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# Patenting in the United States

# 美国专利保护

## I. INTERNATIONAL

## I.专利的国际保护

Owning a patent only gives protection for that invention in the country where the patent was granted.[1] Therefore, an inventor must file for a patent in each country in which protection is desired by a country-specific deadline.[2] Usually, the filing must be done before any "public disclosure" of the invention. This creates difficulties in filing patents in a foreign country due to time and financial constrains. Fortunately, international treaties have been created to ameliorate that problem.

拥有一项专利只保护该专利发明在专利授予国的权益。因此，发明者如果想要在各个国家使其发明得到保护的话，就必须在各国规定的截至日期前为其发明申请专利。通常，申请必须在一发明公之于众之前递交。由于时间和金钱上的制约，这个要求对发明者在国外申请专利制造了困难。但好在已有国际公约来尽量减少这些困难。

### A. Paris Convention and the PCT

### A. 巴黎公约和专利合作条约

Both China and the United states have entered into the Paris Convention for the Protection of Industrial Property treaty (Paris Convention).[3] The key concept to derive from this treaty is the "claim to priority"[4] which allows a patent owner to file a patent in a member country if it is filed within a certain grace period.[5] The date of filing in the home country is known as the effective filing date.[6] The grace period for filing a foreign patent is six months for a design patent or a trademark and one year for a utility patent.[7] Therefore, an inventor can file a patent in his or her home country, release it to the public for sale, and still file a patent in a foreign country if it is within the grace period even though the patent has been publicly disclosed.

中国和美国都加入保护工业产权公约（巴黎公约）。从这个国际条约引申出来的最关键的概念是"优先权声明"，允许发明者在一定的宽限期内向任何公约会员国递交专利申请。发明者在自己国家内递交专利申请的日期将被视为向其他国家提交有效申请的日期。这个国外申请专利的宽限期，如果是外观设计或商标为有效申请日期起 6 个月，如果是发明和实用新型则为有效申请之日起一年。 因此，如果一个发明者在本国为他的发明申请专利之后将此发明投入市场，虽然这样他的发明早已经公之于众，他仍可以在这个宽限期内在另一个国家申请专利。

The United States and China are also part of the Patent Cooperation Treaty (PCT).[8] This treaty provides a uniform filing procedure for international patents known as the "International Patent Application."[9] However, this treaty is only effective with inventions, not design patents or trademarks.[10] Applying for a patent under the PCT acts as an effective filing in all member states.[11] Unfortunately, this application merely prolongs the time allowed to file a patent in the other counties, it does not act as an

actual “international patent.”[12] National Stage Applications must still be filed in each country where the patent is desired to take effect.[13] In the end, the application gives an additional eighteen months to file a patent beyond the initial twelve months provided by the Paris Convention.[14]

中国和美国也都是《专利合作条约》（PTC）的成员国。这个条约提供了一个统一的国际专利申请程序，称之为国际专利申请。此条约只适用于发明和实用新型，对工业设计和商标并不适用。按照《专利合作条约》规定所提交的专利申请等效于在所有会员国申请该专利。然而，这个条约只是延长了申请人在国外可申请专利的期限，而并非意味着申请人就此拥有了一项“国际专利”。要使专利在某个特定国家受到保护，申请人还是必须在该国提交申请。最终，在国外申请该专利，根据这个申请程序可给予专利申请人在巴黎公约的 12 个月的宽限期基础上额外 18 个月时间。

### B. The TRIPS Agreement

### B. 与贸易有关的知识产权协议

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the newest international patent treaty.[15] In order to become a member of the World Trade Organization (WTO), a country must ratify the TRIPS agreement.[16] Both the United States and China have ratified the treaty.[17]

《与贸易有关的知识产权协议》(TRIPS)是最新的关于专利保护的国际条约。一个国家若要加入 WTO 就必须签署此协议。中国和美国都已加入了这个协议。

Three main standards come from the TRIPS treaty. First, the treaty sets out a minimum standard of intellectual property procedural protection for ratifying countries.[18] Next, the treaty sets out enforcement rules, policies, and remedies to protect intellectual property.[19] Finally, the treaty sets out the WTO dispute settlement procedures which govern all disputes under the TRIPS treaty.

TRIPS 协议设立了三个主要准则。首先，协议对缔约国在知识产权程序性保护方面设定了基本标准。其次，协议规定了缔约国实施知识产权保护的规则，政策和侵权救济措施。另外，协议规定了 TRIPS 协议下的争议适用 WTO 的争端解决机制。

## II. PATENT LAW IN CHINA

## II. 中国的专利法

Patent law in China is constantly evolving; the most recent amendments to the law were enacted in 2009.[20] These amendments were intended to increase protection of patents in China and to align Chinese patent law with the international standards.

中国的专利法还在不停的发展改进之中。最近在 2009 年又作出了新的修正。修改的目的在于加强中国的专利保护以及使中国的专利法与国际标准接轨。

In order to receive a patent, a product must possess novelty, inventiveness, and practical applicability.[21] Novelty requires that the product has not been publicly disclosed in China before the date of the filing.[22] To have inventiveness, a product must have substantial differences from other technology and must represent “notable progress.”[23] The requirement of practical applicability means that the product must produce effective positive results.[24]

在中国要获得一项专利，一个产品必须具有新颖性、创造性和实用性。新颖性是指在申请日以前没有同样的产品在国内公开披露过。创造性要求该产品跟现有技术相比有突出的实质性特点和进步。实用性要求该产品必须能产生积极的正面效果。

Chinese patent law contains three types of patents: inventions, utility models, and designs.[25] The rights to an invention patent last for 20 years from the date of filing and 10 years for the utility and design patents.[26] Throughout the duration of a patent, an inventor must pay an annual maintenance fee.[27] A patent can be lost if the fees are not paid or if an entity or individual challenges it and the Patent Reexamination Board declares the patent invalid.[28]

中国的专利法包括三种专利：发明，实用新型和外观设计。发明专利受保护期限为自申请日起 20 年，而实用新型和外观设计专利受保护期限为自申请日起 10 年。在专利有效年限内，专利拥有者必须每年缴纳一定费用。如果未交纳该费用，或者有团体或个人对该专利提出异议而专利再审委员会宣布该专利无效的，专利权人将丧失该专利。

The 2009 amendment updates and improves some of the current deficiencies of patent law in China. Chinese individuals and entities will no longer have to file an application for a Chinese patent for inventions made in China before filing elsewhere.[29] The inventor will be able to apply for protection in a foreign country first, though the invention will still have to be reviewed by Chinese authority before it is released. Also, the novelty requirement will be tightened as the new requirement changes the law from "publicly disclosed in China" to "publicly disclosed anywhere."[30] Furthermore, the new

amendments have added articles to more effectively strengthen enforcement of patent rights in China.[31]

2009 的修正更新和改进了中国专利法现存的不足。修正后，中国的团体或个人在其他国家为其在中国的发明申请专利之前，不再需要先在中国申请专利。发明人可以先在国外申请专利，但在其公之于众前，仍然需经过中国有关机构的审查。同时，对于申请专利产品的新颖性要求也变得更加严格，由“从未在中国公开披露”改为“从未在任何地方公开披露”。另外，修改后的专利法增加了新的条款以更有效的加强专利权在中国的执行。

Finally, criminal penalties can be inflicted for violations that pose a serious harm to society.[32] However, the actual deterrent effects of the penalties are unclear at this point.[33]

最后，如果侵害专利的行为对社会造成严重伤害，可对侵权人予以刑事处罚。但这些刑事处罚的实际威慑力在目前尚不清楚。

## III. PATENT LAW IN THE UNITED STATES

## III. 美国的专利法

### A. Basics

### A. 概况

In the United States, anyone can apply to the United States Patent and Trademark Office (USPTO) for a patent as long as they are the true inventor.[34] In the United States there are three types of patents: utility, design, and plant.[35] Utility

patents are actual inventions, design patents cover the shape and surface of an object, and plant patents cover uniquely created plants.[36]

在美国，任何人都有权为其产品向美国专利和商标局申请专利，只要该申请人是该产品的真正发明人。在美国有三种专利：实用专利，外观设计和植物专利。实用专利其实就是发明专利，外观设计涵盖物品的形状和表面，而植物专利则适用于新创造的植物物种。

There are four legal requirements to obtain a patent in the U.S. The first is that it must be within a certain statutory class.[37] These include processes, machines, manufactures, compositions, and new uses of any of the previous.[38] These classes are very broad and most new inventions fit into them without any problems.[39] The next requirement is utility.[40] Any invention will pass this test if it is functionally useful.[41] This is done to weed out immoral, illegal, non-operable, and nuclear inventions.[42] The third requirement is novelty, in which the invention must be different in some way from any other publicly available invention, known as prior art.[43] The final requirement is that of non-obviousness, which means that the difference in the invention must be substantial and significant.[44]

在美国取得专利权必须满足四方面的法律要求。首先，这项产品必须隶属于某个法定的类别。这些类别包括工艺过程，机械，生产制造，物质构成，以及以上这些的新用途。这些类别涵盖面非常广，几乎所有的新发明都会毫无疑问的隶属于其中某一类。第二个要求是实用。任何专利产品只要能正常运作就可以满足这个要求。这个限制只是为了剔除那些不道德，不合法，不能运作的产品以及核能方面的

发明。第三是新颖性，即新发明必需在某些方面区别于之前的已公之于众的发明，即“现有技术”。最后是非显而易见性，即新发明中有重要且显著的不同之处。

Utility and plant patents last for 20 years from the date of the filing while design patents last 14 years from the date of issuance.[45] During this time of ownership, an inventor must pay maintenance fees.[46]

实用专利和植物专利有效期是自申请日期起 20 年，而外观设计专利的有效期是自专利核准日起 14 年。在专利有效期内，专利拥有者必须支付专利维持费用。

Once an inventor receives the patent, there is no absolute guarantee of a monopoly over the invention. The patent can be lost if: 1. fees are not paid, 2. the patent does not adequately describe the invention, 3. prior art is found, 4. the inventor engages in illegal activity, and 5. the application was prosecuted under fraud.[47]

如果某发明者取得了专利，这并不意味着法律保障他对此项专利的垄断权。他可以因为以下原因而失去专利：1、未支付专利维持费用；2、专利并没有充分描述其发明；3、专利在现有技术中被找到；4、发明者从事非法活动；以及 5、专利申请而被起诉欺诈。

The official set of Patent laws can be found under the United States Code Title 35.[48]

官方的整套专利法可在美国法典第 35 部中找到。

B. Unique Aspects

B. 美国专利法的独特之处

The United States has more lawsuits than any other country including a 2007 estimate of 2,000-3,000 patent suits.[49] The owner of a patent can file for a lawsuit for any infringement that occurs in the U.S., which may include some foreign activities which effect domestic sales.[50] Plaintiffs in a patent lawsuit have two major goals: injunctions and/or monetary damages.[51]

美国每年的案件数量超过其他任何一个国家，这些案件中包括大约 2000-3000 个专利案件（2007 年数据）。专利权人可以对于任何发生在美国的侵权行为提起诉讼，这些侵权行为还包括发生在国外但对美国境内的销售产生影响的行为。专利案件中的原告主要有两个目的：停止侵权行为和/或者经济赔偿。

Patent lawsuits can be tried before a federal district court or the International Trade Commission (ITC), both which follow the Federal Rules of Civil Procedure.[52] From the Rules, the district courts need to look to see if they have jurisdiction over the parties.[53] The ITC deals only with the importation of goods, so proper jurisdiction is not a requirement.[54] The district courts are presided over by a federal judge whereas the ITC cases are decided by an Administrative law judge.[55] ITC cases generally take a year or more to be decided whereas district courts can take several years.[56]

专利案件可以由联邦地区法院或者国际贸易委员会审理，两者都遵循联邦民事诉讼程序规则。根据该规则，联邦地区法院需要确定其是否对案件有管辖权。国际贸易委员会只处理涉及进口的案件，因此不存在管辖权上的问题。联邦地区法院的案子由一个联邦法官审理，而国际贸易委员会的案子由一个行政法官作出决定。国际贸易委员会的案子大概会在一年或一年多时间内解决但联邦地区法院的案件可能会审理好几年。

### C. Foreign Inventors in the United States

### C. 外国发明者在美国

An inventor of a patent will not be discriminated against with respect to the citizenship of the inventor.[57] Any foreign inventor can apply for a patent on the same basis as a United States citizen.[58] Nonetheless, United States patent law contains different requirements than other foreign countries.

专利的发明人不会因为国籍而受到歧视。任何外国发明者可与美国公民在同样的基础上申请专利。但美国的专利法跟其他国家的比起来存在一些不同的要求。

If a patent is filed in a foreign country, a U.S. patent can only be obtained if a U.S. application is on record within a specific grace period after the original filing.[59] But if the patent is filed within that time, the U.S. patent will have the same legal force as if the patent was granted at time of the original filing in the foreign country.[60] Also, a patent applicant must make an oath or declaration for every application disclosing any prior patent filing in another country.[61] There are also distinct rules for oaths given in a foreign country.[62] Finally, a foreign patent applicant may be represented by an United States patent attorney or agent.[63]

如果专利是从其他国家提起申请的，那么美国专利只有自第一次申请日期起在宽限期内及时提出申请才会被批准。但在宽限期内提起的专利升起，其美国专利视为从该专利在其他国家最初提交申请时即生效。而且专利申请人在每次申请时必须宣誓公开所有之前在其他国家提出的专利申请。如果宣誓是在其他国家进行的话，适用不同的规则。另外，一个外国专利申请人可以聘请美国专利律师或专利代理人代理专利申请。

## IV. MAJOR DIFFERENCES AND DIFFICULTIES

## IV. 中美专利法的主要区别和由此造成的问题

### A. The Basics

### A. 基本区别

The United States has 195 more years of patent history than that of China and therefore the two systems of law have differences between them.[64] A basic comparison is shown in the table below.

美国在专利保护方面的历史比中国早 195 年， 因此这两个系统之间难免有差别。以下表格对此进行了基本的比较。

| No. | Contents 内容 | US 美国 | China 中国 |
|---|---|---|---|
| 1 | Subject of patent protection 专利保护的对象 | Very wide 很广泛 | Wide 广泛 |
| 2 | First to file 先申请原则 | No 不是 | Yes 是 |
| 3 | Plants and animals patent 植物和动物专利 | Yes 有 | No 无 |
| 4 | Term extension for drug patent 药物专利的延期 | Yes 可以 | No 不可以 |
| 5 | Clinical trial data protection 临床试验数据保护 | 5 years +3<br>5 年+3 | 6 years<br>6 年 |
| 6 | Unauthorized license 强制许可 | No 无 | Yes 有 |
| 7 | Special IP Appeal Court 专门的专利上诉法庭 | Yes 有 | No 无 |
| 8 | Court litigation parties for invalidation 专利无效诉讼的当事人 | Original parties 原始当事人 | PRB-defendant 专利复审委员会-被告 |

[65]

Also, the laws differ in what types of "things" can be patented in the two countries. In the U.S., there are utility patents, design patents, and plant patents. However, in China there are invention patents, utility model patents, and design patents.[66] Each type of patent also has differing lengths of protection. For utility patents and patents for inventions, both countries have a term of 20 years.[67] For design patents, the U.S. protects for 14 years whereas China protects for 10 years.[68] In the United States, plant patents have a length of 20 years and in China utility model patents have a 10 year life span.[69]

另外，两国的法律也对于什么东西可以受到专利保护有不同规定。在美国，有实用专利，外观设计专利和植物专利，而在中国有发明专利，实物新型专利和外观设计专利。每一个类型的专利又有不同的受保护年限。对实用专利和发明专利，两国都给予 20 年的保护期限。对于外观设计专利，美国给予 14 年的保护而中国只给予 10 年。美国的植物专利的保护期限有 20 年。中国的实用新型专利有 10 年的受保护期限。

### B. Rights of the Applicant and Prior Art

### B. 申请人权利和现有技术上的区别

China and the U.S. also differ in the rights of the applicant. In the U.S., the only person eligible for a patent is the person who thinks they are the original inventor or an assignee.[70] The patent is filed by this person and the patent is then issued to that same person.[71] On the other hand, in China an entity, such as the employer of a worker who

used the employer's resources to create the invention can apply directly for a patent as well as the inventor for non-service patents.[72]

中国和美国在专利申请人权利上也有区别。在美国，只有产品的最初发明人或其受让人才可申请专利。专利申请必须由该人员提出且专利只授予申请人本人。而在中国，一个单位，比如一个公司的员工用公司的资源研制出的新发明，该公司可以和非职务发明者一样直接申请专利。

Also, in the United States, the first person to invent is the one to whom the patent is granted, whereas in China the patent is granted to the first person to file.[73] Therefore, if two inventions were created separately, the senior inventor would prevail in the U.S. but whoever filed the application first would win in China.

在美国专利授予给产品的最初发明者，而在中国是授予最初申请人。因此，当一个产品由两个人独立发明的时候，在美国，先发明者将获得专利权，而在中国，专利权会授予率先申请的人。

In the U.S. prior art is considered publication anywhere in the world prior to the date of invention or public use or sale more than one year before the filing date.[74] In China, there is no 1 year grace period for sale.[75] However, China does have a six month exceptions for academic meetings or international exhibits which the United States does not have.[76]

在美国，“现有技术”被认为是在发明日之前已在世界任何地方公开发表，或者公开使用或者在申请日一年前就已销售的产品。在中国，那些已向公众销售的

产品并没有一年的宽限期。但在中国，学术会议或者在国际展览中公布的产品却有六个月宽限期，而美国没有这方面的规定。

### C. Patentable Subjects

### C. 可授予专利的对象上的区别

The majority of non-patentable subjects in the United States are the same as in China. However, China is more restrictive as they do not allow for patents of plant and animal varieties or for methods of diagnosing or treating diseases.[77] Another major difference between the two counties is in the patenting of software and pure business methods. In China, pure software and pure business methods are not allowed to be patented unless there is a combination of software and hardware.[78] This is unlike patenting in the U.S. which allows for software and business method patents as long as there is a "practical application."[79]

在美国和中国，不能被授予专利的对象大致相同。但在中国，规定更加严格，因为中国不对新的植物和动物物种以及那些用来诊断和治疗疾病的新方法授予专利。另外一个显著的不同是两国对软件和纯粹的商业方法的专利保护。在中国，纯粹的软件和纯粹的商业方法不会被授予专利权，除非软件和硬件相结合。这一点与美国不同。在美国只要软件和商业方法有实际应用，也可以申请专利。

### D. Substantive Requirements

### D. 实质要件上的区别

As mentioned above, the novelty requirement in the United States differs from the China as there is a one year "grace period" for patents in the U.S.[80] This allows for more leniency in the publication or commercialization of an invention in the U.S.

在前文中已经提到，美国和中国对专利的新颖性要求有所不同，因为美国的专利法允许一年的宽限期，这让论文发表具有更多的灵活性，也利于新发明的商业化。

There is also a difference in the “non-obvious” requirement for patents between the two countries. In China, the invention must be substantively different before the date of filing.[81] However, in the United States, the requirement applies at the time the invention was made, not at the time of filing.[82] Also, China’s standard of inventiveness is lower than the United States standard of non-obvious.[83]

两国在专利的“非显而易见”性上的要求有所不同。在中国，该发明创造必须与申请日期前存在的现有技术有显著的不同。而美国只要求该专利与发明日前存在的现有技术有所不同，而不是申请日。另外，中国专利法创造性的标准也低于美国的“非显而易见性”标准。

In China there is a practical application requirement which states that an invention must be able to be manufactured or used in industry for a positive result.[84] In the U.S., there is only a utility requirement which requires the patentable invention to be useful, which distinguishes harmful and beneficial inventions.[85] Therefore, this requirement is more lax in the United States than in China.

在中国，要求专利具有实用性，此要求规定该发明创造必须能够在工业中被制造或使用以产生积极的效用。而在美国，只要求专利能够被使用，以区分有害的和有益的发明。因此，在美国的要求比中国更加宽松。

E. Appeal Re-examination and the Courts

E. 复审和法院程序上的区别

In both countries there is a standard examination process and an appeals process in the application for a patent.[86] A major difference between the two is that in China an inventor can appeal after one rejection whereas in the U.S. two rejections are needed.[87] Also, patents can be granted through civil action in the United States whereas they cannot in China.[88] Finally, in the United States an inventor can request for a continuation application whereas this is not possible in China.[89]

美国和中国在专利申请中都有一套规范的审查和复审程序。但两国间一个主要的区别在于，在中国申请者可以在一次申请遭到拒绝后马上提出复审，而在美国要两次申请被驳后才能要求复审。还有，在美国，专利可以由民事诉讼授予，而在中国却不行。另外，美国的发明者可以提交继续申请，而在中国这一点也不行。

Another major difference between the U.S. and China is that the U.S. has a centralized appellate court system. This allows for more uniform decision making on patent cases whereas in the Chinese system there is a possibility of different decisions for identical cases.[90]

两国之间的另一个主要区别在于美国有一套集中的上诉法院系统。这个有利于法院对专利案件作出统一的裁决，而在中国，不同的法院则有可能对于完全相同的案件作出不同的判决。

Finally, the U.S. courts have a formal process for the discovery of evidence whereas China does not.[91] In the United States, each party conducts discovery based on the Federal Rules, whereas in China the judges conduct discovery.[92] Also, the United States allows more access to confidential business information than does China.[93]

最后，美国的法院有一套正规的证据开示程序，而中国没有。在美国，当事人双方根据联邦法规要求对方展示所掌握的证据，而在中国，这一程序由法官来完成。另外，与中国法院相比，美国法院在允许当事人接触对方的秘密商业信息上更宽松。

## V. CONCLUSION

## V. 结论

China is strongly developing its patent laws, but the United States has been established for a much longer period of time. International treaties have helped to unify and streamline the process for foreign patents in which both countries have ratified. While there are some key differences between the two systems, the basic premise is the same: to protect the rights of the inventor.

中国正在强有力的发展其专利法，但美国已经在很久以前就已建立起这套体系。两国都已加入的国际公约有助于统一专利法并使国外专利申请过程更加通畅。尽管两个系统之间存在一些关键区别，但基本立足点是相同的：保护发明者的权益。

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