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

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REVIEW OF LEGISLATION IN THE FIELDS OF PATENTS, LAYOUT-DESIGNS
(TOPOGRAPHIES) OF INTEGRATED CIRCUITS, PROTECTION OF
UNDISCLOSED INFORMATION AND CONTROL OF
ANTI-COMPETITIVE PRACTICES IN
CONTRACTUAL LICENCES

Replies from Switzerland to questions posed by Japan

The following communication, dated 12 May 1997, has been received from the Permanent Mission of Switzerland.

GENERAL COMMENTS

Attention is drawn to the fact that the Principality of Liechtenstein and Switzerland have, within the framework of their Customs Union Treaty of 1923, concluded in 1978 a Treaty on the Protection of Patents (Patent Treaty), which has been complemented in 1994¹. Under the Patent Treaty, both countries constitute a unitary territory of protection. The applicable law for that unitary territory is the Patent Law of Switzerland. Patents can be granted, transmitted, cancelled, or lapse only for the whole territory of protection. Both countries are parties to the European Patent Convention of 1973 and to the Patent Cooperation Treaty of 1970. Under these treaties, they can be designated together only.

REPLIES TO THE QUESTIONS POSED BY JAPAN

Patents

1. *In your country, are the following subject matters protectable by patent: (1) Plants and animals, and (2) Plant and animal varieties?*

Article 1a of the Swiss Patent Law provides for the same solution as Article 53 lit. b of the European Patent Convention.

¹See Switzerland's notification IP/N/CHE/1 (in particular remark 4 of the Annex) and Liechtenstein's notification IP/N/1/LIE/P/1. The bilateral agreements mentioned here above were also transmitted by Switzerland to the TRIPS Council together with notification IP/N/4/CHE/1 and by Liechtenstein with notification IP/N/4/LIE/1.

It excludes plant and animal varieties from patentability. However, plants and animals in general are patentable provided that the conditions for patent protection are fulfilled (novelty, industrial applicability and inventiveness in particular).

(n.b.: Plant varieties are protected in Switzerland by a *sui generis* protection in conformity with the UPOV Convention (1978 Act).)²

2. *In your country, is the act of offering for sale included in the exclusive rights of patent?*

Yes. See Article 8(2) of the Swiss Patent Law.

3. *In your country, what kinds of acts are recognized as exceptions to the exclusive rights conferred by a patent right?*

Under Article 8(1) of the Swiss Patent Law, only the patent owner has the exclusive right to the "*professional*" use of the invention. The following exceptions to the exclusive right are possible:

- (a) use for private purpose; and
- (b) use for analysis, study or research purposes (provided that such acts are not considered as being preparations in view of a professional use).

Any person who, prior to the filing date of the patent application, was in good faith professionally using the invention in Switzerland or had made special preparations for that purpose, is allowed to continue such use (Article 35 of the Swiss Patent Law).

In accordance with Article 48 of the Swiss Patent Law, a patent will have no effect against persons who have professionally used an invention in good faith in Switzerland or have made special preparations for that purpose between

- (i) the last day of the time limit prescribed for payment of an annual fee and the filing date of the request for further processing (Article 46a) or for *restitutio in integrum* (Article 47); or
- (ii) between the last day of the priority period (Article 17(1)) and the filing date of the patent application.

4. *In your country, in which case is use without the authorization of the right holder permitted, including use by the government or by third parties authorized by the government?*

"Government use" is not known in Switzerland.

As far as other uses without the authorization of the right holder are concerned, the Swiss legislation provides for the following:

- (a) licences for dependent inventions (Article 36 of the Swiss Patent Law);
- (b) licences for non-working of the invention in Switzerland (Article 37 of the Swiss Patent Law), importation being considered as working of the patent;
- (c) licences in the public interest (Article 40 of the Swiss Patent Law);

²Ratification of the 1991 Act is foreseen. It is to be noted that Switzerland is already granting, by way of ordinance, protection to varieties of almost all plant genera and species.

- (d) licences for violations of competition law (only in the field of semi-conductor technology; Article 40a of the Swiss Patent Law).

The grant of the above-mentioned licences is subject to very strict requisites, most of which have been added to the Swiss Patent Law in order to comply with the requirements of Article 31 of the TRIPS Agreement (see in particular Article 40b of the Swiss Patent Law).

It should be noted that, to our knowledge, no compulsory licence has been granted in Switzerland.

5. *In your country, how is the obligation under TRIPS Articles 34.1 and 34.2 regarding the shift of the burden of proof in civil proceedings for patent infringement related to a process patent implemented?*

Under Article 67(1) of the Swiss Patent Law, if the invention concerns a process for the manufacture of a *new* product, every product of the same composition is deemed to have been obtained by the patented process until proof to the contrary has been adduced.

Reversal of the burden of proof as embodied in Article 67(1) of the Swiss Patent Law is also applicable in the case of a process for the manufacture of a *known* product, if the patent owner shows *prima facie* evidence of infringement of the patent (Article 67(2) of the Swiss Patent Law).

The Swiss Patent Law therefore goes beyond Article 34 of the TRIPS Agreement.