IPKey

CHINA

STUDY ON BAD FAITH PATENT APPLICATION IN CHINA

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Contents

EXECUTIVE SUMMARY

This study is a part of the IP Key China 2021 project and focuses on how bad faith patent applications are established and cracked down in China, considering the administrative and judicial implementation of the new rules in force, the impact of the Chinese patent law amendment re restrictions on the abuse of patent right, and how it compares to the regulations and practice in the European Union (EU).

Please note that in China, the activities of filing BFPA are mainly regulated by the CNIPA in administrative procedures, while the activities of enforcing a patent granted from a BFPA are regulated by courts in judicial proceedings. Accordingly, in this report, the activities of filing BFPA will be discussed under the term "BFPA", and the activities of enforcing a patent right granted from a BFPA will be discussed under the term "abuse of patent right based on BFPA".

Main findings of the study are summarized below:

1. Regulatory Review

Definition of BFPA

The term "Bad Faith Patent Application" (BFPA)" has different meanings in the legal contexts in Europe and China. In the EU, BFPA closely relates to patent ownership issue, and means filing a patent application without being entitled to the application. In China, BFPA refers to patent applications filed with the purpose other than for protecting innovation, which is usually of low quality and contains plagiarised or forged content. This has some overlap with the EU's interpretation but is not exactly an issue of patent ownership or an issue of novelty / inventive step.

BFPA as a Unique Problem in China

BFPA is found to be a unique problem under the patent system of China. BFPA is regulated by regulations not found corresponding ones in the EU. From the views of surveyed EU patent practitioners, some variants of BFPAs defined in administrative rules in China may be addressed as issues of novelty/inventive step, or irrelevant to patent practice in the EU.

The China National Intellectual Property Administration (CNIPA) categorises BFPAs into nine different types (originally three types initially defined in 2007, six types in 2017, and now nine types in 2021) thus highlighting the complexity of issues and the resulting regulatory measures needed to deal with BFPAs.

Policy Background for BFPA

BFPAs are better understood in the context of the evolving national IP strategies and IP polices of China. The issue of BFPA grows along with incentive policies stimulating the number of patents being filed. Cancellation of such patent subsidy policies for patent applications may reduce the number of BFPAs whilst also help improve patent filing quality.

Regulatory Changes Against BFPA

The China National Intellectual Property Administration (CNIPA) now categorises BFPAs into nine different types (originally three types initially defined in 2007, six types in 2017, and now nine types in 2021) thus highlighting the complexity of issues and the resulting regulatory measures needed to deal with BFPAs.

Regulatory restrictions on BFPA have been continuously updated over the last decade and escalated from administrative rules into legislative measures, including the addition of the good faith principle into Article 20 of the Patent Law (Amendment 2020).

In addition to the updated definitions and examination procedures for BFPA in 2021, two major updates to administrative regulations against BFPA include adding BFPA as a cause for rejection, and adding BFPA as a cause for invalidation, according to Draft Amendment to the Implementing Regulations of the Patent Law published in November 2020 and Draft Amendment to Guidelines for Patent Examination published in August 2021 by the CNIPA, all of which may help strengthen the position of the CNIPA and patent holders in combatting BFPAs.

Restrictions on Abuse of Patent Rights Based on BFPA

There are judicial measures against the abuse of patent rights in bad faith in China, particularly against "bad faith patent litigation" and "acquiring a patent in bad faith", which relate to abuse of patent right base on ungrounded patent right, such as patent obviously belonging to prior art. Such abuse of patent right based on BFPA is different from abuse of patent right based on dominant position. The latter was regulated as monopolistic acts regulated by Anti-Monopoly Law in China and the EU competition Law in the EU.

It is observed that inconsistent criteria are applied for establishing BFPA in administrative procedures and for establishing "bad faith patent litigation" or "acquiring patent in bad faith" in judicial proceedings. Moreover, how the administrative regulatory measures against BFPA will be linked to such judicial measures is still not quite clear.

Impact of the Regulatory Changes Against BFPA

Generally, the recent regulatory changes are positive in addressing the prominent issue of BFPA in China by detailing the definitions of BFPA, formulating the procedures, and providing legal basis for the CNIPA to reject BFPA and for the patent holders to invalidate patents granted from BFPA. Along with the shifting of national top-level IP strategy from quantity to quality growth of patents, it is expected that the regulatory changes may help improve the China patent environment to be more friendly to the patent holders and the public by severely cracking down the BFPAs.

There are concerns raised by the regulatory changes to patent holders, especially worries that normal patent applications might be mistakenly determined as BFPAs according to some currently vague rules. It is noticed that the current regulatory measures against BFPA are still not perfect nor completely clear, and more detailed rules for implementation are expected to follow, hopefully providing more certainties and confidence to the patent holders and the public.

2. Implementation Review

Motivations Behind BFPA

Fighting BFPA is a complicated issue concerning multiple stakeholders with various motivations at play. Since the first patent subsidy policy in 1999, BFPA has grown into an instrument for some domestic applicants seeking to grow patent portfolio volume and low-price patent agencies assisting them in obtaining government subsidies, tax concessions, profit, or other rewards.

Procedure for Determining BFPA

Currently China adopts administrative approaches to assess and identify BFPA activities in patent application processes, and judicial approaches to address abuse of patent right based on BFPA. The CNIPA may proactively assess the bad faith patent applications throughout the process of patent prosecution before a patent is granted. The CNIPA may also initiate the assessment of BFPA based on the report from a third party. Courts will usually assess and determine in the patent enforcement proceedings whether it's the abuse of patent right based on patent right obtained in bad faith.

The procedure for the determination of BFPA was not fully stated previously but are prescribed in detail in the latest administrative rules released in 2021, notably Measures on Regulating Patent Application Activities (Announcement No. 411) issued in March 2021, and Draft Amendment to Several Provisions on Regulating Patent Application Activities issued in May 2021 (Draft Amendment to Order No. 75) by the CNIPA.

Remedies to Parties Involved in BFPA

There are remedies available for the public to combat BFPA.

- For a pending BFPA, the public may report case of BFPA to the IP offices or file a third-party observation.
- For a granted BFPA, the public is likely to have the option to file invalidation against the patent on the ground of failure to comply with the principle of good faith, according to Draft Amendment to Implementing Regulations of the Patent Law published in November 2020 and Draft Amendment to Guidelines for Patent Examination published in August 2021 by the CNIPA.

There are also remedies available for patent applicants whose application is determined as BFPA. It's feasible for the patent applicants to submit statement and provide evidence in response to the CNIPA's notice about BFPA. But it sounds not feasible for the patent applicants to amend patent applications in the procedure. Both administrative and judicial remedy procedures are available to patent applicants if they're not satisfied with the CNIPA's decision.

Measures Taken to Combat BFPA

The CNIPA has particularly taken campaigns against BFPA and other dishonesty acts of patent agencies besides against BFPA applicants. More than 220,000 BFPAs have been identified through the "Blue Sky" campaign for combating bad faith patent agency services since its launch in April 2019. Relevant policies are updated annually to support and deepen the "Blue Sky" campaign.

A joint punishment mechanism was initiated in 2018 and implemented by 38 government departments against serious dishonesties in the field of intellectual property (patents), including BFPA, which prescribes 38 disciplinary actions against six types of serious defaulting acts, including repeated patent infringement and abnormal patent application acts. The joint punishment mechanism further strengthens the measures against BFPA and may significantly increase the cost of filing BFPA.

Details of how some of the administrative rules against BFPA are implemented were found from officially published BFPA cases. The implementation details will be further clarified along with the update of the rules per se and availability of more BFPA cases.

Inconsistent Criteria Applied for BFPA and Abuse of Patent Right Based on BFPA

It is found that the criteria for establishing "IP litigation in bad faith" or "obtaining patent right in bad faith" applied by Chinese courts in judicial proceedings are much stringent than those criteria for establishing BFPA

applied by the CNIPA in administrative procedures. How the definitions for BFPA updated by the CNIPA may be applied before courts is still unclear.

3. Recommendations for Improvement

The Chinese government and IP authorities have switched the direction of patent filing strategy from quantity to quality with key performance indicators (KPI) for intellectual property to average 12 high-value invention patents per 10,000 population as the innovation outcome index for local governments, released in the CNIPA Annual Work Guidelines in March 2021[1]. We expect more severe restriction to bad faith patent applications, in alignment with the switching.

The study finds that current administrative rules against BFPA, as reflected in Announcement No. 411 and Draft Amendment to Order No. 75, may be improved in the following aspects:

1) Defining the line between BFPA and normal patent applications more clearly;

2) Refining the criteria for determining BFPA to be more implementable; and

3) Reducing the overlap between the criteria for determining BFPA and novelty/inventive step.

On May 6th, 2021, the CNIPA released and called for comments on the "Draft Amendment to Several Provisions on Regulating Patent Application Activities" (Draft Amendment to Order No. 75). Some published comments include:

- Limitation on the scope of BFPA to those patent filers who have applied for government subsidies or patent rewards,
- Limitation on the scope of BFPA examinations to utility model and design patents only and excluding invention patents[2].
- Proposal for introduction of a more expansive concept of "duty of candour" similar to the "information disclosure statement" mechanism in some countries to indicate the source of information concerning prior art.

We expect that there may be more changes to the provisions around bad faith patent applications when taking into account comments from the public.

Further, to restrict abuse of patent right based on BFPA, e.g., enforcement of a patent right obtained through BFPA, we think improvements to rules against BFPA may be made to:

(1) further clarify the evidence requirements for invalidating a patent granted from BFPA according to Article 20.1 of the Patent Law (Amendment 2020), in order to provide a practical instrument to the public to invalidate patent rights obtained through BFPA, with less cost and efforts than those required for invalidating a "normal" patent right; and

(2) add BFPA as a scenario of "acquiring a patent right in bad faith" in judicial guidelines to prevent the abuse of patent rights obtained in bad faith.

[1] "Annual Work Guidelines for Promoting High-quality Development of Intellectual Property (2021)", CNIPA, March 2021

[2] IPO-Comments-Patent-Applications-CNIPA.pdf, Intellectual Property Owners Association (IPO), 5 June 2021

In summary, the issue of BFPA may be mitigated with regulatory and judicial changes in years to come. However, further improvements/clarifications to the regulatory rules and implementation of the rules against BFPA are still expected to provide effective solutions to the issue of BFPA.

1. Methodology

1.1 Acronyms and Abbreviations

Acronym	Name
BFPA	Bad Faith Patent Application/s
CNIPA	China National Intellectual Property Administration
EUIPO	European Intellectual Property Office
MNC	Multi-National Companies
NPC	National People's Congress
SAMR	State Administration of Market Regulation
SIPO	State Intellectual Property Office[3]
SPC	Supreme People's Court
Order No. 45	Several Provisions on Regulating Patent Application Activities (Order No. 45) issued by the SIPO on August 27, 2007
Order No. 75	Several Provisions on Regulating Patent Application Activities (Order No. 75) issued by the CNIPA on March 1, 2017
Announcement No. 411	Measures for Regulating Patent Application Activities (Announcement No. 411) issued by the CNIPA on March 11, 2021
Draft Amendment to Order No. 75	Draft Amendment to Several Provisions on Regulating Patent Application Activities issued by the CNIPA on May 6, 2021

1.2 Overview

We've undertaken within the broad framework of a comparative analysis between China and EU, the aim of which is to analyse bad faith patent applications from both normative and empirical perspectives.

From a normative perspective, we've researched when and how the applicant's bad faith is assessed and remedies to address bad faith patent applications.

- When? - It is at the time of filing an application and/or the examination and/or grant?
- How? - What parameters Patent Offices and Courts of the surveyed countries apply to assess bad faith? Are they rules, guidelines defining what bad faith? How concurrent applications covering the same inventions are treated? Are double patenting or refiled patents with slight modifications to

[3] The State Intellectual Property Office (SIPO) was renamed to China National Intellectual Property Administration (CNIPA) on August 28, 2018

consolidate previous filings are considered constitute bad faith applications?

- Remedies - Can opposition and cancellation actions be filed on the ground of bad faith applications and is the process reasonable in practice? It may be an issue for the actual implementation and the process.

From an empirical perspective, we've analysed legal and judicial aspects of bad faith patent applications, taking into consideration the latest legal developments including amended Examination Guidelines to the Chinese patent law (2019, 2020) and the draft amendments to the same recently released (September 2020), and also add CIELA[4], Rouse proprietary Chinese IP dispute analysis platform – www.CIELA.cn, to identify typical bad faith patent application cases and capture the trends in court rulings on bad faith patents in China.

Considering the increasing number of patent applications and the patent bad faith issue as well, it is valuable to conduct a comparative study on the patent application and protection systems under Chinese and European legal regimes, which will provide relevant stakeholders an insight of how the current legal systems and practice work around bad faith applications and if a balance needs to be brought between the protection and restriction of patent rights to create a supportive environment encouraging innovation and development of start-ups in significant numbers. The research method used in this study includes desk research, online surveys, and interviews with stakeholders across different countries and sectors.

1.3 Methodology

1.3.1 China research

Expected China research is based on a series of legal documents and cases as follows:

1) Regulatory / government policy study

We will identify and review all legislations, regulations and other guidance issued by CNIPA and local courts in China to understand the definition and the type of patent bad faith including but not limited to:

- Legislative and institutional regulations / state policies in China around bad faith patent applications. For example, Beijing HPC issued "Guidelines for Patent Infringement Determination (2017)" stipulating the definition and types of patent bad faith application, such as fabricating experimental data, technical effects and other means to make the patent meet patentability requirements of the Patent Law and obtaining a patent; "Several Provisions on Standardizing Patent Applications" (2017) also defined the abnormal patent application behaviours.
- Restrictions of patent right holders on abuse of patent right, comparison between the EU's competition law and the draft amendments to the China Patent Law;
- Impact of these regulations and potential changes to patent holder, public interest and business operation in China.

2) Judicial implementation study

We've studied court cases to determine the scenarios, legal procedures of establishing bad faith patent applications and remedies to parties involved and damages caused by a bad faith patent application.

[4] Rouse CIELA database – see www.ciela.cn

3) Statistical analysis

   We've collected and analysed official data issued by the CNIPA and other authorities to reveal the trends of bad faith patent application.

   In addition, with CIELA we've analysed administrative decisions and judicial judgments in which a claim of bad faith by the applicant was made to understand the arguments made, the extent to which arguments are supported and the overall outcomes.

4) Based on the above research to discover the motivation behind bad faith applications and assess the remedies to crack down on bad faith applications - both administrative invalidation procedures and court decisions.

5) Assessment of the legislation on bad faith patent applications, past and future.

6) Questionnaires and interviews with China and EU IP rights holders, IP practitioners / experts from China and EU.

1.3.2 EU research

Expected EU research in this section is based on the analysis of legal documents and market-based research:

- Any restrictions are imposed on European patents rights holders under the EU's competition law and related documents,
- Impact of the restrictions on patent holders, by analysing data and case law and by the way of questionnaires,
- Comparing the above important issues with the China patent system.

2. What is BFPA?

The role of intellectual property in the overall economic and social development of China is becoming more and more prominent, and China is changing from a major importer of intellectual property to a major generator of intellectual property. Furthermore, intellectual property policy in China is changing from pursuing quantity to improving quality. In the recent five years, the Chinese government has taken a series of measures against bad faith patent applications and changed incentive policies from promoting the quantity of patent filings, to promoting filing patents of high value. Despite the measures taken, the problem has persisted. With the incredible growth in the number of patent applications filed in China in the last decade – from 1.2 million in 2010 to 5.2 million in 2020 – the perception is that the problem of bad faith patent applications / patents has grown too.

The Study will use the term of bad faith patent application (BFPA) in a broad sense covering abnormal (irregular) patent applications, abnormal (irregular) patent application behaviours, patent enforcement in bad faith and others, rather than its strict legal definition.

Please note that in China, the activities of filing BFPA are regulated by the CNIPA in administrative procedures, while the activities of enforcing a patent granted from a BFPA are regulated by courts in judicial proceedings. Accordingly, in this report, the activities of filing BFPA will be discussed under the term “BFPA”, and the activities of enforcing a patent right granted from a BFPA will be discussed under the term “abuse of patent right based on BFPA”.

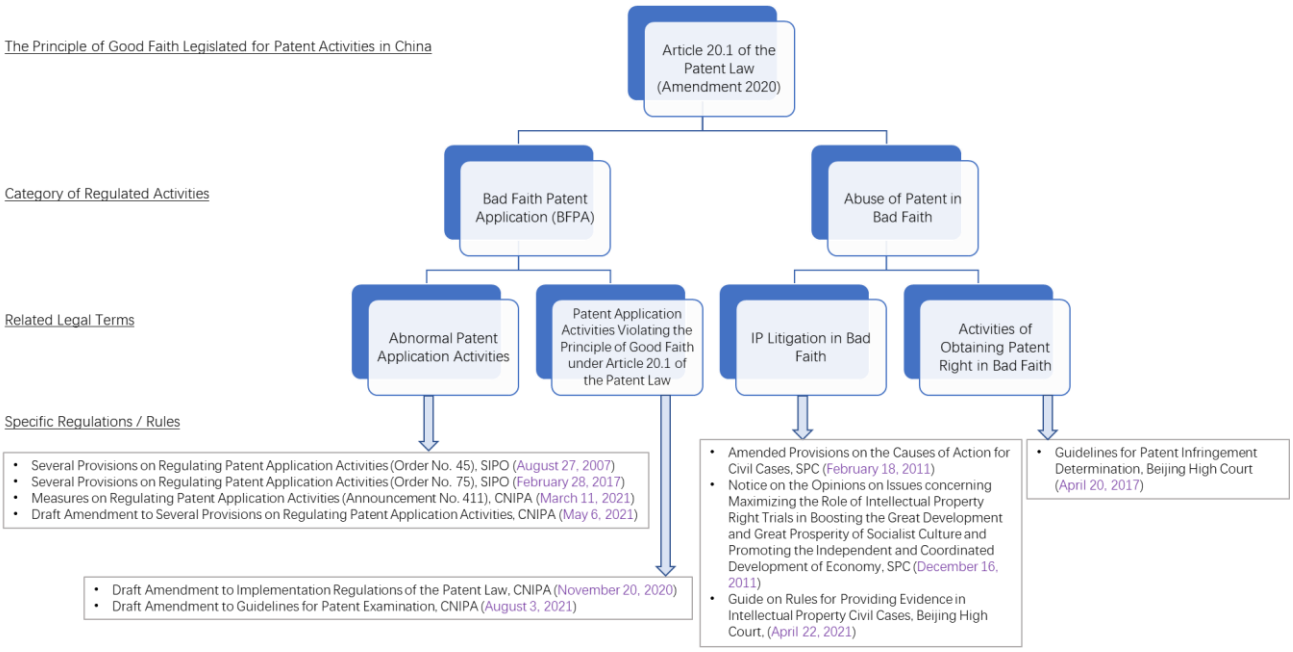
In the following sections, we will discuss the legislation and regulations on BFPA in China and make a comparative study on the differences between BFPAs in China and the EU.

2.1 Legislation and Regulations on BFPA in China

2.1.1 Overall Regulatory Framework

The Study has found that the legislative and institutional regulations about bad faith patent applications in China relate to two categories of regulated activities and four related legal terms, as is shown in Chart 1 below.

Chart 1: Legislative and institutional regulations about BFPA in China



From the top down, Article 20.1 of the Patent Law (Amendment 2020) prescribes that "in exercising the application or patent right, one should follow the principle of honesty and credibility, but shall not abuse the right to harm public interest or other's legitimate rights." This sets out the fundamental principle for regulating BFPA behaviour in China.

At the level of specific regulations / rules, regulated behaviours related to BFPA include two categories: 1) bad faith patent application activities and 2) abuse of patent right based on BFPA. According to the current applicable regulations, bad faith patent application activities are regulated through administrative regulations and rules issued by the CNIPA, while abuse of patent rights is regulated through judicial rules issued by courts.

Each of these two categories of regulated activities has been defined in different regulations or laws. For instance, bad faith patent application activities are administratively termed as "Abnormal Patent Application Activities" according to several provisions in the administrative rules issued by the CNIPA. They also have a differently worded definition as "Patent Application Activities Violating the Principle of Good Faith" under Article 20.1 of the China Patent Law, which was present in the Draft Amendment to Implementing Regulations of the China Patent Law, and Draft Amendment to Guidelines for Patent Examination published by the CNIPA. Abuse of patent rights in bad faith is termed as "IP Litigation in Bad Faith" under the civil laws, while in the Guidelines for Patent Infringement Determination of Beijing High Court, abuse of patent rights in bad faith is defined to include "Activities of Obtaining Patent Right in Bad Faith".

As discussed above, currently there are different terms for BFPA in China, and the administrative definition of BFPA appears to be inconsistent with the judicial definition of BFPA. It is worth noting that there are inconsistencies between the definitions and specific types of BFPA in administrative rules issued by the CNIPA,

and those in judicial rules issued by courts. Obviously, the types of BFPA adopted by courts are more narrowly and strictly defined. Consequently, as found through this study, there are much less BFPA cases determined by the courts in judicial proceedings than those determined by the CNIPA in administrative procedures.

As commented by an Italian intellectual property professional, "*it would be definitely better to have consistent definitions of BFPA. Discrepancies in the approach of CNIPA and courts in this respect are hardly acceptable*", we can see it is expected that there would be consistent definition and approaches taken by the CNIPA and Chinese courts against BFPA.

With the fourth amendment of the Patent Law in 2020, the principle of good faith as prescribed in Article 20.1 may provide a unified legal framework to address such inconsistency, with more details of further regulation and implementation expected to be rolled out in future.

The following parts in this section will discuss in detail relevant regulations and types for bad faith patent application activities and abuse of patent right on BFPA respectively.

2.1.2 Regulations on BFPA

Legal Definitions of BFPA

- Definition 1: "Abnormal Patent Application Activities"

This is the term adopted by the SIPO / CNIPA in its administrative rules for regulating BFPA in China, as shown in the table below.

Table 1: Evolution of the Main Administrative Rules for Defining and Regulating BFPA in China

Regulations	Issuing Authority	Publication
Several Provisions on Regulating Patent Application Activities (**Order No. 45**)	SIPO	August 27, 2007
Several Provisions on Regulating Patent Application Activities (**Order No. 75**)	SIPO	February 28, 2017
Measures on Regulating Patent Application Activities (**Announcement No. 411**)	CNIPA	March 11, 2021
Draft Amendment to Several Provisions on Regulating Patent Application Activities issued by the CNIPA on May 6, 2021 (**Draft Amendment to Order No. 75**)	CNIPA	May 6, 2021

The term "Abnormal Patent Application Activities" was defined by a list of examples without an explicit definition in Order No. 45 issued by the SIPO in 2007, and Order No. 75 issued by the SIPO in 2017, and was for the first time explicitly defined in Announcement No. 411 issued by the CNIPA in 2021, and slightly re-worded in Draft Amendment to Order No. 75.

Specifically, the latest definitions of the term "Abnormal Patent Application Activities" include

> "*the activities of any entity or individual, independently or by collusion, submitting various patent applications, acting as agent for patent applications, transferring patent application rights or patent*

rights, etc. not for the purpose of protecting innovations or not based on genuine invention-creation[5] *activities, but for the purpose of seeking improper benefits or fabricating innovation performance or service performance*" in **Announcement No. 411**; and

"*the activities of any entity or individual, such as independently or jointly submitting various patent applications, acting as agent for patent applications, transferring patent application rights or patent rights, etc. not for the purpose of protecting innovations, but for the purpose of seeking improper benefits or fabricating innovation performance or service performance*" in **Draft Amendment to Order No. 75**.

By the time of writing this report, Announcement No. 411 is the latest administrative rule in-force defining "Abnormal Patent Application Activities", and it will be replaced once Draft Amendment to Order No. 75 is finalized and comes into effect.

As compared with the definition in Announcement No. 411, the definition in Draft Amendment to Order No. 75 deleted "*not based on genuine invention-creation activities*" as one of the conditions for "Abnormal Patent Application Activities". This is understandable, as the purpose for the activities might be indicated from various characteristics of the activities, but it might be impractical to judge if a patent application is based on genuine invention-creation activities or not, which is beyond the information contained in the text of patent applications and filing activities.

From the above latest definitions, it can be seen that "Abnormal Patent Application Activities" generally refer to[6]:

Any of the three types of activities, including:

- Submitting various patent applications meeting the criteria of BFPA,
- Acting as an agent for abnormal patent applications,
- Transferring patent application rights or patent rights meeting the criteria of BFPA, etc.,

With the purpose of

- not for protecting innovations, but
- for seeking improper benefits or fabricating innovation performance or service performance.

Though "bad faith" is not explicitly stated in the definition of "abnormal patent application activities", such activities shall be determined based on its purpose, and are considered to be an activity against the principle of good faith.

It is worth noting that the defined "Abnormal Patent Application Activities" not only cover activities of filing patent applications meeting certain criteria of BFPA, but also cover activities of a patent firm or patent attorney/agent or someone else acting as the agent for BFPA. According to our survey to European patent attorneys, there are no specific provisions at the EU level, in Germany, Italy or France, against the patent attorneys or patent firms acting as agent for bad faith patent applications in Europe.

[5] Invention-creation" is a concept introduced in Article 1 of the Patent Law of China, referring to a product of innovation activity or the activity of innovation.

[6] Draft Amendments to Several Provisions on Regulating Patent Application Activities issued by the CNIPA on May 6, 2021

Further, the defined “Abnormal Patent Application Activities” also covers activities of transferring patent applications or granted patents, which are not considered as bad faith patent application activities in Europe too.

- Definition 2: "Patent Application Activities Violating the Principle of Good Faith"

The principle of good faith was legislated in Article 20.1 of the Patent Law (Amendment 2020), which came into effect on June 1, 2021. Article 20 specifically prescribes that patent application and exercise of patent rights shall comply with the principle of good faith.

Following the same terminology, the Draft Amendment to "Implementation Regulations of the Patent Law" published by the CNIPA in November 2020 added a new article defining that **fabrication**, **forgery**, **plagiarism**, **patchwork** or **other improper behaviours** during the patent application process belong to "Patent Application Activities Violating the Principle of Good Faith under Article 20.1 of the Patent Law". This principle of good faith has been added as a legal ground for invalidating a patent in the Draft Amendment to the "Implementation Regulations of the Patent Law". These modifications upon effectiveness will provide a regulatory basis for invalidation against a granted patent which may be captured to be a BFPA at the post-grant stage.

Draft Amendment to "Guidelines for Patent Examination" published by the CNIPA in August 2021 reuses the term "Activities Violating the Principle of Good Faith under Article 20.1 of the Patent Law" and lists further examples of such activities.

As compared with "Abnormal Patent Application Activities" defined in administrative rules of the CNIPA, "Patent Application Activities Violating the Principle of Good Faith under Article 20.1 of the Patent Law" appears to be a broader term in its literal meaning. However, the two terms are generally consistent in their target activities to be regulated, namely patent applications filed away from the purpose of protecting innovation, in the context of patent application activities. Moreover, the activities under the two terms are both intended to be regulated by the CNIPA with administrative measures. Therefore, for brevity, both terms will be addressed as BFPA or "Abnormal Patent Application Activities" in this report.

Types of BFPA

The types of Bad Faith Patent Application Activities according to each of the above definition are further summarized in the following table:

	Abnormal Patent Application Activities (As defined in Draft Amendment to Order No. 75 published by the CNIPA on May 6, 2021)
1	DEFINITION: Any of the three types of activities, including: - Submitting various patent applications meeting the criteria of BFPA, - Acting as agent for abnormal patent applications, - Transferring patent application rights or patent rights meeting the criteria of BFPA, etc., With the purpose of - not for protecting innovations, but - for seeking improper benefits or fabricating innovation performance or service performance. TYPES:

	(1) **Same Invention or Simple Variation**[7]: Where the submitted multiple patent applications have obviously the same invention-creation contents or are essentially formed by simple combinations of different invention-creation features or elements; (2) **Fabricating, Plagiarizing, or Patchwork**: Where the submitted patent application contains fabricated, forged or altered inventions-creation contents, experimental data or technical effect, or plagiarism, simple replacement or patchwork of existing technologies or existing designs, or other similar circumstances; (3) **Randomly Generated**: Where the invention-creation contents of the submitted multiple patent applications are generated randomly mainly by using computer technology etc.; (4) **Anti-Common Sense, or Unnecessarily Narrowed**: The invention-creation of the submitted patent application is obviously inconsistent with technical improvement or design common sense, or is deteriorated, piled up or unnecessarily limiting the scope of protection; (5) **Lack of R&D Capability/Resource**: Where the invention-creation of the submitted patent application is obviously inconsistent with the actual research and development capabilities and resource conditions of the applicant or inventor; (6) **Scattered Patent Filing in Bad Faith**: Where multiple patent applications substantially connected with a particular entity, individual or address are submitted maliciously in a scattered way, in sequential order or in different places; (7) **Abnormal Transfer of Right / False Change of Inventor**: Where the patent application rights or patent rights are transferred for illegitimate purposes, or the inventors or designers are falsely changed; (8) **Assistance in BFPA Activity**: Where a patent agency, patent agent, or any other institution or individual acts as an agent, induces, abets, assists or conspires with others to carry out various abnormal patent application activities; and (9) **Other BFPA Activity Violating the Principle of Good Faith**: Other abnormal patent application activities that violate the principle of good faith or disrupt the normal order of patent work and other relevant activities.
2	**Patent Application Activities Violating the Principle of Good Faith under Article 20.1 of the Patent Law** (As defined in Draft Amendment to Guidelines of Patent Examination published by the CNIPA on August 3, 2021)
	DEFINITION: Fabrication, forgery, plagiarism, patchwork or other improper behaviours during the patent application process TYPES: (1) **Same Invention or Simple Variation:** Where the multiple patent applications submitted simultaneously or successively have obviously the same invention-creation contents or are essentially formed by simple combinations of different invention-creation features or elements; (2) **Fabricating, Plagiarizing, or Patchwork:** Where the submitted patent application contains fabricated, forged or altered inventions-creation contents, experimental data or technical effect, or plagiarism, simple replacement or patchwork of existing technologies, or other similar circumstances;

[7] Short names in bold font are added here to help readers of this report quickly understand the key point of each form of BFPA, and the original legal text shall be consulted for the exact scope of each form as defined.

	(3) **Lack of R&D Capability/Resource**: Where the invention-creation of the submitted patent application is obviously inconsistent with the actual research and development capabilities and resource conditions of the applicant or inventor; and (4) **Other BFPA Activity Violating the Principle of Good Faith**: Other abnormal patent application activities that violate the principle of good faith or disrupt the normal order of patent work and other relevant activities.

2.1.3 Abuse of Patent Right Based on BFPA

Article 20 of the Patent Law (Amendment 2020) prescribes the principle of good faith and the restriction to the "abuse of patent right to eliminate or restrict competition". The former is much broader than the latter, as the latter has additional requirements for the patentee to have a dominance position to eliminate or restrict competition and may be considered as monopolistic act to be regulated in accordance with Anti-monopoly Law.

Beyond "abuse of patent rights to eliminate or restrict competition", which constitutes monopolistic act according to Article 20.2 of the Patent Law (Amendment 2020), there is observed a type of abuse of patent right based on BFPA. Specifically, in Judicial rules / guidelines issued by courts, BFPA may be considered as a basis for "IP Litigation in Bad Faith", and in certain cases may be termed as "Activities of Obtaining Patent Right in Bad Faith". Accordingly, from the perspective of judicial rules and implementation, our study is focused on such abuse of patent right based on BFPA.

Legal Definition for Abuse of Patent Right Based on BFPA

- Definition 1: "IP Litigation in Bad Faith"

Generally, abuse of patent right based on BFPA may constitute "IP Litigation in Bad Faith" and will be supported by courts.

"IP Litigation in Bad Faith" has been formally added as a cause of action for civil cases in the "Amended Provisions on the Causes of Action for Civil Cases" released by the SPC in 2011.

In the same year, the SPC issued "Notice on the Opinions on Issues concerning Maximizing the Role of Intellectual Property Right Trials in Boosting the Great Development and Great Prosperity of Socialist Culture and Promoting the Independent and Coordinated Development of Economy", prescribing that the relationship between protection of patents and prevention of the abuse of rights shall be appropriately handled to legally contain the abuse of patents and abuse of a pre-action injunction. In addition, if a patentee knowing that its patent falls within the scope of prior arts or designs, still issues warnings in bad faith or abuses its right to sue against justifiable users of the patent and their transaction counterparties, such action of the patentee will constitute a tort.

- Definition 2: "Activities of Obtaining Patent Right in Bad Faith"

The term of "Activities of Obtaining Patent Right in Bad Faith" can be found in the "Guidelines for Patent Infringement Determination" issued by the Beijing High Court in April 2017, which refers to activities of intentionally filing and obtained a patent right for an innovation which should not be granted a patent, and may be used as a counter claim by a defendant against a patent infringement lawsuit initiated by a patentee.

The term appears to be similar to the "Abnormal Patent Application Activities" as defined in the above-described administrative rules issued by the CNIPA, but with the following differences:

(1) Granting is required for the activity of filing a patent application to constitute "Activities of Obtaining Patent Right in Bad Faith", while granting is not required for the activity to constitute "Abnormal Patent Application Activities"; and

(2) "Activities of Obtaining Patent Right in Bad Faith" has a much narrower / specific definitions for the activities to be regulated, as compared with the "Abnormal Patent Application Activities", which will be discussed in the following sections.

According to the above Guidelines, if "Abnormal Patent Application Activities" is confirmed by the court, the court may reject the plaintiff's claim.

On April 22, 2021, Beijing High Court issued "Guide on Rules for Providing Evidence in Intellectual Property Civil Cases", in which the "Activities of Obtaining Patent Right in Bad Faith" defined in the Guidelines for Patent Infringement Determination was suggested as evidence to be provided by defendants who would like to claim "IP Litigation in Bad Faith" against the assertion of patent infringement from a plaintiff.

Types of Abuse of Patent Right Based on BFPA

The types of "Abuse of Patent Right Based on BFPA" according to each of the above definition are further summarized in the following table:

1	**Activities of Obtaining Patent Right in Bad Faith** (As defined in Guidelines for Patent Infringement Determination issued by Beijing High Court on April 20, 2017)
	DEFINITION: Activities of intentionally filing and obtained a patent right for an innovation which should not be granted a patent. TYPES: (1) Applying for and obtaining a patent for **a technical solution in the technical standards** such as national standards and industry standards, which the patentee clearly knows prior to the filing date; (2) Applying for and obtaining a patent based on other's technical solution by the participant who clearly knows the said **technical solution when drafting and setting technical standards** such as national standards and industry standards; (3) Applying for and obtaining **a patent for a product** which, the applicant clearly knows, is **widely manufactured and used in a certain area**; (4) Using such means as **fabricating experimental data or technical effects** to make the patent in suit meet requirements for patentability under the Patent Law and obtaining a patent; and (5) Applying for and obtaining, in China, a patent for **a technical solution which is disclosed in patent application documents abroad**.
2	**IP litigation in bad faith based on BFPA** (According to Notice on the Opinions on Issues concerning Maximizing the Role of Intellectual Property Right Trials in Boosting the Great Development and Great Prosperity of Socialist Culture and Promoting the Independent and Coordinated Development of Economy issued by SPC on December 16, 2011)

	If a patentee knowing that its patent falls within the scope of prior arts or designs, still issues warnings in bad faith or abuses its right to sue against justifiable users of the patent and their transaction counterparties, such action of the patentee will constitute a tort.

2.2 Legislation and Regulations on BFPA in the EU

2.2.1 Legal Definition of BFPA in the EU

Similar to China, Bad Faith Patent Application (BFPA) is not formally defined in the legal text in the EU and several member states surveyed under this study, namely Germany, Italy, and France. Instead, according to our survey to European patent practitioners, BFPA in the EU is understood to be mainly embodied in filing an application for an invention without being entitled to the invention. A practical example could be an employee of a company filing a patent application for an invention, which the employee has been made aware of, but the patent does not belong to him/her.

Those provisions differ in their specific wording, but they all provide means for the rightful owner of the invention to take back ownership and control of their patent application and/or patent. European Patent Convention and the patent regulations in Germany, Italy and France stipulates remedies that a rightful owner can take once identifying their own inventions have been filed by a third party such as prosecuting the application in their own name, re-filing the patent, or patent assignment.

2.2.2 Legislations on BFPA in the EU

Bad Faith Patent Application is regulated e.g.,

- at European level by Art. 61 European Patent Convention (EPC),
- in Germany by Art. 8 German Patent Act (PatG),
- in Italy by Art. 118 Italian Industrial Property Code (CPI), and
- in France by Art. L. 611-8 of the French Intellectual Property Code (CPI).

Taking France as an example, there is no legislative definition of a bad faith patent application. The sole reference made to bad faith behaviour in the context of patent applications can be found in article L. 611-8 of the French Intellectual Property Code (CPI). This text provides that a legal action can be taken when a patent application was filed by someone who was not entitled to the patent, because they were not the inventor nor their successor. This notion of bad faith is not explicitly defined but it seems that this refers to situations such as when the applicant is not the rightful inventor, and the invention was stolen. Other than this, no reference is made to bad faith in terms of patent applications. Moreover, we can observe that no automatic sanctions are evoked in this article.

French law is more concerned with the interests of the true inventor rather than looking to punish the bad faith behaviour. In order to obtain any compensation, the rightful patent owner will have to form an infringement action against the bad faith applicant once the ownership claim is upheld.

To summarize, in the EU and the EU member countries as mentioned above, it is possible for the rightful owner of the patent and/or patent application to recover their rights to their IP from an unentitled applicant. This is however subject to various conditions so that it is advisable to act immediately as soon as the wrongful application/patent is identified.

2.3 Comparison between BFPAs in China and the EU

- Definitions and Regulated Activities as BFPA are Different

In general, BFPA has different definitions in China and the EU. BFPA in China is currently a regulated and unique problem under the patent system in China with no similar regulations in the EU.

BFPA in China

BFPA in China is primarily referred to as 'serious dishonest subjects who conduct abnormal patent application activities'. The types of subjects include patent agencies, patent agents and patent applicants (either individuals or entities) who violate the administrative rules, especially conducting activities as defined in the Draft Amendment to Order No. 75 issued by the CNIPA in May 2021.

The dishonest activities may comprise: a) submitting various patent applications that meet the BFPA criteria, b) acting as an agent for abnormal patent applications, and c) transferring patent application rights or patent rights meeting the BFPA criteria. A prerequisite for these dishonest activities is the subjective intent of filing not for innovation protection or not based on genuine invention-creation activities, but for seeking improper benefits or fabricating innovation performance or service performance.

According to its definition, BFPA in China is neither an issue purely of patent ownership, nor an issue purely of patentability, but an issue of patent application activities with dishonesty with the purpose for improper benefit instead of protecting genuine innovation.

BFPA in the EU

In comparison, the BFPA defined in the EU relates to filing an application for an invention without being entitled to the invention, which is generally an issue of patent ownership. In China, similar activities are regulated by the provisions of service inventions, trade secret misappropriation or ownership disputes.

- Definitions to Abuse of Patent Right based on BFPA are Different

In China, abuse of patent right based on BFPA, namely enforcing a patent obtained in bad faith, is regulated by judicial rules issued by courts. If "IP Litigation in Bad Faith" or "Obtaining patent right in bad faith" is established, the asserted patent will not be supported by court. It is worth noting that such abuse of patent right based on BFPA is regulated under Article 20.1 of the China Patent Law (Amendment 2020) and is different from abuse of patent right to eliminate or restrict competition as regulated under Article 20.2 of the China Patent Law (Amendment 2020).

In comparison, abuse of patent rights based on the EU's competition law is fundamentally different from the abuse of patent rights based on BFPA in China. The most fundamental EU rules on competition are found in the "Treaty on the Functioning of the European Union" (TFEU). Specifically, Article 101 of the TFEU prohibits anti-competitive agreements, and Article 102 prohibits the abuse of a dominant position.[8] Obviously, TEFU does not provide restrictions on the BFPA activities as defined in the administrative and judicial rules in China.

Article 20.2 of the Patent Law prescribes that "*Abuse of patent right to eliminate or restrict competition which constitutes a monopolistic act, shall be punished in accordance with the Anti-monopoly Law of the People's*

[8] The Intellectual Property and Antitrust Review: European Union, Thomas Vinje, 15 July 2021, https://thelawreviews.co.uk/title/the-intellectual-property-and-antitrust-review/european-union

Republic of China." Such type of "abuse of patent rights to eliminate or restrict competition which constitutes a monopolistic act" is more alike to the abuse of patent rights regulated by the EU competition law.

In 2007, Anti-Monopoly Law of the People's Republic of China was issued. Article 3 of the anti-monopoly law defines:

> *The term "monopolistic acts" as mentioned in this Law includes:*
>
> *1. Monopoly agreements reached between business operators;*
>
> *2. **Abuse of dominant market position by business operators**; and*
>
> *3. Concentration of business operators that may have the effect of eliminating or restricting competition.*

To name a few, such abuse of patent rights according to Article 20.2 of the Patent Law (Amendment 2020) involving abuse of dominance position may be further regulated by the following judicial regulations:

> 1) Decision of the Supreme People's Court on Amending the Provisions on the Causes of Civil Cases issued by the Supreme People's Court In 2011. In this decision, "disputes over liability for damages due to intellectual property lawsuits in bad faith" was added as one of the causes of action in civil cases. This reflected that the number of IP lawsuits filed in bad faith must have increased and reached a level that the relevant authorities had to pay attention to;
>
> 2) Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition[9] issued by the State Administration for Industry and Commerce In 2015;
>
> 3) Guide for Countering Monopolization in the Field of Intellectual Property Rights[10] issued by the Anti-Monopoly Committee of the State Council on January 4, 2019; and
>
> 4) Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition[11] issued by the SAMR on October 23, 2020.

We conclude that the conception of bad faith patent application in EU is very different from China and BFPA is a unique issue in China. The BFPA activity in China is more focused on dishonest patent application activities conducted by Chinese patent filers or patent agencies with the purpose for improper benefit instead of protecting genuine innovation, and abuse of patent rights based on BFPA refers to patent litigation concerning patents obtained through dishonest patent application activities.

Therefore, the focus of this report will firstly be centred around the administrative measures regulating BFPA in the context of patent prosecution as abnormal patent applications have largely disrupted normal order of China's overall patent system, and secondly also discuss the judicial measures regulating BFPA in the context of patent litigation in bad faith.

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[9] Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition, State Administration for Industry and Commerce, 2015, http://www.gov.cn/gongbao/content/2015/content_2878227.htm

[10] Guide of the Anti-Monopoly Committee of the State Council for Countering Monopolization in the Field of Intellectual Property Rights, January 4, 2019, http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321857.html

[11] Provisions of the State Administration for Industry and Commerce on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition, SAMR, October 23, 2020, http://gkml.samr.gov.cn/nsjg/fgs/202011/t20201103_322857.html

3. Situation and Impact of BFPA in China

In this Chapter, we collected official data issued by the CNIPA and other authorities to reveal the trends of bad faith patent applications. Official statistics on the number of cases involving BFPA appear to be rarely available. Although there are ballpark figures of bad faith patent applications released officially and occasionally, there is a lack of public information regarding the details of BFPAs in China; for example, how many bad faith patent applications are identified among Chinese patent applications filed per year.

3.1 Status of BFPA in China

3.1.1 Number of BFPA from Official Sources

CNIPA announced that they identified two batches of suspected abnormal patent applications at the end of 2018 and the beginning of 2019 respectively, of which 92% of the applications were withdrawn voluntarily, 7% were deemed withdrawn or rejected, and only 1% of them were approved for proceeding normal prosecution by the CNIPA under review procedures.

From the start of 2021, CNIPA strengthened its efforts to crack down on abnormal patent applications. At the end of February, and by March 17th, 2021, 60% of the notified abnormal patent applications were withdrawn by the applicants[12]. This reflects an improvement compared to the rate of withdrawal two years ago.

Deputy director of the CNIPA, Mr. HE Zhimin, disclosed that a total of 220,000 abnormal patent applications were confirmed in the past three years in May 2021[13]. It's the first time for the CNIPA to disclose the exact number of abnormal patent applications established. According to IPR Daily, a screen shot of a notice allegedly sent by the CNIPA to various agencies indicated that CNIPA will likely withdraw 400,000 patent applications that were deemed irregular[14].

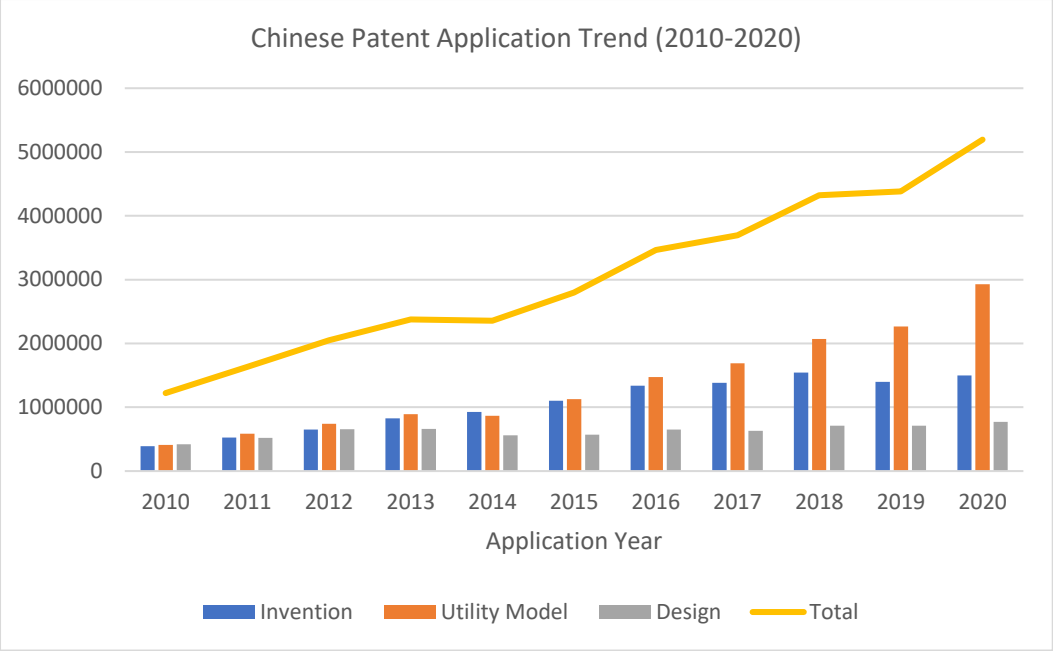
From the above numbers officially released, it appears that the administrative campaigns conducted by the CNIPA worked effectively and the recent rate of "normal" patent applications determined as BFPAs appears to be quite low (1%).

3.1.2 Other Indications to the Number of BFPA

Although official data of abnormal patent applications are difficult to obtain, the indications of bad faith patent applications filed in China may also be found, for example, by considering the Chinese patent application trend in the past decade and the actions taken by the SIPO/CNIPA during the period.

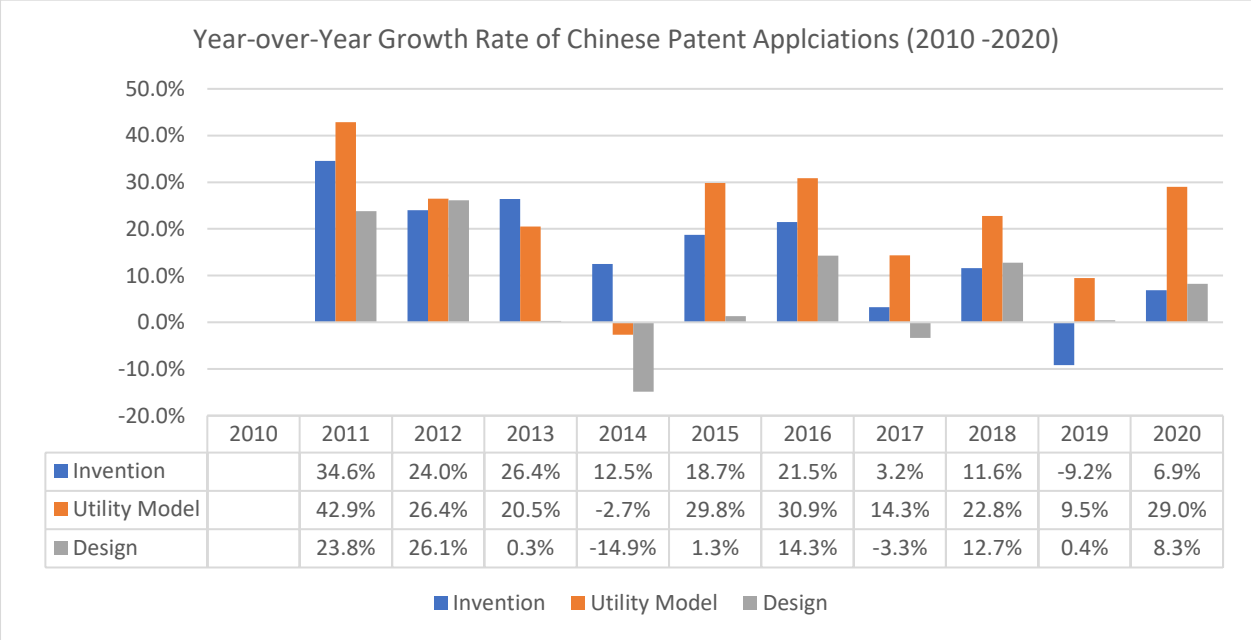
As shown in the following chart, Chinese patent applications have grown significantly from 1.2 million to 5.2 million per year from 2010 to 2020, with a compound annual growth rate of 15.6%.

[12] CNIPA news report, March 2021, https://www.cnipa.gov.cn/art/2021/3/19/art_53_157884.html
[13] Policy Briefing Meeting of State Council held in May 2021.
[14] IPR Daily, news report, Mach 2021, http://www.iprdaily.cn/news_27255.html



(Data Source: Statistical Annual Report of the CNIPA[15])

However, we've identified that the growth of patent applications slowed down significantly in the years of 2014, 2017, and 2019. By taking a closer look at the Year-over-Year (YoY) growth rate of Chinese patent applications, as shown in below chart, it can be seen that the growth rate of Chinese patent applications in the three years dropped drastically.



	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Invention		34.6%	24.0%	26.4%	12.5%	18.7%	21.5%	3.2%	11.6%	-9.2%	6.9%
Utility Model		42.9%	26.4%	20.5%	-2.7%	29.8%	30.9%	14.3%	22.8%	9.5%	29.0%
Design		23.8%	26.1%	0.3%	-14.9%	1.3%	14.3%	-3.3%	12.7%	0.4%	8.3%

(*Data Source: Statistical Annual Report of the CNIPA*)

[15] Data for 2010-2016 refer to numbers of patent applications accepted by the SIPO, data for 2017-2020 refer to number of patent applications.

Specifically, the YoY Growth Rate of invention applications fell from 26.4% in 2013 to 12.5% in 2014; from 21.5% in 2016 to 3.2% in 2017, from 11.6% in 2018 to -9.2% below zero in 2019, while the YoY Growth Rate of utility model applications from 20.5% in 2013 to -2.7% below zero in 2014, 14.3% in 2016 to -3.3% 30.9% in 2016 to 14.3% in 2017, 22.8% in 2018 to 9.5% in 2019, indicating a sharp shrink in invention and utility model applications in the three years respectively.

Though there may be various factors contributed to the drastic drop in patent application numbers in 2014, 2017, and 2019, we observe that these droppings are in coincidence with key actions made by the SIPO/CNIPA against BFPA, namely:

From 2013 to 2014		
Year-over-year growth rate	Invention applications	Utility model applications
	26.4% in 2013 12.5% in 2014	20.5% in 2013 -2.7% in 2014
Policies released		

Amendments to the Guidelines for Patent Examination in 2013

In 2013, the Guidelines for Patent Examination was amended on September 16, 2013, and came into effect in October 15[16], which added provisions about examination of BFPA for utility model (and design) applications, as follows:

> If a utility model (design) patent may involve an abnormal application, such as obvious plagiarism of prior art or repeated submission of patent applications with obviously substantially the same content, the examiner shall examine whether the utility model (design) patent application is obviously not novel based on the cited reference obtained through the search or the information obtained through other means.

In other words, according to the amended Guidelines for Patent Examination, patent examiners had the obligation to challenge suspected BFPAs for utility model and design, based on obvious lack of novelty. The BFPA was defined here according to the definition provided in Order No. 45 issued in 2007.

Though without concrete evidence, this amendment might well account for the dramatic drop of utility model and design application in 2014.

16 Decision (I) on Amendment to the Guidelines to Patent Examination, CNIPA, September 2013, https://www.cnipa.gov.cn/art/2016/8/11/art_526_145927.html?xxgkhide=1

From 2016 to 2017		
Year-over-year growth rate	Invention applications	Utility model applications
	21.5% in 2016 3.2% in 2017	30.9% in 2016 14.3% in 2017
Policies released		
Order No. 75 issued in 2017 Order No. 75 ("Several Provisions Regarding the Regulation of Patent Activities)" was released to expand the definitions of BFPAs and BFPA behaviours to six types.		

From 2018 to 2019		
Year-over-year growth rate	Invention applications	Utility model applications
	11.6% in 2018 -9.2% in 2019	22.8% in 2018 9.5% in 2019
Policies released		
Blue Sky Campaign initiated in 2019 In April 2019, the Blue Sky Campaign was initiated by the CNIPA against BFPA patent agency activities.		

Associated with the release of these regulation and policies to crack down bad faith patent applications and bad faith patent application activities, there was a sharp decrease in the number of invention and utility model patent applications in the subsequent year. If the above actions taken by the SIPO/CNIPA against BFPA and the drastic drop in YoY Growth Rate in that or the following year were correlated, it can be seen that there might be a shift in the type of patent of BFPAs over the years: in 2014, BFPAs might be mainly in the forms of utility model and design applications, while in 2019, BFPAs in the form of invention patent applications appeared to be cracked down severely.

3.2 Status of Abuse of Patent Right Based on BFPA in China

CNIPA released survey data in 2019 on the abuse of patent rights which reported that 3.8% of respondents had encountered patent right abuse, among which, up to 44.9% of them had encountered the abuse activities of "on the basis of utility model and design patents, arbitrary filing of lawsuits, rash use of pre-litigation stopping infringement and other temporary measures"[17].

This kind of bad faith litigation compared to other blatant malicious infringement activity, not only makes it easier for the legitimate rights and interests of IP rights holders to be damaged, but also seriously interferes with litigation order and wastes limited judicial resources.

Apart from the above official data from CNIPA, we have also searched cases involving Patent Litigation in Bad Faith from the CIELA IP litigation database and identified 47 court judgments of Patent Litigation in Bad Faith. Among these cases, 16 cases were adjudicated as bad faith patent claims. Relevant case information will be

[17] China Patent Survey Report 2019

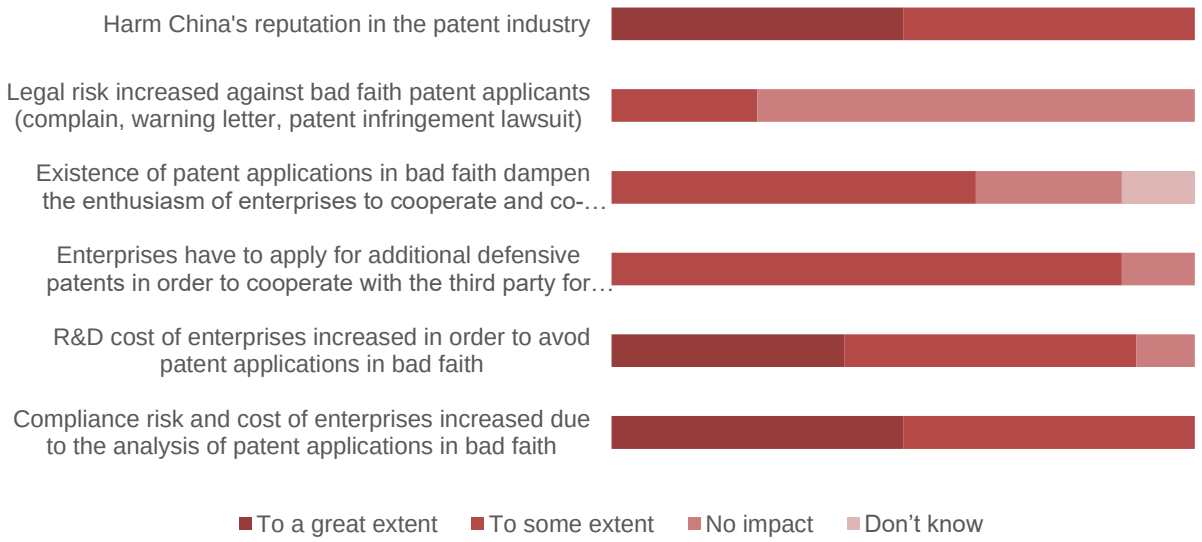
discussed in more detail in the following Chapter 5 in this Study, where both statistics and example cases will be presented as a demonstration for the effects of legal measures against Bad Faith Patent Applications.

3.3 Survey results on Negative Effects from BFPA

Most EU respondents expressed that BFPA primarily refers to ownership disputes and is not a concern in the EU. However, both EU and China stakeholders expressed that BFPA is a serious issue for their respective business operations in China.

Influence on normal business operation in China

According to our survey, results are shown in the below chart to reflect numerous concerns on the impact of BFPA to business operation in China and the patent system in China[18], including increased compliance risk and increased compliance costs to enterprises caused by the existence of BFPAs and analysis of suspected BFPAs, increased R&D costs of enterprises to design around malicious patent applications, increased defensive patent filings to deal with the situations above, and increased legal costs for enterprises to deal with malicious patent applicants (complaints, warning letters, patent infringement litigation, etc.).



Besides those identified in our survey, we've summarized the following potential impacts of BFPAs to business operations in China by incorporating the feedback from inhouse counsels from China, Germany, France, Sweden and UK and IP attachés from France and Italy respectively.

Weaken the function of the patent system

Along with the emerging of BFPA, the image of Chinese IP system was seriously impacted. A lot of patent applications were abandoned before examination or just after granting upon receipt of patent subsidy from the government, or many of them were abandoned in the second year upon grant without paying the annuity. In addition, unqualified individual and companies acted as patent agencies to incite inventors to fabricate patent applications not for the purpose of protecting innovations.

[18] Annex I of this report.

A patent counsel from a Chinese company in our interview directly pointed out that one purpose for individuals to file multiple patents is to obtain government subsidies or to apply for the qualification of a high-tech company to enjoy tax reduction, which is a typical BFPA situation in China. The patent subsidies likely encourage people to seek patents to receive the subsidy rather than to protect an innovation, which will hurt the passion of real inventors and weaken the function of the patent system to protect real innovations in China.

Misleading Consumers

A certain amount of BFPAs have been known to be filed based on copying products commercially available in the European market, and Chinese BFPA patent holders promoting and labelling their products as "patented products" misleading, Chinese consumers importing products from Europe. Most of these BFPAs are likely to be filed in the form of utility model and design patents by taking advantage of the patent regulations without substantive examination.

Potential Risk of Being Sued

A patent is enforceable directly following its grant. The existence of a huge amount of BFPAs causes big concerns about normal business operations in China. It's believed that the utility model patent is a major type of BFPA as they are granted without being subject to substantive examination. 2.9 million utility model patents were filed in China in 2020, and utility model patents accounted for approximately 65% of patent grants in China in the same year.[19]

BFPA constitute legal barriers to any others once granted, as a patent authorizes the patent holder a legitimate monopoly right in the market. The existence of a huge amount of BFPAs causes big concerns to normal business operations in China.

Difficulty in Patent Commercialization

The existence of BFPAs may result in the public's view on the low commercial value of China's patent portfolio, relative to other countries. It may increase the difficulty for a Chinese company to transfer its Chinese patents out as the existence of BFPA makes it less possible to use patents as an indicator to evaluate innovation capacity of a Chinese company. Cross-border comparisons based on the raw number of patent applications risk overstating innovation activity in China.

In general, stakeholders from both China and EU expressed the concerns that BFPA is most detrimental to the reputation of China's patent industry, and hence confidence in the patent system and value of Chinese patents.

[19] CNIPA, 2020.12 Patent Statistical Report, https://www.cnipa.gov.cn/module/download/down.jsp?i_ID=156474&colID=246

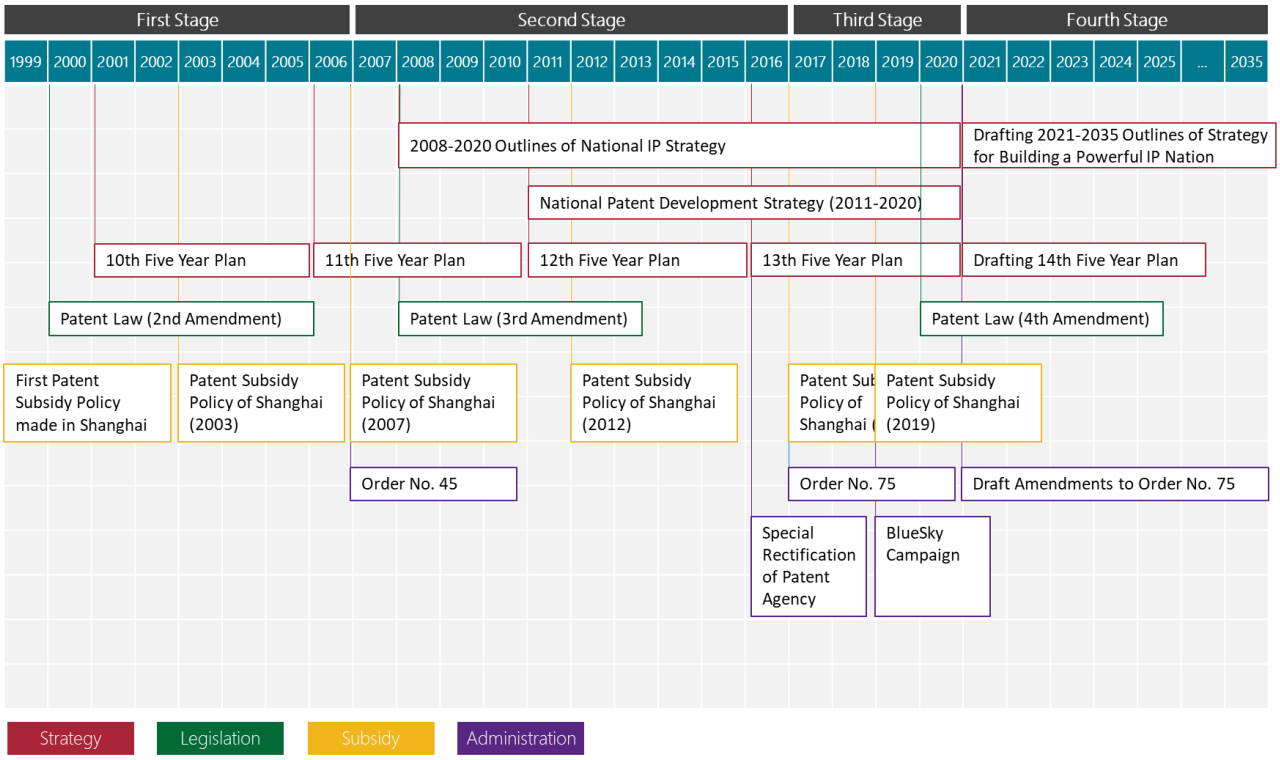
4. Motivations Behind BFPA

From the previous analysis, the issue of BFPA seems to grow along with patent subsidy policies and as a result of regulations with limited restriction on patent quality. It is expected that BFPA phenomenon might be mitigated with the cancellation of patent subsidy policies.

In this Chapter, we will first analyse the policy background for BFPA in China, which comprises four stages over the past 20 years. In Section 4.2, the primary motivation for patentees who conduct BFPA behaviour will then be identified and further incentives that also fuelled the BFPA will be discussed in Section 4.3.

4.1 Policy Background

BFPA will be easier to understand when putting in the context of the evolving national IP strategies and IP polices of China. We've summarized in the table below the key milestones of China's national IP strategies, patent subsidy policies, patent legislation, administrative regulations and actions, and judicial norms from 1999 to the present are shown. Here, the year 1999 is taken as the starting year for this Study as it was the year when the first patent subsidy policy was introduced in China.



From the perspective of BFPA, the development of China's IP system can be divided into four stages in the time span, as described in the following.

4.2.1 First stage (1999 - 2006)

This is a stage where the primary objective for the SIPO is to encourage patent filings and to increase the amount of patent applications in China. The national strategic IP KPI was set by number of patents with incentives from various patent subsidy policies, and therefore BFPA was not recognized as an issue and thus not being regulated at all.

IP Strategy's KPIs were set based on the number of patents

China government started in 1999 to involve patent applications as an essential element to reward subsidies, assess high-tech enterprise qualifications, and issue professional title, etc. Before "Order No. 45" was issued, the number of patents was an important index to measure the innovation capability of an entity or individual, and also for local governments. However, while pursuing the number of patents, the quality of patents was paid less attention.

China central government promoted in 2001 in the 10th Five-Year Plan for Patent Work in China[20] that the number of patent filings had grown strongly **by 81%** during the previous Five-Year Plan period from 1996 to 2000 with an average annual growth rate of 15.7%. The government report further specified objectives of 14% average annual growth rate of patent applications. The similar objectives repeated in the central government's reports for the 11th Five-Year Plan for Patent Work (2006)[21] and promoted that the numbers of utility model and design patents / applications had achieved top 1 in the world.

Patent subsidy has appeared, providing economic incentive for the birth of BFPA

China central government provided patent subsidy to eligible enterprises and individuals with the original purpose of encouraging enterprises or individuals to innovate. It's no doubt that the patent subsidy policies played an important role in promoting the increase of the public's awareness of patents and the increase in the number of patent applications at the initial stage.

As an example, the patent subsidy polices in Shanghai updated in 2003[22] and 2005[23] provided 100% refund for application fees, examination fees, grant fees, and patent agency fees for the three types of patents including invention, utility model and design patents. Notably, patent subsidy was not rewarded on the condition of patent granting and may be rewarded for filing patent applications.

Due to lack of requirement and criteria to measure the quality of patent applications when providing subsidies, BFPA activities has appeared, but may not receive sufficient attention and recognition or may be intentionally or unintentionally ignored in the background for local governments to pursue KPI purely when implementing the policies.

Patent subsidies were provided at regional level of governments and mainly in the form of funding for attorney fees and official fees from filing a patent until grant. After continuous adjustments and improvements, patent application subsidies have been gradually formed in 31 provinces, and a multi-level funding structure consisting of province, city, district or county, and high-tech zone or even town.

It was widely felt that various measures taken by the Chinese government at different levels to set patent application numbers as KPI's and provide economic incentives to encourage inventors and applicants to file more patent applications, on one hand did encourage innovations in China, and on the other hand, provided monetary incentive to the emerging of BFPA, especially for those low-quality BFPA filed for the purpose of receiving government subsidies.

During the first stage, monetary incentive policy to patent filings were made and implemented, and BFPA not for the purpose of protecting innovations appeared. China and EU stakeholders commented that they believe

[20] 10th Five-Year Plan for Patent Work in China, https://www.cnipa.gov.cn/art/2001/10/31/art_65_11333.html
[21] 11th Five-Year Plan for Patent Work in China, https://www.cnipa.gov.cn/art/2006/7/19/art_65_11345.html
[22] Measures for Subsidizing Patent Fees in Shanghai (2003), http://old.iprtop.com/18shlawandrule/18s1.html
[23] Measures for Subsidizing Patent Fees in Shanghai (2005), http://sipa.sh.gov.cn/xxgkml/20191130/0005-23366.html

a huge amount of utility model and design patents were filed ever since then for seeking government subsidies under the background of the government incentive policies.

4.2.2 Second stage (2007 - 2016)

In the second stage, China's national IP Strategy started to emphasize invention patents over utility models and design patents, as the former are typically deemed to represent better innovations. Apart from the national IP Strategy's KPI change, during this stage the Order No. 45 was issued in 2007 which was intended to regulate BFPA for the first time. The Order No.45 remained in force until early 2017 when it was replaced by the Order No. 75.

IP Strategy's KPIs switched from number of patents to number of invention patents

The 12th Five-Year Plan for Patent Work[24], published in 2011, specified the target for patent filings including: by 2015, the number of invention patents granted annually reaching 2nd in the world, increasing the number of invention patents to an average of 3.3 invention patents per 10,000 population, and doubling the number of foreign patent applications owned by Chinese applicants.

According to the 13th Five-Year Plan published in 2017[25], under the patent subsidy incentive mechanism, the number of invention patents per 10,000 population of 2015 reached 6.3, triple the same index achieved in 2010 presented in the 11th Five-Year Plan.

The Key Points for Patent Work in 2012[26] issued by the SIPO mentioned using the number of invention patents per 10,000 population as a KPI and standardizing the mechanism for monitoring and regulating BFPA. Additionally making guidelines for regulating patent subsidy work to direct patent subsidies based on patent quality.

Patent subsidy and BFPA regulations coexist, but the conditions for granting patent subsidy became stricter.

Patent subsidy policies continued in this stage. However, SIPO had begun to realize that patent subsidies had been breeding BFPA for profit-making purposes, thus implementing more restrict conditions for patent subsidies.

SIPO issued the "Notice on Issuing the "Guidance on Patent Application Funding" in 2008, requiring local Intellectual Property Offices at all levels to strictly examine and approve the application to grant of patent subsidies[27]. For BFPA cases identified, refunding of patent subsidies was required and further patent subsidies will be stopped.

It's reflected in the change of many local governments' patent subsidy policies. As an example, the patent subsidy policy in Shanghai in 2007[28] maintained the 100% refund for Chinese invention patent, utility model, and design patent granted. However, in 2012, the updated patent subsidy policy in Shanghai[29] reduced the

[24] 12th Five-Year Plan for Patent Work, https://www.cnipa.gov.cn/art/2013/3/15/art_543_146429.html?xxgkhide=1
[25] 13th Five-Year Plan for National IP Protection and Utilization, https://www.cnipa.gov.cn/art/2017/1/8/art_65_11391.html
[26] SIPO, Key Points for Patent Work in 2012, https://www.cnipa.gov.cn/art/2012/3/12/art_544_146444.html?xxgkhide=1
[27] SIPO, January 2008, https://www.cnipa.gov.cn/art/2008/1/22/art_564_146029.html?xxgkhide=1
[28] Measures for Subsidizing Patent Fees in Shanghai (2007) http://sipa.sh.gov.cn/xxgkml/20191130/0005-23492.html
[29] Measures for Subsidizing Patent in Shanghai (2012), http://sipa.sh.gov.cn/xxgkml/20191130/0005-23681.html

subsidies for application fees and annual fees for Chinese invention granted to 80% refund and limited the refund for patent agency fees from 100% to not exceeding RMB 2,000 per patent. Meanwhile subsidies for the application fees and grant fees for utility model were reduced from 100% to 50% refund, and subsidies for the application fees and grant fees for design patent were reduced from 100% to 60% refund.

BFPAs had evolved in a different form to be adaptable to the change of the policies. A lot of patent applications were abandoned before examination or just after granting, as long as the applicant received the subsidy from the government. Some patents were maintained valid for a very short period of time after granting without paying the annuity. The coexistence of patent subsidy and BFPA regulations seems to have tendency to continue encouraging more patent filings by the Chinese government.

4.2.3 Third Stage (2017 - 2020)

The third stage continued China's efforts in incentivizing high-quality patents, which is especially marked by that the number of PCT applications was for the first time included in the KPIs in China's IP Strategy. In this stage BFPA was further regulated by updated rules as prescribed by Order No. 75, which was issued in 2017 and is being further updated in 2021.

IP Strategy's KPIs added number of PCT applications in addition to number of invention patents

According to the 13th Five-Year Plan for National IP Protection and Utilization[30] published on January 8, 2017, the target for patent included: the number of invention patents per 10,000 population reaching 12 by 2020 from 6.3 in 2015 (1.9 times), and the number of PCT applications per 10,000 population reaching 6 by 2020 from 3 in 2015 (2 times).

Patent subsidies were further reduced

The below table shows Shanghai's policy change from 2017 to 2018. Since January 1, 2019, the new subsidy policy cancels the funding for utility model and design patents, and reduces the funding for domestic invention patents, while in the meantime, increases supports for high-quality patents and oversea patent applications.

[30] 13th Five-Year Plan for National IP Protection and Utilization, https://www.cnipa.gov.cn/art/2017/1/8/art_65_11391.html

Example: Shanghai Patent Subsidy 2017 vs 2018		
Domestic invention patents		
Subsidized Items	***Subsidized amount & Conditions (2017)[31]***	***Subsidized amount & Conditions (2018)[32]***
Application fee	Subsidized at 80% of the actual paid amount after the patent application is accepted	No
Examination and grant fees	Subsidized according to the actual amount paid after grant	One-time subsidy shall not exceed RMB 2,500 Additional subsidy for high-quality patents (e.g., winning patent awards, stable patent rights or patents put into actual operation)
Annual fees for the 2nd and 3rd years after grant	Subsidized at 80% of the actual amount paid	One-time subsidy for annual fee shall not exceed RMB 1,500
Patent agency fees	Subsidized at a rate not exceeding RMB 2,000 per application after grant	No
Domestic utility model or design patents		
Application fee	Utility models are subsidized at 50% of the actual payment amount; Designs are subsidized at 60% of the actual payment amount	No
Grant fee	Same as above	No
Foreign Invention Patents		
Official fees; Service fees paid to domestic patent agencies	Each invention patent subsidy shall not exceed 5 countries, and the amount of funding for each country does not exceed RMB 30,000; Total subsidies for one enterprise shall not exceed 1 million RMB.	Each invention patent subsidy shall not exceed 5 countries, and the amount of funding for each country does not exceed RMB 50,000 through PCT or not exceed RMB 40,000 through the Paris Convention; Total subsidies for one enterprise shall not exceed 10 million RMB.

[31] Measures for Subsidizing Patent in Shanghai (2017), http://sipa.sh.gov.cn/zcfg/20191130/0005-24809.html
[32] Measures for Subsidizing Patent in Shanghai (2018), http://sipa.sh.gov.cn/xxgkml/20191130/0005-23901.html

Foreign Design Patents		
Official fees; Service fees paid to domestic patent agencies	Each design subsidy shall not exceed 3 countries, and the amount of funding for each country does not exceed RMB 3,000	No

In 2018, the CNIPA issued the "Notice on Conducting Special Supervision on Policies Concerning Patent Applications". It set out the principle that general patent subsidy polices should be adjusted and improved in accordance with the requirements of "prior grant, partial subsidies", which requires that the scope of patent subsidies should be limited to granted patents and subsidies shall only cover a partial portion of the total patent application fees. The scope of patent subsidy was further restricted.

The Beijing government announced the patent incentive measures in December 2019 that an applicant is now entitled to as much as RMB 20 million (USD 3 million) in foreign patent subsidies per year (up from USD 150,000, which is higher than the RMB 2 million (USD 300,000) cap for domestic patents[33]. Though providing incentive to patent granting rather than patent filing, such subsidies may continue to encourage the public to seek the number of granted patents to receive the subsidy rather than to protect an innovation. For example, applicants may be motivated to strategically filing more patents, including the practice of splitting a single patent application into multiple applications in an effort to reach specific innovation metrics. In other words, patent subsidy policies to provide incentive to patent granting may still become the target of BFPA activities to receive the monetary reward, as long as the incentive policies are based on quantities of patents.

Taking into account both the changes in patent subsidy policy and the national KPI for patent numbers, it can be seen that though the monetary incentive to patent applications had been curbed, the KPI for the growth in patent numbers was still very high (nearly to be doubled in five years). Thus, in this stage, the issue of BFPA appears to have become more serious, which consequently resulted in the "Special Rectification of Patent Agencies Action" in 2016, the issuance of Order No. 75 in 2017 to update the definition of BFPA, and the Blue Sky Campaign started in 2019 to further crack down BFPAs.

4.2.4 Fourth Stage (2021 -)

The regulation against BFPA reached a peak period during the fourth stage, where the Announcement No. 411 issued in March 2021 imposed new rules on BFPA and the drafted amendments to the Order No. 75 was published in May 2021. In this stage, patent subsidies will gradually be completely cancelled in order to achieve a reformation from quantity to quality.

IP Strategy's KPIs will be based on the number of high-value invention patents

Outlines of Strategy for Building a Powerful IP Nation (2021-2035) is being drafted to provide top-level IP strategy for the next 15 years for China's patent work. According to a report on April 26, 2021, as introduced by Mr. SHEN Changyu, the commissioner of the CNIPA, 2021 is the beginning year of the 14th Five-Year Plan for national Patent Work, it is planned to convert China from a big country importing intellectual properties into a big country creating intellectual properties, and the intellectual property work world should transform from pursuing the quantities of IPs to quality. [34]

[33] http://www.beijing.gov.cn/zhengce/zhengcefagui/201912/t20191210_1029118.html
[34] News report in April 2021, http://www.xinhuanet.com/fortune/2021-04/26/c_1127375925.htm

The CNIPA announced in June of this year that the object for patent protection is changed from the number of invention patents owned per 10,000 population to be the number of **invention patents of high value** owned per 10,000 population[35].

On April 26, 2021, Routine News Conference of the CNIPA for the Second Quarter 2021[36], the definition of "high-value invention patent" was clarified by Mr. GE Shu, director of the Strategic Planning Department of the CNIPA as follows:

> *High-Value Invention Patent mainly refers to valid invention patents in the key industries of the nation, having higher quality and higher value, which mainly includes five types:*
>
> *1) invention patents in strategic emerging industries;*
>
> *2) invention patents with at least a family member patent granted overseas;*
>
> *3) invention patents maintained valid over 10 years;*
>
> *4) invention patents with higher amount pledged for financing; and*
>
> *5) invention patents won national science or technology awards, or China Patent Awards.*

BFPAs are clearly against the top-level national IP strategy of China and the trend of transforming from quantity to quality growth of patents.

CNIPA completely cancels subsidy for the patent application stage

In January 2021, the CNIPA issued "Notice regarding further strict regulation of patent applications", stating that all levels of subsidies for patent application stages should be cancelled before the end of June 2021. It also pointed out that patent annual fees and patent agency service fees shall not be subsidized. All types of financial supports for patent grant will be gradually reduced and cancelled before 2025. If innovation entities want to obtain such financial supports, they need to pay more attention to building innovation capabilities, strengthening the patent portfolio and cultivating high-value patents.

CNIPA will completely cancel all levels of subsidies for patent application stages by the end of June 2021. All local IP Authorities are also not allowed to provide financial support for patent applications in any form such as subsidies, rewards, and subsidies.

The scope of local existing funding should be limited to granted invention patents (including invention patents granted overseas through the PCT and other channels), and the manner of providing subsidy method should be in the form of post-grant subsidies.

The total amount of funding at all levels and types of funding received by the funding target shall not exceed 50% of the official fees paid for obtaining patent rights and shall not fund the patent annual fee and patent agency service fees.

For those who falsify and arbitrage patent funding, the allocated funds shall be recovered within a time limit.

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[35] CNIPA, June 16, 2021, Policy Interpretations of the Notice by CNIPA On Deepening The Reform Of "Decentralization, Administration and Service" in the Field of Intellectual Property to Optimize the Innovation Environment and Business Environment, https://www.cnipa.gov.cn/art/2021/6/16/art_66_160083.html

[36] CNIPA, second quarter meeting, April 2021, https://www.cnipa.gov.cn/col/col2599/index.html

During the "14th Five-Year Plan" period, all local IP Authorities will gradually reduce various types of financial assistance for patent grant and cancel them all by 2025. All local IP Authorities should focus on optimizing the use and management of patent funding-related financial funds, strengthen the use of patent protection, and focus on increasing support for subsequent transformation and use, administrative protection, and public services.

On March 3, 2021, the CNIPA issued the Yearly Work Guide for Promoting the High-Quality Development of Intellectual properties (2021)[37], which re-iterated severely cracking down abnormal patent application activities not for the purpose of protecting innovations, especially activities of acting as agent for abnormal patent applications.

As compared with previous stages, the restrictions on BFPA reached a peak in 2021, with various measure taken, including legislative measure to introduce “the principle of good faith” into the Patent Law (Amendment 2020); administrative measures to define more detailed criteria for determining BFPA in updated rules; policy measures to completely cancel patent subsidy at application stage, and planned to cancel post-grant subsidy by 2025, so as to remove the economic incentive for BFPA.

Since 1999, regional governments in China have been tasked with providing incentives for entities filing IP rights. A series of subsidy policies and measures introduced in this process have to a certain extent reduced the economic burden of various innovation entities for patent application and maintenance and improved the possibility and enthusiasm of small and medium-sized enterprises to use the patent system to protect technology. The emerging and development of BFPA in China was closely correlated to the top-level national IP strategy, and the KPIs specified in shorter term strategy as five-year plans, as summarized above. The motivations behind BFPAs will be discussed in the following sections.

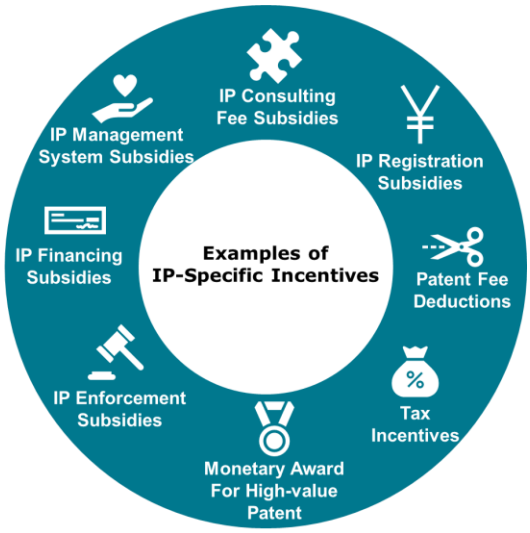
4.2 Motivations behind BFPA

Bad faith patent application in the current regulations can take many different forms. Here we look at how to tackle an allegation of bad faith and the factors that case law suggests are more (and less) likely to lead to a bad faith finding.

As per our analysis above, the central and local governments policies including patent subsidy have greatly stimulated the increase in the number of patent applications and granted patents. In addition to obtaining patent subsidies, there are various types of incentives, and the analysis in this report will mainly focus on a few larger scale innovation policies to analyse the policy development trajectory, the future trends, and their suspected influence on bad faith patent filings in China.

[37] Yearly Work Guide for Promoting the High-Quality Development of Intellectual properties (2021), the CNIPA, March 3, 2021 https://www.cnipa.gov.cn/art/2021/3/5/art_551_157228.html?xxgkhide=1

Examples of IP-specific incentives:



In comparison, in the EU, there are also various regional and national subsidies schemes but a bit different from the China policies. For example, in France, there is no specific subsidy provided for filing patents. However, the French intellectual property office grants up to 50% discount on the main procedural fees (filing, search report) and on the first seven years of patent maintenance for small and medium-sized companies with fewer than 1000 employees. Many other aids are provided to small and medium-sized companies and entrepreneurs by the national public investment bank. They can reach up to 5 million euros, depending on the expenses generated by the invention at issue. These aids can also constitute zero interest credits. There are no legal provisions stating the consequences when the patent is proven to be a bad faith patent after the patent applicant receives the subsidies.

However, it was believed that there are insufficient quality safeguards in China's IP-conditioned incentives, and patent subsidies and IP-related tax policies are especially incentivized lower quality patents in China[38]. We've summarized the motivations behind the BFPAs in the following scenarios:

1. Patent applications for the purpose of patent subsidy

In the development of the patent industry, the scope and amount of patent subsidies used to be very considerable. It's widely believed that generalized patent subsidy approach regardless of patent type has induced a large number of junk patents to obtain government funds for profit, and patent subsidy policies may cause patent "bubbles" and many companies and individuals apply for patents in order to obtain subsidies. They used the least cost to apply for patents and defrauded subsidies, so that the cost of patent applications was lower than the amount of subsidies, and the applicants who can earn a fortune depend on a high volume of patent applications.

The gratuitous funding provided by cash subsidies and other forms of policy support made patent applications profitable, and the subsidies and support were mostly based on the number of applications or the number of patent grants. As a result, applicants who abnormally apply patents could "obtain as many patent applications or granted patents as possible in the shortest possible time", with less time and effort cost, which becomes the basic tactic for concocting abnormal patent applications.

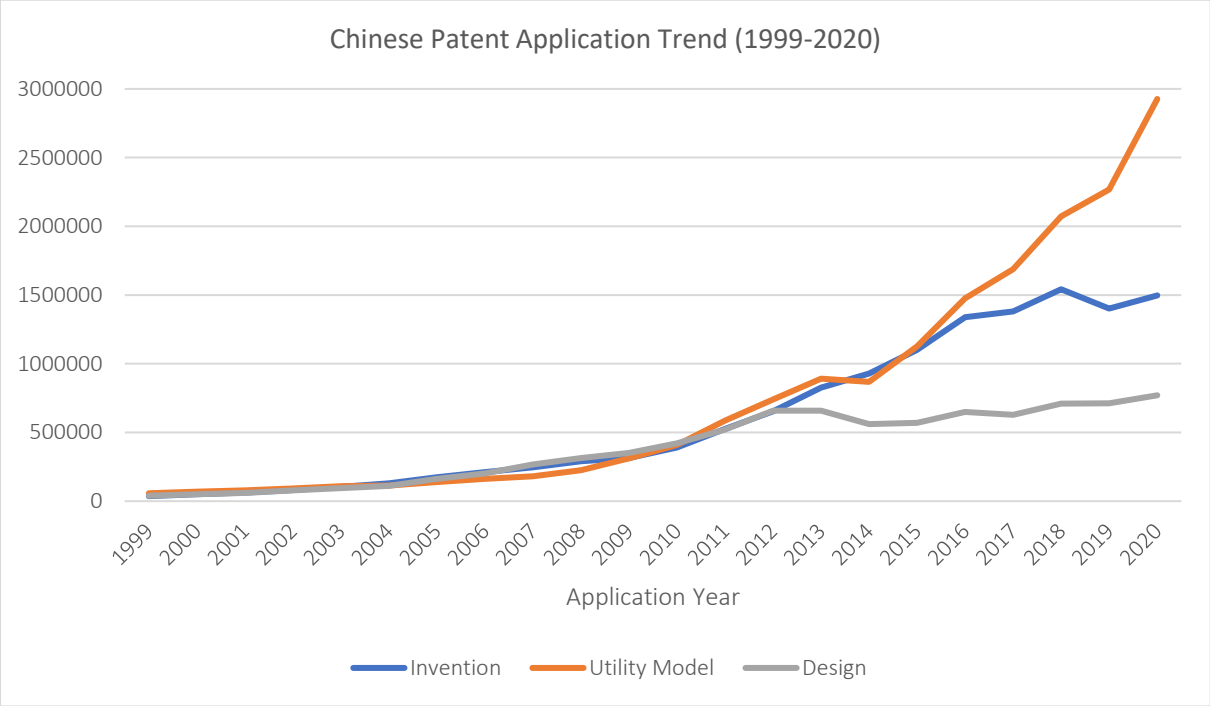
[38] Dan Prud'homme, Designing IP-conditioned state incentives: lessons from the EU and China, December 9, 2016

At the national level, there are mainly two patent funding policies, i.e., the "Patent Fee Mitigation Measures"[39] and the "Interim Measures for the Administration of Special Funds for Foreign Patent Applications"[40]. The former one provides appropriate fee reductions and exemptions of patent application fees, examination fees and patent maintenance fees of the three types of patents to entities and individuals; while the latter one is tailored for domestic small and medium-sized enterprises, public institutions and scientific research institutions who file patent applications abroad.

For this reason, these companies are desperate to lower the agency fees of patent agencies and “patch together” the number of patents, as listed in types (1) ~ (7) as above-mentioned in Announcement No. 411.

As a result, these companies not only created a lot of "junk patents", but also ruined the market environment, causing patent agencies to fall into a situation of vicious competition by lowering price.

We’ve analysed the patent filing trend associated with the change of government funding policies to patent application and it sounds that the funding policies have much more influence on utility model and design patents, which echo and at a certain level prove the comments we’ve received from EU and China stakeholders that BFPAs are mainly filed in the form of the two types of patents.



(Data Source: Statistical Annual Report of the CNIPA[41])

The chart shows that before 2012, all three types of Chinese patents were similarly boosted by the patent subsidy policies, when 100% refund were applied to them, as illustrated by the patent subsidy policies in Shanghai before 2012 as described in Sections 4.2.1 and 4.2.2. Since 2012, patent subsidy policies were restricted for utility model and design patents, also as illustrated by the patent subsidy policy in Shanghai

[39] SIPO Order 30, 2006, "Patent Fee Mitigation Measures”, http://www.gov.cn/flfg/2006-11/06/content_433510.htm
[40] SIPO, 2012, "Interim Measures for the Administration of Special Funds for Foreign Patent Applications”,http://www.gov.cn/zwgk/2012-05/31/content_2149501.htm
[41] Data for 1999-2016 refer to numbers of patent applications accepted by the SIPO, data for 2017-2020 refer to number of patent applications.

(2012), as described in Section 4.2.3. In 2013, the Guidelines for Patent Examination was revised to require examiners to examine BFPA cases for utility model and design patent applications, as described in Section 3.1.2. It appears that the BFPA cases of design patents might be effectively controlled since 2013, as shown from the number of design applications from the above chart.

However, the strong filing trend of utility model as shown by the above chart appears not to be impacted by the regulations and measures against BFPA, except in the years of 2014, 2017, and 2019. Therefore, it might be safe to infer that utility model might be the major type of BFPAs since 2011. This is understandable as under China's patent system, utility models are not substantively examined and could be exploited as an instrument for applicants in bad faith to gain patent subsidy from the government at extremely low cost, in short time, and without much risk of being rejected.

2. Patent applications for the purpose of high-tech enterprise qualification

A high-tech enterprise is a special product with Chinese characteristics. If an enterprise obtains the qualifications of a high-tech enterprise, it can obtain preferential policies in terms of corporate taxation, corporate loans, and corporate listing. Number of patent filings is an important index for high-tech enterprises.

In order to encourage and support enterprises' R&D investments, China provides relevant tax incentives for enterprises. One of the most prevalent policies is preferential tax deduction of R&D expenses. Enterprises other than manufacturing companies enjoy 75% deduction of R&D expenses for tax calculation, and manufacturing companies enjoy 100% deduction of R&D expenses. Specifically, if the R&D expenses actually incurred by an enterprise in conducting R&D activities have not formed intangible assets and are not included in the current profit and loss, 75% of the actual amount is deducted before tax; while if intangible assets are formed out of these R&D activities, they shall be amortized before tax at 175% of the cost of intangible assets during the above-mentioned period. The ratios of tax deduction of R&D expenses for manufacturing enterprises are larger, respectively 100% without intangible assets formed and 200% with intangible assets formed.

Another prominent tax incentive is a preferential corporate income tax rate of 15% for high and new technology enterprises (short for "HNTE"), as opposed to the 25% statutory CIT rate. Companies need to satisfy regulatory requirements on core technology, R&D expenses and innovation capability, which is often represented by invention patents or utility models or design patents.

Therefore, in order to obtain high-tech qualifications, some companies might apply for some abnormal patent applications as listed in types (1) ~ (7) as above-mentioned in Announcement No. 411.

Therefore, it is indeed very necessary for the regulatory measures to manage this kind of phenomenon.

3. Patent applications for the purpose of evaluation of professional titles, etc.

In the evaluation process of many personal titles and professional qualifications, whether an individual possesses patent(s) is a necessary condition or a bonus item for the evaluation, which also leads to individuals having to apply for patent applications, as listed in types (8) as above-mentioned in Announcement No. 411, in order to obtain the professional title and professional qualification.

4. Patent agency without professional ethics

This refers to agencies act that violate the "Patent Agency Regulations". Some of the agencies do not care about the quality of patents they filed, but only pursue the number of patent applications and corresponding benefit.

Because of this, some patent attorneys (even people who have no patent attorney qualifications at all) will also instigate and promote enterprises and individuals to apply "abnormal applications", as listed in types (IX) as above-mentioned in Announcement No. 411.

To this end, the determination and efforts of the CNIPA to deal with abnormal patent applications will be beneficial and gratifying to the development of the patent industry in China.

4.3 BFPA activities involve participation and interest of multiple parties

For Patent agencies

Some patent agencies were active in assisting clients to apply for abnormal patent applications so as to increase their revenue of patent agency fees. For example, patent agents might help conduct the so-called "patent mining" for customers, where they fabricate a number of “technical improvements” on behalf of customers. There were also cases found that patent agencies selling the same fabricated patent application or similar fabricated applications to multiple customers.

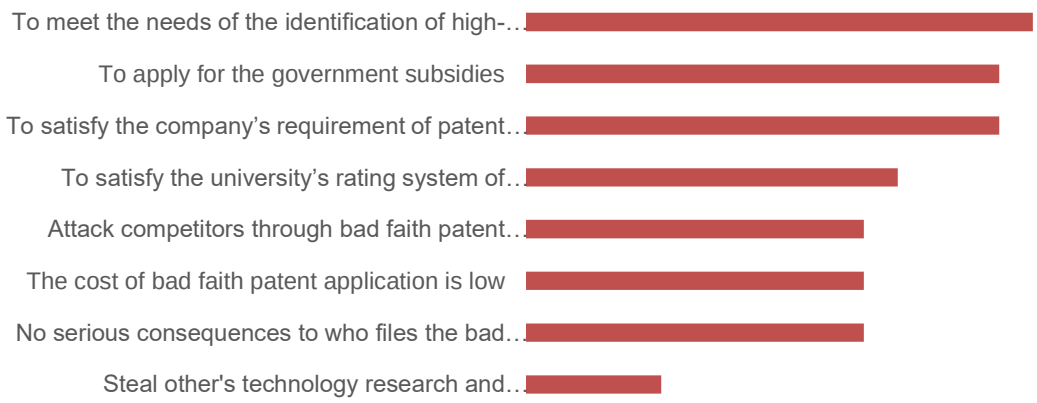
For Patent Applicants

The motivations behind BFPA are diverse and are not limited to patent subsidies. Specifically, the main motivations of applicants who obtain patents through improper conduct include:

- To meet the number of patent requirement required by “high and new tech enterprises”
- Government subsidies for patent applications
- Internal requirements for the number of patent applications and performance appraisal in enterprises
- Requirements for the rating of professors by universities
- To steal others' technology research and development results
- To fight against competitors through malicious patent applications
- Low cost of malicious patent application
- Limited negative consequences will be caused to the applicants by malicious patent applications

Survey results

A survey was conducted in this study regarding the motivations for BFPA, and as shown in the below chart, the top factor is to meet the number of patent requirements required by “high and new tech enterprises”, which provides tax benefits for enterprises and thus creating strong motivation for companies to apply patent applications.



It can be seen that there are more motivations behind BFPA other than receiving patent subsidy from the government. The measures against BFPA may not consider only those patent applications receiving patent subsidies.

In comparison, according to the feedback from IP stakeholders in Europe, lack of quantitative targets from the government for patent filings and high cost of filing patent applications in Europe may de-motivate patent applicants in the EU to file BFPAs as found in China, as illustrated by the following comments from IP stakeholders and professionals:

> *"Also, a reason why France does not have a common practice of BFPA but China has is the fact that there are no quantitative targets for patent flings in France ", a*s mentioned by a French IP practitioner;
>
> *"At current stage, issues related to abnormal applications seems to be specific in China. Comparing with China, the cost of filing patent applications in Europe is higher. If the cost of filing patent applications in Europe decreases, there might be similar issues arise in Europe"* as commented by an IP professional from Italy; and
>
> "*the main problem (for BFPAs in China) seems to be the various incentives for filing lots of patent applications*" supplemented by comments from a General Counsel of an EU based multiple-national company with business in China.

In summary, BFPAs in China appear to be motivated by a variety of rewards which are obtainable through filing a large number of patents and proportional to the quantity of patents filed or granted, as well as the low cost for filing such BFPAs. Among the motivations behind BFPAs, patent subsidy and tax reduction based on high-tech company status are the main drive for the BFPA filings. With the shifting in national IP strategy from quantity to quality of patent filings, the BFPAs in China may be de-motivated to certain extent, depending on the implementation of the updated regulations and future improvement of the regulations and implementations.

5. Regulatory Measures Against BFPA in China

Fighting BFPA is a complicated problem involving various stakeholders with different motivations. The Chinese government has taken a series of measures from administrative and judicial perspectives to combat against the bad faith patent applications.

From the administrative perspective, the CNIPA has adopted a series of measures to promote the improvement of patent quality, but there are still various types of abnormal patent applications not for the purpose of protecting innovations. Therefore, in order to maintain the legislative purpose of the China Patent Law, abide by the principle of good faith, and regulate abnormal patent application activities, the CNIPA issued Announcement No. 411 in March 2021, and published Draft Amendment to Order No.75 in May 2021, to provided updated definitions for BFPA and formulated procedures for regulating BFPA. After the Draft Amendment to Order No.75 in May 2021 is finalised and implemented, Announcement No. 411 will be abolished.

From the judicial perspective, the principle of good faith, i.e., the principle of honesty and credit as literally termed in Chinese legal text, regulated in the China's Civil Law since early 1986, has been well utilized in determining and ruling IP litigations in bad faith. This principle of good faith was restated in the Civil Code which has come into effect on January 1, 2021 and written into the Chinese Patent Law in its fourth amendments in 2020.

We've identified and analysed the topic covering the following topics:

- When and how bad faith patent applications will be assessed?
- What remedy procedures are available for the parties involved?
- What measures have been taken to combat bad faith patent application?

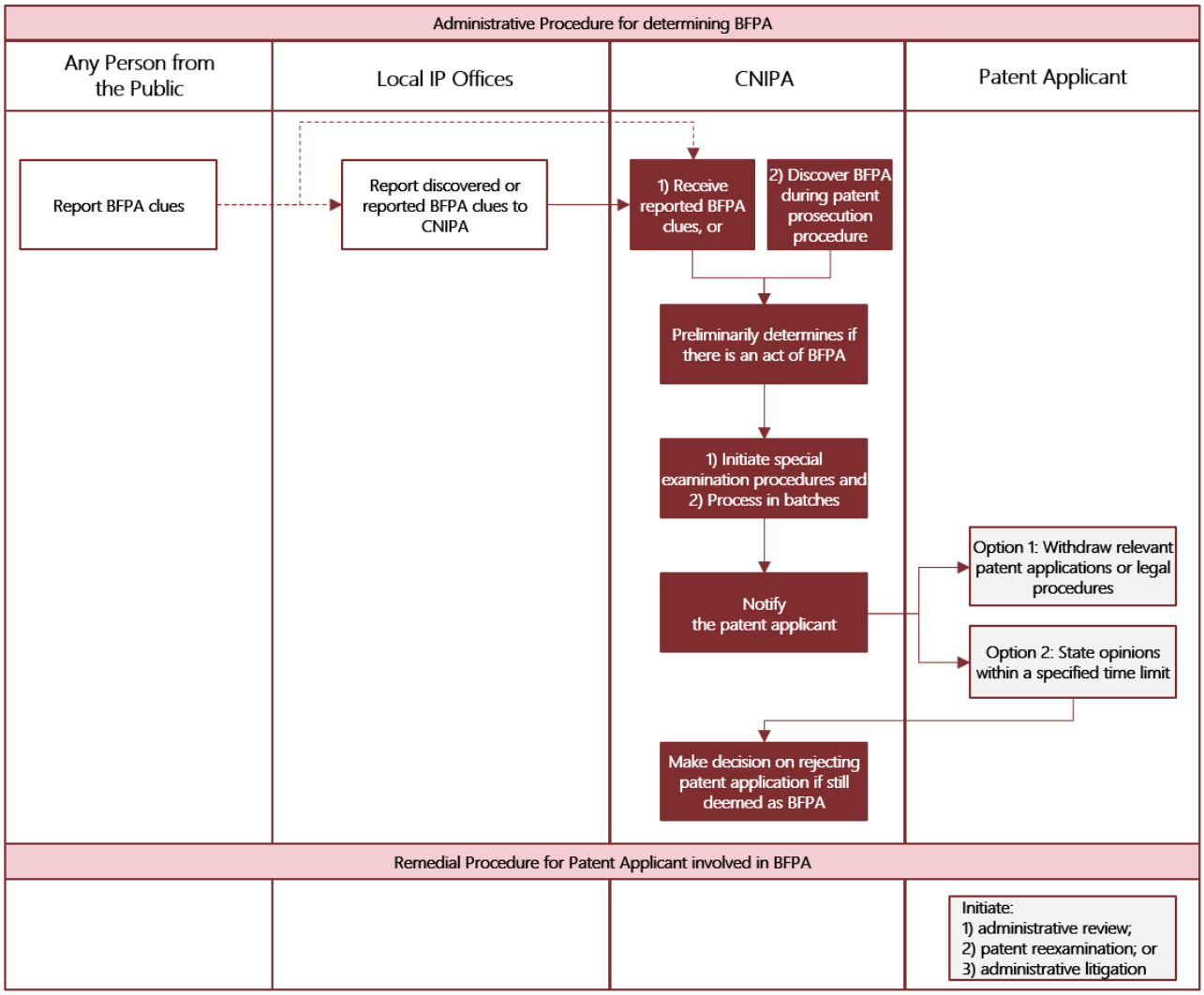
Currently, China adopts administrative approaches to assess and identify BFPA activities in patent application processes, and judicial approaches to address abuse of patent right based on BFPA. The CNIPA may proactively assess the bad faith patent applications throughout the process of patent prosecution before a patent is granted. The CNIPA may also initiate the assessment of BFPA based on the report from a third party. Courts will usually assess and determine in the patent enforcement proceedings whether it's the abuse of patent right based on patent right obtained in bad faith.

In this Study, administrative procedures for determining BFPA and remedies to involved parties will firstly be discussed in Section 5.1. In addition, the detailed assessment criteria for determining BFPA will be explained in detail in Section 5.2, complemented with selected cases of BFPA. In Section 5.3, we will also list some of the most recent major actions taken by CNIPA which are aimed to combat BFPA. Furthermore, Section 5.4 will focus on measures against abuse of patent right based on BFPA from a judicial perspective. Finally, the trends of changes in regulatory measures against BFPA will be analysed in Section 5.5.

5.1 Administrative and Remedial Procedures for Determining BFPA

Announcement No. 411 and Draft Amendment to Order No. 75 stipulate the examination measures, remedial procedure and punishment measures for BFPA.

Flowchart: Administrative Procedure for Determining BFPA



5.1.1 Regulated BFPA Actors

Here, we will discuss who will be regulated by the administrative procedures taken by the CNIPA for determining BFPA.

The administrative procedure for assessing and determining BFPA is targeted at three types of entities or individuals who have conducted BFPA related activities referred to in stipulations, including:

- Patent applicants filing patent application,
- Agencies or patent agents acting for patent applications,
- Patent owners assigning the right to apply for a patent or the patent right.

In the above flowchart, patent agents with BFPA behaviour are not presented as they will receive punishments different from those intended for patent applicants.

5.1.2 Initiation of BFPA Assessment

Regarding when the assessment of BFPA is conducted, it is found that BFPA will be examined in a special examination procedure conducted by CNIPA at any time:

- throughout the prosecution process of a Chinese patent application, namely, the acceptance, preliminary examination, substantive examination, or re-examination stages, or
- during international phase of international applications.

Regarding who may initiate the assessment of BFPA, it is found that the special examination procedure for BFPA may be initiated when some BFPA is:

- proactively discovered by the CNIPA;
- discovered by local IP offices and reported to the CNIPA; and
- reported by any person or entity from the public.

For example, according to a report from Guangzhou Daily[42], telephone numbers and website are published by Guangzhou SAMR published for the public to report potential cases of BFPA.

5.1.3 Special examination procedure for BFPA

Notification for Confirming Abnormal Patent Application

Once identified to be BFPA by the CNIPA or reported by any third party, the CNIPA will perform a special examination procedure conducted by a special examination workgroup or an authorized patent examiner. The patent applicant will be notified via a Notification for Confirming Abnormal Patent Application and asked by the CNIPA to voluntarily withdraw the patent application if the patent application is preliminarily determined as BFPA.

Response from the Patent Applicant

Upon receipt of the Notification for Confirming Abnormal Patent Application, the patent applicant may take one of the two options in response:

Option 1 - the applicant may **voluntarily** withdraw one or multiple patent applications deemed as BFPA, or withdraw the legal procedures for transfer patent applications or patent rights (in case the BFPA activity falls into the circumstance of "Patent owners assigning the right to apply for a patent or the patent right" as described in Section 5.1.1; and

Option 2 - the patent applicant may respond with opinions and supporting materials if they disagree with the CNIPA's assessment on BFPA.

It is arguable whether the examiner has the right to ask the applicants to voluntarily withdraw their patent applications. If the applicant takes the option 1 to voluntarily withdraw the patent applications, the applicant may not have the chance to seek remedies for the withdrawal, as the voluntary withdrawal is not an administrative decision made by the CNIPA and hence not appealable.

[42] http://www.gd.gov.cn/zwgk/zdlyxxgkzl/zscq/content/post_3253402.html

In addition, it sounds not feasible for the patent applicants to amend patent applications in the procedure for determining BFPA. This might be an issue for applicants who might want to keep the application alive, even a part of the patent application contains content meeting the criteria of BFPA. This scenario seems not addressed by the regulations yet.

Decision by the CNIPA

If the CNIPA is convinced by the applicant, it will proceed further with the patent examination process of the patent application.

Otherwise, the CNIPA may reject the patent application based on the principle of good faith[43]. According to "Answers to Questions related to of Applying the Amended Patent Law"[44] published by the CNIPA on May 27, 2021, the patent examiners may start to examiner the compliance of patent applications with Article 20.1 of the Patent Law (Amendment 2020) since June 1, 2021, when the Amendment 2020 comes into effect.

5.1.4 Remedial Procedure for Determined BFPA Actors

It's possible for people to request to provide arguments against CNIPA's determination on BFPA. Both Order No. 45 and Order No. 75 stipulated that the CNIPA may give the parties an opportunity to state their opinions before BFPA is confirmed. However, Order No. 75 issued in 2017 stipulated that the CNIPA may consider **if it's necessary** to give the parties the opportunity to state their opinions, which means it was optional go give the patent applicant the opportunity to state opinions and appeared not quite fair to the patent applicant.

Currently, both administrative and judicial remedy procedures are available to patent applicants if they're not satisfied with the CNIPA's decision. A request for re-examination can be filed with the CNIPA for rejected BFPA and an administrative lawsuit may be initiated with courts.

In detail, Announcement No. 411 issued in March 2021 made it clear that the patent applicant can have three options in response to the decision of the CNIPA rejecting the patent application:

Option 1 – requesting administrative review of the CNIPA's decision;

Option 2 – request for re-examination with the CNIPA if the patent application is finally rejected based on BFPA; and

Option 3 - file an administrative lawsuit before the Court to appeal against the CNIPA's decision.

Please note all of the options 1-3 may be taken against the decision of the CNIPA rejecting the patent application, instead of against the CNIPA's decision determining the patent application as BFPA. Please noted that an administrative ruling[45] made by the SPC in 2015 confirmed that the Notification for Confirming Abnormal Patent Application issued by the SIPO was not an administrative decision and hence not appealable through administrative proceedings before courts.

5.1.5 Punishments for Determined BFPA Actors

Deterrent to patent filers in bad faith is also important. The "Measures" published by the CNIPA in 2021 stipulates punishment measures for BFPA by different levels and by subjects.

[43] Article 20.1 of the China Patent Law.
[44] Answers to Questions related to of Applying the Amended Patent Law, https://www.cnipa.gov.cn/art/2021/5/27/art_66_159677.html
[45] http://www.court.gov.cn/paper/content/view/id/10925.html

Punishments to patent applicants

Besides being required to withdraw bad faith patent applications, BFPA applicants will loss the opportunity of reducing payment of the patent fees to CNIPA of all their patents. BFPA applicants will be further required to compensate for all the patent fees that have been reduced by the CNIPA.

For applicants with serious BFPA activities such as repeat offenders, the applicants shall not enjoy patent application fee reduction within five years from the date of determining the abnormal patent application.

Apart from the penalty on patent fee reduction qualification, some other punishment measures will also be applied depending on circumstances, which includes:

- Make public condemnations of alleged patent applicants
- Cancel the eligibility to apply for national IP titles and awards such as National IP Demonstration and Superior Enterprises, Certified Enterprises with Intellectual Property Protection Centre, and the China Patent Awards
- Cancellation of financial supports or monetary awards

The scope of examination covers international phase applications. It sounds to be a pending issue not yet addressed in the measures, how the determination of a BFPA made by the CNIPA will take place to attack validity of national phase applications of the same patent application in other jurisdictions.

In addition, patent applicants who engage in BFPA may also be listed as “Serious Illegal and Untrustworthy” individuals or enterprises pursuant to China’s social credit system and may have their business license revoked and personal credit irreparable.

Punishments to patent agencies or agents

For patent agencies who represent for BFPA, induce, instigate, assist others or conspire with others to conducted abnormal patent application Activities, the All-China Patent Agent Association (ACPAA) will take self-discipline punishment measures for them. And for serious cases where the patent agencies are repeated offenders, the CNIPA will impose penalties in accordance with laws and regulations.

5.1.6 Remedial Procedure for the Public to Combat BFPA

Remedies are available for the public to combat BFPA both at the time when the BFPA is pending and when the BFPA is granted as a patent.

For a pending BFPA

Currently the BFPA administrative measures are addressed to a pending patent application. The public may

- Report BFPA to the IP offices[46]
- File a third-party observation[47]

[46] Article 6 of the Announcement No. 411
[47] Article 48 of the Implementing Regulations of the China Patent Law.

Submission of a third-party observation is not a specific channel to deal with patent applications filed in bad faith, but it can be used as a channel to combat BFPA in practice.

For a granted BFPA

A granted BFPA is always a legal barrier before it's announced to be invalid. Analysis on patents' validity and strength is a regular legal activity for a business on risk control. For patent holders to fight against granted BFPAs relevant to the business operations in China, the legal cost may be increased significantly if there are too many granted BFPA patents around. This is also reflected in our interview with corporate inhouse counsels[48]. The suggested practical approaches to identify relevant granted BFPAs in China may include:

- Conducting clearance search to identify bad faith patent patents of concerns prior to launching a new product in China.
- Performing validity analysis of bad faith patent applications once they're identified.
- Analysing and estimating financial damage that may be caused by identified patent granted from BFPA.
- Monitoring closely Chinese patents in the technologies or fields of interest to detect BFPAs that may influence business as early as possible.

Legal approaches are available to be taken against a granted BFPA:

- Request for invalidation against the granted BFPA;
- File patent ownership lawsuit against the granted BFPA, if the granted BFPA was obtained from breach of contract or trade secret;
- Utilizing the "obtaining patent right in bad faith" against patent infringement claim from a patent granted from BFPA; and
- Filing non-infringement lawsuit against the granted BFPA.

It's been discussed about adding "not comply with good faith principle" to be a legal ground for patent invalidation to prevent a granted BFPA from being a detrimental to the public interest. In the Fourth Amendment to the Chinese Patent Law (2020), "good faith principle" was introduced in line with the China Civil Code.

It is noticed that Article 20.1 of the Paten Law (Amendment 2020) was proposed to be added as both a cause for rejection and also as a cause for invalidation, according to Draft Amendment to the Implementing Regulations of the Patent Law published in November 2020 and Draft Amendment to Guidelines for Patent Examination published in August 2021 by the CNIPA. Accordingly, it's very likely that failure to comply with the principle of good faith may be supplemented as a legal ground to invalidate a patent. The public is still a bit concerned how to differentiate "good faith" from "bad faith" and what's the line between them. Due to the different definitions and types of bad faith patent applications in China and EU, it's also essential important to clarify how to determine bad faith patent applications for stakeholders and patent holders outside of China to predict legal outcome of their patent filing behaviours. Due to the different definitions and types of bad faith patent applications in China and EU, it's also essentially important to clarify how to determine bad faith patent applications for stakeholders and patent holders outside of China to predict legal outcome of their patent filing behaviours. Though according to BFPA data officially disclosed, there appears no BFPA cases in

[48] Annex of this report.

the name of foreign applicants are identified, there are still uncertainties felt by stakeholder and patent holders outside of China.

In addition, on September 10, 2020, the SPC issued "Provisions (I) on Several Issues concerning the Application of Law in the Trial of Administrative Cases Involving Granted Patents Verification", which prescribes that in the trial of administrative cases involving the verification of granted patents, during judicial review of patent re-examination and invalidation decisions, a patent may be challenged based on evidence showing that a patent applicant or a patentee forges or fabricates any relevant technical content such as specific implementation methods, technical effects and data and graphs in the specification and appended drawings against the principle of good faith. The Provisions (I) provides further support to petitioners in judicial review of invalidation cases against patents granted from BFPA.

5.2 Assessment criteria of BFPA

Bad faith patent application in the current regulations can take many different forms. Here we look at how to tackle an allegation of bad faith and the factors that case law suggests are more (and less) likely to lead to a bad faith finding.

As discussed in the above section, BFPA as patent application activity is established in administrative procedure implemented by the CNIPA with the support from local IP authorities, rather than legal proceedings before courts.

The criteria for determining BFPA are the key to the implementation of the regulations. Those criteria are specified in the definitions and types of BFPA as prescribed in the administrative regulations/rules issued by the SIPO/CNIPA.

As a quick recap, the milestones in the development of administrative regulations/rules on the definition of BFPA in China are listed in Table 1 in Section 2.1.2. It can be seen that the definition of BFPA and criteria for determining BFPA are evolving over time and updated rapidly in 2021.

In 2007, the SIPO first issued the "Several Provisions Regarding the Regulation of Patent application activities" (hereinafter referred to as "Order No. 45"), which specifically defined three types of patent application activities as BFPA activities, including:

(1) **Duplication** - The same entity or individual or instructing others to submit multiple patent applications that are obviously the same to each other;
(2) **Plagiarism** - The same entity or individuals or instructing others to submit multiple patent applications that clearly plagiarize prior technology or prior designs; or
(3) **Patent agency for BFPA** - Patent agencies submit the above types of patent applications.

It is noticed that duplication and plagiarism were regulated as BFPA activity and may be the most frequent types of BFPA, as they persist in the following versions of types of BFPA defined in administrative rules.

According to Order No. 45, "submitting multiple patent applications" is a condition for meeting the criteria for determining BFPA according to Order No. 45. A single patent application may not be deemed as BFPA.

Patent agency became a control point against BFPA activities from the beginning of regulations against BFPA in China.

The implementation of the "Several Provisions" has played a certain role in curbing abnormal patent applications, but in fact there have been some new and more prominent abnormal patent applications that need to be regulated.

In 2017, the SIPO issued the “Order No. 75”, which increased the types of regulated BFPA activities from three to six, including:

a) Same entity or individual submits multiple patent applications
   - that are obviously the same to each other (**Duplication**);
   - that clearly plagiarize prior technology or prior designs (**Plagiarism**);
   - that are simple replacement or patchwork of different materials, components, proportions, parts, etc. (**Patchwork**);
   - that describe obvious falsified or technical effects (**Fabrication**); and
   - that use computer technology to randomly generate product administration, patterns or colours (**Randomly Generated**); and
b) Patent agencies **or anyone** submit the above types of patent applications for helping others.

Among the types of BFPA activities as defined, duplication and plagiarism are previously defined and kept in this version of criteria for determining BFPA, while patchwork, fabrication, and randomly generated were new forms of BFPA activities added to Order No. 75. As discussed, the new types of BFPA activities added to Order No. 75 in 2017 may be identified through the special rectification of patent agencies action taken by the SIPO in 2016.

In addition, with the increasingly higher demand for patent applications, drafting and filing patents became a profitable business, and even individuals or entities unqualified to practice patent before the SIPO started to provide patent drafting and filing services to applicants in need. In response to such phenomenon in the patent industry, the Order No. 75 regulated against activities of assisting in filing BFPAs conducted by qualified patent agencies and unqualified individuals or entities

Also, according to Order No. 75, “submitting multiple patent applications” is a condition for meeting the criteria for determining BFPA and a single patent application may not constitute BFPA.

It is reported that the “Order No. 75” had played a positive role in curbing abnormal patent applications since its effectiveness in 2017. Notably, the Blue Sky Campaign taken by the CNIPA in 2019-2021 against BFPA was mainly conducted based on the definition and types of BFPA activities as defined in Order No. 75.

In order to manage various abnormal patent applications that violate the legislative purpose of the Patent Law and the principle of good faith, possibly to address new types of BFPA activities identified from the Blue Sky Campaign from 2020 to early 2021, the CNIPA rapidly rolled out updated rules against BFPA by publishing Measures on Regulating Patent Application Activities (Draft for Comments) on February 10, 2021 and issuing the Measures on Regulating Patent Application Activities (Announcement No. 411) on March 11, 2021.

It is worth noting that according to a news report[49] from China Intellectual Property News on March 19, 2021, the CNIPA immediately conducted a first batch of BFPA screening action in February and the Announcement No. 411 will provide updated definitions and types of BFPA activities to support the screening action.

[49] https://www.cnipa.gov.cn/art/2021/3/19/art_53_157884.html

Please note that the Announcement No. 411 issued in 2021 was not intended to be a replacement for Several Provisions on Regulating Patent Application Activities (Order No. 75) issued in 2017, because Announcement No. 411 is a lower rank regulation than Order No. 75, as will be discussed later in the following Section.

Thus, the CNIPA published Draft Amendment to Several Provisions on Regulating Patent Application Activities (Draft amendment to Order 75) on May 6, 2021, which is intended to replace Order No. 75 to serve as the main administrative regulation against BFPA activities with which the actions of the CNIPA shall comply.

It is noticed that the definitions and forms of BFPA in Draft amendment to Order No. 75 are mainly based on those defined in Announcement No. 411 but with refined wordings. Therefore, the latest criteria for determining BFPA activities in China will be discussed in the following with reference to the provisions of Announcement No. 411 and Draft Amendment to Order No. 75, Official Interpretation for Announcement No. 411 published on May 31, 2021 issued by the CNIPA (hereinafter referred to as "Official Interpretation")[50], and comments from other sources, including comments from EU patent practitioners (hereinafter referred to as "EU Patent Practitioner Comments"), and Comments from the Intellectual Property Owners Association (IPO) of the United States on Draft Amendment to Order No. 75 (hereinafter referred to as "IPO Comments")[51].

Nine forms of BFPA activities regulated according to Announcement No. 411 and Draft Amendment to Order No. 75 include[13]:

(1) **Same Invention or Simple Variation:** *Multiple patent applications submitted simultaneously or successively have obviously the same invention-creation contents or are essentially formed by simple combinations of different invention-creation features or elements* **in Announcement No. 411** or *the submitted multiple patent applications have obviously the same invention-creation contents or are essentially formed by simple combinations of different invention-creation features or elements* in **Draft Amendment to Order No. 75**

Official Interpretation:
It refers to patent applications, regardless of whether these patent applications are filed at the same time or one after the other, include not only the submission of multiple inventions or utility model applications with different materials, components, proportions, parts, etc., which are simply replaced or pieced together, but also include the design applications of different design features or elements after the original form or minor changes, obtained by simple assembly and replacement.

It is important to point out that "the content of the invention-creation is obviously the same" does not include the situation where the same applicant applies for both utility model patents and invention patents for the same invention-creation on the same day as permitted by Article 9.1 of the Patent Law.

EU Patent Practitioner Comments:

[50] Interpretation for Measures on Regulating Patent Application Activities (Announcement No. 411), CNIPA, March 32, 2021, https://www.cnipa.gov.cn/art/2021/3/31/art_66_158145.html

[51] Comments on Draft Amendment to Several Provisions on Regulating Patent Application Activities from the Intellectual Property Owners Association (IPO) of the United States, published on June 5, 2021, https://ipo.org/wp-content/uploads/2021/06/IPO-Comments-Patent-Applications-CNIPA.pdf

Such circumstances relate to the issue of novelty/inventive step/ double patenting, which may result in the patent application being rejected / patent being declared invalid due to lack of patentability, not due to “bad faith”.

IPO Comments:
With respect to “simple combination of different invention-creation features or elements,” that is an issue of inventive step. Legitimate inventions often arise out of combinations or substitution of elements in existing technology. So long as the invention meets patentability standards including inventive step, this element should not be the sole basis for deeming an invention to be an abnormal application.

Our Observations:

- The provision of Draft Amendment to Order No. 75 does not require the multiple applications to be submitted simultaneously or successively, which may give the examiner the option to crack down BFPAs filed with a large gap in filing date.
- According to the provisions, concurrent patent applications filed by different applicants will not be deemed as BFPAs.
- It seems a consensus that multiple patent applications filed on a same invention by a same applicant should constitute BFPA. However, it is quite controversial regarding treating patent applications with simple combination of different invention-creation features or elements as BFPAs. It is noted that the views from the EU patent practitioners and the IPO have an emphasis on comparison between a single patent application with combination of elements from different prior arts. From our study, we understand the provision appears to be directed to the multiple patent applications that are similar to each other and formed by simple combination of different elements. However, such similarity requirement is not fully expressed in the text of the provisions. We would expect further clarifications of the provisions in future.

(2) The submitted patent application contains fabricated, forged or altered inventions-creations, experimental data or technical effect, or plagiarism, simple replacement or patchwork of existing technologies or existing designs, or other similar circumstances in **Announcement No. 411** and in **Draft Amendment to Order No. 75**

Official Interpretation:
It refers to "fabricated, forged or altered " which mainly refers to acts of fabricating or falsifying non-existent invention-creation, experimental data, technical effects, etc.; or acts that exaggerate the effects after modifying existing technologies or design schemes, but the effects cannot actually be achieved.

EU Patent Practitioner Comments:
Such circumstances relate to the issue of novelty/inventive step, which may result in the patent application being rejected / patent being declared invalid due to lack of patentability, not due to “bad faith”.

An invention putting together prior arts is patentable if the technical result answers an unsolved technical problem and provides a different technical solution from the individual prior technical solutions.

At the stage of examination, it may be difficult for the examiner to detect such a fraud.

IPO Comments:
It is customary for applications to include matter that has not yet been put fully into actual practice,

or that is required to abstract the invention to a higher level of generality in order to give the applicant the full scope of protection he is entitled to. This definition should be revised to distinguish innocent fabrication from malicious fabrication, and to limit its application to the claims of the patent and not the rest of the content.

In addition, legitimate inventions arise out of combinations or substitution of certain elements in existing technology or designs. So long as the invention meets patentability standards including inventive step, "simple replacement, patchwork of existing technology or existing designs" should not be a basis for deeming an invention to be an abnormal application.

Our Observations:

- We agree that it may be difficult for the examiner to detect such a fraud at the stage of examination.
- Evidence appears to be critical for the determination of BFPA of this type, so requirements for evidence should be clarified.
- It should also be made clear whether the examiner or the applicant has the burden to provide evidence in the determination of BFPA of this type.
- It might be feasible to detect plagiarism but may be very difficult to distinguish "simple replacement, patchwork of existing technology or existing designs" from innovation activities in good faith. It is not clear how simple is simple and innovations with simple but inventive modification to existing technology may be mistakenly treated as BFPA.

(3) The invention-creation of the submitted patent application is obviously inconsistent with the actual research and development capabilities and resource conditions of the applicant or inventor in **Announcement No. 411** and in **Draft Amendment to Order No. 75**

Official Interpretation:

It refers to the number or contents of invention-creation in the submitted patent applications which clearly exceed the actual R&D capabilities and Resource conditions of the applicants and inventors. For example, a company has submitted a large number of patent applications in a short period of time, but after verification, the company has no insured personnel and paid-in capital. It is, in fact, a shell company with no investment in scientific research, no R&D team, no production, and no operation.

EU Patent Practitioner Comments:

Such circumstances are irrelevant to patentability or "bad faith", and therefore, there is no control in the EU on such circumstances.

IPO Comments:

IPO is concerned that the actual R&D capabilities of an entity or inventor is difficult to ascertain, and if the applicant has the burden to prove this capability, applicants could be required to disclose proprietary and sensitive information regarding their operations and future plans. The spirit of innovation includes the potential to generate concepts and inventions outside of an organization's traditional business and R&D scope, which should not be used to deem an invention an abnormal patent filing.

Our Observations:

- The provisions appear to be too broad to cover both the BFPAs as described in the official interpretation, and innovation in good faith, such as great inventions made in garage of the inventors.
- There should be a balance between regulations against BFPAs and encouragement for genuine innovation activities.

(4) The invention-creation contents of the submitted multiple patent applications are generated randomly mainly by using computer programs or other technologies in **Announcement No. 411** or the invention-creation contents of the submitted multiple patent applications are generated randomly mainly by using computer **technology etc.** in **Draft Amendment to Order No. 75**

Official Interpretation:
It refers to the fact that there is no actual participation of scientific research personnel, and only computer methods are used to randomly and disorderly form technical solutions or design solutions, which are not true innovative activities. For example, the contents of multiple applications submitted are completely technical solutions, product shapes, patterns or colours randomly generated using computer technology.

EU Patent Practitioner Comments:
Such circumstances are irrelevant to patentability or "bad faith".

IPO Comments:
Another factor listed as belonging to the act of an abnormal application is directed to the invention-creation contents of multiple patent applications being "mainly generated randomly by computer technology and the like." IPO respectfully submits that this factor be deleted from the list of factors under Article 3. More particularly, this factor does not identify those applicants seeking illegitimate interests — or to falsify innovation or service performance. For example, artificial intelligence in the future may very well work in the way described under Definition 3 for the purpose of generating new and important inventions associated with or developed from a core inventive concept, and this should not be excluded under these amendments which aim to curb abnormal applications. The list of factors identifying an abnormal application should not be focused on, and it should not matter how an invention is created.

Our Observations:
- The official interpretation of this provision has an emphasis on design patent but may also applied to invention and utility model applications.
- It might be easier for the examiner to state some patent applications are generated randomly mainly by using computer technology etc. but might be difficult for the applicant to prove the content of the patent application is not generated randomly by using computer technology. Thus, the burden of providing evidence should be carefully allocated between the examiner and the applicant.

(5) The invention-creation of the submitted patent application is deliberately formed for the purpose of evading patentability examination, which is obviously inconsistent with the technical improvement or design common sense or is of no actual value of protection for being deteriorated, piled up or unnecessarily limiting the scope of protection, or the contents is without any search or examination significance in **Announcement No. 411** or *the invention-creation of the submitted patent application is obviously inconsistent with technical improvement or design common sense, or is deteriorated, piled up or unnecessarily limiting the scope of protection* in **Draft Amendment to Order No. 75**

Official Interpretation:
It refers to the position of a person skilled in the art. In order to circumvent patentability examination, the applicant deliberately uses technical routes or design schemes that are conventional in the field or can be achieved through simple steps. With complicated processing, but it actually did not achieve technical improvements and design improvements, especially the claims formed by listing a large number of subtle and non-essential technical features, which essentially unnecessarily narrowed the scope of protection.

EU Patent Practitioner Comments:
Such circumstances are irrelevant to patentability or "bad faith".

IPO Comments:
An invention is at risk of being deemed an abnormal application if it "apparently does not conform to the technical improvement or design common sense, or is deteriorating, padding, or unnecessarily restricting the scope of protection." However, IPO notes that unexpected results are well-accepted as support for a finding of inventive step. By definition, unexpected results are inconsistent with design common sense - thus they are unexpected, and inventions that demonstrate unexpected results should not be deemed to be an abnormal application. In addition, Applicants are free to make a reasoned choice to pursue narrower claims, i.e., restrict the scope of protection, to make those claims more difficult to invalidate. In fact, narrowing of claims is usually requested by patent examiners. The decision to obtain narrower patent scope should not be the basis for deeming an invention an abnormal application.

Our Observations:
- These provisions of Announcement No. 411 appear to have been made without careful wording and contain very subjective conditions, e.g., "deliberately formed for the purpose of evading patentability examination", "of no actual value of protection", and "the contents is without any search or examination significance", possibly indicating a haste in drafting the provisions of Announcement No. 411, which might reflect the urgency for cracking down BFPAs further in 2021.
- There should be a line between low quality patent in good faith, and BFPA. It is discussable if the line should be based on conventional steps taken or narrowed scope.

(6) Multiple patent applications which are substantially connected with a particular entity, individual or address are submitted in a scattered or sequential order or in different places for the purpose of evading regulatory measures against abnormal patent application activities in **Announcement No. 411** or *multiple patent applications substantially connected with a particular entity, individual or address are submitted maliciously in a scattered way, in sequential order or in different places* in **Draft Amendment to Order No. 75**

Official Interpretation:
It refers to the avoidance of being identified as an abnormal patent applicant. Intentionally, by registering multiple companies, using multiple ID numbers or using multiple company addresses, the patent application that originally belonged to the same applicant was submitted separately from multiple perspectives such as time, location, and applicant.

EU Patent Practitioner Comments:
Such circumstances are irrelevant to patentability or "bad faith".

IPO Comments:
IPO recommends a clarification that multiple filings "in China" may form the basis of an abnormal patent filing. This is to avoid inadvertently sweeping in an applicant's activities of filing corresponding applications worldwide.

Our Observations:
- In our study, according to the limited data about officially identified BFPA cases, no case of BFPA is observed to be against a patent application from a foreign applicant yet. More publication of identified BFPA cases from the CNIPA will be helpful for the public to understand the criteria for determining BFPAs.

- It is a common strategy taken by trademark squatters in China to register multiple companies to file bad faith trademark applications, and such activities shall also be regulated in the field of patent.

(7) The patent application rights or patent rights are resold not for the purpose of implementing patented technologies, designs or for other legitimate purposes, or falsely changing inventors or designers in **Announcement No. 411** or *the patent application rights or patent rights are **transferred for illegitimate purposes**, or the inventors or designers are falsely changed* in **Draft Amendment to Order No. 75**

Official Interpretation:

There are mainly two situations: one is buying or reselling patent application rights for non-market competition purposes or the act of patent rights. For example, an institution or individual transfers patent applications during the examination period or granted patents in batches, and the patent application or patent held by the assignor is not necessarily related to its business; or the assignee is obviously not for technical implementation or other acts of accepting patent applications or patent rights for reasonable legal purposes. The other one is the act of falsely altering the inventor or designer. In practice, it has been discovered that for the purpose of illegitimate interests, the person who did not contribute to the invention is changed to the inventor or designer. Article 13 of the Implementing Regulations of the Patent Law stipulates that the inventor or designer should be responsible for the invention and a person who makes a creative contribution to the substantive characteristics of creation.

IPO Comments:

It is unclear why transfers of ownership rights need to be regulated to improve the quality of patent applications - regulation of patent application filing should resolve the concerns about abnormal patent filings. Moreover, issued invention patents would have met all of CNIPA's requirements, thus it is unclear how issued invention patents could be abnormal, and why their transfer would need to be regulated this way. Also, patents are often transferred in bulk, with hundreds or thousands of patents changing hands; thus, review of all patents in all transfers for compliance with these provisions would be impractical.

Our Observations:

- This provision appears to impose no restrictions on the patent application rights or patent rights. It is not clear if transfer of BFPAs or transfer of any type of patent applications/patent rights are regulated here.
- There seem no clear and objective criteria to determine whether the purpose of patent application or patent transfer is illegitimate.
- It is not clear if adding a company as co-applicant for a patent application or patent falls into the definition of right transfer under this provision.

(8) A patent agency, patent attorney, or any other institution or individual acts as an agent, induces, abets, assists or conspires with others to commit various abnormal patent application activities in **Announcement No. 411** and in **Draft Amendment to Order No. 75**

Official Interpretation:

It refers to qualified patent agencies and patent agents, and institutions or individuals without patent agency qualifications carry out various types of abnormal patent applications, including the act of directly acting as an agent for abnormal patent applications, as well as the act of inducing, abetting, and helping others to file abnormal patent applications.

Our Observations:

- There are opinions in the patent industry that patent agencies may not be the root cause for the issue of BFPA in China, as they are at the supply side of the market which respond to the need from the demand side, and the regulatory actions against BFPAs may impact the business of considerable number of patent agencies.
- Practically speaking, regulating the behaviour of patent agencies appears to be a control point over the production line of BFPAs. If applicants for BFPAs and the associated patent agencies or unqualified agent may profit and thrive from the BFPA activities, it would be really harmful to the IP system of China.

(9) Other abnormal patent application activities that violate the principle of good faith or disrupt the normal order of patent work and other relevant activities in **Announcement No. 411** and in **Draft Amendment to Order No. 75**

Official Interpretation:
Among them, reducing "patent applications that are obviously inconsistent with R&D capabilities" may have an impact on primary and middle school students and companies without insured personnel, no paid-in capital, and no R&D funds; the reduction of "abnormal scalping of patent applications" will curb batch applications and reselling for profit, or multiple transactions of the same patent for arbitrage of funding.

Our Observations:
There appears to be various more specific forms of BFPA activities behind the provisions, e.g., BFPA activities conducted by primary and middle school students, and multiple transactions of the same patent for arbitrage of funding. However, concerns are raised for patent holders and various participant in the patent industry from those provisions appearing to be broad and potentially imposing restrictions on genuine innovation activities. Therefore, clarifications and refinement of those ambiguous provisions are generally expected.

Divisional Application as BFPA

It is worth noting that a controversial type of BFPA was proposed in Draft for Measures on Regulating Patent Application Activities published by the CNIPA on February 10, 2021 but removed in the finalized Measures on Regulating Patent Application Activities (Announcement No. 411) issued by the CNIPA on March 11, 2021. This type of BFPA was defined as “proactively filing multiple divisional applications from a parent application with the prospect of granting, but with no legal or technical necessity”.

From the perspective of Chinese patent examiners, it is necessary to regulate batch filing of divisional BFPAs to gain benefits such as patent subsidy or High-Technology Company Status. According to a paper published in 2015 authored by a Chinese patent examiner[52], divisional patent applications were seriously abused by BFPA filers in China and the author called for strict regulations on the activities of filing divisional BFPAs. In the paper, Chinese patent publication no. CN021175519 was given as an example of divisional BFPAs, which had 268 divisional applications of similar content.

However, from the perspective of patent holders, it would be a very common practice to file divisional applications for various strategic purposes. For example, as commented by an Italian patent professional, "*a definition of BFPA is potentially dangerous. Let us imagine a Pharma company that files a large number of*

[52] FU Qi, Study on Divisional Patent Application System, Journal of Law and Technology, Issue 6, 2015

applications as a first filing the same day or a divisional application. If the large and unusual number may be considered a criterion for a definition of BFPA, this may have a negative impact on the market." The boundaries between normal divisional applications and divisional BFPAs are vague and BFPAs should not be determined based on the number of divisional applications.

The proposal and withdrawal of defining divisional BFPAs provides a good example showing the difficulties in distinguishing BFPAs from the normal applications and demonstrating that regulations against BFPA should be made carefully. It is noticed that there was only one month's time between the publication of the Draft and the finalized version of Announcement No. 411. Therefore, it might be advisable to finalize draft regulations against BFPAs in longer time for more thorough discussions and testing of the newly proposed regulations.

Summary

According to surveyed EU patent practitioners, some variants of BFPAs defined in administrative rules in China may be addressed as issues of novelty/inventive step, or irrelevant to patent practice in the EU. Particularly, items (1) and (2) are considered to be related to novelty/inventive step, and items (3)-(6) appear to be irrelevant to patent practice in the EU.

Considering the large volume of BFPAs in China, it might be unpractical to examine the novelty or inventive step of each and every BFPA, because patent search is needed and there may be multiple rounds of office actions to finally reject a BFPA. In view of this, as compared with full examination of the novelty/inventive step of the patent applications, the administrative rules against BFPA appear to be a lightweight instrument designed to identify and cleanse BFPAs in a quick and cost-effective manner. However, the balance between efficiency and fairness to the right of the patent applicant shall be considered.

In addition, establishment of bad faith patent application will have to review and identify the behaviours behind the patent applications and review the patent applications themselves. BFPA behaviours mainly perform in the following types:

- Plagiarism, including the situation of "making up one-sentence claims", aiming to create many patent applications in a simple way.
- Fabrication, including the situations of "solving simple technical problems with complex technical means", "fictional or exaggerated technical problems" or "fabrication of technical effects that are not easy to verify", aiming at "obtaining grant in a short time".
- Replication, such as "copy" or "malicious divisional patents", targeting to obtain "as many as possible".
- Applicant's other abnormal activities

A major part of BFPA is aimed at creating patent applications in a short period and with limited effort cost for the purpose away from innovation protection.

There may be certain confusions about how to differentiate patent filings in bad faith from multiple patent applications for business purpose. It's essentially important to clarify the criteria of determining varied BFPAs as stipulated above for people to clearly anticipate the legal outcome of their patent filing activities.

Cases of Establishing BFPA

In the following, we will combine the typical cases in each of the above types of abnormal patent applications to explain in detail common cases.

It is found that not all types of BFPAs as defined in the administrative rules may be found in BFPA cases officially published. Notably, the following types of BFPAs appear to be most frequently determined by the CNIPA.

(1) Plagiarism

According to the grant conditions of invention patents, there is absolutely no possibility to grant invention applications formed by plagiarism. However, the occurrence of plagiarism still exists due to incentives from patent subsidy policies. An important reason for this is that some local IP Authorities in the early stage of formulating subsidy policies gave financial subsidies to patents in the application stage, that is, as long as the applicant submits the patent application that meets the formal requirements to CNIPA, a certain amount of cash can instantly be granted by obtaining a patent application number. Therefore, applicants use plagiarism as a simple and efficient way to create abnormal applications.

However, a patent drafted in a simple way shall not be the criteria of establishing BFPA, especially in view that a utility model patent with minor improvement to the prior art may not involve too many inventive features to be claimed in the patent specification and claims.

(2) Fabrication

The technical features of the claims of such abnormal applications are often only one or two sentences long, which cannot possibly define any technical solution with substantial protection for an invention patent. Similar to "plagiarism", this approach of abnormal applications is a consequence of the early financial support given by some local IP Authorities to patents in the application stage. For example, an invention application entitled "Scraping bar for scraping flooring" has only one claim, which reads "A scraping bar for scraping flooring, characterized in that it includes a long wooden bar body with a handle at one end of the long wooden bar body". The specification is also only a few sentences, and the full text of the specific implementation part reads: "Referring to the attached drawings, a scraping bar for scraping flooring, characterized in that it includes a long wooden bar body 1, and a handle 2 is provided at one end of the long wooden bar body 1. The invention can be used more smoothly and improve the work efficiency."

Another form of “Fabrication” is presented by fictitious or exaggerated technical issues in patent applications or obviously unachievable technical effects.

Applications fabricated by "fictional or exaggerated technical problems" generally have a relatively complete or even "perfect" structure, that are not "abnormal" as at the formal level for bad faith patent applications such as "one-sentence claims". The key to this approach is that the technical problems they claim to solve do not exist in real life, and if they do, they occur under very specific conditions and with very small probability, and are not worth solving by technical means, let alone getting a protection by means of a patent. For example, "a toothbrush with automatic heating of the brush head" to reduce the discomfort of the mouth caused by the low temperature of the brush head when brushing teeth, "a device for correcting the deformation of the ring-shaped needle" to prevent the deformation of the ring-shaped needle after use, etc. However, although the technical problems solved by such applications are absurd, the technical means to solve the problems are reasonable and the technical effects achieved are promising, so they can generally meet the requirements of novelty, inventiveness, and minimum practicability.

The situation is similar for applications fabricated by “obviously unachievable technical effects”. For example, a patent integrated technical keywords such as “"normalization", "objective function with penalty and constraint functions", "Gaussian radial basis kernel function", and "Bayesian evidence framework for support vector machine optimization" in the solution, which are randomly pieced together and unrelated to each other, without specifying what functions are induced for each of the methods. When such solutions show up in multiple related applications, it can be considered as an abnormal application.

As a result, in the view of those who are not familiar with the relevant technical fields, these invention patent applications are sophisticated in design, clever in concept, have considerable practical and market value, and are easily misjudged as high-value patents.

In most situations, a professional review will be needed to determine if technical issues were exaggerated in a patent to form fabrication activity when using this reason to establish BFPA. It's easy to understand that many patent applicants may intend to beautify the technical effects achieved by the patented technologies. More clarification on what level of exaggeration to establish BFPA may be important for the public to predict the legal outcome of their patent filing activities.

(3) Replication

A legacy problem induced by patent subsidy policies is creating abnormal patent applications through replication, especially when the patent subsidy policies are aimed to increase the number of patent applications or granted patent applications.

BFPA applicants may choose to create multiple patent applications based on one "basic application" and reproduce multiple applications with similar contents by simply combining and replacing some of the technical features of the "basic application".

This criteria of establishing BFPA may cause concerns to patent right holders which may prefer to adopt multiple filing strategy including divisional filing strategy to support the goals from business perspective.

The two cases below were identified during the CNIPA's investigation, are typical cases of "replication" type of abnormal applications.

“Qingdao Yongji” Case
Brief of the case: On the same day in February 2018, a patent agency filed 78 patent applications with apparently identical contents for a company. For example, the application CN2018101669228 with the invention name "A method for finite element fatigue analysis of PV joint-row shed structure" and the application CN 2018101677031 with the invention name "A method of finite element fatigue analysis of photovoltaic shade shed structure" have the same content. Except for the technical features "joint row shed" and "shade shed" in the invention name, the technical solutions in these two applications are obviously the same.
Indication: **If more than one patent applications are filed at the same time for one inventive concept applied to different scenarios, the patents shall be considered as abnormal patent applications.**

“Chaofan” Case
Brief of the case: In August and December 2017, a patent agency represented a chemical company to file 9 patent applications with simple substitution of different materials, which were related to fertilizers and their preparation methods. For example, applications CN 2017106696918 and CN 2017106696941 were both with the invention name "A method of preparing urea fertilizer". These two patents addressed the technical problem that urea is easily decomposed and volatilized in soil, which not only results in low utilization rate by plants and causing serious waste, but also causing environmental pollution due to the volatilization of ammonia gas. The difference between the technical solutions in the two patents is simply the substitution of different materials: the former is a high temperature steam and the latter is an alkaline and acid solution that wets the urea surface. There is no essential difference between the effects of acid and base solutions and high-temperature steam, and in order to solve the technical problem of melting the urea surface and wetting it, it is easy for those skilled in the art to think of using acid and base solutions for neutralization or high-temperature steam to treat the urea surface. The technical effect can be clearly expected. Therefore, it is obvious that the two applications mentioned above are essentially of the same inventive idea.
Indication: **If more than one patent applications are filed at the same time for simple substitution mentioned above, the patents shall be considered as abnormal patent applications.**

As can be seen from the above, if patent applications are found to contain multiple pieces of apparently identical content, or different materials, components, ratios, parts, etc. which are simply substituted or pieced together, and multiple pieces of experimental data or technical effects that are obviously fabricated, it is necessary to examine whether the minor differences are substantial and meaningful improvements to the existing technology in order to prevent misjudgement.

“Qingchuang” Case
Brief of the case: A patent agency filed and prosecuted 60 invention patents for one client which were all related to various feed or feed additives and other formulations. Some applications have simple substitution of different components. For example, patent CN 2018103578191 titled "A feed additive for preventing and treating chicken Newcastle disease" and patent CN 2018103578327 titled "A feed additive for preventing and treating poultry cholera" have a difference between the technical solutions of the patent applications that lies only in the simple substitution of some components and ratios in the feed additive formulations.
Indication: **If more than one patent applications are filed at the same time for one inventive concept applied to different scenarios, the patents shall be considered as abnormal patent applications.**

(4) Abnormality identified through patent bibliographic information

One typical scenario is related to applicants, where the technical solutions submitted by the same applicant and/or inventor involves multiple completely unrelated fields that are completely irrelevant to their business. For example, a game company applied for a large number of cases in the chemical field. The technical solutions in the applications are obviously inconsistent with the applicant's age and knowledge category.

Another typical scenario is related to the agency, where they submit a large number of applications or similar topics on the same day or in a short period of time. For example: a patent agency in Beijing filed 20 invention patent applications for “medical chairs” in December 2015, involving different applicants from Wenzhou, Lishui, Jiaxing, Jinhua and other places in Zhejiang. These applications include the same content of the invention, with only slight differences in the combination of different publicly known content.
A third scenario is contact person, where a large number of patent applications with different subjects share the same contact person. For example: a person applied for a complicated claim drafting without agency, and technical solutions of two other applications were found to be slightly different from this application, all three applications have the same contact phone number.

The fourth scenario is divisional patent applications based on one application. Usually, after the initial parent is granted, the applicant immediately submits a large number of divisions, and the divisional claims are only minor additions and deletions to the content of the claims in the initial parent. The purpose of such is usually to obtain more patent application rights.

Since the issuance of Order No. 75, a series of bad faith patent applications and related patent agencies been punished by the CNIPA. The table below showcased some of the cases identified by the CNIPA in the first quarter of 2019. The eighteen cases cover abnormal patent application types of type (1), (3), (4) and (6) as specified in the Announcement No. 411, where in case patent agencies and relevant patent agents were separately given warnings or other punishment actions. It is also worth noting that these published cases do not include abnormal applications of utility models and design patents, as they were withdrawn once identified as abnormal applications and not to be published.

Patent Agency	*Patent Applicant*	*Abnormal Patent Applications / Statutory Grounds*
Yongji **	Qingdao ** Technology Co., Ltd.	**78** invention patent applications with obvious identical content mainly relates to analysis methods and calculation methods Order No. 75 Article 3 (1); Order No. 75 Article 3 (6)
**Chaofan ** **	Chengdu ** Technology Co., Ltd.	**88** patent applications for simple replacement of different components, which involve multiple topics in the field of Internet of Things Order No. 75 Article 3 (1) and Article 3 (3); Order No. 75 Article 3 (6)
**Chaofan ** **	Chengdu ** Chemical Co., Ltd.	**9** patent applications for simple replacement of different materials, which involved fertilizers and their preparation methods Order No. 75 Article 3 (1) and Article 3 (3)
**Qingchuang ** **	Foshan ** Technology Co., Ltd. Foshan ** Agricultural Technology Co., Ltd.	**60** invention patents relate to various feed or feed additives and other formulations Order No. 75 Article 3 (1) and Article 3 (3); Order No. 75 Article 3 (6)
**Longteng ** **	Jinhua ** Biotechnology Co., Ltd.	**74** patent applications with obviously the same contents Order No. 75 Article 3 (3); Order No. 75 Article 3 (6)
**ShengFan ** **	Multiple applicants	**123** invention patent applications with obvious fabricated technical effects Order No. 75 Article 3 (4); Order No. 75 Article 3 (6)

As instructed by the CNIPA on investigating abnormal patent applications, administrative authorities such as local intellectual property offices, local administration bureau for market regulation mainly impose penalties such as warnings and fines on relevant applicants or agencies in accordance with "The Patent Agency Regulations" and "The Patent Agency Management Measures". For example, the SMAR in Guangzhou province has imposed warnings, fines and other penalties against agencies that engaged in abnormal patent applications.

Patent Agency	*Punishment*	*Penalties*	*Statutory Grounds*
Guangzhou Xinnuo	26 invention patents	Warning and Fines of 30,000 RMB	"The Patent Agency Regulations" Article 25(5) "The Patent Agency Management Measures" Article 53(2)
Shenzhen Dejin	Patent No 201930664915.6 etc.	Warning	"The Patent Agency Regulations" Article 25(5) "The Patent Agency Management Measures" Article 53(2)

5.3 Measures Taken to Combat BFPA

SIPO / CNIPA has issued increasingly more severe and more detailed administrative rules requiring in order to improve the patent quality and then against BFPA[53].

5.3.1 Special Rectification of Patent Agencies Action Taken by the SIPO in 2016

SIPO took the Special Rectification of Patent Agency action in September to November, 2016[54]. The focus of the special rectification includes dealing with the act of accrediting patent agents, unqualified patent agents, and agents of bad faith patent applications. In terms of dealing with the activities of patent agents, the measures taken include special investigations, strengthening of supervision during and after the event, and self-discipline of industry associations. In terms of reducing unqualified patent agency activities, the measures taken include the formation of supervisory linkages, through the corporate credit information publicity system, corporate information sharing platform, and timely grasp of the enterprise information that has been approved and registered by the administrative department for industry and commerce and whose business scope includes patent agency. All local intellectual property offices shall investigate unqualified patent agency activities through online monitoring, on-site inspections, and public reporting. For entities or individuals suspected of unqualified patent agency activities, they shall cooperate with the local administrative department for industry and commerce, according to the Investigate and punish in accordance with the relevant provisions of the Regulations on Business Investigation, Punishment and Banning. The measures taken to deal with agents of abnormal patent applications mainly include intensified monitoring and investigation, industry associations adopting industry self-discipline measures against agencies and patent agents, and punishments when necessary.

This is also deemed as the "crackdown on BFPA", or a predecessor of "Blue Sky" campaign. In the following year, on February 7, 2017, "Several Provisions on Regulating Patent Application Activities (2017)" (Order No. 75) was issued by the SIPO to expand the officially defined forms of bad faith patent applications from three to six. It is believed that additional forms of bad faith patent application may be identified through the Special Rectification of Patent Agencies Action taken by the SIPO in 2016 and added into the administrative rules in 2016.

This shows that the regulation against BFPA in China has to be practical to address the actual circumstances happening in the practice.

5.3.2 Blue Sky Campaign Taken by the CNIPA in 2019-2021

It's believed that IP / patent agencies have played a role in supporting BFPA applicants to draft, forge and file a large number of BFPAs. The BFPA investigation conducted by the CNIPA in early 2021 showed that the BFPAs submitted through patent agencies accounted for a relatively high proportion, involving more than 1,400 agencies. The relevant person in charge of the CNIPA thus made critical comments at the administrative guidance meeting in May 2021 with the attendance of 14 provincial (municipal) IP offices and 74 representatives from patent agencies, that some patent agencies had not been sufficiently aware of the hazards of acting as an agent for BFPAs. The BFPA investigation conducted by the CNIPA in early 2021 showed

[53] Guidelines for Patent Examination (2010)

[54] Notice of the Office of the State Intellectual Property Office on Carrying out a Special Rectification of Patent Agency, https://www.cnipa.gov.cn/art/2016/9/23/art_551_149376.html?xxgkhide=1

that the BFPAs submitted through patent agencies accounted for a relatively high proportion, involving more than 1,400 agencies, which means more than 37% of Chinese patent agencies have acted as agency for BFPAs.

The CNIPA started to take “Blue Sky” action campaign targeted at patent agencies against BFPA on the basis of the Regulation on Patent Agency revised in 2018, and the Measures for the Administration of Patent Agency (2019) (Order No. 6 of the SAMR) issued in April 2019.

The CNIPA has organized and carried out a series of rectification actions for the "blue sky" campaign since 2019 toward the intellectual property agency industry. It has mainly adopted 8 measures, including rapid crackdown on BFPA agency activities, and intensified investigation and handling of major cases, and comprehensive strengthening of industry supervision and so on.[55]

A timeline of key regulations and CNIPA’s actions re the Blue Sky campaign are summarized as follows:

Published Date	Title
2019-03-26	Eighteen Decisions of Punishment on Patent Agencies/Agents
2019-04-04	Measures for the Administration of Patent Agency (2019) (Order No. 6 of the SAMR)
2019-04-22	Notice of the General Office of the CNIPA on Issuing the Work Plan for Strengthening Patent Agency Supervision
2020-05-08	Notice by the General Office of the CNIPA of Deepening the “Blue Sky” Campaign to Promote the Healthy Development of the Intellectual Property Right Service Industry
2021-03-12	Notice by the CNIPA of Deepening the “Blue Sky” Special Rectification Campaign
2021-03-19	A report from China Intellectual Property News re a First Batch of BFPA Screening
2021-05-10	Notice by the CNIPA On Deepening the Reform of "Decentralization, Administration, and Service" in the Field of Intellectual Property to Optimize the Innovation Environment and Business Environment
2021-06-02	A report from China Intellectual Property News re a Second Batch of BFPA Screening

Data show that in the two years since the "Blue Sky" campaign was launched, the CNIPA has interviewed 2,950 IP agencies, ordered 1,095 rectifications, filed and investigated 330 cases, and imposed 182 administrative penalties.[56] In addition, the CNIPA has also organized 25,000 intellectual property agencies and more than

55 https://mp.weixin.qq.com/s?__biz=MzA4MDgwNzkzMw==&mid=2664790218&idx=1&sn=c6da50e9e31ed78f9476250b191f7eb0&chksm=84bf4a58b3c8c34ec0564376b80755a24d39b89325b1d8f5f013f4920212d1fa874c64c4f0ee&mpshare=1&scene=1&srcid=0312OTNL7G31Z1VF9NxIksmq&sharer_sharetime=1615519919637&sharer_shareid=2ec67d05f5f1e7d9e7572b3d1472b577&exportkey=AVtgk0m8ou4FKAHDqhxwrJY%3D&pass_ticket=h6zXRKjaodIdsO9ovjHaPwhhqhe3QRXqBdWU8fb21ZxgKlk8b5B0DrHvKkaCSesU&wx_header=0#rd

56 Notice by the General Office of the China National Intellectual Property Administration of Deepening the “Blue Sky” Action to Promote the Healthy Development of the Intellectual Property Right Service Industry, 05-07-2020 https://www.lawinfochina.com/display.aspx?id=33058&lib=law&SearchKeyword=&SearchCKeyword=

16,000 patent agents to complete self-examinations and sign credit commitments to review, identify and withdraw BFPAs.

So far, CNIPA has established a rapid responding and three-dimensional reporting and complaint network. The corresponding illegal patent agencies have been included in the list of abnormal business operations and the list of severely illegal and untrustworthy enterprises according to law. It has also issued the "Patent Agency Supervision Work Regulations (Trial implementation)" to provide a reference for further unifying standards and improving the level of supervision.[57]

The Blue Sky campaign has achieved the expected results. For instance, the CNIPA notified two batches of potential bad faith patent applications to local IP Authorities at the end of 2018 and the beginning of 2019 respectively, 92% of these patent applications were withdrawn voluntarily, 7% deemed withdrawn or rejected, and only 1% of these patent applications were approved by the CNIPA for proceeding further upon the applicants' request for a further review of the BFPA decisions[58]. A more recent notification took place in March 2021 and 60% of BFPAs notified this time had been withdrawn voluntarily by applicants in the same month.

CNIPA also joint forced with local authorities to impose punishment on abnormal patent applications. For example, in March 2021, the CNIPA notified multiple provinces, including Jiangsu, Sichuan, Jiangxi, Hubei, Guangdong, etc., about a batch of abnormal patent applications that were not intended for the purpose of protecting innovation.

Table: Number of BFPA cases identified by the CNIPA in March 2021

Province	***Number of applicants***	***Number of patent agencies***
Jiangsu	10495	309
Zhejiang	8300	242
Sichuan	2246	113
Jiangxi	946	101

The administrative measures targeting IP agencies seem be an efficient way to tackle BFPA issues in China. The CNIPA has announced to continue to carry out in-depth "blue sky" special rectification actions for the intellectual property agency industry in 2021.

The below table showed enforcement results from the Blue Sky Campaign during 2019 and 2020.

Statistics from Blue Sky Campaign during 2019-2020[59]

2,950 patent and trademark agencies were questioned
Estimated to be ~4.5% out of the total IP service agencies (~66,000)

[57] http://www.iprchn.com/cipnews/news_content.aspx?newsId=128057
[58] Report from China Intellectual Property News re a First Batch of BFPA Screening https://www.cnipa.gov.cn/art/2021/3/19/art_53_157884.html
[59] Source: http://www.xinhuanet.com/fortune/2021-01/27/c_1127031924.htm

	1,095 patent and trademark agencies were ordered to rectify their practices
	330 cases of non-compliance were filed and investigated
	182 administrative penalties were imposed

5.3.3 Joint Discipline Mechanism

Joint discipline mechanism is another approach taken by the government to tackle BFPA issues, which has been implemented by the CNIPA in collaboration with the other 38 government to combat serious dishonesties in the field of intellectual property (patents) such as BFPA.

In November 2018, the CNIPA, together with the Development and Reform Commission, the People's Bank and a total of 38 departments and units, signed the “Memorandum of Cooperation on Joint Discipline against Seriously Defaulting Subjects in the Field of Intellectual Property Rights (Patents)” (hereinafter referred to as the "Memorandum"), deciding to take 38 disciplinary measures against six types of serious defaulting acts, including bad faith patent application activities and abuse of patent rights.

In October 2019, "Management Measures for the List of Subjects of Joint Discipline for Serious Breach of Trust in the Patent Field (for Trial Implementation)"[60] was further issued to ensure the implementation of joint disciplinary measures for serious breach of trust in the patent field.

The Memorandum and the Measures define six serious dishonesties in the field of intellectual property (patents), including:

1) Repeated patent infringement.
2) Refusal to satisfy the effective decisions of patent infringement and counterfeiting.
3) Serious violations of law by patent agencies such as serious illegal patent commissioning.
4) Altering, reselling, leasing or lending the qualification certificate of a patent agent.
5) **Abnormal patent application** (defined in Order No. 75)
6) Providing false documents for patent applications.

One point is raised in these regulations that “the joint disciplinary action against a defaulting person/entity is not the ultimate goal of the policy” and the person/entity to be disciplined is encouraged to correct the defaulting activity, eliminate the negative impact and remove themselves from the default list based on their effort.

In summary, in addition to the administrative measures taken by the CNIPA against the BFPA activities, the joint discipline mechanism further strengthens the measures against dishonesty acts in the field of patent, including BFPA, and increase the cost of filing BFPA.

Penalties under the Joint Discipline Mechanism

The potential penalties for untrustworthy behaviour in patent industry under the joint discipline mechanisms and relevant government bodies are summarized in the table below for easy reference.[61]

Penalty	Government body
Restricted government funding support	China government – all levels
Limitation on government subsidies	China government – all levels
Restricted participation as a supplier in government procurement	Ministry of Finance
Violations recorded in financial credit database	People's Bank of China
Applications for issuance of corporate bonds could be rejected	National Development and Reform Commission
Increased insurance rates according to risk pricing principles	People's Bank of China, Banking and Insurance Regulatory Commission
Referenced during approval and management of foreign exchange quotas	State Administration of Foreign Exchange
Increased day-to-day supervision, increased frequency of spot checks	State Administration of Market Regulation, Food and Drug Administration, State Taxation Administration, others
Strict supervision of imports and exports, restriction on becoming a customs-certified enterprise	General Administration of Customs
Banned from advertising patent-infringing products	State Administration of Radio Film and Television
Restriction on travel by airplane and high-speed rail	Supreme People's Court
Restriction on non-life and non-work-related consumer behaviour such as vacations, limiting travel within a certain range	Ministry of Culture and Tourism
Restriction on receiving awards, revocation of awards received	Central Propaganda Department

5.4 Measures Against Abuse of Patent Right Based on BFPA

The China Patent Law was introduced in 2020 the restriction to "abuse of patent right" in Article 20.1 of the fourth amendment and specifically prescribes restricting the "abuse of patent rights to eliminate or restrict competition" in Article 20.2. The "abuse of patent right" according to Article 20.2 has additional requirements for the patentee to have a dominance position to eliminate or restrict competition and may be considered as monopolistic act to be regulated in accordance with the Anti-monopoly Law.

In contrast, the "abuse of patent right" according to Article 20.1 may include the common situation that a patentee issues warnings in bad faith or sue against justifiable users of the patent after knowing that the

[61] "Bad faith in China: unique solutions for unique problems", by Jacob Schindler, March 2019, IAM

patent falls within the scope of prior art. If a patent right was, possibly, granted to a BFPA, such patent right obtained from BFPA may be utilized by the patentee in patent infringement cases against others. Such lawsuit may be considered as abuse of patent right based on BFPA, which falls into the "abuse of patent right" according to Article 20.1. In such a circumstance, the sued party may file a counter lawsuit against the patentee based on the cause for "IP litigation in Bad Faith".

The judicial measures mainly determine and regulate the activities of obtaining patent right in bad faith in the litigation proceedings when the patentee intends to enforce a patent acquired in bad faith.

5.4.1 Variety of forms of abuse of patent right

The CNIPA released a report in December 2019 that enterprises of different sizes met different activities of abuse of patent right, which is summarized and shown in chart below.[62]

Activities of Abuse of Patent Right Met by Enterprises of Different Sizes in China (%)

Activities of Abuse of Patent Right	Large Enterprise	Medium Enterprise	Small Enterprise	Micro Enterprise	Unknown
Charging unreasonable licensing fees based on a portfolio of core patents and useless patents	**42.1**	30.3	31.2	27.6	30
Arbitrarily initiating litigation based on utility model and design patents, rashly **requesting** pre-trial injunction	24	**48.8**	**45.4**	**48.3**	23.2
Forming technology monopoly through **temporary** measures, selling non-patent product in bundles, cooperative pricing, minimum limit price	**41.8**	33.8	35.7	26.8	0.7
Patentee licensor restricting the improvement to patented technologies	20	9.3	29.2	30	47.8
Patent licensor requesting ownership of IP on improvement made to the licensed technology	4.1	4.6	18	24.9	0.4
Others	0.3	2.6	1.8	9.1	0

Among the listed activities of abuse of patent right, the activity "Arbitrarily initiating litigation based on utility model and design patents, rashly requesting pre-trial injunction" appears to be abuse of patent based on BFPA. Notably, 45% to 48% of the investigated SMEs and Micro enterprises were afflicted by "Arbitrarily initiating litigation based on utility model and design patents, rashly requesting pre-trial injunction", and even 24% large enterprises were inflicted by such abuse of patent based on BFPA.

It can be seen that there are a variety of forms of the abuse of patent rights. We'll mainly discuss this topic related to "obtaining patent right in bad faith" and "patent litigation in bad faith" from the judicial perspective.

5.4.2 Obtaining Patent Right in Bad Faith

Definition of obtaining patent right in bad faith

The Beijing High People's Court issued the "Guidelines of Patent Infringement Determination (2017)" which stipulates the definition of the obtaining patent right in bad faith below:

[62] China Patent Survey Report 2019

"obtaining patent right in bad faith refers to applying for a patent for an invention-creation, which one clearly knows should not be granted patent protection, and finally obtaining patent right." [63]

Specifically, obtaining patent right in bad faith refer to that the patentee clearly knows prior to patent filling and obtains a patent for the technologies[64]:

1) For technical standards such as national standards or industry standards
2) For others' technologies to be used as technical standards,
3) For a product being widely manufactured and used in a certain area,
4) With fabricated experimental data or effects to meet the patentability requirements,
5) Disclosed in a patent or a published overseas patent application.

A defendant can refer to the patentee's abuse of patent right as defence once being claimed for patent infringement as long as proving the patent is obtained in bad faith according to the above criteria.

Principle of good faith in patent verification proceeding

The SPC issued in 2020 the "Provisions on Several Issues Concerning the Application of Law in Hearing Administrative Cases of Granted Patent Verification" which stipulated similar corresponding provisions in the administrative litigation for patent right verification.[65] In summary, if the petitioner of the invalidation can prove that the patentee has violated the principle of good faith such as by fabricating experimental data,[66] the court may determine that the relevant claims do not comply with the relevant provisions of the Patent Law and uphold or turn over the decision made by the patent administrative authority.

The circumstances of obtaining patent right in bad faith as defined by the Guidelines and the Provisions above appear to be more specifically/narrowly defined and implementable than BFPA activities as defined in the administrative rules. The definition of patents obtained in bad faith is totally different from that defined in the EU patent regulations which mainly refer to a patent based on the technology stolen from others.

It is not yet clear if BFPA as defined in a broader scope in the administrative rules may be added as a circumstance of "obtaining patent right in bad faith" in the litigation procedure. However, if so, potential threat of patent infringement against the public may be alleviated to some extent, through the synergy between administrative and judicial regulatory efforts.

5.4.3 Patent Litigation in Bad Faith

The so-called IP litigation / lawsuit in bad faith usually refers to the intentional filing of an unreasonable lawsuit by an illegal actor for the purpose of obtaining illegal or improper benefits, and causes the opponent suffered losses in the lawsuits. According to relevant provisions of the China's General Principles of Civil Law and the Tort Liability Law, IP litigation in bad faith shall have the four elements of subjective fault, infringement, damage, and causal relationship between the infringement and the damage.

[63] Article 127 of the "Guidelines of Patent Infringement Determination (2017)" issued by the Beijing High People's Court in 2017.
[64] Article 127 of the "Guidelines of Patent Infringement Determination (2017)" issued by the Beijing High People's Court in 2017.
[65] Article 5 of the "Provisions on Several Issues Concerning the Application of Law in Hearing Administrative Cases of Granted Patent Verification" issued by SPC in September 2020.
[66] http://www.cnipa.gov.cn/art/2021/5/27/art_2073_159683.html

The SPC offered the remedy procedure for the public to combat patent infringement claims based on a patent acquired in bad faith, where "disputes over liability for damages due to intellectual property lawsuits in bad faith" was added as one of the causes of action in civil cases.[67] This reflected that the number of IP lawsuits filed in bad faith must have increased and reached a level that the relevant authorities had to pay attention to.

Specifically, the identification of a specific litigation as an IP litigation in bad faith, should meet the following requirement:

1) A party has made a request in the form of filing an intellectual property lawsuit;
2) The party making the request has subjective malice;
3) There is an actual consequence of damage; and
4) There is a causal relationship between the action of the party making the request and the consequences of the damage.

For the point 2) above, subjective malice (i.e., bad faith) means that the party making the request clearly knows that its request lacks justification and still improperly exercises its right of lawsuit with the intention of causing the opponent to suffer damages of its property or reputation in a manner contrary to the purpose for which the right was set up.

The essence of an IP litigation in bad faith is a tort activity for the abuse of patent rights rather than the proper exercise of the patent rights. The purpose of an IP litigation in bad faith is to obtain illegal or improper benefits, cause the opponent damages in the lawsuit, rather than to get the remedy based on the patent rights granted by the law.

5.4.4 Case examples of IP Litigation in bad faith

In China's judicial practice, it is relatively difficult to prove whether the party making the request has subjective malice. It is often the case that even if the requesting party's claims are not upheld by the court in the final judgment, it cannot be easily assumed that his or her lawsuit acted in subjective malice.

The following cases illustrate the determination of IP litigation in bad faith.

Second trial of a dispute over damages for IP litigation in bad faith between Tan Fawen (Tan) and Shenzhen Tencent Computer System Co., Ltd. (Tencent)[68]

[Case Brief]

Tencent owns the copyrights of a number of “QQ Penguin" series of artworks and the exclusive rights to register trademark. In December 2008, Tan applied to SIPO for a design patent of a "speaker (Xzeit mini penguin type)", which was granted.

In March 2011, Tencent filed a lawsuit on the grounds that the QQ mini speaker sold by Tan and AoWei company infringed its copyright and trademark rights. The two parties reached a settlement and Tan agreed to stop the infringement activities, pay compensation and withdraw his design patent. However, Tan did not fulfil the promise and continued to pay annual fees to maintain the design patent valid.

[67] “Decision of the Supreme People's Court on Amending the Provisions on the Causes of Civil Cases” issued by SPC in 2011.
[68] https://www.chinacourt.org/article/detail/2020/04/id/5051477.shtml

During the period, Tencent and another company (Zhongke) cooperated in the production and sale of penguin shape speakers. In 2016, Tan filed a lawsuit against Tencent and Zhongke for patent infringement of the design patent and requested them to pay patent royalties of 900,000 RMB. The design patent was wholly invalidated in the patent invalidation procedure before the SIPO (now CNIPA). The Court then ruled that Tan's lawsuit for patent infringement claim was dismissed.

Tencent filed this lawsuit to the same court against Tan **on the grounds that Tan's actions constituted IP litigation in bad faith** and requested that Tan be ordered to compensate for damages, apologize and eliminate the negative impacts including Tencent's loss of goodwill, attorney's fees, travel expenses, and expected available benefits caused by the patent infringement litigation initiated by Tan in 2016.

The court supported Tencent's claim based on the facts confirmed below:

- Tan knew well that Tencent had prior copyright on the QQ penguin artworks prior to filing a design patent with the Patent Office, which violated the principle of good faith.
- Tan improperly excised the patent right, intending to obtain the illegal benefits of market competition while knowing on the improper obtaining of patent right.

Indicator

With the increasing prominence of the huge commercial value of intellectual property rights, some unscrupulous actors have taken advantage of the loopholes in the existing copyright registration and the formal examination of design and utility model patents to obtain illegal or improper benefits by frequently filing IP litigation in bad faith. This case gave an example that China has taken judicial measures to deal with the abuse of patent right based on BFPA, especially for a patent acquired in bad faith.

First Case regarding the abuse of patent right – Utility model patent infringement dispute[69]

[Case Brief]

In August 2003, Yuan, the director of a valve factory, sued another individual for infringement of his patent rights.

The utility model patent ZL01204954.9 titled "ball valve for firefighting" was as the legal basis in the infringement dispute. The patent was later found to be the national standard and was disclosed long time ago prior to the patent filing. The patent was invalidated eventually. The defendant sued Yuan for bad faith patent litigation in a separate lawsuit. The Court took a joint trial.

The court supported the defendant's claim that the Yuan's behaviour of applying for the utility model patent ZL01204954.9 "Ball Valve for Fire Fighting" deemed to lack of honesty and credit / good faith, and the act of applying for and obtaining the patent right be considered as a bad faith application, based on the findings that the plaintiff of the patent infringement dispute had served as the workshop director and factory manager of the valve factory for a long time and he should be familiar with the relevant national standards for ball valves.

The court held that Yuan Lizhong maliciously applied for and obtained patent authorization, and then sued others for infringing its patent rights, dragging the innocent defendant into the whirlpool of patent infringement litigation and patent administrative litigation, interfering with the defendant's normal production and business activities. Its behaviour has seriously deviated from the purpose of the patent

[69] Rouse CIELA database – see www.ciela.cn

system, infringed on the legitimate rights and interests of others, and objectively caused damage to Tongfa, which constitutes malicious prosecution and should bear the corresponding legal responsibility.

Indication

This was reportedly the first case of patent litigation in bad faith in China. In the decision, the court defined malicious prosecution as "the act of intentionally bringing a civil action for the purpose of causing damage to another person, in the absence of substantive rights or without factual basis and justification, causing the opposite party to suffer loss in the litigation".

The court supported the defendant for not establishment of patent infringement as the patent acquired in bad faith in the patent infringement litigation proceeding, meanwhile the court supported the defendant's claim for bad-faith litigation against the patentee in a parallel legal proceeding.

Sea Mild (Shanghai) vs. Procter & Gamble, Patent Infringement Case (2021) [70]

[Case Brief]

Luo Yunjun and Sea Mild (Shanghai) Technology are the patentees of Chinese patent ZL200910140391.6 titled 'a portable cleaning item and manufacturing method thereof'. The patentees filed a civil litigation against Procter & Gamble Guangzhou Ltd before the Shanghai IP Court on 26 June 2019, asserting that it infringed the patent by importing and selling a laundry detergent pouch product in China. The patentee requested injunction and indemnification of Rmb100 million for damages and reasonable expenses incurred for stopping the infringement. After receiving the complaint served by court, Procter & Gamble filed an invalidation petition against the patent before the CNIPA, which invalidated all claims of the patent on 20 January 2020.

Indication

> "*Multinationals are increasingly becoming the targets of unreasonable patent assertion in China. Some opportunist patentees assert low-quality patents against them with the aim of cashing in on unsubstantiated accusations. Without a 'loser pays' rule against the plaintiff in China, the unsuccessful party is not required to reimburse the winning defendant's legal expenses, including attorneys' fees, making the cost of unreasonable patent assertion quite low. Conversely, multinationals have a lot at stake (e.g., business, goodwill and credibility), should the court grant an injunction against it. In reality, it is not unusual for corporations to choose settlement in exchange for the patentee's withdrawal of lawsuit.*"

It is true that patent holders may be disadvantageous in such situations. However, it is not easy to establish "IP litigation in bad faith" or "obtaining patent right in bad faith" before court, as shown in below statistics of patent litigation in bad faith cases we identified.

The frequent emergence of IP litigation in bad faith based on BFPA represents not only the unscrupulousness of illegal actors to seize illegal benefits, but also reflects the lack of a long-term effective mechanism in the current anti-malicious lawsuit. Under such circumstances, to effectively curb the malicious lawsuits in the field of intellectual property, it is not sufficient to just rely on the severe punishment and heavy penalties for such illegal acts afterwards but should also make efforts at the source.

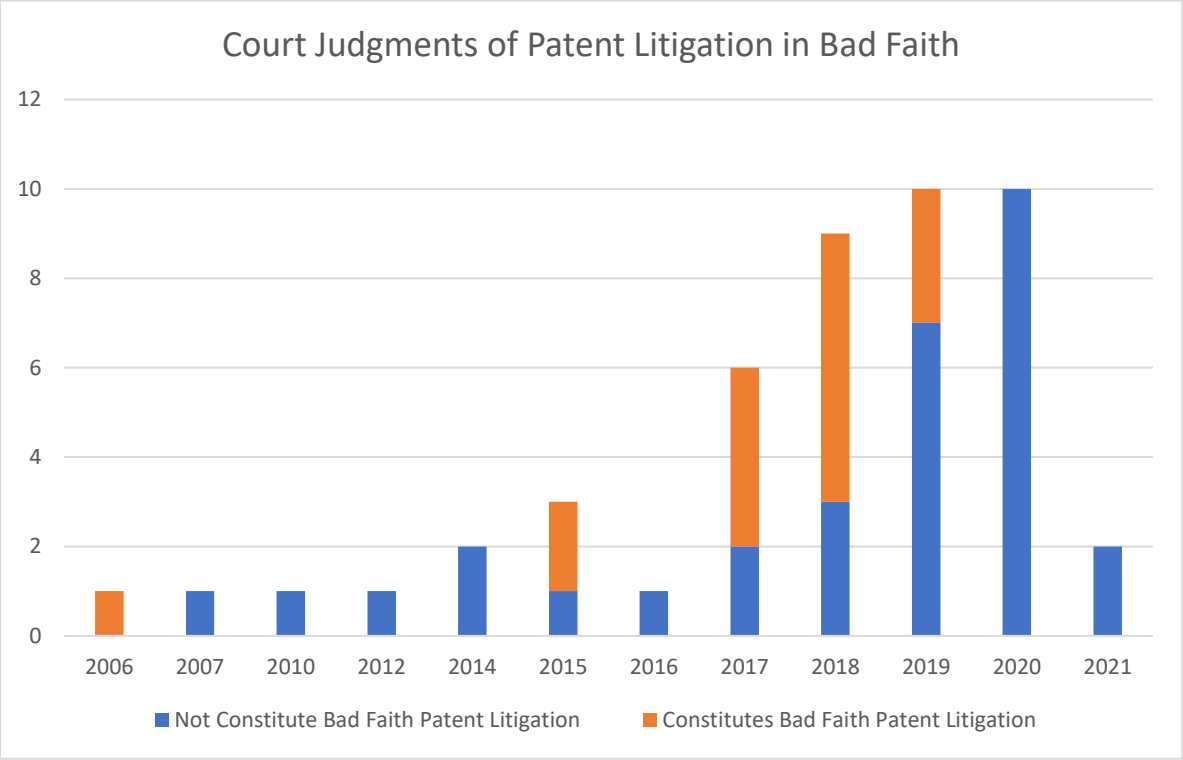
[70] https://www.iam-media.com/procter-gamble-fends-unreasonable-patent-lawsuit-in-china

The emergence of malicious lawsuits based on BFPA also reflects that the China's current credit discipline has not yet played a proper deterrent effect on the malicious lawsuit actors. In view of this, the current anti-malicious lawsuit mechanism should be combined with the ongoing promotion of social credit system construction, and the malicious lawsuit actors should be moved into the integrity blacklist, in order to not only make the illegal actors pay a heavy price, but also to deter those who intends to get illegal benefit from the malicious lawsuits.

5.4.5 Statistics of IP Litigation in bad faith cases

We have researched cases of Patent Litigation in Bad Faith from CIELA database and identified 47 court judgments of Patent Litigation in Bad Faith, as charted below. Among these cases, 16 cases (34% of a total of 47) were adjudicated as bad faith patent claim.

Chart: Court Judgments of Patent Litigation in Bad Faith



(Data Source: CIELA-the Chinese IP Litigation Analysis Service Database[71])

As compared with hundreds of thousands BFPAs identified by the CNIPA in administrative procedures in the past three years, the 47 court judgments on cases of patent litigation in bad faith show that it is quite difficult to establish such "patent litigation in bad faith" in Chinese courts. According to our study, this is probably because of the high requirements of evidence in judicial proceedings for proving that the asserted patent is improper.

Therefore, there is a clear gap between the much looser criteria for establishing BFPAs in administrative procedures by the CNIPA, and the much stricter criteria for establishing "IP litigation in bad faith" or "obtaining patent right in bad faith" before courts. Accordingly, it appears that the better strategy for patent holders to challenge threatening BFPAs in China might be through administrative procedures in patent prosecution or patent invalidation, rather than through the judicial proceedings before courts.

From the above chart, it can be seen a trend of increase in "Patent Litigation in Bad Faith" cases raised by defendant sued for patent infringement, which also indicates there is a tendency for patent right obtained from BFPA might be increasingly utilized before Chinese courts.

[71] Rouse CIELA database – see www.ciela.cn

5.5 Trend of Regulatory Measures

After experiencing the "barbaric growth" stage of simply pursuing the number of patent applications, how to ensure the number of applications and the improvement of patent quality at the same time has become a problem that the Chinese government has to solve at this stage and in the nearby future. Among them, how to suppress BFPA has become an urgent problem for the government. The Chinese government including the CNIPA has taken various measures such as fine-tuning of the previous policies and changes made from regulatory and administrative perspective, aiming to find an effective means to fundamentally solve the BFPA phenomenon.

- Changes being made from policy perspective

Change of KPIs for technology innovation

The Chinese government has made the optimization of patent subsidy and incentive policies to better protect and encourage high-value patents and develop patent-intensive industries as one of its objectives in the 14th Five-Year Plan (2021-2025).[72]

The CNIPA announced in June of this year that the object for patent protection is changed from the number of invention patents owned per 10,000 population to be the number of **invention patents of high value** owned per 10,000 population[73].

We expect that the China government will change the KPIs to recognize high-tech companies or the contribution of individual innovators. It's advisable to at least assess the strength of patents involved for the evaluation.

Cancel patent subsidy

The CNIPA announced early this year that patent subsidies will be cancelled step by step since June 2021[74] and completely cancelled by 2025. Since this year, the patent subsidy will be provided at the post-grant procedure to invention patents only to cover up to 50% official fees excluding annuity fee. No funding is available to utility model and design patents and no funding is available to cover patent agency service fees. We expect this change from the policy perspective will guide the purpose of patent filing to be back to track for the inherent purpose of patents and result in the decrease in the number of BFPAs.

EU stakeholders also pointed out that the nature of patent is for the government to grant a legitimate monopoly right. The patent subsidy offered by the China government to Chinese companies destroy the principle of fair competition in the market and it causes unfairness to foreign companies competing with Chines companies in the same technical area.

[72] Outline of the 14th Five-Year Plan (2021-2025) for National Economic and Social Development and Vision 2035 of China

[73] CNIPA, June 16, 2021, Policy Interpretations of the Notice by CNIPA On Deepening The Reform Of "Decentralization, Administration and Service" in the Field of Intellectual Property to Optimize the Innovation Environment and Business Environment, https://www.cnipa.gov.cn/art/2021/6/16/art_66_160083.html

[74] CNIPA, "Notice by the CHINA of Further Strictly Regulating Patent Application Activities" issued on January 27, 2021.

- Changes being made from regulatory perspective

Introduction of examination

It's believed that most BFPAs are filed in the form of utility model and design patents. Thus, it might be advisable to raise the bars for the examination for utility model and design patents, for example, by requiring search of prior arts before granting.

Introduction of "bad faith" as a legal ground for patent invalidation

It's very likely that failure to comply with the principle of good faith will be a legal ground to request for patent invalidation in view of the recent legislation activities, which is reflected in the draft amendment to the Implementation Regulations of the China Patent Law and in the drat amendment to the Guidelines for Patent Examination.

Increase to filing fees

Currently the filing cost for Chinese patents is relatively lower than that in many EU countries. It might be advisable to increase the patent filing cost, at least increase the filing cost for utility model and design patents, in order to increase the cost for BFPA patent filers.

Clear definition to the BFPA

We've analysed each type of BFPA in the report and it's advisable to clear define BFPA. It's difficult to provide "good faith" in certain situations such as multiple patent filings for an important technology. Thus, it sounds essentially important to clearly define the BFPA activities and provide more cases for the stakeholders in China and Europe to get a sense about the establishment of BFPA.

In addition, we've identified the inconsistency in BFPA definition and determination in administrative procedure and judicial procedure. It's believed that the consistency in the two procedures can make it easy for the public to anticipate outcome of one activity.

We expect that there may be more changes to provisions around bad faith patent applications when further from the public will be taken in account.

In summary, the issue of BFPA may be mitigated with regulatory and judicial changes in years to come. However, further improvements/clarifications to the regulatory rules and implementation of the rules against BFPA are still expected to provide effective solutions to the issue of BFPA.

6. Conclusion

In summary, BFPA is not an isolated issue, but a product of the evolution and development of the Chinese patent system. Comprehensive consideration and understanding of the history and trends of China's patent strategy, policies, administrative regulations, judicial rules, and legislation will help all participants of the Chinese patent system understand the problems of BFPA and find corresponding countermeasures.

6.1 Summary of Key Findings

Definition of BFPA

The term “Bad Faith Patent Application” (BFPA)” has different meanings in the legal contexts in Europe and China. In the EU, BFPA closely relates to patent ownership issue, and means filing a patent application without being entitled to the application. In China, BFPA refers to patent applications filed with the purpose other than for protecting innovation, which is usually of low quality and contains plagiarised or forged content. This has some overlap with the EU’s interpretation but is not exactly an issue of patent ownership or an issue of novelty / inventive step.

BFPA as a Unique Problem in China

BFPA is found to be a unique problem under the patent system of China. BFPA is regulated by regulations not found corresponding ones in the EU. From the views of surveyed EU patent practitioners, some variants of BFPAs defined in administrative rules in China may be addressed as issues of novelty/inventive step, or irrelevant to patent practice in the EU.

The China National Intellectual Property Administration (CNIPA) categorises BFPAs into nine different types (originally three types initially defined in 2007, six types in 2017, and now nine types in 2021) thus highlighting the complexity of issues and the resulting regulatory measures needed to deal with BFPAs.

Policy Background for BFPA

BFPAs are better understood in the context of the evolving national IP strategies and IP polices of China. The issue of BFPA grows along with incentive policies stimulating the number of patents being filed. Cancellation of such patent subsidy policies for patent applications may reduce the number of BFPAs whilst also help improve patent filing quality.

Regulatory Changes Against BFPA

The China National Intellectual Property Administration (CNIPA) now categorises BFPAs into nine different types (originally three types initially defined in 2007, six types in 2017, and now nine types in 2021) thus highlighting the complexity of issues and the resulting regulatory measures needed to deal with BFPAs.

Regulatory restrictions on BFPA have been continuously updated over the last decade and escalated from administrative rules into legislative measures, including the addition of the good faith principle into Article 20 of the Patent Law (Amendment 2020).

In addition to the updated definitions and examination procedures for BFPA in 2021, two major updates to administrative regulations against BFPA include adding BFPA as a cause for rejection, and adding BFPA as a cause for invalidation, according to Draft Amendment to the Implementing Regulations of the Patent Law published in November 2020 and Draft Amendment to Guidelines for Patent Examination published in August

2021 by the CNIPA, all of which may help strengthen the position of the CNIPA and patent holders in combatting BFPAs.

Restrictions on Abuse of Patent Rights Based on BFPA

There are judicial measures against the abuse of patent rights in bad faith in China, particularly against "bad faith patent litigation" and "acquiring a patent in bad faith", which relate to abuse of patent right base on ungrounded patent right, such as patent obviously belonging to prior art. Such abuse of patent right based on BFPA is different from abuse of patent right based on dominant position. The latter was regulated as monopolistic acts regulated by Anti-Monopoly Law in China and the EU competition Law in the EU.

It is observed that inconsistent criteria are applied for establishing BFPA in administrative procedures and for establishing "bad faith patent litigation" or "acquiring patent in bad faith" in judicial proceedings. Moreover, how the administrative regulatory measures against BFPA will be linked to such judicial measures is still not quite clear.

Impact of the Regulatory Changes Against BFPA

Generally, the recent regulatory changes are positive in addressing the prominent issue of BFPA in China by detailing the definitions of BFPA, formulating the procedures, and providing legal basis for the CNIPA to reject BFPA and for the patent holders to invalidate patents granted from BFPA. Along with the shifting of national top-level IP strategy from quantity to quality growth of patents, it is expected that the regulatory changes may help improve the China patent environment to be more friendly to the patent holders and the public by severely cracking down the BFPAs.

There are concerns raised by the regulatory changes to patent holders, especially worries that normal patent applications might be mistakenly determined as BFPAs according to some currently vague rules. It is noticed that the current regulatory measures against BFPA are still not perfect nor completely clear, and more detailed rules for implementation are expected to follow, hopefully providing more certainties and confidence to the patent holders and the public.

2. Implementation Review

Motivations Behind BFPA

Fighting BFPA is a complicated issue concerning multiple stakeholders with various motivations at play. Since the first patent subsidy policy in 1999, BFPA has grown into an instrument for some domestic applicants seeking to grow patent portfolio volume and low-price patent agencies assisting them in obtaining government subsidies, tax concessions, profit, or other rewards.

Procedure for Determining BFPA

Currently China adopts administrative approaches to assess and identify BFPA activities in patent application processes, and judicial approaches to address abuse of patent right based on BFPA. The CNIPA may proactively assess the bad faith patent applications throughout the process of patent prosecution before a patent is granted. The CNIPA may also initiate the assessment of BFPA based on the report from a third party. Courts will usually assess and determine in the patent enforcement proceedings whether it's the abuse of patent right based on patent right obtained in bad faith. The procedure for the determination of BFPA was not fully stated previously but are prescribed in detail in the latest administrative rules released in 2021, notably Measures on Regulating Patent Application Activities (Announcement No. 411) issued in March 2021, and

Draft Amendment to Several Provisions on Regulating Patent Application Activities issued in May 2021 (Draft Amendment to Order No. 75) by the CNIPA.

Remedies to Parties Involved in BFPA

There are remedies available for the public to combat BFPA.

- For a pending BFPA, the public may report case of BFPA to the IP offices or file a third-party observation.
- For a granted BFPA, the public is likely to have the option to file invalidation against the patent on the ground of failure to comply with the principle of good faith, according to Draft Amendment to Implementing Regulations of the Patent Law published in November 2020 and Draft Amendment to Guidelines for Patent Examination published in August 2021 by the CNIPA.

There are also remedies available for patent applicants whose application is determined as BFPA. It's feasible for the patent applicants to submit statement and provide evidence in response to the CNIPA's notice about BFPA. But it sounds not feasible for the patent applicants to amend patent applications in the procedure. Both administrative and judicial remedy procedures are available to patent applicants if they're not satisfied with the CNIPA's decision.

Measures Taken to Combat BFPA

The CNIPA has particularly taken campaigns against BFPA and other dishonesty acts of patent agencies besides against BFPA applicants. More than 220,000 BFPAs have been identified through the "Blue Sky" campaign for combating bad faith patent agency services since its launch in April 2019. Relevant policies are updated annually to support and deepen the "Blue Sky" campaign.

A joint punishment mechanism was initiated in 2018 and implemented by 38 government departments against serious dishonesties in the field of intellectual property (patents), including BFPA, which prescribes 38 disciplinary actions against six types of serious defaulting acts, including repeated patent infringement and abnormal patent application acts. The joint punishment mechanism further strengthens the measures against BFPA and may significantly increase the cost of filing BFPA.

Details of how some of the administrative rules against BFPA are implemented were found from officially published BFPA cases. The implementation details will be further clarified along with the update of the rules per se and availability of more BFPA cases.

Inconsistent Criteria Applied for BFPA and Abuse of Patent Right Based on BFPA

It is found that the criteria for establishing "IP litigation in bad faith" or "obtaining patent right in bad faith" applied by Chinese courts in judicial proceedings are much stringent than those criteria for establishing BFPA applied by the CNIPA in administrative procedures. How the definitions for BFPA updated by the CNIPA may be applied before courts is still unclear.

6.2 Comments / Recommendations on Potential Improvement

6.2.1 Procedure for Determining BFPA

We have recapitulated the examination of BFPA in the patent prosecution below:

Initiatives of BFPA examination
- CNIPA proactively initiates it
- CNIPA receives a report from the public.

BFPA identification may be conducted during any of the following procedures:
- Patent acceptance
- Preliminary examination
- Substantive examination,
- Re-examination
- International phase of international application

Examination authority
- Special examination working groups of the CNIPA
- Authorized examiners

BFPA determination process
- Notice to patent applicants
- Applicants have the options of:
  - Withdrawing the patent application, or
  - Submitting a statement and evidence for clarification

Outcome of BFPA examination
- Patent applications withdrawn voluntarily by the applicant
- Patent applications deemed to be withdrawn
- Patent applications rejected
- Request for going through the relevant legal formalities not approved

The current procedure for BFPA determination and notifying the applicant to withdraw the application is controversial among IP practitioners in China. On one hand, the current criteria for determining BFPA are thought to lack clarity and certainty. On the other hand, it seems arguable whether the examiner has the right to ask the applicants to withdraw their applications voluntarily. In fact, as mentioned in the above comments, the current criteria for determining BFPA are still needed to be improved or clarified. Thus, the determination of BFPA based on the current unclarified criteria may continue to be controversial for a period of time.

6.2.2 Assessment Criteria for Determining BFPA

CNIPA's Announcement No. 411 and Draft Amendment to Order No. 75 specified and listed certain scenarios of BFPA activities. We've reviewed and commented on these specific BFPA activities below.

(1) **Same Invention or Simple Variation:** *Multiple patent applications submitted simultaneously or successively have obviously the same invention-creation contents or are essentially formed by simple combinations of different invention-creation features or elements* **in Announcement No. 411** or *the submitted multiple patent applications have obviously the same invention-creation contents or are essentially formed by simple combinations of different invention-creation features or elements* in **Draft Amendment to Order No. 75.**

Comment (1.1): Whether the content regarding invention-creation refers to the claims or the descriptions of the patent applications, or both?

In practice, it has been a patent strategy for a corporation to file a series of patent applications based on the same or similar patent description with different claim sets to claim different aspects of an innovation, such as product, process for making the product, mechanical structure of the product. If it is to be considered BFPA activity, it may be a big concern to some corporations that usually utilize double or multiple filing strategy to protect a complex technology.

Our interview with one patent counsel from a Chinese high-tech company in AI industry raised concern about this type of activity to be deemed as BFPA Activity.

Comment (1.2): What's the line between simple combination and variation of different invention-creation characteristics or elements, and creative combination and variation of different invention-creation characteristics or elements?

Creative combination and variation of such characteristics or elements is not necessarily complicated. Determining whether the combination and variation are simple or not sounds to be the criteria of being inventive for granting a patent, and it may be or might not be an appropriate criterion to distinguish BFPA from "normal" patent applications.

(2) *The submitted patent application contains fabricated, forged or altered inventions-creations, experimental data or technical effect, or plagiarism, simple replacement or patchwork of existing technologies or existing designs, or other similar circumstances* in **Announcement No. 411** and in **Draft Amendment to Order No. 75.**

Comment (2.1): How to distinguish a BFPA with plagiaristic parts from a normal patent with minor improvement on existing technologies? It's possible for such a normal patent with major part similar or overlapping with existing technologies. The definition to BFPA activity may work in certain situations but it generally looks like involving the examination on inventiveness of a patent application.

In addition, for utility model applications, which are not substantively examined and considered to be a major source of BFPA, it appears to be difficult for an examiner to draw conclusions about its inventive step and identify cases of "the existing technologies or designs that are plagiarized, simply substituted or pieced together".

(3) *The invention-creation of the submitted patent application is obviously inconsistent with the actual research and development capabilities and resource conditions of the applicant or inventor* in **Announcement No. 411** and in **Draft Amendment to Order No. 75.**

Comment (3.1): It's not clear about the legal principle of defining this activity as BFPA activity. This regulation may not consider the situations of technology assignment prior to patent filing or commissioned research. The rights to apply for a patent application is a type of business asset which can be trading commercially in the market. So, it may be not practical to require patent applicants to have corresponding research capacities for the applications that they've filed.

On one hand, it is difficult to judge if the invention-creation in the patent application is commensurate with the actual research capacities and resource conditions of applicants and inventors, because lack of clear standards, and the actual research capacities and resource conditions of applicants and inventors are usually unknown to the patent examiner.

On the other hand, great inventions may be created by small companies or individuals who may not have all the "actual research capabilities and resource conditions" when they start to make and apply patents for their invention-creations.

(4) *The invention-creation contents of the submitted multiple patent applications are generated randomly mainly by using computer programs or other technologies* in **Announcement No. 411** or the invention-creation contents of the submitted multiple patent applications are generated randomly mainly by using computer **technology etc.** in **Draft Amendment to Order No. 75.**

Comment (4.1): If a patent application is deemed by the examiner as having been generated randomly by using computer programs or other technologies, what evidence is required from the applicant to prove that the patent application was NOT generated randomly by using computer programs or other technologies? It is not clear whether the burden of providing evidence is on the examiner side or the applicant side.

(5) *The invention-creation of the submitted patent application is deliberately formed for the purpose of evading patentability examination, which is obviously inconsistent with the technical improvement or design common sense or is of no actual value of protection for being deteriorated, piled up or unnecessarily limiting the scope of protection, or the contents is without any search or examination significance* in **Announcement No. 411** or *the invention-creation of the submitted patent application is obviously inconsistent with technical improvement or design common sense, or is deteriorated, piled up or unnecessarily limiting the scope of protection* in **Draft Amendment to Order No. 75.**

Comment (5.1): Same as comment (2.1). The definition to BFPA activity may work in certain situations but it generally looks like involving the examination on inventiveness of a patent application. Moreover, it appears to be difficult to determine the intention or purpose of the patent applicant through the text of the patent application, so more detailed criteria might be needed to determine BFPA of this type.

(6) *Multiple patent applications which are substantially connected with a particular entity, individual or address are submitted in a scattered or sequential order or in different places for the purpose of evading regulatory measures against abnormal patent application activities* in **Announcement No. 411** or *multiple patent applications substantially connected with a particular entity, individual or address are submitted maliciously in a scattered way, in sequential order or in different places* in **Draft Amendment to Order No. 75.**

Comment (6.1): This may happen in practice for patent filers in bad faith to prevent being readily identified as BFPA. It may not be very clear to the public about the BFPA activities constituted by using different entities and filing patent applications in different places. The examiner appears to need additional information / intelligence to identify BFPA of this type. Implementation of this rule also faces the difficulty of how to judge the purpose of the patent filing activities.

(7) *The patent application rights or patent rights are resold not for the purpose of implementing patented technologies, designs or for other legitimate purposes, or falsely changing inventors or designers* in **Announcement No. 411** or *the patent application rights or patent rights are* ***transferred for illegitimate purposes****, or the inventors or designers are falsely changed* in **Draft Amendment to Order No. 75.**

Comment (7.1): Details of patent transaction are usually not disclosed to the public as it's a process of dealing with a private civil right. It may be difficult to get to know the purpose of a patent transaction, and it may be the same difficult to identify an illegitimate purpose in a patent deal.

In addition, patent assignment / license recordal is subject to only formalities examinations, such that a simple form of patent assignment / license will meet the requirement for the official recordal with the document containing bibliographic data of the patent / patent application for assignment and signed by both assignor

and assignee. It may be a concern for the public if more details of patent transaction are to be disclosed to the CNIPA for the CNIPA to identify the authentic purpose of patent assignment.

(8) *A patent agency, patent attorney, or any other institution or individual acts as an agent, induces, abets, assists or conspires with others to commit various abnormal patent application activities* in **Announcement No. 411** and in **Draft Amendment to Order No. 75.**

Comment (8.1): It appears to be one of the most direct measures to mitigate the generation of BFPAs by imposing strict regulations on patent agencies and agents to increase the cost for filing BFPAs.

(9) *Other abnormal patent application activities that violate the principle of good faith or disrupt the normal order of patent work and other relevant activities* in **Announcement No. 411** and in **Draft Amendment to Order No. 75.**

Comments (9.1): This is used as a miscellaneous provision.

The line between BFPA and normal patent applications to be further clarified

How to distinguish some types of bad faith patent applications from "normal" patent applications / non-BFPAs appears to be challenging. Even though with the BFPA activities specified in the CNIPA announcement, there is a need for detailed regulations clarifying how to differentiate BFPA and non-BFPA or normal patent application activities.

Currently, BFPA regulations are applied in the individual administrative decisions made by the CNIPA, local courts and local Intellectual Property Offices. It is important to collect and summarize these cases by an official authority, in order for the public to understand and anticipate what kind of activities will be considered to be bad faith patent applications.

The Announcement No. 411 stipulates bad faith patent application activities. The act of copying or piecing together content from other sources may not be considered evidence of "bad faith" as major patented innovations are developed based on prior art technologies, which may be addressed as issues of novelty/inventive step according to surveyed EU patent practitioners.

It might be impractical to examine the novelty or inventive step of every BFPA, due to the need to conduct a patent search and the possibility of multiple rounds of office actions to finally reject a BFPA. In view of this, as compared to full examination of the novelty/inventive step of the patent applications, the administrative rules against BFPA appear to be a lightweight instrument designed to identify and cleanse BFPAs in a quick and cost-effective manner. However, the balance between efficiency and fairness to the right of the patent applicant shall be considered.

A wilful failure of disclosing the information source may partially prove the existence of "bad faith". One effective solution may be the introduction of a more expansive concept of "duty of candour" or fraud before the CNIPA which would mandate disclosure of potentially relevant prior art[75].

[75] IPO Comments to CNIPA on Draft Amendments to Several Stipulations Regarding Regulating the Act of Applying for a Patent - Intellectual Property Owners Association, IPO, 5 June 2021.

6.2.3 Measures against Abuse of Patent Rights in Bad Faith

Currently, the latest administrative rules against BFPA, namely Announcement No. 411, prescribe that the transfer of a patent right that meets the criteria for BFPA may also constitute a BFPA activity.

In addition, we note the definition of "acquiring a patent right acquired in bad faith" in judicial guidelines, particularly Guidelines for Patent Infringement Determination issued by Beijing High Court in 2017. Obtaining a patent right in bad faith refers to applying and obtaining the patent right for an invention-creation, which one clearly knows should not be granted as a patent right. Obtaining a patent right in bad faith could be used as a defence against patent infringement claim, which includes circumstances[76] that are defined more specifically than the types of BFPA prescribed in Announcement No. 411.

In view of the above, further improvements to rules against BFPA may be made to:

(1) further clarify the evidence requirements for invalidating a patent granted from BFPA according to Article 20.1 of the Patent Law (Amendment 2020), in order to provide a practical instrument to the public to invalidate patent rights obtained through BFPA, with less cost and efforts than those required for invalidating a "normal" patent right; and

(2) add BFPA as a scenario of "acquiring a patent right in bad faith" in judicial guidelines to prevent the abuse of patent rights obtained in bad faith.

The Study finds that current administrative rules against BFPA, as reflected in Announcement No. 411, may be improved in the following aspects:

1) Defining the line between BFPA and normal patent applications more clearly;
2) Refining the criteria for determining BFPA so it can be better implemented; and
3) Reducing the overlap between the criteria for determining BFPA and novelty/inventive step.

6.3 Expectation

This study shows that BFPA is a key issue threatening the effectiveness and credibility of China's patent system. BFPA is a unique issue in China rarely seen in the current patent system in the EU. BFPA relates to an issue different from patent ownership, novelty, and inventive step and often embodied as patent applications usually of low quality and containing plagiarised or forged content. The emerging BFPA issue appears to be closely related to national IP strategy and policies. Regulatory measures against BFPA have significantly improved over the years, though still not perfect. Further refinement of regulatory rules and measures against BFPA are expected in the new stage of China's national IP strategy 2020-2035 towards patent quality improvement.

7. ANNEXES

7.1.1 List of Survey Respondents

No.	Respondent Type	Organisation Type	Proportion	Location
1	Practitioners	IP Firm	73%	China, Sweden, French, Germany, UK
2	Inhouse Counsels	Corporation	24%	China, Germany, UK, Sweden
3	Researchers	Organization	3%	China

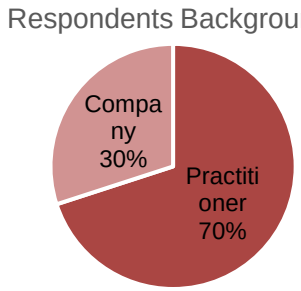
7.1.2 List of Interviewees

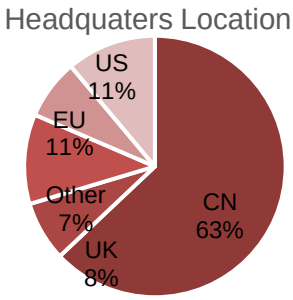
No.	Interviewees	Organisation type
1	Head of Patents	Chinese High-tech Company in AI Industry with business in Europe
2	Legal Counsel	MNC consumer goods company with business in China and Europe
3	Patent Counsel	Chinese Tier 1 company in packaging industry
4	Head of IP	Sweden based MNC with business in China
5	IP Counsel	Sweden based MNC with business in China
6	Stakeholder	EU based MNC with business in China
7	French Practitioner	French Law Firm
8	Anonymous French IP Advisors	French IP Firms and French Companies
9	Italian Legal Counsel	Italy based MNC with business in China
10	Italian Practitioner	Italian Law Firm
11	Italian Practitioner	Italian Law Firm
12	Italian Practitioner	Italian Law Firm

Notes: MNC refers to Multi-national Corporation, AI refers to artificial intelligence.

7.2 List of Survey Results

7.2.1 Survey Respondents Introductory

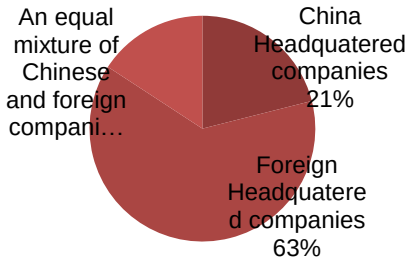




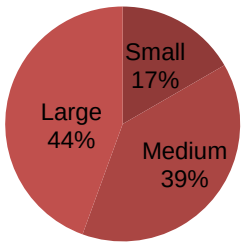
7.2.2 Questionnaire Results

- *Practitioner Questionnaire Results*

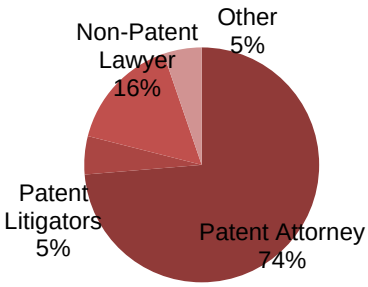
1.1 What kind of companies do you mostly act for?



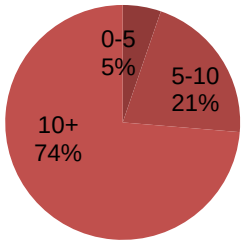
1.2 What size of companies do you mostly act for?



1.3 What is your position?

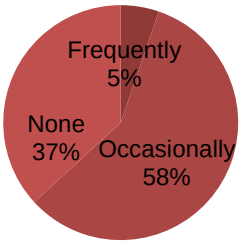


1.4 How long have you been practicing IP law?

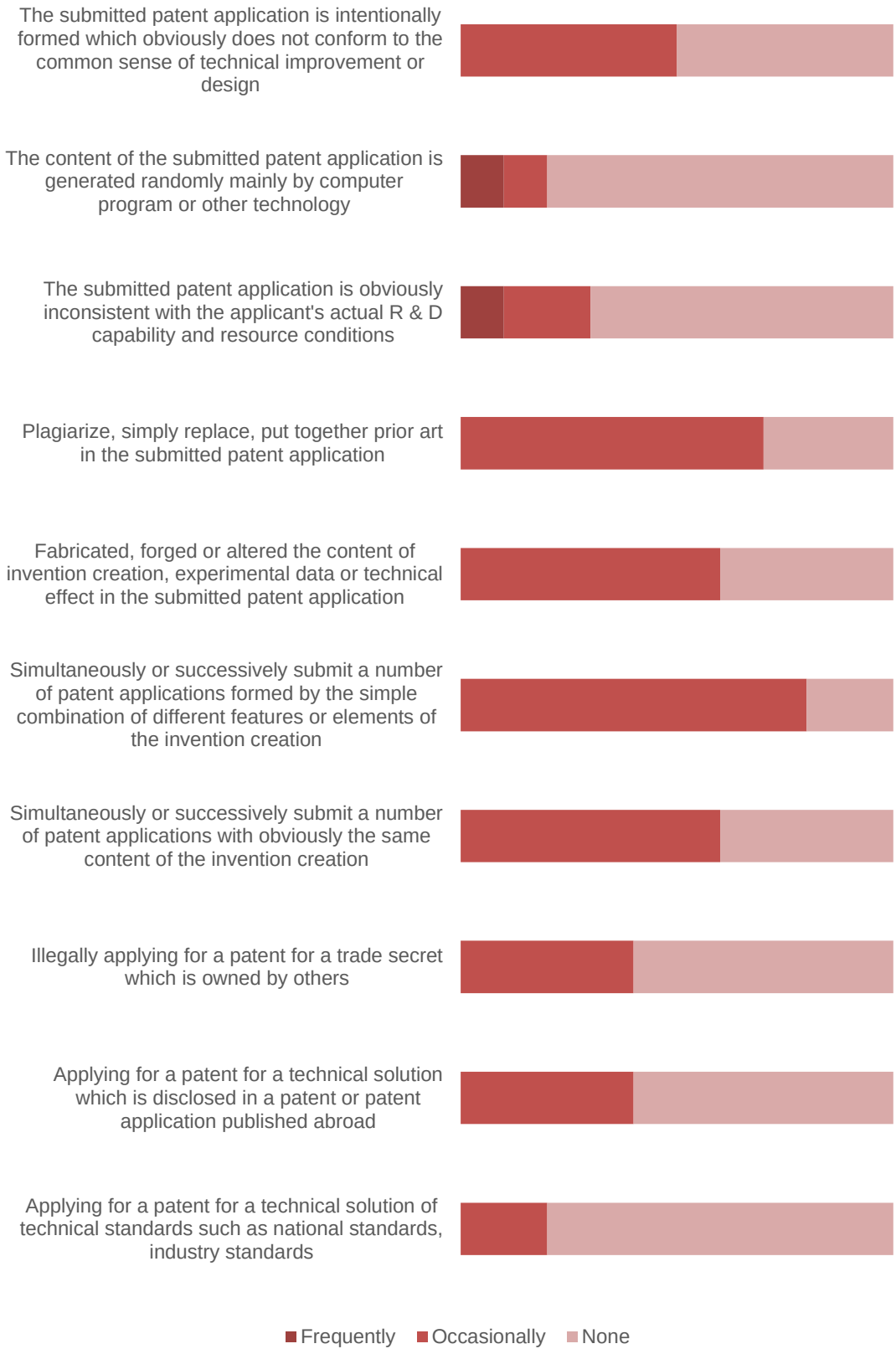


1.5 Have you ever heard/known about below bad-faith patent applications?

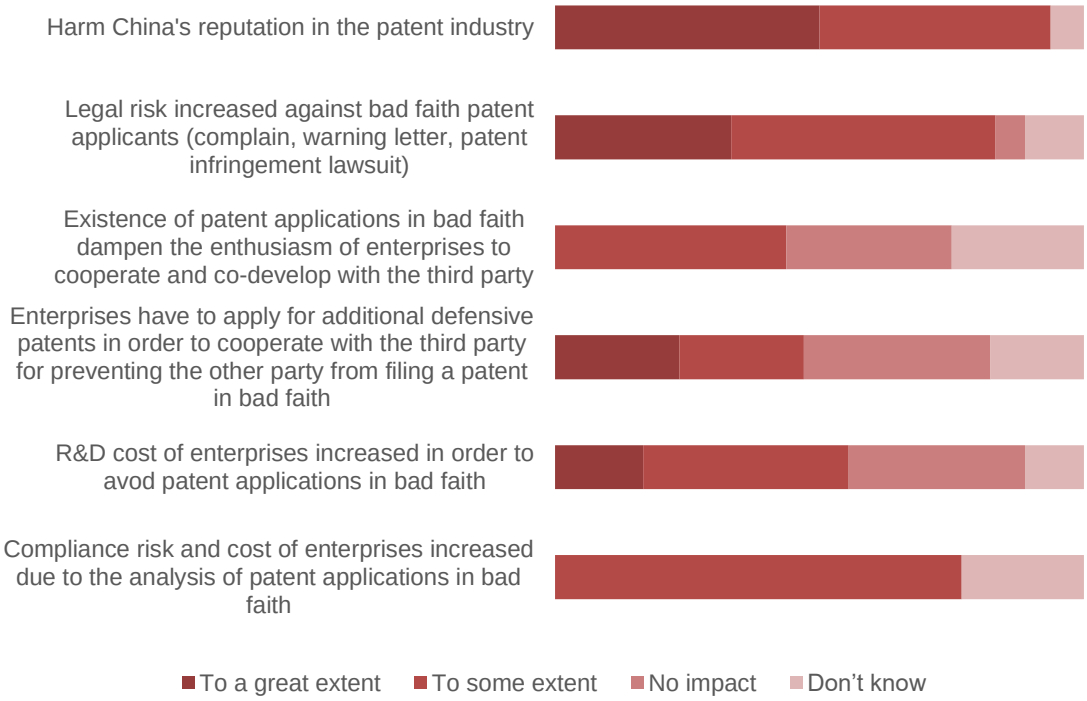
1.6 How many bad-faith patent applications have you experienced or suffered in China [over the last five years]?


Frequently
5%
None
37%
Occasionally
58%

1.7 What types of bad faith patent application have you directly experienced in China in the last five years?

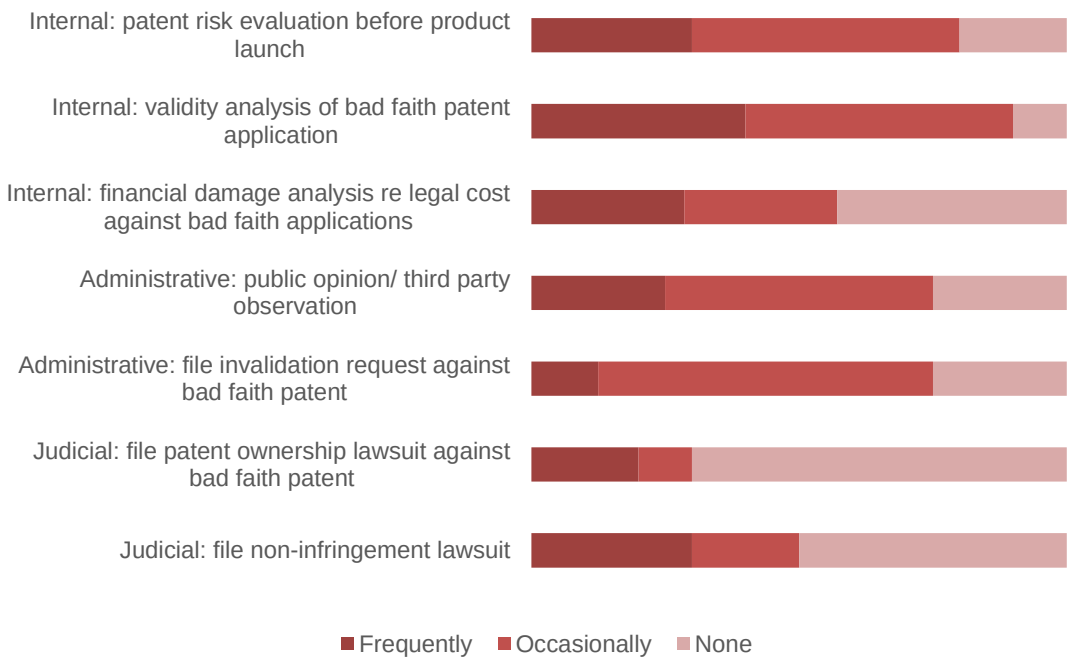


1.8 To what extent would you say your business was impacted by the following as a result of the bad-faith patent application?

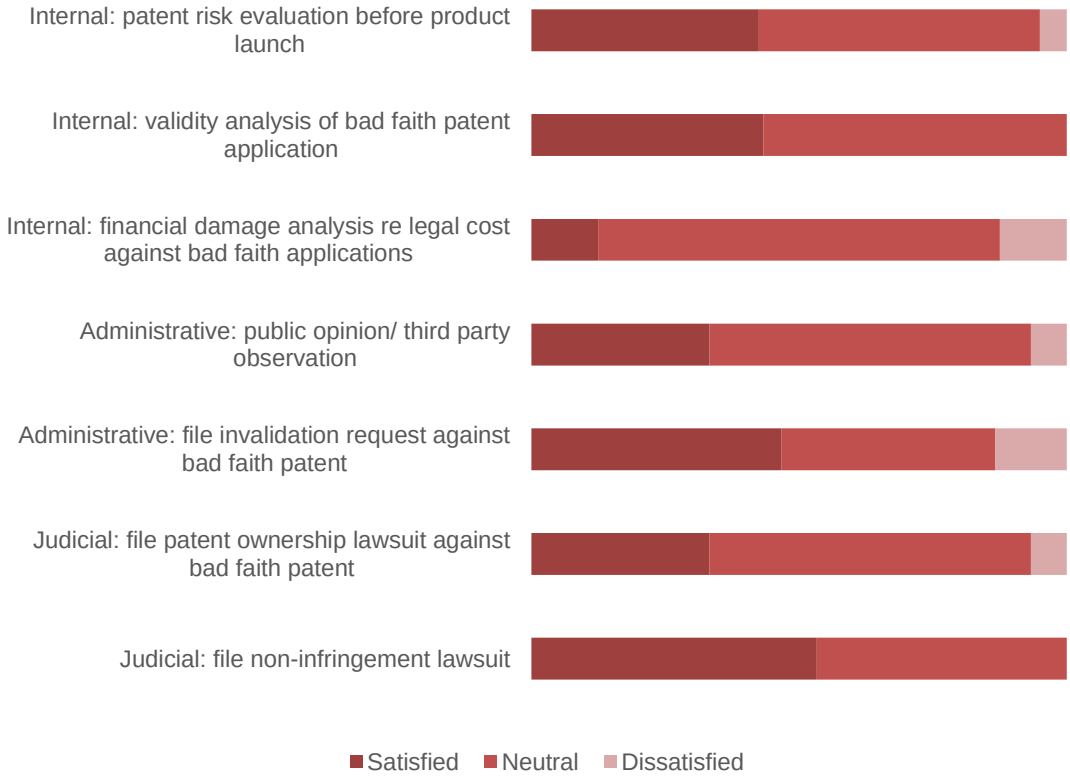


1.9 What do you think are the reasons for bad faith patent application?

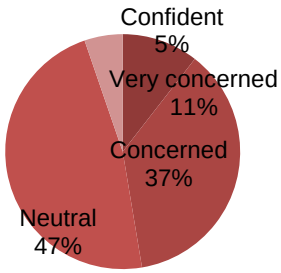
1.10 What do you think are the reasons for bad faith patent application?



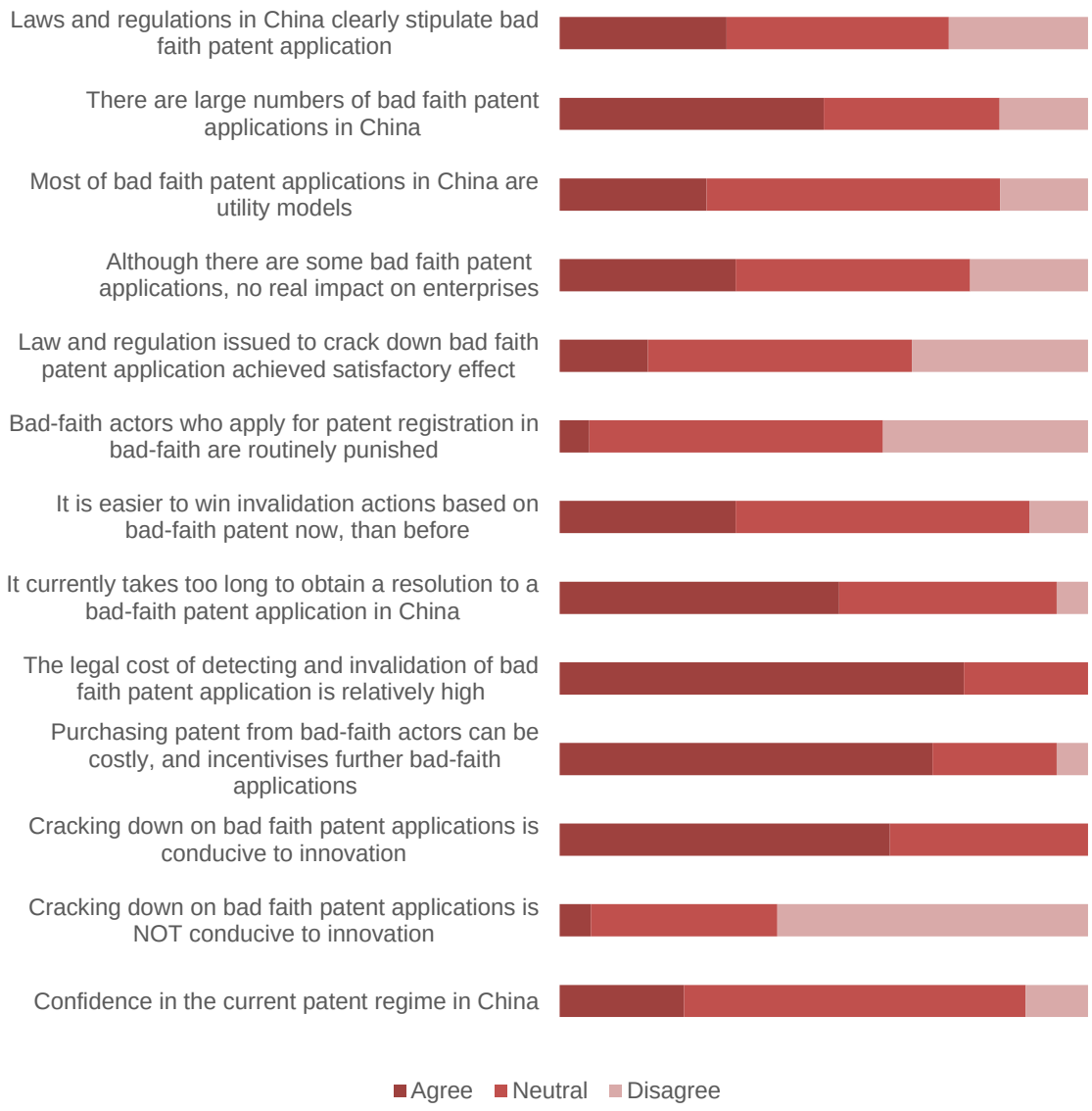
1.11 How satisfied or dissatisfied were you about below measures on bad faith patent application?



1.12 To what extent are you worried about/ confident about the current status of bad-faith patent applications in China?

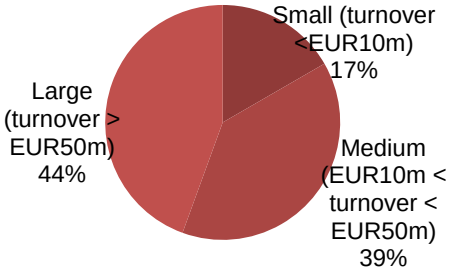


1.13 To what extent do you agree or disagree with the following statements on the restriction of patent abusing in China?

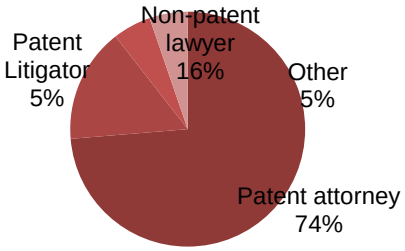


- *Company Questionnaire Results*

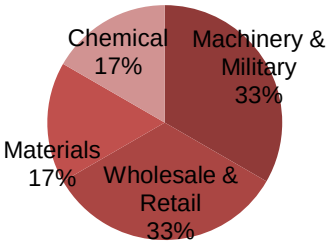
2.1 What size of companies do you mostly act for?



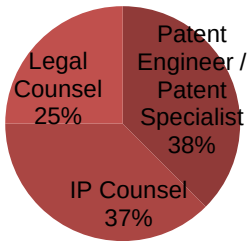
2.2 What is your position?



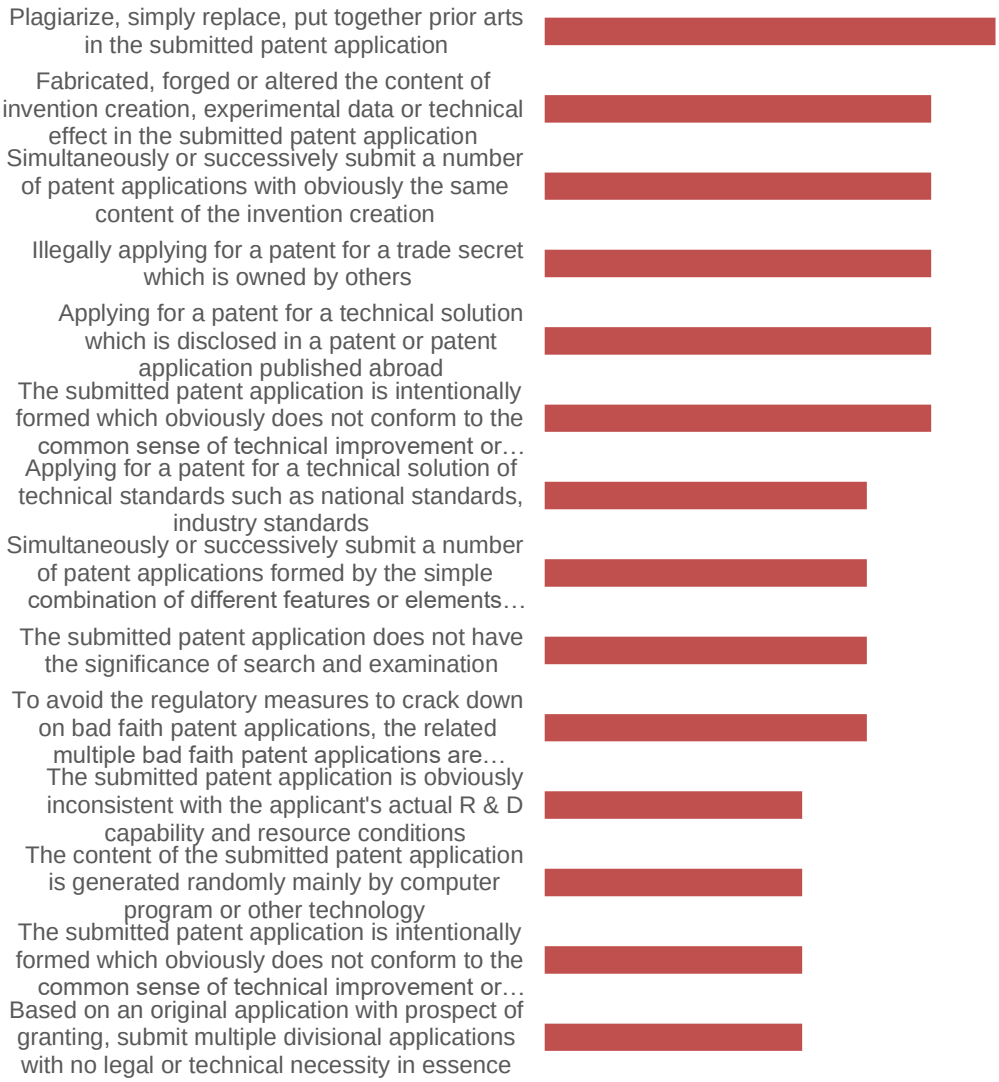
2.3 In which industry does your business operate?



2.4 What is your position?

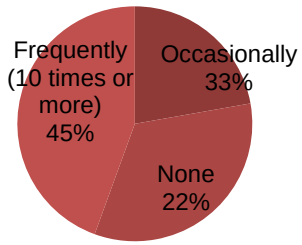


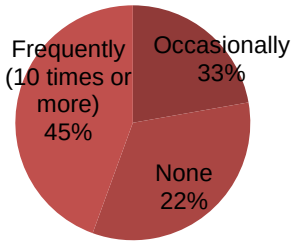
2.5 Have you ever heard/known about below bad-faith patent applications? (including malicious acquisition of patent rights and irregular patent applications)?

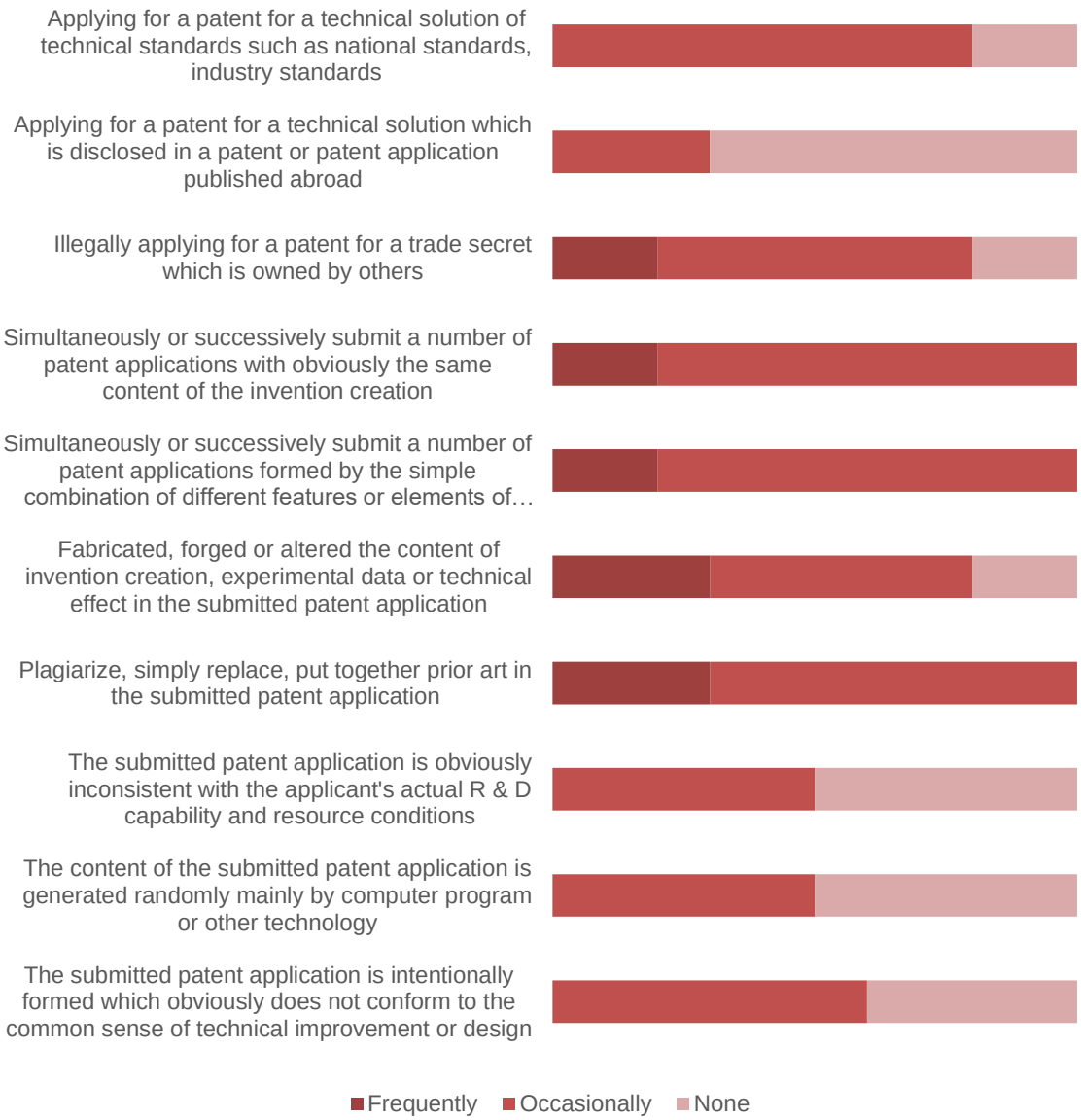


2.6 How many bad-faith patent applications has your business experienced in China [in the last five years]? including your company, affiliate company, competitors

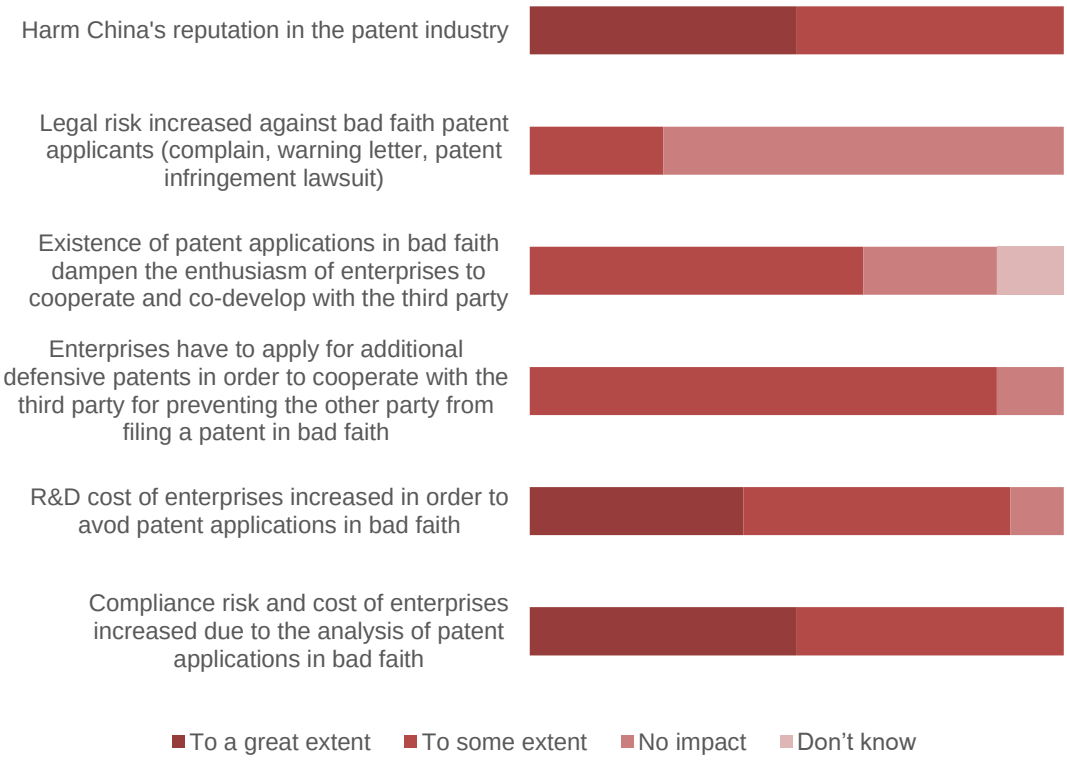
2.7 What types of bad faith patent application has your business directly experienced in China in the last five years?



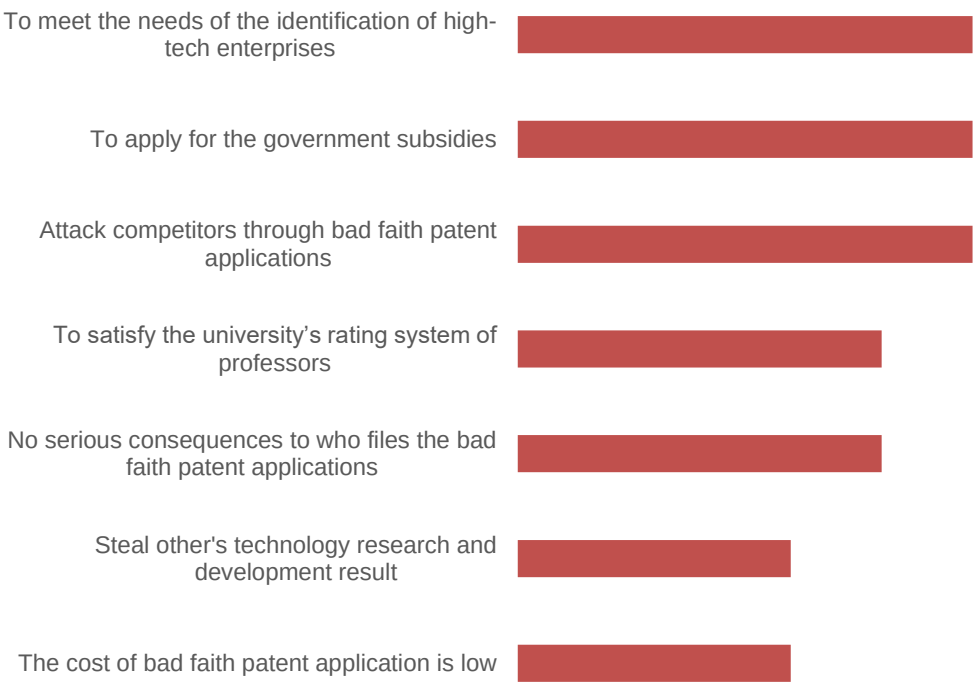




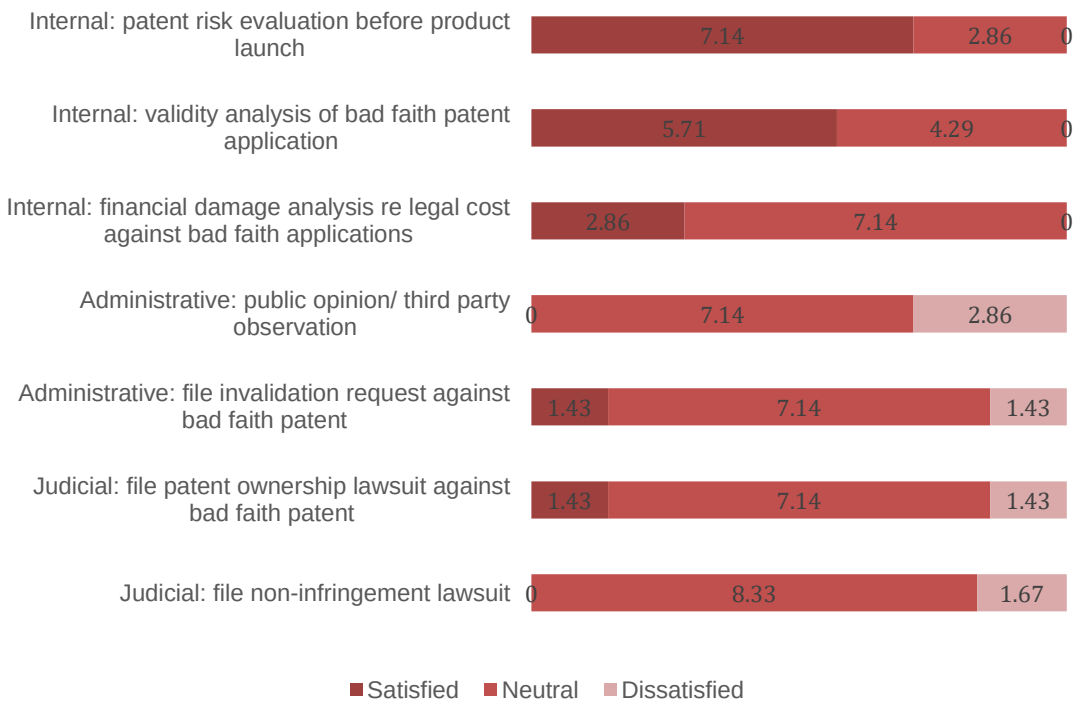
2.8 To what extent would you say your business was impacted by the following as a result of the bad-faith patent application?



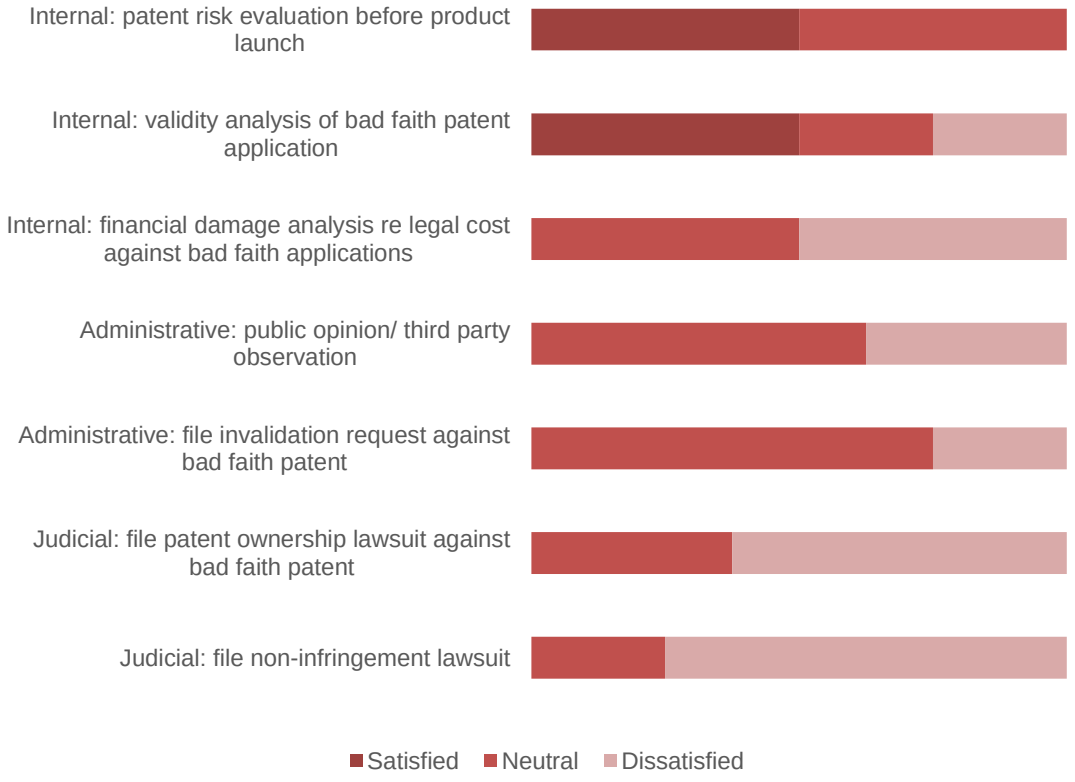
2.9 What do you think are the reasons for bad faith patent application?



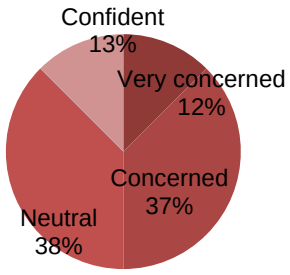
2.10 Will you take following measures when you encounter litigation or dispute on bad faith patent application?



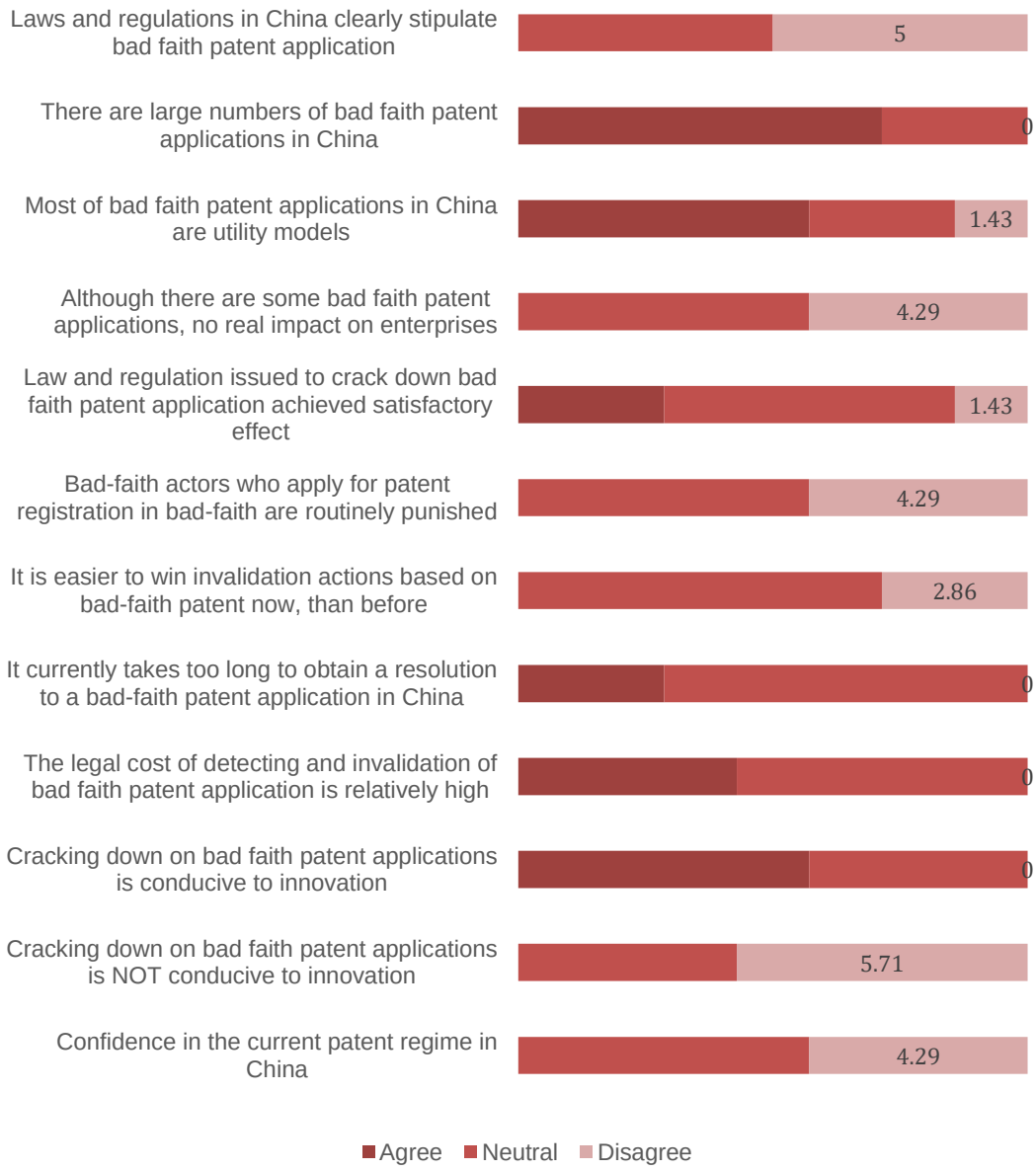
2.11 How satisfied or dissatisfied were you about below measures on bad faith patent application?



2.12 To what extent are you worried about/ confident about the current status of bad-faith patent applications in China?



2.13 To what extent do you agree or disagree with the following statements on the restriction of patent abusing in China?



7.3 Interview Transcripts

7.3.1 Interview with Head of Patent from a Chinese High-tech Company in AI Industry

Interviewer(s)	China Based Patent Attorneys from Lusheng Law Firm / Rouse Network
Interviewee(s)	Head of Patent Chinese High-tech Company in AI Industry with business in Europe
Date of Interview	2021-04-07
Location of interview	Online Meeting

Rouse	**Thank you for participating in this interview. As we discussed in the E-mail, I would like to know your opinion about the three themes we are researching: Bad Faith Application, Invalidation System, and Utility Model System.**
Interviewee	Actually, I have heard some actions that CNIPA took recently about Bad Faith Application.
Rouse	**Yes, since the Chinese Government just announced some restrictions on Bad Faith Application in 2021, so it arouses wide public concerns.**
Interviewee	Bad Faith Application may be caused due to various reasons. For example, it is very common that applicants only consider the number of applications even some applications are very simple and low-quality, perhaps only with one or two claims, or 1 to 2 pages specification in total. There are also some specifications that seem to be quite long, but are edited by the machine, and only replace the keywords. I have heard of this phenomenon in the industry, and the government has mentioned it before, but it has never been governed as hard as this year.
Rouse	**What do you think is their purpose for applying for these patents?**
Interviewee	I guess it might be to get government funding. Many companies do like this. Some of them filed patents for increasing their number of patent applications, some of them may have some KPI requirements on the number of patents, and the huge quantity of patents may be beneficial to the company's operation or listing, etc.
Rouse	**Generally speaking, when a company filed for a patent for a reasonable purpose, as your company did, it is very standardized and truly protects the innovation achievements of the enterprise in the form of patents. Have you ever been troubled by such bad faith applications in intellectual property management?**
Interviewee	Not really. Our management team has no problems in this regard. First, they did not give me any patent management KPIs, and we do not need to make a lot of bad faith applications. I think there are two main reasons. On the one hand, our company is focusing on research and development. There are more than 200 people in our R&D Team. To be honest, I think the number of patents is still low compared to the size of the research and development team. It means that our normal R&D output is sufficient to support our normal patent application activities. On the other hand, the attitude of our management is also very important. The management will not specify a KPI based on the number of patent applications, like “we must have 100 patents this year”. Therefore, we are still value protection oriented overall.
Rouse	Maybe high-tech companies like yours have encountered fewer these low-quality applications. Generally, product risk assessment would be conducted before the product launched to the market, just like a Freedom-to-Operate Search, did you retrieve any low-quality patents, but the scope of protection seems to be wide in this process. In this situation, is there any additional patent risk analysis required, which results an increase in the company’s management cost? I would like to know your experience in this area.
Interviewee	Good question. We may retrieve some patents of poor quality. But they may be not junk patents. There are two situations. The first one is that the scope of protection of patent claims is particularly wide, and I just want to strive for a wide scope of protection first. Generally, we will analyse and study the scope of protection of unlicensed patents one by one. For example, will these patents affect us? Just as we have entrusted you to track a certain communications

company's patent before, public comments were submitted, and in fact, the patent was not authorized. So, it's not that once we see a wide scope of protection for a patent, we will take corresponding measures, or we need to conduct research based on specific cases. If there are patents that obviously touch porcelain, we will also consider countermeasures, which of course are different from ordinary patent applications. Because if it is a junk patent, the probability of its successful application is very low, we will continue to observe and research. Second, even if the patent is granted, we will consider its stability and whether it will be invalidated by others.

In addition, there is also a possibility that this patent may only be used to obtain government subsidies. In short, our response strategy is to analyse individual cases based on specific patents.

Rouse **Has your company received a lawyer's letter on a bad faith application, for example, the patentee claims that your company's products are within the scope of his patent protection? Do you have this experience?**

Interviewee **No.**

Rouse **Compared with state authorities, the information I have is definitely incomplete, so I don't have a complete view on the status of bad faith patent applications. However, I think the topic discussed just now is indeed a big issue. In fact, what the country is worried about in this regard is the waste of administrative resources. I don’t know if there are such bad faith applications in foreign countries or Europe and the United States, but in fact, how many valuable patents are there from abroad or under the current patent system in Europe and the United States?**

Interviewee We can analyse in two aspects: In fact, I personally think that if the source of government subsidies for domestic patent applications is removed, this phenomenon of abnormal applications can be greatly reduced. I think patent application is more of a market behaviour, and it still needs to be adjusted by the market. As long as the government plugs some loopholes in the system, such as more refined patent subsidies, patent subsidies for specific enterprises or focus on subsidies for overseas patent applications, because the cost of overseas patent application is relatively high, once a company is willing to apply for an overseas patent, it shows that the value of its own patent application is still high. This kind of detailed strategy is more necessary than aimless subsidies, and it can help us pass the quantitative stage and begin to pursue the qualitative stage. Therefore, the improvement of domestic patent quality requires more policy guidance.

This kind of dynamic policy may play a supporting role. I think it is necessary to start with the most fundamental logic or market logic to regulate the entire patent application environment. Of course, I still support the big idea of reforming the system and regulations. Once a patent is linked to many other external interests that deviate from innovation, the value of the patent itself will be distorted. In short, patent applications should return to the market, and the government can do more guidance to correct this abnormal phenomenon.

Rouse **Let me summarize your comments: First, the patent itself is a legal system that regulates and encourages innovation, and the patent incentive system should be oriented to promote innovation. In addition, you mentioned that the regulation of patents, such as bad faith application, requires the government to formulate appropriate policies for correct guidance and not deviate from the essence of innovation. Secondly, patents should be regulated by the market. So, in terms of regulations, do we need to formulate corresponding penalties for irregular applications that have occurred, or are our existing regulations sound enough to restrict irregular applications?**

Interviewee As far as I know, or according to news or other available public information, machines are the mainstay, and humans are the supplementary method to screen out such bad faith applications. Otherwise, there is no way to judge millions of patents one by one. Of course, this situation will inevitably cause some misjudgements. This kind of abnormal application may also have a misjudgement. E.g., for the purpose of patent layout, it is a patent strategy for the right holder

to file a divisional application or submit multiple sets of claims for one invention patent. Whether it will be regarded as a bad faith application, you may have such concerns. I think the premise of formulating penalties is to clarify the boundary between normal and irregular applications. I do not have any idea for what kind of laws or penalties should be enacted. My opinion is that if the government patent incentive policy can be straightened out, this kind of abnormal applications will naturally disappear, or most of them will disappear.

In short, to manage from the source of bad faith applications, one is to guide the incentive mechanism correctly, and the other is to clarify the boundary between abnormal patent applications and normal patent application strategies, otherwise it will hurt the innocent. In addition, malice and deliberate are intentional for those which are not malice intended, the boundary needs to be clearly distinguished.

Rouse **Regarding bad faith application, you mentioned that there are some non-innovation-oriented applications. Do you think this problem can be solved through government legislation penalties or through invalid patents of stakeholders?**

Interviewee I think there is a contradiction here. If the value of a patent is very low, it should not be granted a patent right. The problem of invention patents may be relatively less, because invention patents have to go through substantive examination and the passing rate of patents is low. not high. For example, the problem of utility models is relatively obvious, and there are indeed a large number of patents of low-quality and low value. I personally think that with the current judicial policy or administrative inertia in China, it is a good choice to leave this problem to the government.

In fact, I have this feeling in the practice of trademark applications. For example, China conducts pre-examinations for trademark similarities, while the European Trademark Office will not conduct such examinations. Even if Europe Trademark Office finds a relatively similar one, it will only be safeguarded by the prior right holders. On the one hand, the advantage of EUIPO is that it delegates the work of trademark value judgment to the market. If the prior right holder does not believe that the other party's trademark is conflated with his own trademark and will not constitute infringement, there is no need to interfere with administrative measures. On the other hand, the strength or energy of an individual may be limited. If a lot of burdens are placed on individual applicants, the legal burden will be heavier. I think there may be a deep-seated logical difference between an active government and a passive government between Chinese and Western governments.

Therefore, on this issue, if we follow the usual Chinese style, I think it is feasible for the government to come forward at least to conduct a prior review of utility models. A better solution should be based on patent law. For example, strengthen the preliminary examination of utility models, improve the search and examination mechanism for preliminary examination, and avoid the risk of a quantity of low-value patents before granting, otherwise the patents that have been granted will remain in an uncertain legal status to the public, and the burden leave to the public and individuals is too heavy. Another way is to specifically formulate laws to govern irregular applications.

7.3.2 Interview with Legal Counsel from a MNC consumer goods company with business in China and Europe

Interviewer(s)	China Based Patent Attorneys from Lusheng Law Firm / Rouse Network
Interviewee(s)	Legal Counsel in Asia MNC consumer goods company with business in China and Europe
Date of Interview	2021-04-09
Location of interview	Online Meeting

Rouse **Recently, the CNIPA has released announcements on some bad faith patent applications. As the representative of our foreign-funded enterprise's intellectual property practitioners in China, you belong to the fast-moving consumer goods industry. I would like to ask questions about illegal applications or bad faith patent applications. Have you ever heard of it or has experience in handling related cases?**

Interviewee I think the definition of "bad faith application" is a bit too broad. People may be used to calling them "junk patents" in the past, but now their definition is broader and not as negative as the previous name, but in short, the quality of these patent applications is relatively low. The patents are written by fabricating or falsifying test data. In fact, these patents are not realizable. The applicant did it deliberately. Regardless of their purpose, it obviously has deviated from the original intention of patent protection innovation. In the past two years, I have also encountered some such cases. The basis of litigation by patent holders is this kind of patent with a very low degree of innovation. The occurrence and existence of such "bad faith applications" will have an impact on our company's normal operations in China.

Rouse **Yes, you have been serving the enterprise for such a long time, you will definitely encounter such a situation, so generally you will do it before the production is launched. Like Freedom-to-Operate Search (FTO), right? Do you have such experience: In the process of FTO search, will you find a patent that seems to be meaningless? But because the existence of the patent itself is a legal obstacle, it will remain valid before any legal action is taken. How did you deal with this situation?**

Interviewee Ideally, before each new product goes on the market, making a FTO Search can reduce or even eliminate patent risks as much as possible. However, the actual operation is quite different from the ideal situation, and there will be many considerations. Among them, economic cost is an important factor. In addition, if you want the search results to be relatively accurate and precise, it means that the greater the workload and the longer the time, the higher the legal cost will be occurred. However, the FTO analysis is only a supporting legal opinion. Sometimes patent litigation is inevitable, even if our products do not fall within the scope of the other party's patent protection. Patent search and analysis work will be conducted more frequently.

We will adopt contract methods to stipulate that the product supplier shall bear the patent risk of the purchased product, thereby transferring the patent infringement risk or liability for infringement. This approach is a risk management and control method that we usually adopt after balancing and considering the budget. But if it involves important projects or important products, even we can exclude economic tort liability through the contract, we will still conduct FTO searches before listing to predict and control the risk of infringement as much as possible.

Rouse **You just mentioned that FTO search will only be done for important projects. So have you also encountered bad faith applications or litigation of junk patents?**

Interviewee I think this situation is quite common. Of course, this is just my personal feeling without data support. If it is a product designed by us, we will evaluate the new product technology and evaluate whether it can form a patent application from the technical aspect. We will also conduct a patent infringement risk assessment to measure whether this product will fall into the scope of patent protection of others. When we measure the point of product innovation, we will look at the time point of the existing technology and the types of existing patents. Design patents are specially evaluated. I believe that there will be a lot of bad faith patent applications in the field of design patents. For example, a product is already available on the market, and the designer himself did not apply for a design patent but was used by others to obtain a patent authorization. I believe this situation exists. As for utility models, I also feel that there are many abnormal patent applications. For example, a certain technology looks like a certain technical feature in the public domain, but when a patent is invalidated, it is necessary to search to find evidence to prove the prior use or prior disclosure. From a subjective point of view, it is an abnormal application. However, it is more difficult to prove an event that happened in the past,

and there is a gap between subjective feelings and the objectivity requirements of evidence in legal procedures.

Rouse **If we retrieve a patent and feel that it is not patentable or seems to be a bad faith application, will we take legal action or temporarily shelve it, and wait to see the actual legal risks?**

Interviewee I will treat it depends on the situation. If this patent does pose a high risk of infringement on our products, we will consider possible legal actions against it, such as invalidating or purchasing this patent. We have not really dealt with a similar actual case, and usually only consider whether it needs to be invalid. If the price of purchasing a patent is relatively high, we will negotiate with the other party. In short, we hope more to resolve legal disputes from the commercial level rather than blindly litigation.

Rouse **Does your company have any experience in patent infringement litigation? And how about the frequency?**

Interviewee I have been working in this company for the fifth year. There was basically no patent litigation in the first three years, but there have been several patent litigations in the last two years. So, there is a growing trend.

Rouse **Do you think the patents involved in these patent infringement lawsuits contain elements of bad faith applications? Is there any problem with the patentability itself?**

Interviewee These patents do not seem to exclude the possibility of bad faith applications. These patents do not seem to be highly innovative. Taking the existing technology to apply for a patent itself is also a kind of abnormal application. If it is determined to be an abnormal application, and the patent lawsuit is equivalent to a malicious lawsuit.

Rouse **If the number of bad faith application is on the rise, what countermeasures should the company adopt? Is it more active to apply for patents, or is it more cautious to cooperate with third parties and require the other party to bear more potential infringement liability? Are there clear ideas and arrangements?**

Interviewee The increase in bad faith will affect the company's normal operations. The response method still depends on the company's budget and risk management strategy. Because most of our product design is from suppliers, we will require suppliers to provide FTO reports, and require them to use a qualified agency to issue such patent risk assessment opinions, to control our legal costs. We will also review the evaluation reports provided by these suppliers to understand the existing technology for assistance and reference. All assessments cannot absolutely exclude the occurrence of litigation, but it is necessary in many cases.

Rouse **As the China Legal Director of your company, you are the link between China and the US headquarters. Your company's global legal team has encountered some bad faith applications in China or experienced litigation caused by irregular applications. Do your colleagues, especially those overseas, have any comments on this? Including from the perspective of the industry and the company's reputation.**

Interviewee I don't have much information to answer this question. Because in the existing corporate structure, the United States centrally manages global patent affairs. I only participated in certain specific patent litigation in China and did not have many opportunities to communicate with patent teams in other regions. I think there are not many invention patents in the fast-moving consumer goods industry, so there is not much exchange between people. We also have some technical improvements, such as packaging improvements. We have about 50 patents and patent applications in China, most of which should be in product preparation. Baking itself may not have much patent protection, because it can be protected more through technical secrets. In the food industry, trade secrets are also a very important means of intellectual property protection.

Rouse **We want to know what the motivation for the bad faith patent application is, and what is your view on this?**

Interviewee To put it bluntly, it is money driven. It can be further subdivided into many types: in the past, it was to obtain government patent subsidies and patent subsidies. In addition, the company needed patent packaging to go public, and its technical strength was reflected by the number of patents. Another thing was to see the opportunity to obtain compensation through patent litigation. Although China's current average data on patent compensation is not high, there is a growing trend. Finally, patents form technical barriers in the industry. These are just my subjective guesses.

Rouse **We want to know what the motivation for the bad faith patent application is, and what is your view on this?**

Interviewee To put it bluntly, it is money driven. It can be further subdivided into many types: in the past, it was to obtain government patent subsidies and patent subsidies. In addition, the company needed patent packaging to go public, and its technical strength was reflected by the number of patents. Another thing was to see the opportunity to obtain compensation through patent litigation. Although China's current average data on patent compensation is not high, there is a growing trend. Finally, patents form technical barriers in the industry. These are just my subjective guesses.

Rouse **The Fourth Amendment of the Patent Law will take effect this year. The most important point is the introduction of punitive damages for deliberate patent infringement, including the calculation method of 1 to 5 times the amount of infringement. The amount of compensation for patent infringement has been greatly increased compared with the past. In this case, do you have any worries and worries about subsequent litigation caused by bad faith applications?**

Interviewee There is no case yet. From our experience, I think there are still a lot of irregular patent applications, and it is easier to obtain authorization, and the threshold for patent litigation is relatively low. In this case, I can only say, and continue to observe.

7.3.3 Interview with Patent Counsel from a Chinese Tier 1 company in packaging industry

Interviewer	China Based Patent Attorney from Lusheng Law Firm / Rouse Network
Interviewee	Patent Counsel Chinese Tier 1 company in packaging industry
Date of Interview	2021-06-03
Location of interview	Face to Face meeting, BJ

Rouse **Thank you very much for participating in our interview today. According to our communication, you already know that our EUIPO project includes three themes, bad faith patent application, invalidation system and utility model system. Do you have any opinions about these?**

Interviewee I have probably heard of them. In our daily search, we will find some unique foreign products, but there is no corresponding patent protection. Sometimes you have the urge to apply for a patent yourself, this kind of existing design examiner may not be able to retrieve it. However, this kind of patent application is a bad faith application, right?

Rouse **This situation is equivalent to applying for an existing technology as a patent, which should be a bad faith application. Patent is required for novelty. Even though it is difficult for an examiner to search in patent or non-patent literature, you did know that the patent is not novel.**

In fact, national laws currently have definitions of abnormal filing behaviours, including repeated filing of patent applications with very similar technical solutions.

Interviewee This kind of bad faith application behaviour is well understood, they are for increasing the application amount.

Rouse **There is also an obvious mismatch between the technical solution of the invention application and the actual research and development capabilities or resource conditions of the right holder.**

Interviewee I am not quite understanding this rule, but it feels that it is not really well defined. Sometimes, we also face practical problems. We develop new products by ourselves, but when we have not applied for a patent, the product is seen by our competitors and others have applied for a patent first.

Rouse **This may involve trade secret protection and patent ownership disputes. Is the number of patent applications of your company one of the performance of patent management?**

Interviewee It will not. When the company first established its R&D centre, it paid more attention to the number of patents and encouraged R&D personnel to apply for patents. Now that R&D and innovation capabilities have been enhanced, and the number of patents has accumulated for a certain period of time, more attention is paid to patent quality. We set up a process review before patent application, if there is no need to apply for a patent, we will not apply. Patents are different from trademarks. Patent maintenance fees are paid every year, and the cost of maintaining quantitative patents is not low. Therefore, the company is currently applying for patents for the purpose of product protection and R&D innovation.

KPIs for patent management have requirements for the number of patent applications, but they are not high, and can be fully achieved with normal applications.

7.3.4 Interview with Head of IP from a Sweden based MNC with business in China

Interviewer	Sweden based patent attorney from Rouse
Interviewee	Head of IP Sweden based MNC with business in Europe and China
Date of Interview	2021-08-13
Location of interview	Stockholm

Rouse **We've found that the term "Bad Faith Patent Application (BFPA)" has different meanings in the legal contexts in the EU and China. In the EU, BFPA mainly relates to patent ownership issue, which refers to a patent application for invention filed by someone who is not entitled to do so.**

In China, BFPA mainly refers to patent applications filed with the purpose other than for innovation protection. Such as, many patents of low quality were filed for the purpose of applying for patent subsidies from the government, applying to be recognized as a high-tech company to enjoy tax benefit, or other advantages offered by patent-incentive policies. Such BFPA in China are officially termed as "abnormal patent applications".

What do you think about the differences above? Do you think bad faith patent applications in China/ abnormal patent applications are an issue specific in China only and not found in your country or EU? Will it cause a big concern to companies / stakeholders from your country or EU and how do you think it will impact them?

Interviewee I personally consider "bad faith patent applications" to be patent applications applied for fraudulent reasons – when you know that the invention is not yours. This seems to be the accepted meaning in Europe. Since there is nothing to be gained by generally filing lots of patent applications in Europe, for reasons of tax benefits or subsidies, this is normally not done. If this is a problem in China, it is important that forceful measures are taken against it, since it is extremely important that all parties can trust the patent system.

On the other hand, European companies often file lots of patent applications around a single invention, to create a "bomb mat" around it, or file "speculative" patent applications around an inventive concept that has not yet been fully developed. This is in Europe not considered to be

"bad faith patent applications". Such patenting should be allowed, for strategic reasons, and there is no reason to prevent it.

Rouse **Bad faith patent applications are mainly regulated by administrative rules provided by the CNIPA. It is currently not feasible to invalidate a patent on the ground that it was granted from a BFPA, because BFPA is still not a legal ground for patent invalidation in China.**
Do you think it would be a good idea to add bad faith patent application as a legal ground for invalidating a Chinese patent? How important it is to stakeholders / IP right holders in your country or EU?

Interviewee If "bad faith patent application" is added as a legal ground in China, this should be restricted to patent applications filed for inventions that are not yours. The broader meaning discussed above would be very problematic for many European companies – se the discussion under 1).

Rouse **The definition of bad faith patent applications provided by the CNIPA seems not consistent from the definition of "a patent obtained in bad faith" adopted by the courts in China. The scope of "BFPA" defined by CNIPA is a bit broader than the definition adopted by the courts.**
What do you think of the inconsistency specified above? Do you think it is advisable and essential important (or not important) to define BFPA consistently in the administrative and judicial procedures in China?

Interviewee It is important to define "bad faith patent application" consistently, and not too broadly – se 1) and 2) above.

Rouse **A line seems not clearly drawn between certain types of bad faith patent applications and normal patent applications. For example, filing multiple divisional applications from a parent patent application may be considered as abnormal patent applications if it's believed not necessary for the divisional filings. A main challenge for defining BFPAs would be how to determine the bad faith behind the patent application.**
Do you have any comments and suggestions on the current definition to BFPA in China?

Interviewee Too broad. Only patent applications filed for inventions you did not make or legally acquire should be considered to be BFPA.

Rouse **According to our survey, some EU patent practitioners do not think BFPA in China is a concern to their client in Europe. However, some patent practitioners and in-house IP lawyers think the purpose of Chinese BFPAs are not solely for receiving patent subsidies but may be used to attack competitors' business.**
What are your opinions on the impact of BFPA on the operation of businesses from your country or EU in China?

Interviewee I have not seen any impact yet, but this could of course be a problem.

Rouse **According to our survey, BFPA appears not to be an issue in the EU countries. However, there seems no corresponding regulations in your country and EU as equivalent to those administrative rules provided by the CNIPA against bad faith patent applications in China.**
What do you think China may learn from your country or EU in restricting bad faith patent applications?

Interviewee Ensure that there is nothing to be gained (e.g., tax benefits or subsidies) by filing lots of patent applications. In Europe, the filing and enforcement of patents is expensive, this is also a deterrent.

Rouse **What do you think is missing in the Chinese patent regulations and practice in restricting abuse of patent right, if any?**

Interviewee I do not know, but the main problem seems to be the various incentives for filing lots of patent applications.

Rouse **Procedures for establishing BFPA in China are currently performed by the CNIPA rather than by courts. As compared with full examination of the novelty/inventive step of the patent applications, the administrative rules against BFPA appear to be a lightweight instrument designed to identify and cleanse BFPAs in a quick and cost-effective manner. However, the**

patent applicants may lose certain rights for requesting judicial review of the establishment of the BFPA.
Do you think judicial review is necessary to establish a BFPA? What would be your suggestions for reaching the balance between efficiency in establishing BFPA and fairness to the right of the patent applicant?

Interviewee It needs to be possible to quickly and cheaply appeal the decision that an application is determined to be a BFPA. As explained above, normal patenting by European companies, that is not in any way fraudulent, may be considered to be BPFA under the current regulations, and there must be efficient means for challenging such decisions.

7.3.5 Interview with IP Counsel from a Sweden based MNC with business in China

Interviewer	Sweden Based Patent Attorneys from Rouse
Interviewee	IP Counsel Sweden based MNC with business in China
Date of Interview	2021-08-13
Location of interview	Stockholm

Rouse **What do you think about the situation of bad faith patent applications in the EU and China?**

Interviewee I was not aware of the problem in China, I do not think that it exists in Europe.

Rouse **What are your expectations for improvement of laws, regulations, and other measures against bad faith patent applications in the EU and China?**

Interviewee I hope that forceful measures are taken against bad faith patent applications, because it is extremely important that all parties can trust the patent system. China is a very important market, and many EU companies are increasing their presence, setting up their own production sites and such. This development will be hampered by the existence of bad faith patent applications.

7.3.6 Interview with Stakeholder from an EU based MNC with business in China

Interviewer	Sweden Based Patent Attorney from Rouse
Interviewee	IP Counsel EU based MNC with business in China
Date of Interview	2021-08-13
Location of interview	Stockholm

Rouse **What do you think about the situation of bad faith patent applications in the EU and China?**

Interviewee European companies do not seem to generally consider bad faith patent applications to be a problem.

Rouse **Bad faith patent applications are mainly regulated by administrative rules provided by the CNIPA. It is currently not feasible to invalidate a patent on the ground that it was granted from a BFPA, because BFPA is still not a legal ground for patent invalidation in China.**
Do you think it would be a good idea to add bad faith patent application as a legal ground for invalidating a Chinese patent? How important it is to stakeholders / IP right holders in your country or EU?

Interviewee It would be better to ensure that there is nothing to be gained (e.g., tax benefits or subsidies) by filing lots of patent applications. This is what causes the problem, this is what could fix it.
If "bad faith patent application" is added as a legal ground in China, this must be restricted to patent applications filed for inventions that are not yours. The broader meaning discussed above would be very problematic for many European companies.

Rouse **The definition of bad faith patent applications provided by the CNIPA seems not consistent from the definition of "a patent obtained in bad faith" adopted by the courts in China. The scope of "BFPA" defined by CNIPA is a bit broader than the definition adopted by the courts.**
What do you think of the inconsistency specified above? Do you think it is advisable and essential important (or not important) to define BFPA consistently in the administrative and judicial procedures in China?

Interviewee It is important to define "bad faith patent application" consistently, and not too broadly.

Rouse **A line seems not clearly drawn between certain types of bad faith patent applications and normal patent applications. For example, filing multiple divisional applications from a parent patent application may be considered as abnormal patent applications if it's believed not necessary for the divisional filings. A main challenge for defining BFPAs would be how to determine the bad faith behind the patent application.**
Do you have any comments and suggestions on the current definition to BFPA in China?

Interviewee Too broad. Only patent applications filed for inventions you did not make or legally acquire should be considered to be BFPA.

Rouse **According to our survey, some EU patent practitioners do not think BFPA in China is a concern to their client in Europe. However, some patent practitioners and in-house IP lawyers think the purpose of Chinese BFPAs are not solely for receiving patent subsidies but may be used to attack competitors' business.**
What are your opinions on the impact of BFPA on the operation of businesses from your country or EU in China?

Interviewee Ensure that there is nothing to be gained (e.g., tax benefits or subsidies) by filing lots of patent applications. This is better than creating new regulations.

Rouse **What do you think is missing in the Chinese patent regulations and practice in restricting abuse of patent right, if any?**

Interviewee The main problem seems to be the various incentives for filing lots of patent applications.

Rouse **Procedures for establishing BFPA in China are currently performed by the CNIPA rather than by courts. As compared with full examination of the novelty/inventive step of the patent applications, the administrative rules against BFPA appear to be a lightweight instrument designed to identify and cleanse BFPAs in a quick and cost-effective manner. However, the patent applicants may lose certain rights for requesting judicial review of the establishment of the BFPA.**
Do you think judicial review is necessary to establish a BFPA? What would be your suggestions for reaching the balance between efficiency in establishing BFPA and fairness to the right of the patent applicant?

Interviewee It needs to be possible to quickly and cheaply appeal the decision that an application is determined to be a BFPA.

7.3.7 Interview with French Practitioner

Interviewer	China Based Patent Attorney from Lusheng Law Firm / Rouse Network
Interviewee	French Practitioner, a French Law Firm
Date of Interview	2021-08-24
Location of interview	E-mail

Rouse **Are there any restrictions of patent right holders on abuse of patent right based on a bad faith patent, from the competition law or similar law or regulations in EU or any countries where you practice (and especially in Germany, France, and Italy)?**

Interviewee We are not aware of any restrictions in this sense.

Rouse	**From the perspective of patent application and protection system in EU, could you help provide comments on below two questions?** **(1) How the current legal systems and practice work around "bad faith" patent applications; and** **(2) If a balance needs to be brought between the protection and restriction of patent rights to create a supportive environment encouraging innovation and development of start-ups in significant numbers.**
Interviewee	We got your response which specifies that a typical situation for "bad faith" patent applications in EU is to file a patent application for invention without being entitled to the invention. A practical example could be an employee filing a patent application for invention which he's aware of but does not belong to him. This is regulated - at European level by Art. 61 EPC, - in Germany by Art. 8 PatG, - in Italy by Art 118 CPI. Those provisions differ in wordings, but they all provide means for the rightful owner of invention to take back ownership of their patents / applications. At European Patent Office (Art. 68 EPC), if by a final decision it is ruled that a person other than the applicant is entitled to the grant of the European patent, that person may (a) prosecute the European patent application as his own application in place of the original applicant. (b) file a new European patent application in respect of the same invention; or (c) request that the European patent application to be rejected.

7.3.8 Interview with Anonymous France IP Advisors

Interviewer	China Based Patent Attorney from Lusheng Law Firm / Rouse Network
Interviewee	Anonymous French IP advisors French IP firms and companies
Date of Interview	2021-08-24
Location of interview	E-mail

This interview was conducted via French IP attaché.

Rouse	**We've found that the term "Bad Faith Patent Application (BFPA)" has different meanings in the legal contexts in the EU and China. In the EU, BFPA mainly relates to patent ownership issue, which refers to a patent application for invention filed by someone who is not entitled to do so.** **In China, BFPA mainly refers to patent applications filed with the purpose other than for innovation protection. Such as, many patents of low quality were filed for the purpose of applying for patent subsidies from the government, applying to be recognized as a high-tech company to enjoy tax benefit, or other advantages offered by patent-incentive policies. Such BFPA in China are officially termed as "abnormal patent applications".** **What do you think about the differences above? Do you think bad faith patent applications in China/ abnormal patent applications are an issue specific in China only and not found in your country or EU? Will it cause a big concern to companies / stakeholders from your country or EU and how do you think it will impact them?**
Interviewee	Abnormal Patent Applications such as defined above can also exists in Europe, but their usage is marginal. Concerning the Chinese situation where the use of abnormal patent application is significant, there could be several aspects which can trigger the situation: - The government incentives that existed for many years

- The low cost of patent applications for Chinese nationals (who do not need to be represented by a patent agency)
- The fact that "patent" in China is not only "invention patent": it seems that utility models and design patents are easy and relatively cheap to file

The BFPA causes a big concern for French companies/stakeholders. The impact can be seen at several levels:

- Fighting BFPA has a cost: it takes time and money, and the result of the actions is uncertain. Moreover, the money and time invested to fight BFPA is money and time not invested in developing the new market that China is for them
- BFPA can have a bad impact on their image
- BFPA creates a distorted image of a company's/a country level of innovation

Rouse **Bad faith patent applications are mainly regulated by administrative rules provided by the CNIPA. It is currently not feasible to invalidate a patent on the ground that it was granted from a BFPA, because BFPA is still not a legal ground for patent invalidation in China.**
Do you think it would be a good idea to add bad faith patent application as a legal ground for invalidating a Chinese patent? How important it is to stakeholders / IP right holders in your country or EU?

Interviewee Making it a legal ground for invalidation could be a first step to help stakeholders fight BFPA. However, the level of evidence required should be reasonable so that it is actually an effective legal ground.

Rouse **The definition of bad faith patent applications provided by the CNIPA seems not consistent from the definition of "a patent obtained in bad faith" adopted by the courts in China. The scope of "BFPA" defined by CNIPA is a bit broader than the definition adopted by the courts.**
What do you think of the inconsistency specified above? Do you think it is advisable and essential important (or not important) to define BFPA consistently in the administrative and judicial procedures in China?

Interviewee It seems important that the definition is the same: it would make procedures more consistent and make it easier for foreign companies to understand the legal environment of China.

Rouse **A line seems not clearly drawn between certain types of bad faith patent applications and normal patent applications. For example, filing multiple divisional applications from a parent patent application may be considered as abnormal patent applications if it's believed not necessary for the divisional filings. A main challenge for defining BFPAs would be how to determine the bad faith behind the patent application.**
Do you have any comments and suggestions on the current definition to BFPA in China?

Interviewee It is indeed complicated to give a definition: the definition should make it possible to conclude that a patent is indeed BFPA without making it possible to invalidate any patent or create circumstances in which stakeholders are facing actions for BFPA when their patents are legitimate.

A non-exhaustive list of what BFPA can be (based on what the CNIPA has already seen) seems a reasonable solution, as well as recognizing a cluster of indicator/cluster of evidence.

Rouse **According to our survey, some EU patent practitioners do not think BFPA in China is a concern to their client in Europe. However, some patent practitioners and in-house IP lawyers think the purpose of Chinese BFPAs are not solely for receiving patent subsidies but may be used to attack competitors' business.**
What are your opinions on the impact of BFPA on the operation of businesses from your country or EU in China?

Interviewee BFPA can be a hurdle for French businesses. Plus, it can create situations of inequality. For instance, when a business file a BFPA in China and receives subsidies for that application: the foreign company has to spend money (sometimes a lot) to see this BFPA cancelled. It results in an unfair situation of two companies, maybe competitors on a market, one earning money and the other one spending money. This can be a harmful situation unbalancing competition.

Not even mentioning the financial impact that BFPA can have they can also stop a company from selling or manufacturing their products in China for some time, they can have an impact on the export of products manufactured in China and sold abroad. The impact of these practices is numerous.

Rouse **According to our survey, BFPA appears not to be an issue in the EU countries. However, there seems no corresponding regulations in your country and EU as equivalent to those administrative rules provided by the CNIPA against bad faith patent applications in China.**

What do you think China may learn from your country or EU in restricting bad faith patent applications? What are your opinions on the impact of BFPA on the operation of businesses from your country or EU in China?

Interviewee France has a specific mechanism to address BFPA. A "patent claim action" allows a stakeholder to claim the ownership or the invention patent when the invention has been misappropriated from its inventors, or when the patent application was an infringement to a legal or contractual obligation.

The French law provides that: "Where an application for the grant of an industrial property title has been made either for an invention unlawfully taken from an inventor or his successors in title, or in violation of a legal contractual obligation, the injured party may claim ownership of the application or of the title granted. Actions claiming ownership shall be barred after three years from publication of the grant of the industrial property title. However, if the bad faith of the owner of the title at the time the title was granted or acquired can be proved, the time limit shall be three years as from the expiry of the title."

Also, a reason why France does not have a common practice of BFPA, but China has is the fact that there are no quantitative targets for patent flings in France. However, China has several (for instance for SOEs, but also in the 5YP, or to obtain the HNTE status).

Rouse **What do you think is missing in the Chinese patent regulations and practice in restricting abuse of patent right, if any?**

Interviewee ---No reply---

Rouse **Procedures for establishing BFPA in China are currently performed by the CNIPA rather than by courts. As compared with full examination of the novelty/inventive step of the patent applications, the administrative rules against BFPA appear to be a lightweight instrument designed to identify and cleanse BFPAs in a quick and cost-effective manner. However, the patent applicants may lose certain rights for requesting judicial review of the establishment of the BFPA.**

Do you think judicial review is necessary to establish a BFPA? What would be your suggestions for reaching the balance between efficiency in establishing BFPA and fairness to the right of the patent applicant?

Interviewee An administrative action is indeed interesting to be cost effective and fast. However, an appeal could be made possible for the administrative decision, as it is for other administrative actions.

7.3.9 Interview with Italian Legal Counsel

Interviewer	China Based Patent Attorney from Lusheng Law Firm / Rouse Network
Interviewee	Italian Legal Counsel Italy based MNC with business in China
Date of Interview	2021-08-24
Location of interview	E-mail

This interview was conducted via Italian IP attaché.

Rouse **We've found that the term "Bad Faith Patent Application (BFPA)" has different meanings in the legal contexts in the EU and China. In the EU, BFPA mainly relates to patent ownership issue, which refers to a patent application for invention filed by someone who is not entitled to do so.**

In China, BFPA mainly refers to patent applications filed with the purpose other than for innovation protection. Such as, many patents of low quality were filed for the purpose of applying for patent subsidies from the government, applying to be recognized as a high-tech company to enjoy tax benefit, or other advantages offered by patent-incentive policies. Such BFPA in China are officially termed as "abnormal patent applications".

What do you think about the differences above? Do you think bad faith patent applications in China/ abnormal patent applications are an issue specific in China only and not found in your country or EU? Will it cause a big concern to companies / stakeholders from your country or EU and how do you think it will impact them?

Interviewee The BFPA under EU's definition (i.e., patent ownership issues) are solved in China by means of patent administrative law enforcement or lawsuit. Numbers of such issues in China are relatively small and has not caused impacts on administration of patent. Numbers of abnormal patent applications in China are bigger than numbers of patent with disputes on ownership.

At current stage, issues related to abnormal applications seems to be specific in China. Comparing with China, the cost of filing patent applications in Europe is higher. If the cost of filing patent applications in Europe decreases, there might be similar issues arise in Europe.

Abnormal patent applications in China may have impacts on European companies / stakeholders. There are infringers in China filed applications for utility models or design patents that are identical/similar to products already on European market and promote their products as "patented products", which would mislead Chinese consumers.

Rouse **Bad faith patent applications are mainly regulated by administrative rules provided by the CNIPA. It is currently not feasible to invalidate a patent on the ground that it was granted from a BFPA, because BFPA is still not a legal ground for patent invalidation in China.**

Do you think it would be a good idea to add bad faith patent application as a legal ground for invalidating a Chinese patent? How important it is to stakeholders / IP right holders in your country or EU?

Interviewee It would be a good idea to add bad faith patent application as a legal ground for invalidating a Chinese patent. Some infringers filed dozens of abnormal patent applications (similar to products already on European market or containing a trademark/decoration similar to a European brand). If the bad faith patent application could be introduced into the invalidation system in China, the cost for stakeholders/ IP right holders to invalidate such patents would be reduced.

Rouse **The definition of bad faith patent applications provided by the CNIPA seems not consistent from the definition of "a patent obtained in bad faith" adopted by the courts in China. The scope of "BFPA" defined by CNIPA is a bit broader than the definition adopted by the courts.**

What do you think of the inconsistency specified above? Do you think it is advisable and essential important (or not important) to define BFPA consistently in the administrative and judicial procedures in China?

Interviewee The bad faith applications provided by the CNIPA referred to abnormal patent applications that have impact on patent examination and administration by CNIPA. The bad faith applications adopted by the courts referred to patents filed on purpose of unfair competition. Such inconsistency was caused by different positions.

The CNIPA takes actions against bad faith on purpose of better administration; the courts introduce the definition of "bad faith application" to solve disputes between equal subjects. It is not important to define BFPA consistently in the administrative and judicial procedures in China.

Rouse	**A line seems not clearly drawn between certain types of bad faith patent applications and normal patent applications. For example, filing multiple divisional applications from a parent patent application may be considered as abnormal patent applications if it's believed not necessary for the divisional filings. A main challenge for defining BFPAs would be how to determine the bad faith behind the patent application.** **Do you have any comments and suggestions on the current definition to BFPA in China?**
Interviewee	When defining a BFPA in patent examination, the patent examiner shall review the applicant's filing record. If the applicant filed many patent applications identical/similar to products already on market, its patent application shall be considered as a BFPA.
Rouse	**According to our survey, some EU patent practitioners do not think BFPA in China is a concern to their client in Europe. However, some patent practitioners and in-house IP lawyers think the purpose of Chinese BFPAs are not solely for receiving patent subsidies but may be used to attack competitors' business.** **What are your opinions on the impact of BFPA on the operation of businesses from your country or EU in China?**
Interviewee	Chinese BFPAs would have impacts on European companies. There are infringers in China filed applications for utility models or design patents that are identical/similar to products already on European market and promote their products as "patented products", which would mislead Chinese consumers.
Rouse	**According to our survey, BFPA appears not to be an issue in the EU countries. However, there seems no corresponding regulations in your country and EU as equivalent to those administrative rules provided by the CNIPA against bad faith patent applications in China.** **What do you think China may learn from your country or EU in restricting bad faith patent applications?**
Interviewee	China shall consider increase the official fees for filing patents and cancel subsidies for filing patents.
Rouse	**What do you think is missing in the Chinese patent regulations and practice in restricting abuse of patent right, if any?**
Interviewee	The patent rights of utility models and design, which did not go through substantial review before granting, might be abuse. When conducting preliminary examination of such patent applications, the CNIPA shall consider establish a database about bad faith applicant and check if the applicant of the patent is a bad faith applicant.
Rouse	**Procedures for establishing BFPA in China are currently performed by the CNIPA rather than by courts. As compared with full examination of the novelty/inventive step of the patent applications, the administrative rules against BFPA appear to be a lightweight instrument designed to identify and cleanse BFPAs in a quick and cost-effective manner. However, the patent applicants may lose certain rights for requesting judicial review of the establishment of the BFPA.** **Do you think judicial review is necessary to establish a BFPA? What would be your suggestions for reaching the balance between efficiency in establishing BFPA and fairness to the right of the patent applicant?**
Interviewee	Judicial review is not necessary to establish a BFPA. If a patent was a BFPA, it usually would be lack of novelty.

7.3.10 Interview with Italian Practitioner

Interviewer	China Based Patent Attorney from Lusheng Law Firm / Rouse Network
Interviewee	Italian Practitioner, Italian IP Firms
Date of Interview	2021-08-24
Location of interview	E-mail

This interview was conducted via Italian IP attaché.

Rouse	**We've found that the term "Bad Faith Patent Application (BFPA)" has different meanings in the legal contexts in the EU and China. In the EU, BFPA mainly relates to patent ownership issue, which refers to a patent application for invention filed by someone who is not entitled to do so.** **In China, BFPA mainly refers to patent applications filed with the purpose other than for innovation protection. Such as, many patents of low quality were filed for the purpose of applying for patent subsidies from the government, applying to be recognized as a high-tech company to enjoy tax benefit, or other advantages offered by patent-incentive policies. Such BFPA in China are officially termed as "abnormal patent applications".** **What do you think about the differences above? Do you think bad faith patent applications in China/ abnormal patent applications are an issue specific in China only and not found in your country or EU? Will it cause a big concern to companies / stakeholders from your country or EU and how do you think it will impact them?**
Interviewee	The European/Italian law has not the issue of "Bad Faith Patent Application (BFPA)". Rather the EP law has the matter of patent filed by not the entitled person, i.e., rules on the ownership of the patent. Art 61 EPC relates to European patent applications filed by non-entitled persons. According to the article if by a final court decision, it is adjudged that a person other than the applicant is entitled to the grant of the European patent, that person may, in accordance with the Implementing Regulations: (a)prosecute the European patent application as his own application in place of the applicant; (b) file a new European patent application in respect of the same invention; or (c)request that the European patent application be refused. Thus, in case of filed law quality patents/unnecessary patents, they will be probably refused for some "normal" reason (insufficient description, lack of inventive step for instance) and not as a BFPA as this issue is not ruled by the law.
Rouse	**Bad faith patent applications are mainly regulated by administrative rules provided by the CNIPA. It is currently not feasible to invalidate a patent on the ground that it was granted from a BFPA, because BFPA is still not a legal ground for patent invalidation in China.** **Do you think it would be a good idea to add bad faith patent application as a legal ground for invalidating a Chinese patent? How important it is to stakeholders / IP right holders in your country or EU?**
Interviewee	We see a concern, may a novel and inventive BFPA be invalidated as a BFPA only? The risk of having a patent invalidated for a ground other than the grounds that apply to the EPO for instance will introduce uncertainty, we do not see the immediate need of adding bad faith patent application as a legal ground for invalidating a Chinese patent.
Rouse	**The definition of bad faith patent applications provided by the CNIPA seems not consistent from the definition of "a patent obtained in bad faith" adopted by the courts in China. The scope of "BFPA" defined by CNIPA is a bit broader than the definition adopted by the courts.** **What do you think of the inconsistency specified above? Do you think it is advisable and essential important (or not important) to define BFPA consistently in the administrative and judicial procedures in China?**
Interviewee	In order to reply to the above question, we need to know how the guidelines of CNIPA define a BFPA. In any case, our concern is that a definition of BTFA could introduce a subjective element in a court or CNIPA judgment that is not normally present in a traditional judgement of validity or in a judgment under Art 61 EPC.
Rouse	**A line seems not clearly drawn between certain types of bad faith patent applications and normal patent applications. For example, filing multiple divisional applications from a parent patent application may be considered as abnormal patent applications if it's believed not**

	necessary for the divisional filings. A main challenge for defining BFPAs would be how to determine the bad faith behind the patent application. **Do you have any comments and suggestions on the current definition to BFPA in China?**
Interviewee	As above outlined, we need to know how the guidelines define BFPA.
Rouse	**According to our survey, some EU patent practitioners do not think BFPA in China is a concern to their client in Europe. However, some patent practitioners and in-house IP lawyers think the purpose of Chinese BFPAs are not solely for receiving patent subsidies but may be used to attack competitors' business.** **What are your opinions on the impact of BFPA on the operation of businesses from your country or EU in China?**
Interviewee	As above outlined in section (2) a definition of BFPA is potentially dangerous. Let us imagine a Pharma company that files a large number of applications as a first filing the same day or a divisional application. If the large and unusual number may be considered a criterion for a definition of BFPA, this may have a negative impact on the market.
Rouse	**According to our survey, BFPA appears not to be an issue in the EU countries. However, there seems no corresponding regulations in your country and EU as equivalent to those administrative rules provided by the CNIPA against bad faith patent applications in China.** **What do you think China may learn from your country or EU in restricting bad faith patent applications?**
Interviewee	That the reasons of validity must be harmonized in countries belonging to the WTO.
Rouse	**What do you think is missing in the Chinese patent regulations and practice in restricting abuse of patent right, if any?**
Interviewee	---No reply---
Rouse	**Procedures for establishing BFPA in China are currently performed by the CNIPA rather than by courts. As compared with full examination of the novelty/inventive step of the patent applications, the administrative rules against BFPA appear to be a lightweight instrument designed to identify and cleanse BFPAs in a quick and cost-effective manner. However, the patent applicants may lose certain rights for requesting judicial review of the establishment of the BFPA.** **Do you think judicial review is necessary to establish a BFPA? What would be your suggestions for reaching the balance between efficiency in establishing BFPA and fairness to the right of the patent applicant?**
Interviewee	We think that a judicial decision is necessary in analogy with the above Art 61 EPC that subjects any decision to the ownership to a final court decision (i.e., a not appealable decision).

7.3.11 Interview with Italian Practitioner

Interviewer	China Based Patent Attorney from Lusheng Law Firm / Rouse Network
Interviewee	Italian Practitioner, Italian IP Firms
Date of Interview	2021-08-30
Location of interview	E-mail

This interview was conducted via Italian IP attaché.

Rouse	**We've found that the term "Bad Faith Patent Application (BFPA)" has different meanings in the legal contexts in the EU and China. In the EU, BFPA mainly relates to patent ownership issue, which refers to a patent application for invention filed by someone who is not entitled to do so.** **In China, BFPA mainly refers to patent applications filed with the purpose other than for innovation protection. Such as, many patents of low quality were filed for the purpose of applying for patent subsidies from the government, applying to be recognized as a high-tech**

company to enjoy tax benefit, or other advantages offered by patent-incentive policies. Such BFPA in China are officially termed as "abnormal patent applications".
What do you think about the differences above? Do you think bad faith patent applications in China/ abnormal patent applications are an issue specific in China only and not found in your country or EU? Will it cause a big concern to companies / stakeholders from your country or EU and how do you think it will impact them?

Interviewee The newly revised Patent Law of the People's Republic of China, entered in force on June 1st, 2021, has expressly identified good faith as a substantial requirement for patent application. Particularly, the recalled provisions maintain that "Whoever applies for a patent and exercises the patent right shall follow the principle of good faith. No person may abuse the patent right to harm the public interest or the legitimate rights and interests of other persons".
Whereas the scope of the definition of good faith and whether the lack of good baith would become a ground for both invalidating a patent and rejecting a patent application will require further clarification through the implementing rules of the revised Patent Law (which is still at the stage of draft), we believe this provision refer to the cases where invalid rubber-stamp utility model and design patents (which are granted without substantial examination) are used to extort money from others. Other instances where the provision can be relevant is in proceedings brought by "patent trolls", non-practicing entities and in standard essential patent litigation.
Therefore, in our view, the aim of the provision is not only to contrast forms of abuse resulting in an undue benefit for the applicant (e.g., the obtainment of patent subsidies, the obtainment of the high-tech status for the purpose of enjoying tax benefits), but also to provide patent holders with an additional ground to challenge rubber-stamp utility model and design patents as above specified.
This express provision would be therefore useful to contrast the aforesaid situations which unfortunately seldom happened in the past in the territory of the P.R.C. and may thus be considered as a local specific issue.
Briefly saying, we tend to believe these new provisions will be beneficiary (and not detrimental) from foreign companies/investors in China (including EU/Italian) as they will provide an additional ground to contrast/invalidate BFPA.

Rouse **Bad faith patent applications are mainly regulated by administrative rules provided by the CNIPA. It is currently not feasible to invalidate a patent on the ground that it was granted from a BFPA, because BFPA is still not a legal ground for patent invalidation in China.**
Do you think it would be a good idea to add bad faith patent application as a legal ground for invalidating a Chinese patent? How important it is to stakeholders / IP right holders in your country or EU?

Interviewee As anticipated, the implementing rules of the Patent Law are likely to expressly qualify bad faith as a legal mean for invalidating a Chinese patent or to reject a patent application. In fact, the last Draft Patent Law Implementation Rules ("Draft Rules") issued by CNIPA already specifies that "bad faith" will become a ground for both invalidating a patent and rejecting a patent application (particularly, this may be read in art. 44(1), art. 53(2), and art. 65.2 of the Draft Rules). We believe these provisions will help to increase the protection of the IPR of foreign companies operating in China by providing an additional ground to challenge malicious filings.

Rouse **The definition of bad faith patent applications provided by the CNIPA seems not consistent from the definition of "a patent obtained in bad faith" adopted by the courts in China. The scope of "BFPA" defined by CNIPA is a bit broader than the definition adopted by the courts.**
What do you think of the inconsistency specified above? Do you think it is advisable and essential important (or not important) to define BFPA consistently in the administrative and judicial procedures in China?

Interviewee In our view is indeed important to maintain uniformity in the definition and interpretation of the concept of BFPA. In this respect, in our view the only method to achieve such result is to expressly define the term at the legislative level (which would be the sole binding for either

Courts or administrative authorities). Unfortunately, the concept of BFPA was not clearly outlined in the Patent Law. The Draft Patent Law Implementation Rules ("Draft Rules"), which are nevertheless issued by CNIPA, provides however some guidelines as it includes examples of BFPA such as fabricating, faking, plagiarizing and cobbling together a patent (see Draft Rules art. 43, addition 1). What remains unclear is whether the infringement of prior rights, such as theft of trade secrets, would also count as a bad faith behaviour, based on which an invention or utility model patent can be invalidated.

Rouse **A line seems not clearly drawn between certain types of bad faith patent applications and normal patent applications. For example, filing multiple divisional applications from a parent patent application may be considered as abnormal patent applications if it's believed not necessary for the divisional filings. A main challenge for defining BFPAs would be how to determine the bad faith behind the patent application.**

Do you have any comments and suggestions on the current definition to BFPA in China?

Interviewee In our view, there is not a clear definition of BFPA in China. We would expect and recommend including a clear definition of BFPA in the final Patent Law Implementation Rules to be adopted to avoid uncertainties in the application of the provision of art. 20 of the revised Patent Law.

Rouse **According to our survey, some EU patent practitioners do not think BFPA in China is a concern to their client in Europe. However, some patent practitioners and in-house IP lawyers think the purpose of Chinese BFPAs are not solely for receiving patent subsidies but may be used to attack competitors' business.**

What are your opinions on the impact of BFPA on the operation of businesses from your country or EU in China?

Interviewee As above outlined in section (2) a definition of BFPA is potentially dangerous. Let us imagine a Pharma company that files a large number of applications as a first filing the same day or a divisional application. If the large and unusual number may be considered a criterion for a definition of BFPA, this may have a negative impact on the market.

Rouse **According to our survey, BFPA appears not to be an issue in the EU countries. However, there seems no corresponding regulations in your country and EU as equivalent to those administrative rules provided by the CNIPA against bad faith patent applications in China.**

What do you think China may learn from your country or EU in restricting bad faith patent applications?

Interviewee As above specified, we believe the aim of art. 20 of the revised Patent Law is not only to contrast forms of abuse resulting in an undue benefit for the applicant (e.g., the obtainment of patent subsidies, the obtainment of the high-tech status for the purpose of enjoying tax benefits), but also to provide patent holders with an additional ground to challenge rubber-stamp utility model and design patents as above specified. As for this latter aspect, we believe the amendment will be beneficiary for the purpose of the protection of IPR of foreign (including EU/Italian) companies operating in China.

Rouse **What do you think is missing in the Chinese patent regulations and practice in restricting abuse of patent right, if any?**

Interviewee In the Italian legal system, there are not specific rules allowing the invalidation/refusal of patent application for bad faith filings in respect of patents as above intended (ref., art. 20 Patent Law). In practice, bad faith patent applications in Italy are normally intended to as patents registration maliciously filed by a subject other than the inventor. In such a case, the real inventor may bring legal action to request that his right be recognized and that the patent be transferred to him. While we believe this aspect may be further considered by the Chinese regulatory authority to clearly address the legal remedies in such situation, it is clear that the same does not fall within the "bad faith" situations for the purpose of art. 20 of the patent law.

Rouse **Procedures for establishing BFPA in China are currently performed by the CNIPA rather than by courts. As compared with full examination of the novelty/inventive step of the patent applications, the administrative rules against BFPA appear to be a lightweight instrument**

designed to identify and cleanse BFPAs in a quick and cost-effective manner. However, the patent applicants may lose certain rights for requesting judicial review of the establishment of the BFPA.

Do you think judicial review is necessary to establish a BFPA? What would be your suggestions for reaching the balance between efficiency in establishing BFPA and fairness to the right of the patent applicant?

Interviewee: As the Patent Laws always provides for the possibility to refer to lawsuits before the IPR Courts in order to challenge the administrative decisions of CNIPA, we tend to believe the applicant will still have the opportunity to refer to a judicial review to establish the existence of a BFPA. In our view, moreover, the assessment of the existence of a BFPA is more technical than juridical, so that having the possibility of a judicial review rather than a judicial mandatory assessment is already a fair balance between the need to protect the rights of the patent applicant and the right to challenge an application/patent by reason of BFPA grounds.

7.3.12 Interview with Italian Practitioner

Interviewer	China Based Patent Attorney from Lusheng Law Firm / Rouse Network
Interviewee	Italian Practitioner, Italian IP Firm
Date of Interview	2021-08-30
Location of interview	E-mail

This interview was conducted via Italian IP attaché.

Rouse: **The definition of bad faith patent applications provided by the CNIPA seems not consistent from the definition of "a patent obtained in bad faith" adopted by the courts in China. The scope of "BFPA" defined by CNIPA is a bit broader than the definition adopted by the courts. What do you think of the inconsistency specified above? Do you think it is advisable and essential important (or not important) to define BFPA consistently in the administrative and judicial procedures in China?**

Interviewee: It would be definitely better to have consistent definitions of BFPA. Discrepancies in the approach of CNIPA and courts in this respect are hardly acceptable.

7.4 Machine Translation of BFPA Regulations

Items	Regulations	Issuing Authority	Publication	Effective date
1	Announcement of China National Intellectual Property Administration on Promulgation of the Measures on Regulating Patent Application Activities No. 411	CNIPA	2021-03-11	2021-03-11
2	Notice of the State Intellectual Property Office on Further Strictly Regulating Patent Application Activities	CNIPA	2021-01-27	2021-01-27
3	Several Provisions on Regulating Patent Application Activities (Order No. 75)	CNIPA	2017-02-28	2017-04-01

4	Guidelines for Patent Infringement Determination (2017)	Beijing Municipal High People's Court	2017-04-20	2017-04-20
5	Several Provisions on Regulating Patent Application Activities (Order No. 45)	CNIPA	2007-08-27	2007-10-01

7.4.1 Measures on Regulating Patent Application Activities, CNIPA Announcement No. 411

Promulgation Authorities State Intellectual Property Office
Promulgation Date 2021-03-11
Effective Date 2021-03-11
Status: Valid
(The Chinese text of the Guidelines shall prevail in case of inconsistency)

In order to earnestly implement the decisions and arrangements of the CPC Central Committee and the State Council on strengthening the protection of intellectual property rights, comprehensively improve the quality of patents, ensure the realization of the legislative purpose of the Patent Law of the People's Republic of China of encouraging genuine innovation activities, and abide by the principle of good faith, the China National Intellectual Property Administration has enacted the Measures on Regulating Patent Application Activities, which are hereby promulgated, effective as of the date of promulgation.

Article 1 These Measures are enacted in accordance with the Patent Law of the People's Republic of China and its Implementing Rules, the regulations on patent agency and other relevant laws and regulations for the purpose of reducing various abnormal patent application activities that violate the legislative purpose of the Patent Law of the People's Republic of China and the principle of good faith. Abnormal patent application activities and abnormal patent applications shall be strictly examined and handled in accordance with these Measures.

Article 2 For the purpose of these Measures, the term "abnormal patent application activities" as mentioned refers to the activities of any entity or individual, independently or by collusion, submitting various patent applications, acting as agent for patent applications, transferring patent application rights or patent rights, etc., not for the purpose of protecting innovations or not based on genuine invention-creation activities, but for the purpose of seeking improper benefits or fabricating innovation performance or service performance.

The following activities fall under abnormal patent application activities referred to in these Measures:

(I) Where multiple patent applications are simultaneously or successively submitted that have obviously the same invention-creation or are essentially formed by simple combinations of different invention-creation features or elements;

(II) Where the submitted patent application contains fabricated, forged or altered inventions-creations, experimental data or technical effect, or plagiarism, simple replacement or patchwork of existing technologies or existing designs, or other similar circumstances;

(III) Where the invention-creation of the submitted patent application is obviously inconsistent with the actual research and development capabilities and resource conditions of the applicant or inventor;

(IV) Where the invention-creation contents of the submitted multiple patent applications are generated randomly mainly by using computer programs or other technologies;

(V) Where the invention-creation of the submitted patent application is an invention-creation that is deliberately formed for the purpose of evading patentability examination and is obviously inconsistent with the technical improvement or design common sense, or is of no actual value of protection, or has actual

value of protection, or unnecessarily reduces the scope of protection, or contains no contents of search or examination significance;

(VI) Where multiple patent applications which are substantially connected with a particular entity, individual or address are submitted in a scattered or sequential order or in different places for the purpose of evading regulatory measures against abnormal patent application activities;

(VII) Where the patent application rights or patent rights are not resold for the purpose of implementing patented technologies, designs or for other legitimate purposes, or falsely changing inventors or designers;

(VIII) Where a patent agency, patent attorney, or any other institution or individual acts as an agent, induces, abets, assists or conspires with others to commit various abnormal patent application activities; and

(IX) Other abnormal patent application activities that violate the principle of good faith or disrupt the normal order of patent work and other relevant activities.

Article 3 Where the China National Intellectual Property Administration finds out or learn of according to the report the existence of the abnormal patent application activities as mentioned in the present Measures in the procedures of acceptance, preliminary examination, actual examination, and re-examination of patent application or the procedures of the international phase of international application, it may set up a special examination working group or authorize an examiner to initiate the special examination procedures in accordance with the present Measures, process the application in batches and collectively, notify the applicant and require the applicant to stop the relevant activities immediately, and take the initiative to withdraw the relevant patent application or request for going through the relevant legal formalities within a specified time limit, or make statements.

Where an applicant refuses to accept the preliminary determination of abnormal patent application activities, it shall make statements and submit adequate supporting materials within a specified time limit. Where no reply is given within the time limit without justified reasons, the relevant patent application shall be deemed to have been withdrawn, and the request for going through the relevant legal formalities shall be deemed not to have been filed.

Where the China National Intellectual Property Administration still considers that such activities fall under the abnormal patent application activities mentioned in the present Measures after the applicant has made statements, it may reject the relevant patent application in accordance with the law or may not approve the request for going through the relevant legal formalities.

Where an applicant refuses to accept the aforesaid decision of the China National Intellectual Property Administration, it may file an application for administrative reconsideration, request for re-examination or file an administrative lawsuit in accordance with the law.

Article 4 With respect to the abnormal patent application that has been determined, the China National Intellectual Property Administration may, in light of the circumstances, not reduce the patent fees; where the patent fees have been reduced, it shall require the applicant to make up the reduced part.

As for an applicant who commits repeated offenses or commits other serious offences, it may not reduce the patent fees for its patent application within five years as of the date when it is determined that such activities are abnormal.

Article 5 The All-China Patent Attorneys Association shall take self-disciplinary measures against any patent agency or patent attorney that commits abnormal patent application activities as provided in Item (VIII), Paragraph 2 of Article 2 of the present Measures. In case of repeated offenses or other serious offences, it shall be punished by the China National Intellectual Property Administration or the administrative department for patent affairs in accordance with the law and regulations.

Other institutions or individuals that commit the aforesaid activities shall be punished by the administrative department for patent affairs in accordance with the relevant provisions on investigating and punishing

unqualified patent agency activities. In case of violation of other laws and regulations, the case shall be transferred to the relevant department for handling in accordance with the law.

Article 6 Where the administrative department for patent affairs or the patent agency office finds out or learns of any clue of abnormal patent application activities according to the report, it shall report it to the China National Intellectual Property Administration in a timely manner.

The administrative department for patent affairs shall, in accordance with the requirements of the relevant policy documents, implement the relevant measures against the entity or individual that is determined to have abnormal patent application activities.

Article 7 Where any entity or individual that commits the activities as provided in Article 2 is suspected of constituting a crime in accordance with the Criminal Law of the People's Republic of China, it shall be transferred to the relevant organ for investigation of criminal liability.

Article 8 The present Measures shall enter into force as of the date of promulgation.

7.4.2 Notice of the State Intellectual Property Office on Further Strictly Regulating Patent Application Activities

Promulgation Authorities	State Intellectual Property Office
Promulgation Date	2021-01-27
Effective Date	2021-01-27
Status:	Valid

(The Chinese text of the Guidelines shall prevail in case of inconsistency)

Intellectual Property Offices of all provinces, autonomous regions, municipalities directly under the Central Government and Xinjiang Production and Construction Corps, Sichuan Intellectual Property Service Promotion Centre, Guangdong Intellectual Property Protection Centre; all departments of the bureau, all departments of the patent bureau, all units directly under the bureau, and all social organizations:

In order to thoroughly study and implement Xi Jinping’s thoughts on socialism with Chinese characteristics in the new era, earnestly implement the decisions and deployments of the Party Central Committee and the State Council, and earnestly promote China’s transformation from a large country in the introduction of intellectual property rights to a large country of creation, from the pursuit of quantity to the improvement of quality, in recent years, the whole system has been intensified. The patent quality improvement project, local intellectual property departments at all levels strengthened the regulation of relevant support policies for patent applications, severely cracked down on abnormal patent applications-related activities and played an important role in stimulating and protecting innovation and promoting the high-quality development of intellectual property rights. However, there are still some places where insufficient attention is paid to the requirements for high-quality patent development, poor implementation, and blind pursuit of quantitative indicators. Abnormal patent applications that are not aimed at protecting innovation still exist, seriously disrupting administrative order and harming public interests. Obstructing enterprise innovation, wasting public resources, and undermining the patent system. In order to strictly implement the requirements for high-quality development, further regulate patent application activities, improve the quality of patent applications, and eliminate abnormal patent application activities that are not intended to protect innovation, the relevant matters are hereby notified as follows:

1. Clear work goals

Efforts should be made to guide the number and quality of patent applications to adapt to the level of regional economic development, industrial development needs and technological innovation capabilities, scientifically set various work indicators, strengthen quality guidance, and effectively play a leading role in high-quality development indicators. Further adjust and improve policies such as funding and rewards, completely cancel funding for patent applications, and focus on increasing support for subsequent

transformation and application, administrative protection, and public services. Clean up and standardize the order of patent applications, resolutely crack down and effectively curb abnormal patent applications that are not aimed at protecting innovation and promote the high-quality development of intellectual property.

2. Grasp the focus of work

Those who implement the following abnormal patent applications (hereinafter referred to as such applications) that are not for the purpose of protecting innovation shall be severely cracked down and dealt with in accordance with relevant laws, regulations and policies.

(one)"Several Provisions Regarding the Regulation of Patent Application Activity"(State Intellectual Property Office No. 75 Bureau Order) six situations stipulated in Article 3;

(2) Units or individuals deliberately submit related patent applications in a scattered manner;

(3) Units or individuals submit patent applications that are obviously inconsistent with their research and development capabilities;

(4) Units or individuals reselling patent applications abnormally;

(5) Patent applications submitted by entities or individuals have technical solutions that implement simple functions with complex structures, use conventional or simple features to combine or stack, and other activities that are obviously not in line with the common sense of technological improvement;

(6) Other violations of the principles of good faith and non-compliance with the provisions of the Civil Code, Patent law Relevant regulations and acts that disrupt the order of patent application management.

The above "units and individuals" include the same natural person, legal person, other organization and the same actual controller.

3. Strengthening work measures

For this type of application, except for the basis Patent law. In addition to the strict handling of submitted patent applications according to the provisions of its implementation rules, the following measures should be taken depending on the circumstances:

(1) No reduction in patent fees will be granted to applicants. If the payment has been reduced, it is required to make up the payment of the reduced fee. If the circumstances are serious, the patent fee shall not be reduced within five years from this year.

(2) Announce it on the government website of the State Intellectual Property Office and the China Intellectual Property News.

(3) The number of such applications shall be deducted from the statistics of the number of patent applications.

(4) Cancel the qualifications for applying for the national intellectual property demonstration and superior enterprises, the intellectual property protection centre filing enterprises, and the Chinese patent award application, participation or award qualification.

(5) Local intellectual property departments at all levels do not grant funding or rewards to applicants and related agencies. Those that have been funded or rewarded shall be recovered in whole or in part. If the circumstances are serious, no funding or awards will be granted within five years from the current year. Those involved in fraudulently obtaining financial aid and rewards are suspected of constituting a crime, they shall be transferred to relevant agencies for investigation of criminal responsibility in accordance with the law.

(6) Local intellectual property departments at all levels shall, in accordance with the identification situation, intensify investigation and handling of patent agencies that act on behalf of such applications and seriously

disrupt the order of patent work. The All-China Association of Patent Agents adopts industry self-discipline measures against patent agencies and patent agents engaged in and involved in such applications.

4. Strengthening collaborative governance

(1) Improve the scientific nature of assessment indicators. Local intellectual property departments at all levels must firmly establish the concept of high-quality development, actively coordinate relevant departments to further improve and perfect the evaluation index system related to patent work, improve the scientific and effective evaluation, and check and eliminate the unrealistic growth rate evaluation index, to avoid using the number of patent applications as the main basis for departmental work evaluation. It is not allowed to set binding evaluation indicators for the number of patent applications, and it is not allowed to apportion the number of patent applications to local IP Authorities, enterprises, agencies, etc. by means of administrative orders or administrative guidance. The number of patent applications (including patent applications through the Patent Cooperation Treaty (PCT)) shall not be compared with each other. Once the above activities are discovered, various titles and preferential policies such as the qualifications for the application of national intellectual property operation projects, the model cities granted by the State Intellectual Property Office, etc. will be cancelled as appropriate.

(2) Adjust the patent funding policy. Before the end of June 2021, all levels of patent application funding should be completely cancelled. All local IP Authorities shall not provide financial support for patent applications in any form such as subsidies, rewards, subsidies, etc. The scope of local existing funding should be limited to granted invention patents (including invention patents granted overseas through the PCT and other channels), and the funding method should be in the form of post-authorization subsidies. The total amount of funding at all levels and types of funding received by the funding target shall not exceed 50% of the official fees paid for obtaining patent rights and shall not fund the patent annual fee and patent agency service fees. For those who falsify and arbitrage patent funding, the allocated funds shall be recovered within a time limit. During the "14th Five-Year Plan" period, all governments will gradually reduce various types of financial assistance for patent authorization and cancel them all by 2025. All local IP Authorities should focus on optimizing the use and management of patent funding-related financial funds, strengthen the use of patent protection, and focus on increasing support for subsequent transformation and use, administrative protection, and public services.

(3) Highlight the quality orientation of patent applications. The State Intellectual Property Office regularly reports or publishes data on high-quality patent applications and the proportion of such applications in various local IP Authorities. If the proportion of such applications has increased for two consecutive quarters and the proportion of high-quality patent applications has declined for two consecutive quarters, the local intellectual property department shall be notified. If the above phenomenon occurs for three consecutive quarters, the local party committee and government shall be notified, and the relevant information shall be published on the government website of the State Intellectual Property Office and the China Intellectual Property News. If the phenomenon occurs for more than one year in a row, various titles such as model cities and preferential policies granted by the State Intellectual Property Office shall be cancelled. All types of awards involving patents shall not simply take the number of patent applications and authorizations as the main conditions.

(4) Strengthen credit supervision in the field of patent applications. Revise Patent law of the implementation rules promote the inclusion of such application activities as dishonest activities into intellectual property credit supervision in accordance with the law. Intellectual property departments at all levels should emphatically consider including such application activities into the scope of supervision when formulating intellectual property credit supervision policy documents. Strengthen the coordinated governance of agencies that are seriously illegal and untrustworthy. For patent agencies that have been punished for acting on such applications, they will be linked and restrained in terms of incentives and awards, industry evaluation and awards, and strengthen the effect of supervision.

(5) Strengthen the regulation and supervision of patent transactions. Local intellectual property departments at all levels must implement the territorial supervision responsibility for regulating intellectual

property transactions, resolutely curb patent application rights and patent rights transfers that are obviously not for the purpose of technological innovation and implementation, and provide support for the construction of intellectual property rights (patents) by government departments at all levels. Transaction operation platforms and institutions strengthen supervision and guidance, strengthen guidance on various patent transaction service organizations and platforms in the jurisdiction, do a good job in the background review of transaction targets and transaction parties, and strictly prevent such applications from making profits and laundering through transactions. The State Intellectual Property Office will strengthen the monitoring of registration and filing data such as patent transfers and licensing, and work with relevant local IP Authorities to promptly deal with abnormal patent operations in accordance with the law.

(6) Strengthen inter-departmental information communication. For the detailed information related to this type of application, local intellectual property departments at all levels should consult with relevant departments, proactively report to science and technology management departments in a timely manner, support and assist science and technology management departments to strengthen the administrative management of patent applications, and ensure that such applications are not Used to defraud various national preferential policies such as high-tech enterprises. For “three-no’s” shell companies that have no insured persons, no paid-in capital, and no R&D funds to apply for patents, relevant information shall be promptly transferred to the local market supervision department for strict supervision.

5. Improve the working mechanism

(1) Work docking mechanism. The State Intellectual Property Office continues to monitor and identify such applications, and promptly notify and transfer relevant information about such applications to the local authorities. The local intellectual property departments strengthen administrative guidance and require the entities and individuals involved and agencies to take the initiative to withdraw relevant applications. Those who actively withdraw can be handled lightly as appropriate. If the units and individuals involved and the agency refuse to withdraw or submit complaints and provide sufficient evidence, the local intellectual property department will deal with it according to the circumstances, and transfer relevant clues to the market supervision department, public security department, and credit supervision department for disposal in accordance with the law.

(2) Information screening mechanism. The patent examination department shall strictly examine and reject such applications in accordance with the law, and discover, summarize, and submit relevant clues in a timely manner. Patent agencies, Intellectual Property Protection Centre, and Intellectual Property Right Protection Centre strictly screen such applications and report relevant clues to the State Intellectual Property Office in a timely manner.

(3) Reporting and verification mechanism. Encourage units and individuals to report such application activities and illegal index settings and application funding policies to local intellectual property departments at all levels. Local intellectual property departments at all levels must set up dedicated networks to accept reports. After receiving the report, it must be checked and dealt with in a timely manner and reported to the State Intellectual Property Office.

(4) Positive guidance mechanism. Actively carry out various forms of publicity reports to improve the quality of patent applications, strengthen the incentives for enterprises and individuals that actively invest in innovation, scientific and rational layout of patents, further enhance the awareness of the strategic layout and quality of patent applications in the whole society, and effectively improve the quality of patent applications.

6. Promoting the implementation of work

(1) Carry out special governance. In the whole year of 2021, special rectifications will be launched to combat this type of application activity. Severe crackdowns on related activities for which clues have been discovered. Strive to further standardize the order of patent applications by the end of 2021, with a marked decrease in such applications, and a continuous increase in the proportion of high-quality patent

applications. The State Intellectual Property Office will deploy and carry out special governance from time to time according to the work effect and relevant conditions.

(2) Strengthen self-examination and self-correction. Local intellectual property departments at all levels should focus on their work goals and priorities, conduct in-depth self-examinations, comprehensively sort out indicator settings, funding policies, etc., find out existing deficiencies and outstanding problems, propose rectification measures, and formulate work plans and policies and measures. Submit the self-inspection results to the State Intellectual Property Office on time and submit important clues and key cases in a timely manner.

(3) Strengthen organization and leadership. The State Intellectual Property Office will follow up and guide and supervise the handling of local policies and case handling. Local intellectual property departments at all levels should attach great importance to the importance of severely cracking down on such application activities, report to the local people's government on special topics, and be responsible for the main person in charge, establish a leadership coordination mechanism, comprehensively study and judge the status of local patent applications, and clarify the key goals and objectives of the work. For key links, formulate special work plans, clarify specific responsible persons and work contacts, set up special classes, and carry out in-depth and continuous related work.

7.4.3 Several Provisions on Standardising Patent Applications No.75

(Revised based on the No.75 Provisions effective on 2007-10-01)

Promulgation Authorities	State Intellectual Property Office
Promulgation Date	2017-02-28
Effective Date	2017-04-01
Status:	Valid

(The Chinese text of the Guidelines shall prevail in case of inconsistency)

Article 1 These Provisions are formulated pursuant to the Patent Law, the Regulations on Implementation of Patent Law and the Regulations on Patent Commissioning, for the purposes of standardising the activities of patent applications and safeguarding the order of patent work procedures.

Article 2 Submission of patent application or agents submitting patent application on behalf shall comply with the relevant provisions of laws, rules and regulations, and abide by the principles of honesty and integrity in making applications, and shall not engage in abnormal activities of patent applications.

Article 3 The terms "abnormal activities of patent applications" of these Provisions shall refer to:

(1) an entity or individual submits multiple patent applications of obviously similar contents;

(2) an entity or individual submits multiple patent applications involving obviously plagiarised technologies or designs; and

(3) the same entity or individual submits multiple patent applications which involve simple replacement or putting together of different materials, composition, ratio, parts etc;

(4) the same entity or individual submits multiple patent application for which the experiment data or technical effect is evidently fabricated;

(5) the same entity or individual submits multiple patent applications which have product shape, pattern or colour generated randomly using computer technology; and

(6) assist others to submit or a patent agency submits on behalf a patent application which falls under the types stipulated in item (1) to item (5) of this Article.

Article 4 In respect of abnormal activities of patent applications, Except to deal with the patent applications pursuant to the relevant provisions of the Patent Law and the Regulations on Implementation of Patent Law, the following measures may be adopted depending on the circumstances:

(1) no reduction of patent fees; where the patent fees have been reduced, the reduced portion shall be repaid; in serious cases, reduction of patent fees shall not be allowed within five years from the current year;

(2) public announcements shall be made on the government website of the State Intellectual Property Office and in the "China Intellectual Property Rights News", and included in the national creditworthiness information sharing platform;

(3) the number of abnormal patent applications shall be deducted from the statistical figures of patent applications of the State Intellectual Property Office;

(4) all levels of intellectual property offices shall not grant any subsidy or reward; subsidies or incentives granted shall be fully or partially recovered; in serious cases, no subsidy or reward shall be granted within five years from the current year;

(5) the All-China Patent Agents Association shall adopt self-regulatory industry measures on patent agencies and patent agents which engage in abnormal activities of patent applications and, where necessary, the corresponding disciplinary action shall be meted out by the Patent Agents Disciplinary Committee pursuant to the provisions of the Disciplinary Rules for Patent Agents (Provisional); and

(6) where financial assistance or incentives are fraudulently obtained through abnormal activities of patent applications, if the case constitutes a criminal offence, the case shall be handed over to the relevant authorities and criminal liability shall be pursued in accordance with the law.

Article 5 Prior to adopting the measures stipulated in Article 4 of these Provisions, where necessary, the parties concerned shall be given a chance to make representation.

Article 6 All levels of intellectual property offices shall guide the general public and patent agencies in making patent applications pursuant to the law.

Any abnormal activities of patent applications discovered by a local patent agency office shall be promptly reported to the State Intellectual Property Office.

Article 7 These Provisions shall be implemented with effect from 1 October 2007.

7.4.4 Guidelines for Patent Infringement Determination (2017)

Promulgation Authorities	Beijing Municipal High People's Court
Promulgation Date	2017-04-20
Effective Date	2017-04-20

(The Chinese text of the Guidelines shall prevail in case of inconsistency)

English translation of Articles 126 and 127 provided below only.

(II) Defence Based on Abuse of Patent Right

126. If the accused party provides evidence and proves that the patentee has obtained the patent in bad faith, the court may reject the plaintiff's claim. Where the patent is invalidated during legal proceedings of patent infringement, a decision on abuse of patent right shall not be readily rendered.

127. Acquisition of a patent in bad faith refers to applying for a patent for an invention-creation, which one clearly knows should not be granted patent protection, and finally obtaining patent right.

Acquisition of a patent in bad faith includes following circumstance:

(1) Applying for and obtaining a patent for a technical solution of technical standards such as national standards, industry standards, etc. which the patentee clearly knows prior to the filling date;

(2) Applying for and obtaining a patent based on other's technical solution which is clearly learnt by the participants who draft and set technical standards such as national standards, industry standards, etc.;

(3) Applying for and obtaining a patent for a product which the applicant knows being widely manufactured and used in a certain area;

(4) Fabricating experimental data, technical effects and other means to make the patent meet patentability requirements of the Patent Law and obtaining a patent;

(5) Applying for and obtaining a patent for a technical solution which is disclosed in a patent or patent application published abroad.

（This English Version is officially released by the Beijing High People's Court.）

7.4.5 Several Provisions on Regulating Patent Application Activities, SIPO Order No. 45

Promulgation Authorities	State Intellectual Property Office
Promulgation Date	2007-08-27
Effective Date	2007-10-01
Status	Revised

(The Chinese text of the Guidelines shall prevail in case of inconsistency)

Article 1 These Provisions are formulated pursuant to the Patent Law, the Regulations on Implementation of Patent Law and the Regulations on Patent Commissioning for the purposes of standardising the activities of patent applications and safeguarding the order of patent work procedures.

Article 2 Patent applicants or agents acting on behalf of patent applicants shall comply with the relevant provisions of laws, rules and regulations and abide by the principles of honesty and integrity in making applications and shall not engage in abnormal activities of patent applications.

Article 3 The terms "abnormal activities of patent applications" of these Provisions shall refer to:

(1) an entity or individual submits multiple patent applications of obviously similar contents, or instructs others to submit multiple patent applications of obviously similar contents;

(2) an entity or individual submits multiple patent applications involving obviously plagiarised technologies or designs, or instructs others to submit multiple patent applications involving obviously plagiarised technologies or designs; and

(3) an agent of a patent agency submits patent applications described in item (1) or item (2) of this Article.

Article 4 In respect of abnormal activities of patent applications, the State Intellectual Property Office may deal with the patent applications pursuant to the relevant provisions of the Patent Law and the Regulations on Implementation of Patent Law, and may adopt the following measures depending on the circumstances:

(1) no reduction or deferred payment of patent fees; where the patent fees have been reduced or deferred, they shall be recovered fully or partly;

(2) public announcements shall be made on the government website of the State Intellectual Property Office and in the "China Intellectual Property Rights News";

(3) the number of abnormal patent applications shall be deducted from the statistical figures of patent applications of the State Intellectual Property Office;

(4) it is recommended that the patent administrative authorities of the local people's governments shall not provide financial assistance or incentives to such patent applications; where any financial assistance or

incentives have been granted to such patent applications, it is recommended that such financial assistance or incentives be recovered fully or partly;

(5) it is recommended that the All-China Patent Agents Association shall adopt self-regulatory industry measures on patent agencies and patent agents engaging in abnormal activities of patent applications and, where necessary, the corresponding disciplinary action shall be meted out by the Patent Agents Disciplinary Committee pursuant to the provisions of the Disciplinary Rules for Patent Agents (Provisional); and

(6) where financial assistance or incentives are fraudulently obtained through abnormal activities of patent applications and where the case constitutes a criminal offence, the case shall be handed over to the relevant authorities and criminal liability shall be pursued in accordance with the law.

Article 5 Prior to adopting the measures stipulated in Article 4 of these Provisions, the State Intellectual Property Office shall allow the parties concerned to make representation.

Article 6 The patent administrative authorities of the local people's governments shall guide the general public and patent agencies in making patent applications pursuant to the law.

Any abnormal activities of patent applications discovered by a local patent agency office shall be promptly reported to the State Intellectual Property Office.

Article 7 These Provisions shall be effective 1 October 2007.