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100805

北京市西城区前门西大街1号

全国人民代表大会常务委员会法制工作委员会

沈春耀主任

## 主题：《中华人民共和国专利法（修正案草案）》反馈意见

尊敬的沈主任您好：

美国知识产权所有人协会(下称“IPO协会”)感谢全国人大常委会法制工作委员会(下称“人大法工委”)提供的对2019年1月4日发布的《中华人民共和国专利法(修正案草案)》(下称“《草案》”)提交意见的机会。

IPO协会是一家代表各行业、各技术领域内拥有知识产权或相关权益的公司和个人的国际性行业协会。它拥有大约两百家会员以及超过一万两千多名个人会员。这些个人会员有些从属于公司会员或律所成员,有些是发明人、作者或律师会员。IPO协会的会员遍及三十多个国家。

IPO协会提倡有效和实惠的知识产权,为会员提供广泛的服务,包括支持会员在立法和国际事务中的利益、分析当前知识产权问题、提供教育和信息服务、以及向公众传播知识产权的重要性。

IPO协会感谢人大法工委在促进创新上所做的努力。我们非常高兴地看到《草案》中包括了很多大家期盼已久的变革。第四十三条(现行法第四十二条)中加入了创新药品的专利权期限延长,这表明了对制药公司在药品临床开发阶段做出重大投资,然而专利权期限却因审批时间而流失的补偿。

我们盛赞人大法工委对专利权执行和对专利侵权的有效救济等实际问题上所付出的心力。举例而言,《草案》第七十二条(现行法第六十五条)提高了专利侵权的法定赔偿,这能更为准确反映专利权人所遭受的实际损害。将法院关于赔偿数额的举证责任的实践已成熟的做法上升为法律规范也会被专利权人所赞同。专利法可以通过保护对创新的投资来鼓励各方面积极创新。有效的专利系统则需要公平而有效率的机制来解决关于专利权的争议。

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IPO 协会赞同《草案》第七十五条（现行法第六十八条）中把侵犯专利权的诉讼时效从二年增加到三年。这一改变对那些对中国某些区域的侵权行为发生了解不够充分的专利权人很重要。我们也高兴地看到《草案》第六十六条（现行法第六十一条）允许双方当事人而不仅仅是人民法院或管理专利工作的部门对于实用新型和外观设计专利“主动出具专利权评估报告”。由于国家知识产权局对这两类专利不进行实审，专利权评估报告在诉讼中尤为重要，因为它能帮助确定权利的界限，促进诉讼的公平和效率。

我们非常赞同《草案》第二十二条（现行法第二十一条）中加入的要求“国务院专利行政部门应当加强专利信息公共服务体系建设，定期出版专利公报，完整、准确、及时发布专利信息，提供专利信息基础数据，促进专利信息传播与利用”。这将增加国家知识产权局办公的透明度，使专利系统的使用者得益，也有利于国知局建立起一个公正和有效的形象。

我们也赞同删除现行法第七十二条。这一条款中提到的侵夺权益的非法行为完全可以通过已有的合同和法律救济手段来阻止和惩罚。

以下意见就《草案》第二、六、十六、二十、二十六、三十一、四十三、四十七、五十二、六十五、六十九、七十一和七十二条而提出。

## 第二条

《草案》删去了 2015 年国务院法制办《中华人民共和国专利法修订草案(送审稿)》中第二条增加的对局部设计的保护。我们强烈建议在第二条中包括局部设计，这将鼓励创新，并增加跟其他主要国家和地区（例如美国，欧盟，日本和韩国）的一致性。

保护局部设计为创新提供了保护和激励。举例而言，目前对局部设计保护的缺失使得图形用户界面(GUI)的外观设计专利很难维权，哪怕是在极其明显的软件抄袭和侵权的情况下。很多人认为，如果没有对局部设计的保护，中国的 GUI 和图标外观设计专利的价值就会降低，尤其是对那些只制造软件的公司以及对那些在各种不同的装置和平台上使用的软件而言。

对局部设计保护的缺失并不仅对 GUI 设计是个问题。今天的创新很多都是对已有的创意和产品的改进，有些产品设计中的元素会被一直沿用到后代产品中。因为产品的新设计可能基于或者沿用前代产品的部分设计，这些产品中的观感新颖特征可能会独立于整体产品之外具有重要的商品价值。

此外，为了防止在供应链中形形色色的侵权者，对产品单独部分的保护也可能是必须的。

在中国专利法中加入对局部设计的保护会增强国际统一性并减轻申请人的负担。几乎所有其他的主要国家和地区都有对局部设计的保护。如果在中国没有保护，会对中国申请人在国外申请增加负担，也对国外申请人在中国申请增加负担，因为他们都需要修改在

国外和国内的申请策略。此外，中国如果想加入工业品外观设计国际注册海牙体系，也需要提供对局部设计的保护。

IPO 协会谨此建议对现行专利法第二条作如下修改：

## 第二条

本法所称的发明创造是指发明、实用新型和外观设计。

发明，是指对产品、方法或者其改进所提出的新的技术方案。

实用新型，是指对产品的形状、构造或者其结合所提出的适于实用的新的技术方案。

外观设计，是指对产品的整体或者局部的形状、图案或者其结合以及色彩与形状、图案的结合所作出的富有美感并适于工业应用的新设计。

## 第六条

我们理解，就像人大法工委在关于《中华人民共和国专利法修正案（草案）》的说明中所说的那样，第六条第一款中增加的内容是为了明确单位对职务发明创造的处置权。然而我们认为新增句中关于产权激励的部分是不必要且容易引起歧义的，因此建议删除这一部分。

专利法第十六条已经要求单位（就职务发明）对发明人或者设计人给予合理的报酬（但是没有规定具体方式），而第六条中新增的产权激励机制包括了具体的例子。我们担心的是，这一句中着重强调了“股权、期权、分红”这几种方式并在后面用了“等”这一词，可能会被错误地理解为报酬方式被限定于这些基于产权的奖励，从而限制了单位给员工报酬的自由。

另外，我们注意到，这一句关于产权激励机制的语言似乎来自于政府对国有科技型企业的要求（例如财政部、科技部、国资委 2016 年 2 月 26 日印发的《国有科技型企业股权和分红激励暂行办法》以及 2018 年 9 月 18 日印发的《关于扩大国有科技型企业股权和分红激励暂行办法实施范围等有关事项的通知》），而民营企业依公司法成立，有依法的内部股权分配原则和发明人奖励办法。将适用于国有科技型企业的条款加于民营企业头上，可能会造成单位和员工之间不必要的紧张关系，干扰企业的合法经营。

IPO 协会谨此建议对《草案》第六条作如下修改：

#### 第六条

执行本单位的任务或者主要是利用本单位的物质技术条件所完成的发明创造为职务发明创造。职务发明创造申请专利的权利属于该单位；申请被批准后，该单位为专利权人。该单位对职务发明创造申请专利的权利和专利权可以依法处置，~~实行产权激励，采取股权、期权、分红等方式，使发明人或者设计人合理分享创新收益，促进相关发明创造的实施和运用。~~

非职务发明创造，申请专利的权利属于发明人或者设计人；申请被批准后，该发明人或者设计人为专利权人。

利用本单位的物质技术条件所完成的发明创造，单位与发明人或者设计人订有合同，对申请专利的权利和专利权的归属作出约定的，从其约定。

#### 第十六条

现行专利法第十六条(《草案》未修改)规定被授予专利权的单位对职务发明创造的发明人或者设计人据专利实施推广应用的范围和取得的经济效益给予合理的报酬，但是并没有说明经济效益是由谁获得。如果单位已将专利权转让或者许可给他人，取得专利受让或许可的乙方所获得的经济效益与原专利权单位获得的经济效益并不相等。因此，我们建议澄清本条以说明经济效益是指单位取得的经济效益。

此外，我们认为，只要发明人或设计人所在单位执行了依法制定的有关职务发明奖酬的规章制度或与发明人或设计人之间有关职务发明奖酬的约定，就应被视为满足了第十六条下对单位给予发明人或者设计人奖励和报酬的要求。

IPO 协会谨此建议对现行专利法第十六条作如下修改：

#### 第十六条

被授予专利权的单位应当对职务发明创造的发明人或者设计人给予奖励；发明创造专利实施后，~~单位如果实施职务发明创造，在实施之前或之后~~应根据其推广应用的范围和单位取得的经济效益，对发明人或者设计人给予合理的报酬。

#### 第二十条

我们认为《草案》新增的第二十条是不必要的。我们理解“诚实信用原则”指的是不应该偷窃、剽窃或抄袭他人的发明或专利申请内容来申请自己的专利，或者冒充专利，假冒他人专利以及明知他人有专利权而去实施侵犯该专利权的行为，但“排除、限制竞

争”一词语义过于模糊不明，尤其是在专利本身的特征之下。专利是政府给予的排他性权利，用于交换发明对公众的公开。这种排他性权利是对创新的激励，也是专利系统的基石。合理地利用专利权排除和限制竞争并不是“滥用”。

其次，“损害公共利益”一词的语义也过于模糊，难以为人民法院及行政机关提供足够清晰、准确及容易执行的标准，其结果可能是造成严重的不确定性，以至于影响对专利的合法使用，因而违反了世界贸易组织《与贸易有关的知识产权协定》(TRIPS)第三十条的规定，即“成员方可对专利授予的独占权规定有限的例外，条件是该例外规定没有无理地与专利的正常利用相冲突，也未损害专利所有者的合法权益，同时考虑到第三者的合法权益”。

另外，《中华人民共和国反垄断法》适用于“经营者滥用知识产权，排除、限制竞争的行为”（见第五十五条）。基于此条，国家的反垄断机构和人民法院已经在近年将滥用专利权作为反竞争的行为而制定了相应的规定和指南及发布了相应的法律意见。因此，在中国现有的法律体系下，滥用专利权是一种反竞争的行为，应当在反垄断法及相应的法规涵盖范畴下，而不应该由专利法重复涵盖。

IPO 协会谨此建议删去新增的《草案》第二十条。如果不能删去，我们建议对第二十条作如下修改：

第二十条（新增）

申请专利和行使专利权应当遵循诚实信用原则，不得滥用专利权损害公共利益或者排除、限制竞争。

## 第二十六条

《草案》第二十六条禁止对疾病的诊断和治疗方法的发明授予专利。然而，与疾病诊断和治疗方法相关的发明，比如包含药品的剂量或频率的疗法，对医疗的发展有重要价值。如果不能就此类发明取得专利，会妨碍在中国的病人得到新颖和有益的诊断和治疗。

IPO 协会谨此建议删除《草案》第二十六条第三款对疾病的诊断和治疗方法的限制

## 第二十六条

对下列各项，不授予专利权：

- （一）科学发现；
- （二）智力活动的规则和方法；
- ~~（三）疾病的诊断和治疗方法；~~

（四）动物和植物品种；

（五）原子核变换方法以及用原子核变换方法获得的物质；

（六）对平面印刷品的图案、色彩或者二者的结合作出的主要起标识作用的设计。

对前款第（四）项所列产品的生产方法，可以依照本法规定授予专利权。

如下：

## 第三十一条

《草案》第三十一条将提交发明和实用新型专利优先权文件的期限从提出申请之日三个月内延长到第一次提出申请之日起十六个月内，但是这一变化并没有包括外观设计专利的优先权文件提交。IPO 协会谨此建议对《草案》第三十一条作如下修改：

## 第三十一条

申请人要求优先权的，应当在申请的时候提出书面声明，并且在第一次提出发明、实用新型专利申请之日起十六个月内或者在**第一次**提出外观设计专利申请之日起**三十**个月内，提交第一次提出的专利申请文件的副本；未提出书面声明或者逾期未提交专利申请文件副本的，视为未要求优先权。

## 第四十三条

我们非常乐于见到外观设计专利权的期限从十年增加到了十五年，以及对药品专利权期限的延长。只是在中国境内与境外同步申请上市这一要求对创新药品公司会造成很大的负担。因此，IPO 协会谨此建议对《草案》第四十三条作如下修改：

#### 第四十三条

发明专利权的期限为二十年，实用新型专利权和外观设计专利权的期限为十年，外观设计专利权的期限为十五年，均自申请日起算。

为补偿创新药品上市审评审批时间，对在中国境内与境外同步首次申请上市的创新药品发明专利，国务院可以决定延长专利权期限，延长期限不超过五年，创新药上市后总有效专利权期限不超过十四年。

在本法实施之日时已经上市的符合上述条件的创新药品，如果专利权期限不少于六个月，专利权人可以在本法实施之日三个月内提出延长专利权期限的申请。

#### 第四十七条（现行专利法第四十六条）

无效宣告请求程序应当是专利权人和宣告专利权无效的请求人之间就专利有效性产生的争议的解决机制。在现有的上诉程序中，专利复审委员会为无效宣告程序的决定做辩护，这不仅是对行政资源的极大浪费，还阻止了争议双方另行解决（例如通过和解或者撤销）争议。因此，IPO协会谨此建议对《草案》第四十七条（现行专利法第四十六条）作如下修改：

#### 第四十七条

专利复审委员会对宣告专利权无效的请求应当及时审查和作出决定，并通知请求人和专利权人。宣告专利权无效的决定，由国务院专利行政部门登记和公告。

对专利复审委员会宣告专利权无效或者维持专利权的决定不服的，可以自收到通知之日起三个月内向人民法院起诉无效宣告请求程序中的对方当事人。人民法院应当通知无效宣告请求程序的对方当事人专利复审委员会作为第三人参加诉讼。

#### 第五十二条

IPO协会建议将《草案》第五十二条中的“国务院专利行政部门”修改为“专业调解机构”，因为我们认为对开放许可有争议的双方应该对调解有选择权，而任何一个机构想要在商业许可争议和调解领域达到专业水平都需要很长的时间。因此，IPO协会谨此建议对第五十二条作如下修改：

## 第五十二条

当事人就实施开放许可发生纠纷的，可以请求国务院专利行政部门专业调解机构进行调解。

## 建议第六十五条后新增条款

现行专利法对于国家知识产权局及其地方分支机构作出的行政决定是否立即具有执行力并无规定。IPO 协会建议新增的条款明确了此类行政决定在上诉期间无效且不具有执行力。这一修改能够确保行政执法可以收到司法审查。如果缺乏这一修改，根据《中华人民共和国民事诉讼法》，上述行政决定将立刻生效，有可能产生不好的效果。

在过去的二十年间，有一些人民法院已经积累具备了审判专利侵权案件的专长。确实而言，在北京、上海、广州建立知识产权法院，集中知识产权界的技术和法律专家，正是向着提高中国人民法院一致性走出了坚实的一步。此外，今年新建的最高人民法院知识产权法庭更是向法院一致性迈开了更大的一步。而使得行政决定立刻生效恰恰和中国将知识产权案件交给专门法院的努力方向相违背。

因此，IPO 协会谨此建议在《草案》第六十五条（现行专利法第六十条）后增加以下条款：

## 第六十五条后新增第 X1 条

管理专利工作的部门作出的停止侵权、没收、罚款、查封、扣押等行政决定，当事人依照《中华人民共和国民事诉讼法》、《中华人民共和国民事诉讼法》和其他相关法律向人民法院起诉的，诉讼进行期间，该行政决定不具有执行力。若当事人起诉期满未提起诉讼的或相关生效判决维持该行政决定，该行政决定生效且具有执行力。

## 第六十九条

《草案》第六十九条将管理专利工作和负责专利执法的部门的查处权力从假冒专利行为扩大到包括侵犯专利权行为。与查处假冒专利行为（通常只需要确认专利所有权）不同，对侵犯专利权行为的调查往往会涉及到保密的技术和商业信息。我们担心，如果给予管理专利工作和负责专利执法的部门广泛的权力来检查涉嫌违法行为的场所以及查阅有关资料，会造成很大的技术和商业秘密泄露风险。因此，IPO 协会谨此建议对第六十九条作如下修改：

## 第六十九条

管理专利工作的部门、负责专利执法的部门根据已经取得的证据，对涉嫌侵犯专利权、假冒专利行为进行处理、查处时，可以询问有关当事人，调查与涉嫌违法行为有关的情况；对当事人涉嫌违法行为的场所实施现场检查；查阅、复制与涉嫌违法行为有关的合同、发票、账簿以及其他有关资料；检查与涉嫌违法行为有关的产品，对有证据证明是假冒专利的产品，可以查封或者扣押。查处过程中应维持当事人技术和商业信息的保密性。

管理专利工作的部门、负责专利执法的部门依法行使前款规定的职权时，当事人应当予以协助、配合，不得拒绝、阻挠。

## 第七十一条

《草案》新增的第七十一条规定了网络服务提供者的连带责任，如果其在接到专利权人或者利害关系人依据人民法院生效的判决书、裁定书、调解书，或者管理专利工作的部门作出的责令停止侵权的决定而发的通知后未及时采取必要措施（例如删除、屏蔽、断开侵权产品链接）。第七十一条也要求网络服务提供者接到负责专利执法的部门对假冒专利作出责令改正的决定后所发的通知后采取必要措施。

总体而言，我们认为网络服务提供者应该与其它任何向侵权第三方提供可能用于专利侵权行为的服务或部件的供应商一样，在同样的法规和标准下承担次级侵权责任。举例而言，如果网络服务提供者提供的网络服务恰好被侵权第三方所用，这与一个卡车或货运公司提供的运输服务恰好被侵权第三方所用或与一个制造商提供的部件恰好被用于侵权产品中的情况不应被区别对待。据我们所知，世界上并没有其它任何主要国家对网络服务提供者要求类似的专利侵权连带责任。

此外，为避免专利侵权连带责任所需采取的“必要措施”的范围过于不确定。举例而言，人民法院的判决书或管理专利工作的部门作出的决定可能不一定明确说明了哪些产品被认定侵权或假冒，哪些网站包含了与这些产品相关的内容，以及对这些网站网址链接到底需要采取哪些必要措施。除非判决书和决定足够明确地列出了那些网站和产品需要被网络服务提供者提供地网络服务删除，服务提供者并没有很好的方法能够合理地确定哪些链接需要被删除，以解决确立的侵权和假冒问题。由于第七十一条并没有对法院判决书的细节有所规定，以及网络服务提供者很有可能不能确定哪些链接跟侵权产品有关，要求网络服务提供者仅在收到通知的情况下就承担连带责任，会给服务提供者带来很大的负担和不确定性。而且，因为专利权利要求的含义远远不如著作权和商标的排除范围清晰和确定，想要区分通往侵权产品的链接和通往非侵权替代产品或规避设计产品的链接极其困难。由于网络服务提供者收到通知后所需采取行动的不确定性，《草案》中的侵权连带责任是一个过于严苛的救济。

## 第七十二条

《草案》第七十二条保留了现行专利法第六十五条第一款中的“侵犯专利权的赔偿数额按照权利人因被侵权所受到的实际损失确定；实际损失难以确定的, 可以按照侵权人因侵权所获得的利益确定”。我们提议, 在证据允许的情况下, 应该准许专利权人自己选择按照实际损失还是按照侵权人因侵权所获利益获得赔偿。我们也建议赔偿数额不要包括开支, 因为专利属于复杂的争议案件, 当事人双方可能真诚地持不同意见, 只有在非常特别地情况下才应该判定赔偿数额包括支付的开支。

虽然 IPO 协会赞同在本条中加入针对故意侵权行为的条款, 我们认为这一条款还可以在两方面有所改进。首先, “故意侵权”没有被定义, 这可能造成各人民法院和专利行政部门对故意侵权给出不同的释义。我们建议在本条中加入进一步的指导以避免造成释义不同。其次, 对故意侵权处以确定赔偿数额最高五倍地赔偿数额过于高了, 尤其在确定赔偿数额已经很高的情况下。据我们所知, 没有任何其他国家和地区对故意侵权处以如此高的惩罚。我们建议对故意侵权的惩罚性赔偿不超过确定赔偿数额的三倍。

IPO 协会谨此建议对《草案》第七十二条作如下修改:

## 第七十二条

侵犯专利权的赔偿数额按照权利人因被侵权所受到的实际损失确定；实际损失难以确定的，或者根据权利人的选择，也可以按照侵权人因侵权所获得的利益确定。权利人的损失或者及侵权人获得的利益均难以确定的，参照该专利许可使用费的倍数合理确定。

对故意侵犯专利权，~~情节严重的~~，可以在按照上述方法确定数额的一倍以上五三倍以下确定赔偿数额。

确立故意侵犯专利权以及故意侵犯专利权的赔偿数额时应考虑以下因素：

- (一) 侵权人的行为是否与业界行为标准一致；
- (二) 侵权人是否故意复制权利人有专利覆盖的产品；
- (三) 侵权人是否合理地相信自己未侵权；
- (四) 侵权人是否合理地相信相关专利无效；
- (五) 侵权人是否为避免侵权做过真诚的努力，例如对专利做过规避设计；
- (六) 侵权人是否试图掩盖侵权行为；
- (七) 侵权人是否真诚地依赖于关于其行为不属于专利侵权或者专利无效或不能执行的法律意见书。

权利人的损失、侵权人获得的利益和专利许可使用费均难以确定的，人民法院可以根据专利权的类型、侵权行为的性质和情节等因素，确定给十万元以上五百万元以下的赔偿。

~~赔偿数额还应当包括权利人为制止侵权行为所支付的合理开支。~~

人民法院为确定赔偿数额，在权利人已经尽力举证，而与侵权行为相关的账簿、资料主要由侵权人掌握的情况下，可以责令侵权人提供与侵权行为相关的账簿、资料；侵权人不提供或者提供虚假的账簿、资料的，人民法院可以参考权利人的主张和提供的证据判定赔偿数额。

随信附上本信的翻译版本。IPO 协会再次感谢人大法工委给予此次机会提出反馈意见。我们也非常愿意进一步交流或能有机会提供更多的信息。

此致

美国知识产权所有人协会谨启



Mark Lauroesch 马克·劳勒施

执行会长

附件：IPO 协会对《中华人民共和国专利法（修正案草案）》的反馈意见(英文版)



2 February 2019

Mr. Shen Chunyao  
Chairman, Legislative Affairs Commission  
Standing Committee of the National People's Congress of the People's Republic of China  
No. 1, Qianmen Street W  
Xicheng District  
Beijing 100805  
People's Republic of China

**Re: The Patent Law of the People's Republic of China (Draft Revision)  
(January 4, 2019)**

Dear Chairman Shen:

Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the request for comments on the Patent Law of the People's Republic of China (Draft Revision) ("the Draft Revision") dated 4 January 2019.

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes about 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans over 30 countries.

IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

IPO commends the Legislative Affairs Commission for its efforts in promoting innovation. We are glad to see that the Draft Revision includes many changes that have been long anticipated. IPO applauds the addition of patent term extension for innovative drugs in Article 43 (original Article 42). This recognizes the significant investment made by pharmaceutical companies during the clinical development phase of a drug and, as a result of the patent term, lost during regulatory review.

We commend the attention given to practical concerns regarding enforcement of patent rights and development of effective remedies for infringement of those rights. In this regard, the increase in statutory damages provided in Article 72 (original Article 65), for example, better reflects the actual damages suffered by patentees. The codification of the shift of burden of proof of damage from the patentee to the defendant also solidifies the practice by the courts and is welcomed by IP owners. By protecting investments in innovation, patent law

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encourages parties to innovate. Fair and efficient mechanisms for resolving disputes relating to patent rights are important parts of any effective patent regime.

IPO welcomes the amendment of Article 75 (original Article 68) to increase the statute of limitations for patent infringement from two to three years. This change is particularly important to entities who have more limited awareness of infringement of their patents in regions of China. We also welcome the amendment to Article 66 (original Article 61) to allow parties, not just the court, to "take the initiative to submit patentability evaluation reports" for utility model and design patent infringement disputes. Neither utility model nor design patents undergo substantive examination by CNIPA, so it is important that patentability evaluation reports be available in litigation to determine the proper scope of such rights before infringement is determined, to promote fairness and efficiency.

IPO welcomes the amendment to Article 22 (original Article 21) to require that "[t]he patent administration department under the State Council shall strengthen the construction of the public service system of patent information, regularly publish patent bulletins, release patent information in a complete, accurate and timely manner, provide basic data of patent information, and promote the dissemination and utilization of patent information." This increased transparency in the patent office's operations will benefit users of the patent system, and promote the perception of the patent office as a fair and efficient agency.

IPO also welcomes the deletion of original Article 72. Existing contractual and legal remedies are sufficient to deter and penalize usurpation of rights and other improper acts addressed by original Article 72.

Our comments below address Articles 2, 6, 16, 20, 31, 43, 52, 65, 69, 71, and 72 of the Draft Revision.

## **Article 2**

The Draft Revision does not include previously proposed amendments to Article 2 that would enable protection for partial designs. Such amendments were included in the previous 2015 draft. We strongly recommend including partial designs as allowable designs in Article 2, to both encourage innovation and to increase harmonization with other major jurisdictions, such as the United States, European Union, Japan, and South Korea.

Protecting partial designs provides stronger protection, and incentive, for innovation. For example, the current lack of protection for partial designs makes GUI design patents difficult to enforce, even when there is blatant software copying and infringement. Many believe that, without such protection, there is a reduced worth associated with GUI and icon design patents in China, particularly for companies that produce software alone, and for software that is usable on a variety of devices or platforms.

The inability to claim partial designs is not only a problem for GUI designs. Much of today's innovation is incremental, building on existing ideas and products, and certain elements of a product's design often carry through to later generations. Because new designs for products might build on or incorporate portions of designs of previous product generations, novel features within those goods with respect to look and feel can have significant commercial relevance separate and apart from the overall product.

Additionally, it might be necessary to separately protect individual parts of a product to safeguard against specific infringers in a supply chain.

Incorporating protection for partial designs in China would lead to increased international harmonization and help lessen the burdens on applicants. Almost all other major jurisdictions protect partial designs. The lack of protection of partial designs in China adds additional burdens to Chinese applicants who file abroad, and a similar burden to foreign applicants who file in China, because both need to revise their filing strategies for filing inside and outside of China. Moreover, China should provide protection of partial designs to participate in the Hague System for the International Registration of Industrial Designs.

Partial design protection should include the use of broken lines. Broken lines enable the applicant to provide critical context for their design without overly limiting what is protected by a design patent. Broken lines also allow the applicant to focus on just the novel features of the design. In other countries, including the United States, European Union, Japan, and South Korea, such lines allow the applicant to depict non-essential features to clarify the novel aspect being claimed.

IPO respectfully recommends that Article 2 be revised as follows:

In this Law, "inventions-creations" mean inventions, utility models and designs.

"Invention" means any new technical solution relating to a product, a process or improvement thereof.

"Utility model" means any new technical solution relating to the shape, the structure, or their combination, of a product, which is fit for practical use.

"Design" means any new design of the shape, the pattern, or their combination, or the combination of the color with shape or pattern, of a portion or the whole of a product, which creates an aesthetic feeling and is fit for industrial application.

## Articles 6

Although we understand, as stated in the Explanatory Notes regarding the Draft Revision, that the addition to paragraph 1 of Article 6 serves the purpose of solidifying employer entities' disposition right of service inventions, we believe that the second part of the sentence regarding incentive mechanism is unnecessary and might cause confusion, and therefore recommend its removal.

Article 16 already requires an employee entity to give the inventor or designer (of a service invention) a reasonable amount of remuneration (but without specifying exactly how). The proposed incentive mechanism in Article 6 includes specific examples. We are concerned that, by specifically emphasizing stock-related awards such as "equity, options, and dividends," and placing the word "etc." in the same phrase as "equity, options, and dividends," this amendment can be misinterpreted as requiring share-based awards as the only acceptable type of remuneration, and thereby limiting the employee entity's freedom in remunerating its employees.

Additionally, we noticed that the sentence regarding incentive mechanism appears to have derived from measures applicable to state-owned technological enterprises (see, e.g., Interim Measures for the Equity and Dividend Incentives for State-owned Scientific and Technological Enterprises, published by the Ministry of Finance, the Ministry of Science and Technology, and the State-Owned Assets Supervision and Administration Commission on February 26, 2016 and amended on October 23, 2018). Privately-owned enterprises formed under corporate law might already have equity distribution principles and inventor remuneration policies established according to applicable laws. Applying incentive mechanism measures meant for state-owned technological enterprises to private-owned enterprises might cause unnecessary tensions between employees and their employer entities and thereby disturb the legal operation of the entities.

IPO respectfully recommends that Article 6 be revised as follows:

Any invention/creation made in the course of performing the duties of an employee for the employer entity, or primarily by using the material and technical resources of an employer entity, shall be deemed a service invention/creation. The right to apply for a patent on any service invention/creation shall belong to the employer entity; and the employer entity shall be the patentee after the application is granted patent right. The employer entity is entitled to dispose the right of patent application and the patent right of a service invention in accordance with the law, ~~and the property right incentive mechanism such as equity, option and dividend incentive policies may be implemented to allow the inventor or designer to reasonably share the proceeds of innovation and promote the implementation and application of the relevant invention.~~

The right to apply for a patent on any non-service invention/creation shall belong to the inventor or designer; and the inventor or designer shall be the patentee after the application is granted patent right.

For invention/creations made by using the material and technical resources of an employer entity, if the employer entity has contracted with the inventor or designer providing the ownership of the right to apply for a patent or the ownership of the patent, such provision shall prevail.

## Article 16

Article 16 requires an employer entity that is granted the patent right to give the inventor or designer a reasonable amount of remuneration according to the scope of the claimed invention/design and the economic benefits obtained. However, it does not specify who might have obtained the economic benefits. In the case that the patent right has been assigned or licensed by the employer entity, the economic benefits obtained by the assignee or licensee from exploiting the patent are not the same as the economic benefits obtained by the employer entity. Therefore, we recommend clarifying Article 16 by specifying that the economic benefits are obtained by the employer entity.

Additionally, we believe the obligation under Article 16 to give inventors/designers remuneration shall be considered satisfied by compliance with an employer's invention remuneration rules, regulations, plan, or compliance with an agreement between employer and inventor regarding inventor reward and remuneration. Further, an entity should be allowed the option of giving an inventor/designer remuneration before a patent is exploited.

IPO respectfully recommends that Article 16 be revised as follows:

The employer entity that is granted the patent right shall reward the inventor or designer of service invention/creation. ~~After the patent on the invention/creation is exploited, such~~ An employer entity who exploits a patent on an invention/creation shall give the inventor or designer a reasonable amount of remuneration before or after the exploitation according to the scope of application and the economic benefits obtained by the employer entity.

Obligation to give inventors and designers remuneration shall be considered fulfilled by compliance with the employer entity's service invention/creation remuneration policy or with the agreement between the employer entity and inventor or designer regarding service invention/creation remuneration.

## Article 20

We believe the proposed Article 20 is unnecessary. We understand that the principle of good faith means an applicant shall not steal, plagiarize, or copy a third party's invention or patent application contents and file it as its own patent application or patent, pass off a third party's patent, or infringe a third party's patent intentionally. However, the term "exclude or restrict competitions" is vague and confusing, especially in view of the very nature of a patent. A patent is the government's grant of an exclusive right in exchange for the public disclosure of an invention. Such exclusive right serves as the incentive to promote innovation, and is the basis of the patent system. The proper use of patent right to exclude and restrict competition is not "misuse."

The term "harm public interest" is also too vague to constitute sufficiently clear, specific, or administrable standards to guide courts or administrative agencies, which might create significant uncertainty and impede the legal use of patents. This would violate Article 30 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provides that the exceptions to the exclusive rights conferred by a patent should not unreasonably conflict with a normal exploitation of the patent and unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Moreover, the Chinese Anti-Monopoly Laws already cover "the conduct of business operators to eliminate or restrict market competition by abusing intellectual property rights." (See Article 55 of the Chinese Anti-Monopoly Law). Based on this provision of the Chinese Anti-Monopoly Law, various Chinese antitrust enforcement agencies and courts had already issued enforcement guidelines and rendered legal decisions in recent years to deal with abuse of IP rights as a form of anti-competitive behavior. Therefore, under the current Chinese legal regime, patent misuse is an anti-competitive behavior that falls within the scope of the Chinese Anti-Monopoly Laws and related regulations, and should not be covered duplicatively in the Patent Law.

IPO respectfully recommends that new Article 20 be removed, or, alternatively, be revised as follows:

The application of patent and the exercise of patent right shall abide by the principle of good faith, and shall not misuse patent right to harm the public interest or exclude or restrict competitions.

## Article 26

Article 26 (3) of the Draft Revision prohibits patenting inventions of methods for the diagnosis or treatment of diseases. Inventions relating to method of diagnosis or treatment of disease, e.g., dose or dosage regimen, bring great value to the advancement in medicines. The inability to obtain relevant patents for such inventions undermines patient's access to novel and beneficial diagnosis or treatment in China. IPO respectfully recommends deletion of (3) methods for the diagnosis or treatment of diseases from Article 26 as follows:

Patent rights shall not be granted for any of the following subject matters:

- (1) scientific discoveries;
- (2) rules and methods for intellectual activities;
- ~~(3) methods for the diagnosis or treatment of diseases;~~
- (4) animal or plant varieties;
- (5) methods of nuclear transformation and substances obtained by means of nuclear transformation;
- (6) designs that are mainly used for marking the pattern, color or the combination of the two of prints.

Patent right may, in accordance with the provisions of this Law, be granted for the production methods of the products specified in Subparagraph (4) of the preceding paragraph.

## Article 31

Article 31 of the Draft Revision extends the time limit of priority document submission for invention and utility model patents from within 3 months of the application day to within 16 months of the priority filing date, but not for that of priority document submission for industrial design applications. IPO respectfully recommends that the original Article 30 (new Article 31) be revised as follows:

An applicant requesting the right of priority shall submit a written declaration at the time of application and submit, within sixteen months from the date on which any applicant first filed a patent application for an invention or utility model, or within ~~three~~ **ten** months from the date on which any applicant **first** filed a patent application for an industrial design, a copy of the priority patent application document. The right or priority shall be deemed waived if no written declaration is submitted or a copy of the priority patent application document is not submitted prior to the expiration of the specified time limit.

### Article 43

IPO welcomes the increase of the patent term for industrial design patents from 10 to 15 years, as well as the addition of patent term extension for pharmaceutical products. The requirement of simultaneous market approval applications in China and abroad, however, is burdensome to innovative pharmaceutical companies. As such, IPO respectfully recommends that original Article 42 (current Article 43) be revised as follows:

The term of an invention patent right shall be 20 years, and that of a utility model shall be 10 years, and that of a design patent shall be 15 years, all starting from the application date.

To compensate for the delayed market launch due to the time taken for the clinical trial and the evaluation and approval of innovative drugs, the Patent Administrative Department under State Council may decide to extend the duration of the patent right, for invention patents of innovative drugs for which marketing approval is applied ~~simultaneously~~ in China ~~and abroad~~ **for the first time**, for a period of not more than 5 years, and the total patent term of such innovative drugs after market launch shall not exceed 14 years.

**For those innovative drugs already on the market and of which the invention patent still has six months or more in patent term at the time this Law is enacted, the patent right holder may submit application for patent term extension within three months of the enactment of this Law.**

### Article 47

The patent invalidation procedure should be a settlement mechanism for any dispute the patentee and requesting party have over a patent's validity. Under the current procedures for appeal of a patent invalidation decision the Patent Reexamination Board defends the invalidation proceeding decision. Placing this burden on the Patent Reexamination Board not only wastes administrative resources, but also inhibits the parties in dispute from resolving the matter (e.g., by settlement, withdrawal, etc.). Accordingly, IPO respectfully recommends that original Article 46 (current Article 47) be revised as follows:

The Patent Reexamination Board shall examine the request for declaring a patent invalid and make a decision in a timely manner, and notify the requesting party and the patentee of its decision. The decision on declaring a patent invalid shall be registered and made public notice by the patent administration department under the State Council.

A party that disagrees with the Patent Reexamination Board's decision on declaring a patent invalid or its decision on affirming the patent right may take legal action before a people's court, within three months from the date of receipt of the notification, **with the opposite party in the invalidation procedure as the defendant**. The people's court shall notify the ~~opposite party~~ **Patent Reexamination Board** in the invalidation procedure to participate in the litigation as a third party.

**Article 52**

IPO recommends replacing “the Patent Administration Department under the State Council” with “professional mediation organization,” because we believe parties in open license disputes should have choices when it comes to mediation. This is particularly important because the development of expertise in commercial license disputes and mediation takes a long period of time for any organization to achieve.

As such, IPO respectfully recommends that new Article 52 be revised as follows:

Parties who have disputes arising from the implementation of an open license may request ~~the Patent Administration Department under the State Council~~ a qualified professional mediation organization to mediate.

**Suggested New Article after Article 65**

The current Chinese Patent Law is silent on whether an administrative decision rendered by CNIPA or its local branches is enforceable immediately. IPO proposes a new article to make it explicit that such administrative decision is not effective and enforceable so long as there is a pending appeal against such decision. This amendment is necessary to ensure that administrative enforcement is subject to judicial review. If this amendment is not made, such administrative decision can be immediately effective under the Chinese Administrative Procedure Law, which would lead to undesirable results.

Over the last 20 years, certain Chinese courts have developed expertise in adjudicating patent infringement matters. The establishment of IP Courts in Beijing, Shanghai, and Guangzhou was a positive step to concentrate technical and legal experts in the IP fields and to improve consistency among People’s Courts in China. Moreover, the Supreme People’s Court IP Tribunal was established this year to further improve the consistency. Making an administrative decision effective immediately would be contrary to China’s efforts to move IP cases to specialist courts.

We respectfully recommend adding the following new article after original Article 60 (current Article 65):

Any administrative decision made by the patent administration department for patent affairs regarding orders to stop infringement, confiscation orders, imposing a fine, sealing up business, and seizing products, shall not be immediately executable if any involved party has instituted legal proceedings in the People’s Court in accordance with the Administrative Procedure Law of the People’s Republic of China, Civil Procedure Law of the People’s Republic of China, and any other related laws. In the case where the involved party fails to institute legal proceedings within the period of limitation of actions or such administrative decision is upheld by any effective judicial decision, the administrative decision shall be put into effect and executable.

## Article 69

Article 69 of the Draft Revision expands the investigation authority of patent administration and enforcement departments to include patent infringement cases beyond the existing patent passing-off cases. Unlike patent passing-off cases, where the investigation typically only involves the verification of patent ownership, patent infringement cases often involve confidential technical and commercial information. We are concerned that giving patent administration and enforcement departments broad authority to inspect the sites where the alleged infringement act takes place and to review and copy relevant documents might create a significant risk for disclosure of confidential technical and commercial information. As such, IPO respectfully recommends that original Article 64 (current Article 69) be revised as follows:

When the department administrating patent affairs or the department responsible for patent enforcement handles, investigates and disposes a suspected act of passing off of patent ~~or patent infringement~~ based on evidence obtained, it may inquire the parties concerned, and investigate the circumstances related to the suspected illegal act; it may conduct field inspection of the places where the suspected illegal act takes place; it may review and copy the relevant contracts, invoices, accounting books, and other related materials; it may inspect the products related to the suspected illegal act, and seal or seize the products that have been proved to be patent passing-off products. **Such investigation should be conducted so as to ensure that the confidentiality of technical and commercial information is maintained.**

When the department administrating patent affairs or the department responsible for patent enforcement performs its duties as prescribed in the preceding paragraph, the parties concerned shall provide assistance and cooperation, and shall not refuse or hinder.

## Article 71

New Article 71 of the Draft Revision would impose joint and several liability on Internet Service Providers (“ISP”s) for infringement by third-party users where the ISP fails to take necessary measures (such as deleting, blocking or disconnecting the link of the infringing product) in time after receiving notice from the patentee or interested party on the basis of a written judgment, order, or conciliation statement issued by the People’s Court or the decision made by the administrative authority for patent affairs ordering to stop infringement. Article 71 would also require ISPs to take necessary measures in time after receiving notice from the patent enforcement department of an order to correct patent counterfeiting.

In general, we believe that secondary liability for ISPs should be governed by the same rules and standards as secondary liability for any other type of business that provides a service or component that is potentially used by an infringing third party. It is unclear why, for example, a trucking or shipping company or a manufacturer that provides a component incorporated into an infringing product should be treated any differently than the provider of an internet service that happens to be used by a third-party infringer. We are unaware of any other major jurisdiction

that has sought to adopt such a secondary liability rule for ISPs in the context of patent infringement.

Additionally, the “necessary measures” standard as currently provided is too uncertain in scope to be appropriate for the imposition of secondary liability for patent infringement. For example, the notice of a court or administrative agency’s order might fail to specify with clarity which products of the defendants were adjudicated to be infringing or counterfeit, which websites contain content relating to those products, and what the necessary measures are regarding links to those websites’ URLs. Unless the court’s order sufficiently identifies the websites and products formally subject to removal from the ISP’s service, there are no good means by which the ISP can reasonably determine what links should be removed to address any infringement or counterfeiting that is found. Given the article’s current lack of detail regarding the content of a court’s order, and the possibility that ISPs might be unable to make accurate determinations as to which links pertain to an infringing product, imposing liability based on mere notice would place significant burdens and uncertainty on ISPs. Furthermore, because the meaning of patent claims can be far less clear and certain than the exclusionary scope of copyrights and trademarks, it is exceptionally difficult to distinguish between links to an infringing product from links to a non-infringing alternative or design around. Under the current proposed amendment, joint infringement liability is too extreme a remedy in view of potential ambiguity in determining what actions an ISP should be taking with respect to such notice.

## **Article 72**

Article 72 of the Draft Revision retains the language from original Article 68 that damages shall be determined according to the patent holder’s actual losses or the infringer’s profits. We propose that the patent holder should be allowed to elect between these, if the evidence allows such a determination. We also suggest that the damages not include expenses, because patent cases are complex disputes where the parties might hold differing views in good faith, and expenses should only be awarded in exceptional cases.

Although IPO welcomes the addition of willful infringement to this Article, we believe that the Article should be further revised in two respects. First, “willful infringement” is not defined, which might lead to inconsistent interpretations of the law by the various courts and administrative agencies. We recommend incorporating a list of factors to provide guidance and to avoid different interpretations. Second, the penalty for willful infringement is set at up to five times the amount of compensation otherwise determined, which is excessive, particularly where the amount of compensation is found to be very large. IPO is aware of no other jurisdiction which penalizes willful infringement so severely. We recommend that the penalty for willfulness be no more than three times the amount of compensation determined.

IPO respectfully recommends that Article 72 be revised as follows:

The amount of damage for patent right infringement shall be determined according to the patentee's actual losses caused by the infringement. If the actual losses are hard to determine, or if the patentee elects, the amount may be determined according to the infringer's profits through the infringement. If the patentee's losses ~~or~~ and the infringer's profits are hard to determine, the amount may be determined based on the reasonably multiplied amount of the royalties of the patent.

With respect to willful patent infringement the damage may be set at an amount between one and three times the amount determined by the aforementioned methods. In determining whether willful infringement occurred and if so to determine the amount of damages, the following factors should be considered:

1. Whether defendant acted consistently with the standards of behavior for its industry;
2. Whether defendant intentionally copied a product of plaintiff that is covered by the patent;
3. Whether defendant reasonably believed it did not infringe;
4. Whether defendant reasonably believed that the patent was invalid;
5. Whether defendant made a good-faith effort to avoid infringing the patent by, for example, attempting to design around the patent;
6. Whether defendant tried to cover up its infringement; and
7. Whether defendant relied in good faith on an opinion of counsel that its actions did not infringe the patent or the patent was invalid or unenforceable.

If the losses of the patentee, benefits of the infringer, or royalties of the patent are all hard to determine, the people's court may, on the basis of the factors such as the type of patent right, nature of the infringement, and seriousness of the case, determine the amount of damage between RMB 100,000 and 5,000,000.

~~The amount of damage shall include the reasonable expenses paid by the patentee for stop the infringement.~~

For the purpose of determining damage amount, in the situation that patentee has made every effort to provide evidence, but the accounting books and materials related to the infringement are controlled by the accused infringer, the people's court may order the accused infringer to provide such. If the accused infringer fails to provide the account books and materials or provides fake account books and materials, the people's court may determine the amount of damage by referencing to the patentee's claims and evidence.

Attached please find this letter as translated. We again thank you for permitting IPO to provide comments and would welcome any further dialogue or opportunity to provide additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Lauroesch". The signature is written in a cursive style with a prominent loop at the end.

Mark Lauroesch 马克·劳勒施

Executive Director

Attachment