

Provisions on several issues concerning examination of patent infringement disputes (conference discussion version, October 27-29, 2003)

In order to facilitate correct examination of patent infringement disputes, the following provisions are made in accordance with the Patent Law of the People's Republic of China (hereinafter referred to as the Patent Law), the Civil Procedure Law of the People's Republic of China (hereinafter referred to as the Civil Procedure Law) and the Administrative Procedure Law of the People's Republic of China, in combination with examination practice and experience.

I. Determination of infringement of patent for an invention or utility model

(I) Determination of the extent of protection of a patent for an invention or utility model

Article 1 [Rule of eclectic interpretation]

Where the People's court interprets the claim of a patent in accordance with Article 56(1) of the Patent Law, the People's court shall not interpret that the extent of protection of the patent right is strictly limited by the literal meaning of the claim, and the description and drawings are only used for illustrating ambiguous portions of the claims, nor shall the People's court interpret that a claim only determines a general inventive core, only serving as a guidance, and the extent of protection extends to what the patentee anticipates, which can be understood by a person skilled in the relevant field of technology by reading the description and drawings. The People's court shall start from the middle of the above two

extreme interpretations to interpret a claim such that not only is a patentee fairly protected, but the public is guaranteed with reasonable legal stability.

Article 2 [Interpretation text]

The People's court shall determine the extent of protection of a patent right of an invention or utility model based on the text of the claims published by the patent administrative organ under the State Council when a patent is granted. Where a patent maintaining procedure is involved, the People's court shall use claims that are decided to be maintained in a legal document.

Article 3 [Claims as the interpretation object]

Where the People's court determines the extent of protection of an invention or utility model in accordance with Article 56 (1) of the Patent Law, it shall generally base on the essential technical features recited in an independent claim. Where an independent claim is not invalidated, and an obligee requests to determine the extent of protection of the patent right based on a dependent claim, the People's court shall permit said request and rule that both the technical features recited in said dependent claim and the technical features of all the other claims shall serve as the essential technical features for determining the extent of protection of the patent right.

Where a patent infringement lawsuit instituted by an obligee once was not supported by a valid verdict of the People's court, and the obligee institutes another lawsuit based on other claims that did not serve as the basis for examination, the People's court shall deal with such a lawsuit in accordance with Article 111(5) of the Civil Procedure Law.

Where a patent right is kept valid based on a dependent claim in accordance with a legal document in the patent maintaining procedure, the dependent claim and all the previous claims to which it refers should be combined to form a new independent claim.

Article 4 [Functions of the description and the appended drawings]

That “the description and the appended drawings may be used to interpret the claims” according to Article 56(1) of the Patent Law means that, in determining the extent of protection of a patent, the description and appended drawings may be used to illustrate the technical features recited in the claim, to clarify the ambiguous parts of the technical features and technical terms involved in the claim, and to exclude the prior art described in the description and drawings from the extent of protection of the patent as well as to serve as a basis for the application of the rule of Estoppel to the patentee.

Where a technical feature represented by a specific concept is described by its generic concept in a claim, the People’s court shall interpret this generic concept according to the specific embodiments mentioned in the description and other embodiments that a person skilled in the relevant field of technology can think of through reading the description and the appended drawings without exercising creative work.

Technical features that are only reflected in the description and the appended drawings but not described in a claim cannot be included to limit the extent of protection of the patent when interpreting the claim. Where the technical contents described in a claim of a patent are inconsistent or partially inconsistent with the disclosures or embodiments

of the description, judgment shall be made based on the contents described in the claim.

Besides the description and the appended drawings, other patent documents may serve as reference documents for interpreting a claim.

Article 5 [Function of the examples, reference signs and abstract]

Interpretation of a claim shall not limit the extent of protection of a patent to specific embodiments for fulfilling the invention or utility model as disclosed in the description and the examples thereof. However, these specific embodiments and their examples can be used to interpret a claim.

Where reference signs are used in a claim, the specific structure reflected in the appended drawings cannot be used to limit the corresponding technical features of the claim.

The abstract of the description cannot be used to interpret a claim or serve as a basis for the determination of the extent of protection of the patent right.

Article 6 [Dependent claim used for interpreting technical features]

Dependent claims of a patent can be used to clarify the ambiguous technical portions of the technical features recited in their independent claim, so as to avoid inconsistent interpretation of the same technical term recited in the independent claim and its dependent claims. However, the additional technical features of the dependent claims cannot be introduced into the independent claim to limit the extent of protection determined by the independent claim.

Article 7 [Interpretation of open-ended claims of an invention for a composition]

According to Rule 22(2) of the Implementing Regulations of the Patent Law, where a claim of a patent for an invention for a composition is written in an open-ended or semi-open-ended manner, but no components other than those specified in the claim are described in the description, the People's court shall treat the claim as a close-ended claim, interpreting that the claimed composition merely consists of the components specified in the claim and has no other components than impurities in regular contents.

The open-ended type mentioned in the previous paragraph means that a composition does not exclude the components that are not specified in a claim. The close-ended type means that a composition only contains the specified components and excludes all the other components. The semi-open-ended type means that a compound does not exclude unspecified components that have no substantial influence on the basic characteristics or new characteristics of the components specified in the claim.

Article 8 [Interpretation of functions or effect features]

Where a claim of a patent has technical features characterized by functions or effects, the People's court shall interpret the claim and determine the extent of protection properly according to the detailed illustration of embodiments of the technical features in the description and within the specific embodiments that can be thought of by a person skilled in the relevant field of technology through reading the claim, the description and the appended drawings without exercising creative work.

Where the description only describes one specific embodiment for achieving the functions or effects, the technical feature shall be interpreted as only covering that embodiment and its equivalences. Where the description describes multiple embodiments for achieving the functions or effects, and the functions or effect features recited in the claim are appropriate generalization of the functions or effects shared by these embodiments, the technical features shall be interpreted as covering all the embodiments that can achieve those functions or effects.

Article 9 [Interpretation of technical terms and concepts]

Technical terms and concepts mentioned in a claim of a patent shall be interpreted mainly based on the description and the appended drawings. The technical terms or concepts that cannot be interpreted directly based on the description and the appended drawings shall be interpreted based on the general meaning understood by a person skilled in the relevant field of technology. Where a technical term or concept concerned has two or more interpretations, dictionaries, encyclopedias, technical reference books, and publicly published papers shall be considered as the general meaning understood by a person skilled in the relevant field of technology. Where there are multiple general meanings, the meaning related to the subject of this invention shall be adopted based on the record of the patent file.

Article 10 [Correction of clerical and printing errors]

Obvious grammatical errors, symbol and clerical errors in a claim, description, and appended drawings of a patent that can be identified by a person skilled in the relevant field of technology shall be corrected according to the exclusive interpretation that can be obtained by a person skilled in the relevant field of technology from comprehensive analysis of

the claim, description, and appended drawings. Where there are several interpretations, those unfavorable to the patentee shall be adopted.

Printing errors in a claim, the description and appended drawings can be corrected or explained according to the original documents in the files concerned, except the copy of priority documents and other original documents in foreign languages.

Article 11 [Rule of equivalence]

That “the extent of protection of the patent right for invention or utility model shall be determined by the terms of the claim” under Article 56(1) of the Patent Law means that the extent of protection of the patent right shall be determined by the extent determined by the essential technical feature recited in the claim, also including the extent determined by equivalent feature of said essential technical feature.

Equivalent feature of the technical feature recited in the claim means that the feature uses basically the same means, achieves basically the same function and results in basically the same effect, and it can be contemplated by one skilled in the art without exercise of creative work by reading the description, drawings and claims when an infringement occurs.

In an infringement lawsuit, where an obligee requests that an alternative feature of a technical feature recited in a claim, which alternative feature is obvious to one skilled in the art on the date of filing the application but is not recited in the claim, shall be determined as an equivalent feature by applying the rule of equivalence, the People’s court shall not support such a request.

Where the rule of equivalence is applied, the People's court shall only judge whether the technical features of the accused infringing article are equivalent to the corresponding technical features recited in the claim. The People's court shall not judge whether the accused infringing article is equivalent to the technical solutions of a patent as a whole.

Article 12 [Equivalence of technical features defined with value ranges]

Where a claim recites technical features defined with a range of value, the People's court generally shall not determine that a corresponding technical feature of the accused infringing article which is not within the range of value is an equivalent feature.

As for a patent for invention for a composition defined with both components and contents, the People's court shall firstly judge whether the components of the accused infringing article are the same as or equivalent to those recited in the claim. Where one or more components are not the same or equivalent, it shall be determined that the accused infringing article does not fall within the extent of protection of the patent right; while where the components are the same or equivalent, comparison of contents shall be further conducted in accordance with the previous paragraph.

Article 13 [Rule of Estoppel]

Any amendments or observations having restrictive effect on the extent of protection of the patent right, made by the patent applicant of a patent or patentee during patent granting or maintaining procedures in the patent documents or written statements or observations on record aiming at satisfying requirements on substantive conditions for granting a patent right under the Patent Law and its Implementing Regulations, have

limiting effect on the obligee. The rule of Estoppel shall be followed in a patent infringement lawsuit.

The People's court shall not consider Estoppel technical contents as equivalent features of the technical features recited in the claim. As to technical features that have been amended in the patent granting and/or maintaining procedures, after the rule of Estoppel is applied, the obligee still has the right to request application of the principle of equivalence to the technical features retained.

Article 14 [No neglect of non-utility model technical features]

Technical features concerning use of a product, manufacturing process, use process, components of a material and contents thereof as recited in a claim of a patent for utility model, which do not concern the product's shape, structure, or their combination, are therefore having limiting effect on the extent of protection of a patent right and shall not be neglected by the People's court.

(II) Process of judging infringement of a patent for invention or utility model

Article 15 [Rule of full coverage]

Where an accused infringing article comprises all technical features recited in a claim, or where although individual or some technical features of the accused infringing article are not the same as the corresponding technical features recited in the claim, they are considered equivalent technical features of the technical features recited in the claim in accordance with the rule of equivalence, the People's court shall determine that the accused infringing article falls within the extent of

protection of the patent right and rule that the accused infringer does not infringes a patent right.

Where the accused infringing article comprises additional technical feature besides the technical features that are the same as or equivalent to all the technical features recited in the claim, no matter what function and/or effect can be produced by the additional technical feature per se or a combination of the features with other technical features, the People' s court shall draw the same conclusion as in the previous paragraph.

Where technical feature of an accused infringing article fall within the extent of a technical feature represented by a generic concept in a claim, the People's court shall determine that this technical feature of the accused infringing article is the same as the technical feature represented by a generic concept in the claim.

Where an accused infringing article lacks one or more technical features of a claim, or where one or more technical features of the accused infringing article are neither the same as nor equivalent to the corresponding technical features of the claim, the People' s court shall determine that the accused infringing article does not fall within the extent of protection of the patent right and rule that the accused infringing article does not infringe a patent.

Article 16 [Comparison of technical features]

Where technical comparison shall be conducted to in a patent infringement lawsuit, all the essential technical features recited in a claim shall be compared with the corresponding technical features of an accused infringing article. No comparison of technical features shall be conducted between an accused infringing article a patented product

produced by the obligee or a patented process employed by the obligee and the product directly obtained by the patented process and the.

II. Judgment of infringement of patent right for design

(I) Determination of the extent of protection of patent right for design

Article 17 [Extent of protection of patent right for design]

As described in Article 56(2) of the Patent Law, “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”. This means that the extent of protection of the patent right for design shall be determined by the visible shape, graphic pattern or their combination of the patented product of the design as shown in the drawings or photographs as well as the new design part with a sense of beauty formed by the combination of the color and the shape and/or graphic pattern, including the identical or similar designs of the products identical or similar to the patented product of the design.

Article 18 [Contents which are not subjected to protection of patent right for design]

According to Article 23 of the Patent Law and Rule 2(3) of the Implementing Regulations of the Patent Law, the People’s court shall exclude the following designs from the extent of protection of the patent right for design.

(I) Internal shape, graphic pattern and color characteristics of the product that will not be noticed during regular purchase and cannot be seen by consumers when using said product;

(II) The only design that can be adopted to realize the technical function of a product;

(III) A design used to connect or install a product to or on another product so that they can function together, excluding the situation that there are several designs that can be selected in order to realize the technical functions.

Article 19 [Protection of color of design]

For a patent right for design that requests protection of color at the same time, the claimed color is one of the factors that limit the extent of protection of the patent right for this design. The People's court shall use the combination of the claimed color with the shape and/or graphic pattern as the extent of protection of the patent. If the shape of this design is a common shape, comparison and judgment shall be made only for the combination of the color with the shape or the color with the graphic pattern. If the shape, graphic pattern, and color are all newly designed, comparison and judgment shall be made for the combination of the shape, graphic pattern, and color.

The color of a product alone may not be the object of the protection of a design unless the change of color itself forms a type of graphic pattern.

The original colors of the materials used for manufacturing a product are not subjected to patent protection of the design.

Article 20 [Effects of brief explanation, sample, or model of a design]

The brief explanation of a design, and the key design points of the design, and samples or models submitted during the patent right granting procedure as required by the patent administrative organ under the State Council can be used to interpret a patent for design.

(II) Method of judging infringement of the patent right for design

Article 21 [Identical or similar design of identical or similar products]

If the accused infringing product uses a design identical or similar to a patented design on a product that is identical or similar to the product incorporating the patent design as shown in the drawings or photographs at the time when the patent right is granted, the People's court shall rule that the accused infringing product falls under the extent of protection of the patented design, and the accused infringer infringes the patent right of the design.

If the accused infringing product is neither identical nor similar to a product of a patent for design, or the design of an accused infringing product is neither identical nor similar to that of a product of a patent for design, the People's court shall rule that the accused infringing product does not fall under the extent of protection of the patented design, and the accused infringer does not infringe the patent right of the design.

Article 22 [Identical product and similar product]

Identical product as described in Article 21 of the present Provisions means that an accused infringing product has completely identical

applications and functions with the product of a patent for design.

Similar products as described in Article 21 of the present Provisions means that an accused infringing product has completely identical applications with the product of a patent for design, but the specific functions therefore are different.

The People's court can determine the use of a product with reference to the names of the products, type of the product specified to use that design when granting the patent right to the design (that is, the same category in the design product classification table publicized by the patent administrative organ under the State Council), and the actual situations of sales and use of the products.

Article 23 [Identical design and similar design]

Identical design as described in Article 21 of the present Provisions means that an accused infringing product, which is identical with the product of a patent for design, uses a design visually having no differences from the design of the product of said patent for design.

Similar design as described in Article 21 of the present Provisions means that an accused infringing product, which is identical with or similar to the product of a patent for design, uses a design similar to the design of the product of said patent for design.

Contents which are not the main design factors, such as the size, material, internal structure, functions, technical performance of a product, and the subject matter and expressions in the graphic pattern of the product will not influence the identification of identical or similar designs.

Article 24 [Identification of similar designs]

When identifying a similar design, the People's court shall rely on the fact whether ordinary consumers concerned will be easily confused out of ordinary attention. If they will be easily confused, the accused infringing product shall be judged to have a similar design. Otherwise, the design is neither identical nor similar.

Methods for identifying whether an accused infringing product has a design similar to the product of a patent for design include direct visual observation, comparison under certain intervals in both time and space, focus on the comparison of main parts, and comprehensive judgment.

If an accused infringing product has a design integrally similar to the product of a patent for design, or the main parts thereof are identical or similar, the People's court shall generally identify that ordinary general consumers concerned will be easily confused, and the accused infringing product shall be judged to have a similar design.

Ordinary consumers concerned in this provision are the final consumers of the product. However, parties who have a close relationship with sales or service of the product can also be considered as the ordinary consumers concerned. The main parts mentioned above are parts of the appearance of a product that draw attention of the ordinary consumers concerned. Main parties of a design can be identified by combining with the general state of the product used, key design factors of the design, and aesthetic perception.

Article 25 [Comparison object]

When comparing and judging a design during a lawsuit of an infringement of the patent right of a design, the drawings or photographs of the product of a patent for design shown in granted document shall be compared with drawings or photographs of an accused infringing product or drawings or photographs that reflect the design of the accused infringing product. The People's court shall not compare the actual product of a patent for design submitted by an obligee with the accused infringing product unless the actual product is completely identical to the product of the design illustrated in the drawings or photographs of the product of the patent for a design shown in the granted document

III. Patent infringement act

(I) Exploitation of patent infringement

Article 26 [Production or business purposes]

The production or business purpose mentioned in Article 11 and Article 63(2) of the Patent Law means the purpose for industrial or agricultural production or commercial operation and is not limited to profitable purpose. It, however, does not include the purpose for individual use or consumption.

Acts of offering to sell and selling a patented product or obtaining a product directly by a patented process by natural persons, legal persons, or other organizations, or the acts of manufacturing, using, importing a patented product or using and importing a product directly obtained by a patented process of legal persons, or other organizations, are all acts with the production or business purposes.

If a doctor temporarily prepares a patented drug for the prescription of a specific patient and the drug is only used by that patient, the act of the doctor is not considered to have a production or business purpose.

Article 27 [Manufacture of a patented product]

Manufacture of a patented product mentioned in Articles 11 and 63 of the Patent Law means processing or manufacturing of a patented product through a mechanical or manual means. The following acts are deemed as manufacture of a patented product,

(I) the act of assembling a patented product;

(II) the act of acquiring parts of a sold patented product and re-assembling the patented product; and

(III) the act of recycling the product of a patent for design as a package used by another organization and packaging one's own product for the purpose of production and business.

Maintenance conducted by a legitimate user of a patented product, such as repair or replacement of the parts of the product so as to enable proper use of the patented product is not considered as act of manufacturing a patented product.

Quantity, quality and the like of a patented product do not affect the identification of the manufacturing act.

Article 28 [Offering to sell a patented product]

If a party shows the intention of selling a patented product prior to patent expiration but clearly indicates that the product can only be available after the patent expires, it is not considered an act of offer to sell as described in Articles 11 and 63 of the Patent Law.

Article 29 [Sale of a patented product]

If the ownership of a patented product is not actually transferred but a sale contract has been established legally, the act is also considered as the sale of said patented product as prescribed under Article 11 and 63 of the Patent Law unless it is clearly indicated in the contract that the product can only be actually available after the patent expiration.

If a manufacturer uses a product infringing a patent for design owned by another party as a part in the product manufactured by itself, such an act constitutes sale as prescribed in Article 63(2) of the Patent Law; if a manufacturer of a product is unable to prove the legitimate source of that part, said manufacturer is considered to have manufactured said product that infringes a patent for design.

Article 30 [Import of a patent product]

Import of patented product mentioned in Articles 11 and 63 of the Patent Law means transporting a patented product from foreign countries into China by crossing the national border.

A patent product brought into a free trade zone is considered imported patented product.

Article 31 [Product directly obtained by a patented process]

“A product directly obtained by a patented process” mentioned in Articles 11 and 63 of the Patent Law means a primitive product obtained by using all the technical features of a patented manufacturing process claim. The act of further processing and treating a primitive product to obtain a subsequent product by producing physical or chemical change is an act of directly obtaining a product by said patented process, but the subsequent product is not a product directly obtained by the patented process anymore.

Article 32 [Exploitation of infringement of dependent patent]

A patentee of a dependent patent exploits its own patent without the authorization of the patentee of a fundamental patent or acquiring the compulsory license for exploitation of the fundamental patent, the People’s court shall rule this act as an infringement of the fundamental patent.

If the patentee of a fundamental patent exploits a dependent patent without the authorization of the patentee of the dependent patent or acquiring the compulsory license for exploitation of the dependent patent, the People’s court shall rule this act as an infringement of the dependent patent.

If a third party exploits a dependent patent without the authorization of patentees of both a fundamental patent and a dependent patent or acquiring the compulsory licenses for exploitation of both the fundamental patent and the dependent patent, the People’s court shall rule

this act as an infringement of both the fundamental patent and the dependent patent.

Dependent patent in the present Provisions is also called a modified patent. It means that an invention or utility model filed later is a modification of a patent filed earlier. The later filed patent adds new technical content while employing the technical solution of the prior patent, including addition of new technical features or discovery of a new use based on the earlier filed product patent, and therefore it is granted for satisfying requirements of granting a patent as prescribed under the Patent Law. The prior patent is called a fundamental patent.

(II) Collective patent infringement act

Article 33 [indirect patent infringement]

According to Article 148(1) of Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For trial implementation), the People's court shall handle the following situations as collective patent infringement act:

(I) A person or an organization is aware fact that a third party infringes a patent of some else's, but still provides the third party with helps for exploiting the infringement, such as apparatus, working place;

(II) A person or an organization is aware fact that a product series concerned can only be used for raw materials, intermediate products and the like for exploiting a specific patent or utility model but still gives them to a third party who will use them and have no legal right to exploit the patent; and

(III) A trademark registrant is aware that licensee uses his trademark on a product infringing a patent of someone else's, but does not stop such an act.

Article 34 [Unauthorized permission of exploitation]

Unauthorized permission to a third party to exploit a patent without the special authorization by patentees or any basis under the Patent Law, or unauthorized permission to a third party by a patentee of a joint patent to exploit a patent without the consent of the other patentees or any legal basis, is deemed as collective patent infringement.

If a licensee is aware of or shall be aware of the fact that the licensor has no right to give permission, the licensee shall stop the patent infringement and bear a joint responsibility for compensation together with the licensor. If a licensee is unaware of or shall not be aware of the fact that the licensor has no right to give permission, the licensee shall stop the patent infringement, and the compensation or other civil liabilities shall be handled according to the provision of Article 353 of the Contract Law of the People's Republic of China.

Patentees listed in the patent certificate can be used as one of the main base to determine whether the licensee shall be aware of the fact that the licensor has no right to give permission.

Article 35 [Patent infringement of collective contractor]

If a contractor of a contract for work infringes a patent of someone else's because of accepting the principal's commission, reference may be made to Article 34 of the present Provisions.

Article 36 [Technical standards and patent license]

If a standardization management organization or an organization for standardization incorporate a patent into national standards, industrial standards, or other professional technical standards without the authorization of the patentee or the compulsory license for exploiting the patent, and a party adopting the standards infringes the patent by exploiting the standards, the People's court shall rule that the standardization management organization or the organization for standardization commits collective patent infringement.

If patentees participate in the standardization concerned but fails to declare that some contents concerned fall within the extent of protection of its effective patent before the standards are published, it is deemed that implied authorization for exploiting said contents for free has been acquired from the patentees, and relevant acts concerned of the standardization management organization, or the organization for standardization, and the party adopting the standards shall not be deemed as patent infringement.

Article 37 [Investigation of responsibilities of joint infringers]

In a joint patent infringement, an infringer who exploits a patent is called a direct infringer, while the other joint infringers are called auxiliary infringers. If it is difficult for the infringed party to find out the direct infringer or claim rights directly from a direct infringer when filing a lawsuit, it can file a lawsuit with the People's court to directly investigate and the responsibility of the auxiliary infringers.

In a patent infringement lawsuit, a plaintiff can request to add the joint infringers as joint defendants to participate in the lawsuit. A defendant can request the People's court to add the joint infringers as joint defendants to participate in the lawsuit. If necessary, the People's court can also directly add joint infringers as joint defendants to participate in the lawsuit.

If the joint infringers participate in a lawsuit, the People's court can directly allocate the responsibilities among the joint infringers at the request of the joint infringers after identifying that the joint infringers shall bear the liability for the infringement. If the joint infringers do not participate in the lawsuit, after the defendant bears the joint liability of compensation, the plaintiff can claim rights from the other joint infringers according to the laws.

(III) Act of passing off a patent

Article 38 [Exploitation of patent license and use of patent number]

If a licensee under a patent exploitation license contract exploits a patent according to the contract and indicates the patent number of a patent on its product or package thereof, or uses the patent number of a patent in other manners specified in the contract, the People's court shall not identify the act as an act of passing off a patent of another party as prescribed under Article 58 of the Patent Law.

If the technology or design actually exploited by the licensee of under a patent exploitation license contract is obviously inconsistent with the patent described in the contract and the licensee still illustrates the patent number of the patent on its product and package, or uses the patent number of the patent in other manners such that people confuse the

technology or design concerned with the patent of the patentee, the People's court shall rule the act as an act of passing off the patent of another party as prescribed under Article 58 of the Patent Law.

Article 39 [Civil liabilities of passing off a patent]

A party passing off the patent of another party shall bear the corresponding civil liabilities according to Article 118 of the General Principles of the Civil Law of the People's Republic of China.

If a party uses the patent number of a patent on a product that infringes a patent of another party, the act is not an act passing off the patent of another party as prescribed under Article 58 of the Patent Law, and the People's court shall handle such an act according to Article 57 of the Patent Law.

IV. Plea of Patent Infringement

(I) Plea of Non-infringement

Art. 40 [Known technology plea]

In an invention or utility model patent infringement lawsuit, if an accused infringer's plea of non-infringement argues that the accused infringing article uses a known technology, the People's court shall examine said patent whether or not the accused infringer requests to invalidate said patent.

The term "known technology" referred to hereinabove means a technology having been publicly issued in both domestic and overseas publications, publicly used domestically or made known to the public by

any other means, before the filing date of an application for an invention or utility model patent. Conflicting patent applications that have been disclosed are regarded as known technologies in this Provision.

While judging whether or not a known technology plea is valid, an accused infringing article shall be compared with an individual known technology. If, upon comparison, technical features of the accused infringing article are identical with technical features of the individual known technology, or although the technical features of the accused infringing article are not totally identical with those of the individual known technology, but a simple combination of the individual known technology with the knowledge or technology well-known by skilled persons in the art, the People's court shall determine that the known technology plea is valid and the accused infringer does not commit patent infringement whether or not the technical features of the accused infringing article are identical with or equivalent to the technical features recited in the claims.

If skilled persons in the art consider the technology used in the accused infringing article to be an obvious simple combination of two or more known technologies, and no novel technical effects are produced, the People's court may also determine that the known technology plea is valid and the accused infringer does not commit patent infringement.

Art. 41 [Known design plea]

In a design patent infringement lawsuit, if an accused infringer's non-infringement plea argues that the accused infringing product uses a known design, the lawsuit shall be handled according to Article 41 in this Provision unless otherwise this article has other provisions.

The term “known design” referred to hereinabove means identical or similar design of an identical or similar product, which design has been publicly issued in both domestic and overseas publications or publicly used domestically before the filing date of a patent for design.

If the design of an accused infringing product is not totally identical with an patented design, and the patented design is not significantly distinguishable from known design, the People’s court shall determine that the accused infringing product does not fall under the scope of protection of the patent for design and the accused infringer does not commit patent infringement.

Art. 42 [No double protection of a design]

If other parties only manufacture, sell or import a design product after the patent right of the design is terminated or the protection term expires, no infringement of the ex-patentee’s right is committed because the design product uses a known design.

Art. 43 [Right conflict of design]

If all or some of the elements of a patented design used for the same type of commodity or a similar commodity are identical or similar to the trademark registered by another party, and the filing date of the patent is later than the publication date of the provisional approval of the trademark, or all or some of the elements of a patented design are identical to works of another party copyrighted prior to the filing date of the patent, the patent is “in conflict with any prior right of another party” as prescribed under Article 23 of the Patent Law. However, if a design is created and completed by the applicant of the patent or the designer alone, the design patent does not fall under said circumstance.

Art. 44 [Plea of one's own patent]

In a patent infringement lawsuit, if an accused infringer's non-infringement plea argues that the exploited patent is owned by itself and, in the mean time, the filing date of the patent owned by the accused infringer itself is prior to the filing date of the patent owned by the plaintiff, the People's Court shall examine whether or not the accused infringing article makes use of a patent owned by the accused infringer. If the accused infringer indeed exploits a patent owned by itself, the People's Court shall determine that the accused infringer does not commit patent infringement. If the accused infringer does not exploit its own patent, the People's court shall continue to compare the accused infringing article with the patent of the plaintiff.

If the filing date of the patent owned by the accused infringer is after the filing date of the patent owned by the plaintiff, the People's Court will not examine whether or not the accused infringing article is a patent owned by the accused infringer, and only compare the accused infringing article with the patent of the plaintiff. If the accused infringing article falls under the scope of protection of the patent owned by the plaintiff, the People's court shall protect prior legitimate rights according to the Laws and determine that the accused infringer commits patent infringement.

(II) Plea of acts not deemed patent infringement

Article 45. [Exhaustion of patent rights]

The People's court shall handle the following situations according to Article 63(1)(I) of the Patent Law:

(i) after the sale of an equipment which is useful only for exploiting a patented process and is manufactured or imported by the patentee or under the authorization of the patentee, the equipment is used to exploit the patented process;

(ii) after the sale of components which are useful only for manufacturing a patented product and are manufactured or imported by the patentee or under the authorization of the patentee, the components are used to exploit the patent; and

(iii) after the sale of a breeding material of an animal or plant variety obtained by the patentee or under the authorization of the patentee directly according to a patented process for producing the animal or plant variety, a farmer uses the breeding material of the plant variety on his own, or uses or sells the breeding material of the animal variety on his own.

Art. 46 [Parallel import]

If a patented product manufactured by the patentee or the licensee or a product obtained directly according to a patented processes imported back into China after it is firstly sold domestically and then exported abroad, or if a patented product manufactured by the patentee or the licensee or a product obtained directed according to the patented process is imported into China after it is firstly manufactured and sold abroad by the patentee or the licensee, the People's Court shall handle the case according to Article 63(1) (I) of the Patent Law except that there are definite restrictive terms on where the patented product shall be sold in the sale contract signed by the patentee and the first distributor or in the patent exploitation contract signed by the patentee and the licensee.

The handling of the case according to the above-mentioned provision shall not infringe the exploitation right enjoyed exclusively and solely by another party, which has been publicly announced according to the Laws.

Art. 47 [Right of prior use]

The wording “to have made necessary preparations for its making or using” mentioned in Article 63(1)(II) of the Patent Law means that special investment has been substantively made and necessary technical preparations have been completed. Manufacturing or purchasing special equipment, completing the blueprint of a product and processing documents, and completing trial production of samples and tests of various technical properties can be regarded as having made necessary preparations for manufacture or use.

The wording “to continue to make or use it within the original scope only” mentioned in Article 63(1)(II) of the Patent Law means that the party enjoying the right of prior use continues exploitation by itself for the purpose of self-development within an industrial field of a technology or design that has been exploited before the filing date of a patent. Expanding the manufacturing scale after the filing date of a patent by proper means, such as addition of a production line and addition of a branch plant, is still regarded as exploitation within the original scope.

The technology or design exploited by the party enjoying the right of prior use shall be developed or designed by itself or obtained from a legitimate transfer prior to the filing date of a patent. A party will not enjoy the right of prior use if using a technology or design that infringes the rights and interests of another party.

The party enjoying the right of prior use neither has the right to give permission to another party to exploit the technology or design upon which it has the right of prior use nor has the right to transfer the technology or design upon which it has the right of prior use to another party unless the exploited technology or design and the organization are transferred or inherited as a whole.

Art. 48. [Scientific experimentation]

The wording “to use the patent concerned solely for the purpose of scientific research and experimentation” mentioned in Article 63(1)(IV) of the Patent Law means manufacture and use of a patented product, use of a patented processor use of a product obtained directly according to the patented process in order to study, verify, or improve a patent. It does not include other scientific studies and experimentations conducted by employing said patent.

Manufacture and use of a patented product, use of a patented processor use of a product obtained directly according to the patented process for clinical experiments during the process for the application for registering a drug in order to exploit the technology immediately after the valid period of the patent expires shall be handled by the People’s Court according to Article 63(1) (IV) of the Patent Law.

Art. 49 [Right to use a patent of other parties when said patent right is resumed after forfeiture]

If a patent is resumed after forfeited, during the forfeiture period, exploitation conducted by other parties with respect to the patent shall not be considered infringement of the patent right. However, if the act is a continuation of an infringing act prior to forfeiture of the patent right, the

People's Court shall still determine that such an act infringes of the patent right.

If another party starts to manufacture an identical product or use an identical processor has made necessary preparations for the manufacture or use during the forfeiture period of a patent right and continues the manufacture or use act only within the original scope after the patent right is resumed, the act shall not be considered infringement of the patent right. However, if a party acts in bad faith, the People's Court shall still determine that such an act infringes the patent right.

A party enjoying the right to use a patent as prescribed in the previous provision neither has the right to give permission to another party to exploit the technology or design it exploits nor has the right to transfer the technology or design it exploits to another party unless the exploited technology or design and its organization are transferred or inherited as a whole.

Art. 50 [Repeated patent application filed by the same applicant]

The identical invention-creation mentioned in Article 9 of the Patent Law means that two patent applications or patents claim the same invention-creation, including identical inventions or utility models and identical designs. Identical invention or utility model means that the technical solutions claimed in the claims are the same. It will not be considered as identical inventions or utility models if the disclosures in the descriptions are the same but the technical solutions claimed in the claims are different.

If the same applicant applies for both a patent for an invention and a patent for a utility model for the same invention-creation, the applicant

shall make a declaration to the patent administrative department under the State Council prior to the announcement of granting a utility model patent, and shall make a public announcement in the Announcement of Granting. The protection term for the later granted patent for an invention is counted from the filing date of the prior application.

If no public announcement is made, a utility model will be deemed to have entered the public domain after its patent right is terminated. The exploitation of said technology by another party is not considered infringement of said patent.

After a public announcement has been made, if the applicant chooses to abandon the patent right of the utility model and obtains the patent right of an invention prior to the termination of the patent right utility model, or the patent right for an invention is not granted until the term of the utility model patent expires, processes for identifying the scope of protection of the patent right and infringement of the patent respectively apply relevant laws, administrative regulations and judicial interpretations according to the types of the prior patent and the later patent. If a patent for an invention is granted after the term of the patent for utility model expires, Article 49 in this Provision shall be referred to as well.

Where the same applicant applies for both an invention patent and a utility model patent for the same invention-creation, and the patentee gives permission to another party to exploit the utility model that is granted earlier and then claims rights from the licensee based on the invention patent after the patent application for an invention is granted, the People's court shall not uphold the applicant's allegation except when the parties concerned have a separate special agreement and the patentee

has clearly informed the licensee that a patent application for an invention has been filed for the same invention creation at the time of signing the contract.

Art. 51 [non-infringement of exploitation prior to publication of a patent]

During the period of from the filing date of a patent to the publication date of a patent application for an invention or to the date of the announcement of granting of a utility model or design, exploitation of the same invention creation by another party is not considered infringement of the patent right.

V. Infringement Liabilities

Art. 52 [Infringement liabilities of offering for sale]

If infringement of patent is caused by offering for sale, the People's Court shall order the infringer to bear the civil liability of stopping infringement of the patent. If an obligee indeed suffers actual economic losses due to the infringement, the People's Court shall order the infringer to bear the corresponding compensation liability and pay a reasonable amount of investigation expense. However, if the party that offers for sale does not know that the product of the offer for sale infringes a patent owned by another party and can prove the source of the product is legitimate, the People's court shall handle the case according to Article 63(1) of the Patent Law.

Art. 53 [Exemption from liabilities for compensation for Bona Fide use or sale]

“Without knowing” mentioned in Article 63(2) of the Patent Law includes the situation that it is impossible for a party to know and the

situation that a party actually does not know even though it is supposed to know.

The legitimate source mentioned in Article 63(2) of the Patent Law means that a patented product used or sold or a product obtained directly according to a patented process obtained from legitimate commercial sources, not a product produced by the patentee or produced and sold under the authorization of the patentee. Regular sales contracts, commercial invoices and the like can be used to prove the legitimate source. The user's or distributor's responsibility of providing evidence to show the legitimate sources of its product shall not be exempted merely because of the warranty of defect rights in the contract at the time of acquiring the product.

If an obligee has sent a warning letter, attorney letters and the like to a user or distributor and provided documents such as the patent certificate, the description of the patent, the claims of the patent and the technical comparison explanation, which are sufficient to make the user or distributor realize that the accused infringing product may possibly infringe the patent right, but the user or distributor still continues to use or sell the accused infringing product, the act shall be deemed intentional. After the People's court determines that the user or distributor commits patent infringement, even if the user or distributor can prove the legitimate source of the product, it shall still bear the civil liabilities including compensation for losses.

This provision is suitable for the act of offering for sale.

Art. 54 [Calculation of compensation for infringement of parts and infringement of package design]

If the key parts displaying the technical functions and effects of the end product infringe the patent owned by another party, the People's Court shall calculate the compensation based on the profits of the end product. If the general parts that only play an auxiliary role in the end product infringe the patent owned by another party, the compensation shall be calculated reasonably based on factors such as the value of the parts per se and the role of the parts in achieving the profits of the end product.

If a package infringes the design patent owned by another party, the People's Court shall properly calculate the compensation based on factors such as the value of the package per se and the role of the package in achieving the profits of the packaged product. If a package is usually the main factor that attracts ordinary consumers to buy the packaged product, and it is inseparable from the packaged product for sale, the compensation can be calculated reasonably based on the profits of the packaged product.

Art. 55 [Fees of exploiting a patent in temporary protection phase]

If a patentee files a lawsuit to require a user to pay an appropriate fee for exploiting the invention between the period of from publication of the patent application for the invention and to the grant of patent according to the provisions of Article 13 of the Patent Law, such a request shall be filed after the patent is granted.

“The exploitation act” mentioned in Article 13 of the Patent Law refers to various exploitation acts with respect to a patent for an invention as prescribed under Article 11(1) of the Patent Law. While determining whether a defendant exploits the patent for an invention during the temporary protection period, if the protection scope of the claims at the time of the publication of the patent application is broader than the

protection scope of the claims determined at the time of the announcement of granting or during the patent maintaining proceeding, the People's court shall make decisions on the basis of the protection scope of the claims determined at the time of the announcement of granting; if the protection scope of the claims at the time of the publication of the patent application is narrower than the protection scope of the claims determined at the time of the announcement of granting or during the patent maintaining proceeding, the People's court shall make decisions on the basis of the protection scope of the claims at the time of the publication of the patent application.

The People's Court can determine the appropriate fee mentioned in Article 13 of the Patent Law based on the scale of exploitation by the user with reference to the rational standards for a patent license fee. If there is no patent license fee for reference, the amount of the fee can be appropriately determined according to the actual profits of the user. The exploitation fee determined by the People's court shall not be higher than the compensation according to Article 60 of the Patent Law and the relevant judicial interpretations.

Art. 56 [Order of handing over, destroying or blocking infringing articles]

An obligee can request the People's court to order or, if necessary, the People's court can directly order an infringer to hand over, destroy or block the infringing product and main materials, tools and the like used for manufacturing the infringing product. However, if an infringing product is attached to other articles and can hardly be replaced or if destroying an infringing product will seriously damage the values of other articles, the People's Court usually shall not order to destroy the infringing product.

If an infringing product and the main materials and tools and the like used for manufacturing the infringing product are transferred to and further handled by an obligee, the value of the goods concerned can be deducted when calculating the compensation the infringer must make.

Art. 57 [Order of providing infringement source]

An obligee can request the People's Court to order or, if necessary, the People's court can directly order an infringer to inform the obligee of the true identity of the third party that manufactures, sells or imports an infringing product, which are known or shall be known by the infringer.

If without justified reasons, an infringer refuses to inform the obligee of the true identity of the third party that manufactures, sells or imports an infringing product, the People's court can impose a relevant civil sanction on the infringer according to Article 134(3) of the General Principles of the Civil Law of the People's Republic of China.

Art. 58 [Situation that determination of infringement may be absent in the mediation decision]

In a patent infringement lawsuit, if parties concerned voluntarily make a compromise through negotiation that does not violate the compulsory provisions of relevant laws and administrative regulations or the public benefits of the society, the People's Court do not need to definitely determine whether or not the act of an defendant is infringement in the civil mediation decision.

Article. 59 [Patentee's malice]

If a patentee definitely knows that its application involves a known technology or design but still files a patent application which is granted subsequently, or a patentee deliberately cheat the patent administrative department under the State Council during the patent granting and/or maintaining proceedings, resulting in grant of the patent application that does not comply with relevant provisions of the Patent Law and Implementing Regulations thereof or that a patent contrary to relevant provisions of the Patent Law and Implementing Regulations thereof is maintained, the patentee's said act is malice as prescribed under Article 47(2) of the Patent Law.

The wording "any judgement or ruling of patent infringement which has been pronounced and enforced by the People's court" mentioned in Article 47(2) of the Patent Law does not include the rulings made by the People's Court pursuant to the obligee's pre-litigation application for ordering suspension of patent infringement and application for pre-litigation preservation of properties and preservation of evidence.

6. Provisions on Procedures

Article 60 [Litigation rights of a patent licensee]

The interested parties mentioned in Article 57(1) of the Patent Law include the licensee of a licensing contract for exploitation of a patent, legitimate inheritor to the patent and the like.

When a patent is infringed, a licensee which has monopoly over the license contract for exploitation may institute legal proceedings in the People's court, while a licensee of an exclusive license contract for

exploitation may institute legal proceedings either with the patentee or by itself when the patentee does not do so. A licensee of an ordinary license contract for exploitation may institute legal proceedings on behalf of itself with the clear authorization of the patentee, or although without authorization from the patentee with the proviso that the licensee urges the patentee to exercise its rights but fails, and, without prosecution, great losses will be caused to the licensee's interests.

Where a licensee has evidence to prove that it has notified the patentee, or the patentee has known the infringing act and still does not institute legal proceedings within a reasonable time limit, it falls under the situation that a patentee does not prosecute as prescribed in the previous paragraph.

Where a licensee of a license contract for exploitation of patent institutes legal proceedings on behalf of itself, it shall bear the litigation fees and the results of the litigation by itself. The patentee has no right to request for enjoying the interests obtained by the licensee in the litigation, unless the contract contains other agreements.

Article 61 [Litigation rights in case one party refuses to stop infringement of a patent]

Where it is ruled in an effective verdict that an infringer shall bear the civil liability of stopping the infringement of a patent, and the party that is held responsible refuses to stop the infringement, the obligee may file another lawsuit against said continuous infringing act.

Article 62 [Lawsuit for confirmation of non-infringement]

Where a party, which is or will be manufacturing a product or using a process, requests a patentee to confirm that its act does not or will not

constitute infringement of its patent and provides the technical documents and information required for the confirmation in a reasonable manner, but the patentee fails to reply or refuses to confirm the non-infringement of its patent right within a reasonable period, the aforementioned party may institute legal proceedings in the People's court to request confirming that its act does not or will not constitute infringement of the patent.

Where a patentee or an interested party thereof warns other parties that they infringe its patent, the warned party may institute legal proceedings in the People's court to request the confirmation of non-infringement of said patent. Where the warning act of a patentee or an interested party thereof infringes other rights of the warned party, the warned party may, together with the previous request, request the People's court to rule the warning parties to stop infringement, compensate the losses, eliminate adverse influences and make apologies.

Under the circumstances of the previous two paragraphs, the patentee or an interested party therefore may file a countercharge to request the confirming that the plaintiff of the original lawsuit has constituted the infringement of a patent and shall bear civil liabilities.

If the same legal relationship problem based on the same facts is being or has been handled by the People's court or the administrative authorities for patent affairs, and the party concerned files a lawsuit according to paragraphs 1 and 2 of this Article, the People's court will not accept the lawsuit.

Article 63 [New products and burden of proof associated therewith]

A new product mentioned in Article 57(2) of the Patent Law refers to a product that is not present in domestic market prior to the filing date of a

patent. Compared with the same type of product present prior to the filing date of said patent, this product shows obvious distinctions in the product's components, structure, or its quality, properties and functions.

In a patent infringement lawsuit concerning an invention for a process for the production of a new product, the plaintiff shall sufficiently explain whether the product directly obtained according to the patented process is a new product and has burden of proof to demonstrate that the accused infringing product is identical with the product directly obtained according to the patented process. Where the defendant can prove that the product of the plaintiff is not a new product or is different from its product, the plaintiff is still responsible for providing evidence regarding the process for the production of the defendant.

According to Article 57(2) of the Patent Law, evidence provided by the defendant to prove that the process for the production of its product is different from the patented process shall be acknowledged only when it is capable of providing essential facts for the investigation of the case and undergoes cross-examination. Where the defendant asks to protect relevant commercial secrets related to the process, according to Article 66 of the Civil Procedure Law and relevant judicial interpretations, the People's court may order the participants of the lawsuit, i.e. the plaintiff or its agent, identifier, witness and the like, are responsible of not leaking the commercial secrets of the defendant.

Article 64 [Overseas evidence]

Foreign patent literatures and other publications that can be obtained domestically and can be verified by the collection institutions like relevant government departments and public libraries shall not be deemed as evidence formed out of the territory of the People's Republic of China.

Where the opposing party has evidence showing that reasonable doubts cannot be excluded with respect to the authenticity of the relevant evidence and the source thereof, the verification procedures concerned shall be handled according to Article 11 of Several Provisions Concerning the Evidence in Civil Lawsuits by the Supreme People's Court.

Data obtained from a computer network can be used as evidence if there is other evidence sufficient to prove the time said data are produced, the sources of said data, and the integrity of the data.

Article 65 [Technical identification]

The People's court may authorize a professional identification institution to identify the similarities and differences of the technical features of the disputed technical solutions as well as the functions, effects and the like of the technical features and the technical solutions and also further evaluate the technical significance of the technical differences concerned. However, no technical identification shall be entrusted with respect to the application of laws, for example, whether an accused infringing article falls under the patent protection scope.

Article 66 [Sample handling]

Parties concerned can file an application either in written form or record form with the People's court to ask for the return of samples submitted as evidence in the lawsuit during the hearing of the case or after the examination of the case is finished. The People's court will decide whether to return the samples. The people's court can also notify parties concerned to take back the samples within a designated reasonable period. The samples will be disposed of by the people's court if they are not

taken back after the expiry of said period. If necessary, the people's court can retain materials related to the case from the samples or take videos and photos of the samples and put them on the record of the lawsuit.

Article 67 [Connection between patent maintaining procedures and infringement lawsuit procedures]

The People's Court may, after suspending the lawsuit of a patent infringement case concerning a utility model or a design because of the defendant's or another party's request for invalidating the patent, resume the examination of the case, if the Patent Reexamination Board decides to maintain the patent.

Where the Patent Reexamination Board declares a patent invalid or partially invalid, and a party concerned requests suspension of the patent infringement lawsuit in the subsequent administrative lawsuit proceedings, the People's court does not have to suspend the lawsuit. However, according to the available materials, if the People's court decides that the continuation of the examination might conflict with the results of the administrative lawsuit, the People's court may suspend the lawsuit at the request of the party concerned with a written application.

Article 68 [Acceptance of case of application for temporary measures and patent infringement administrative cases]

After the department in charge of registration in the People's Court registers an application filed by the obligee for pre-litigation order to stop infringement of the party as well as pre-litigation preservation of properties and preservation of evidence, the application shall be transferred to the examination division in charge of the examination of patent cases to be handled.

The examination division in charge of the examination of patent cases shall handle the appeal to the People's Court if a party concerned is unsatisfied with the decision made by the patent administration department according to Article 57(1) of the Patent Law.

VII Supplementary Provisions

Rule 69 [Explanations on relevant terms and concepts]

Patent granting procedures in the present Provisions include the patent examination procedure adopted by the Patent Administration Department under the State Council to receive an application, examine the application and determine whether a patent shall be granted, the patent reexamination procedure adopted by the Patent Reexamination Board to conduct reexamination as required by an applicant who is not satisfied with the Decision on Rejection made by the Patent Administration Department under the State Council as well as the related administrative lawsuit procedure, as well as the opposition examination procedure pursuant to the previous Patent Law. The patent maintenance procedures include the procedure of invalidation conducted by the Patent Reexamination Board under the invalidation request filed by anybody after a patent is granted as well as the related administrative lawsuit procedure, as well as the revocation procedure conducted according to the previous Patent Law and the reexamination procedure and the administrative lawsuit procedure related to the revocation procedure.

A person skilled in the relevant field of technology is also called a person having ordinary skill in the art. It is an assumed person, who has all the common technical knowledge in the field of a specific invention or utility model prior to a specific date, is capable of acquiring all current

technologies in the field and has the ability of conducting conventional experiments prior to said specific date. However, the person does not have inventive ability. If the technical problem to be solved enables the person skilled in the art to seek for the techniques in other technical fields, he/she shall be capable of obtaining the relevant current technologies, the common technical knowledge and the conventional experimental techniques from the other technical fields prior to the specific date. As for a design, a person skilled in the relevant field of technology is an ordinary professional designer in that field.

Accused infringing articles include accused infringing products and accused infringing processes.

Obligee in the present Provisions refers to a patentee or a person interested who is entitled to be a plaintiff to prosecute someone who infringes a patent.

Where a patent application has a priority date, the filing date of a patent in the present Provisions refers to the priority date.

Other terms that are used in handling patent infringement cases but are not interpreted in the present Provisions can be found in the related provisions in Guidelines for Examinations published by the Patent Administration Department under the State Council.

Rule 70 [Validity of the Present Provisions]

The present Provisions are implemented from the date of publication. In case there is any inconsistency between the provisions concerning patent infringement lawsuit issued previously by this court and the present Provisions, the present Provisions shall prevail.

For a patent infringement occurred before the implementation of the present Provisions, the Provisions implemented when the infringement occurred shall be applied. If there are no provisions at that time or if the provisions are unclear, the present Provisions shall be applied.

If the examination of a case was terminated before the implementation of the present Provisions, the interested parties cannot request a reexamination directly according to the present Provisions.

The following article is only for discussion

Rule 71 [Rules for designating redundancy]

When identifying the protection scope of a patent according to the claims, in principle, the People's court shall not ignore any technical features recited in the claims. However, the People's court may ignore some individual technical features in the claims, if a patentee makes a clear request before the deadline for providing evidence in the first instance and said individual technical features meet the following requirements:

(I) Without said technical feature, the technical solution claimed in a claim is still a complete technical solution and is still capable of solving the technical problem indicated in the description and achieving the desirable effects indicated in the description;

(II) Without said technical feature, the technical solution claimed in said claim still has novelty, inventiveness and practical applicability;

(III) An applicant for a patent or a patentee does not make any amendments to a technical feature during the patent granting procedures

or patent maintenance procedures so as to meet the substantive requirements for the grant of patent under the Patent Law or the Implementing Regulations of the Patent Law;

(IV) A patentee is capable of making convincing explanations on why said technical features are included in the claims such that a persons skilled in the art believes that the incorporation of said technical features in the claims is an obvious mistake made by the patentee, and thinks that identification of the protection scope of the claims in combination with said technical features will obviously produce unfair results.

(V) An accused infringer is provided with an opportunity to make observations.