

Measures for Administrative Enforcement of Patent
(Promulgated on 17 December 2001 by the State Intellectual Property Office)

Chapter One General Provisions

Article 1 These Measures are formulated according to the Patent Law of the People's Republic of China, the Implementing Regulations of the Patent Law of the People's Republic of China and other relevant laws and regulations with a view to effectively resolving patent infringement disputes, mediating patent disputes, investigating and handling acts of passing off others' patents and counterfeiting patents, protecting the patent right, maintaining and regulating the order of the socialist market economy.

Article 2 The administrative authority for patent affairs shall resolve patent infringement disputes, investigate and handle acts of passing off others' patents and counterfeiting patents in accordance with facts, in line with the law and in the light of the principles of impartiality and promptness.

The administrative authority for patent affairs shall mediate patent disputes according to law and regulations, encouraging mutual understanding between interested parties to reach mediation agreement on the basis of ascertained facts and distinguished right and wrong.

Article 3 The administrative authority for patent affairs shall set up special division or arrange special staff members for resolving patent infringement disputes, mediating patent disputes, investigating and handling acts of passing off others' patents and counterfeiting patents.

Staff members handling a case shall have with them the Patent Administrative Enforcement Certificate issued by the State Intellectual Property Office, and be formally dressed when performing their duties.

Article 4 In respect of cases of patent infringement disputes and cases of passing off others' patents and counterfeiting patents of great influence, the State Intellectual Property Office may organize the relevant administrative authority for patent affairs to handle, investigate and punish them if necessary.

Where an administrative authority for patent affairs runs into difficulties when handling patent infringement disputes, mediating patent disputes and investigating and handling acts of passing off others' patents and counterfeiting patents, the State Intellectual Property Office shall provide guidance.

Chapter Two Handling of Patent Infringement Disputes

Article 5 Following requirements shall be satisfied when filing request with the administrative authority for patent affairs for handling a patent infringement dispute:

- (1) The requester is the patentee or an interested party;
- (2) The respondent is clearly identified;
- (3) The matter in respect of which the request is filed is specific and the facts and reasons definite;
- (4) The case falls into the scope of acceptance by and under the jurisdiction of the administrative authority for patent affairs receiving it; and
- (5) The interested party has not instituted proceedings in the People's Court in respect of the patent infringement dispute.

The interested parties mentioned in (1) include, among others, the licensee of a licensing contract for exploitation of a patent and the legitimate successor of a patent right. Of the former, the exclusive licensee of a licensing contract for exploitation of a patent may file the request alone; and the sole licensee of a licensing contract for exploitation of a patent may do so when the patentee does not file the request. Unless otherwise agreed upon in a contract, an ordinary licensee of a licensing contract for exploitation of a patent shall not file a request alone.

Article 6 Where the administrative authority for patent affairs is requested for handling a patent infringement dispute, the requester shall submit a Request and a copy of the Patent Certificate of the patent right in respect of which the request is filed and furnish the same number of copies of the Request as that of the respondents.

When necessary, the administrative authority for patent affairs may check with the State Intellectual Property Office the legal status of the patent right in respect of which the request is filed. Where a patent infringement dispute involves a patent for utility model, the administrative authority for patent affairs may require the requester to hand in the search report issued by the State Intellectual Property Office.

Article 7 The Request shall contain, among other things, the following information:

- (1) name or title and address of the requester, and the name and position of the legal representative of the requester, the name of agent or title and address of the agency where an agent has been appointed;
- (2) name or title and address of the respondent(s); and
- (3) the matter in respect of which and the facts and reasons for which the request is filed,

Relevant evidence and proofs may be submitted in the form of appendixes attached to the Request.

The Request shall be signed or sealed by the requester.

Article 8 Where the request meets the requirements of Article 5 of these Measures, the administrative authority for patent affairs shall put it on file for handling and notify the requester within 7 days from the receipt of the Request, and, meanwhile, appoint three or more staff members (in odd number) to handle the patent infringement dispute; where the request does not meet the requirements of Article 5 of these Measures, the administrative authority for patent affairs shall inform the requester that the request is not accepted and tell the reason for the non-acceptance within 7 days from the receipt of the Request.

Article 9 The administrative authority for patent affairs shall forward the copies of the Request and the appendixes thereto to the respondent by postal or direct delivery or by other means within 7 days from the date of putting it on file for handling, requiring him to submit his written defence in duplicate. The respondent's failure to do so at the expiration of the time limit does not affect the handling of the case by the administrative authority for patent affairs.

Where the respondent submits his written defence, the administrative authority for patent affairs shall forward the copies of the written defence to the requester by postal or direct delivery or by other means within 7 days from the date of receipt thereof.

Article 10 In handling a patent infringement dispute, the administrative authority for patent affairs may, as required by the facts of a case, decide whether or not an oral hearing should be conducted. Where it decides to do so, the administrative authority for patent affairs shall inform the interested parties of the time and place of the oral hearing 3 days before the oral hearing is to be conducted. Where the requester or the respondent refuses to show up without a good reason, or leaves when oral hearing is not over, as in the former case, the request shall be deemed to have been withdrawn, and as in the latter case, the respondent is deemed to be absent.

Article 11 Where the administrative authority for patent affairs holds an oral hearing, it shall make a record of the participants and main points thereof, and the staff members handling the case and the participants shall sign or seal the records after they are examined and found error free.

Article 12 Article 56, paragraph one, "the extent of protection of the patent right for invention or utility model shall be determined by the terms of the claims" of the Patent Law means that the extent of protection of the patent right should be determined by the extent of the technical features as stated in the claims, including also the extent as determined by those equivalent to the claimed technical features. By the equivalent features are meant those using basically the same means, performing basically the same function and achieving basically the same effect as the claimed technical features, and which can be contemplated by a person ordinarily skilled in the art without inventive labor.

Article 13 Unless the interested parties reach a mediation or conciliation agreement or

the requester withdraws his request, the administrative authority for patent affairs handling a patent infringement dispute shall prepare the Resolution Decision, in which the following information is given:

- (1) names or titles and addresses of the interested parties;
- (2) facts and reasons given by the interested parties;
- (3) reasons for which and bases on which the determination is made as to whether the infringing acts is constituted;
- (4) where the Decision determines the constitution of the infringing act, the category, object and scope of the infringing act shall be indicated which the respondent is ordered to cease performing; where Decision does not determines the constitution of the infringing act, the request by the requester shall be rejected; and
- (5) approach of and time limit for instituting administrative proceedings if a party is not satisfied with the Decision.

The Resolution Decision shall be signed by the staff members handling the case, and sealed by the administrative authority for patent affairs.

Article 14 Where, after the administrative authority for patent affairs makes the decision or the People's Court renders the judgment on the constitution of the infringing act, the respondent commits again the same infringing act of the same patent right, and the patentee or the interested party requests for handling the matter, the administrative authority for patent affairs may directly decide to order the cessation of the infringing act.

Chapter 3 Mediation of Patent Disputes

Article 15 One requesting the administrative authority for patent affairs for mediation of a dispute shall submit the Request, in which following information shall be given:

- (1) name or title and address of the requester, and the name and position of the legal representative of the requester, name of agent or title and address of the agency where an agent has been appointed;
- (2) name or title and address of the respondent; and
- (3) the matter in respect of which and reason for which the request is filed,

One alone requesting for mediation on the amount of damages for an infringement of the patent right shall submit a copy of the Resolution Decision made by the relevant administrative authority for patent affairs on the determination of the constitution of the infringing act.

Article 16 After receiving the Mediation Request, the administrative authority for patent affairs shall promptly forward the copy of the Request to the respondent by postal or direct delivery or by other means, requesting him to submit his statement of opinion within 15 days from the date of receipt of the copy.

Article 17 Where the respondent submits the statement of opinion and agrees on mediation, the administrative authority for patent affairs shall promptly put it on file for handling, and notify the requester and respondent of the time and place of the mediation.

Where the respondent fails to submit the statement of opinions after the expiration of the time limit, or expresses therein his non-acceptance of mediation, the administrative authority for patent affairs does not put it on file for handling, and notifies the requester thereof.

Article 18 The administrative authority for patent affairs may invite a relevant entity or individual to assist in the mediation of patent dispute, and the relevant entity or individual invited shall assist in the mediation.

Article 19 Where the interested parties reach an agreement upon mediation, a Mediation Agreement shall be prepared, signed or sealed thereby, and submitted to the administrative authority for patent affairs for filing. Where the agreement is not reached, the administrative authority for patent affairs closes the case as if the case was withdrawn, and notifies both parties thereof.

Article 20 Where a request is filed for mediation of a dispute over the ownership of the right to apply for the patent or of the patent right, an interested party may request, with the Acceptance Notification issued by the administrative authority for patent affairs, the State Intellectual Property Office to suspend the relevant procedure of the patent application or the patent right.

Where an agreement is reached upon mediation, the interested party shall go, with the Mediation Agreement, through the procedure for resuming the procedure with the State Intellectual Property Office; where the agreement is not reached, the interested party shall go, with the Notification on Withdrawal of the Case issued by the administrative authority for patent affairs, through the procedure for resuming the procedure with the State Intellectual Property Office. Where no request is filed for renewal of the suspension at the expiration of one year from the date of the request for the suspension, the State Intellectual Property Office automatically resumes the relevant procedure.

Chapter Four Investigation and Handling of Acts of Passing off the Patent of another Person and Counterfeiting Patent

Article 21 Upon finding out or receiving a report of an act of passing off the patent of another person or counterfeiting patent, the administrative authority for patent affairs shall promptly put it on file for handling and appoint two or more staff members to investigate and handle the case.

Article 22 Investigating and handling acts of passing off the patent of another person and counterfeiting patent are under the jurisdiction of the administrative authority for patent affairs of the place where the act has taken place.

Where the administrative authorities for patent affairs have a dispute over their jurisdiction, the administrative authority for patent affairs of their higher level People's Government shall designate administrative authority for patent affairs to exercise the jurisdiction; if there is no such administrative authority for patent affairs of their higher level People's Government, the State Intellectual Property Office shall designate administrative authority for patent affairs to exercise the jurisdiction.

Article 23 Before making a decision on administrative penalty, the administrative authority for patent affairs shall inform the interested party of the facts and reasons for and bases on which the penalty decision is made and tell them the rights they are entitled to under the law.

Article 24 An interested party has the right to voice his opinion and defend himself, and the administrative authority for patent affairs shall examine the facts, reasons and evidence raised thereby.

Article 25 Where an act of passing off the patent of another person or counterfeiting patent is constituted upon investigation, the administrative authority for patent affairs shall prepare the Decision on Penalty, in which information as to the following shall be indicated:

- (1) title or name and address of the interested party;
- (2) facts and reasons for and bases on which the constitution of the act of passing off the patent of another person or counterfeiting patent is established;
- (3) penalty and mode of execution thereof; and
- (4) approach of and time limit for instituting administrative proceedings out of dissatisfaction of the decision on penalty.

The Decision on Penalty shall be sealed by the administrative authority for patent affairs.

Article 26 Where an act of passing off the patent of another person or counterfeiting patent is not constituted upon investigation, the administrative authority for patent affairs closes the case as if the case were withdrawn.

Chapter Five Investigation and Evidence Collection

Article 27 In the process of handling patent infringement dispute and investigating and handling the act of passing off the patent of another person or counterfeiting patent, the

administrative authority for patent affairs may, if necessary, make investigation and collect evidence according to its functions and authority.

Article 28 The administrative authority for patent affairs making investigation and collecting evidence may consult and copy contracts, account books and other relevant documents relating to the case; question the interested parties and witnesses; and conduct on-site inspection by way of measurement-taking, photography-taking and videotape-recording. Where an infringement of the patent right for process of manufacture is suspected, the administrative authority for patent affairs may require the person being investigated to conduct on-site demonstration.

The administrative authority for patent affairs making investigation and collecting evidence shall take notes, which shall be signed and sealed by the staff members handling the case and the entity or individual investigated. Where the entity or individual being investigated refuses to sign or seal, this information shall be indicated in the notes.

Article 29 The administrative authority for patent affairs making investigation and collecting evidence may collect evidence by way of sampling.

In the case of patent for product, a part of the products suspected of infringement may be collected as the sample; in the case of patent for process, a part of the products directly obtained by the process may be collected as the sample. The quantity of the sample taken shall be enough to testify the fact.

The administrative authority for patent affairs collecting evidence by way of sampling shall take notes, indicating the name, features and quantity of the sample taken. The notes shall be signed or sealed by the staff members handling the case and the entity or individual investigated.

Article 30 Where the evidence is likely to be lost or difficult to obtain afterward, and where it is impossible to collect evidence by way of sampling, the administrative authority for patent affairs may keep and take a record of the evidence, and make a decision within 7 days.

The entity or individual being investigated shall not destroy or transfer the evidence so kept and recorded.

The administrative authority for patent affairs keeping and taking a record of evidence shall take notes, indicating the name, features, quantity and place of recording and keeping the evidence. The notes shall be signed or sealed by the staff members handling the case and the entity or individual investigated.

Article 31 Where the administrative authority for patent affairs investigates and collects evidence and examine evidential materials, the relevant entity or individual shall furnish true evidence and materials, and assists in the investigation.

Article 32 The administrative authority for patent affairs which needs to entrust another administrative authority for patent affairs for assistance in the investigation and evidence collection shall clearly make the request. The administrative authority for patent affairs accepting the entrustment shall promptly and conscientiously assist in the investigation and evidence collection, and make its reply as soon as possible.

Chapter Six Legal Responsibilities

Article 33 Where it establishes that an act constitutes an act of patent infringement, the administrative authority for patent affairs shall order the infringer to immediately cease the infringing act and take the following measures to stop the infringing act.

(1) Ordering the infringer manufacturing a patented product to immediately cease the act of manufacture, destroy the equipment or moulds specially used for the manufacture of the infringing products, and not to sell and use the infringing products that have not been sold or not to market them in any other form; where the infringing products are difficult to be kept, ordering the infringer to destroy them;

(2) Ordering the infringer using a patented process to immediately cease the act of using the patent, destroy the equipment or moulds specially used for the exploitation of the patented process, and not to sell and use the infringing products that have not been sold and which have been directly obtained by the patented process, or not to market them in any other form; where the infringing products are difficult to be kept, ordering the infringer to destroy them;

(3) Ordering the infringer selling patented products or products directly obtained by the patented process to immediately cease the act of sale, and not to use the infringing products that have not been sold and which have been directly obtained by the patented process, or not to market them in any other form; where the infringing products are difficult to be kept, ordering the infringer to destroy them;

(4) Ordering the infringer offering for sale of patented products or products directly obtained by the patented process to immediately cease the act of offering for sale, to eliminate ill effects and not to permit any act of actual sale;

(5) Ordering the infringer importing patented product or products directly obtained by the patent process to immediately cease the act of importation; where the infringing products are imported into the territory of China, ordering not to sell and use the infringing products, or to market them in any other form; where the infringing products are difficult to be kept, ordering the infringer to destroy the products; where the infringing products are not imported into the territory of China, the relevant customs may be notified of the Resolution Decision; and

(6) Taking other measures necessary to cease the infringing act.

Article 34 Where the respondent institutes administrative proceedings in the people's

court after the administrative authority for patent affairs establishes that an act constitutes a patent infringement, the enforcement of the decision shall not be suspended during the proceedings.

Where the infringer does not institute proceedings against the Resolution Decision by the administrative authority for patent affairs establishing constitution of the infringing act, nor does he cease his infringing act after the expiration of the time limit, the administrative authority for patent affairs may apply the People's Court for compulsory enforcement.

Article 35 Where an act of passing off the patent of another person is suspect of violating Article 216 of the Criminal Law, the administrative authority for patent affairs shall transfer the case to the judicial authority to be prosecuted for criminal liability.

Where an act of counterfeiting or transforming any patent certificate is suspect of violating Article 280 of the Criminal Law, the administrative authority for patent affairs shall transfer the case to the judicial authority to be prosecuted for criminal liability.

Article 36 Where it establishes the constitution of an act of passing off the patent of another person or counterfeiting patent, the administrative authority for patent affairs shall order the actor to take the following rectifying measures;

(1) Where the number of another person's patent is indicated on the products manufactured and marketed or on the packages thereof, or non-patented products are manufactured and marketed with a patent marking attached, the actor shall immediately remove the marking and number of the patent; where the marking and number of the patent are difficult to be detached from the products, ordering the actor shall destroy the products.

(2) Where the number of another person's patent is used in advertisement or other promotional materials, or a non-patented technology is called a patented one in advertisement or other promotional materials, ordering the actor shall immediately stop issuing the advertisement or circulating the promotional materials, eliminate ill effect, and hand in the remaining promotional materials.

(3) Where the number of another person's patent is used or a non-patented technology is called a patented one in contract, ordering the actor shall immediately notify the other party thereof, and rectify the relevant contents of the contract.

(4) Where an act of counterfeiting or transforming the patent certificate, patent document or patent application document of another person or act of counterfeiting or transforming the patent certificate, patent document or patent application document is committed, the actor shall immediately cease the act, hand in his counterfeited or transformed patent certificate, patent document or patent application document.

(5) Any other necessary rectifying measures.

Article 37 Where the administrative authority for patent affairs establishes the constitution of an act of passing off the patent of another person or counterfeiting patent and makes a decision on the punishment thereof, the decision shall be published.

Article 38 When the administrative authority for patent affairs establishes the constitution of an act of passing off the patent of another person, it may determine the illicit income of the actor by the following approaches:

(1) Where products are sold that pass off the patent of another person, the sales price thereof times the quantity of the products sold is the illicit income of the actor; or

(2) Where a contract is concluded for a passing-off patent, the fees collected therefore are illicit income of the actor.

Article 39 Where after the administrative authority for patent affairs makes the decision on punishment, an interested party institutes administrative proceedings in the people's court, the enforcement of the decision shall not be suspended during the proceedings.

Article 40 An actor of the act of passing off the patent of another person or counterfeiting patent shall pay the fine indicated in the decision on punishment at a designated bank within 15 days from the date of receipt of the Decision on Punishment; where the fees are not paid after the expiration of the time limit, an addition fine shall be imposed a day that is 3 per cent of the amount of the initial fine.

Article 41 Where one disallows and blocks the administrative authority for patent affairs to carry or from carrying on the duty according to law, penalty shall be imposed thereon according to the Rules by the Social Security Authority on Penalty for the Purpose of Administration of Social Security; where the circumstances are so serious as to constitute a crime, the judicial authority imposes criminal liabilities according to law.

Chapter Seven Supplementary Provisions

Article 42 Where the regulations and rules issued by the former Patent Office and the State Intellectual Property Office are not consistent with these Measures, these Measures shall prevail.

Article 43 The State Intellectual Property Office is responsible for the interpretation of these Measures.

Article 44 These Measures enter into force on the day of promulgation thereof.