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Page: 1/26

**Council for Trade-Related Aspects of  
Intellectual Property Rights**

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**CHECKLIST OF ISSUES ON ENFORCEMENT<sup>1</sup>**

**RESPONSES FROM SWITZERLAND**

**Introduction**

The present document is an updated version of the responses of Switzerland to the Checklist of Issues on Enforcement as contained in document IP/N/6/CHE/2 of 12 February 2014. This revised version of the responses reflects the state of laws and regulations in force in Switzerland on 17 January 2022.

During the past 15 years, the IP Enforcement System in Switzerland has undergone various changes. In the year 2000, a comprehensive revision of the Swiss Federal Constitution ('the Constitution') came into force. In addition, 2007 saw the Federal Procedure Law change with the merging of all federal administrative appeal and arbitration committees into one Federal Administrative Court. The Swiss system is characterized by federalism and according to Articles 122 and 123 of the Constitution, the Confederation has the right to legislate on matters such as intellectual property, civil law, civil procedure law, criminal law, and criminal procedure law. Until 2011, civil and criminal procedure law was vested with the Cantons. Based on the new rules of the Constitution, the Law on Civil Procedure and the Law on Criminal Procedures came into force on 1 January 2011. The organization of the judicial system and the administration of justice remain with the Cantons. Finally, in 2012, the Federal Patent Court started to operate as the court of first instance for actions concerning patents. As of 2017, some rules concerning indications of source and the Swiss coat of arms were modernized, leading to novelties in the field of enforcement. More specifically, criteria applicable for the use of Swiss indications of source in relation to goods or services were specified and, at the same time, the Swiss Federal Institute of Intellectual Property was endowed with further competences to enforce these laws.

The Constitution establishes the Federal Supreme Court under Article 188. Subject to the conditions of federal law, appeals may be made to the Federal Supreme Court in response to decisions on IP matters from the higher Cantonal Authority, the Federal Patent Court and, in some cases, the Federal Administrative Court.

Enforcement of intellectual property rights (IPRs) is governed by federal legislation. The details of the relevant laws and regulations (dates of entry into force and amendment, references to the official gazettes/compendia in which they were published) can be found in the latest notifications of revised IP laws and regulations of Switzerland contained in documents IP/N/1/CHE/26 to IP/N/1/CHE/45 of 2022.

For the sake of convenience, the Swiss federal laws and regulations relating to intellectual property and IP enforcement most often referred to can be found in the *non-exhaustive* list below. In addition to the legislative texts, court decisions and legal opinion also play an important role in the development of Swiss law, particularly with regard to the general principles of law.

1. The special intellectual property laws and regulations are:
  - the Federal Act on Copyright and Related Rights (SR 231.1, CopA);
  - the Ordinance on Copyright and Related Rights (SR 231.11, CopO);

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<sup>1</sup> Document [IP/C/5](#)

- the Federal Act on the Protection of Topographies of Semi-Conductor Products (SR 231.2, LTo);
- the Ordinance on the Protection of Topographies of Semi-Conductor Products (SR 231.21, OTo);
- the Federal Act on the Protection of Trade Marks and Indications of Source (SR 232.11, TmPA);
- the Ordinance on the Protection of Trade Marks and Indications of Source (SR 232.111, TmPO);
- the Ordinance on the Use of Swiss Indications of Source for Food Products (SR 232.112.1);
- the EAER Ordinance on the Use of Swiss Indications of Source for Food Products (SR 232.112.11);
- the Ordinance on the Use of "Switzerland" or "Swiss" for Watches (SR 232.119);
- the Ordinance on the Use of Swiss Indications of Source for Cosmetic Products (SR 232.112.3);
- the Federal Act on the Protection of Designs (SR 232.12, DesA);
- the Ordinance on the Protection of Designs (SR 232.121, DesO);
- the Federal Act on Patents for Inventions (SR 232.14, PatA);
- the Ordinance on Patents for Inventions (SR 232.141, OBI);
- the Federal Act on the Protection of New Plant Varieties (SR 232.16, LPOV);
- the Federal Act on the Protection of Swiss Coat of Arms and Other Public Signs (SR 232.21, CAPA);
- the Ordinance on the Protection of the Swiss Coat of Arms and Other Public Signs (SR 232.211, CAPO);
- the Ordinance on the Register of Designations of Origin and Geographical Indications for Non-Agricultural Products (SR 232.112.2, Ordinance on Non-Agricultural PDOs and PGIs);
- the Ordinance on the Protection on Designations of Origin and Geographical Indications for Agricultural Products, Processed Agricultural Products, Forestry Products and Processed Forestry Products (SR 910.12, PDO/PGI Ordinance);
- the EAER Ordinance on the Minimum Requirements for Control Procedures of Protected Designations of Origin and Geographical Indications (SR 910.112, Ordinance on the Control of PDOs and PGIs);
- the Federal Act on the Statute and Tasks of the Federal Institute of Intellectual Property (SR 172.010.31);
- the IPI Ordinance on fees (SR 232.148).

2. The following laws contain certain provisions on specific issues in the field of intellectual property:

- the Federal Act on Agriculture (SR 910.1, AgricA);
- the Ordinance on Viticulture and Importation of Wine (SR 916.140, Ordinance on Wine);
- the Federal Act on Unfair Competition (SR 241, UCA);
- the Swiss Code of Obligations (SR 220, CO);
- the Federal Act on Cartels and Other Restraints to Competition (SR 251, CartA).

3. The following laws contain special provisions concerning enforcement and are also applicable to the field of intellectual property:

- the Swiss Civil Procedure Code (SR 272, CPC);
- the Federal Act on the Federal Civil Procedure (SR 273, FCPA);
- the Swiss Criminal Procedure Code (SR 312.0, CrimPC);
- the Federal Act on Administrative Procedures (SR 172.021, APA);
- the Ordinance on Fees and Costs in Administrative Procedures (SR 172.041.0);
- the Swiss Criminal Code (SR 311.0, SCC);
- the Federal Act on the Federal Supreme Court (SR 173.110, FSCA);
- the Federal Act on the Federal Administrative Court (SR 173.32, FACA);
- the Federal Act on the Federal Patent Court (SR 173.41, PatCA);
- the Federal Act on the Free Movement of Lawyers (SR 935.61, LawA);
- the Federal Act on Patent Attorneys (SR 935.62, PatAA);
- the Ordinance on Patent Attorneys (SR 935.621, PatAO);
- the Federal Act on the Liability of the Confederation, the Members of its Authorities and its Officials (SR 170.32, GLA);

- the Ordinance relating to the Law on Liability (SR 170.321, Ordinance on Liability);
- the Ordinance on the Notification of Cantonal Criminal Judgments (SR 312.3);
- the Ordinance on Federal Customs Administration Charges (SR 631.035).

4. The importance of the Federal Constitution (SR 101, Cst.) must be emphasized, as it contains a number of general principles of law, such as legality, equality before the law, good faith and proportionality which guide Swiss legislation and jurisdiction.

5. The principle whereby public international law is part of national law is codified in Article 190 Cst. It states that all the judicial authorities shall apply both federal acts and international law.

6. In addition to the texts referred to in paragraphs 1, 2 and 3, and the international intellectual property agreements such as the TRIPS Agreement, the Berne Convention and the Paris Convention, it should be noted that Switzerland is also a party to international treaties on judicial proceedings, such as the Lugano Convention (Convention of 30 October 2007 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; SR 0.275.12) and the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR; SR 0.101). The latter forms an important basis with regard to certain general principles of law, particularly the right to be given a hearing.

7. Lastly, it should be noted that Switzerland and the Principality of Liechtenstein form a single customs territory by virtue of the Customs Union Treaty of 29 March 1923 (RS 0.631.112.514). Under the Customs Union Treaty the two countries concluded the bilateral Treaty on Patents on 22 December 1978 (RS 0.232.149.514), whereby the law applicable to the two countries is the Swiss Federal Act on Patents for Inventions (PatA). Similarly, the Swiss agricultural legislation also applies to Liechtenstein, in particular the provisions on PDOs and PGIs.

8. In view of the complexity of the subject and the difficulty of fully reflecting the system, Switzerland reserves the right to revise this communication as and when necessary.

## Civil and Administrative Procedures and Remedies

### (a) *Civil judicial procedures and remedies*

#### **1. Specify the courts which have jurisdiction over IPR infringement cases.**

Civil judicial remedies are regulated under federal legislation. The Swiss Civil Procedure Code (CPC) governs the proceedings before cantonal authorities for contentious civil matters (Article 1(a) CPC) unless the special intellectual property laws contain specific provisions.

Article 5(1) CPC expressly requires each Canton to designate a single court to be responsible throughout its territory for dealing with civil actions concerning intellectual property rights irrespective of the sum involved. The same applies concerning the Federal Act on Unfair Competition (UCA) - which contains, *inter alia*, provisions on industrial and business secrets, and on incitement to betray these secrets - if the sum involved is higher than CHF 30,000. The Cantons designate the responsible Court in their Cantonal Judicial Organisation Acts. For instance, in the Canton of Geneva, the Court of Justice ("Cour de Justice") is the only court competent to determine intellectual property matters, while in the Cantons of Zurich and Berne it is the Commercial Court ("Handelsgericht"). These courts of sole jurisdiction are also the courts of last instance at cantonal level.

With regard to patents, the competent judicial authority is the Federal Patent Court. It decides over the existence and the infringement of patents, over the grant of licences, the grant of interim measures and the enforcement of these decisions (Article 26(1) PatCA). The Federal Patent Court decides over other civil appeals if they are connected with patents. If, in a civil appeal before a Cantonal Court, the question over the invalidity or the infringement of a patent has to be answered before deciding over the case, the Cantonal Court sets a time-limit to institute legal proceedings before the Federal Patent Court. The Cantonal Court suspends its proceedings until the Federal Patent Court passes a final decision (Article 26(3) PatCA). The procedure before the Federal Patent Court is governed by the Swiss Civil Procedure Code (see Article 27 PatCA).

An appeal to the Federal Supreme Court against decisions of the single Cantonal Courts or the Federal Patent Court is admissible in disputes relating to intellectual property rights, irrespective of the sum involved (Article 75(1) and Article 74(2)(b) FSCA).

In matters of unfair competition, where the sum at stake is less than CHF 30,000, the case is brought before the ordinary cantonal civil courts. An appeal to the Federal Court is admissible against the final decisions taken by the last cantonal court only if the appeal raises a question concerning a legal principle (Article 74(1)(a), 74(2)(a) FSCA).

## **2. Which persons have standing to assert IPRs? How may they be represented? Are there requirements for mandatory personal appearances before the court by the right holder?**

### **2.1 Which persons have standing to assert IPRs?**

#### **2.1.1 Standing to act pursuant to an IPR or an exclusive licence right:**

Any holder of an IPR or the beneficiary of an exclusive licence right whose right is or is likely to be infringed has standing to act before the courts (Articles 62(1) and 62(3) CopA; Article 10(1) LTo; Articles 55(1) and 55(4) TmPA; Article 35(1) and 35(4) DesA; Article 72 and Article 75 PatA). Holders of a non-exclusive licence are allowed to join an appeal made by the IPR right holder or the holder of the exclusive licence right to claim their own damage.

The CopA, for instance, states that where there are a number of authors, each co-author has standing to bring an action against anyone who has infringed the rights over the common work; however, they may do so only on behalf of all those concerned (Article 7(3) CopA).

Insofar as indications of source are concerned, trade or business associations may bring an action for the declaration of a right or a legal relationship or an action pursuant to a contractual obligation provided that their statutes authorize them to defend the economic interests of their members (Article 56(1)(a) TmPA). Standing to act with regard to indications of source is also granted to national or regional organizations which, in accordance with their statutes, are concerned with consumer protection (Article 56(1)(b) TmPA). These two categories of organization also have standing to bring an action for a declaration involving a guarantee mark or a collective mark (Article 56(2) TmPA).

In addition, the Swiss Federal Institute of Intellectual Property (IPI) may bring an action for declaratory judgment or an action for performance as far as indications of source that have designations such as "Switzerland", "Swiss" or other designations or symbols that indicate the geographical territory of the Swiss Confederation (Article 56(1)(c) TmPA) are concerned. Furthermore, the canton concerned, to the extent that its name or other designations or symbols referring to its geographical territory are used, has the same standing (Article 56(1)(d) TmPA).

Regarding the protection of the Swiss coat of arms and other public signs, any person who suffers infringement of or threat to their economic interests due to the unlawful use of a public sign may request the court to prohibit an imminent infringement, remedy an existing infringement, or establish the unlawful nature of an infringement. The same rights are granted to professional and trade associations in order to safeguard their members (Article 21(a) CAPA), as well as organizations of national or regional importance dedicated to the protection of consumers (Article 21(b) CAPA). Furthermore, a public body entitled to use a public sign may bring an action under the same circumstances (Article 22(1) CAPA), as well as the IPI insofar as the use of the sign implies a reference to a national authority or an official or semi-official activity (Article 22(2) CAPA).

With regard to unfair competition, anyone whose economic interest is or is likely to be infringed has standing before the courts (Article 9(1)(a-b) UCA).

#### **2.1.2 Standing to act for a declaratory judgment:**

Anyone with a legitimate interest in the declaration of a right or a legal relationship has standing to bring an action (see Article 61 CopA; Article 10(1) TopoA; Article 52 TmPA; Article 33 DesA; Articles 28 and 74 PatA; Article 9(1)(c) UCA; Article 20(1)(d) CAPA).

### 2.1.3 Standing to act for the assignment of a right:

Where a patent application has been filed by a person who had no right to be granted the patent, the entitled person may request that the patent application, or the patent itself, if it has already been granted, be assigned to the entitled person (Article 29(1) PatA). A similar action for assignment is provided for under the Trade Mark Act (Article 53(1) TmPA) and under the Designs Act (Article 34 DesA).

### 2.2 How may they be represented?

Each party has the right to either represent itself or to be represented by a lawyer with power of attorney in legal proceedings (Article 68(1) CPC).

The ability to act as a professional representative before any cantonal and federal court is granted to any lawyer admitted to represent parties before Swiss courts under the LawA (Article 68 CPC; 40 LTF). Before the Federal Patent Court, patent lawyers, under the Patent Attorneys Act of 20 March 2009, are also allowed to act as professional representatives (Article 29 PatCA).

### 2.3 Are there requirements for mandatory personal appearances before the court by the right holder?

If the court considers it necessary, it may summon a party, or all the parties, to appear before the court in person (Article 68(4) CPC). If a party fails to appear before the court, the court continues the procedure in the absence of the summoned party (Article 147 CPC). If the absent party provides a satisfactory explanation, the court can grant a new time to appear in person before the court (Article 148 CPC).

## **3. What authority do the judicial authorities have to order, at the request of an opposing party, a party to a proceeding to produce evidence which lies within its control?**

As a general rule each party in civil proceedings must, except under certain circumstances, prove the facts which it cites in order to exercise its rights before the courts (Article 8 CC). However, the claimant may rely on evidence which lies within the defendant's control who, if the court so requests, is obliged to produce it, except in the case of correspondence with its lawyers (see Article 160(1)(b) CPC). If a party claims that a document containing a crucial item of evidence lies within the control of the opposing party or a third party, the court may, at the request of that party, order the opposing party or third party to present that item of evidence. The opposing party may oppose the adducing of the evidence or the formal notice to produce a piece of evidence if the law allows it to do so (Article 162 *et seq.* CPC), especially if by presenting the document a person close to the opposing party would be liable under civil or criminal law or if by presenting the document the opposing party would be liable under Article 321 Criminal Code (CSCC) for revealing a secret (Article 163 CPC).

If a party disputes being in possession of an item of evidence, the judicial authorities may call upon that party to indicate where this item of evidence (e.g. a document) can be found. The party is then obliged to reveal the location of the evidence concerned (Article 160(1)(a) CPC). Failing to do so becomes punishable under criminal law (Article 306 SCC). Any party to civil proceedings which has been directed by judicial authorities to reveal any evidence and has been made aware of the consequences of making false statements, could either face a custodial sentence of a period not exceeding three years and/or a monetary penalty (Article 306 SCC).

The court forms its opinion based on its free assessment of the evidence taken (Article 157 CPC). It will therefore take into account the unjustified refusal to answer a question put by the judge or to either produce required evidence or indicate where it can be found (see Article 164 CPC). The court will also take into consideration the conduct of a party which deliberately disposes of evidence or makes it unusable. The court may, however, not infer from a party's or third party's legitimate refusal to cooperate that the alleged fact is proven (Article 162 CPC).

Evidence which may not, because of its nature, be produced in court or which would damage legitimate interests may be consulted *in situ* (Article 181 CPC).

If a document is to be found within the control of a third party, that party is required to present the document in question (Article 160(1)(b) CPC). This obligation is waived if the content of the document concerns facts in respect of which it could refuse to give evidence (see Articles 165 and 166 CPC).

Insofar as indications of source as well as Swiss coat of arms and other public signs are concerned, the burden of proof is reversed. It is not up to the plaintiff to prove infringement or unlawful use, but up to the person using the indication of source or sign to prove that they are making lawful use of it (Article 51a TmPA; 19 CAPA).

#### **4. What means exist to identify and protect confidential information brought forward as evidence?**

Where evidence jeopardizes the legitimate interests of a party or a third party, especially if confidential information is concerned, the court may take necessary means to protect these interests (see Article 156 CPC).

Witnesses may refuse to testify concerning matters which, if revealed, would expose them to criminal liability under Article 321 SCC (see Article 166(1)(b) CPC).

#### **5. Describe the remedies that may be ordered by the judicial authorities and criteria, legislative or jurisprudential, for their use:**

- **injunctions;**
- **damages, including recovery of profits, and expenses, including attorney's fees;**
- **destruction or other disposal of infringing goods and materials/implements for their production;**
- **any other remedies.**

##### **5.1 Injunctions**

The holder of a right over an intangible asset whose IPR is or is likely to be infringed may request an injunction from judicial authorities to prevent an infringement if it is imminent, or to stop an ongoing one (Article 62(1)(a-b) CopA; Article 10(1) LTo; Article 55(1)(a-b) TmPA; Article 35(1)(a-b) DesA; Articles 66 and 72 PatA; Article 9(1)(a-b) LCD; Article 20(1)(a-b) CAPA).

The action to prevent an imminent infringement presupposes a sufficient interest; this exists if the holder of the IPR is directly threatened by the unlawful act, i.e. if there are serious grounds to fear infringement of the IPR.

The subject of the action to prevent an ongoing infringement must be defined precisely in the submissions accompanying the action. The plaintiff must give an exhaustive description of the defendant's unlawful conduct, so that no difficulty can arise when enforcing the judgment. The injunction may, as a matter of course, be coupled with the threat of the penalties provided for in Article 343 CPC (criminal penalty under Article 292 SCC, disciplinary fees up to CHF 5,000 or CHF 1,000 for each day of non-compliance) addressed to the defendant.

The claimant must, at the request of the defendant, provide security for the payment of costs, in particular if he or she does not have a domicile or seat in Switzerland (Article 99(1)(a) CPC).

##### **5.2 Damages, including recovery of profits, and expenses, including attorney's fees**

###### **5.2.1 Damages**

Anyone who either through negligence or intentional carelessness infringes an IPR and causes damage to the IPR holder, is required under the CO to repair that damage (Article 62(2) CopA; Article 10(1) LTo; Article 55(2) TmPA; Article 35(2) DesA; Article 73(1) PatA; Article 9(3) LCD; Article 20(2) CAPA). The right holder then has a choice between various actions for damages and recovery provided under the CO: an action for the payment of damages (*damnum emergens et*

*lucrum cessans*) (Articles 41 *et seq.* CO), an action for surrender of the proceeds of unjust enrichment (Article 62 CO), an action to compensate for non-pecuniary damage (Article 49 CO), and an action for the handing-over of earnings in accordance with the principles of business conducted in the agent's interest (Article 423 CO).

If the right holder is unable to quantify the damage they have suffered or the infringer's unlawful profit, they may ask the judge to use his/her discretion in determining the amount of compensation (*ex aequo et bono*), in the light of the ordinary run of events and the measures taken by the injured party (Article 42(2) CO).

#### 5.2.2 Legal fees

The court rules as a matter of course on the procedural costs of the case (Article 104 CPC). The procedural costs include the court costs and the party costs (Article 95(1) CPC). As a general rule, the court costs are awarded against the party that has lost the case (see Article 106(1) CPC). If neither of the parties has won the case on all counts, the costs are allocated in accordance with the outcome of the case (Article 106(2) CPC). Unnecessary expenses are charged to the party that caused them (Article 108 CPC).

At the request of the parties the court decides, by ruling on the dispute itself, whether and to what extent the costs of the party that has won the case will be borne by the party that has lost. The parties may provide a detailed statement of their expenses before the judgment is delivered (Article 105(2) CPC). The compensation includes the costs for professional representation and the reimbursement of necessary outlays (Article 95(3)(a-b) CPC). In justified cases, the court may also grant reasonable compensation for personal efforts if a party is not professionally represented (Article 95(3)(c) CPC).

#### 5.3 Destruction or other disposal of infringing goods and materials/implements for their production

In all fields of intellectual property the court may order items which have been made or used unlawfully, as well as instruments, tools and other resources intended mainly for manufacturing them, to be confiscated, destroyed or rendered unfit for use (see Article 63(1) CopA; Article 10(1) TopoA; Article 57 TmPA; Article 36 DesA; Article 69(1) PatA; Article 23(1) CAPA). An exception is made for works of architecture already constructed (Article 63(2) CopA) and semi-conductor products acquired in good faith which contain illegal copies of topographies (Article 10(2) TopoA). It is permitted to put the latter back into circulation; however, the producer is entitled to receive a fair payment. In the event of a dispute, the court determines whether the entitlement to payment is substantiated and, if so, fixes the amount of the payment (Article 8 TopoA).

According to trademark law, it is for the court to decide "whether the mark or indication of source is to be rendered unrecognizable or whether the articles are to be rendered unfit for use, destroyed or used in a particular manner" (Article 57(2) TmPA).

Even if the case is dismissed, the court may order the destruction of articles manufactured in breach of a patent and of the instruments, tools and other resources intended mainly for the infringement of a patent (Article 69(3) PatA).

#### 5.4. Any other remedies

##### Publication of the judgment

At the request of the party that has won the case, the court may order the judgment to be published at the expense of the opposing party (Article 66 CopA; Article 10(1) LTo; Article 60 TmPA; Article 39 DesA; Article 70(1) PatA; Article 9(2) LCD; Article 26 CAPA).

#### **6. In what circumstances, if any, do judicial authorities have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the goods or services found to be infringing and of their channels of distribution?**

The TmPA, the CopA, the DesA and the LTo authorize the right holder, whose right is being or is likely to be infringed, to ask the judge to require the other party to indicate the source and the

quantity of those goods in its possession which have been unlawfully reproduced or unlawfully provided with a distinctive sign as well as the addressees' names and the extent of the distribution to commercial customers (Article 62(1)(c) CopA; Article 10(1) LTo; Article 55(1)(c) TmPA; Article 35(1)(c) DesA; Article 20 (1)(c) CAPA). The law on patents stipulates that the refusal to declare to the "competent authority" the source, the quantity, the addressees and the extent of the commercial customers of those products in its possession that have been unlawfully manufactured may give rise to civil or criminal proceedings (see Article 66(b) PatA).

**7. Describe provisions relating to the indemnification of defendants wrongfully enjoined. To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?**

As a general rule, the party which loses the case will be ordered to reimburse in full the opposing party's costs (see Articles 105(2) and 106 CPC). This includes the reimbursement of necessary outlays, the costs for professional representation and, in justified cases, a reasonable compensation for personal efforts if a party is not professionally represented.

If the defendant suffers damage as a result of wrongful judgment delivered based on a plaintiff's petition that constitutes an unlawful act, the defendant may, on the basis of Articles 41 *et seq.* CO, claim compensation via the ordinary procedure.

In the event of unjustified provisional measures (interim measures), the possibility of bringing an action via the ordinary procedure against the plaintiff for compensation in respect of the damage is explicitly provided for in the federal civil procedure law. The court may make the interim measure conditional on the payment of security by the applicant if it is anticipated that the measures may cause loss or damage to the opposing party. Article 264(2) CPC provides that the applicant is liable for any loss or damage caused by an unjustified provisional measure. If the applicant proves, however, that he or she applied for the measure in good faith, the court may reduce the damages or entirely release the applicant from liability. Any security paid must be released once it is established that no action for damages will be filed; in case of uncertainty, the court may specify a suitable period within which the opposing party must bring its action (Article 264(3) CPC).

Whether decisions or judgments are erroneous is, in principle, verified through the normal channels of appeal. The authority and/or the public servant in question is not liable in such a situation. According to the decisions of the Federal Supreme Court, an unlawful act giving rise to liability can occur only if there has been a serious and obvious error. In the case of public authorities and officials, the idea of an unlawful act is tied up with that of a breach of official duties. An unlawful act occurs if the judge or the public servant is guilty of negligence or an error which would not have been perpetrated by a normally conscientious magistrate (ATF 112 II 231). If they acted or intended to act in good faith when, at the request of the plaintiff, they enjoined a particular course of action, proceedings for damages are excluded.

Liability of members of the Federal Supreme Court, the Swiss Federal Institute of Intellectual Property and other independent federal authorities, the Federal Administrative Court, the Federal Patent Court, the Federal Administration and other independent federal authorities *vis-à-vis* third parties is governed by the Federal Act on the Liability of the Federal Government, the Members of its Authorities and its Public Officials (SR 170.32, GLA; see Article 1(1) GLA). According to Article 3(1) GLA, the Federal Government is liable for damage caused unlawfully to a third party by an official in the performance of their duties. The aggrieved party cannot take any action against the offending official. Also, the legality of the final decisions, orders and judgments cannot be re-examined in an action for damages (see Article 12 GLA).

Each Canton has its own laws on liability for public law acts. In fact, most Cantons have the same system as the Federal Government, with the Canton being liable for damage unlawfully caused to a third party by an official in the performance of their duties.

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**8. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.****8.1 Length of proceedings**

There are no data on the duration of proceedings. This depends on numerous factors which can vary on a case-by-case basis (complexity of the matter, number of exchanges of documents, appeal to the Federal Supreme Court, etc.).

If the court takes too long to make a decision, an objection for denial of justice is possible (Article 319(c) CPC).

**8.2 Cost of proceedings**

The cost of proceedings includes legal and other expenses. The Cantons fix the scale of legal charges for the proceedings before cantonal courts (Article 96 CPC).

The court fees at the Federal Patent Court are fixed according to the sum involved in the dispute, the scale and difficulty of the case, the way in which the parties proceed and their respective financial situation (Article 31(2) PatCA). The court fees range from CHF 1,000 to CHF 150,000 (Article 31(3) PatCA).

The court fees at the Federal Supreme Court level are also fixed according to the sum involved in the dispute, the scale and difficulty of the case, the way in which the parties proceed and their respective financial situations (Article 65(2) FSCA). For instance, the court fees for an appeal may, depending on the sum involved, range from CHF 200 to CHF 100,000 (see the Federal Supreme Court's scale of court fees, 31 March 2006; SR 173.110.210.1).

At cantonal level, the judge determines the parties' compensation and the attorney's fees within the limits of the scale of charges using their discretion to assess the amount of time lost, the nature of the work done and the sum involved in or importance of the case (Article 95 CPC).

For cases heard by the Federal Patent Court, a scale determined by the court establishes the amount of the costs awarded to the opposing party based on the sum involved in the dispute (Article 4 of the Rules for Procedural Costs before the Federal Patent Court, SR 173.413.2). The compensation ranges from CHF 2,000 to CHF 300,000 (Article 5 of the Rules).

For cases heard by the Federal Supreme Court, a scale determined by the court establishes the amount of the costs awarded to the opposing party in respect of the court proceedings and also takes attorney's fees into account (Article 4 of Rules for Costs Awarded to the Opposing Party in Cases Heard by the Federal Supreme Court (RS 173.110.210.3)). The costs include the compensation payable to the opposing party and its attorney's fees. The compensation payable to the opposing party includes the reimbursement of its disbursements. Where this is justified by special circumstances, the court may also award compensation for time or earnings lost as a result of the dispute (with regard to the federal level, see Article 11 of the Rules). For an appeal, the amount of the fees ranges between CHF 600 and CHF 4,000 (where the sum involved is less than CHF 20,000), and CHF 20,000 and 1% (where the sum involved is more than CHF 5,000,000) – see Article 4 Rules for Costs Awarded to the Opposing Party in Cases Heard by the Federal Supreme Court. In exceptional cases, such as those requiring an extraordinary amount of work (where the evidence is lengthy and difficult to substantiate and the case is a big and complex one), the Federal Supreme Court may award fees which are higher than the normal rate (Article 8 of Rules for Costs Awarded to the Opposing Party in Cases Heard by the Federal Supreme Court).

It should be noted that the Federal Supreme Court's scale of charges does not apply to relations between the lawyer and their client; these are governed by the contract of agency provisions of the code of obligations. In this case, attorney's fees are normally calculated in accordance with a scale laid down by the bar association of each Canton and depend on a number of factors, including the amount involved in the dispute.

Legal aid is granted to an indigent party: this applies at both the federal level (Article 64 FSCA; Article 34 PatCA) and the cantonal level (Articles 117–123 CPC).

In light of the foregoing, it is difficult to put a precise figure on the total cost of a case owing to numerous factors which may be taken into account, such as the sum involved in the dispute, the length of the proceedings, the number and length of the hearings, the cost of expert opinions and witnesses' allowances.

(b) *Administrative procedures and remedies*

**9. Reply to the above questions in relation to any administrative procedures on the merits and remedies that may result from these procedures.**

With regard to intellectual property, only the federal authorities are involved in administrative procedures. Articles 7 to 43 of the Federal Act on Administrative Procedure (APA) apply to first-instance administrative procedures, in particular before the Swiss Federal Institute of Intellectual Property (IPI). The appeals procedure involving the Federal Administrative Court is, however, governed by Articles 44 to 71 of the APA and by the Federal Act on the Federal Administrative Court (FACA). Where an administrative law appeal to the Federal Supreme Court is admissible, proceedings before this authority are governed by Articles 82 to 112 FSCA.

It should be stressed that Swiss intellectual property law *does not provide for administrative procedures on the merits and remedies for IPR infringements such as those referred to within the context of judicial proceedings*. However, for reasons of **transparency**, a description is given of the rules which apply to administrative procedures in general. The following may be cited as types of administrative procedures to which an IPR holder may have recourse to assert their right:

- Opposition procedure by the holder in respect of a registration which they considers to be in conflict with their IPR<sup>2</sup>;
- a request for intervention at the border.

9.1 Specify the administrative authorities which have jurisdiction over IPR infringement cases

Opposition procedure

This procedure is provided for in the field of trademarks, geographical indications and patents.

The holder of a prior mark may lodge an objection to a new registration with the IPI within three months of that registration being published (Articles 31 *et seq.* TmPA).

Appeals against decisions of the IPI may be lodged with the Federal Administrative Court (Article 44 APA). If the objector wins their case, the registration of the mark will be revoked. The Federal Administrative Court's decisions in trademark opposition cases are final (Article 73 LTF).

Opposition procedure is based on plausibility. It is supposed to be quick and inexpensive. Beside the opposition procedure, a nullity procedure is possible before the civil courts.

It is also possible to oppose patent applications within nine months after the publication of the registration with the IPI (Article 59c PatA). Anyone may oppose the registration based on absolute grounds for refusal, which are, however, limited to the exclusion of patentable material on grounds of morality (Article 1a, 1b and 2 PatA). Opposition against lack of novelty or inventive step is not possible, as these elements are not assessed during the examination of a patent. Appeals against these decisions are dealt with in the first instance by the Federal Administrative Court (see Article 59c(3) PatA) and in the final instance by the Federal Supreme Court.

With regard to geographical indications, anyone who can prove a legitimate interest or the Cantons may lodge an objection to the registration of a geographical indication with the Federal Agriculture Office or the IPI (see Articles 10 and 11 Ordinance on Agricultural PDOs and PGIs; Article 9 Ordinance on Non-Agricultural PDOs and PGIs). Appeals against these decisions are dealt with in the first instance by the Federal Administrative Court (Article 44 APA) and in the final instance by the Federal Supreme Court. Possible grounds for objection may include the non-representative

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<sup>2</sup> Opposition proceedings are covered by Article 62 of the TRIPS Agreement. Except in the case of trademarks, opposition proceedings may be initiated for reasons other than that of a conflict with a prior right.

nature of the applicant group, a conflict with a well-known or reputable mark or name which is completely or partly homonymous and has been in use for a long time.

#### Measures at the border

The Customs Authorities are responsible for measures at the border. They may suspend the release into free circulation of a suspect consignment "ex officio" and alert the persons referred to in section 9.2.1 below or may act on request from such a person. The Customs Authorities' decision cannot be appealed. The introduction of an appeals procedure would run counter to the goal pursued by the Customs Authorities, viz. to act in as simple and rapid a manner as possible to give the applicant the time to obtain provisional measures from the civil court. An appeal could actually prevent the Customs Authorities from acting in time. It should be noted that if someone applies for a measure at the border, as a rule, provisional measures from the civil law judicial authorities should be requested within the prescribed periods (see, for instance, Article 77(2) CopA; Article 72(2) TmPA).

9.2 Which persons have standing to assert IPRs? How may they be represented? Are there requirements for mandatory personal appearances before the administrative authority by the right holder?

9.2.1 Which persons have standing to assert IPRs?

#### Opposition procedure in the event of conflict with a prior right

With regard to trademarks, only the holder of a prior mark which has been filed or registered, or a well-known mark may oppose the subsequent registration of another mark within three months of that mark being published (Article 31, 3(2) and 3(3) TmPA). Insofar as patents are concerned, any person may, within nine months of publication of a patent registration, oppose the issuing of the patent (Article 59c PatA). With regard to an appeal to the Federal Administrative Court against decisions concerning opposition applications, anyone involved as a party to the procedure which led to the decision appealed against or anyone excluded from the procedure by the decision appealed against has standing to act (Article 48 APA).

#### Measures at the border

The following have standing to apply for action to be taken: the holder of a trademark, copyright or related right, the right to an industrial design or integrated circuit topography, the registered holder of a geographical indication, copyright or related rights collecting societies, licensees entitled to lodge a civil procedure or even trade or business associations which are authorized to do so with regard to geographical indications (Articles 75(1) and 76(1) CopA and Article 12 TopoA with a cross-reference to Article 75(1) CopA; Article 71(1) TmPA; Article 47 DesA; Article 86b PatA). In regard to indications of source, to the extent that designations such as "Switzerland", "Swiss" or other designations or symbols that indicate the geographical territory of the Swiss Confederation are used, the IPI has standing to apply for action to be taken (Article 71(1) TmPA). As far as the protection of the Swiss coat of arms and other public signs is concerned, the same rules apply (Article 31(2) CAPA).

9.2.2 How may they be represented?

At all stages of the administrative procedure, a party may be represented unless it has to act in person, or be assisted if this possibility is not ruled out in view of the urgency of an official inquiry. The person representing or assisting the party in question must possess civic rights (Article 11 APA).

In administrative procedures, in both the first and final instance, there is no obligation to be represented by a lawyer (see Article 11 APA; conversely Article 40 FSCA). However, any person who is involved in an administrative procedure and does not have a residence or principal place of business in Switzerland must designate an address for service in Switzerland, unless international law or the competent foreign body permits the authority to serve documents directly in the state concerned. The IPI is entitled to declare to the competent foreign body that direct service is permitted in Switzerland in intellectual property matters provided Switzerland is granted reciprocal rights (Article 13(1) PatA; Article 42 TmPA; Article 18 DesA).

Nevertheless, there are provisions requiring parties to be represented by an attorney: anyone who is party to an administrative procedure concerning intellectual property and who is neither resident in nor has their head office in Switzerland must be represented by an attorney established in Switzerland, unless international law or the competent foreign body permits the authority to serve documents directly in the state concerned (Article 42 TmPA; Article 5 TmPO; Article 18 DesA; Article 5 DesO; Article 13 PatA and Article 8 PatO). In addition, if more than 20 people submit collective or individual applications to defend the same interests, the authority may require them to select one or more representatives for the procedure (Article 11a APA).

9.2.3 Are there requirements for mandatory personal appearances before the administrative authority by the right holder?

The parties are required to collaborate with the court to establish the facts of the case at hand and have a wider obligation under federal law to provide or disclose information. The authority may declare applications inadmissible if the parties refuse to cooperate insofar as they can be expected to do so (Article 13 APA).

9.3 What authority do the administrative authorities have to order, at the request of an opposing party, a party to an administrative procedure to produce evidence which lies within its control?

The APA does not contain any direct or exhaustive answer to this question. With regard to the procedure of taking evidence, the rules of the Federal Act on Federal Civil Procedure (FCPA, SR 273) apply *mutatis mutandis* (Article 19 APA), namely those relating to proof and evidence such as that provided by witnesses, documents, visual inspection and experts. The parties are required to produce all the evidence which lies within their control in the legal proceedings (see Article 50(1) FCPA). If a party claims that a document containing a crucial item of evidence lies within the control of the opposing party or a third party, the court may, at the request of that party, order the opposing party or third party to present that item of evidence.

If a party disputes being in possession of an item of evidence, the judicial authorities may call upon it, subject to the statutory penalties, to indicate where this item of evidence (e.g. a document) can be found (see Article 50(1) FCPA).

Documents which may not, because of their nature, be produced in court or which would damage legitimate interests may be consulted *in situ* (Article 53 FCPA).

If a document is to be found within the control of a third party, that party is required to present the document in question. This obligation is waived if the content of the document concerns facts in respect of which it could refuse to give evidence as a witness pursuant to Article 42 FCPA (see Article 51(1) CPC).

In the event of a refusal to cooperate, the authority may apply statutory fines (Article 292 of the Criminal Code (SCC)) or direct enforcement against the person of the obligor or their assets (Article 41 APA). The appeals authority may reprimand or impose a disciplinary fine of up to CHF 3,000 on the parties or their representative if they break with the conventions or disrupt the conduct of a case (Article 60 APA). It should be noted that the authority must not apply a means of constraint which is more rigorous than required by the circumstances (proportionality rule; Article 42 APA).

9.4 What means exist to identify and protect confidential information brought forward as evidence?

The party or its attorney is entitled to consult, under the auspices of the authority called upon to hear and determine the matter, all documents serving as evidence (Article 26(1) APA). The authority may refuse permission to consult the documents only on the following conditions: if important public interests of the Confederation or the Cantons (in particular the internal or external security of the Confederation) or important private interests (particularly those of the opposing party) require that secrecy be maintained or if the interests of an official enquiry which has not yet been closed so require (Article 27(1) APA). Refusal to authorize the consultation of documents may extend only to those which have to be kept secret (Article 27(2) APA). The provisions of the Federal Act on Federal Civil Procedure (FCPA) apply *mutatis mutandis* to the protection of confidential

information in the production of the documents held by third parties and in the procedures governing the giving of evidence (Article 19 APA, which has a cross-reference to Article 51 FCPA). The judge may order a document containing confidential information to be concealed wholly or partly from the opposing party or where necessary from both parties (see Article 38 FCPA). If there are grounds for withholding only certain passages of a document, the court may order those passages to be concealed from view by affixing seals or in some other way (see Article 51(1) FCPA). It may also order the presiding magistrate or a delegation from the court to examine confidential information at the premises of the holder of that information, in order to prevent legitimate interests from being damaged by the disclosure of the documents.

9.5 Describe the remedies that may be ordered by the administrative authorities and criteria, legislative or jurisprudential, for their use:

#### 9.5.1 Injunctions

May be ordered only by the judicial authorities. The IPI cannot grant injunctions. In cases where an appeal is pending, the Federal Administrative Court may grant interim measures to uphold an existing situation or to secure threatened interests (Article 56 APA).

#### 9.5.2 Damages, including recovery of profits, and expenses, including attorney's fees

##### Damages

They may be ordered only by the judicial authorities.

##### Administrative expenses

The competent authority also determines the procedural and legal costs (Article 63 and 64 APA). Thus, the IPI, for instance, decides by ruling on the opposition itself, whether and to what extent the costs of the party which wins the case will be borne by the losing party (Article 34 TmPA).

Procedural costs: as a general rule, the procedural costs, which comprise the fee for granting the order, the administrative fees and disbursements, are borne by the losing party. No procedural costs may be awarded against the federal authorities. Costs may be imposed against a party that contravenes procedural rules (Article 63 APA).

Legal costs: The competent authority may, automatically or upon request, award the party which has won on all or some of the counts, compensation for the essential, relatively high expenses it has incurred, particularly in respect of attorney's fees (Article 64 APA).

The rules on costs and compensation in connection with administrative proceedings are contained in the Ordinance on Costs and Compensation in respect of Administrative Procedures of 10 September 1969 (SR 172.041.0).

#### 9.5.3 Destruction or other disposal of infringing goods and materials/implements for their production

The destruction or other disposal of such goods may be ordered only by the judicial authorities. Under certain circumstances, Customs Authorities may destroy infringing goods without judicial authority.

#### 9.5.4 Other remedies

The administrative authorities may not order other remedies such as the publication of the judgment. Publication of the judgment: At the request of the party that has won the case, the court may order the judgment to be published at the expense of the opposing party (Article 66 CopA; Article 10(1) LTo; Article 60 TmPA; Article 39 DesA; Article 70(1) PatA; Article 9(2) LCD; Article 26 CAPA).

9.6 In what circumstances, if any, do administrative authorities have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the goods or services found to be infringing and of their channels of distribution?

It may be ordered only by the judicial authorities.

9.7 Describe provisions relating to the indemnification of defendants wrongfully enjoined. To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?

Under the Federal Act on the Liability of the Federal Government, the Members of its Authorities and its Public Officials (GLA, SR 170.32), the Federal Government is liable for the damage caused unlawfully to a third party by an official in the performance of their duties, irrespective of whether the official was negligent. The injured party cannot bring an action against the negligent official. If a third party claims damages from the Federal Government, the latter immediately notifies the official, against whom it could exercise a right of appeal (Article 3 GLA). If the Confederation compensates for the damage, it may bring an action for indemnity against the official if they caused the damage intentionally or as a result of gross negligence, even after the employer/employee relationship has been terminated (Article 7 GLA). The official is liable for damage caused directly to the Confederation as a result of a violation of their official duties, either intentionally or through serious negligence (Article 8 GLA). The general provisions on the creation of obligations resulting from unlawful acts (Code of Obligations) are applicable to the Confederation's claims against its officials (Article 9(1) GLA). The provisions concerning officials apply *inter alia* to members of the Federal Supreme Court, the Federal Administrative Court, the Federal Patent Court and the Federal Criminal Court, members of the independent federal authorities and of the federal administration, to officials and other servants of the Confederation and to all persons directly entrusted with public law tasks by the Confederation (Article 1(1), Article 2(1), Articles 3 to 10 GLA).

Under the same law, criminal proceedings are also possible if felonies or misdemeanours are committed by officials in the performance of their duties (Articles 13 *et seq.* GLA). Provision is also made for disciplinary liability (Articles 17-18 GLA). If a body or an employee of an independent institution of the ordinary civil service entrusted by the Confederation with carrying out public law tasks wrongfully causes, in the performance of these activities, damage to a third party, the institution is liable for this wrong *vis-à-vis* the injured party and the Confederation is liable, *vis-à-vis* the injured party, for the damage in respect of which the institution is not able to provide compensation. It can – as can the institution – take action against the negligent official (Article 19 GLA).

9.8 Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

#### Cost

For the charges and costs of proceedings with the IPI, see the Ordinance on the Charges of the Swiss Federal Institute of Intellectual Property, SR 232.148.

For charges, costs and compensations in administrative procedures, see the Ordinance on Costs and Compensation in respect of Administrative Procedures (RS 172.041.0) with cross reference to the Rules on Costs and Compensation in respect of Procedures at the Federal Administrative Court (RS 173.320.2).

With regard to the cost of proceedings under the auspices of the Customs Authorities: A fee of between CHF 1,500 and CHF 3,000 is charged for the processing of applications. Each application may be renewed if a fee between CHF 500 and CHF 1,500 is paid (Regulation on Charges levied by the Customs Authorities, SR 631.035). The holding and the notification cost at least CHF 50.

#### Length

The period of time permissible for an authority to decide cannot be determined in the abstract. It depends on a number of factors, including the complexity of the case and the interests at stake.

For opposition proceedings, it is difficult to indicate a precise average figure; however for a simple case (with a single exchange of documents and only three extensions of the periods allowed for replying), the length will be between eight and 12 months. The IPI endeavours to ensure that the proceedings are completed swiftly.

An appeal to the Federal Administrative Court against a decision to have a judgment set aside can take on average eight to ten months. It should be pointed out that a party can at any time appeal to the supervisory authority on the grounds of a miscarriage of justice or unjustified delay against an authority which, without good reason, refuses to act or delays taking a decision (Article 46a APA).

## Provisional Measures

### (a) Judicial measures

#### **10. Describe the types of provisional measures that judicial authorities may order, and the legal basis for such authority.**

##### 10.1 Civil procedural law

The Swiss Civil Procedure Code (CPC) governs the judicial authorities' powers and the conditions for ordering provisional measures in civil proceedings (Articles 261–269 CPC).

The various provisional measures are not listed by the law in an exhaustive manner; the court can and must adapt them to take account of the specific characteristics of each individual case (Article 262 CPC). In general, the provisional measures are concerned essentially with guaranteeing the *de facto* or *de jure* situation or safeguarding the legitimate interests of the parties to the proceedings, up until the final judgment. With regard to intellectual property, the following provisional measures should be noted (e.g. Article 65 CopA; Article 59 TmPA; Article 38 DesA; Article 10(1) TopoA; Article 77(1) PatA; Article 43 LPOV; Article 25 CAPA):

- measures to ensure that the relevant evidence in connection with the alleged infringement is preserved;
- measures to identify the source of goods made or released for circulation unlawfully or to obtain a precise description of the processes allegedly applied illegally, of the products allegedly counterfeited or manufactured illegally and of the facilities, tools, etc. used in their manufacture;
- precautionary measures to maintain the existing *de facto* situation;
- measures to ensure on a provisional basis the exercising of the claims to prevent or put an end to the disturbance.

##### 10.2 Criminal procedural law

There are two types of provisional measures in criminal proceedings.

The first prompts judicial and police authorities to take temporary measures to guarantee that circumstantial and other evidence is preserved. The public prosecutor, however, may only take these measures if (Article 197 CrimPC):

- they are permitted by law;
- there are reasonable grounds for suspicion of a criminal act;
- there are no more moderate measures to reach the same goal;
- the seriousness of the criminal offence justifies the measure.

With regard to intellectual property, the public prosecutor may *inter alia* seize the allegedly counterfeit items and the instruments and implements used principally for counterfeiting purposes (see Article 44 DesA; conversely Article 72 CopA; Article 68 TmPA; Article 69 PatA; Article 23 CAPA). The public prosecutor may order the seizing of allegedly counterfeit items or of instruments and implements used mainly for counterfeiting purposes which can be used as evidence (Article 263 CrimPC). According to the Federal Supreme Court, the judicial authorities may order provisional measures in all IPR-related criminal proceedings in accordance with the "*in majore minus*"

principle.<sup>3</sup> It should be noted that an exception applies to completed works of architecture. According to Article 72 CopA, these may not be confiscated.

The second provisional measure empowers the judicial and police authorities to resort to coercive or constraining measures to ensure that the suspect is present throughout the proceedings and above all that the final decision is enforced. Remand and preventive detention, however, are only permitted if there is a strong suspicion that the accused has committed a felony or misdemeanour and there is a serious concern that the accused (Article 221 CrimPC):

- will evade criminal proceedings or the anticipated sanction by absconding;
- will influence people or tamper with evidence in order to compromise efforts to establish the truth; or
- will pose a considerable risk to the safety of others by committing serious felonies or misdemeanours since he or she has already committed similar offences.

Where there is a risk in any delay, the police or members of the public may provisionally seize items or assets on behalf of the public prosecutor or the courts (Article 263(3) CrimPC).

## **11. In what circumstances may such measures be ordered *inaudita altera parte*?**

### 11.1 Civil procedural law

In general, the judge gives the opposing party the opportunity to be heard; this fundamental principle stems from Article 29(2) Cst. However, if the infringement is imminent such that time does not permit the opposing party to be heard, the judge may order emergency measures subject to an application simply being made (Article 265 CPC). This presupposes that not only are all the conditions satisfied for the granting of the provisional measures but also that the applicant demonstrates that the likely imminence of the threat of infringement is such that there is no time left to hear the opposing party. The latter must be notified as soon as the provisional measures have been carried out.

### 11.2 Criminal procedural law

In criminal proceedings, compulsory measures must be ordered in writing and the persons directly concerned must be given a copy of the warrant and of any records relating to its execution against confirmation of receipt (Article 199 CrimPC). If the person in possession of the seized article is not present while it is actually being seized, they must be notified as soon as the provisional measure has been carried out (Article 29 Cst and Article 6 European Convention on Human Rights, ECHR).

## **12. Describe the main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant.**

### 12.1 Civil procedural law

The main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant, are governed by the CPC and by the federal intellectual property laws. Anyone wishing to apply for provisional measures has to credibly demonstrate that a right to which they are entitled has been violated or a violation is anticipated, and that the violation threatens to cause not easily reparable harm to the applicant (Article 261 CPC). Reasons to order provisional measures could be (see Article 65 CopA; Article 10(1) TopoA; Article 59 TmPA; Article 38 DesA; Article 77 PatA; Article 43 LPOV; Article 25 CAPA):

- to preserve evidence;
- to establish the origin of the manufactured goods infringing the intellectual property right;
- to preserve facts;
- to temporarily cease or prevent the infringement.

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<sup>3</sup> According to the "*in majore minus*" principle the judge may confiscate articles made or used illegally as well as instruments, tools and other resources intended mainly for their manufacture. He/She may also order the provisional seizure of these articles.

As a general rule, the court gives the opposing party the opportunity to be heard (Article 29 Cst., Article 53 and Article 253 CPC). In the event of an emergency measure being imposed, the opposing party must be notified as soon as the measures have been carried out.

The provisional measures guarantee that the applicant's rights will be provisionally protected for the duration of the proceedings. However, they may already be applied for before the action is brought. If need be, the court, when it allows the application, will grant the applicant a period to bring the action, informing them that the provisional measures will lapse if they fail to act within that period (Article 263 CPC). The measures become automatically ineffective when the decision on the merits comes into force. The court may order their continuation if it serves the enforcement of the decision or if the law so provides (Article 268(2) CPC). The judge always has the option to modify or revoke the provisional measures they have ordered if the circumstances have changed or if the measures have proven unjustified (Article 268(1) CPC).

The applicant is liable for any loss or damage caused by unjustified provisional measures. If the applicant proves, however, that he or she applied for the measures in good faith, the court may reduce the damages or entirely release the applicant from liability (Article 264(2) CPC). The court may make the provisional measure conditional on the payment of security by the applicant if it is anticipated that the measures may cause loss or damage to the opposing party (Article 264(1) CPC).

## 12.2 Criminal procedural law

It is for the judicial authorities (the public prosecutor and the court) to order the necessary provisional measures.

It is also for the public prosecutor to lift the applied measures as soon as the conditions which led to the measures being taken have been remedied or satisfactorily addressed (see Article 267(1) and Article 212(2)(a) CrimPC). The fate of the items and assets that were seized must be determined in the final judgment at the latest (Article 267(3)-(6) CrimPC).

All measures are subject to the proportionality rule (Article 5(2) Cst.). This rule requires the judge to resort, if possible, to less incisive measures, such as the drawing-up of an inventory or the taking of photographs (see also Articles 212(2) and 268 CrimPC).

The provisional measures may be the subject of a judicial review at cantonal level (Article 393 CrimPC). However, during the appeals process, the provisional measures will stay in place until the court of appeals has issued its decision (see Article 387 CrimPC).

## **13. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.**

No data are available on the usual length and cost of proceedings concerning the provisional judicial measures pertaining to intellectual property rights.

In general, it can be said that the length of the proceedings is, by the very nature of the measures, short. The proceedings are only summary ("*Summarverfahren*") (Article 248(d) CPC); the judge who investigates the proceedings decides alone and certain conditions which must be satisfied in ordinary proceedings are not required (for example, the imminence of the danger does not have to be proven but only made to appear plausible). The length also depends on the kind of provisional measures requested and the period of urgency. Finally, evidence must in principle be provided in the form of physical records, even though other evidence can be also admissible in certain cases (Article 254 CPC).

The cost of the proceedings can vary from one Canton to another and can depend on both the complexity of the particular case and the amount involved in the dispute.

*(b) Administrative measures***14. Reply to the above questions in relation to any administrative provisional measures.**

The Swiss Federal Institute of Intellectual Property cannot order provisional measures. It cannot, either on its own initiative or at the request of a party, provisionally cancel a registration, since this would not be compatible with the purpose of the IPR registers (public confidence in documents). A party that wishes to obtain provisional measures in a registration matter must request them from the judicial authorities.

In principle, within the framework of the opposition procedure, the Federal Administrative Court may, after receiving the appeal document, order provisional measures, on its own initiative or at the request of a party, provided that such measures are necessary in order to maintain provisionally intact a *de jure* or *de facto* situation (see Article 56 APA). However, this possibility remains theoretical since the *de jure* or *de facto* situation, except regarding the trademark opposed, is not affected by the IPI's decision if a party has lodged an appeal against that decision.

An administrative measure comparable to a provisional measure (*inaudita altera parte*) is the one taken by the Customs Authorities when suspending the release into free circulation of goods suspected of infringing an intellectual property right.

**Special Requirements Related to Border Measures**

**15. Indicate for which goods it is possible to apply for the suspension by the customs authorities of the release into free circulation, in particular whether these procedures are available also in respect of goods which involve infringements of intellectual property rights other than counterfeit trademark or pirated copyright goods as defined in the TRIPS Agreement (footnote to Article 51). Specify, together with relevant criteria, any imports excluded from the application of such procedures (such as goods from another member of a customs union, goods in transit or *de minimis* imports). Do the procedures apply to imports of goods put on the market in another country by or with the consent of the right holder and to goods destined for exportation?**

An application may be lodged by any entitled person like the right holder, the holder of an exclusive licence (or an authorized collective rights management organization regarding rights according to CopA) to the Customs Authorities to suspend the release into free circulation of goods if they have valid grounds for suspecting that the *importation, exportation or transit* of goods infringing an intellectual property right covered by the border measures provisions may take place.

In addition to counterfeit trademark goods and pirated copyright goods, Swiss law also provides for border measures in respect of goods infringing rights in relation to indications of source, public signs, geographical indications, industrial designs, patents, and the topographies of integrated circuits. These border measures are specifically governed by the following provisions:

- Articles 75 to 77h of the CopA and Articles 18 to 21 of the CopO;
- Article 12 (which refers back to Articles 75 to 77h of the CopA) of the TopoA and Articles 16 to 19 of the TopoO;
- Articles 70 to 72h of the TmPA and Articles 54 to 57 of the TmPO;
- Articles 46 to 49 of the DesA and Articles 37 to 40 of the DesO;
- Articles 86a to 86k of the PatA and 112-112f of the PatO;
- Article 32 of the CAPA and Articles 7 to 9 of the CAPO;
- Articles 1 to 5 and Annex 1 (tariff) to the Regulation on Charges levied by the Customs Authorities.

With regard to the protection of the Swiss coat of arms and other public signs, the law refers to an analogous application as in Article 70 to 72h TmPA (Article 32 CAPA).

The procedure applies also to goods *stored in a Swiss customs warehouse*. With regard to patent rights and goods in transit, Customs Authorities will only take action if a right holder can demonstrate that they are entitled to prevent importation into the country of destination (Article 8(3) PatA).

Swiss Law does not provide for a *de minimis* exception. Customs Authorities may also act against small consignments and on infringing goods intended for private use. However, if Customs Authorities confiscate goods intended for private use, no criminal liability will apply.

These customs procedures do not apply, however, to imports of goods put on the market in another country by or with the consent of the right holder.

**16. Provide a description of the main elements of the procedures relating to the suspension of the release of goods by customs authorities, in particular the competent authorities (Article 51), the requirements for an application (Article 52) and various requirements related to the duration of suspension (Article 55). How have Articles 53 (security or equivalent assurance), 56 (indemnification of the importer and of the owner of the goods) and 57 (right of inspection and information) been implemented?**

With regard to the requirements which must be met by an application for suspension of the release of goods, the Customs Authorities provide interested groups with instructions on the procedure to be followed.<sup>4</sup> The request must contain certain information: data on the IPR holder, the person entitled to use it or their representative, a copy of the registration certificate, circumstantial evidence which suggests that counterfeit products are being imported, exported, in transit or stored in a Swiss customs warehouse, a precise description of the goods, if possible details of the counterfeiting methods, the characteristics of the counterfeit or imitated goods, the firms involved (carrier, importer, etc.) and the consignments allegedly containing illegal products. Furthermore, the request must contain a declaration by the applicant as to whether or not they wish that the Customs Authorities send samples of the counterfeit goods to the right holder, destroy counterfeit goods, and – if design or trademark rights are concerned – retain counterfeit goods even if they are being shipped for personal use only.

The Customs Authorities suspend the release of such goods into free circulation for up to ten working days as from the date of the request to enable the applicant to obtain provisional measures. In duly substantiated cases, the Customs Authorities may hold the goods for a maximum of an additional ten working days (Article 77(2) and (3) CopA; Article 12 TopoA; Article 72(2) and (3) TmPA; Article 48(2) and (3) DesA; Article 86c(2) and (3) PatA). If it is established, prior to the expiry of these time-limits, that the applicant is unable to obtain provisional measures, the goods are released immediately (Article 20(3) CopO; Article 18(3) TopoO; Article 56(3) TmPO; Article 39(3) DesO; Article 112b(3) PatO).

In order to protect the defendant or third parties from damages, the Customs Authorities may require a liability declaration or – in justified cases – an appropriate security or equivalent assurance from the applicant (Article 77h CopA; Article 12 TopoA; Article 72h TmPA; Article 49 DesA; Article 86k PatA).

The applicant is authorized to examine the goods during their suspension. The person entitled to dispose of the goods (owner, shipper, etc.) may also take part in this examination to protect trade or industrial secrets (Article 77b(2) CopA; Article 72b TmPA; Article 48b DesA; Article 86e PatA; Article 12 TopoA).

**17. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost. How long is the validity of decisions by the competent authorities for the suspension of the release of goods into free circulation?**

It usually takes one to two months to examine an application for suspension of the release of goods. The application is normally valid for two years unless made for a shorter period. A fee of between CHF 1,500 and CHF 3,000 is charged for the processing of applications. Each application may be renewed if a fee between CHF 500 and CHF 1,500 is paid (Regulation on Charges levied by the Customs Authorities, SR 631.035).

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<sup>4</sup> For information see the "Fact sheet on the provision of assistance by the Federal Customs Administration in the sphere of intellectual property rights" under:  
[http://www.ezv.admin.ch/zollinfo\\_firmen/04202/04284/04299/index.html?lang=en](http://www.ezv.admin.ch/zollinfo_firmen/04202/04284/04299/index.html?lang=en).

Once the application has been examined and found valid, the Customs Authorities may hold the goods in question for up to ten working days from the date of the notification. In duly substantiated cases, the Customs Authorities may hold the goods for a further ten days maximum. The holding and the notification costs at least CHF 50.

During this time, the applicant must obtain provisional measures from a civil judge. Failing this, the goods are immediately released.

**18. Are competent authorities required to act upon their own initiative and, if so, in what circumstances? Are there any special provisions applicable to *ex officio* action?**

The Customs Authorities have the authority to *draw ex officio the attention* of the right holder to certain consignments which are suspected of infringing relevant intellectual property rights (Article 75 CopA; Article 12 TopoA; Article 70 TmPA; Article 46 DesA; Article 86a PatA). After the notification, the IPR holder has to submit an application to the Customs Authorities within three days. If they fail to do so, the goods are released.

**19. Describe the remedies that the competent authorities have the authority to order and any criteria regulating their use.**

If the applicant has placed an order of destruction, the Customs Authorities will notify the person entitled to dispose of the goods accordingly. Customs Authorities have the authority to destroy the counterfeit goods, given either the consent of the person entitled to dispose of the goods or if that person does not voice any opposition to their destruction, within ten days after having received the notification from the Customs Authorities. Criminal procedures are, at first instance, a matter for the Cantonal Authorities (see Article 73(1) CopA; Article 69 TmPA; Article 45 DesA; Article 85(1) PatA; Article 51 LPOV Article 27(1) UCA).

## Criminal Procedures

**20. Specify the courts which have jurisdiction over criminal acts of infringement of IPRs.**

Criminal proceedings are regulated under federal legislation. The Swiss Criminal Procedure Code (CrimPC) governs the prosecution and adjudication by the federal and cantonal criminal justice authorities of offences under federal law (Article 1(1) CrimPC) unless the special intellectual property laws contain specific provisions (see Article 1(2) CrimPC). Each Canton designates for the whole of its territory the authorities responsible for the proceedings and passing of judgment in cases of infringement (see Article 14 CrimPC). If there is a breach of federal law, appeals on a point of law against the cantonal judgments may be made to the Federal Supreme Court (Articles 80 and 95 FSCA).

The competent authority for conducting the proceedings and passing judgment on an IPR infringement is the authority located in the place in which the infringer acted. If only the place in which the result occurred is in Switzerland, the competent authority is the one which has jurisdiction over that place (see Article 31(1) CrimPC). With regard to patents, the law allows the plaintiff to choose between the place in which the perpetrator acted and that in which the result occurred (see Article 84(1) PatA). If the perpetrator acted or the result occurred in different places, the competent authority is that of the place in which the first investigation was initiated (see Article 31(2) CrimPC). If the infringement was committed abroad or it is not possible to determine where it was committed, the competent authority is that of the place in which the perpetrator of the infringement resides (see Article 32(1) CrimPC). If the perpetrator of the infringement does not reside in Switzerland, the authorities at their place of origin have jurisdiction; in the absence of a place of origin, the authorities of the place where the perpetrator of the infringement was found have jurisdiction.

**21. In respect of which infringements of which intellectual property rights are criminal procedures and penalties available?**

Swiss law provides for criminal law protection against infringements of all intellectual property rights and not only against the counterfeiting of trademarks and copyright piracy, as provided for

in Article 61 of the TRIPS Agreement. Criminal procedures and penalties are available in respect of the following infringements:

- According to Articles 67 *et seq.* and 70 CopA, the following offences are punishable if committed intentionally and unlawfully: using a work under a false name or one which is different from that decided on by the person responsible for the work; divulging a work; modifying a work; using a work to create a derivative work; making copies of a work, irrespective of the technique used; offering to the public, disposing of or in some other way putting into circulation copies of a work; reciting, representing or performing a work, directly or irrespective of the technique used, or showing or playing it in a place other than that in which it was presented; to make a work accessible so that other persons at any time or place of their own choice can access it; broadcasting a work by radio, television or similar means, either by radio relay, cable or other conductors or retransmitting it by technical means the use of which does not fall within the remit of the original broadcasting authority; showing or playing a broadcast work, a retransmitted work or a work, which has been made accessible; refusing to declare to the competent authorities the source of the copies of works in the possession of the person concerned which were made or put into circulation unlawfully and refusing to name the addressees and the extent of a distribution to commercial customers; renting out software; omitting to mention, in those cases prescribed by law (Articles 25 and 28), the source used and, if so designated therein, the author; asserting copyright the management of which is placed under federal supervision (see Article 40 CopA).
- According to Articles 69 *et seq.* CopA, the following offences are punishable if committed intentionally and unlawfully: broadcasting by radio, television or similar means or by radio relay, cable or other conductors a performance by an entertainer; making sound or video recordings of a performance or recording it on some other data medium; offering to the public, disposing of or in some other way putting into circulation copies of a performance; retransmitting a performance by technical means the use of which does not fall within the remit of the original broadcasting body; showing or playing a broadcast or retransmitted performance or a performance which has been made accessible; using a performance under a false name or a name other than the performer's name; reproducing performances, sound or video recordings in a way that other persons at any time or place of their own choice can access it; reproducing a sound or video recording or offering to the public, disposing of or in some other way putting into circulation the reproduced copies; retransmitting a broadcast; making sound or video recordings of a broadcast or recording it on some other data medium; reproducing a broadcast recorded on a sound recording, video recording or another data medium or putting into circulation such copies; refusing to declare to the competent authorities the source and the quantity of a medium on which a performance protected under related rights pursuant to Articles 33, 36 or 37 of the CopA is recorded and which has been made or put into circulation unlawfully and is in the possession of the person concerned and refusing to name the addressees and the extent of a distribution to commercial customers.
- According to Article 69a CopA, the following offences are punishable if committed intentionally and unlawfully:
  - circumventing effective technological measures under Article 39a(2) to undertake a statutory unlawful use of works or other objects of protection;
  - manufacturing, importing, offering, selling, or otherwise distributing, lending, entrusting or advertising for use or possessing for commercial purposes devices, products or parts, or providing services which:
    1. are the subject of a sales promotion, advertisement or commercial activity aiming at circumventing effective technological measures;
    2. have only a limited economic purpose or use other than the circumvention of effective technological measures; or
    3. are primarily designed, manufactured, adapted, or provided to make circumvention of effective technological measures possible or easier;
  - removing or modifying digital information for the exploitation of copyright and related rights under Article 39c(2);

- reproducing, importing, offering, selling or otherwise distributing, broadcasting or making perceivable or accessible works or other objects of protection on which the digital information for the exploitation of rights under Article 39c(2) has been removed or altered.
- According to Article 11 of the TopoA, the following offences are punishable if committed intentionally and unlawfully: copying a topography, irrespective of the means used and the form which the copy takes; offering to the public, disposing of, renting out, lending or putting into circulation in some other way a topography or importing it for such purposes; refusing to declare to the competent authorities the source of the items which were produced or put into circulation illegally and which are in the possession of the person concerned.
- According to Articles 61 *et seq.* of the TmPA, the following offences are punishable if committed intentionally: infringing someone else's rights to trademarks, by usurping, counterfeiting or copying those trademarks or using the usurped, counterfeit or copied trademarks to offer products or put them into circulation, offer or provide services or for advertising purposes, import, export or putting into transit; refusing to state the source and the quantity of the items on which a usurped, counterfeit or copied trademark has been affixed and which are in the possession of the person concerned and refusing to name the addressees and the extent of a distribution to commercial customers; illegally naming products or services with the trademark of a third party with a view to deceiving others, thus leading them to believe that the products or services are original; offering or putting into circulation as originals products illegally named using a third party's trademark; offering or providing as originals services named using a third party's trademark; using a guarantee mark or a collective mark in such a way as to contravene the provisions of the regulation or refusing to state the source of the items on which a usurped, counterfeit or copied trademark has been affixed and which are in the possession of the person concerned.
- According to Articles 64 *et seq.* of the TmPA, the following offences are punishable if committed intentionally: using an inaccurate indication of source or designation of origin; creating a risk of deception by using a name, company name, address or trademark in connection with products or services from another source; contravening the requirements relating to the manufacturer's identification mark.
- According to Article 172 of the Federal Act on Agriculture (SR 910.1), the following offence is punishable: intentionally using an appellation of origin or a protected geographical indication illegally (i.e. one which has been registered in respect of agricultural and processed agricultural products).
- According to Article 41 of the DesA, the following offences are punishable if committed intentionally: using unlawfully a registered design; colluding in the offences referred to or encouraging or facilitating the perpetration of those offences; refusing to declare to the competent authority the source and the quantity of articles in one's possession which are counterfeit and refusing to name the addressees and the extent of a distribution to commercial customer.
- According to Articles 66 and 81 *et seq.* of the PatA, the following offences are punishable if committed intentionally and unlawfully: using a patented invention (copying is regarded as using); refusing to declare to the competent authority the source and the quantity of the products in one's possession which have been manufactured illegally and refusing to name the addressees and the extent of distribution to commercial customers; removing the patent mark on a product or its packaging without the consent of the patent holder or licensee; incitement to commit one of the acts referred to, collaborating in, encouraging or facilitating the perpetration of such acts; disclosing wrong information concerning the genetic resources or traditional knowledge of indigenous people as described in Article 49a PatA; putting up for sale or bringing into circulation one's commercial documents, advertisements of any kind, products or goods bearing particulars designed to lead people to believe, wrongly, that the products or goods are protected by the PatA.
- According to Articles 48 *et seq.* of the LPOV, the following offences are punishable: intentionally and unlawfully acting in breach of the conditions of Article 5 LPOV; making statements in advertising, in one's business documents or when marketing products which

may lead people to believe, wrongly, that the product in question is protected; omitting to use the name of the variety if making a business out of selling the material for propagating a protected variety; using in respect of another variety of the same botanical species or a similar species in one's business activities the varietal name of a protected variety or a name leading to confusion with that name; infringing in any other way the LPOV or the relevant implementing requirements.

- According to Article 23 UCA, the following offence is punishable: intentionally engaging in unfair competition within the meaning of Article 3 UCA (unfair advertising and sales techniques and other illegal practices), Article 4 UCA (incitement to breach or terminate a contract), Article 4a UCA (to bribe someone or to accept a bribe), Article 5 UCA (exploiting someone else's work) or Article 6 UCA (infringing industrial or business secrets).
- According to Articles 28 *et seq.* of the CAPA, the following offences are punishable if committed wilfully and unlawfully: affixing domestic or foreign public signs protected under the Act or signs that could be confused with them to items, or selling, making available, importing, exporting or carrying in transit or otherwise placing items marked in this way on the market; using those signs on office signs, in advertisements, prospectuses, business papers, internet sites or the like; using those signs for services or advertising services with such signs; using an official designation or a designation that could be confused with it; using a domestic or foreign national figurative or word design.
- According to Article 162 of the SCC, the following offence is punishable: disclosing an industrial or commercial secret which once was under a statutory or contractual obligation to keep; the same applies to using such disclosure for one's own benefit or the benefit of a third party.
- According to Article 320 of the SCC, the following offence is punishable: disclosing a secret confided to one in one's capacity as a member of an authority or as an official or which has come to one's notice as a result of one's office or employment. (N.B. This general rule of the criminal code is also reflected in numerous intellectual property laws and regulations.)

## **22. Which public authorities are responsible for initiating criminal proceedings? Are they required to do this on their own initiative and/or in response to complaints?**

With regard to IPR infringements, the proceedings and passing of judgment concerning breaches of criminal law are a matter for the cantonal authorities (see Article 73(1) CopA; Article 69 TmPA; Article 45 DesA; Article 85(1) PatA; Article 51 LPOV; Article 27(1) UCA; Article 31(1) CAPA). In all Cantons, it is the police authorities and the public prosecutors who are responsible for initiating criminal proceedings. The public prosecutors direct the police investigations.

Under intellectual property law criminal proceedings require, as a rule, a complaint from the injured party (Articles 67(1), 68 and 69(1), Article 69a(1) CopA; Article 11(1) TopoA; Articles 61(1) and (2), 62(1), 63(1) and (2) TmPA; Article 41(1) DesA; Article 81(1) PatA; Article 48 LPOV; Article 23 UCA). However, if the perpetrator of the offence is acting in a professional capacity/at commercial scale, public authorities may initiate proceedings "*ex officio*" (Article 67(2), Article 69(2), Article 69a(2) and Article 70 CopA; Article 11(2) TopoA; Article 61(3), Article 62(2), Article 63(4), Articles 64(2) and 65 TmPA; Article 41(2) DesA; Article 81(3), Article 81a, Article 82 PatA). Regarding the use of an incorrect indication of source, or a public sign (like the Swiss Coat of Arms for instance), public authorities may initiate proceedings "*ex officio*" even without the perpetrator acting in a professional capacity/at commercial scale (Article 64(1) TmPA; Article 28 CAPA).

Furthermore, the Swiss Federal Institute of Intellectual Property may file a complaint with the competent authority and exercise the rights of a private claimant in proceedings, as far as the use of an incorrect indication of source (Article 64(3) TmPA) or the unlawful use of public signs (Article 31(2) CAPA) is concerned.

## **23. Do private persons have standing to initiate criminal proceedings and, if so, who?**

Under intellectual property law criminal proceedings require, in most cases, a complaint from the injured party. Consequently, private individuals are able to initiate criminal proceedings. Any injured person may lodge a complaint. If the injured party does not exercise their civil rights, their

legal representative will be entitled to lodge a complaint. If they are in the care of a guardian, it is the tutelary authority which will be entitled to lodge a complaint. If the injured party is over the age of 18 and capable of understanding, they will also be entitled to lodge a complaint. If they die without lodging a complaint or having expressly renounced the right to do so, their right will pass on to each of their close relatives (see Article 30 SCC).

**24. Specify, by category of IPR and type of infringement where necessary, the penalties and other remedies that may be imposed:**

- **imprisonment;**
- **monetary fines;**
- **seizure, forfeiture and destruction of infringing goods and materials and implements for their production;**
- **other.**

Swiss law provides for the following penalties: custodial sentence, monetary penalty and fine. The monetary penalty amounts to a number of daily penalty units at a certain amount. The court decides on the number of the penalty units according to the culpability of the offender, but no more than 360 daily penalty units in total. The court decides on the value of the daily penalty unit according to the personal and financial circumstances of the offender at the time of conviction, but not higher than CHF 3,000 (Article 34 SCC). The highest monetary penalty is therefore CHF 1,080,000 (360 (daily penalty units) x CHF 3,000). Unless a special IPR law provides otherwise, the highest amount of a fine is CHF 10,000 (Article 106 SCC).

- For breaches of copyrights (Article 67 CopA) and related rights (Article 69 CopA), as well as infringements of the provisions regarding the protection of topographies (Article 11 TopoA), a custodial sentence of up to one year or a monetary penalty may be applied. If the perpetrator of the offence is acting in a professional capacity, the penalty will be a custodial sentence of up to five years or a monetary penalty.
- For intentionally failing to mention the source used by whoever is legally required to do so or by the author if they are designated to do so (Article 68 CopA), a fine is applicable.
- For intentionally violating the technical protection measures or digital information for the exploitation of copyright (Article 69a CopA), a fine is applicable. If the perpetrator of the offence is acting in a professional capacity, the penalty will be a custodial sentence of up to one year or a monetary penalty.
- For unlawful enforcement of rights that can only be enforced with an authorization granted by federal authorities (Article 70 CopA), a fine is applicable.
- For an infringement of the right to a trademark (Article 61 TmPA), for fraudulent use of a trademark (Article 62 TmPA), for improperly using a guarantee or collective mark (Article 63 TmPA), and for the incorrect use of an indication of source or a protected designation of origin or geographical indication for a non-agricultural product (Article 64 TmPA), a custodial sentence of up to one year or a monetary penalty may be applied. If the perpetrator of the offence is acting in a professional capacity, the penalty will be a custodial sentence for up to five years and a monetary penalty.
- For the illegal use of a protected designation of origin or geographical indication for an agricultural product, a custodial sentence of up to one year or a monetary penalty (Article 172 of the Federal Act on Agriculture) is applicable. If the perpetrator of the offence is acting in a professional capacity, the penalty will be a custodial sentence of up to five years or a monetary penalty.
- For infringements relating to the producer's identification mark (Article 65 TmPA), a fine of up to CHF 20,000 may be applicable.

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- For the unlawful use of public signs (Article 28 CAPA), a custodial sentence not exceeding one year or a monetary penalty may be applied. If the perpetrator acts for commercial gain, the penalty will be a custodial sentence of up to five years or a monetary penalty.
  - For infringing the provisions governing the protection of industrial designs (see Article 41 DesA), a custodial sentence of up to one year or a monetary penalty may be applied. If the perpetrator of the offence is acting in a professional capacity, the penalty will be a custodial sentence of up to five years and a monetary penalty.
  - For infringing the provisions governing the protection of the rights to a patented invention (see Article 66 PatA), a custodial sentence of up to one year or a monetary penalty may be applied (Article 81(1) PatA). If the perpetrator of the offence is acting in a professional capacity, the penalty will be a custodial sentence of up to five years and a monetary penalty.
  - For disclosing wrong information about genetic resources and traditional knowledge (Article 81a PatA), a fine of up to CHF 100,000 may be applied.
  - Anyone who offers for sale or brings into circulation their commercial documents, advertisements of any kind, products or goods bearing particulars which lead people to believe, wrongly, that the products or goods are protected by the PatA, will be fined (Article 82(1) PatA).
  - For infringement of the provisions regarding the protection of plant varieties (Article 48 LPOV), a custodial sentence of up to one year or a monetary penalty can be applied. If the perpetrator of the offence is acting negligently, the penalty will be a fine (Article 48(2) LPOV).
  - For misleading advertising and other offences (Article 49 LPOV), a fine is applicable.
  - For unfair competition (Article 23 UCA), a custodial sentence of up to three years or a monetary penalty is applicable.

Swiss law also provides for other remedies. For instance:

- A judge may order the seizure or confiscation of items and instruments which have been or were to be used in committing an IPR infringement or which are the result of an infringement, and of tools and other resources intended primarily for manufacturing these products (Article 69 CP; Article 68 TmPA; conversely Article 72 CopA; Article 44 DesA; Article 69(1) PatA; Article 50 LPOV; Article 30 CAPA). A judge may order that the confiscated items or products be rendered unfit for use or destroyed (Article 69(2) SCC; Article 69(1) PatA). Once they have been completed, works of architecture may not be confiscated (Article 72 CopA).
- If, as a result of a misdemeanour or felony, a person suffers damage which is not covered by any insurance and the offender is not expected to indemnify the injured party, the judge awards the injured party, at its request, up to the amount of the damage found by the courts or by agreement with the injured party (Article 73 SCC):
  - (a) the amount of the monetary penalty or fine paid by the convicted person;
  - (b) the items and assets which have been confiscated or the proceeds of liquidating them, after deduction of expenses;
  - (c) the claims for compensation;
  - (d) the amount of the precautionary guarantee.
- If the public interest or that of the injured party so requires, the judge may order the publication of the criminal judgment in one or more newspapers at the expense of the convicted person (see Article 68(1) SCC; Articles 70 and 82(2) PatA).
- Where a misdemeanour or felony has been committed in the exercise of a professional, industrial or commercial activity and the offender has, because of this offence, received a custodial sentence of more than six months or a monetary penalty of more than 180 daily units, the judge may, if there is reason to fear further abuses, prohibit the convicted person from carrying out that professional, industrial or commercial activity for a period of between six months and five years (Article 67(1) SCC).

**25. Describe provisions governing the length and any cost of proceedings. Provide any available data on the actual duration of proceedings and their cost, if any.**

The application of criminal law in intellectual property matters is exclusively a matter for the Cantons (Articles 22 and 23 CrimPC).

The criminal justice authorities are obliged to commence criminal proceedings immediately and conclude them without unjustified delay (Article 5 CrimPC). In practice, the prosecution authorities are overburdened and prioritize the prosecution of the most serious offences. Mention should also be made of the principle of promptness, deduced from Articles 29 Cst and 6 ECHR, covering a particular kind of formal miscarriage of justice and violation of the right to be given a hearing.

If applicable, the cost of the proceedings is governed by Articles 416 *et seq.* CrimPC. The expenses and costs are normally borne by the losing party. No statistical data are available on the actual duration or cost of the proceedings.

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