Switzerland

Dr. Markus Wang

Dr. Jonas Bornhauser

Bär & Karrer Ltd.

1 Patent Enforcement

1.1 Before what tribunals can a patent be enforced against an infringer? Is there a choice between tribunals and what would influence a claimant's choice?

In Switzerland, the Federal Patent Court has exclusive jurisdiction over those actions that require the application of substantive patent law, in particular, actions regarding the validity of patents, patent infringement actions and applications for preliminary measures.

Besides that, the Federal Patent Court Act (**PCA**) provides for concurrent jurisdiction of the Federal Patent Court and the cantonal courts for other patent-related disputes, such as disputes arising from patent licensing agreements.

In addition, willful patent infringement is a criminal offence under the Federal Act on Patents for Inventions, (**PatA**). In such cases, the patentee may initiate criminal proceedings against an infringer.

Finally, the patentee may request border control measures (see question 6.1).

1.2 Can the parties be required to undertake mediation before commencing court proceedings? Is mediation or arbitration a commonly used alternative to court proceedings?

No, the parties cannot be required to undertake mediation before commencing court proceedings. Further, mediation or arbitration are not a commonly used alternative to court proceedings, although patent infringement (and validity) matters are considered to be arbitrable in Switzerland.

1.3 Who is permitted to represent parties to a patent dispute in court?

Registered Swiss patent attorneys may represent their clients in proceedings concerning the validity of Swiss national patents or the Swiss part of a European Patent alone. In all other court proceedings, only Swiss attorneys are permitted to represent parties. Swiss patent attorneys are, however, given the opportunity to comment on the technical merits in all hearings before the Federal Patent Court.

1.4 What has to be done to commence proceedings, what court fees have to be paid and how long does it generally take for proceedings to reach trial from commencement?

Proceedings are started by the filing of a detailed written statement of claim (or a request for a PI) by the plaintiff. Upon the filing of the statement of claim, the proceedings are pending, subject to the payment of the advance. There are no other pre-trial steps required under Swiss law.

The Federal Patent Court will request the plaintiff to pay the advance within two weeks by a related order.

The amount of the requested advance depends on the amount in dispute. The following table lists the court fees to be paid in advance for different amounts in dispute. The specific costs within the indicate ranges depend on the subject-matter of the dispute and are determined by the importance, the level of difficulty and the scope of the matter, as well as by the attorney's expenditure of time.

Amount in Dispute [CHF]	Court fee [CHF]
Up to 50 000	1,000 – 12,000
50,000 – 100,000	8,000 – 16,000
100,000 – 200,000	12,000 – 24,000
200,000 – 1,000,000	20,000 – 66,000
1,000,000 – 3,000,000	60,000 – 120,000
3,000,000 – 5,000,000	80,000 – 150,000
More than 5,000,000	100,000 – 150,000

Recently, the Federal Patent Court changed its practice regarding the payment of the advance in ordinary proceedings in such way as henceforth the plaintiff has to pay an advance on only half of the above court costs for a decision.

1.5 Can a party be compelled to disclose relevant documents or materials to its adversary either before or after commencing proceedings, and if so, how?

The Swiss Code of Civil Procedure provides that courts must take evidence at any time before a case on the merits becomes pending if the requesting party has an "interest worthy of protection". Such interest is assumed to exist in case the relevant evidence is at risk, as it would otherwise not be available at a later date, or where the requesting party has an interest to be better able to assess the chances of success of a potential civil claim. This is aimed at helping to avoid unnecessary proceedings. It has proved to be helpful in cases where a party requires information that is in the hands of the presumed defendant in order to decide whether initiating a litigation is justified or not.

During a lawsuit, a party may be ordered by the court upon application of the other party to provide disclosure of relevant and specific documents or materials that are in that party's possession.

Failure to comply with such order may be taken into account by the court when assessing the weight of the evidence presented. The court may further request third parties to produce specific documents or materials relevant to the lawsuit. Finally, disclosure may also be ordered during a lawsuit in order to allow the plaintiff to substantiate its monetary claims. Specifically, the plaintiff may demand disclosure of the defendant's financial statements and information on the infringing activities in a first step. This shall enable the plaintiff to substantiate and quantify its monetary claim in a second step, i.e. once an infringement is established.

1.6 What are the steps each party must take pre-trial? Is any technical evidence produced, and if so, how?

There are no mandatory pre-trial steps to be taken. However, in order to not only preserve but establish evidence (unlike the precautionary taking of evidenced described under question 1.5), the Federal Patent Court can be requested to order the presumably infringing party to produce a description of an allegedly infringing process, of allegedly infringing products or of the means used for producing such products.

1.7 How are arguments and evidence presented at the trial? Can a party change its pleaded arguments before and/or at trial?

Patent actions are usually based on written evidence such as written prior art, evidence in writing for the skilled person's general knowledge, drawings and photographs of the allegedly infringing embodiment, correspondence between the parties and the like. Other means of evidence, such as, witnesses, are used less frequently. Further, affidavits and private expert opinions do not qualify as means of evidence, and since the Federal Patent Court usually finds the required expertise among its judges, it does not need to rely on the opinion of external experts.

A party is permitted to change its pleaded factual arguments in its second written submission (reply or rejoinder), if a second exchange of briefs is ordered, or during the oral instruction hearing that may be held before the main hearing. However, in the course of the main hearing, new facts and new exhibits are admitted only if certain prerequisites are met. If neither a second exchange of briefs nor an instruction hearing was held, new facts and exhibits are fully permitted.

1.8 How long does the trial generally last and how long is it before a judgment is made available?

In 2018, regular proceedings (without settlements) before the Federal Patent Court regarding patent infringement without counter-claim of nullity of patent on average took 354 days, such regarding the nullity of patent without counter-claim of patent infringement 545 days, and such regarding the infringement and nullity of patent 828 days.

The Federal Patent Court strives to render a first-instance judgment within 12 months of the commencement of proceedings. Therefore, the parties are confronted with relatively short time limits to submit their briefs and limited possibilities to request an extension of time limits.

1.9 Is there any alternative shorter, flexible or streamlined procedure available? If so, what are the criteria for eligibility and what is the impact on procedure and overall timing to trial?

No, Swiss law does not provide such alternative procedures.

1.10 Are judgments made available to the public? If not as a matter of course, can third parties request copies of the judgment?

Yes, the decisions of the Federal Patent Court are made available to the public, usually in unreacted form, on the Federal Patent Court's website: www.bundespatentgericht.ch/en/case-law/case-law/.

1.11 Are courts obliged to follow precedents from previous similar cases as a matter of binding or persuasive authority? Are decisions of any other jurisdictions of persuasive authority?

The Swiss legal system is based on the civil law tradition. As such, it depends widely on written codes as a primary source for authoritative statements of law. Accordingly, judicial decisions are of less importance than they are in common law jurisdictions. Even though a line of judicial decisions establishing a particular legal practice does carry substantial weight, in particular as the Federal Patent Court has exclusive jurisdiction with regard to the application of substantive patent law (subject only to appeals against its decisions to the Federal Supreme Court), the common law rule of binding precedent (stare decisis) is not recognised. Foreign decisions concerning the same patent at dispute are considered in particular in connection with nullity actions, but are not as such a persuasive authority, let alone binding.

1.12 Are there specialist judges or hearing officers, and if so, do they have a technical background?

The Federal Patent Court comprises both legally and technically trained judges. Roughly two-fifths of the technical judges graduated in chemistry, biochemistry or biology, a third in physics, and the rest in mechanical and electrical engineering (see the list of judges at https://www.bundespatentgericht.ch/en/about-the-court/judges/). Most of the technically trained judges are European patent attorneys.

1.13 What interest must a party have to bring (i) infringement, (ii) revocation, and (iii) declaratory proceedings?

Any person who is threatened with or has his/her rights infringed may demand an injunction or that the unlawful situation be remedied (Article 72 PatA). In order to have an interest in infringement proceedings, the plaintiff must show that infringing acts have already occurred or are reasonably expected to occur.

Anyone with a proven interest may bring a revocation (invalidity) action (see Article 28 PatA). The burden for proving an interest in a declaration of a patent's invalidity is rather low. Specifically, the plaintiff has to show that the challenged patent potentially creates a conflict with its contemplated business activity in Switzerland. With regard to already expired patents, it needs to be demonstrated that the patentee may still assert claims against the plaintiff resulting from the period when the patent was still in force.

Any person showing an interest may bring an action to obtain a declaratory judgment on the existence or non-existence of a circumstance or legal relationship governed by the PatA, such as, that a particular patent is valid or that the defendant has performed a patent infringing act (Article 74 PatA).

1.14 If declarations are available, can they (i) address non-infringement, and/or (ii) claim coverage over a technical standard or hypothetical activity?

As mentioned above under question 1.13, negative declaratory actions are permitted under Swiss law. This, in particular, includes a declaration that a certain patent is not infringed. Such actions are, however, only admitted if the plaintiff substantiates: (i) an uncertainty regarding a legal relationship; (ii) that the uncertainty cannot be reasonably tolerated by the plaintiff any longer; and (iii) that the plaintiff has no other option to eliminate that uncertainty, in particular that there is no option to bring another action against the defendant to eliminate the intolerable uncertainty.

1.15 Can a party be liable for infringement as a secondary (as opposed to primary) infringer? Can a party infringe by supplying part of, but not all of, the infringing product or process?

A Swiss patent confers on its owner the right to prohibit others from commercially using the invention (covered by the patent). Such use in particular includes the manufacturing, storage, offering, placing on the market, importing, exporting and carrying in transit, as well as possession for any of these purposes (direct infringements). However, carrying in transit may only be prohibited if the owner of the patent is permitted to prohibit importation into the country of destination (Article 8 PatA).

Under the PatA, not only the direct infringer may be held liable, but also "any person who abets any [direct infringement], participates in them, or aids or facilitates the performance of any of these acts" (Article 66 letter (d) PatA). Accordingly, illicit contributory infringement requires that the person in question contributes to an act that qualifies as direct infringement under the PatA.

Swiss courts assume that a person may be liable as contributory infringer only if the direct infringement to which he or she contributes took place in Switzerland. On the other hand, Swiss courts held the view that it does not matter from where the contributory infringer contributes to a direct infringement in Switzerland. Therefore, a person may be held liable as contributory infringer under Swiss law if such person contributes to a direct infringement in Switzerland that has been initiated from within Switzerland or from abroad.

1.16 Can a party be liable for infringement of a process patent by importing the product when the process is carried on outside the jurisdiction?

If the invention protected by a Swiss patent concerns a manufacturing process, the effects of the patent also extend to the products directly obtained by that process. Consequently, the patent owner may prevent the importer from importing the product into Switzerland when the process is carried on outside the jurisdiction.

1.17 Does the scope of protection of a patent claim extend to non-literal equivalents (a) in the context of challenges to validity, and (b) in relation to infringement?

Yes, the scope of protection also comprises non-literal equivalents. A solution is deemed equivalent in either case if it deviates only in nonessential points from the claimed solution. This might be the case if an accused device or process omits features of the patent claim that a person skilled in the art recognises as dispensable, or if the accused device or process has features that, although modified, are regarded by the skilled person as equivalent to the features of the patent claim. In order to qualify the modified features as equivalent, three conditions must be met: (1) the features must fulfil the same function; (2) the modified features and the function of the features must be obvious to a person skilled in the art; and (3) a person skilled in the art would have considered the modified features as an equivalent solution based on the patent claims and the description.

1.18 Can a defence of patent invalidity be raised, and if so, how? Are there restrictions on such a defence e.g. where there is a pending opposition? Are the issues of validity and infringement heard in the same proceedings or are they bifurcated?

Patent invalidity may be raised either as a defence to an infringement action or as a counterclaim (or in the form of an independent revocation action). There are no restrictions. The Federal Patent Court has (exclusive) jurisdiction for both validity and infringement proceedings and issues of validity and infringement can be heard in one and the same proceedings.

1.19 Is it a defence to infringement by equivalence that the equivalent would have lacked novelty or inventive step over the prior art at the priority date of the patent (the "*Formstein* defence")?

Yes, it is.

1.20 Other than lack of novelty and inventive step, what are the grounds for invalidity of a patent?

Besides lack of novelty and inventive step, a patent may be held invalid:

i. if the subject matter of the patent is not patentable (see question 5.1 below in this regard);
ii. if the invention is not disclosed in the patent in such a way that a person skilled in the art can carry it out;
iii. if the subject matter of the patent goes beyond the content of the version of the patent application that determined the filing date; and
iv. if the patentee is not entitled to the patent.

1.21 Are infringement proceedings stayed pending resolution of validity in another court or the Patent Office?

As elaborated above, the Federal Patent Court has exclusive jurisdiction throughout Switzerland to adjudicate patent infringement and validity disputes. Therefore, infringement and validity of a patent will usually be dealt with in the same proceedings. Proceedings are not stayed *ex officio* while validity cases are pending at foreign court or dealt with at the EPO.

1.22 What other grounds of defence can be raised in addition to non-infringement or invalidity?

An alleged infringer may further argue that:

i. the activities performed are exempted from patent protection (e.g. since the accused infringer used the patented invention exclusively for noncommercial purposes, for research purposes, in order to obtain regulatory approval of a pharmaceutical

product or if a patented invention is in transit and the owner of the patent is not permitted to prohibit importation into the country of destination);
ii. the patentee's exclusivity rights are exhausted (see question 5.7);
iii. it has commercially used the invention in good faith in Switzerland, or had made special preparations for that purpose, prior to the date of filing of the patent application (this would allow the alleged infringer to continue to use the patented invention to the same extent);
iv. it is entitled to a compulsory licence (see question 3.2 below);
v. the patentee's assertion of patent rights violates antitrust law (see *infra* question 7.1); and
vi. that the infringement claims are time-barred or forfeited (see *infra* question 1.28).

1.23 (a) Are preliminary injunctions available on (i) an *ex parte* basis, or (ii) an *inter partes* basis? In each case, what is the basis on which they are granted and is there a requirement for a bond? Is it possible to file protective letters with the court to protect against *ex parte* injunctions? (b) Are final injunctions available?

Anybody who has standing to bring an infringement action is entitled to interim relief, in particular in the form of a preliminary injunction, if the plaintiff provides *prima facie* evidence that:
i. the defendant has committed or intends to commit an act of infringement;
ii. the platintiff is threatened by a loss that is not easily reparable; and
iii. the plaintiff filed for preliminary injunctions within a reasonable time from becoming aware of the alleged infringement.

Except where the urgency is so great that hearing the defendant prior to ordering measures is not warranted – in particular because it would frustrate the very purpose of the requested measure – such requests are decided in *inter partes* proceedings. If an interim measure is ordered *ex parte* (which happens very rarely), it needs to be confirmed *inter partes*.

The plaintiff may be ordered to furnish sufficient security to cover any damages if the preliminary injunctions turn out to be unjustified.

In cases where a court orders preliminary injunctions, it gives the plaintiff a term not exceeding 30 days to file an ordinary court action against the alleged infringer, failing which the preliminary injunctions will lapse. In order to obtain final injunctions against an infringer, the plaintiff must file a lawsuit against the infringer and prove actual or impending patent infringement. In case patent infringement is established, Swiss courts will issue a final injunction.

A party expecting a patentee to file an *ex parte* request for interim measures may deposit a protective letter explaining to the Federal Patent Court the reasons why such a request should be dismissed, or at least not decided *ex parte*. The patentee will only be informed of the protective letter after having filed a request for interim measures.

1.24 Are damages or an account of profits assessed with the issues of infringement/validity or separately? On what basis are damages or an account of profits assessed? Are punitive damages available?

As elaborated in question 1.5, in an infringement proceeding, the plaintiff may demand disclosure of the defendant's financial statements and information on the infringing activities in a first step. This shall enable the plaintiff to substantiate and quantify its monetary claim and to decide whether to claim damages or an account of profits in a second step (i.e. following the receipt of the documents and information ordered to be disclosed).

Monetary remedies are estimated on the basis of putting the party who suffered a patent infringement into the same financial position as if no infringement had occurred. Punitive damages are not available under Swiss law. Provided the specific requirements are met, the plaintiff may choose whether to claim compensation for the pecuniary loss sustained (i.e. damages), or to claim the profits made by the infringer with the infringing activities (i.e. account of profits).

Swiss courts (including the Federal Patent Court) assess the compensation for pecuniary losses based on the actual damage suffered and on lost profits, both of which have to be proven by the plaintiff, including the causal link between the damages/lost profits and the patent infringement. If the amount of actual damage suffered or lost profit cannot be proven, the plaintiff may request the court to estimate the damages to be awarded based on the circumstances and on the results of the taking of evidence.

1.25 How are orders of the court enforced (whether they be for an injunction, an award of damages or for any other relief)?

The Federal Patent Court has also exclusive jurisdiction over enforcement proceedings regarding judgments issued under the Federal Patent Court's exclusive jurisdiction.

If a decision relates to the payment of money or provision of security, it is enforced according to the provisions of the Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy (**DEBA**). In case of injunctions, the plaintiff may request the Federal Patent Court to order that the defendant becomes subject to criminal sanctions or has to pay non-criminal fines in case of non-compliance with the injunction.

1.26 What other form of relief can be obtained for patent infringement? Would the tribunal consider granting cross-border relief?

In addition to injunctions and monetary relief, Swiss law provides the following forms of relief in case of patent infringements:
i. a declaration that a patent is valid and that it was infringed by the defendant;
ii. an order requesting the defendant to disclose the source and quantity of products in his possession, which were unlawfully manufactured and/or put on the market, and to provide information on business activities related to, and profits derived from, such goods;
iii. an order to confiscate and destroy the infringing products in the defendant's possession; and
iv. an order authorising the plaintiff to publish the decision at the defendant's expense.

1.27 How common is settlement of infringement proceedings prior to trial?

There are no statistics about settlement prior to trial. Settlements often occur during trial, in particular at or after the so-called instruction hearing, at which the Federal Patent Court (usually the expert judge) provides a preliminary view of the issues at dispute.

According to the Federal Patent Court's Annual Report 2018, the court handled 23 cases in ordinary proceedings of which 11 were resolved by settlement.

1.28 After what period is a claim for patent infringement time-barred?

The right to request and injunction is not subject to any limitation period. However, if the patentee is aware of an injunction and does

not intervene for a long time, allowing the infringer to develop in good trust a significant business, the patentee may forfeit is right to request an injunction.

Claims for monetary relief are to a limitation period of one year as from the moment the plaintiff learns of the damage as well as of the infringer. Such claims become time-barred in any case after a maximum of 10 years following the occurrence of the damage.

If a claim for monetary relief is based on an act that also qualifies as a criminal offence (e.g., in cases of wilful patent infringements), the statute of limitation period under criminal law applies, provided it is longer than the civil statute of limitation period.

1.29 Is there a right of appeal from a first instance judgment, and if so, is it a right to contest all aspects of the judgment?

As a court of first instance, decisions of the Federal Patent Court may be appealed. Such appeals are made directly to the Federal Supreme Court, which is the final court of appeals for all decisions rendered by the Federal Patent Court. The Federal Supreme Court only has very limited competence to review facts, and its decision-making processes are very efficient. Currently, appeal proceedings before the Federal Supreme Court take around six months in average.

1.30 What are the typical costs of proceedings to first instance judgment on (i) infringement, and (ii) validity? How much of such costs are recoverable from the losing party?

The typical costs of infringement and validity proceedings are:

i. court fees (see question 1.4 above);
ii. court expenses (depend primarily on whether the court appointed technical experts);
iii. attorneys' fees (according to the relevant tariff of the court, such fees vary between CHF 2,000 and CHF 300,000, taking into account the amount in dispute, the length as well as complexity of the lawsuit); and
iv. cost of the patent attorney support requested by a party.

The party losing the lawsuit usually bears the court fees and expenses and must compensate the winning party for attorneys' fees and cost of patent attorney support. In addition, the losing party must compensate reasonable costs for patent attorneys assisting the other party. The attorneys' fees payable by the losing party under said tariff usually cover only part of the legal costs actually incurred by the winning party.

1.31 For jurisdictions within the European Union: What steps are being taken in your jurisdiction towards ratifying the Agreement on a Unified Patent Court, implementing the Unitary Patent Regulation (EU Regulation No. 1257/2012) and preparing for the unitary patent package? Will your country host a local division of the UPC, or participate in a regional division? For jurisdictions outside of the European Union: Are there any mutual recognition of judgments arrangements relating to patents, whether formal or informal, that apply in your jurisdiction?

Switzerland is not a jurisdiction within the EU but a Member State of the European Patent Convention. Switzerland will, however, not be a part of the Unitary Patent and Unified Patent Court System.

Switzerland is party to the Lugano Convention (Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters), which provides for most countries within Europe a simplified recognition procedure for any decision rendered by a court or tribunal of a country bound by the convention. Such convention principally also covers patent disputes.

For judgments from (typically non-European) countries that are not members of the Lugano Convention, the Swiss Federal Statute on Private International Law provides for a regime of recognition of judgments, which in principle also applies to patent disputes.

However, as far as validity issues concerning Swiss patents (or the Swiss part of European patents are concerned), the FPC has exclusive jurisdiction and thus foreign judgments to this respect would not be recognised in Switzerland.

2 Patent Amendment

2.1 Can a patent be amended *ex parte* after grant, and if so, how?

Yes, the patentee may partially renounce his patent rights by requesting the Federal Institute of Intellectual Property:

i. to cancel a claim;
ii. to restrict an independent claim by combining one or more dependent claims in it; or
iii. to restrict an independent claim in some other way (in such case, the restricted claim shall 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 its filing date).

2.2 Can a patent be amended in *inter partes* revocation/invalidity proceedings?

Yes. In case of court proceedings concerning the validity of a patent, the patentee is entitled to partially acknowledge the invalidity action. The court may also declare invalid only a part of the patent.

2.3 Are there any constraints upon the amendments that may be made?

A partial renunciation or declaration of partial invalidity of a patent may only pertain to the patent claims, but not to description, the drawings or the abstract (see also question 2.1: the scope of protection of the patent claims may only be narrowed, but not enlarged).

3 Licensing

3.1 Are there any laws which limit the terms upon which parties may agree a patent licence?

Parties are principally free to agree on the contractual terms of patent licenscs. There is no specific legislation limiting the terms upon which parties may agree to a patent licence. It should, however, be noted that a licence agreement must comply with anti-trust law (see question 7.2 below) and with the mandatory provisions of Swiss contract law. Such provisions are however rare.

3.2 Can a patent be the subject of a compulsory licence, and if so, how are the terms settled and how common is this type of licence?

Under the PatA, compulsory licences are in particular available:

i. to the owner of a patent if the patented invention cannot be used without infringing a prior patent, provided that the invention represents an important technical advance of considerable economic interest in relation to the invention that is the subject of the prior patent;
ii. if the patentee does not use the invention in Switzerland (in this context, importation is regarded as use) within three years following the grant of the patent;
iii. for public interests or for the manufacture and export of pharmaceutical products to developing countries in order to combat public health problems;
iv. for diagnostic products or methods, provided a practice in violation of antitrust law is proven; and
v. for patented biotechnological inventions that shall be used as research tools.

If the efforts undertaken by the plaintiff to obtain a contractual licence on reasonable commercial conditions have not succeeded, the granting of such licences can be ordered by the court which determines the terms and conditions of the compulsory licence. The practical relevance of compulsory licences in Switzerland is little.

4 Patent Term Extension

4.1 Can the term of a patent be extended, and if so, (i) on what grounds, and (ii) for how long?

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).

In addition, the Swiss legislator partially followed the EU's endeavours to improve the health of children by incentivising pharmaceutical companies to perform paediatric tests for their drugs by extending already granted supplementary protection certificates (**SPC**) by an additional six months (Paediatric Extensions). However, the legislator went one step further and decided to not only grant the benefit of an additional six months' exclusivity period to those who have already been granted an SPC, but also to those who, for whatever reason, have not previously obtained an ordinary SPC. The respective legislation entered into force in the beginning of 2019.

5 Patent Prosecution and Opposition

5.1 Are all types of subject matter patentable, and if not, what types are excluded?

The following types of subject matter are particularly not patentable:
i. inventions that do not have a technical character (ideas, discoveries, business or mathematical methods, aesthetic creations, etc.);
ii. inventions that are contrary to public policy and morality;
iii. inventions covering surgical, therapeutic or diagnostic methods used on humans or animals;
iv. the human body in all its phases of formation and development, animal species, plant varieties, and essentially biological methods for breeding plants or animals; and
v. naturally occurring gene sequences and partial sequences.

5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents? If so, what are the consequences of failure to comply with the duty?

National Swiss patent applications are not examined by the Swiss Patent Office with respect to novelty and non-obviousness. As a result, the applicant is under no obligation to disclose prejudicial prior disclosures or documents.

5.3 May the grant of a patent by the Patent Office be opposed by a third party, and if so, when can this be done?

In principle, the grant of a Swiss national patent may not be opposed in proceedings before the Swiss Patent Office (one exception applies with regard to an opposition based on the grounds that the patent covers certain unpatentable subject matter).

5.4 Is there a right of appeal from a decision of the Patent Office, and if so, to whom?

Decisions of the Swiss Patent Office can be appealed to the Swiss Federal Administrative Tribunal. Decisions of the Swiss Federal Administrative Tribunal can be appealed to the Swiss Federal Tribunal.

5.5 How are disputes over entitlement to priority and ownership of the invention resolved?

Swiss patent law is based on a first to file (and not a first to invent) system. In case two inventors have made an invention independently of each other, the right to the patent belongs to the one who filed the earlier patent application or the application with the earlier priority date. The other inventor may, however, have a right to continue using the invention in cases where he had already commercially used the invention in Switzerland before the filing or priority date (see also question 1.22 above).

5.6 Is there a "grace period" in your jurisdiction, and if so, how long is it?

Swiss patent law does not foresee a general grace period. However, where the invention has been made available to the public within six months prior to the application date or priority date, this disclosure does not form part of the prior art when it was due to:
i. an evident abuse to the detriment of the patent applicant or his legal predecessor; or
ii. the fact that the patent applicant or his legal predecessor have disclosed the invention at an official international exhibition falling within the terms of the Convention on International Exhibitions signed in Paris on 22 November 1928.

5.7 What is the term of a patent?

The patent term is 20 years from patent application.

5.8 Is double patenting allowed?

No. Double patenting is explicitly prohibited under the PatA (see Article 20a PatA).

6 Border Control Measures

6.1 Is there any mechanism for seizing or preventing the importation of infringing products, and if so, how quickly are such measures resolved?

The Swiss patent act also provides for border measures that can be put in place upon request of a patent owner. Request forms can be downloaded from the website of Stop Piracy, a Swiss association that includes members from the private sector, authorities and consumer representatives.

7 Antitrust Law and Inequitable Conduct

7.1 Can antitrust law be deployed to prevent relief for patent infringement being granted?

If the plaintiff may behave independently of the other participants (competitors, suppliers or consumers) in the market (i.e., if it has dominant position) and if the refusal to license restricts competition, the accused infringer may theoretically claim to be entitled to a compulsory licence or argue that the plaintiff's assertion of patent rights amounts to a behaviour of a dominant undertaking that is unlawful under Swiss antitrust law. However, no respective case law exists to date.

7.2 What limitations are put on patent licensing due to antitrust law?

There is no specific legislation dealing with limitations imposed by antitrust law on patent licensing practices and only limited case law exists in this respect.

7.3 In cases involving standard essential patents, are technical trials on patent validity and infringement heard separately from proceedings relating to the assessment of fair reasonable and non-discriminatory (FRAND) licences? Do courts grant FRAND injunctions, i.e. final injunctions against patent infringement unless and until defendants enter into a FRAND licence?

To date, no case law exists in this respect in Switzerland.

8 Current Developments

8.1 What have been the significant developments in relation to patents in the last year?

As regards to the recently enacted revision of the PatA pertaining to paediatric extensions (see question 4.1 above).

8.2 Are there any significant developments expected in the next year?

As indicate above, Switzerland will not be part of the Unitary Patent and Unified Patent Court system currently being created within the EU. However, the Swiss part of European patents will continue to fall under the jurisdiction of the newly established Swiss Federal Patent Court.

8.3 Are there any general practice or enforcement trends that have become apparent in your jurisdiction over the last year or so?

No there are not.

Dr. Markus Wang heads the intellectual property team and co-heads the life sciences group of the firm. His practice covers a wide range of contentious and non-contentious patent, trademark and other IP-related issues, in particular in the pharmaceutical, biotech and IT sectors. He frequently drafts and negotiates licence, outsourcing and R&D agreements. Furthermore, he specialises in regulatory matters in the fields of life sciences and health care.

Markus Wang lectures on intellectual property law at the University of Fribourg. He is recognised as a leading practitioner in the field of intellectual property in professional and life sciences publications and listings such as Chambers Europe, European Legal Experts, Who's Who Legal, WTR 1000: The World's Leading Trademark Professionals, IAM Patent 1000 and BestLawyers.

Bär & Karrer Ltd.
Brandschenkestrasse 90
CH-8027 Zurich
Switzerland

Tel: +41 58 261 55 10
Email: markus.wang@baerkarrer.ch
URL: www.baerkarrer.ch

Dr. Jonas Bornhauser mainly advises clients on intellectual property and technology law (including data protection) as well as media, advertising and unfair competition law both in contentious and non-contentious matters.

Bär & Karrer Ltd.
Brandschenkestrasse 90
CH-8027 Zurich
Switzerland

Tel: +41 58 261 54 13
Email: jonas.bornhauser@baerkarrer.ch
URL: www.baerkarrer.ch

Bär & Karrer is a renowned Swiss law firm with more than 170 lawyers in Zurich, Geneva, Lugano and Zug. The core business is advising clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. The clients range from multinational corporations to private individuals in Switzerland and around the world. Bär & Karrer was repeatedly awarded Switzerland Law Firm of the Year by the most important international legal ranking agencies in recent years. Almost all leading private equity funds active in Switzerland form part of our client basis.

- 2019 *International Financial Law Review (IFLR)* "Debt and Equity-linked Deal of the Year" Award.
- 2019, 2015 and 2014 *IFLR* Awards.
- 2018 IFLR "Deal of the Year" Award.
- 2018, 2017 and 2016 Trophées du Droit Gold or Silver.
- 2018, 2016, 2015 and 2014 *Mergermarket* M&A Awards.
- 2016, 2013 and 2012 *Chambers* European Awards.
- 2016, 2015 and 2014 *The Legal 500* ("most recommended law firm in Switzerland").
- 2015, 2014, 2013, 2011 and 2010 *The Lawyer's* European Awards.
- 2015 Citywealth Magic Circle Awards ("International Law Firm of the Year EMEA").
- 2014 Citywealth International Financial Centre Awards.

www.baerkarrer.ch

BÄR & KARRER