Patents

Contributing editor
Richard T McCaulley Jr

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GETTING THE DEAL THROUGH

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Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Brazil, Portugal, Switzerland and Ukraine.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Patent enforcement proceedings

1 Lawsuits and courts

What legal or administrative proceedings are available for enforcing patent rights against an infringer? Are there specialised courts in which a patent infringement lawsuit can or must be brought?

When infringement of patent rights occurs it is possible to initiate administrative, civil or criminal proceedings. In the case of administrative proceedings the patent holder shall lodge a complaint with the police. The police officers shall draw up an infringement report and initiate an administrative court action. The police may also initiate an administrative court action on their own initiative if they find infringement. The plaintiff in the administrative court action will be the police.

The patent holder may also initiate an administrative case in the anti-monopoly body, which considers the case itself. Its decision may be appealed in court.

The patent holder may initiate a civil court action and be the plaintiff in court proceedings.

If a criminal action has to be initiated the patent holder shall lodge a complaint with the police, who will initiate a criminal case in court. It should be noted, however, that a criminal case will be considered by the court only if the damage suffered by the patent holder is considerable. The amount of damage, considerable or not, will be evaluated by the court. If the court decides that the damage is not large it will not consider the case.

In all civil/administrative infringement cases the court of first and appeal instance will be local courts whose judgments may be appealed in the IP Court. Criminal cases are considered within the structure of common courts (first instance, appeal, cassation).

If the patent holder is a physical person any case will be considered by the common court.

2 Trial format and timing

What is the format of a patent infringement trial?

When a court action is initiated the court sets a preliminary hearing followed by a substantive hearing. The court hearing may be adjourned if there are circumstances preventing the consideration. The court accepts all kinds of evidence, be it documents, affidavits or live testimony. Cross-examination of witnesses may also take place. If the patent is complicated the court may appoint an expert to make a report. The conflicting parties may also petition for technical expertise. At the first instance court there is normally one judge. Appeals are considered by a panel of three judges. Typically, the judgment at first instance court is issued in four to six months. If the judgment is appealed in all court instances the time

span may be two or more years. If the case is complicated it may take more time to be considered.

3 Proof requirements

What are the burdens of proof for establishing infringement, invalidity and unenforceability of a patent?

In case of infringement (unenforceability) each participating party shall prove the circumstances on which it relies. If this is an invalidity issue the case will be considered by the patent office where the burden of proof also rests with each of the parties. The decision of the patent office may be appealed in the IP Court.

4 Standing to sue

Who may sue for patent infringement? Under what conditions can an accused infringer bring a lawsuit to obtain a judicial ruling or declaration on the accusation?

The patent holder or his or her exclusive licensee may sue for patent infringement directly. Other persons (eg, non-exclusive licensee) may sue the infringer on the basis of a power of attorney issued by the patent holder. The infringer may bring a counter suit against the patent holder within the frame of court proceedings.

5 Inducement, and contributory and multiple party infringement

To what extent can someone be liable for inducing or contributing to patent infringement? Can multiple parties be jointly liable for infringement if each practises only some of the elements of a patent claim, but together they practise all the elements?

Contributory infringement is not covered by the law. However there have been some rare cases where the court examined contributory infringement applying systemic interpretation of the law and ruled in favour of the patent owner. Hence, wherever there is a fact of contributory infringement it is advisable to initiate a court action.

6 Joinder of multiple defendants

Can multiple parties be joined as defendants in the same lawsuit? If so, what are the requirements? Must all of the defendants be accused of infringing all of the same patents?

Multiple parties may be joined as defendants in a lawsuit. The law provides that the exclusive right for a patent covers import, manufacture, offer for sale, sale, storage of patented products and any other actions aimed at marketing the patented products. Hence, a lawsuit may be brought against any number of defendants who are involved in the above actions. When a patent infringement occurs through the joint actions of several persons, such persons shall be held jointly liable with respect to the patent owner.

7 Infringement by foreign activities

To what extent can activities that take place outside the jurisdiction support a charge of patent infringement?

The activities that take place outside Russia will not provide any support or influence court proceedings in Russia.

8 Infringement by equivalents

To what extent can 'equivalents' of the claimed subject matter be shown to infringe?

A patent is considered to have been infringed if every feature given in the independent claims is used in the product or the method, or a feature equivalent thereto. A feature will be considered equivalent if it gives the same result as the patented feature in the independent claim. Equivalence is to be determined by the court or, more frequently, by an expert appointed by court. The expert makes a conclusion as to whether there is equivalence. The scope of equivalence is not considered. It either exists or does not.

9 Discovery of evidence

What mechanisms are available for obtaining evidence from an opponent, from third parties or from outside the country for proving infringement, damages or invalidity?

When the plaintiff files a suit with the court it gathers evidence itself. If any of the pieces of evidence cannot be obtained the plaintiff may petition the court to order the defendant to provide the missing evidence. The same applies to third parties. If evidence located outside Russia is required the court may ask the Ministry of Foreign Affairs to request appropriate bodies in the foreign country to provide such evidence. Positive result of such request will depend on the existence of bilateral agreements on legal assistance between Russia and other countries. Otherwise this may depend on the goodwill of the foreign country.

10 Litigation timetable

What is the typical timetable for a patent infringement lawsuit in the trial and appellate courts?

The typical timetable for examination of an infringement case by a court depends on the workload of the court. Normally, the court appoints a preliminary hearing one or two months after filing the suit. The substantive hearing will be appointed one month after the preliminary hearing. The judgment of the first instance court may be issued by court four months after filing the lawsuit. If the judgment is appealed the hearing in the appellate court will be fixed within one or two months after filing the appeal. The appeal itself shall be filed within one month after issuance of the first instance court judgment. It should be noted the terms above are average and in certain circumstances the terms may be extended.

11 Litigation costs

What is the typical range of costs of a patent infringement lawsuit before trial, during trial and for an appeal? Are contingency fees permitted?

The typical range of costs of a patent infringement suit is US$35,000 including preparation of the documents and court hearings. Appeal proceedings costs will amount to approximately US$15,000 because many of the documents prepared for the court of first instance may be used in the appeal proceedings too.

12 Court appeals

What avenues of appeal are available following an adverse decision in a patent infringement lawsuit? Is new evidence allowed at the appellate stage?

If an infringement patent suit is lost in the court of first instance it may be appealed in the court of appeal.

New evidence may be produced at the appellate court only if the party presenting new evidence proves that it did not have the opportunity to present it to the first instance court. Further, the case may be appealed at the IP Court and still further in the Supreme Court in its capacity as second cassation and supervisory instances.

13 Competition considerations

To what extent can enforcement of a patent expose the patent owner to liability for a competition violation, unfair competition, or a business-related tort?

In theory, abuse of right may be invoked – however, in practice these cases are not known.

14 Alternative dispute resolution

To what extent are alternative dispute resolution techniques available to resolve patent disputes?

Alternative dispute resolution is available – however, it is very rarely used to resolve patent disputes.

Scope and ownership of patents

15 Types of protectable inventions

Can a patent be obtained to cover any type of invention, including software, business methods and medical procedures?

A patent may be obtained for a technical solution related to a product (in particular, a device, a substance, a micro-organism strain, or a culture of cells of plants or animals), process, or use of product or process for the certain purpose, including first and second medical (as well as non-medical) use. Pharmaceuticals, chemical compositions, treatment of the human or animal body are patentable. Not patentable are methods of human cloning and a human clone, methods of modification of genetic integrity of cells of human embryo lines, use of human embryos in manufacturing and commercial purposes; discoveries, scientific theories and mathematical methods, solutions relating only to an external appearance of products, rules and methods of games, intellectual or economic activity (eg, business method), computer programs and solutions consisting only in the presentation of information.

16 Patent ownership

Who owns the patent on an invention made by a company employee, an independent contractor, multiple inventors or a joint venture? How is patent ownership officially recorded and transferred?

As a general rule, the law provides that the right to obtain a patent for an invention shall belong to the inventor. In case of an employee's invention created in the course of fulfilment of labour duties or specific task by the employer the law provides that this right shall belong to the employer unless the contract between the employee and employer, eg, labour contract, provides otherwise. The law also stipulates that in the case of an invention created by an independent contractor the right to a patent shall belong to the performer (contractor) unless the contract provides otherwise. If several persons have the right to obtain a patent for the invention they have to dispose of their rights jointly. Only one patent would be granted for a

co-owned invention.

Defences

17 Patent invalidity

How and on what grounds can the validity of a patent be challenged? Is there a special court or administrative tribunal in which to do this?

A patent may be challenged and invalidated, either in full or in part, at any time during its period of validity, on the following grounds:

(a) the invention does not meet the conditions of patentability;

(b) the claims in the patent contain a feature that was not in the application on the filing date;

(c) the patent was granted in breach of the prescribed procedure where there were several applications for identical invention having one and the same priority date; or

(d) the patent was granted with wrong indication of the inventor(s) or patent owner(s).

Invalidation actions on the basis of grounds (a), (b), and (c) shall be filed with the Russia Patent Office, Rospatent. The decision of Rospatent may be appealed in the IP Court.

Invalidation action on the basis of ground (d) shall be filed with the IP Court.

If the patent is invalidated in part, a new patent shall be granted.

18 Absolute novelty requirement

Is there an 'absolute novelty' requirement for patentability, and if so, are there any exceptions?

There is an 'absolute novelty' requirement for patentability. However, disclosure of an invention by the inventor, applicant or another person who obtained information on the invention directly or indirectly from the inventor or applicant shall not prevent patentability of the invention if the application has been filed within six months after such disclosure.

19 Obviousness or inventiveness test

What is the legal standard for determining whether a patent is 'obvious' or 'inventive' in view of the prior art?

According to article 1350(2) of the Civil Code, an invention is considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. Patent Regulations used by the Russian Patent Office provide that an invention is obvious to a person skilled in the art if it can be regarded as produced by a combination, alteration of simultaneous application of information contained in the state of the art and/or of the common general knowledge of a person skilled in the art.

20 Patent unenforceability

Are there any grounds on which an otherwise valid patent can be deemed unenforceable owing to misconduct by the inventors or the patent owner, or for some other reason?

There is no ground or reason on which a valid patent can be deemed unenforceable. However, in a specific case the court may dismiss the patent owner's claims if the court considers that the owner has abused his or her exclusive right. Also the court, at the defendant's request, may dismiss the case if the three-year limitation period has passed by the date of action (the term starts when the plaintiff found out or should have found that its rights had been infringed).

21 Prior user defence

Is it a defence if an accused infringer has been privately using the accused method or device prior to the filing date or publication date of the patent? If so, does the defence cover all types of inventions? Is the defence limited to commercial uses?

An accused infringer may declare the prior use right as a defence. According to article 1361 of the Civil Code any person who before the priority date of a patented invention (regardless of type of the invention) was using in good faith (regardless of purposes of such use) within the territory of the Russian Federation an identical solution, created independently of the inventor, or a solution that differs from the invention only by equivalent features, or made the preparations necessary for this, shall retain the right of further free use of the identical solution, provided that the scope thereof is not enlarged.

Remedies

22 Monetary remedies for infringement

What monetary remedies are available against a patent infringer? When do damages start to accrue? Do damage awards tend to be nominal, provide fair compensation or be punitive in nature? How are royalties calculated?

The patent owner is entitled to be awarded damages in full from the infringer. Damages may be direct or circumstantial. The plaintiff shall carefully prove the amount of damages to the court. As an alternative, the patent holder may claim compensation up to 5 million roubles, which does not have to be proved. The court will judge whether the claimed compensation is commensurate with the infringement and can moderate it if necessary. The patent holder may also claim the double amount of the right of use of the invention. The royalties are calculated on the basis of the market situation.

23 Injunctions against infringement

To what extent is it possible to obtain a temporary injunction or a final injunction against future infringement? Is an injunction effective against the infringer's suppliers or customers?

It is possible to obtain a temporary injunction if non-appliance of such injunctive relief will make it impossible to enforce the final judgment. The plaintiff shall explain these circumstances to the court. The injunction may be sought at any stage but before the judgment is issued. It may be claimed against the respondent who may be the vendor or the supplier or other persons who undertake actions such as import, manufacture, offer for sale, sale, storage of patented products and any other actions aimed at marketing the patented products. The final injunction is granted after the hearing on the merits within the scope of the plaintiff's claims stated in the lawsuit only. A permanent injunction can be granted if the defendant's

product contains every feature of the independent claim of the patent owned by the applicant. Analysis of court practice shows that in most cases the patentee claims permanent injunction only. The court may satisfy the claim on preventing the actions infringing the right or creating a threat of infringement. In addition, it may satisfy the claim to withdraw the infringing product from the persons who manufacture, import, store, transport, sell or from the persons who unfairly obtained the infringing product.

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24 Banning importation of infringing products

To what extent is it possible to block the importation of infringing products into the country? Is there a specific tribunal or proceeding available to accomplish this?

Customs does not normally monitor the transit of patented products across the border. However, if the patent owner learns that a patented product is going to cross the border, customs may (but is not obliged to) inform the patent holder of the incoming goods so that the patent holder could initiate a lawsuit before the goods are cleared by customs. There is no specific tribunal for such cases. A lawsuit should be brought to the commercial court in the same way as is done in other infringement cases.

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25 Attorneys' fees

Under what conditions can a successful litigant recover costs and attorneys' fees?

A successful litigant may recover costs and attorney fees in all cases. These expenses, however, should be properly documented. The attorney fees should be reasonable, the court may compare the recovery sought with the market situation, with the fee normally charged by other attorneys. The court may moderate the recovery claims.

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26 Wilful infringement

Are additional remedies available against a deliberate or wilful infringer? If so, what is the test or standard to determine whether the infringement is deliberate? Are opinions of counsel used as a defence to a charge of wilful infringement?

There are no additional remedies against wilful or deliberate infringement. The remedies to be sought by a plaintiff are the same. Nevertheless, if compensation is claimed by a plaintiff instead of damages the court may consider the wilful character of the infringement and award higher compensation. There are no standards to determine whether the infringement is deliberate.

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27 Time limits for lawsuits

What is the time limit for seeking a remedy for patent infringement?

The general time limit of three years is applied to patent infringement.

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28 Patent marking

Must a patent holder mark its patented products? If so, how must the marking be made? What are the consequences of failure to mark? What are the consequences of false patent marking?

There are no provisions in the law regarding patent marking. Nor does the law contain provisions regarding false patent marking.

Licensing

29 Voluntary licensing

Are there any restrictions on the contractual terms by which a patent owner may license a patent?

The licence contract must be in writing. The duration of a licensing contract shall not exceed the term of patent validity. If the licence contract is silent about the term of the licence, the licence shall be presumed for five years. In the case of an exclusive licence, the licensor cannot use the invention in the manner and scope that has been granted under the licence unless the contract provides otherwise. The free worldwide exclusive licence for the whole term of patent validity is prohibited between the profit-making organisations.

The licence must be registered with the Patent Office otherwise the licence shall not be considered granted.

30 Compulsory licences

Are any mechanisms available to obtain a compulsory licence to a patent? How are the terms of such a licence determined?

If an invention, without any good reasons, is not used or is insufficiently used for four years for an invention, and three years for a utility model that leads to insufficient offer of respective goods on the Russian market, a non-exclusive compulsory licence may be granted by a court decision, if the patent owner refuses to conclude a licence contract on the terms meeting the prevailing practice.

In addition, in the event that a patent owner cannot exploit his or her patent without infringing the rights of the owner of another patent who refused to conclude a licence agreement on generally accepted terms, such patent owner may initiate a court action against the owner of the other patent to seek a compulsory non-exclusive licence to use that other patent, provided his or her own invention represents an important technical achievement and has significant economic advantages over the invention of the owner of that other patent.

The terms and conditions of a compulsory licence are determined by the court. The total amount of the payment for such a licence shall be established in the court decision and not be less than licence prices in comparable circumstances.

Patent office proceedings

31 Patenting timetable and costs

How long does it typically take, and how much does it typically cost, to obtain a patent?

It typically takes one-and-a-half to two years to obtain a patent provided a request for substantive examination is filed without delay. The costs associated with filing and prosecution of an average application and grant a patent are approximately US$3,500 to US$6,000 including official fees and patent

agent fees.

32 Expedited patent prosecution

Are there any procedures to expedite patent prosecution?

The Russian Patent Office participates in the global Patent Prosecution Highway (PPH) programme. No extra fees are required for use of PPH benefits.

33 Patent application contents

What must be disclosed or described about the invention in a patent application? Are there any particular guidelines that should be followed or pitfalls to avoid in deciding what to include in the application?

There is a requirement in article 1375(2) of the Civil Code that a description of the invention in the patent application must disclose the invention in sufficient detail for the invention to be carried out by a person skilled in the art. Patent rules applied by the Patent Office further prescribe that, in the application, means and methods should be described by means of which the claimed invention can be carried out and the technical result of the carrying out of the invention indicated in the application be achieved. There is no requirement to disclose in the application the 'best mode' of making or practising the invention. This requirement – sufficiency of disclosure – does not imply anything different from what is required by the PCT or in the majority of foreign patent offices. Therefore, the applications drafted to fit the requirements of the PCT or those patent offices can be expected to successfully pass the sufficiency of disclosure verification of the Russian Patent Office.

The description of the invention shall first state the title of the invention and shall contain the following parts:

• the technical field(s) to which the invention relates;

• the state of art known to the applicant;

• the summary of the invention in which the essential features of the invention, technical problems and the technical results that can be obtained due to the invention should be demonstrated;

• a brief description of drawings (if any); and

• the detailed description of the invention disclosing how to carry out the invention to achieve the purpose thereof preferably by means of examples and with reference to the drawings as well as confirming the possibility of obtaining the technical result mentioned in the summary of the invention.

In the case of an invention in the microbiological field a culture of the micro-organism concerned must be deposited before the filing or priority date with an institute having the status of International Depositary Authority under the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure. The description must contain a characterisation of the method of generation of the micro-organism. In case such characterisation is insufficient to implement the invention, the data on the deposit, including the name and the address of the institute with which the deposit was made and the deposit number must be given.

34 Prior art disclosure obligations

Must an inventor disclose prior art to the patent office examiner?

According to the rules applied by the Patent Office, the description of a patent application must contain the ‘prior art’ section where the applicant must disclose information on analogues known to him or her and specify the analogue among others that is most similar to the claimed invention in respect of the combination of its essential features (the prototype). The description of each of the analogues shall contains bibliographical data on the source of information disclosing the analogue, features of the analogue including those that coincide with the essential features of the claimed invention, and also the reasons known to the applicant which prevent the attainment of the desired technical result.

If the invention relates to a process for producing a mixture of undefined composition having a concrete purpose or biologically active properties, then a process for producing a mixture having the same purpose or the same biologically active properties shall be indicated as an analogue.

If the invention relates to a process for producing a new individual chemical compound, including a high-molecular compound, then information on a process for producing of a known structural analogue, or destination analogue, shall be presented.

Information on the produced substance shall be provided in the description of the most similar analogue of an invention relating to a strain of a micro-organism, to a culture of plant and animal cells, to a producer of a substance.

If the invention relates to the use of a device, process, substance, strain (culture) for a certain purpose, then known devices, processes, substances, strains (cultures) having the same purpose respectively are considered to be related to analogues of the invention.

Information on an analogue of each individual invention shall be provided in the specification of an application for a group of inventions.

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35 Pursuit of additional claims

May a patent applicant file one or more later applications to pursue additional claims to an invention disclosed in its earlier filed application? If so, what are the applicable requirements or limitations?

The applicant may file a divisional application for an invention disclosed in the parent application. The divisional application shall have as its filing date the filing date of the parent application and shall preserve the priority right, if any, provided the divisional application is filed before the date of registration of the allowed parent application into the State Register or before exhaustion of the right to file an appeal against an Official Decision of Rejection of the parent application.

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36 Patent office appeals

Is it possible to appeal an adverse decision by the patent office in a court of law?

An applicant may appeal against:

• an Official Decision of Rejection;

• an Official Decision of Grant; and

• an Official Decision to withdraw the application.

An appeal against an Official Decision of Grant may be filed, eg, when the applicant does not agree with the allowable claims.

Any appeal shall be filed with the Patent Office within seven months from the date of the Official Decision. The appeal decision of the office may be further contested in the IP Court.

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37 Oppositions or protests to patents

Does the patent office provide any mechanism for opposing the grant of a patent?

No opposition against applications is provided by law. However, after the information of the application is published, any persons may inspect the application documents and provide to the Patent Office their observations on patentability of the invention, which shall be considered during the examination of the application. The submission of such observations, however, does not give the person who has submitted them any procedural rights when considering the application.

A granted patent may be challenged and invalidated (see question 17).

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38 Priority of invention

Does the patent office provide any mechanism for resolving priority disputes between different applicants for the same invention? What factors determine who has priority?

Article 1383 of the Civil Code provides the mechanism for resolving conflicts between different applicants for the same invention. It stipulates that if several applicants have filed applications for identical inventions, utility models or industrial designs, and these applications have the same priority date, a patent for the invention, utility model or industrial design will be granted only on one of these applications in the name of the person determined by agreement between the applicants. The applicants must inform the Patent Office of their agreement within the prescribed term. After that, in the case of a patent grant, all the authors indicated in the applications will be recognised as co-authors with respect to identical inventions, utility models or industrial designs. If the applicants fail to inform the Patent Office of their agreement within the prescribed time limit, the applications will be considered withdrawn.

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39 Modification and re-examination of patents

Does the patent office provide procedures for modifying, re-examining or revoking a patent? May a court amend the patent claims during a lawsuit?

Russian patent law does not provide a procedure for the amendment of the claims after the patent has been granted. Only clear mistakes and clerical errors may be corrected in the granted patent, including at the request of the patentee. There is, however, possibility for the patent owner to renounce the patent partially, namely to renounce any invention(s) in the group(s) protected under the patent. The claims may also be amended (restricted) in the course of an independent invalidation action initiated by a third party, if such amendment would remove the grounds for the invalidation action.

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40 Patent duration

How is the duration of patent protection determined?

The general term of protection is 20 years from the filing date (or international filing date for a patent granted on a PCT international application). If the patent is granted on a divisional application, the 20-year term shall be counted from the filing date of the parent application. The validity term for patents related to pharmaceuticals, pesticides or agrichemicals, for the use of which a special approval ('marketing authorisation') is required by law, may be extended for a period of up to five years.

Update and trends

In 2014–2015 many amendments were introduced in Part IV of the Russian Civil Code, which regulates IP matters. The most significant amendments relating to patents are as follows:

• obligatory substantive examination of utility model applications has been introduced (before the amendment, only formal examination of utility model applications was conducted);

• the possibility of amending an application has become substantially restricted;

• when determining the fact of use of an invention patent under the 'doctrine of equivalents' the equivalency of the features should have already been known by the patent's priority date, rather than by the date of its alleged use (as had been established before the amendment);

• the doctrine of equivalents shall no longer apply for utility models;

• new liability for patent infringements has been provided – statutory monetary compensation instead of damages; and

• the term of protection for utility models has been reduced.

In 2016, it is expected that the Russian Patent Office will issue new (updated) examination regulations and guidelines regarding patent applications, as well as new rules for the consideration of appeals.

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