



GUIDE TO GOING GLOBAL

IPT

Austria



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INTRODUCTION

Welcome to the 2023 edition of DLA Piper's *Guide to Going Global – Intellectual Property and Technology*.

GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics companies need to know. The *Guide to Going Global* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

INTELLECTUAL PROPERTY AND TECHNOLOGY

Inside this guide, we outline crucial aspects of IPT laws in over 40 jurisdictions that are particularly relevant to businesses seeking to expand their operations globally. We also summarize some fundamental commercial terms that customarily appear in IPT-related agreements.

You will find answers to such common questions as:

- Which jurisdictions recognize moral rights?
- What does my business need to do to have an enforceable assignment of intellectual property from an employee, from a consultant?
- What kind of liability can be excluded from a commercial contract?

With this edition, we've also included a section for each country that discusses the enforceability of electronic signatures.

Our goal is to make the guide as readable and informative as possible, providing you just the background you need to get an overview of the IPT laws in the selected jurisdictions. This is not a substitute for professional legal advice. If you have questions regarding specific matters, we encourage you to contact one of our contributors listed in the contributors section of this guide. With nearly 500 dedicated IPT lawyers around the globe, DLA Piper's IPT group is ready to handle your legal needs wherever you do business.

Also, please note that the guide's use of the term "trademarks" also refers to service marks, unless specifically addressed separately. The summary of intellectual property covers only the most commonly used categories worldwide (for example, we have not addressed plant patents). We have also referred to international treaties and conventions with their most commonly used names and not their formal titles (such as the TRIPS Agreement, the Berne Convention, the Paris Convention and the Patent Cooperation Treaty).

We hope that you find this guide valuable and we welcome your feedback.

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This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that intellectual property and technology law is dynamic, and the legal regime in the countries surveyed could change.

AUSTRIA



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INTELLECTUAL PROPERTY FRAMEWORK

Overview

In general, intellectual property rights in Austria are governed by specific federal statutory laws, as follows:

- Copyright – the Copyright Act (*Urheberrechtsgesetz*)
- Patent – the Patent Act (*Patentgesetz*)
- Utility Models – the Utility Model Act (*Gebrauchsmustergesetz*)
- Trademarks – the Trademark Act (*Markenschutzgesetz*)
- Semiconductors – the Semiconductor Protection Act (*Halbleiterschutzgesetz*)
- Designs and utility patents – the Designs Act (*Musterschutzgesetz*)
- Trade secrets – the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*)

Certain other statutory laws protect other manifestations of intellectual property that do not fulfill the requirements of the intellectual property types cited above in various ways – in particular, the Act on Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*), which imposes a more general prohibition or limitation to takeover of other persons' intellectual works and offers protection for trade secrets and know-how, the Criminal Code (*Strafgesetzbuch*), which penalizes certain trade secret related actions and the Commercial Code (*Unternehmensgesetzbuch*) and Company Register Code (*Firmenbuchgesetz*), which provide protection for names and company names.

COMMERCIAL CONTRACT FRAMEWORK

Overview

Austrian law contains extensive federal legislation (of both a dispositive and mandatory nature) on commercial contracts, considering both the general principles (such as interpretation) and the specific contract types. In business-to-consumer relationships, the Consumer Protection Act (*Konsumentenschutzgesetz*) and the Distance and Off-Premises Act (*Fern- und Auswärtsgeschäfte-Gesetz*) are also of great relevance.

The general principles of contracts as well as a large number of contracts are regulated in the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) and Commercial Code (*Unternehmensgesetzbuch*), including the publishing contract (Sections 1172 and 1173 Civil Code).

Further regulations are contained in the IP-specific acts mentioned above, as well as in statutory laws regulating other specific contract types.

Commercial contracts are enforced by courts according to general civil proceedings regulations – the Civil Proceedings Act (*Zivilprozessordnung*) and the Enforcement Act (*Exekutionsordnung*).

COPYRIGHTS

Nature of right

Copyrights are available for works that are "unique intellectual creations" (*eigentümliche geistige Schöpfung*) in the fields of literature (including computer programs), musical art, fine arts and movie arts. The main criteria to determine whether a creation is a work are human creativity and originality/individuality; no specific quality of work is required. There is detailed case law in Austria dealing with the assessment of whether a work is subject to copyright. The work does not have to be fixed in a tangible medium to be protected. Furthermore, it is not possible to register works because there is no register for copyrights.

The Copyright Act also provides protection for several "related rights" that are not copyrighted but are subject to the same or similar regulations (ancillary copyright – *Leistungsschutzrecht*). These rights are relevant for performers and presenters, producers of media and broadcasters. Certain works (ie, databases and photographs) can be subject to both copyright (if sufficiently original) and ancillary copyright. Finally, the Copyright Act also provides protection for technical measures intended to prevent copyright infringement (digital rights management protection).

Copyright owners have the exclusive right to exploit their work (including the right to reproduce, distribute, lend, lease, prepare derivative works, make work available, emit and publicly perform) as well as certain personal rights (such as the right to be named as author).

It is possible to use copyrighted works under certain circumstances (so-called "free work use"). These free work uses include among others (Sections 41 et seq. Copyright Acts):

- Use for administration and justice administration
- Use for volatile and accompanying reproductions
- Reporting of daily events
- Teaching and learning purposes

- Use for text and data mining

Legal framework

Copyrights are governed by the Copyright Act, which also implements various EU directives.

Austria is also a party to several international treaties (including the WIPO Copyright Treaty and the TRIPS Agreement).

Duration of right

In general, the duration of copyright protection is 70 years after the author's death. There are specific regulations for:

- i. Film works, where the duration of the right is 70 years after the latest death of the following persons: the main director, the author of the script, the author of the dialogues, and the author of musical works made specifically for the film
- ii. Related rights of the performers and presenters, where the duration of the right is 50 years after the presentation or, if the presentation was recorded and published or publicly reproduced, within this deadline, 70 years after the publication or reproduction
- iii. Photographs which are not subject to copyright, where the duration of the right is 50 years after the making of the photography or, if published, 50 years after publication
- iv. Rights of the producer of audio media, where the duration of the right is 70 years after the publication or 50 years after the recording if not published within this period
- v. Radio broadcasts, where the duration of the right is 50 years after the broadcast
- vi. Databases not subject to copyright, where the duration of the right is 15 years after the finalization of the database or, if published, 15 years after the publication

Renewal of rights provided by the Copyright Act is not possible.

Ownership / licenses

The owner of a copyright can only be a natural person or their successor; a legal entity may only be a licensee. The right as such is not transferable (except in the case of universal succession – that is, inheritance). However, the owner may license single, several or all exploitation rights (eg, right to reproduce, right to distribute, right to make the work available, right to emit). Personality rights (eg, right to be named as author) are not transferable or limitable, unless agreed otherwise by the owner.

Joint ownership of copyrights is recognized.

Remedies for infringement

Civil remedies for copyright infringement include:

- Cessation of infringement (preliminary or permanent injunction)
- Claim for elimination of the circumstances constituting the infringement, including the destruction of infringing copies
- Rendering of accounts
- Publication of judgment
- Monetary relief (adequate consideration, damages and handover of profits)

Criminal remedies may include:

- Monetary fine
- Imprisonment

Preventing import of infringing goods and cooperation of customs officers may also be invoked.

MASK WORKS / TOPOGRAPHIES

Nature of right

Protection is available for three-dimensional structures of a micro-electric semiconductor product (topographies as well as gate arrays), which are results of its creator's own intellectual effort and are not commonplace in the semiconductor industry.

A "semiconductor product" is the final or an intermediate form of any product:

- Consisting of a body of material which includes a layer of semiconducting material
- Having one or more other layers composed of conducting, insulating or semiconducting material, the layers being arranged in accordance with a predetermined three-dimensional pattern
- Intended to perform an electronic function, exclusively or together with other functions

The "topography" of a semiconductor product is a series of related images, which represents the 3-dimensional pattern of the layers making up a semiconductor product, both fixed or encoded. Additionally, each image in said series must consist of the pattern of a semiconductor product's surface at any stage of manufacture.

The owner of the semiconductor protection right may exclude any other person from:

- Reproducing the topography or its separately exploitable parts
- Producing images of and instructions for production of topography

- Offering, introducing into the market, or importing such images and instructions

Legal framework

Semiconductor protection is governed by the Semiconductor Protection Act and ancillary ordinances as well as the EU Semiconductor Protection Directive and the TRIPS Agreement.

Duration of right

The duration of protection for semiconductors is 10 years from registration (ends at end of tenth calendar year). Semiconductors must be registered within 2 years of the first non-confidential commercial exploitation.

Ownership / licenses

Rights in semiconductor products and their topographies are freely transferable, subject to registration in the semiconductor registry.

Remedies for infringement

Civil remedies for infringement include:

- i. Cessation of infringement (preliminary or permanent injunction)
- ii. Claim for elimination of the circumstances constituting the infringement, including the destruction of infringing copies
- iii. Rendering of account
- iv. Publication of judgment
- v. Monetary relief (adequate consideration, damages and handover of profits)

Criminal remedies include:

- i. Monetary fine
- ii. Imprisonment

PATENTS

Nature of right

Patents are granted on technical inventions which are novel and commercially usable. Additionally, those inventions must not be obvious to industry experts, according to the current state of the art.

The patent owner has an exclusive right to produce, place onto the market, offer for sale and use the claimed invention.

Legal framework

Patents in Austria are governed by the Austrian Patent Law 1970. Austria became party to the Patent Cooperation Treaty in 1979 and to the Paris Convention in 1908.

Duration of right

Patent rights have a duration of 20 years from the filing date of an application.

Ownership / licenses

The inventor or their successor in title has a right to the granted patent.

Patent owners may grant licenses. The license may, but does not need to, be recorded in the patent register for the perfection of the license. However, the license is effective towards third parties only upon registration.

Compulsory licensing is available in certain exceptional cases (such as the owner failing to use the patent).

Remedies for infringement

Civil remedies for infringement include:

- i. Cessation of infringement (preliminary or permanent injunction)
- ii. Claim for elimination of the circumstances constituting the infringement
- iii. Rendering of account
- iv. Publication of judgment
- v. Monetary relief

Criminal remedies may include:

- i. Monetary fine
- ii. Imprisonment

Based on a regulation of the European Council (EC No. 608/2013) in combination with the Austrian Product Piracy Act (PPG 2004), an application for action may be filed with the Customs Authorities in order to prevent the import of infringing goods.

TRADEMARKS

Nature of right

Trademarks can be any sign that can be represented graphically, in particular words, including personal names, designs, letters, numerals and the shape or style of the goods, provided that such signs are capable of distinguishing the goods or services of one enterprise from those of other enterprises. Three-dimensional marks, color marks and sound marks are also protectable, if sufficiently graphically displayable/displayed. Furthermore, also motion marks and multimedia marks are protectable, if they can be played back through a corresponding video file; in that case the video file is published in the Trademark Register. Haptic or olfactory marks and national emblems are not protectable as trademarks in Austria.

Legal framework

The Austrian Trademark Act (*Markenschutzgesetz*) protects registered trademarks. Non-registered trademarks, in Austria termed "signs," may have protection according to Article 9 of the Austrian Act on Unfair Competition.

Austria became a member of the Madrid Agreement in 1909 and Madrid Protocol in 1999. Austria signed the Trademark Law Treaty in 1994.

Duration of right

Trademark registrations are in effect for 10 years and are renewable repeatedly for 10-year periods by paying a renewal fee.

Ownership / licenses

Trademark owners may grant licenses. A license may, but does not need to, be recorded in the trademark register.

Remedies for infringement

Civil remedies for infringement of trademarks include:

- Cessation of infringement (preliminary or permanent injunction)
- Claim for elimination of the circumstances constituting the infringement
- Rendering of account
- Publication of judgment
- Monetary relief

Criminal remedies for infringement of trademarks include:

- Monetary fine
- Imprisonment

Registered marks can be filed with Austrian customs to prevent import of goods that contain infringing marks.

TRADE SECRETS

Nature of right

Trade secrets as such are not recognized as an intellectual property asset in Austria, even though their protection is ensured by general statutory acts. Further protection was implemented into the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*) in 2018, mostly based on EU-Directive 2016/943.

Trade secrets are defined as information that is

1. secret, in the sense that it is not known or readily accessible by persons that normally deal with the kind of information in question,
2. of commercial value because it is secret, and
3. subject to reasonable steps to be kept

All 3 requirements are necessary for a trade secret. Reasonable steps may include specific IT-security measure, making secret information only accessible to certain trustworthy employees and non-disclosure agreements.

A variety of information may be considered a trade secret according to the definition above. This includes rights which may be already protected (eg, inventions and designs) as well as otherwise unprotected information such as production processes, customer data, business models, big data analysis and market development data.

Legal framework

Trade secrets are addressed in a variety of legislation.

Sections 26a – 26j the Unfair Competition Act define trade secrets and regulate their use, misuse and accompanying consequences. It is also possible to hold confidential court proceedings (Section 26h Unfair Competition Act).

Additionally, Sections 122-124 of the Criminal Code penalize the discovery, publication or exploitation of trade secrets in various ways.

Duration of right

Indefinite, as long as protection criteria are met.

Ownership / licenses

The owner of a trade secret can be a natural person or a legal entity.

Remedies for infringement

Civil remedies include:

- i. Cessation of infringement (preliminary or permanent injunction)

- ii. Claim for elimination of the circumstances constituting the infringement, including the destruction of infringing materials
- iii. Monetary relief (including lost profit, adequate consideration, damages, handover of profits; and under special circumstances: compensation for insults or personal disadvantages)

Criminal remedies include:

- i. Monetary fine
- ii. Imprisonment

Certain measures ensure that trade secrets are not exposed during (civil) court proceedings, including not to the opposing party. This includes the possibility to only disclose minimum information necessary to substantiate a claim or have a court appointed expert witness report to the court about the trade secret without revealing confidential information.

If it is imperative to guarantee a fair trial the court may, however, order the disclosure of a trade secret.

OTHER KEY IP RIGHTS

Nature of right

Not applicable for this jurisdiction.

Legal framework

Not applicable for this jurisdiction.

Duration of right

Not applicable for this jurisdiction.

Ownership / licenses

Not applicable for this jurisdiction.

Remedies for infringement

Not applicable for this jurisdiction.

INTELLECTUAL PROPERTY IN EMPLOYMENT CONTEXT

Employees

The Austrian Copyright Act does not recognize "works made for hire," i.e., the original author is always the owner of the copyright. However, it is possible to license the exploitation rights. In certain cases, Austrian law recognizes the implied license for an employer to use an employee invention developed during employment using the employer's resources (equipment or funding). Nevertheless, it is highly recommended that employers address the licensing of inventions developed by employees in the employment agreement. There is a statutory assumption of an implicit license for computer programs.

The Austrian Patent Act provides similar principles to patents, with the exception that there is a statutory transfer claim for inventions made by employees in public service (clerks). Otherwise, a transfer right must be agreed in the employment contract or collective labor agreement.

For semiconductors, the same principles as regarding patents apply; however, there is a statutory assumption for a license in case of works made for hire (applies to both employees and contractors). The same applies to designs and utility patents.

Trademarks are freely transferable and can therefore also be made for hire for another person (including legal entities).

Consultants / contractors

In the absence of an agreement, consultants and contractors will retain ownership of the intellectual property developed by them, even if contracted and paid for by another party. The agreement can, however, be oral and implied; nevertheless, written agreements are recommended for evidentiary purposes. This is subject to the above mentioned exceptions,

KEY COMMERCIAL CONTRACT CONSIDERATIONS

Registration of commercial agreements

There are no general registration requirements for commercial contracts, except for any transfer of patents and registered rights where the Patent Office must be provided with the transfer agreement in order to register the transfer.

Registration of licenses for patents, utility patents, designs and trademarks is possible and necessary for the license to have *erga omnes* (absolute) validity, but is not required for the validity of the transfer itself.

Recognized language of commercial agreements

There are strict requirements on the clarity of business-to-consumer contracts. In principle, the clarity is in principle jeopardized if the consumer is not familiar with the language of the contract. In case of Austrian consumers, any contract that is not written in German will likely be unclear to the consumer and thus invalid.

Country-specific issues for online content

The E-Commerce Act (*E-Commerce-Gesetz*) provides limitations of liability for the providers of routing, search engine, caching, hosting and linking services under specific requirements in case of infringements.

Enforceability of online/clickwrap/shrinkwrap terms

Online terms which are in line with the E-Commerce Act (and, if applicable, the Consumer Protection Act) are recognized and fully enforceable. In accordance with consumer protection laws, consumers are usually entitled to revoke the respective non-compliant contract. It is recommended to notify customers about their right to revoke such contracts (including a revocation template) in a document separate from the terms and conditions.

The enforceability of shrinkwrap terms is severely disputed under Austrian and EU law. This is due to the provisions of Austrian law stating that a contract should be finally concluded before it is executed, and most shrinkwrap agreements do not meet this standard. In addition, under EU law the Rome I and Brussels I regulations also affect this issue and in some cases limit the applicability of shrinkwrap licenses.

Governing law

Governing law and venue for resolution of disputes (including arbitration) specified in a commercial contract will generally be accepted and recognized, under certain limitations. The governing law is in general subject to *ordre public* reservation. Additional and more severe limitations apply to business-to-consumer contracts and employment contracts. Dispute resolution and arbitration clauses that materially disrupt the balance between the parties (e.g., one-way arbitration clauses) should be carefully assessed in each specific case.

KEY COMMERCIAL CONTRACT TERMS

Enforceability of warranty disclaimers

Limitations and exclusions of warranty claims are generally permissible, except if *contra bonos mores*, but to be interpreted restrictively. Such disclaimers are not permissible in business-to-consumer contracts.

Enforceability of exclusions/limitations of liability indemnification

Exclusion or limitation of liability is permissible in principle for damages caused by slight negligence; they are not permissible for willful misconduct. Limitations or exclusion of liability for gross negligence are not permissible in business-to-consumer contracts and exclusion for slight negligence is only possible to a certain extent and are explicitly excluded in certain cases.

Furthermore, any limitation of liability should be assessed as to whether or not it is *contra bonos mores* in the specific case.

Exclusion or limitation of liability for death and injury is not permissible.

The same principles apply for caps on direct damages (ie, a cap is considered as a limitation of liability and to be treated under the same principles).

Exclusion or limitation of liability for indirect or consequential damages is to a certain extent permissible, but these terms are not fully defined under Austrian law and a precise description of excluded damages is recommended.

Indemnification

In general, express indemnities stated in contracts are permissible. Note that there is no indemnification concept comparable to US law in Austria.

Electronic signatures

In Austria, electronic signatures are regulated by the Signatures and Trust Services Act (*Signatur- und Vertrauensdienstegesetz*) which is based on the Regulation 910/2014 on electronic identification and trust services for electronic transactions in the internal market.

Generally, a qualified electronic signature equals a handwritten signature and has the same legal effects as any written signature, unless the parties agree otherwise. According to the "non-discrimination-rule" in the Signatures and Trust Services Act, any documents signed with an electronic signature in general have to be equally accepted as evidence in the court.

There are some exceptions when electronic signatures are not acceptable – for example, surety agreements, last will and certain declarations in family and inheritance law.

KEY CONTACTS



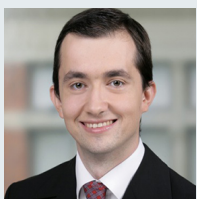
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