

International Comparative Legal Guides



Trade Marks 2020

A practical cross-border insight into trade mark work

Ninth Edition

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From the Publisher

Dear Reader,

Welcome to the ninth edition of *The International Comparative Legal Guide to: Trade Marks*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to trade mark laws and regulations around the world, and is also available at www.iclg.com.

This year, there are two expert chapters which provide an overview of online intermediary liability and trade mark infringement and the overlap between trade mark and design rights from an Indian perspective.

The question and answer chapters, which in this edition cover 48 jurisdictions, provide detailed answers to common questions raised by professionals dealing with trade mark laws and regulations.

As always, this publication has been written by leading trade mark lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editor Nick Aries of Bird & Bird LLP for his leadership, support and expertise in bringing this project to fruition.

Rory Smith
Group Publisher
Global Legal Group

Germany

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Astrid Gérard



Moritz Körner

1 Relevant Authorities and Legislation

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

The relevant trade mark authority in Germany is the German Patent and Trade Mark Office (GPTO).

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

The German Act on Trade Marks (Trade Mark Act) and the Ordinance for the implementation of the Trade Mark Act (Trade Mark Ordinance).

2 Application for a Trade Mark

2.1 What can be registered as a trade mark?

All signs, particularly words including personal names, designs, letters, numerals, sound marks, three-dimensional designs, the shape of goods or of their packaging as well as other wrapping, including colours and colour combinations, may be protected as trade marks if they are capable of distinguishing the goods or services of one enterprise from those of other enterprises (sect. 1 (1) Trade Mark Act). These signs include position marks, pattern marks, tracer marks, motion marks, multimedia marks, hologram marks and other marks.

2.2 What cannot be registered as a trade mark?

Signs consisting exclusively of the shape, or another characteristic, which results from the nature of the goods themselves; the shape, or another characteristic, of goods which is necessary to obtain a technical result; or the shape, or another characteristic, which gives substantial value to the goods shall not be capable of being protected as a trade mark (sect. 3 (2) Trade Mark Act). In addition, signs which face absolute grounds for refusal, such as lack of distinctiveness, may not be registered (sect. 8 Trade Mark Act).

2.3 What information is needed to register a trade mark?

The applicant needs to provide their name and address, and, where applicable, the name and address of its representative; the representation of the trade mark (in particular where it is a figurative mark, three-dimensional trade mark, colour mark, sound

mark, or any other marks such as *position* trade marks, etc.); and a specification of the goods and services for which the sign seeks protection. If the applicant claims priority of a foreign trade mark, this needs to be indicated. Depending on whether the applicant requests the registration of collective trade marks or certification marks, additional information is required such as regulations governing the use of the certification mark as well as details of the applicant.

2.4 What is the general procedure for trade mark registration?

The applicant needs to file the request for registration of the trade mark if possible by means of using one of the official forms which the GPTO provides on their website. Once the application fee has been paid, the GPTO will review the application of the trade mark regarding whether it conforms to all formal and substantial requirements, in particular whether there are no absolute grounds for refusal. If the examiner concludes that there are no grounds for refusal, the trade mark will be registered.

2.5 How is a trade mark adequately represented?

The adequate representation depends on the trade mark to be registered. If the sign consists or includes only words, designs, letters, or numerals, it may suffice just to provide a representation of the sign or the name of the mark. In case of an application for registration of a colour mark or colour combinations, it is essential to provide the number of the colours in accordance with an official classification system and, in case of colour combinations, the exact proportion of the colour combination. Where sound marks are applied for, the Office will need notes or a data carrier with the sound.

2.6 How are goods and services described?

Goods and services are described in line with the Nice Classification of goods and services; it is helpful to revert to the uniform classification data base available on the GPTO's or EUIPO's website "TMclass".

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?

Any mark must be represented in such a way as to enable the competent authorities and the public to determine clearly and

unequivocally the subject matter of the protection (sect. 8 (1) Trade Mark Act). This also applies to, for instance, positional marks, tracer marks, motion marks, multimedia marks or hologram marks.

The representation may be filed in paper form or on a data carrier. The admissible types and formatting of data carriers are listed on the GPTO's website: <http://www.dpma.de>. Where it is possible to file several representations of the trade mark, all representations must be contained in a single file. In the case of trade marks which cannot be represented in any other way, a description as the sole means of representation shall be permissible if the text clearly and unambiguously identifies the subject matter of the protection of the trade mark. If the same representation of the trade mark is filed on paper and on a data carrier, the representation on a data carrier shall be decisive for the subject matter of protection.

If the applicant indicates that the mark is to be registered as a colour mark, the application for a monochrome abstract colour mark must be accompanied by a colour sample. The colour shall be designated by the number of an internationally recognised colour classification system. In the case of an abstract colour mark consisting of several colours, the application for registration shall, in addition to the requirements laid down before, contain the systematic arrangement in which the colours concerned are combined in a fixed and consistent manner.

If the applicant indicates that the mark is to be registered as a sound mark, the application must be accompanied by a representation on a data carrier or a graphic representation of the sound mark.

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

German law does not require proof of use for a trade mark registration save for trade marks which have been registered due to acquired distinctive character through use. For renewal purposes, the GPTO does not verify whether a trade mark has been used; it is sufficient that the renewal fee is paid on time in order to renew the duration.

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

A German trade mark covers the territory of the Federal Republic of Germany.

2.10 Who can own a trade mark in your jurisdiction?

Any natural person, legal person or partnership insofar as the partnership is equipped with the capacity to acquire rights and enter into liabilities may own a trade mark in Germany.

2.11 Can a trade mark acquire distinctive character through use?

A trade mark may acquire distinctive character through use in Germany. This requires that the sign must have been used intensively on the German market and has acquired a reputation. This means, in principle, that a significant proportion of the relevant public establishes a link between the sign and a particular undertaking. The reputation does not need to be in the minds of all the public, but only in such part which is not insignificant for the economic movement of the goods or services concerned.

2.12 How long on average does registration take?

As a rule, from the date of application through to registration, if no objections are raised, it will take about two to four months. If the GPTO raises objections, in particular based on absolute grounds for refusal, it may take up to twelve months more until the GPTO renders a decision. If the applicant appeals a decision refusing the registration of the trademark, this may take several years until a final decision, either by the Federal Office or the Federal Supreme Court, is rendered.

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

The GPTO's fees for filing a trade mark in up to three classes are EUR 290 (if filed electronically) or EUR 300 (if filed on paper). Any further classes will cost EUR 100 per class. If the applicant requests an expedited review of the application this will cost an additional EUR 200. The GPTO's fees for filing a collective or certification mark are EUR 900 for up to three classes; any further class fees for a collective trade mark or certificate trade mark are EUR 150.

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

A trade mark may enjoy protection in Germany through registration as a German trade mark; however, it is also possible to obtain protection in Germany by means of a European Union Trade Mark (EUTM) or an international registration with protection in Germany.

2.15 Is a Power of Attorney needed?

In order to file a trade mark no Power of Attorney is needed. However, in proceedings before the GPTO or the Federal Patent Court a party who has neither a residence nor principal place of business nor an establishment in Germany may only participate in these proceedings if the party has appointed as his representative a lawyer or patent attorney.

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

The Power of Attorney does not require notarisation or legalisation.

2.17 How is priority claimed?

The applicant claiming priority of another trade mark application needs to provide details of the date of filing and state of the earlier application within two months after the date of filing of the German trade mark. If the applicant has complied with these requirements, the GPTO shall set a deadline of two months upon service requesting to indicate the file number of the earlier application and to submit a copy of the earlier application (sect. 34 (3) Trade Mark Act). In addition, there exists the possibility to claim "exhibition priority" (sect. 35 Trade Mark Act). Where the applicant has displayed goods or services under the trade mark applied for at a recognised international exhibition or at a domestic or foreign exhibition, the applicant may, if the application is filed within a period of six months following the display of the goods or services under the trade mark applied for, claim a right of priority.

2.18 Does your jurisdiction recognise Collective or Certification marks?

Sect. 97 *et seq.* Trade Mark Act provide for the recognition of collective marks; sect. 106a *et seq.* provide for the recognition of certification marks.

3 Absolute Grounds for Refusal

3.1 What are the absolute grounds for refusal of registration?

The absolute grounds for refusal are set out in sect. 8 Trade Mark Act. Trade marks which are not capable of being represented in the register in such a way as to enable the competent authorities and the public to determine clearly and unequivocally the subject matter of the protection are excluded from registration as trade marks.

In addition, according to sect. 8 Trade Mark Act no. 1 through 8, absolute grounds for refusal apply to trade marks which: are devoid of any distinctive character for the goods or services; consist exclusively of signs or indications which may serve to designate, *inter alia*, the kind, quality, quantity, intended purpose, value, geographical origin of the goods or of rendering of the services, or other characteristics of the goods or services; consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade to designate the goods or services; are of such a nature as to deceive the public, for instance as to the nature, quality or geographical origin of the goods or services; are contrary to public policy or to accepted principles of morality; contain state coats of arms, etc. of, *inter alia*, a domestic local authority association; contain official signs indicating control or warranty; contain coats of arms, flags or other signs of international intergovernmental organisations; the use of which can evidently be prohibited in the public interest in accordance with other provisions (sect. 8 (2) no. 13 Trade Mark Act); or which have been applied for in bad faith (sect. 8 (2) no. 14 Trade Mark Act).

Likewise, trade marks shall not be registered which are excluded from registration, pursuant to: Union legislation or national law, or to international agreements to which Germany, the Union or the Member State concerned is party, providing for protection of designations of origin and geographical indications (sect. 8 (2) no. 9 Trade Mark Act); Union legislation or international agreements to which the Union is party, providing for protection of traditional terms for wine (sect. 8 (2) no. 10 Trade Mark Act); or pursuant to Union legislation or international agreements to which the Union is party, providing for protection of traditional specialities guaranteed (sect. 8 (2) no. 11 Trade Mark Act).

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

Only where the trade mark lacks distinctive character, consists exclusively of descriptive indications or has become customary, may the objection be overcome (sect. 8 (3) Trade Mark Act). In order to overcome the objection, the applicant needs to prove that prior to the point in time of the decision on registration, the trade mark had a reputation within the relevant public as a result of its use for the goods or services for which the application was filed.

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

A decision of refusal of registration may be appealed within one month after service either with a so-called “objection” (*Erinnerung*) (sect. 64 Trade Mark Act) to the GPTO or directly by filing an appeal to the Federal Patent Court (sect. 66 Trade Mark Act). Under certain circumstances, in particular where the Federal Patent Office gives leave, a further appeal may be filed to the Federal Supreme Court (sect. 83 Trade Mark Act).

3.4 What is the route of appeal?

Please see the answer to question 3.3.

4 Relative Grounds for Refusal

4.1 What are the relative grounds for refusal of registration?

The relative grounds for refusal are set out in sect. 9 Trade Mark Act. The registration of a trade mark may be cancelled if it is identical to an earlier trade mark which is applied for or registered for identical goods and services (sect. 9 (1) no. 1 Trade Mark Act), if there exists likelihood of confusion between the trade mark and the earlier mark, including the likelihood of association (sect. 9 (1) no. 2) or where the trade mark is identical to an earlier mark and has been registered for goods or services which are not similar to those of the earlier mark, if the earlier mark has a reputation and the use of the later trade mark would, without due cause, take unfair advantage of, or be detrimental to, the distinctive character or repute of the trade mark which has the reputation (sect. 9 (1) no. 3).

Applications for trade marks shall only constitute a ground for refusal if they are registered.

4.2 Are there ways to overcome a relative grounds objection?

The proprietor of the contested trade mark may seek to convince the GPTO that there is, for instance, no likelihood of confusion or the proprietor may seek an amicable settlement with the proprietor of the prior trade mark.

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

Please see the answer to question 3.3.

4.4 What is the route of appeal?

Please see the answer to question 3.4.

5 Opposition

5.1 On what grounds can a trade mark be opposed?

The opponent may invoke that the trade mark should be cancelled because of: an earlier trade mark applied for or registered (sect. 42 (2) no. 1 Trade Mark Act); an earlier notorious

trade mark (sect. 42 (2) no. 2 Trade Mark Act); its registration for an agent or representative of the trade mark proprietor (sect. 42 (2) no. 3 Trade Mark Act); an earlier unregistered trade mark or commercial designation (sect. 42 (2) no. 4 Trade Mark Act); or because of an older designation of origin and geographical indications (sect. 42 (2) no. 5 Trade Mark Act).

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

The proprietors of an earlier trade mark applied for or registered, proprietors of earlier notorious trade marks, or proprietors of earlier unregistered trade marks or commercial designations, or of designations of origin or geographical indications, may oppose the registration (sect. 42 (2) Trade Mark Act).

5.3 What is the procedure for opposition?

The proprietor of prior rights may file an opposition within three months upon publication of the registration of the trade mark (sect. 42 (1) Trade Mark Act). The opposition does not need to be substantiated. If both parties request, the GPTO shall grant a cooling-off period of at least two months in order to reach an amicable settlement (sect. 42 (4) Trade Mark Act). If the parties do not reach a settlement, the GPTO will render a decision; it usually takes about 12 to 18 months until a decision is rendered on the substance.

6 Registration

6.1 What happens when a trade mark is granted registration?

The registration is published. Upon publication of the registration third parties have a period of three months to file an opposition.

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

Upon registration the trade mark is fully protected. Oppositions may be based on a trade mark which has only been applied for but applications for trade marks shall only constitute a ground for refusal if they are registered (sect. 9 (2) Trade Mark Act).

6.3 What is the term of a trade mark?

A trade mark is protected for 10 years, starting with the day of application (sect. 47 (1) Trade Mark Act).

6.4 How is a trade mark renewed?

The trade mark may be renewed upon request for a term of every 10 years, provided that the renewal fee has been paid.

7 Registrable Transactions

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

Individuals as well as companies may request the registration of the assignment of a trade mark. If only one of the

parties requests the registration of the assignment, it will need to provide the consent of the other party; if there is a joined request, no further documents are needed.

7.2 Are there different types of assignment?

A trade mark may be assigned in part or in whole (sect. 27 Trade Mark Act). If the assignment is only for parts of the goods or services, the registration shall be divided and the pertinent fee paid to the GPTO (sect. 27, 46 Trade Mark Act).

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

Since 14 January 2019 the parties to a licence agreement may request the registration of the licence with the GPTO (sect. 30 (6) Trade Mark Act). The request needs to indicate whether it is an exclusive or a non-exclusive licence. The type of licence, such as a sub-licence, need not be indicated; likewise, whether it is a licence restricted in time, territory or regarding certain goods and services.

7.4 Are there different types of licence?

Licences may be exclusive or non-exclusive. In addition, an exclusive licence may be granted in such a way that the licensor still has the right to use the trade mark.

7.5 Can a trade mark licensee sue for infringement?

As a rule, a licensee may bring an action before the courts only with the trade mark proprietor's consent. However, where the proprietor of the trade mark, after having been formally requested within a reasonable time, does not file a suit, the holder of an exclusive licence may bring an action before the ordinary courts (sect. 30 (3) Trade Mark Act).

7.6 Are quality control clauses necessary in a licence?

Clauses regarding the quality of the licensed product should be included in licence agreements but it is not mandatory.

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

The GPTO provides forms where any individual may request the registration of a pledge or other measures *in rem*. In addition, it is possible to request the registration of insolvency proceedings.

7.8 Are there different types of security interest?

The right arising from a trade mark may be pledged or form the object of another right *in rem* such as *usufruct*, or be the object of measures of levy of execution (sect. 29 Trade Mark Act).

8 Revocation

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

A trade mark may be fully or partially revoked: for non-use; if, in consequence of acts or inactivity of the proprietor, the trade

mark has become the common name in the trade for a product or service in respect of which it is registered; if, in consequence of the use made of the trade mark by the proprietor of the trade mark or with his consent in respect of the goods or services for which it is registered, the trade mark is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services; or if the proprietor does not fulfil the preconditions for proprietorship anymore (sect. 49 Trade Mark Act).

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

The request for revocation of a trade mark because of non-use may be filed either with the GPTO or by means of a civil claim in ordinary proceedings (sect. 53 (1) Trade Mark Act). As of 1 May 2020, the applicant has to provide facts and evidence with the filing of the request to the GPTO. The request may be filed by any individual or company. The GPTO forwards the request for revocation to the proprietor of the contested trade mark together with the request to file comments within two months upon service of the request (sect. 53 (4) Trade Mark Act). If the proprietor of the contested trade mark does not oppose the request for revocation, the GPTO shall declare the trade mark revoked (sect. 53 (5) Trade Mark Act). If the proprietor of the contested trade mark objects to the request for revocation and the applicant requests the continuation of the revocation proceedings and pays the fees of EUR 400, the revocation proceedings shall continue before the GPTO. Otherwise, the revocation proceedings shall be deemed to be finished.

8.3 Who can commence revocation proceedings?

The request for revocation based on non-use may be filed by any natural or legal person and by any association of producers, service providers, traders or consumers which may be involved in the procedure (sect. 53 (2) Trade Mark Act as in force starting 1 May 2020). Under certain circumstances, third parties may join the revocation proceedings (sect. 54 Trade Mark Act as in force starting 1 May 2020).

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

With respect to the request for revocation based on non-use, the proprietor of the contested trade mark must provide evidence of genuine use of the trade mark according to sect. 26 Trade Mark Act.

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

If revocation proceedings are continued before the GPTO (sect. 53 (5) 4 Trade Mark Act) and the GPTO renders a decision, that decision may be appealed to the Federal Patent Court. Otherwise, if the motion for revocation has been filed before court, an appeal may be filed against the court's judgment.

9 Invalidity

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

The registration of a trade mark may be declared invalid, in addition to revocation proceedings because of non-use, by the

GPTO for absolute and relative grounds for refusal (sect. 53 (1) Trade Mark Act as of 1 May 2020).

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

The request for declaration of invalidity of a trade mark because of the existence of prior rights may be filed either with the GPTO or by means of a civil claim in ordinary proceedings (sect. 51 (1) Trade Mark Act). As of 1 May 2020, the request must be accompanied by comments providing facts and evidence. The GPTO forwards the request to the proprietor of the contested trade mark together with the request to file comments within two months upon service of the request (sect. 53 (4) Trade Mark Act). If the proprietor of the contested trade mark does not oppose the request, the GPTO shall declare the trade mark invalid and cancel the registration (sect. 53 (5) Trade Mark Act). If the proprietor of the contested trade mark objects to the request, the GPTO shall forward the objection to the applicant. Decisions on the invalidity request are rendered by the GPTO trademark divisions including at least three members of the GPTO. Therefore, these decisions may be appealed only directly to the Federal Patent Court without a previous objection (*Erinnerung*).

9.3 Who can commence invalidation proceedings?

The request for declaration of invalidity based on absolute grounds may be filed by any natural or legal person and by any association of producers, service providers, traders or consumers that may be involved in the procedure. The request for a declaration of invalidity based on relative grounds may be filed by the holder of the earlier rights referred to in sect. 9–13 Trade Mark Act and by persons entitled to claim rights under a protected geographical indication or protected designation of origin (sect. 53 (2) and (3) Trade Mark Act as in force starting 1 May 2020).

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

See answers to questions 3.2 and 4.2.

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

In both cases, i.e. decision of invalidity based on absolute grounds or on relative grounds, the decision may be appealed to the Federal Patent Court and, upon explicit admission by the Federal Patent Court or other exceptional circumstances, to the Federal Supreme Court. If the applicant chooses to file a judicial complaint, judgments of the Court of First Instance may be appealed to the Court of Appeal and, under certain circumstances, to the Federal Supreme Court.

10 Trade Mark Enforcement

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

Claims for infringement of a trade mark may be filed in ordinary proceedings before the pertinent Regional Court. German jurisdiction provides for specialised chambers dealing with

trade mark matters. The Regional Courts are competent irrespective of the value of the litigation. Regarding the venue, as a rule, the complaint needs to be filed at the seat of the defendant; however, if the infringement takes place, for instance, on the internet, the claimant may choose any Regional Court.

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

Though it is not a legal obligation, it is strongly recommended to send a warning letter to the alleged infringer requesting an undertaking to cease the infringing act. There are no fixed deadlines to file a judicial complaint if the infringer refuses to sign such undertaking or to cease the infringing acts. It is important to keep in mind the limitation period for infringement claims (see question 10.7).

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

Preliminary injunctions are available; however, the claimant must prove that the matter is urgent. The Regional Courts in Germany differ in their assumption of when a matter is urgent. As a rule, the claimant should not wait more than one month, maximum two months, to request a preliminary injunction upon knowledge of the infringer and the infringing act. The claimant needs to provide *prima facie* evidence of the infringing act. The preliminary injunction may become final if, after having been served with the injunction, the defendant accepts the preliminary injunction as a final and binding decision without filing an opposition or if the defendant acknowledges the preliminary injunction as final and binding after oral proceedings. In addition, injunctions are final when rendered in main proceedings and when they may not be appealed anymore.

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

A party may not be compelled to provide disclosure to its adversary unless ordered by court. It is upon each party to bring forward all facts and evidence in support of their position.

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

Any submission or evidence is presented in writing; during the hearing the parties may bring forward further arguments. However, the parties must take into account that submissions or evidence presented after a deadline may not be taken into account. If witnesses have been called, they may be examined by both parties.

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

German procedural law provides that where the resolution of the dispute depends in whole or in part on the existence or non-existence of a legal relationship which is the subject of another pending dispute, or which is to be determined by an

administrative authority, the court may order that the proceedings be stayed until the other dispute has been resolved or until the administrative authority reaches a decision (sect. 148 Code of Civil Procedure). Thus, infringement proceedings may be stayed pending the resolution of validity by the GPTO. The court has discretion in whether to grant the stay. On the other hand, an EU trade mark court shall, unless there are special grounds for continuing the hearing, of its own motion or at the request of one of the parties and after hearing the other parties, stay the proceedings where the validity of the EU trade mark is already an issue before another EU trade mark court on account of a counterclaim, or where an application for revocation or for a declaration of invalidity has already been filed at the EUIPO (Art. 132 EUTMR (Regulation (EU) 2017/1001 of 14 June 2017)).

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

A claim for trademark infringement is time-barred after three years, beginning at the end of the year in which the claim has arisen and the claimant (trade mark proprietor) becomes aware of the circumstances giving rise to the claim and of the infringer, or where the claimant should have become aware without gross negligence (sect. 20 Trade Mark Act; sect. 195, 199 Civil Code). If the claimant did not have knowledge of the infringing act, claims are time-barred after 10 years.

10.8 Are there criminal liabilities for trade mark infringement?

The Trade Mark Act provides for a criminal liability in sect. 143 *et seq.*

10.9 If so, who can pursue a criminal prosecution?

Criminal proceedings may be initiated by the public prosecutor, either *ex officio* because of the particular public interest in criminal prosecution, or upon criminal complaint.

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

There exist no specific provisions for unauthorised threats of trade mark infringement. However, the alleged infringer may file a declaratory claim requesting declaration of non-infringement and, in addition, compensation of the costs arisen in connection with the defence against an unjustified threat of trade mark infringement.

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?

The defence can be based on:

- no use of the sign contested in the course of trade;
- no use of the sign contested in a way designating the origin of goods and services from a certain undertaking; and
- no likelihood of confusion.

If the plaintiff claims a reputation of its trade mark in Germany, the use of the sign contested takes no unfair advantage of the distinctive character or the repute of the plaintiff's trade mark.

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

Additionally, the defence can be based on arguments as follows:

- invalidity of the plaintiff's trade mark;
- the defendant is the proprietor of an earlier right justifying the use of the sign contested;
- if the plaintiff claims a reputation of its trade mark in Germany and there is no such reputation;
- limitation of the claims asserted (sect. 20 Trade Mark Act);
- the use of a later registered trade mark for the goods or services for which it is registered insofar as the plaintiff has acquiesced, for a period of five successive years, to the use of the trade mark while being aware of such use, unless the registration for the later trade mark was applied for in bad faith (sect. 21 Trade Mark Act);
- the use of a later registered trade mark, for the goods or services for which it has been registered, if a request for cancellation of the later trade mark has been refused – or would have been refused – because the plaintiff's trade mark could have been cancelled due to revocation or absolute grounds of refusal on the date of the publication for the registration of the later trade mark (sect. 22 Trade Mark Act);
- the use of the sign contested is justified because it is the defendant's name or address; or it is used as an indication of characteristics or properties of goods or services, in particular their nature, quality, intended purpose, value, geographical origin or time of production or of rendering;
- the use of the sign contested as an indication of the intent purpose of the goods, in particular as an accessory or spare part, or of a service insofar as the use is necessary therefore. However, the use must not be contrary to accepted principals of morality (sect. 23 Trade Mark Act);
- exhaustion of the plaintiff's trade mark right (sect. 24 Trade Mark Act); or
- exclusion of the plaintiff's trade mark rights due to a lack of use (sect. 25 Trade Mark Act).

12 Relief

12.1 What remedies are available for trade mark infringement?

If the trade mark is infringed, the trade mark proprietor is entitled to:

- final or preliminary injunctive relief (sect. 14 (5) Trade Mark Act);
- damages incurred by the act of infringement or, in the absence of intent or negligence, levy of unjustified enrichments, in case of an intentional or negligent infringement (sect. 14 (6) Trade Mark Act; sect. 812 German Civil Code);
- destruction of the goods held or owned by the infringer unlawfully identified (sect. 18 (1) Trade Mark Act);
- recall of unlawfully identified goods or final removal from the channels of commerce (sect. 18 (2) Trade Mark Act);
- provision of information regarding the origin and the channels of commerce of the unlawfully identified goods or services (sect. 19 (1) Trade Mark Act);
- provision of information against third parties possessing infringing goods, making use of infringing services, providing services used for infringing activities or participating in manufacturing, creating or distributing such products or participating in the provision of such services, in cases of an obvious legal infringement (sect. 19 (2) Trade Mark Act);

- under certain circumstances, inspection of certain documents (sect. 19a Trade Mark Act); and
- under certain circumstances, a publication of the judgment (sect. 19c Trade Mark Act).

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 party that has not prevailed in the dispute is to bear the costs of the legal dispute, in particular any costs incurred by the opponent, to the extent these costs were required in order to bring an appropriate action or to appropriately defend against an action brought by others. A compensation of costs also comprises compensation of the opponent for any necessary travel or for time the opponent has lost by having been required to make an appearance at hearings. However, the proportion of attorney fees are calculated according to the German Law of Remuneration of Attorneys (RVG) depending on the amount in dispute.

13 Appeal

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

The Regional Court's judgment, which is the Court of First Instance, may be appealed to the competent Higher Regional Court which will review both factual and legal questions. The decision of the Court of Appeal may be further appealed on a point of law to the Federal Court of Justice (FJC) if the Court of Appeal has admitted the appeal or the Federal Court of Justice has admitted the appeal based on a complaint against the Higher Regional Court's refusal to grant leave to appeal on points of law. The appeal on points of law to the Federal Court of Justice will be admitted by the Higher Regional Court only if the legal matter is of fundamental significance or the further development of the law, or the interests in ensuring uniform adjudication require a decision to be handed down by the Federal Court of Justice.

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

Any means of challenge or defence that were rightly dismissed in the proceedings before the Court of First Instance will be ruled out by the Court of Appeal. Therefore, new means of challenge or defence will be admitted by the Court of Appeal only if they (i) concern an aspect that the Court of First Instance has recognisably failed to see or has held to be insignificant, (ii) were not asserted in proceedings before the Court of First Instance due to a defect in the proceedings, or (iii) were not asserted in the proceedings before the Court of First Instance, without this being due to the negligence of the party. The Court of Appeal may demand that those facts be demonstrated to its satisfaction based on which the new means of challenge or defence may permissibly be brought before the court.

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?

The seizure by the customs authority of infringing goods from

outside the EU is subject to Regulation (EU) No. 608/2013 of the European Parliament and the Council of 12 June 2013 concerning Customs Enforcement of Intellectual Property Rights and Repealing Council Regulation (EC) No. 1383/2003. In addition to the provisions under European law, there are also provisions for border seizure in national German law, in particular sect. 146 *et seq.* Trade Mark Act. Accordingly, border seizures under national German law come into consideration if infringing goods from other Member States of the EU are discovered at the German borders. For both the border seizure under European law and under national German law the customs authority is responsible. The request for border seizure has to be made to the Central Customs Authority in Munich and remains in force for one year. The request may be repeated. If potentially infringing products are discovered by the customs authority, the trade mark proprietor will be informed accordingly. After inspection of the sample of the potentially infringing product, the trade mark proprietor may apply for destruction. If the recipient of the infringing goods does not object to the destruction within the time limit set by the customs authority, his consent is deemed to have been given. If an objection is made, the trade mark proprietor must initiate legal proceedings against the recipient of the infringing goods.

15 Other Related Rights

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

According to sect. 4 (2) Trade Mark Act the use of a sign in trade will give rise to trade mark protection insofar as the sign has acquired public recognition as a trade mark within the affected trade circles. Furthermore, any trade mark will give rise to trade mark protection if it constitutes a well-known mark within the meaning of Art. 6*bis* of the Paris Convention. Unregistered trade marks have the same scope of protection as registered trade marks. However, the scope of protection might be limited only to a certain region in Germany if the sign has acquired public recognition only in this region and not in the whole of Germany.

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

Company names, special designations of a business operation, business signs and other signs intended to distinguish the business operation from other business operations, and which are regarded as signs of the business operation within affected trade circles, enjoy protection as commercial designations (sect. 5 Trade Mark Act) and grant its proprietor an exclusive right. The proprietor of a commercial designation is entitled to prohibit third parties from using the commercial designation or a similar sign in trade, in a manner liable to cause confusion with the protected designation (sect. 15 Trade Mark Act). The enforcement of commercial designations and the reliefs available are similar to trade mark rights.

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

The German Trade Mark Act provides protection for titles of works like names and special designations of printed publications, cinematic works, music works, stage works or other comparable works (sect. 5 (3) Trade Mark Act). In addition, the right to a name and indications of geographical origins are protected by intellectual property rights as well as know-how.

16 Domain Names

16.1 Who can own a domain name?

Any natural or legal person with legal capacity can own a domain name.

16.2 How is a domain name registered?

A domain name with the ccTLD “.de” has to be registered with the German Network Information Centre (DENIC, <https://www.denic.de>). The registration of a “.de” domain can be arranged by any internet provider who is either a DENIC member or who cooperates with a DENIC member. Alternatively, the application for registration of a “.de” domain can be filed at DENIC directly. However, DENIC does not offer any additional internet services, such as web space or email accounts. The registration of a domain name is granted to the first applicant. There is no proof of authorisation to use the name within the domain.

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

The registration of a domain name itself does not constitute any intellectual property right. The use of a domain name in the course of trade may, under certain circumstances, grant to its proprietor a commercial designation (*cf.* question 15.2).

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

In Germany the ccTLD “.de” is available via DENIC. Further generic TLDs are available via different ICANN-accredited registers. For a list of all current ICANN-accredited registers, see <http://www.internic.net/regist.html>.

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

There is no dispute resolution procedure at DENIC in Germany. Instead, court proceedings may be initiated if no amicable settlement out of court with the domain holder is possible. DENIC only provides the instrument of a DISPUTE-entry, which ensures that the domain cannot be transferred to anyone else and the holder of the DISPUTE-entry automatically becomes the new domain holder as soon as the domain is released. For a DISPUTE-entry the claimant must submit evidence to DENIC showing that he might have a right to the domain.

17 Current Developments

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

The Trade Mark Law Modernisation Act, and thus the amendment of the German Trade Mark Act to implement the revised EU Trade Mark Directive 2015/2436 of 16 December 2015 (TMD), entered into force on 14 January 2019. This was to implement all mandatory and a large number of the optional requirements of the TMD into German law, e.g.: whereas registered trade marks previously had to be capable of being represented graphically, it

is now sufficient for them to be clearly and precisely determined. Thus, sound marks, multimedia marks, holograms and other forms of marks can also be registered as trade marks in suitable electronic formats. Furthermore, the new certification mark introduced a new trade mark category into German trade mark law. The main feature of the certification mark is that, unlike the individual trade mark, it does not focus on the function of the trade mark as an indication of origin but on the guarantee function. Furthermore, geographical indications and designations of origin, in particular for food stuff, wines and spirits, have been introduced as absolute grounds for refusal.

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

In its decision “Da Vinci” of 23 October 2019 (I ZR 46/19) the German Federal Court of Justice (FCJ) held that it could be contrary to the principals of good faith if a trade mark proprietor claims only a formal legal position when asserting claims for contractual penalties. The FCJ continued and clarified, with that decision, its case law on so-called “speculative trade marks”. The FCJ stated that a general intention to use the trade mark was a requirement for the protection of a trade mark, which results from the nature of a trade mark as a distinctive sign. The intention to use the mark must exist independently of the five years’ grace period for use. The grace period for use was a reliable presumption for such an intention. What was required from the outside was a general willingness, on the part of the trade mark proprietor, to use the trade mark as a sign in the course of business, either by himself or allowing a third party to use it – by way of licensing or following an assignment. The FCJ specified that the trade mark proprietor had an increased secondary burden of proof. He must describe the considerations behind the trade mark application and must disclose the marketing affords made and the successes achieved in each case, within the bounds of reason.

In its decision of 18 July 2019 (25 W (pat) 532/18), the Federal Patent Court dismissed an appeal against the decision of the German Trade Mark Office according to which the designation “RCT resilience–circle–training” could not be registered as a trade mark for several goods and services it was applied for. “Resilience” was a technical term used in particular in the field of psychology, which designates mental resilience or the ability to survive difficult life situations without lasting impairment. The term “circle training” designates a special method of

fitness training in which different stations have to be completed one after the other, each of which focuses on specific areas. The combination of words “resilience–circle–training” thus has the meaning of a training to strengthen resilience. The proceeding sequence of letters “RCT” clearly consists of the first letters of the following word combination – an “acronym” – and thus appears only as an accessory part of the overall designation, which shares the descriptive character of the word combination.

In its decision of 29 January 2020 (C-371/18) in the case “Sky/SkyKick” the European Court of Justice (ECJ) decided that a lack of intention to use a trade mark could constitute bad faith within the meaning of Art. 59 (1) (b) EUTMR. The ECJ held that a trade mark application made without any intention to use the trade mark in relation to the goods and services covered by the registration constituted bad faith if, alternatively, the applicant for registration of the trade mark had the intention of undermining, in a manner inconsistent with honest practices, the interest of third parties, or the applicant for registration of the trade mark had the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark.

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

Cancellation proceedings are renamed “revocation proceedings” or “invalidity proceedings”. From 1 May 2020 it will be possible to claim relative grounds for refusal (earlier rights) in official invalidity proceedings in addition to absolute grounds for refusal, as is currently possible. Furthermore, the current formal preliminary procedure, with regard to revocation declarations, will be converted into revocation proceedings before the GPTO.

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

An increasing number of proceedings can be observed in which the question of the lack of a general intention to use the mark for all or certain registered goods and services plays a role. However, against the background of the decisions of the Federal Court of Justice and the European Court of Justice mentioned under question 17.2, new possibilities of defence against so-called speculative marks are offered.



Astrid Gérard specialises in advising and litigating on all aspects of trade mark law, design law, competition law and copyright law. She represents clients in disputes in these areas before the German and European courts, as well as in trade mark and design proceedings before the German Patent and Trade Mark Office and the European Union Intellectual Property Office. Astrid Gérard is experienced in managing extensive trade mark portfolios and drafting licensing and delimitation agreements.

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