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THE PATENT SYSTEM IN CHINA

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Intellectual property comprises two main branches: one is industrial property and the other is copyright. In the field of industrial property China protects inventions, utility models, designs, trademark and trade names. The grant of patents for inventions, utility models and designs is regulated by the Patent Law, 1984, the registration of trademarks by the Trademark Law, 1982, the Registration of trade names by the Interim Provisions Concerning the Registration and Administration of the Names of Industrial and Commercial Enterprises, 1985. As to copyright: the General Principles of the Civil Law, 1986, provides that citizens and legal persons shall enjoy copyright; they shall have the right to be named, to make works known to the public, to publish works, to receive remuneration, etc., according to the law; when the copyright is infringed, its owner has the right to demand that the infringement be ceased and compensation provided for any injury. The copyright law is now in active preparation. The Patent Law is administered by the Patent Office, the Trademarks Law and the Interim Provisions Concerning the Registration and Administration of the Names of Industrial and Commerce Enterprises and administered by the State Administration for Industry and Commerce. The future copyright law will be administered by the Copyright Office under the State Council.

I shall now speak about the patent system in China.

The Patent Law was promulgated on March 12, 1984, and entered into force on April 1, 1985. It is virtually the first patent law of the People's Republic of China.

The Situation before Enactment of the Patent Law

A 1950 statute entitled the Provisional Regulations on the Protection of the Invention Right and the Patent Right, established a double-track system of the patent and the invention certificate. The holder of a patent enjoyed a patent right, that is, an exclusive right to exploit the patented invention. The holder of an invention certificate enjoyed an invention right, that is, a right to money award, medal, etc., whereas the right to exploit and dispose of the invention belonged to the State. Both the patent right and the invention right had a duration of three to fifteen years. From 1953 to 1957 only 6 invention certificates and 4 patents were issued in accordance with the said Regulations. Starting from 1958 no patents or invention certificates were issued. These Regulations were in force for so short a time that they did not leave much impression in the mind of the people.

The said Regulations were officially abolished in 1963. To replace them, the Regulations on Awards for Inventions were issued at the same time. Under the new Regulations, inventions were no longer protected but were to be encouraged by citations and awards only. These Regulations, however, soon ceased to be effective because of the outbreak of the so-called Cultural Revolution. After the Cultural Revolution, the Regulations on Awards for Inventions were reissued with minor amendments. Under these Regulations, the

invention which was granted an invention certificate and award belonged to the state and all entities throughout the country (including entities under collective ownership) could use such inventions when needed. As a matter of fact, however, such inventions were treated differently from other articles of state property, because inventions were not priced and not recorded in the accounts. Any entity could use them freely. For that reason, inventions were not treated as "property" in the legal sense of the word.

Drafting of Patent Law

Almost at the same time China decided to start the modernization programme. It has adopted the policy of reform, opening to the outside world and invigorating the national economy. China needs foreign investment, advanced technology and management techniques. In order to improve the environment of investment and technology import from abroad, China started to draft a series of laws concerning trade and investment, including the Law on China-Foreign Joint Ventures, the Trademark Law and the Patent law.

The drafting of the Patent Law was started in the Spring of 1979. We had no experience in the field of patents. We had to look at the experience and the patent systems of foreign countries. For this purpose, China sent personnel to foreign countries to study patent systems. The drafting group studied the patent laws of more than thirty countries. In addition, foreign experts were invited to China to give lectures on patent law.

I would like to point out that in the course of drafting the Patent Law and establishing the patent system, China has obtained much assistance from the World Intellectual Property Organization, and also much assistance from many national patent offices, the European Patent Office, other international patent organizations and friends in industrial property circles. They passed on to us much valuable experience, put forward many useful suggestions, furnished us with a large number of patent specifications, and also helped train a large number of personnel. Such assistance and enthusiasm are highly commendable. We are deeply grateful.

Once the drafting was started, a question which had to be decided first of all was, should China, as in the past, adopt a double-track system of patent and inventor's certificate, or adopt a single system of patent protection? It was not difficult for us to make a decision on such a question. Because, at that time, China had already made a decision to carry on a reform of the economic structure, to change the equalitarian system of income distribution and enlarge the decision-making power of enterprises. Under the inventor's certificate system, after an inventor has been issued such a certificate, the right to exploit the invention belongs to the state. This means that all the entities under socialist public ownership are free to make use of the invention. Though the entity in which the invention was made has expended manpower, it has no right to remuneration. Thus, few entities would be willing to make investment in research and working. Such a system is also in contradiction with the policy of enlarging the decision-making power of enterprises in operation and business. It is for all these reasons that China decided not to adopt the inventor's certificate but the patent system.

On the other hand, there were people who were reluctant to give up the inventor's certificate system. They questioned whether the patent right, which is exclusionary in nature, granted to entities under socialist public ownership would suit the socialist system of China. There were also people

who doubted whether now it was the right time for China to have a patent system, because China, as a developing and technologically backward country, had very few inventions which were patentable.

The essence of the question is, whether technical inventions should be protected or not. We consider that technical inventions have the attributes of commodity and so should be protected. The technical invention is the fruit of men's work. It embodies men's intellectual work, which is decisive, and manual work. In making inventions men have to make use of instruments, apparatus and equipments which are also the fruit of men's intellectual and manual work. Hence the technical invention has value. When it is applied in production, it can be turned into productive force and produce economic, technical or social effects. Therefore the technical invention has also use value. For this reason it has the attributes of commodity. It is property. It can be transferred like ordinary commodities. It is on this account that the technical invention has to be protected as property. If it is not protected, the inventor cannot be compensated for the expenses he has incurred in making the invention, still less benefited by the invention itself. This is, of course, not the correct policy of encouraging inventive activity.

After repeated discussions and considerations, the conclusion was reached that, from a long-term and overall point of view, China should have a patent system.

The drafting work of the Patent Law lasted five years, during which six of the drafts were sent to the departments, provinces and municipalities for comments. There were three principles guiding the drafting work: first, the Law should be conducive to encouragement of inventive activity; second, the Law should promote the application and spreading of inventions and creations; and third, the Law should help the import of advanced technology from abroad. In order to bring about these principles, the drafting group tried hard to work out a system which would not only suit the specific political and economic systems of China and meet the needs of reform of economic, scientific and technological structures, but also be consistant with the Paris Convention for the Protection of Industrial Property and international practice in the patent field, so as to make it acceptable to inventors and enterprises at home and abroad.

After the Patent Law was promulgated in March, 1984, China acceded to the Paris Convention on March 19, 1985. Since the entry into force of the Patent Law on April 1, 1985, any national of the Paris Union countries and any national of other countries which have the right to enjoy national treatment under the Patent Law, are entitled to obtain patents in China.

Where any national of the Paris Union countries files a national or regional application for a patent for invention or utility model, or for a patent for design, in one of the Paris Union countries and subsequently, within 12 or 6 months from the date of the first filing, files another application for a patent for the identical invention or utility model, or for the identical design, in China, he may claim a right of priority under the Patent Law.

I shall now speak about the main features of the Patent Law.

Subject Matters of Protection

The Patent Law provides for the grant of patents for three subject matters, that is inventions, utility models and designs. Little need be said about the necessity of protection of inventions and designs. However, a few words should be said about the necessity of protection of utility models. There are a dozen or so of countries in the world which provide for a system of utility model. Some of them protect the utility model by registration, and some protect it by patents. The Chinese Patent Law protects it by patents also. From the point of view of China, utility models are considered necessary to be protected for the following reasons:

1. China is a developing country and is still backward in the field of technology. In the foreseeable years to come, the great majority of the technical achievements made in the various organizations and by individuals would be of a lower level of inventiveness, that is, they are utility models and not inventions. Without protecting these achievements the Patent Law can hardly be said that it is conducive to encouragement of inventive activity. An advancing technology cannot rely alone on the adoption of inventions of a high standard, but must also have the support of minor developments. The protection of utility models can encourage and stimulate domestic innovations and inventions.

2. The adoption of the system of utility model can relieve the Patent Office by offering simpler and speedy granting procedure to applicants for utility models. If this system is not adopted, the applicants would convert part of their applications to those for patent for invention and thus increase the workload of the Patent Office in examination as to substance.

3. As a result of the adoption of the utility model system in the Patent Law, the applicant can enjoy more effective protection after his application for patent for invention is published. Under the Patent Law, an application for a patent for invention and an application for a patent for utility model cannot be converted into each other. However, the law does not exclude the application to file, at the same time or one after another, two kinds of applications for the same subject matter. If the applicant files only an application for a patent for invention, he can enjoy a provisional protection after the application is published within 18 months from the date of filing. But if he files, in addition, an application for a patent for utility model, he can be protected by that patent after the application for a patent for invention is published.

It now appears that the inclusion of the ulitity model in the law was correct. From April 1, 1985 until August 31, 1987, the total number of applications for patents for utility models filed with the Patent Office was 25512 (99% of which were filed by domestic applicants), which far exceeds the total number of those for inventions. The filings are steadily increasing. This clearly demonstrates that the system greatly stimulates enthusiasm for inventiveness among the people. Many of the utility models which have been granted patents are really valuable and have played a positive role in the development of the economy.

Exclusion from Patent Protection

The patent laws of many countries, especially those of the developing countries, do not grant patents to all fields of technical inventions. Typical examples of the technical fields excluded from patent protection are food and beverages, pharmaceuticals, chemical substances and substances obtained by means of nuclear transformation. The reasons for such exclusion are well known: to protect the lives and health of the people, to protect the relevant domestic industries, and to protect the security of the State. There were such exclusions even in the patent laws of certain highly developed countries. The exclusions were repealed only some ten or twenty years ago. Such experience deserves our attention. China is a developing and technologically backward country. We have no experience in the field of patents. Therefore, a restrictive protection is provided for in the Patent Law in respect of the technical fields mentioned above. The products are not patentable, only the processes used in producing the products other than nuclear substances are patentable.

It should be noted that not all chemical substances are excluded from protection. The Patent Law stipulates that substances obtained by means of a chemical process are not patentable. Therefore, any composition or mixture composed of two or more kinds of chemical substances which do not produce chemical reactions with each other, catalysts, and any agricultural chemical composed of one compound as an active ingredient and one or more other effective ingredients, for example, insecticide and herbicide, are patentable. Any new use of a known substance may be protected by a process patent.

Micro-biological processes and the product of such processes, except for the micro-organism itself and the products which are not patentable according to the Patent Law, are patentable.

Computer programs are not patentable. However, if an invention in which a computer program is involved makes a technical contribution to the known technology, for example, program-controlled machine or a program-controlled process, it is normally regarded as patentable.

Substantive Requirements for Grant of Patent Right

When China was to establish a patent system for the first time, an important question which had to be considered was, whether China should establish a patent system with a high standard patentability or with a low standard patentability. Specifically speaking, would China grant patent protection to technical inventions which had already been patented or published abroad? We consider that it is preferable for China to establish a patent system with a high standard patentability in order that the system could play an important role in promoting the development of technology in the country. Any technical invention which has been patented or published abroad should be considered as having lost novelty and is no longer patentable in China. The patent for invention granted by the Patent Office should be of a high standard so as to acquire a high reputation.

Based upon the above considerations, the Patent Law provides as follows:

Concerning the criterion of novelty, the Law adopts a mixed system prescribing universal novelty as far as publications in tangible form are concerned and local novelty as far as use and any other forms of disclosure are concerned. Publications in tangible form means any printed, typewritten or handwritten publications, as well as microfilms, tape, disc recordings, computer cards, etc. The decisive moment for determining prior art is the date of filing or priority date. In addition, the contents of any other persons' domestic patent applications having an earlier date of filing will also affect the novelty of a subsequent application, provided that the earlier application described the identical invention or utility model and was published after the said date of filing.

A grace period of six months is stipulated by the Patent Law where the subject matter of an application was first exhibited at an international exhibition sponsored or recognized by the Chinese Government, or where it was first made public at a prescribed academic or technological meeting, or where it was first disclosed by any person without the consent of the applicant. This means that if the applicant files an application within six months from the date on which the said event occurred, the invention or utility model does not lose its novelty. But if any of these events occurred in a foreign country, such disclosures will not be taken into consideration when a patent application is filed in China. Because under the Patent Law, disclosure abroad will be taken into consideration only if it is made in publications.

Inventiveness is defined in the patent laws of a number of countries in a negative way. It is called "non-obviousness". This term is not easily understood by the Chinese public. Hence the Patent Law defined it in a positive way. It says, inventiveness means that, as compared with the technology existing before the date of filing, the invention has prominent substantive features and represents a notable progress and that the utility model has substantive features and represents progress. Substantive features means the essential differences of the invention or utility model from the existing technology. All the necessary features constituting the invention or utility model must not be directly deducible from the existing technology by a person having ordinary skill in the relevant field of technology. Progress means technical advance over the existing technology. The Patent Law requires that the inventiveness of the invention should be prominent, and the progress should be notable. In contrast, for a utility model, it is sufficient that it has substantive features and that it represents progress. This is the demarcation line between the two.

When examining the application for patent for invention, the Chinese Patent Office will weigh up the standards of inventiveness, sufficient disclosure, etc., roughly in line with the standards practised in the patent offices of some important countries.

Practical applicability means that the invention or utility model can be made or used in the industry and can produce effective results.

Any design for which patent rights may be granted must possess novelty and originality, that is, it must not be identical with or similar to any design which, before the date of filing, has been publicly disclosed in publications in the country or abroad or has been publicly used in the country. In addition, it should create an aesthetic feeling and should be fit for industrial application.

In addition, any invention, utility model and design for which a patent is applied for must not be contrary to the laws of the state or social morality or detrimental to public interest.

Examination of Application

In view of the fact that the patent system was newly established in China, and there would be only a limited number of qualified examiners, it was suggested that China should adopt a registration system for the grant of patents or adopt a registration system at the beginning and change to an examination system after a number of years.

After repeated consideration, it was decided, in accordance with the expected strength of qualified examiners and the role of inventions, utility model and designs would play respectively in the development of national economy, to adopt two kinds of procedures for the grant of patents: one is an examination as to substance for any application for patent for invention, and the other is an examination as to form with an opposition procedure for an application for patent for utility model or design.

Generally speaking, inventions are of greater significance than utility models or designs for the development of the economy. If a patent for invention is granted without examination as to its substance, it is of not much significance because it is not known whether or not the patented invention fulfills the conditions of patentability. The patentee does not know the real value of his invention, therefore, he would hesitate to make any decision to invest in exploiting the invention. Competitors do not know whether or not their business activities would infringe the patent. Therefore, from the point of view of development of economy, the adoption of the examination as to substance for the grant of patent for invention would be a great advantage. It has a further advantage in that it contributes to the raising of the scientific and technological level of the country. Of course, it is very expensive to practise such a system because it requires enormous documentation, especially a well-organized collection of search files and the use of computers, and a highly specialized staff. However, from a long-term point of view, it deserves much investment support.

The system of examination which China adopts is deferred examination. After receiving an application, the Patent Office will first of all examine it mainly as to its conformity with the formal requirements prescribed by the law. On points of substance, the Patent Office shall examine the application as to whether or not there are obvious substantial deficiencies. If this preliminary examination is favorable, the Patent Office shall publish the application within 18 months from the date of filing or the priority date. The Patent Office puts off the examination as to substance until after the applicant makes a request for it. The request must be made at any time within three years from the date of filing or the priority date. If the request is not made within that period, the application shall be deemed to have been withdrawn. We consider that, under the deferred examination system, the majority of applicants for patents for invention will not request examination as to substance at the same time as they file their patent applications. Moreover, there will be a part of the applications which will be deemed to have been withdrawn because of failure to meet the three-year time limit for requesting examination as to substance. This will reduce the examining workload of the Patent Office.

The Patent Law provides that, when the applicant for a patent for invention requests examination as to substance, he shall furnish prior art reference materials concerning the invention. If the applicant has filed in a foreign country an application for a patent for the same invention, he shall furnish documents concerning any search or the results of any examination made in that country at the time of requesting examination as to substance. The documents thus furnished merely serve the purpose of facilitating the evaluation of the novelty and inventiveness of the invention claimed in the application. The Patent Office will not draw any other conclusions from the materials thus furnished. The Patent Office will independently make its decisions of approval or rejection.

If after examination as to substance the Patent Office finds that there is no cause for rejection of the application, it shall publish the application to give third parties an opportunity to file opposition to the grant. If the application is rejected by the Patent Office, the applicant has the right to request the Patent Re-examination Board to make a re-examination. If he is not satisfied with the decision of the Board, he may institute legal proceedings in court.

As mentioned above, the Patent Law provides for an examination as to form with an opposition procedure for any application for patent utility model or design. This examination as to form includes also an examination as to whether or not there are obvious substantive deficiencies. Any third party is allowed to file an opposition to the grant before the patent is granted. The advantage of an opposition procedure prior to the grant is that the number of patents for utility model or design which are invalid for lack of patentability can be reduced to a certain extent.

Attribution of Patent Right

China is a socialist country in which there exists socialist public property, that is, (a) property under ownership by the whole people, (b) property under collective ownership by the working prople, and (c) private property under ownership by Chinese citizens and by foreigners. The patent is a form of industrial property which must suit the system of property ownership in China. When the ownership of the patent right is considered, the interests of the State, the collective and the individual must be taken into account. An important principle of the Patent Law is, the distinction between a service invention (that is, an invention made by a staff member in execution of the tasks of the entity in which he works) and a non-service invention. So far as a non-service is concerned, the right to apply for a patent belongs to the inventor. After the application is approved, the patent right is owned by him. So far as a service invention is concerned, the right to apply for a patent belongs to the entity, regardless of whether the entity is an entity under ownership by the whole people or under collective ownership, and regardless of whether the entity is a foreign enterprise or a Chinese-foreign joint venture enterprise located in China.

Next, after the application is approved, a distinction must be made between the application filed by an entity under ownership by the whole people and the application filed by an entity other than those under ownership by the whole people. If the application was filed by an entity other than those under ownership by the whole people, the patent right shall be owned by the

entity or enterprise which applied for it. If the application was filed by an entity under ownership by the whole people, the patent right shall be "held" by that entity. This means that, under the circumstances, the patent right originally should belong to the State. However, in order to meet the needs of economic reform and enlarging enterprises' decision-making power, the Patent Law makes a distinction between the right of ownership and the right of management, and provides that the patent right shall be held by the entity under ownership by the whole people. This means that, in the last analysis, the patent right is owned by the state, but the entity under ownership by the whole people is entrusted to hold it. It shall be managed by that entity. Such entity has the right to exploit, or to authorize other entities to exploit, the patented invention, and to receive fees for exploitation. Any assignment, however, must be approved by the competent authority at the higher level.

The Patent Law provides that, after being granted the patent right, the entity owning or holding it shall award to the inventor of a service invention a money prize and, upon exploitation of the patented invention, shall award to the inventor a remuneration based on the extent of application and spreading and the economic benefits yielded. In so doing, the interests of the inventor are secured.

The principles mentioned above apply also to utility models and designs.

Rights and Obligations of Patents

The patent right conferred by the Patent Law is an exclusive right. The patentee of a patented product has the right, within the duration of the patent right, to forbid any third party, without his authorization, to make, use or sell the patented product for production or business purposes in the country, regardless of the process by which such product is made. He has also the right to forbid any third party to use or sell indentical products imported from a foreign country. However, he has no right to forbid such importation.

If the patent right granted is for a process, the patentee has the right, within the duration of the patent right, to forbid any third party, without his authorization, to use the process for production or business purposes in the country. It should be pointed out that the effect of the process patent does not extend to the product directly obtained by the patented process. If the patentee desires the use and sale of the product to be protected, he must include a product claim in the patent, provided that the product is patentable. If he does not include a product claim, the use or sale by any third party of such product is not an infringement. The patentee's only remedy is to sue the party who makes the product in the country by the patented process without his authorization. This may present some difficulties for the patentee where the product is not patentable under the Patent Law, for example, pharmaceuticals and chemical substances obtained by means of a chemical process. We have taken note of this problem and will study it when we make a revision of the law. Under the present circumstances, it is recommended that the patented process should be used in the country so that the importation of the product directly obtained by such process would be rendered unnecessary.

One of the main purposes of the Patent Law is to foster the application and dissemination of the patented invention (and utility model, the same below) and promote the development of the national economy. For this reason, under the Patent Law, the patentee has the obligation to work his patented invention, that is, to make the patented product or use the patented process, in China. He may not substitute import and sale of such product for working. He may work his patented invention himself or authorize other persons to work it. But the working must be done in China.

If the patentee fails, without any justified reason, to work his patented invention in China, the Patent Office may possibly, by the expiration of three years from the grant of the patent and upon the request of an entity which is qualified to work the invention, grant a compulsory license to work it. If non-working is based on any justified reason, the request for compulsory license shall be refused. Whether any argument put forward by the patentee is justified or not shall be determined by the Patent Office according to the circumstances. If the patentee is not satisfied with the decision of the Patent Office, he may appeal to the Court.

In addition to the compulsory license based on non-working, the Patent Law stipulates two other measures which allow the working of the patented invention without any agreement on the part of the patentee.

The first measure is compulsory license based on interdependence of inventions. Where an invention for which a patent right is granted is technically more advanced than another invention for which a patent right has been granted earlier, and the working of the later invention depends on the working of the earlier invention, if the earlier patentee refuses to grant a license to work the earlier invention, the Patent Office may, on the request of the later patentee, grant a compulsory license to work the earlier invention. The purpose of this provision is to prevent the working in the country of a patented invention constituting a technical advance from being blocked by the patentee of the earlier invention. Where such a compulsory license is granted, the Patent Office may, upon the request of the earlier patentee, also grant a compulsory license to work the later invention.

The Patent Law stipulates that any entity or individual that is granted a compulsory license shall not have an exclusive right to work the invention and shall not have the right to authorize working by any others. Therefore, the patentee himself may still, if he so wishes, work this patented invention in China.

The second measure is working by third persons authorized by the Government. The Patent Law provides that, in respect of any patent for an important invention held by a Chinese entity under ownership by the whole people, the competent departments concerned of the State Council or the governments of provinces, autonomous regions or municipalities directly under the Central Government shall have the power, in accordance with the State plan, to decide that the patentee must allow certain designated entities to work that patentee invention. In respect of any patent of Chinese individual or entity under collective ownership, of the patent is of great significance to the interests of the State or to the public interest and is in need of dissemination and application, the competent departments concerned of the State Council may, after approval by the State Council, treat the patent in a similar way. In either case, the entity must pay a fee for exploitation to the patentee.

The second measure is designed according to the specific conditions of China. Its purpose is to adapt the patent right of an exclusionary nature to the commodity economy with planning in a socialist country. With such measure, any important patented invention which is in need of extensive application can be disseminated without resort to the ordinary licensing procedure.

It should be stressed that the second measure is strictly restricted to the patent right of the Chinese entities and individuals, especially to the patent right held by the entities under ownership by the whole people. It does not apply to foreigners' patents, nor to the patent of Chinese-foreign joint venture enterprises located in China.

So far as the rights of a foreign patentee are concerned, aside from the compulsory licenses mentioned above, there are no provisions in the Patent Law applicable for the exploitation of the patented invention by the Government or by third parties authorized by the Government for reasons of public interest without any agreement on the part of the patentee. Moreover, there are no provisions for revocation of any patent right by the Government for reasons of non-working of the patented invention in the country up to a certain number of years. Likewise there are no provisions for expropriation of any patent right by the Government for reasons of public interest. This is the result of careful considerations. In order to encourage foreigners to come and apply for patents and transfer their patented technology to China, the Patent Law merely stipulates that the Patent Office may, when necessary, grant compulsory licenses for the prevention of abuses which might result from the exercise of the exclusive rights conferred by the patent. This is considered appropriate in the light of the policy adopted by the Chinese Government and the actual conditions existing in China.

Duration, Cessation and Invalidation of Patent Right

The duration of the patent right for invention is 15 years, and that for utility model and design is 5 years, counted from the date on which the application was filed in China. The duration of the patent right for invention is not renewable, whereas the duration of the patent right for utility model and design is renewable. Before the expiration of that patent right, the patentee may apply for a renewal for 3 years.

Where the patentee abandons his patent right by a written declaration before the expiration of its duration, or where an annual fee is not paid as prescribed, the patent right shall cease.

Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning.

If any person considers that the grant of a patent right is not in conformity with the provisions of the Patent Law, he may request the Patent Reexamination Board to declare that patent right invalid. This procedure is considered especially necessary in respect of the patent right for utility models and designs, because no examination as to substance is carried out before their grant. Anyone who is sued by the patentee or by his exclusive licensee for infringement of his patent right may request the invalidation of the patent on the ground that the subject matter does not fulfill the

conditions of patentability. With respect to the patent right for invention, if any party is not satisfied with the decision of the Patent Reexamination Board he may appeal to the Court. With respect to the patent right for utility models and designs, however, the decision of the Board is final. No party may appeal to the Court.

Infringement of Patent Rights

Anyone who exploits the patented invention, utility model or design without the authorization of the patentee, constitutes infringement of the patent right. That is to say, anyone who makes, uses or sells the patented product, or uses the patented process, or makes or sells the product incorporating the patented design, for production or business purposes without the authorization of the patentee, constitutes infringement of the patent right. The Patent Law stipulates, however, that none of the following acts will be deemed an infringement:

(1) Any act of exploiting done not for production or business purposes, especially any act done solely for the purposes of scientific research and experimentation;

(2) Use or sale of a patented product which was made and sold by the patentee or with the authorization of him;

(3) Use or sale of a patented product not knowing it was made and sold without the authorization of the patentee;

(4) Use of the patented product on any foreign means of transport which temporarily enters the territory, the territorial water or territorial airspace of China in accordance with any agreement with China or on the basis of the principle of reciprocity, for its own needs in its devices and installations;

(5) Any act of exploiting the identical invention or creation by the person who has the right to prior use;

(6) Any act of exploiting a patented invention or creation by a compulsory licensee; and

(7) Any act of exploiting a patent invention or creation of the Chinese patentees by the entity which is authorized by the Government or its competent department concerned.

The extent of protection of the patent right for 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. This means that the claims are not to be interpreted solely in a strict literal sense. On the other hand, the claims are not a guideline which can be interpreted freely. The extent 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.

The patentee bears the burden of proving infringement when he institutes legal proceedings. In the case of process patent, it is difficult for the patentee to provide proof of infringement. Therefore the Patent Law

stipulates that if the infringement dispute concerns a patent of process for the manufacture of a product, the alleged infringer manufacturing the identical product must furnish proof of the process used in the manufacture of his product. This provides the owner of a process patent with stronger protection.

When an infringement occurs, there are two channels through which the patentee can have a legal remedy. One is to institute legal proceedings in the Court. The other is to make a request for handling to the administrative authority for patent affairs. Both authorities have the power to order the infringer to stop the infringing act and to compensate for the damage. The administrative authorities for patent affairs are specially established for dealing with patent infringement cases. They are staffed with technical personnel who have received special training in patent law and other laws. They are established under the competent departments concerned of the State Council and the people's governments of the provinces, autonomous regions, municipalities directly under the Central Government, coastal open cities and special economic zones. There are several advantages when infringement cases are handled by such authorities: simple and convenient procedure, speedy handling, less expenses and no hurt to both parties' feelings. The decision of such authorities has the same binding force as the Court's decision. Any party dissatisfied with the decision of such authorities may institute legal proceedings in the Court. If such proceedings are not instituted and if the order is not complied with, the administrative authority concerned may approach the Court for compulsory execution.

The time limit for instituting legal proceedings concerning the infringement of patent right is two years counted from the date on which the patentee or any interested party obtains or should have obtained knowldege of infringing act.

Implementation of Patent Law

In order to carry the Patent Law into effect, China has built up a patent working system which includes, with the Patent Office as the core, administrative authorities for patent affairs, patent agencies, a network of Chinese patent documentation services, patent documentation subcenters. Since 1980 the Patent Office has organized a number of training courses in which thousands of patent personnel, including examiners, lawyers, agents and persons managing patent documentation were trained. With such a working system and a large number of patent personnel the Patent Law entered into force in April, 1985.

The total number of patent applications which the Patent Office received during the period from April 1, 1985 until August 31, 1987, is 49768, including three kinds of patent applications. Out of this number, 21911 applications are for patent for invention, 25512 applications are for patent for utility model, 2345 applications are for patent for design. The total number of applications coming from abroad is 12729, which accounts for 25.6% of the total. So far as applications for patent for invention are concerned, the number of domestic applications is 10173, which makes up 46.4% of the total, and the number of foreigners' applications is 11738, which makes up 53.6% of the total. According to the statistics of the whole year of 1986, the total number of patent applications is 18509. Out of this number, 8009 applications are for patent for invention, 43.6% of which are filed by domestic applicants and 56.4% of which came from abroad.

The filing of patent applications has been stable, showing a trend of increase. Except of April 1, 1985, the first day on which the Patent Law came into force, 3445 applications were filed, the average number of applications the Patent Office received each day is 40 applications in 1985, 50 applications in 1986 and 70 applications in 1987. During the first 8 months of 1987, 16887 applications for three kinds of patents were received. The average number of applications received each month in 1987 is over 2100. It is estimated that the total number of applications in 1987 would reach 25000.

The average number of applications coming each month from abroad was 551 applications during the 9 months in 1985, 402 applications during 1986, and 367 applications during the first 8 months in 1987, showing a trend of decrease. This decrease in mainly due to the fact that applications coming from Japan were reduced considerably in 1986 and 1987, as compared with the figure of 1985. At present, so far as applications coming from abroad are concerned, applications from the United States of America top the list, those from Japan are the next, and the following in order are Federal Republic of Germany, the United Kingdom, the Netherlands, France, Switzerland and 45 other countries and regions. Most of the applications coming from abroad are for patent for invention, which makes up 92.2% of foreigners, total applications up to the end of August, 1987.

Up to August 31, 1987, the Patent Office granted a total of 6874 patents, out of which 5719 were patents for utility model, 830 were patents for design. There were only 325 patents for invention. This number is rather small. This was due to the fact that in 1985 and 1986 the classified search files were still under preparation and the examiners lacked practical experience in examination. Starting from this year classified search files have been preliminarily built up. It is believed that in the future, examination as to substance will be gradually accelerated on the premise that the quality of examination is assured.

Initial results have been achieved in promoting the working of patented technology, which is, we believe, an important aspect of the patent system. According to an investigation by sample, 100 out of 228 items of patented technology in Beijing, and 61 out of 118 items of patented technology in Tianjin, have been worked respectively. In other places the government departments have also paid close attention to the working of patented technology. "Technology Fairs", in which patented technology also participated, were often held in various cities. In order to show the results of the exploitation of patented technology, a patented technology exhibition of a small scale was held under the auspices of the Patent Office during the Second National Conference of Patent Work, November, 1986.

Most of the patents which have been granted are patents of utility model, which accounts for 83.5% of the total patents. Under the Patent Law, the application for patent for utility model is not examined as to substance. They should have been approved speedily. However, it took more than a year for part of such applications to be approved. It is too long. This is due to the fact that the majority of such applications were filed by independent inventors and the requests, descriptions and claims were often not in conformity with the regulations. They had to be corrected and amended. On the other hand, the number of applications for patent for utility model has been steadily increasing. The number of such applications during the first

seven months of 1987 amounts to the total number of such applications of the whole year of 1986. It appears that the number of utility model examiners is not enough. This has delayed the grant of the patent. We are planning to make a study of the grant procedure and see if any adjustment could be made.

In Western countries, enterprises are the main users of the patent system. In China, enterprises are undergoing structural reform. They have been found to have filed too few applications. In 1985, the number of applications filed by enterprises accounts for only 12% of the total domestic patent applications. In 1986, the percentage rose to 14.7%. On this account the question of strengthening the patent work in enterprises was discussed at the Second National Conference on Patent Work, November, 1986. At the beginning of 1987, the Patent Office issued a directive to that effect jointly with the State Economic commission, State Scientific and Technological Commission and Ministry of Finance. As a result of this directive, the competent departments concerned of the State Council, the governments of provinces, autonomous regions and municipalities, and enterprises began to attach much importance to the patent work. Training courses have been organized in several cities to train patent personnel for the enterprises. The number of patent applications filed by enterprises during the first half of 1987 is 1346, an increase of 85.7% as compared with the figure of the same period of 1986. In the future, with the deepgoing reform of the economic structure and the strengthening of research and development activities, enterprises will gradually become important users of the patent systems.

It is now two and a half years since the entry into force of the Patent Law. Our experience shows that the Law is in keeping with the specific conditions of China and is workable in practice. We have reason to be optimistic about the prospect of the patent system in China. But we have often to improve and adapt it to the changing conditions. We are planning to revise the law and the regulations on the basis of our experience and with reference to the recent developments of patent law in the international sphere in a few years to come. We will make a study of a number of questions, including questions of substance, for example, the extent of protection, and questions of procedure, for example, the grant procedure in respect of applications for patent for utility model and design. The question of accession to the Patent Cooperation Treaty and the Budapest Treaty on the International Recognition of the Deposit of Micro-organism for the Purposes of Patent Procedure will be studied in due course.

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