

The Patent Act – Calling Card for the Power of Innovation

Patent legislation is in the process of changing and is being amended to suit technological and international developments. The federal chambers have just approved a substantial revision – time for a short historical review and a preview of the new patent act.

The changes in a tree's climatic conditions can be read in its annual rings. The shifts in the economy's innovative vigor can similarly be read in the legislative changes in the patent system. Looking back at the beginning of patent rights in Switzerland can illustrate. On July 10, 1887 the population and its governing bodies voted for a constitutional change giving the confederation the competence to protect inventions. On June 29, 1888, the federal act on invention patents was approved and became the first patent law in Switzerland. With that move, the Swiss people were put "at the same level as the other cultured people regarding the protection of intellectual property" (BBl 1888 I 241, 242). In fact, countries such as England, France, Germany and America already had protection for inventions through patents for a long time. The first Swiss patent act, however, was restricted to inventions represented as models. Other restrictions

on protection for inventions followed in the next decades. For example, the restriction on patenting chemical compounds was finally lifted in 1978 when Switzerland joined the European Patent Organisation.

Early opposition from industrial circles

Certain industrial sectors opposed the introduction of invention protection in Switzerland. They were afraid it would hinder their entrepreneurial development and endanger the economic development of Switzerland. However, the downfall of Swiss industry and business predicted to occur after the introduction of patent protection never took place. One hundred and twenty years after passage of the first patent act, the cause and effect of the rise of the Swiss economy is still debated. Does the growth of Swiss industry prior to patent protection provide clear evidence that its absence does not prevent technological growth? Or, did individual branches

of industry simply use the absence of patent protection as a running board to industrialization by assimilating advanced technologies until they caught up? Is patent protection a drag shoe for overcoming technological backwardness in an economy, or is it actually a precondition for technology and knowledge transfer from leading industrial countries? The answers are neither here nor there. The fact is, that the position of a country as an innovation and research center is tied to patent protection so much so that patent protection can be seen as an indicator for the viability of an economy's innovation. Switzerland's example shows that the acceptance of strong patent protection is an expression of a well-supported, innovative domestic industry.

Backbone of the knowledge-based economy

The early opposition to patent protection by Swiss industry is anecdotal. Patent law is essential for a country such as Switzerland today. Were its elimination to become an issue, no one in industry would take it seriously. Innovation is a central resource of our knowledge-based economy. Products with a high level of research and development are the source of economic value and affluence. Patent protection is an important, basic condition for research-intensive, and thus, also risk-involved, sectors. And it is significant for more than just global corporations. Small and medium-sized businesses are dependent on loan capital for financing their research and development costs. Investors are willing to take a risk but only if there is a corresponding assurance – that means that the products or processes behind the business's success are protected through patents and legal certainty exists.

A new calling card thanks to the revision

The current patent act amendment will reflect the importance of patent rights in the Swiss economy. It elaborates patent law in the light of the technological progress and international developments of past years and meets higher standards. The innovative atmosphere and economic growth of Switzerland should be encouraged.

Biotechnology: The focus of the revision is to take the field of biotechnology better into account and assure appropriate patent protection for biotechnological inventions. Swiss research and development in chemicals occupies a top position world-wide. This leading role must be maintained. This requires not only effort on the part of industry, but a reliable and pro-innovation environment. The basic framework for research and development in Switzerland must be maintained and further improved. The current patent law, however, does not sufficiently reflect the peculiarities of biotechnological inventions. The resulting legal uncertainty is paralyzing. That is why appropriate patent protection for inventions in this field must be guaranteed. Appropriate patent protection means creating effective protection as an incentive to research, on the one hand, and, on the other, sufficient restrictions to that protection so that research is not encumbered or discouraged by patents. Economic growth is not the only priority of the amendment. The needs of the economy must be balanced by the varied interests of society, ethics, and research. In particular, ethical issues are increasingly the subject of public debates. The amendment by the Federal Council takes the interests of the economy and the common good – i.e., ethical and social aspects – into consideration. In this way the amendment bill confirms the existing option to protect biotechnological inventions through patents thereby giving a clear sign in the interna-

tional competition for research funding. At the same time, the amendment contains a balanced bundle of restrictions. It makes an equilibration among the varied interests. The research privilege should be highlighted here, which will be legislatively anchored. It allows scientific research on the object of an invention independently of the patent holder's permission. In addition, any actions necessary for approval of a pharmaceutical product in Switzerland or abroad are exempted. If a biotechnological invention serves as a research tool, the bill requires a license to use it. This assures freedom to research to a far-reaching extent. A further exception is that a patent holder can no longer refuse permission for the use of a patented invention for teaching purposes. The revised patent law also excludes biological matter which is reproduced unintentionally or because it was technically unavoidable in agriculture from the scope of the patent. This protects farmers from overly broad claims. The concerns of developing countries have also been taken into account, to the extent possible in national legislation. Patent applicants will newly be obliged to disclose the source of genetic resources or traditional knowledge (see also the article on page 12 of our 02/03 annual report). These measures will lead to greater transparency and simplify the long-term control of access permission to such resources or knowledge as well as enforcement of the distribution of any economic advantages resulting therefrom.

Distribution procedure: The amendment includes improvements at the level of national granting as well: Publication of a patent application 18 months after filing, introduction of a shortened opposition procedure as well as an official prior art search for national patent applications (see box on page 10) all increase transparency, assure speedy transmission of knowledge, and improve third-party infor-

mation. The measures are particularly important for the sensitive area of biotechnological inventions, but would strengthen the national patent system in general.

Compulsory licenses: The amendment does not only concern biotechnological inventions. A significant, further element of it is compulsory licenses for exporting patent protected medicines. The provision of medical supplies is often precarious in developing countries. These lands often have very few pharmaceutical manufacturers, and building the needed infrastructure in the short or mid-term often does not even enter into question. Developing countries are dependent on foreign manufacturers. Recourse to production capacity abroad could fail if the patent protection in that country does not allow manufacturing

the medicine without the permission of the rights holder. Current law allows compulsory licensing only for supplying the domestic market. The amendment allows compulsory licensing for export as well. In cases of serious public health epidemics, developing countries have access to production capacities in Switzerland under the conditions defined by the World Trade Organization. The new regulation balances the involved interests. Access to medicines for developing countries is improved and administrative hurdles are kept minimal, on the one hand, while abuse of compulsory licenses is prevented through regulation, on the other. It will not be possible for medicines destined for developing countries to be taken from the suffering populations and their country and diverted to other markets.

Piracy: Measures for combating piracy should also be mentioned. Intellectual property piracy has massively increased worldwide in recent years. The damages to the economy are enormous. Innovative Swiss companies are heavily affected. In addition to the losses for the Swiss economy, consumers are also hurt. The civil and criminal instruments available up until now have not stopped piracy. The amendment proposes more effective measures for fighting piracy.

Patent Cooperation Treaty: The amendment includes the ratification of the Patent Cooperation Treaty which unifies certain formalities of patent law. Such formalities vary greatly across the world today. For businesses who want to protect their inventions abroad, the differing formalities mean greater expense and risk. Not

Prior Art Searches for National Patent Applications Become Official

Since its introduction in the fall of 2004, the demand for prior art searches for national patent applications (RENA) has steadily increased (see graphic). This cost-effective, professional information for prior art has already been well received for the national filing procedure. Now, with the new amendment, this search will be officially codified in the Swiss patent act. Delivery conditions, procedural flow and scope of the current search for a national patent application will be mostly taken over as is, in other words:

- Searches can be requested up to 14 months after the filing or priority date, and
- Results are ready within one to two months.

The official version of the prior art search for national patent applications (ORNA) is optional. It was specially created with the Swiss industry in mind, particularly small and medium-sized businesses. The aim is to assist businesses in calibrating their patent application to the known state of the art and, in that way, strengthen their position on the market. At the same time, clearly weak patents are highlighted through an ORNA and costly annulations cases can be avoided. Until the search is officially introduced on July 1, 2008, RENA can naturally still be requested with the same comprehensiveness as usual.

The new patent act amendment also foresees the publication of applications after 18 months, which makes it equivalent to the international standard. Since the application also follows the publication of the searches, the search reports are being conformed to international standards and the requirements of electronic processing.

adhering to the formal regulations can lead to loss of patent protection. The Patent Cooperation Treaty reduces the diversity of formalities and improves procedural protection. This gives patent system users significant relief and savings. Improved legal certainty is also created. As a result, it will be easier to get protection for inventions abroad. The overall result of the approved amendment is a central economic and social-political legislative change which will significantly influence the attractiveness of Switzerland as a place of research and knowledge. Switzerland is giving itself a new calling card with the amended patent act. It is a snapshot of a climate existing in Switzerland which is conducive to innovation and should be maintained and fostered for a long time.

Number of Searches for a National Application

