

Acquisition of patent rights

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Legal basis

The "Patent Law of the People's Republic of China" was promulgated on March 12, 1984, and was effectuated on April 1, 1985. The Patent Law was amended for the first time on September 4, 1992, and the revised Patent Law came into force on January 1, 1993. The Patent Law was amended for the second time on August 25, 2000, and came into force on July 1, 2001. The Patent Law was revised for the third time on December 27, 2008, and was effectuated on October 1, 2009. On October 17, 2020, during the 22nd Session of Standing Committee of 13th National People' s Congress, delegates voted and passed the Decision on Amending the Patent Law of the People' s Republic of China. The revised Patent Law was implemented on June 1, 2021.

China became a member of the "World Intellectual Property Organization" (WIPO) on June 3, 1980, and afterwards joined several organizations: the "Paris Convention for the Protection of Industrial Property" (Stockholm Agreement) on March 19, 1985; the "Patent Cooperation Treaty" (PCT) on January 1, 1994 ; the "Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure" (Budapest Treaty) on July 1, 1995; the "Locarno Agreement on Establishing an International Classification for Industrial Design" (Locarno Agreement) on September 19, 1996; the " International Patent classification Agreement " (Strasbourg Agreement, SA), on the June 19, 1997; became a member of the "International Convention for the Protection of New Varieties of Plants" (UPOV) on April 23, 1999. On December 11, 2001, China ratified the WTO agreement and became a

member of the WTO, "Agreement on Trade-Related Aspects of Intellectual Property Rights" (TRIPs) took effect in China at the same time.

Language

All application documents and correspondence with the China National Intellectual Property Administration (CNIPA) and the Patent Reexamination and Invalidation Department must be in Chinese.

Patent type

There are three types of patents, namely patent for invention, patent for utility model and patent for design.

Patent protection term

The duration of patent right for invention shall be 20 years, the duration of patent right for utility model shall be 10 years and patent right for design shall be 15 years, all counted from the date of filing.

Definition of invention, utility model and design

An invention refers to a new technical solution for a product, a process, or an improvement thereof.

Utility model refers to a new technical solution relating to a product' s shape, structure, or a combination thereof, which is fit for practical use.

Design refers to a new design of shape, pattern, or a combination thereof, as well as a combination of the color, shape and pattern, of the entirety or a portion of a product, which creates an aesthetic feeling and is fit for industrial application.

Subjects that cannot be granted patent rights

The following topics cannot be granted patent rights:

- 1 Scientific discovery
- 2 Rules and methods of intellectual activity
- 3 Disease diagnosis and treatment methods
- 4 Animal and plant varieties
- 5 Nuclear transformation methods and substances obtained therefrom; and
- 6 Designs on patterns, colors or their combinations on printed flat works whose main functions are for recognition

However, the production methods of animal and plant species can be granted patent rights.

Preservation of biological materials

If the invention patent is related to a new biological material, which is not available to the public, and the description of the biological material is not sufficient to enable a professional technical personal to implement the invention, the applicant should, no later than the application date (or the priority date for those who have the priority claim) , deposit the sample of the biological material to a depository institution recognized by CNIPA for preservation, and thereafter submit the receipt of deposit and viability report issued by the depository institution at the time of filing or within 4 months from filing at the latest.

Patent for inventions involving computer program

The computer program code is not anything related to patentability and can be protected by the Copyright Law. However, if an invention involving a computer

programs is aimed to solve a technical problem, utilizes technical means and produces technical effects, it shall be protected under the Patent Law. The eligible subject matters of an invention involving a computer program include a method, an apparatus, and a computer-readable storage medium (CRSM).

Invention-creations that rely on genetic resources

No patent shall be granted for invention-creations that obtain or utilize genetic resources and rely on such genetic resources while violating the provisions of laws and administrative regulations. When applicant applies for a patent for an invention-creation that relies on genetic resources, a statement indicating the direct source as well as the primary source of the genetic resources in the application documents shall be submitted to CNIPA. If the primary source cannot be explained, the reasons shall be stated.

Novelty

An application for invention or utility model, if it is not a technology known to the public before the date of filing in China or abroad; and has neither entity or individual filed an application for the identical invention or utility model to the National Patent Administration Department under the State Council, even nor disclosure in the patent application documents published or patent documents announced, then the invention or utility model shall be considered as possessing novelty.

An application for design, if it is not a design that is known to the public in China or abroad before the date of filing, and neither has entity or individual filed an application for the identical design to the National Patent Administration Department under the State Council , even nor disclosure in the patent documents announced, then this design shall be considered as possessing novelty.

Inventiveness

An invention is inventive, by the date of filing, has outstanding substantive features with significant progress when comparing with the technology known to the public in China and abroad.

A utility model is inventive, by the date of filing, has substantive features with progress when comparing with the technology known to the public in China and abroad.

A design is creative, if it is significantly different from the existing design or a combination of existing design features.

Foreign priority and domestic priority

Where, within 12 months from the date on which the applicant first filed in a foreign country an application for a patent for invention or utility model, or within six months from the date on which the applicant first filed in a foreign country an application for a patent for design, he or it may thereafter, files in China an application for a patent for the same subject matter in accordance with any agreement concluded between the said foreign country and China, or in accordance with any international treaty to which both countries are a party, or on the basis of the principle of mutual recognition of the right to priority, enjoy the right to priority. Such priority is called foreign priority.

Where the applicant, within 12 months from the filing date of the first application for a patent for invention or utility model in China, or within six months from the filing date of the first application for a patent for design in China, and files an application from a patent for the same subject matter with Patent Administration Department under the State Council afterwards, may enjoy the right of priority. Such priority is called domestic priority. However, if the earlier application falls in any of the following circumstances, it may not be

taken as the basis for claiming domestic priority:

- (1) The foreign priority or domestic priority has been claimed;
- (2) The patent right has been granted;
- (3) It shall be a divisional application filed as prescribed;

For an application for invention or utility model, once the later application claiming for domestic priority was filed, the earlier application shall be deemed to have been withdrawn.

Chinese national phase entry

Any Applicants for international applications entering Chinese national phase should go through the formalities within 30 months from the earliest priority date. If the relevant formalities are not completed within the prescribed time limit, he or it may pay a surcharge for the late entry before the expiration of the time limit of 32 months counted from the earliest priority date.

First-to-file application principle

The Chinese Patent Law adopts the First-to-Apply principle. When two or more applicants apply for a patent for the identical invention-creation separately, the patent right shall be granted to the person who applied first.

Documents required for application

The following documents are required for each invention and utility model application before CNIPA:

- Power of Attorney, signed by the applicant (notarized or certified one is not required);
- Description, claims and abstract;
- Drawings (if any);

- Priority Document (if priority is claimed);
- Priority Assignment, if the applicant who file such application in China is not identical with the applicant of the earlier application.

The following documents are required for each design application before CNIPA:

- Power of Attorney, signed by the applicant (notarized or certified one is not required);
- Pictures or photos or drawings of the design;
- Brief description of the design;
- Priority Document (if priority is claimed);
- Priority Assignment, if the applicant who file such application in China is not identical with the applicant of the earlier application.

Format of claims

It is recommended to use a "European-style" claim format, that is, an independent claim should contain a preamble portion and a characterizing portion. The preamble portion should specify the subject matter of the technical solution of the invention or the utility model seeking protection, and those necessary technical features which the subject matter of the invention or utility model share with the closest prior art. The characterizing portion shall state the technical features of the invention or the utility model which distinguish it from the most related prior art.

Publication of application

After passing the preliminary examination, the invention patent will be published immediately after 18 months from the filing date or earliest priority date.

Substantive examination

Substantive examination is required for invention patent applications. In order to start the substantive examination procedure, the applicant should submit a formal request thereon within 3 years from the filing date or earliest priority date in China. If there is no request for substantive examination within such time limit, the invention patent application will be deemed to be withdrawn.

Utility model and design applications do not need to undergo the substantive examination procedure and can be granted after passing the preliminary examination.

The requirement of unity

An application for a patent for invention or utility model shall be limited to one invention or utility model. Two or more inventions or utility models belonging to a general inventive concept may be filed in one application, and they should be technically interrelated and contain one or more the identical or corresponding special technical features. The expression “special technical features” shall mean those technical features that define a contribution which each of those inventions or utility models, considered as a whole, makes over the prior art.

An application for a design patent shall be limited to one design used in a product. Two or more similar designs for the same product, or two or more designs used or sold as set for products belonging to the same class, may be filed in one application. There shall be no more than 10 similar designs in one multiple design application.

Submission of divisional application

Where a patent application includes two or more inventions, utility models, or designs, the applicant may, before the expiration of the two-month period from

the date receipt of *Notification to Grant the Patent Right* (If this application is already a divisional application, before the expiration of the two-month period from the date of receipt of *Notification to Grant the Patent Right* for its parent application), submit a divisional application with CNIPA. However, if the patent application has been rejected, withdrawn, or deemed to be withdrawn, a divisional application cannot be filed.

Multiple dependent claims

Multiple dependent claims referring to more than two claims shall refer to the preceding claims in the alternative only, and shall not serve as a basis for any other multiple dependent claims.

Amendments to application

The amendment to the patent application for invention or utility model shall not go beyond the scope of disclosure contained in the initial specification and claims.

The applicant may have the opportunity to amend the patent application for invention on his or its own initiative when requesting for substantive examination, or within the time limit of three months from the date of receipt of the notification stating that the application for a patent for invention has entered in to the substantive examination phase.

The applicant may have the opportunity to amend the patent application for utility model or design on its or own initiative within two months from the date of filing.

Rejection and reexamination

If CNIPA believes that a patent application cannot be approved and has given the applicant at least one opportunity for responding the Office Actions, the

patent application would be rejected by the examiner eventually.

The applicant who is not satisfied with the decision of rejection issued by CNIPA, may file a request for reexamination with the Patent Reexamination and Invalidation Department.

The applicant who is dissatisfied with the decision of the Patent Reexamination and Invalidation Department, may institute legal proceedings before the People' s court within three months from the date of receipt of the notification.

Invalidation procedure

Any entity or individual may request the Patent Reexamination and Invalidation Department to declare the patent invalid starting from the date when the grant of the patent right was announced.

Where the patentee or applicant who made the request of invalidation, is dissatisfied with the decision of the Patent Reexamination and Invalidation Department declaring the patent right invalid or to upholding the patent right, may institute legal proceedings in the people's court within three months from the date of receiving the notification of decision.

The scope of patent protection

The protection scope of the patent right for invention or utility model patent is subject to the content of its claims, and the description and appended drawings may be used to explain the content of the claims. The protection scope of the patent right for design shall be determined by the product incorporating the patented design as shown in the drawings or photographs, and the brief description may be used to explain the design of the product as shown in the drawings or photographs.

After the granting of the patent for invention or utility model, the patentee has the right to stop any entity or individual from exploiting the patent which

includes the actions of manufacturing, using, offering for sale, selling or importing the patented product, or using the patented method, or using , offering for sale, selling or importing the product directly obtained by the patented method, for the purpose of production and business without the permission of the patentee.

After the granting a patent for design, the patentee has the right to stop any entity or individual from exploiting the patent, that is to say, they shall not manufacture, offer for sale, sell or import the product of design for the purpose of production and business without the permission of the patentee.

Confidentiality examination of patent applications to be filed abroad

Any entity or individual who intends to apply for a patent in foreign countries for an invention or utility model accomplished in China, must submit the matter to CNIPA for confidentiality examination before filing in foreign countries, regardless of whether it is the first application to be submitted to a foreign patent office, or the first application has been submitted to CNIPA and serves as a priority claim for any subsequent applications in foreign countries. If the applicant violates the above regulation, the patent for identical invention or utility model shall not be protected in China.

Rights of previous users

Before the filing date of patent application, if the identical product has been manufactured, the identical method has been used, or the necessary preparations have been made for production or use by any entity or individual, the continued production or use within the original scope does not constitute an infringement on the patent.

Annual fee

The annual fee for the year in which the patent is granted shall be paid within 2 months after receipt of *Notification to Grant Patent Right*, and the subsequent annual fees should be paid before the expiration of the preceding year.

There is a 6-month grace period for the payment of annual fees.

Patent agent

Any foreign enterprise or individual that does not have a regular domicile or business site in China, shall entrust a legally established patent agency with all patent-related matter or procedures before CNIPA and the Patent Reexamination and Invalidation Department.

Recording of assignment and licensing contracts

For the right transfer for the patent application or patent right, the parties concerned shall conclude a written assignment contract and record it with the CNIPA. The right transfer for the patent application or patent right shall take effective as of the date of registration with the CNIPA.

The patent licensing agreement shall be made a record with the CNIPA within 3 months from the effective date of the agreement.

If a Chinese entity or individual transfers a patent application right or patent right to a foreigner, a foreign enterprise or any other foreign organization, it shall go through the formalities as stipulated by the relevant laws and administrative regulations.

Patent mark

Although it is not mandatory to indicate the patent mark, it is recommended to mark the patented product with the patent application number or patent

number.