

**Federal Act
on the Federal Patent Court
(Patent Court Act, PatCA)**

173.41

of 20 March 2009 (as amended as of 1 March 2010)

The Federal Assembly of the Swiss Confederation,
on the basis of Article 191a paragraph 3 of the Federal Constitution,¹ and having
considered the Dispatch of the Federal Council dated 7 December 2007,²

decrees:

Chapter 1: Position

Art. 1 General principles

¹ The Federal Patent Court is the patent court of first instance of the Swiss Confederation.

² It renders its decisions as a lower court of the Federal Supreme Court.

Art. 2 Independence

The Federal Patent Court is independent in its adjudication and is obligated only to the law.

Art. 3 Supervision

¹ The Federal Supreme Court exercises supervision over the administration of the Federal Patent Court.

² The Federal Assembly exercises ultimate supervision over the Federal Patent Court.

³ The Federal Patent Court shall submit to the Federal Supreme Court its annual draft budget, annual accounts and annual report for the attention of the Federal Assembly.

Art. 4 Financing

The Federal Patent Court shall be financed by court fees and contributions of the Swiss Federal Institute of Intellectual Property (IPI) taken from the patent fees annually collected by it.

Patent Court Act

Art. 5 Infrastructure and staff for administrative assistance services

¹ The Federal Administrative Court shall make available its infrastructure to the Federal Patent Court at cost and provide the staff required for rendering administrative assistance services for the Federal Patent Court.

² In its work for the Federal Patent Court, the administrative assistance staff reports to the Administrative Board of Judges.

Art. 6 Sitting location and place of service

The Federal Patent Court shall sit at the seat of the Federal Administrative Court. This sitting location shall also serve as the place of service of the permanent judges, court clerks and the administrative assistance staff.

Art. 7 Special sitting location

Where justified by the circumstances, the Federal Patent Court may sit at another location. The Cantons shall provide the requisite infrastructure free of charge.

Chapter 2: Judges

Art. 8 Composition

¹ The Federal Patent Court shall be composed of judges with legal training and judges with technical training. The judges must have proven knowledge of patent law.

² The Federal Patent Court shall be composed of two permanent judges and a sufficient number of non-permanent judges. The majority of non-permanent judges must possess technical training.

Art. 9 Election

¹ The judges are elected by the Federal Assembly.

² Eligible for election are those eligible to vote on federal matters .

³ In the election of judges to serve on the Court it shall be ensured that technical fields of expertise and Switzerland's official languages are appropriately represented.

⁴ During the preparatory phase for the election, the IPI as well as professional organisations and interested groups involved with patents may be heard.

AS 2010 513

¹ SR 101

² BBl 2008 455

Art. 10 Incompatibility of activities

¹ The judges of the Court may not be members of the Federal Assembly, the Federal Council or a federal court.

² They may not engage in any activity that impairs their ability to fulfil the duties of their office, their independence, or is injurious to the reputation of the Court.

³ They may not serve in any official capacity on behalf of a foreign state.

⁴ Permanent judges may not act as professional representatives of third parties before the Court.

⁵ Permanent judges on a full time basis may not hold office in a canton or engage in any other gainful activity. They may also not be a member of the management board, board of directors, advisory board or serve as an auditor of a commercial enterprise.

Art. 11 Other gainful activities

In order to engage in gainful activities outside of the Court, permanent judges on a part time basis must obtain authorisation from the Administrative Board of Judges.

Art. 12 Incompatibility of persons

¹ The following persons may not serve simultaneously as judges of the Federal Patent Court where they are related to serving Court members in the following capacities:

- a. spouses, registered partners or domestic partners;
- b. spouses, registered partners and domestic partners of siblings;
- c. relatives in direct lineage and relatives in collateral lineage up to and including the third degree;
- d. relatives in-law in direct lineage and relatives in-law in collateral lineage up to and including the third degree;

² The provision of paragraph 1 letter d shall apply accordingly to domestic partnerships.

Art. 13 Term of office

¹ The term of office of judges amounts to six years. Re-election is permissible.

² Judges shall leave office at the end of the year in which they reach ordinary retirement age as defined in the Federal Personnel Act of 24 March 2000.³ Where they are involved in pending proceedings at this time, they may be charged with completing them as agreed with the Administrative Board of Judges.

³ Offices vacated in this manner shall be filled for the remaining term of office.

Art. 14 Removal from office

The electoral authorities may remove a judge from office before he or she has completed his or her term where he or she

- a. wilfully or by gross negligence commits serious breaches of his or her official duties; or
- b. has permanently lost the ability to perform his or her official duties.

Art. 15 Oath of office

¹ Prior to taking office, judges shall take an oath pertaining to fulfilling their duties conscientiously.

² They shall be sworn in before the Plenary Court.

³ A vow may be taken in lieu of swearing an oath.

Art. 16 Immunity

¹ No criminal proceedings may be initiated against permanent judges during their term of office in respect of a felony or misdemeanour that is not linked to their service and activities in their office unless with their written consent or the consent of the Plenary Court.

² The foregoing shall not apply to precautionary arrest due to a risk of absconding or where the member is caught in the act of committing a felony. The authority ordering the arrest must apply directly to the Plenary Court within twenty-four hours for its consent to the arrest being carried out, provided that the person in question has not given his or her own written consent to being taken into custody.

³ Where criminal proceedings in respect of the offence named in paragraph 1 have already been initiated against the member at the time he or she takes office, he or she shall have the right to request a decision of the Plenary Court on the continuation of any detention that has already been ordered and on any summonses to attend court hearings. The submission of such a request shall have no suspensive effect on orders already issued.

⁴ No immunity may be invoked against a legally enforceable judgement that imposes a custodial sentence whose execution has been ordered prior to the member taking office.

⁵ Where the Plenary Court refuses to give its consent to the criminal prosecution of a judge, the prosecuting authority may lodge an appeal with the Federal Assembly within ten days.

Art. 17 Employment and remuneration

The Federal Assembly will enact an ordinance on the employment and remuneration of judges.

Chapter 3: Organisation and Administration

Art. 18 Presidency

- 1 The Federal Assembly shall elect a permanent judge President of the Federal Patent Court.
- 2 The President of the Federal Patent Court is elected for a full term of office. Re-election is permissible.
- 3 The President of the Federal Patent Court must possess legal training.
- 4 He or she presides over the Plenary Court and represents the Court in dealing with third parties.
- 5 The Vice-President acts as the President's deputy.

Art. 19 Plenary Court

- 1 The Plenary Court shall elect from among the legally trained judges the Vice-President and from its midst the other members of the Administrative Board of Judges.
- 2 Rulings and elections of the Plenary Court shall be valid where at least two-thirds of all judges take part in a session or a circular proceeding.

Art. 20 Administrative Board of Judges

- 1 The Administrative Board of Judges shall bear the responsibility for the Court's administration.
- 2 It shall consist of three persons, namely the two permanent judges and the Vice-President. Where a permanent judge serves as Vice-President, the Plenary Court shall select the third member from among the non-permanent judges. The appointment of a replacement may be provided for in a set of regulations.
- 3 The Administrative Board of Judges is responsible for:
 - a. enacting rules and regulations on the organisation and administration of the Court, allocation of duties, the composition of the panels, disclosure of information, court fees, and the compensation of parties to proceedings, official representatives, experts and witnesses;
 - b. all tasks and duties that are not assigned to another body under this Act.

Art. 21⁴ Panels

- 1 As a general rule, the Court shall adopt its decisions as a three-member body(panel), of which at least one member must possess technical training and one member legal training.

4 Not yet in force.

2 Upon the order of the President, the Court shall adopt its decisions as a five-member panel, of which at least one member must possess technical training and one member legal training, where this is in the interest of the further development of the law or the uniform application of the law.

3 Where more than one technical field of expertise is to be judged in a dispute, upon the order of the President, the Court shall render its decision as a panel comprised of up to seven members, of which at least one must possess legal training.

4 The designation of the technically trained judges shall be done in accordance with the technical field of expertise at issue in a dispute.

5 At least one permanent judge must always sit on a panel, except for cases of force majeure.

Art. 22 Voting

1 Rulings of the Plenary Court and the Administrative Board of Judges shall be adopted and elections decided by an absolute majority of the votes cast.

2 Where there is a tie vote, the President shall have the deciding vote; elections and appointments shall be decided by drawing lots.

3 The non-permanent judges and the permanent judges on a part time basis have full voting rights.

4 Judges shall recuse themselves in matters in which they have a vested interest.

Art. 23⁵ Single judges

1 The President of the Federal Patent Court adopts decisions in the capacity of a judge sitting alone on:

- a. summary dismissal of manifestly inadmissible causes of action;
- b. petitions for preliminary measures;
- c. petitions for legal aid;
- d. dismissal of proceedings on grounds of irrelevance, withdrawal or recognition of the claim or settlement;
- e. actions for the granting of a licence according to Article 40d of the Patent Act of 25 June 1954.⁶

2 He or she may charge other legally trained judges with some or all of these tasks.

3 Where required for legal or factual reasons, a single judge may adopt decisions on petitions for preliminary measures together with two other judges in a panel of three. Where the understanding of a technical matter is of particular significance, decisions must be adopted in a panel of three.

5 Not yet in force.
6 SR 232.14

Art. 24 Court clerks

¹ Court clerks shall take part in case briefings and the adoption of decisions. They shall act in an advisory capacity.

² They shall draft proposals under the supervision of a judge and edit the decisions of the Federal Patent Court.

³ They shall perform other tasks that are assigned to them in a set of regulations.

⁴ The employment and remuneration of court clerks shall be governed by the Federal Personnel Act of 24 March 2000.⁷

Art. 25 Disclosure of information

The Federal Patent Court shall disclose to the public information on its adjudication activities.

Chapter 4: Jurisdiction⁸

Art. 26

¹ The Federal Patent Court shall be exclusively competent for:

- a. validity and infringement disputes and actions for issuing a licence in respect of patents;
- b. ordering preliminary measures prior to the onset of the litisprudence of an action as defined in letter a;
- c. the enforcement of decisions adopted in its exclusive competence.

² It shall also be competent for other civil actions possessing a factual connection to patents, in particular concerning the right to patents or their assignment. The competence of the Federal Patent Court shall not preclude that of the cantonal courts.

³ Where the nullity or infringement of a patent is to be adjudicated before a cantonal court on a preliminary question or defence basis, the judge shall grant the parties a reasonable period of time for filing the validity or infringement action before the Federal Patent Court. The cantonal court shall stay the proceeding until a final and absolute decision has been rendered on the action. Where no action is filed before the Federal Patent Court within the specified time limit, the cantonal court shall resume the proceeding and the preliminary question or defence shall be disregarded.

⁴ Where the defendant party files a counter-claim of nullity or infringement of a patent, the cantonal court shall refer both actions to the Federal Patent Court.

⁷ SR 172.220.1

⁸ Art. 26–32 are not yet in force.

Chapter 5: Proceedings

Section 1: Applicable Law

Art. 27

The proceedings before the Federal Patent Court shall be governed by the Code of Civil Procedure of 19 December 2008,⁹ unless provided for otherwise in the Patent Act of 25 June 1954¹⁰ or this Act.

Section 2: Recusal

Art. 28

Non-permanent judges shall recuse themselves in proceedings where a member of the judge's law firm or patent law firm or employer represents one of the parties.

Section 3: Representation of Parties

Art. 29

¹ In proceedings concerning the validity of a patent, patent attorneys may also represent parties before the Federal Patent Court as provided for in Article 2 of the Patent Attorney Act of 20 March 2009¹¹ provided that they engage in independent practice.¹

² Proof of independent practice as a patent attorney shall be furnished by way of suitable documentation upon request of the Federal Patent Court.

³ In all proceedings before the Federal Patent Court, patent attorneys as defined in Article 2 of the Patent Attorney Act of 20 March 2009 shall be afforded the opportunity to provide technical arguments concerning the facts of the case.

Section 4: Litigation Costs and Legal Aid¹²

Art. 30 Litigation costs

Litigation costs are:

- a. court costs;
- b. representation costs.

⁹ SR 272

¹⁰ SR 232.14

¹¹ SR 935.62

¹² Art. 34–41 are not yet in force.

Art. 31 Court costs

¹ Court costs are:

- a. court fees;
- b. expenses, namely costs for photocopying legal briefs; posting summonses and other items of service; translations, with the exception of those between the official languages; as well as compensation for experts and witnesses.

² The amount of the court fees shall be governed by the value in dispute, the scale and complexity of the case, the form of the proceedings, and the financial circumstances of the parties.

³ As a general rule, they shall amount to between 1,000 and 150,000 francs.

⁴ In setting the amount of the court fees, the Federal Patent Court may depart from the framework of paragraph 3 where this is justified by special reasons.

⁵ It may waive court costs where they have not been occasioned by one of the parties or a third party.

Art. 32 Representation costs

The award of compensation for representation costs by the Federal Patent Court shall be made in accordance with the schedule of rates (Art. 33). The parties may submit a debit note.

Art. 33 Schedule of rates

The Federal Patent Court establishes the rates for litigation costs.

Art. 34 Imposition of litigation costs in legal aid cases

¹ Where the party receiving legal aid does not prevail, the litigation costs shall be charged as follows:

- a. The counsel providing free legal representation shall receive appropriate compensation from the Federal Patent Court.
- b. The court costs shall be borne by the Federal Patent Court.
- c. The opposing party shall be reimbursed the advance on costs paid by it.
- d. The party receiving legal aid shall effect payment of compensation of representation costs to the opposing party.

² Where the party receiving legal aid prevails and where the representation costs are presumably not recoverable or are not recoverable at all from the opposing party, the counsel providing free legal representation shall receive appropriate compensation from the Court's cashier's office. The party receiving legal aid shall reimburse the court when it is later in a position to do so.

Section 5: Conduct of Proceedings and Procedural Formalities

Art. 35 Instructing judge

¹ The President shall preside over proceedings in the capacity of instructing judge until a decision is adopted; he or she may charge another legally trained judge with this task.

² The instructing judge may consult a technically trained judge at any time; this judge shall act in an advisory capacity.

Art. 36 Language of proceedings

¹ The Court shall designate one official language as the language of a proceeding. The language of the parties shall be taken into consideration where it is not an official language.

² In motions and oral hearings, each of the parties may express itself in an official language other than the language of the proceeding.

³ English may also be used provided that the Court and the parties give their consent. The judgement and procedural rulings shall be drafted in one of the official languages in any event.

⁴ Where a party submits documents that are not in one of the official languages or, in the case of paragraph 3, not in English, the Federal Patent Court may waive the requirement of a translation subject to the agreement of the opposing party. Otherwise it will direct that a translation should be made where this is necessary.

Section 6: Expert Opinions

Art. 37

¹ Experts shall submit their opinions in writing.

² The parties shall be afforded an opportunity to submit their position on the opinion in writing.

³ Where a technically trained judge possesses specific expertise, the judge's expert opinion shall be entered in the court record. The parties shall be afforded an opportunity to submit their position on the court record.

Section 7: Submission of Position on Evidentiary Conclusions

Art. 38

Upon concluding the gathering of evidence, the Federal Patent Court shall give the parties the opportunity, upon reasoned request, to submit a written position on the evidentiary conclusions.

Section 8: Procedure and Decision for Granting and Amending the Conditions of a Licence as Provided for in Article 40d of the Patent Act

Art. 39

¹ The procedure for granting and amending the conditions of a licence as provided for in Article 40d of the Patent Act of 25 June 1954¹³ shall be initiated by filing an action, said action to be filed in one of the manners according to Article 130 of the Civil Code of Procedure.^{14 15}

² It shall be settled by way of a decision within one month of action being filed.

³ Otherwise the provisions of the Civil Code of Procedure of 19 December 2008 pertaining to summary proceedings shall apply.

Chapter 6: Final Provisions

Art. 40 Amendment of current legislation

The amendment of current legislation is regulated in the Annex.

Art. 41 Transitional provisions

The Federal Patent Court shall, where it is competent, assume the adjudication of the cases that are pending before the cantonal courts upon the entry into force of this Act, provided that the main proceedings have not yet been conducted.

Art. 42 Referendum and commencement

¹ This Act shall be subject to an optional referendum.

² The Federal Council shall determine the date of commencement.

¹³ SR 232.14

¹⁴ SR 272

¹⁵ AS 2010 6413

Date of entry into force: 1 March 2010¹⁶

Art. 21, 23, 26–32 and 34–41 and Annex No. 2–4 shall enter in force at 1.1.2012.¹⁷

¹⁶ Federal Council Decree of 16 December 2009

¹⁷ Federal council Decree of 11. May 2011

Annex
(Art. 40)

Amendment of Current Legislation

The following federal laws are amended as follows:

...¹⁸

¹⁸ The amendments may be consulted under AS 2010 513.