



## Chinese Patent Law Amendment

### Speed read

On 4 January 2019, the National People's Congress published a draft amendment to the Patent Law (the **Amendment**, available in Chinese [here](#)). The Amendment is open for public comment until **3 February 2019**. This note summarizes the important changes to the Patent Law proposed in the Amendment including:

- 1) The Amendment would introduce a patent term extension system for certain drug patents to compensate for regulatory delays caused by the National Medical Products Administration (**NMPA**, formerly known as **CFDA**);
- 2) The Amendment would extend the term of design patents from 10 years to 15 years calculated from the filing date; and
- 3) The statute of limitation for patent infringement would be extended from two years to three years.

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#### Pharmaceutical Patent Term Extension

The Amendment would introduce a patent term extension system for certain drug patents to compensate for regulatory delays caused by NMPA. An invention patent claiming an innovative drug concurrently seeking marketing approval in both China and abroad may be eligible for a patent term extension of up to five years, provided that the total patent term including the extension does not exceed 14 years following regulatory approval. *See Article 43 of the Amendment*. Unfortunately, the Amendment gives no clear indication as to what counts as an “innovative drug” or what is meant by “concurrent marketing applications” in China and abroad. This article also causes some concern from the local innovators because their “innovative drugs” may be for China only and never seek “marketing applications” in a foreign country.

#### Design Patent Term

The Amendment would extend the term of design patents from ten years to 15 years calculated from the filing date. *See Article 43 of the Amendment*. Application for design patent would be able to claim priority to an application on the same subject matter filed with the China National Intellectual Property Administration (**CNIPA**) not more than six months prior. *See Article 30 of the Amendment*.

#### “Endorsed Licence of Right”

The Amendment aims to create a system similar to “endorsed licence of right” under UK law. Under this system, the applicant could send a written statement to CNIPA expressing the applicant's intention to grant a license to anyone who is willing to in-license the patent under standard royalty terms promised by the patentee. CNIPA would publicly announce the statement. Anyone might then exploit such patent after notifying the right holder in writing and paying the royalty fees. *See Articles 50 through 52 of the Amendment*.

#### Punitive Damages

One major theme of the Amendment is to “toughen up” against infringers. Specifically, it would impose joint liability on the network service provider for not timely stopping online infringement upon the request of the patentee or licensee. *See Article 71 of the Amendment*. For the first time in the history of Chinese patent law, the Amendment would provide for punitive damages against wilful infringement, which could be up to four times the actual damages (which adds up to a total of five times of the actual loss), although the Amendment give no definition for “wilful infringement.” The Amendment would increase the statutory damages from RMB1 million to RMB5 million. Further, it would codify the existing Supreme People's Court interpretation on shifting the burden of proof to the alleged infringer to produce financial records for damages calculations. *See Article 72 of the Amendment*.

### Three Years of Statute of Limitation

The statute of limitation for patent infringement would be extended from two years to three years. *See Article 71 of the Amendment.* This is consistent with the earlier change to the statute of limitation for civil claims in general under the new General Rules of the Civil Law.

### No Reference to Patent Linkage

One disappointing aspect of the Amendment is the lack of reference to any patent linkage system. Such a system has been eagerly anticipated, especially by the pharmaceutical industry, ever since the CFDA proposed it in 2017. The drug regulator, the NMPA, appears to be the main driving force behind the proposal, whereas the patent office, the CNIPA, is perhaps not yet fully on board. This is despite the fact that both agencies have been put under a uniform umbrella agency, the SAMR. It is difficult to see how a linkage system could function without an amendment to the Patent Law to introduce a Chinese equivalent to Paragraph IV action. Therefore, in the absence of such changes in the Amendment, it may be safe to assume that a proper patent linkage system is still years away in the future.

### Administrative Enforcement

Another cause for worry is the further empowerment under the Amendment of the administrative IP offices at various levels of government. The Amendment seeks to strengthen the patent enforcement powers of the administrative branch of government by allowing greater leeway for IP offices to act against infringers. See Articles 68 through 70 of the Amendment. This seems to be a particularly heavy-handed approach to tackle the problem of patent infringement, which typically manifests as commercial disputes between private parties. It is quite conceivable for the IP offices' exercise of its administrative enforcement powers to interfere with the patentee's exercise of private patent rights through the judiciary.

Please refer to the table below for a comparison between the current Patent Law and the Amendment.

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## Comparison between the current Patent Law and the Amendment

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<p><b>Article 6</b></p> <p>An invention-creation that is accomplished in the course of performing the duties of an employee, or mainly by using the material and technical conditions of an entity shall be deemed an employment invention-creation. For an employment invention-creation, the entity has the right to apply for a patent. After such application is granted, the entity shall be the patentee.</p> <p>For a non-employment invention-creation, the inventor or designer has the right to apply for a patent. After such application is granted, the said inventor or designer shall be the patentee.</p> <p>For an invention-creation that is accomplished by using the material and technical conditions of an entity, if the entity has concluded a contract with the inventor or designer providing the ownership of the right to apply for the patent or the ownership of the patent right, such provision shall prevail.</p>	<p><b>Article 6</b></p> <p>An invention-creation that is accomplished in the course of performing the duties of an employee, or mainly by using the material and technical conditions of an entity shall be deemed an employment invention-creation. For an employment invention-creation, the entity has the right to apply for a patent. After such application is granted, the entity shall be the patentee. <b>The entity may lawfully have the right to apply for patents and the patent rights for employment invention-creation and adopt equity incentives schemes in the form of equity, options, dividends, etc. to enable the inventor or designer to reasonably share the profit from innovation and promote the implementation and application of relevant inventions.</b></p> <p>For a non-employment invention-creation, the inventor or designer has the right to apply for a patent. After such application is granted, the said inventor or designer shall be the patentee.</p> <p>For an invention-creation that is accomplished by using the material and technical conditions of an entity, if the entity has concluded a contract with the inventor or designer providing the ownership of the right to apply for the patent or the ownership of the patent right, such agreement shall prevail.</p>
<p><b>Article 19</b></p> <p>If a foreigner, foreign enterprise, or other foreign organization without a regular residence or business site in China intends to apply for a patent or handle other patent-related matters in China, he or it shall entrust a legally established patent agency with the application and such matters.</p> <p>If a Chinese entity or individual intends to apply for a patent or handle other patent-related matters in China, it or he may entrust a legally established patent agency with the application and such matters.</p> <p>A patent agency shall abide by laws and administrative regulations and handle patent applications or other patent-related matters as entrusted by its principals. It shall also be obligated to keep confidential the contents of the inventions of its principals, unless the patent applications have been published or announced. The specific measures for administration of the patent agencies shall be formulated by the State Council.</p>	<p><b>Article 19</b></p> <p>If a foreigner, foreign enterprise, or other foreign organization without a regular residence or business site in China intends to apply for a patent or handle other patent-related matters in China, he or it shall entrust a legally established patent agency with the application and such matters.</p> <p>If a Chinese entity or individual intends to apply for a patent or handle other patent-related matters in China, it or he may entrust a legally established patent agency with the application and such matters.</p> <p>A patent agency shall abide by laws and administrative regulations and handle patent applications or other patent-related matters as entrusted by its principals. It shall also be obligated to keep confidential the contents of the inventions of its principals, unless the patent applications have been published or announced. The specific measures for administration of patent agencies shall be formulated by the State Council.</p>

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	<b>Article 20 (newly added)</b> The application for patents and the exercise of patent rights should follow the principles of candor and good faith. No one may abuse patent rights to harm the public interest or the legitimate rights and interests of others or to exclude or restrict competition.
<b>Article 21</b> The patent administration department under the State Council and its Patent Review Board shall, according to the requirements of objectivity, fairness, accuracy and timeliness, handle patent applications and requests in accordance with law. The patent administration department under the State Council shall release patent-related information in a complete, accurate and timely manner, and publish patent gazettes on a regular basis. Before a patent application is published or announced, the staff members of the patent administration department under the State Council and the persons concerned shall be obligated to keep such application confidential.	<b>Article 22 (originally 21)</b> The patent administration department under the State Council and its Patent Review Board shall, according to the requirements of objectivity, fairness, accuracy and timeliness, handle patent applications and requests in accordance with law. <b>The patent administration department under the State Council shall redouble its effort in the establishment 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.</b> Before a patent application is published or announced, the staff members of the patent administration department under the State Council and the persons concerned shall be obligated to keep such application confidential.
<b>Article 25</b> Patent rights shall not be granted for any of the following: i) scientific discoveries; ii) rules and methods for intellectual activities; iii) methods for the diagnosis or treatment of diseases; iv) animal or plant varieties; v) substances obtained by means of nuclear transformation; and vi) designs that are mainly used for marking the pattern, color or the combination of the two of prints. The patent right may, in accordance with the provisions of this Law, be granted for the production methods of the products specified in Subparagraph iv) of the preceding paragraph.	<b>Article 26 (originally Article 25)</b> Patent rights shall not be granted for any of the following: i) scientific discoveries; ii) rules and methods for intellectual activities; iii) methods for the diagnosis or treatment of diseases; iv) animal or plant varieties; v) <b>methods of nuclear transformation and substances obtained by nuclear transformation methods; and</b> vi) designs that are mainly used for marking the pattern, color or the combination of the two of prints. The patent right may, in accordance with the provisions of this Law, be granted for the production methods of the products specified in Subparagraph iv) of the preceding paragraph.
<b>Article 29</b> If, within twelve months from the date the applicant first files an application for an invention or utility model patent in a foreign country, or within six months from the date the applicant first files an application for a design patent in	<b>Article 30 (originally Article 29)</b> If, within twelve months from the date the applicant first files an application for an invention or utility model patent in a foreign country, or within six months from the date the applicant first files an

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<p>a foreign country, he files an application for a patent in China for the same subject matter, he may enjoy the right of priority in accordance with the agreements concluded between the said foreign country and China, or in accordance with the international treaties to which both countries have acceded, or on the principle of mutual recognition of the right of priority.</p> <p>If, within twelve months from the date the applicant first files an application for an invention or utility model patent in China, he files an application for a patent with the patent administration department under the State Council for the same subject matter, the applicant may enjoy the right of priority.</p>	<p>application for a design patent in a foreign country, he files an application for a patent in China for the same subject matter, he may enjoy the right of priority in accordance with the agreements concluded between the said foreign country and China, or in accordance with the international treaties to which both countries have acceded, or on the principle of mutual recognition of the right of priority.</p> <p>If, within twelve months from the date the applicant first files an application for an invention or utility model patent in China, <b>or within six months from the date the applicant first files an application for design in China</b>, he files an application for a patent with the patent administration department under the State Council for the same subject matter, the applicant may enjoy the right of priority.</p>
<p><b>Article 30</b></p> <p>An applicant who requests the right of priority shall submit a written declaration at the time of application and submit, within three months, duplicates of the patent application documents filed for the first time. Where no written declaration is submitted or no duplicates of the patent application documents are submitted at the expiration of the specified time limit, the applicant shall be deemed to have waived the right of priority.</p>	<p><b>Article 31 (originally Article 30)</b></p> <p>An applicant who requests the right of priority shall submit a written declaration at the time of application and submit, <b>within 16 months from the date of filing the first application for a patent for invention or utility model, or within three months from the date of filing the application for a patent for design</b>, duplicates of the patent application documents filed for the first time. Where no written declaration is submitted or no duplicates of the patent application documents are submitted at the expiration of the specified time limit, the applicant shall be deemed to have waived the right of priority.</p>
<p><b>Article 42</b></p> <p>The duration of the invention patent right shall be 20 years and that of the utility model patent right and of the design patent right shall be ten years respectively, all commencing from the date of application.</p>	<p><b>Article 43 (originally Article 42)</b></p> <p>The duration of the invention patent right shall be 20 years, and <b>that of the utility model patent right shall be ten years, and that of the design patent right shall be 15 years</b>, all commencing from the date of application.</p> <p><b>In order to make up for the time taken for the evaluation and approval of innovative drugs, the State Council may decide to extend the duration of the patent right for the invention of innovative drugs for which marketing approval is applied simultaneously in China and abroad, for a period of no more than five years, and the total post-marketing patent term of such innovative drugs shall not exceed fourteen years.</b></p>
<p><b>Chapter 6 Compulsory license for exploitation of a patent</b></p>	<p><b>Chapter 6 Special license for the exploitation of a patent</b></p>
	<p><b>Article 49 (newly added)</b></p> <p><b>The administrative department for patent under the State Council and the administrative</b></p>

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	<p>department for patent affairs under the local people's government shall, together with the relevant departments at the same level, take measures to strengthen the public service for patent and promote the implementation and application of patents.</p>
	<p><b>Article 50 (newly added)</b></p> <p>Where the patentee has made a written declaration to the administrative department for patent under the State Council that it is willing to license any entity or individual to exploit its or his patent, and has specified the method and standard of payment for the royalties, the administrative department for patent under the State Council shall make a public announcement and issue an open license. Where an announcement of an open license is made for a patent for utility model or design, a patentability evaluation report shall be provided.</p> <p>Where the patentee withdraws the declaration of open license, it shall do so in writing, which shall be published by the patent administration department under the State Council. The withdrawal of an open license announcement shall not affect the effect of the open license previously granted.</p>
	<p><b>Article 51 (newly added)</b></p> <p>Any entity or individual wishing to exploit a patent to which an open license is granted shall, after notifying the patentee in writing and paying the royalties in accordance with the method and standards of payment for royalties as announced, obtain the license to the patent.</p> <p>During the period of open license, the patentee may not grant a sole or exclusive license to the patent.</p>
	<p><b>Article 52 (newly added)</b></p> <p>Where parties have a dispute over the implementation of an open license, they may request the patent administration department under the State Council to mediate.</p>



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<b>Article 61</b>	<b>Article 66 (originally Article 61)</b>
Where any infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process.	Where any infringement dispute relates to a patent for invention for a process for the manufacture of a new product, any entity or individual manufacturing the identical product shall furnish proof to show that the process used in the manufacture of its or his product is different from the patented process.
Where the dispute of patent infringement relates to a patent for utility model or design, the people's court or the administrative authority for patent affairs may ask the patentee or interested party to furnish an appraisal report of the patent right made by the patent administration department under the State Council after conducting search, analysis and appraisal of the relevant utility model or design as an evidence for trial and handling of the patent infringement disputes.	Where the dispute of patent infringement relates to a patent for utility model or design, the people's court or the administrative authority for patent affairs may ask the patentee or interested party to furnish an appraisal report of the patent right made by the patent administration department under the State Council after conducting search, analysis and appraisal of the relevant utility model or design as an evidence for trial and handling of the patent infringement disputes. <b>The parties may also of their own accord submit patent evaluation reports.</b>
<b>Article 63</b>	<b>Article 63</b>
Where any person passes off the patent, he shall, in addition to bearing his civil liability according to law, be ordered by the administrative authority for patent affairs to amend his act, and the order shall be announced. His illegal earnings shall be confiscated and , in addition, he may be imposed a fine of not more than four times his illegal earnings and, if there is no illegal earnings, a fine of not more than RMB 200,000 yuan. Where the infringement constitutes a crime, he shall be prosecuted for his criminal liability.	Where any person passes off the patent, he shall, in addition to bearing his civil liability according to law, be ordered by <b>the department responsible for patent enforcement</b> to correct his act, and the order shall be announced. <b>A fine under five times of the illegal turnover may be imposed, where there is no illegal turnover or the illegal turnover does not exceed RMB 50,000, a fine of not more than RMB 250,000 may be imposed;</b> Where the infringement constitutes a crime, he shall be prosecuted for his criminal liability.
<b>Article 64</b>	<b>Article 69 (originally Article 64)</b>
In handling the act suspected of passing off of the patent, administrative authority for patent affairs may, based on the evidence collected, make inquiries of the relevant persons, investigate into the matters pertinent to the act suspected of violation of laws; conduct on- spot inspection of the place where the act of the relevant persons is suspected of violation of laws; examine and make copy of the contract, invoices, accounting books and other materials relating to the act suspected of violation of laws; inspect the product relating to the act suspected of violation of laws, and may seal and detain the products as proved by evidence to be counterfeits.	In handling the act suspected of <b>infringing a patent or</b> passing off of the patent, <b>the department responsible for patent enforcement</b> may, based on the evidence collected, make inquiries of the relevant persons, investigate into the matters pertinent to the act suspected of violation of laws; conduct on-spot inspection of the place where the act of the relevant persons is suspected of violation of laws; examine and make copy of the contract, invoices, accounting books and other materials relating to the act suspected of violation of laws; inspect the product relating to the act suspected of violation of laws, and may seal and detain the products as proved by evidence to be the products passing off the patent.
The relevant persons shall help and cooperate with the administrative authority for patent affairs exercising the authorities as provided in the preceding paragraph and must not make any rejection or obstacles.	The relevant persons shall help and cooperate with administrative authority for patent affairs and <b>the department responsible for patent enforcement</b> exercising the authorities as provided in the preceding paragraph and must not make any rejection

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	<p>or obstacles.</p> <p><b>Article 70 (newly added)</b></p> <p>The patent administration department under the State Council may, at the request of the patentee or an interested party, handle any dispute over patent infringement that has a significant impact throughout the country.</p> <p>The administrative department for patent affairs of the local people's government shall, at the request of the patentee or any interested party, handle any dispute concerning patent infringement, and may consolidate cases of infringement of the same patent within its own jurisdiction.</p> <p>Any cross-regional infringement of the same patent may be referred to the administrative department for patent affairs of the people's government at a higher level.</p>
	<p><b>Article 71 (newly added)</b></p> <p>The patentee or interested party may, on the basis of effective judgment, order or settlement agreement issued by the people's court or the decision made by the administrative authority for patent affairs ordering cessation of infringement, notify the Internet Service Provider to take necessary measures, such as deleting, blocking or disconnecting the link to the infringing product. If the Internet Service Provider fails to take necessary measures in time after receiving such notice, it shall, together with the infringing network users, be jointly and severally liable for the unmitigated portion of the damages.</p> <p>After the department responsible for patent enforcement makes the decision to order correction of the fake patent, it may notify the Internet Service Provider to take necessary measures such as deleting, blocking or disconnecting the link to the fake patented products. Upon receiving such notice, the Internet Service Provider shall take necessary measures in a timely manner.</p>
<p><b>Article 65</b></p> <p>The amount of compensation for the damage caused by the infringement of the patent right shall be assessed on the basis of the actual losses suffered by the patentee; where the actual losses are difficult to be determined, it may be assessed on the basis of the profits which the infringer has earned through the infringement. If it is difficult to determine the losses which the patentee has suffered or the profits which the infringer has earned, the</p>	<p><b>Article 72 (originally 65)</b></p> <p>The amount of compensation for the damage caused by the infringement of the patent right shall be assessed on the basis of the actual losses suffered by the patentee; where the actual losses are difficult to be determined, it may be assessed on the basis of the profits which the infringer has earned through the infringement. If it is difficult to determine the losses which the patentee has suffered or the profits which</p>



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amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license. The amount of compensation shall include the reasonable expenses incurred to the patentee for handling the infringement.

In case it is difficult to calculate the losses of the patentee, the profits which the infringer has earned, and the amount of the exploitation fee of that patent under contractual license, the people's court may, on the basis of such factors as the type of the patent, nature and circumstances of the infringement etc., determine the amount of the compensation from RMB 10,000 yuan to RMB one million yuan.

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the infringer has earned, the amount may be assessed by reference to the appropriate multiple of the amount of the exploitation fee of that patent under contractual license. **For wilful infringement with serious circumstances, the amount of damages may be set at an amount between one and five times the amount determined in accordance with the above- mentioned method.**

In case it is difficult to calculate the losses of the patentee, the profits which the infringer has earned, and the amount of the exploitation fee of that patent under contractual license, the people's court may, on the basis of such factors as the type of the patent, nature and circumstances of the infringement etc., determine the amount of the compensation from RMB **100,000** yuan to RMB **five** million yuan. The amount of compensation shall include the reasonable expenses incurred to the patentee for handling the infringement

**In order to determine the amount of damages, the people's court may order the infringer to provide the accounting books and materials relating to the infringement where the patentee has exhausted its burden of proof and where the accounting books and materials relating to the infringement are mainly in the possession of the infringer. Where the infringer fails to provide the same or provides false accounting books or materials, the people's court may determine the amount of damages by referencing the claims of the patentee and the evidence provided by the patentee.**

**Article 66**

Where a patentee or interested party has evidence to prove that someone else is committing or is going to commit an infringement upon the patent right, and its (his) lawful rights and interests will be damaged and are difficult to be remedied if the said infringement is not stopped in time, it or he may, prior to initiating a lawsuit, apply to the people's court for taking such measures as ordering the stop of the relevant act.

When an applicant files an application, it shall provide a guarantee. If it or he fails to do so, the application shall be rejected.

The people's court shall make a ruling within 48 hours as of its acceptance of an application. If it is necessary to extend the time limit in a special circumstance, the time limit may be extended for up to 48 hours. If a ruling is made to stop the relevant act, it shall be executed immediately. If any party refuses to accept the ruling, it (he) may apply for one review. The execution of the ruling

**Article 73 (originally Article 66)**

Where a patentee or interested party has evidence to prove that someone else is committing or is going to commit an infringement upon the patent right, and its (his) lawful rights and interests will be damaged and are difficult to be remedied if the said infringement is not stopped in time, it or he may, prior to initiating a lawsuit, apply to the people's court for taking such measures as ordering the stop of the relevant act.

**(subsequent clauses deleted)**

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is not suspended during the process of review.	
If the applicant fails to lodge a lawsuit within 15 days after it takes such measures as ordering the stop of the relevant act, the people's court shall lift the said measure.	
Where there are errors in an application, the applicant shall compensate the party against whom an application is filed for the losses caused by the stop of the relevant act.	
<b>Article 67</b>	<b>Article 74 (originally Article 67)</b>
To stop a patent infringement, the patentee or any interested party may apply to the people's court for preserving the evidence when such evidence is likely to be destroyed and hard to be obtained again.	To stop a patent infringement, the patentee or any interested party may apply to the people's court for preserving the evidence when such evidence is likely to be destroyed and hard to be obtained again.
The people's court may order the applicant to provide a guarantee for the preservation. If the applicant fails to do so, its or his application shall be rejected.	<b>(subsequent clauses deleted)</b>
The people's court shall make a ruling within 48 hours after it accepts an application. If it makes a ruling on preserving the evidence, the ruling shall be executed immediately.	
If the applicant fails to initiate a lawsuit within 15 days after the people's court has taken the measure of preserving the evidence, the people's court shall terminate the said measure.	
<b>Article 68</b>	<b>Article 74 (originally Article 68)</b>
The statute of limitation on an action against an infringement upon a patent right shall be two years counted from the date on which the patentee or any interested party knows about or should have known about the infringing act.	The statute of limitation on an action against an infringement upon a patent right shall be three years counted from the date on which the patentee or any interested party knows about or should have known about the infringing act.
Where anyone uses an invention after the application for a patent for this invention is published but before the patent right is granted without paying adequate royalties, the statute of limitations for the patentee to claim payment of such royalties shall be two years, commencing from the date when the patentee knows or ought to know that his invention is used by some else. However, if the patentee has known or ought to have known about this fact prior to the date when the patent right is granted, the statute of limitations shall commence from the date when the patent right is granted.	Where anyone uses an invention after the application for a patent for this invention is published but before the patent right is granted without paying adequate royalties, the statute of limitations for the patentee to claim payment of such royalties shall be <b>three</b> years, commencing from the date when the patentee knows or ought to know that his invention is used by some else. However, if the patentee has known or ought to have known about this fact prior to the date when the patent right is granted, the statute of limitations shall commence from the date when the patent right is granted.

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<b>Article 72</b>	<b>Deleted</b>
Where any person usurps the right of an inventor or designer to apply for a patent for a non-service invention, or usurps any other right or interest of an inventor or designer as prescribed in this Law, he shall be subject to an administrative sanction by the entity for which he works or by the competent authority at the higher level.	

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