

# PUBLICATION

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## Patent Protection in China: Myth Versus Reality

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Over the past 25 years, China has adopted laws protecting intellectual property, but the perception that China does not protect intellectual property persists.<sup>1</sup> Recent developments in Chinese patent law, however, challenge that perception. On March 8, China's Ministry of Commerce announced a plan to revise 17 intellectual property rights related laws and regulations including trademarks, copyrights and patents. Recent criminal enforcement also has added teeth to the laws.

The patent law of the People's Republic of China provides for protection of "patents of invention, utility models and industrial design."<sup>2</sup> Once a patent right is granted, "no entity or individual may, without authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to use, sell or import the product directly obtained by the patented process ..."<sup>3</sup>

To obtain a patent in China, the patented subject matter must possess novelty inventiveness and practical applicability.<sup>4</sup> It should be noted, however, that patents are not granted for:

- scientific discoveries;
- rules and methods for mental activities;
- methods for the diagnosis or for the treatment of diseases;
- animal and plant varieties<sup>5</sup>; and
- substances obtained by means of nuclear transformation.<sup>6</sup>

To file nationally in China, foreign applicants not having a residence or establishment in China for filing a patent application must appoint as agent one of the agents specially designated by the China Intellectual Property Office to represent foreign parties. An application based on a U.S. utility application may be filed in China by two routes. First, it may be filed through the Paris Convention within 12 months of filing the U.S. priority application. If this route is selected, the Chinese translation of the U.S. patent application is considered the priority document. Errors in translation cannot be corrected. Another route for submitting a patent application in China is the Patent Cooperation Treaty (PCT). The English language PCT application is considered the priority document if the PCT route is selected; thus, if an error in translation occurs, recourse can be made to correct the translation.

The election of the route to file relates to the subject matter. For example, if the patent application relates to a pharmaceutical composition or a method to make a pharmaceutical composition, it is best to file via the PCT route as the filing procedure allows correcting the translated application. A PCT application is submitted within 12 months of the U.S. priority application and is considered the international phase. The applicant has 30 months from the date the U.S. priority application is filed to file an application in a specific country, in what is known as the national phase.

The major types of patents are patents of invention, utility models and industrial design patents. The duration of protection for a patent of invention is 20 years from the date of filing the application in China (subject to the

payment of annual fees; no extension). Patents for invention are substantively examined for novelty, inventive step and industrial applicability. Utility models relate to new technical devices concerning a shape, structure or combination of these in an article that is suitable for practical application. Utility model applications are only examined for form; that is, they are examined to determine whether they are properly filed. The length of the patent term is ten years from the date of filing the application in China (subject to the payment of annual fees; no extension). Industrial design patents last ten years from the date of filing the application in China (subject to the payment of annual fees; no extension). An industrial design patent covers the unique appearance of an object. For example, objects such as fans, dental implants and backpacks can be the subjects of design patents.

Chinese statistics indicate that between 1985 and 2004, more than 7.8 million patent applications were filed with the State Intellectual Property Office of the People's Republic of China (SIPO). Statistics also show that filings increased 38 percent from 2002 to 2003.<sup>7</sup>