

Switzerland

Administrative procedure

The Swiss Federal Institute of Intellectual Property (hereinafter the “Patent Office”) is the competent authority for granting patents in Switzerland and Liechtenstein. Switzerland and Liechtenstein have the same patent regulations based on a Patent Treaty (Treaty between the Swiss Confederation and the Principality of Liechtenstein on Patent Protection of 22 December 1978). A Swiss patent is valid in Liechtenstein, and a Liechtenstein patent is equally valid in Switzerland. The two countries form a unified territory of patent protection.

Opposition

Any person may give notice of opposition to the grant of a patent within nine months of publication of the entry in the Patent Register (Art. 59c PatA). Opposition may be based only on the grounds that the subject-matter of the patent is not patentable under Arts. 1a, 1b and 2 PatA (Art. 59c PatA).

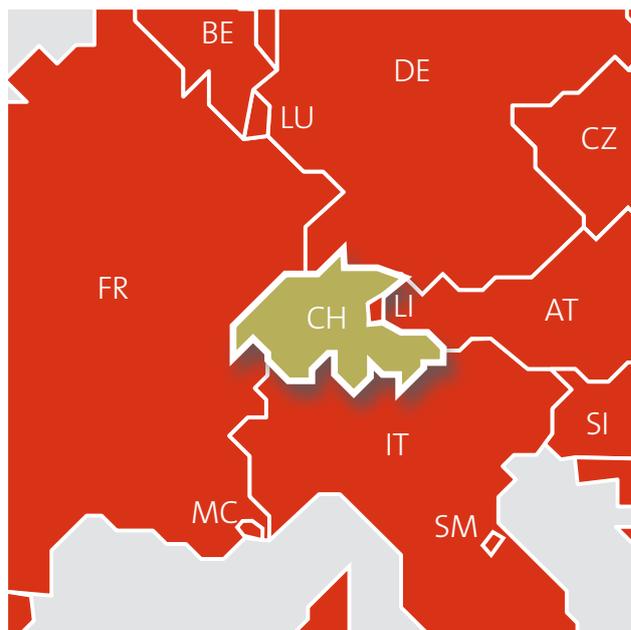
Appeal

The decisions of examiners, legal services and opposition divisions of the Patent Office may be appealed before the Swiss Federal Administrative Court. Any party to proceedings adversely affected by a decision or a person whom the decision has excluded from the procedure may appeal. Judgments of the Federal Administrative Court may be appealed to the Swiss Federal Supreme Court.

Civil procedure

In patent matters only, the Principality of Liechtenstein has a common court structure with Switzerland. The Court of Appeal (Obergericht) has competence for patent issues in Liechtenstein at first instance. Appeals against its judgments in patent matters, in as far as substantive issues are concerned, can be filed with the Swiss Federal Supreme Court.

On 1 January 2012, the Swiss Federal Patent Court Act (PatCA) entered into force and created a specialised patent court in Switzerland. The Swiss Federal Patent Court is now exclusively competent for all patent validity and infringement disputes and other matters having a factual



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connection to patents (Art. 26 PatCA). However, in other civil patent matters (concerning the right to patents or their assignment) the 26 cantonal courts may have parallel competence to the Federal Patent Court.

The Federal Patent Court ensures the necessary expertise and effective legal protection for technical inventions. The court comprises both legally and technically qualified judges to take account of the fact that patent disputes are at the interface of technology and law. The applicable procedural law is the Swiss Civil Procedure Code (CPC), as well as special provisions in the PatCA (Art. 27 et seq.) and the PatA relating to the particularities of patent law.

Infringement

The patentee or exclusive licensee may take action under civil or penal law against a person who uses the patented invention unlawfully (Art. 66 PatA).

The Federal Patent Court has exclusive jurisdiction over infringement disputes and actions for issuing a licence in respect of patents (Art. 26(1) PatCA).

If a preliminary question or plea on the validity of the patent infringement in a civil litigation case is put before a cantonal civil court, proceedings will be suspended. The cantonal judge will set an appropriate deadline for filing the validity action before the Federal Patent Court. The cantonal court stays the proceedings until a final decision has been rendered on the action (Art 26(3) PatCA).

Where the defendant files a counterclaim for nullity of a patent, the cantonal court refers both actions to the Federal Patent Court (Art. 26(4) PatCA).

Criminal proceedings: upon request of the injured party, criminal proceedings may be initiated before a criminal court against a party who wilfully commits an infringement (Art. 81 PatA). If the accused party claims the nullity of a patent, the court may grant him an appropriate deadline to file an action for declaration of patent nullity, with a warning of the consequences of his failure to do so (Art. 86 PatA).

Nullity/counterclaim for revocation

Any person having a legitimate interest may claim the nullity of a patent before the Federal Patent Court (Art. 26 PatA; Art. 26(1) PatCA).

Partial nullification is possible (Art. 27 PatA).

Cancellation of a patent due to non-working (Art. 38 PatA): If the grant of licences does not suffice to meet the demand of the Swiss market, any person with a proven interest may request the cancellation of the patent after a period of two years from the grant of the first licence under Art. 37(1) PatA before the Federal Patent Court.

In nullity proceedings before the Federal Patent Court the patentee may, and in practice often will, present amended claims, also as auxiliary requests.

Remedies

Injunction, suspension, seizure, confiscation or destruction of products manufactured unlawfully; additionally, publication of the judgment can be ordered; an infringer may also be liable for damages (Art. 69-73 PatA).

Other actions

Any person demonstrating a legitimate interest may request a declaratory judgment as to the infringing character of one or more acts (Art. 74 No. 3 PatA).

Appeal

A further appeal may be filed with the Swiss Federal Supreme Court, irrespective of the value in dispute. The Swiss Federal Supreme Court is generally bound by the

findings of fact of the lower instance, and its reviews are usually confined to points of law.

Parallel proceedings

A party may invoke the nullity of the Swiss part of a European patent, be it as a request or as a defence, regardless of any parallel proceedings at the EPO. The Swiss judge may however suspend the proceedings in case of parallel opposition or appeal proceedings at the EPO (Art. 128 PatA).

Arbitration/mediation

The structure of the procedure before the Federal Patent Court fosters settlements between the parties. It includes, for example, preparatory hearings with opportunities for the parties to negotiate, if desired with the assistance of the court. The court may at any time attempt to reach a settlement agreement between the parties (Art. 124(3) CPC). The settlement rate at the Federal Patent Court is therefore high (above 75%).

In Switzerland, there is no official authority for arbitration or mediation. The Federal Patent Court may recommend mediation to the parties at any time, and the parties may also make a joint request for mediation at any time. The parties are responsible for organising and conducting the mediation (Art. 215 CPC).

Enforcement

The Federal Patent Court is competent for the enforcement of its preliminary or final decisions, as well as for measures for preserving evidence. There is a specific patent-related procedure for the preservation of evidence handled by the Federal Patent Court, similar to the French “*saisie-contrefaçon*” (Art. 77 PatA). To enforce a decision, the court may request the assistance of other authorities (e.g. the police, customs administration etc., Art. 343(3) CPC). If a decision relates to the payment of money or provision of security, it is enforced according to the provisions of the Federal Act on Debt Enforcement and Bankruptcy (DEBA) (Art. 335(2) CPC), and the Debt Recovery and Bankruptcy Office is the competent authority.

Compulsory licence

Swiss patent law includes several grounds for granting compulsory licences, such as the non-working of a patent;

the interest of the public; anti-competitive practices in the field of semiconductor technology; for research tools; for diagnostics; or for the export of pharmaceutical products to developing countries (Art. 36-40e PatA). A compulsory licence is granted by the Federal Patent Court (Art. 40e PatA, Art. 26(1)(a) PatCA).

Compulsory licences are issued only if efforts by the applicant to obtain a contractual licence on appropriate market terms within a reasonable period of time have been unsuccessful (Art. 40e(1) PatA). The patent holder has the right to appropriate remuneration (Art. 40e(5) PatA).

Relevant national law

Federal Act on Patents for Inventions of 25 June 1954 (Patents Act; PatA SR 232.14) [cited as: PatA];

Federal Act on the Federal Patent Court of 20 March 2009 (Patent Court Act; PatCA SR 173.41) [cited as PatCA];

Swiss Civil Procedure Code of 19 December 2008 (CPC SR 272) [cited as CPC].

Competent authorities or courts

