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Patent Litigation 2022

Switzerland: Law & Practice
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SWITZERLAND

Law and Practice

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1. INTELLECTUAL PROPERTY RIGHTS AND GRANTING PROCEDURE

1.1 Types of Intellectual Property Rights

In Switzerland, inventions are primarily protected by patents. A patent with effect for the territory of Switzerland can either be applied for and granted as a Swiss national patent under the Swiss Patents Act (PatA) or as a European patent under the European Patent Convention (EPC) with the designation of Switzerland. According to the PatA and Swiss judicial practice, certain inventions are excluded from patentability, such as gene sequences, methods of medical treatment or mere computer programs.

Under Swiss law, protection of an invention as a utility model is not available and the Federal Council (the Swiss government) recently abandoned its plan to introduce a utility model as part of the partial revision of the PatA that is currently underway.

Undisclosed inventions may qualify as trade secrets and are then protected by law against unlawful use and disclosure, which may qualify as an act of unfair competition (Article 6, Act against Unfair Competition) or a criminal act (Article 162, Penal Code). In addition, trade secrets can be protected through contractual means. The Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) is not directly applicable in Switzerland, which is not an EU country, nor has any analogous law been adopted in Switzerland. Overall, the Swiss provisions on trade secret protection are less detailed than the legal framework in the European Union, but they provide effective protection that meets the requirements of Article 39, paragraph 2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

1.2 Grant Procedure

A Swiss national patent is granted pursuant to the PatA upon application to the Swiss Federal Institute of Intellectual Property (*Institut Fédéral de la Propriété Intellectuelle*, or IPI). European patent applications with protection for Switzerland may be filed with the European Patent Office (EPO) pursuant to the EPC.

European patent applications have the same effect in Switzerland as national patent applications filed with the IPI (Article 110, PatA) and are recorded in the Swiss register once granted by the EPO.

The IPI currently examines national patent applications only with respect to formal requirements and selected legal requirements, such as the technical nature of the invention, whether the invention is contrary to public policy or morality, the clarity and uniformity of the claims and added matter. In contrast to the examination procedure of European patents by the EPO, the IPI does not examine the material requirements of novelty and non-obviousness before granting the patent (Article 59 paragraph 4, PatA).

As part of the currently ongoing partial revision of the PatA, the Federal Council proposed to keep this “unexamined” national patent, but to newly introduce also a “fully examined” national patent similar to a patent granted through the European Patent Office. As a result, inventors would have the choice between applying for an “unexamined” or a “fully examined” national patent with the IPI. In addition, in each case a public state of the art search report would be prepared, which is intended to give preliminary indications as to the novelty and inventive step of the claimed invention.

Trade secret protection is granted by law, without any examination or registration by any authority, provided that the undisclosed invention meets

the conditions for protection, such as confidentiality and an interest in such confidentiality.

1.3 Timeline for Grant Procedure

Currently, patent examination by the IPI for granting a national patent may last between one and two years or even longer, depending on whether the IPI is asked to provide a report on the state of the art or arrange an international-type search (Article 59 paragraph 5, PatA). Patent granting proceedings by the EPO usually take longer, as the examination of the novelty and obviousness requirements takes time. The European patent grant procedure generally takes about three to five years from the date the application is filed, but in certain cases it can last considerably longer depending on the complexity of the file.

The average costs for the grant of a patent by the IPI amount to approximately EUR700 (without any fees for optional searches). To take a patent application through to the grant stage before the EPO, one may expect costs of around EUR5,000. These costs do not include the fees for consultancy services of a patent attorney.

Swiss residents do not need to be represented by a patent attorney before the IPI, but applicants (natural or legal persons) who have neither residence nor a place of business in Switzerland are obliged to be represented by a local professional representative. Similar rules apply for residents of non-contracting states in front of the EPO.

1.4 Term of Each Intellectual Property Right

For both Swiss national patents and European patents with protection for Switzerland, the term of protection is 20 years from the filing date of the patent application (Article 14, PatA).

Inventions that qualify as trade secrets are protected by law as long as the invention meets

the conditions for protection – ie, as long as the invention remains confidential and the inventor has an interest in its confidentiality.

1.5 Rights and Obligations of Owners of Intellectual Property Rights Obligations

In order to maintain both Swiss national patents and Swiss parts of European patents, once granted, the patent owner's primary obligation is to timely pay the registration and annual renewal fees. The amount of the renewal fees is progressive based on the years of protection.

Rights

Both Swiss national patents and European patents with protection for Switzerland, confer on their owners the right to prohibit others from commercially using the invention (Article 8, PatA). It is the responsibility of the patent owner to enforce their exclusivity rights. Possible civil legal actions include:

- an action for permanent injunction or remedy of the unlawful situation (Article 72, PatA);
- an action for monetary relief, including damages such as lost profits, accounts of the infringer's profits and surrender of the unjust enrichment in the form of a reasonable licence fee (Article 73, PatA); and
- an action for declaratory judgment on the existence or non-existence of a circumstance or right governed by the PatA (Article 74, PatA).

Actions for injunction or remedy can also be requested as preliminary measures (Article 77, PatA). Moreover, in order to establish infringements, patent owners may request as a preliminary measure that the court carries out a so-called precise description of the allegedly unlawful process or product (Article 77, PatA).

Besides the initiation of civil actions, the patent owner may file a complaint in order to start criminal proceedings against the infringer of their patent rights (Articles 81 et seq, PatA). The PatA also provides for custom measures (Articles 86a et seq, PatA). If the patent owner has clear indications that goods infringing their patent may imminently be imported into or exported out of Swiss customs territory, they may request the Customs Administration to refuse the release of the goods. The Customs Administration may withhold the goods for a maximum period of ten working days, so that the applicant may obtain preliminary measures.

Inventions that are only protected as trade secrets enjoy protection either under Swiss criminal law (Article 162, Penal Code), under unfair competition law (Article 6, Act against Unfair Competition) or by contractual means. Unfair competition law provides for civil injunctions, remedies and monetary relief actions as well as for criminal sanctions.

1.6 Further Protection after Lapse of the Maximum Term

Upon an application by the owner of a Swiss national patent or a European patent with protection for Switzerland, the IPI may grant a supplementary protection certificate (SPC) for the active ingredients or a combination of the active ingredients of medicinal products or plant protection products (Articles 140a et seq, PatA). An SPC can only be granted on the basis of a valid patent and a granted marketing authorisation for the medicinal product.

The period of protection for the SPC begins as soon as patent protection expires and is valid for a maximum period of five years. This term may be extended for a further six months if paediatric studies have been carried out and the results are reflected in the product information of the

respective medicinal product (paediatric extension).

For situations where the patent owner is not eligible to apply for an ordinary SPC, which could be prolonged through a paediatric extension, the PatA also provides the possibility of a paediatric SPC that is directly linked to the patent and not to the ordinary SPC.

1.7 Third-Party Rights to Participate in Grant Proceedings

Third parties currently do not have any right to participate in the grant proceedings for a Swiss national patent or an SPC – eg, by filing third party observations. However, any person can file an opposition against a Swiss national patent once it is granted by the IPI. Due to the limited scope of the examination by the IPI, national opposition proceedings following grant of Swiss national patents are rare. The grant of an SPC can be challenged by appeal if the appealing party can show a legal interest in the outcome of the proceedings.

In proceedings before the EPO, third parties can file observations concerning the patentability of the invention (third-party observations) in order to try to prevent a patent from being granted. However, third parties cannot take part in the grant proceedings as a formal party. Any person may, however, file an opposition against a European patent once it is granted by the EPO.

1.8 Remedies against Refusal to Grant an Intellectual Property Right

Against a refusal to grant patent protection or an SPC by the IPI, an appeal can be filed with the Swiss Federal Administrative Court and thereafter to the Swiss Federal Supreme Court.

A decision of the EPO refusing to grant a European patent may be appealed with the EPO's Boards of Appeal.

1.9 Consequences of Failure to Pay Annual Fees

A patent registered in the Swiss patent register is cancelled (and the patent protection terminates with effect *ex nunc*) if the annual renewal fees are not paid on time.

Where the patent owner provides *prima facie* evidence of having been prevented, through no fault on their part, from observing a time limit, the IPI may grant, on request, the re-establishment of their rights (Article 47, PatA). Acceptance of the request has the effect of restoring the situation that would have resulted from carrying out the act in good time. However, due to the quite strict practice on the no-fault requirement, Article 47 of the PatA is often not applicable.

Alternatively, the patent owner may file a request for further processing with the IPI (Article 46a, PatA). The request must be made within two months after receiving notification of the missed time limit or within six months after the time limit has expired. Within this time, the action that has been omitted must be executed. If the request for further processing is approved, the situation that would have resulted from executing the act on time will be restored.

1.10 Post-grant Proceedings Available to Owners of Intellectual Property Rights

Once the patent has been granted (and the opposition period has expired), the patent owner may file with the IPI a request for a declaration of partial surrender of a Swiss national patent or the Swiss part of a European patent in order to:

- surrender a patent claim;
- 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 – in such cases, the limited claim must refer

to the same invention and define an embodiment that is included in the specification of the published patent and in the version of the patent application that determined the date of filing.

The partial surrender may not be used to file new patent claims or to make up for something else that was overlooked in the granting procedure.

On the occasion of registration of a partial surrender, the patent owner may, within a three-month period, file an application for the establishment of one or more new patents to cover the dropped patent claims; such new patents are given the filing date of the original patent.

2. INITIATING A LAWSUIT

2.1 Actions Available against Infringement

Under Swiss law, civil legal actions include:

- actions for permanent injunction or remedy of the unlawful situation (which may also be requested as preliminary measures);
- actions for monetary relief; and
- declaratory judgment actions.

Moreover, the patent owner may also initiate criminal proceedings or apply for customs measures.

Please see **1.5 Rights and Obligations of Owners of Intellectual Property Rights** for more detail.

2.2 Third-Party Remedies to Remove the Effects of Intellectual Property Opposition Proceedings

Within nine months of publication, any third party, without the need to demonstrate a proven interest, may file an opposition against a Swiss

national patent granted by the IPI or against a European patent granted by the EPO.

Grounds for opposition against a Swiss national patent are rather limited. The opposing party may claim that the patent contains inventions that are excluded from patentability because:

- the invention relates to the human body or its elements;
- the invention relates to naturally occurring sequences or partial sequences of genes; or
- the invention's exploitation is contrary to human dignity or disregards the integrity of living organisms, or is in any other way contrary to public policy or morality according to Article 2 of the PatA.

The EPC allows for more grounds for opposition. In addition to similar opposition grounds allowed under Swiss law, a third party may also claim that:

- the invention is not new;
- the invention does not involve an inventive step;
- the invention is not susceptible to industrial application;
- the invention is not disclosed clearly and completely enough for a person skilled in the art to carry it out; or
- the patent's subject-matter extends beyond the content of the application as filed.

Civil Proceedings

Third parties, with a proven interest, may also initiate civil proceedings in order to claim the invalidity or partial invalidity of a Swiss national patent or of the Swiss part of a European patent if the invention is excluded from patentability, is obvious, not novel or not disclosed in a way that a person skilled in the art could carry it out, or if matter was added after the filing date (Articles 26 et seq, PatA).

In addition, when the patent has been filed by an applicant who was not entitled to that patent, the entitled person may apply for assignment of the patent application or, if the patent has already been granted, of the patent itself (Article 29, PatA).

Compulsory Licensing

Under Swiss law, third parties with a legitimate interest may, under certain conditions, also initiate actions for the grant of compulsory licences (Articles 36 et seq, PatA), if:

- a patent 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;
- a patent is not sufficiently exploited in Switzerland, and where such a failure to exploit cannot be justified;
- the public interest so requires;
- a licence to patents in the field of semiconductor technology is required to remedy a practice held to be anti-competitive; or
- a licence to use a patented biotechnological invention is required for research purposes.

Requests for the grant of compulsory licences are rare and to date no compulsory licence appears to have ever been granted by a court in Switzerland.

2.3 Courts with Jurisdiction

The Swiss Federal Patent Court rules on civil actions concerning patents at first instance. Pursuant to Article 26 of the Patent Court Act (PCA), it has exclusive jurisdiction over civil patent litigation concerning patent validity as well as patent infringement, compulsory licence actions, requests for preliminary measures and enforcement of judgments made under its exclusive jurisdiction.

The Federal Patent Court also has jurisdiction in other civil actions that have a connection to patents, in particular those concerning contractual rights to patents (ownership and licensing) or their assignment. In such cases, the jurisdiction of the Federal Patent Court does not preclude the jurisdiction of the cantonal courts. For such disputes, the claimant may choose whether to bring an action before the Federal Patent Court or the relevant cantonal court.

An appeal against the decision of the Federal Patent Court or of a cantonal court can only be lodged with the Federal Supreme Court directly as second instance. The decision of the Federal Supreme Court is final. The Federal Supreme Court can, however, remand the case back to the Federal Patent Court for new consideration of certain aspects. In such event, the Federal Patent Court's second decision can again be appealed to the Federal Supreme Court.

2.4 Specialised Bodies/Organisations for the Resolution of Disputes

The Federal Patent Court is a specialised court for patent matters. It comprises judges with legal training and judges with a technical qualification.

Besides the Federal Patent Court and cantonal courts, arbitral tribunals may also be competent to resolve disputes related to patents. According to Swiss case law, all aspects of intellectual property disputes are arbitrable, including contractual issues related to patents as well as disputes over the validity of patents. Although arbitral awards on the validity of patents are recognised and enforced in Switzerland, arbitration proceedings related to mere validity disputes are rather rare, because of the multi-jurisdictional nature of most arbitral proceedings and hence possible enforcement issues with respect to certain jurisdictions. However, contractual disputes in connection with patents, such as licensing

disputes, are often submitted to arbitral tribunals.

No other (non-statutory) specialised organisations exist in Switzerland to rule on patent disputes.

2.5 Prerequisites to Filing a Lawsuit

There are no special prerequisites for filing a patent action in Switzerland. Civil actions relating to intellectual property rights can be filed with the competent court without any need to attempt conciliation in front of a conciliation authority.

The issuance of warning letters is also not required, although mostly recommended to consolidate the legitimate interest of the claimant and to support the attribution of the procedural costs to the defendant. Sometimes litigation costs can even be avoided following settlement discussions or voluntary undertakings triggered by warning letters.

If patent infringement proceedings are commenced by an entitled licensee (see **3.1 Necessary Parties to an Action for Infringement**), it is not required that the licence is registered in the patent register.

2.6 Legal Representation

Parties may decide, but do not have any obligation, to be represented by an attorney at law in intellectual property matters. If a party decides to be represented in front of a Swiss court, the representative must be a qualified attorney at law. In proceedings concerning the validity of a patent in front of the Federal Patent Court, the parties may also be represented by a qualified and admitted patent attorney (Article 29, PCA).

2.7 Interim Injunctions

Measures for interim relief are available under Swiss law if the applicant can provide prima

facie evidence that the following requirements are met:

- the right to which they are entitled has been infringed or an infringement is imminent;
- such infringement threatens to cause not easily reparable harm;
- the requested relief is relatively urgent; and
- the requested relief is proportionate to the harm caused by the alleged infringement (Articles 261 et seq, Civil Procedure Code, CPC).

Note that urgency is not a strict requirement for granting interim relief. However, interim relief will not be granted if the applicant has waited for a substantial period of time (according to current practice, for more than 14 months) before requesting measures for interim relief.

In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated, the court may order the interim measure immediately and without hearing the opposing party (ex parte interim measures) (Article 265, CPC). The ex parte interim measures must subsequently be confirmed in inter partes proceedings granting the opposing party its right to be heard.

In addition, all interim relief proceedings require confirmation in main proceedings. In an interim judgment, the Federal Patent Court will set a deadline for the commencement of main proceedings, whereby the injunction lapses if the applicant does not initiate main proceedings, in which case the applicant is liable for any damages caused to the defendant.

In interim relief proceedings the applicant can request:

- an injunction;
- an order to remedy an unlawful situation;
- an order to a registering authority or to a third party; or
- performance in kind.

2.8 Protection for Potential Opponents

Any person who has reason to believe that an ex parte interim measure will be applied against them, may set out their position in advance by filing a protective letter (Article 270, CPC).

Protective letters must be filed with the Federal Patent Court and/or the cantonal courts that are likely to have jurisdiction for ordering the ex parte interim measures in the case at hand. The other party will be served with the protective letter only if they actually initiate the respective proceedings. The protective letter becomes ineffective six months after it was filed.

2.9 Special Limitation Provisions Statute of Limitation

Monetary claims in patent infringement proceedings are time-barred after three years from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for them, but in any event ten years after the date on which the loss or damage was caused. If the action for damages is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil claim.

Claims for injunctive and declaratory relief are in principle not time-barred, but rather remain available as long as there is a legitimate interest in obtaining such a relief.

Forfeiture

The enforcement of rights might be limited due to their forfeiture based on Article 2 of the Swiss Civil Code, which requires every person to act in good faith in the exercise of their rights. If a person waits too long before initiating enforcement proceedings, their rights may be forfeited if the court determines, taking into account all relevant circumstances, that the claimant acted against good faith. As an example, the right to apply for interim measures is considered forfeited 14 months after the patent owner actually learned, or should have learned, of the infringement unless there are special circumstances (see **2.7 Interim Injunctions**). With regard to main proceedings, forfeiture is likely to occur after approximately eight years. Based on Swiss case law, urgent status will not be granted by the courts if the patent owner has waited so long.

2.10 Mechanisms to Obtain Evidence and Information

Swiss procedural law does not provide any procedural mechanisms for far reaching US-style fishing expeditions in order to obtain all evidence from the opposing party that might be relevant. However, there exist certain mechanisms allowing a party to obtain specific evidence.

Swiss Patents Act

Based on the Swiss Patents Act, a patent owner with a legitimate interest – ie, providing prima facie evidence that their patent has been infringed or an infringement is suspected – may request that the Federal Patent Court order as an interim measure:

- the securing of evidence; and/or
- a precise description to be made of the allegedly unlawful processes used and/or of the allegedly unlawful products manufactured, as well as the means used to manufacture them (Article 77, PatA).

The procedure for making the description is typically carried out by a technically trained judge and a clerk at the location where the alleged infringement takes place. Upon the request of an opposing party, the court will take necessary measures to safeguard business and trade secrets and might exclude the applicant (but not its representatives) from taking part in the inspection. The court will draft a written report describing the product or process and before the applicant receives the report, the opposing party is given the opportunity to comment (Article 77, PatA).

Under Swiss law there is no limitation as to how the evidence obtained through a description can be used, which means that a Swiss description can also be used to support proceedings abroad.

Swiss Civil Procedure Code

The Swiss Civil Procedure Code also allows a more general right to ensure preliminary taking of evidence without any need to start civil litigation (Article 158, CPC). Similar evidence as during a pending litigation on the merits can be the subject of such a preliminary taking of evidence – ie, the party may request witness hearings, the production of specifically identified documents, the inspection of goods or places or the drafting of a court-appointed expert's report. The questioning of the parties, however, can only be part of the proceedings on the merits.

In general, the parties to the case, and third parties, have a duty to co-operate in the taking of evidence (Article 160, CPC). However, the court cannot enforce its order, if a party to the proceedings does not produce the required evidence. But the court will take such conduct into account when assessing the evidence and the facts of the dispute.

2.11 Initial Pleading Standards

Under Swiss procedural law, the statement of claim must contain:

- the prayers for relief;
- a statement of the value in dispute;
- the allegations of fact;
- a notice of the evidence offered for each allegation of fact; and
- the date and signature.

It is not required by law to state the legal arguments (since the court must know the law), but it is common practice to do so and some courts expressly expect the parties to briefly state on which grounds their actions are based.

In general, in main proceedings, each party is entitled to two submissions during which it may provide new facts and evidence, amend its prayers for relief and limit the patent claims at stake either inter partes or through a limitation request at the IPI. After the second submission, new facts and new evidence are admissible only if presented immediately after they become known and (i) if they occurred after the second submission (proper nova), or (ii) if they existed before but could not have been submitted despite reasonable diligence (improper nova). At such stage, a limitation of the patent claims at stake will only be considered if it were triggered by new arguments or evidence brought forward in the rejoinder. In any case, new facts and new evidence are admitted only until the court begins its deliberations.

2.12 Representative or Collective Action

Under Swiss law, no class actions or other collective actions are permitted. However, joinder of parties in civil proceedings is admissible.

2.13 Restrictions on Assertion of an Intellectual Property Right

Restrictions on the assertion of patent rights may apply from the law against unfair competition and antitrust law, in particular with respect to restrictions against parallel imports which are not justified (Article 9a, PatA and Article 5, Swiss Cartel Act) and unlawful practices by market-dominant undertakings or undertakings with relative market power (Article 7, Swiss Cartel Act).

Furthermore, a patent owner might be restricted in the enforcement of their rights due to their forfeiture based on Article 2 of the Swiss Civil Code (acting in good faith), in particular if they were to wait too long before initiating enforcement proceedings (see **2.9 Special Limitation Provisions**).

3. INFRINGEMENT

3.1 Necessary Parties to an Action for Infringement Civil Actions

The patent owner who has their rights infringed, or is threatened with an infringement, may initiate a civil action. The exclusive licensee, irrespective of the registration of the licence in the patent register, may also bring an infringement action independently, provided this is not expressly excluded by the licence agreement (Article 75, PatA). Non-exclusive licensees, however, may only join the infringement proceedings filed by the patent owner or the exclusive licensee in order to claim their own losses or damages.

An infringement action can be raised against any person:

- who uses a patented invention unlawfully;
- who refuses to notify the authority concerned of the origin and quantity of products in their possession which are unlawfully manufac-

tured or placed on the market, and to name the recipients and disclose the extent of any distribution to commercial and industrial customers;

- who removes the patent mark from products or their packaging without authorisation from the proprietor of the patent or the licensees; and
- who abets any of the said offences, participates in them, or aids or facilitates the performance of any of these acts (Article 66, PatA).

If there are several infringers, the claimant is not obliged to initiate the infringement action against all potential infringers.

Criminal Proceedings

Criminal proceedings can be initiated against the same persons provided that they wilfully committed the patent infringement, on complaint by the patent owner or ex officio if the infringer acts for commercial gain (Article 81, PatA).

3.2 Direct and Indirect Infringement

Swiss law does not explicitly know a doctrine distinguishing between direct and indirect patent infringement. Whoever commits an infringement act as described in Article 66 of the PatA may be held liable under Swiss civil and criminal law.

However, the PatA implicitly distinguishes between direct infringement (Article 66 litterae a, b and c, PatA) and contributory infringement (Article 66 littera d, PatA), according to which any person who abets, participates in, aids or facilitates the performance of any (direct) infringement may also be held liable under civil and criminal law. According to case law of the Swiss Federal Supreme Court, a contributory infringement is accessory to a direct infringement, meaning that an unlawful principal act is required for a contributor infringement, whereby it is sufficient for a claim for injunctive relief

against the contributory infringer that a direct infringement is imminent.

With regard to its application in an international context, the accessoriness has the effect that the contributory infringer acting in Switzerland but contributing to a direct infringement abroad cannot be held liable under Swiss law. On the other hand, if the direct infringement takes place in Switzerland, a contributory infringer contributing to that infringement may be liable irrespective of whether the contributory acts are performed in Switzerland or abroad.

Regarding the supply of (non-infringing) materials or parts to a customer who uses these parts or materials for the manufacture of goods infringing a patent, the Swiss Federal Supreme Court has clarified that the supplier is liable as contributory infringer if they knew or should have known that the means supplied were suitable for, and intended to be used by the customer for use in the infringing goods.

3.3 Process Patents

The most important particularity of process patent infringement proceedings concerns the burden of proof. In general, the claimant carries the burden of proof in infringement proceedings. However, the burden of proof may be reversed if the patent in question is a process patent. If an invention concerns a process for the manufacture of a new product, every product of the same composition is presumed to have been made by the patented process until proof to the contrary has been provided (Article 67 paragraph 1, PatA). The same applies by analogy to a process for the manufacture of a known product if the patent owner provides prima facie evidence of an infringement of the patent (Article 67 paragraph 2, PatA).

Regarding the territorial scope of a process patent infringement, the general rules apply,

meaning that a direct infringement must occur in Switzerland in order for Swiss law to apply. Accordingly, the Swiss Federal Supreme Court held in a case that if a device intended for carrying out a patented process is manufactured in Switzerland, but the process itself is only carried out abroad, the process patent is not infringed in Switzerland.

3.4 Scope of Protection for an Intellectual Property Right **Literal Infringements**

The patent claims determine the scope of protection of a patent (Article 51 paragraph 2, PatA). According to established practice, the patent claims must be interpreted from the viewpoint of a skilled person, starting with the claim language but also taking into account the description and the drawings. General technical knowledge is also accepted as a means of interpretation.

The Swiss Federal Supreme Court held that the prosecution history of a patent is, in general, not decisive for the interpretation of the patent claims. Waivers and limitations made by the patent applicant during prosecution are to be taken into account only to the extent that they are ultimately reflected in the patent claims and/or the description.

Equivalent Infringements

The PatA explicitly holds that an imitation is also deemed to constitute a use (Article 66 littera e, PatA) and, hence, not only literal infringements but also equivalent infringements are known under Swiss law. The Swiss Federal Supreme Court and the Federal Patent Court have elaborated in several decisions, taking into account other European courts' practice, a standard test for the assessment of an equivalent infringement based on three main steps.

- Equal effect – the modified feature must objectively fulfil the same technical function

as the corresponding feature of the patent claim.

- Accessibility – the modified feature must be obvious to the skilled person in light of the teaching of the patent; the Federal Patent Court has clarified that the starting point for the assessment of accessibility is not the general prior art, but the patent at issue, as this step should not be confused with the assessment of the inventive step.
- Equality – the skilled person must consider the modified feature as an equivalent solution taking into account the claim language and the description.

If all three requirements are fulfilled, an equivalent patent infringement exists according to Swiss practice.

3.5 Defences against Infringement

Within Swiss patent infringement proceedings, the defendant may attack the validity of the claimant's patent or raise non-infringement arguments.

Validity Defences

The defendant may plead the invalidity of the patent as a defence in the form of an objection or as a formal counterclaim. If the defendant raises the invalidity as an objection and the court determines that the patent is in fact invalid, that decision has only a direct effect between the parties – ie, the infringement action is rejected but the patent is not revoked from the patent register. If the defendant decides to file a counterclaim, this has the same effect as a standalone invalidity action – ie, if the invalidity of the patent is confirmed by the court, the infringement action is rejected and the patent is also declared invalid and formally revoked.

Lawful Use Defences

Alternatively, or additionally, defendants may also claim to have lawfully used the allegedly

infringed patent. Defendants may argue the following.

- That they have been granted a valid licence right.
- That they can rely on a statutory exception as per Article 9 of the PatA, including the exceptions of:
 - (a) private use for non-commercial purpose;
 - (b) use for research or experimental purposes (in order to obtain knowledge about the subject-matter of the invention);
 - (c) use for teaching purposes, use for obtaining marketing authorisation for a medicinal product (Bolar-type exemption);
 - (d) use by a medicinal professional for an individual person (medical prescription exemption); or
 - (e) use for a direct individual preparation of a medicinal product in a pharmacy (pharmacists' exemption).
- That the patent owner's rights were exhausted (Article 9a paragraph 1, PatA); whereas in general EEA-wide exhaustion applies, but if the patent is of subordinate importance for the functional characteristics of the goods, global exhaustion applies, and if the price of the patented goods is fixed by the state (such as with medicinal products), national exhaustion applies.
- That they have a prior use right (ie, have commercially used the invention in good faith in Switzerland or have made special preparations for that purpose prior to the filing or priority date of the patent application (Article 35, PatA)); in this case, the defendant might have to pay the patent owner appropriate compensation (Article 48, PatA).
- That the patent in question is a standard essential patent and defendants rely on a FRAND (fair, reasonable and non-discriminatory) licence; so far, no case law in this respect has been established in Switzerland

since all FRAND cases in front of the Federal Patent Court have been settled.

3.6 Role of Experts

As a general rule, the Federal Patent Court makes its decisions as a three or five-member body (panel), of whom at least one member must possess technical training. One of the technically trained judges will issue a written opinion (the Technical Opinion) covering all technical aspects of the case and the parties are given the opportunity to comment. Such Technical Opinions do not bind the other judges, although in many instances they will be largely followed in the judgment.

Additional technical know-how, at the request of a party or ex officio, may be obtained by an opinion from one or more external experts appointed by the court ad hoc (Article 183, CPC). However, external expert opinions basically do not play a role in patent proceedings, since the Federal Patent Court has technically trained judges with expertise in all relevant fields of science.

The parties may submit written expert statements. However, these are considered as assertions of the parties only.

3.7 Procedure for Construing the Terms of the Patent's Claim

All arguments against the infringement of patent claims must be raised within the same proceedings. There is no separate procedure for construing patent claims.

3.8 Procedure for Third-Party Opinions

Swiss law does not provide for a mechanism where a third party that is not a party to the patent proceedings could file, on its own, any kind of amicus brief to the court.

4. REVOCATION/ CANCELLATION

4.1 Reasons and Remedies for Revocation/Cancellation

There are several reasons for a revocation or cancellation of a patent.

Often, a patent registered in the Swiss patent register is cancelled because the renewal fees are not paid on time.

Swiss national patents or Swiss parts of European patents are also cancelled, and removed from the Swiss patent register, if an action for invalidity of the patent has been successful. The cancellation is done by the IPI upon the provision of full official copies of the final judgments. Any person with a proven interest may bring an invalidity action if the invention is excluded from patentability (eg, human body), is obvious, not novel, not disclosed in a way that a person skilled in the art could carry it out or if the application has been unduly amended (Articles 26 et seq, PatA). The requirements for the interest to be demonstrated by the claimant are rather low. The only exception is an invalidity action based on the allegation that the patent owner has no right to the grant of the patent. This particular ground for invalidity can only be asserted by the person claiming to actually be entitled to the patent.

An action for the cancellation of a patent could also be brought by a person with a demonstrated interest if the grant of licences does not suffice to meet the demand of the domestic market after a period of two years from the grant of the first compulsory licence (Article 38, PatA). Such actions are very rare and to date no patent appears to have ever been cancelled based on such action in Switzerland.

Finally, based on the prohibition against double patenting, a Swiss patent is revoked in favour of a European patent for one and the same invention with effect in Switzerland and granted to the same inventor or to their successor in title with the same filing or priority date (Article 125 paragraph 1, PatA).

4.2 Partial Revocation/Cancellation

Partial cancellation is possible if the successful invalidity action relates to certain patent claims only (Article 27, PatA).

4.3 Amendments in Revocation/ Cancellation Proceedings

A patent owner may amend a patent by surrendering a patent claim, limiting an independent claim by combining one or more patent claims which are dependent on it or limiting an independent claim in some other way (see **1.10 Post-grant Proceedings Available to Owners of Intellectual Property Rights**).

A patent may also be amended during invalidity or infringement proceedings. However, the patent owner is only able to rely on the amended patent up to a certain stage of the proceedings.

The Swiss Federal Supreme Court has clarified that if the patent owner amends the patent through the IPI during pending infringement proceedings, this has an *ex tunc* effect and thus the original patent that is the subject of the infringement proceedings no longer exists. If the introduction of new facts (ie, the amended patent) is no longer admissible at the stage of the proceedings in question, the infringement proceedings must be dismissed. This is generally the case if the patent is limited after the second pleading, at which stage new facts and new evidence are admissible only under very strict circumstances (see **2.11 Initial Pleading Standards**). Hence, if the patent owner wants to proceed against the alleged infringer based on the amended ver-

sion of the patent, they must commence new infringement proceedings.

4.4 Revocation/Cancellation and Infringement

Where an invalidity claim is raised as a defence within patent infringement proceedings, that invalidity claim is heard at the same time and within the same proceedings. The Swiss patent litigation system is not bifurcated.

5. TRIAL AND SETTLEMENT

5.1 Special Procedural Provisions for Intellectual Property Rights Procedural Provisions

The Swiss Federal Patent Court has exclusive jurisdiction in certain civil patent litigations. However, the proceedings before the Federal Patent Court are primarily based on the ordinary Swiss Civil Procedure Code, which applies to all civil proceedings. The Patent Court Act only contains a few provisions relating to the proceedings (eg, composition of the panel, jurisdiction and legal representatives).

Typical Steps of Infringement Proceedings

Ordinary infringement proceedings are initiated by filing a written statement of claim, followed by a written statement of defence in which the defendant usually asserts invalidity of the patent either by way of a defence or by filing a counterclaim.

After the exchange of the first briefs, the parties are summoned to an instruction hearing in front of a delegation of the court, normally consisting of the court president, the leading technical judge and a court clerk. The instruction hearing consists of two parts. In a first part that is minuted, the court delegation can pose questions to the parties to seek specific clarifications or to

get information with respect to parallel proceedings. The delegation will also mention if further substantiation is required. This part is normally quite short. The second, informal part of the instruction hearing is not minuted. The delegation of the court will present a confidential preliminary assessment of the case and the parties may then engage in court-mediated settlement negotiations.

If no settlement is found, the proceedings continue and the parties will exchange their second briefs (ie, reply, rejoinder and comments on new invalidity arguments and evidence in the rejoinder). Thereafter, the technical judge will issue its written expert opinion, on which the parties may comment in writing. As a final step, the parties are summoned to the main hearing. After the parties' pleadings, the court can decide whether a court expert will be appointed, witnesses will be heard, or other evidence will be taken. In most cases the court closes the proceedings after the main hearing and renders its judgment in writing within four to six weeks.

Ordinary proceedings on the merits concerning infringement or the nullity of a patent generally take about 18 to 24 months.

Action by Stages

An infringement action is typically initiated as a so-called action by stages (*Stufenklage*). In the first stage, the Federal Patent Court renders a partial judgment on the validity of the patent (if contested), the infringement, injunctive relief and the disclosure of information for the calculation of monetary relief. In the second stage, the patent owner asserts the amount of its monetary relief claim based on the information received and the Federal Patent Court decides on the monetary relief.

5.2 Decision-Makers

The Federal Patent Court makes its decisions as a three-member (or occasionally a five-member) body (panel), of whom at least one member must possess technical training.

In the rare proceedings concerning patent matters that are ruled before civil cantonal courts (see **5.4 Other Court Proceedings**), external technical experts may be appointed to submit an expert opinion *ex officio* or at the request of a party (Article 183, CPC). However, the final decision remains with the judges also with regard to technical questions.

5.3 Settling the Case

Settlements may be agreed at any stage of civil proceedings. They may be discussed with the mediation of the court or upon separate negotiations among the parties only. Swiss courts often actively support the parties in order to find a settlement.

In front of the Swiss Federal Patent Court, the parties are summoned to an instruction hearing after the exchange of the first briefs (see **5.1 Special Procedural Provisions for Intellectual Property Rights**). During this hearing, the court will present a confidential preliminary assessment of the case, which should serve as a basis for settlement discussions. A considerable number of disputes are settled at this stage.

5.4 Other Court Proceedings

In respect of contractual rights related to patents, such as ownership and licence rights, legal actions may not only be filed with the Federal Patent Court but also with the cantonal courts (Article 26 paragraph 2, PCA). Where the invalidity or infringement of a patent is to be adjudicated in such proceedings as a preliminary question or on a defence basis, the cantonal court grants the parties a reasonable period of time for filing the validity or infringement action before the

Federal Patent Court, which has exclusive jurisdiction over this subject matter (see **2.3 Courts with Jurisdiction**). The cantonal court must then stay the proceedings until a final decision has been made by the Federal Patent Court. However, considering that actions before cantonal courts with regard to patents have become very rare since the establishment of the Federal Patent Court, the influence of cantonal proceedings on the others are, in practice, very limited.

If infringement proceedings before the Federal Patent Court relate to a European patent which is the subject of pending opposition or appeal proceedings before the EPO, the Federal Patent Court may stay its proceedings. In practice, however, this plays only a very limited role, since the Federal Patent Court emphasises that it only suspends its proceedings if a decision by the EPO can be expected in a short time. Instead, it is the Federal Patent Court's standard practice to submit an acceleration request to the EPO.

Parallel infringement proceedings in front of other European courts do not have a direct influence on proceedings before the Federal Patent Court. The Federal Patent Court, however, is generally interested in judgments of other European courts when parallel parts of European patents are involved, although such judgments do not bind the Swiss courts in any way.

Anti-suit injunctions of foreign courts are generally considered as inadmissible under Swiss law.

6. REMEDIES

6.1 Remedies for the Patentee

Civil remedies for patent owners include injunctions or reparatory remedies, damages (including legal costs), declaratory judgments, delivery up or destruction of infringing goods, a recall order and publication of the judgment. See **1.5**

Rights and Obligations of Owners of Intellectual Property Rights for further detail.

Permanent injunctions are the most common remedy sought in infringement proceedings and are generally granted if an infringement is affirmed. In order to enforce the injunction, the judgment provides for administrative fines (per day of violation) if the infringer does not comply with the injunction, and for criminal sanctions.

For past infringements, the patent owner may claim monetary remedies in the form of damages such as lost profits or, if the infringer acted in bad faith, account of the infringer's profit. Alternatively, the patent owner can choose to ask for surrender of the unjust enrichment in the form of a reasonable royalty rate. Swiss law does not provide for punitive or exemplary damages or the like.

Since the patent owner usually does not have all the necessary information to prove the amount of damages or the profit to be surrendered, Swiss law grants the patent owner a claim for the necessary information and the infringer may be ordered to render account on the sales and gross turnover made from the infringing activities. Such a claim is usually asserted in a so-called action by stages. See **5.1 Special Procedural Provisions for Intellectual Property Rights**.

The court is bound by the available civil remedies and the parties' prayers for relief and has no discretion in ordering other remedies.

6.2 Rights of Prevailing Defendants

According to Swiss civil procedure law, the losing party must bear the court costs and has to reimburse the prevailing party for its legal costs and expenses, including the costs for assisting patent attorneys. The compensation for legal costs is calculated based on tariffs depending

on the value of the dispute. Such compensation will often not cover all the fees actually incurred.

If the defendant has incurred damages as a consequence of the proceedings, they may claim compensation for such damages. Within proceedings for interim measures, the court may make the interim measure conditional on the payment of a security deposit by the applicant, if it is anticipated that the measures may cause damage to the opposing party. An applicant for interim relief is liable for any damages caused in the event such measures are later found to be unjustified. If the applicant proves, however, that they applied for the measures in good faith, the court may reduce the damages or entirely release the applicant from liability (Article 264, CPC).

6.3 Types of Remedies

The same types of remedies are available for infringements relating to Swiss national patents and Swiss parts of European patents. Essentially, also the same types of remedies are available for civil proceedings involving inventions protected as trade secrets. See **1.5 Rights and Obligations of Owners of Intellectual Property Rights** for further detail.

6.4 Injunctions Pending Appeal

An appeal to the Swiss Federal Supreme Court does not have suspensive effect and, accordingly, injunctions granted at first instance are enforceable during the appeal proceedings. Upon request, the Federal Supreme Court may grant suspensive effect, but this is quite rare.

7. APPEAL

7.1 Special Provisions for Intellectual Property Proceedings

Appeals to the Swiss Federal Supreme Court against decisions of the Federal Patent Court or

the civil cantonal courts as sole instance follow the same rules as appeals in civil matters.

7.2 Type of Review

The Swiss Federal Supreme Court's discretion when reviewing final decisions of prior instances on the merits is limited to legal questions. In a recent judgment the Swiss Federal Supreme Court decided that the construction of patent claims is a legal question. In addition, the assessment of invalidity grounds is also a legal question. In contrast, a review of the facts is only possible in a very limited manner by ascertaining an abuse of law by the prior instance in arbitrarily determining the facts (Article 97, Supreme Court Act, SCA).

With regard to decisions on interim measures, the discretion of the Swiss Federal Supreme Court is narrower and limited to a review of a violation of constitutional rights (Article 98, SCA).

8. COSTS

8.1 Costs before Filing a Lawsuit

Prior to filing a patent lawsuit, there may be significant costs associated with the technical assessment of a patent's validity (as the defendant's usual defence will be to bring an invalidity action against the patent) and the assessment of the potential infringement of said patent by the allegedly violating goods of the counterparty. Additional costs may arise for the issuance of warning letters or the preparation and filling of protective briefs.

8.2 Calculation of Court Fees

Court costs are calculated based on tariffs depending on the value of the dispute.

Upon filing an action, the claimant is requested to advance part of the court costs. In proceedings before the Federal Patent Court, the

advance payment is usually half of the expected court costs, which corresponds to the expected court costs up to and including the instruction hearing.

8.3 Responsibility for Paying the Costs of Litigation

As a principle, the losing party must bear the court costs and has to reimburse the prevailing party for its legal costs. A proportionate allocation in relation to the outcome is also possible. Both, court costs and the compensation for legal costs, are calculated based on tariffs depending on the value of the dispute.

9. ALTERNATIVE DISPUTE RESOLUTION

9.1 Type of Actions for Intellectual Property

In Switzerland, alternative dispute resolution (ADR), or more specifically arbitration, is an important means of resolving intellectual property disputes, particularly in international cases where a single decision is advantageous.

ADR in Switzerland is attractive for patent disputes as Switzerland provides for arbitration experts in most fields of technology and Switzerland has a liberal regime regarding the recognition and enforcement of arbitral awards.

According to Swiss case law, all aspects of intellectual property disputes are arbitrable, including contractual issues related to patents as well as disputes over the validity of patents. Whereas arbitration proceedings related to mere validity disputes are rather rare, contractual disputes are often the subject of arbitration proceedings (see **2.4 Specialised Bodies/Organisations for the Resolution of Disputes**).

10. ASSIGNMENT AND LICENSING

10.1 Requirements or Restrictions for Assignment of Intellectual Property Rights

Under Swiss law, the assignment of intellectual property rights consists of the undertaking to assign the right and the actual disposition of the right. While the undertaking to assign the right is not required to fulfil specific formal requirements, the actual transfer of the patent or patent application rights must be made in writing (Article 33 paragraph 2bis, PatA).

In order to validly assign and transfer the patent or patent application rights neither the approval of the IPI nor its recording in the Swiss patent register is required. However, if the assignment is not recorded, it is invalid against persons who have acquired in good faith rights to the patent from the registered patent owner.

For the recording of the assignment of the patent or patent application rights, the IPI requests the written consent of both the assignor and the assignee.

10.2 Procedure for Assigning an Intellectual Property Right

See **10.1 Requirements or Restrictions for Assignment of Intellectual Property Rights.**

10.3 Requirements or Restrictions to License an Intellectual Property Right

Under Swiss law, there are no specific formal requirements for licence agreements. Licence agreements can even be concluded orally and no approval of the IPI is required. However, where the patent application or the patent is owned by two or more persons, a licence grant requires the consent of all co-owners.

Licences may be recorded in the Swiss patent register, but this is not required for their validity between the contractual parties. However, if the licence is not recorded, it is invalid against persons who have acquired the patent in good faith (Article 34 paragraph 4, PatA).

For the recording of the licence rights, the IPI requests the written consent of the licensor.

10.4 Procedure for Licensing an Intellectual Property Right

See **10.3 Requirements or Restrictions to License an Intellectual Property Right.**

Pestalozzi is a multicultural Swiss business law firm that has focused on high-end work for domestic and international clients since 1911. Pestalozzi's lawyers are strong and empathic personalities, known for their truly independent approach to advising and representing their clients. The firm guides and supports its clients in their strategic business decisions, anticipates their future challenges and helps them solve their critical issues. Being fully integrated, Pestalozzi encounters no internal limits in shaping the most competent and efficient teams for clients' needs. With over 100 professionals in

Zurich and Geneva, the firm is at home in Switzerland's two main commercial hubs. While being locally embedded, Pestalozzi has also developed a sought-after expertise in dealing with multi-jurisdictional transactions and disputes. Pestalozzi has a long tradition in providing intellectual property services. Its IP practice group is known to provide results-oriented, effective and pragmatic solutions for the protection and commercialisation of intangible assets, including representing clients from all industry sectors in enforcing and defending their intellectual property rights.

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