

China Law Update

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China's New Patent Law Effective October 1, 2009

On December 27, 2008, China's top legislature (the National People's Congress) approved the revision of the Patent Law. It became effective on Oct 1. The law was promulgated in 1984 and had previously been revised in 1992 and 2000. The first amendment added pharmaceutical compositions to the list of patentable items and introduced China's membership in the Patent Cooperation Treaty ("PCT"). The second amendment responded to the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement.

Main Points

The new law adopts the "absolute novelty" standard as condition for granting patents, replacing the "relative novelty" standard in the previous amendment. Under the "absolute" standard, an invention or utility model must not be a technology known to the general public, both in China and abroad. In comparison, the "relative novelty" standard only requires the technology to be new in China. The new standard will reduce patent infringement resulting from manufacture of foreign products that are not yet publicly known by Chinese companies in China.

Chinese individuals and entities can now apply for international patents under the new law without first applying for Chinese patents as previously required. However, the administrative department of the State Council may undertake a security check if an applicant wants to apply for patent after it filed an application in a foreign country for the same invention. Failure to go through the security check will cause the Chinese patent not to be granted.

Moreover, the new law enhances the power of the government to grant compulsory licenses upon application or by itself under an emergency. It is worth noting that compulsory licensing for patented drugs for public health is added into the new law. This type of mandatory licensing has been tried in several Asian countries. The law also added provisions protecting the nation's genetic resources. Applicants are required to provide the direct source and the original source when applying for patents for inventions based on genetic resources.

In addition, the updated law also authorizes the People's courts to fine the infringer between 10,000 yuan to 1 million yuan as compensation when actual losses incurred cannot be identified. People's courts are also authorized to permit measures which stop infringing conduct or preserve evidence before the applicant files a lawsuit.

Conclusions

The focus of the new law is on improving independent innovation and expanding protection of patent rights. More details about its enforcement and procedures will be unveiled in the new implementation rules, drafted amendment to which was released in March.

(For analysis regarding the design patent in the new law, please see ["New Trends in Protecting Design Patent in China"](#))

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