

Patents 2020

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Contributing editor

Louis E Fogel

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Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Patents*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 new chapters on Eurasia, Honduras, Kazakhstan, Ukraine, United States and Uzbekistan.

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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.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Louis E Fogel of Jenner & Block, for his continued assistance with this volume.



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PATENT ENFORCEMENT PROCEEDINGS

Lawsuits and courts

- 1 | 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?

From the outset, patentees have to instigate civil proceedings to enforce patent rights. The Swiss Federal Patent Court (FPC) has exclusive jurisdiction over patent infringement and invalidity actions of patentees (article 26(1)(a) of the Patent Court Act (PatCA)). The panel of judges at the FPC is composed of at least one judge with a legal background and one judge with a technical background. The judges of the FPC must have proven knowledge of patent law to be eligible. Appeals against decisions of the FPC are heard by the Swiss Federal Supreme Court (SFSC).

According to article 81 of the Swiss Federal Act on Patents for Inventions (PatA), wilful patent infringement is a criminal offence. Therefore, patentees can also instigate criminal proceedings against an infringer. Criminal proceedings may be instigated by the state (ex officio), if the infringer acts in a commercial manner.

In addition, patentees may request border control measures from the custom authorities, such as seizure and destructions of infringing goods, subject to statutory requirements (article 86a et seq PatA).

Trial format and timing

- 2 | What is the format of a patent infringement trial?

The proceedings before the FPC are governed by the Swiss Code on Civil Procedure (CPC). The court decides as a panel of three, although in special cases it will be a panel of five (article 21 PatCA). For preliminary injunctions, a decision can be taken by a single judge unless the technical background of the case requires a panel of three, which is usually the case (articles 23(1)(b), (3) PatCA). Swiss law does not on the other hand provide for the carrying out of jury trials at the FPC.

Different evidence is permissible in proceedings before the FPC. This includes live testimony, documents and expert opinion.

The FPC panel must comprise at least one judge with a technical background. While, in theory, the court has the power to appoint external experts, it usually relies on a formal opinion of one of its own technical judges. This opinion is made available to the parties for comments (article 183(3) CPC and article 37(3) PatCA).

Opinions by party-appointed experts do not generally qualify as evidence under the CPC. They are considered only to be a party's allegations. Nonetheless, party-appointed expert opinions are often filed by a party to support its pleading.

A Federal Patent Court decision on the merits is usually rendered within 12 to 24 months. The majority of cases before the Federal Patent Court (more than 50 per cent) are terminated by settlement (often at

the preparatory hearing). The preparatory hearing usually takes place approximately six months after the statement of claim has been filed. An expedition of this process is not possible.

Proof requirements

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

The general principle for the burden of proof states that the burden of proof rests with the person who derives rights from an alleged fact. This principle also applies in patent law (cf BGER 4A_142/2014 from 2 October 2014 rec 5).

Standing to sue

- 4 | 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 proprietor is entitled to bring an action for an injunction or remedy, damages and a declaratory judgment. Additionally, any person who holds an exclusive licence, irrespective of the registration of the licence in the Register, is entitled to bring an action for injunction or remedy as well as an action for damages, provided this is not expressly excluded by the licence agreement.

Article 74 paragraph 3 PatA provides the legal basis for an action for negative declaratory relief by an accused infringer to have a decision on whether an infringement has been committed by him or her. The accused infringer must show that he or she has an interest in a declaratory judgment, that there is uncertainty in the legal situation and that this uncertainty will continue unreasonably. An interest in declaratory judgment is regularly present when the patent proprietor accuses the plaintiff of patent infringement (BGE 129 III 295 rec 2.4). The Swiss Federal Supreme Court and the prevailing doctrine, however, deny an interest in a declaratory judgment if a performance claim is to be expected within a 'short period of time' because in that case an unreasonable continuation of the legal uncertainty is not given (BGE 131 III 319 rec 3.5).

Inducement, and contributory and multiple party infringement

- 5 | 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?

Article 66 litera d PatA expressly states that any person who abets any of the offences mentioned in Article 66 litera a-c PatA, participates in them, or aids or facilitates the performance of any of these acts may be held liable under civil and criminal law.

Furthermore, Swiss civil law recognises the principle of joint liability. According to this principle, two or more persons who have together caused damage, whether as instigator, perpetrator or accomplice, are jointly and severally liable to the person suffering damage (article 50 paragraph 1 CC). Joint liability according to this article requires that several persons cause the damage in an adequate causal and joint manner. It is required that the persons cooperate, whereby each injuring party knows or could at least have known about the conduct of the other party. Therefore, it is possible for multiple parties to be jointly liable for infringement, if each practises some of the elements of a patent claim, but together they practise all the elements.

Joinder of multiple defendants

6 | 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?

Under Swiss law, multiple parties can be joined as defendants in the same lawsuit. The purpose of such a joinder of parties is generally to simplify procedures and avoid contradictory judgments.

There are three requirements. Firstly, the rights and obligations to be assessed must be based on similar facts or legal grounds. The necessary similarity exists if the formation of a simple joinder of parties appears to be appropriate with regard to the subject matter of the proceedings, whether for reasons of procedural economy or to avoid contradictory judgments (cf BGER 4A_625/2015 rec 2.). Secondly, all individual cases must be subject to the same types of procedure under Swiss law (article 71 CPC). Lastly, there must be the same substantive jurisdiction for all actions. However, the same local jurisdiction is not a prerequisite for a simple joinder of parties.

Infringement by foreign activities

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

Generally, activities taking place outside the Swiss jurisdiction are subject to the foreign jurisdiction where they take place. A Swiss court cannot order or enforce an injunctive remedy against activities outside of its jurisdiction. This would be considered an infringement of the territoriality principle. Damages claims alone can theoretically be addressed against the infringer in Switzerland if he or she is located in Switzerland. Nevertheless, this rarely happens as the foreign jurisdiction will usually assume both aspects of the dispute together (the injunctive remedy and the damages claims) and thereby create a *lis pendens* (meaning the Swiss court could no longer take over jurisdiction over the same damage dispute).

In terms of cross-border importations, the principle of unilateral regional exhaustion (ie, without agreement of a reciprocal right) in the European Economic Area (EEA) has applied in Switzerland since 2009. This means that the right of exclusion lapses as soon as the patent owner introduces the patented product on the market in an EEA country. In such a case, it may also be imported in parallel into Switzerland from the EEA without the owner's permission. Contrarily, if it is first put on the market in a country outside of the EEA, parallel importation is not allowed unless there is corresponding consent. However, for patent-protected goods whose price is fixed by the government – this primarily applies to pharmaceutical products – national exhaustion in Switzerland applies (article 9a paragraph 5 PatA).

Infringement by equivalents

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

According to article 66 litera a PatA, the doctrine of equivalents applies to infringement actions in Switzerland. To extend the scope of protection beyond the strict literal meaning of the words of the claim, any element that is equivalent to an element specified in that claim is taken into account. Therefore, the scope of protection conferred by a patent claim is not limited to the identical use of the features of the construed claim by the defendant's product or process, but it also extends to equivalent elements if the following conditions are met:

- the equivalent element has the same effect;
- it is obvious to the skilled person that it has the same effect; and
- the skilled person would have considered the equivalent element as having the same value.

Discovery of evidence

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

As the burden of proof lies with the party that alleges a fact, in this case the infringement, it is for the party itself to obtain the evidence.

However, preliminary measures may be requested to preserve evidence or obtain a precise description of an allegedly infringing process (article 77 paragraph 1 PatA). Furthermore, a petitioner may request the taking of evidence at a pre-trial stage if this is required to assess a potential claim's likelihood of success (article 158 CPC).

Litigation timetable

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

A Federal Patent Court decision on the merits is usually rendered within 12 to 24 months. The majority of cases before the Federal Patent Court (more than 50 per cent) are terminated by settlement (often at the preparatory hearing). The preparatory hearing usually takes place approximately six months after the statement of claim has been filed. An expedition of this process is not possible.

Litigation costs

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

Patent litigation costs include:

- the court fees and expenses;
- attorneys' fees; and
- patent attorneys' fees.

If a litigant loses the lawsuit, it must bear the court fees and expenses and will be ordered to pay the prevailing party compensation for attorneys' and patent attorneys' fees. The FPC determines the court fees and the adverse party's attorneys' fees on the basis of a statutory tariff. Parties may also demand compensation for the reasonable actual legal costs incurred to pay their attorneys and patent attorneys by furnishing proof of actual and reasonable costs.

Court appeals

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

Patent office decisions are subject to appeal to the Swiss Federal Administrative Court (SFAC). The decisions of the SFAC are subsequently subject to appeal to the Swiss Federal Supreme Court (SFSC), Switzerland's highest court.

Judgments of the FPC are subject to appeal to the SFSC. The right to appeal is granted by law and is not subject to a leave to appeal.

In an appeal to the SFSC, the losing party may raise only substantive legal questions. The Federal Tribunal will not review the FPC's or SFAC's factual findings unless they were due to obvious mistakes. New evidence is generally not allowed before the SFSC. Where the court of lower instance did not exhaustively establish the facts of the case, the Federal Tribunal will usually refer the case back to the lower instance so that it may complete the factual findings.

The deadline to file an appeal is 30 days from receipt of the FPC's decision. Appeal proceedings usually take three to 12 months.

Competition considerations

- 13 | 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?**

Since patents grant exclusive rights, they may generally result in a restriction of economic competition which is, however, imposed by the law and not infringing per se. Nevertheless, the particular use of patents (eg, by imposing import restrictions, inadmissible patent licensing or distribution agreements, inadmissible conduct by market-dominant companies) may collide with competition law principles (article 3 paragraph 2 Swiss Cartel Act of 1995 (CartA): 'The law does not cover restrictions of competition which result exclusively from legislation on intellectual property. On the other hand, import restrictions based on intellectual property rights are subject to assessment under this law.'). Generally speaking, the mere assertion of injunctive relief based on a patent is considered legitimate. Additionally, articles 40a and 40c PatA each stipulate that under certain circumstances, compulsory licences may be ordered, but only after an anti-competitive practice within the meaning of the CartA has been established.

The enforcement of a patent against an infringer does not by itself constitute an act of unfair competition, unless a separate cause of action would arise in parallel to the patent (eg, a public defamation of the alleged infringer). The same applies for business-related torts: patent enforcement per se does not cause tort-based damage claims unless a separate cause of action would arise in parallel (eg, the patent infringement claims were obviously unfounded and caused market reputation damages to the defendant).

Alternative dispute resolution

- 14 | To what extent are alternative dispute resolution techniques available to resolve patent disputes?**

Patents can only be challenged in substance before the Swiss Federal Patent Court. However, patent validity issues are considered arbitrable in Switzerland. Thus, if a patent dispute would fall within the ambit of a validly established arbitration agreement, a party could challenge the patent in arbitration.

Parties are free to agree on mediation, arbitration or any other alternative dispute resolution mechanisms, if they can agree on the competence of an alternative dispute resolution body. Patent infringement and validity cases are considered arbitrable in Switzerland.

However, arbitration proceedings are rarely used to resolve pure patent infringement and invalidity disputes alone. It is more frequent for parties to conclude arbitration agreements in patent licensing agreements. This also empowers an arbitral tribunal to decide on underlying patent infringement and validity issues. An arbitral award declaring a patent invalid will be recognised and enforced by the Swiss Federal Institute on Intellectual Property.

SCOPE AND OWNERSHIP OF PATENTS

Types of protectable inventions

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

According to article 1 of the Swiss Federal Act on Patents for Inventions (PatA), to obtain a patent, a technical invention must be novel, capable of industrial application, inventive and involve an inventive step. Inventions that are generally not of a technical nature are not patentable, for example scientific theories and discoveries, mathematical methods and rules of games, rules and methods to perform mental acts, organisational procedures, and aesthetic creations or designs.

Software and computer programs are protected under Swiss copyright law. They are considered a set of instructions to perform orders (ie, programming code). This does not qualify as technical invention in the sense of the PatA. However, if software is used to solve a technical problem, (eg, a technical invention involving the use of a computer or where a computer program realises one or more features) it may be patentable as a 'computer-implemented invention'.

Business methods are concepts facilitating or improving business procedures, namely organisational procedures. To the extent that they are only computer-based (ie, software), they are only protected under copyright and do not qualify as technical inventions in the sense of the PatA. To the extent that they are not computer-based, such methods may be protected as trade secrets (if they bear valuable commercial know-how adequately kept secret), but they are not considered patentable. Nevertheless, business methods may be patentable under Swiss patent law if they – as a whole – provide for a technical feature in the sense of the PatA.

If medical procedures qualify as technical inventions in the sense of the PatA, a patent can be obtained to cover them. However, inventions whose exploitation is contrary to human dignity, disregard the integrity of living organisms, or are in any other way contrary to public policy or morality (eg, procedures for cloning human beings) are not patentable under article 2 paragraph 1 PatA. Furthermore, methods for treatment by surgery or therapy and diagnostic methods practised on the human or animal body are excluded from patentability under Swiss law (article 2 paragraph 2 letter a PatA).

Patent ownership

- 16 | 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?**

An invention generally belongs to the inventor (article 3 PatA: principle of the inventor). Inventors are always what is known as 'natural persons' (ie, individuals) who created an invention. Where several inventors have made an invention jointly, they are jointly entitled to the patent. All inventors have the right to be named inventor in the patent application. This applies irrespective of who owns the patent (ie, if another person acquires patent ownership, inventors remain named).

Under employment law, the employer is entitled to the work result produced by the employee (article 321b CC). This principle takes precedence over the default principle under patent law. However, a distinction is made between job-related inventions, occasional inventions and inventions not related to work.

Job-related inventions are inventions that the employee has created during the employment relationship in the course of his or her official duties and in fulfilment of his or her contractual obligations. According to the principle of article 321b CC, job-related inventions originally belong to the employer. Divergent contractual agreements are possible.

An occasional invention is considered to be made when an employee makes an invention while performing his or her official duties but not in fulfilment of his or her contractual obligations. In principle, the employee is originally entitled to the invention. The employer can only acquire an occasional invention by derivative means, but may contractually secure the possibility of acquisition for all occasional inventions.

Inventions not related to work are made neither in the performance of official duties nor in fulfilment of contractual obligations and thus have no objective connection with the employee's contractual field of work. According to the patent law principle of the inventor, the employee is entitled to those inventions.

It is always the owner of the patent who derives the benefit from the patent he or she decides how to exploit it. The right to the patent as property right is unrestrictedly transferable and inheritable, even to legal entities (private and public) (article 33 paragraph 1 PatA). The transfer of the patent must be made in writing (Article 33 paragraph 2 PatA). The contract of transfer must therefore bear the signatures of all persons who are bound by it. A registration in the Swiss Federal Institute of Intellectual Property is not mandatory, but only of declaratory nature.

DEFENCES

Patent invalidity

- 17 | 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?

Within nine months of the publication of the entry in the patent register, any person may give notice of opposition to a patent (post grant) to the Swiss Federal Institute of Intellectual Property (IPI). Opposition may only be filed on the grounds that the subject-matter of the patent is not patentable. If the IPI finds in favour of the opposition, it may revoke the patent or maintain it as amended.

Absolute novelty requirement

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

Yes. Only new inventions are patentable. An invention must not form part of the state of the art (also known as 'prior art'). The state of the art includes all knowledge that has been publicly available anywhere in the world prior to filing the application for a patent. This includes printed and online publications, as well as public lectures and exhibitions. Even what the inventor himself makes known about his or her invention is generally considered to be state of the art – and the invention is no longer considered new. The invention must therefore be kept a secret before the application is filed. There are three exceptions.

The first exception are non-prejudicial disclosures: article 7b of the Swiss Federal Act on Patents for Inventions (PatA) excludes from the relevant state of art disclosures made by the patent applicant himself or by his or her predecessor in title (in particular the inventor) for two

specific situations: where the disclosure is the result of an obvious abuse to the detriment of the patent applicant or his or her predecessor in title, and where the disclosure took place at a recognised international exhibition.

The second and third exceptions concern new uses of known substances. The second exception, 'first medical use', allows absolute patent protection for new chemical products (substances or mixtures of substances), irrespective of a specific manufacture or use, and the scope of protection of such a patent claim extends in particular to medical uses as a medicinal product, diagnostic agent or in surgery. The third exception supplements the second exception (first medical use) by explicitly allowing protection also for further medical uses of a substance where a first medical use is already known.

Obviousness or inventiveness test

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

The invention must not be obvious to a person skilled in the art. In patent law, a 'person skilled in the art' is a hypothetical person who knows the prior art in his or her specialist field but is unimaginative. If the purpose of an invention is shown to a person skilled in the art and this person readily comes up with the same solution, then the solution is not inventive.

Patent unenforceability

- 20 | 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?

As discussed earlier, a patent owner may act or behave in a way that infringes competition law principles. This may be raised as a defence by a defendant in a patent dispute and a judge could deny enforcement of a patent claim based on the individual (anti-competitive) constellation. This applies, in particular, to the parallel importation of patented goods, which a patent owner cannot impede once the principle of exhaustion applies.

Prior user defence

- 21 | 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?

In general, acts undertaken within the private sphere for non-commercial purposes are not considered patent infringements, regardless of whether they are undertaken before or after the filing or publication date of the patent (article 9 paragraph 1 lit. a PatA). This defence covers all types of inventions.

Furthermore, a patent may not be invoked against any person who, prior to the filing or priority date of filing or priority, has already been commercially using the invention in good faith in Switzerland or had made special preparations for that purpose (article 35 paragraph 1 PatA). Any such person allowed to use the invention according to the aforementioned rule may even use the invention for the purposes of their trade or business (article 35 paragraph 2 PatA). This defence covers all types of inventions.

REMEDIES

Monetary remedies for infringement

- 22 | 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 focus in Swiss patent infringement litigation is on obtaining permanent injunctive relief. Both preliminary and permanent injunctions are available. Monetary relief is also available on the basis that the claimant must be placed in a position it would have been in if no infringement had occurred. Monetary relief is always compensatory, but not punitive in nature. Therefore, a claimant can request damages, account of profits and surrender of any unjust enrichment deriving from the infringing act. However, the threshold to prove causation and loss for monetary relief is high.

Other available forms of relief are:

- declaratory relief (eg, concerning non-infringement (article 74 PatA); and
- an order:
 - requesting the defendant to disclose the origin and quantity of products in its possession that were unlawfully manufactured or placed on the market, and name the recipients and disclose the extent of any distribution to commercial and industrial customers (article 66(b) PatA);
 - seizing and destroying the infringing products and related manufacturing equipment (article 69 PatA); or
 - authorising the successful party to publish the judgment at the counterparty's expense (article 70(1) PatA).

A plaintiff's losses may encompass actual damage suffered and lost profits, which must be proven by the plaintiff, including the causality between the damages or lost profits and the patent infringement. The infringer may be required to surrender any unjust enrichment deriving from the infringing act. The calculation of lost profits based on a reasonable royalty rate is permissible only if it may be assumed that the patentee would have granted a licence to the infringer on request. This will usually be the case only if the patentee can show that it:

- granted non-exclusive licences to third parties; and
- would have been willing to grant a licence to the infringer based on the same or similar terms.

Injunctions against infringement

- 23 | 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?

Preliminary injunctions are available in Switzerland based on article 261 of the Swiss Code on Civil Procedure (CPC) and article 77 of the PatA.

In order to obtain a preliminary injunction, a petitioner must credibly show (*prima facie* showing) that:

- the respondent has infringed or is likely to infringe the petitioner's patent right; and
- the petitioner is threatened by harm that cannot be easily remedied.

In the case of special urgency and provided that the petitioner initiated the proceedings without undue delay, the Swiss Federal Patent Court (FPC) may order a preliminary injunction immediately and without hearing the opposing party first (*ex parte* preliminary injunction), which is, however, rarely granted in practice.

The court may make the interim measure conditional on the payment of security by the petitioner if it is possible that the measures could cause loss or damage to the opposing party.

Preliminary measures may also be requested to preserve evidence or obtain a precise description of an allegedly infringing process (article 77(1) PatA). A petitioner may also request the taking of evidence at a pre-trial stage if this is required to assess a potential claim's likelihood of success (article 158 CPC).

Permanent injunctions are granted if the plaintiff proves actual or impending patent infringement. No further requirement must be shown (eg, irreparable harm). The grant of permanent injunction is highly dependent on the substantial assessment of the patent infringement case at hand, but it is usually granted, if the court finds a patent infringed.

Banning importation of infringing products

- 24 | 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?

The importation of infringing products for commercial use violates the right of exclusivity of the proprietor (article 8 paragraph 2 PatA). This provision allows in principle to intercept all infringing goods at the border (see articles 86a-86k PatA).

Yes, a specific proceeding is available to accomplish the blocking of the importation of infringing products. If the proprietor or a licensee of a patent that is valid in Switzerland has clear indications that goods which infringe that patent may imminently be brought into Swiss customs territory, he or she may request the Customs Administration in writing to refuse the release of the goods (article 86b paragraph 1 PatA).

If the Customs Administration, as a result of an application under Article 86b paragraph 1 PatA, has grounds to suspect that certain goods intended to be brought into or taken out of Swiss customs territory infringe a patent valid in Switzerland, then it notifies the applicant and the declarant, holder or owner of the goods accordingly. Furthermore, it withholds the goods for a maximum of 10 working days from the time of notification, so that the applicant may obtain preliminary measures (article 86c paragraph 1 PatA).

When making an application under article 86b paragraph 1 PatA, the applicant may additionally submit a written request to the Customs Administration to destroy the goods (article 86f paragraph 1 PatA).

Attorneys' fees

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

Yes, successful parties are usually awarded a certain compensation for attorneys' fees (article 106(1) of the CPC). The successful party may also claim compensation for its patent attorneys' fees (since attorney representing parties in patent litigation are usually assisted by patent attorneys).

Furthermore, the losing party is ordered to bear the court fees.

Wilful infringement

- 26 | 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?

Additionally to the civil liability, the wilful infringer is also subject to criminal charges. Article 81 paragraph 1 PatA states that any person who wilfully commits a patent infringement specified in article 66 PatA

is, on complaint by the injured party, liable to custodial sentence not exceeding one year or to a monetary penalty. If the offender acts for commercial gain, he or she is prosecuted ex officio. In this case, the penalty is a custodial sentence not exceeding five years or a monetary penalty. Additionally, the custodial sentence is combined with a monetary penalty (article 81 paragraph 3 PatA).

According to article 12 Swiss Criminal Code (SCC), 'whoever performs an act knowing and willing' acts intentionally. Additionally, anyone who applies a patented invention commercially without being sure of the existence and scope of the corresponding patents deliberately accepts the possibility of an infringement and acts therefore with conditional intent (article 12 paragraph 2 SCC). Conditional intent means in this context that the infringer did not know with certainty that he or she was infringing a patent, but that he or she would have acted in the same way even if he or she had known about the infringement. In other words, that he or she accepted the infringement.

In civil trials, opinions by party-appointed experts (this includes opinions of counsel) do not generally qualify as evidence under the CPC. They are considered only to be party's allegations. According to the consistent practice of the Swiss Federal Supreme Court, this also applies in criminal proceedings.

Time limits for lawsuits

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

The right to claim damages becomes time-barred three years from the date on which the person suffering damage became aware of the loss, damage or injury and of the identity of the person liable for it but in any event 10 years after the date on which the harmful conduct took place or ceased. If the person liable has committed a criminal offence through his or her harmful conduct, then the right to damages or satisfaction becomes time-barred at the earliest when the right to prosecute the offence becomes time-barred. If the right to prosecute is no longer liable to become time-barred because a first-instance criminal judgment has been issued, the right to claim damages or satisfaction becomes time-barred at the earliest three years after notice of the judgment is given (article 73 paragraph 1 PatA in conjunction with article 60 CC). If the patent infringement was committed at least with conditional intent, the limitation period of criminal law applies (seven years; article 97 paragraph 1 lit c Swiss Criminal Code). With regard to the limitation period, it is not necessary that a criminal complaint has been filed nor does the offender need to have been punished for the offence, and no criminal complaint needs to have been filed.

However, an infringement claim can also be forfeited if the proprietor of the patent, being aware or negligently unaware of the infringer and the infringing act, waits for a long time before executing his or her rights, so that the infringer gains the trust that the rights will not be executed in the future. The infringer can only develop such trust if he or she must assume that his or her actions will provoke opposition because they are apparent to the entitled party. The legal consequence of forfeiture is the loss of the enforceability of the right against a specific infringer.

Patent marking

28 | 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?

If a product is patented, it may be indicated on the packaging or the product itself. This can be a selling point and can also warn off potential patent infringers. However, the marking of the product is not mandatory.

The marking may feature the patent mark on a product. This consists of the Swiss cross and the patent number. In addition, '+pat+ CH' or 'EP/CH' followed by the patent number are frequently used signs (eg, 'CH689101' for a Swiss patent or 'EP/CH 1109604' for a European patent that is valid in Switzerland). If products are brought to market and labelled before the patent has been granted, the signs 'pat. pend.' (patent pending) or 'patent applied for' may be used. The patent owner can require licensees of the patent to also use these signs.

Even though the use of the signs is optional, misusing them is a criminal offence (article 82 PatA).

LICENSING

Voluntary licensing

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

The only restriction is that in principle only valid intellectual property rights can be the subject of a licence agreement. The prevailing doctrine and case law assume the impossibility of a licence agreement in the case of the invalidity of all licensed rights.

In addition, it should be noted that licence agreements can be problematic from an antitrust law perspective. Article 5 to 7 of the Swiss Cartel Act of 1995 (CartA) thus form a substantive barrier to licence agreements.

Apart from these two exceptions, there are no special restrictions on the contractual terms (see article 34 Swiss Federal Act on Patents for Inventions (PatA)).

Compulsory licences

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

Yes. The Swiss Patent Act provides for compulsory licences in the following four fields:

- semi-conductor technology (article 40a PatA);
- research tools (article 40b PatA);
- diagnostic tools (article 40c PatA); and
- the export of pharmaceutical products (article 40d PatA).

These licences are granted only if efforts by the applicant to obtain a contractual licence on appropriate market terms within a reasonable period of time have been unsuccessful (article 40e PatA). A compulsory licence is primarily granted for supplying the domestic market, and the scope and term of such a licence are limited to the purpose for which it has been granted. Additionally, the proprietor has the right to an appropriate remuneration. The court decides on the grant and revocation of licences, on their scope and duration as well as on the remuneration payable. In particular, the court revokes the licence if the circumstances that led to its being granted no longer apply and it is not expected that they will arise again.

Additionally, the Swiss Patent Act recognises further situations in which a claim to a licence may exist:

- A licence for the use of an invention that interferes with the subject-matter of a prior patent (article 36 PatA). Such a non-exclusive licence can be granted if a patented invention cannot be used without infringing a prior patent, provided that the invention represents an important technical advance of considerable economic significance in relation to the invention that is the subject-matter of the prior patent.
- If the proprietor of a patent has not sufficiently exploited the invention in Switzerland by the time of the action and cannot justify such a failure (article 37 PatA), an application for a compulsory licence can be filed three years from the date of the grant of the patent or at the earliest four years after filing the patent application. If the grant of

such licences does not suffice to meet the demand of the domestic market, any person with a proven interest may bring an action for the cancellation of the patent after a period of two years from the grant of the first of these licences (article 38 PatA).

- A licence in the public interest (article 40 PatA). Where a public interest so dictates, the person to whom the proprietor of the patent has, without sufficient reason, refused to grant the licence requested, may apply to the court for the grant of a licence to use the invention (article 40 PatA). This licence only comes into consideration if the invention is not carried out in Switzerland either by the patentee or by a licensee and if there is a public interest in its execution (eg, be a medicine against new threats such as the covid-19).

PATENT OFFICE PROCEEDINGS

Patenting timetable and costs

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

Swiss national patents are usually granted within three to five years from filing. However, applicants may request an expedited examination procedure (article 63 of the Swiss Federal Patent Ordinance (FPO)). The Patent Office does not examine novelty or non-obviousness (article 59 of the Swiss Federal Act on Patents for Inventions (PatA)).

The official fees for filing a patent are 200 Swiss francs comprising 10 patent claims. The Patent Office's general examination fee is 500 Swiss francs. The fee for an expedited examination procedure is 200 Swiss francs. Annual renewal fees are beginning to be due four years after the filing of a patent. This fee amounts to 100 Swiss francs and then increases by 50 Swiss francs for each subsequent year.

Generally, additional, internal fees apply for the involvement of patent attorneys (to draft patent claims). Typically, the costs for preparing and filing a Swiss national patent may range from 5,000 to 12,000 Swiss francs, depending on the complexity of the patent and the patent attorney involved.

Finally, European patent applications designating Switzerland may usually take longer to be granted since – unlike Swiss national patents – novelty and obviousness is examined. Additional costs are likely involved for translations of a patent application into the national languages of the designated countries.

Expedited patent prosecution

32 | Are there any procedures to expedite patent prosecution?

With regard to the obtaining of a patent, applicants may request an expedited examination procedure (article 63 FPO).

The expedition of the judicial process in Switzerland is, however, not possible.

Patent application contents

33 | 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?

In order to secure a filing date, only the description of the invention and the name of the applicant must be submitted. According to the PatA, the description must present the invention in such a way that a person skilled in the art can understand it and carry it out. The description must demonstrate at least one way in which the invention can be carried out. The problem being solved by the invention (the purpose of the invention) must be clearly defined and the solution presented in a way that it can be understood. All of the features necessary for the invention must be

disclosed. If special embodiments of the invention or additional applications are also to be protected, the corresponding additional features must be presented in the technical documents. This is usually done through examples that are illustrated with technical drawings. Patent applications for chemical substances must describe at least one example of manufacturing. In addition, the substance must be identifiable by means of physical data. After the filing date, no new information may be added to the description of the invention. It is, therefore, important, that all necessary features are sufficiently described in the application from the outset, as the original technical documents determine what is protected. A precise and detailed description thus forms the basis for the legal interpretation of patent claims.

Within three months after the filing date, the following should be submitted to the IPI:

- at least one patent claim defining the invention;
- technical drawings of reproducible quality;
- an abstract; and
- a translation of the technical documents in one of the official Swiss languages if the documents are not being submitted in one of the official languages or in English.

Concise and clear patent claims are the most reliable way to avoid misunderstandings about the subject matter and scope of protection claimed.

Within 16 months after the priority date additional documents must be submitted to the IPI:

- a declaration of any international priority rights being claims as well as the priority documents;
- the names and addresses of all inventors involved;
- any waivers by individual inventors to being named; and
- a translation of the technical documents in one of the official Swiss languages if the documents have been submitted in English.

Prior art disclosure obligations

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

The description in the application usually includes a description of the state of the art known to the applicant to the extent necessary for understanding the invention.

However, as there is no examination for the requirements of novelty and inventive step in the Swiss granting procedure, the state of the art must not be formally disclosed and proven to the patent office examiner. Nonetheless, it is strongly recommended to check the requirements of novelty and inventive step before applying for a patent, since in Switzerland a patent is granted without guarantee and can, therefore, subsequently be declared invalid if a third party appeals against it.

Pursuit of additional claims

35 | 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 technical documents (including the patent claims) may be amended under certain circumstances. The patent office accepts amendments only if:

- the redefined subject matter was already included in the original documents; or
- the supplemented elements were already known at the time of the application, namely they belonged to the state of the art.

However, as mentioned before, after the filing date, no new information may be added to the description of the invention.

Patent office appeals

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

Yes.

Oppositions or protests to patents

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

Within nine months of the publication of the entry in the patent register, any person may give notice of opposition to the IPI to a patent that has been granted. Opposition may only be filed on the grounds that the subject matter of the patent is not patentable. If the IPI finds in favour of the opposition, it may revoke the patent or maintain it as amended.

Priority of invention

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

The party claiming nullity or the defendant in the infringement proceedings who raises the plea of nullity bears the burden of proof that the state of the art is contrary to the patent within the meaning of article 1 paragraph 2 PatA (inventive step) or article 7 PatA (novelty). In addition, this party in principle also bears the burden of proof in cases where the (in)validity of the priority is decisive that the priority is not validly claimed. However, article 20 PatA partially changes this allocation of the burden of proof.

Since neither the legitimacy nor the substantive validity of the priority is verified in the national examination procedure, article 20 paragraph 1 PatA provides that if priority is claimed and the validity of the priority is contested, the patentee shall bear the burden of proof of the existence of the right of priority. In order for the reversal of the burden of proof under article 20 paragraph 1 PatA to be effective, the opposing party, usually the party claiming nullity, must make sufficient allegations and prove an interest in the validity of the priority.

If the validity of the priority is disputed with the argument that the earliest priority application claimed is not the first application within the meaning of article 17 paragraph 1 (Union priority) or paragraph 1-bis (internal priority) PatA, the patentee benefits from the legal presumption that the application whose priority is claimed is a first application. This presumption is rebuttable. If the opposing party finds an earlier application of the applicant of the first claimed priority that discloses the same subject matter, this presumption can be overturned by the proof of the contrary. This exception from the reversal of the burden of proof is useful, since otherwise an unspecified negative fact would have to be proved, namely that there is no other earlier application with the same subject matter.

Modification and re-examination of patents

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

Yes. The proprietor of the patent may partially surrender the patent by requesting the IPI to revoke a patent claim or limit an independent claim by combining one or more patent claims, which are dependent on it or limit an independent claim in some other way (article 25 paragraph 1 PatA).

Furthermore, where a ground for nullity applies to only a part of the patented invention, the court can limit the patent accordingly (article 27 paragraph 1 PatA).

The effects of the granted patent are deemed not to have occurred from the outset insofar as the proprietor of the patent surrenders the patent or the court declares the nullity of the patent based on a nullity action (article 28a PatA).

Patent duration

40 | How is the duration of patent protection determined?

The maximum term of the patent is 20 years from the filing date of the application (article 14 PatA).

The IPI may grant on application a supplementary protection certificate for the active ingredients or combination of active ingredients of medicinal products (article 140a paragraph 1 PatA). The certificate takes effect on expiry of the maximum term of the patent for a period equal to the period that elapses between the date of filing under article 56 PatA and the date of the first authorisation of the medicinal product containing the product in Switzerland, minus five years (article 140e paragraph 1 PatA). However, the maximum duration may not exceed five years (article 140e paragraph 2 PatA).

UPDATE AND TRENDS

Key developments of the past year

41 | What are the most significant developing or emerging trends in the country's patent law?

On 13 September 2016, Stemcup Medical Products AG (Stemcup) filed a patent infringement lawsuit against Implantec GmbH (Implantec) and Endoprothetik Schweiz GmbH (Endoprothetik).

Stemcup alleged that hybrid sockets (designed for hip prosthesis) manufactured and distributed by Implantec and Endoprothetik under the name 'ANANOVA' infringed the Swiss part of patent EP 1411 869 B1 for hybrid sockets in Switzerland.

During the litigation proceedings, Stemcup partially waived EP 1 411 869 B1 at the Swiss Federal Institute of Intellectual Property to overcome the judge-rapporteur's expert opinion finding an undue extension of subject matter in the patent. The partial waiver was filed at a very late stage of the proceedings (after formal closure of the file and roughly nine months after the rejoinder of Implantec and Endoprothetik where undue extension of the subject matter had been asserted). The parties strongly disagreed on whether a partial waiver of a patent at this stage of the proceedings is admissible as a *novum* (new fact) in the sense of article 229 Civil Procedure Code (CPC) and if Stemcup had acted in good faith. The Swiss Federal Patent Court (FPC) held that the plaintiff made use of an option explicitly provided for in article 24 of the Swiss Federal Act on Patents (FPA) and that this partial waiver was effective *ex tunc* (ie, the patent must be treated as if it had been granted limited scope from the beginning). Article 229 paragraph 1 lit. a. CPC does not prescribe how, by whom or when a new fact can arise or be created. It only defines from which point in time something is to be considered a *novum*.

Since Stemcup's patent was newly shaped by the partial waiver, the proceedings were not without purpose. If the partial waiver had not been permitted, the FPC would be required to hand down a meaningless judgment assessing the legal situation based on a patent that no longer exists. Nevertheless, the fact that Stemcup had partially waived its patent at a very late stage was considered in the apportionment of costs (one-third by Stemcup, although it won the case on the substantive matter). The FPC rendered its decision on 28 October 2019 (Q 2016_012).

In terms of the patent landscape, Switzerland faces an increase in software-based or software-supported technical inventions as well as inventions in the biotech sector. One recent noteworthy decision concerned such an invention.

On 23 March 2017, Hamilton Medical AG (HM) filed a patent infringement lawsuit before the Swiss Federal Patent Court (FPC) against Imtmedical AG (IMT) with the request to cease and desist from manufacturing, selling and advertising a mechanical respirator that is wired to a screen and has sensor technology that captures a lung's volume changes, compliance and breathing frequency, and represents all of these features in an animated manner. HM is owner of a European Patent (EP 1 984 805 B1) and filed its lawsuit based on the Swiss part of the patent for the territory of Switzerland. The FPC ultimately held that the device infringes on HM's patent and presented the following findings:

- Since the patent at stake covers a new, IT-connected medical device (interacting with a proprietary IT-infrastructure), the relevant experts used to assess the patent claims were described as a 'team consisting of two persons, one development engineer for medical technology with experience on mechanicals and electronic components of respiratory devices and a software-developer with knowledge in data- and graphic data-processing in connection with respiratory devices'.
- In this context, the FPC clarified that article 53(c) of the European Patent Convention (EPC) ('... methods for treatment of the human body and diagnostic methods . . .') that excludes the need for certain patenting is not applicable to medical devices (hardware), but only to procedures (process patents), which was not considered to be the case.
- In regard to article 52 EPC (requirement of a technical invention to obtain a patent), the FPC assessed how patents containing both technical and non-technical features must be dealt with. It confirmed the COMVIK-examination approach developed by the European Patent Office (EPO) according to which at least one feature of the patent claims must be technical in nature, which was considered to be the case. The EPO-approach was considered persuasive for Switzerland as well (despite a registration practice by the Swiss Federal Institute of Intellectual Property that deviated from this). After all, Switzerland is a signatory of the EPC and the FPC strives to render decisions in line with public international treaties. In the same context, the FPC also held that patent EP 1984 805 B1 revealed sufficient novelty vis-à-vis other older patents raised by IMT (WO 02/071933 A2 and an older scientific research paper by Wachter et al., which addressed similar devices with graphic display options, but not with specific 'real time' visual animation and graphic analysis like the patent in contention).
- The FPC held that all devices of IMT subject to the present lawsuit bore the features of patent EP 1984 905 B1 in claim No. 1 (literal infringement). Regarding the injunctive remedy sought, the FPC held that IMT should obey a court order to recall its devices and deactivate the embedded software features. In other words, IMT can continue selling mechanical respirators, but it must make sure that the devices are 'less IT-intelligent' to avoid interfering with HM's patent.
- Finally, the FPC held that in its threat of punishment (its subpoena) linked to the injunctive order, members of the board and management of IMT could not be addressed in person since board members or management can change over time. Whether a subpoena is applicable to specific members must be examined on an individual basis by an enforcement judge once a violation of the FPC's court decision occurs. The FPC rendered its decision on 1 November 2019 (Q 2017_007).



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