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Chapter 25

SWITZERLAND

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I FORMS OF INTELLECTUAL PROPERTY PROTECTION

Switzerland is a party to the majority of international treaties concerning protection of intellectual property rights, including the Paris Convention (industrial property), the Berne Convention (copyright), the Rome Convention (performances, phonograms and broadcasts), the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and – with a particular focus on patents – the Patent Cooperation Treaty (PCT), the Patent Law Treaty, the European Patent Convention and the London Agreement. However, since Switzerland is neither a Member State of the European Union (EU) nor of the broader European Economic Area (EEA), it is not bound by harmonised EU regulations and directives. Hence, there are some notable differences from the *acquis communautaire*, particularly in the field of copyright. Nevertheless, the Swiss legislator frequently tends to unilaterally adopt European directives in order to ensure regulatory compatibility to a certain degree.

The most important forms of intellectual property protection available in Switzerland are briefly described below.

i Patents

Despite the small domestic market, patents attract particular attention in Switzerland owing to the importance of the pharmaceutical industry and its upstream sectors. Patents may be obtained on the basis of a national or – more commonly – a European application or via the designation of Switzerland (directly or through a European application) pursuant to the PCT. In order for a technical invention to be patentable, it must be new, non-obvious, capable of industrial application and sufficiently disclosed. It needs to be emphasised at the outset

1 Thomas Schär and Martina Braun are senior associates, and Brigitte Bieler and Nicolas Gut are associates, at Wenger Plattner.

though that national applications are not examined with respect to novelty and inventiveness and are therefore granted on the basis of a mere examination of formal aspects. The term of protection is 20 years from the filing date.

The patent endows the proprietor with a right to enjoin others from commercial use of the invention, which encompasses, in particular, manufacturing, storage, offering, placing on the market, importation, exportation, as well as possession for any of these purposes. Carrying in transit may also be prohibited, provided that the patentee could prohibit importation into the country of destination.

The effects of the patent do not, *inter alia*, extend to use within the private sphere for non-commercial purposes; research or experimental purposes; or for obtaining marketing authorisation for a medicinal product. Further, the Federal Patent Act stipulates EEA-wide (so-called regional) exhaustion, except if the patent protection is only of subordinate importance for the functional characteristics of the goods, in which case the patented goods first sold by or with the consent of the patentee anywhere in the world may be imported. On the other hand, the patentee's consent is always reserved if the goods are subject to price regulation in Switzerland or the country of origin. This carveout of national exhaustion is mainly designed to prevent parallel imports of pharmaceutical products.

Utility patents for minor technical inventions do not exist in Switzerland. However, since the requirements of novelty and non-obviousness are not examined *ex officio* during the application process, domestic patents may serve as an instrument of protection that is relatively easy to obtain, but also easy to challenge.

ii Supplementary protection certificates

Supplementary protection certificates (SPCs) can be obtained for active ingredients of patented and authorised pharmaceutical products or pesticides. The term of protection is the shorter of five years or the time between the filing date of the patent and the date of marketing authorisation in Switzerland, minus five years. The application for an SPC must be filed within six months following the date of marketing authorisation or patent grant, whichever occurs later. The SPC grants the same rights as a patent and is subject to the same restrictions. Within these limits, the scope of protection extends to any use of the product as a pharmaceutical (or pesticide, as the case may be).

As the law currently stands, there are no other forms of patent term extensions available in Switzerland. However, for products for paediatric use this will change following the enactment of amendments to the Federal Therapeutics Act and Federal Patent Act, respectively, which have been passed by Parliament in March 2016 (see Section V, *infra*). The revised Federal Patent Act will bring about a six-month SPC extension for paediatric pharmaceuticals.

iii Data exclusivity

Holders of marketing authorisations for pharmaceutical products benefit from a 10-year data exclusivity period, during which no generic manufacturer may rely on the results of the pharmacological, toxicological and clinical tests of the authorised product without the originator's approval.

Upon the implementation of the revised Federal Therapeutics Act (see Section I.ii, *supra*), authorisation holders will benefit from a data exclusivity period of up to 15 years for medicinal products for paediatric use and rare diseases in the future.

iv Copyright

Copyright protection for literary, scientific or artistic works of individual nature, including computer programs, is available immediately upon the work's creation irrespective of the author's nationality or domicile and is not subject to any registration requirement. The term of protection expires 70 years after the author's death. Neighbouring rights (rights of artistic performers, phonographic rights, rights of broadcasters) benefit from a term of 50 years from the year of presentation, publication or transmission respectively. There is no *sui generis* protection of database rights or photographs in Switzerland.

The copyright owner is entitled to determine if, when and how the work is being exploited. The owner's exclusive right is limited by the private use and other customary limitations, which are devised in a relatively broad manner and are partly subject to collective exploitation by authorised collecting societies. Federal Supreme Court decisions confirmed that the Swiss Copyright Act is technologically neutral.[2] Pursuant to long-established case law and subject to a few statutory exceptions, Switzerland has adopted the concept of international exhaustion of copyright, meaning that an example of a copyrighted work put into circulation with the author's consent anywhere in the world may be freely imported into Switzerland.[3]

v Trademarks

Trademark protection can be obtained through national registration or designation of Switzerland via the Madrid System (Agreement and Protocol). Signs that (1) belong to the public domain; (2) are of a shape that constitutes the essential nature of the claimed goods or is otherwise technically necessary; (3) are misleading; and (4) are contrary to public policy, morality or the law cannot acquire protection as a trademark. Swiss examiners tend to be fairly strict when it comes to the appraisal of misleading indications of origin, both alluding to domestic locations or places abroad.

A trademark is valid for a period of 10 years from the date of application and may be renewed indefinitely for subsequent periods of 10 years each. The trademark endows the owner with the exclusive right to prohibit others from commercially using an identical or confusingly similar sign for the designation of specific goods or services. As in copyright protection, the Swiss Federal Supreme Court has posited international exhaustion once a branded product has been put into circulation for the first time.[4]

The Swiss Federal Institute of Intellectual Property (the Institute) has issued Trademark Guidelines on the conduct of its proceedings, which are available in German, French or Italian.[5] Additionally, the Institute provides a trademark examination support tool that serves to predict trademark examination decisions made by the Institute as well as to maintain consistent trademark practice. It contains decisions of the Institute on applications for the registration of trademarks and oppositions, abstract examination rules and geographical indications protected under international treaties.

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2 Federal Supreme Court, 30 July 2015, 4A_203/2015 = sic! 11/2015, 639 et seq.; Federal Supreme Court, 28 November 2014 – Bibliothekslieferdienst, 4A_295/2014 = sic! 3/2015, 155 et seq.

3 Federal Supreme Court, 20 July 1998 – *Nintendo*, 124 III 321 et seq.

4 Federal Supreme Court, 23 October 1996 – *Chanel*, 122 III 469 et seq.

5 Trademark Guidelines, available at: www.ige.ch (last visited 24 March 2016).

Indications of origin are protected in their own right by virtue of Articles 47 et seq. of the Federal Trademark Act. They are not subject to any registration requirements. On 1 January 2017, the new 'Swissness' legislation will come into force. The Swissness criteria strengthen the protection of the 'Made in Switzerland' designation and the Swiss cross. The bill establishes precise rules in the Federal Trademark Act concerning the conditions under which a product or service may be labelled as being Swiss. If these rules are complied with, services and goods can be endorsed with the Swiss cross.

Unregistered signs and trade dresses are capable of protection under unfair competition law, while company names benefit from a specific protection regime. Domain name registrations do not entail legal exclusivity rights *per se*, but earlier trademarks or trade names may constitute a claim for having a corresponding domain name transferred. Since September 2015, the new '.swiss' internet domain is available to the Swiss community. It is exclusively available to organisations that have a relationship with Switzerland.

vi Designs

A design is the visible form of a two-dimensional or three-dimensional object, which is eligible for protection if it is new and distinctive without offending public order, morality or the law. Protection may be obtained by way of national registration or designation via the Hague and Geneva Acts of the Hague Agreement. The thresholds for registration are deliberately kept low, which is why the constitutive requirements of novelty and distinctiveness are not examined *ex officio*. A downside resulting from these low thresholds is that any registered design remains heavily exposed to nullity defences by alleged infringers. The maximum term of protection is 25 years from the filing date. Since case law related to designs is scarce, the Federal Supreme Court has not yet been seized to opine on the geographic scope of exhaustion. Doctrine favours international exhaustion in analogy to the situation in copyright and trademark law.

vii Trade secrets and know-how

There is no exclusive right conferred on trade secrets and other valuable confidential business information as such. However, unauthorised disclosure or exploitation of corresponding information is sanctioned by virtue of unfair competition and criminal law. Trade secrets are widely perceived as a viable alternative to patent protection outside the pharmaceutical and chemical sector, given the potentially undetermined protection period, the avoidance of disclosure and the deterring costs of prosecuting and enforcing patents.

II RECENT DEVELOPMENTS

The Federal Patent Court (the Patent Court), which began operations on 1 January 2012, has continued to increase its profile. Its judgments are generally well received and, in 2015, the Patent Court further pursued its intention to offer expedited and cost-efficient proceedings. As in previous years, the Patent Court continued to achieve a remarkable settlement ratio: in 16 out of 19 ordinary proceedings concluded by the Patent Court in 2015, a settlement was attained.

On 11 December 2015, the Federal Council submitted the draft amendment of the Copyright Act for consultation. The preliminary draft for modernisation of the copyright

is guided by the recommendations of the copyright working group (AGUR12).[6] The end date for the consultation procedure was 31 March 2016. The proposals in the draft for consultation primarily focus on the following provisions and aims:[7]

a Improved anti-piracy strategy: Hosting providers domiciled in Switzerland have to remove copyright infringing content from their servers (take down). In case they do not join a self-regulating body, they also have to prevent such content from being re-uploaded onto their servers (stay down).

b More efficient collective management of copyright: The draft bill lays the foundation for ensuring that in the future, new offers can be made available to consumers quickly and legally via voluntary collective rights managements, internationally known as 'extended collective licensing'. The draft bill also expands the supervision of the collective management of rights.

c Modifications to limitations and exceptions to copyright as well as other changes: The press photographers should have the sole right of copying and selling their photographs, for as long as these photographs are of interest to current media reporting. In addition to the already existing remuneration for the rental of copies of a work, a new remuneration is to be introduced for the lending of copies of a work. The subject matter of rental and lending are books, videos, the visual arts and music scores. Lending is defined as the situation when a copy of a work is given to somebody for a certain period of time to use free of charge. Only if someone lends out copies of works as a main or part-time business, such as libraries and museums, should therefore owe remuneration.[8]

Pursuant to the consultation procedure, the draft bill summarised above may be adjusted and will be subject to approval by the Swiss Parliament.

III OBTAINING PROTECTION

Domestic patent applications are to be filed with the Institute, which is also the designated office for dealing with international applications claiming patent protection in Switzerland pursuant to the PCT. Applicants domiciled in Switzerland may also file European patent applications with the Institute, with the exception of divisional applications.

Upon filing of a patent application, the Institute will first conduct a formal examination and then proceed to the validation of the technical elements of the invention upon receipt of the examination fee. The substantive validation focuses on the patentability of the invention, grounds for exclusion from patentability, sufficient disclosure of the invention, admissibility of modification of the technical documents, and the formulation of the patent claims. Unlike the European Patent Office, the Institute does not examine the criteria of novelty and

6 www.ige.ch/en/copyright/modernisation-of-copyright.html.

7 In particular, the following remarks are based on the Media Release and Media Kit from the Swiss Federal Institute of Intellectual Property, dated 11 December 2015.

8 www.ige.ch/fileadmin/user_upload/Urheberrecht/e/modernisierung_urheberrecht_2015_e/Medienrohstoff_URG_EN.pdf; www.ige.ch/fileadmin/user_upload/Urheberrecht/e/modernisierung_urheberrecht_2015_e/Medienmitteilung_2015_12_11_EN.pdf.

inventive step *ex officio*. Consequently, the applicant is under no obligation to disclose prior art. The application is published at the latest 18 months following the application or the earlier designated priority date.

For an invention to be patentable, it must be of a technical character, namely, it must entail a physical interaction with the environment. In this light, claims merely containing characteristics of computer software as such or of business methods transposed to a computer network are not capable of being patented. The invention must further be executable and reproducible in industrial application.

The following types of inventions are excluded from patentability:

a the human body as such, at all stages of its formation and development, including the embryo (an element of the human body is, however, patentable if it is produced by means of a technical process and a beneficial technical effect is indicated);

b naturally occurring gene sequences or partial sequences (however, technically produced derivatives of gene sequences may be patented if their function is specifically indicated);

c unmodified human embryonic stem cells and stem cell lines;

d processes for cloning human beings or the creation of other organisms by using human genetic material;

e processes for modifying the germ line genetic identity of human beings;

f essentially biological processes for the production of plants or animals;

g harmful processes for modifying the genetic identity of animals without due justification;

h use of human embryos for non-medical purposes; and

i methods for surgical treatment or therapeutic and diagnostic methods practiced on the human or animal body. However, substances and compositions solely intended for such medical use (first medical indication) or for use in the manufacture of a means to a medical end (a 'Swiss-type claim', also available for second and further medical indications) are patentable even if the underlying substances and composition form part of the prior art. The latter constitutes a notable discrepancy with the European procedure, where Swiss-type claims are no longer admissible.

In the event that biological material is directly obtained by a patented manufacturing process, the effects of the patent also extend to propagated material (vertical extension of protection) and to products in which the biological material is incorporated (horizontal extension of protection). These principles also apply to the Swiss part of European patents.

Once granted, the patent may be opposed by third parties within a time limit of nine months, but solely on the grounds of non-patentability essentially for reasons of public policy or morality. Hence, the requirements of novelty or non-obviousness can only be scrutinised by the Patent Court in nullity or infringement proceedings by virtue of a counterclaim or objection.

IV ENFORCEMENT OF RIGHTS

i Possible venues for enforcement

The Patent Court has exclusive jurisdiction in the first instance over validity and infringement disputes and for suits aiming at the grant of licences related to patents, including the ordering of preliminary measures with respect thereto. Its competence also comprises the enforcement

of decisions made under its exclusive jurisdiction. Further, the Patent Court has concurrent jurisdiction in other civil actions with a factual connection to patents, such as the right to patents or the assignment of patents. This is particularly interesting in disputes where the Patent Court's technical expertise is sought by the claimant.

In addition to civil claims, criminal proceedings and border control measures may be envisaged by the patentee. In case of a suspected imminent import, export or transit of goods that infringe a patent that is valid in Switzerland, the customs administration may withhold – either on its own initiative or on request of the patentee or the licensee of the patent – the concerned goods for a period of up to 10 working days (extendable to a maximum of 20 working days) to allow the applicant to institute proceedings for preliminary measures.

The Patent Court is also competent with regard to the defence of patent invalidity, independent of whether such defence is raised in the form of an objection, a counterclaim or a distinct revocation action. Hence, if – on a preliminary question or defence basis – the question of the nullity or infringement of a patent is at stake before an ordinary civil law court, the latter stays the proceedings and sets a reasonable time limit to file an independent revocation or infringement action before the Patent Court. If no such action is filed, the seized court will resume the proceedings and disregard the preliminary question or defence. In case the defendant party files a counterclaim for revocation or infringement before an ordinary civil law court, the latter completely loses its competence and refers both actions to the Patent Court.

Finally, arbitral decisions on patent infringement and validity rendered by an arbitral tribunal having its seat in Switzerland are enforceable in Switzerland. The Institute will only act upon an arbitration ruling if a certificate of enforceability is produced. Such certificate will be issued by the High Court of the canton in which the arbitral tribunal is seated. Regarding the enforceability of foreign arbitral decisions the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is applicable.

ii Requirements for jurisdiction and venue

The patentee is entitled to demand the cessation of or desistance from infringements if infringing acts are imminent or have already occurred, and to claim damages in case such infringing acts have been performed voluntarily or through negligence. Further, an action for a declaratory judgement may be filed, provided that the plaintiff shows a qualified interest. Such interest is given, where an unclear and enduring legal situation that cannot be remedied by other means exists. Hence, if the plaintiff can bring an action for infringement, it is usually deprived of an interest to obtain a declaratory judgment.

Exclusive licensees may procure injunctions and claim damages independently and on their own right, unless excluded by the licence agreement. Non-exclusive licensees must procure title to sue from the patentee. However, pursuant to Article 75 of the Federal Patent Act licensees of any type may join an action for damages instituted by the patentee in order to claim their own loss or damage.

Nullity actions may be brought by anyone demonstrating a legitimate interest in defeating the patent. The thresholds for showing such interest are rather low, an actual or potential competitive relation with the patentee is deemed sufficient. Non-challenge clauses in licence agreements should in principle prevent the licensee from having the patent revoked. However, such clauses are contested with regard to European competition law.

iii Obtaining relevant evidence of infringement and discovery

As a matter of principle in Swiss civil procedure law, the parties to the proceedings have to produce the relevant evidence in support of their allegations. Fact-finding attempts comparable to pretrial discovery are stigmatised as fishing expeditions.[9] However, there are two procedural mechanisms to obtain an adversary's evidence even before filing the lawsuit on the merits.

First, a patentee requesting preliminary measures may demand that the Patent Court orders a precise description of the allegedly unlawful products manufactured or processes used. The applicant must provide *prima facie* evidence that an existing claim has been infringed or an infringement is suspected to occur. If the opposing party claims that a manufacturing or trade secret is involved, the Patent Court will take the necessary measures to safeguard such secret, for instance by conducting the procedure for establishing the description *ex parte*. Such exclusion does not necessarily extend to the applicant's attorney or patent attorney, who, however, may be bound to secrecy by the court with regard to their clients and ordered to hand in their notes to the court.[10]

Second, the Federal Code of Civil Procedure allows to request the court to take preliminary evidence if the applicant makes it plausible that the evidence is at risk, in particular that it may disappear, or if another legitimate interest is established.

The scope of the taking of evidence is confined to the establishment of facts that are legally relevant and disputed by the parties. For instance, a request to disclose the identity of an unspecified manufacturer of allegedly infringing products is not permissible.[11] Further, the alleged infringer cannot be compelled to release documentary evidence. The taking of evidence is therefore confined in practice to the seizure or visual inspection of infringing goods or methods, examination of witnesses, procurement of expert opinions or the release of documents in the hands of third parties.

As an alternative to preliminary measures pertaining to the taking of evidence, the plaintiff may also specify documentary evidence in the hands of the defendant or third parties to be released. The defendant is not obliged to meet such a request. However, refusal of such release will be considered by the court in the course of the appraisal of the evidence on file. Third parties on the other hand are obliged to comply with a court's order to release documentary evidence.

Last, the patentee is entitled to demand disclosure of information pertaining to the sources, quantities and recipients of infringing products.

iv Trial decision-maker

The Patent Court is a specialised court constituted by two permanent judges and 38 non-permanent judges, of whom 27 are technical experts and 11 have a legal education. All of them have proven knowledge of patent law. In regular proceedings, the panel is composed of three, five or seven judges and always includes as well jurists as technically trained specialists. In proceedings regarding preliminary measures, the chairman usually rules as a single judge on procedural aspects and appoints a panel of three judges whenever deemed

9 As expressly declared by the Patent Court, 27 April 2012, S2012_006, cons. 7.

10 Patent Court, 30 August 2013, S2013_008, cons. 7.

11 Federal Patent Court, 12 June 2012, S2012_006, cons. 7.

appropriate for legal or factual considerations. Also, if the understanding of a technical issue is of particular significance, decisions regarding preliminary measures must be made in a panel of three.

v Structure of the trial

Proceedings before the Patent Court are governed by the Federal Civil Procedure Code, unless otherwise provided in the Federal Patent Act or in the Federal Act on the Patent Court. Further, the Patent Court has issued guidelines on the conduct of its proceedings, which are also available in English.[12]

Proceedings in patent disputes are initiated by submission of the plaintiff's written statement of claim outlining the relevant facts and offering the supporting evidence. After receipt of the statement of claim, the Patent Court designates one of the three official languages in Switzerland – being German, French and Italian – as the language of the proceedings. Generally, the language used in the statement of claim is chosen, provided that it is one of the official Swiss languages. Nevertheless, the parties are allowed to express themselves in motions and – subject to a three-week prior notice – in oral hearings in another of the official Swiss languages than the designated language of the proceedings. Further, English may be used subject to the consent of the Patent Court and both parties. However, the judgment and procedural rulings will be drafted in one of the official languages in any event.

After submission of its statement of claim, plaintiff is ordered to pay an advance on the court fees. Simultaneously, the defendant is served with the statement of claim for its attention. Recently, the Patent Court changed its practice regarding the payment of the court retainer fee in ordinary proceedings in such way as henceforth the plaintiff has to pay an advance on only half of the expected court costs for a decision. Only upon receipt of the advance payment will the court will set a time limit to the adverse party to submit its statement of defence.

Upon receiving the statement of defence, or, in the case of a counterclaim, upon receiving the reply and defence to counterclaim, an instruction hearing generally takes place, in which the chairman or the instructing judge and the designated technically trained judge participate. After a discussion with the parties on the matter in dispute, the court delegation will proceed with a preliminary assessment of the matter off the record and will attempt to bring about a settlement. If no settlement is achieved, the proceedings will usually continue with another exchange of briefs.

At the end of the exchange of briefs, the main hearing takes place. If a judge's expert opinion is rendered, the parties are given the opportunity to submit their positions thereto. Thereafter, theoretically the procedure of taking evidence would take place. However, up until now, no such procedure has been performed by the Patent Court. As stated in subsection iii, *supra*, object thereof are the facts that are legally relevant and disputed by the parties. The plaintiff normally carries the burden of proof in infringement proceedings. However, regarding invention concerning a process for the manufacture of a new product the burden of proof is reversed in the way that every product of the same composition shall be presumed

12 Guidelines on Proceedings before the Patent Court (effective from 1 January 2016), available at: www.bundespatentgericht.ch (last visited 24 March 2016).

to have been fabricated by the patented process until proof to the contrary has been provided. The same applies to a process for the manufacture of a known product if the patentee shows probable cause of a patent infringement.

vi Infringement

Pursuant to Article 66 of the Patent Act, use or imitation of a patented invention is deemed an infringement (i.e., literal and equivalent infringements are prohibited). The Patent Court adapted the previous Swiss doctrine of equivalents to the prevailing standards in continental Europe. Hence, equivalent infringement takes place if the following three criteria are met: (1) a product or process substitutes certain functional characteristics of a patent claim (same effect), while (2) the substitutive characteristics must be evident to an expert in the art in view of the patented teaching (accessibility), and (3) are considered by such expert as a solution of equal value with respect to the patent claim as literally stated in light of the description (equal value).[13] The third element emphasising the importance of the literal patent claim for the determination of the equivalence was absent in the past practice of the Swiss cantonal courts and the Federal Supreme Court.

vii Defences

Defences may be asserted in the course of the infringement proceedings or by way of an independent action against the patentee (see subsection i, *supra*). Apart from non-infringement, the most popular defence against an infringement action is patent invalidity, which may be asserted based on lack of novelty, lack of inventive step, non-patentability, or insufficient disclosure of the invention for it to be carried out by a person skilled in the art. Further, a patent can be revoked if the subject matter of the patent goes beyond the content of the initial patent application or if the patentee was not entitled to be granted the patent (e.g., because the invention was made by someone else).

As a less common defence, the alleged infringer may argue that the incriminated use is exempted from patent protection because of private use or other privileged purposes or because of exhaustion of rights (see Section I.i, *supra*). Further, a patent cannot be invoked if the alleged infringer was commercially using the invention in good faith in Switzerland or had made special preparations for that purpose prior to the filing or priority date of the patent application. Such person is allowed to continue to use the invention for the purposes of its trade or business. Further, a compulsory licence may be claimed if the respective prerequisites are met. Compulsory licences are available *inter alia* for facilitating the use of dependent inventions purporting a major technical advance, in the absence of sufficient exploitation of a patent in Switzerland, if public interest so demands, as a remedy for anticompetitive behaviour in the field of diagnostics, or for the export of pharmaceutical products to developing countries.

13 Patent Court, 21 March 2013, S2013001, cons. 17.2, confirmed by the Patent Court, 25 January 2016, O2014_002, cons. 6.5.2.2.

viii Duration of first-level decision

The Patent Court aims to render a first instance judgment within 12 months of the commencement of proceedings. Hence, the parties are confronted with relatively short time limits to submit their briefs, ranging between four and six weeks, and limited possibilities to request an extension of time limits.

ix Remedies

The main remedies available to the patentee are injunctions and compensation of damages. Further, surrender of documents and information disclosing the source, quantities and recipients of infringing products can be ordered by the court.

With respect to monetary claims for compensation of damages or disgorgement of unlawfully attained profits, the plaintiff may in a first step demand disclosure of evidence relevant for the quantification of the claimed amount, which will then be pursued in a second step. Three alternative calculation methods are recognised by the courts: proof of the actual loss of profits, licence analogy and conclusion by analogy based on the profits of the infringer.[14] There are no punitive damages in Switzerland.[15]

Under the concept of licence analogy, the damage actually suffered is substituted by a fictitious reasonable royalty that would have been due if the adverse parties had entered into a licence agreement. However, according to the Federal Supreme Court, the plaintiff must establish a causal link between the hypothetical damage and the conduct of the infringer; in other words, evidence that a licence agreement could possibly have been concluded is required.[16] This requirement defeats the concept of licence analogy in the majority of cases, but the plaintiff may demand the same by taking recourse to the concept of unjust enrichment in the amount of the infringer's savings commensurate to a fictitious reasonable royalty rate.

Injunctions may also be obtained by way of preliminary measures, provided that the plaintiff shows credibly that the patent is infringed or an infringement is imminent, he or she is likely to suffer irreparable harm because of such infringement, and there is urgency. In case of particular urgency, preliminary measures may be ordered immediately and without hearing the opposing party. However, *ex parte* injunctions are rarely granted. With respect to *ex parte* injunctions based on domestic patents, it should be noted that the plaintiff must produce *prima facie* evidence on the validity of the patent, such as an official search report, because there is no *ex officio* examination of novelty as a prerequisite for patent grant.[17] If an infringer expects an attempt by the patentee to obtain an *ex parte* injunction, it may lodge a preventive protective writ with the Patent Court outlining the defence against the anticipated allegations.

x Appellate review

Judgments rendered by the Patent Court may be appealed to the Swiss Federal Supreme Court. In general, just points of law may be invoked, the findings of facts can be challenged only in very limited circumstances.

14 Federal Supreme Court, 19 December 2005,132 III 379, cons. 3.2.

15 Federal Supreme Court, 10 October 1996, 122 III 463, cons. 5cc.

16 Federal Supreme Court, 19 December 2005,132 III 379, cons. 3.3.

17 Federal Patent Court, 24 May 2013, S2013_005, cons. 3.

Preliminary rulings are considered as intermediary orders and are therefore solely appealable if they are capable of causing irreparable legal prejudice to the appellant and in general only on the grounds of violations of constitutional rights.

xi Alternatives to litigation

Since the objections admissible in oppositions brought against domestic patents before the Institute are very limited (see Section III, *supra*), opposition is only a viable alternative to litigation if directed against a European application within nine months after grant of the right in the patent.

V TRENDS AND OUTLOOK

With regard to patent law, the current reform focuses, *inter alia*, on improving the conditions for biotechnical research and industry as well as medical treatment of children and patients with rare diseases. The Swiss Parliament finally adopted the revised Federal Therapeutics Act and Patent Act in March 2016. As an incentive for research, a six-month SPC extension for paediatric pharmaceuticals and a data exclusivity period of 15 years for products for paediatric use or rare diseases will be introduced. The new statutory provisions are expected to enter into force by the end of 2017.

Although Switzerland will not participate in the unitary patent and Unified Patent Court scheme of the European Union, the corresponding developments will be closely observed and analysed.

Appendix 1

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Thomas Schär is a senior associate on the IP, private clients and litigation teams. He advises private clients as well as national and international companies, primarily in relation to IP, licensing and contract law. Another focus of his activity is insolvency and restructuring. Mr Schär also represents clients in court, having built an impressive track record as a litigator.

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Martina Braun is a senior associate and member of the IP & IT and the life sciences and health law teams. She advises and represents clients on all aspects of intellectual property law and information technology, with a particular focus on copyright, trademarks and data protection. One of her key areas of expertise is advising on contract law. She also deals with a wide range of health law matters and the related regulatory issues.

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