COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF INTELLECTUAL PROPERTY LAW AND INTERNATIONAL LAW ON THE DRAFT AMENDMENTS TO CHINA'S PATENT LAW

美国律师协会知识产权法部门和国际法部门对中国专利法修改草案的评论

April 27, 2015

The views stated in this submission are presented only on behalf of the Intellectual Property Law and International Law Sections of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the Association.

本文提交的观点仅代表美国律师协会知识产权法部门和国际法部门。本文中的观点未经美国律师协会代表议会和美国律师协会理事会批准，因此不得解释为代表协会的政策。

The Sections of Intellectual Property Law and International Law of the American Bar Association (ABA) (together, the Sections) welcome the opportunity to comment on the Draft Amendments to China's Patent Law (Draft Amendments) issued by the State Intellectual Property Office (SIPO).[1] The Sections' comments are based upon the experience and expertise of its members who practice intellectual property law and competition law in the United States, Canada, the European Union, and other jurisdictions around the world.

美国律师协会（ABA）知识产权法部门和国际法部门（以下统称为“本部门”）很欢迎有机会对国家知识产权局发布的《中华人民共和国专利法修改草案 （征求意见稿）》(“修改草案”)进行评论。[2]本部门的评论由在美国、加拿大、欧盟和世界其他国家和地区从事知识产权法和竞争法工作并且具有丰富经验和专业知识的组织成员做出。

The Sections' comments are limited to Articles 3, 14, 60, 64 and 82 of the Draft Amendments, because of the fairly limited scope of the remainder of the Draft Amendments[3] and in the interests of time given the deadline for the submission of comments.

鉴于修改草案其余条款相对有限的范围[4]并且满足提交评论的截止期限，本部门的评论仅限于修改草案的第 3 条、第 14 条、第 60 条、第 64 条和第 82 条。

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[1] The Sections' comments are based on an informal translation of the Draft Amendments, which is appended for ease of reference.

[2] 本部门的评论以修改草案的非正式翻译为基础，为引用方便，该修改草案见附件。

[3] In the case of proposed new Article 80, based on the Explanatory Notes to the Draft Amendments ("Explanatory Notes"), the Sections understand that Article 80 is to be read in conjunction with new Article 79. Thus, we do not provide any comment on the Article 80 grant of a "license of rights" because it is only triggered if a patent holder has given written notice, pursuant to Article 79, that it is willing to permit any person to implement its patent.

[4] 对于所提议的新的第 80 条，根据修改草案注释（简称“注释”），本部门认为第 80 条应该与新的第 79 条结合起来进行理解。因此，我们对第 80 条赋予的“许可权”不做任何评论，因为只有专利权人根据第 79 条给出意图允许任何人实施其专利的书面通知，该条才适用。

Article 3
第三条

Proposed Article 3 expands the role of the patent administrative department, including local county offices, to allow SIPO to investigate and penalize patent infringement that has a "significant impact" and to engage in "market supervision" work. The local county IPOs likewise would be empowered to investigate and penalize patent infringement. It is unclear whether the department may independently initiate such investigations.

草案第 3 条扩大了包括县级地方人民政府专利行政部门在内的专利行政部门的权力，允许国家知识产权局调查和查处"有重大影响的"专利侵权行为并从事"市场监督管理"工作。地方知识产权局同样有权调查和查处专利侵权行为。这些部门是否可以独自发起此类调查尚不明确。

The proposed expanded role for the administrative department is larger than that of any other patent agency known to the Sections. In contrast with patent agencies, courts have established procedures for and experience in litigation and are better suited to make infringement determinations. This particular expertise is why such complex determinations are universally entrusted to the judiciary. China's courts now have three decades of patent adjudication experience and have developed significant guidelines in several areas of patent law. SIPO and the local IPOs lack substantial experience in patent adjudication. The Sections urge that the responsibility of making infringement determinations and imposing remedies for infringement be retained solely by China's courts, including the newly-established specialized Patent Courts, and not be delegated to an administrative agency. The Sections respectfully suggest that SIPO follow the pattern of other patent systems by entrusting such enforcement powers exclusively with China's courts, especially its Patent Courts.

上述提议行政部门扩大的权力要大于本部门所了解的任何其他专利机构的权力。相较于专利机构，法院已经制定了诉讼程序并且拥有诉讼经验，更宜于做出侵权判定。这方面的专长也是此类复杂判定通常由司法机关做出的原因。迄今为止，中国法院拥有三十年的专利审判经验并且已经在专利法的某些领域起到了重要的引领作用。国家知识产权局和地方知识产权局在专利审判上缺乏丰富的经验。本部门强烈要求将做出侵权判定和采取侵权补救措施的职责仅仅授予中国法院，包括新近成立的知识产权法院，而非赋予行政机构。本部门建议国家知识产权局效仿其他专利制度模式，将此类执行权力专门赋予中国法院，特别是知识产权法院。

Article 14
第 14 条

Proposed new Article 14 provides that "[t]he exercise of patent rights shall abide by the good faith principle, shall not harm public interests, shall not improperly exclude or restrict competition, [and] shall not impede the advancement of technology." The Explanatory Notes indicate that the objective of Article 14 is to prevent the "abusive use of patent right." The Sections suggest that Article 14, as currently proposed, may lead to inconsistent results. The

Sections recommend that if such an article is added to the Patent Law, it be revised to significantly narrow its focus to only on the abuse of patent rights – a legal concept derived from and defined in competition law. The Sections suggest that Article 14 simply state that "the exercise of patent rights under this law shall not derogate from the relevant provisions in the Anti-Monopoly Law and its implementing regulations." The State Administration for Industry and Commerce's new Rules on Stopping the Abuse of Intellectual Property to Eliminate or Restrict Competitive Conduct ("IP Abuse Rules") address the topic of patent abuse in detail.[5] The Sections' suggested revision of draft Article 14 would ensure that there is no conflict between the Patent Law and the Anti-Monopoly Law, legitimate patents rights are not unintentionally undermined, and the judiciary knows where to look for guidance on patent abuse.

草案第 14 条规定，"行使专利权应当遵循诚实信用原则，不得损害公共利益，不得不正当地排除、限制竞争，不得阻碍技术进步。"说明指出第 14 条的目的在于阻止"专利权滥用"。本部门认为当前所提议的第 14 条可能导致不一致的后果。本部门建议，如果要在专利法中加入该条，应将其缩限至仅仅关注于专利权滥用（该法律概念来源于竞争法并在其中进行了定义）。本部门建议只在第 14 条中简单地规定，"根据本法行使专利权不得违反反垄断及其实施细则中的有关规定。"国家工商总局《关于禁止滥用知识产权排除、限制竞争行为的规定》（以下简称"知识产权滥用规定"）对专利滥用进行了详细地规定。[6] 本部门认为第 14 条的修改应确保专利法和反垄断法之间不发生冲突，法定的专利权不会在无意中遭到破坏，司法机关知晓在何处寻找关于专利滥用的指导。

As to the remaining provisions of the proposed Article 14, that [t]he exercise of patent rights shall abide by the good faith principle, shall not harm public interests,…[and] shall not impede the advancement of technology," the Sections respectfully suggest that the remaining provisions are unsupported by sufficient guidance to ensure compliance with China's obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). China is bound under TRIPS to have a TRIPS-compliant patent law. In particular, it does not appear to the Sections that the remaining provisions are sufficiently defined to create the assurance that they will satisfy TRIPS Article 30, which only allows for "limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

至于所提议的第 14 条的其他规定，"行使专利权应当遵循诚实信用原则，不得损害公共利益……不得阻碍技术进步"，本部门特别指出，这些规定并未得到充足指导的充分支持，以确保符合世界贸易组织的《与贸易有关的知识产权协定》(TRIPS)。中国受 TRIPS 约束，专利法必须与 TRIPS 相符合。特别是，本部门认为这些规定不足以确保满足 TRIPS 第 30 条的规定，该条仅仅规定，"考虑到第三方的合法利益，可以对授予的独占权规定出有限的例外情况，其条件是这样的例外不得与专利的正常开发利用相抵触，并且不得不合理地损害专利权人的合法利益。"

[5] The IP Abuse Rules are the result of a lengthy drafting process, during which many stakeholders provided input.

[6] 知识产权滥用规定是经过一个漫长的起草过程，其间许多利益相关者提供投入，的结果。

"Shall abide by the good faith principle." Patent rights are, fundamentally, exclusionary rights[7] and exceptions should be specifically identified in the law[8]. However, given the broad and undefined language in draft Article 14, it does not appear to the Sections that there is sufficient guidance to the judiciary to ensure that such a broad principle is applied in a consistent manner in different cases. Without specific guidance, any refusal to license patent rights might be considered as bad faith.

"应当遵循诚实信用原则"。专利权从根本上属于排他权[9]，法律应该对例外情况进行特别明确的规定。[10]然而，草案第 14 条的表述过于宽泛且并不明确，本部门认为不足以确保司法机关在不同的案件中以一致的方式适用这条宽泛的原则。在缺乏明确指引的情况下，任何拒绝对专利权进行许可的行为都可能被视为不诚实守信。

"Shall not harm the public interest." Article 5 of the Patent Law allows SIPO to refrain from granting a patent for an invention that contravenes the moral order or is harmful to public interests, and this is consistent with TRIPS and the laws of other countries. Consequently, once a patent is granted, only limited restrictions should be placed on the exercise of those patent rights as patent owners may invest significant resources to implement the patent. The proposed "public interest" principle in draft Article 14 could be broadly applied to undermine patent rights because of its lack of limiting parameters. The possibility that a patent, issued as consistent with the public interest, might later become unenforceable under the undefined and broad provisions of draft Article 14 would significantly and unreasonably prejudice legitimate interests of patent owners. At a minimum, this Article 14 principle should be subject to and cross-reference the substantive and procedural protections in Chapter VI of the Patent Law that limit the availability and use of compulsory licenses.

"不得损害公共利益"。专利法第 5 条允许国家知识产权局不授予违反道德秩序或损害公共利益的发明以专利权，这与 TRIPS 协定和其他国家的法律相符合。因此，专利权授予后，鉴于专利权人可能在专利实施上投入大量的资源，只能在专利权的行使上施加有限的限制。由于缺少必要的限制，草案第 14 条所提议的"公共利益"原则的广泛适用可能会破坏专利权。符合公共利益的专利，可能由于根据草案第 14 条不明确和宽泛的规定变得无法执行，这种可能性将明显不合理地损害专利权人的法律利益，第 14 条的这一原则应该与专利法第六章中的实质性和程序性保护相一致，专利法第六章限制了强制许可的有效条件和使用。

Further, any provision that is added to the Patent Law such as draft Article 14 should be consistent with the following relevant WTO TRIPS principle that balances the public

[7] *See, e.g.*, PRC Patent Law Article 11 (identifying the rights granted in a patent).

[8] WTO TRIPS, Article 30 provides that there may be "limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

[9] 例如，参见《中华人民共和国专利法》第 11 条（专利授予后的权利确定）。

[10] 世界贸易组织 TRIPS 协定第 30 条规定："考虑到第三方的合法利益，可以对授予的独占权规定出有限的例外情况，其条件是这样的例外不得与专利的正常开发利用相抵触，并且不得不合理地损害专利权人的合法利益。"

interest and the exercise of patent rights: TRIPS Article 8(1) allows WTO members to "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement." This WTO principle suggests that the promotion of public interest in this context is limited to certain key industrial sectors, while Article 14 is a provision of general application and would potentially provide a "public interest" exception for any patent enforcement action in any sector of the economy. Moreover, TRIPS Article 8 is subject to the limitations in Article 30 and other limitations in TRIPS, while Article 14 lacks any limitations.

此外，如草案第 14 条等加入专利法的任何规定都应该与世界贸易组织的 TRIPS 协定中与平衡公共利益和专利权实施的以下相关原则保持一致：TRIPS 第 8 条第（1）项允许世界贸易组织成员"采取必要的措施来保护公众的健康和营养，维护在对于其社会经济和技术发展来说至关重要的领域中的公众利益，其条件是这样措施与本协议的规定相一致"。在这一语境下，该项世界贸易组织原则将公共利益的促进限定在某些主要的工业领域中，而第 14 条则是一项普遍适用的规定并且潜在地为任何经济领域中的专利实施行为提供了例外。而且，TRIPS 第 18 条受第 30 条和 TRIPS 协定中的其他限制性规定的支配，而第 14 条则缺乏任何限制。

"Shall not impede the advancement of technology." This principle also has insufficient definition to ensure it will not unreasonably interfere with the exercise of patent rights or unreasonably prejudice a patent owner. If SIPO decides to retain this principle in Article 14, the Sections suggest incorporating some of the limiting language of TRIPS Article 40 so that it provides more guidance and is limited to the concept of preventing patent abuse that has the effect of impeding the advancement of technology. The Sections also suggest that the phrase "impede the advancement of technology" be more fully spelled out. Otherwise, the current language of draft Article 14 is so broadly worded that it easily could be used for industrial policy purposes, or as with the public interest and good faith provisions unreasonably interfere with the exercise of patent rights or unreasonably prejudice a patent owner.

"不得阻碍技术进步"。 此项原则不够明确，难以确保不会不合理地阻碍专利权的实施或者不合理地侵害专利权人。如果国家知识产权局决定在第 14 条中保留这一原则，本部门建议加入一些 TRIPS 第 40 条中的限制性措辞，从而使这一原则能够提供更多的指引并且限定在预防产生阻碍技术进步后果的专利滥用这一概念范围内。本部门还建议将"阻碍技术进步"表述得更详细一些。否则，草案第 14 条中的当前这种过于宽泛的表述很容易基于产业政策的目的被利用，或者与公共利益和诚实信用的规定一起不合理地阻碍专利权的实施或者不合理地侵害专利权人的利益。

In summary, as currently drafted, draft Article 14 is too broadly worded to establish readily operable exceptions to the exercise of patent rights. It is important to establish objective criteria that parties can use to determine ex ante whether their IP-related conduct could run afoul of the Patent Law. Draft Article 14 is vague and subjective in defining prohibited conduct and if retained should be revised to include more concrete, objective criteria that may provide predictability and transparency.

综上所述，当前草案第 14 条的规定过于宽泛，难以建立可操作的专利权实施的例外性规定。建立起各方可以用来判断其知识产权相关行为是否与专利法相冲突的客观标准至关重要。草案第 14 条在禁止行为的定义上是模糊和主观的，如果对该条予以保留，则在草案中应该包括具有可预见性和透明度的更为具体、客观的标准。

Article 60
第 60 条

The Sections respectfully state that the power provided in the proposed amendments to Article 60, to "confiscate or destroy the infringing products, the parts, tools, modules or equipment that are used to manufacture the infringing products or implement the infringing methods", is a drastic remedy and not in accord with international norms. For example, the United States has no such remedy for patent infringement.[11] The Sections recommend that this remedy be deleted, or made available only in cases where the infringer has failed to comply with an order to stop infringement. Even in such cases, it should be employed only to the extent necessary to stop the infringement, recognizing that parts, tools, modules and equipment may also be used to manufacture non-infringing products.

本部门特别指出，草案第 60 条的修改所赋予的权力，"没收、销毁侵权产品、专用于制造侵权产品或者使用侵权方法的零部件、工具、模具、设备等"，是一种过于强烈的补救措施并且不符合国际准则。例如，美国并没有这种专利侵权补救措施。[12]本部门建议删除该项补救措施，或者这种措施只在侵权人没有遵守停止侵权命令的情况下采取。即使在这些情况下，也应该将其限定在阻止侵权行为的必要范围内，并且要辨别那些也可能用于制造非侵权产品的零部件、工具、模具和设备。

Article 64
第 64 条

The proposed amendments to Article 64 would implement a substantial expansion of the powers of the patent administrative department. The Sections respectfully question whether this expansion, as drafted, is advisable. The current version of Article 64 provided for investigative powers related to suspected counterfeit patent cases, and included the power to seal up or detain suspected counterfeits. The identification of counterfeits is relatively straightforward and can be done by simple examination of the products and the patents at issue. The amendments to Article 64 would add patent infringement to the scope of Article 64, thus empowering the patent administrative department to seal up or detain products suspected of patent infringement. Patent infringement is much more difficult to ascertain than counterfeiting and is often a subtle and hotly disputed issue. Making a determination of patent infringement typically involves construing the patent, taking evidence from both sides of the dispute and evaluating expert opinions. The Sections express concern that allowing products that are merely suspected of patent infringement to be sealed up or detained at a preliminary stage of an investigation would be unwarranted.

[11] Such a remedy may be imposed in trademark infringement situations.
[12] 此类补救措施可能被强加于商标侵权的情况。

草案第 64 条的修改将极大地扩大专利行政部门的权力。本部门质疑草案中的这种扩张是否明智。第 64 条的当前版本赋予了与调查假冒专利行为有关的权力，包括查封或扣押涉嫌假冒产品。假冒产品的鉴定相对简单并且通过对问题产品和专利进行简单的检测便可以完成。第 64 条的修改将专利侵权纳入第 64 条的范围，因而赋予专利行政部门查封或扣押涉嫌侵犯专利权产品的权力。专利侵权比假冒更难查明并且通常是一个微妙并激烈争论的问题。确定专利侵权通常包括专利分析、从争议双方取证以及评估专家意见。本部门明确担忧在调查的初步阶段允许对仅仅涉嫌侵犯专利权的产品进行查封或扣押是没有根据的。

The Sections commend the proposed amendment adding "products that willfully infringed patent rights and disturbed market order" to Article 64, insofar as this proposed amendment appears to limit the applicability of the remedies of Article 64. However, the Sections note that it may be particularly difficult to determine at a preliminary stage of an investigation whether an infringement was willful. Further, the phrase "disturbed market order" is vague and undefined, making it difficult to understand when the remedies of Article 64, as amended, would be available.

本部门赞同在第 64 条所提议的修改中增加"扰乱市场秩序的故意侵犯专利权的产品"，只要该修改提议对第 64 条救济措施的适用进行限制。然而，本部门注意到在调查的初步阶段确定侵权是否是故意的可能是特别困难的。此外，"扰乱市场秩序"这一措辞是模糊且不明确的，这使得很难理解什么时候适用修改后的第 64 条的救济措施。

Article 82
第 82 条

Proposed Article 82 addresses non-disclosure of standard essential patents by patent holders engaged in standard setting activities in China. In light of the IP Abuse Rules that address this situation in detail, the Sections urge SIPO to delete Article 82 from the final amendments. If an article is included addressing non-disclosure in standard setting, then the Sections urge that it be consistent with the IP Abuse Rules and impose no additional requirements.

草案第 82 条解决在中国参与标准制定活动的专利权人不披露其标准必要专利的问题。鉴于知识产权滥用规定详细地规定了这种情况，本部门请求国家知识产权局从草案中删除第 82 条。如果加入处理标准制定中的不披露的问题的条款，本部门请求与知识产权滥用规定保持一致并且不要增加额外要求。

Moreover, in referring to failure to disclose standard essential patents during the standard development process, draft Article 82 is at odds with the rules of at least some standards development organizations ("SDOs"). Its adoption would undermine the functioning of SDOs, their ability to adopt their own rules and the principle of voluntary participation. It may have the practical effect of requiring any patent holder participating in standard development to permit any implementer of the standard to use the patented technology, for several reasons. First, some

standards development organizations have no requirements to disclose patents. Second, during the standard development process, it is unclear which patents may be standard essential. Third, because the technology involved is often newly developed, there may be no patents or even patent applications yet. A provision in the Patent Law that may be construed to impose involuntary licensing commitments would significantly chill incentives to participate in standards development. The Sections therefore respectfully suggest that if Article 82 is retained it should be modified to provide that "A patent holder who during its participation in a national standard-setting process does not comply with the standards development organization's patent disclosure policy is deemed to permit the user who implements the standard to use the patented technology unless the standards development organization's patent disclosure policy provides otherwise."

此外，对于在标准制定过程中没有披露标准必要专利的情况，草案第 82 条至少与某些标准制定组织("SDOs")的规则不同。采用第 82 条将破坏标准制定组织的运作、其采用自身规则的能力以及自愿参与的原则。它可能产生要求所有参与标准制定的专利权人允许任何标准实施者使用其专利技术的实际效果，理由如下。第一，一些标准制定组织没有专利披露要求。第二，标准制定过程中，哪些专利是标准必要的可能并不明确。第三，由于涉及的技术常常是新近开发的，专利或专利申请可能并不存在。专利法中存在可以被解释为强行做出非自愿许可承诺的条款，这将严重打击参与标准制定的积极性。本部门因而建议，如果保留第 82 条，应该将其修改为"参与国家标准制定的专利权人在标准制定过程中不遵守标准制定组织的专利披露政策的，视为其许可该标准的实施者使用其专利技术，除非标准制定组织的专利披露政策另有规定"。

In all events, the Sections urge that the patent administration department should not determine disputed royalty rates. The patent administration department is ill-equipped to be a price regulator, and lacks procedures for hearing and cross-examining relevant evidence, including expert testimony. The licensor and/or licensee should be able to use the court system to set the royalty rate in the first instance.

在所有情形下，本部门敦促专利行政部门不应该对有争议的许可使用费进行裁定。专利行政部门并不具备调节价格的条件，并且没有听证和交叉检查相关证据的程序，包括专家证言。许可人和/或被许可人应该能够首先通过法院设定许可使用费。

Conclusion
结论

The Sections appreciate the opportunity provided by SIPO to comment on the Draft Amendments. We would be pleased to respond to any questions SIPO may have regarding these comments, or to provide additional comments or information that may be of assistance to SIPO.

本部门感谢有机会对国家知识产权局的修改草案进行评论。我们很乐于回答国家知识产权局对这些评论的任何疑问，或者进一步做出评论或提供可能对国家知识产权局有帮助的信息。

Patent Law of the PRC
Proposed Revisions (April 2015)

Chapter I General Provisions

Article 1 This law is enacted for the purpose of protecting the legitimate rights and interests of patentees, encouraging inventions, giving an impetus to the application of inventions, improving the innovative capabilities, and promoting scientific and technological progress as well as the economic and social development.

Article 2 The "inventions" as used in this Law means inventions, utility models and designs.

The term "invention" refers to any new technical solution relating to a product, a process or an improvement thereof.

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

The term "design" refers to any new design of a product's shape, pattern or a combination thereof, as well as the combination of the color and the shape or pattern of a product, which creates an aesthetic feeling and is fit for industrial application.

Article 3 The patent administrative department of the State Council shall be in charge for the administration of the patent work throughout China, uniformly accept and examine applications for patents, grant patents in accordance with the law, be responsible for works involving the market supervision and management of patents, investigate and penalize patent infringement and counterfeit conduct that have significant impact, be responsible for the construction of patent information public service system, promote the dissemination and utilization of patent information, grant patent agent's qualification according to the law, review and approve patent representation agencies.

The patent administrative department of each of the county-level's people's government , shall take charge of the administration of patents within its own jurisdiction, engage in patent administrative enforcements, investigate and penalize patent infringement and counterfeit conduct, provide patent public services.

Article 4 Where the invention for which a patent is applied for relates to the security or other vital interests of the State and is required to be kept confidential, the application shall be handled in accordance with the relevant provisions of the State.

Article 5 No patent shall be granted for an invention that contravenes any law or social moral or that is detrimental to public interests.

No patent will be granted for an invention based on genetic resources if the access or utilization of the said genetic resources is in violation of any law or administrative regulation.

Article 6 An invention made by a person in the execution of the tasks of the entity shall be a service invention. The right to apply for patenting a service invention shall remain with the entity. After the application is approved, the entity shall be the patentee.

For any non-service invention, the right to apply for a patent shall remain with the inventor or designer. After the application is approved, the inventor or designer shall be the patentee.

For an invention made by a person by taking advantage of the material and technical means of the entity where he works, if there is a contract between the entity and the inventor or designer regarding

the right to apply for patent and the ownership of the patent, the contractual stipulations shall prevail: In the absence of stipulations, the right to apply a patent shall belong to the inventor or designer.

Article 7 No entity or individual shall prevent the inventor or designer from filing an application for patenting a non service invention.

Article 8 For an invention made through the joint work of two or more entities or individuals, or made by an entity or individual upon the authorization of another entity or individual, the right to apply for a patent shall, unless it is otherwise agreed upon, remain with the entity or individual which made the invention or with the entities or individuals which jointly made the invention. After the application is approved, the entity (or entities) or individual(s) that filed the application shall be the patentee.

Article 9 One patent shall be granted to one invention. However, if a same applicant applied for both a patent for utility model and a patent for invention on a same day, if the patent for the utility model it has previously applied for has not terminated yet and if the applicant declares to waive the patent for utility model, the patent for invention can be granted.

Where two or more applicants file applications for a patent for an identical invention, the patent shall be granted to the applicant who is the first to file an application.

Article 10 The right to apply for a patent and the patent rights may be assigned.

Where a Chinese entity or individual is to assign the right to apply for a patent or a patent right to a foreigner or foreign enterprise or any foreign organization, it or he shall go through the formalities under relevant laws and administrative regulations.

Where the right to apply for a patent or a patent right is assigned, the parties concerned shall conclude a written contract, and have the contract registered in the patent administrative department of the State Council. The said contract shall be announced by the patent administrative department of the State Council. The assignment of the right to apply for the patent or the patent right shall come into force as of the date of registration.

Article 11 After the granting of patent for an invention or utility model, unless it is otherwise prescribed by this Law, no entity or individual is entitled to, without permission of the patentee, exploit the patent, that is, to make, use, promise the sale of, sell or import the patented product, or use the patented process and use, promise the sale of, sell or import the product directly obtained from the patented process, for production or business purposes.

After the granting of a patent for a design, no entity or individual shall, without permission of the patentee, exploit the patent, that is to say, they shall not make, promise to sell, sell, or import the product incorporating its or his patented design, for production and business purposes.

Article 12 Where an entity or individual exploits the patent of anyone else, it or he shall conclude a licensing contract with the patentee and pay a patent royalty to the patentee. The licensee has no right to license any entity or individual other than the entity or individual as stipulated in the licensing contract to exploit the said patent.

Article 13 After the publication of an application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.

Article 14 [Note: the original Article 14 is now Article 77 in the proposed revisions.] The

implementation of patent rights shall abide to the good faith principles, shall not harm public interests, shall not improperly exclude or restrict competition, shall not impede the advancement of technology.

Article 15 If there is any agreement between the joint owners of the right to apply for a patent or a patent right regarding the exercise of the relevant right, the agreement shall be followed. If there is no such agreement, any of the joint owners may exploit the patent independently or license others to exploit the patent by means of ordinary license. In the case of licensing others to exploit the patent, royalties charged shall be distributed among the joint owners.

Except for the circumstance as described in the preceding paragraph, the exercise of the right to apply for a patent or a patent right shall be based on the consensus of all joint owners.

Article 16 After a service invention is granted, the entity to whom a patent is granted shall give to the inventor or designer of the service invention a reward and shall, after exploitation of the patented invention, the entity shall pay the inventor or designer a reasonable remuneration on the basis of the scope of popularization and application as well as the economic benefits yielded.

Pursuant to Article 6(4) of this law, where the entity and the inventor or designer stipulates that the right to apply a patent belongs to the entity, the entity shall give the inventor or designer a reward or remuneration pursuant to the preceding paragraph.

Article 17 An inventor or designer has the right to expressly indicate in the patent documents that he is the inventor or designer.

A patentee has the right to label the patent on its patented product or on the package of the said product.

Article 18 Where any foreigner, foreign enterprise or other foreign organization that has no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with the agreement, if any, concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are a party, or on the basis of the principle of reciprocity.

Article 19 Where a foreigner, foreign enterprise or any other foreign organization that has no habitual abode or business office in China intends to apply for a patent or handle other patent-related matters in China, he or it shall authorize a legitimately formed patent agency in accordance with the regulations to act on his or its behalf.

To apply for a patent or handle other patent-related matters in China, a Chinese entity or individual may authorize a legitimately formed patent agency to act on its or his behalf.

A patent agent and patent agency shall abide by the laws and administrative regulations when filing applications for patents or handling other patent affairs as entrusted by the principal. It shall also be obligated to keep confidential the contents of the principal's invention, unless the application for patent has been published or announced. The specific measures for the administration of patent agents and patent agencies shall be formulated by the State Council.

Article 20 Where an entity or individual intends to file an application in a foreign country for patenting an invention or utility model accomplished in China, it or he shall report in advance to the patent administrative department of the State Council for confidentiality review. The provisions of the State

Council shall be followed in regard to the procedures and time limit for the confidentiality review.
A Chinese entity or individual may, in accordance with the relevant international treaties acceded to by the People's Republic of China, file an international application and received related protections. An applicant who files an international application shall abide by the provisions of the preceding paragraph.
The patent administrative department of the State Council shall handle international applications in accordance with the relevant international treaties acceded to by the People's Republic of China, this Law, and the relevant provisions of the State Council.
As to an invention or utility model for which a patent application is filed in a foreign country by violating the provision of paragraph 1 of this Article, no patent will be granted to it if a patent application has been filed in China.
Article 21 The patent administrative department of the State Council and the Board of Patent Appeals and Interferences shall, pursuant to the requirements of objectivity, impartiality, accuracy and timeliness, handle the relevant patent applications and appeals.
The patent administrative department of the State Council shall completely, accurately and timely announce the patent information and regularly publish patent gazettes, provide the basic data of patent information.
Before an application for patent is published or announced, the functionaries and other relevant persons of the patent administrative department of the State Council shall keep confidential the contents therein.

Chapter II Conditions for Granting Patents

Article 22 An invention or utility model for which a patent is to be granted shall be novel, inventive and practically applicable.
Novelty means that the invention or utility model is not an existing technology, and prior to the date of application, no entity or individual has filed an application heretofore with the patent administrative department of the State Council for the identical invention or utility model and recorded it in the patent application documents or patent documents released after the said date of application.
Inventiveness means that, as compared with the technology existing before the date of application the invention has prominent substantive features and represents a notable progress and that the utility model has substantive features and represents progress.
Practical applicability means that the invention or utility model can be made or used and can produce effective results.
The term “existing technology” as mentioned in this Law refers to the technologies known to the general public both at home and abroad prior to the date of application.
Article 23 Any design for which a patent is granted shall not be attributed to the existing design, and no entity or individual has, before the date of application, filed an application with the patent administrative department of the State Council on the identical design and recorded it in the patent documents published after the date of application.

As compared with the existing design or combination of the existing design features, the design for which a patent is granted shall have distinctive features.
The patented design may not conflict with the lawful rights that have been obtained by any other person prior to the date of application.
The term "existing design" as used in this Law refers to a design known to the general public both at home and abroad prior to the date of application.
Article 24 An invention for which a patent is applied for does not lose its novelty where, within six months before the date of application, one of the following events occurred:
(1) where it was first exhibited at an international exhibition sponsored or recognized by the Chinese Government;
(2) where it was first made public at a prescribed academic or technological meeting;
(3) where it was disclosed by any person without the consent of the applicant.
Article 25 For any of the following, no patent right shall be granted:
(1) scientific discoveries;
(2) rules and methods for mental activities;
(3) methods for the diagnosis or for the treatment of diseases, except for those concerning farm animals;
(4) animal and plant varieties;
(5) substances obtained by means of nuclear transformation; and
(6) the design, which is used primarily for the identification of pattern, color or the combination of the two on printed flat works.
For processes used in producing products referred to in items (4) of the preceding paragraph, a patent may be granted in accordance with the provisions of this Law.

Chapter III Application for Patents

Article 26 Where an application for a patent for invention or utility model is filed, a request, a description and its abstract, and claims shall be submitted.
An application shall expressly specify the name of the invention or utility model, name of the inventor, name and address of the applicant, and other matters.
The description shall clearly and completely describe the invention or utility model so as to enable a person skilled in the relevant field of technology to carry it out; where necessary, drawings are required. The abstract shall state briefly the main technical points of the invention or utility model.
The claims shall clearly and concisely state the requested patent protection scope in accordance with the specifications.
For an invention based on genetic resources, the applicant shall state the direct source and the original source of the genetic resources in the application documents. If the applicant is not able to state the original source, it or he shall state the reasons.
Article 27 To apply for patenting a design, the applicant shall submit an application, pictures or photos of the design, a brief introduction to the design, and other documents.

The relevant pictures or photos submitted by the applicant shall clearly show the product's design for which the patent protection is requested.

Article 28 The date on which the patent administrative department of the State Council receives the application shall be the date of application. If the application is sent by mail, the date of mailing indicated by the postmark shall be the date of application.

Article 29 Where, within twelve months from the date on which any applicant first filed in a foreign country an application for patenting an invention or utility model, or within six months from the date on which any applicant first filed in a foreign country an application for patenting a design, he or it files in China an application for patenting the same, he or it may, 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.

Where, within twelve months from the date on which any applicant first filed in China an application for patenting an invention or utility model, he or it files with the patent administrative department of the State Council an application for patenting the same, he or it may enjoy the right to priority.

Article 30 Any applicant who claims the right to priority shall make a written declaration in accordance with the regulations, and submit a copy of the patent application document which was first filed; if the applicant fails to make the written declaration or to submit the patent application document in accordance with the regulations, the claim to the right to priority shall be deemed as having not been made.

Article 31 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 attributed to a single general inventive concept may be filed as one application.

An application for a design patent shall be limited to one design. As to two or more similar designs for the same product or for products which fall into the same class and are sold or used in sets, an application for one design may be filed.

Article 32 An applicant may withdraw his or its application for a patent at any time before the patent right is granted.

Article 33 An applicant may make modifications to his or its application for a patent, but the modifications to the application for a patent for invention or utility model may not go beyond the scope of the disclosure contained in the initial description and claims, and the modifications to the application for a patent for design may not go beyond the scope of the disclosure as shown in the initial drawings or photographs.

Chapter IV Examination and Approval of Patent Applications

Article 34 Where, after having received an application for patenting an invention, the patent administrative department of the State Council finds, upon preliminary examination, that the application is in conformity with the requirements of this Law, it shall publish the application promptly after the lapse of eighteen full months from the date of application. Upon the request of the applicant,

the patent administrative department of the State Council may publish the application earlier.

Article 35 Upon the request of the invention patent applicant made at any time within three years from the date of application, the patent administrative department of the State Council will make a substantive examination on the application. If, without any justifiable reason, the applicant fails to request a substantive examination within the limit, the application shall be deemed to have been withdrawn.

The patent administrative department of the State Council may, on its own initiative, make a substantive examination on the application for a patent for invention when it deems it necessary.

Article 36 When the invention patent applicant requests a substantive examination, he or it shall furnish the reference materials of the invention that existed prior to the date of application.

Where an invention patent applicant has filed in a foreign country an application for a patent for the same invention, the patent administrative department of the State Council may require the applicant to submit within the specified time limit references retrieved for the purpose of examining that application, or the references of the examination result, in that country. If, without any justifiable reason, the said materials are not submitted within the specified time limit, the application shall be deemed to have been withdrawn.

Article 37 Where the patent administrative department of the State Council, after it has made the substantive examination on an invention patent application, finds that the application conforms to the provisions of this Law, it shall notify the applicant, requiring him or it to make a statement or revise the application within a specified time limit. If he or it fails to make a response without any justifiable reason, the application shall be deemed to have been withdrawn.

Article 38 Where, after the applicant has made a statement or revisions, the patent administrative department of the State Council finds that the invention patent application still does not conform to the provisions of this Law, the application shall be rejected.

Article 39 Where it is found after a substantive examination that there is no reason to reject the patent invention application, the patent administrative department of the State Council shall make a decision to grant a patent for the invention, issue an invention patent certificate, and register and announce it. The patent right for invention shall become effective as of the date of announcement.

Article 40 Where it is found after the preliminary examination that there is no reason to reject the application for patenting a utility model or design, the patent administrative department of the State Council shall make a decision to grant a patent for the utility model or design, issue the relevant patent certificate, and register and announce it. The patent right for utility model or design shall become effective as of the date of announcement.

Article 41 The patent administrative department of the State Council shall form a Patent Re-examination Board. If any patent applicant is dissatisfied with the decision of the patent administrative department of the State Council on rejecting the application, it/he may, within three months as of receipt of the notification, appeal to the Patent Re-examination Board for review. The Patent Reexamination Board examines the request for review, when necessary, may examine whether the patent application is in compliance with other provisions set forth under this Law. The Patent Re-

examination Board shall, after the review, make a decision and notify the patent applicant.
Where a patent applicant is dissatisfied with the review decision of the Patent Re-examination Board, it/he may, within three months as of receipt of the notification, bring a lawsuit with the people's court.
Chapter V Duration, Termination and Invalidation of Patents
Article 42 The duration of an invention patent shall be twenty years, the duration of the patent for a utility model shall be ten years, the duration of the patent for design shall be fifteen years, counted from the date of application.
Article 43 A patentee shall pay an annual fee beginning with the year in which the patent is granted.
Article 44 In any of the following cases, the patent shall be terminated before the expiration of its duration:
(1) an annual fee is not paid under relevant provisions;
(2) the patentee waives his or its patent by a written declaration.
Any patent which is terminated prior to the expiration of its duration shall be registered and announced by the patent administrative department of the State Council.
Article 45 Where, as of the announcement of the granting of the patent by the patent administrative department of the State Council, any entity or individual considers that the granting of the said patent does not conform to the relevant provisions of this Law, it or he may request the Board of Patent Appeals and Interferences to invalidate the patent right.
Article 46 The Patent Re-examination Board shall timely examine the request for invalidating a patent, when necessary, may examine whether the patent application is in compliance with other provisions set forth under this Law, make a decision and notify the petitioner and the patentee.
The decision on invalidating or upholding the patent right shall be registered and announced promptly by the patent administrative department of the State Council.
Where any party is dissatisfied with the decision of the Patent Re-examination Board on declaring a patent invalid or maintaining a patent, such party may, within three months as of receipt of the notification, bring a lawsuit to the people's court. The people's court shall notify the opposite party in the procedures for requesting invalidation that it or he should participate in the litigation as a third party.
Article 47 Any patent right that has been invalidated shall be deemed to be non-existent from the very beginning.
The decision on invalidating a patent shall, prior to the invalidation of the patent, have no retroactive effect on any judgment or mediation document on patent infringement which has been made and enforced by the people's court, on any implemented or compulsorily enforced decision concerning the settlement of a dispute over patent infringement, penalty decision, or on any performed contract for licensing a patent exploitation or for assignment of patent right. However, the patentee shall compensate for the damages it or he has maliciously caused to others.
Where, in accordance with the provisions of the preceding paragraph, the fact that no patent infringement compensation, no royalty for the exploitation of the patent or no patent assignment fee is refunded is obviously contrary to the principle of fairness, it shall be totally or partially refunded.

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Chapter VI Compulsory License for Exploitation of Patents

Article 48 Under any of the following circumstances, the patent administrative department of the State Council may, upon the application of an eligible entity or individual, grant it or him a compulsory license to exploit the patent for an invention or utility model:

(1) The patentee, after the lapse of 3 full years from the date when patent is granted and after the lapse of 4 full years from the date when a patent application is filed, fails to exploit or to fully exploit its or his patent without any justifiable reason; or

(2) The patentee's act of exercising the patent rights is determined as a monopolizing act and it is to eliminate or reduce the adverse consequences of the said act on competition.

Article 49 Where a national emergency or any extraordinary state of affairs occurs, or where the public interest so requires, the patent administrative department of the State Council may grant a compulsory license to exploit the patent for an invention or utility model.

Article 50 For the purpose of public health, the patent administrative department of the State Council may grant a compulsory license for a patented medicine so as to produce and export it to the country or region which conforms to the provisions of the relevant international treaty to which the People's Republic of China has acceded.

Article 51 Where an invention or utility model for which the patent was granted has seen any major technical progress of prominent economic significance when compared with another invention or utility model for which the patent has been granted earlier, and the exploitation of the later invention or utility model depends on the exploitation of the earlier one, the patent administrative department of the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model.

Where, according to the preceding paragraph, a compulsory license is granted, the patent administrative department of the State Council may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.

Article 52 Where the invention involved in the compulsory license is a semi-conductor technology, the exploitation of the compulsory license shall be limited only to public interests and the circumstance as described in Article 48 (2) of this Law.

Article 53 Besides the circumstances as described in Article 48 (2) and Article 50 of this Law in which a compulsory license is granted, the exploitation of a compulsory license shall be implemented primarily for supplying the domestic market.

Article 54 The entity or individual requesting, in accordance with the provisions of Article 48 (1) and Article 51 of this Law, a compulsory license for exploitation shall prove that it or he has not been able to conclude with the patentee a license contract for exploitation on reasonable terms within a reasonable timeframe.

Article 55 Where the patent administrative department of the State Council decides to grant a compulsory license for exploitation, it shall notify the patentee in time, and register it and make an announcement.

A decision on granting a compulsory license for exploitation shall, on the basis of the reasons for compulsory license, specify the scope and time of exploitation. When the reasons for compulsory license have been eliminated and will no longer occur, the patent administrative department of the State Council shall, upon request of the patentee, make a decision after examination on terminating the compulsory license.

Article 56 Any entity or individual who is granted a compulsory license for exploitation shall not have exclusive right to exploit the patent and shall not have the right to authorize anyone else to exploit the patent.

Article 57 The entity or individual that is granted a compulsory license for exploitation shall pay to the patentee a reasonable royalty or deal with the royalty issue under the relevant international treaties to which the People's Republic of China has acceded. If a royalty is to be paid, the amount of the royalty shall be decided by both parties upon negotiation. If the parties fail to reach an agreement, the issue shall be settled by the patent administrative department of the State Council.

Article 58 Where a patentee is dissatisfied with the decision of the patent administrative department of the State Council on granting a compulsory license for exploitation, or where a patentee, or an entity or individual to whom the compulsory license for exploitation is granted is dissatisfied with the ruling of the patent administrative department of the State Council on the royalties payable for compulsorily licensed exploitation, he or it may, within three months as of receipt of the notification, bring a lawsuit to the people's court.

Chapter VII Protection of Patent Rights

Article 59 The scope of protection of the patent right for an invention or utility model shall be determined by the terms of the claims. The description and the appended drawings may be used to interpret the claims.

The scope of protection of the patent right for design shall be determined by the product incorporating the patented design as shown in the drawings or photographs.

Article 60 In the event that a dispute arises out of any exploitation of a patent without permission of the patentee, that is, the infringement upon a patent right, the parties shall settle the dispute through negotiations. If they are not willing to negotiate or fail to reach an agreement through negotiations, the patentee or any interested party may either bring a lawsuit with the people's court, or request the patent administrative department, for settlement. If the patent administrative department ascertains at the time of settlement that infringement exists, it may order the infringer to immediately stop the infringement act, it may confiscate or destroy the infringing products, the parts, tools, modules or equipment that are used to manufacture the infringing products or implement the infringing methods. The party dissatisfied may, within 15 days as of receipt of the notification, bring a lawsuit with the people's court in accordance with the Administrative Procedural Law of the People's Republic of China. If the infringer neither brings a lawsuit within the time limit nor stops the infringement act, the patent administrative department may apply to the people's court for compulsory enforcement. The patent administrative department that settles the dispute may, upon request of the parties may hold a

mediation regarding the compensation amount for infringement upon the patent right. If no agreement is reached through mediation, either party may bring a lawsuit with the people's court in accordance with the "Civil Procedural Law of the People's Republic of China. The mediation agreement reached by the parties is validated by the people's court, when one party refuses to fulfill or fails to fully fulfill [the agreement], the other party may apply to the people's court to enforce [the agreement].

For conduct of willful infringement of patent right which allegedly disrupt market order, such as group infringement and repetitive infringement, the patent administration department shall investigate and penalize in accordance with the law; where the patent administration department finds that the willful infringement is established and [the conduct] disrupts the market order, it may order the infringer to immediately stop the infringement, confiscate or destroy the infringing products, the parts, tools, modules or equipment that are used to manufacture the infringing products or implement the infringing methods. For illegal business turnover of more than 50,000 yuan, [the patent administrative department] shall impose a fine of more than one time and less than five times of the amount of illegal business turnover; for zero illegal business turnover or illegal business turnover of 50,000 yuan or less, [the patent administrative department] shall impose a fine of 250,000 yuan or less.

Where the review or process of a patent infringement dispute is suspended due to a request to invalidate the patent, after the announcement of the decision on invalidating or upholding the patent right, the people's court and the patent administrative department shall promptly review or process [the dispute].

Article 61 Where any dispute over patent infringement involves a patent for invention for the manufacturing process of a new product, the entity or individual manufacturing the identical product shall provide proof on the difference of its own process used in the manufacture of its product from the patented process.

Where any dispute over patent infringement involves a patent for utility model or design, except for the circumstances in which an immediate review or process is required, the people's court or the patent administrative department shall require the patentee or the interested parties to present a patent assessment report issued by the patent administrative department of the State Council, after the retrieval, analysis and assessment of the pertinent utility model or design, as a proof for trying and settling the dispute over patent infringement.

Once the people's court concluded that an infringing conduct has been established, in order to determine the amount for compensation, under the circumstances in which the right holder has used its best efforts to present evidence, and the related account books or materials are mainly in control by the accused infringer, [the court] may order the accused infringer to provide account books and materials relating to the infringing conduct; if the accused infringer does not provide or provides false account books or materials, the people's court may refer to the right holder's claims and evidence to rule on the amount of compensation.

Article 62 In a dispute over patent infringement, if the accused infringer has evidence to prove that the technology or design it or he exploits is an existing technology or design, no patent infringement is

constituted.

Article 63 Whoever counterfeits the patent of anyone else shall, in addition to bearing civil liabilities in accordance with the law, be ordered by the patent administrative department to make a correction and be announced by the patent administrative department. For illegal business turnover of more than 50,000 yuan, [the patent administrative department] shall impose a fine of more than one time and less than five times of the amount of illegal business turnover; for zero illegal business turnover or illegal business turnover of 50,000 yuan or less, [the patent administrative department] shall impose a fine of 250,000 yuan or less. If any crime is constituted, it or he shall be subject to criminal liabilities according to law.

Article 64 When the patent administrative department investigates into and deals with a suspected patent infringement conduct or counterfeit patent case on the basis of the evidence it has already gathered, it may query the relevant parties so as to find the information relevant to the suspected violation, may conduct an on-site inspection over the site of party suspected of having committed the violation, may consult and copy the contracts, invoices, account books and other materials relating to the suspected violation, may check the products relating to the suspected violation, and may seal up or detain the products that willfully infringed patent rights and disturbed market order, or counterfeit patented products as proved by evidence.

When the patent administrative department exercises the functions as prescribed in the preceding paragraph according to law, the parties shall assist and cooperate with it and shall not reject or hamper it. Where the parties refuse or hamper the patent administrative department to carry out its duties, the patent administrative department may issue warnings; where the conduct constituted a violation of the security administration, the public security will impose security administration penalty in accordance with the law; where [the conduct] constituted crime, [the party] shall be responsible for criminal liabilities in accordance with the law.

Article 65 The amount of compensation for a patent infringement shall be determined on the basis of the actual losses incurred to the patentee as a result of the infringement. If it is difficult to determine the actual losses, the actual losses may be determined on the basis of the gains which the infringer has obtained from the infringement. If it is difficult to determine the losses incurred to the patentee or the gains obtained by the infringer, the amount shall be reasonably determined by reference to the multiple of the royalties for this patent. In addition, the compensation shall include the reasonable expenses that the patentee has paid for stopping the infringement.

If it is difficult to determine the losses incurred to the patentee, the gains obtained by the infringer as well as the royalty obtained for the patent, the people's court may, by taking into account such factors as the type of patent, nature and particulars of the infringement, etc., decide a compensation in the sum of not less than 10, 000 yuan but not more than 1 million yuan.

For willful patent infringement conduct, based on factors including circumstances, scale, consequences of damages, the people’s court shall raise the amount of compensation to two to three times , based on the amount of compensation determined by the two preceding paragraphs.

Article 66 Where a patentee or interested party has evidence to prove that someone else is

committing or is going to commit an infringement upon the patent right, and its (his) lawful rights and interests will be damaged and are difficult to be remedied if the said infringement is not stopped in time, it or he may, prior to initiating a lawsuit, apply to the people's court for taking such measures as ordering the stop of the relevant act.

When an applicant files an application, it shall provide a guarantee. If it or he fails to do so, the application shall be rejected.

The people's court shall make a ruling within 48 hours as of its acceptance of an application. If it is necessary to extend the time limit in a special circumstance, the time limit may be extended for up to 48 hours. If a ruling is made to stop the relevant act, it shall be executed immediately. If any party refuses to accept the ruling, it (he) may apply for one review. The execution of the ruling is not suspended during the process of review.

If the applicant fails to lodge a lawsuit within 15 days after it takes such measures as ordering the stop of the relevant act, the people's court shall lift the said measure.

Where there are errors in an application, the applicant shall compensate the party against whom an application is filed for the losses caused by the stop of the relevant act.

Article 67 To stop a patent infringement, the patentee or any interested party may apply to the people's court for preserving the evidence when such evidence is likely to be destroyed and hard to be obtained again.

The people's court may order the applicant to provide a guarantee for the preservation. If the applicant fails to do so, its or his application shall be rejected.

The people's court shall make a ruling within 48 hours after it accepts an application. If it makes a ruling on preserving the evidence, the ruling shall be executed immediately.

If the applicant fails to initiate a lawsuit within 15 days after the people's court has taken the measure of preserving the evidence, the people's court shall terminate the said measure.

Article 68 The statute of limitation on an action against an infringement upon a patent right shall be two years counted from the date on which the patentee or any interested party knows about or should have known about the infringing act.

Where anyone uses an invention after the application for a patent for this invention is published but before the patent right is granted without paying adequate royalties, the statute of limitations for the patentee to claim payment of such royalties shall be two years, commencing from the date when the patentee knows or ought to know that his invention is used by some else. However, if the patentee has known or ought to have known about this fact prior to the date when the patent right is granted, the statute of limitations shall commence from the date when the patent right is granted.

Article 69 None of the following circumstances shall be deemed an infringement upon a patent right:

(1) using, promising to sell, selling or importing any patented product or product directly obtained under the patented process after the said product is sold by the patentee or by its (his) licensed entity or individual;

(2)having made identical product or having used the identical process or having made necessary preparations for making such a product or using such a process prior to the date of application, and

continuing making such product or using such a process only within the original scope;
(3) for any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China, its using the relevant patents in accordance with any agreement concluded between China and that country to which the foreign means of transport belongs, or in accordance with any international treaty to which both countries have acceded, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations;
(4) using relevant patents solely for the purposes of scientific research and experiment; and
(5) producing, using or importing patented medicine or patented medicinal equipment for the purpose of providing the information as required for administrative examination and approval, and producing and importing the patented medicine or patented medicinal equipment exclusively for the said purpose.

Article 70 Whoever uses or sells a patented product without knowing that the product was produced and sold without permission of the patentee or a product directly obtained from a patented process for the purpose of production and business operation is not required to bear the liabilities for compensation provided that it or he can prove that the product is obtained from a legal source.

Article 71 [new addition] Where the Internet service provider know or should have known that the Internet user infringes patent right by utilizing the Internet services provided, but failed to adopt necessary measures to stop, such as deleting, blocking or disconnecting the link to the infringing products, [the Internet provider] shall be jointly and severally liable with the network users.

Where the patent right holder or the interested party have evidence to prove that the Internet user utilized the Internet service to infringe its patent rights, [it] may inform the Internet service to adopt necessary measures as described in the preceding paragraph to stop [the infringement]. Where the Internet service provider fails to adopt necessary measures upon valid and effective notice, [it] shall be jointly and severally liable with the network users for the expanded portion of damages.

Article 72 [new addition] In the absence of the State Council's permission, entities and individuals are prohibited to engage in the practice patent representation. The patent administrative department shall order the [entities or individuals] who violate this rule to cease the illegal conduct, confiscate illegal gains, and may impose a fine.

Article 73 Whoever, in violation of the provisions of Article 20 of this Law, files in a foreign country an application for a patent, if it or he has divulged any state secret, he shall be subject to an administrative sanction by the entity where he works or by the competent authority at the higher level. If any crime is constituted, he shall be subject to the criminal liabilities.

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Article 74 No patent administrative department shall participate in the business activities such as recommending patented products to the public.

Where a patent administrative department violates the provisions of the preceding paragraph, it shall be ordered by its superior organ or its supervision organ to make a correction and eradicate the ill effects. The illegal proceeds, if any, shall be confiscated. If the circumstance is serious, the directly liable person-in-charge and other directly liable persons shall be subject to an administrative sanction

in accordance with the law.

Article 75 Where any staff member of a state organ for patent administration or of any other relevant state organ neglects his duties, abuses his powers, practices favoritism for himself or his relative, if any crime is constituted, he shall be subject to criminal liabilities according to law. If no crime is constituted, he shall be given an administrative sanction according to law.

Chapter VIII The Implementation and Use of Patents

Article 76 [new addition] Patent administrative departments of all levels shall promote the implementation and use of patents, encourage and regulate patent information market services and patent operation activities.

Article 77 [originally Article 14] Where any patent for invention owned by a state-owned enterprise or public institution is of great significance to the interests of the state or to the public interests, the relevant competent department of the State Council and the people's government of the province, autonomous region, or municipality directly under the Central Government may, upon approval of the State Council, decide to popularize and apply the patent within the approved scope, and allow designated entities to exploit the patent; and the exploiting entity shall, in accordance with the legal provisions of the state, pay royalties to the patentee.

Article 78 [new addition] After a reasonable period of time after the national research and development institutions or universities obtained a patent through service invention, if neither self-implemented nor make the necessary preparations for implementation, nor transferred and licensed to others to implement, without changing the ownership of the patent, the inventor or designer may negotiate with his or her entity to self-implement or permit others to exploit the patent, and enjoy the corresponding rights and interests in accordance with the agreement.

Article 79 [new addition] Where patentee declares in writing to the patent administration department under the State Council that it is willing to permit any person to implement its patent, and specify the licensing fees, it shall be announced by the patent administration department under the State Council, and execute a license of rights.

Where license of rights is proposed for utility models or design patents, [the party] shall provide patent evaluation report.

The patent owner shall submit a withdrawal of the declaration of license of rights in writing to the patent administration department under the State Council, and the patent administration department shall make an announcement. The licensees prior to the withdrawal of the announcement will not be affected by the withdrawal.

Article 80 [new addition] Any party who wishes to implement the license of rights shall notify the patent holder in writing and make license fee payment.

During the period of licensing of license of rights, the patent holder shall not grant exclusive license or file for an injunction.

Article 81 [new addition] Where disputes arises between the parties with regard to the license of rights, the patent administration department under the State Council shall adjudicate. The party who is

dissatisfied with the ruling may bring a lawsuit with the people's court within fifteen days of receipt of the notice of decision.

Article 82 [new addition] Patent holder who does not disclose its standard essential patents during its participation in the national standard-setting process is deemed to permit the user who implements the standard to use the patented technology. License fees shall be negotiated by the parties, if the parties are not able to reach an agreement, the patent administration department of the local people's government shall adjudicate. If the party is dissatisfied with the ruling, the party may appeal to the people's court within three months from the date of receipt of the notice.

Article 83 [new addition] For pledged patent, the pledgor and the pledgee shall jointly register for patent pledge registration with the patent administrative department under the State Council, the effective date of the pledge starts with the date of registration.

During the pledge period, if the value of the patent is significantly decreased, the pledgee may request the pledgor to provide separate or increased guarantee; where the pledgor does not provide separate guarantee, the pledgee may dispose of the pledged patents.

Chapter VIII Supplementary Provisions

Article 84 To apply for a patent or going through other formalities with the patent administrative department of the State Council, the applicant shall pay the prescribed fees.

Article 85 [new addition] The Patent Agent Association is a legally established social organization, it is a self-discipline organization of the patent agency profession, it receives guidance and supervision from the patent administration department under the of the State Council.

Patent agents and patent agencies shall join Patent Agent Association. Patent Agent Association disciplines members who violates the professional self-discipline rules.

Article 86 This Law shall enter into force on April 1, 1985.