

## **Decision of the Standing Committee of the National People's Congress on Amending the Patent Law of the People's Republic of China**

(Adopted at the 6th Meeting of the Standing Committee of the Eleventh National People's Congress on December 27, 2008)

At its 6th Meeting, the Standing Committee of the Eleventh National People's Congress decided to make the following amendments to the Patent Law of the People's Republic of China:

1. Article 1 is revised to read: "This Law is enacted for the purpose of protecting the lawful rights and interests of patentees, encouraging invention-creation, promoting the application of invention-creation, enhancing innovation capability, promoting the advancement of science and technology and the economic and social development."

2. Three paragraphs are added in Article 2 as the second, third and forth paragraph, which read:  
"Inventions mean new technical solutions proposed for a product, a process or the improvement thereof.

"Utility models mean new technical solutions proposed for the shape and structure of a product, or the combination thereof, which are fit for practical use.

"Designs mean, with respect to a product, new designs of the shape, pattern, or the combination thereof, or the combination of the color with shape and pattern, which are rich in an aesthetic appeal and are fit for industrial application."

3. Article 5 is revised to read: "Patent rights shall not be granted for invention-creations that violate the law or social ethics, or harm public interests.

"Patent rights shall not be granted for inventions that are accomplished by relying on genetic resources which are obtained or used in violation of the provisions of laws and administrative regulations."

4. One paragraph is added in Article 9 as the first paragraph, which reads: "Only one patent can be granted for the same invention. However, where the same applicant applies for a utility model patent and an invention patent with regard to the same invention on the same day, if the utility model patent acquired earlier is not terminated yet and the applicant declares his waiver of the same, the invention patent may be granted."

5. The second paragraph of Article 10 is revised to read: "If a Chinese unit or individual intends to transfer the right to apply for a patent or patent rights to a foreigner, foreign enterprise or other foreign organization, it or he shall perform the procedures in accordance with the provisions of relevant laws and administrative regulations."

6. The second paragraph of Article 11 is revised to read: "After a design patent right is granted, no unit or individual may exploit the patent without permission of the patentee, i.e., it or he may not, for production or business purposes, manufacture, offer to sell, sell or import the design patent products."

7. Article 12 is revised to read: "Any unit or individual that intends to exploit the patent of another unit or individual shall conclude a contract with the patentee for permitted exploitation and pay the royalties. The

permittee shall not have the right to allow any unit or individual not specified in the contract to exploit the said patent."

8. The second paragraph of Article 14 is deleted.

9. One article is added as Article 15, which reads: "If there are agreements regarding the exercise of rights by the co-owners of the right to apply for the patent or of the patent right, the agreements shall prevail. In the absence of such agreements, the co-owners may separately exploit the patent or may, in an ordinary manner, permit others to exploit the said patent. where others are permitted to exploit the patent, the royalties received shall be distributed among the co-owners.

"Except under the circumstances specified in the preceding paragraph, exercise of the co-owned right to apply for patent or of the co-owned patent right shall be subject to the consent of all the co-owners."

10. Article 15 and 17 are merged into one article as Article 17, which reads: "An inventor or designer shall have the right to state in the patent documents that he is the inventor or designer.

"The patentee shall have the right to have his patent mark displayed on the patented products or the package of such products."

11. The first paragraph of Article 19 is revised to read: "If a foreigner, foreign enterprise, or other foreign organization without a regular residence or business site in China intends to apply for a patent or handle other patent-related matters in China, he or it shall entrust a legally established patent agency with the application and such matters."

The second paragraph is revised to read: "If a Chinese unit or individual intends to apply for a patent or handle other patent-related matters in China, it or he may entrust a legally established patent agency with the application and such matters."

12. The first paragraph of Article 20 is revised to read: "Any unit or individual that intends to apply for patent in a foreign country for an invention or utility model accomplished in China shall submit the matter to the patent administration department under the State Council for confidentiality examination. Such examination shall be conducted in conformity with the procedures, time limit, etc. prescribed by the State Council."

One paragraph is added as the fourth paragraph, which reads: "With regard to an invention or utility model for which an application is filed for a patent in a foreign country in violation of the provisions of the first paragraph of this Article, if an application is also filed for the patent in China, patent right shall not be granted."

13. One paragraph is added into Article 21 as the second paragraph, which reads: "The patent administration department under the State Council shall release patent-related information in a complete, accurate and timely manner, and publish patent gazettes on a regular basis."

14. The second paragraph of Article 22 is revised to read: "Novelty means that the invention or utility model concerned is not an existing technology; no patent application is filed by any unit or individual for any identical invention or utility model with the patent administration department under the State Council before the date of application for patent right, and no identical invention or utility model is recorded in the patent application documents or the patent documentations which are published or announced after the date of application."

The third paragraph is revised to read: "Creativity means that, compared with the existing technologies, the invention possesses prominent substantive features and indicates remarkable advancements, and the utility model possesses substantive features and indicates advancements."

One paragraph is added as the fifth paragraph, which reads: "For the purposes of this Law, existing technologies mean the technologies known to the public both domestically and abroad before the date of application."

15. Article 23 is revised to read: "A design for which the patent right is granted is not an existing design, and no application is filed by any unit or individual for any identical design with the patent administration department under the State Council before the date of application for patent right and no identical design is recorded in the patent documentations announced after the date of application."

"Designs for which the patent right is to be granted shall be ones which are distinctly different from the existing designs or the combinations of the features of existing designs."

"Designs for which a patent right is granted shall be ones which are not in conflict with the lawful rights acquired by others prior to the date of application."

"For the purposes of this Law, existing designs mean designs that are known to the public both domestically and abroad before the date of application."

16. One subparagraph is added into the first paragraph of Article 25 as Subparagraph (6), which reads: "designs that are mainly used for marking the pattern, color or the combination of the two of prints."

17. The second paragraph of Article 26 is revised to read: "In the written request shall be specified the name of the invention or utility model, the name of the inventor or designer, the name or title and the address of the applicant and other related matters."

The fourth paragraph is revised to read: "The written claim shall, based on the written description, contain a clear and concise definition of the proposed scope of patent protection."

One paragraph is added as the fifth paragraph, which reads: "With regard to an invention-creation accomplished by relying on genetic resources, the applicant shall, in the patent application documents, indicate the direct and original source of the genetic resources. If the applicant cannot indicate the original source, he shall state the reasons."

18. Article 27 is revised to read: "When a person intends to apply for a design patent, he shall submit a

written request, drawings or pictures of the design, a brief description of the design, and other relevant documents.

"In the relevant drawings or pictures submitted by the applicant shall clearly be shown the design of the products for which patent protection is requested."

19. The second paragraph of Article 31 is revised to read: "An application for a design patent shall be limited to one design. Two or more similar designs of one and the same product or two or more designs of products of the same kind that are sold or used in sets may be handled with one application."

20. The second paragraph of Article 47 is revised to read: "The decision on declaring a patent right invalid shall have no retroactive effect on any written judgment or written mediation on patent infringement that has been made and enforced by the people's court, or on any decision concerning the handling of a dispute over the patent infringement that has been performed or compulsively executed, or on any contract for permitted exploitation of the patent or for transfer of patent rights that has been performed--prior to the invalidation declaration of the patent right. However, compensation shall be made for the losses caused to another person mala fides by the patentee."

The third paragraph is revised to read: "Where the patent infringement compensation, royalties, and patent right transfer fees are not refunded pursuant to the provisions of the preceding paragraph, which constitutes a blatant violation of the principle of fairness, refund shall be made fully or partly."

21. Article 48 is revised to read: "Under any of the following circumstances, the patent administration department under the State Council may, upon application made by any unit or individual that possesses the conditions for exploitation, grant a compulsory license for exploitation of an invention patent or utility model patent:

"(1) When it has been three years since the date the patent right is granted and four years since the date the patent application is submitted, the patentee, without legitimate reasons, fails to have the patent exploited or fully exploited; or

"(2) The patentee's exercise of the patent right is in accordance with law, confirmed as monopoly and its negative impact on competition needs to be eliminated or reduced."

22. One article is added as Article 50, which reads: "For the benefit of public health, the patent administration department under the State Council may grant a compulsory license for manufacture of the drug, for which a patent right has been obtained, and for its export to the countries or regions that conform to the provisions of the relevant international treaties to which the People's Republic of China has acceded."

23. One article is added as Article 52, which reads: "If an invention involved in a compulsory license is a semi-conductor technology, the exploitation thereof shall be limited to the purpose of public interests and to the circumstances as provided for in Subparagraph (2) of Article 48 of this Law."

24. One article is added as Article 53, which reads: "Except for the compulsory license granted in

accordance with the provisions of Subparagraph (2) of Article 48 or Article 50 of this Law, compulsory license shall mainly be exercised for the supply to the domestic market."

25. Article 51 is revised as Article 54, which reads: "A unit or individual that applies for a compulsory license in accordance with the provisions of Subparagraph (1) of Article 48 or Article 51 of this Law shall provide evidence to show that it or he has, under reasonable terms, requests the patentee's permission for exploitation of the patent, but fails to obtain such permission within a reasonable period of time."

26. Article 54 is revised as Article 57, which reads: "The unit or individual that is granted a compulsory license for exploitation shall pay reasonable royalties to the patentee, or handle the issue of royalties in accordance with the provisions of the relevant international treaties to which the People's Republic of China has acceded. The amount of royalties to be paid shall be subject to consultation between the two parties. In the event of failure to reach an agreement between the two parties, the patent administration department under the State Council shall make a ruling."

27. Article 56 is revised as Article 59, which reads: "For the patent right of an invention or a utility model, the scope of protection shall be confined to what is claimed, and the written description and the pictures attached may be used to explain what is claimed.

"For the design patent right, the scope of protection shall be confined to the design of the product as shown in the drawings or pictures, and the brief description may be used to explain the said design as shown in the drawings or pictures."

28. The second paragraph of Article 57 is revised as Article 61, which reads: "If a dispute over patent infringement involves an invention patent for the method of manufacturing a new product, the unit or individual manufacturing the same product shall provide evidence to show that the manufacturing method of their own product is different from the patented method.

"If a dispute over patent infringement involves a utility model patent or a design patent, the people's court or the administration department for patent-related work may require the patentee or the interested parties to present a patent right assessment report prepared by the patent administration department under the State Council through searching, analyzing, and assessing the relevant utility model or design, which shall serve as evidence for trying or handling the patent infringement dispute."

29. One article is added as Article 62, which reads: "In a patent infringement dispute, if the accused infringer has evidence to prove that the technology or design exploited is an existing technology or design, the exploitation shall not constitute a patent right infringement."

30. Article 58 and 59 are merged into one article as Article 63, which reads: "A person who counterfeits the patent of another person shall, in addition to bearing civil liabilities in accordance with law, be ordered by the administration department for patent-related work to put it right, and the department shall make the matter known to the public, confiscate his unlawful gains and, in addition, impose on him a fine of not more than four times the unlawful gain; if there are no unlawful gains, a fine of not more than RMB

200,000 may be imposed on him; and if a crime is constituted, criminal responsibility shall be pursued in accordance with law."

31. One article is added as Article 64, which reads: "When the administration department for patent-related work investigates and handles the suspected counterfeiting of a patent, it may, based on evidence obtained, inquire the parties concerned, and investigate the circumstances related to the suspected illegal act; it may conduct on-the-spot inspection of the places where the suspected illegal act is committed; consult and duplicate the relevant contracts, invoices, account books and other related materials; and check the products related to the suspected illegal act and seal or detain the products that are proved to be produced by the counterfeited patent.

"When the administration department for patent-related work performs its duties as prescribed in the preceding paragraph, the parties concerned shall provide assistance and cooperation, instead of refusing to do so or creating obstacles."

32. Article 66 is revised as Article 65, which reads: "The amount of compensation for patent right infringement shall be determined according to the patentee's actual losses caused by the infringement. If it is hard to determine the actual losses, the amount of compensation may be determined according to the benefits acquired by the infringer through the infringement. If it is hard to determine the losses of the patentee or the benefits acquired by the infringer, the amount of compensation may be determined according to the reasonably multiplied amount of the royalties of that patent. The amount of compensation shall include the reasonable expenses paid by the patentee for putting an end to the infringement.

"If the losses of the patentee, benefits of the infringer, or royalties of the patent are all hard to determine, the people's court may, on the basis of the factors such as the type of patent right, nature of the infringement, and seriousness of the case, determine the amount of compensation within the range from 10,000 yuan to 1,000,000 yuan."

33. Article 61 is revised as Article 66, which reads: "If the patentee or interested party has evidence to prove that another person is committing or is about to commit a patent infringement, which, unless being checked in time, may cause irreparable harm to his lawful rights and interests, he may, before taking legal action, file an application to request that the people's court order to have such act ceased.

"When filing such an application, the applicant shall provide guarantee. In the event of failure to provide guarantee, the application shall be rejected.

"The people's court shall make a ruling within 48 hours from the time of its acceptance of the application. If an extension is needed under special circumstances, a 48-hour extension may be allowed. If a ruling is made to order to have the relevant act ceased, it shall be enforced immediately. The party that is dissatisfied with the ruling may file once for review, and the enforcement shall not be suspended during the period of review.

"If the applicant does not take legal action within 15 days from the date the people's court takes measures to have the relevant act ceased, the people's court shall lift such measures.

"If the application is wrong, the applicant shall compensate the losses suffered by respondent due to ceasing of the relevant act."

34. One article is added as Article 67, which reads: "To check a patent infringement, when evidence might be lost or might be hard to acquire thereafter, the patentee or interested party may, before taking legal action, file an application with the people's court for evidence preservation."

"If the people's court takes preservation measures, it may order the applicant to provide guarantee. If the applicant fails to provide guarantee, the application shall be rejected."

"The people's court shall make a ruling within 48 hours from the time of its acceptance of the application. If it rules to take preservation measures, such a ruling shall be enforced immediately."

"If the applicant does not take legal action within 15 days from the date the people's court takes preservation measures, the people's court shall lift such measures."

35. The first paragraph of Article 63 is revised as Article 69, and Subparagraph (1) is revised to read: "After a patented product or a product directly obtained by using the patented method is sold by the patentee or sold by any unit or individual with the permission of the patentee, any other person uses, offers to sell, sells or imports that product;"

One subparagraph is added as Subparagraph (5), which reads: "Any person produces, uses, or imports patented drugs or patented medical apparatus and instruments, for the purpose of providing information required for administrative examination and approval, or produces or any other person imports patented drugs or patented medical apparatus and instruments especially for that person."

36. The second paragraph of Article 63 is revised as Article 70, which reads: "Where any person, for the purpose of production and business operation, uses, offers to sell or sells a patent-infringing product without knowing that such product is produced and sold without permission of the patentee, he shall not be liable for compensation provided that the legitimate source of the product can be proved."

This Decision shall go into effect as of October 1, 2009.

The Patent Law of the People's Republic of China shall be revised and the order of the articles shall be rearranged correspondingly in accordance with this Decision, and the Law shall be promulgated anew.