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Intellectual property

1 Intellectual property law

Under what legislation are intellectual property rights granted? Are there restrictions on how IP rights may be exercised, licensed or transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

In Switzerland, intellectual property (IP) rights are granted under the following statutes:

- the Federal Act on Patents for Inventions of 25 June 1954 (the Patent Act), which provides for the grant of patents for technical inventions that are new, involve an inventive step and are susceptible to industrial application;
- the Federal Act on the Protection of Trademarks and Appellations of Origin of 28 August 1992 (the Trademarks Act), which allows the registering of signs capable of distinguishing the products or services of one enterprise from those of other enterprises as trademarks;
- the Federal Act on the Protection of Copyright and Neighbouring Rights of 9 October 1992 (the Copyright Act), which grants copyrights for works of art or literature having an individual character;
- the Federal Act on Design of 5 October 2001, which provides for the grant of design rights for the new and individual designs;
- the Federal Act on the Protection of Topographies of Semiconductor Products of 9 October 1992, which protects uncommon three-dimensional structures of semiconductors; and
- the Federal Act on the Protection of Plant Varieties of 20 March 1975, under which rights can be obtained for new varieties of plant.

Unauthorised exploitation or other use of IP that is not caught by any of these statutes may be prohibited in certain circumstances based on the Federal Act Against Unfair Competition.

Some of aforementioned statutes provide for restrictions regarding the exercise of the rights in the sense that they limit or even exclude their enforceability in specific circumstances. In particular, the Copyright Act contains a number of provisions barring an author from exercising exclusivity right againsts certain exploitation activities by third parties (eg, in case of private use or use for educational purposes), limiting the author's right to a mere right for compensation or conferring the right to enforce the copyright exclusively to collecting societies. Certain other restrictions result from competition law (see question 10 and following) or other kind of legislation. Exercise of all IP rights is limited by the doctrine of exhaustion (see question 15).

Under Swiss law, IP rights can generally be freely transferred. Certain limitations exist, however, regarding the transfer of copyrights, for the Copyright Act provides that 'moral' rights, such as the right to materially change a work or the right to be named as the author, cannot be transferred by the author. With regard to the licensing of IP rights, Swiss legislation does not provide any specific

rule prohibiting or limiting the licensing thereof. However, certain anti-competitive licensing arrangements may be prohibited under competition law rules.

Swiss IP rights exceed the standards required by TRIPs. Swiss authorities even try to increase minimum protection standards provided by TRIPs in different aspects such as the protection of appellations of origin.

2 Responsible authorities

Which authorities are responsible for administering IP legislation?

All registerable IP rights are administered by the Swiss Federal Institute of Intellectual Property (FIIP), which also keeps the various registers. The FIIP is organised as a profit centre and reports to the Federal Department of Justice with regard to its governmental tasks such as the examination and registration of IP rights (patent, design and trademark rights). Upon a request of the Federal Department of Justice, the FIIP further prepares proposals for amendments of any legislation dealing with IP rights, including copyrights.

3 Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights?

The Trademarks Act provides for an administrative proceeding allowing the owner of a prior trademark to oppose the registration of a new trademark within three months of its publication (opposition proceedings). Further, IP legislation provides for the assistance of the Federal Customs Administration in connection with the prevention of the import of counterfeit goods; otherwise, enforcement of IP rights requires a court action. Except for appeals to the Swiss Federal Supreme Court, court proceedings are presently governed by cantonal law. Each Swiss canton has to appoint one specific court that handles all IP-related litigation (usually commercial or cantonal courts). However, from 1 January 2011 a newly established federal patent court will deal with all patent-related litigation. IP rights infringements may also constitute criminal offences (sanctioned with fines, in severe cases even with imprisonment), which are prosecuted upon application of the owner of the rights or, if committed on a commercial basis, ex officio by the cantonal prosecution authorities.

4 Remedies

What remedies are available to a party whose IP rights have been infringed?

Essentially, the remedies available are injunction and monetary relief such as damages or the surrender of the profits achieved by the infringer. As a general rule, only those damages that have actually been suffered can be claimed as damages (no punitive or treble damages). Further potential remedies are declaratory awards, seizure of infringing goods or (other) removal of ongoing infringements. Injunctions may be obtained on a preliminary basis based on prima facie evidence

(in cases of urgency, even without having the other party heard) if the rights holder can show that he or she is suffering disadvantage by the infringement that cannot be remedied with the final judgment. Upon application of the rights holder, Swiss customs authorities may withhold infringing goods intended for import or export.

5 IP legislation and competition

Does IP legislation make any specific mention of competition or contain provisions on the anti-competitive or similar abuse of IP rights?

The IP legislation makes no specific mention of competition law and does not contain provisions respecting the anti-competitive or similar abuse of IP rights.

6 Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices in addition to traditional 'passing off' or trademark infringement cases?

Yes. The Trademarks Act as well as the Swiss Act against Unfair Competition and some other laws (such as legislation concerning food stuff or the protection of official emblems) provide remedies for deceptive practices. These rules may also be enforced by private parties.

7 Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures and digital rights management enforced in your jurisdiction? Does legislation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Could TPM or DRM protection be challenged under the competition laws?

WIPO protection of TPMs and DRM has been implemented in national legislation by an amendment to the Copyright Act that became effective as of 1 July 2008. Legislation does not restrict the ability of manufacturers to incorporate TPM or DRM protection, but excludes the enforceability of the prohibition to circumvent TPM in cases where the use of the related works or performances is authorised by law. TPMs or DRM protection as such may not be challenged under competition laws. However, a specific administrative body has been established that monitors the effects of TPM, and acts as liaison office with consumers and users groups in order to find cooperative solutions in cases of abusive use of TPM. However, currently the body does not have any decision-making powers.

8 Industry standards

What consideration has been given in legislation or case law to the impact of the adoption of proprietary technologies in industry standards?

The Patent Act provides for the possibility of obtaining compulsory licences if justified by a public interest, which can theoretically (there is no case law) also exist where the use of the related invention is required to meet a specific standard.

Competition

9 Competition legislation

What legislation sets out competition law?

The Swiss antitrust law relevant to the exercise or licensing of intellectual property rights is found in the Federal Act on Cartels and other Restraints of Competition dated 6 October 1995 (as amended) (the Cartels Act). Article 5 of the Cartels Act prohibits agreements and concerted practices that significantly restrict competition without being justified on grounds of economic efficiency or that eliminate competition. Article 7 prohibits practices of undertakings in a dominant position that abusively restrain other undertakings from exercising competition or place trading parties at a disadvantage.

10 IP rights in competition legislation

Does the competition legislation make specific mention of IP rights?

Yes. According to article 3(2) of the Cartels Act, the Act does not apply to restrictions of competition resulting solely from laws governing IP; there is not much case law on this provision. In a decision in 2005, the Commercial Court of Berne held that the refusal to license a patent could not be assessed under the Cartels Act because such refusal would be a direct consequence of the patent rights unless the IP right constituted an essential facility. Note that the exemption in article 3(2) of the Cartels Act does not apply to restrictions on imports of goods that are based on IP rights. Such restrictions are assessed under the relevant provisions of the Cartels Act, in particular articles 5 and 7. This exemption from article 3(2) regarding parallel imports was introduced in 2003 following the *Kodak* judgment of the Swiss Federal Court. In *Kodak*, the Swiss Federal Court ruled that national exhaustion applies to patents (contrary to copyright and trademarks where the Swiss Federal Court decided that international exhaustion applies) but that a patent holder prohibiting parallel imports would abuse its dominant position if it would foreclose the Swiss market or impose excessively high prices or other unreasonable conditions (note that the parliament subsequently introduced a regional exhaustion for patents; see question 16).

Another provision making mention of IP rights is article 6(1)(d) of the Cartels Act. Article 6(1) authorises the Competition Commission and the Federal Council to set out in notices or ordinances the conditions under which particular arrangements restricting competition are generally deemed justified on grounds of economic efficiency. Article 6(1)(d) specifically mentions the exclusive licensing of IP rights as an example of such an agreement. However, so far, neither the Competition Commission nor the Federal Council has issued a respective notice or ordinance.

11 Review and investigation of competitive effect

Which authorities may review or investigate the competitive effect of conduct related to IP rights?

The relevant authorities are the Competition Commission and its Secretariat. The Secretariat conducts the investigations and issues procedural orders together with a member of the presidency of the Competition Commission. The Secretariat leads the investigation and submits proposals for decisions to the Competition Commission (which then decides on such proposals).

In addition, the civil courts may review the competitive effect of conduct related to IP rights upon request of a party.

12 Competition-related remedies for private parties

Do private parties have competition-related remedies if they suffer harm from the exercise, licensing or transfer of IP rights?

Yes. Private parties restrained from exercising or entering into competition by an unlawful restriction of competition may sue the other party in the civil courts. The respective remedies are prohibitory action or injunctive relief, compensation of damages and reparation for moral damages, and appropriation of the unjust profits of the violating party. Civil courts may also impose interim measures.

Private parties may also submit complaints to the secretariat of the Competition Commission in order to get injunctive relief or interim measures. Note, however, that the Competition Commission has no power to award compensation of damages or appropriation of unjust profits. Nonetheless, in practice many injured parties first file a complaint with the secretariat of the Competition Commission because of the higher costs and risks associated with civil litigation. If, however, the Competition Commission believes that the dispute is mainly about private interests and not about the (public) interest in effective competition, it will not initiate an investigation.

13 Competition guidelines

Has the competition authority issued guidelines or other statements regarding the overlap of competition law and IP?

No. There are no specific guidelines on licensing IP. So far, the Competition Commission has, inter alia, only published notices on the appraisal of vertical agreements (2 July 2007) and on agreements between SMEs (19 December 2005), which, however, do not give guidance regarding the overlap of competition law and IP. The notice on the appraisal of vertical agreements specifically states that it does not apply to agreements that have as their primary object the assignment or use of IP rights.

The lack of specific guidelines is also due to there being virtually no case law on licensing agreements. As a general rule of thumb, the Competition Commission will apply the rules contained in the Block Exemption Regulation No. (EC) 772/2004 and the guidelines of the European Commission on technology transfer analogously.

14 Exemptions from competition law

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

As mentioned in question 10, under article 3(2) of the Cartels Act, the Act does not apply to restrictions of competition resulting solely from laws governing IP. However, the Competition Commission tends to construe the scope of this exemption very narrowly. For example, although the holder's unilateral exclusion of others from using its IP is likely to be generally exempt from antitrust law, it cannot be excluded that, if the holder of the IP right is dominant, the Competition Commission would conclude that the IP rights holder's refusal to deal would be unlawful in the absence of legitimate business reasons. Civil courts can be expected to interpret article 3(2) of the Cartels Act more broadly. An example is the decision of the Commercial Court of Berne mentioned in question 10.

In addition to the foregoing, article 3(1) states that the Cartels Act does not apply with a view to regulations that prohibit competition for goods or services in a specific market. Collecting societies established by the copyright regulation that have the exclusive right to exploit certain rights of the author are examples falling under this exemption.

15 Copyright exhaustion

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws, for example with regard to efforts to contract out of the doctrine, to control pricing of products sold downstream and to prevent 'grey marketing'?

Yes. As mentioned in question 10, the Swiss Federal Court has held that national exhaustion applies to patents and international exhaustion to copyright and trademarks. As also mentioned in question 10, efforts to contract out of the doctrine will be assessed under the relevant provisions of the Cartels Act, in particular articles 5 and 7.

16 Import control

To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

As mentioned in question 10, in the *Kodak* case, the Swiss Federal Court ruled that national exhaustion applies to patents (contrary to copyright and trademarks where international exhaustion applies). Following the *Kodak* decision of the Federal Supreme Court, the Swiss parliament introduced a regional exhaustion for patent-protected products that have been marketed in an EEA member state by the patent owner or with its consent. In other words, these patent-protected products can be imported into Switzerland without the consent of the patent owner.

If the patent-protected products have been marketed outside Switzerland and the EEA by the patent owner or with its consent,

the patent owner cannot prohibit parallel imports of products that are also protected by IP rights other than patents, if the patent protection only extends to secondary characteristics of such products. Note, however, that patent-protected products with prices regulated by public authorities are, in the jurisdiction where they have been marketed or in Switzerland, exempt from these rules, and still subject to national exhaustion (eg, pharmaceutical products).

These amendments have entered into force on 1 July 2009.

Furthermore, as mentioned in question 10, the provisions of the Cartels Act apply to restrictions on imports of goods that are based on IP rights. Moreover, in principle the patent holder can only exercise its rights unilaterally. An agreement to exercise the patent rights to prevent unauthorised imports will be assessed under article 5 of the Cartels Act. In addition, if the patent holder is dominant, a prevention of 'grey-market' or unauthorised importation or distribution of its products could constitute an unlawful abuse under article 7 of the Cartels Act. In *Kodak* (see question 10), the Swiss Federal Court stated obiter that a patent holder prohibiting parallel imports may abuse its dominant position if it forecloses the Swiss market or impose excessively high prices or other unreasonable conditions (see also question 10 regarding refusals to license).

17 Competent authority jurisdiction

Are there circumstances in which the competition authority may have its jurisdiction ousted by, or will defer to, an IP-related authority, or vice versa?

No.

Merger review**18 Powers of competition authority**

Does the competition authority have the same powers with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Yes. In transactions involving only the transfer of IP rights, the decisive question is whether the transfer constitutes a concentration. This question is assessed under the same principles as under the EC merger control regulation. Consequently, a transaction confined to IP rights may also be considered to be a concentration if such rights are the basis for an existing economic activity and the assignment of these rights is sufficient to also transfer the turnover-generating activity.

19 Analysis of the competitive impact of a merger involving IP rights

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The Competition Commission will apply the same antitrust analysis to a transaction involving IP rights as it would apply to other transactions.

20 Challenge of a merger

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights?

The Competition Commission applies the same substantive test to concentrations involving IP rights as it does to other transactions. The Competition Commission will challenge a merger or require conditions and obligations if the transaction creates or strengthens a dominant position that could eliminate effective competition and does not lead to an improvement of the competitive conditions in another market that prevails over the disadvantages of the dominant position. So far, in mergers involving IP rights, the Competition Commission has followed the analysis of the European Commission. For example, in clearing Pfizer's acquisition of Pharmacia, the Competition Commission accepted the same remedies as already imposed by the European Commission.

21 Remedies to alleviate anti-competitive effect

What remedies are available to alleviate the anti-competitive effect of a merger involving IP rights?

In general, the Competition Commission prefers structural to behavioural remedies. Therefore, the Competition Commission will most likely require structural remedies, such as the divestment of a business or IP rights. Licensing of IP rights might be accepted, as an alternative to divestment if, for example, a divestment is not feasible or is disproportionate.

Specific competition law violations**22 Conspiracy**

Describe how the exercise, licensing, or transfer of IP rights can relate to cartel or conspiracy conduct.

A cartel involving IP rights (such as an agreement between competitors on their royalties for third parties) will be treated like any other horizontal price-fixing and deemed unlawful.

An agreement between competitors to transfer or license IP constitute will not per se constitute an illegal cartel. The transferring and licensing of IP rights will be assessed under the same rules as it is done under the Block Exemption Regulation No. (EC) 772/2004 and the guidelines of the European Commission on technology transfer.

There is no publicly available case law on reverse patent settlement payments. However, as long as the underlying patent infringement lawsuit was not objectively and subjectively unfounded (ie, a sham lawsuit), the Competition Commission and the civil courts can be expected to tolerate reverse patent settlement payments.

Patent pools are likely to be lawful if they do not prevent the parties from developing competing products and standards, do not restrict the licensees' freedom to set their prices, provide for fair and non-discriminatory licensing conditions and do not foresee exclusive grant-back licences. Where the patent pool has a dominant position, exclusive licences are likely to be unlawful.

Copyright collectives as such are lawful since they are covered by articles 40 et seq of the Copyright Act (see also question 14).

Agreements on standard-setting may be unlawful if they prevent the parties from either developing alternative standards or commercialising products that do not comply with that standard. Also participation in the standard-setting should in general be open to all. To the extent a certain standard becomes a de facto standard, third parties may not be foreclosed from access to it.

23 (Resale) price maintenance

Describe how the exercise, licensing, or transfer of IP rights can relate to (resale) price maintenance.

Yes, licensors of IP are restrained from setting minimum resale prices for licensees. According to article 5(4) of the Cartels Act, resale price maintenance is presumed to eliminate effective competition. It is disputed under which conditions this presumption can be rebutted (inter-brand competition alone is not regarded as sufficient by the Competition Commission). Even if such rebuttal would be successful, the Competition Commission will view resale price maintenance as a significant restriction of competition (regardless of the market share of the parties involved) that cannot be justified for reasons of economic efficiency and, therefore, is unlawful.

24 Exclusive dealing, tying and leveraging

Describe how the exercise, licensing, or transfer of IP rights can relate to exclusive dealing, tying and leveraging.

An exclusive licence (ie, an obligation of the licensor towards a licensee not to license others) between non-competitors is in general likely to be lawful unless the licensee is dominant.

Exclusive dealing (single branding, ie, an obligation of the licensee not to use third-party technologies) could be unlawful if the licensor has a strong market position (generally a market share of 30 per cent or more). The same applies to tying obligations where the licensor has a strong position in the market of the tying product.

25 Abuse of dominance

Describe how the exercise, licensing, or transfer of IP rights can relate to abuse of dominance.

The Competition Commission is likely to apply the same principles in assessing the conduct of an IP rights holder as it does in other cases regarding the abuse of a dominant position. This means that in cases where specific conduct impedes or exploits other market participants, the dominant undertaking must establish that its conduct is justified by legitimate business reasons.

There is no conclusive case law on the question of abuse of a dominant position by a holder of IP rights. In *Kodak* (see question 10), the Swiss Federal Court stated obiter that a patent holder prohibiting parallel imports abuses its dominant position if it forecloses the Swiss market or imposes excessively high prices or other unreasonable conditions (see also question 10 regarding refusals to license).

26 Refusal to deal and essential facilities

Describe how the exercise, licensing, or transfer of IP rights can relate to refusal to deal and refusal to grant access to essential facilities.

The Competition Commission's view is that dominant undertakings are in general free to choose their business partners. However, in so choosing they have to apply legitimate criteria. In general, termination of a relationship with an existing customer of a dominant undertaking is likely to be treated with more suspicion than the refusal to deal with a new customer. The same principles can be expected to apply to dominant undertakings holding IP rights (see also questions 25 and 10).

As regards the refusal of an owner to grant access to its essential facility, the Competition Commission is likely to find an abuse if such refusal to deal prevents the introduction of a new product (not yet offered by the patent holder) for which there is a potential demand, eliminates competition on the respective market, and cannot be justified based on objective reasons.

In cases where the refusal to deal or the refusal to grant access to essential facilities constitutes an abuse of a dominant position, it cannot be ruled out that the Competition Commission or the competent court would impose mandatory licensing as a remedy (see also question 8).

Remedies**27 Remedies for violations of competition law involving IP**

What sanctions or remedies can the competition authority or courts impose for violations of competition law involving IP?

The Competition Commission may impose fines on undertakings (but not on individuals) of up to 10 per cent of the turnover generated in Switzerland during the past three business years for specific violations of the Cartels Act, including:

- horizontal price-fixing, quota cartels and market-sharing (article 5(3));
- vertical price-fixing and absolute territorial protection (article 5(4)) (it is questionable, however, whether absolute territorial protection in licence agreements falls under this article); and
- the abuse of a dominant position (article 7).

In addition, the Competition Commission may impose fines in the same amount on undertakings and on individuals of up to 100,000 Swiss francs (approximately €66,200) when they violate an enforceable decision of, or a settlement with, the Competition Commission.

As regards remedies, the law does not state specifically what remedies the Competition Commission may impose. Usually, if the Competition Commission finds that an undertaking has infringed the Cartels Act, it will order the parties to cease the violation. In cases of refusal to deals, this may imply compulsory licensing. Theoretically also the divestment of IP could be ordered. However, it can be expected that the Competition Commission would be very reluctant to do so. As regards remedies to be sought in civil courts, please see question 12.

28 Competition law remedies specific to IP

Do special remedies exist under your competition laws that are specific to IP matters?

No.

29 Remedies and sanctions

What competition remedies or sanctions have been imposed in the IP context?

There are no cases on this subject.

30 Scrutiny of settlement agreements

How will a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective?

There is no case law on this question. But it can be expected that settlement agreements whereby one party agrees not to compete with respect to the patented product are lawful as long they are not sham agreements for a market-sharing scheme.

Economics and application of competition law

31 Economics

What role has economics played in the application of competition law to cases involving IP rights?

There is no case law on this subject. It can be assumed that economics will not play a more important role than in other antitrust cases.

32 Recent cases

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

The last high-profile case dealing with the intersection of competition law and IP rights was the *Kodak* case mentioned in question 10.

Another current case is the *CCV-Jeronimo v SIX Multipay* case. SIX Multipay is an acquirer for debit and credit cards. It also supplies payment card terminals. SIX Multipay developed a new function, the dynamic currency conversion, which allows cardholders to choose at the point of sale whether they want to pay in their home currency or in Swiss francs. SIX Multipay refused to grant access to information on interfaces to competing suppliers of payment card terminals such as CCV-Jeronimo. The Competition Commission is currently investigating whether this refusal violates the Cartels Act.

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