

# Enforcing patents in Switzerland

By **Michael Stierwald**, Braunpat Braun Eder AG, Basel

## 1. What options are open to a European patent holder, whose rights cover your jurisdiction, when seeking to enforce its rights in your jurisdiction?

In case of an alleged infringement the patent holder may file court actions for the award of an injunction and for the award of damages. Infringement suits can be filed only after the issuance of the patent; the suits can be civil or criminal. Damages may be claimed from the time at which the defendant should have become aware of the content of the patent application, but the action may be introduced only after grant of the patent. Only when the patent infringement has been committed intentionally can criminal proceedings be instituted.

A court may also order the confiscation, sale or destruction of the infringing articles. Declaratory judgment as to non-infringement or as to the validity of a particular patent may be requested by any interested party. The right of suing a given patent infringer is granted to an exclusive licensee but not to non-exclusive licensees.

## 2. Does your jurisdiction have specialist patent courts? If not, what level of expertise can a patent owner expect from the courts?

There are no special patent courts. Switzerland is a federal state and is divided into 26 cantons. In patent matters, the cantonal procedural laws are applicable and for each canton there is a court designated which receives the civil actions. The level of expertise is very heterogeneous. In principle, commercial courts have a higher level of expertise.

## 3. Is it possible to cross-examine witnesses

## at trial? How far are proceedings based on written evidence? Are there restrictions on the use of evidence from experts?

Cross-examination is not possible and proceedings are based on written evidence.

It is up to the court to appoint and question the experts. However, the parties can also appoint their own experts. Such expert opinions may be considered by the court.

## 4. Are infringement and invalidity dealt with simultaneously? What level of proof is necessary to demonstrate one or the other?

Infringement and invalidity are dealt with at the same court but not simultaneously. All allegations must be substantiated and the level of proof is rather high, based on written evidence or witnesses.

## 5. To what extent is pre-trial discovery permitted? If it is permitted, how is discovery conducted?

Pre-trial discovery is not permitted in Switzerland. Discovery can, in rare cases, be conducted by the judge.

## 6. To what extent does any doctrine of equivalents apply in an infringement action?

In Switzerland the patent protection provided is broader than the literal scope of the claim, as demonstrated by case law. Thus a doctrine of equivalents applies to patent cases.

## 7. Are there certain types of patent right that may be granted by the EPO – biotech or computer software-related, for example – that are more difficult to enforce than others?

No.

## 8. To what extent are courts willing to consider, or bound by, the opinions and decisions of other courts that have dealt with similar cases?

Cantonal courts are independent and therefore not bound by the decisions of other courts. However, the decisions of other

cantonal courts in similar cases may be considered, at the discretion of the court, to a high extent.

**9. To what extent are courts willing to consider the reasoning given by foreign courts that have handed down decisions in similar cases?**

Swiss courts are willing, at the discretion of the court, to consider the reasoning given by foreign courts to a high extent, depending on things such as the country from which a decision is cited and the seniority of the court that handed down the judgment.

**10. What options are open to a defendant seeking to delay a case? How can a plaintiff counter delaying tactics?**

The prolongation of time limits is the only means to delay a case. A judge may suspend the procedure or defer the judgment where the validity of a European patent has been contested and where one of the parties to the dispute gives evidence that opposition may yet be filed with the European Patent Office or that a final decision on the subject of a pending opposition has not been taken.

**11. How available are preliminary injunctions and how do you get them?**

Precautionary measures are provided by law in the event of infringement. Provisional measures may be ordered to secure evidence, to maintain the actual state of affairs and to enforce disputed rights provisionally. The party requesting such measures at court will have to furnish equitable security. The petitioner must provide *prima facie* evidence that the other party has committed or intends to commit an act contrary to law and that it is threatened by a loss which is not easily repairable, and which can be avoided only by provisional measures. Before a precautionary measure is granted, the opposing party will be heard, but if there is an imminent danger urgent measures may be taken even before hearing the opposing party, provided that it is informed thereof immediately after such measures are taken. If precautionary measures are granted, an infringement action has to be brought within a set term that shall not exceed 30 days.

**12. How long does it take to get a decision at first instance? Is it possible to expedite this process?**

Depending on the case, the technical field, expert opinions etc, a decision at first instance can be obtained within one to three

years. Besides consequent adherence to time limits, there is no possibility to expedite this process.

**13. What avenues for appeal are open to the defeated party in a first instance case? What criteria are there for granting an appeal? How long does the appeal process take?**

The Swiss law provides only one possibility for appeal. An appeal can be taken from the cantonal court to the Supreme Court of Switzerland regardless of the values in litigation.

**14. To take a case through to a first instance decision, what level of cost should a party to a litigation expect to incur?**

Depending on the amount in dispute and the complexity of the case – for example, if it requires expert opinions – costs for a first-instance decision are about CHF 50,000 to CHF 1 million, or even more.

**15. Who can represent parties in court? Is specialist representation required?**

Parties in court may be represented only by attorneys at law admitted to the bar of the corresponding canton. Patent attorneys provide the technical know-how.

**16. What remedies are available for infringement and how are these typically applied? Are punitive damages available and in what circumstances?**

Punitive damages are not available in Switzerland (see also 1, above). Whoever wilfully or by negligence or imprudence unlawfully utilises a patented invention shall be bound to pay damages to the injured party. The prerequisites for the liability for damages are given by the Swiss Code of Obligations (damage, illegality, fault, causal connexion). The injured party has to assess beforehand the amount of damages or the judge may be requested to award damages at his discretion on the basis of the evidence. The judge may also authorise the successful party to publish the decision at the expense of the other party. In criminal cases the infringer may be liable to imprisonment not exceeding one year or to a fine not exceeding CHF 100,000.

**17. Are there any realistic alternatives to litigation in cases relating to patent disputes?**

Besides negotiation or arbitration, there are no realistic alternatives to litigation.

**18. Has your jurisdiction signed up to either the London Protocol or the European Patent**

**Litigation Agreement? If not, how likely is it that it will do so?**

Switzerland has signed up to the London Protocol and is a member of the sub-group of the Working Party on Litigation to produce a draft agreement.

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**19. Are there any other features of the enforcement system in your jurisdiction that you would like to point out?**

A revision of the Swiss Patent Act is on the way. As well as changes to the cantonal procedural law, the establishment of a federal patent court with specialised judges is also up for discussion.