

Why Did China Adopt an Absolute Novelty Standard for Patentability(?), and Other Issues in the New Chinese Patent Law

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Long ago the United States patent law provided for a grace period. The grace period is a period of time from the date after which an inventor's invention is disclosed to the public during which the inventor can apply for a patent and not have the disclosure count as prior art against the inventor's application. The United States grace period is 1 year. European patent law provides no grace period. Most other countries provide no grace period.

In December 2008, China adopted a change in its patent laws following the European model of no grace period. Why? It appears that China decided that it is better to limit the rights to a patent than to participate in evidentiary determinations that necessarily result from according rights based upon proving inventive activity by other than the evidence of patent applications on file with the government.

While that makes sense from a purely administrative position, it does not enable early disclosure of scientific and related technological discoveries and inventions. The provision of a grace period is widely believed from a public policy perspective to be a best practice in patent law because it promotes technological development.

Moreover, and more importantly, the United States has generally held out as a negotiating point the worldwide acceptance of a grace period as a prerequisite for abandoning the United States's first to invent system. The United States is the only country in the world having a first to invent system.

An important point to note in the Chinese decision is that it does not respect this implied offer from the United States. This may in part reflect the changing balance of economic power in the world, in which the United States' former economic supremacy is sinking compared to economic power in Asia and Europe.

The other notable changes to the Chinese patent law are requirements for design patents that are inconsistent with requirements for United States design patents. As a result, there will be difficulties and limitations to obtaining in China the Paris priority right of a United States design application. Specifically, Chinese patent law now requires that a design application include a "description" of the design. United States design applications do not require a description, but do not preclude a description. The Chinese regulations implementing this requirement have not yet been promulgated so it remains to be seen exactly what description will be required. In addition, Chinese patent law now allows multiple similar designs in a single design application, whereas United States design patent applications are limited to a single design. Consequently, a single Chinese design patent application may consolidate the disclosures of multiple United States design applications and claim plural Paris priority rights thereto.

The new Chinese patent law addresses many other issues as well, including genetic materials disclosure, compulsory licensing, infringement damages, and provides a Bolar exception.

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