

Financial Independence for the Brazilian Patent and Trademark Office: a judicialized debate

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Topics

Intellectual Property

In September of this year, the Brazilian Intellectual Property Association ("ABPI") brought a collective interest action with a view to ensuring the financial independence of the Brazilian Patent and Trademark Office ("INPI") - Public Civil Action no. 50957105520214025101. The ABPI filed said action after the Supreme Federal Court (Brazil's constitutional court) ruled on Constitutional Challenge no. 5529, which analyzed the constitutionality of the provision of the Industrial Property Law (Law 9.279/96) that extends the term of a patent if the INPI takes more than 10 years to examine the relevant patent application.

During the judgment of the Constitutional Challenge, Justice Dias Toffoli noted that the existence of such a provision and the discussion in that case arose out of the backlog of patent applications, and that the proper solution would be to take steps to improve staffing at the INPI (which suffers from chronic structural problems) so that patents could be granted more quickly.

In its Public Civil Action, the ABPI argues that the INPI's precarious budget is the source of the problem. The association stresses that the measures taken by INPI to fight the backlog address only time-related aspects of the Institute's work and cannot resolve what the ABPI refers to as a "state of divergence".

To resolve the structural problems flowing from an inadequate budget, the ABPI asked for a preliminary injunction by which the federal government would have to pass on to the INPI all revenues generated by the Institute. The association also asks that the INPI presents a detailed plan of measures to improve its operations, to be monitored by the court.

The preliminary injunction was denied on the grounds of lack of urgency. The court also pointed out that both the INPI and the federal government must be heard, and that it is necessary to conduct a more detailed examination of the INPI's alleged structural problems, the nature of the revenues generated by the INPI, and the way in which the INPI is currently funded.

In its answer to the Public Civil Action, the federal government takes the position that the relief requested in the action can only be achieved by legislative act, namely legislation on the budgetary guidelines for each financial year or by other kind of legislation, in case of permanent funding. According to the federal government, resorting to the courts to discuss INPI's funding amounts to an attempt to impose a fiscal priority and criterion that do not comply with the applicable law or the established formal procedure.

In its reply, the INPI also argues that the Public Civil Action should be dismissed, and highlights that it has been adopting measures to reduce the

number of pending patent applications – such as hiring qualified patent examiners and rolling out the "Backlog Reduction Plan" – and that it is already showing greater efficiency than in previous years. While acknowledging that more funding and authorization to hold competitive hiring processes could contribute to better results, the INPI contends that there is no institutional obstacle on its part with respect to the implementation of public policies to uphold intellectual property rights in Brazil.

The mere fact that an action has been brought is an important step in bringing the question of the INPI's funding into the spotlight. After all, Brazil's economic and technological development depends in part on the INPI having sufficient funds to maintain an efficient structure, capable of granting protection for intellectual property rights quickly and effectively.