HAN KUN
汉 坤 律 师 事 务 所
Han Kun Law Offices

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Legal Updates

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1. Brief Comments on the Draft Data Security Law

Authors: Kevin DUAN | Kemeng CAI | Shasha ZHOU | Minzhe HU

Since October 2019, the Central Committee of the Communist Party of China and the State Council have successively issued documents clarifying the status of data as a new production factor, demanding acceleration of the cultivation of the data element market, promotion of the publication and sharing of government data, and enhancement of the value of social data resources, and, through unified legislation, further providing basic safeguards for data protection and giving full play to the value of data as a production factor. Furthermore, as data also becomes an increasingly prominent strategic resource with the continued development of the digital economy, many issues unique to the digital age, such as data sovereignty, cross-border data transfers, and data-related trade controls, require legislative clarity so as to better protect national security and state interests.

On June 28, the Standing Committee of the National People's Congress for the first time deliberated and published the full text of the closely-watched *Data Security Law of the People's Republic of China (Draft)* (the "**Draft Law**"). The Draft Law summarizes, refines, and adopts into law the requirements for data governance that have been implemented in practice in recent years, and outlines the future institutional framework for data security protection in China. We believe that the Draft Law is highly notable in the following aspects:

Scope of application

According to its provisions, the Draft Law governs data activities undertaken in China, including data collection, storage, processing, use, provision, transactions, and disclosure. In addition, the Draft Law also stipulates certain extraterritorial effect, i.e. offshore organizations and individuals are held liable for engaging in data activities that harm China's national security, public interests, or the legitimate rights and interests of Chinese citizens and organizations.

The Draft Law also further stipulates that, with respect to specially protected data such as data involving state secrets and personal information, the special provisions under the Law on Guarding State Secrets and personal information protection laws shall prevail.

Division of responsibilities for data security and protection

The Draft Law specifies responsibilities and duties of the central and local governments in terms of data security and protection.

1. **Central government level**: the central national security leadership department, i.e. the National Security Council, will be responsible for the decision-making and overall coordination of China's data security work; the Cyberspace Administration of China will be responsible for overall coordination of network data security and protection and related supervision work; national public security organs and national security organs shall be responsible for data security and supervision according to their

respective duties.

2. **Local and departmental level**: local departments and each ministry will undertake primary responsibility for the data generated, aggregated, and processed in the execution of their respective work duties and are to be responsible for data security.

3. **Industry level**: competent industry authorities will be responsible for unified data security supervision in sectors such as industrial, telecommunications, natural resources, health, education, defense technology industry and financial.

The foregoing data administration system emphasizes centralized leadership while also accounting for the features of data administrative practice in various regions and industries. This would allow for departments to administer various industries and for governments in different regions to implement distinct data protection regimes adaptive to characteristics of these industries and regions under the guidance of national principles and guidelines.

Data classification and categorization and protection of important data

In terms of data security administration, the Draft Law stipulates requirements for classified and categorized data protection, emphasizing that special efforts should be made to protect "important data." Before the promulgation of the Draft Law, authorities had put forward requirements for data classified and categorized protection for important areas such as finance, electricity, healthcare, and critical infrastructure. The Draft Law continues to use the data classification standards applicable for the network data protection, and proposes to implement classified data protection based on the degree of harm caused to national security, public interests, or the legitimate rights and interests of Chinese citizens and organizations if the relevant data is tampered with, destroyed, disclosed, or illegally obtained or used.

On the basis of data classified protection, the Draft Law further proposes basic requirements for important data protection, including:

1. Important data processors are to establish responsible persons and management organizations in charge of data security and implement duties for data security and protection;

2. Important data processors are to carry out risk assessments in accordance with regulations and submit risk assessment reports to relevant competent authorities, which should specify the types and quantities of important data which the processor holds, the circumstances related to data collection, storage, processing, and use, and potential data security risks and countermeasures, etc.

According to the 2019 *Measures for Administration of Data Security (Draft for Comment)*, important data is defined as "data that, once disclosed, may directly influence national security, economic security, social stability, and public health and safety", such as data concerning undisclosed government information, large-scale population, genetic health, geographic and mineral resource, etc. Important data generally does not include enterprise production, operation and internal management information, personal information, and so on. The Draft Law does not clearly define important data, likely due to the broad types of important data, instead authorizing local and industry competent authorities to formulate important data protection catalogues corresponding to the features of their respective regions and industries.

However, it remains to be observed how conflicts will be resolved between the definitions of important data which these competent authorities formulate in practice.

Data transaction system

In recent years, data exchanges have been established in Guiyang, Shanghai, Wuhan, Chongqing, etc., and data transaction partnerships have become important data sources for market players in fields such as financial risk control and credit investigation, advertising media, map surveying and mapping, health and medicine, environment and meteorology. The Draft Law proposes a breakthrough by officially recognizing under law the legal status of data transactions and data transaction service providers[1]. Key provisions include:

1. Article 3 acknowledges data transactions as a data activity and entitles proper legal status to data transaction activities;

2. Article 17 stipulates that the government is to establish and improve a data transaction system, regulate data transaction behaviors, and cultivate data transaction markets;

3. Article 30 stipulates that "agencies engaged in data transaction intermediary services" require data providers to explain the sources of the data, verify the identities of both parties to transactions, and preserve corresponding review and transaction records;

4. Article 43 stipulates that if a data transaction intermediary agency fails to fulfill its obligations under Article 30 which causes a data transaction to originate from illegal sources, the relevant competent authority will order the agency in violation to make corrections, confiscate illegal income gained, and impose administrative penalties, which includes imposing fines, revoking business operating licenses and business licenses, etc. A fine is also to be imposed on the responsible person of the agency in violation.

Considering the complexity and diversity of data transaction deals, as well as debate remaining over the ownership of data at the jurisprudence level, the Draft Law does not elaborate on data transaction system, but leaves it to be further explored in practice based on specific data types and application scenarios. However, since the Draft Law formally recognizes under law the legal status of data transactions, we can foresee that it will bring vitality to various industries in the future.

Data security review system

Article 22 of the Draft Law stipulates for the first time China's data security review system, with the aim to establish a comprehensive cyberspace and data security protection system, further safeguard China's cyberspace sovereignty, and prevent disclosure and destruction of data and information that may influence national security. The Draft Law does not specify the concepts of the data security review system, but in principle requires that data activities be subject to a national security review if the data activities may influence national security. We understand that because the data security review system would apply to

[1] To some extent, *General Provisions of the Civil Law*, promulgated in 2017, recognizes data as being subject to property protections and lays the foundation for the data transaction system.

all data activities within China, that it may also in the future cover the closely-watched cross-border data security review system. In addition, according to the Draft Law, decisions of administrative departments on data security reviews may be final and are not subject to existing remedies such as administrative reconsideration litigation, signifying the discretion and specialization administrative departments have regarding this issue.

Clarifies data sovereignty and promotes cross-border data flows

Security assessments of cross-border data transfers continue to be a closely watched issue. Rather than prescribing specific rules related to cross-border data transfer security assessments, the Draft Law provides for export controls related to cross-border data transfers, data use-related countermeasures, and a reporting and approval system for cross-border data enforcement. These provisions manifest China's fundamental vision for safeguarding data security and encouraging the free flow of data. On one hand, data is a key element for digital economic development: the Draft Law indicates China will actively participate in international data exchanges and promote cross-border data flows. On the other hand, data is also a fundamental national strategic resource: the Draft Law proposes establishing a data export control system, data-use countermeasure system, and a reporting and approval system for overseas data retrieval for purposes of safeguarding national interests and effectively responding to risks and challenges China faces in safeguarding national security in the data field.

I Strengthens cross-border data exchanges and cooperation

As the world's second largest digital economy, China has always considered the digital economy as a key sector when promoting cross-border exchanges and cooperation, and data is a key element for promoting the development of the digital economy. In order to further promote cross-border data flows, the Draft Law provides at Article 10 that China will actively promote cross-border data exchanges and cooperation, participate in the formulation of international rules and standards related to data security, and cooperate with other countries to promote cross-border data flows in a secure and free manner.

II Establishes a data export control system

Cross-border data flows give rise to issues such as how to define data sovereignty and how to protect data security. In this context, the Draft Law proposes for the first time a data export control system, i.e. to implement export controls in accordance with law for data that is categorized as controlled and is relevant to fulfilling international obligations and maintaining national security. However, it remains to be observed how the data export control system will connect the data national security review system and cross-border data transfer security assessment system.

III Specifies countermeasures to be taken against restrictive measures on investment and trade related to data and data development and utilization

In the context of worsening trade and investment conflicts globally, the Draft Law specifies that China may take corresponding countermeasures based on actual circumstances against any country or region which adopts discriminatorily prohibitive, restrictive, or other similar measures against China in

respect of investment and trade related to data development, utilization, and technologies.

IV Clarifies issues related to data retrieval in cross-border law enforcement

In terms of obtaining data in cross-border law enforcement, foreign organizations are prohibited from directly engaging in investigations and collecting evidence in China in criminal and securities matters, respectively under the *Law of the People's Republic of China on International Judicial Assistance in Criminal Affairs*, as adopted in 2018, and the *Securities Law of the People's Republic of China*, as revised in 2019. These laws specify that domestic organizations or individuals may not to submit evidence to foreign parties without the consent of the competent authorities. The Draft Law, as the basic law for the data field, further specifies that, in principle, domestic organizations and individuals must report to and seek approval from the competent authorities prior to transferring data to overseas law enforcement agencies.

Fulfills the task of government data publication

In order to promote e-government development and fulfill the task of government data publication as described under the *Action Outline for Promoting Big Data Development*, the Draft Law devotes a special chapter to rules on security and publication of government data, and further specifies a government data security management system and rules for the publication and use of government data, with a view to promote the publication and exploitation of government data resources.

In one respect, the Draft Laws stipulate basic principles for government data publication. Specifically, the government is to continue to abide by the principle of "government data should be published except in special circumstances" as prescribed under the *Regulations on Disclosure of Government Information*, and should disclose government affairs data in a timely and accurate manner by following the principles of fairness, equality, and convenience for the public. In addition, the Draft Laws stipulate the formulation of a government data publication catalog in order to build a unified, standardized, interconnected, and secure and controllable government data publication platform and to promote and implement the publication and use of government data.

In fact, to date, local governments have successively promulgated regulations on public data disclosure and secure management, and have consistently planned and improved their data disclosure platforms, for example:

1. In 2016, the Guiyang government took the lead in the construction of a data publication platform to disclose to the public free data resources, with a scope of disclosure covering government data of all Guiyang municipal governmental departments and related directly subordinate institutions.

2. In 2018, Shanghai promulgated the *Measures of Shanghai Municipality on Administration of Public Data and One-stop Handling Networks* and the *Interim Measures of Shanghai Municipality on the Disclosure of Public Data*, to provide specific rules related to the publication procedures, platform construction, and security safeguards during the publication of public data, including government data.

3. In 2019, Beijing promulgated the *Work Plan on Disclosure of Public Data to Promote the Development of the Artificial Intelligence Industry*, proposing that Beijing will take the lead in building a data

publication innovation base nationwide, and make conditional disclosure of a batch of special public data resources to Beijing artificial intelligence companies, including medical insurance data, judicial data and traffic data, with the aim to supply data in a free and accurate manner to satisfy enterprises' needs regarding product development and application innovation. The *Measures for Administration of Publication of Traffic and Travel Data (for Trial Implementation),* promulgated in the same year, stipulate the publication of traffic data for the purpose of promoting the deep integration of the transportation sector and Internet companies, and optimizing and improving travel guidance services.

4. In 2020, Zhejiang promulgated China's first provincial-level legislation on public data disclosure—the *Interim Measures of Zhejiang Province on the Public Data Disclosure and Security Management*, which comprehensively provide rules on data publication, channels of publication and data security, and further specify big data administration duties and the experts committee system.

The government data disclosure system stipulated by the Draft Law will help to make full use of government data as a public resource, and promote and deepen the intelligent and digital transformation of various industries, so as to better allow data to facilitate China's economic and social development.

Conclusion

The Draft Law provides an initial summary of the preceding stage of data governance and practices in China, and describes multiple basic systems in terms of data security and development by comprehensively considering the characteristics of the digital economy. It can be regarded as both a reasonable and necessary supplement to the *Cybersecurity Law of the People's Republic of China* in respect of cyberspace governance. The Draft Law, together with the forthcoming Personal Information Protection Law, rules for determining important data, data security review systems, and cross-border data transfers systems, not only respond to many issues which concern the public in practice, but also provide a legal basis for the development of data markets and the data industry in the future.

2. Highlights of the New Amendment Draft to the Patent Law

Authors: Lili WU | Kevin DUAN | Qian YANG

On July 3, 2020, the *Amendment to the Patent Law of the People's Republic of China (Draft for the Second Deliberation)* was published for public comment on the website of the National People's Congress.

Eight years have passed since work began in 2012 on the fourth amendment to the currently effective *Patent Law of the People's Republic of China*[2] (the "**Patent Law 2008**"), signifying China's thoughtful deliberation in amending the law. In August 2012, the former State Intellectual Property Office ("**SIPO**"; now the China National Intellectual Property Administration, "**CNIPA**") for the first time solicited public comments on draft amendments to the Patent Law. In the second half of 2014, SIPO officially launched the fourth round of comprehensive amendments to the Patent Law. In April 2015, SIPO released an amendment draft for public comments; in December 2015, the Legislative Affairs Office of the State Council released for public comments an amendment draft to the Patent Law (the"**2015 Draft**"); in December 2018, an amendment draft to the Patent Law was submitted to and deliberated at the 17th meeting of the Standing Committee of the 13th National People's Congress and were then released for public comments on January 4, 2019 (the "**2019 Draft**"). On June 28, 2020, a second amendment draft to the Patent Law was submitted for deliberation to the 20th meeting of the Standing Committee of the 13th National People's Congress, which was again released for public comments (the "**2020 Draft**").

The 2020 Draft contains a total of 81 articles and comprises 29 amendments to the Patent Law 2008. The 2020 Draft reflects not only China's determination to improve the intellectual property system and promote scientific and technological progress, but also fully demonstrates the lawmakers' precise understanding of the socio-economic situation in the country. Among its highlights, the 2020 Draft exhibits breakthroughs in adjustments of drug patent-related systems, improvements to the design system, and increases in damages for patent infringement. In this article, we venture to summarize and briefly comment on amendments reflected in the 2020 Draft, with emphasis placed on major amendments, while also briefly commenting on other adaptive changes and changes previously reflected in the 2019 Draft.

System adjustments related to drug patents

Adjustment of the drug patent system is reflected in Articles 42 and 75 of the 2020 Draft. The third paragraph of Article 42 provides for an extended patent term for drug patents. Article 75 stipulates "artificial infringement" and "waiting period" that are similar to the concepts under the U.S. patent linkage system, and stipulates a coordination mechanism between CNIPA and the National Medical Products Administration ("**NMPA**"). The patent linkage system is beginning to take shape in China, based on this mechanism and the patent publicity system stipulated by the *Opinions on Deepening the Reform of the Evaluation and Approval System and Encouraging Innovations in Drugs and Medical Devices* [3]

[2] Patent Law of the People's Republic of China (*as amended by* 6 Standing Comm. 11 Nat'l People's Cong., P.O. 8; promulgated Dec. 27, 2008, effective Oct. 1, 2009).

[3] Opinions on Deepening the Reform of the Evaluation and Approval System and Encouraging Innovations in Drugs and Medical Devices (Gen. Off. Cent. Comm. CPC, Gen. Off. St. Council; promulgated Oct 8, 2017) 2017 ST. COUNCIL GAZ. 29

("**Document 42**"), and the consistency evaluation system under the *Opinions on Implementing the Consistency Evaluation of Quality and Therapeutic Effect of Generic Drugs*[4].

I Extended patent term for drug patents

The purpose of the extended patent term system is primarily to protect the interests of original drug research companies. Substantial time is required during the new drug production cycle, from research and development to marketing approval. However, generic drug companies can greatly shorten the review process by leveraging the consistency evaluation system and using quality and efficacy-related data of original drugs. Therefore, Article 42 of the 2020 Draft grants an extended patent term for new drugs to offset the time required by the review and approval process, which will make up, to a certain extent, the loss of the patent protection period caused by the process of drug marketing review and approval.

We notice that, compared with the 2019 Draft, Article 42 of the 2020 Draft changes "innovative drugs" to "new drugs," and strikes the restriction on "dual applications for both domestic and overseas marketing," conforming to the *China-U.S. Economic and Trade Agreement*[5]. We also observe that Article 15 of Document 42 stipulates that "[n]ewly approved drugs or drugs that have passed the quality and efficacy consistency evaluation of generic drugs are to be included in the catalogue of listed drugs in China, specifying innovative drugs, improved new drugs and generic drugs with the same quality and efficacy as original drugs." Therefore, this change of wording awaits further interpretation and practical observation as to whether the 2020 Draft expands the application scope of the extended patent term from "innovative drugs" to "improved new drugs." In addition, striking the restrictions on dual application for both onshore and offshore marketing substantially expands the application of Article 42 and better reflects China's intent to protect the interests of original drug companies.

II Establish an early dispute settlement mechanism for drug patent disputes

According to Article 16 of Document 42:

Explore establishment of a drug patent linkage system. Explore the establishment of a drug review, approval and drug patent linkage system in order to protect the legitimate rights and interests of patentees, reduce the risk of patent infringement of generic drugs, and encourage the development of generic drugs. In the application for drug registration, the applicant shall state the relevant patents

(hereinafter "**Document 42**"):

"(15) **Establish a catalog of listed drugs**. Newly approved drugs or drugs that have passed the quality and efficacy consistency evaluation of generic drugs are to be included in the catalogue of listed drugs in China, specifying innovative drugs, improved new drugs and generic drugs with the same quality and efficacy as original drugs, as well as effective ingredients; information on dosage forms, specifications, marketing license holders, acquired patent rights, test data protection period, etc.

(16) **Explore establishment of a drug patent linkage system.** Explore the establishment of a drug review, approval and drug patent linkage system in order to protect the legitimate rights and interests of patentees, reduce the risk of patent infringement of generic drugs, and encourage the development of generic drugs. In the application for drug registration, the applicant shall state the relevant patents and patent ownership status and shall notify the relevant drug patentee within a prescribed time limit."

[4] Opinions on Implementing the Consistency Evaluation of Quality and Therapeutic Effect of Generic Drugs (Gen. Off. St. Council, Guo Ban Fa〔2016〕No. 8, promulgated Feb. 6, 2016) 2016 ST. COUNCIL GAZ. 8.

[5] *See* Economic and Trade Agreement, Ch.-U.S., signed Dec. 31, 2019, at Section D, art. 1.12, para. 2.

and patent ownership status and shall notify the relevant drug patentee within a prescribed time limit. In the event of any dispute over the patent right, the party concerned may bring a lawsuit in a court, and the technical review of drug will not cease during the lawsuit. As for the drugs passing the technical review, food and drug regulators will decide whether or not such drugs may come onto the market according to the effective court judgments, rulings, or mediation documents; and the said drugs may come onto the market as approved by the food and drug regulators, if no effective court judgment, ruling, or mediation document is made within a time limit."

The 2020 Draft at Article 75 grants patentees the right to sue for infringement at the publicity stage of the marketing application after a generic drug company submits its application to NMPA,[6] which is similar to "artificial infringement" under the U.S. legal system. The same provision also permits generic drug companies at this stage to initiate "confirmation of non-infringement" litigation. Article 75 further stipulates that "NMPA may decide whether to approve the marketing application" based on the result of a court ruling or administrative decision for a nine-month period if the patentee or generic drug company files a lawsuit or initiates an administrative proceeding, which echoes Document 42, "drugs may come onto the market as approved by the food and drug regulators, if no effective court judgment, ruling, or mediation document is made within a time limit."

We notice that the third paragraph of Article 75 stipulates that NMPA *may*, rather than *must,* decide based upon a "court ruling or administrative decision," clarifying that "an effective ruling or administrative decision should be made within nine months" and stipulates the suitability of the administrative decision. Considering current judicial practice, it is difficult to obtain an effective court ruling or an administrative decision in nine months if the dispute is related to a complex drug patent. NMPA issued in 2017 a draft policy document stating that "the drug review agency may stipulate a waiting period of no more than 24 months after receiving the relevant document issued by a judicial organ certifying a patent infringement case has been placed on file[7]." Considering the 2020 Draft stipulates a nine-month dispute settlement period, it remains to be seen how the system will function in practice.

In fact, the above-mentioned provisions of Article 75 of the 2020 Draft lay a foundation for the establishment of a drug patent linkage system and for the establishment of an early patent dispute resolution mechanism before the marketing stage of generic drugs, which would benefit patent owners who have difficulty in protecting their rights prior to the marketing of generic drugs. Besides this, Article 75 also implements Article 1.11 of the *China-U.S. Economic and Trade Agreement*, "Effective Mechanism for Early Resolution of Patent Disputes." However, there remain many details to be clarified in practice, such as patent publicization obligations of original drug research companies[8], obligations of generic drug companies to notify patentees[9], and settlement of disputes over the validity

[6] 2020 Draft, art. 75, para. 2.

[7] Announcement of the China Food and Drug Administration on Soliciting Opinions on the Relevant Policies on Encouraging Innovation in Drug and Medical Equipment and Protecting the Rights and Interests of Innovators (Draft for Comment) (Nat'l Medical Products Admin., Ann.〔2017〕No. 55, issued for public comment on May 12, 2017 until June 10, 2017).

[8] *See* 2020 Draft, *supra*, art. 75, para. 2: "relevant patent rights published on the patent information registration platform for drugs marketed in China."

[9] *See* Document 42, *supra*, art. 16: "shall notify the relevant drug patentee within a prescribed time limit."

of patent rights[10].

According to the *Explanation on the Measures for Administration of Drug Registration (Draft for Comment)* issued by State Administration for Market Regulation in October 2019:

"(14) **Patent linkage system**. Document 42 proposes to explore the establishment of a drug patent linkage system. The core purpose of the system is to minimize potential patent disputes in the review and approval of generic drugs. The patent linkage system has an impact on the interests of drug patentees and generic drug companies, and has an impact on drug accessibility and public health. The relevant principles of the system should be clarified in higher-order laws, thereby are not mentioned in these Measures accordance with legislative requirements."

Article 75, paragraph 4 of the 2020 Draft clarifies the relevant coordination obligations between NMPA and CNIPA, leaving room for the formulation of the lower-order laws. In addition, it should be noted that the *Provisions on Several Issues Concerning the Application of Law in the Trial of Drug Patent Link Disputes* was ranked 19th in the agenda of the Supreme People's Court's 2020 Judicial Interpretation Project Plan, which is scheduled to be completed by the end of 2020. This illustrates that preparatory work for the drug patent linkage system is being carried out in all aspects, from amendment of the Patent Law to the promulgation of related judicial interpretations and departmental rules. We can expect to soon see the drug patent linkage system come online.

Improvement of the design system

The 2020 Draft amends the design system mainly in three aspects: the establishment of a partial design system, the addition of domestic priority rights, and extension of the protection period to 15 years.

I Establish a partial design system

We can observe that the "partial design" concept has undergone continued legislative debate, as it was referenced in Article 2, paragraph 4 of the 2015 Draft, struck in the 2019 Draft, and is now reappearing in the 2020 Draft.

Partial design refers to "parts of the product" rather than the "overall product," such as the handle of a glass cup, the knob of a microwave oven, etc. For a long time, protections in China have only been granted to the overall design of products[11], and the principle of "overall observation and comprehensive

[10] *See* Economic and Trade Agreement, Ch.-U.S., *supra*, art. 1.11, para. 2: "civil judicial proceedings and expeditious remedies for the resolution of disputes concerning the validity or infringement of an applicable patent. China may also provide for administrative proceedings for the resolution of such disputes."

[11] Guidelines for Patent Examination, supra, Part IV, ch. 5, sec. 5.2.4: "the comparison of designs shall be made through the approach of whole observation and comprehensive judgment. The approach of whole observation and comprehensive judgment means to determine on the observation of the patent concerned and the comparative designs as a whole rather than on part or details of the designs."

Provisions (I) of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Cases for Patent Grant and Confirmation (Draft for Comment) (Sup. People's Ct., issued for public comment on Apr. 28, 2020, until June 15, 2020), art. 19: "Compared with an existing design of the same or similar type of product, if the overall visual effect of a design patent is the same or substantially the same, the people's court shall determine that it constitutes an 'existing design' as stipulated in Article 23, paragraph 1, of the Patent Law. Except for the circumstances specified in the preceding paragraph, if the difference between a design patent and an existing design of the same or similar type of product does not have a significant impact on the overall visual effect, the people's court shall determine that it is not

evaluation" has been clarified in the design rights confirmation procedure, and the principle of "comprehensive evaluation based on the overall visual effect of the design" has been clarified for the infringement procedure[12]. The existing system makes it difficult for the protection of innovations made to partial product designs.

Currently, all major countries leading in intellectual property protection have adopted partial design systems. To adapt to this trend, the Chinese design patent system has substituted for the partial design system by emphasizing the importance of partial elements of designs by stipulating the principles of "easily observable parts," "design features that differ from existing designs," "size of the design space," and "functional design features[13]." Review of these partial elements is not subject to the subjective intent of the right holder, but is rather dependent on the discretion and judgment of the competent authority, which results in a lack of objectivity and predictability in protecting inventions. In such cases, the inventors may only invent partial designs by placing the partial design on different products and then applying to patent the resulting design. For inventors in new economy industries such as Internet-based industries, their principal assets are embodied in the form of software. The external manifestations of the software, such as graphical user interfaces (GUIs), were included in the scope of design patent protections in the 2014 amendment[14] to the *Guidelines for Patent Examination*[15]. However, under the Patent Law 2008, protection is only granted to GUIs when combined with hardware products, which has yielded growing demand for protection of partial designs.

In addition, as described below, as China is actively attempting to accede to the *Hague Agreement Concerning the International Registration of Industrial Designs*[16] (the "**Hague Agreement**"). To conform to provisions of the Hague Agreement, the 2020 Draft extends to 15 years the protection period of design patents and adds domestic priority claims for designs. If the Patent Law, as amended, fails to provide for a partial design protection system, applicants who intend to obtain protection under the Hague Agreement would have to separately process the China part of an international design patent application for international design patent applications, because other major countries or regions have already developed and established partial design protection systems. In this manner, the lack of a partial design protection system in China would reduce the advantage of the Hague Agreement in respect of the convenience it offers for design patent protection.

'distinctly different' as stipulated in Article 23, paragraph 2 of the Patent Law."

[12] Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Patent Infringement Disputes (Sup. People's Ct., Fa Shi〔2009〕 No. 21; promulgated Dec. 28, 2009, effective Jan. 1, 2010), art. 11: "When determining whether an industrial design is the same or similar, the people's court shall conduct comprehensive judgment on the basis of the design features of the authorized industrial design and the infringing industrial design at issue as well as the overall visual effect of the industrial design; consideration shall not be given to design features mainly determined by technical functions and such features of the products as the material and internal structure that do not have influence on the overall visual effect."

[13] Gu Xin, *Research on the Legislative Necessity of a Partial Design System*, INTELLECTUAL PROPERTY, Issue 4, 2018.

[14] Decision of the State Intellectual Property Office on Amending the Guidelines for Patent Examination (SIPO, Decree No. 68; promulgated Mar. 12, 2014, effective May 1, 2014).

[15] Guidelines for Patent Examination (as amended by CNIPA Ann. No. 343; promulgated Dec. 31, 2019, effective Feb. 1, 2020).

[16] Hague Agreement Concerning the International Registration of Industrial Designs, adopted Nov. 6, 1925, entered into force June 1, 1928.

The partial design system in China has emerged with a view to provide comprehensive protection for the partial design inventors' inventions, echoing urgent domestic needs and building on the experiences of foreign countries, as well as to echo China's active acceding to international agreements. The subject matter of partial design protection can be either a certain part of a product or can be expanded to include all products containing that part. The formulation of a partial design system is a major step forward in terms of the intellectual property rights protection in China. At the same time, in implementing the partial design system, a core issue to be considered is how to balance the interests of the public and prevent excessively expanding patent rights from impeding social development.

II Adding domestic priority claims for design patents

The right of domestic priority was added to the Patent Law 1992. Domestic priority, however, applies only to invention and utility model patent applications, but not to design patent applications. The reason for the exclusion of design patent applications was not mentioned in the relevant interpretations of the Patent Law 1992. In the process of amending the Patent Law in 2008, there was a strong demand to include design patent applications in the protection scope of right of domestic priority. However, lawmakers ultimately did not adopt this position[17].

The right of domestic priority has been long absent for design patent applications in China, which has put Chinese applicants in a disadvantageous position vis-à-vis foreign patent applicants—Chinese patent applicants are not entitled to six months of priority to which foreign applicants are entitled with respect to design patent applications filed abroad for the first time when re-filing the application again domestically. The 2020 Draft in Article 29 includes design patents into the protection scope of domestic priority, and further specifies in Article 30 the specific procedures for claiming domestic priority, which provides for a complete and standardized domestic priority system covering all three types of patents.

III Extending the protection period of design patents

Article 42 of 2020 Draft extends the protection period for design patents from 10 years to 15 years.

Under the Patent Law 1984, the duration for invention patent rights was 15 years; the duration of patent rights for utility models and designs was three years, which could be renewed for another three years expiry. The Patent Law 1992 again amended the duration of patent rights, which are the terms still in use today. As China has the largest number of design applications around the world, design patents in China enjoy a relatively shorter patent protection period, which meets only the the minimum protection period required by the TRIPS Agreement.

With societal and economic development, design patents play an increasingly important role in China's patent system, and design patent holders have demanded safeguarding of their rights and interests. However, as patent infringement disputes can take years to be settled, a design patent solely with a patent duration of ten years is likely to expire before the conclusion of the dispute resolution process.

[17] Yin Xintian, Detailed explanation of Chinese Patent Law, Intellectual Property Press, March 2011, ed. 1, pg. 392.

Indeed, the trend toward extending the protection period for design patents has been reflected in all proposed amendment drafts to the Patent Law since 2012, indicating lawmakers' long-held intent to extend the protection period for design patents.

In addition, according to the Hague Agreement at Article 17, paragraph 3(a): "Provided that the international registration is renewed, and subject to subparagraph (b), the duration of protection shall, in each of the designated Contracting Parties, be 15 years counted from the date of the international registration." It is also mentioned in the *Explanation on the Draft Amendment to the Patent Law (Draft for Comment),* issued by SIPO in 2015, that China feels it necessary to join the Hague Agreement in order to meet the needs of Chinese enterprises to obtain design protections abroad and to facilitate inventors to obtain design protections in multiple jurisdictions at the same time. In January 2020, the spokesperson of the Ministry of Foreign Affairs mentioned in answering reporters' questions that "China is currently actively advancing the work related to accession to the Hague Agreement and the relevant Chinese authorities have already initiated the relevant legal procedures, with the vew to complete the relevant preparatory work as soon as possible." The 2020 Draft echoes the this statement by removing a major obstacle in the way of acceding to the Hague Agreement.

Increase in infringement compensation

Article 71 of 2020 Draft enhances the amount of damages for patent infringement, which is the most requested change in this round of amendments to the Patent Law and is thus considered the amendment most certain to be adopted. Before the issuance of the 2020 Draft, the requirements for strengthening intellectual property protection and introducing punitive damages for patent infringement have been repeatedly mentioned in various policy documents. For example, in March 2018, Premier Li Keqiang put forward that "We should strengthen the protection of intellectual property, and enforce a punitive compensation system for intellectual property rights infringements…"[18] Subsequently, intent has repeatedly been expressed for establishing a punitive damages system for intellectual property infringement in various official documents, including the *Regulations on Optimizing Business Environment*,[19] the 2018 *Report on the Work of the Supreme People's Court*[20], and the *Opinions on Strengthening Intellectual Property Protection*[21]. In 2013, the *Trademark Law of the People's Republic of China* for the first time stipulated punitive damages of one to five times damages caused for malicious intellectual property infringement. The 2015 Draft proposed punitive damages of three times, and the

[18] Report on the Work of the Government (13 Nat'l People's Cong. 2; Li Keqiang, delivered Mar. 5, 2019, adopted Mar. 15, 2019) 2019 Standing Comm. Natl People's Cong. Gaz. 2 at 362.

[19] Regulations on Optimizing Business Environment (St. Council, Dec. 722; promulgated Oct. 22, 2019, effective Jan. 1, 2020) 2019 ST. COUNCIL GAZ. 31, art. 15: "The State establishes a punitive compensation system for intellectual property infringement, promotes the establishment of a rapid collaborative protection mechanism for intellectual property rights, improves the diversified settlement mechanism for intellectual property disputes, and the intellectual property rights protection assistance mechanism, and strengthens the protection of intellectual property."

[20] Report of the Work of the Supreme People's Court (13 Nat'l People's Cong. 1; Zhou Qiang, delivered Mar. 9, 2018, adopted Mar. 20, 2018) 2018 Standing Comm. Nat'l People's Cong. Gaz. 2 at 244: "Explore the application of punitive compensation measures in intellectual property trials, and focus on resolving problems such as of the low costs of infringement and the high costs of rights protection."

[21] Opinions on Strengthening Intellectual Property Protection (Gen. Off. Cent. Comm. CPC, Gen. Off. St. Council; promulgated Nov. 24, 2019) 2019 St. Council Gaz. 34: "Accelerate the introduction of punitive damages for infringement in areas such as patents and copyrights."

2019 Draft and 2020 Draft have raised the upper limit to five times.

Specifically, Article 71 involves adjusting the following three aspects:

I Adjustment of calculation method of compensation

Under the 2020 Draft, the method for determining infringement damages no longer relies on prioritizing the order of the loss of the right holder and the gains of the infringer, the two are directly connected in determining damages. This calculation method, which is first mentioned in the 2020 Draft, grants right holders greater flexibility, enabling them to voluntarily select the method for calculating compensation when filing a lawsuit. Furthermore, the 2020 Draft strikes the prescribed minimum compensation amount of RMB 100,000, which would leave more discretion for courts to determine the amount of compensation, and reduce the damages potential plaintiffs in bad faith could expect to obtain in lawsuits against patent right infringement. These changes remove pain points existing in judicial practice, and will help judicial organs to adjust policy orientation in a more accurate manner in determining the compensation amount, thereby achieving the effects of driving innovation by providing more accurate economic rewards.

II Punitive damages provisions

According to the 2020 Draft at Article 71, paragraph 1, "if the infringer intentionally infringes patent rights, and the circumstances are serious, the court my impose punitive damages greater than one times and less than five times of the amount determined in accordance with the above method." It can be seen that the elements resulting in application of punitive damages are "intentional infringement" and "serious circumstances," and the amount of the penalty multiple is one to five times a prescribed amount. "Intentional infringement" is an expression used in the traditional civil law language, which is slightly different from the expression used in trademark law, i.e. "malicious infringement" and "serious circumstances". In this aspect, a judge pointed out in an article that[22]: "malicious infringement" does not mean "intentional infringement", and that punitive damages should be used in a prudent manner, out of the need to strike a balance between existing inventions (patents) and subsequent inventions (inventions based on patented technical solutions)." It would thus appear that further clarification is required in judicial practice between "malicious infringement" and "intentional infringement."

III Applying the rule of obstruction of evidence in calculating damages

Article 95 of the *Several Provisions on Evidence in Civil Litigation* promulgated by the Supreme People's Court in October 2019 embodies what is known as the obstruction of evidence rule, that is, "if a party who controls evidence refuses to submit it without justifiable reasons, and the other party who bears the burden of proof claims the withheld evidence is unfavorable to the withholding party, the court may rule in support of the other party's claim." The 2020 Draft adopts into legislation the obstruction of evidence rule, stipulating at Article 71, paragraph 4 that the rule applies in the calculation of damages for patent infringement. This provision uses the same basic wording as that used in the

[22] Zhou Xiang, *How to use punitive damages in technical intellectual property rights infringement cases*, China Intellectual Property, Issue 158.

Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Patent Infringement Disputes (Fa Shi〔2016〕No. 1).

Other changes reflected in the 2020 Draft

In addition to the amendments mentioned above, the 2020 Draft also introduces many other amendments that are worthy of note. Below, we briefly comment on the some of these amendments for your reference.

I The 2020 Draft strikes from the 2019 Draft at Article 71 obligations of network service providers

Due to changes in the legal environment, the 2020 Draft strikes provisions on obligations of network service providers found in the 2019 Draft. For example, e-commerce platform operators are now required to establish intellectual property protection rules under Articles 41 to 45 of the *E-commerce Law of the People's Republic of China*,[23] and separate provisions were recently adopted for network infringement under the *Civil Code of the People's Republic of China* at Articles 1194 to 1197.[24] It is thus observable that obligations of network service providers have been specified in relevant laws, obviating the need for the Patent Law to repeat such provisions.

II Linkage proposed with the Anti-Monopoly Law on prohibiting the abuse of patent rights

"Monopoly" is an issue that has accompanied the patent system since its inception. As China increasingly strengthens the intensity of intellectual property protection, legislators have noticed that patent right, as an exclusive right, may be abused and thereby hinder technological innovation. However, the Patent Law has long lacked relevant provisions on prohibiting patent right abuse, resulting in difficulties for judicial organs to identify a direct legal basis for tackling various problems arising under current circumstances. The 2020 Draft at Article 20 emphasizes for patent rights the principles of good faith which is the fundamental principle of the civil law in China, the public interest, and without prejudice to legitimate interests of others, with the second paragraph using the same wording as the Anti-Monopoly Law. Article 20 can be viewed as a high-order legal principle, leaving sufficient room for formulating specific rules and regulations to tackle various issues that have and will appear in practice.

III Establish an open licensing system

The 2020 Draft amends the title of Chapter VI of the Patent Law 2008 from "Compulsory License for Exploitation of a Patent" to "Special Licenses for Exploitation of a Patent," providing an additional Article 48 to the responsibilities of the administrative organs, and further prescribing "planning permission" (original Article 14 deleted and moved here, now referred to as "the promotion and application of invention patents owned by state-owned enterprises and public institutions"), "open licensing" (newly added) and "compulsory licensing"(existing), which combined form a relatively complete special licensing system. Specifically, the open patent licensing system is regarded as an

[23] E-commerce Law of the People's Republic of China (5 Standing Comm. 13 Nat'l People's Cong., P.O. 7; promulgated Aug. 31, 2018, effective Jan. 1, 2019) 2018 Standing Comm. Nat'l People's Cong. Gaz. 5 at 580.

[24] Civil Code of the People's Republic of China (13 Nat'l People's Cong. 3, P.O. 45; promulgated May 28, 2020, effective Jan. 1, 2021) 2020 Standing Comm. Nat'l People's Cong. Gaz. T.K. at 2.

important measure taken to promote the exploitation and application of patented technology to realize the value of patents.

Article 50 of the 2020 Draft stipulates the elements required for patentees to establish and withdraw open licenses: Article 51 stipulates the methods through which potential licensees can obtain open licenses; Article 52 stipulates the methods for settlement of disputes over open licenses, including negotiation, mediation, and litigation. If a patent intended for open licensing is thought of as goods offered for sale on the shelves of a supermarket and the licensee as a potential consumer of the goods, then the patent opening process can be understood as the following scenario: goods to be put on shelves of the supermarket must be clearly marked with a price and quality (stability of rights) of the goods must be guaranteed; an announcement must be circulated to the public if the goods are to be taken off-shelf, which is not retroactive for the sold. consumers may purchase the goods by submitting a written notice and paying the price, the price is open for "bargaining" but the goods are not subject to "buyouts"; any disputes arising from the process are first subject to negotiations. Where the negotiations fail, the dispute may be submitted to mediation or litigation.

Notably, the 2015 Draft stipulated a pre-administrative adjudication procedure for open license dispute resolution. The 2019 Draft revised "adjudication procedure" to "mediation," while the 2020 Draft specifies pre-mediation or litigation, which has the effect of weakening the role administrative power may play in the resolution of open license disputes.

IV Grant innovators with more flexibility by adjusting relevant regulations on rewards and remuneration for service invention-creations

The 2020 Draft at Article 6 emphasizes the employer's right to dispose of application rights and patent rights of service invention-creation patents, and Article 15 stipulates the rights of the inventor or designer of a service invention-creation, including the rewards and reasonable remuneration that the employer "shall" pay to the innovator, and to stipulate that the "State encourages" employers to share income derived from innovations with innovators by providing property rights incentives. In addition, the 2020 Draft strikes Article 72, originating in Patent Law 1984, which imposes administrative punitive measures on employers for the infringement of non-service invention-creations. This provision is of no practical significance, because relevant circumstances could be dealt with either in accordance with Article 85 of the *Rules for the Implementation of the Patent Law*,[25] where the involved parties may apply for meditation, or in accordance with Article 6, paragraph 2 of the Patent Law 2008, where the parties involved may file court litigation.

V Increase the type of novelty grace period

The 2020 Draft at Article 24 stipulates one additional circumstance resulting in application of the novelty grace period, that is "patents that are disclosed for the first time for the purpose of public interest, in the event of a state of emergency or due to extraordinary circumstances does not result in loss of novelty of such patent." We notice the wording of this provision is very similar to the provision

[25] Rules for the Implementation of the Patent Law (*as revised by* St. Council Decree No. 569; promulgated Jan. 9, 2010, effective Feb. 1, 2010).

of compulsory license of Article 49 of the Patent Law 2008. We understand this may reflect the most direct impact of the COVID-19 pandemic on the amendment of the Patent Law.

VI Improved patent administration

The 2020 Draft illustrates the trend toward weakening administrative power under the Patent Law. For example, Article 15 uses the expression the "government encourages…"; Article 52 only reserves administrative mediation as a dispute resolution method for open license dispute, but strikes "administrative" from "administrative punitive measures" under the Articles 73 and 74 of the Patent Law 2008, which indicates a general trend of releasing patents to the market and de-emphasizing the role of administrative departments.

However, we should not completely ignore nor deny the role administrative departments play in the operation of the patent system in China. Therefore, the 2020 Draft at Article 68 raises the upper limit of the fines imposed for patent infringement violations. In addition, considering the administrative departments have no right to award damages for patent infringement, Article 69 specifies measures that the "patent administration department" can take when handling patent infringement disputes, which exclude inspecting and copying relevant financial data. Article 70 specifies the jurisdiction of administrative adjudication for patent infringement disputes. Article 78 and Article 79 increase the punishment for administrative agencies and personnel who breach relevant rules.

VII Other adaptive amendments

The Patent Law 2008 has been effective for more than ten years, during which the political and economic environment in China has undergone tremendous change. To adapt to such changes, the 2020 Draft proposes to amend the Patent Law 2008 in many other aspects, including:

Article 25 adds "methods of nuclear transformation" to subject matter for which no patent right may be granted, which is consistent with patent examination practice.

Article 30 optimizes the procedures for priority claims, equalizing treatment under the *Paris Convention for the Protection of Industrial Property* and the *Patent Cooperation Treaty*.

Article 42 stipulates that an extended patent term may be granted to drug patents for delays caused during the process of marketing application reviews and further stipulates that applicant may apply for extended patent terms if an invention patent encounters unreasonable delays in the examination and approval process, which acts to implement paragraph 1.12 of the *China-U.S. Economic and Trade Agreement*.

Article 66 stipulates that both parties to a patent infringement dispute, and interested parties, can actively submit a patent right evaluation report, which echoes Article 56, paragraph 1 of the *Rules on Implementation of the Patent Law* and Part 5, Chapter 10, Section 2.2 of the *Guidelines for Patent Examination*, which prescribe eligibility requirements for persons who wish to request evaluation reports.

Articles 72 and 73 strike specific provisions on pre-litigation behavior preservation and evidence preservation available during the patent infringement dispute resolution process, stipulating relevant

matters are subject to provisions of the *Civil Procedure Law of the People's Republic of China*[26].

Article 74 extends to three years the statute of limitations for patent infringement litigation, commencing from the date when "the party knows or should have known the infringer…", which is consistent with Article 188 of the *Civil Code of the People's Republic of China*[27].

The amendments to Articles 21, 41, 45, 46, and 48 are adaptive to the needs of the State Council institutional reforms and are consistent with the functional configuration and internal organization of CNIPA.

Conclusion

In summary, the 2020 Draft stipulates revisions that aim to implement the State Council's institutional reforms and the *China-U.S. Economic and Trade Agreement*, which embody the following characteristics: (1) increase compensation for both pharmaceutical patent infringement and design patent infringement, signifying China's intent to strengthen protection of patent rights while also preventing their abuse; (2) increase the protection of patent rights by introducing punitive damages and striking the upper limit and lower limits of statutory damages, allowing more discretion to judicial organs; (3) establish an open licensing system, with the intent to promote the exploitation and application of patents, and to promote China to transform from a major intellectual property country to an intellectual property power; (4) fully ensure that the administrative management system plays its role under the patent system, while de-emphasizing the presence of administrative power and giving full play to the role of the market in the patent system. We have every reason to expect that the Patent Law, once amended, will be more consistent with the current political and economic environment and will march the Chinese patent system into a new era.

[26] Civil Procedure Law of the People's Republic of China (*as amended by* 28 Standing Comm. 13 Nat'l People's Cong., P.O. 71; promulgated June 27, 2017, effective July 1, 2017) 2017 Standing Comm. Nat'l People's Cong. Gaz. 4 at 508.

[27] Civil Code of the People's Republic of China, *supra*.

Important Announcement

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If you have any questions regarding this publication, please contact:

Beijing	**Wenyu JIN**	**Attorney-at-law**
	Tel:	+86 10 8525 5557
	Email:	wenyu.jin@hankunlaw.com
Shanghai	**Yinshi CAO**	**Attorney-at-law**
	Tel:	+86 21 6080 0980
	Email:	yinshi.cao@hankunlaw.com
Shenzhen	**Jason WANG**	**Attorney-at-law**
	Tel:	+86 755 3680 6518
	Email:	jason.wang@hankunlaw.com
Hong Kong	**Dafei CHEN**	**Attorney-at-law**
	Tel:	+852 2820 5616
	Email:	dafei.chen@hankunlaw.com