practical importance of protection of company symbols with reputation is relatively low.[257] For this reason for a detailed analysis of the scope of protection it is referred to the analysis regarding protection of marks with reputation in Chapter III C. 1. f.

4. Scope of protection of trade names (Firma)

The protection under §37 HGB requires that the Firma is used as a trade name and without the authorisation of the proprietor, §37(2) HGB requires further that the applicant's rights are infringed by that use. This general clause is sufficiently broad to cover double identity, likelihood of confusion and protection of trade names with reputation.[258]

Use as trade name has been defined as "any action that has a direct relation to the operation of one's business and can be understood as an expression of the user's intention to use the sign as his own trade name".[259] Whether this is the case is judged from the point of view of the commercial circles that encounter the sign. It has been recognised that use as a trade name is given in situations in which a trade name is usually utilised and therefore the public expects that such a name will be used.[260] Accordingly it seems that in an application for invalidation of a Community design the evidence must be produced that the use of the accused design infringes the rights to a trade name. The registration of a design as such does not lead to use as a trade name, the context of use and possible impression among the public need to be shown.

With respect to an infringement of rights to a trade name by a design, a recent decision of the Higher Court in Cologne[261] provides for a relevant guidance. According to this decision, since under §18 HGB the trade name must be able to characterise its owner and possess a distinguishing character, it must not include any figurative elements and like other names can be composed only of words. Therefore the use of the trade name with additional elements, for example as part of a logo, might lead to lack of use as a trade name and consequently – not be infringing under §37 HGB.

The protection of a trade name under §37(2) HGB requires further that the rights of the applicant for the invalidation of a Community design are infringed.

257 Ingerl/Rohnke, *supra* note 24, §15 para. 79-80.
258 Lüken in: Stöckel/ Lüken, *supra* note 53, 255.
259 BGH NJW 1991, 2023, 2024 - Case II ZR 259/90.
260 Ingerl/Rohnke, *supra* note 24, Nach §15 para. 166.
261 6 U 67/10 [2010] OLG Köln, Nov. 5, 2010 with comments by Fabian Zigenaus, GRUR-Prax 2011, 10.

It has been recognised by the case-law that those rights must be of an economic nature.[262]

5. Scope of protection of names

The protection under §12 BGB is pre-empted by the possibility to rely on trade mark law.[263] Therefore in the context of design infringement it is not likely to be relied on in many instances and is prone to be called upon in the cases of use in a design of a sign which by its owner is not used commercially and therefore is protected neither as a trade mark nor as a company symbol.[264] This general clause allows for sufficient flexibility to cover double identity, likelihood of confusion and protection of names with reputation.[265]

Finding of an infringement under §12 BGB requires an unauthorised use of a name in such a way that infringes the legitimate interests of the owner of that name. The provision protects the identification function of a name and therefore use that can be prohibited by the owner of the protected name must be such that it influences the association of the name with its owner[266] and has been described not as likelihood of confusion as to source but rather as ability to cause such confusion.[267] As a result – the protection under §12 BGB requires a lower threshold of proof on confusion as it seems to be judged in more abstract terms than the likelihood of confusion closely connected to the judgement of the relevant public.

The requirement of infringement of legitimate interests of the owner of the name goes beyond the protection against the likelihood of confusion, likelihood of association and dilution of his name, whereas, differently as under §15(2) MarkenG, the protection against likelihood of confusion does not require the proximity of the fields of activity between the proprietor of a name and the alleged infringer.[268] Furthermore, depending on whether the name for which the protection is claimed is a name of a natural or a legal person, it is required that

262 II ZR 259/90 [1991] BGH Apr. 8, 1991, NJW 1991, 2023.
263 Ingerl/Rohnke, *supra* note 24, Nach §15 para. 3.
264 Ingerl/Rohnke, *supra* note 24, Nach §15 para. 7; opposite view presented by Nägele in: Nägele, *supra* note 70, 1009, himself being of the opinion that the applicability of §15 MarkenG or §12 BGB should depend on the rationale of protection under each of the provisions and giving examples of such factual configurations, *id*. 1013.
265 Lüken in: Stöckel/ Lüken, *supra* note 53, 255.
266 BGH GRUR 1993, 151, 153 – *Universitätsemblem*.
267 Nägele, *supra* note 70, 1008.
268 *Id*. 1008-1009.