance and release of the goods due to the illegal application or in case of its release pursuant to paragraph (3) of this paragraph.

c. Without prejudice to paragraph (b) above, the Department shall be responsible for:

1. If clear indicators are present indicating that the goods infringe on any intellectual property rights, it shall inform the Attorney General of the matter attaching all relevant documents as well as a sample of the products and the Attorney General must issue his decision within three days of transferring the case to the competent court or release of the goods in accordance with proper procedures and his decision shall be final.
2. When decision of Attorney General is issued to transfer the matter to the competent court, the procedures to release the goods by the Department shall be stopped until a final court decision is issued and the goods shall be confiscated and deposited in a public storage, the expenses of which shall be borne by the right holder until a court issues a decision stating that there is an infringement in such case the right holder shall have the right to claim compensation for the expenses from the importer.

d. The Department shall exercise its legal role to stop the procedures of clearance and release of the goods, by a decision of the Director or person authorized by him, if apparent indicators are present that the goods infringe on any intellectual property in accordance with the following provisions:

1. Inform the importer and intellectual property right holder, if the Department knows his address, about the decision to stop the procedures of clearance and release of the goods.
2. The right holder or his representative shall be given a period not exceeding seven working days from date of receipt of notice of the Department's decision to stop the procedures of clearance and release of the goods to file a case of intellectual property infringement with the competent court and in accordance with applicable legislation.
3. If the Department was not notified by the right holder that a claim was filed, the Department shall stop the procedures of clearance

and release of the goods, and keep such goods confiscated until the issuance of a final decision from the competent court and pursuant to sub-paragraph (4) of paragraph (b) above.

4. If the Department was notified by the right holder in writing that the goods infringe on intellectual property rights and said right holder does not file an infringement claim with, the Department shall inform the Attorney General of the matter attaching all relevant documents as well as a sample of the products whereby the provision of paragraph (c) shall apply.
5. Without prejudice to the right of the Department to inform the Attorney General when convincing and clear indicators are present regarding the infringement, the goods shall be released after verifying that all the legal requirements of import are met, in any of the following conditions:
  - a. If the right holder does not inform the Department that he has filed an infringement case within seven working days from being notified of the decision to stop the procedures of clearance and release of the goods.
  - b. If the right holder does not inform the Department of the act of infringement on intellectual property rights within the same period as per the preceding paragraph.
  - c. If the Department was unable to inform the right holder because it did not have a clear address for him
6. The importer shall have the right to appeal the decision issued by filing an appeal with the Court of Appeal within ten days from the date of the decision, and its decision shall be considered final.
- e. The applicant shall have the right, under the supervision of the concerned section, to inspect, on the premises of the customs department, the goods whose procedures of clearance and release were stopped, to enable him to prove his claim and in urgent cases the Director General of the Customs Department or any person authorized by him to grant the intellectual property right holder or his representative a sample of the imported products.
- f. The provision of this Article shall apply to cases of confiscation of goods inside the Kingdom and smuggled into the country contrary to applicable legislation.
- g.
  1. The right holder may submit an application to the Department to be renewed annually from date of acceptance of said application to take the

necessary measures to protect his right in return for a service fee to be determined in accordance with Instructions issued by the Director General.

2. The right holder shall be obliged to submit a bank guarantee or monetary security to guarantee the rights of the Department and third parties.

h. Small quantities of goods, non-commercial goods, personal goods and gifts with passengers or in small packages shall be exempted from the provisions of this Article, as well as goods in transit, and goods made available in market of the country of export by the right owner or upon his approval, shall be exempted from .

i. The Department of Customs shall not be liable to compensate for the loss or damages sustained by importer or the owner of the goods whose procedures of release and clearance were stopped in accordance with this Article.

j. The Director General, or any person authorized by him, may in case of import of goods that harms national interest, health of public morals to take the necessary legal measures by informing the relevant authorities.

k. Goods infringing on any intellectual property rights shall be considered unlawful goods.

l. The Director General may specify the conditions and necessary measures needed to implement the provision of this Article in accordance with Instructions issued pursuant thereto.

#### **4. REVIEW OF ARTICLE 41 PROVIDED UNDER ITALIAN TECHNICAL ASSISTANCE TO THE GOJ**

Jordanian Customs started to protect intellectual property since June 2000 to amend Article 41 of Customs Law number (20) of 1998 pursuant to Jordan's obligations under the World Trade Organization, Article (41) of Customs Law number (20) of 1998 provided the legal cover for the Jordanian Customs to play its role in protecting the intellectual property rights through boarder measures, however several comments have been highlighted in relation to said Article, most importantly the following:

##### **First: Substantial Comments:**

- 1) Boarder measures protecting intellectual property rights can only be commenced upon the importation of goods, since the prohibition in Article (41) is limited to imported goods only, although the Article did not clearly exclude exported goods or re-exported goods as in the case of goods in transit that have been clearly excluded in paragraph (e) of Article 41.
- 2) Article (41) of Customs Law number (20) of 1998 encompasses two procedures; the first procedure, in the case of the right owner filing a case with the court to get a decision to suspend clearance and release of the goods, this procedure is applied in a limited way and is also applied on goods in the transit considering it not subjected to border measures. The second procedure requires Jordanian Customs to take direct action to suspend clearance and release of infringed goods where trade mark or in copy right infringement is suspected, as a result the right owner shall be granted 8 days period to file a case, and if no filing is made the goods shall be released. It is noted, that practical experience have proved that right owners rarely file cases with competent courts when notified by Customs of such seizures and less than 5% of such cases witnesses case filings. This is due the high cost of bringing a lawsuit as well as the fact that the Jordanian market is perceived as a small market and therefore such activities does not cause great harm to said owners. Therefore, it should be noted that in both procedures outlined in Article (41), the right holder must file a case with the competent court to protect his right. It is also noteworthy to that paragraph (2) of Article (41) TRIPS Agreement states that the procedures for protecting Intellectual property rights should not be too costly.
- 3) Jordanian Customs only inform right holders when there are clear indicators of infringement of trade mark and copyright violations and the Customs

Department cannot inform said right holders when the matter concerns patents, topographies of integrated circuits, Industrial design and drawings, geographical indications and plant varieties.

- 4) The time given to right holder to file a case is restricted to 8 days only, where this period, at its best, does not exceed 6 working days since it includes Friday and Saturday, and in some cases it may not exceed 1 or 2 working days if it occurs during long holidays such as Eid Al-Adha and Eid Al-Fiter, it is noteworthy that paragraph (2) of Article (41) of TRIPS Agreement stated that the procedures for protecting the Intellectual Property rights shall not include unreasonable periods.
- 5) Paragraph (h) of Article (41) of Customs Law provides the right owner with the right to inspect goods, which are subject to suspension of clearance and release to inspect the goods within the campus of the Customs Department, while noting that right owners cannot verify if goods are counterfeit unless they are examined at special laboratories outside Customs.
- 6) Border measures in relation to intellectual property rights as remunerated in Article (41) of the Customs Law No. (2) Of 1998 is incompatible with Jordan's Commitments under JUSFTA, which obligates customs officials of Jordan and US with ex officio authority to seize goods and prosecute offenders without the needs for a complaint of right holders.
- 7) Border measures in relation to intellectual property rights as remunerated in Article (41) of the Customs Law No. (2) Of 1998 is incompatible with Euro-Mediterranean Association Agreement, which Jordan is a member of, that obligates both parties to provide adequate and effective protection to intellectual, industrial and commercial right in accordance with the highest international standards, including effective measures to enforce

## **Second: Non-substantive Comments**

- 8) Article 41 does not remunerate the cases that are considered violation of intellectual property rights, which means a customs official must consult with 10 intellectual property laws to determine such cases.
- 9) The definition of "intellectual property" was included at the end of Article (41), unlike the normal drafting practice to include such definitions at beginning of the legal provisions not at the end.

**The above comments were taken into consideration when preparing a new amendment to Article (41) of the Customs Laws, by providing for the following amendments:**

1. All forms of customs entry – with exception of transit status- have become subject to border measure protection.

2. Intellectual property rights were defined.
3. The concept of Ex Officio Action as outlined in Article (58) of the TRIPS Agreement was introduced as part of the procedures that may be taken by Customs Authority if it receives notification from right holder that goods infringe intellectual property rights or if clear indicators are present indicating that the goods infringe on any intellectual property rights, Customs shall inform the Attorney General of the matter attaching all relevant documents as well as a sample of the products for Attorney General to issue his decision in this regard. And in light of this procedure, protection of intellectual property rights is possible without right holder incurring any expenses.
4. The period of 8 days was changed to 10 days.
5. A paragraph was added in relation to applications seeking protection by Customs Department.
6. For goods in transit cases, the new amendment differentiates between two cases; the first relates to goods that contravene public security, public health and public morals, in such cases the Department may take necessary procedures outlined for imported goods or re-exported goods, in the second case, the Department cannot intervene unless the right holder presents a court order to seize the goods.
7. The new amendment provides right holders with the opportunity to take a sample of goods that infringe intellectual property rights.
8. Encourage the signature of MOUs with other official entities in order to cooperate in the field of intellectual property protection.

It is noteworthy that the amendment of Article (41) will require amendment of Border Measures Instructions number (7) for the Year 2000, in accordance with the following:

1. Outline the cases that constitute intellectual property infringement.
2. Amend the notification period from 8 days to 10 days.
3. In relation to application submitted by right holders seeking protection, the information required in such application must be spelled out, including description of the goods, nature of the infringement, name of trademark holder and his representative as well as his confirmation that he will seek court action.

In conclusion, we believe that the new amendment shall enhance the role of Jordanian Customs in enforcing intellectual property rights without it being a hindrance to trade. In addition, Jordan shall comply with its international obligations, including TRIPS Agreement, Jordan US Free Trade Agreement, and the Euro Mediterranean Partnership Agreement.

### **Proposed amendment to Article (41) of Customs Law**

1. It is prohibited to import or re-export of goods, which infringe on any intellectual property rights that are subject to protection by virtue of related and applicable laws, including:

- A. All importation cases remunerated in Article (65) of the Law with the exception of goods in transit which shall be subject to paragraph (6) of this Article
- B. The goods entering and leaving free zones

2. The Director shall issue Instructions that outline cases of infringement on intellectual property rights.

3. For purposes of implementing this Article Intellectual Property Rights shall mean: copyright and related rights, trademarks, patent, topographies of integrated circuits, industrial design and drawings, and geographical indications.

4. If clear indicators are present indicating that the goods infringe on any intellectual property rights, the Customs Department shall take the following procedures:

- To stop the procedures of clearance and release of the goods and inform the importer and intellectual property right holder about the decision to stop the procedures of clearance and release of the goods.
- The Right holder shall given no more than 10 working days from date of notification of the decision to stop the procedures of clearance and release of goods to file a claim with competent court, and if such notification is provided, the Court may provide him with an additional 10 day period to demonstrate that the competent court has issued its decision to seize the goods and hold their release, and if right holder fails to do so, the goods shall be released.
- If the Department was notified by the right holder in writing that the goods infringe on intellectual property rights and said right holder does not file an infringement claim with, the Department shall inform the Attorney General of the matter attaching all relevant documents as well as a sample of the products and the Attorney General must issue his decision regarding the goods within three (3) days of notification, and in such case the right holder does not have any right to claim compensation from the goods owner.
- If the Customs Department fails to notify the right holder because it did not have his clear address, or if the right holder does not inform the Department within time specified that the goods are infringing his intellectual property right, the Department may, if clear indicators are present indicating that the goods infringe on any intellectual property rights, inform the Attorney General of the matter attaching all relevant documents as well as a sample of the products and the Attorney General must issue his decision regarding the goods within three days.

5. The right holder may submit an application to the Department to be renewed annually from date of acceptance of said application to take the necessary measures to protect his rights.

6. In relation to goods in transit that is subject to the exception outlined in paragraph (1) above, intellectual property owners may apply to the Department upon a court decision to stop release of goods of this type of products, however, the Department may, in relation to goods that contravene public security, public health and public morals, in such cases the Department may take necessary procedures outlined in paragraph (3) and inform competent departments.

7. For all above cases, the right holder may apply to receive a sample of the goods for purposes of inspecting it and verifying if it violates intellectual property rights, and the Department shall entertain such applications depending on nature of the goods.

8. Small quantities of goods, non-commercial goods, personal goods and gifts with passengers or in small packages shall be exempted from the provisions of this Article.

9. The Department of Customs shall not be liable to compensate for the loss or damages sustained by importer or the owner of the goods whose procedures of release and clearance were stopped in accordance with this Article.

10. The Department shall sign MOUs with competent authorities that have a mandate to protect intellectual property rights, for example, JISM, National Library, JFDA, to cooperate in the field of intellectual property rights and gathering of information.

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