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Re: AIPLA Comments on Proposed SIPO Examination Guidelines
美国知识产权法协会关于中国国家知识产权局<<专利审查指南修改草案(征求意见稿)>>意见

Dear Sir or Madam:

尊敬的先生或女士:

The American Intellectual Property Law Association (“AIPLA”) is pleased to have the opportunity to present its views with respect to the proposed amendments to the examination guidelines presented by the State Intellectual Property Office of the People’s Republic of China (“SIPO”).

美国知识产权法协会很高兴有机会就中华人民共和国国家知识产权局<<专利审查指南修改草案(征求意见稿)>>陈述意见。

AIPLA is a U.S.-based national bar association whose approximately 15,000 members are primarily lawyers in private and corporate practice, government service, and the academic community. AIPLA represents a diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, unfair competition, and trade secret law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property including users of the Chinese intellectual property system.

美国知识产权法协会是美国的全国性律师行业协会，其大约一万五千名会员，主要是在律师事务所、公司、政府机构和司法研究机构从业的律师。美国知识产权法协会代表着各种不同领域的个人、公司以及研究机构，他们直接或者间接地从事专利、商标、版权、不正当竞争和商业秘密法律方面的工作，以及能够影响知识产权的其它法律领域方面的工作。我们的会员代表着知识产权的所有者和使用者，包括中国知识产权体系的使用者。

AIPLA has a robust program of activities with respect to the intellectual property system in China, as well as a significant on-going relationship with SIPO, including the personal visit of Commissioner Tian Lipu to AIPLA Headquarters in May 2010. AIPLA's Committee on Intellectual Property Practice in China conducts regular trips to China, including visits to SIPO and other Chinese agencies. AIPLA is a member of Industry IP-5 which meets annually with SIPO and other major offices, and of the SIPO-US Bar Liaison Council which will host a visit from SIPO this year. AIPLA's AIPPI-US Division also has on-going relations with AIPPI China, a major IP association with international focus.

美国知识产权法协会有着活跃的关于中国知识产权体系的活动项目，也和中国国家知识产权局保持着深厚的关系。田力普局长曾于2010年5月亲自访问过美国知识产权法协会总部。美国知识产权法协会中国知识产权实践委员会经常派代表访问中国，包括访问国知局和其他中国机构。美国知识产权法协会是“行业IP-5”的成员，每年会和中国国知局及其它主要专利局开会，也是“中国国家知识产权局/美国律师协会联络委员会”的成员。后者今年将负责接待国知局的来访。美国知识产权法协会下属的国际保护知识产权协会美国分会，也和国际保护知识产权协会中国分会保持着良好关系（国际保护知识产权协会中国分会是一个注重国际交流的主要知识产权协会）。

AIPLA recognizes the progress that China has made in recent years in the improvement of its laws regarding the effective protection of intellectual property rights and the processes for enforcing these laws. The preparation of the proposed Amendments to the Examination Guidelines, and the willingness to consider comments of the world community so as to draw on the knowledge and experience of practitioners and patent offices throughout the world, constitutes a clear demonstration of China's commitment. AIPLA would like to offer the following comments regarding this present draft.

美国知识产权法协会认识到中国近年来在完善其有效保护知识产权的法律和维护这些法律的程序上所取得的进步。起草专利审查指南修改草案，并愿意考虑国际社会的意见从而吸收世界各地的从业者和专利局的知识经验，清楚地显示了中国的决心。关于现在的草案，美国知识产权法协会提供下述及附件内的意见。

First, AIPLA appreciates the problems presented by poor quality and/or plagiarized utility model and design patent applications. In particular, AIPLA appreciates the initiative taken by SIPO to provide improved examination of these applications to better protect the Chinese public and the international trading community. The present regulations provide greater certainty for inventors and enterprises with respect to the validity of utility model and design patent applications.

首先，美国知识产权法协会理解实用新型和外观设计专利申请存在的质量和抄袭问题。美国知识产权法协会尤其赞赏国知局主动努力提高对这类申请的审查质量，以更好的保护中国公众和国际贸易界。修改后的规定让发明人和企业对实用新型和外观设计专利的有效性更有把握。

AIPLA believes that the draft Regulations may be an effective check on plagiarized and/or low-quality utility model and design patent applications. In particular, the proposed amendments would require SIPO to examine utility model patent applications for an obvious lack of novelty. This would include applications that were plagiarized or copied from prior art and repeated submission of applications having substantially identical content. AIPLA appreciates the difficulty of examining utility model applications for obviousness, particularly in view of the use of simple registration systems in almost all other countries that employ utility model registration systems.

美国知识产权法协会相信本修改草案有可能可以有效地遏制实用新型和外观设计专利申请的质量和抄袭问题。尤其值得一提的是，征求意见稿要求国知局对实用新型专利申请进行是否明显不具备新颖性的审查。这包括抄袭现有技术的申请，和内容明显实质相同的专利申请重复提交。美国知识产权法协会理解审查实用新型专利申请的明显性会有困难，尤其鉴于几乎所有其它国家只采用简单的实用新型专利注册系统。

With respect to design patent applications, AIPLA notes that many international systems do not examine design patent applications. The United States, however, does. AIPLA believes that in the circumstances confronting SIPO, the proposed amendments to examine design applications may be an effective check against plagiarized, as well as other low-quality design patent applications. This could potentially eliminate or reduce the problem of plagiarized or copied design patent applications. It may also facilitate more effective clearance of designs by enterprises who are conducting searches and are trying to avoid infringing rights in registered designs.

AIPLA Comments on Proposed SIPO Examination Guidelines

March 17, 2013

Page 4

关于外观设计专利申请, 美国知识产权法协会注意到很多国家的专利系统并不审查外观设计专利申请。不过, 美国审查外观设计专利申请。美国知识产权法协会相信, 鉴于中国国知局所面临的情况, 修改中所建议的审查外观设计专利申请可以有效地遏制抄袭和低质量的外观设计专利申请。这样做有可能消除或减少外观设计专利申请抄袭的问题, 也能让想避免侵权的公司对授权的外观设计专利进行更有效的防侵权检索。

AIPLA greatly appreciates the opportunity to present these comments to the State Intellectual Property Office of China, and looks forward to working together with SIPO to help develop an optimal intellectual property system that protects inventors and enterprises, as well as the public. If you have any questions regarding these comments, please let us know and we would be willing to discuss them further with you.

美国知识产权法协会非常感谢有机会向中国国家知识产权局陈述意见, 并期待着与国知局合作以帮助发展保护发明人、企业和公众的最佳知识产权体系。如果您对上述意见有任何问题, 敬请相告, 我们愿与您进一步讨论。

Sincerely yours,
诚挚的,



Jeffrey I.D. Lewis

杰弗里·路易斯

President

主席

American Intellectual Property Law Association

美国知识产权法协会

Attachment: TABLE AIPLA Comments SIPO Examination Guidelines

附件: 表格 美国知识产权法协会关于国知局<<专利审查指南修改草案(征求意见稿)>>意见

Guideline 2013 amdt	Guideline 2013 amdt	Proposed Comments	<u>Translation of Proposed Comments</u>
Part I, Chapter II.	Part I, Chapter II.		
<p>11. 根据专利法第二十二条第二款的审查</p> <p>初步审查中, 审查员对于实用新型专利申请是否明显不具备新颖性进行审查。审查员可以根据其获得的有关现有技术或抵触申请的信息审查实用新型专利申请是否明显不具备新颖性。</p> <p>实用新型可能涉及非正常申请的, 例如明显抄袭现有技术或者属于内容明显实质相同的专利申请重复提交, 审查员应当根据检索获得的对比文件或者其他途径获得的信息审查实用新型专利申请是否明显不具备新颖性。</p> <p>有关新颖性的审查参照本指南第二部分第三章的规定。</p>	<p>11. Examination in Accordance with Article 22.2</p> <p>In the preliminary examination, the examiner generally does not determine on search examines whether a utility model patent application is obviously lack of novelty, but and may determine such on the information <u>obtained</u> of related prior art or conflicting applications not through search. However, Where an abnormal applications for utility model is involved, such as an application obviously plagiarizing prior art or repeated submission of an application with substantially identical content, the examiner shall judge examine whether the utility model is obviously lack of novelty based on the reference document obtained from search or through other approaches. With regard to the examination on novelty, the provisions of Chapter 3 of Part II of these Guidelines shall apply.</p>	<p>AIPLA supports the proposed amendment to examine utility model applications for obvious lack of novelty. A substantial number of Chinese utility models have been filed in recent years and the assertion and/or enforcement of low-quality utility model applications may act as a drag on innovation. AIPLA respectfully submits that effective examination practices, including those proposed by the amendment, may reduce the burden of these low-quality utility models.</p>	<p>美国知识产权法协会支持对于实用新型专利申请是否明显不具备新颖性进行审查。近年来中国实用新型专利申请的数量很高, 而维护低质量实用新型有可能成为创新的阻力。美国知识产权法协会诚挚的认为: 有效率的, 包括此修正草案所提出的审查实践能减少此类低质量实用新型专利所产生的负担。</p>
<p>13. 根据专利法第九条的审查</p> <p>专利法第九条第一款规定, 同样的发明创造只能授予一项专利权。专利法第九条第二款规定, 两个以上的申请人分别就同样的</p>	<p>13. Examination in Accordance with Article 9</p> <p>In accordance with Article 9. 1, for any identical invention-creation, only one patent right shall be granted. In accordance with</p>	<p>AIPLA supports the application of a first-to-file rule in determining priority. AIPLA further encourages full searching to determine and apply all relevant prior art during the examination</p>	<p>美国知识产权法协会支持在决定授权优先顺序时适用最先申请人规则。美国知识产权法协会更鼓励全</p>

<p>发明创造申请专利的，专利权授予最先申请的人。</p> <p>初步审查中，<u>审查员可以根据其获得的同样的发明创造的专利申请，对实用新型专利申请是否符合专利法第九条的规定进行审查。</u></p> <p>对同样的发明创造的处理，参照本指南第二部分第三章第 6 节的规定。</p>	<p>Article 9. 2, where two or more applicants file applications for patent for the identical invention-creation, the patent right shall be granted to the applicant whose application was filed first.</p> <p>In the preliminary examination, whether or not a patent application for utility model may obtain a patent right according to Article 9 shall not be examined through search in general.</p> <p>However, if the examiner knows that there is an applicant who has filed a patent application for the identical invention-creation, he shall conduct the examination.</p> <p><u>the examiner may examine the utility model patent application based on the information obtained of the corresponding invention patent application to determine whether or not a patent application for utility model meet the requirement of Article 9 of Chinese Patent law.</u></p> <p>With regard to the handling of identical inventions-creations, the provisions in Chapter 3, Section 6 of Part II of these Guidelines shall apply.</p>	<p>process.</p>	<p>面检索以发现并在审查中应用有关现有技术。</p>
<p>8. 根据专利法第二十三条第一款的审查</p> <p>初步审查中，<u>审查员对于外观</u></p>	<p>8. Examination According to Article 23. 1</p> <p>During the preliminary</p>	<p>AIPLA supports the proposed amendments to examine design applications for obvious failure to</p>	<p>美国知识产权法协会支持对于外观设计专利申请是</p>

<p><u>设计专利申请是否明显不符合专利法第二十三条第一款的规定进行审查。审查员可以根据其获得的有关现有设计或抵触申请的信息审查外观设计专利申请是否明显不符合专利法第二十三条第一款的规定。</u></p> <p>外观设计可能涉及非正常申请的，例如明显抄袭现有设计或者属于内容明显实质相同的专利申请，审查员应当根据检索获得的对比文件或者其他途径获得的信息审查外观设计专利申请是否明显不符合专利法第二十三条第一款的规定。</p> <p>相同或者实质相同的审查参照本指南第四部分第五章的相关规定。</p>	<p>examination, <u>the examiner examines whether the design application obviously does not meet the requirements of Article 23. 1. The examiner may examine whether the design patent application obviously does not meet the requirements of Article 23. 1 on the basis of relevant prior design or conflicting application obtained, the examiner usually does not conduct search and normally judges whether the design application obviously does not meet the requirements of Article 23. 1 only on the basis of the content of the application document and common sense of the normal consumer. The examiner, however, may judge whether the design obviously does not meet the requirements of Article 23. 1 on the basis of the information, which is not resulted from search, concerning prior design or conflicting application.</u></p> <p>When examining design relating to abnormal filing, among other things, obviously plagiarizing prior design or prior application with substantially identical content, the examiner shall judge whether the design obviously does not meet the requirements of Article 23. 1 on the basis of prior design document resulted from search or</p>	<p>meet the statutory requirements. Although some countries do not examine design patents, the United States does. A substantial number of Chinese design applications have been filed in recent years and assertion and/or enforcement of low-quality design patents may act as a drag on innovation. In addition, more vigorous examination may better facilitate clearance of genuinely new designs. AIPLA respectfully submits that effective examination practices may reduce the burden of these low-quality design patents.</p>	<p><u>否明显不符合专利法的规定进行审查的修改建议。尽管有些国家不对外观设计专利进行审查，美国仍审查。近年来中国外观设计专利申请的数量很高，而维护低质量外观设计专利有可能成为创新的阻力。而且，更严格的审查可以更便于清理出真正新颖的外观设计。美国知识产权法协会诚挚的认为：有效的审查实践能减少此类低质量外观设计专利所产生的负担。</u></p>
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	<p>information obtained through other channels.</p> <p>Examination regarding identical or substantially identical designs shall follow provisions in Chapter 5 of Part IV of these Guidelines.</p>		
<p>11. 根据专利法第九条的审查 专利法第九条第一款规定，同样的发明创造只能授予一项专利权。专利法第九条第二款规定，两个以上的申请人分别就同样的发明创造申请专利的，专利权授予最先申请的人。</p> <p>初步审查中，审查员可以根据其获得的同样的外观设计专利的申请，对外观设计专利申请是否符合专利法第九条的规定进行审查。</p>	<p>11. Examination According to Article 9 In accordance with Article 9. 1, for any identical invention-creation, only one patent right shall be granted. According to Article 9. 2, where two or more applicants file applications for patent for the identical invention-creation, the patent right shall be granted to the applicant whose application was filed first.</p> <p>During the preliminary examination of a patent application for design, <u>an examiner may examine whether the design patent application meets the requirement of Article 9 of Chinese Patent Law based on the same design patent application obtained.</u> the examiner normally does not take the initiative to search and examine whether or not the application for design can be granted the patent right according to the provisions of Article 9. However, where the examiner</p>	<p>AIPLA supports the application of a first-to-file rule in determining priority. AIPLA further encourages full searching to determine and apply all relevant prior art during the examination process.</p>	<p>美国知识产权法协会支持在决定授权优先顺序时适用最先申请人规则。美国知识产权法协会更鼓励进行全面检索以发现并在审查中应用有关现有技术。</p>

	knows that one or more applicants have filed patent applications for the identical design, the examination shall be conducted.		