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中國的專利類型 - 為你的產品作出明智決定

在中國有三種專利權：發明專利、實用新型及外觀設計。為了讓發明或設計得到充分保護，選擇適合的專利類型是非常重要的。本文將簡要介紹這三種專利，並就如何選擇合適專利提供一些建議。

發明專利和實用新型都會為發明的技術特徵提供保護，其中實用新型僅保護具有新穎性和創造性的結構、形狀或者結構與形狀之結合的發明，而發明專利還額外保護涉及方法、用途、材料、化合物和組合物的發明。需要留意的是，複合層（例如多層結構）和線路構造屬於實用新型的產品結構。相比之下，外觀設計保護的是產品的外觀，而不是功能或結構方面的特徵。有些情況下，由於發明專利與實用新型之間，或者實用新型與外觀設計之間存在特有的共通點，申請人可能難以在它們之間作出選擇。

與發明專利相比，實用新型被稱為“小專利”，旨在鼓勵申請人為規模相對較小的發明尋求專利保護。實用新型與發明專利在申請程序上的最主要區別在於，實用新型僅涉及初步審查，不會有實質審查。在初步審查中，審查員對實用新型是否存在明顯的實質性缺陷進行審查，包括新穎性、說明書是否公開充分等等，但不會審查實用新型的創造性。實用新型的創造性要求較低，審查員通常僅會引用一至兩個來自相同技術領域的現有技術來評價實用新型的創造性，而且實用新型的創造性審查通常在授予專利權之後。相對於發明專利的審查程序通常需時二至四年，實用新型一般少於一年便獲得授權，且費用較低。

雖然與發明專利相比，實用新型通過審查程序的門檻較低，但實用新型的專利期較短，只有十年，是發明專利的一半。另外，由於實用新型沒有實質審查，在授權後的階段會因為缺乏新穎性、創造性或其他實質性缺陷而容易被宣告無效。有見及此，申請人可根據發明的性質以及想希望的專利保護期選擇合適的專利類型。又或者，可採用“雙重申請策略”，即同一申請人在同一天為相同的發明創造提交發明專利及實用新型申請。這樣做的話，申請人既享受了實用新型快授權、儘早實施專利的好處，又得到了發明專利的較強保護和較長保護期。同樣的發明創造只能授予一項專利權。在作出授予發明專利授權之前，除非發明專利和實用新型的保護範圍不同，申請人須放棄該實用新型專利權。但是PCT的國家申請階段不允許雙重申請，這種情況下申請人只能在發明專利或實用新型之間作出選擇。

與實用新型相似的是，外觀設計不需要實質審查，並且只需幾個月便能獲得授權。外觀設計保護產品具美感的外觀（即形狀或圖案），但不保護任何技術方案。因此，外觀設計的保護範圍由申請提交的圖片或照片所限定，以致產品設計的可變性受到限制，不能超出圖片或照片顯示的範圍內。有些發明人認為發明專利或實用新型較外觀設計更有用和有效。他們認為外觀設計專為某些範疇的製造商而生，例如汽車業或時裝業。他們的想法某程度上是對的。然而，外觀設計適用於各類產品，能在全面的專利申請策略中能發揮作用，以確保更全面徹底的保護。在許多情況下，外觀設計可成為阻止他人直接複製產品形狀或圖案的有力工具。

綜上所述，選擇專利申請時涉及多個因素，包括發明的性質、產品生命周期、商業策略和財務預算。申請人應考慮採取哪種方式以切實有效地實施專利權，並善用專利組合提供全面保護。

以下表格概述了發明專利、實用新型和外觀設計之間差異：

	發明專利	實用新型	外觀設計
專利期	20 年	10 年	10 年
申請需時	2-4 年	< 1 年	< 1 年
申請費用	較高 – 主要來自實質審查階段的費用	較低	較低
審查	包括初步審查和實質審查	只需初步審查	只需初步審查
專利性要求	必須具備新穎性和工業用途; 較高的創造性要求	必須具備新穎性和工業用途； 較低的創造性要求	必須具備新穎性、創造性和工業用途
專利的主体	裝置、方法、用途、材料、化合物和組合物，包括功能性和/或結構性特徵	裝置的結構性特徵(僅包括形狀或結構)	具有美感的外觀的產品

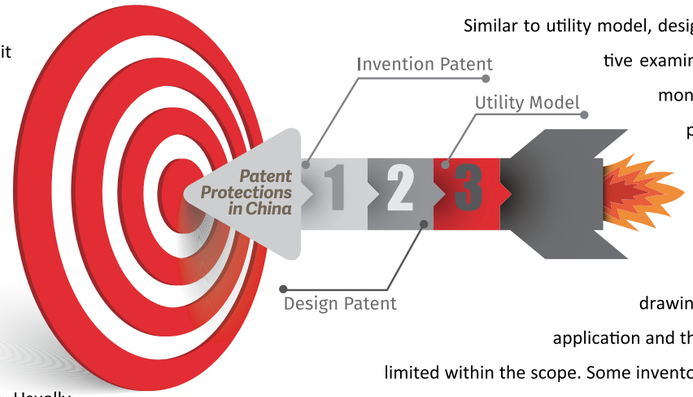
Patent Protections in China – Make a Wise Decision for Your Products

There are three types of patent rights in China, namely invention patent, utility model and design patent. Choosing the right type of patent is crucial in order to obtain a valid protection for inventions or designs. This article will give you a brief introduction on the three types of patents with our general advice on how to select a suitable type of patent rights in China.

Both invention patent and utility model provide protection for technical features of inventions, whereas utility model only protects novel and inventive structures or shapes or their combination of a product. Invention patent additionally protects inventions regarding methods, uses, materials, compounds and compositions. Note that composite layer structures and circuit structures fall into the scope of product structures under patent protection by utility model. Unlike utility model and invention patent, design patent aims to protect a unique appearance of a product instead of its functional or structural features. In some cases, it can be a struggle for an applicant to choose between invention patent and utility model, or between utility model and design patent, due to possible overlapping of protection within each pair.

Compared with invention patent, utility model is known as "petty patent", as it encourages applicants to seek protection for inventions with relatively smaller scale. Utility Model differs from invention patent primarily in that no substantive examination would be conducted for utility model which is only subject to a preliminary examination. The examiner will examine the utility model for presence of obvious substantive defects including lack of novelty and insufficient disclosure during preliminary examination. Inventive step of utility model would not be assessed during the preliminary examination. Besides, the examination of utility model imposes lower requirement on inventive step and would be conducted after grant of utility model upon request filed at the Chinese Patent Office. Usually only one to two prior art references will be quoted from identical technical field to assess the inventive step of utility model. In addition, utility model generally takes less than one year to be granted with lower cost, in contrast to the prosecution of invention patent which normally spends two to four years.

Despite the fact that utility model has a lower hurdle to pass the prosecution compared with invention patent, it has a much shorter patent term of ten years, being half of that of invention patent. In addition, due to lack of substantive examination, utility model can be vulnerable to be invalidated in the post-grant stage simply because of novelty, inventive step and/or other substantive defects. In view of the above, the applicant may choose a suitable patent type according to the nature of invention and protection term desired. Alternatively, "dual filing strategy" may be adopted, in which invention patent and utility model are allowed to be filed for the same invention-creation on the same day. In this way, utility model will be granted quickly for prompt patent enforcement, followed by strong invention patent protection with longer protection period. In view of one patent right granted to any identical invention, before an official decision to grant the invention patent is made, the applicant is required to abandon the utility model unless the protection scopes of invention patent and utility model are different. However, for national entry of PCT application, dual filing is not allowed, and instead, either invention patent or utility model shall be chosen in such a case.



Similar to utility model, design patent does not require substantive examination and it takes only a couple of months to be granted. Design patent protects the aesthetic appearance (i.e. shape or pattern) but not any technical solution of a product. Therefore, the protection scope of design patent is defined by the drawings or photos submitted in the application and the versatility of the product design is limited within the scope. Some inventors may consider invention patent or utility model more useful and powerful than design patent. They reckon that design patent should be the game of some manufacturers in those industries with shorter product life circle such as automobile or fashion. These presumptions are true to some extent. However, design patent finds application a variety of products and is useful in a comprehensive patent filing strategy to provide better and thorough protection. In some cases, design protection can be a strong tool to exclude others from directly copying the shape or pattern of your product.

In view of the above, we can see the choice of a patent application would depend on a couple of factors, including the nature of an invention, product life circle, business strategy and financial budget. Applicant should consider which option(s) can help achieve efficient and effective enforcement of patent right, and make good use of the patent combinations for all-round protections.

The following table highlights the differences among invention patents, utility models and design patents:

	Invention Patent	Utility Model	Design Patent
Patent term	20 years	10 years	10 years
Period of prosecution	2-4 years	< 1 year	< 1 year
Cost	Higher – mainly due to prosecution during examination stage	Lower	Lower
Examination	Both preliminary and substantive examination	Only preliminary examination	Only preliminary examination
Patentability requirements	Have to be novel with industrial use; Higher Inventiveness requirement.	Have to be novel with industrial use; Lower Inventiveness requirement.	Have to be novel and inventive with industrial use
Subject of patent	Device, method, use, material, compound and composition with functional and/or structural features	Device with structural features (only shapes and structures)	Product with aesthetic appearance

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