

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

Replies from Switzerland

Preliminary remarks

The Swiss system is characterized by federalism. According to Articles 64 and 64a of the Swiss Federal Constitution (Cst), the Confederation has the right to legislate on matters such as intellectual property, civil law and criminal law but the organization of the judicial system, procedures and the administration of justice are vested with the cantons. Under the Swiss Constitution there is only one Supreme Federal Court (Article 106 Cst). Subject to the conditions laid down by federal law, appeals may be made to the Federal Court against decisions of the higher cantonal authority.

Enforcement of intellectual property rights (IPRs) is governed by numerous federal legislative texts. The latter were notified in 1996 (document IP/N/1/CHE/1); this document will be added to and updated by the end of 1997. The details concerning these texts (dates when they were adopted and revised, references to the official gazettes/compendia in which they were published) are referred to in this notification. It should be pointed out that in the notification special mention was made of the particular importance of the cantonal codes of procedure. Given their number and the complexity of the matter, Switzerland did not transmit the actual texts of these codes.

In order to make this document easier to read, the relevant federal laws and regulations most often referred to are enumerated in the *non-exhaustive* list below. It should be borne in mind that, in addition to the legislative texts, court decisions and legal opinion play an important part in the development of Swiss law, particularly with regard to the general principles of law.

1. The special intellectual property laws and regulations are in particular the following:
  - The Federal Law on Copyright and Neighbouring Rights (LDA);
  - the Ordinance on Copyright and Neighbouring Rights (ODAu);
  - the Federal Law on the Protection of Topographies of Semi-Conductor Products (LTo);
  - the Ordinance on the Protection of Topographies of Semi-Conductor Products (OTo);
  - the Federal Law on the Protection of Trademarks and Indications of Source (LPM);
  - the Ordinance on the Protection of Trademarks (OPM);

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<sup>1</sup>Document IP/C/5

- the Federal Law on Industrial Designs and Models (LDMI);
- the Ordinance on Industrial Designs (ODMI);
- the Federal Law on Patents for Inventions (LBI);
- the Ordinance on Patents for Inventions (OBI);
- the Federal Law on the Protection of New Plant Varieties (LPOV);
- the Federal Law on Unfair Competition (LCD);
- the Federal Law on Cartels and Other Impediments to Competition (LCart).

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

- the Federal Law on the Liability of the Confederation, Members of its Authorities and its Officials (LRCF);
- the Ordinance relating to the Law on Liability (Ordinance on Liability);
- the Federal Law on Administrative Procedures (LPA);
- the Ordinance on Costs and Compensation in respect of Administrative Procedures;
- the Federal Law on the Organization of the Judicial System (OJ);
- the scale of costs allowed to the opposing party in cases brought before the Federal Court;
- the Ordinance on the Organization and Procedure of Federal Appeal and Arbitration Committees;
- the Swiss Civil Law Code (CC);
- the Swiss Criminal Law Code (CP);
- the Code of Obligations (CO);
- the Federal Law on Civil Procedure (PCF);
- the Federal Law on Criminal Law Procedure (PPF);
- the Ordinance on the Communication of Decisions taken by the Cantonal Authorities in Criminal Law Cases;
- the Regulation on Charges levied by the Customs Authorities;
- the Ordinance fixing the maximum amount at issue in disputes to be settled via procedures relating to consumer protection or unfair competition.

3. The importance of the Federal Constitution must be emphasized: it was taken as a basis by legislators when adopting the laws referred to in paragraphs 1 and 2 above and by the courts and legal writers for developing a number of general principles of law, such as legality, equality before the law, good faith and proportionality.

For instance, violation of the principle of equality before the law (Article 4 Cst) is a formal denial of justice if the correct procedures have not been followed (particularly if a person has not been given a hearing or a decision is delayed without good cause) or a material denial if it involves an arbitrary act.

The Swiss cantons also have their own constitutions, which must be consistent with federal law (Article 6 Cst).

4. The principle whereby public international law is part of national law is also accepted in Switzerland as an unwritten (uncodified) principle. The courts and the legal literature unanimously agree that this principle applies not only to customary international law but also to international treaties. In the event of a discrepancy, international law takes precedence. Swiss law must be interpreted in the light of international law (Federal Court Judgment in the Frigerio case [ATF 94[1968] I 669, 672]). Swiss courts are thus required to comply with international obligations that are binding upon Switzerland when they are applying a provision of national law to a specific case.

5. In addition to the texts referred to in paragraphs 1, 2 and 3 above and the international intellectual property agreements such as the TRIPS Agreement or the Berne and Paris Conventions, it should also be pointed out that Switzerland is party to international treaties on judicial proceedings, such as the Lugano Convention (Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; RS 0.275.11). The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (CDEH; RS 0.101) is also an important basis, especially with regard to certain general principles of law, particularly the right to be given a hearing.

6. 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 (see notification IP/N/4/CHE/1).

Under the Customs Union Treaty the two countries concluded, on 22 December 1978, the bilateral Treaty on Patents, whereby the law applicable to the two countries is the Swiss Federal Law on Patents (LBI).

7. *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

As indicated in the preliminary remarks, civil judicial procedures are governed by cantonal procedural laws and the Federal Law on the Organization of the Judicial System (OJ) unless the special intellectual property laws contain specific provisions.

Civil judicial remedies are regulated under federal legislation.

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

1.1 The special federal intellectual property laws expressly require each canton to designate a single court to be responsible throughout its territory for dealing with civil actions concerning intellectual property rights (Article 64 LDA; Article 10(1) LTo; Article 58 LPM; Article 76(1) LBI; Article 42 LPOV; Article 33(1) LDMI; Article 14 LCart). 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 Zürich and Berne it is the Commercial Court (“Handelsgericht”). In these three examples the court of sole jurisdiction is also the court of last instance at cantonal level.

The canton designates the competent court in its code of civil law procedure and its law on the organization of the judicial system.

An appeal to the Federal Court against decisions of the cantonal courts is admissible in disputes relating to intellectual property rights (except for those concerning the protection of industrial or business secrets), irrespective of the sum involved (Article 45(a) OJ).

1.2 The Law on Unfair Competition (LCD), which contains *inter alia* provisions on industrial or business secrets and on incitement to betray these secrets, does not expressly provide for a single competent court. It leaves it to the cantons to determine jurisdiction *ratione materiae*. However, if there is a close connection with a civil law dispute under a federal law which provides for a single cantonal court, the action concerning unfair competition may also be brought before that court (Article 12(2) LCD).

With regard to unfair competition an appeal to the Federal Court is admissible against final decisions taken by the cantonal courts which cannot be the subject of an ordinary appeal under cantonal law if, according to the submissions of the parties concerned, the value of the rights contested before the final cantonal authority amounts to at least Sw F 8,000 (Article 46 OJ). Where provision has been made for a single cantonal court, the appeal to the Federal Court is admissible irrespective of the sum involved (Article 12(2) LCD).

## **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 a contractual obligation:**

Any holder of a right over an intangible asset (i.e. the holder of an exclusive IPR or the beneficiary of such a right (a licensee, for instance)) whose right is or is likely to be infringed has standing to act (Article 61 and Article 62 LDA; Article 10(1) LTo; Articles 52, 53 and 55 LPM; Article 72 LBI; Article 5(2) LDMI). The LDA, 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, he may do so only on behalf of all those concerned (Article 7(3) LDA). With regard to software, only the employer is authorized to appeal to the courts to prevent the unlawful use of software developed by an employee in the performance of his duties in the service of the employer and in accordance with his contractual obligations (see Article 17 LDA).

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(1a) LPM). Standing to act with regard to indications of source is also granted to national

or regional organizations which are concerned, in accordance with their statutes, with consumer protection (Article 56(1b) LPM). 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) LPM).

#### 2.1.2 Standing to act for the declaration of a right:

Anyone with a legitimate interest in the declaration of a right or a legal relationship has standing to bring an action (see Article 61 LDA; Article 10(1) LTo; Article 52 LPM; Articles 28 and 74 LBI; Article 9(1c) LCD; Article 13 LDMI).

#### 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 registered holder may request that the patent application, or the patent itself if it has already been granted, be assigned (Article 29(1) LBI). A similar action for assignment is provided for under the trademark law (Article 53(1) LPM).

### 2.2 How may they be represented?

Although it may not be in a position to do so itself, each party has the right to conduct its case itself or to be represented in legal proceedings by a lawyer with power of attorney. Legal persons and limited or commercial partnerships may be represented by a lawyer or a person responsible for managing the enterprise and authorized to sign.

The ability to bring legal proceedings on behalf of others as a professional attorney (i.e. as a lawyer) is governed by the specific laws concerning the profession of lawyer. The requirement that a lawyer must be a member of the bar association of the canton in which the action is brought has been relaxed with the entry into force of the Federal Law of 6 October 1995 on the Internal Market (RS 943.02), which now enables lawyers to practise in any canton. Only lawyers and professors of law at Swiss universities may appear as attorneys before the Federal Court; disputes arising in cantons where there are no restrictions on membership of a bar association are unaffected (Article 29(2) OJ).

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

Yes.

Under the ordinary procedures of most cantons, the bringing of an action is preceded by an attempt at conciliation. The parties must appear in person at the conciliation hearing if they live in the area or the judge orders them to do so. However, lawyers may also accompany their clients. Except in the conciliation hearing, it is not mandatory for a party to appear in person before the court.

If the court considers it necessary, it may, however, summon a party, or all the parties, to appear before the court in order to be questioned. If a party fails to turn up without providing a satisfactory explanation, the court has the discretion to decide what effect this conduct will have on the giving of evidence, due account being taken of all the circumstances involved (see Article 40 PCF). In addition, it may punish the party concerned by imposing an administrative fine.

### 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 must, unless the law stipulates otherwise, prove the facts which it cites in order to deduce its right (Article 8 CC). But at the same time the parties are required to produce in the legal proceedings all the evidence which lies within their control (see Article 50(1) PCF). 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 in the subsequent proceedings only if it immediately establishes that the applicant has no legal interest.

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) PCF). If the court considers it necessary, it may also call upon the party, subject to the statutory penalties, to repeat its statements on specific facts (see Article 64(1) PCF). Anyone who fails to comply with a decision served by a competent authority or official under threat of the penalty provided for in Article 292 CP (fine or short period of imprisonment) will be punished by one of these penalties. Anyone who is a party to civil proceedings and, after being expressly called upon by the judge to tell the truth and being made aware of the penal consequences of failing to do so, makes a false statement concerning the facts which constitutes evidence, will be punished by penal servitude for a period not exceeding three years or imprisonment (Article 306 CP).

For the opposing party the order to give evidence is not enforceable. The judicial authorities have no direct way of forcing a party to furnish evidence that has been requested. Nevertheless, the attitude of the parties concerned during the proceedings may be taken into consideration when assessing the evidence. The judge is required to assess the evidence as he sees fit. He will therefore take into account the failure of a party to comply with a summons to attend in person, the refusal to answer a question put by the judge or to produce required evidence or indicate where it can be found. In the same way, it assesses the attitude of a party who deliberately disposes of evidence or makes it unusable (see Article 40 and Article 50(2) PCF). In all cases the judge may consider the fact which was to be proven by this evidence to have been established beyond doubt.

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 PCF).

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 PCF (see Article 51(1) CPC).

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

The court has the power to decide whether and to what extent it is necessary and admissible for those passages of a document which are not relevant to be hidden from the view of the judge and the parties by affixing seals or by any other suitable means (see Article 5(2) PCF).

Where information or passages are relevant, the protection of confidential matters (industrial or business secrets) as evidence is guaranteed (see Article 68(1) LBI; Article 40(1) LPOV; Article 15(1) LCD; Article 16(1) LCart). This general rule is to be observed in all civil, administrative and criminal proceedings concerning the protection of intangible assets.

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 PCF;

Article 68(2) LBI; Article 40(2) LPOV; Article 15(2) LCD; Article 16(2) LCart). 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) PCF). 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.

Witnesses may refuse to testify concerning matters which, if revealed, would expose them to definite pecuniary loss or other damage (see Article 42(1a) PCF). In addition, the court may exempt a witness from revealing professional secrets or an industrial secret if the witness's interest in keeping the secret overrides a party's interest in revealing it (see Article 42(2) PCF).

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

### **5.1 Injunctions**

The holder of a right over an intangible asset whose IPR is or is likely to be infringed may request the judicial authorities to prevent that from happening, if it is imminent, or to put a stop to it if it is still going on (Article 62(1a) LDA; Article 10(1) LTo; Article 55(1) LPM; Article 72(1) LBI; Article 5(2) LDMI; Article 9(1a) LCD). It is not necessary to prove fault or damage. The action to prevent an imminent infringement (preventive injunction) 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 a persistent 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 is, as a matter of course, coupled with the threat of the penalties provided for in Article 292 CP (fine or imprisonment) addressed to the defendant.

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

#### **5.2.1 Damages**

Anyone who, either intentionally, or through negligence or carelessness, infringes an IPR and causes damage to the IPR holder is required under the CO (Article 62(2) LDA; Article 10(1) LTO; Article 5(2) LPM; Article 7(1) LBI; Article 2(1) and Article 26 LDMI; Article 9(3) LCD) to repair that damage. The right holder then has a choice between the various actions for damages and recovery provided for under the CO: an action for the payment of damages (*damnum emergens et lucrum cessans*) (Article 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 imperfect business management (Article 423 CO).

If the right holder is unable to quantify the damage he has suffered or the infringer's unlawful profit, he may ask the judge to use his 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 costs of the case. The parties provide a detailed statement of their expenses before the judgment is delivered. As a general rule, the legal costs are awarded against the party which has lost the case (see Article 156(1) OJ). If neither of the parties

has won the case on all counts or the party which has lost genuinely believes that it is justified in pursuing the case, the costs may be shared proportionally between the parties (see Article 156(3) OJ). Unnecessary expenses are borne by the party which incurred them (see Article 156(6) OJ).

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 which has won the case will be borne by the party which has lost (see Article 159(1) OJ). As a general rule the losing party is required to reimburse all essential costs occasioned by the dispute (see Article 159(2) OJ). The costs include the compensation for the opposing party and the attorney's fees. They must cover all essential costs occasioned by the dispute. If the judgment does not fall exclusively in favour of one party or the party which has lost genuinely believes that it is justified in pursuing the case, the costs may be shared proportionally by the parties (see Article 159(3) OJ).

### **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) LDA; Article 10(1) Lto; Article 29(1) LDMI; Article 69(1) LBI; Article 57 LPM). An exception is made for works of architecture already constructed (Article 63(2) LDA) and semi-conductor products acquired in good faith which contain illegal copies of topographies (Article 10(2) LTo). 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 LTo).

In the case of patents and industrial designs the court may - as a further possibility - order the confiscated items to be sold off, provided that the right holder agrees to this.

With regard to trademarks, a distinction is made between an article bearing a mark which is counterfeit or illegal in some other way and the article itself. It is the mark which is deemed to constitute a breach of the right to the mark (except in the case of a mark relating to the form, where the article is individualized by the form itself). According to trademark law it is for the court to decide "whether the mark or indication of source is to be rendered unrecognisable or whether the articles are to be rendered unfit for use, destroyed or used in a particular manner" (Article 57(2) LPM).

Even if the case is dismissed, the court may order the destruction of articles manufactured in breach of an IPR and of the instruments, tools and other resources intended mainly for the infringement of an IPR (Article 69(3) LBI; Article 29(2) LDMI). Conduct or a de facto situation which is objectively unlawful is sufficient.

### **5.4 Any other remedies**

#### **Publication of the judgment**

At the request of the party which has won the case the court may order the judgment to be published at the expense of the opposing party (Article 66 LDA; Article 10(1) LTo; Article 60 LPM; Article 70(1) LBI; Article 30 LDMI; Article 9(2) LCD).

**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 LPM, the LDA 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 of those goods in its possession which have been unlawfully reproduced or unlawfully provided with a distinctive sign (Article 62(1c) LDA; Article 10(1) LTo; Article 55(1c) LPM). The laws on patents and industrial designs stipulate that the refusal to declare to the “competent authority” the source of those products in its possession that have been unlawfully manufactured (see Article 66(b) LBI; Article 24, subparagraph 4, LDMI) may give rise to civil or criminal proceedings.

**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?**

7.1 As a general rule the party which loses the case will be ordered to reimburse in full the opposing party’s costs (see Article 156(1) OJ). This includes the legal expenses, disbursements, attorney’s fees and the compensation for the opposing party.

If, at the request of the plaintiff, the court has wrongfully enjoined the defendant, the latter may, on the basis of Articles 41 *et seq.* CO, claim compensation via the ordinary procedure, provided that he has suffered damage as a result of the judgment that was delivered, that the plaintiff’s petition constitutes an unlawful act and that the plaintiff brought the action intentionally, through negligence or serious carelessness, or that he has caused the damage intentionally by means of action contrary to accepted standards of behaviour. If the plaintiff has, as a result of negligence or slight carelessness, wrongly assessed a legal situation, he may be ordered to reimburse the costs and expenses in full. According to precedents established by the Federal Court, it would be contrary to the legal system also to permit the defendant to claim compensation from the plaintiff (see ATF 117 II 396, 3b).

In the event of unsubstantiated provisional 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 intellectual property laws (see Article 28a(1) LDMI; Article 80(1) LBI; Article 46(1) LPOV; Article 59(4) LPM; Article 65(4) LDA; Article 10(1) LTo; Article 14 LCD; Article 17(2) LCart and the general rule of Article 28f(1) CC). If the petition for provisional measures proves not to have been materially substantiated, the plaintiff is required to compensate for the damage caused to the defendant. The judge may, however, refuse to award compensation or reduce it if the plaintiff has not been negligent or has only been slightly negligent (Article 28f(1) CC). The guarantees provided by the plaintiff will not be returned to him until it is certain that an action for damages will not be brought; the court may specify a suitable period within which the opposing party must bring his action, informing him that if he fails to act within that period, the guarantees will be returned to the plaintiff (see Article 28a(3) LDMI; Article 80(3) LBI; Article 46(3) LPOV; Article 59(4) LPM; Article 65(4) LDA; Article 10(1) LTo; Article 14 LCD; Article 17(2) LCart; Article 28f(3) CC).

7.2 Whether decisions or judgments are erroneous is, in principle, verified through the normal channels of appeal. The fact that an appeal is allowed simply means that the act complained of is unlawful. The authority and/or the public servant in question is not liable in such a situation. According to the decisions of the Federal 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 Court, the Federal Institute for Intellectual Property and the independent federal authorities and commissions of the federal courts and the federal administration *vis-à-vis* third parties is governed by the Federal Law on the Liability of the Confederation, Members of its Authorities and its Officials (RS 170.32, LRCF; see Article 1(1) LRCF). According to Article 3(1) LRCF, the Confederation is liable for damage caused unlawfully to a third party by an official in the performance of his duties. The aggrieved party cannot take any action against the offending official. However, the legality of the final decisions, orders and judgments cannot be re-examined in an action for damages (see Article 12 LRCF).

Each canton has its own laws on liability for public law acts. In fact most cantons have the same system as the Confederation, with the canton being liable for damage unlawfully caused to a third party by an official in the performance of his duties. In other cantons there is cumulative liability of the State and its servants (the canton then has subsidiary liability). In one canton the liability of cantonal officials is directly subject to the Code of Obligations (the canton has a subsidiary liability according to Article 55 CO). As under federal law, the law in most cantons rules out the possibility of challenging the legality of final decisions, orders and judgments in an action for damages.

**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 the proceedings. This depends on numerous factors, which vary according to the individual case (complexity of the matter, number of exchanges of documents, appeal to the Federal Court, etc.).

**8.2 Cost of proceedings**

The cost of proceedings includes the legal and other expenses (including the attorney's fees). The cantons fix the scale of legal charges. At the federal level the legal charges borne by the parties include court fees and the expenses allowed for translations, expert opinions, witnesses' allowances, etc. (Article 153(1) PCF). The court fees at the Federal Court level 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 situations. For instance, the court fees for an appeal may, depending on the sum involved, range between Sw F 200 and Sw F 50,000 (see the Federal Court's scale of court fees, 31 March 1992; RS 173.118.1).

At the cantonal level the judge determines the parties' compensation and the attorney's fees within the limits of the scale of charges, using his discretion to assess the amount of time lost, the nature of the work done and the sum involved in or importance of the case (see, for instance, Article 66 of the code of civil law procedure of the canton of Berne).

For cases heard at the federal level, a scale laid down by the court establishes the amount of the costs awarded to the opposing party in respect of the court proceedings, account being taken of his attorney's fees (Article 160 PCF and the scale of charges of 9 November 1978 for costs awarded to the opposing party in cases heard by the Federal Court (RS 173.119.1)). The costs include the compensation payable to the opposing party and his attorney's fees. The compensation payable to the opposing party includes the reimbursement of his 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 159 OJ; see also the reply to question 5, in particular reply 5.2.2). For an appeal, the amount of the fees ranges between Sw F 500 and Sw F 4,000 (where the sum involved is less than Sw F 20,000), and Sw F 20,000 and 1 per cent (where the sum involved

is more than Sw F 5,000,000). 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 Court may award fees which are higher than the normal rate.

It should be noted that the Federal Court's scale of charges does not apply to relations between the lawyer and his 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 a party "in need": this applies at both the federal level (Article 152 OJ) and the cantonal level (see, for instance, Article 77 of the code of civil law procedure of the canton of Berne).

In the 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. However, the cost of legal proceedings in Switzerland does not appear to be particularly high or prohibitive compared with neighbouring countries or countries with a similar legal system; no specific complaints have been brought to the attention of the Swiss authorities.

(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 Law on Administrative Procedures (LPA) apply to first-instance administrative procedures, i.e. before the Federal Institute for Intellectual Property. The appeals procedure involving the Appeals Committee with regard to industrial property matters is, however, governed by Articles 44 to 71 LPA (Article 71a(1) LPA). Where an administrative-law appeal to the Federal Court is admissible, proceedings before this authority are governed by Articles 97 to 115 OJ.

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 procedure to which an IPR holder may have recourse to assert his right:

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

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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.

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

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

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 Federal Institute for Intellectual Property within three months of that registration being published (Article 31 *et seq.* LPM). It is also possible to oppose patent applications subject to prior examination filed before 1 October 1995<sup>3</sup> (Articles 101 and 7a LBI).

Appeals against decisions of the Institute may be lodged with the Federal Appeals Committee insofar as intellectual property matters are concerned (see, for instance, Article 36 LPM). The Appeals Committee's decisions in opposition cases are final (Article 36(2) LPM; Article 100(w) OJ); in this context, the Committee acts as an independent court and applies the LPA. If the objector wins his case, the registration of the mark will be revoked. If not, he may lodge a complaint with the civil courts against the party registered as the holder of the mark or patent.

With regard to geographical indications in respect of agricultural products and processed agricultural products, 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. Appeals against these decisions are dealt with in the first instance by the Commission for appellations of origin and geographical indications and in the final instance by the Federal Court (see Articles 10 and 11 of the Ordinance on the Protection of Appellations of Origin and Geographical Indications in respect of Agricultural Products and Processed Agricultural Products). Among the possible grounds for objection mention may be made of 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 themselves decide to draw the attention of the persons referred to below in reply 9.2.1 to certain suspect consignments. At the request of those persons they may refuse to allow products which do not comply with Swiss law to enter into free circulation. The Customs Authorities give a definitive ruling (see, for instance, Article 73(3) LPM). 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 from acting in time. It should be noted that if someone applies for a measure at the border, that person must, within the prescribed periods, request provisional measures from the civil law judicial authorities (see, for instance, Article 77(2) LDA; Article 56(3) OPM).

See also the replies to questions 15 to 19.

## **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?**

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<sup>3</sup>Patent applications concerning inventions in the fields of textile fibre processing and time measurement technology (Article 87 *et seq.* LBI) are subject to prior examination. This examination was abolished with effect from 1 October 1995. The provisions relating to such applications, including those connected with the opposition procedure, have been maintained for applications which are still pending.

### **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 LPM). Insofar as patents are concerned, for applications subject to prior examination filed before 1 October 1995 (see in particular footnote 1), the conditions are similar: any interested party may, within three months of publication [of a patent application], oppose the issuing of the patent (Article 101 LBI). With regard to an appeal to the Appeals Committee for intellectual property matters 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. The opposing party has standing to appeal only if it has been admitted as a party to the opposition procedure (Article 106a LBI).

#### Measures at the border

The following have standing to apply for action to be taken: the holder of a trademark, copyright or neighbouring right, the right to an industrial design or integrated circuit topography, the registered holder of a geographical indication, copyright or neighbouring rights collecting societies or even trade or business associations which are authorized to do so with regard to geographical indications. (Article 75(1) LDA and Article 12 LTo with a cross-reference to Article 75(1) LDA; Article 71(1) LPM; Article 33b LDMI).

See also the replies to questions 15 to 19.

### **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 enjoy civic rights (Article 11 LPA).

In administrative procedures, in both the first and final instance, there is no obligation to be represented by a lawyer (see Article 11 LPA; conversely Article 29(2) OJ).

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 his head office in Switzerland must be represented by an attorney established in Switzerland (Article 42 LPM; Article 5 OPM; Article 13 LBI and Article 8 OBI). In addition, if more than 20 people submit collective or individual applications to defend the same interests, the authority may require them to select, for the procedure, one or more representatives (Article 11a LPA).

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

The parties are required to collaborate in establishing the facts in procedures they have taken themselves if they are making independent applications and have a wider obligation under a federal law to provide or disclose information. The authority may declare applications inadmissible if the parties refuse to provide the necessary assistance which can be expected of them (Article 13 LPA).

### **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 LPA does not contain any direct or exhaustive answer to this question. With regard to the probatory procedure, the rules of federal civil law procedures apply *mutatis mutandis* (Article 19 LPA), namely those relating to proof and evidence such as that provided by witnesses, documents, visual inspection and experts (see the replies to question 3).

The LPA does not provide for any means of coercion in the event of a refusal to cooperate, apart from the possibility of invoking, for instance, Article 292 of the Criminal Code (CP) or direct enforcement against the person of the obligor or his assets (Article 41 LPA). The appeals authority may reprimand or impose a disciplinary fine of up to Sw F 500 on the parties or their representative if they break with the conventions or disrupt the conduct of a case (Article 60 LPA). 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 LPA).

#### **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) LPA). 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) LPA). Refusal to authorize consultation of documents may extend only to those which have to be kept secret (Article 27(2) LPA). The provisions of the Federal Law on Civil Procedure (PCF) 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 LPA, which has a cross-reference to Articles 42 and 51 PCF); see the replies to question 4.

#### **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**

An IPR holder whose IPR is being or is likely to be infringed must ask the civil judicial authorities to grant injunctions (see the reply to question 5.1). The Federal Institute for Intellectual Property and the Federal Appeals Committee for intellectual property matters cannot grant injunctions.

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

###### **(a) Damages**

An IPR holder whose right is being or is likely to be infringed must ask the civil judicial authorities to award damages (see reply to question 5.2.1).

###### **(b) Administrative expenses**

The competent authority also determines the procedural and legal costs (Article 63 and 64 LPA). Thus the Federal Institute for Intellectual Property, 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 LPM).

Procedural costs: as a general rule, the procedural costs, which comprise the fee for granting the order, the administrative fees and disbursements, are awarded against the losing party. If the latter is not found against on all counts, these costs are reduced. In exceptional cases they may be remitted in full. No procedural costs may be awarded against the federal authorities. Costs may be awarded against the party which has won the case if it has incurred those costs by infringing procedural rules (Article 63 LPA).

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 LPA).

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 (RS 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. See reply to question 5.3 above.

9.5.4 Other remedies

The administrative authorities may not order other remedies such as those described in the reply to question 5.4 above.

**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?**

See reply to question 5.6 above.

**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?**

See reply 7.2.

Under the Federal Law on the Liability of the Confederation, Members of its Authorities and its Officials (LRFC), the Confederation is liable for the damage caused unlawfully to a third party by an official in the performance of his 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 Confederation, the latter immediately notifies the official, against whom it could exercise a right of appeal (Article 3). If the Confederation compensates for the damage, it may bring an action for indemnity against the official if he caused the damage intentionally or as a result of gross negligence, even after the employer/employee relationship has been terminated (Article 6). The official is liable for damage caused directly to the Confederation as a result of a violation of his official duties, either intentionally or through serious negligence (Article 7). 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)). The provisions concerning officials apply *inter alia* to members of the Federal Court, members of the independent federal authorities and committees of the federal courts 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). Under the same law criminal proceedings are also possible if felonies or misdemeanours are committed by officials in the performance of their duties (Article 13 *et seq.*). Provision is also made for disciplinary liability (Articles 17-18). 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).

**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 example, the charge for opposing marks is Sw F 800 (Article 31(2) LPM, Article 2 and Annex, paragraph I of the Ordinance on the Charges of the Federal Institute for Intellectual Property).

The Institute decides whether and to what extent the costs of the party which wins the case will be borne by the party which loses (Article 34 LPM; Article 24 OPM). The costs must cover the following expenses of the party which wins: the cost of being represented or assisted, the party's disbursements and other expenses exceeding Sw F 50, loss of earnings if it exceeds a day's earnings where the successful party's financial circumstances are modest (Article 8 of the Ordinance on Costs and Compensation in respect of Administrative Procedures).

The cost of an appeal to the Federal Appeals Committee for intellectual property questions is Sw F 1,000 to Sw F 4,000, depending on the subject of the appeal and the complexity of the proceedings.

With regard to the cost of proceedings under the auspices of the Customs Authorities, see the reply to question 17.

Length: For proceedings opposing trademarks, it is difficult to give a precise average figure, as the length depends very much on the complexity of the case, the number of exchanges of documents, extensions of the time-limits, the suspensions of proceedings and whether or not there is more than one party opposing the trademark. For instance, 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. As a general rule the Federal Institute for Intellectual Property endeavours to ensure that the proceedings are completed swiftly.

An appeal to the Federal Appeals Committee for intellectual property questions against a decision to have a judgment set aside can take on average eight to 10 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 70 LPA). 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.



## 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 federal legislation concerning intellectual property governs the authorities' powers and the conditions for ordering provisional measures in civil proceedings. It is augmented by the provisions of Articles 28c to 28f of the CC and the precedents established by Federal Court decisions.

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 the case in point. 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 law mention may be made of the following provisional measures:

- Measures to ensure that the relevant evidence in connection with the alleged infringement is preserved (e.g. Article 65(2) LDA; Article 59(2) LPM; Article 10(1) LTo; Article 77(1) LBI; Article 28(1) LDMI; Article 14 LCD; Article 28c(2), subparagraph 2, CC);
- precautionary measures to maintain the existing *de facto* situation (e.g. Article 65(2) LDA; Article 59(2) LPM; Article 28(1) LDMI; Article 10(1) LTo; Article 77(1) LBI; Article 14 LCD; Article 28c(2), subparagraph 1, CC);
- measures pursuant to a contractual obligation to ensure on a provisional basis the exercising of the claims to prevent or put an end to the disturbance (e.g. Article 65(2) LDA; Article 59(2) LPM; Article 10(1) LTo; Article 28(1) LDMI; Article 77(1) LBI);
- measures to identify the source of articles 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 (e.g. Article 65(2) LDA; Article 59(2) LPM; Article 28(1) LDMI; Article 10(1) LTo; Article 77(1) LBI).

##### **10.2 Criminal procedural law**

There are two types of provisional measures in criminal proceedings: firstly, the judicial and police authorities are prompted to take temporary measures to guarantee that circumstantial and other evidence is preserved and, secondly, they are empowered 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. This latter power is particularly important with regard to intellectual property; here, the investigating judge may *inter alia* seize the allegedly counterfeit items and the instruments and implements used principally for counterfeiting purposes (see Article 28(1) LDMI; conversely Article 72 LDA; Article 68 LPM; Article 69 LBI). Once they have been completed, works of architecture may not be confiscated (Article 72 LDA). The judicial authorities may in particular order the seizing of allegedly counterfeit items or of instruments and implements used mainly for counterfeiting purposes which they consider necessary to demonstrate the truth or to confiscate (see Article 28(1) LDMI;

Article 65 LPP). Even though the ordering of provisional measures in criminal proceedings is governed only under the LDMI, this possibility is not confined to industrial designs. According to the Federal Court the judicial authorities may order provisional measures in all IPR-related criminal proceedings in accordance with the “*in majore minus*” principle<sup>4</sup>.

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

In general, the judge gives the opposing party the opportunity to be heard: this fundamental principle stems from Article 4 Cst. However, if the imminence of the danger is such that the opposing party cannot be heard, the judge may order emergency measures subject to an application simply being made (see Article 65(4) LDA; Article 10(1) LTo; Article 59(4) LPM; Article 77(3) LBI; Article 43(3) LPOV; Article 28(3) LDMI; Article 14 LCD; Article 28d(2) CC). 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 (“need for urgent action”) 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.

In criminal proceedings the police authorities and the investigating judge order the provisional measures which they consider necessary. If the person in possession of the seized article is not present while it is actually being seized, he must be notified as soon as the provisional measure has been carried out (Article 4 Cst and Article 6 CDEH).

## **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 for the most part by the federal intellectual property laws. Anyone wishing to apply for provisional measures must demonstrate that it is likely that his IPR is being or is likely to be infringed and that such infringement is likely to cause him damage which will be difficult to make good and which can be averted only by means of provisional measures (see Article 65(1) LDA; Article 10(1) LTo; Article 59(1) LPM; Article 43(2) LPOV; Article 77(2) LBI; Article 14 LCD; Article 17(2) LCart; Article 28c(1) CC; this last provision also applies *mutatis mutandis* to industrial designs). Furthermore, any provisional measure to some extent implies a sense of urgency.

As a general rule the court gives the opposing party the opportunity to be heard (Article 65(4) LDA; Article 10(1) LTo; Article 59(4) LPM; Article 28(3) LDMI; Article 77(3) LBI; Article 43(3) LPOV; Article 14 LCD; Article 17(2) LCart; Article 28d(1) CC). In the event of emergency measures (see reply to question 11), 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 of 30 days maximum to bring the action, informing him that the provisional measures will lapse if he fails to act

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<sup>4</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. See reply 5.3. He may also order the provisional seizure of these articles.

within that period (Article 65(4) LDA; Article 10(1) LTo; Article 59(4) LPM; Article 28(4) LMDI; Article 77(4) LBI; Article 14 LCD; Article 17(2) LCart; Article 28e(2) CC)<sup>5</sup>. It is for cantonal procedural law to determine in what form the action on the merits is to be brought. If the provisional measures are ordered during the proceedings, they normally lose their validity by the time the final decision enters into force at the latest. The judge may, however, order a limited extension of the validity of the provisional measures, for example that a note be made in the trademarks register that the holder's power of alienation is limited until the registration of the mark is definitively expunged. The judge always has the option, on the requisition of the parties, to reverse, modify or restrict the provisional measures he has ordered if there is no longer any need for urgent action or if the circumstances have changed.

The applicant is required to compensate for the damage caused to the opposing party if the application for provisional measures proves to have been without foundation (see reply to question 7). If the opposing party is likely to suffer harm as a result, the judge may compel the applicant to provide guarantees before ordering the provisional measure and will make the enforcement of his decision concerning a provisional measure dependent upon that being done (Article 65(4) LDA; Article 10(1) LTo; Article 59(4) LPM; Article 28(2) LMDI; Article 79(1) LBI; Article 44(1) LPOV; Article 14 LCD; Article 17(2) LCart; Article 28d(3) CC).

## 12.2 Criminal procedural law

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

It is also for the investigating judge to lift the seizure as soon as the conditions which led to this measure being taken are no longer satisfied or have changed, for example as soon as the purpose for which it was ordered no longer justifies this provisional measure being taken. The fate of the items and assets that were seized must be determined in the final judgment at the latest.

A distinction should be made between probatory seizure, which is intended to furnish evidence or proof, and preventive attachment (see reply 10.2). Probatory seizure may be ordered only if the items to be sequestered are likely to be directly or indirectly connected with an IPR infringement. The items must be of use for demonstrating the truth in order to be able to be seized. Preventive attachment is possible only if the items to be seized are closely connected with a specific infringement. In addition, the confiscated items must be sufficiently likely to be jeopardized in future. Both probatory seizure and preventive attachment are also subject to the proportionality rule. This rule requires the judge to resort to less incisive measures, such as the drawing-up of an inventory or the taking of photographs.

Before ordering provisional measures, the (investigating) judge will hear the opposing party; if there is a need for urgent action he may take emergency measures beforehand. In this case the opposing party will be notified as soon as the measures have been carried out (see Article 28(3) LMDI).

If need be the (investigating) judge, when he allows the application, will grant the applicant a period of 30 days maximum to bring the action, informing him that the measures ordered will lapse if he fails to act within that period (see Article 28(4) LMDI). A detailed inventory is drawn up of the items that have been sequestered or put in a safe place. The interested parties receive a copy (see Article 70 LPP). Throughout Switzerland, the provisional measures may be the subject of a judicial

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<sup>5</sup>The current Federal Law on the Protection of New Plant Varieties provides for a period of 60 days. This period will be reduced to 30 days in the draft amendment at present being prepared.

review at cantonal level on the grounds that seizure is a restriction of ownership as guaranteed by Article 22b of the Constitution. An appeal does not, however, prevent the provisional measure from continuing to exist until the court of appeal approves the appeal.

With regard to the liability of the (investigating) judges in the event of seizures wrongfully ordered, see the reply to question 7.

The judge may refuse to award compensation or may reduce it if the applicant has not been negligent or has been only slightly negligent. The action for compensation for the injury may be brought before the court which ordered the provisional measures. The guarantees provided by the applicant are returned if the judge establishes that the opposing party will not demand compensation for the injury. If need be, the judge lays down a period within which action must be taken, notifying the opposing party that if it does not act within that period, the guarantees will be returned to the applicant (see, for instance, Article 28f CC; Article 28a LDMI; Article 80(3) LBI).

**13. What, under normal circumstances, is the length and cost of proceedings?**

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, fairly short. The proceedings are only summary (“*Summarverfahren*”); 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.

The cost of the proceedings depends on the complexity of the particular case and the amount involved in the dispute; it also varies from one canton to another.

(b) Administrative measures

**14. Reply to the above questions in relation to any administrative provisional measures.**

The Federal Institute for Intellectual Property does not 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 which wishes to obtain provisional measures must request them from the judicial authorities.

In principle, within the framework of the opposition procedure, the Appeals Committee for intellectual property questions 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 LPA). However, this possibility has remained theoretical where IPRs are concerned since the *de jure* or *de facto* situation is not affected by the Institute’s decision if a party has lodged an appeal against that decision (see reply to question 9.1).

The only measure which could be compared to a pre-provisional measure (i.e. *inaudita altera parte*) is that which can be taken by the Customs Authorities (see below replies to questions 15 *et seq.*).

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?**

A request may be made for action by the Customs Authorities if the *importation* or *exportation* of goods whose distribution would contravene the legislation applicable is imminent.

In addition to the goods referred to in footnote 14 concerning Article 51 of the TRIPS Agreement, Swiss law also provides for border measures in respect of goods infringing the rights in relation to geographical indications, industrial designs and the topographies of integrated circuits. These border measures are specifically governed by the following provisions:

- Articles 75 to 77 of the LDA and Articles 18 to 21 of the ODAu;
- Article 12 (which refers back to Articles 75 to 77 of the LDA) of the LTo and Articles 16 to 1 of the OTo;
- Articles 70 to 72 of the LPM and Articles 54 to 57 of the OPM;
- Articles 33a to 33c of the LDMI and Articles 29 to 29c of the ODMI;
- Articles 1 to 5 and Annex 1 (tariff) to the Regulation on Charges levied by the Customs Authorities.

The procedure is not confined to goods imported or exported across the Swiss customs line but applies also to goods *stored in a Swiss customs warehouse*. It is, however, ruled out for goods in transit.

With regard to trademarks, the Customs Authorities may refuse a request for it to take action if it emerges that such request is intended to prevent parallel imports.

**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. On the basis of the LPM, for instance, the request must contain certain information: data on the trademark holder, the person entitled to use it or his representative, a copy of the registration certificate, (strong) circumstantial evidence which suggests that products illegally bearing the trademark or the indication of source are being imported, exported or stored, 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.

In urgent cases the written request may, in exceptional circumstances, be presented directly to the customs office at which illegally named products are supposedly being cleared (see, for instance, Article 55(1) OPM).

For requests concerning fields such as:

- Copyright and neighbouring (related) rights,
- topographies of semi-conductor elements,
- industrial designs,

these provisions apply *mutatis mutandis*.

The Customs Authorities hold the goods for up to ten working days as from the date of notification, to enable the applicant to obtain provisional measures. In duly substantiated cases, the Customs Authorities may hold the goods for a maximum of a further ten working days (Article 77(2) and (2a) LDA; Article 12 LTo; Article 72(2) and (2a) LPM; Article 33c(2) and (3) LDMI). If it is established, prior to the expiry of these time-limits, that the applicant is unable to obtain provisional measures, the products are released immediately (Article 20(3) ODAu; Article 18(3) OTo; Article 56(3) OPM; Article 29b(3) ODMI).

In order to meet any request for damages from third parties, the Customs Authorities may require an appropriate guarantee from the applicant (Article 77(2b) LDA; Article 12 LTo; Article 72(2b) LPM; Article 33c(4) LDMI).

The applicant is authorized to verify the goods that are being held. The person entitled to dispose of the goods may also take part in this verification (Article 20(2) ODAu; Article 18(2) OTo; Article 56(2) OPM; Article 29b(2) ODMI).

**17. Describe provisions regarding 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?**

The application is normally valid for two years unless made for a shorter period. It may be renewed. A fee of Sw F 120 is charged for the processing of applications.

The Customs Authorities hold the goods in question for up to ten working days from the date of the notification. The applicant must take advantage of this period to obtain from the civil judge provisional measures, without which the goods are released immediately. In duly substantiated cases the Customs Authorities may hold the goods for a further ten days maximum.

**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 registered holder to certain consignments which are regarded as suspect (Article 75 LDA; Article 12 LTo; Article 70 LPM; Article 33a LDMI). This power is important, as it removes a major obstacle, namely professional secrecy, which, until the provisions referred to entered into force, prevented the customs authorities from reporting consignments which obviously contained counterfeit goods. However, such

consignments are not detained as a matter of course. There is no systematic attempt by the customs authorities to look for such consignments.

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

The Customs Authorities do not have authority to withdraw from circulation or automatically destroy goods which contravene the applicable law, since Swiss legislation does not contain any basis for such measures by the customs authorities. For this kind of remedy, see the replies to question 5 above (civil judicial proceedings).

Criminal procedures

With regard to IPR infringements, the proceedings and passing of judgment insofar as offences under criminal law are concerned are a matter for the cantonal authorities (see Article 73(1) LDA; Article 69 LPM; Article 27(1) LDMC; Article 85(1) LBI; Article 51 LPOV; Article 27(1) LCD).

Each canton has a code of criminal law procedure which is applied subject to Article 365(2) CP and Articles 247 *et seq.* of the Federal Law on Criminal Law Procedure, unless the special intellectual property laws contain specific provisions.

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

20.1 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 345(1) CP). If there is a breach of federal law, appeals on a point of law against the cantonal judgments may be made to the Federal Court of Appeal (Article 269(1) LPP).

20.2 The competent authority for conducting the proceedings and passing judgment on an IPR infringement is that of the place in which the perpetrator 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 346(1) CP). With regard to patents and industrial designs, 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) LBI; Article 27(1) LDMI). 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 346(2) CP; Article 84(1) LBI; Article 27(2) LDMI). 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 348(1) CP).

**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 IPRs 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 LDA the following offences are punishable: 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; 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 or a repeat; 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; 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 LDA).

- According to Articles 69 *et seq.* LDA the following offences are punishable: 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; 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, in some other way, putting into circulation such copies; refusing to declare to the competent authorities the source of a medium on which a performance protected under neighbouring rights pursuant to Articles 33, 36 or 37 of the LDA is recorded and which has been made or put into circulation unlawfully and is in the possession of the person concerned.
- According to Article 11 of the LTo the following offences are punishable: 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 LPM the following offences are punishable: 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; 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; 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; importing, exporting or storing products which the person concerned knew would be offered or put into circulation illegally, with a view to deception; using a guarantee mark or a collective mark in such a way as to contravene the provisions of the regulation.



- According to Articles 64 *et seq.* of the LPM the following offences are punishable: intentionally using an inaccurate indication of source or designation of origin; creating a risk of deception by using a 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 112b of the Law on Agriculture the following offence is punishable: intentionally using, illegally, an appellation of origin or a protected geographical indication (i.e. one which has been registered in respect of agricultural and processed agricultural products).
- According to Articles 24 *et seq.* of the LDMI the following offences are punishable: intentionally and unlawfully counterfeiting a registered design or copying it in such a way that the genuine product can only be distinguished from the counterfeit product after careful examination: selling, putting up for sale or bringing into circulation or importing into Switzerland counterfeit or illegally copied articles; colluding in the offences referred to or encouraging or facilitating the perpetration of those offences; refusing to declare to the competent authority the source of articles in one's possession which have been counterfeited or copied; wrongfully incorporating particulars in one's commercial documents, advertisements or products which lead people to believe that a design has been registered under the LDMI.
- According to Articles 66 and 81 *et seq.* of the LBI the following offences are punishable: intentionally and unlawfully using a patented invention (copying is regarded as using); refusing to declare to the competent authority the source of the products in one's possession which have been manufactured illegally; 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; 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 LBI.
- According to Articles 48 *et seq.* of the LPOV the following offences are punishable: intentionally and unlawfully producing for commercial purposes material for the propagation of a protected variety, offering this material for sale or making a business out of selling it; continuously using material for the propagation of a protected variety to produce material for propagating a new variety; using plants or parts of plants of a protected variety which are regularly offered for sale for purposes other than propagation in order to produce professionally ornamental plants or cut flowers; making a business out of selling ornamental plants or cut flowers of species in respect of which the protection has been widened to include the marketed product; 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 of the LCD the following offence is punishable: intentionally engaging in unfair competition within the meaning of Article 3 of the LCD (unfair

advertising and sales techniques and other illegal practices), Article 4 of the LCD (incitement to breach or terminate a contract), Article 5 of the LCD (using something promised in another's contract) or Article 6 of the LCD (infringing industrial or business secrets).

- According to Article 162 of the CP the following offence is punishable: disclosing an industrial or commercial secret which one 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 CP 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. See Switzerland's reply in the context of the review of legislation on undisclosed information during the May 1997 session).

**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?**

22.1 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) LDA; Article 69 LPM; Article 27(1) LDMC; Article 85(1) LBI; Article 51 LPOV; Article 27(1) LCD). In all cantons it is the police authorities and the public prosecutors which are responsible for initiating criminal proceedings. The public prosecutors direct the police investigations.

22.2 Under intellectual property law criminal proceedings require, in most cases, a complaint from the injured party (Articles 67(1), 68 and 69(1) LDA; Article 11(1) LTo; Article 61(1) and (2), 62(1) and (3), 63(1) and (2) and 64(1) LPM; Article 81 LBI; Article 27(1) LDMI; Article 48, subparagraph 2, LPOV; Article 23 LCD; Article 162 LP). However, if the perpetrator of the offence is acting in a professional capacity in some cases proceedings are taken as a matter of course (Article 67(2), Article 69(2) LDA; Article 11(2) LTo; Article 61(3), 62(2), 63(4) and 64(2) LPM).

**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 (see reply 22.2). Consequently, only private individuals are able to initiate criminal proceedings. Any injured person may lodge a complaint. If the injured party does not exercise civil rights, his legal representative will be entitled to lodge a complaint. If he is 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 at least and capable of understanding, he will also be entitled to lodge a complaint. If he dies without lodging a complaint or having expressly renounced the right to do so, his right will pass to each of his close relatives (see Article 28 CP).

Where proceedings are taken against an infringement as a matter of course, the injured party may sue for damages.

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

Swiss law provides for the following penalties:

- For breach of copyright (Article 67 LDA), for breach of a neighbouring right (Article 69 LDA) and for infringement of the provisions regarding the protection of topographies (Article 11 LTo): imprisonment for up to one year or a fine of up to Sw F 40,000. If the perpetrator of the offence is acting in a professional capacity, the penalty will be imprisonment for up to three years and a fine of up to Sw F 100,000;
- for unlawfully exercising a right (Article 70 LDA): imprisonment for up to three months or a fine of up to Sw F 40,000;
- for intentionally omitting to mention the source used by whoever is legally required to do so or by the author if he is designated to do so (Article 68 LDA): a fine of up to Sw F 40,000;
- for fraudulent use of a trademark (Article 62 LPM): imprisonment for up to three years or a fine of up to Sw F 100,000. If the perpetrator of the offence is acting in a professional capacity, the penalty will be imprisonment for up to five years and a fine of up to Sw F 100,000;
- for infringement of the right to a trademark (Article 61 LPM) and for improperly using a guarantee or collective mark (Article 63 LPM): imprisonment of up to one year or a fine of up to Sw F 100,000. If the perpetrator of the offence is acting in a professional capacity, the penalty will be imprisonment for up to three years and a fine of up to Sw F 100,000;
- for importing, exporting or storing products which are unlawfully offered for sale or brought into circulation with a view to deceiving others through one's trademark (Article 62(3) LPM): imprisonment for up to three months or a fine of up to Sw F 20,000;
- for using incorrect indications of source (Article 64 LPM): imprisonment for up to one year or a fine of up to Sw F 100,000. If the perpetrator of the offence is acting in a professional capacity, the penalty will be imprisonment for up to three years and a fine of up to Sw F 100,000;
- for illegal use of a protected appellation of origin or geographical indication: imprisonment for up to one year or a fine of up to Sw F 100,000 (Article 112b of the law on agriculture);
- for infringements relating to the producer's identification mark (Article 65 LPM): a fine of up to Sw F 20,000;
- for infringing the provisions governing the protection of industrial designs (see Article 24 LDMI): imprisonment of up to one year or a fine of up to Sw F 100,000 (Article 25 LDMI). Anyone who has wrongfully incorporated particulars in his commercial documents, advertisements or products which lead people to believe that a design has been registered under the LDMI will be fined up to Sw F 40,000 (Article 31 LDMI);
- for infringing the provisions governing the protection of the rights to a patented invention (see Article 66 LBI): imprisonment of up to one year or a fine of up to Sw F 100,000 (Article 81(1) LBI). Anyone who offers for sale or brings into circulation

his 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 LBI will be fined up to Sw F 2,000 (Article 82(2) LBI);

- for infringement of the provisions regarding the protection of plant varieties (Article 48 LPOV): imprisonment for up to one year or a fine of up to Sw F 40,000;
- for misleading advertising and other offences (Article 49 LPOV): a fine of up to Sw F 40,000;
- for unfair competition (Article 23 LCD): imprisonment of up to three years or a fine of up to Sw F 100,000.

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 (conversely Article 58 CP; Article 68 LPM; conversely Article 72 LDA; Article 29(1) LDMI; Article 69(1) LBI; Article 50 LPOV). A judge may order that the confiscated items or products be rendered unfit for use or destroyed (Article 58(2) CP; Article 29(2) LDMI; Article 69(1) LBI). Once they have been completed, works of architecture may not be confiscated;
- 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 make good that damage, the judge awards the injured party, at his request, up to the amount of the damage laid down by the courts or by agreement with the injured party:
  - (a) the amount of the 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 (Article 60 CP);
- 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 61(1) CP; Article 30 LDMI; Articles 70 and 82(2) LBI);
- where a misdemeanour or felony has been committed while carrying out, subject to official authorization, a professional, industrial or commercial activity and the offender has, because of this offence, received a custodial sentence of more than three months, 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 54(1) CP).

**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.

Most codes of procedure stipulate only that the courts are obliged to ensure that the proceedings are not prolonged unnecessarily. Furthermore, certain stages of the proceedings must be completed within precise time-limits (but these may differ from one canton to another). Mention should also be made of the principle of promptness, deduced from Articles 4 Cst and 6 CEDH, as a particular kind of formal miscarriage of justice and violation of the right to be given a hearing. Finally, according to Article 73 CP the statute of limitations is ten years if the offence is punishable by imprisonment and five years for all other offences. The statute of limitations applying to the principal penalty prevails over that for ancillary penalties.

As for the cost, if any, of the proceedings, this is governed by the general provisions of cantonal criminal law regarding expenses, costs and compensation and, in particular, the advancing of court fees by the State and of certain expenses relating to expert opinions by the parties concerned. 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.