



American Intellectual Property Law Association

November 25, 2016

吕德军先生
国家知识产权局条法司条法二处
北京市海淀区西土城路6号
中华人民共和国

Mr. Lv Dejun
State Intellectual Property Office, Legal Affairs Department
People's Republic of China

via email <tiaofasi@sipo.gov.cn>

Re: Comments on the Draft Amendments of the Guidelines for Patent Examination (For Public Comment)

对《专利审查指南修改草案（征求意见稿）》的意见

Dear Mr. Lv,

尊敬的吕德军先生,

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to comment on the proposed amendments to the State Intellectual Property Office (SIPO) Guidelines for Patent Examination (the Guidelines), and attach a chart listing our detailed comments, some of which are also summarized below.

美国知识产权法律协会（AIPLA）感谢就此次国家知识产权局（SIPO）《专利审查指南修改草案（征求意见稿）》（以下简称“修改草案”）提出意见的机会。现随函附上我们的具体意见和建议（主要意见概括如下）。

AIPLA is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

AIPLA 有约 14000 名会员的国家法律协会，协会会员主要为在私人或企业团体、政府公职以及学术机构中就职的律师。AIPLA 成员广泛而多样化的代表了不同的个人、企业及机构，其范围直接或间接涉及专利、商标、版权、商业秘密和不公平竞争法，以及会影响知识产权的其他法律领域。我们的成员同时代表了知识产权的所有者和使用者。我们的使命包括帮助建立和维护法律和政策公平、有效，这些法律及政策在平衡公众在健康竞争、费用合理以及基本公平方面的利益的同时促进并鼓励创造发明。

AIPLA generally commends and welcomes the proposed amendments as they will generally improve Chinese patent examination practice by bringing Chinese practice more closely into alignment with that of its close trading partners and international norms, making examination more

Comments on the Draft Amendments of the Guidelines for Patent Examination (For Public Comment)

对《专利审查指南修改草案（征求意见稿）》的意见

Page 2

open and transparent, and clearer in some aspects. The proposed amendments respond positively to some requests from the patent applicants, with a view to balance the interests of the applicants and the public. Of course, we suggest that some aspects of the guidelines can still be further improved, as detailed in the attached Chart and summarized below.

AIPLA 总的来说赞成和欢迎修改草案所建议的修改，因为这些修改会改善中国的专利审查实践，使中国于中国的亲密贸易伙伴和国际标准更一致，使中国的专利审查更开放、审查标准更清晰，即积极响应了专利申请人的一些呼声，也照顾到了公众利益。当然，我们觉得某些方面还可以进一步改进，具体意见详见附件，概述如下。

AIPLA commends the inclusion of the new example in Part II, Chapter 1, section 4.2, and believes this example is helpful to clarify that a claim that includes a business rule or method is patentable under Article 25 provided that the claim includes technical features such that, when viewed as a whole, it is not merely a claim to the business rule or method.

AIPLA 赞同第二部分第一章第 4.2 节中新增加的例子，其有助于明确，涉及商业模式的权利要求如果既包含商业规则和方法的内容又包含技术特征，从而就整体来看这项权利要求不仅仅只含商业规则和方法，则可以授予专利权，不因《专利法》第二十五条而不受专利保护。

AIPLA commends the proposed insertion of “*per se*” in Part II, Chapter 9, section 2(1). Although the insertion of “*per se*” clarifies this section, AIPLA suggests that this section could be further clarified by including an affirmative acknowledgement that claims drafted in computer-readable medium plus computer program process format are permissible. To this end, AIPLA proposes a statement as detailed in the attached Chart for possible inclusion in the amendments to this section.

AIPLA 赞同在第二部分第九章第 2（1）节中插入「本身」的修改。不过，虽然插入“本身”使本节规定已较为清楚，AIPLA 还是建议加入更明确的规定，允许采用“计算机可读介质+计算机程序流程”的方式撰写权利要求。这一点虽然在“国家知识产权局关于《专利审查指南修改草案（征求意见稿）》的说明”中提到，但是《指南》修改草案本身并没有明确肯定。具体建议条款请见附表中相应章节。

AIPLA agrees with the proposed deletion of Example 9 in Part II, Chapter 9, section 3. AIPLA considers that it would be very helpful to both applicants and Examiners to include an example of an invention claimed in computer-readable medium plus computer program process format that would be considered permissible and subject matter eligible in view of the amendments to Section 2 of Chapter 9. AIPLA also considers it helpful to clarify whether computer readable medium includes transitory mediums (transmission over a network) by way of an example.

AIPLA 同意将第二部分第九章第三节中的例 9 删除，因其并未对鉴别专利保护的客体提供清晰有效的指导。AIPLA 同时认为，在这里加入一个受专利保护的采用“计算机可读介质+计算机程序流程”的方式撰写的权利要求的例子，对审查员和申请人都会有所帮助。此外，AIPLA 还希望《指南》能举例说明短暂存储介质（通过网络传播）是否属于计算机可读介质的范畴。

AIPLA commends the important amendments to Part II, Chapter 9, section 5.2, as these amendments allow significantly greater flexibility in proper claiming of inventions relating to computer programs, and improve the clarity of this section.

AIPLA 赞成对第二部分第九章第 5.2 节的重要修改。这些修改使申请人可以更为灵活地撰写涉及计算机程序的发明专利申请的权利要求，也使本节更为清楚。

Comments on the Draft Amendments of the Guidelines for Patent Examination (For Public Comment)

对《专利审查指南修改草案（征求意见稿）》的意见

Page 3

AIPLA is encouraged by the fact that the proposed amendments to Part II, Chapter 10, paragraph 3.4 and the addition of paragraph 3.5 will aid Examiners with appropriate consideration of supplemental data submitted after the date of filing when determining sufficiency of disclosure under Article 26(3). However, AIPLA suggests further clarification be made as to what data is acceptable or not acceptable, and offer alternative language as an example. AIPLA further observes that new paragraph 3.5 as proposed only clearly applies to examination under Article 26(3) in the chemical art. AIPLA believes the same guideline should be consistently applied for examination in all art fields and under Articles 22(3), 26(3), and 26(4). AIPLA encourages further amending the Guidelines to expressly allow consideration of post-filing data for assessing compliance with all relevant Articles of the Patent Law regardless of the subject matter of the invention. For example, a more general section may be added to provide that the Examiner shall consider experimental data submitted after the date of filing for compliance with all requirements for patentability under the Patent Law, including Article 22(3), Article 26(3), Article 26(4), and other articles. It is noted that almost all jurisdictions around the world permit the use of post-filing data to support inventive step, provided there is some support in the disclosure of the application for the property or technical effect that is proven with the post-filing data.

对第二部分第 10 章第 3.4 段的修改和新增加的 3.5 段使 AIPLA 受到很大鼓励。这些修改将有助于审查员在根据专利法第 26（3）款确定公开内容的充分性时适当考虑在申请日之后提交的补充数据。然而，AIPLA 建议进一步澄清哪些数据是可接受的或不可接受的，并在附表中提出具体的示范性修改建议。AIPLA 进一步指出，新的第 3.5 节仅仅明确适用于第 26（3）款及化学领域发明的审查，但同样的问题也出现在根据第 26（4）款（支持权利要求的广度），第 22（3）款（创造性），或不同发明领域的审查。AIPLA 鼓励进一步修订指南，明确允许在评估是否符合专利法的所有相关条款时考虑申请日之后提交的数据，无论发明的主题如何。例如，可以增加一个通用章节，规定审查员在判断申请是否符合专利法规定的所有授权要求，包括第 22（3）款，第 26（3）款，第 26（4）款及其他条款时，均应考虑在申请日之后提交的实验数据。例如，值得注意的是，世界上几乎各国和地区都允许使用申请日之后提交的数据来支持创造性，前提是申请日之后提交的数据对所要证明的性征特点或技术效果有所支持。

AIPLA is encouraged by the proposed amendments to Part IV, Chapter 3, which provide that during invalidation proceedings the patentee can amend an issued claim by incorporating technical features recited in other issued claims. However, the proposed amendments do not provide additional time to allow the petitioner to submit additional evidence directed to the claims amended by the patentee. AIPLA observes that in some situations, the petitioner may not have previously provided evidence related to that particular technical feature. AIPLA recommends that in such situations, the petitioner should be given an opportunity (and additional time) to submit additional evidence, and has proposed further amendments to paragraph 4.3.1. (2) (i) of this Chapter.

AIPLA 也被第四部分第三章的拟议修订所鼓舞。该条款规定，在无效宣告程序期间，专利权人可以通过补入其他已授权权利要求中记载的技术特征来修改已授权的权利要求。然而，拟议的修正案没有提供额外的时间来允许请求人提交针对专利权人修正的权利要求的额外证据。AIPLA 观察到，在有些情况下，请求人可能以前没有提供与该特定技术特征相关的证据。AIPLA 建议，在这种情况下，请求者应有机会（并有更多时间）提交其他证据，并对本章第 4.3.1。（2）（i）段提出进一步修正。

Comments on the Draft Amendments of the Guidelines for Patent Examination (For Public Comment)

对《专利审查指南修改草案（征求意见稿）》的意见

Page 4

AIPLA commends the amendments to Part IV, Chapter 3, sections 4.2, 4.6.2 and 4.6.3, as they broaden the permissible claim amendment during invalidation proceedings, and allow correction of obvious mistakes in the patent specification in such proceedings. It is noted that amendments under paragraph 4.6.2 relate only to amendments under invalidation proceedings, and do not modify current procedure for ex parte prosecution. AIPLA commends the increased flexibility in amending issued patents and appreciate SIPO's efforts to strike a balance between the patentee's interests and the public interests. However, consistent with the current practice of other major patent offices around the world, such as USPTO, EPO, and UKIPA, AIPLA recommends that during an invalidation proceeding, the patentee be allowed to incorporate into an issued claim not only technical features recited in another issued claim but also technical features described in the original disclosure. This would improve harmonization among the major patent offices. A balance between the interests of the patentee and the interests of the public and the public notice function of patent claims can still be maintained by limiting a third party's infringement liability to infringing activities occurred after the public has been given notice of the amended claim. Thus, AIPLA suggests further amendment to section 4.6.2, as detailed in the attached Chart.

AIPLA 赞同对第四部分第三章第 4.2 条、第 4.6.2 节及第 4.6.3 节的修改，放宽在无效程序中修改权利要求的限制，并且允许改正专利说明书中明显的错误。我们注意到本节的修改仅涉及到无效程序中权利要求的修改，而并没有改变目前授权前的审查程序。AIPLA 赞同增加修改授权专利的灵活度，并且赞赏 SIPO 在平衡专利权人的利益与公众利益方面所作出的努力。不过，鉴于世界其它主要专利局（如：USPTO, EPO 及 UKIPA）目前的审查实践，AIPLA 建议在无效程序过程中，不仅允许专利权人往授权的权利要求里增加在另外授权的权利要求里记载的技术特征，而且允许加入原始公开里记载的技术特征，以增进与其它主要专利局之间的一致性。如果把第三方侵权责任限制到在权利要求修改公示之后发生的侵权行为，就仍能维持专利权人与公众利益之间的平衡以及专利权利要求的公示性。因此，AIPLA 在附表中提出了针对第 4.6.2 节的具体修改建议。

AIPLA commends the proposed amendments in Part V, Chapter 4 and SIPO's efforts to improve both public access to examination documents and transparency of the patent examination process. AIPLA encourages further improvements in public access and transparency of patent examination, such as providing online access to patent prosecution documents as USPTO and EPO currently do.

AIPLA 赞扬国家知识产权局改进审查案卷的公众查阅和专利审查过程的透明度的努力。AIPLA 鼓励进一步改善公众查阅和专利审查透明度，例如，如美国专利商标局和欧洲专利局所现行的，提供专利审查案卷的在线查阅。

AIPLA commends the proposed amendments in Part V, Chapter 7 and SIPO's efforts to align SIPO practice with court orders or notices, as these amendments will reduce potential conflict between SIPO proceedings and court proceedings, thereby improving consistency and public confidence in China's legal system.

AIPLA 赞扬国家知识产权局将其实践和人民法院裁定书或通知书协调一致的努力。这将减少国家知识产权局的程序和人民法院的程序之间的潜在冲突，并且可以改善法律系统的协调性和公信力。

Comments on the Draft Amendments of the Guidelines for Patent Examination (For Public Comment)

对《专利审查指南修改草案（征求意见稿）》的意见

Page 5

We appreciate the opportunity to provide these comments on the proposed changes to the SIPO patent examination guidelines, and we would be happy to answer any questions that our comments may raise.

我们感谢有机会能就中国专利审查指南修改草案提供意见，并且乐意解答上述意见可能带来的问题。

Sincerely,

A handwritten signature in cursive script that reads "Mark L. Whitaker".

Mark L. Whitaker
President
American Intellectual Property Law Association

《专利审查指南修改草案（征求意见稿）》修改对照表

DRAFT AMENDMENT OF GUIDELINES FOR PATENT EXAMINATION (For Public Comment) - COMPARISON CHART

《专利审查指南修改草案（征求意见稿）》	Draft Amendment Of Guidelines For Patent Examination	AIPLA Comments
<p>第二部分第一章</p> <p>4.2 智力活动的规则和方法</p> <p>智力活动，是指人的思维运动，它源于人的思维，经过推理、分析和判断产生出抽象的结果，或者必须经过人的思维运动作为媒介，间接地作用于自然产生结果。</p> <p>.....</p> <p>（2）除了上述（1）所描述的情形之外，如果一项权利要求在对其进行限定的全部内容中既包含智力活动的规则和方法的内容，又包含技术特征，则该权利要求就整体而言并不是一种智力活动的规则和方法，不应当依据专利法第二十</p>	<p>Part II. Chapter 1</p> <p>4.2 Rules and Methods for Mental Activities</p> <p>"Mental activities" refer to human's thinking movements. They originate from human's thinking, and produce abstract results through inference, analysis and judgment, or, via human's thinking movement, produce results by indirectly acting on the nature.</p> <p>.....</p> <p>(2) Except the cases described above in point (1), if a claim in its whole contents contains not only matter of rule or method for mental activities but also technical features, then the claim, viewed as a whole, is not a rule or method for mental activities, and shall not be excluded from patentability under Article 25.</p>	

<p>五条排除其获得专利权的可能性。</p> <p>【例如】</p> <p><u>涉及商业模式的权利要求，如果既包含商业规则和方法的内容，又包含技术特征，则不应当依据专利法第二十五条排除其获得专利权的可能性。</u></p>	<p>[Example]</p> <p><u>If a business method claim contains both contents related to rules and methods of business, and technical characteristics, the claim shall not be excluded from patentable subject matter under Article 25 of the Patent Law.</u></p>	<p>AIPLA commends the inclusion of this example because it underscores the existing statement in Section 4.2(2) that the claim must be viewed as a whole. Specifically, AIPLA believes this example is helpful to show that, as with claims including rules or methods of mental activities, a claim that includes a business rule or method should be patentable under Article 25 provided that the claim includes technical features such that, when viewed as a whole, it is not merely a claim to the business rule or method.</p> <p>AIPLA 赞同第二部分第一章第 4.2 节中新增加的例子，因其强调了第 4.2（2）小节中权利要求要整体看待的规定。具体来说，这个例子有助于明确，涉及商业模式的权利要求如果既包含商业规则和方法的内容又包含技术特征，从而就整体来看这项权利要求不仅仅只含商业规则和方法，则可以授予专利权，不因《专利法》第二十五条而被排除在外。</p>
<p>第二部分第九章</p> <p>2. 涉及计算机程序的发明专利申请的</p>	<p>Part II. Chapter 9</p> <p>2. Examination Criteria of Invention Applications Relating to</p>	

<p>审查基准</p> <p>审查应当针对要求保护的解决方案，即每项权利要求所限定的解决方案。</p> <p>.....</p> <p>(1)如果一项权利要求仅仅涉及一种算法或数学计算规则，或者计算机程序本身或仅仅记录在载体（例如磁带、磁盘、光盘、磁光盘、ROM、PROM、VCD、DVD 或者其他的计算机可读介质）上的计算机程序<u>本身</u>，或者游戏的规则和方法等，则该权利要求属于智力活动的规则和方法，不属于专利保护的客体。</p> <p>如果一项权利要求除其主题名称之外，.....不属于专利保护的客体。</p> <p>例如，仅由所记录的程序<u>本身</u>限定的计算机可读存储介质或者一种计算机程序产品，或者仅由游戏规则限定的、不包括任何技术性特征，例如不包括任何物理实体特征限定的计算机游戏装置等，由于其实质上仅仅涉及智力活动的规则和方法，因而不属于</p>	<p>Computer Programs</p> <p>Examination shall focus on solutions for which protection is sought for, i. e., solutions defined by each claim.</p> <p>.....</p> <p>(1) If a claim merely relates to an algorithm, or mathematical computing rules, or computer programs <u>per se</u>, or computer programs <u>per se</u> recorded in mediums (such as tapes, discs, optical discs, magnetic optical discs, ROM, PROM, VCD, DVD, or other computer-readable mediums), or rules or methods for games, etc., it falls into the scope of the rules and methods for mental activities and does not constitute the subject matter for which patent protection may be sought.</p> <p>If all the contents of a claim, except its title of the subject matter, does not constitute patentable subject matter.</p> <p>For example, computer-readable storage medium or a product of computer program that is merely defined by recorded program <u>per se</u>, or devices for computer games, etc., which are merely defined by game rules and does not include any technical features, e. g., those do not include any physical entity, does not constitute the subject matter of patent protection because it essentially merely</p>	<p>AIPLA commends the proposed insertion of “<i>per se</i>” in this section, thereby removing the inference that inventions relating to computer programs, including claims drafted in computer-readable medium plus computer program process format, are excluded from patentability.</p> <p>AIPLA 赞同本节中插入「本身」的修改，因这些修改有助于避免可能产生的，涉及计算机程序的发明，包括采用“计算机可读介质+计算机程序流程”的方式撰写的权利要求，不能获得专利保护的误解。</p> <p>Although the insertion of “<i>per se</i>” clarifies this section, AIPLA suggests that Section 2 of Chapter 9 could be further clarified by including an affirmative acknowledgement that claims drafted in computer-readable medium plus computer program process format are permissible . A clear acknowledgement of this is currently present in the SIPO notes to the proposed amendments to this Section, but not in</p>
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<p>专利保护的客体。但是，如果专利申请要求保护的介质涉及其物理特性的改进，例如叠层构成、磁道间隔、材料等，则不属此列。</p>	<p>relates to rules and methods for mental activities. However, the claimed medium in an patent application relating to physical characteristics improvement thereof, for example, layer composition, magic channel spacing, materials, etc., does not fall into the cases mentioned above.</p>	<p>the amendments themselves. AIPLA proposes the following statement for possible inclusion in the amendments to this Section:</p> <p><u>“Claims drafted in computer-readable medium plus computer program process format are permissible and are subject matter eligible provided that the computer program process includes technical features such that, when viewed as a whole, it does not merely relate to rules and methods for mental activities.”</u></p> <p>不过，虽然插入“本身”使本节规定已较为清楚，AIPLA 还是建议加入更明确的规定，允许采用“介质+计算机程序流程”的方式撰写权利要求。这一点虽然在“国家知识产权局关于《专利审查指南修改草案（征求意见稿）》的说明”中提到，但是《指南》修改草案本身并没有明确肯定。AIPLA 建议 SIPO 考虑在本节中增加以下规定：</p> <p><u>“允许采用以“计算机可读介质+计算机程序流程”的方式撰写权利要求，只要其中计算机程序流程包含技术特征，从而作为一个整体来看，该权利要求不仅仅只涉及智力活动的规则和方法，就可受专利保护。”</u></p>
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<p>第二部分第九章</p> <p>3. 涉及计算机程序的发明专利申请的审查示例</p> <p>以下，根据上述审查基准，给出涉及计算机程序的发明专利申请的审查示例。</p> <p>.....</p> <p>(3) 未解决技术问题，或者未利用技术手段，或者未获得技术效果的涉及计算机程序的发明专利申请，不属于专利法第二条第二款规定的技术方案，因而不属于专利保护的客体。</p> <p>【例 8】.....该发明专利申请不属于专利法第二条第二款规定的技术方案，不属于专利保护的客体。</p>	<p>Part II. Chapter 9</p> <p>3. Examination Examples for Invention Applications Relating to Computer Programs</p> <p>The following are examination examples for invention applications relating to computer programs based on the above examination criteria.</p> <p>.....</p> <p>(3) Invention applications relating to computer programs which do not solve technical problems, or do not utilize technical means, or do not obtain technical effects, are not technical solutions as provided for in Article 2. 2, and therefore are not subject matter of patent protection.</p> <p>[Example 8] this invention application is not the technical solution as provided for in Article 2.2 and is not the subject matter of patenting protection.</p>	<p>AIPLA agrees with the proposed deletion of Example 9 as not providing clear guidance on subject matter eligibility. In place of this example, AIPLA considers that it would be very helpful to both applicants and Examiners to include an example of an invention claimed in computer-readable medium plus computer program process format that would be considered permissible and subject matter eligible in view of the amendments to Section 2 of Chapter 9. AIPLA also considers it helpful to clarify whether computer readable medium includes transitory mediums (transmission over a network) by way of an example.</p> <p>AIPLA 同意将例 9 删除，因其并未对鉴别专利保护的客体提供清晰有效的指导。AIPLA 同时认为，在这里加入一个受专利保护的采用“计算机可读介质+计算机程序流程”的方式撰写的权利要求的例子，对审查员和申请人都会有所帮助。此外，AIPLA 还希望《指南》能举例说明短暂存储介质（通过网络传播）是否属于计算机可读介质的范畴。</p>
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<p>第二部分第九章</p> <p>5.2 权利要求书的撰写</p> <p>涉及计算机程序的发明专利申请的权利要求可以写成一种方法权利要求，也可以写成一种产品权利要求，<u>例如</u>实现该方法的装置。无论写成哪种形式的权利要求，都必须得到说明书的支持，并且都必须从整体上反映该发明的技术方案，记载解决技术问题的必要技术特征，而不能只概括地描述该计算机程序所具有的功能和该功能所能够达到的效果。如果写成方法权利要求，应当按照方法流程的步骤详细描述该计算机程序所执行的各项功能以及如何完成这些功能；如果写成装置权利要求，应当具体描述该装置的各个组成部分及其各组成部分之间的关系，<u>所述组成部分不仅可以包括硬件，还可以包括程序。</u></p> <p>如果全部以计算机程序流程为依据，按照与</p>	<p>Part II. Chapter 9</p> <p>5.2 Drafting of Claims</p> <p>The claims of an invention application relating to computer programs may be drafted as process claim or product claim, <u>e.g.</u>, the apparatus for executing the process. No matter what kind of claim it is drafted as, the claim shall be supported by the description, represent the technical solution of the invention in its entirety and outline the essential technical features for resolving the technical problems, and shall not only generally describe the functions of the computer program and the effects those functions can produce. If it is drafted as a process claim, the various functions to be performed by the computer program and the way to perform the functions shall be described in detail according to the steps of the process. If it is drafted as an apparatus claim, the various component parts and the connections among them shall be specified, <u>where the component parts may include not only hardware but also software.</u></p> <p>If an apparatus claim is drafted on the basis of computer program flow completely and according to the way completely identical</p>	<p>AIPLA commends these important amendments, which provide:</p> <ol style="list-style-type: none"> 1) software invention apparatus claims are not limited to only claims to the apparatus for executing the process; and 2) the component parts recited in such an apparatus claim may be not only hardware but also software. The amendments allow significantly greater flexibility in proper claiming of inventions relating to computer programs, and improve the clarity of this section. <p>AIPLA 赞同本节的重要修改，明确下列两点</p> <ol style="list-style-type: none"> 1. 写成装置权利要求的计算机软件发明不仅限于实现该方法的装置； 2. 装置权利要求的组成部分可以包括硬件及软件。 <p>这些修改使申请人可以更为灵活地撰写涉及计算机程序的发明专利申请的权利要求，也使本节更为清楚。</p>
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<p>该计算机程序流程的各步骤完全对应一致的方式，或者按照与反映该计算机程序流程的方法权利要求完全对应一致的方式，撰写装置权利要求，即这种装置权利要求中的各组成部分与该计算机程序流程的各个步骤或者该方法权利要求中的各个步骤完全对应一致，则这种装置权利要求中的各组成部分应当理解为实现该程序流程各步骤或该方法各步骤所必须建立的<u>程序</u> 模块，由这样一组<u>程序</u> 模块限定的装置权利要求应当理解为主要通过说明书记载的计算机程序实现该解决方案的<u>程序</u> 模块构架，而不应当理解为主要通过硬件方式实现该解决方案的实体装置。</p> <p>.....</p>	<p>with and corresponding to each step in the said computer program flow, or according to the way completely identical with and corresponding to the process claim reflecting the said computer program flow, i.e., each component in the apparatus claim completely corresponds to each step in the said computer program flow or each step in the said process claim, then each component in the apparatus claim shall be regarded as <u>program</u> modules which are required to be built to realize each step in the said computer program flow or each step in the said method. The apparatus claim defined by such a group of <u>program</u> modules shall be regarded as the <u>program</u> module architecture to realize the said solution mainly through the computer program described in the description rather than entity devices to realize the said solution mainly through hardware.</p> <p>.....</p>	<p>AIPLA also supports the proposed amendment to replace “function module” with “program module” for clarity.</p> <p>AIPLA 支持将“功能模块”改为“程序模块”。</p>
<p>第二部分第十章</p> <p>3.4 关于实施例</p> <p>由于化学领域属于实验性学科，多数发明需</p>	<p>Part II. Chapter 10</p> <p>3.4 Specific Mode for Carrying Out the Invention</p> <p>Chemistry is an experimental science, and a number of inventions in this field need to be verified by experimentation, therefore, the</p>	<p>AIPLA is encouraged by the fact that the proposed amendment will aid Examiners with appropriate consideration</p>

<p>要经过实验证明，因此说明书中通常应当包括实施例，例如产品的制备和应用实施例。</p> <p>说明书中实施例的数目，取决于权利要求的技术特征的概括程度，例如并列选择要素的概括程度和数据的取值范围；在化学发明中，根据发明的性质不同，具体技术领域不同，对实施例数目的要求也不完全相同。一般的原则是，应当能足以理解发明如何实施，并足以判断在权利要求所限定的范围内都可以实施并取得所述的效果。</p> <p><u>3.5 关于补交的实验数据</u></p> <p>判断说明书是否充分公开，以原说明书和权利要求书记载的内容为准。</p> <p><u>对于申请日之后补交的实验数据，审查员应</u></p>	<p>description generally shall include embodiments, in case of an invention of a product, for instance, those which specifically show how to make the product and how to use it.</p> <p>The number of embodiments needed in the description depends on the extent to which the technical features are generalized in the claim, such as the extent of generalization of parallel alternative elements and the range of selected values of data. The number of embodiments needed in a chemical invention varies depending on the nature and specific fields of technology of the invention. As a general rule, there shall be a sufficient number of embodiments for a person skilled in the art to understand how to carry out the invention and to assess that the invention can be carried out and achieve the effect as expected through the whole of the scope defined by the claims.</p> <p><u>3.5 Post-filing Supplemental Data</u></p> <p>(2) Whether or not the description is sufficient is judged on the basis of the disclosure contained in the initial description and claims.</p> <p><u>The Examiner shall examine supplemental experimental data</u></p>	<p>of supplemental data when determining the sufficiency of the disclosure under Article 26(3) and support of the breadth of the claims under 26(4), in accordance with the clarification published by the SIPO Patent Affairs Administration Department in December 2013. It is noted, however, that the statement “should be obtainable from the disclosure of the patent application . . .” may be confusing when determining what data is acceptable or not acceptable. We suggest an alternative statement as an example of how the focus might be shifted to examining all data as stated in the draft, and then to judge how persuasive or not the data is in determining if the Applicant was in possession of the claimed invention and has described it well enough for the skilled person to make and use the invention, as follows:</p> <p>“3.5 Supplementary Experimental Data</p> <p>Whether or not the description is sufficient is judged on the basis of the disclosure contained in the initial description, <u>figures</u> and claims <u>and on whether that disclosure describes how to make and use the claimed invention so that the person skilled in the art</u></p>
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<p>当予以审查。补交实验数据所证明的技术效果应当是所属技术领域的技术人员能够从专利申请公开的内容中得到的。</p>	<p><u>submitted after the date of filing. The technical effects proven by the supplemental data should be obtainable from the disclosure in the patent application by the person skilled in the art.</u></p>	<p><u>can achieve the technical solution.</u></p> <p>Examiner shall examine experimental data submitted after the date of filing. The technical effect proven by the supplementary experimental data should be obtainable <u>disclosed by or inherently flow</u> from the disclosure in the patent application by the person skilled in the art. <u>The supplementary experimental data should be considered to the extent it supports the technical effect or other assertions made in the disclosure of the application.</u></p> <p>对第二部分第 10 章第 3.4 段的修改和新增加的 3.5 段使 AIPLA 受到鼓励。这些修改将有助于审查员,按照 SIPO 2013 年 12 月发表的通知说明,根据专利法第 26 (3) 款确定公开内容的充分性时和根据第 26 (4) 款支持权利要求的广度时适当考虑在申请日之后提交的补充数据。然而,值得注意的是,“应当从专利申请的公开内容中获得…”一语可能会在确定什么数据是可接受或者不可接受时造成混淆。下面,我们提出具体改进建议,将重点移到审查所有数据,然后判断数据是否有说服力来确定申请人是否拥有</p>
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		<p>invention. AIPLA encourages further amending the Guidelines to expressly allow consideration of post-filing data for assessing compliance with all relevant Articles of the Patent Law regardless of the subject matter of the invention. For example, a more general section may be added to provide that the Examiner shall consider experimental data submitted after the date of filing for compliance with all requirements for patentability under the Patent Law, including Article 22(3), Article 26(3), Article 26(4), and other articles. For example, it is noted that almost all jurisdictions around the world permit the use of post-filing data to support inventive step, provided there is some support in the disclosure of the application for the property or technical effect that is proven with the post-filing data.</p> <p>AIPLA 进一步指出,新的第 3.5 节仅仅明确适用于第 26(3) 款及化学领域发明的审查,但同样的问题也出现在根据第 26(4) 款(支持权利要求的广度),第 22(3) 款(创造性),或不同发明领域的审查。AIPLA 鼓励进一步修订指南,明确允许在评估是否符合专利法的所有相关条款时考虑申请日之后提交的数据,无论发明的主题如何。例如,</p>
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		<p>可以增加一个通用章节，规定审查员在判断申请是否符合专利法规定的所有授权要求，包括第 22（3）款，第 26（3）款，第 26（4）款及其他条款时，均应考虑在申请日之后提交的实验数据。例如，值得注意的是，世界上几乎各国和地区都允许使用申请日之后提交的数据来支持创造性，前提是申请日之后提交的数据对所要证明的性征特点或技术效果有所支持。</p>
<p>第四部分第三章</p> <p>4.2 无效宣告理由的增加</p> <p>(1) 请求人在提出无效宣告请求之日起一个月内增加无效宣告理由的，应当在该期限内对所增加的无效宣告理由具体说明；否则，专利复审委员会不予考虑。</p> <p>(2) 请求人在提出无效宣告请求之日起一个月后增加无效宣告理由的，专利复审委员会一般不予考虑，但下列情形除外：</p>	<p>Part IV. Chapter 3</p> <p>4.2 Addition of Causes for Invalidation</p> <p>(1) Where the petitioner raises additional causes for invalidation within one month from the date of submitting the request, he shall explain the causes concretely within this period; otherwise the Patent Reexamination Board will not take them into account.</p> <p>(2) Where the petitioner raises additional causes for invalidation after one month from the date of submitting the request, generally the Patent Reexamination Board will not take them into account,</p>	

<p>(i) 针对专利权人以<u>删除以外的</u>方式修改的权利要求，在专利复审委员会指定期限内<u>针对修改内容</u>增加无效宣告理由，并在该期限内对所增加的无效宣告理由具体说明的；</p> <p>(ii) 对明显与提交的证据不相对应的无效宣告理由进行变更的。</p>	<p>unless in any of the following circumstances:</p> <p>(i) for claims amended by way of <u>other than deletion</u> by the patentee , addition of causes for invalidation <u>in view of the amendment</u> is made within the time limit specified by the Patent Reexamination Board, and the added causes are explained concretely within the time limit; or</p> <p>(ii) the addition is to change the causes for invalidation which are obviously inappropriate to the evidence submitted.</p>	
<p>第四部分第三章</p> <p>4.3.1 请求人举证</p> <p>(1) 请求人在提出无效宣告请求之日起一个月内补充证据的，应当在该期限内结合该证据具体说明相关的无效宣告理由，否则，专利复审委员会不予考虑。</p> <p>(2) 请求人在提出无效宣告请求之日起一个月后补充证据的，专利复审委员会一般不予考虑，但下列情形除外：</p>	<p>Part IV. Chapter 3</p> <p>4. 3. 1 Presenting Evidence by the Petitioner</p> <p>(1) Where the petitioner presents additional evidence within one month from the date of filing the request for invalidation, he shall explain concretely the relevant causes for invalidation with reference to the additional evidence within this period; otherwise the Patent Reexamination Board will not take it into account.</p> <p>(2) Where the petitioner presents additional evidence after one month from the date of filing the request for invalidation, generally the Patent Reexamination Board will not take it into account, unless in any of the following cases:</p>	<p>AIPLA is encouraged by the proposed amendments to Part IV, Chapter 3, which provide that during invalidation proceedings the patentee can amend an issued claim by incorporating technical features recited in other issued claims. However, the proposed amendments to the Guidelines do not provide additional time to allow the petitioner to submit additional evidence directed to the claims amended by the patentee. The SIPO's notes on the proposed amendments explained that as the incorporated technical features are previously recited in the issued claims and are not newly introduced features, there is no need to provide additional evidence. AIPLA observes that in some situations, e.g., when one of the incorporated technical</p>

<p>(i) 针对专利权人提交的反证，请求人在专利复审委员会指定的期限内补充证据，并在该期限内结合该证据具体说明相关无效宣告理由的；</p> <p>(ii) 在口头审理辩论终结前提交技术词典、技术手册和教科书等所属技术领域中的公知常识性证据或者用于完善证据法定形式的公证书、原件等证据，并在该期限内结合该证据具体说明相关无效宣告理由的。</p> <p>(3) 请求人提交的证据是外文的，提交其中文译文的期限适用该证据的举证期限。</p>	<p>(i) concerning counter-evidence presented by the patentee, the petitioner presents additional evidence within the time limit specified by the Patent Reexamination Board, and explain the relevant causes concretely with reference to the additional evidence within this period;</p> <p>(ii) by the closure of oral proceedings, the petitioner presents such evidence of common knowledge in the skilled art as those in a technical dictionary, technical manual, or textbook, or such complementary evidence for meeting the legal requirement for evidence as a notarial document or the original, and explain the relevant causes concretely with reference to the additional evidence within the period; or</p> <p>(3) where the petitioner presents evidence in a foreign language, the time limit for submitting the Chinese translation thereof is the same as that for presenting the evidence.</p>	<p>features is taken from a claim that is not in dispute in the invalidation procedure, the petitioner may not have previously provided evidence related to that particular technical feature. AIPLA recommends that in such situations, the petitioner should be given an opportunity (and additional time) to submit additional evidence.</p> <p>AIPLA 也被第四部分第三章的拟议修订所鼓舞。该条款规定，在无效宣告程序期间，专利权人可以通过补入其他已授权权利要求中所述的技术特征来修改已授权的权利要求。然而，对指南的拟议修订没有提供额外的时间允许请求人提交针对专利权人修正的权利要求的额外证据。SIPO 关于所提出的修改的说明解释，由于并入的技术特征先前在所授权的权利要求中已列举并且不是新引入的特征，因此不需要提供额外的证据。AIPLA 观察到，在一些情况下，例如当所并入的技术特征之一来自在无效过程中没有争议的权利要求时，请求人可能先前没有提供与该特定技术特征相关的证据。 AIPLA 建议，在这种情况下，请求人应有机会（和额外的时间）提交其他证据。</p> <p>If the Guidelines adopt AIPLA’s recommendation in the next</p>
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		<p>section regarding allowing the patentee to amend an issued claim by incorporating technical features described in the disclosure of the application, the petitioner should be given more time to address the newly introduced technical feature(s) by presenting additional reasons and submitting additional evidence.</p> <p>如果指南在下一节中采用了 AIPLA 的建议，即允许专利权人通过补入说明书中描述的技术特征来修改已授权的权利要求，请求人应该有更多的时间通过提出额外的理由和提交额外的证据来解决新引入的技术特征。</p> <p>Thus, AIPLA suggests revising the proposed section 4.3.1.(2)(i) as follows:</p> <p>“(i) concerning <u>claims amended or</u> counter-evidence presented by the patentee, the petitioner presents additional evidence within the time limit specified by the Patent Reexamination Board, and explain the relevant causes concretely with reference to <u>the amended claims or</u> the additional evidence within this period;</p> <p>因此，AIPLA 建议修订拟议的第 4.3.1 (2) (i) 条如下：</p>
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		<p>“(i) 针对专利权人<u>修改的权利要求或者</u>提交的反证，请求人在专利复审委员会指定的期限内补充证据，并在该期限内结合<u>该修改的权利要求或</u>该证据具体说明相关无效宣告理由的；”</p>
<p>第四部分第三章</p> <p>4.6.2 修改方式</p> <p>在满足上述修改原则的前提下，修改权利要求书的具体方式一般限于权利要求的删除、技术方案的删除、<u>权利要求的进一步限定、明显错误的修正。</u></p> <p>权利要求的删除是指从权利要求书中去掉某项或者某些项权利要求，例如独立权利要求或者从属权利要求。</p> <p>技术方案的删除是指从同一权利要求中并列的两种以上技术方案中删除一种或者一种以上技术方案。</p> <p><u>权利要求的进一步限定是指在权利要求中补入其他权利要求中记载的一个或者多个技术特征，以缩小保护范围。</u></p>	<p>Part IV. Chapter 3</p> <p>4. 6. 2 Manners of Amendment</p> <p>Subject to the above principles of amendments, the specific manners of amendment are generally limited to deletion of a claim, deletion of a technical solution, <u>further defining a claim, and correction of obvious errors.</u></p> <p>Deletion of a claim means one (or more) claim, such as an independent claim or a dependent claim, is removed from the claims.</p> <p>Deletion of a technical solution means to remove one or more technical solutions from several parallel technical solutions defined in the same claim.</p> <p><u>Further defining a claim means adding one or more technical characteristics recited in another claim, to narrow the scope of the claim.</u></p>	<p>It is noted that amendments under this section relate only to amendments under invalidation proceedings, and do not modify current procedure for ex parte prosecution. The amendments in sections 4.2, 4.6.2 and 4.6.3, broaden the permissible claim amendment during invalidation proceedings, and allow correction of obvious mistakes in the patent specification. AIPLA commends the increased flexibility in amending issued patents and appreciate SIPO’s efforts to strike a balance between the patentee’s interests and the public interests. However, consistent with the current practice of other major patent offices around the world, such as USPTO, EPO, and UKIPA, AIPLA recommends that during an invalidation proceeding, the patentee be allowed to incorporate into an issued claim not only technical features recited in another</p>

		<p>issued claim but also technical features described in the original disclosure. This would improve harmonization among the major patent offices. A balance between the interests of the patentee and the interests of the public and the public notice function of patent claims can still be maintained by limiting third party's infringement liability to infringing activities occurred after the public has been given notice of the amended claim.</p> <p>我们注意到本节的修改仅涉及到无效程序中权利要求的修改，而并没有改变目前授权前的审查程序。第 4.2 条、第 4.6.2 节及第 4.6.3 节的修改放宽了在无效程序中修改权利要求的限制，并且允许改正专利说明书中明显的错误。AIPLA 赞同增加修改授权专利的灵活度，并且赞赏 SIPO 在平衡专利权人的利益与公众利益方面所作出的努力。不过，鉴于世界其它主要专利局（如：USPTO, EPO 及 UKIPA）目前的审查实践，AIPLA 建议在无效程序过程中，不仅允许专利权人往授权的权利要求里增加在另外授权的权利要求里记载的技术特征，而且允许加入原始公开里记载的技术特征，以增进与其它主要专利局之间的一致性。如果把第三方侵权责任限制到在权利要求修改公示之后发</p>
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		<p>生的侵权行为，就仍能维持专利权人与公众利益之间的平衡以及专利权利要求的公示性。</p> <p>Thus, AIPLA suggests that the last paragraph of Section 4.6.2 be revised as follows:</p> <p>“Further defining a claim means adding one or more technical characteristics recited in another claim <u>or in the specification as originally filed</u>, to narrow the scope of the claim.”</p> <p>因此 AIPLA 建议第 4.6.2 节的最后一段作以下修改：</p> <p>“权利要求的进一步限定是指在权利要求中补入其他权利要求中<u>或原始申请书中</u>记载的一个或者多个技术特征，以缩小保护范围。”</p>
<p>第四部分第三章</p> <p>4.6.3 修改方式的限制</p> <p>在专利复审委员会作出审查决定之前，专利</p>	<p>Part IV. Chapter 3</p> <p>4. 6. 3 Restrictions to Manners of Amendment</p> <p>Before the Patent Reexamination Board makes a decision on the</p>	

<p>权利人可以删除权利要求或者权利要求中包括的技术方案。</p> <p>仅在下列三种情形的答复期限内，专利权人可以<u>删除以外</u>的方式修改权利要求书：</p> <p>(1) 针对无效宣告请求书。</p> <p>(2) 针对请求人增加的无效宣告理由或者补充的证据。</p> <p>(3) 针对专利复审委员会引入的请求人未提及的无效宣告理由或者证据。</p>	<p>request for invalidation, the patentee may either delete a claim or delete a technical solution contained in a claim.</p> <p>The patentee may amend the claims by the way of <u>other than deletion</u> within the time limit for response only in one of the following circumstances:</p> <p>(1) in response to the request for invalidation;</p> <p>(2) in response to causes for invalidation or evidence added by the petitioner;</p> <p>(3) in response to causes for invalidation or evidence not mentioned by the petitioner but introduced by the Patent Reexamination Board.</p>	
<p>第五部分第四章</p> <p>5.2 允许查阅和复制的内容</p> <p>(1) 对于公布前的发明专利申请、授权公告前的实用新型和外观设计专利申请，该案申请人或者代理人可以查阅和复制该专利申请案卷中的有关内容，包括：申请文件，与申请直接有关的手续文件，以及在初步审查程序中向申请人发出的通知书和决定书、申请人对通知书的答复意见</p>	<p>Part V. Chapter 4</p> <p>5.2 Contents Allowed for Consultation and Photocopying</p> <p>(1) For a patent application for invention before publication and a patent application for utility model or design before the announcement of the grant of patent right, the applicant or agent thereof may consult or photocopy the relevant contents in the said patent application files, including the application documents, the formality documents directly relating to the application,</p>	<p>The proposed amendments in Part V, Chapter 4 provide increased and timely public access to additional patent examination documents issued by SIPO. AIPLA commends SIPO's efforts to improve both public access to examination documents and transparency of the patent examination process. AIPLA encourages further improvements in public access and transparency of patent examination, such as providing online access to patent prosecution documents as</p>

<p>正文。</p> <p>(2) 对于已经公布但尚未公告授予专利权的发明专利申请案卷，可以查阅和复制该专利申请案卷中的有关内容，包括：申请文件，与申请直接有关的手续文件，公布文件，在初步审查程序中向申请人发出的通知书和决定书、申请人对通知书的答复意见正文，<u>以及在实质审查程序中向申请人发出的通知书、检索报告和决定书。</u></p> <p>(3) 对于已经公告授予专利权的专利申请案卷，可以查阅和复制的内容包括：申请文件，与申请直接有关的手续文件，发明专利申请单行本，发明专利、实用新型专利和外观设计专利单行本，专利登记簿，专利权评价报告，以及在各已审结的审查程序（包括初步审查、实质审查、复审和</p>	<p>notifications and decisions sent to the applicant in the preliminary examination procedure, and the text of the observations submitted by the applicant in response to the notifications;</p> <p>(2) for the file of a patent application for invention which has been published and whose grant of patent right has not been announced, the contents in the file which may be consulted and copied, including the application documents, formality documents directly relating to the application, publication documents, notifications and decisions sent to the applicant in the preliminary examination procedure and the text of the observations submitted by the applicant in response to the notifications, <u>and notifications, search reports and decisions issued to the applicant during substantive examination;</u></p> <p>(3) for the file of a patent application for which grant of patent right has been announced, the contents in the file which may be consulted and copied include the application documents, the formality documents directly relating to the application, pamphlet of patent application for invention, pamphlet of patent for invention, pamphlet of patent for utility model or pamphlet of patent for design, Patent Register, and evaluation report of patent,</p>	<p>USPTO and EPO currently do.</p> <p>第五部分第四章的修改草案允许公众更广泛地和更及时查阅国家知识产权局发出的专利审查案卷。AIPLA 赞扬国家知识产权局改进审查案卷的公众查阅和专利审查过程的透明度的努力。AIPLA 鼓励进一步改善公众查阅和专利审查透明度，例如，如美国专利商标局和欧洲专利局所现行的，提供专利审查案卷的在线查阅。</p>
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<p>无效宣告等) 中专利局、专利复审委员会向申请人或者有关当事人发出的通知书、<u>检索报告</u>和决定书、申请人或者有关当事人对通知书的答复意见正文。</p> <p>(4) 对于处在复审程序、无效宣告程序之中尚未结案的专利申请案卷，因特殊情况需要查阅和复制的，经有关方面同意后，参照上述第(1)和(2)项的有关规定查阅和复制专利申请案卷中进入当前审查程序以前的内容。</p>	<p>and the various notifications, search reports and decisions issued by the Patent Office or the Patent Reexamination Board to the applicant or parties concerned, and the text of the observations submitted by the applicant or the parties concerned in response to the notifications in the examination proceedings which have been closed (including procedures of preliminary examination, substantive examination, reexamination and invalidation, etc.) ;</p> <p>(4) for the file of patent applications which are still in re-examination or invalidation procedure and have not been closed, where consultation and photocopying of the file is necessary due to special needs, the contents in the file before starting the current procedure may be consulted and copied upon the approval of the competent authorities in accordance with the relevant provisions of above-mentioned items (1) and (2).</p>	
<p>第五部分第七章</p> <p>7.4.2 因协助执行财产保全而中止的期限</p> <p>对于人民法院要求专利局协助执行财产保全</p>	<p>Part V. Chapter 7</p> <p>7.4. 2 Time Limit of Suspension Due to Execution Assistance of Property Preservation</p> <p>For the suspension due to execution assistance of property</p>	<p>The proposed amendments in Part V, Chapter 7 remove</p>

<p>而执行中止程序的, <u>按照民事裁定书及协助执行通知书写明的财产保全期限中止有关程序。</u></p> <p>人民法院要求继续采取财产保全措施的, 应当在中止期限届满前将继续保全的协助执行通知书送达专利局, 经审核符合本章第 7.3.2.1 节规定的, <u>中止期限予以续展。</u></p> <p>7.4.3 涉及无效宣告程序的中止期限</p> <p>对涉及无效宣告程序中的专利, 应权属纠纷当事人请求的中止, 中止期限不超过一年, 中止期限届满专利局将自行恢复有关程序。</p>	<p>preservation asked by the People's Court <u>the relevant procedure shall be suspended according to the property preservation period stated in the civil order or execution assistance notice.</u></p> <p>Where the People's Court orders to continue adopting measures of property preservation, it shall serve the Patent Office with a <i>Notification on Assistance in Execution</i> for keeping on the preservation before the expiration of the time limit for suspension.</p> <p>The suspension <u>deadline</u> may be extended if the <i>Notification on Assistance in Execution</i> complies with the regulations set forth in Section 7.3.2.1 of this chapter after being checked.</p> <p>7. 4. 3 Time Limit of Suspension Concerning Invalidation Procedure</p> <p>With respect to patents in the invalidation procedure, the duration for suspension as requested by the party concerned in a dispute over the ownership of right shall not exceed one year. The Patent Office will resume the relevant procedures on its own initiative once the time limit of suspension expires.</p>	<p>certain time limit for suspension of relevant proceedings, and provide that the period of suspension should be in accordance with the preservation period stated in an civil order or execution assistance notice from a court. AIPLA commends the efforts to align SIPO practice with court orders or notices. This will reduce potential conflict between SIPO proceedings and court proceedings, thereby improving consistency and public confidence in China's legal system.</p> <p>第五部分第七章的修改草案删除了相关诉讼中止期限的某些硬性时限, 并且规定中止期限应当根据人民法院发出的民事裁定书或协助执行通知书写明的保全期限。AIPLA 赞扬国家知识产权局将其实践和人民法院裁定书或通知书协调一致的努力。这将减少国家知识产权局的程序和人民法院的程序之间的潜在冲突, 并且可以改善法律系统的协调性和公信力。</p>
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