

## China Patent Law Fourth Amendment—Impact on Foreign Companies

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China first enacted its Patent Law (“**CPL**”) in 1984, and thereafter amended it three times, in 1992, 2000 and 2008. On October 17, 2020, the Standing Committee of the National People’s Congress promulgated the long-awaited fourth amendment to the CPL (the “**Fourth Amended CPL**”). This Fourth Amended CPL is scheduled to take effect on June 1, 2021, with a view to strengthen the protection of legitimate rights and interests of patentees, to promote the implementation and application of patent rights in China, and to refine the overall patent granting mechanism in response to the ever-changing patent usage environment in the past decade and the increase in demand for patents from domestic and foreign enterprises. We will not go into the deeply technical aspects of the Fourth Amended CPL, but will highlight below the two major conceptual changes of which foreign investors should be aware:

### 1. **Broadened Scope and Protection for Design Patents**

The CPL provides three forms of patents: invention patent, utility model patent and design patent. A design patent under the Fourth Amended CPL means a new design of the whole or partial shape or pattern of a product or a combination thereof, as well as a combination of color with shape or pattern, which creates an aesthetic feeling and is fit for industrial application.

Partial design is now patentable under the Fourth Amended CPL. This allows applicants to protect their product’s distinctive design features (which are inseparable from the rest of the product) apart from the product’s commonplace features. This also enables applicants to protect their unique design features more conveniently without being limited by commonplace features of the same product. For example, a unique design of a cup handle by itself will be patentable under the Fourth Amended CPL. In addition, a Design Patent’s protection term is extended to 15 years (from a current protection term of 10 years) under the Fourth Amended CPL, to be aligned with the Hague Agreement Concerning the International Registration of Industrial Designs (Geneva Act of July 2, 1999), which China intends to join.

### 2. **Strengthened Patent Protection System**

The Fourth Amended CPL makes certain adjustments that strengthen patent protections in China:

- (i) *Improves property preservation and act preservation (i.e., injunctive relief).*<sup>1</sup>

Articles 72 and 73 of the Fourth Amended CPL stipulate the procedures for property preservation and act preservation before litigation (“**Pre-Litigation**”) as defensive mechanisms that patent holders can employ to protect their patent rights. There were mainly two big changes provided under the Fourth Amended CPL.

First, “acts that harm patentees or interested party’s rights or hinder the realization of said rights” was added as one of the triggers for Pre-Litigation property preservation and act preservation.

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<sup>1</sup> According to Article 100 of the Civil Procedure Law of the PRC: For cases in which the action of a party to the lawsuit or any other reason causes difficulty in enforcement of a judgment or causes other harm to the litigants, a People’s Court may, pursuant to an application by a counterparty litigant, rule on preservation of its property, order the counterparty to undertake certain acts or prohibit the counterparty to undertake certain acts.

Second, due to procedural matters such as the time limits for handling Pre-Litigation property preservation and act preservation, the requirements for guaranty, preservation cancellation and remedies for preservation errors have been clearly stipulated in the Code of Civil Procedure and related judicial interpretations. The Fourth Amended CPL deletes these provisions so as to avoid any confusion or redundancy.

(ii) *Increase in Penalties*

While the current penalties for violating the CPL are mainly compensatory (i.e. to be calculated based on the patent holder's loss or illegal gains by the infringer), the Fourth Amended CPL adds the following: (a) in addition to compensatory damages, if the infringement is found to be substantial and willful the court can impose punitive damages up to five times the amount of compensatory damages; and (b) when compensatory damages are difficult to ascertain, statutory penalties can be imposed between RMB 1 million (approximately US\$150,000) to RMB 5 million (approximately US\$750,000). Such enhanced penalties will certainly have stronger deterrent effects and offer more protection to deter infringers. It is expected that the establishment of tougher protection and higher damages will encourage foreign investment in Chinese industries, especially in the now fast-developing technology industry.

(iii) *Eased Burden of Proof*

The traditional lack of discovery process in litigation in China—i.e., the rule of “he who asserts must prove”—is known to make it difficult to prove damages, especially for patent holders. The Fourth Amended CPL allows for the potential shifting of the burden of proof relating to damages. Specifically, a Chinese court may order the accused infringer to produce evidence (such as the financial books and other materials) relating to the infringement action. If the accused infringer refuses to do so, the court may determine the damages based on evidence provided by the patent owner.

## Conclusion

It has been 12 years since the CPL was last amended. The Fourth Amended CPL contains significant changes to the patent system in China. As both domestic and foreign companies have become increasingly sophisticated in pursuing and enforcing patent rights in China, it is important for companies to have a basic understanding of the Fourth Amended CPL as soon as possible and formulate and adjust their intellectual property protection strategies.

For more information, please see the following resources:

- [China Updates page](#)
- [China Regulators Remove Restrictions on Insurance Fund Investment](#), December 14, 2020
- [China Adopts Interim Provisions on the Review of Concentrations of Business Operators for the Anti-Monopoly Law](#), November 30, 2020
- [China Releases Draft Personal Data Protection Law for Comments](#), November 12, 2020
- [China Adopts Export Control Law](#), November 5, 2020
- [China Releases New QFII/RQFII Rules](#), October 27, 2020
- [China Releases Provisions on Strengthening the Supervision of Private Equity Investment Funds \(Draft\)](#), October 15, 2020
- [China Releases Provisions on the Unreliable Entity List](#), October 5, 2020
- [China Releases Revised Measures on Handling Complaints of Foreign-Invested Enterprises](#), September 23, 2020
- [China Releases Administrative Measures for Strategic Investment by Foreign Investors in Listed Companies](#), September 10, 2020

- [China Releases Draft Data Security Law](#), September 8, 2020
- [China Releases Circular on Further Stabilizing Foreign Trade and Foreign Investment](#), August 24, 2020
- [China Releases Draft Measures for the Administration of Imported and Exported Food Safety](#), August 18, 2020
- [U.S. Listed Chinese Companies: Regulatory Scrutiny and Strategic Options](#), July 30, 2020
- [China Passes Controversial Hong Kong National Security Law](#), July 9, 2020
- [China's Relaxed Financial Sector May Aid Foreign Investors](#), June 18, 2020
- [Is There a Law in China Similar to the US Defense Production Act?](#), May 8, 2020
- [Coronavirus Brings Force Majeure Claims to LNG Contracts](#), March 4, 2020
- [The Rise of China](#), March 4, 2020
- [Coronavirus Fears Cast Cloud Over Dealmaking](#), February 27, 2020

Additional questions? Please contact Haynes and Boone lawyers [Liza L.S. Mark](#) and [Jasmine Yang](#)