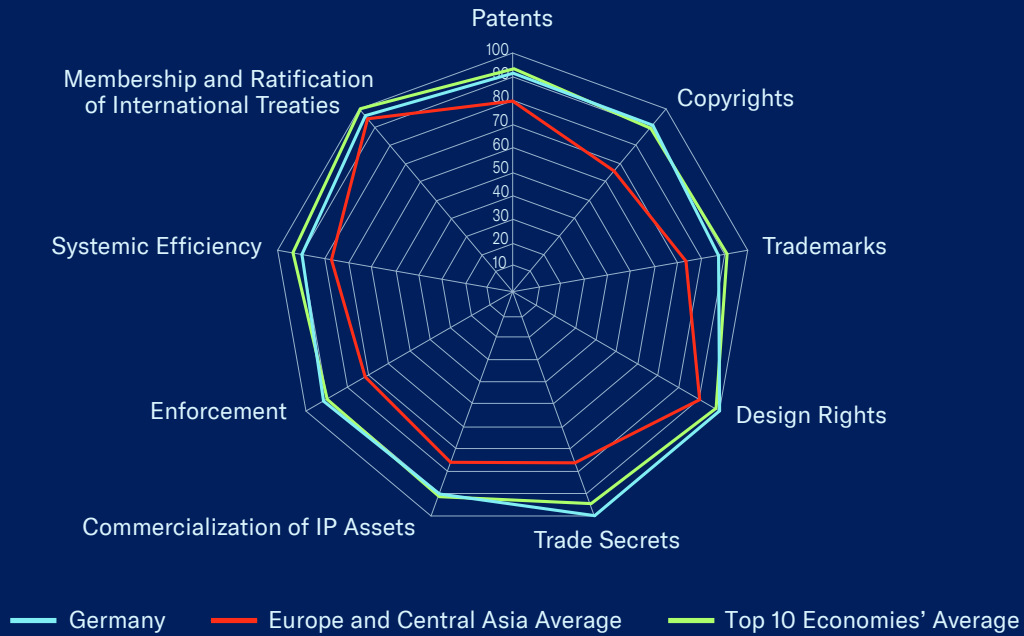
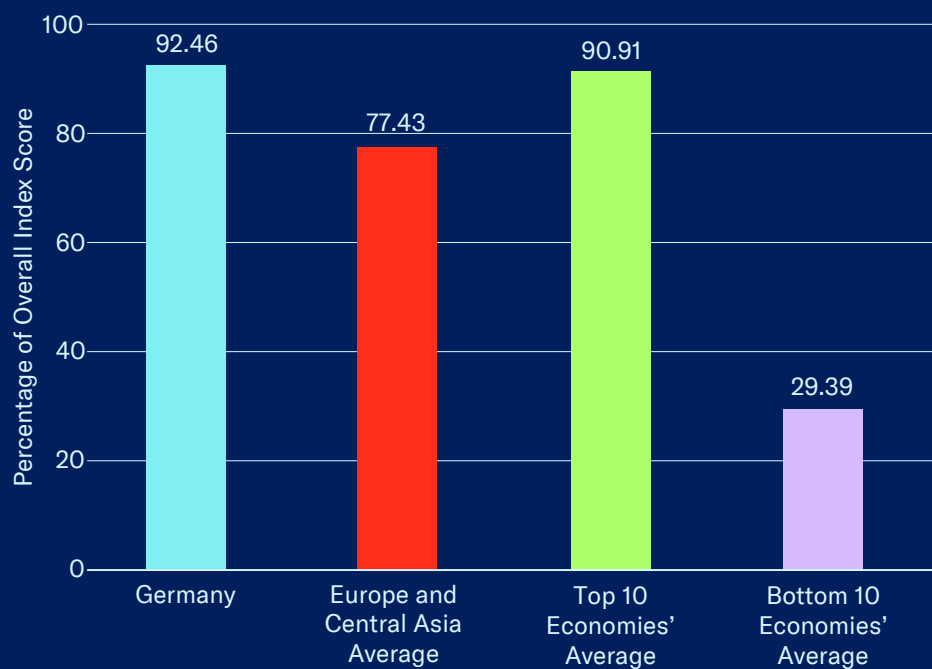
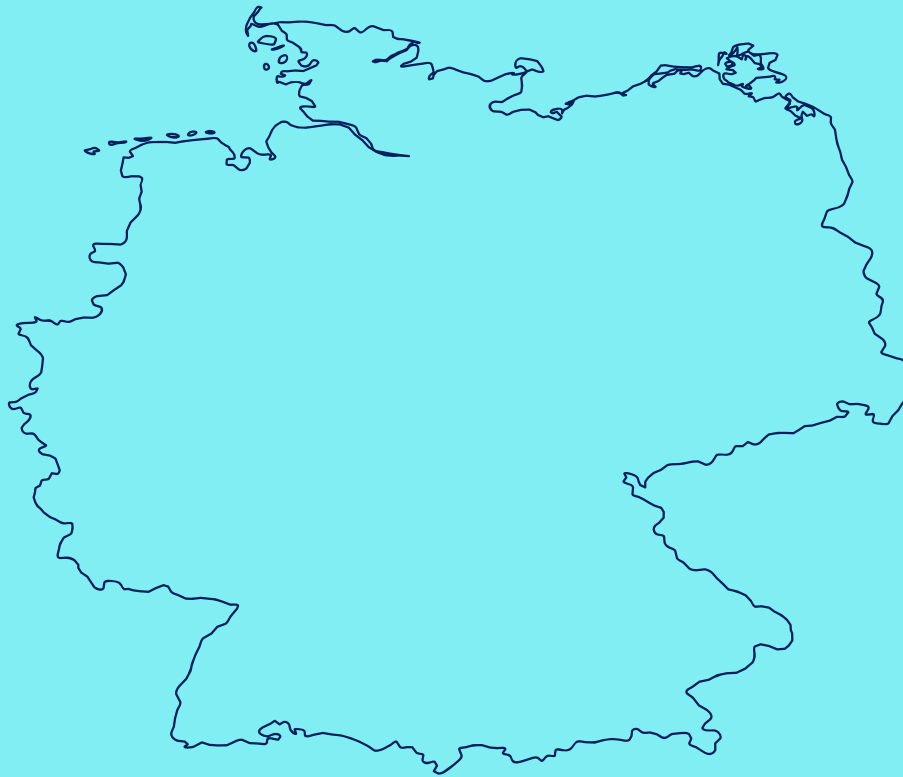


Category Scores



Overall Score in Comparison





Key Areas of Strength

- Introduction of new R&D tax credits in 2020
- Advanced and sophisticated national IP environment
- Sector-specific IP rights in place
- Membership of all major international PPH tracks through the national patent office and EPO

Key Areas of Weakness

- Regulation 2019/933 and existing SPC exemption for exports of biopharmaceuticals poses significant risk to Germany's and the EU's research and IP-based biopharma industry
- Patent Law Treaty signed but not ratified

Indicator	Score
Category 1: Patents, Related Rights and Limitations	8.25
1. Patent term of protection	1.00
2. Patentability requirements	1.00
3. Patentability of computer-implemented inventions (CIIs)	1.00
4. Plant variety protection, term of protection	1.00
5. Pharmaceutical-related patent enforcement and resolution mechanism	0.50
6. Legislative criteria and use of compulsory licensing of patented products and technologies	1.00
7. Patent term restoration for pharmaceutical products	0.75
8. Membership of a Patent Prosecution Highway (PPH)	1.00
9. Patent opposition	1.00
Category 2: Copyrights, Related Rights, and Limitations	6.38
10. Copyright (and related rights) term of protection	0.63
11. Legal measures which provide necessary exclusive rights that prevent infringement of copyrights and related rights (including Web hosting, streaming, and linking)	1.00
12. Expedient injunctive-style relief and disabling of infringing content online	1.00
13. Availability of frameworks that promote cooperative action against online piracy	1.00
14. Scope of limitations and exceptions to copyrights and related rights	0.75
15. Technological protection measures (TPM) and digital rights management (DRM) legislation	1.00
16. Clear implementation of policies and guidelines requiring that any proprietary software used on government ICT systems should be licensed software	1.00
Category 3: Trademarks, Related Rights, and Limitations	3.50
17. Trademarks term of protection (renewal periods)	1.00
18. Protection of well-known marks	1.00
19. Legal measures available that provide necessary exclusive rights to redress unauthorized uses of trademarks	1.00
20. Availability of frameworks that promote action against online sale of counterfeit goods	0.50
Category 4: Design Rights, Related Rights, and Limitations	2.00
21. Industrial design term of protection	1.00
22. Legal measures available that provide necessary exclusive rights to redress unauthorized use of industrial design rights	1.00
Category 5: Trade Secrets and the Protection of Confidential Information	3.00
23. Protection of trade secrets (civil remedies)	1.00
24. Protection of trade secrets (criminal sanctions)	1.00
25. Regulatory data protection term	1.00

Indicator	Score
Category 6: Commercialization of IP Assets and Market Access	5.42
26. Barriers to market access	1.00
27. Barriers to technology transfer	1.00
28. Registration and disclosure requirements of licensing deals	1.00
29. Direct government intervention in setting licensing terms	1.00
30. IP as an economic asset	0.75
31. Tax incentives for the creation of IP assets	0.67
Category 7: Enforcement	6.43
32. Physical counterfeiting rates	0.88
33. Software piracy rates	0.80
34. Civil and preceudural remedies	1.00
35. Pre-established damages and/or mechanisms for determining the amount of damages generated by infringement	0.75
36. Criminal standards including minimum imprisonment and minimum fines	1.00
37. Effective border measures	1.00
38. Transparency and public reporting by customs authorities of trade-related IP infringement	1.00
Category 8: Systemic Efficiency	4.50
39. Coordination of IP rights enforcement	0.75
40. Consultation with stakeholders during IP policy formation	1.00
41. Educational campaigns and awareness raising	1.00
42. Targeted incentives for the creation and use of IP assets for SMEs	0.75
43. IP-intensive industries, national economic impact analysis	1.00
Category 9: Membership and Ratification of International Treaties	6.75
44. WIPO Internet Treaties	1.00
45. Singapore Treaty on the Law of Trademarks and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks	1.00
46. Patent Law Treaty and Patent Cooperation Treaty	0.75
47. Membership of the International Convention for the Protection of New Varieties of Plants, Act of 1991	1.00
48. Membership of the Convention on Cybercrime, 2001	1.00
49. The Hague Agreement Concerning the International Registration of Industrial Designs	1.00
50. At least one post-TRIPS FTA with substantive IP provisions and chapters in line with international best practices	1.00

Total Score:
46.23



Spotlight on the National IP Environment

Past Editions versus Current Scores

Germany's overall score has increased from 92.27% (46.13 out of 50) in the ninth edition to 92.46% (46.23 out of 50) in the tenth edition. This reflects a score increase on indicator 32.

Copyrights, Related Rights, and Limitations

11. Legal measures which provide necessary exclusive rights that prevent infringement of copyrights and related rights (including Web hosting, streaming, and linking); and 13. Availability of frameworks that promote cooperative action against online piracy: As has been detailed in previous editions of the Index, like all other EU Member States, Germany has for the past two years been in the process of transposing and implementing EU Directive 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive). In June 2020, the Federal Ministry of Justice and Consumer Protection published a self-described draft discussion of a draft law transposing the CDSM (*Diskussionsentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Zweiten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes*). This was followed up in May 2021 with the passing of a series of amendments and transposition of not only the CDSM but also Directive 2019/789, which complements the “Satellite and Cable Directive” from 1983. For purposes of transposing Article 17 of the CDSM and defining the responsibilities for online content-sharing platforms, the result is a new law, the “Law to adapt copyright law to the requirements of the digital single market” (*Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes*). This law broadly follows the scope of the underlying directive, particularly regarding responsibilities and requirements under Article 17. While maintaining existing exceptions and

limitations provided under German and European copyright law and jurisprudence, the new law strengthens protections for creators online by providing clear definitions of what constitutes secondary liability for communication to the public of a protected work. It also provides a clear definition and safe harbor mechanism for content-sharing platforms to avoid any direct liability.

One further positive change in the law is a clarification on the extent to which text and data mining are allowed for research purposes. This is an important area of future economic activity, as advances in computational power and new technological advancements in artificial intelligence (AI) and machine learning allow for scientific advances and innovation to take place through the analysis of large volumes of data and information. The German law adds a somewhat convoluted exception explicitly for short excerpts of content if they are for non-commercial purposes.

In what is now a moot matter given these changes to the German Copyright Act and EU law, 2021 did see a final verdict rendered by the European Court of Justice in the long-running court case between music producer Frank Peterson and YouTube. As has been detailed in preceding editions of the Index, the dispute began almost 15 years ago with Peterson (a music producer and rightsholder) alleging that 36 music clips he had produced and owned the rights to had been uploaded and viewed on YouTube. The gist of the dispute is the extent to which YouTube, and by extension other internet intermediaries, could be held liable for the posting of infringing content on its platform. Peterson argued that YouTube did have this responsibility and was liable for damages as it indirectly profited from the uploads through viewership, consequently depriving content creators and rightsholders, such as Peterson, from licensing income. The case initially ran through the lower German courts with two judgements

issued in 2010 and 2015 by the Hamburg District Court and Court of Appeal. In September 2018, the highest relevant court of law in Germany, the Federal Court of Justice (*Bundesgerichtshof*), was expected to issue a definitive ruling. Instead, the court asked the European Court of Justice to examine the issue pertaining to EU law, specifically the meaning of Directive 2001/29/EC On the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, Directive 2000/31/EC On Electronic Commerce, and Directive 2004/48/EC On the Enforcement of Intellectual Property Rights. In July 2020, the CJEU's Advocate General, Henrik Saugmandsgaard Øe, issued a non-binding opinion on this case and the case *Elsevier Inc. v Cyando AG*. (The latter case touches on a similar set of legal principles, that is, the responsibilities and potential legal liabilities online service providers have for the content that is uploaded through and onto their platforms.)

In a long discussion on the particulars of the cases and pre-CDSM EU and German law, the opinion concluded that platforms could not be held directly liable for any potentially infringing content uploaded through their services. Regarding secondary liability, or any equivalent level of responsibility on part of the service providers, the Advocate General argued that this can only be maintained if the service provider has been served with “specific illegal information.” The opinion also raised concerns over service providers becoming *de facto* judges over the legality of uploaded content and “over-removing” content. In June 2021, the full CJEU gave its final judgment.

The verdict largely echoes the Advocate General's arguments. Overall, it finds that “the operator of a video-sharing platform or a file-hosting and sharing platform, on which users can illegally make protected content available to the public, **does not** make a ‘communication to the public’ of that content...unless it contributes, beyond merely making that platform available, to giving access to

such content to the public in breach of copyright” [Emphasis added]. As noted in last year's edition of the Index, it is remarkable that the rightsholders in question have been waiting for such a length of time to achieve redress for the alleged infringement: over a decade in the Peterson case and eight years in *Elsevier Inc. v Cyando AG*. While the CDSM and relevant changes to German copyright law should more effectively address this gap in legal protection than preceding statute under which the CJEU's judgment is based on, it is not acceptable that European rightsholders should have to wait so long to achieve a final verdict. The scale and speed of modern-day internet-based copyright infringement is such that new infringements take place by the hour. It is imperative that rightsholders can quickly and effectively achieve redress in cases in which their copyright is potentially being infringed. The Index will continue to monitor rightsholders' ability to practically enforce their copyrights in Germany in 2022.

Systemic Efficiency

43. IP-intensive industries, national economic impact analysis: As has been noted in previous editions of the Index, various German government departments and agencies are engaged in understanding and measuring the impact IP rights have on economic activity. For example, the Federal Ministry for Economic Affairs and Energy (*Bundesministeriums für Wirtschaft und Energie*) has a long-standing and strong research interest in understanding the drivers of the German economy. The ministry has sponsored several general and sector-specific studies measuring and examining the relationship between IP rights and economic impact. As a Member State of the European Union and contracting party to the European Patent Convention, the German government also takes part in the multitude of research efforts conducted by European institutions. A whole swathe of European institutions study the economic impact of IP-intensive industries in the EU and Europe. Major



institutions that publish studies and research on various aspects of the economics of IP-intensive industries include the EPO, EUIPO, EUROSTAT, and the European Commission. The latest such study is the 2019 *IPR-Intensive Industries and Economic Performance in the European Union* published by the EUIPO and EPO. This study found that IP-intensive industries contributed an estimated 49.9% of German GDP, on average, in the time period 2014-16. Similarly, with respect to employment, an estimated 33.3% of the German labor force worked in IP-intensive industries.

This important work continued in 2021 with the release of *Intellectual Property Rights and Firm Performance in the European Union*. Co-produced by the EPO and EUIPO, this report examines the relationship between IP rights and rates of economic activity at the firm level. Overall, the report finds that European businesses that own at least one registered form of IP right (patents, designs, or trademarks) have, on average, 20% higher revenues per employee than businesses with no registered IP portfolio. Similarly, the report found that firms with registered IP rights also pay higher wages— 19% higher, on average. The EPO and EUIPO should be congratulated for the production of this report and for their leadership on providing detailed statistical data and economic analysis of the socio-economic benefits of IP rights.