

A hand is shown from the bottom, holding a light blue, semi-transparent map of Germany. The map is centered in the frame. Overlaid on the map is the text 'COHAUSZ & FLORACK' in white, uppercase letters. Below the map, the text 'CFUpdate' is written in bold black letters, followed by 'Intellectual property rights in Germany' and 'Success strategies for your business' in bold black letters.

COHAUSZ & FLORACK

**CFUpdate**

**Intellectual property rights in Germany  
Success strategies for your business**

„The aim of **Go** is relative advantage;  
the game is played all over the board,  
and the objective is to increase  
one's options and reduce those of the adversary.  
The goal is less victory than persistent strategic progress.

Dr. Henry Kissinger (in Newsweek, 11.08.2004)

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# Introduction

In a globalized economy, where companies share their services and goods across continents – does anyone actually need special knowledge of German property rights? Absolutely! Because for intellectual property (IP) rights, as in other areas of law, the principle of territoriality applies. Every state grants sovereign rights within its own territory and determines the limits thereof. For IP rights this concerns temporary exclusion rights that are limited to the territory of the state and prohibit the use of the protected subject-matter without the permission of the owner.

In addition to the purely national rights, there are also IP rights that apply throughout the EU, such as EU trademark and EU design rights. In addition, Germany is a member of all major international agreements in the field of intellectual property rights and is thus interlocked with other legal systems around the world. Thus, international trademarks may be extended to Germany in accordance with the Madrid Agreement and Protocol. International agreements, such as the Paris Convention of 1883, play a particular role when dealing with rights that arise without formal assessment or official granting – in particular company name rights and copyrights. An important principle embedded in the agreement is the treatment of foreigners as nationals: Foreigners from member states of the agreement are treated the same way as nationals.

A number of international agreements and EU legislation

are relevant for the registration and enforcement of property rights in Germany, and the current trend is heading towards further international harmonization. Nevertheless, issuing procedures, protection requirements, scope of protection, as well as the law enforcement in Germany do still differ from what is considered a natural part of the legal order in other countries across the world. These differences are to be highlighted here.

Whoever holds property rights – whether in Germany or elsewhere – should, in addition to the protection of the own product, always also follow market developments: What products is the competition working on? What property rights have they already registered? Companies that are particularly vigilant in this respect can use their own property rights cleverly in order to ensure an important competitive advantage. This is where a holistic legal approach is recommended. Through a holistic legal approach, the same product can be protected by different rights. Innovative technical solutions, for example, can be protected through patents while the design of a solution can be protected through a registered design, an unregistered community design right, or copyright. The means of communication that convey the image of the product and distinguish it from competitor products are protected by features such as company name and trademark. In addition, there are rights that

# Introduction

protect parties against unfair activities by competitors and other participants. This includes, for example, the protection of know-how or protection against the unfair exploitation of others' work results, which are regulated by the Act on the Protection of Trade Secrets (GeschGehG) as well as by the Act against Unfair Competition (UWG). These laws are particularly strict in Germany compared to foreign legal systems and have many special features. We also provide information below on how these different provisions interact in German IP law and how they are enforced here compared to other countries.

When reading, you will notice the following: If you cleverly use the protections offered by the German legal system within the framework of a sustainable concept, you can gain strategic advantages for your company – similar to a player of the Asian board game “Go”, who gains the upper hand over the other players by limiting their room to manoeuvre. We would be happy to assist you with the design and implementation of such strategies.

Your COHAUSZ & FLORACK team

## Protection for your technical inventions: registration of patents

To obtain patent protection for your technical invention in Germany, file the corresponding application, for example a first or subsequent application, either at the German Patent and Trademark Office (DPMA) or the European Patent Office (EPO). Proceedings before the EPO may be conducted in German, English, or French. At the German Patent and Trademark Office, proceedings may be initiated in English or French. However, a German translation must be submitted here no later than 12 months from the filing date (first application) or 15 months from the priority date (subsequent application). If the application was filed with the German Patent and Trademark Office in a language other than German, English, or French, the translation must be submitted within three months of the filing date. If you do not (yet) have a registered office in Germany, you must be represented by a “domestic representative” when filing

your patent application at the German Patent and Trademark Office. These are usually attorneys-at-law or patent attorneys from Germany. Under certain conditions, these may also be attorneys-at-law or patent attorneys from a member state of the European Union, a signatory state to the Agreement on the European Economic Area, or Switzerland, if they are admitted to the bar in Germany or are permitted to provide their services here on a temporary basis.

In addition, you can also request protection in Germany or another European country with an international patent application (conducted in accordance with the “Patent Cooperation Treaty” of 1970, also referred to as “PCT application”). In PCT proceedings, the national German phase of the patent application (DE phase) is to be initiated within 30 months of the priority

**Tip 1:** If you are looking for quick, cost-effective protection for your invention in Germany, the registration of a utility model is recommended. In this procedure it is not checked whether the subject matter to be protected is new or based on an inventive activity. After fulfilling the formal criteria (e.g. whether it is a technical invention), the utility model is registered within a few weeks. In an infringement action, the validity can be checked in the context of the procedure.

## Protection for your technical inventions: registration of patents

date of the application. The German translation must also be made available to the DPMA by this deadline. The European phase of the patent application (EP phase) must be initiated no later than 31 months after the priority date. If a translation into one of the official languages of the EPO is required, this should also be completed within this period. Be aware that claims fees may apply in both cases!

Once a patent has been granted, the German and European patent systems offer third parties the chance to file an opposition within nine months. Unlike a nullity suit, opposition proceedings are relatively inexpen-

sive. In German proceedings, a relevant prior art may, under certain conditions, still be submitted after the end of the opposition period. The EPO is stricter here: a document submitted subsequently must be prima facie relevant, for example prejudicial to novelty, to still be admitted to the proceedings. The respective patent office decides on the opposition in the first instance and the Federal Patent Court (Bundespatentgericht) or an EPO Board of Appeal in the second instance. No nullity suit may be brought while the opposition proceedings are pending.





## *Excursus*

# **Efficient protection in Europe: EU patent and Unified Patent Court**

Are you looking to invest and do business in a European country for the first time? Then you should know about the patent system in the EU. Before now, there has been no uniform patent throughout the EU, merely a uniform application and grant procedure. When you apply for a European patent at the European Patent Office (EPO), you must therefore choose in which states the patent will be valid after it is granted. The basis for this is the European Patent Convention (EPC), to which all 27 EU member states and eleven other European states are party.

To reduce the cost of translation in particular, and to make procedures more efficient, many EU countries have agreed on “closer cooperation” and have developed the idea of an EU patent. Contrary to the current situation, this is to be uniformly valid across the EU after being granted. A Unified Patent Court (UPC) is to be created for disputes relating to the EU patent, and it will be staffed by highly qualified legal and technical judges. The judgments of the UPC would automatically be effective in all participating Member States.

The – organizational, technical, and legal – preparations for establishing the UPC are complete for the most part. The exact date when the UPC will commence its work is currently uncertain for a variety of reasons.

# Protection for your brand: the registration of trademarks

You can acquire registered trademark protection in Germany through a national German trademark, an EU trademark, or via an international registration at the World Intellectual Property Organization (WIPO). The latter is filed at the Office of the so-called basic trademark. For a German trademark, the registration is filed at the German Patent and Trademark Office (DPMA) and for an EU trademark at the European Union Intellectual Property Office (EUIPO).

The systems of the national German trademark and the EU trademark differ only in a few points. For example, applicants pay an official fee for up to three classes of a German trademark, while additional fees are due only from the fourth class onwards. For the Union trademark, however, higher fees already apply from the second class onwards. Different regulations also exist for the chronological sequence of registration and oppositions. A German trademark, if all requirements are met, is usually registered within three to four months. An accelerated procedure, however, can be initiated for a fee to have the trademark registered within, ideally, one month. After a German trademark has been registered, holders of (potentially) prior rights may file an opposition within three months. The trademark may also be declared invalid and cancelled in official or judicial cancellation proceedings as a result of earlier rights. EU trademarks, on the other hand, are registered only once this three-month opposition period after trademark

publication has expired. Revocation proceedings before the Office due to prior rights are still possible for EU trademarks even after this period has expired. Grounds for refusal due to conflicting prior rights are not officially checked by the DPMA or the EUIPO. If the owner of a prior right does not take legal action, no objection by the Office will be made and the younger trademark will therefore be registered.

Incidentally, when applying for a trademark – whether an EU or German trademark – you do not have to prove that it has already been used. In the event of claims against third parties for trademark infringement, special usage requirements must be taken into account: trademark owners must be able to prove that they have already used the trademark within the last five years at the time of filing an infringement suit or before the conclusion of the oral hearing – if the opposition period already expired five years ago – or that there are justified reasons for them not using the trademark.

German trademark law, however, also protects marks that are not registered. These include, for example, trademarks acquired by use and notoriously well-known brands. Both must be very well known in Germany for the protection to be effective. However, it is rather rare for the owners of such well-known marks to fail to apply for registration. In this context,

## Protection for your brand: the registration of trademarks

business designations that are not registered, such as company names or work titles, are more relevant. Their protection already arises through the fact that they are in use. They can even prevail against younger registered trademarks in the same industry or in the case of work or product similarity. All companies from member states of the so-called Paris Convention for the protection of industrial property can also claim protection for their corporate trade name according to German trademark law, provided that the relevant trademark is also used in Germany.

What about trademark rights on the World Wide Web? If you are a trademark owner and want to cancel a domain that uses your trademark, your chances in Germany are rather slim. Although the trademark-infringing domain use can certainly be prohibited, you generally do not have a claim for cancellation or transfer of the domain as long as the domain holder can potentially still use the domain in a way that does not infringe on your trademark (this is usually possible because the domain holder can still use the domain for dissimilar goods or services, for example). On the other hand, your prospects are better if your trademark is well-known: you may be able to insist on cancellation of the domain because well-known trademarks may not be used for dissimilar goods or services. If the third-party domain is the name of your company, German law also offers a greater chance

of domain cancellation: for this to be the case, your company must have already used its name before the domain in question was registered. Securing a domain for another party's trademark may ultimately constitute an unfair commercial practice from an obstruction perspective if there is no fair interest in using the domain for one's own purposes, for instance if the domain is only secured to have it purchased by the trademark owner at a high price.

The deletion of a .de domain can be enforced only in court as alternative dispute resolution procedures do not exist. In order to ensure that the concerned domain is not transferred to third parties, a so-called DISPUTE entry can nonetheless be filed with the domain registrar. The owner of this DISPUTE entry automatically becomes the new domain owner once the domain is deleted. However, the DISPUTE application applies only for a limited amount of time and may also not be extended if you fail to take legal action against the domain name holder at the same time.

## How to enforce your property rights

### One system, two instances: your property rights in Court

Your patent or trademark has been infringed? In order for you to enforce your claims, twelve specialized patent dispute chambers are available at the relevant district Courts in Germany for patent litigation. The specialization, in addition to the rather patent holder-friendly rulings and relatively low costs in international comparison, has made Germany (and in particular Düsseldorf) one of the world's leading jurisdictions in patent litigation. Jurisdiction is also focused on individual Courts when it comes to trademark litigation, which has led to a high level of specialization.

There is a statutory requirement to be represented by an attorney-at law before these courts. As the owner of an IP right, you must therefore be represented by an attorney-at law admitted to the bar in Germany. In the event of a patent dispute, it is advisable to consult a patent attorney as well. If you are the claimant and are based outside the EU or EEA, you can usually be required to provide a security deposit for the costs of the proceedings at the request of the defendant. This secures any claim for reimbursement of costs by the defendant.

It is up to you as the rights holder to demonstrate the infringement of your IP rights – the court does not investigate. Documents, objects, witnesses, and experts are admissible as evidence. In rare cases, the parties may also be heard.

Essentially, there are two instances. In the first instance, the District Court (Landgericht) decides after an oral hearing, usually within one or two years. The ruling may be appealed. In the second instance, the Higher Regional Court (Oberlandesgericht) reviews this decision for legal errors and, in special cases, also re-examines new factual circumstances of the case. In exceptional cases, the parties can appeal against the decision of the Higher Regional Court to the Federal Court of Justice (Bundesgerichtshof).

The costs of court proceedings in Germany are usually borne by the losing party. The court and legal fees to be reimbursed are based on the amount in dispute and can usually be estimated and reduced to some degree beforehand using a list of costs.

Before court proceedings are initiated, the (alleged) infringer often receives an out-of-court warning, in which the owner of the IP right asserts his or her claims. If these concern injunctive relief, the infringer can avoid court proceedings by making a declaration to cease and desist and promising to pay a contractual penalty if he or she commits the same infringement again.

In addition to infringement suits, however, court proceedings to determine validity also play a major role in Germany: unlike infringement proceedings, for

## How to enforce your property rights

patents these are heard by the Federal Patent Court (Bundespatentgericht). This court acts as the first instance, usually ruling within two to three years after an oral hearing. The Federal Patent Court's decision can also be appealed against to the Federal Court of Justice (Bundesgerichtshof).

If an infringement procedure is pending concurrent with legal proceedings concerning the validity of a patent, a suspension of the infringement procedure may be requested until a decision has been made regarding the validity. However, the infringement Courts of first instance will suspend the proceedings only if substantial doubts as to the validity of the patent exist. This is usually only the case if a novelty-destroying document has been presented. The infringement Court, however, may not make a decision regarding the patent's validity and reject the infringement proceedings if it itself does not consider

the patent to be legally valid. It is fundamentally tied to the grant of a patent and can merely suspend the infringement proceedings in the case of pending doubts and concurrent proceedings regarding the legal validity.



# How to enforce your property rights

## On the safe side for the time being: expedited proceedings

In addition to the usual legal proceedings, one effective means of enforcing IP rights is interim legal protection, often also referred to as summary proceedings: this ensures that a provisional decision in the form of a preliminary injunction is reached within a short period of time (possibly after only a few days and, in particularly urgent cases, even without an oral hearing). In this way, a ban on the use of the patent or trademark can be imposed at short notice or the infringing goods can be seized and withdrawn from circulation.

One important requirement for a preliminary injunction to be issued is that there is a clear infringement of the IP right in question and thus, for example, a right to injunctive relief exists. You must conclusively demonstrate this “claim for injunctive relief” when you file such a motion. The grounds for injunction (“urgency”) must also be clearly stated in patent disputes. The main goal here is to highlight the urgency of your concern – in other words to show plausibility that any further delay could make it more difficult or even impossible to enforce the injunctive relief. In patent disputes you should also demonstrate that there is no doubt as to the validity of your IP right. This applies to patents and – even more so – to (unexamined) utility models. In contrast, in trademark infringements a “presumption of urgency” applies. This means that the claimant does not have to provide any further details on the grounds for the injunction.

**Tip 2:** If you are concerned that you may wrongly be suspected of an IP rights infringement (in particular in the run-up to the first presentation of your product at a German trade fair), you have the possibility of filing a protective letter with all competent Courts in Germany. In the protective letter you can explain and, if necessary, demonstrate why you believe you are not in violation of any IP rights. The protective letter is centrally filed in an electronic register and requested by the competent Court if a motion for an interim injunction is filed against you. You are typically informed if a motion is in fact filed against you and if the Court rejects the motion you may request a refund for the costs of the protective letter.

## How to enforce your property rights

In Germany, the twelve patent litigation chambers are responsible for motions for preliminary injunctions in patent or utility model infringements, just as they are for legal actions. These chambers check the motions in advance and usually inform you as the claimant if your chances of success are poor. You can then withdraw your motion, potentially without the alleged infringer knowing about it. If, on the other hand, the court considers your motion to be well-founded, the preliminary injunction may even be issued within a few days or even hours without an oral hearing. This is particularly helpful at trade fairs, where a lot of business is conducted and the products in question should be taken out of circulation as soon as possible. A preliminary injunction must be served on the defendant (or his or her attorney of record) within one month of its being issued. The defendant may then lodge an objection if the preliminary injunction was issued without an oral hearing. If, after an oral hearing, a decision is made to uphold the injunction ruling in the opposition proceedings, the losing party still has the chance to appeal.

**Tip 3:** As soon as you become aware of the fact that your rights have been violated, it is important to act quickly and to submit the request for preliminary injunction to the Court – ideally within one month of detecting the infringement. Otherwise, the Court could have doubts about the urgency of the matter, which is the basis for the injunction.

# How to enforce your property rights

## Secure evidence early on: inspection proceedings

One way of securing evidence in advance for later infringement proceedings is the inspection proceeding. You, as the IP right owner (or licensee or other beneficial owner), may use it particularly in cases in which you suspect an infringement, but are not able to sufficiently prove it.

In order to protect the interests of the potential IP rights infringer, strict rules apply for the procedure. The inspection is carried out by an expert appointed by the Court. He is usually accompanied by an attorney and a patent attorney of the claimant. In addition, a bailiff is also present during the inspection. All parties are obligated to maintain confidentiality. The claimant himself is not allowed to be present at the inspection. He must clearly state the items that are to be inspected beforehand. These may include the opposing party's

machines or products, but processes and products, or even construction drawings and manuals can also serve as evidence.

An inspection always takes place unannounced in order to find as much evidence as possible in the business operations of the alleged IP right infringer, which would then suffice for a lawsuit. However, the opposing party can still call in its own attorney or patent attorney at short notice.

After the inspection, the expert provides an expert opinion that may also be handed out to the claimant – in so far as there are no confidentiality issues on the part of the opposing party.



## Minimise risks: due diligence procedure

IP rights are a high priority in Germany. If you, as a foreign company or investor, do business in the German market, you should also look into the IP rights of your business partners. This particularly applies for the purchase of companies or participations. With the help of due diligence assessments, risks relating to IP rights can be identified and minimised in due time.

You should examine the patent portfolio of the company that is to be purchased already when determining a purchase price. A main subject in the negotiations with the seller should be the “quality” of the respective IP rights portfolio. However, the sheer number of property rights is not always adequately informative. For example, the quality of a patent is, among other things, characterized by the legal status, the ownership, the remaining term, the extent of protection, the legal validity, and the legal enforceability. If possible, your due diligence should assess all of these factors.

When assessing these factors, national regulations and standards have to be taken into consideration – from the definition of “state of the art” up to the interpretation of claims in patent infringements. Caution: In some respects the German legal system differs from other legal systems. For example, you should bear in mind the particularities arising from the Employee Inventor Act (ArbnErfG) (see excursus). This is especially important in order to check the effective

transfer of an invention from an employee to the employer. In addition, the ArbnErfG can also be useful for you within the context of a due diligence. As it regulates the amount of remuneration for the inventor based on the value of the invention, evidence of the financial value of the IP rights of your business partners may also result from the careful documentation of the employer.

In addition, you should also closely observe potential competitors and assess their IP rights, since competitor patents or trademarks may limit your own freedom to operate or commit you to paying licensing fees. You should counteract this – and a due diligence is an appropriate means to do so, provided you take into account the national specificities.

## *Excursus*

### **How to deal with the ideas of your employees: employee inventor law**

If your company employs staff under German law who come up with a technical invention (“job-related invention”) in the course of their employment, you must comply with the Employee Invention Act (ArbnErfG). This is because the right to an invention is initially held by its inventor, i.e. the employee. At the same time, however, you as an employer depend on being able to use the innovations that your employees create exclusively for your company. The Employee Invention Act provides a balance of interests here: it obliges the employee to report the job-related invention to you. You can then decide within a certain period whether you want to take over (“claim”) the invention. If you decide to do so, the right to the invention automatically passes from the employee inventor to you (see below). In this case, however, you are also obliged to file a German or European patent application for the job-related invention. An international (PCT) application designating Germany as a contracting state also fulfils this obligation.

In so far as you wish to claim the service invention, the employee inventor is entitled to appropriate remuneration. The amount of the remuneration that you contractually agree to with your employee depends on the extent to which you use the invention (for example in your own operation or through licensing), on the position of the employee in the company, and on his personal

**Tip 4:** Four months after notification by the employee, a service invention automatically passes over to you as the employer. A non-explicit release is regarded as claim of the invention and can, among other things, obligate you to pay the inventor remuneration. You should therefore promptly check whether you wish to make use of the invention. If it is clear for you that you have no interest in the invention, you should release it at an early stage.

contribution to the invention. If several inventors are involved, the relevant employee receives pro rata remuneration. In many cases, the so-called license analogy is applied: The payment is then calculated like a license agreement with a free inventor, whereby the employee inventor receives only a fraction (usually between 10 and 20 per cent) of the license rate of a free inventor. However, there are also cases in which employers and employees cannot agree on a suitable inventor remuneration. The DPMA has a board of arbitration for such cases. This generally has to be called in before one of the parties takes the matter before a court of law.

## Excursus

### How to deal with the ideas of your employees: employee inventor law

Under certain circumstances, you can also declare an invention to be a trade secret and refrain from submitting a patent application. In this case the employee is also entitled to appropriate remuneration. If you do not wish to register in certain countries, or if you want to abandon an existing IP right or an IP right registration, you must give the employee inventor the opportunity to file an application at his own expense or to take on the IP right himself.

**Tip 5:** In order to minimize the administrative burden that accompanies the obligation to offer the invention to the employee inventor, you can agree contractually with the employee that he indemnifies you from your obligations, for example, against payment of an incentive. Such an agreement can be made only after the respective invention has been reported. Overall agreements, for example in the employment contract, are not valid.

# Overview: Offices and Courts in Germany

## Patent application

DPMA – German Patent and Trademark Office

EPO – European Patent Office

## Trademark application

DPMA – German Patent and Trademark Office

EUIPO – European Union Intellectual Property Office

WIPO – World Intellectual Property Organisation

## Patent infringement proceedings

### First instance

District Court of Düsseldorf

District Court of Mannheim

District Court of Hamburg

District Court of München  
and eight more District Courts

### Second instance

Higher Regional Court of Düsseldorf

Higher Regional Court of Karlsruhe

Higher Regional Court of Hamburg

Higher Regional Court of München  
and eight more Higher Regional Courts

### Third instance

Federal Court of Justice

## Patent nullity proceedings

### First instance

Federal Patent Court

### Second instance

Federal Court of Justice

## About COHAUSZ & FLORACK

COHAUSZ & FLORACK is an interdisciplinary firm of patent attorneys and attorneys founded in 1954 and based in Düsseldorf that combines technical and scientific know-how with legal competence. 31 patent attorneys and five attorneys currently work for the firm. In total, the firm has more than 140 employees.

Our consulting services include all aspects of IP rights, as well as the adjacent areas of law such as unfair competition and contractual matters. This is where we assist our national and international clients in everyday business matters as well as in dealing with specific conflict situations.

COHAUSZ & FLORACK is a service provider in legal matters as well as a strategic management consultant for the legal aspect of the trademark and innovation policies of our clients. We have particular expertise in the design, registration, tracking and management of extensive IP rights portfolios.

COHAUSZ & FLORACK represents clients in all legal disputes relating to IP rights before state courts and offices, also within the framework of alternative dispute resolution. Our clients include DAX and Dow Jones-listed international corporations as well as innovative medium-sized companies from all over Germany.

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