

Intellectual Property - Austria

Overview (March 2013)

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Introduction

The Patent Office is the central authority for IP rights in Austria and all applications for a patent, trademark or design must be filed therein. The key regulations in this field are laid down in separate acts for each type of right, namely:

- the Patent Act;
- the Registered Design Act;
- the Semiconductor Protection Act;
- the Trademark Act;
- the Design Protection Act; and
- the Copyright Act.

Patents

Under Section 1 of the Patent Act, an invention is eligible for patent protection if it is:

- novel;
- industrially applicable; and
- not obvious to an expert in the field.

The invention can relate to a process or a product. Patents are not granted for inventions that, among other things, violate public decency or pertain to procedures for the cloning of humans or using human embryos.

A patent gives the holder an exclusive right to the commercial production and general use of the invention.

Registration with Patent Office

Legal protection for patents is granted by virtue of their registration with the Patent Office. On proper filing with the office, the applicant has the right of priority against other (later) filed applications.

The office will verify the application in relation to formal requirements and examine whether material requirements have been met. The application will then be published in the *Patent Gazette*. Third parties may object to the patentability. If the patent is granted, the decision will be published in the *Patent Gazette* and the patent registered with the Patent Office. A patent certificate will also be issued.

The decision can be appealed within a period of four months. The Patent Office can reject the appeal or revoke the patent right. Its decision can be challenged before the complaint department or the Supreme Patent and Trademark Senate.

Protection

Patent protection is granted for a period of 20 years from the date of application. In general, the right to obtain a patent belongs to the inventor or his or her legal successor. The act also offers detailed regulation concerning inventions by an employee in the course of employment. If it has been previously agreed with the

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employee or the employee is a public servant, the employer can claim the rights to the invention for itself.

Infringement

If a patent has been infringed, the holder can claim a cease and desist order, request removal or destruction or order publication of the judgment. In addition, the holder is entitled to appropriate compensation or (in case of culpable patent infringement) damages, or has a right to claim surrender of profits. The holder may also demand criminal prosecution in cases of intentional patent infringement.

Registered designs

As a result of the Registered Design Act, faster protection can be obtained for inventions that do not have the characteristics of an invention necessary to acquire patent protection. Thus, registered designs are also known as 'small patents'.

Registration with Patent Office

Legal protection for registered designs is granted by virtue of their registration with the Patent Office. On proper filing with the office, the applicant has the right of priority against other (later) filed applications.

Protection

The registration of such a design is much simpler than that for a patent, as the investigation considers only on whether it complies with the law, not whether it is new. As a result, the protection period is shorter (a maximum of 10 years), although the scope of protection corresponds to that of a patent.

Infringement

If a registered design has been infringed, the holder can claim a cease and desist order, request removal or order publication of the judgment. In addition, the holder is entitled to appropriate compensation or (in case of culpable infringement) damages, or can claim surrender of profits. The holder may also demand criminal prosecution in cases of intentional patent infringement.

Semiconductor protection

The topography of semiconductor elements enjoys a protection that is similar to that of a patent, regulated through the Semiconductor Protection Act.

Registration with Patent Office

The registration process is similar that for patents. The Patent Office will examine whether formal requirements have been met. However, it will not examine whether material requirements have been met. On completion of the registration process, registration with the Semiconductor Register is effected and the decision published in the *Patent Gazette*.

Protection is granted on the first day of non-confidential use for business purposes, provided that the application is filed within two years thereafter. If topography has been used confidentially for business purposes, protection is granted on the date on which the application is filed with the Patent Office. On successful registration, semiconductor protection results in a right to bar third parties from reproducing the topography in the course of business or from producing designs for the production of topographies. Furthermore, the holder of the right can bar any third party from offering designs intended for the production of topographies.

Protection

The maximum term of protection is 10 years.

Infringement

Legal remedies under the Patent Act are applied correspondingly.

Trademarks

Section 1 of the Trademark Act defines 'trademarks' as signs that can be graphically illustrated (eg, words, pictures, letters and figures) and serve to distinguish goods and services of an undertaking from goods and services of another undertaking.

Not all marks can be registered; exceptions include official symbols and so-called 'generic' names. Under Austrian law, sounds (but not smells and flavours) are also eligible for trademark protection. Trademarks may be represented by words, pictures or combinations thereof. Provided that they are distinctive, trademarks consisting of letters or figures are also eligible.

Registration with Patent Office

Legal protection for trademarks is granted by virtue of their registration with the Patent Office. A trademark registration results in an exclusive right so that only the holder of the right may use the trademark.

On the basis of the International Classification of Goods and Services for the Purposes

of the Registration of Marks, the application must state for which categories of goods or services the trademark is intended. On proper filing with the Patent Office, the applicant has the right of priority against other (later) filed applications. The office will examine the application pertaining to formal requirements and investigate whether similar trademarks have previously been registered. If an identical or similar trademark has been registered before the filing by the applicant, the applicant will be informed by the Patent Office regarding this matter and can decide to pursue the application further or refrain from it.

On successful registration, the applicant will receive written confirmation and the trademark will be published in the *Trademark Gazette*.

Since a 2010 revision of the Trademark Act, holders of an earlier trademark may institute opposition proceedings against an identical or similar younger trademark. Such opposition proceedings can be instituted within three months following the publication of the younger trademark.

Protection

An initial registration provides protection for 10 years, and renewals for further 10-year periods are possible without limitation.

Infringement

In case of infringement, the holder may claim:

- damages (following culpable infringement);
- compensation for unjust enrichment;
- removal;
- a cease and desist order; or
- payment of reasonable compensation.

The holder may also demand criminal prosecution, in cases of intentional infringement. Under Section 58 of the Trademark Act, a cease and desist order is no longer available if the trademark holder had knowledge of the use of its trademark by third parties and did not object to the illegitimate use within a period of five subsequent years.

Community trademarks

The EU Community Trademark Regulation provides for an additional route for trademark protection, effective within the European Union. Applications for Community trademarks can be filed with the Patent Office. The Community trademark can be distinguished from an international trademark, which was created by way of the 1891 Madrid Trademark Agreement. This agreement has opened the possibility to member countries of extending trademark protection from the country of origin to all other member states for a period of 20 years.

Design protection

Designs are defined as models for the appearance of a commercial product and enjoy the protection of the Design Protection Act. The act protects the form, colour and material of the design, among other things, and grants a right of exclusivity. Construction or function are not protected under the act.

Registration with Patent Office

Design protection grants the exclusive right to use the design and to bar others from use without prior consent. Protection can be sought by application to the Patent Office. The design must be presented by means of an example or image. On the basis of a classification of goods under the international treaty of Locarno, the application must state for which categories of goods the design is intended. The Patent Office will examine the application pertaining to formal requirements; it will not investigate if the design is new. In particular, the design must not violate *bonos mores* (ie, good morals) or public order. On the date of filing of the design, the applicant is granted the right of priority against other (later) filed applications.

On registration, the design will be published in the *Design Gazette* and a design certificate issued.

Protection

The initial period of protection is five years and renewals for further five-year periods are possible (up to four times).

In general, the creator (or his or her legal successor) is entitled to protection under the Design Protection Act. However, if an employee invents a design in the course of employment, the design is part of the area of work of the company and the activity leading to the invention of the design was part of the employee's duties, the employer may claim the rights to the design for itself, unless agreed otherwise. The same holds true if the design was developed in the course of a mandate.

Infringement

In case of infringement, the holder may claim damages (in case of culpable infringement), a cease and desist order or payment of reasonable compensation, as well as removal and publication of the judgment. The holder may also demand criminal prosecution in cases of intentional infringement.

Copyright

Copyright protects literary, musical, artistic and cinematographic works. Computer programs are also deemed to be works within the meaning of the Copyright Act, provided that they are the result of an author's own intellectual creation.

Copyright protection

Copyright arises not on notification or registration, but immediately on creation of the work. The author of a work is the natural person who created the work. Copyright gives the author the exclusive right of exploitation; however, this is subject to certain limitations (eg, reproduction by third parties on paper or on a similar medium for private use is permitted). In general, the author may reproduce his or her own work, lease, broadcast, perform it in public or make it available to the public by means of electronic devices.

Protection period

The protection period is 70 years for works of literature, music and the arts and cinematographic works; for broadcasts, sound carriers and photographs, protection lasts 50 years. Free works (eg, laws, decrees and official works) are not granted copyright protection.

Infringement

In cases of copyright infringement, the copyright holder can demand a cease and desist order, request removal or order publication of the judgment, as well as requesting damages (in case of culpable infringement) and payment of a reasonable compensation. In certain cases, criminal prosecution is possible.

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