

## INTELLECTUAL PROPERTY: AN ANALYSIS ABOUT THE PATENT ACQUISITION PROCESS IN BRAZIL

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### ABSTRACT

This article aims to explore the information about the intellectual property institute, seeking to contemplate the legal protection afforded to such property by law. In order to highlight the importance of law regarding the norteamento and regulation of patents, printing rules and laws that help protect their inventors and their creations. In addition, bring the focus in the process of obtaining patents in Brazil, seeking to verify how it's done such a procedure, which is found that walks latest fashion in relation to other countries, which ultimately harm innovation in Brazil, an important area for economic and scientific development.

**Keywords:** Business Law. Innovation. Patents. Industrial property. Intellectual property

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## 1. INTRODUCTION

Throughout human history we can see that human creativity was the central point for the development of society as a whole. The search for mechanisms to improve the quality of life and to solution problems, provided the great advances that have transformed the world.

So with the progress of innovations arising from human ingenuity and also the speed with which the information became widespread, there was a concern to protect those ideas, so that each individual could reap the fruits of their creations.

Thus, there is the intellectual property institute a means by which the law protects inventors, ensuring the bonus of their works. In this sense, the law 9279/96, regulates the rights and obligations relating to industrial property ensuring, through proper registration, privilege and protection to authors about their creations, through its corresponding patent.

This Article is justified starting from the primary point that the patent system has a vital role to encourage the creation and therefore bring economic development to the country, since the innovative capacity is directly related to the improvement of competitive advantages. Thus, handle on innovation is to highlight not only the need to stimulate scientific research as well as its undeniable benefits brought to society.

The in such a scenario crux of the problem lies in the difficulties faced by Brazil in its breeding industry, according to data from the National Institute of Industrial Property (INPI), in its annual 2018 report, the average waiting time between the application and the granting of patents in the INPI, a body of the Ministry of Industry, Trade and Services (MDIC), is around ten years. Meanwhile, in the main countries of the world these deadlines revolve around three years.

This situation makes the country lose chances to develop new technologies as well as being a disincentive for new inventors. Thus, this article aims while presenting the most relevant information and data on the subject, bring a picture about the overview of patents in Brazil, in order to demonstrate their impact on the development of the country as a whole and understand that whether this relative delay, comprising more enlightening manner the aspects that need improvement.

To accomplish this purpose, this article is organized into three chapters, the first of which aims to address the main keyword present in doctrine and legislation regarding intellectual property, regarding mainly patents, highlighting not only, its importance to the scientific and technological progress of the country, as well as emphasizing the necessary

requirements for obtaining it.

The second chapter, in particular, aims to scrutinize the Brazilian patent system, stressing, in summary, as the body responsible for such an institute, INPI, performs the steps for obtaining such registration, and point out the main protection mechanisms for authors that Brazilian law provides.

Finally, the third chapter presents the main recent statistics about the proposed theme, which exemplify the current state of innovation in Brazil, pointing not only the advances of recent years, as well as to establish a pattern of depositors, to thereby, better encompass the current scenario and the necessary advances that lacks.

The methodology used in this article was predominantly exploratory and the technique used to review, not only literature but also legislative both constitutional as infra Moreover, recent reports which bring the current advancements that the patent system in Brazil has been reached, and also the survey data collected in organs such as the National Institute of Industrial Property (INPI).

## **2. PONDERATIONS THE RESPECT OF INSTITUTE GIVES PROPERTY INTELLECTUAL**

The growing demand for new products that facilitate industrial production and add new markets is a challenge that the creators seek to fill, that way the protection that the law guarantees the industrial property allows protection to holders of such property against possible exploitation of third parties over what it took you time and investment.

The right to possess vital function, with respect to intellectual property, as defined rules of making the intellectual creation a legal right, ie a personal right to economic expression, which gives a unit like those with concrete objects, likely including assignment (MAMEDE, 2015).

Thus, the so-called intellectual property arises as a means to ensure protection to inventors, the World Intellectual Property Organization (WIPO) defines intellectual property as:

The sum of the rights relating to literary, artistic and scientific, the interpretations of performers and executions of artists, phonograms, and broadcasts, inventions in all fields of human endeavor, scientific discoveries, to designs industrial, industrial brands, trademarks and service, as well as commercial firms and trade names, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary and artistic (BARBOSA, 2003, p.10).

The Federal Constitution, in Article 5, which deals with the rights and individual and collective duties, establishes the right to the protection of intellectual creations:

XXVII - the authors owns the exclusive right of use, publication or reproduction of their works, transmissible to the heirs by the time the law to leave. XXIX - the law shall ensure the authors of temporary privilege industrial inventions for use as well as protection of industrial creations, property of trademarks, company names and other distinctive signs, in view of the social interest and the technological and economic development of Parents.

As Teixeira (2006, p.1) intellectual property is "the right of any citizen, company or institution has about everything that results from their intelligence or creativity." The property has a fundamental role in promoting scientific and technological development by granting a monopoly, for a limited time, exclusive marketing rights to products and processes their inventors. Thus, conventionally, as already pointed out, intellectual property can be divided into: industrial property, copyright and other rights to intangible assets (MACEDO, 2000).

Regulated copyrighted and protected by law 9.610/98, are included in the field of literature and the arts and can be expressed in different ways, such as words, symbols, music, paintings, three-dimensional objects, or by combining them, so that the laws protecting copyrights range from books, poems, films, drawings to photographs and technical drawings (CHAVES and NOGUEIRA, 2008).

Already with regard to industrial property, this includes the brands and patents, as well, such law governs the relationships related to utilitarian works, ie material goods business use (DURÃES, 2013). According art. 122 of Law 9,279/96, the mark is visually perceptible sign that identifies and distinguish, directly or indirectly, goods and services.

Thus, the brand has the vital importance of providing an affinity and immediate identification of a particular product or service to your customer, on the other hand, the patent as defined by Negrão (2015) is a document that is the privilege of exploitation, granted two types of law that has its origin in the inventiveness of man: the invention and utility model, the use of the word "concession" is applied because the state must grant the right to its operation, upon application to the National Institute of Intellectual Property (PTO); so no one can claim exclusive right of exploitation of an invention or utility model without first having obtained such a right by the state.

Still, conceptualizes Negrão (2015) that the invention is a human act of original creation, lawful, not understood in the art and capable of industrial application. Fazzio Junior (2016) explains that for an invention to be able to be patented must meet the new requirements, inventive activity and industrial application. That is, an invention is to create something that had

never before been done, the result of work in order to seek answers to problems.

With regard to the utility model, this is not absolutely new, but "(...) a creation that is made for common use object, or on parts of an object to determine it a new shape or arrangement , to imply improvement in the performance of their functions (improvement in its use) or in its manufacture." (MAMEDE, 2015, p. 223).

In this sense, the case-utility model, this relates to those creations that enhance the use and performance of something that already exists, in order to facilitate their use and thus bring not only better use, but also make it quick use.

## **2.1. Requirements that make a patentable creation**

One of the requirements to have an invention patentable novelty is linked to the principle of originality, because you can not patent something that is not new. Negrão (2015) conceptualizes novelty as that which is unknown in the scientific, technical and industrial community.

Thus it will be considered again all that was not understood by the prior art, which is defined by the Law 9.279 / 96, article 11 § 1 as "everything made available to the public before the filing date of the patent application, by written or oral description, by use or any other means, in Brazil or abroad "

To ensure that the inventor keep your right and preserves to novelty, when because of public presentation or scientific communication, their invention or utility model has become accessible to the public, that is, when the information was obtained by third parties through the inventor himself, the law states a period of up to 12 months prior to the filing date or the priority of the patent application, which do not understand how state of the art, thus ensuring the right to the inventor (NEGRÃO, 2015).

Note that "(...) can not someone recognizing the novelty and taking advantage of the inertia of the inventor, creating patent or utility model" (MAMEDE, 2015, p. 223).

Even if there is no news as to patent something that is not the result of inventive activity, that is, that was not created. This means that there is no inventive step in the mere discovery, thus the obvious or apparent application of prior art finding something that already exists, the fact that the invention should be a result of hard work and commitment (MAMEDE, 2015).

Negrão (2015), exemplifies a classic example of the invention, ie, the original

production, the science of the time did not imply its creation nor was obvious consequence of scientific knowledge that had been released up to that time, and who was responsible for a revolution such invention relates to electric lamp, created by Thomas Edison in 1879.

As precepts Barbosa (2003) industrial application requires the invention to be a solution to a technical problem, that is, relevant to any type of industry. The other important element of the concept is that the invention is a solution of a problem, so there is the industrial purpose, a technical problem specific to be solved, and not enough to the creation of objects or information, resulting from human activity, it is necessary specify the technical problem to be solved by definition, otherwise it will not be patentable.

Furthermore, such tax bases requirements by law, direct for the full understanding of what can be considered patent, in order to guide those interested depositors and filter out those creations that conveniently become patentable.

### **3. THE PATENT SYSTEM IN BRAZIL**

The Brazil over the past few years, with the goal of becoming not only stimulate innovation and thus improve their competitiveness on the world stage, as also pay up globally has been exploring alternatives that make the process of getting faster patents, such measures benefit companies, universities and national researchers. It is a constant function of patent protection as an incentive not only innovation, such as the protection of the same in this sense:

The patent is a contradictory unity: protects the inventor, but also challenges to facilitate the generation of new inventions by others, inducing its own holder to continue making to stay ahead of their competitors. In other words, the time-limited property and the public interest of the information disclosed - reason for public and private patent-is an instrument to promote technological development (MACEDO, 2000, p. 20).

Patenting a creation not only behind the benefit of legal protection as well as new inventions are disclosed enables other inventors to develop their own patents, like this:

In general terms, the patent system is an exchange between one entity and the inventor determined power grantor, wherein the first discloses creating a background in exchange for a period of exclusivity guaranteed by the latter. It is a set of legal rules to promote a certain economic behavior to boost development - investments in research and economic activity (CASCÃO, p. 17, 2009.).

From this perspective, the patent system, to legally protect the natural or legal persons who through their creativity brought solutions to relevant problems in the technological development sector, thus ensuring fair bonus to those who put their investment and time for

the development of society.

### 3.1. Patent Deposit

The National Institute of Industrial Property - INPI is the responsible federal agency, and other functions, the patent grants. The way to prevent a creation to be used or copied, improperly, starts the application for the award and ends with their approval or not.

The granting of the patent is a declaratory administrative act, to recognize the right of the holder, and attributive (constitutive), requiring the application of the patent and its course by the public administration. The patent is a property title which gives its holder the rights of third parties prevent exploit his invention in a particular territory for a limited period of time in exchange for disclosure of the invention (SUZIN, MARCANZONI e BITTENCOURT, p. 2, 2016).

As provided by law 9.279 / 96, such a concession is subject to certain steps, which are performed by the IMPI, which are:

Art. 19. The application under the conditions set by the PTO, contain: I - a request; II - a specification; III - claims; IV - drawings, if any; V - Summary; and VI - proof of payment of the filing fee (BRAZIL, 1996)

All procedures should respect the rules and resolutions established by INPI. All patent applications should have a title, which should be concise, clear and precise, identifying the object of the application, expressions or irrelevant or unnecessary words (SUZIN, MARCANZONI e BITTENCOURT, 2016).

According to the INPI (National Institute of Industrial Property), in its Basic Guide to Patents, first, interested in patenting an invention or utility model, you should check if your creation has been patented by third parties, ie, it is important to check this request will meet or not the patentability requirements, such as research is not mandatory, but it is advisable.

Complied with the said administrative procedure, the PTO will issue its patent, such an instrument is the only evidence admissible by law to demonstrate the granting of exclusive exploitation right of the invention or utility model (COELHO, 2011).

The patent has certain period of time, being 20 to 15 for the invention and the utility model from filing of the patent application (i.e. the date on which the application was filed with the PTO). To ensure the inventor at least a reasonable period of use of the invention or model, however, the term of the industrial law can not be less than 10 years for inventions, or 7 for the models, counted from the patent expedition ( COELHO, p. 109-110, 2011).

Thus, to achieve the registration of the patent, the holder may by a determined time period, to explore exclusively the patent and ensure any profits that bring you without the possibility that his invention or utility model is used why not It has also borne the brunt of your investment.

### **3.2. Compulsory License**

Industrial property, and consequently the patents, have to right a relevant social interest, so that, once granted the patent, the holder of the right to exploit not use correctly in order to meet the social, has themselves to compulsory license.

Compulsory licensing deals with situations in which the patentee is obliged to license a third party on the exploitation of the invention or the corresponding utility model. This is because, to the right is considered in high esteem the social interest related to access to the facilities afforded by industrial development. In other words, if the holder of the patent for invention or utility model is not exercising his right to meet regularly and conveniently the market, other interested and qualified entrepreneurs will have the right to exploit it through the compulsory license ( COELHO, 2011).

Of course, the graduates remunerarão the owner of the patent. Thus, if the rights granted by the PTO are exercised in an abusive manner, or through them, practicing abuse of economic power, it will be a compulsory license. Also imposes this license if the holder of the patent, having already elapsed three years of his expedition, not exploits completely, or check the case of unsatisfactory marketing (COELHO, p. 110, 2011).

In short such a compulsory license or popularly known as "breaking patents" is a result of the principle that all types of property must follow what the social function. Once granted the patent is vitally important that this be explored in order to add improvements to the technological medium, the holder of a patent does not have its findados efforts in getting your record, but must observe during the time it was offered as unique explorer, the satisfaction of its use for the market and avoid committing abuses during the exercise of their right.

### **3.3. Nullity Actions**

A nullity action is configured as a means by which the law allows third parties to question the granting of a patent, both of judicial as well as administrative way.

The following granted patents can be invalidated by the action of invalidity in a legal

context. Brazilian law provides that any person with a legitimate interest in joining nullity action challenging the validity of a patent granted at any time of its validity. The lawsuits, however, are generally expensive and slow and while there is no definite decision the patent holder will continue benefiting in practice, the rights granted by patent (SUZIN, MARCANZONI e BITTENCOURT, 2016). Law 9.279 / 96, hotdog in Chapter XI, section III, concerning the nullity action, provides that:

Art. 173. The nullity action may be filed by INPI or by any person with a legitimate interest. Single paragraph. The judge may, in case of annulment case, grant an injunction suspending the effects of the registration and use of the mark, provided the appropriate procedural requirements (BRAZIL, 1996).

This mechanism appears to provide the guarantee of the contradictory and full defense and to demonstrate that the patent registration is not an absolute permission, and possible questioning of its irregularities.

#### **4. DATA AND INDUSTRY CHALLENGES OF PATENTS IN BRAZIL**

INPI (National Institute of Intellectual Property) annually provides an annual report of its activities, with regard to all data and panoramas to about your work done throughout the year, in addition to providing an assessment of the progress and also the still needs to be achieved.

Based on the 2018 year's report, this highlights that Brazil is a country entrepreneur, there are around 50 million Brazilians developing any business activity, according to the Global Entrepreneurship Monitor Research (GEM). This means that out of 100 Brazilian adults, aged 18 to 64 in 2017, 36 of them were undertaking.

The report by a admits side Brazil still requires changes to match the increasingly hectic requirements of the patent granting sector, however, on the other hand, there is an improvement in this context, and according to the report the year 2018, there was an increase of 25% in the staff of the INPI, with the hiring of 210 new servers to accelerate the examination of applications for registration of trademarks and patents.

Despite advances, Brazil is in the lantern of the global innovation ranking, according to Buainain and Souza (2018), Brazil occupies the 69 position in Global Innovation Index, produced by Cornell University, INSEAD and the World Property Organization Intellectual (WIPO).

Another fact that worries because even though the 8th economy in the world, no Brazilian company appears in the edition of 2018 in the ranking of the 50 most innovative companies, developed by The Boston Consulting Group (BCG).

Still, according to data published by the World Intellectual Property Organization (WIPO) in 2018, Brazil has the worst performance among the 76 main offices of the world responsible for the registration of patents and intellectual property. WIPO highlights that on average, the evaluation of a patent application with INPI takes 95 months to complete.

Scores Buainain and Souza (2018) that the current low-growth scenario of the economy and low rate of innovation are the result of a number of factors, among which you can highlight economically unfavorable environment, which brings unpredictability, causing there is a defensive attitude with regard to innovation. It also emphasizes that with regard to the profile of innovation of companies indicates that these innovate more in order to respond to specific problems that in order to take a more active role in pursuit of competitive advantage and product innovations, and low rates representing news for the world market.

Other points highlighted by Buainain and Souza (2018), which inhibits the growth of the innovation sector in Brazil is high bureaucracy, interest rates, high cost to import, lack of infrastructure, high complexity of the tax system. All these factors make innovation initiatives end up being restricted.

The annual year report 2018 released by the INPI, points out that with regard to patents, in that year, the Board of Patents Computer Programs and Topographies of Integrated Circuits (DIRPA) reached the rate of 55 decisions techniques examiner patents in full production, this result is due to the consolidation of initiatives to stimulate productivity, such as teleworking, which currently covers 30% of examiners. According to the report made important DIRPA actions to optimize the flow and control their processes in order to allow an increase in the number of decisions.

Further, with regard to the profile of depositors 42% of depositors patents focus on individuals, with regard to the utility model patent numbers are amplified, and individuals responsible for 66% of depositors , according to the annual report of 2018 the INPI. In this perspective Buainain and Souza (2018) adds that such a reality is given, among other reasons, for added security that the patent award provides a particular:

It is also very possible that, in spite of the prior analysis confirmed interest of the productive sector and the possibility of business, individual depositors are more strongly affected by the slowness of the system, since, not counting the letter patent, have more difficulties to mobilize partners and financing (BUAINAIN and SOUZA, p. 67, 2018).

Still, according to the annual report 2018 of the PTO, it is pertinent to note that the patent contained the innovation that educational and research institutions, appear with the second highest rate of patent depositors.

Such role is quite peculiar in the innovation system in Brazil, where companies often seek external support to assist innovative efforts, too, on the other hand, reflects the efforts employed by universities and research institutions to raise awareness of the importance of intellectual property management, such a situation materializes in the growing creation of technology innovation centers linked to research institutions, it reveals that, on the one hand, there is the stimulus of the institutions and other dwarfism companies with regard to innovation (BUAINAIN and SOUZA, 2018 ).

In July 2019 the Ministry of Economy announced measures to reduce the number of patent applications to be analyzed by 80% and reduce to two years the waiting period for the granting of a patent by the PTO. The main change will occur in the examination of applications for patent, domestic or foreign, that have already been evaluated in another country, which corresponds to 80% of those in the queue, so that, from July INPI incorporated the examination of these requests the search for patents held abroad, this measure aims to take advantage of the analyzes made by other countries in order to ensure more quickly in the process (AGENCY BRAZIL, 2019). In fact, the PTO comes in a forward perspective regarding patents, the result of a series of measures implemented in the body:

More recently, from 2014, the number of patents granted has nearly doubled, the result of a great effort of the PTO to reduce the backlog, which involved the incorporation of new patent examiners, information technology, home office, process improvement analysis, technological modernization, international agreements to exchange information and especially the dedication of the technical staff committed to previously agreed targets (BUAINAIN and SOUZA, p. 14, 2018).

In short, it is noted that the granting of patents is a complex process, to ensure that applications meet the requirements of the law, a careful technical examination is necessary, although Brazil still appear to lag behind the rest of the world with regard to innovation, it is possible to note, that there is a noticeable tendency to speed this process.

## **5. FINAL CONSIDERATIONS**

The property has a very significant role in the development of a country, provide an

environment to encourage innovation among companies and individuals, in addition to offering legal support for their protection, it is crucial for sustainable growth.

Patents by providing that inventors can, over a period time, have exclusivity to exploit his invention, reflects the concern of the right to protect the fruits of study and knowledge, in addition to investment companies for creating new mechanisms.

In this context, the patent sector in Brazil, although still face significant difficulties and are at a significant disadvantage and backwardness in relation to other countries, has shown a significant improvement, latest data showed an increase in the number of unanswered requests regarding other years, a result generated by the PTO in search enhance and make the service faster, recognizing its significance for the economy and society as a whole.

It was noted, moreover, the highlight of educational institutions regarding the generation of patents, which shows the significant incentive to scientific production in these environments.

On the other hand, it is noted that as regards the companies there is still a minor situation when it comes to innovative activity, this table shows the existence of factors inhibiting such progress in this area.

Admittedly, the patent system is an indispensable mechanism for the growth of the economy and therefore of society and should be encouraged and protected by law.

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