



## Patenting Software in China

Similar to many other jurisdictions, China does not allow computer programs as such to be patented, but does not rule out patentability for inventions related to computer programs.

### Methods for Performing Mental Activities

A number of exceptions to patentability are set out by Article 25(2) of Chinese Patent Law, one of which relates to rules and methods for performing mental activities. This is the exception that is often cited by Chinese Examiners to raise non-patentable subject matter objections against inventions related to computer programs.

The following are normally regarded by Chinese Examiners as defining rules and methods for performing mental activities:

- methods of calculation or rules of mathematical calculation;
- computer programs per se; and
- rules and methods for playing games.

However, if a claim lists technical features apart from methods for performing mental activities, patentability cannot be ruled out under Article 25(2) of the Chinese Patent Law.

### Technical Solution

Software patent applications may also be rejected under Article 2.2 of the Chinese Patent Law for lack of a technical solution. A 3-step test is normally applied to decide whether an Article 2.2 objection should be raised:

1. whether the claimed subject matter involves execution of computer programs in order to solve a technical problem;
2. whether the computer programs are executed by a computer so as to control or process internal or external objects of the computer in accordance with the laws of nature;
3. whether any technical effect is achieved in accordance with the laws of nature by execution of the computer programs.

If the claimed subject matter fails any one of the three steps, it will not be regarded as a technical solution in the sense of Article 2.2 of the Chinese Patent Law.

## Form of Applications

Certain rules need to be respected when drafting applications for software inventions:

- **Defining the Components**

A product claim should spell out each component of an apparatus, the connections between the components, and how each function of the computer program is performed by a corresponding component or group of components.

If it is not practicable to define the components by their physical structures, it is not necessary to do so. The components can then be defined in means-plus-function language. If means-plus-function language is used for a product claim, it is important to ensure strict one-to-one correspondence between recited means and steps recited in the corresponding method claim.

- **Drafting the Description**

The description of Chinese patent applications also needs to be carefully crafted. Chinese examiners are often reluctant to allow claim amendments unless there is almost verbatim support in the specification.

The description needs to clearly and completely describe the solution as a whole, as well as the design and technical features involved in the computer programs that are necessary to achieve the desired technical effects.

Normally at least a main flow chart should be included in the description of a software invention, with separate flow charts depicting specific functions or branches where necessary.

If particular steps are not essential, it is important that the description explicitly says so. Otherwise, the applicant may be forced to include corresponding steps and means in the independent claims.

Where the execution of computer programs involves changes to the hardware of a computer, a diagram showing the structure of the computer should be included, and the description should describe the relevant hardware components and connections there between in a way clear and sufficient for a skilled reader to implement the invention.

*The above is only a brief discussion of the particulars that one needs to be aware of if you wish to patent a software invention in China. For more detailed information, please contact Handong Ran - see contact details below.*

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