

Die Seite der AIPPI / La page de l'AIPPI

Patentability of computer implemented inventions

REPORT OF SWISS GROUP*

I. Current law and practice

1. Does your current law contain any statutory provisions which specifically apply only to computer implemented inventions ("CII")?

The Swiss Patent Act does not contain statutory provisions which specifically apply only to Computer Implemented Inventions, which may include computer programs and hardware components or only computer programs not as such ("CII"). In fact, there is no mentioning of computers or computer programs at all. In particular, neither CII nor computer programs as such are explicitly excluded by statutory provisions in Switzerland. Besides the Swiss national patent, patent protection can also be obtained through the European patent in Switzerland. Article 52(2)(c) European Patent Convention ("EPC") specifically relates to "programs for computers", which has a narrower meaning than the term "CII" as defined for the purpose of this Study Question.

2. Please briefly describe the general patentability requirements in the *written statute based law* of your jurisdiction which are specifically relevant for the examination of the patentability of CII.

For Swiss national patents the relevant statutory provision is Article 1(1) Swiss Federal Act on Patents for Inventions ("PatA"), which merely states that patents are granted for "inventions". This provision does not necessarily exclude CII from patent protection. However, according to Swiss doctrine and practice, the term "invention" implies technical character. Computer programs as such are deemed to lack technical character and thus not to be inventions. Accordingly, Swiss judicial and administrative practice does not grant patent protection for computer programs as such.

Regarding European patents Article 52(2)(c) EPC states that programs for computers shall not be regarded as inventions and are therefore not accessible to patent protection. Article 52(3) EPC limits the exclusion from patentability only to computer programs "as such". Thus, the CII related statutory provisions of the PatA and the EPC differ but lead to the same result in judicial and administrative practice.

3. Under the case law or judicial or administrative practice in your jurisdiction, are there rules which specifically apply only to CII? If yes, please explain.

The Guidelines for the Substantive Examination of Patents of the IPO ("IPO Guidelines") contain rules applicable to the examination of CII and define CII as inventions characterized in that their performance is implemented by a computer, a network of computers or other programmable means that contains at least one feature that is partially or entirely executed by computer program.

Swiss case law with regard to CII is very scarce and Swiss scholars mostly rely upon a Supreme Court decision of 1970 (BGE 98 I^b 396) and an even older administrative decision of 1968. Both denied patentability of CII due to lack of technical character.

Switzerland is a contracting state of the EPC and the case law of the EPO Boards of appeal ("EPO BoA") is thus applicable to all grant and opposition proceedings regarding European patents validated in Switzerland. Swiss courts are, in general, inclined to follow but not bound by such case law.

* Members of the working group: Simone Billi, Andreas Gygi, Thomas Kretschmer, Peter Ling, Paul Pliska, Sébastien Ragot, Beat Rauber, Cyrill Rieder, Hannes Spillmann, Simon Strässle, Marco Zardi.

4. Please briefly describe the general patentability requirements under the case law or judicial or administrative practice of your jurisdiction which are specifically relevant for the examination of the patentability of CII.

IPO Guidelines: The IPO Guidelines refer to the consultation of March 24, 1976, wherein the Federal Council submitted draft legislation to the Parliament regarding patent law. In this consultation it was stated that the Supreme Court shares the view of the Swiss Federal Institute of Intellectual Property ("IPO") in regard to subject matter excluded from patentability although not explicitly excluded by the PatA. Accordingly, while computer programs "as such" are not patentable (similar to Article 52[3]EPC), CII can constitute patentable subject matter if they have technical character and are new, inventive and susceptible to industrial application. However, as the IPO does not examine patent applications for novelty and inventive step, the IPO Guidelines do not provide further guidance in this regards.

Since the performance of any computer program has physical effects on the hardware (interaction through electrical impulses that modify the hardware's configuration), computer program claims must amount to more than such necessary physical interaction. The technical character must be evaluated by taking the features of a claim as a whole (principle of global assessment) and not by merely considering the type or category of a claim. Therefore, as long as a computer program merely produces standard physical effects, such effects are insufficient to provide technical character to a computer program claim. In the same way, a "method claim" characterized by the sole feature of executing the computer program by a computer may be considered to lack technical character.

Case law of the Supreme Court: In 1970 the Supreme Court ruled that an abstract method of evaluating and combining different factors in order to enable their processing by a computer was not patentable due to lack of technical character (BGE 98 I^b 396). The Court considered that an "invention" is not patentable under Swiss law if it does not "involve the forces of nature to obtain a technical effect".

Case law of the EPO BoA: The condition of a technical character or being in a "field of technology" is interpreted broadly by the EPO BoA. Since the decision T1173/97 (see also G 3/08) the EPO BoA has considered it sufficient for the purposes of the "technical effect" requirement that computer program claims produce a technical effect which goes beyond the "normal" physical interactions between computer program and hardware. Under the case law of the EPO BoA, the main threshold for the patentability of CII is inventive step. If an invention consists of technical and non-technical features, only the technical features are considered for the assessment of inventive step. As a result, the EPO BoA have repeatedly held that CII are only patentable if the inventive step resides in the technical aspects of the CII. The mere automation of a non-technical method by computer is not considered to be inventive and hence is not patentable.

5. Exclusion of non-patentable subject matter per se

a) Do the statutory provisions, case law or judicial or administrative practice (hereinafter collectively referred to as Law / Practice) in your jurisdiction exclude any particular subject matter relating to CII from patentability per se?

Yes.

b) Please describe the subject matter excluded from patentability per se and explain in detail how it is identified in practice.

According to the IPO Guidelines, the technical character of CII can be derived on the basis of the following considerations:

- The problem which the CII is based on and is solved by the invention;
- The means, i.e. the technical features, which solve the problem;
- The effects which are achieved by the solution of the problem;
- The technical considerations involved in order to achieve the claimed CII.

Technical character may be affirmed also in case not all four points above can be answered to the affirmative. The IPO Guidelines provides the following five criteria in order to determine whether the above conditions are met:

- The patent application uses “typical software claims”;
 - Technical and non-technical features are used;
 - The use of process claims and equivalent use claims;
 - The use of product claims; and
 - Software applications are to interact with other technical subject matter.
- c) *If there is any subject matter identified in a patent claim relating to CII that is excluded from patentability per se, is it possible to overcome a rejection of the patent claim by adding other subject matter to the claim?*

Yes, provided the result of adding the “other subject matter” is that the technical character can be affirmed.

- d) *Does the “other subject matter” need to have a certain quality, e.g. does it need to be inventive?*

The law and IPO Guidelines do not answer this question. As the IPO does not assess novelty or inventive step, during examination it seems to be sufficient to add subject matter which is of technical character. However, the Swiss Courts do assess novelty and inventive step, and a patent which does not meet these criteria will be invalidated.

- e) *Can you describe the areas of human endeavor the “other subject matter” needs to relate to? If yes, please explain.*

Such areas should include inventions applicable in industry (Article 1 PatA) and not relate to non-patentable subject matter such as the human body and its elements (Article 1a PatA), gene sequences (Article 1b PatA) and further areas such as cloning, hybrid organisms, surgery or therapy methods and plant or animal varieties (Article 2 PatA). Moreover, the following areas relate to non-patentable subject matter: discoveries (BGer 4A.12/1995, in: sic! 1997, 77; BGE 26 II 232); aesthetical creations; accounting system (BGE 72 I 368), mathematical methods (BGE 95 I 579) and computer programs as such (BGE 98 I 396; BAGE 3.9.1968) and methods for performing mental acts (BGE 95 I 579), doing business or playing games (see IPO Guidelines).

6. Requirement of a contribution in a field of technology

- a) *Does the examination of the patentability of CII in your jurisdiction implicitly or explicitly involve an examination of the contribution the claimed CII makes to the state of the art (such examination may be part of a general “patentability” test or part of the novelty and inventive step/non-obviousness test)?*

Since the IPO does not carry out a substantial examination, it does not examine whether the claimed CII makes a contribution to the state of the art. Nevertheless, the IPO Guidelines provide that only such subject matter that makes a technical contribution to the state of the art is patentable, a requirement that is only implicitly stated in the statutory law (Articles 1 and 7 PatA). Consistently, national courts are invited to assess the required technical contribution by applying the “problem-solution” approach (Federal Appeals Commission for Intellectual Property [“ACIP”], PA 01/04, in: sic! 2005, 589). Yet, the lack of technical character may be straightforward in some cases (see question 6c).

- b) *Does this test implicitly or explicitly involve excluding contributions from areas of human endeavor which are not deemed to be sources of patentable inventions? In other words, does patentability of CII implicitly or explicitly require a contribution from areas of human endeavor which are deemed to be sources of patentable inventions (e.g. engineering, natural sciences)? If yes, please explain.*

Yes. As in the EPC, the IPO Guidelines provide a non-exhaustive list of excluded areas of human endeavor, and Swiss courts consistently follow this line. The IPO Guidelines further provide examples of CII that may typically be considered to be patentable. However, there are no clearly identified areas of human endeavor deemed to be sources of patentable inventions (see question 6d).

- c) *Does this test also implicitly or explicitly require that the relevant contribution the CII makes to the state of the art qualifies as inventive / non-obvious? This additional test may be integrated into the general inventive step / non-obviousness examination, or may be a stand-alone test. If yes, please explain.*

Yes. However, according to a decision of the ACIP (PA 01/04, in: sic!, 2005, 589), the lack of technical character may already result from the fact that an invention cannot be assigned to any patent classification field (Mechanical Engineering, Physics, etc.). In such a straightforward case, it is not required to assess whether the contribution the CII provides to the state of the art qualifies as inventive.

Note that the standard for inventive step as defined in Article 1(2) PatA essentially corresponds to Article 56 EPC. Consistently, national courts apply the standard of the EPO BoA (e.g. BGE 133 III 229). Thus, depending on requests and allegations of the parties and the case at hand, a national court may be led to assess the contribution the CII makes to the state of the art as part of the inventive step assessment (following the European Patent Office ["EPO"] approach). In other cases, however, it may be sufficient to perform a global assessment of the technical character of the invention, similar to the IPO approach, as in the above ACIP decision (PA 01/04, in: sic!, 2005, 589).

- d) *Is there an implicit or explicit consensus in your jurisdiction as to the areas of human endeavor which are accepted as sources of patentable CII? If yes, are these areas of human endeavor defined, and if so how?*

Not really. The IPO Guidelines provide examples of CII that are likely to be patentable (e.g., processes for operating a computer) and guidance as to what is usually perceived as having technical character (e.g. interactions with the physical environment are expected), in a similar manner as the Examination Guidelines of the EPO ("EPO Guidelines") do. It is, however, difficult to conclude that a consensus has been reached as to areas deemed to be sources of patentable CII, especially as technologies constantly evolve.

7. Does the Law / Practice in your jurisdiction contain any specific claim drafting or other formal requirements which are applicable to CII, i.e. which deviate from the Law / Practice applicable to inventions which are not CII? If yes, please explain.

No. Swiss law does not contain any specific claim drafting or formal requirements applicable to CII. According to Article 29 Ordinance on Patents for Inventions relating to the PatA ("oPatA") and in line with Article 84 EPC, the claims shall recite the technical features of the invention and shall be written in a clear and concise manner. The drafter should make sure that the claim language encompasses a technical character in either solving a technical problem, in using further technical means, in achieving a technical effect, or in requiring technical considerations in solving the problem underlying the teaching given by the claim.

8. Does the Law / Practice in your jurisdiction contain any specific requirements as to sufficiency of disclosure and/or enablement which are applicable to CII, i.e. which deviate from the Law / Practice applicable to inventions which are not CII? If yes, please explain.

No. The PatA does not provide any specific requirements for CII. Article 50 PatA, similar to Article 83 EPC, sets forth that the invention must be described in the patent application in such a manner that it can be carried out by a person skilled in the art. Article 26 oPatA in this regard merely states that the description of the invention shall be outlined in a manner that the technical problem and its solution can be understood. Further guidance is provided in the IPO Guidelines, which state with regard to CII that carrying out the invention in the context of Article 50 PatA means that the skilled in the art should be in a position to write a computer program embodying the invention. It is therefore recommended to illustrate the CII inherent computer programs in a manner which is understandable for the person skilled in the art. Suitable for that purpose are block diagrams, flowcharts or pseudo codes, while mere

program listings do generally not meet the disclosure requirement. However, it is admissible to supplement the description with the computer program in the programming language as part of the description or as drawing.

9. Do courts and administrative bodies in your jurisdiction apply the Law / Practice for patentability of CII in your jurisdiction in a harmonized way? If not, please explain.

The IPO Guidelines provide some guidance with regard to patentability of CII, which proves at least an effort towards harmonization. However, there is actually no case law from the Federal Administrative Court ("FAC") in this regard, whereas case law from the former ACIP is rather old (cf. PMMI 1968 I 53). Therefore, it is not possible to determine whether the IPO follows the IPO Guidelines in a harmonized way. Judicial practice with regard to CII is also limited and the decisions available are rather old (e.g. BGE 98 I 396). However, all patent nullity and infringement claims are to be decided by the Federal Patent Court ("FPC") in first instance and the Supreme Court in second instance. Based on this mandatory judicial competence, harmonization is ensured in judicial matters.

II. Policy considerations and proposals for improvements of your current Law / Practice

10. Is the current Law / Practice in your jurisdiction regarding the patentability of CII considered by users of the patent system and practitioners to be understandable and workable? If not, please explain.

Yes. The law supports CII and the IPO Guidelines give guidance to practitioners enabling them to understand and work the law and practice regarding CII. However, for inexperienced users, the meaning of technical character and the principle of global assessment may not be easily understandable in some cases, for instance where the CII lies in the coexistence between technical features and non-technical features, and the non-technical features are the innovative part. Patentability of such CII may derive from precisely claiming the technical field of application, while it is usually denied in case of a generalization that tries to abstract the implementation of the non-technical features to any technical field. For instance a claim directed to a process in which a new mathematical method is used may be considered patentable when restricted to a particular application of the mathematical method in a technical field. This may be the case of a method of encoding audio information in a computer system aimed to reduce distortion induced by channel noise: the idea underlying the method is purely mathematical, but the encoding method as a whole is not excluded from patentability.

11. Does the current Law / Practice in your jurisdiction regarding patentability of CII provide appropriate outcomes, in particular from an economic perspective? If not, please explain.

Switzerland has a living and growing software industry, with many small business-software providers and a few larger IT companies. However, the main software players usually do not protect their computer programs by patents. The handling of protective rights is very rare in the software industry and patents are the least common among all formal and informal protection strategies. Accordingly, no decision relating to CII has been handed down since the new FPC started to work in 2012. However, EPO case law, which is generally followed by Swiss courts, has reached consistency and the FPC as the single first-instance court in patent matters ensures harmonized application of law. Against this background the local standard practice can be considered acceptable from an economic perspective with room to improve.

12. In your jurisdiction, is copyright protection of CII regarded as sufficient from an economic standpoint? Please state why in either case.

No. The copyright protection of computer programs embodied in CII is rather limited. Only the so-called expression of a computer program in any form, be it in source code, object code or machine code, is supposed to be protected under copyright. However, the ideas, principles, and functionalities of underlying elements of the program and the formats of the data do not enjoy copyright protection. Furthermore, it remains unclear whether copyright protection subsists in command names or a series of commands.

13. Alternatively, is there an explicit or implicit consensus that patent protection of CII is required to ensure sufficient reward on investments made into the development of CII? If yes, please explain.

Yes. The Group is of the opinion that patent protection is required but insufficient to ensure adequate reward on investments. In specific cases patent protection may even prevent such reward, given the strict disclosure requirement. In the 1970s, a *sui generis* protection for computer programs was proposed, before copyright protection became the accepted form of protection for computer programs. Protection for computer programs and in particular for application-level inventions is difficult to achieve. An improved protection of such CII, be it by patent or other means, is needed.

14. In your jurisdiction, is there an implicit or explicit consensus that availability of patent protection should be limited to contributions from certain areas of human endeavor, excluding contributions from all other areas of human endeavor, no matter how advanced these contributions? If yes, please explain.

The exemption of some areas of human endeavor from patent protection is widely supported in Switzerland, no matter how advanced the contribution in question.

III. Proposals for harmonization

15. Do you consider that harmonization regarding patentability of CII is desirable?

Yes.

16. Exclusion of non-patentable subject matter per se

a) Should there be any exclusion from patentability per se of subject matter relating to CII?

Yes.

b) If there is subject matter identified in a patent claim related to CII you consider should be excluded from patentability per se, should it possible to overcome a rejection of the patent claim by adding other subject matter to the claim?

Yes. The occurrence of such excluded subject matter is not a sufficient condition to exclude a claim comprising other, non-excluded subject matter.

c) Should such “other subject matter” be required to have a certain quality, e.g. should it need to be inventive? Please state why in either case.

Yes, it must imply inventive step.

d) If yes to question 16c) above, please describe the areas of human endeavor to which such “other subject matter” should relate.

It should relate to an area that is not excluded from patent protection, consistently with response to question 2b) above.

17. Requirement of a contribution in a field of technology

a) Should the examination of subject matter eligibility of CII involve an examination of the contribution the claimed CII makes to the state of the art? If not, please explain.

Yes, inasmuch as harmonization with the EPO practice is desired, as reflected in former opinions of the Swiss Group. Yet, as stated above, assessing the contribution that a claimed CII makes to the state of the art is incompatible with the current lack of substantial examination at the IPO.

- b) *Should such examination be made under a test specific to CII, or should it be part of the usual novelty and inventive step / non-obviousness test?*

In general, such examination, if needed, should be performed as part of the novelty or the inventive step assessment. However, Swiss jurisdiction has to cope with the duality arising from the facts that: (i) no substantial examination is performed at the IPO; while (ii) the FPC is generally inclined to adopt the standards of the EPO, especially for assessing the inventive step (e.g. BGE 133 III 229). Thus, in Switzerland, this examination should be kept flexible and not necessarily imposed as part of a novelty or inventive step test:

- On the one hand, since this examination is incompatible with the current lack of substantial examination at the IPO, the FAC as upper jurisdiction may need to re-assess the technical character of a CII, using the same rules the IPO applies to examine subject matter eligibility, when handling complaints against decisions rendered by the latter.
- On the other hand, the FPC may be led to assess the technical character of CII as part of the inventive step assessment, consistently with the EPO's approach.

Finally, the Group notes that there is no reason, *a priori*, for CII to be subject to another regime than other non-technical inventions, since the fundamental question raised in each case is whether the invention has technical character.

- c) *Under this test, should patentability of CII require a contribution from areas of human endeavor which are deemed to be sources of patentable inventions (e.g. engineering, natural sciences)? In other words, should contributions from areas of human endeavor which are not deemed to be sources of patentable inventions be disregarded? If not, please explain.*

While CII providing no technical contribution at all must certainly be rejected, technical character sometimes results from subtle technical considerations, which might not easily qualify as contributions from well-identified, patent-compatible areas (EPO BoA decisions T 1227/05, T 625/11). Therefore, some expertise is needed to assess technical character, especially as technologies constantly evolve, and CII must be examined on a case-by-case basis.

Contributions from well-accepted, technical areas, if any, may be regarded as a sufficient condition (rather than a necessary condition) for CII to have technical character, at least where further examination comes to moderate such a simple assessment, as in the EPO. For example, a "computer-implemented method" clearly involves a technical and tangible concept (a computer), which is sufficient for this method to have technical character before the EPO. Yet, the EPO implements a second examination step, which requires CII to make an inventive, technical contribution to the state of the art. Such a scheme is compatible with the legal framework in Switzerland and may be implemented by the FPC in practice. Now, the situation at the IPO is more ambiguous and a different approach to the examination of technical character is needed to compensate for the lack of substantial examination.

- d) *Should this test also require that the relevant contribution the CII makes to the state of the art qualifies as inventive/non-obvious? This additional test may be integrated into the general inventive step / non-obviousness examination, or may be a stand-alone test. Please state why in either case.*

Yes, wherever such test is needed and inasmuch as harmonization with the EPO practice is desired. After years of development, the legal framework and case law of the EPO have now reached stability and consistency with regard to the patentability of CII. As a result, the extent to which a CII application might be refused can now be predicted with more reliability. Assuming that the practice of the EPO and, more specifically, the decisions of the EPO BoA will continue to be the standard for the inventive step assessment before Swiss courts, the latter should be free to assess the technical contribution of CII as part of the inventive step assessment.

- e) *Should there be a non-exhaustive list of areas of human endeavor which are accepted as sources of patentable CII, taking into account the ultimate purpose of patent law (protecting unforeseen, non-obvious subject matter)? If yes, please provide such a list. If not, why?*

No. This is not realistic. First, it is difficult to assemble a useful list of sources of patentable CII, as technologies rapidly evolve. Second, using such list may, in practice, substantially complicate the patent prosecution and litigation, because of additional time needed to qualify the contribution(s). This may especially be the case where distinct contributions arise from different areas. All this will result in additional costs for the applicants and the parties.

18. Should there be any specific claim drafting or other formal requirements which are applicable to CII, i.e. which deviate from the rules or practice applicable to inventions which are not CII? Please explain why in either case.

No. The Group is of the opinion that no specific claim drafting or formal requirements should be imposed. The subject matter of a patent claim should be taken as a whole and patentability should be assessed on the basis of the established practice and jurisdiction (see BGE 98 Ib 396), independent of the specific language or presentation of the claim features.

19. Should there be any specific requirements as to sufficiency of disclosure and/or enablement which are applicable to CII, i.e. which deviate from the rules or practice applicable to inventions which are not CII? Please explain why in either case.

No. The Group is of the opinion that no CII specific requirements as to sufficiency of disclosure and/or enablement are required. CII have a many decades' history of practice and jurisdiction in Switzerland and Europe. Over this long period Article 50 PatA and Article 83 EPC proved to set a clear and a sufficient boundary for CII.

20. Please comment on any additional issues concerning patent protection of CII your Group considers relevant to this Study Question.

Initially, computer technology was considered mainly from a program perspective. As technology evolved, programming moved away from the need to consider the computer as a machine and some programming languages became similar to natural languages. This affected the way CII patent applications are written and examined. However, the fact that a programmed computer is still a specific machine should not be overlooked by attorneys, examiners and courts.

At the most fundamental level, a computer compares binary values, produces a result in accordance with a logical operator and shifts such values along a binary value dimension. Due to the specific operation of a computer, tasks may be implemented in a different way from how they would be performed without a computer. Typically, a task is broken down into respective sub-tasks or activities. Therefore CII may be structured by a different functional architecture from an implementation without computer. Thus, a task may be implemented on a computer in a way that is technical not just due to the presence of a computer but because the functional architecture for achieving the task is in part at least to take account of the computer implementation.

Furthermore, the use of a computer may permit solutions which otherwise would not be possible. The computer in that instance becomes a technical part of an overall system and its configuration is new if such overall system was not known before. Thus, although there may not be a technical improvement in the computer itself, there may nevertheless be a technical improvement provided by the overall system that is at least worth to be considered. An appropriate test for CII that is applicable to or adoptable in all jurisdictions should be developed accordingly in order to create harmonization in the world of computer implemented inventions.

Summary

In spite of scarce legal provisions and case law, the Swiss legal framework for CII satisfactorily reconciles the dual system it relies on. On the one hand, the Swiss IPO does not carry out any substantial examination of patent applications and does therefore not examine whether a CII makes a contribution to the state of the art, although it checks whether this CII has technical character. On the other hand, national courts, which, in general, are inclined to follow the legal framework of the EPO, would likely assess the required technical contribution by applying the "problem-solution" approach. Essential principles regarding CII are set forth in the IPO guidelines. Apart from some interesting particularities, the latter are essentially in line with the EPO guidelines for examination. Remarkably, all patent-related,

inter partes litigation is handled by a unique Federal Patent Court in first instance and the Supreme Court in second instance in Switzerland. This mandatory judicial competence ensures harmonization in all patent-related judicial matters. Now, while the Swiss practice is, as a whole, favorably perceived, improved intellectual property protection rights for specific CII, such as application-level inventions, would be welcome.

Zusammenfassung

Trotz spärlicher Gesetzesgrundlagen und Rechtsprechung in Bezug auf CII bringt die schweizerische Rechtsordnung das in der Schweiz bestehende Dualsystem in zufriedenstellender Weise in Einklang: Einerseits führt das Institut für geistiges Eigentum (IGE) keine materielle Prüfung von Patentanmeldungen durch und prüft deshalb nicht, ob eine CII einen Beitrag zum aktuellen Stand der Technik leistet, untersucht aber dennoch, ob eine Erfindung technischen Charakter aufweist. Andererseits sind die nationalen Gerichte grundsätzlich geneigt, den Richtlinien und der Praxis des EPA zu folgen, und würden den erforderlichen technischen Beitrag entsprechend wohl durch Anwendung des «Problem-Lösungs-Ansatzes» prüfen. Grundlegende Prinzipien in Bezug auf die Beurteilung von CII sind in den IGE-Prüfungsrichtlinien festgehalten. Abgesehen von einigen interessanten Eigenheiten, stimmen diese weitgehend mit den EPA-Prüfungsrichtlinien überein. Bemerkenswerterweise werden in der Schweiz alle kontradiktorischen Patentstreitigkeiten erstinstanzlich vom Bundespatentgericht und zweitinstanzlich vom Bundesgericht entschieden. Diese zwingende sachliche Zuständigkeit stellt eine einheitliche Rechtsprechung in allen patentbezogenen Gerichtsangelegenheiten sicher. Während die Schweizer Rechtspraxis insgesamt positiv wahrgenommen wird, wäre eine Verbesserung des immaterialgüterrechtlichen Schutzes für spezifische CII, wie beispielsweise für Erfindungen auf Anwendungsebene, begrüßenswert.

Résumé

Malgré des dispositions légales minimales et une jurisprudence limitée, le cadre juridique suisse relatif aux CII parvient à réconcilier simplement les disjonctions existantes entre l'examen des demandes de brevet et le contentieux relatif aux brevets. En effet, l'Institut Fédéral de la Propriété Intellectuelle (IPI) n'examine pas si une invention satisfait aux conditions de nouveauté et d'activité inventive. L'IPI n'examine donc pas la contribution que fait une CII à l'état de la technique, même s'il vérifie qu'une invention a bien un caractère technique. Au contraire, la jurisprudence invite les tribunaux nationaux à évaluer la contribution technique requise en appliquant l'approche «problème-solution» et montre, qu'en général, les tribunaux suisses sont enclins à adopter le cadre juridique de l'OEB. Les principes essentiels relatifs aux CII sont énoncés dans les directives de l'IPI et sont, à quelques aménagements près, essentiellement compatibles avec les directives de l'OEB. Les litiges liés aux brevets sont exclusivement traités: en première instance, par le Tribunal fédéral des brevets; et, en matière de recours, par le Tribunal fédéral. Cette règle de compétence garantit une harmonisation du droit des brevets. Au final, et même si des améliorations du cadre juridique des CII sont certainement souhaitables, notamment en ce qui concerne les logiciels applicatifs, la pratique suisse est, dans son ensemble, perçue favorablement par les acteurs de l'innovation.