

华中科技大学

Huazhong University of
Science and Technology

Patent Licensing in China

中国专利技术许可制度及实践

Prof. Dr. Xiang YU
余翔 教授

Chinesisch-Deutsch-Institut für Geistiges Eigentumsrecht
Chinese-German Institute for Intellectual Property
中德知识产权研究所

摘要：谈到中国专利技术许可制度及实践，余翔教授分析了许可实践、相关法律制度及注意事项。在许可实践方面，介绍了许可实践的含义、种类、许可费用和商业秘密许可。在相关法律制度方面，介绍了《专利法》、《专利法实施细则》和《合同法》等的相关条款。最后还详细分析了专利许可中的一些注意事项。

Abstract: Professor YU explained the patent licensing practice and the related legal framework in China. In terms of patent licensing practices, He expounded on the definition, typology and loyalty of patent licensing and issues related to know-how licensing. On the legal framework, he analysed important provisions in Patent Law, Implementing Regulations of the Patent Law of PRC and Contract Law etc. He also emphasized some issues that needs special attention in the licensing procedure.

outline 概要:

I. Practices 许可实践

II. Legal Framework 法律制度

III. Notices 注意事项

I. Practices 许可实践

1. Patent licensing 专利许可

2. Typology of Patent licensing 专利许可的种类

3. Royalty 许可费

4. Know-how licensing 商业秘密许可



1. Patent licensing专利许可

- The patentee (the licensor) authorizes other entity or individual (the licensee) to exploit the patent. 是指专利权人将其所拥有的专利技术许可他人实施的行为。
- The licensor and the licensee shall conclude with a license contract for exploitation. 许可方与被许可方要签订专利实施许可合同。
- Patent licensing only authorizes a licensee to exploit the patent, not transferring the ownership of the patent.
这种合同只允许被许可方实施许可方的发明创造专利技术，而不转移许可方的专利所有权。



2. Typology of Patent licensing 专利许可的种类

- 2.1 **Non-exclusive license**, the most common type of patent licensing---"The Licensor grants the Licensee a non-exclusive license of the Rights for the Territory (for example in China) in the duration of this Agreement. The Licensor shall be free to exploit the patent in the Territory and appoint other licensees to do so."
- **普通许可(非独占性许可)**，是最常见的专利许可方式，是指许可方许可被许可方在规定的地域和合同期范围内实施专利，同时保留自己在该范围内使用该专利、以及许可被许可方以外的他人实施该专利的许可方式。



- 2.2 **Exclusive license**--"The Licensor grants the Licensee an exclusive license of the Rights for the Territory for the duration of this Agreement. The Licensor shall not actively exploit the patent in the Territory nor appoint other licensees for the Territory".
- **独占许可**，是指许可方规定被许可方在某一国家或地区内、在合同期内独占实施其专利的权利。特点是许可人本人也不能使用这项专利，同时也不能向任何第三方授予同样内容的许可。



- 2.3 Sole license---“The Licensor grants the Licensee a sole license of the Rights for the Territory for the duration of this Agreement. The Licensor shall not appoint other licensees for the Territory, but may himself / itself exploit the patent in the Territory”.
- **排他许可 (独家许可)**，是指许可人在合同有效期内、在该地域内不再与任何第三方签订同样内容的许可合同，但许可人本身仍有权在该地域内使用该项专利。



3 royalty 许可费

3.1 影响许可费的主要因素

- The royalty applied is determined by various factors, the most notable of which are :
 - The number of technical assistance provided by the licensor. 许可人提供技术协助的数量；
 - Territorial extent of rights and sustainability of the technology. 被许可专利的地域范围及持续时间；
 - Exclusivity of the license. 许可的独占性程度；
 - The Level of innovation and stage of the technology life. 被许可专利技术的创新水平及所处生命周期的阶段。



3.2 assessment of royalty 许可费的估算

- 1) 提成费 (running royalties), 国际上通称为“LSLP” (Licensor's Share on Licensee's Profit), Which usually are formulated in the manner of that the licensee has to pay the licensor a certain percentage of a “provision”, based on the net turnover the licensee achieves with licensed products. The percentage is called “**royalty rate**”. 即技术许可方占被许可方实施被许可技术产生的净营业额的份额，通常以一个固定的百分比表示，该百分数称为**提成率**。
 - As a general rule of thumb, the royalty rate varies considerably across industries, it's about 2-3% in the basic industries, 3-4% in the intermediate goods industries, 4-5% in the consumer goods industries, and 5-6% in the high-tech industries。一般而言，基础工业的提成率应为 2—3 %；工业中间产品为 3—4 %；消费品为 4—5 %；高技术产品为 5—6 %。



Royalty Distribution Analysis in Industry

| Industry | Licenses (nos.) | Min. Royalty,% | Max. Royalty,% | Average,% | Median,% |
|-----------------|------------------------|-----------------------|-----------------------|------------------|-----------------|
| Automotive | 35 | 1.0 | 15.0 | 4.7 | 4.0 |
| Computers | 68 | 0.2 | 15.0 | 5.2 | 4.0 |
| Consumer Gds | 90 | 0.0 | 17.0 | 5.5 | 5.0 |
| Electronics | 132 | 0.5 | 15.0 | 4.3 | 4.0 |
| Healthcare | 280 | 0.1 | 77.0 | 5.8 | 4.8 |
| Internet | 47 | 0.3 | 40.0 | 11.7 | 7.5 |
| Mach.Tools. | 84 | 0.5 | 26 | 5.2 | 4.6 |
| Pharma/Bio | 328 | 0.1 | 40.0 | 7.0 | 5.1 |
| Software | 119 | 0.0 | 70.0 | 10.5 | 6.8 |

Data sourced from: Dan McGavock of IPC Group, Chicago, USA



- 2) In some circumstances there may be **minimum** and **maximum (cut-off) royalty** stipulations. 一些许可合同中有**最低提成费**和**最高提成费**的条款。
 - **The minimum royalties** is agreed on in a form which imposes onto the licensee the obligation under all circumstances to pay certain minimum fees per calendar for a certain period of time. **最低提成费**指规定在一定时间内，不管被许可人是否正常生产，生产多少，销售量多大，是否盈利，都必须支付给许可人一笔最低限度的提成费。
 - **The maximum or cut-off royalty** can be negotiated when the licensor agrees that a cumulative amount will satisfy the objectives of license; once the limit is reached, no further royalties become due. **最高提成费**是指规定被许可人每年提成费支付到一定金额时，即使产品产量和销售量继续增加，也不再多支付提成费。



3.3 许可费的支付方式

- Royalty payments take three basic forms :

1) lump-sum royalty 总付

- Lump-sum royalties are most often encountered when the principal contribution provided by the licensor is easily absorbed by the licensee, that is, once the transmission is completed, the licensor has no involvement with the licensee .
一般被许可技术可以立即被吸收，一旦技术被许可，不需要许可人进一步的参与。

2) running royalties 提成费支付

3) running royalties together with down payment 入门费加提成

- This combination of royalties is met with in ‘technology contracts’ where more than one form of intellectual property is licensed out combined, possibly, [with a know-how license](#). 专利许可可能需要许可人在一定程度上许可相关的技术秘密。



4. Know-how licensing 商业秘密许可

- Know-how is trade secret information in combination with data, techniques, or human and intellectual expertise, that helps a company exploit a licensed technology. Therefore , a company may need to obtain a know-how license, standing alone or together with a patent license。以数据、技术或专业意见等形式表现的商业秘密可能是企业实施被许可专利的重要工具。所以，商业秘密经常被独立许可，或者与专利一并被许可。
- Know-how royalties may be stated as distinct from patent royalties since their periods of validity vary。因为商业秘密同专利的有效期间不同，商业秘密的许可费往往同专利许可费分开计算。



II. Legal Framework 法律制度

1. Patent Law 《专利法》

2. Implementing Regulations of the Patent Law of
PRC 《专利法实施细则》

3. The Measures for Archival Filing of Patent
Licensing Agreements 《专利实施许可合同备案办法
》

4. Contract Law 《合同法》



1. Patent Law 《专利法》

The latest edition came into effect on October 1 2009
2008年修订版自2009年10月1日起施行

- Article 12 :
- Any entity or individual exploiting the patent of another party shall conclude with the patentee a license contract for exploitation, and pay the patentee royalties. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent.

- 第十二条 :
- 任何单位或者个人实施他人专利的，应当与专利权人订立实施许可合同，向专利权人支付专利使用费。被许可人无权允许合同规定以外的任何单位或者个人实施该专利。



2. Implementing Regulations of the Patent Law of PRC 《专利法实施细则》

The latest edition came into effect on February 1 2010
2010年修订版自2010年2月1日起施行

- Article 14 (2) :
- Any license concluded by the patentee with an entity or individual for exploitation of a patent shall, **within 3 months from the date of entry into effect of the license**, be submitted to **the Patent Administration Department under the State Council** for recordal.

- 第十四条(2) :
- 专利权人与他人订立的专利实施许可合同，应当自合同生效之日起3个月内向国务院专利行政部门备案。



3. The Measures for Archival Filing of Patent Licensing Agreements

《专利实施许可合同备案办法》

came into effect on August 1 2011
2010年修订版自2011年8月1日起施行

- It replaces the Patent Licensing Contract Recordal Administrative Measures (2001). The main changes are 替换了2001年《专利实施许可合同备案管理办法》，主要变化包括：
 - The recordal of a patent licensing contract will be solely within the power of SIPO; the responsibility cannot be delegated to local patent offices as currently. 国家知识产权局负责全国专利实施许可合同的备案工作，不再由各地区专利行政管理机关负责。
 - The license contract to be submitted for recordal will have to be the original, not a copy. 备案需提交合同原件，而不是副本。



- The minimum information the license contract must contain will be clearly described, including: the name and address of the parties; the number, application date, grant date and title of the patent; and the duration and type (exclusive, non-exclusive) of the licence. 当事人提交的专利实施许可合同应当包括当事人的姓名或者名称、地址；专利权项数以及每项专利权的名称、专利号、申请日、授权公告日；实施许可的种类和期限。
- The license contract will also not be approved if the patent annuity patent is overdue, ownership of the patent is under dispute or the patent is subject to encumbrances. 滞纳专利年费，专利权归属有争议，或专利权存有瑕疵的情况下不予备案。
- SIPO will voluntarily notify the licensee if the patent in question is subject to invalidation proceedings. 国知局依职权通知被许可人不予备案的理由。



4. Contract Law 《合同法》

came into effect on October 1, 1999
自1999年10月1日起施行

- According to the Article 342 in the section 3 “Contracts for Technology Transfer” of the Chapter 18 “Contracts for Technology”, Technology transfer contracts include contracts on the licensing of patent exploitation. 主要相关条款规定在《合同法》第18章“技术合同”，第三节“技术转让合同”中。根据第342条：“技术转让合同”包括“专利实施许可合同”：
- Relevant articles 相关条款包括：



- Article 342 :
- Technology transfer contracts include contracts on patent transfer, contracts on transfer of the right to apply for a patent, contracts on transfer of know-how and contracts on the licensing of patent exploitation. A technology transfer contract shall be in written form.
- 第342条 :
- 技术转让合同包括专利权转让、专利申请权转让、技术秘密转让、专利实施许可合同。技术转让合同应当采用书面形式。



- Article 344 :
- A contract for the licensing of patent exploitation shall be valid only within the valid period of the patent right. Once the patent right expires or it is declared as invalid, the patentee may not conclude any contract with others for licensing of the exploitation of the said patent. (**for patent for invention, temporary protection between publication of patent application and granting of patent**)
- 第344条 :
- 专利实施许可合同只在该专利权的存续期间内有效。专利权有效期限届满或者专利权被宣布无效的，专利权人不得就该专利与他人订立专利实施许可合同。(**发明专利申请公开后，授权前，临时保护期**)



- Article 345 :
- The licensor shall, according to the terms of the contract, permit the licensee to exploit the patent, submit the technological materials relevant to the exploitation of the patent and provide necessary technical guidance.
- 第345条 :
- 专利实施许可合同的许可方应当按照约定许可被许可方实施专利，交付实施专利有关的技术资料，提供必要的技术指导。



- Article 346 :
- The licensee of a patent exploitation licensing contract shall exploit the patent according to the terms of the contract, and may not permit any third party other than as provided for in the contract to exploit such patent, and shall pay the royalties according to the terms of the contract.
- 第346条 :
- 专利实施许可合同的被许可方应当按照约定实施专利，不得许可约定以外的第三人实施该专利；并按照约定支付使用费。



- Article 351 : (transfer agreement)
- A transferor failing to transfer the technology according to the terms of the contract, shall return part or total of the royalties and be liable for the breach of contract. The party exploiting the patent or know-how exceeding the agreed scope, or unilaterally permit a third party to exploit the patent or use the know-how in violation of the contract, shall cease the act of breach of contract and be liable for the breach of contract. A party violating the agreed obligation of maintaining confidentiality shall be liable for the breach of contract.
- 第351条: (转让合同)
- 让与人未按照约定转让技术的，应当返还部分或者全部使用费，并应当承担违约责任；实施专利或者使用技术秘密超越约定的范围的，违反约定擅自许可第三人实施该项专利或者使用该项技术秘密的，应当停止违约行为，承担违约责任；违反约定的保密义务的，应当承担违约责任。



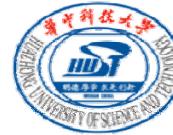
- Article 352 : A transferee failing to pay the royalties according to the terms of the contract shall, make up such payment and pay the breach of contract damages as agreed upon. The transferee refusing to pay the overdue royalties or the breach of contract damages, shall cease the exploitation of the patent or the use of the know-how, return the technological materials and be liable for the breach of contract. A transferee exploiting the patent or using the know-how in a way exceeding the scope as agreed upon in the contract, or permitting a third party to exploit the patent or use the know-how without the consent of the transferor, shall cease the act of breach of contract and be liable for the breach of contract. A transferee violating the agreed obligation for maintaining confidentiality shall be liable for the breach of contract.
- 第352条：受让人未按照约定支付使用费的，应当补交使用费并按照约定支付违约金；不补交使用费或者支付违约金的，应当停止实施专利或者使用技术秘密，交还技术资料，承担违约责任；实施专利或者使用技术秘密超越约定的范围的，未经让与人同意擅自许可第三人实施该专利或者使用该技术秘密的，应当停止违约行为，承担违约责任；违反约定的保密义务的，应当承担违约责任。



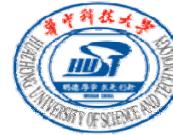
III. Notices 注意事项

- 1. A licensee shall conclude with the patentee a **written** license contract for exploitation. 被许可方应当与许可方订立**书面**实施许可合同；
- 2. The licensee shall pay the patentee **royalties as provided in the license contract.** 被许可人**按照约定**向许可人支付专利使用费；
- 3. A patent licensing contract shall, **within 3 months from the date of entry into effect of the license**, be submitted to **SIPO** for recordal. 专利权人与他人订立的专利实施许可合同，应当**自合同生效之日起3个月内**向**国家知识产权局**申请备案。
- Special notices for the CERC-ACTC. 在CERC-ACTC框架下的特别注意事项
- Possible subtasks for the members under CERC. CERC项目参与单位在知识产权领域的几项重要的子任务

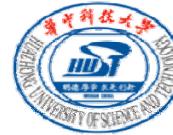




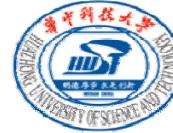
| Key Issues | Clause No. | Key Points |
|--|----------------|--|
| IP Allocation 知识产权归属 | III 2 | Participants shall retain ownership of Project IP created by themselves. 项目成员拥有自己所创造的知识产权所有权。 |
| Information Sharing & Release 信息分享和公开 | IV 2 | Research reports shall be released, except for that which cannot be disclosed to the public in accordance with applicable national or other laws and regulations regarding secrecy, confidentiality or the need to preserve the novelty of an invention for purposes of patenting 研究报告可以向各自政府汇报和向公众公开，但是条款中明确表示了所 公开的报告中不得涉及涉密信息以及会破坏专利申请新颖性的信息 。 |
| IP Licensing 知识产权许可 | V 4.1 V 5.1 | Non-exclusive IP licensing provisions shall not naturally extend to licensee's subsidiaries or branches. Sub-licensing shall be grant by Licensor independently, non-exclusive IP licensing provisions shall not naturally extended to licensee's subsidiaries or branches. 知识产权普通许可的规定并不自然延及被许可公司的子公司。母公司和子公司是各自独立的法人， 给予母公司的授权不应当然地被同时给予子 Chinesisch-Deutsch Institut für Geistiges Eigentumsrecht 应当由当事人自己决定，因此不在 Chinese-German Institute for Intellectual Property TMP 中强制规定。 |



| Key Issues | Clause No. | Key Points |
|---|------------|--|
| IP Licensing of Co-invention 共有知识产权的许可 | V 4.2 | <p>Encourage sharing; prevent a party which is IP owner refusing license to the other party in joint funded research on reasonable terms. In addition, unless otherwise required by law, an owner can license to third parties without accounting to the co-owner. However such licensing shall be restricted in non-exclusive Licensing.</p> <p>鼓励技术转移，要求项目知识产权所有权人不应拒绝向项目以外的第三方许可知识产权。而且，对于双方共有的知识产权，一方权利人向第三方的授权无需向其他共有者报告，也无需向中美政府汇报。 但是这种许可只能是普通许可，不能为独家或者独占许可，而且许可所得应在所有权利人之间进行分配。（因此要求限定此许可为普通许可，至于许可所得的分配问题，建议由项目合作双方自行约定。）</p> |



| Key Issues | Clause No. | Key Points |
|---|------------|---|
| IP Licensing of Invention for Research Purposes only 仅用于科学研究的知识产权许可 | V 5.1 | <p>Deleted the word “free” in licensing, in the US, even licensing for scientific research only may charge.</p> <p>In China, according to Article 69 of Chinese Patent Law, Any person uses the relevant patent especially for the purpose of scientific research and experimentation shall not be deemed to be patent right infringement.</p> <p>据美方要求，删掉了免费许可中的“免费”二字，在美国仅仅为科学研究使用他人专利权需要经得所有权人的许可，可以收费。</p> <p>在中国，根据中国专利法第69条，仅仅为科学研究使用他人专利权的行为属于合理使用，无需取得授权也无需付费。</p> |



Subtask 1

明晰知识产权，
避免日后的纠纷。



Determine background IP, avoiding potential disputes.

Subtask 2

拟定和协商项目知识产权协议；
数据共享和保密协议。



Project based IP Agreement drafting & Negotiation;
Information Sharing & Confidential agreement.



4/6/2025

Subtask 3

整个项目过程中的知识产权运用（特别是许可问题），管理和战略。

IP Using(esp. Licensing Issues)/ Management/ Strategy

Object 1 项目知识产权产出管理

Project Based IP output Management

Object 2 项目知识产权利用和开发

Project IP utilization & Exploitation

Object 3 知识产权许可问题

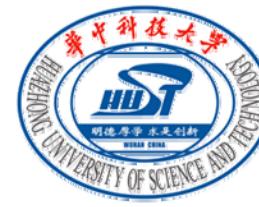
Licensing Issues

Object 4 知识产权战略

IP Strategy (Infringement Risk Analysis, Patent Map Painting, Patent Pool, Technology Standards, etc.)

Chinesisch-Deutsch-Institut für Geistiges Eigentumsrecht
Chinese-German Institute for Intellectual Property

中德知识产权研究所



华中科技大学

Huazhong University of
Science and Technology

Thanks
for your attention!
谢 谢 !

主讲人 : Prof. Dr. Xiang YU (余翔)
yuxiang6_5@hotmail.com

Chinesisch-Deutsch-Institut für Geistiges Eigentumsrecht
Chinese-German Institute for Intellectual Property
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