Laws on Intellectual Property Rights Protection in China

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Part 1 General Definition and Classification

- **Intellectual property (IP)** refers to creations of the intellect for which a monopoly is assigned to designated owners by law.
- **Intellectual property rights (IPRs)** are the protections granted to the creators of IP, and include trademarks, copyright, patents, industrial design rights, and in some jurisdictions trade secrets. Artistic works including music and literature, as well as discoveries, inventions, words, phrases, symbols, and designs can all be protected as intellectual property.

This brochure focuses on trademarks, copyright, patents and trade secrets.

The stated objective of most intellectual property law (with the exception of trademarks) is to "Promote progress." By exchanging limited exclusive rights for disclosure of inventions and creative works, society and the patentee/copyright owner mutually benefit, and an incentive is created for inventors and authors to create and disclose their work.

Part 2 Patent Law

This Law is enacted for the purpose of protecting the lawful rights and interests of patentees, encouraging invention-creation, promoting the application of invention-creation, enhancing innovation capability, promoting the advancement of science and technology and the economic and social development.

1. **Range of protection:**

Firstly, Patent Law protects patentees’ invention-creation, which means inventions, utility models and designs.
- **Inventions** mean new technical solutions proposed for a product, a process or the improvement thereof.
- **Utility models** mean new technical solutions proposed for the shape and structure of a product, or the combination thereof, which are fit for practical use.
- **Designs** mean, with respect to a product, new designs of the shape, pattern, or the combination thereof, or the combination of the color with shape and pattern, which are rich in an aesthetic appeal and are fit for industrial application.

Inventions and utility models for which patent rights are to be granted shall be ones which are novel, creative and of practical use.

- **Novelty** means that the invention or utility model concerned is not an existing technology (which means the technologies known to the public both domestically and abroad before
Creativity means that, compared with the existing technologies, the invention possesses prominent substantive features and indicates remarkable advancements, and the utility model possesses substantive features and indicates advancements.

Practical use means that the said invention or utility model can be used for production or be utilized, and may produce positive results.

The scope of protection is related to the documents submitted for application:

- For a design patent, the patentee shall submit a written request, drawings or pictures of the design, a brief description of the design, etc. The scope of protection shall be confined to the drawings or pictures and the brief description.
- For an invention or utility model patent, the patentee shall submit the relevant documents, such as a written request, a written description and its abstract, and a written claim. The scope of protection shall be confined to what is claimed, explained by the written description and the pictures attached.

Under some conditions patent rights will not be granted:

- When invention-creations violate the law or social ethics, or harm public interests, or inventions that are accomplished by relying on genetic resources which are obtained or used in violation of the provisions of laws and administrative regulations.
- For any of the following:
  1. scientific discoveries;
  2. rules and methods for intellectual activities;
  3. methods for the diagnosis or treatment of diseases;
  4. animal or plant varieties (the patent right may be granted for the production methods of the products);
  5. substances obtained by means of nuclear transformation; and
  6. designs that are mainly used for marking the pattern, color or the combination of the two of prints.

2. Application and Administration:

- For an invention or utility model patent, the applicant shall submit the relevant documents, such as a written request, a written description and its abstract, and a written claim.
  - The written request shall include: the name of the invention or utility model, the name of the inventor or designer, the name or title and the address of the applicant, etc.
  - The written description shall contain a clear and comprehensive description of the invention or utility model so that a technician in the field of the relevant technology can carry it out (pictures can be attached to it).
  - The abstract shall contain a brief introduction to the main technical points.
  - The written claim shall, based on the written description, contain a clear and concise definition of the proposed scope of patent protection.
- For a design patent, the applicant shall submit a written request, drawings or pictures of the
design, a brief description of the design, and other relevant documents. In the relevant drawings or pictures shall clearly be shown the design of the products for which patent protection is requested.

An applicant may amend his patent application documents, provided that the amendment does not exceed the original scope.

3. **Duration, Termination and Invalidation:**

**Duration:**
- Invention patent right: 20 years;
- Utility model and design patent right: 10 years.

The patentee shall pay annual fees commencing from the year when the patent right is granted.

Under any of the following circumstances, the patent right shall be terminated before the expiration of the duration:
- Failure to pay the annual fee as required;
- The patentee waiving of the patent right by a written declaration.

Any unit or individual can request that the patent review board declare the said patent right invalid.

- A compulsory license: under a compulsory license, an individual or company seeking to use another's intellectual property can do so without seeking the rights holder's consent, and pays the rights holder a set fee for the license.

- Under any of the following circumstances, the patent administration may grant a compulsory license for exploitation of an invention or utility model patent:
  - When it has been three years since the date the patent right is granted and four years since the date the patent application is submitted, the patentee, without legitimate reasons, fails to have the patent exploited or fully exploited;
  - The patentee's exercise of the patent right is confirmed as monopoly and its negative impact on competition needs to be eliminated or reduced.

- Where a national emergency or any extraordinary state of affairs occurs, or public interests so require, the patent administration department may grant a compulsory license for exploitation of an invention or utility model patent.

- For the benefit of public health, the patent administration department may grant a compulsory license for manufacture and exportation of a drug, for which a patent right has been obtained.

- If an invention or utility model represents a major technological advancement of remarkable economic significance compared with an earlier one, and exploitation of the former relies on exploitation of the latter, the patent administration department may grant it a compulsory license to exploit the former.
4. Measures of protection:

If a dispute arises, it shall be settled through consultation between the parties. If consultation fails, the patentee or interested party may take legal action before court, and may also request the administration department to handle the dispute. If the infringement is believed to be established, the infringer may be ordered to cease the infringement immediately.

- If the infringer is dissatisfied with the order, he may take legal action within 15 days;
- If the infringer neither takes legal action nor ceases the infringement, there may be compulsory enforcement.

When investigating the infringement, different evidence should be provided for different types of patents:

- If a dispute over patent infringement involves an invention patent for the method of manufacturing a new product, the unit or individual manufacturing the same product shall provide evidence to show that its method is different from the patented one.
- If a dispute over patent infringement involves a utility model or a design patent, the patentee or the interested parties may be required to present a patent right assessment report prepared by the patent administration department as evidence.

The period of limitation for action against patent right infringement shall be two years, commencing from the date when the infringement is known.

Part 3 Trademark Law

1. Range of Protection:

Registered trademarks mean trademarks that have been approved and registered by the Trademark Office, including trademarks, service marks, collective marks and certification marks.

- A trademark is a recognizable sign, design, or expression which identifies products or services of a particular source from those of others. Trademarks used to identify services are usually called service marks.
- A collective mark is a trademark owned by an organization (such as an association), used by its members to identify themselves with a level of quality or accuracy, geographical origin, or other characteristics set by the organization.
- A certification mark on a commercial product often indicates the existence of an accepted product standard and a claim that the manufacturer has tested the product to verify compliance with that standard.

- The following signs shall not be used as trademarks:
  1. Those identical with or similar to the State name, national flag, national emblem, military
flag, or decorations, of the People's Republic of China, with names of the places where the Central and State organs are located, or with the names and designs of landmark buildings;

(2) Those identical with or similar to the State names, national flags, national emblems or military flags of foreign countries, except that the foreign state government agrees otherwise on the use;

(3) Those identical with or similar to the names, flags or emblems or names, of international intergovernmental organizations, except that the organizations agree otherwise on the use or that it is not easy for the use to mislead the public;

(4) Those identical with or similar to official signs and hallmarks, showing official control or warranty by them, except that the use thereof is otherwise authorized;

(5) Those identical with or similar to the symbols, or names, of the Red Cross or the Red Crescent;

(6) Those having the nature of discrimination against any nationality;

(7) Those having the nature of exaggeration and fraud in advertising goods; and

(8) Those detrimental to socialist morals or customs, or having other unhealthy influences.

- The following signs shall not be registered as trademarks:

  (1) Those only comprising generic names, designs or models of the goods in respect of which the trademarks are used;

  (2) Those having direct reference to the quality, main raw materials, function, use, weight, quantity or other features of the goods in respect of which the trademarks are used; and

  (3) Those lacking distinctive features.

2. Application and Administration:

Where two or more applicants apply for the registration of identical or similar trademarks for the same or similar goods, the preliminary approval and the publication shall be made for the trademark which was first filed. If applications are filed on the same day, the preliminary approval and the publication shall be made for the trademark which was the earliest used.

- The use of a trademark means using it on goods, their packages, containers and trading documents, or using it in advertising, exhibitions or other commercial activities to mark the source of goods.

3. Duration, Termination and Invalidation:

- The period of validity of a registered trademark shall be ten years, counted from the date of approval of the registration.

- An application for renewal of the registration shall be made within six months before the expiration of the period. Where no application therefore has been filed within the said period, a grace period of six months may be allowed.

- The period of validity of each renewal of registration shall be ten years.
Any trademark registrant may, by signing a trademark license contract, authorize other persons to use his registered trademark. The licensor shall supervise the quality of the goods in respect of which the licensee uses his registered trademark, and the licensee shall guarantee the quality of the goods.

Where a registered trademark has been cancelled or has not been renewed at the expiration, the Trademark Office shall, during one year from the date of the cancellation or removal thereof, approve no application for the registration of a trademark that is identical with or similar to the said trademark.

4. **Methods of Protection:**

- The exclusive right to use a registered trademark is limited to the approved trademark and goods to use it.

Any of the following acts shall be an infringement of the exclusive right to use a registered trademark:

1. To use a similar or identical trademark for identical or similar goods without the authorization from the trademark registrant;
2. To sell goods that he knows bear a counterfeited registered trademark;
3. To counterfeit, or to make, without authorization, representations of a registered trademark of another person, or to sell such representations;
4. To replace, without the consent of the trademark registrant, its registered trademark and market the goods again; or
5. To cause prejudice to the exclusive right of another person to use a registered trademark.

About the money paid to the infringe:

- The amount of damages shall be the profit that the infringer has earned because of the infringement, including the appropriate expenses of the infringe for stopping the infringement.
- If it is difficult to determine the profit, the People's Court shall impose an amount of damages of no more than RMB 500, 000 yuan according to the circumstances.
- Anyone who sells goods that he does not know has infringed the right of a registered trademark, and is able to prove that it or he has obtained the goods legitimately and indicates the supplier thereof shall not bear the liability for damages.

Where any party has committed any acts to infringe the exclusive right to use a registered trademark and has caused a dispute, the interested parties shall resolve the dispute through consultation; if the consultation fails, the trademark registrant or interested party may institute legal proceedings in the People's Court or request the administrative authority for industry and commerce for actions.
Part 4 Copyright Law

This Law is enacted, in accordance with the Constitution, for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and the copyright-related rights and interests.

1. Range of Protection:

The term "works" includes works of literature, art, natural science, social science, engineering technology and the like which are expressed in the following forms:

(1) Written works;
(2) Oral works;
(3) Musical, dramatic, quyi, choreographic and acrobatic works;
(4) Works of fine art and architecture;
(5) Photographic works;
(6) Cinematographic works and works created by virtue of an analogous method of film production;
(7) Drawings of engineering designs, and product designs; maps, sketches and other graphic works and model works;
(8) Computer software; and
(9) Other works as provided for in laws and administrative regulations.

This Law shall not be applicable to:

(1) Laws; regulations; resolutions, decisions and orders of State organs; other documents of a legislative, administrative or judicial nature; and their official translations;
(2) News on current affairs; and
(3) Calendars, numerical tables and forms of general use, and formulas.

Regulations for the protection of copyright in expressions of folklore shall be established separately by the State Council.

- The term "copyright owners" shall include:
  (1) Authors; and
  (2) Other citizens, legal entities and other organizations enjoying copyright in accordance with this Law.

- The term "copyright" shall include the following personality rights and property rights:
  (1) The right of publication, that is, the right to decide whether to make a work available to the public;
  (2) The right of authorship, that is, the right to claim authorship and to have the author’s name mentioned in connection with the work;
  (3) The right of alteration, that is, the right to alter or authorize others to alter one’s work;
  (4) The right of integrity, that is, the right to protect one’s work against distortion and
mutilation;
(5) The right of reproduction, that is, the right to produce one or more copies of a work;
(6) The right of distribution, that is, the right to make available to the public the original or
reproductions of a work though sale or other transfer of ownership;
(7) The right of rental, that is, the right to authorize, with payment, others to temporarily
use cinematographic works, film production, and computer software, except any
computer software that is not the main subject matter of rental;
(8) The right of exhibition, that is, the right to publicly display the original or reproduction of
a work of fine art and photography;
(9) The right of performance, that is, the right to publicly perform a work and publicly
broadcast the performance of a work by various means;
(10) The right of showing, that is, the right to show to the public a work through film
projectors, over-head projectors or any other technical devices;
(11) The right of broadcast, that is, the right to publicly broadcast or communicate to the
public a work by any tool used to transmit symbols, sounds or pictures;
(12) The right of communication of information on networks, that is, the right to
communicate to the public a work, by wire or wireless means in such a way that
members of the public may access these works;
(13) The right of making cinematographic work, that is, the right to fixate a work on a carrier
by way of film production;
(14) The right of adaptation, that is, the right to change a work to create a new work of
originality;
(15) The right of translation, that is, the right to translate a work in one language into one in
another language;
(16) The right of compilation, that is, the right to compile works or parts of works into a new
work by reason of the selection or arrangement; and
(17) Any other rights a copyright owner is entitled to enjoy.

Where a work is created by adaptation, translation, annotation or arrangement of a preexisting
work, the copyright in the work thus created shall be enjoyed by the adapter, translator,
annotator or arranger, provided that the exercise of such copyright shall not prejudice the
copyright in the original work.

2. Administration:

The course of employment:
- A work created by a citizen in the fulfillment of tasks assigned to him by a legal entity or
other organization shall be deemed to be a work created in the course of employment. The
copyright in such work shall be enjoyed by the author, provided that the legal entity or other
organization shall have a priority right to exploit the work within the scope of its
professional activities. During the two years after the completion of the work, the author
shall not, without the consent of the legal entity or other organization, authorize a third
party to exploit the work in the same way as the legal entity or other organization does.
- If the works were created in the course of employment where the copyright is, in
accordance with laws, administrative regulations or contracts, enjoyed by the legal entity or other organization, the author shall enjoy the right of authorship, while the legal entity or other organization shall enjoy the other rights included in the copyright.

Time Limit:

- The rights of authorship, alteration and integrity of an author shall be unlimited in time.
- For the right of publication and the rights (5) to (17) in copyright:
  - The term of protection the rights of the author shall be the lifetime of the author and fifty years after his death, and expires on 31st December of the fiftieth year after the death of the (last surviving) author.
  - If the copyright belongs to a legal entity or other organization (except the right of authorship), the time shall be fifty years, and expires on 31st December of the fiftieth year after the first publication of such work (not including any work that has not been published within fifty years after the completion).
  - If it is a cinematographic work, a film production or a photographic work, the time shall be fifty years, and expires on 31st December of the fiftieth year after the first publication of such work (not including any work that has not been published within fifty years after the completion).
- For the use or the works protected:
  - Publication: 10 years
  - Performance: 50 years
  - Recording: 50 years
  - Broadcasting: 50 years

Authorization shall be given by the copyright owner and remuneration shall be paid before using.

In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights shall not be prejudiced:

1. use of a published work for the purposes of the user's own private study, research or self-entertainment;
2. appropriate quotation for the purposes of introduction to, or comments on, a work, or demonstration of a point;
3. reuse or citation, for any unavoidable reason, for the purpose of reporting current events;
4. reprinting of articles on current issues published by other media except where the author has declared that the reprinting and rebroadcasting is not permitted;
5. publication in any media, of a speech delivered at a public gathering, except where the author has declared that the publication or broadcasting is not permitted;
6. translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed;
7. use of a published work, within proper scope, by a State organ for the purpose of fulfilling its official duties;
8. reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy,
of the work;
(9) free-of-charge live performance of a published work and said performance neither collects any fees from the members of the public nor pays remuneration to the performers;
(10) copying, drawing, photographing or video recording of an artistic work located or on display in an outdoor public place;
(11) translation of a published work from the Han language into any minority nationality language for publication and distribution within the country;
(12) transliteration of a published work into Braille and publication of the work so transliterated.

If a copyright owner has submitted the manuscript of his work for publication, except where the copyright owner has declared that reprinting or excerpting is not permitted, other publishers may reprint the work or print an abstract of it or print it as reference material, but such other publishers shall pay remuneration to the copyright owner.

A dispute over copyright may be settled by mediation. It may also be submitted for arbitration under a written agreement concluded between the parties or under the arbitration clause in the contract. Any party may institute proceedings directly in the People's Court in the absence of a written agreement or an arbitration clause in the contract.

Part 5 Trade Secrets

A trade secret is a formula, practice, process, design, instrument, pattern, commercial method, or compilation of information which is not generally known or reasonably ascertainable by others, and by which a business can obtain an economic advantage over competitors or customers.

In China, there isn’t a set of laws to protect trade secrets specifically. Owners of trade secrets seek to these information by instituting special procedures like non-disclosure agreements (NDAs), and work-for-hire and non-compete clauses.

However, trade secrets are still loved by companies, for as secrets, they do not need to be exposed to the public like patents (maybe that is why they are not specially protected).

Reference: