Several Legal Issues Relating to Service Technological Results

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How "the rights and interests in the intellectual property rights of the scientists and technicians should be protected and the entity achieving the service-related technological results should remunerate, under law, those achieving the service-related technological results and those making outstanding contribution to the transfer of the technological results" are important issues encountered in China in its efforts to improve its innovation capacity and build up a new nation. The current legal system in connection with the ownership of the right in, reward for, and remuneration to, service-related technological results in China are embodied in a variety of laws and administrative regulations, such as the Law on Progress of Science and Technology promulgated in 1993, the Law on Transfer of Science and Technology Achievements promulgated in 1996, the Patent Law amended in 2000, and the Contract Law promulgated in 1999. Following is an exploration of the main issues relating to the current legal system of service-related technological results in China, and recommendations made to improve it.

I. Relations between technological result and scientific and technological result

In the regulatory documents in China are often seen the terms of "scientific and technological result" and "technological result". How to understand their relations? The former is the simple form of the term scientific and technological result. The Law on Progress of Science and Technology provides that the State encourages the spread and application of scientific and technological results.[1] It also provides that "anyone who infringes another person's copyright, patent right, right of discovery, right of inventions or right of scientific and technological results by means of plagiarism, alteration, imitation, or by any other means, or who illegally usurps technical secrets, shall be dealt with in accordance with the provisions of the relevant law". [2] It may be seen that the term of "scientific and technological result" is wide in meaning in the Law on Progress of Science and Technology. The "scientific and technological results" in the Law on Transfer of Science and Technology Achievements refer to those having practical value.[3] Then how to understand the "practical value"? The law does not set forth any clear provision on it. But the Law on Transfer of Science and Technology Achievements uses "invention-creation" and "scientific and technological result" to respectively show the different circumstances relating to the rights and interests in a technology when spelling out the principles on the ownership of the rights and interests in the transfer of scientific and technological results.[4] Obviously, the "invention-creation" here has a bearing on the "invention-creation" as mentioned in the Chinese Patent Law, meaning patentable technological results; while "scientific and technological results" are those for which patent application will not be filed or which should not be filed, namely "technical secret". Of course, we should not think that "scientific and technological results having practical value" mentioned in the Law on Transfer of Science and Technology Achievements merely refer to patentable invention-creations and technical secrets. For example, the "improved breeds or strain of crops in Article 13 thereof expressly refer to the service-related right in new breeds. Since

the Law on Transfer of Science and Technology Achievements requires that "scientific and technological results" must have practical value, the concept of "scientific and technological result" is obviously narrower in meaning than that in the Law on Progress of Science and Technology.

In the provision on "technical contracts" of the Chinese Contract Law is also used the concept of "technological result".[5] What is a "technological result"? The Contract Law does not define it, but has made one point clear, that is, the technical contract serves the transfer, application and spread of scientific and technological result.[6] It is thus inferred that the concept of technological result in the Contract Law should be equivalent to that in the Law on Transfer of Science and Technology Achievements. In 2004, the Supreme People's Court (the SPC) issued the Interpretation of Several Issues Relating to Application of Law to Trial of Cases of Dispute over Technical Contract (the Technical Contract Interpretation for short), in which it is interpreted that the "technological result refers to technical solution developed with scientific and technological knowledge, information and experience, and relating to products, manufacturing processes, materials and their improvement, including, among other things, patents, patent applications, technical secrets, computer software, lay-out of integrated circuits, and new varieties of plant".[7]

The preceding analysis shows that the term of "scientific and technological result" has both a narrow sense and a broad sense. The scientific and technological result in its broad sense includes theoretic, scientific and technological results of the exploratory or research character and those of applicability; the scientific and technological result in its narrow sense merely refers to scientific and technological result of applicability (having the value of application). The "technological result" is the same as the scientific and technological result in the narrow sense in essence.

II. Service-related technological result

Article 326.2 of the Chinese Contract Law provides that "service-related technological result refers to a technological result achieved in the performance of a task assigned by the legal person or any other organization, or achieved primarily by making use of the materials and technical conditions of the legal person or any other organisation." According to the SPC's Interpretation, "the tasks assigned by the legal person or any other organisation are: (1) performing the duty assigned by the legal person or any other organisation; (2) undertaking other tasks of development assigned by the legal person or any other organization; (3) continuing to undertake the technology development work related to the duty or tasks assigned by the former legal person or any other organization within one year after leaving the work, unless otherwise provided for in law and administrative regulations. [8] There are two circumstances of "primarily making use of the materials and technical conditions of the legal person or any other organisation": (1) making full, or partial, use of the materials of the legal person or any other organization, such as capital, equipment, tools or raw materials, and these materials have substantial effect on the fruition of the technological result; and (2) the substantive content of the technological result is generated on the basis of the technological result or provisional technological result of the legal person or any other organization that is not disclosed, excluding testing or confirmation of technical solution using the materials and technical conditions of the legal person or any other organisation after fruition of the technological result.[9]

The preceding SPC's Interpretation, compatible with the provision of the Chinese Patent Law on service-related invention-creations, more explicitly emphasises that the "the material conditions of the legal person or any other organisation must have a decisive effect on the fruition of the technological result. However, neither the legislation nor the judicial interpretation provides that any technological result achieved by an employee "mainly making use of the materials and technical conditions of the legal person or any other organisation" one year after leaving his employment may constitute a service-related technological result. Therefore, the pre-condition for determining that any technological result made by an employee "mainly making use of the materials and technical conditions of the legal person or any other organization" is existence of the employment relations between the interested parties; after the relations are over, even if a former employee used to mainly make use of the materials and technical conditions of the legal person or any other organization during the existence of the employment relations, his achieved technological result is not a service-related technological result.

III. Those who achieve technological results

Article 6 of the Judicial Interpretation of Technical Con-

tract provides that those who achieve technological results "include those having independently or jointly made inventive contribution, namely the inventors or designers of technological results. When determining inventive contribution, the people's court should analyse the substantive technical composition of a technological result. One who comes up with the substantive technical composition of a technological result and realises the technical solution from it is the one who has made the inventive contribution. Those providing capital, equipment, material and experimental facilities, performing the functions of organisation and management, assisting in making the drawings, sorting out information, and/or translating documents are not those achieving the technological results". This provision is also compatible with the relevant provisions of the Chinese Patent Law.[10] It is thus shown that, according to the general principles of the Chinese law, those achieving the service-related technological results are those who come up with the substantive technical composition of a technological result and realise the technical solution from it, and any other persons are not.

It should be pointed out that a service-related technological result requires the existence of the employment relations between the one achieving the service-related technological result and his employer. By the employment relations are meant the relations of rights and obligations, whereby the employer employs an employee as its part of its work force, and the latter performs the paid work under the management of the former. The employment relations are the basic legal relations for generating any service-related technological result. Between the one achieving the service-related technological result and the relevant entity there may exist the employment relations, and as well relations of entrusted development or joint development. Only when the employment relations exist or existed is it possible to involve the matter of whether a technological result is a service-related technological result.

IV. Statutory ownership of the primitive rights in service-related technological result

According to the general principles of the Chinese law, the primitive rights in a service-related technological result go to the employer, not the one achieving the service-related technological result. But, as the tendency of the legislative and judicial practice shows, the interested parties are allowed to change the statutory attribution or ownership of the primitive rights in a service-related technological result by virtue of contract. Article 6.3 of the Patent Law as revised in 2000 provides that "in respect of an invention-creation made by a person using the material and technical means of an entity to which he belongs, where the entity and the inventor or creator have entered into a contract in which the right to apply for and to be granted a patent is provided for, such a provision shall apply." This provision applies to invention-creations made mainly by making use of the material and technical condition of the entity concerned.[11] That is, as for an invention-creation made mainly by making use of the material and technical condition of the entity concerned, while the law provides that it is a service-related invention-creation, the entity and inventor may change the statutory primitive ownership by virtue of contract. This provision, regarded as a major breakthrough, reflects the principle of encouraging invention-creations and the contract priority principle.[12]

In the Judicial Interpretation of Technical Contract, the SPC has further broadened the scope within which the contract can change the primitive statutory ownership by virtue of contract: the ownership of rights may be changed through contract even if the service-related technological result is achieved in performing a task assigned by the legal entity or any other organization.[13] This judicial interpretation is based on the principle of freedom of contract as embodied in the Contract Law.[14] Does this extended judicial interpretation apply to such technological results as patentable service-related invention-creation, service-related breeding, service-related software and service-related lay-out designs. According to the SPC, it is a legislative deficiency of the Patent Law not to have provided for whether it is possible to conclude a contract on the ownership of the rights in an invention-creation made in performing the work assigned by one's own entity, and the SPC's judicial interpretation has made up for it.[15] It is thus inferable that the provision of said judicial interpretation applies to all service-related technological results. However, what is said here about changing the statutory ownership of the rights in service-related technological result through contract actually means that the interested party may assign the statutory primitive rights in a service-related technological result through contract since the relevant laws and administrative regulations in China do not provide that the statutory ownership of service-related technological result may be changed by virtue of contract. In case like this, the most reasonable understanding of the judicial interpreta-

tion is that contract is not concluded on the ownership of the primitive rights, but on the assignment of the statutory primitive rights. That is, the employer may assign the statutory primitive rights to its current or former employee by way of contract. Understanding the provision this way would prevent from arising the conflict between the judicial interpretation and the laws and administrative regulations since the provision set forth in the current law and regulations on the statutory ownership of service-related technological result is mandatory, not optional or complementory.[16] Of course, the law does not provide for whether the contract must pre-agreed. In theory, there is no reason to ban post-contracts.

V. Reward or remuneration to service-related invention-creation

The reward and remuneration to service-related invention-creation, under the law provision in China, are: 1) reward and remuneration to those who achieve a service-related technological result; and 2) reward to those who make important contribution to the transfer of the service-related technological result.

The Contract Law and the Patent Law have expressly provided for the obligation for an employer to reward/remunerate an employee achieving a service-related technological result. The Scientific and Technological Result Transfer Law takes a further step by providing that the employer is obliged not only to reward those achieving a scientific and technological result, but also reward those who make important contribution to the transfer of it.

As for the employer's such obligation, the Contract Law does not set forth any specific provisions. For the law provisions on the obligation to reward or remunerate see the table below.

The provisions of above table have only made clear the lowest amount of reward or remuneration. However, we should not think that it is fair if the amount of reward or remuneration is not less than the lowest statutory amount. Whether it is fair must depend on the specific circumstances.[17] Besides, although the Implementing Regulations of the Patent Law are binding directly on the State-owned enterprises and institutions, Rule 77 thereof provides that other entities in China may act with reference to them. How to understand "act with reference to the Implementing Regulations"? It is not expressly provided for. In theory, since paying the reward and fair remuneration is a statutory obligation of any employer that has acquired the patent right for a service-related invention-creation, when a dispute arises due to an employer's failure to meet its obligation of payment in the absence of provisions on payment of reward or remuneration formulated by the employer, the competent authority may resolve the dispute with reference to the provisions of the Implementing Regulations. If a non-State-owned entity has established the system for paying reward or remuneration, the provision of the Patent Law should not apply as reference in principle unless the system is glaringly unfair or that the entity, in fact, tries to stay away from the obligation to pay the reward or remuneration.

Law provisions	Reward to	Reward standards	Remuneration standards	Time limit of payment
Rules 74 ~76 of the Implementing Regulation of the Patent Law	Inventor/designer (employee) of a State-owned enterprise or institution	Invention patent: >RMB2000 yuan Utility model or design*: >500RMB	Invention or utility model patent: >2% of net income from exploitation of patent; Design patent: >2% of net income from exploitation of patent; Licensing: > 10% of the patent licensing fee	Reward: within 3 months from the date of announcement of the patent right; Remuneration: within the entire duration of the patent right
Articles 29 and 30 of the Scientific and Technological Result Transfer Law:	Those achieving the scientific and technological result and those making important contribution to the transfer of the scientific and technological result	>20% of the net income of the transfer; >5% new and additional profit	The reward may be converted into share or a percentage of capital investment, or share capital	Reward: Continuing for 3 to 5 years

* Rule 74.2 of the Implementing Regulations of the Patent Law provides that "where an invention-creation is made on the basis of an inventor's or creator's proposal adopted by the entity to which he belongs, the state-owned enterprise or institution to which a patent right is granted shall award to him a money prize on favorable terms."

Those having made important contribution to the transfer of a scientific and technological result mentioned in the Scientific and Technological Result Transfer Law are not limited to those who have made important technical contribution to the follow-up experiment and/or development; they also include those who have made important contribution in promoting the application of the scientific and technological result since Article 2 of the Scientific and Technological Result Transfer Law provides that the "transfer" means the activities of follow-up experiment, development, application, and spreading of a scientific and technological result having practical value until a new product, new manufacturing process and new material and new industry come into being. What are involved here are not only technical, but also commercial, activities. It should also be pointed out that the "transfer" of a technological result is understood differently in the Contract Law and the Scientific and Technological Result Transfer Law. According to Article 9 of the Scientific and Technological Result Transfer Law, there are five forms of "transfer": (1) with one's investment; (2) to another person; (3) by licensing; (4) by working jointly with another person for the transfer with the scientific and technological result as a condition for the cooperation; and (5) as investment with the scientific and technological result counted as part of it, converted share or percentage of the invested capital. According to this provision, the "transfer" has a broad meaning, including all forms of carrying out technological results provided for in the Chinese laws. Article 330.4 of the Contract Law provides that "contracts concluded by the parties on the application and transformation of any technological result with a value for industrial use shall be made with reference to the provisions for technological development contracts." Obviously, the "transfer" of a technological result is understood, in the Contract Law, merely as an activity having the character of technical development. For that matter, the concept of "transfer" of the Scientific and Technological Result Transfer Law should not simply be understood according to the Contract Law.

Since different laws have set forth different provisions on an employer's obligation to pay reward or remuneration, where a patented technological result has been effectively transferred, there will be the issue of how to reward or remunerate the person who achieves the technological result. The law does not expressly provide for it. As for the transfer of a patented technological result, where a State-owned enterprise is involved, the person achieving the service-related technological result shall be rewarded or remunerated under the Patent Law, and those who have made important contribution to the transfer of the scientific and technological result should be awarded or remunerated under the Scientific and Technological Result Transfer Law; where a non-State-owned enterprise is involved, the Scientific and Technological Result Transfer Law should be complied with in principle. One of the important differences between the reward or remuneration system under the Scientific and Technological Result Transfer Law and that provided for in the Patent Law, which is delineated in detail in its Implementing Regulations, is that the former provides for a shorter period for an employer to meet its obligation to pay the reward or remuneration, namely within three to five years; the obligation of reward or remuneration under the latter lasts the whole duration of a patent.

For a comprehensive analysis of the law provisions on reward or remuneration for service-related technological result in China, it may be concluded that (1) "reward" and "remuneration" should not be regarded as different any way in legal terms, and it is an employer's obligation to pay them; (2) all service-related technological results, including computer software and new varieties of plant are the subject matter requiring reward or remuneration under the Contract Law and the Scientific and Technological Result Transfer Law; (3) those who are entitled to the reward or remuneration include those achieving the service-related technological result and those who have made important contribution to the transfer of the scientific and technological result; (4) the laws have merely provided for the lowest, not the highest, amount of the reward or remuneration out of the proportion of the net benefits made from the service-related technological result; and (5) the reward or remuneration may be paid in cash, or in the form of share or capital investment.

VI. Conclusion and Recommendations

In China, the legal system related to service-related technological results achieved by employees are mainly characterized in the following:

(1) The primitive right in a service-related technological result is owned by the employer under the laws, but the relevant right is assignable by virtue of contract. In fact, this provision is of practical legal significance for the State-owned enterprises. With such provision in place, it is illegal for them to change the ownership of right in a service-related techno-

logical result, which is a drain on the Statement assets. A non-State-owned enterprise may, in the absence of the provision of the kind, also assign its right by virtue of contract;

(2) An employer is obliged under the law to reward or remuneration for a large number of service-related technological results, including such service-related technological results as inventions, utility models, computer software, layout-design of integrated circuit, and new varieties of plants. As the foreign practice shows, the provision on obligation of statutory reward or remuneration is applicable to invention-creation eligible to the patent for invention and/or utility model;

(3) The service-related technological results are of a wide coverage in that any technological results achieved within a certain period of time (normally one year) after termination of employment is also a service-related technological result as long as it is related to the employee's work or duty. In countries like Germany, United Kingdom and Japan, only the relevant technological results achieved during the existence of employment are service-related technological results;

(4) Those who are statutorily entitled to reward or remuneration for service-related technological result are not limited to employees achieving service-related technological results, but also include those who make important contribution to the industrialisation of the service-related technological results, while, in some foreign countries, they are limited to those who make the invention-creation eligible to the patent for invention and/or utility model; and

(5) The calculation of reward or remuneration is made on the basis of the income made with a service-related technological result as is prescribed; besides, it is done by following the way of paying the prescribed lowest amount of reward or remuneration and without the limit of the highest amount, which cannot be found in the foreign countries. As the preceding characteristics show, these Chinese laws have a strong regulatory force on the service-related technological results.

Nonetheless, in real life, the legal system of service-related technological results does not play the role it should have played as shown in the following. On the one hand, the law provisions on reward or remuneration are not substantially complied with, protection of the economic interests of those achieving the service-related technological results is absent; on the other, many service-related technological results have been changed, in private, into non-service-related technological results, causing prejudice to the lawful rights and interest of the employers. The causes of the problem are varied, and the main cause lies in the imperfect market and economic system when China is till in a period of transition socially and economically. For that reason, it is necessary to make greater efforts to improve the market environment, and improve the economic environment conducive to the protection of the intellectual property rights. It is against this backdrop that recommendations of change are made as follows from the perspective of intended improvement of the legal system of service-related technological results:

1. Radically changing the provision that the primitive rights in a service-related technological result is owned by the employer under the laws into those allowing the employee achieving it to own it, and the employer has the priority to be licensed the rights. This way will not affect the employer's rights and interests to exclusively own a service-related technological result, and it is more conducive to the protection of the rights of the employee. With the provision that the primitive rights in a service-related technological result are owned by the employee under the laws, when an employer does not exercise, or abandons, its right, or it abandons its right after exercising it, whether or not the service-related technological result has been granted the patent right or any other IP right, the service-related technological result should be returned to the employee free. In this way, it is conducive to preventing the employer from abandoning the right in bad faith in an attempt to free itself from paying the reward or remuneration, and thus infringe the rights and impair the interests of those achieving the service-related technological result and those who have made important contribution to the transfer of the scientific and technological result.

2. The employee is obliged to inform in time the technological result he has achieved, and the employer is obliged to decide on whether to exercise the right of priority to be licensed the technological result within the statutory time limit. The employer's failure to make a reply is legally presumed its implied consent to exercise the right. If the employee fails to inform, or does not inform in time, and thus impairs the rights and interests of the employer, he is liable for the damages.

3. It should be provided that the employer is obliged to pay the statutory reward or remuneration at the same time when it exercises the right of priority to be licensed the technological result. After it exercises the right of priority to be licensed the technological result, the employer is obliged to pay the first amount of the reward or remuneration; it should

pay the reward or remuneration again after it makes benefits. Even if the service-related technological result is not used out of strategic business consideration, it should pay the reward or remuneration again some years after the first payment. The amount of reward or remuneration should be reasonable, and the standards of the amount are to be provided for depending on the character of the employee's work and the different circumstances of the reward or remuneration. It should not be indiscriminately fixed. The law provides that the employer is obliged to pay reward or remuneration for a service-related technological result on the theoretic basis that the employee's work result goes beyond the expectation for which the employer pays him the salary. Its reward or remuneration is an evaluation of his extra contribution, not its unilateral favor to him. The different amount of the salary paid is an indication of the employer's different expectation of its employees. The factor of salary should be taken into consideration as to whether the reward or remuneration is reasonable to the employee who has achieved the service-related technological result.

4. The coverage of the statutory service-related technological result is to be narrowed down, and a technological result achieved within a given period after the employment is over is no longer deemed to be a service-related technological result. If, during the existence of the employment relations, an employee intentionally does not achieve the service-related technological result that he should have, but put it off until the employment is over, so as to stay away from the employer's statutory priority, it is an act of non-compliance with the employment contract and an infringement of its right. Likewise, the employee's intentionally causing the dissolution of the employment at an earlier date in order to take away the service-related technological result is also an act of infringement of the employer's right.

5. Given that the employee is at disadvantage in the employment relations, he usually does not claim any right against the employer during the employment for the purpose of his personal vital interests. It may be provided that the limitation of action or arbitration is six months after the termination of the employment relations in order to protect the rights and interests of the employee.

6. Laws and regulations are to be formulated to comprehensively regulate the service-related technological results, and it is not merely to amend the laws or regulations concerning patented service-related technological results since our existing provisions that are scattered in the various laws by far exceed the coverage of the Patent Law. Besides, formulation of such a law to comprehensively regulate the relations between creation and transfer of the service-related technological results is also conducive to eliminating inconsistencies or even conflicts between these law provisions. ■

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[1] Article 5 of the Law on Progress of Science and Technology.

[2] Article 60 of the Law on Progress of Science and Technology.

[3] Article 2 of the Law on Transfer of Science and Technology Achievements.

[4] Article 26 of the Law on Transfer of Science and Technology Achievements.

[5] Articles 326 and 327 of the Contract Law.

[6] Article 323 of the Contract Law: "entry into a technical contract shall be conducive to the advance of science and technology, and shall accelerate the transfer, application and dissemination of the results achieved in science and technology."

[7] For some scholars, the "technological result" includes known technology since it may be the subject mater of a technical service contract. See Jiang Zhipei, Duly Resolve Technical Contract Dispute and Try to Promote Scientific and Technological Progress and Innovation" in the IP Trial and Guidance, Vol. 9, P. 25; He Zhonglin, Understanding and Application of the SPC's Interpretation of Several Issues Relating to Application of Law to Trial of Cases of Dispute over Technical Contract in the IP Trial and Guidance, Vol. 9, P. 59. However, it is inferred from the provisions relating to "technical contract" of the Contract Law that it is baseless to infer that known technology is a "technological result" for these reasons: 1) the "technological result" mentioned in the contract law relates to the ownership of the IP rights, while the known technological result does not generate the issue of ownership of the right; 2) that a known technology may be the subject mater of a technical service contract does not mean that it is a "technological result" because the technological result is not a subject matter of any technical service contract; and 3) a known technology is not cited as an technological result in the interpretation of "technical contract" in the Technical Contract Interpretation *per se*.

[8] In Article 2.1 of the Technical Contract Interpretation, the "exceptions" mainly refer to the provisions on the service of cultivating new varieties of plant, the special point of which is the provision that an employee's cultivation of a breed/strain accomplished

within three years after he leaves his employer that is related to his work for, or task assigned to him by, his former employer is service-related work. This provision is made because it takes relatively long time to cultivate a new variety of plant.

[9] Article 4 of the Technical Contract Interpretation.

[10] Rule 12 of the Implementing Regulations of the Patent Law: "'inventor' or 'creator' referred to in the Patent Law means any person who makes creative contributions to the substantive features of an invention-creation. Any person who, during the course of accomplishing the invention-creation, is responsible only for organizational work, or who offers facilities for making use of material and technical means, or who takes part in other auxiliary functions, shall not be considered as inventor or creator."

[11] A Detailed Explanation of the New Patent Law by the Department of Legal Affairs of the State Intellectual Property Office, the Intellectual Property Publishing House, 2001, P. 34.

[12] See Supra note 11

[13] Article 2.2 of the Judicial Interpretation of the Technical Contract Law: "where a legal entity or any other organisation concluded a contract with its employees concerning a technological result achieved by the employee during or after his employment, the People's Court shall confirm it according to the agreement."

[14] Jiang Zhipei, Duly Resolve Technical Contract Dispute and Try to Promote Scientific and Technological Progress and Innovation" in the IP Trial and Guidance, Vol. 9, P. 26.

[15] See Supra note 14.

[16] If it is not understood this way, the following conclusion will be made that as long as the law does not expressly rule out the possibility of contract agreement, all civil rights and obligation may be agreed upon in contract. This is obviously wrong.

[17] In a case of dispute over the service inventor's remuneration, the Chongqing No. 1 Intermediate People's Court decided that the reasonable remuneration for a service-related invention should amount to 6% of the income fax and profit. According to the facts of the case and with reference to the relevant regulations of the Chongqing Government, the Chongqing Higher People's Court increased the proportion, and held that 10% is reasonable. See the Chongqing Higher People's Court's Ruling No. Yugaofaminzhongzi 9/2005.

CHINA PATENTS & TRADEMARKS

(Quarterly published in January, April, July and October)

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