Unpatentable Subject Matter in PRC

With regards to patents or patent rights, many of you may have heard of "anything under the sun that is made by man can be patented". However, as a matter of fact, not all of the subject matters are eligible for patent rights, for example, an invention is unpatentable if it is nothing more than an abstract idea which is not tied to any technological art, environment, or machine*.

Every country implementing a patent system has its own examination and authorization systems adapted for domestic technology development and needs, according to which several subject matters will be excluded from the patent-protection system.

In China, with reference to the relevant provisions of the patent law, it is explicitly prescribed that for any of the following, no patent shall be granted.

(1) scientific discoveries;
(2) rules and methods for mental activities;
(3) methods for the diagnosis or for the treatment of diseases;
(4) animal and plant varieties;
(5) substances obtained by means of nuclear transformation;
(6) any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest.

Wherein the rules and methods for mental activities are of greater concern as there are increasing debates over the relevant issues, for example, business method and methods of doing business, computer program or software per se, or the like, all fall into such a category.

Since a computer software is a mental output, which transforms mental activities into the forms executable by a computer, the content of the computer software would always be represented as rules and methods for mental activities. In this regard, computer software is unpatentable in most of the countries.

Then whether a Chinese character input method could be granted a patent ?

Chinese character input methods, such as Changjei input method, QCode input method or the like, are one kind of computer software per se, through which Chinese characters can be input and edited in the computer. The philosophy of a Chinese character input method is to classify the commonly used Chinese characters with respect to the shape of their radicals or strokes, and then encode and represent each of them with alphanumeric strings in English. In this way, the Chinese character input method is a Chinese character encoding method in nature, which is based on the inventor's knowledge on Chinese characters and corresponding rules artificially made for encoding the Chinese characters, wherein it relates to merely a method for encoding the radicals of the Chinese characters and involves no technical solution, thereby it does not belong to the subject matter for patent protection.

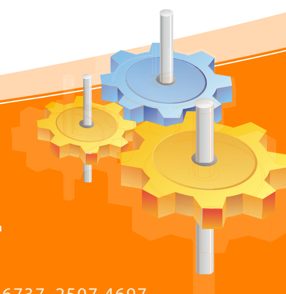
In order to obtain a patent, the computer software shall comply with the requirements for patent application, which is to say, an application for a patent for invention relating to computer software may well be the subject matter of patent protection if it could constitute a new technical solution. For example, if the method for encoding the Chinese characters is combined with a special keyboard so that it works as a method for a computer to process the Chinese character information, enables the computer system to run according to the information in the Chinese characters, and increases the processing function of the computer system, then the patent application constitutes a technical solution as provided for in the patent law and thus belongs to the subject matter of patent protection.

Accordingly, whether a computer software is patentable depends on the fact that whether or not it could constitute a technical solution as provided for in the patent law. If the developer of the computer software wants to take advantage of patent protection, an integration of the software with hardware is desired whereby forming a technical solution capable of solving technical problems, utilizing technical means, and producing technical effects.

To say the least, while the computer software per se could not be integrated with any specific hardware, it could be protected by copyright law. The inventor / applicant could correspondingly make use of copyright law and/or patent law to secure the developed computer software to the greatest extent, whereby ensuring and reaping the maximum commercial return.

- In Ex Parte Bowman, the Board sustained a rejection under 35 U.S.C. § 101 because "the invention before us is nothing more than an abstract idea which is not tied to any technological art, environment, or machine." Id. at 1671. The rejection on appeal asserted that "the claimed invention does not fall within the technological arts because no form of technology is disclosed or claimed." Id. at 1671.

- The "invention" in the China Patent Law means any new technical solution relating to a product, a process or improvement thereof. The technical solution means a set of technical measures in conformity with the laws of nature for solving the technical problems thereof.



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在中國
不授予專利的發明

說起專利或專利權，大家曾聽過一句“anything under the sun that is made by man can be patented”（太陽底下所有人造事物皆可取得專利）。但事實上，不是所有課題皆可取得專利，例如一項發明如只屬於一種抽象概念而與任何技術領域、環境或機器無關的話，則其不能取得專利*。

每個實行專利制度的國家皆有其獨特的專利審查和授權制度，因應其本國的技術發展及需要，將若干課題排除在專利保護制度之外。

在中國，根據相關專利法規，明文規定下列各項為不授予專利權的客體:

(一) 科學發現；
(二) 智力活動的規則和方法；
(三) 疾病的診斷和治療方法；
(四) 動物和植物品種，不包括其生產方法；
(五) 用原子核變換方法獲得的物質；
(六) 違反國家法律、社會公德或者妨害公共利益的發明創造。

其中，智力活動的規則和方法較為惹人關注，而與之相關的爭論也越來越多，例如:營商及商業運作方法、電腦程序本身(或稱為“電腦軟件”)、等等皆屬於此範疇之內。

由於電腦軟件是人的智力成果，軟件研製是把人的智力表現為電腦可執行的形式，因此，電腦軟件的內容總是表現為智力活動的規則和方法。所以，大多數國家的專利法對電腦軟件不授予專利。

那麼中文輸入法是否可授予專利呢？

中文輸入法，如倉頡輸入法、快碼輸入法等，其本身就是一種電腦軟件，通過該軟件可在電腦上輸入及編輯中文。中文輸入法的基本原理是將常用的漢字按部首或筆劃形狀加以分類，再將其編碼成可用英文字母表示，所以中文輸入法本身實際上是一種漢字編碼方法，基於發明人對漢字的認識，人為地製定編碼漢字的相應規則，當中僅涉及漢語字根編碼方法，沒有涉及技術方案。因此不屬於專利法保護的客體。

電腦軟件要獲得專利，必須符合專利申請條件。也就是說，涉及電腦軟件的發明專利申請，只要構成新的技術方案，就可成為專利保護的客體。例如，將中文輸入法的漢字編碼方法與專用鍵盤相結合，構成一種漢字信息處理方法，通過該輸入方法，使電腦系統能夠運行漢字，增加了電腦系統的處理功能，從而構成專利法所要求的技術方案，因此可獲得專利保護。

由此可見，電腦軟件能否取得專利要視乎其可否構成專利法認可的技術方案。電腦軟件的開發者如希望享有專利保護，可將之與適當硬件相結合，從而構成可解決技術問題，採用技術手段，並且能產生技術效果的技術方案。

退一步說，若電腦軟件本身不能與特定配件相結合，還可通過版權法/著作權法對其進行保護。發明人/申請人可以相應地選擇利用版權法和/或專利法對自己開發的電腦軟件作出最佳的保護，從而保障及獲得最好的商業回報。

- In Ex Parte Bowman, the Board sustained a rejection under 35 U.S.C. § 101 because “the invention before us is nothing more than an abstract idea which is not tied to any technological art, environment, or machine.” Id. at 1671. The rejection on appeal asserted that “the claimed invention does not fall within the technological arts because no form of technology is disclosed or claimed.” Id. at 1671.

- 中國專利法所稱的發明是指對產品、方法或者其改進所提出的新的技術方案。所謂技術方案，是指對要解決的技術問題所採取的利用了自然規律的技術手段的集合。