

# Switzerland



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## 1 Relevant Authorities and Legislation

### 1.1 What is the relevant trade mark authority in your jurisdiction?

Swiss trade marks as well as extensions of international trade marks to Switzerland are administered, registered and renewed by the Swiss Intellectual Property Institute ('IPI') (<https://www.ipi.ch>). The IPI is its own legal entity, self-financed, and thus independent from the Swiss Federal Government budget. It is responsible for drafting legislation and advising the Swiss Government and other Federal authorities on matters concerning intellectual property and represents the interests of Switzerland at international level.

### 1.2 What is the relevant trade mark legislation in your jurisdiction?

Swiss trade mark law is governed by the Federal Act on the Protection of Trade Marks and Indications of Origin ('TMA', SR 232.11) and the Ordinance on the Protection of Trade Marks (SR 232.111) as well as the IPI Guidelines on Trade Mark Matters.

On an international level, Switzerland is party to most treaties relevant to trade marks, including:

- the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- the Paris Convention for the Protection of Industrial Property;
- the Madrid Agreement and Protocol Concerning the International Registration of Marks;
- the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks; and
- the Trade Mark Law Treaty.

## 2 Application for a Trade Mark

### 2.1 What can be registered as a trade mark?

The circle of registrable trade marks in Switzerland has grown over time. Apart from traditional word trade marks, graphical trade marks and combinations thereof, new forms, such as three-dimensional trade marks (for instance, the Coca Cola® bottle or the Mercedes-Benz® star), phonetic sound trade marks (like the Migros Jingle®), abstract colour trade marks (e.g. the yellow shade traditionally used by the Swiss Post, but not the signal red used as a position mark on the outer sole of

Christian Louboutin® high heels), identification threads of textiles and distinctive slogans ('Nespresso, what else?®'), smells, holograms as well as moving image sequences.

### 2.2 What cannot be registered as a trade mark?

Within the framework of Article 6 *quinquies* lit. B sec. 2 and 3 Paris Convention, Article 2 TMA excludes certain signs from trade mark protection in Switzerland, which will thus become subject to a provisional refusal if also extended to Switzerland as part of an international trade mark registration with the World Intellectual Property Organization ('WIPO'). Signs excluded are:

- (1) Non-distinctive signs in the absence of secondary meaning: In the absence of special circumstances of a particular case allowing them to acquire so-called 'secondary meaning' (see below, question 3.2), the following signs are usually deemed to be without distinctiveness in Switzerland, i.e. may not be registered as a trade mark:
  - single numerals or letters of the Latin alphabet (but not necessarily of foreign alphabets unless they are generally known in Switzerland, which may be the case for certain signs of the Greek alphabet, for example);
  - simple geometrical signs (e.g. circles and rectangles), but not necessarily combinations of these;
  - descriptive signs—for example, words that describe the quality, quantity, purpose, value, geographical origin or other characteristics of the goods or services, or slogans without a distinctive element, such as: 'KEY-TRADER' in Class 36; 'VERY IMPORTANT PHARMACY' in Classes 3, 5 and 44; 'HYDE PARK' in Classes 12 and 28; 'OKTOBERFEST-BIER' in Class 32; and 'TRUEDEPTH' for navigation, measuring and pocket computer instruments;
  - general indications of quality or purely promotional signs (e.g. 'HYPE', 'ONE&ONLY', 'SUPER', 'MASTERS', 'TOP', 'ROYAL' or 'UNITED FOR YOUR SUCCESS');
  - common or banal signs (e.g. 'ENTERPRISE' and 'NETTO' and top-level domains such as .com and .ch); and
  - registered trade marks that have subsequently become understood merely as a technical term like 'WALKMAN' or 'BOTOX'.

Names of persons and characters may be registered as trade marks, unless they are frequently cited to describe certain goods or services (e.g. 'MOZART' for audio products) or must be kept free for trade (e.g. 'RAPUNZEL' in Classes 9, 14, 16, 20, 21, 28 and 41).

Three-dimensional signs added to goods (i.e. the star on Mercedes-Benz cars or the traditional form of a nutcracker man) are usually distinctive unless they constitute the nature of the goods themselves or shapes of the goods or their packaging that are technically necessary, or shapes and features that are merely of an aesthetic nature.

Signs that must be kept free for trade are those that are indispensable to that trade (e.g. 'POST' for postal services, the colour blue for beverages or 'MARCHÉ' for restaurant and food services).

- (2) Misleading signs and signs against public morality: A trade mark will be regarded as misleading if it gives a wrongful impression about the goods or services for which it is used (like the designation 'CAFÉ' for coffee substitutes or geographical terms that mislead as to the origin of the designated goods or services. The IPI is strict when it comes to geographical terms and holds that a sign consisting of or containing a geographical term evokes the expectation that the designated goods originated in that location, unless:
- places are not known to the general Swiss public ('HAMILTON') or signs with a clear and direct symbolic character (e.g. 'PARADISE ISLAND') or other symbolic meaning;
  - places that are obviously unsuitable for the production or commerce of the goods at issue;
  - signs that have acquired secondary meaning; or
  - signs that have degenerated into a denomination for a certain kind of products (e.g. 'HAMBURGER' for a food product).

In addition, trade mark applications for designations indicating a certain geographical origin of the goods or services may still be registered if the covered goods are restricted to the origin suggested (e.g. 'SAN FRANCISCO FORTY NINERS' for US clothing and 'AFRI-COLA' for African beverages).

Signs that are regarded to infringe public policy, morality or Swiss law include religious symbols and the names of prominent individuals without their consent (e.g. 'BUDDHA BAR' in Classes 9 and 41 and 'MADONNA' or 'BIMBO' in various classes).

- (3) Swissness legislation: Under the Swissness legislation, the designation 'SWISS' may only be used as a trade mark for: natural products that are grown and harvested in Switzerland; foodstuffs of which 80% of the raw material weight is of Swiss origin and the processing steps that give the product its essential characteristics are carried out in Switzerland (like Swiss chocolate made of foreign cocoa beans); or industrial products of which 60% of the manufacturing costs are accumulated in Switzerland and the processing steps that give the product its essential characteristics are carried out in Switzerland.
- The use and registration of the Swiss coat of arms are still not permitted, with the exception of signs of organisations with a quasi-official role.
- Furthermore, it is now possible to register protected designations of origin and geographical indications (both agricultural and non-agricultural), wine designations recognised by the cantons, and indications of source that are the subject of a Federal Council ordinance (e.g. for watches) as geographical trade marks in a special register administered by the IPI (e.g. 'VACHERIN MONT D'OR' (a cheese) and 'SAUCISSON VAUDOIS' (a sausage) are so protected).

### 2.3 What information is needed to register a trade mark?

Pursuant to Article 28 para. 2 TMA, the application for registration can be submitted electronically (<https://e-trademark.ige.ch> or [tm.admin@ekomm.ipi.ch](mailto:tm.admin@ekomm.ipi.ch)) or in writing and must not be signed. In addition to the full name or company name of the applicant, the full postal address of the applicant, a graphic representation of the trade mark and a list of goods and/or services for which it shall be registered must be submitted. Applicants abroad need a Swiss representative.

### 2.4 What is the general procedure for trade mark registration?

Upon application, Swiss trade marks are officially published in the public IPI database at <https://www.swissreg.ch>, where all owners of prior trade mark rights can do searches for such new Swiss trade mark applications, their status as well as potential infringements of their prior trade mark rights (so-called 'relative grounds for refusal').

In parallel to such publication prior to registration, the new Swiss trade mark application will be examined by the IPI and, if no absolute grounds for refusal (see below, section 3) are found, the IPI will proceed to registration.

### 2.5 How is a trade mark adequately represented?

In Switzerland, a trade mark must usually be represented by graphic means. For special types of trade marks, the IPI may permit other types of representation (see below, question 2.7). The IPI requires a description of the trade mark if this is necessary to ensure that the representability requirement is met or to ensure a precise definition of the object of protection. The image must not exceed a maximum format of 8 × 8 cm.

### 2.6 How are goods and services described?

For the description of goods and services, the IPI applies the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks. In cases of uncertainty, i.e. how novel goods and services not yet included in the Nice Classification shall be described, trade mark applicants can resort to the IPI's internet classification tool (<https://wdl.ige.ch/wdl/index.zul>) in German, French and Italian, the three official Swiss languages, but not English.

### 2.7 To the extent 'exotic' or unusual trade marks can be filed in your jurisdiction, are there any special measures required to file them with the relevant trade mark authority?

All 'exotic', special-type trade marks must be first designated as such in words in the application:

- If a certain colour is claimed for a trade mark, it must be described in words. The applicant is free to additionally specify the colour designation(s) in brackets using an internationally recognised colour standard (e.g. Pantone, RAL or NCS).
- An acoustic mark must be represented using a musical notation system, which must contain all relevant information (in particular clef, notes and rest values). Oscillograms, sonograms, spectrograms and the like are not accepted.

- Three-dimensional trade marks must be represented with multiple images from different perspectives, whereby the overall format may not exceed 8 × 8 cm.
- Hologram trade marks that consist of a spatial representation of a single (unchanging) object must be submitted by either one representation showing the three-dimensional character of the object or several representations of the object from different angles. If, on the other hand, the hologram consists of an image of several objects or a variable object, depending on the angle of view, the application for registration must contain images of each of these objects.
- Abstract colour trade marks covering more than a specific shape must specify the claimed colour name(s) with an internationally recognised colour standard (e.g. Pantone, RAL or NCS).
- Design pattern trade marks must contain an illustration of the design pattern together with the specification that consists of a section of an ornament that is basically repeated without limitation so as to avoid confusion with simple figurative marks.
- For moving image sequences, the graphic representation of the trade mark must show the movement for which trade mark protection is sought. Illustrations of the individual movement steps must be submitted to the IPI. In addition, the application for registration must indicate the duration, direction and nature (e.g. continuous) of the movement (such as in CH 585720 'Kleeblatt', in which a shamrock image develops within two seconds into a stick figure).
- Smells (e.g. an almond smell for precious metals and toys) are so far not protectable in Switzerland, as they cannot be graphically represented.

### 2.8 Is proof of use required for trade mark registrations and/or renewal purposes?

The IPI does not require any 'proof of use' *ex officio* for registrations or renewals; however, such proof of use may become relevant in opposition and cancellation proceedings started by third-party opponents if they raise the claim that a trade mark has not been used in the last five years.

### 2.9 What territories (including dependents, colonies, etc.) are or can be covered by a trade mark in your jurisdiction?

Trade marks registered in or internationally extended to Switzerland cover the territory of the Swiss Confederation only. As Switzerland is not a member of the European Union, international trade marks must be separately extended to Switzerland alongside an EU trade mark if protection all over Europe is desired by the applicant.

### 2.10 Who can own a trade mark in your jurisdiction?

Any natural or legal person may submit an application for and own a trade mark registration. Collective trade marks cannot be filed and owned by natural persons (see below, question 2.18). Special provisions for the right to file also apply to geographical trade marks (see above, question 2.2).

### 2.11 Can a trade mark acquire distinctive character through use?

Signs that initially lack distinctiveness may – if they are not deemed to be absolutely indispensable for the general business trade (see below, question 3.2) – be registered based on evidence of extensive use as a trade mark in Switzerland usually for 10 years in all major Swiss language regions, i.e. in the German-, French- and Italian-speaking parts ('WORLD ECONOMIC FORUM'/'ZURICH ECONOMIC FORUM'; 'Appenzeller'; 'Aus der Region, für die Region'). It should be noted in this respect that, unlike in many other jurisdictions, it is usually not necessary to show with opinion polls how many people resident in Switzerland have recognised a certain trade mark upon representation. In case of world-famous companies like Apple, the Swiss Federal Court has held that the general Swiss public predominantly sees the relevant company origin, i.e. this sign could be registered as a mark in classes in which it had never been used by Apple Inc. before, irrespective of the fact that it originally referred to a fruit or its shape.

### 2.12 How long on average does registration take?

Without payment of an express fee, the application, examination and registration process will, in the absence of complications, be completed within four to six months. By paying an extra express fee of CHF 400, you can speed up the process to registration within four to six weeks upon application.

### 2.13 What is the average cost of obtaining a trade mark in your jurisdiction?

The official fees consist of a basic trade mark deposit fee of CHF 450 (or CHF 350 in case of an electronic application) and include three classes under the Nice Classification system, with each additional class costing CHF 100. Local counsel fees vary, but usually roughly equal the official fees.

### 2.14 Is there more than one route to obtaining a registration in your jurisdiction?

A trade mark only benefits from protection in Switzerland if it has been deposited as such. An exception only exists for so-called 'notorious' trade marks, protected under Article 6bis Paris Convention: if they are registered somewhere abroad, they can also be enforced in opposition proceedings against younger Swiss trade mark applications. There is no clear and commonly agreed detailed definition for well-known marks other than that they must be easily recognised. Thus, it is all about brand awareness and gaining reputation due to a high degree of use, whether the marks are registered or not, starting from the idea that those who make substantial investments in the popularisation of a brand deserve special protection. In general, public opinion polling is considered the main factor in appreciating the notoriety of a trade mark.

### 2.15 Is a Power of Attorney needed?

A Power of Attorney is not needed for trade mark applications, but is required for opposition and other proceedings by third parties against Swiss applications and registrations.

### 2.16 If so, does a Power of Attorney require notarisation and/or legalisation?

If a Power of Attorney is needed, it does not require notarisation or legalisation.

### 2.17 How is priority claimed?

A declaration of priority under the Paris Convention must be submitted to the IPI no later than 30 days after the Swiss filing. The declaration of priority is not bound to any particular form and is usually made electronically or in writing under the corresponding heading of the application for registration. It must only indicate the country and the date of the first filing. Notarised priority documents will only be required by the IPI if the priority application is not visible in the WIPO databases. If the priority trade mark deposit was made in a country that is not a member of the Paris Convention, such priority can only be claimed to the extent that the state in question grants Switzerland reciprocal rights.

### 2.18 Does your jurisdiction recognise Collective or Certification marks?

Collective marks are the uniform labelling of products of the members of an association. Only collective bodies, not natural persons, are eligible to be depositors. Associations and co-operatives, as well as other corporate bodies with an open circle of members (e.g. general and limited partnerships), can register them. The Collective mark may be used by the trade mark owner itself. For example, an umbrella organisation can register a Collective mark that all its members may use in accordance with its articles of association. In addition, the applicant must submit regulations that detail the terms and conditions of use for the Collective mark. If an enterprise ceases to be a member of the organisation holding the trade mark, it must, pursuant to a recent decision of the Zurich Commercial Court, also stop the use of the collective mark.

Guarantee marks (as Certification marks are called in Switzerland) are also permitted for use by various companies under the control of the trade mark owner to ensure common characteristics of goods or services of different companies, such as quality (cotton clothing), the geographical origin (Swiss products, products from Valais), the type of manufacture (products from organic farming, animal-friendly farming, or environmentally friendly manufacture) or technical characteristics (products with type testing) distinguishing them from the goods and/or services of other companies. Unlike for Collective marks, the owner of a Certification mark may not use it itself.

## 3 Absolute Grounds for Refusal

### 3.1 What are the absolute grounds for refusal of registration?

Absolute grounds for refusal exist under Swiss trade mark practice only for signs that cannot be registered as a trade mark (see above, question 2.2), i.e. those that: (1) are in the public domain as they lack distinctiveness or must be kept free for all in trade, unless they acquire secondary meaning (see below, question 3.2); (2) are misleading for the general public; or (3) infringe the so-called 'Swissness legislation' regarding the protection of the Swiss coat of arms and the Swiss white cross on a red background.

### 3.2 What are the ways to overcome an absolute grounds objection?

#### Secondary meaning

In practice, trade mark owners may try to overcome the hurdle of non-distinctiveness and achieve a registration by demonstrating that a particular sign acquired distinctiveness through secondary meaning (as in question 2.11 above) as a result of long, important, and non-contested use in each of the three major language regions of Switzerland. This was possible, for example, for the cylindrically shaped three-dimensional SMARTIES box® trade mark that was illegally copied for M&Ms in Switzerland. As a general rule, the Swiss Intellectual Property Office requires evidence of use for a time period of 10 years or more before the filing of a new application or extension of an international trade mark to Switzerland is accepted. However, this period may be shorter if intensive and extensive use, as well as significant promotional efforts and/or an increasing turnover over time, can be demonstrated.

#### Carving out of certain goods and services

Sometimes, trade mark owners may also save their trade mark protection for Switzerland by explicitly carving out certain goods or services from the list of goods and services for which it is sought. For example, the cryptocurrency sign 'DIM' became registrable as a Swiss trade mark (apart from other goods and services) for various software applications by explicitly carving out software applications for the dimming of light.

#### Signs always belonging to the public domain

Certain signs may never acquire distinctiveness by carving out certain goods or services or by acquiring a secondary meaning under Swiss trade mark law. As a result, they are absolutely and without any remedy barred from trade mark protection in Switzerland because they are deemed to always belong to the public domain. This applies, in particular, to the following:

- Shapes that constitute the nature of the goods themselves, such as a three-dimensional oval 'eggish' form for filled chocolate candies.
- Shapes of goods or their packaging that are technically necessary, such as the three-dimensional form of a Paris fashion icon ladies' handbag ('CHRISTIAN DIOR®'). However, this does not apply if the respective registrations are – similar to the corresponding technique for slogans reported above – again combined with a distinctive sign, such as in the three-dimensional round carton packaging for cheese with a print of the characteristic laughing cow of this brand ('LA VACHE QUI RIT®').
- Misleading signs, such as 'Champ' for alcoholic beverages like beer (i.e. other than champagne) and 'GOLDEN RACE' for jewels that are only gold-plated.
- Signs that are contrary to public policy, morality or applicable law, such as 'BUDDHA BAR' for a bar and 'MADONNA' for soaps, fashion, etc., because these signs were regarded as negatively affecting the religious feelings of Buddhists and Catholics, respectively, in Switzerland, or signs that are not permitted under the Swissness legislation governing the use of 'Swiss' and 'Switzerland' to goods and services originating from Switzerland as well as signs consisting of the Swiss national (cross and colours), cantonal or communal flags, which are exclusively reserved to the respective public bodies.

### 3.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office?

Any final decision of the IPI can be appealed to the Swiss Federal Administrative Court within 30 days. All such decisions are officially published on <https://ph.ige.ch/ph>.

### 3.4 What is the route of appeal?

The court decision can then be appealed to the Swiss Federal Supreme Court within 30 days. Its decisions are final and will be published on <https://www.bger.ch>.

## 4 Relative Grounds for Refusal

### 4.1 What are the relative grounds for refusal of registration?

The IPI will issue office actions in case of certain substantive or formal deficiencies deemed not in line with the interests of the Swiss public (see section 3 for these ‘absolute grounds for refusal’), irrespective of whether trade mark applications are national or international extensions to Switzerland within the Madrid Union.

However, unlike many other economically important countries, such as the US, China, India, and other Asian Tiger states – or the European Union Intellectual Property Office (‘EUIPO’) – the IPI will not itself search for prior trade mark rights of third parties. The IPI neither uses such third-party rights as a basis for provisional refusals against younger trade mark applications (so-called ‘relative grounds for refusal’), such as, for example, in the US, China, India, etc., nor will it alert the owners of prior trade mark rights like the EUIPO. Thus, holders of prior trade mark rights in Switzerland must themselves raise and defend them in Swiss opposition or civil proceedings; the IPI does not itself examine whether a new trade mark application infringes such prior rights.

### 4.2 Are there ways to overcome a relative grounds objection?

This is not applicable – see question 4.1 above.

### 4.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office?

See question 4.1 above.

### 4.4 What is the route of appeal?

See question 4.1 above.

## 5 Opposition

### 5.1 On what grounds can a trade mark be opposed?

In opposition proceedings, owners can only claim that a new Swiss trade mark application or a new international trade mark extension to Switzerland infringes their prior Swiss trade mark registration and not that there also exist absolute grounds against Swiss trade mark protection.

### 5.2 Who can oppose the registration of a trade mark in your jurisdiction?

If a Swiss trade mark registration that is identical or very similar to a prior Swiss trade mark registration is published on <https://www.swissreg.ch> by a third party, a trade mark owner can submit a written opposition against it to the IPI within three months of its publication. For international trade mark registrations under the Madrid Union with Switzerland as the designated country, this period does not begin until the first day of the month following publication by WIPO. The official opposition fee of CHF 800 must also be paid to the IPI within these deadlines. It should be noted, however, that the Swiss public is knowledgeable in various languages: e.g. there was no risk of confusion between the ‘CHERIE’ and a ‘CHERRY.TV’ trade marks because both the French and the English semantic meaning were regarded to be totally dissimilar irrespective of the classes involved. However, there existed a risk of confusion between the famous ‘BURGER KING’ mark with the younger figurative ‘BUREK KING’ as the Swiss public was regarded to understand the (Turkish) food term ‘BUREK’ and to therefore possibly expect such food in a Swiss BURGER KING franchise.

### 5.3 What is the procedure for opposition?

Trade mark opposition proceedings are primarily based on written submissions by the parties and documentary evidence. Such opposition proceedings are a simple, comparatively inexpensive, and fast trade mark dispute resolution procedure in Switzerland. Depending on the circumstances of the particular case, the parties involved exchange one or two briefs as to the following aspects:

- (1) whether the signs registered as trade marks may be confused;
- (2) whether the conflicting products and services for which they are protected are identical or similar; and
- (3) whether there exists, taking into account all circumstances of the particular case, a risk of confusion for the target customers in Switzerland.

The challenged younger trade mark owner may also claim that the prior trade mark right of its opponent has not been used within Switzerland for the past five years.

## 6 Registration

### 6.1 What happens when a trade mark is granted registration?

Upon registration, the granted trade mark’s registration number and publication date will be visible on <https://www.swissreg.ch>. In addition, the owner receives a stamped trade mark registration document with all particulars.

### 6.2 From which date following application do an applicant’s trade mark rights commence?

Upon registration, trade mark protection will start with retro-active effect as of the application date.

### 6.3 What is the term of a trade mark?

The term of a Swiss trade mark registration is 10 years from the application date.

#### 6.4 How is a trade mark renewed?

Renewal fees have to be paid prior to the end of the term. The fee is CHF 700 for renewals up to 30 June 2024, and CHF 550 for renewals starting on 1 July 2024 or later. Renewal invoices will only be sent to Swiss owners and Swiss representatives of foreign owners and it is therefore paramount to always have valid addresses for both in the Swiss trade mark registry.

## 7 Registrable Transactions

#### 7.1 Can an individual register the assignment of a trade mark?

Swiss trade mark owners may register the assignment of a trade mark themselves in whole or in part, also as an individual. Foreign owners, however, need a Swiss representative for this.

#### 7.2 Are there different types of assignment?

In principle, a tacit trade mark assignment is legally valid even without a corresponding amendment to the registry entry. However, a third party's good faith in the registered owner's trade mark rights is usually not protected, i.e. an acquisition from an unauthorised registered owner is not possible even in good faith. On the other hand, actions under the TMA can be brought against the registered owner for as long as an assignment is not entered in the registry.

#### 7.3 Can an individual register the licensing of a trade mark?

Similar to assignment recordings (see above, question 7.1), the registration of a licence in the trade mark register is not a prerequisite for licence validity. However, only a registered licence protects the licensee from a *bona fide* trade mark acquirer. Thus, licence registrations, which can also be effectuated by the licensee, even as a natural person, are highly recommended and foreigners should mandate a Swiss representative to effectuate them. Entry of the licence in the Swiss registry is only a validity prerequisite for Collective trade marks.

#### 7.4 Are there different types of licence?

Licences may take the form of a partial licence for only some goods and/or services or may only apply to a specific Swiss region. With an exclusive licence, the licensee may be granted the exclusive right to use the trade mark. For as long as an exclusive licence is entered in the registry, no further licences that are incompatible with it will be entered in the registry for the same trade mark.

#### 7.5 Can a trade mark licensee sue for infringement?

In Switzerland, only the trade mark owner and exclusive trade mark licensees are entitled to sue for trade mark infringement and not non-exclusive licensees (Article 55 TMA *e contrario*).

#### 7.6 Are quality control clauses necessary in a licence?

Swiss legislation does not have any formal rules or requirements governing trade mark licence agreements. In the

absence of such formal rules and requirements, parties are only bound by Swiss legislation that is mandatorily applicable and are, in all other respects, free to determine the terms and conditions of their licence agreements.

#### 7.7 Can an individual register a security interest under a trade mark?

The Swiss trade mark owner or security interest holder may itself register a security interest in a trade mark in whole or in part, also as an individual. Foreign interested parties, however, need a Swiss representative for this.

#### 7.8 Are there different types of security interest?

A trade mark may be the subject of a security interest such as usufruct and a right of pledge under Article 19 TMA combined with Articles 745ff. and 899ff. Swiss Civil Code. Registration of a security interest is not mandatory. However, with regard to third parties acting in good faith, the usufruct and the right of pledge will have effect only after their respective registration.

## 8 Revocation

#### 8.1 What are the grounds for revocation of a trade mark?

If the owner has not used a Swiss trade mark in relation to the goods or services for which it was claimed for an uninterrupted period of five years after the expiry of the opposition period or after the end of opposition proceedings, whichever is later, the owner may no longer enforce its prior Swiss trade mark right, unless there are important reasons for such non-use (Article 12 TMA). For international registrations extended to Switzerland that have been subject to a provisional refusal, the five-year period starts from the date of the final Swiss protection grant, and in all other cases after the expiry of the period within which the IPI was entitled to issue a provisional refusal.

#### 8.2 What is the procedure for revocation of a trade mark?

The revocation request must be submitted in writing and in duplicate by signed documents to the IPI. Simultaneously with the request, the revocation fee of CHF 800 must be wired to the IPI. In addition, the plaintiff must substantiate its revocation request, presenting only *prima facie* evidence regarding the non-use at issue. Admissible *prima facie* evidence may consist of a combination of a Commercial Registry Excerpt, a third-party use survey, internet searches and information by professional organisations. The burden of proof for sufficient use lies with the owner of the trade mark (Article 35a para. 2 lit. a and b TMA). The sufficient use threshold is not very high – pursuant to a recent decision of the Swiss Federal Administrative Court, the selling of 90 watches with prices between CHF 1,500 and CHF 2,500 over a period of two years is enough to uphold the respective mark for watches.

#### 8.3 Who can commence revocation proceedings?

Any person may request the cancellation of a trade mark on the grounds of non-use (Article 35a TMA); proof of a legitimate legal interest is not required.

#### 8.4 What grounds of defence can be raised to a revocation action?

The best defence against a non-use revocation request is full proof of use with all suitable evidence, such as invoices for goods and services deliveries, turnover evidence, marketing samples, etc.

#### 8.5 What is the route of appeal from a decision of revocation?

Any final decision of the IPI can be appealed to the Swiss Federal Administrative Court within 30 days. All such decisions are officially published on <https://ph.ige.ch/ph>. The court decision can then again be appealed to the Swiss Federal Supreme Court within 30 days. Its decisions are final and will be published on <https://www.bger.ch>.

## 9 Invalidity

#### 9.1 What are the grounds for invalidity of a trade mark?

Any person who can demonstrate a legitimate legal interest may apply to the court for a declaratory judgment as to whether a right or legal relationship governed by the TMA does or does not exist in a so-called cancellation action. Possible invalidity grounds are:

- Non-admissibility as a trade mark under Article 2 TMA for absolute grounds for refusal (see above, questions 2.2 and 3.1) as such grounds cannot be invoked on.
- Infringement of prior rights under Article 3 or for famous trade marks under Article 15 TMA (relative grounds for refusal – see above, question 4.1).
- Non-use under Articles 11 and 12 TMA (see above, question 8.1), i.e. an interested party not succeeding in revocation proceedings before the IPI can then start ordinary court proceedings.
- Registration of a trade mark by the agent without approval of the principal (Article 4 TMA).
- Non-compliant internal regulations for a Collective or Certification trade mark (Article 25 TMA).
- Repeated irregular use of a Collective or Certification Mark (Article 26 TMA).

#### 9.2 What is the procedure for invalidation of a trade mark?

Invalidity proceedings are ordinary proceedings and can be started before the competent courts. They need to be fully substantiated in four written briefs (claim, answer, reply and rejoinder) together with all suitable evidence by both parties, which the court will then assess freely after all respective evidence has been submitted. As a general rule, the plaintiff has the full burden of proof in invalidation proceedings against a registered trade mark right as the registration is *prima facie* evidence for validity. Only for trade mark rights registered as a result of their secondary meaning (see above, question 3.2) may the burden of proof shift to the defendant.

#### 9.3 Who can commence invalidation proceedings?

Any person who has a legitimate legal interest can start invalidation proceedings before the competent Swiss cantonal

courts, e.g. the defendant in a trade mark infringement suit by counterclaim, a competitor interested in the use of a non-used but registered trade mark, a professional organisation or consumer protection organisation regarding Collective or Certification marks, etc.

#### 9.4 What grounds of defence can be raised to an invalidation action?

Depending on the different grounds for invalidity (see above, question 9.1), the defendant can substantiate that the respective prerequisites for invalidation are, on the factual circumstances of the particular case at issue, not met and submit any type of suitable evidence to that effect.

#### 9.5 What is the route of appeal from a decision of invalidity?

As a matter of Swiss law, there exists only one cantonal court instance in every Swiss canton competent to decide on trade mark matters (Article 58 TMA). The only second instance is the Swiss Federal Supreme Court (<https://www.bger.ch>). An appeal to it must be made within 30 days upon receipt of the final cantonal decision.

## 10 Trade Mark Enforcement

#### 10.1 How and before what tribunals can a trade mark be enforced against an infringer?

Any person whose right to a trade mark or geographical indication is infringed or under threat of infringement may bring an action before the competent court:

- For Swiss domestic infringement actions, the plaintiff has the choice to sue in four different venues. It may sue at the domicile or registered office of the defendant or at its own domicile or registered office, or where the act occurred or had its effect (*forum delicti*). A ‘*forum delicti* venue’ means, in practice, that plaintiffs can choose among all 26 cantonal courts if the infringement occurs in all of Switzerland (i.e. with respect to online offerings). This relative freedom to choose a venue in case of infringement in Switzerland allows for extensive forum shopping. The four commercial courts of Argovia, Bern, St Gallen and Zurich have professional lawyer judges on the panel, as well as expert judges.
- The venues for international trade mark disputes are quite similar.

If the defendant has no representative in Switzerland, the plaintiff must sue at the seat of the IPI in Bern.

#### 10.2 What are the key pre-trial procedural stages and how long does it generally take for proceedings to reach trial from commencement?

In Switzerland, there are no pre-trial procedural stages, such as US-style pre-trial discovery or the like, and no other far-reaching mechanisms to secure evidence of infringement. It is helpful to conduct trap purchases to obtain evidence of both trade mark infringement and its location, and to ascertain that the chosen court is competent to hear the case.

### 10.3 Are (i) preliminary, and (ii) final injunctions available and if so, on what basis in each case?

Injunctions are common in Switzerland when it comes to trade mark litigation. Injunctive relief can be granted during the main proceedings, but is more often granted during separate interim proceedings initiated before the main proceedings. Preliminary injunctions are frequently issued in trade mark litigation, but usually only after the defendant has been heard. The requirements for preliminary injunctions are:

- a *prima facie* case of existing or imminent trade mark infringement;
- irreparable harm; and
- relative urgency.

The burden of proof for preliminary injunctions is reduced as no strict evidence is required. It is sufficient that the plaintiff puts forward a *prima facie* case, i.e. that it makes it believable to the judge that there is trade mark infringement, irreparable harm and urgency. The requirement of urgency is relative in the sense that the preliminary proceedings should not last longer than the main proceedings.

### 10.4 Can a party be compelled to provide disclosure of relevant documents or materials to its adversary and if so, how?

Rights owners may request an order during preliminary injunction proceedings to have infringing goods seized and information as to their source secured. Moreover, where there is a danger that evidence may be lost, owners may request an order to secure it in interim proceedings. In addition, such requests may also be made in the main proceedings as part of the written briefs therein (see below, question 10.5).

### 10.5 Are submissions or evidence presented in writing or orally and is there any potential for cross-examination of witnesses?

Trade mark litigation is primarily based on written submissions by the parties and documentary evidence. Only in specific cases will surveys and expert witnesses be used. Cross-examination of witnesses is alien to Swiss law; only courts interrogate witnesses, whereby the parties can request certain questions to be brought forward by the judges.

Overall, survey evidence does not play a key role in trade mark infringement actions in Switzerland. This is largely because likelihood of confusion is considered a legal question to be decided by the court without relying on factual considerations, such as survey evidence. However, survey evidence is increasingly used to support arguments of acquired distinctiveness and the well-known character or fame of a trade mark.

Expert witnesses are rarely used in trade mark litigation. However, they play a role when adducing survey evidence: in such cases, the court can appoint expert witnesses upon request by one of the parties. Typically, these will be cases of trade marks with acquired distinctiveness or of famous or well-known marks. More importantly, however, if technical aspects are in issue – such as functionality or technical necessity of three-dimensional marks – then the court must appoint an expert witness to assess the technical aspects of the case.

### 10.6 Can infringement proceedings be stayed pending resolution of validity in another court or the Intellectual Property Office?

As a general rule, Swiss courts can stay proceedings at their own discretion whenever this is deemed adequate in the special circumstances of a particular case. This can happen when a case that is somehow connected, but not necessarily identical or similar, is pending elsewhere, possibly even abroad.

### 10.7 After what period is a claim for trade mark infringement time-barred?

Acquiescence is an available defence in favour of the defendant. However, there are no specific rules with respect to the duration of an infringing use and other factors. Rather, the courts assess acquiescence on a case-by-case basis by taking four factors into account:

- First, the trade mark owner must have known or should have known of the infringing mark.
- Second, it must have tolerated that use for a long period, usually at least four to eight years.
- Third, the defendant must have acquired valuable goodwill in the meantime.
- Lastly, the defendant must have acted in good faith, i.e. not have been aware of the older trade mark right or, if aware, must have otherwise acted in good faith, e.g. because the defendant believed in good faith that he was entitled to such use under an agreement with the trade mark owner that was later proved invalid.

The courts will consider these four factors in an overall assessment so that the prevalence of one factor can have an impact on the outcome. Thus, if the defendant acquired significant goodwill and the plaintiff should have known of it, a shorter period of less than four years can lead to the forfeiture of rights.

### 10.8 Are there criminal liabilities for trade mark infringement?

The infringement of another owner's prior trade mark right can be a criminal offence in Switzerland if the infringer acted with unlawful intent, i.e. was aware of the prior trade mark right and the infringing nature of his behaviour. The offender may be sanctioned with a fine and/or up to one year of imprisonment or, if the offender acted in a professional capacity to make business profits, with up to five years of imprisonment, e.g. in case of fraudulent product piracy.

### 10.9 If so, who can pursue a criminal prosecution?

Prosecution will start with a complaint of the owner of the prior trade mark right to the competent Swiss penal authorities.

### 10.10 What, if any, are the provisions for unauthorised threats of trade mark infringement?

Unauthorised threats of trade mark infringement are not dealt with in the TMA but in the Unfair Competition Act ('UCA'), which sanctions anyone who makes incorrect or misleading statements about himself, his company, his business name, his goods, works or services, their prices, the quantity in stock,



the type of sales event or his business relationships or favours third parties in competition in a corresponding manner (Article 3 (1) b UCA).

## 11 Defences to Infringement

### 11.1 What grounds of defence can be raised by way of non-infringement to a claim of trade mark infringement?

A defendant can argue that his use is not infringing the trade mark in dispute by submitting proof that he was using the mark prior to the plaintiff's application and registration and that he can therefore continue its use. In addition, the defendant can argue that there is no infringement when taking into account all factual circumstances of the case because:

- (i) The trade marks at issue are not identical or similar.
- (ii) The goods and services at issue are not identical or similar.
- (iii) There is no risk of confusion irrespective of an identical or similar trade mark and/or identical or similar goods and services.

It is important to stress that Swiss courts are not bound by prior IPI decisions on the same subject matter, e.g. in opposition proceedings (see above, section 5).

### 11.2 What grounds of defence can be raised in addition to non-infringement?

Before a Swiss court, a defendant can also claim that the trade mark in dispute is invalid based on either absolute grounds, such as lack of distinctiveness or technical necessity, or non-use for over five years irrespective of whether the IPI has already decided on that issue, i.e. Swiss courts are not bound by prior IPI decisions on the same subject matter.

In Swiss domestic cases, defendants can rely on the non-use objection and thus force plaintiffs to prove genuine use of their Swiss marks. However, in cross-border cases where plaintiffs rely on foreign marks, the Swiss courts will not accept jurisdiction over the non-use objection; they will stay the Swiss infringement proceedings and set the defendants a deadline to file a cancellation action abroad with the competent court.

The same applies to the other invalidity arguments against the plaintiff's mark based on absolute grounds. In Swiss domestic cases, this objection forces the plaintiff, for instance, to prove that the mark has acquired distinctiveness through use (best shown through a survey). In cross-border cases, the cancellation action against the foreign mark must be brought before the competent foreign court.

A defendant may claim that the trade mark rights are exhausted or that the plaintiff's use was merely descriptive or decorative. Such uses do not warrant trade mark protection. Switzerland applies the principle of international exhaustion, allowing for genuine grey market goods to enter Switzerland from anywhere in the world.

## 12 Relief

### 12.1 What remedies are available for trade mark infringement?

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A defendant may claim that the trade mark rights are exhausted or that the plaintiff's use was merely descriptive or decorative. Such uses do not warrant trade mark protection. Switzerland applies the principle of international exhaustion, allowing for genuine grey market goods to enter Switzerland from anywhere in the world.

### 12.2 Are costs recoverable from the losing party and if so, how are they determined and what proportion of the costs can usually be recovered?

The owner of a trade mark or indication of origin may seek the following remedies:

- an injunction against the infringer, forcing them to cease and desist from the infringement;
- a seizure order with the possibility of destroying the infringing products;
- an order forcing the defendant to account for the source and quantity of the infringing goods;
- an account of profits;
- publication of the decision in certain circumstances;
- monetary remedies: damages (i.e. lost profits) due to trade mark infringement are hard to recover in Switzerland and as a result, the focus of monetary remedies shifted to accounting for and surrendering of profits or reasonable royalties, the latter of which is based on the legal theory of unjust enrichment; treble or punitive damages are not available;
- an action for declaratory judgment (e.g. cancellation of the infringing trade mark); and
- an action for assignment of the infringing trade mark instead of a cancellation action – namely, if an agent registered the mark of its principal without the latter's consent.

## 13 Appeal

### 13.1 What is the right of appeal from a first instance judgment and is it only on a point of law?

Trade mark litigation cases are heard by the higher cantonal instance (i.e. the high court) or, where available, the commercial court. Hence, the usual appeal from the first to the second cantonal instance is not available in trade mark cases. Trade mark decisions can be appealed only once to the Swiss Federal Supreme Court.

### 13.2 In what circumstances can new evidence be added at the appeal stage?

The Swiss Federal Supreme Court is the only appellate court and its decisions are final.

An appeal to the Swiss Federal Supreme Court does not allow for a full review of the case. Rather, legal issues can be appealed, or factual issues only if the previous instance relied on obviously wrong facts. New facts and evidence are admissible before the Swiss Federal Supreme Court only if the lower cantonal instance decision made it necessary for such new facts and evidence to be introduced on appeal.

Appeal possibilities are further restricted in preliminary injunction proceedings. On appeal, only irreparable legal (and not factual) harm can be addressed. *Ex parte* injunctions cannot be appealed, but may be reconsidered by the court issuing them after the hearing of the defendant.

## 14 Border Control Measures

### 14.1 Is there a mechanism for seizing or preventing the importation of infringing goods or services and if so, how quickly are such measures resolved?

In Switzerland, trade mark owners can also rely on customs assistance and border measures against imports of counterfeit goods. The Swiss Federal Customs Administration is authorised to notify any trade mark right holder if it suspects that any imminent import, transit, or export of goods would infringe such right holder's rights in Switzerland. To that effect, a trade mark right holder may file a written application for assistance to the Customs Administration. Upon notification of any import, transit or export, the right holder can then apply for customs clearance to be refused if it suspects that the affected goods would infringe its trade mark rights in Switzerland. If the Customs Administration withholds goods based on such requests, the right holder may then submit an application within 10 days to the competent judge requesting preliminary seizure and other precautionary measures to be taken.

## 15 Other Related Rights

### 15.1 To what extent are unregistered trade mark rights enforceable in your jurisdiction?

The proprietor of a famous mark may prohibit others from using identical or similar signs for any type of goods or services if such use is detrimental to the distinctiveness of the famous mark (dilution) or exploits or damages its reputation. The scope of protection of a famous mark is therefore extended since it is not limited to the claimed goods and services. Registration of a famous mark is not a requirement for dilution as a cause of action.

Moreover, Swiss law protects unregistered marks to the extent that they are well known within the meaning of Article 6bis Paris Convention. Outside of this specific framework, unregistered marks enjoy only limited protection under the UCA, provided that they have acquired both distinctiveness through use and significant goodwill in the Swiss marketplace.

### 15.2 To what extent does a company name offer protection from use by a third party?

A company name not protected as a registered, famous or

well-known trade mark in parallel only offers protection against use by non-authorised third parties as their company name and not against use as a mere trade mark by such non-authorised third parties. Owners of brands who did not sufficiently protect their trade marks can only resort to the UCA. The UCA, however, does not protect trade marks as such, but only their uses in certain circumstances that are contrary to fair competition prerequisites required by the UCA.

### 15.3 Are there any other rights that confer IP protection, for instance book title and film title rights?

No, such titles do not profit from any special protection rules in Switzerland, i.e. they must be protected as trade marks or by copyright. For example, 'Pirates of the Caribbean' was not protectable as a trade mark in Switzerland because of its purely descriptive nature for all types of goods and services in this field.

## 16 Domain Names

### 16.1 Who can own a domain name?

Any entity or individual connected to Switzerland can own a .ch domain name. Use of the .swiss extension has been attributed to the Swiss Confederation for further distribution.

### 16.2 How is a domain name registered?

The Federal Office of Communications ('OFCOM') manages the .swiss domain on behalf of Switzerland. It checks, publishes and validates every request based on the principles set out in the Ordinance on Internet Domains ('OID') (<https://www.fedlex.admin.ch/eli/cc/2014/701/en>). Thereunder, a .swiss website is regarded as indication of origin, i.e. to feature products and services from Switzerland. In this case, any risk of deception regarding their origin must be avoided. The .ch domain is for use by anybody with a Swiss address and may be obtained from any registrar authorised by OFCOM to distribute .ch top-level domains.

### 16.3 What protection does a domain name afford *per se*?

A domain name does not profit from any protection *per se*; its owner only has a contractual right with the respective Swiss registrar.

### 16.4 What types of country code top-level domain names (ccTLDs) are available in your jurisdiction?

Pursuant to the OID, .ch and .swiss are the available ccTLDs in Switzerland.

### 16.5 Are there any dispute resolution procedures for ccTLDs in your jurisdiction and if so, who is responsible for these procedures?

Mechanisms based on the Uniform Domain Name Dispute Resolution Policy ('UDRP') (<https://www.wipo.int/amc/en/domains/gtld/udrp/index.html>) are in place for both .ch and .swiss domain names with WIPO and managed by the WIPO

Arbitration and Mediation Center. These mechanisms are an efficient way of resolving abusive registration and domain name registrations in bad faith that violate trade mark rights. This administrative procedure is without prejudice to recourse to the competent courts.

## 17 Current Developments

### 17.1 What have been the significant developments in relation to trade marks in the last year?

On 1 January 2025, the 12<sup>th</sup> Nice Classification for goods and services in trade mark applications entered into force in Switzerland.

### 17.2 Please list three important judgments in the trade marks and brands sphere that have been issued within the last 18 months.

In a recent landmark decision, the Zurich Commercial Court ordered an infamous European trade mark troll group of companies (with 10,000 trade mark registrations, e.g. in Germany and Austria, across various group companies) to withdraw Swiss trade mark oppositions against legitimate owners of younger Swiss trade mark applications and to not hinder them in their use. This decision was based on German, Austrian and Dutch substantive law as, on the facts, the plaintiffs could establish that the troll's only intent was to distort competition of others without fostering legitimate competition participation of the troll group itself.

Regarding the risk of confusion, the famous figurative trade mark 'ZARA' was regarded to not be infringed by the younger figurative trade mark 'ZÄMÄ' for identical goods because of slightly different graphic design and the difference between the letters 'R' and 'M', irrespective of the fact that English, French and Italian speakers in Switzerland foreseeably do not recognise the meaning of the Swiss German 'ZÄMÄ' (i.e. 'together').

Furthermore, Facebook could not monopolise a trade mark for the 'thumbs up' like button design in Switzerland as the

Swiss Federal Administrative Court held that this 'thumbs up' did not acquire secondary meaning in favour of the Facebook group. The *ratio decidendi* was that Facebook cannot monopolise this universal gesture because everyone has the right to use it, and it is therefore not sufficiently close to the reputation of Facebook's trade mark.

### 17.3 Are there any significant developments expected in the next year?

Apart from new leading cases pending (the outcome of which cannot yet be predicted), it is worth noting that the IPI now codes figurative, word/figurative and other trade marks with the Vienna Classification. The Vienna Classification divides the figurative components of trade marks into 29 categories, divisions and sections based on their visual elements. The international classification system was created in 1973 by the Vienna Agreement establishing an International Classification of the Figurative Elements of Trade Marks and is administered by WIPO. A complete list of all Vienna codes can be found on the WIPO website.

### 17.4 Are there any general practice or enforcement trends that have become apparent in your jurisdiction over the last year or so?

Court cases in Switzerland are burdensome and costly. The minimum legal costs typically range from CHF 20,000 to CHF 35,000 for trial preparation, maybe even higher in complicated cases, and cannot be fully recovered (see above, question 12.2). Thus, it is paramount to avoid court cases from the outset by checking prior Swiss trade mark registrations and applications as well as prior extensions to Switzerland before starting trade mark registrations in Switzerland. Likewise, trade mark owners should monitor Swiss third-party applications and registrations, trade mark extensions to Switzerland as well as Swiss ccTLDs and oppose them in time before the IPI or, as applicable for .ch and .swiss ccTLDs, the WIPO Arbitration and Mediation Center.



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