

2020 AMENDMENTS TO CHINA PATENT LAW

On Oct. 17, 2020, the Thirteenth Standing Committee of the National People's Congress adopted a decision to amend the People's Republic of China Patent Law. The revised Patent Law ("New Patent Law") will become effective on June 1, 2021. This is China's fourth amendment to the Patent Law, more than 12 years since the last amendment, marking the longest gap between amendments in its history. Development of the fourth amendment started in 2014, and it includes significant changes to the Patent Law, particularly as it relates to design patents, patent enforcement and patent term adjustment.

Design Patents

1. Under Article 2 of the New Patent Law, a design patent may claim an article or portions of an article. This major change brings China's design patent protection into alignment with law in other countries and provides increased flexibility to design patent protection. In implementation of the New Patent Law, like in many countries in the world, solid lines are used to indicate the claimed design, and broken lines are used to indicate the overall appearance of the article.
2. Under Article 29 of the New Patent law, domestic priority may be claimed based on a design patent application filed in China within six months of the filing date of the design patent application.
3. Under Article 42 of the New Patent Law, the term of a design patent is changed from 10 years to 15 years. The term starts from the filing date of the design patent application.

Patent Enforcement

1. In protecting utility model or design patents through administrative actions or litigation, the patentee generally needs to submit a patent evaluation report. Under Article 66 of the New Patent Law, both the patentee and the accused infringer are allowed to provide a patent evaluation report.
2. Under Article 68 of the New Patent Law, the upper limit of penalty issued in an administrative action for patent passing off is increased to five times the illegal income or up to 250,000 RMB (approximately \$38,090 USD), from the current limit of four times the illegal income or up to 200,000 RMB (approximately \$30,470 USD). Passing off is

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SERVICES AND INDUSTRIES

Intellectual Property

misrepresentation of patent protection on a product, such as advertising or marking the product using an expired patent or a bogus patent number.

3. Under Article 71 of the New Patent Law, for willful patent infringement, in serious cases, punitive damages of one to five times the compensatory damages may be awarded. In situations where compensatory damages are difficult to determine, the court may award damages in the range of 30,000 RMB (approximately \$ 4,571 USD) to 5 million RMB (approximately \$760,000 USD), increased from the current range of 10,000 RMB (approximately \$1,523 USD) to 1 million RMB (approximately \$152,300 USD). The New Patent Law also changed the provisions on burden of proof and the calculation method of damages, and reduced the difficulty of providing infringement proof for patentees. The New Patent Law states, in order to determine the amount of compensation, the people's court may order the infringer to provide account books and information related to the infringement when the rights-holder has tried its best to provide evidence and the account books and information related to the infringement are mainly in the control of the infringer. If the infringer does not provide account books or if false account books and materials are provided, the people's court may determine the amount of compensation based on the claims and evidence provided by the rights-holder.
4. Under Article 74 of the New Patent Law, the statute of limitations on patent litigation has increased from two years to three years.

Patent Term Adjustment

Under Article 42 of the New Patent Law, if a patent application for invention is allowed more than four years from the filing date and three years from the request date for substantive examination, the China National Intellectual Property Administration (CNIPA), at the request of the patentee, should adjust the patent term to account for unreasonable delays. The unreasonable delays for patent term adjustment, however, do not include unreasonable delays caused by the applicant.

In sum, the changes in the New Patent Law increase the flexibility and patent terms of design patents, and effectiveness of patent litigation as an option for patent rights enforcement in China. Companies who hold patents or want to obtain patents in China should speak with their regular AT attorney or legal counsel to better understand the unique impact on their business.

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Rachel and Sabrina recently co-authored "[Revised China Patent Law Makes Litigation More Attractive](#)" for Law360 should you have interest in reading further.