

Incremental patents under criticism

A public hearing hosted by the Family and Social Security Committee of the Brazilian Congress was held in Brasilia this last October to discuss incremental, second use and polymorph patents. Officials attending the meeting concluded for the non-patentability of such inventions due to the absence of public interest and of the inventiveness requirement. The meeting further concluded that incremental patents should be construed as mere discoveries, not patentable under Brazilian law.

Following the event and under severe criticism by both Government and opposition politicians and health authorities, the Brazilian Patent Office - INPI ratified in a report prepared and published by its legal department its opinion, that the current Industrial Property Law does not expressly prohibit the patentability of incremental inventions.

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INPI's report was an indirect response to the recommendation issued on December 8 by the Inter-Ministerial Intellectual Property Committee-GIPI, a group formed by representatives of the Federal Government that severely criticized and opposed to the granting of patent rights to incremental use patents.

The Brazilian Congress is currently analyzing two bills that purpose to amend the Industrial Property Law by expressly banning patentability of incremental patents. Both proposed bills contain similar assumptions and intend to oppose incremental patents contending that such inventions would not benefit the public interest and that prices of products associated thereto (e.g. pharmaceutical products) would probably increase.

Sport-related events, counterfeiting and ambush, guerrilla marketing

Recently the city of Rio de Janeiro was granted the right to host the 2016 Summer Olympics. With the announcement, and the prior election of Brazil to host the 2014 FIFA World Cup, Brazil may become the world capital of international sports events of the next decade.

At the same time that a wave of excitement took over the Brazilian market, both foreign and local trademark owners were concerned about the probable increase in local IP-related violating actions in

connection with the events, such as counterfeiting of trademarks, licensed merchandised and events-related titles, as well as cyber or typo squatting.

Unusual promotion and marketing practices are also expected to happen, such as acts of ambush or guerrilla marketing. Unexpected, unconventional and provoking, those schemes may unlawfully interfere in a wide range of areas, such as exclusive sponsorships, licensing and broadcasting agreements, as ambushers and guer-

rilla marketers may try to illegitimately associate promoted products with the official events.

The Brazilian Olympic Committee issued a note alerting local entities about the illegality of such practices and of the image and financial losses associated thereto, as well as to the fact that, under certain circumstances, such acts could be considered unfair competition and could expose their promoters to commercial and criminal sanctions.

Internationalized domain names

The Internet Corporation for Assigned Names and Numbers-ICANN announced the creation of Internationalized Domain Names-IDNs, which are domain names represented by local language characters and currently not technically available for registration. Such IDNs could contain letters or characters from non-ASCII scripts, such as from the Arabic, Chinese or Cyrillic alphabets. Changes to the international domain names structure coincides with the celebrations of the 40th anniversary of the Internet.

Trademark owners worldwide are analyzing their registration strategies to avoid cyber or typo squatting-related actions, *i.e.*, the registration or use of a domain name in bad faith to profit from the goodwill of a trademark owned by a third party. The common mindset is that with the new proposed IDNs, virtual squatters may attempt to and register, adapted, transliterated trademarks and protected titles.

It is still uncertain if Registro.br, *i.e.*, Brazil's Official Domain Name Registrar, will issue new guidelines ruling the registration of IDNs.

Currently, only ASCII characters are accepted for registration purposes. Although the first come, first serve system still rules Brazilian domain names registration procedure, current case law indicates that Brazilian Courts are starting to relate domain names, trademarks and unfair competition, assimilating, therefore, the World Intellectual Property Organization Mediation and Arbitration Center's Guidelines, by favoring those that can successfully demonstrate their proprietary interests relating to the disputed domain name, the lack of interest and the existence of bad faith of the registrant.

Patent office and health authorities

Currently, in Brazil, pharmaceutical-related process and products patents are subject to a dual analysis. Once the INPI concludes its analysis of the patentability criteria of pharmaceutical-related inventions, the Brazilian Health Agency – ANVISA, equivalent to the US FDA, must approve the invention before the patent is finally issued.

The prior approval by INPI is a mandatory requirement of the Industrial Property Law and is subject to constant debate.

In such regard, in mid October, following a request by INPI, the Office of the National General Attorney issued an opinion stating that INPI should be the sole agency responsible for the evalua-

tion of patentability requirements and that ANVISA should analyze inventions only from a health perspective. Despite the fact that the aforementioned opinion does not change the dual analysis system, its strong, well structured basis may be construed as the first line of the last chapter affecting pharmaceutical patents in Brazil.

New trademark examination procedures guidelines

The Trademark Bureau of the INPI is planning to replace its current Trademark Examination Procedures Guidelines (TGEP) by new ones. The TGEP, that corresponds to the Brazilian version of USPTO's TMEP, shall grant to the INPI trademark examining personnel, as well as to the trademark applicants and their representatives, a reference work on the practices and procedures relating to the prosecution of trademark regis-

tration applications in the USPTO, as well as a roadmap to the general understanding of INPI's staff relating to trademarks.

The new TGEP attempts to update certain concepts and registration procedures of the current guidelines, e.g. inclusion of concept of tri-dimensional brands, applications containing special characters, non-exclusive and limited registrations.

Both national and regional Intellectual Property Associations in Brazil hosted meetings and suggestion sessions in which attendants could comment on the proposed TGEP. One of the concerns raised was that the proposed TGEP could cause INPI to apply even more subjective criteria for trademark procedures. The final version of the TGEP is still being discussed by INPI.

Climate change and technology transfer

The United Nations Framework Convention on Climate Change was held earlier November in Barcelona to attempt an agreement on the final draft of the proposal to be discussed in a high level meeting on climate change that shall occur in Copenhagen in December. Notwithstanding all the controversies among the attendants to the Convention, it was consensus that one of the keys to successfully mitigating climate change would be the implementation of a swift

global diffusion of climate-friendly technology, e.g., energy efficient technologies and renewable energy generation technologies.

In the context of technology transfer, intellectual property rights was a largely debated issue. While developed countries argued that intellectual property rights were the main key for the innovation and development of environmentally-sound technologies, developing and less developed countries strongly

argued that the current intellectual property rights system should be flexibilized for purposes of removing obstacles and creating incentives to promote access to affordable and environmentally-sound technologies. In this regard, countries such as Brazil and India suggested the compulsory license of patents associated to environmentally-sound technologies, as well as the creation of new mechanisms to reduce or eliminate the patent rights attributable to such technologies.

Intellectual property and cross retaliation

A panel from the World Trade Organization issued in September a report favouring Brazil and allowing the imposition of trade sanctions against the United States in the amount of USD 294.7 million, further to cross-retaliation against the United States in services and Intellectual Property. The report is related to a complain filed by Brazil with the Trade Organization challenging the United States' cotton subsidies.

Brazil claimed that it would not be feasible to the Brazilian economy, due to cost-effectiveness, to retaliate against the United States solely in goods. Hence, Brazil was granted the right to cross-retaliate against the United States under the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) after a threshold of US\$410 million worth of sanctions has already been

reached. If applicable, cross retaliation measures may include compulsory license of patents of pharmaceutical inventions.

On October 29 the Foreign Trade Ministry issued a new resolution creating an Inter-Ministerial Committee with the objective of identifying, evaluating and formulating proposals for the effective performance of the trade retaliation, including the so-called cross sanctions.

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