Antitrust practice in Brazil throughout the lens of intellectual property

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Abstract: From a *laissez period* towards a proactive regulator conduct, Brazilian Antitrust Authority (CADE) has risen to sanction the abusive use of IP Rights in Brazil.

Keywords: IP Rights, Misuse, Antitrust Impacts, Regulation.

1) Introduction; 2) Brief View of the Intellectual Property Market in Brazil; 3) The Strategic Use of IP Litigation in Brazil; 4) The Shop Tour Case and Antitrust Impacts; 5) Conclusion; 6) Research References

1. Introduction

This article focuses in the Shop Tour case, decided by the Brazilian antitrust Authority[2] on December 13, 2010. The issue was sham litigation with undue use of Intellectual Property rights[3].

Taking this case as a start, this paper analyzes the administrative case law effects throughout the *fair* competition practices in strategic areas (such as pharmaceuticals and agrochemicals), the costs concerning IP rights managing and litigation; and finally, it proposes some objective criteria concerning the diagnostic of illegitimate – but quite frequent– behavior of IP stakeholders in Brazil.

2. Brief view of the intellectual property system in Brazil

Brazil has had a long tradition concerning the protection of IP rights: starting in the 19th century (1809), when it's first patent Law[4] was introduced by the Portuguese king João VI[5]. Since

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[2] CADE is the acronym of Brazilian national economic defense agency, found at http://www.cade.gov.br/.

[3] See SALGADO, L.H., ZUCOLOTTO, G., BARBOSA, D.B., Study on the anti-competitive enforcement of intellectual property (IP) rights: sham litigation, found at http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_inf_6_rev.pdf, visited Aug. 10, 2015. SALGADO, L. H. , BARBOSA, D. B. , ZUCOLOTO G. (2012) Litigância Predatória no Brasil, Radar 22, Ipea, Brasília, 2012. (Available at http://www.ipea.gov.br/portal/images/stories/PDF s/radar/121114_radar22.pdf).

then, Brazil became a founding member in the Paris Convention of 1883[6], signed the Berne Treaty in 1922[7], produced its first Industrial Property Code in 1945, and is currently in its fifth IP Code, the 96º Law (9.279) which is generally deemed to be TRIPS compliant[8].

However, nowadays stakeholders struggle with the Brazilian IP Office (INPI) "administrative timing", since its backlog in the patent area reaches – in some niches such as the pharmaceuticals – an average eleven-year duration[9], counting from the filing date to an eventual grant. Trademarks are also subject to a considerable period of processing time, usually longer than four years.

This insecurity is not actually so long or stringent, since unfair competition protection[10] are available even before the trademarks are applied for (or independently whether registration is ever required), and there is retroactive protection on basis of tort liability once a patent is issued[11]. The opportunity provided for such retroaction may (and reputedly does) entice the applicants to opportunistic behavior[12].

Some commentators note that the society at large (considering State, consumer, and competitor's *fair* interests[13]) is the main victim of INPI (the local PTO) rather lax standards towards

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[4] For a specific historical study of this Law: BARBOSA, Denis Borges. *Tratado da Propriedade Intelectual*. Volume 1, Rio de Janeiro: Lumen Juris, 2010; MALAVOTA, Leandro Miranda. *A Construção do Sistema de Patentes No Brasil – Um Olhar Histórico*. Rio de Janeiro: Lumen Juris, 2011.

[5] The "Alvará" aimed in stimulating the introduction of technology allowing exclusivity rights even for subject matter that was not compliant with the current concept of novelty, if it was not state of art technology in the Country, but only elsewhere.

[6] Information available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2.

[7] Information available at http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=922C.

[8] In fact, there are many TRIPS-plus provisions such as the pipeline patents that allowed protection for public domain pharmaceutical, agrochemical and biotechnologies, the extension of trademarks, industrial designs etc.

[9] Information available at http://epocanegocios.globo.com/Informacao/Acao/noticia/2015/05/brasil-demora-11-anos-em-media-para-aprovar-patentes.html.

[10] Translation of the Article 195 of the Brazilian IP Law of 1996: "Commits crime of unlawful competition who: III – applies fraudulent means to deviate, for itself or others, third parties clients."

[11] Translation of Articles 44 and 210 of the Brazilian IP Law of 1996: "The patentee is assured the right to obtain indemnification for the unlawful exploitation of its subject matter occurred since the publication of the application and the grant"; "The loss of profits will be determined by the most favorable criteria to the victim considering: I – the benefits that the victim would have profited if the violation had not occurred; or II – the benefits that were profited by the responsible of the rights violation; or III – the value that the party responsible for the violation would have paid for the grant of a license that would, legally, authorize the exploitation of the asset".

[12] To maintain the complete satisfaction of the patentee application holder the provision of article 40, §1º, of the Brazilian IP Law of 1996, which is being challenged in the Supreme Court for its unconstitutionality (ADI 5061, filed by ABIFINA – a Brazilian association of the generic and similar drug, agrochemical and biotech industries).

[13] Legal authors tend to stress that Constitutional principle of free competition aims at the society welfare, and do not particularly favor the competitor: GRAU, Eros Roberto. *A Ordem Econômica na Constituição de 1988.* São Paulo: Ed. Malheiros, 2010, p. 215

patent[14] (especially inventiveness step and best mode), and trademarks requirements (specifically intrinsic distinctiveness[15]). Actually, second use, incremental development *monopolies*, and secondary meaning and generic/descriptive signs have become an administrative routine[16]. According to such sources, the "inflation"[17] or flood of weak exclusive titles endorses illegitimate barriers for commerce and trade whilst, also, vilifies public domain, fair uses and general freedom rights; which, therefore, are true obstacles to the virtues of the *network society* that depends on fantastic *commons* production[18].

IP rights that are subject to substantive analysis by the Federal Administration (Geographical Indications, Semiconductor Topographies, Trade Names, Trademarks, Plant Varieties and Patents) are confronted by some of the critical issues indicated above. Copyright protection does not require any registration[19]. Industrial Design protection, on the other hand, can be registered with or without[20] substantive examination; applicants tend to choose the more expeditious path of a registration without substantive examination, deferring to the court system any question on novelty and originality.

Since the PTO's fees are quite affordable[21] – at least for medium economic rate companies – and IP prosecution in Brazil counts with huge competition (there are circa one million lawyers in Brazil, and thousands of IP Agents), some companies take the routine to file too many

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[14] Intrinsic bad quality patent grants is a quite old practice in Brazil: FORGIONI, Paula A. *Os Fundamentos do Antitruste.* São Paulo: 4th Ed. Revista dos Tribunais, 2010, p. 113.

[15] "The conclusion that I reach – verifying, even, the diversity of commercial establishments throughout Brazilian cities, that the creativity commented in the legal books concerning trademarks the employ "complete distinctiveness" to the sign, perhaps doesn't exist in the real world, at least in Brazil" 2nd Federal Circuit, 1st Specialized Court, Appellate Federal Judge Márcia Helena Nunes, Appellation number1999.51.01.023852-3, published at 28.09.2007.

[16] In fact, the property attribution over descriptive/generic signs can induce as much danger for competition considering trademarks than those of patents, since there is not a fixed date of extension for a property of a trademark: SILVA, Miguel Moura e. *Direito da Concorrência*. Coimbra: Almedina, 2008, p. 408.

[17] BARBOSA, Pedro Marcos Nunes. "How Pharmaceutical Industries avoid competition in Brazil", Brazilian Institute of Intellectual Property Electronic Magazine, nº10, 2014, available at http://ibpibrasil.org/ojs/index.php/Revel/article/view/101/96.

[18] BENKLER, Yochai. *The Wealth of Networks*: How Social Production Transforms Markets and Freedom. New Haven: Yale University Press, 2006.

[19] Translation of article 18 of the Law 9.610/98 ("Copyright" Law, that does not concern software that is regulated by its own Law, 9.609/98): "The guarantee of the rights granted by this law is independent of registration procedures".

[20] Translation of article 116 of the Brazilian IP Law of 1996: "Once filed the Industrial Design application and observed articles 100, 101 and 104 provisions, it will be automatically published and granted the registration with the emission of the certificate".

[21] *Verbi gratia* the fee for examining one to ten patent claims is R$590 which is less than US$200,00, information of 2014, available at http://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=11/03/2014&jornal=1&pagina=77&totalArquivos=108. In this article the value of an American dollar is estimated in three Reais each.

applications[22]. Actually, many business organizations organized as stock exchange corporations may have its market value evaluated (since 2007[23]) considering inter alia the number of IP rights held. This fact may cause some market players to follow a *the more the* merrier perspective towards IP rights.

Another quite frequent practice, especially in the agrochemical context, is what could be qualified as a programed obsolescence strategy. This behavior is sometimes employed by such patent owners of a technology that protects a blockbuster molecule. Besides being the patent owners, most of these proprietors are also holders of new entity registration before the regulatory authorities. Registration here is a quite complex procedure that involves the Ministry of Agriculture - MAPA, the Environmental Authority – IBAMA, and the Health Authority - ANVISA.

In such a case, it was noted that in the *eve* of the patent term, the holder pleads for the cancellation of its own registration, informing that it will not further commercialize that exact technology. This is qualified as a *suicidal approach* or an act of *friendly fire:* even displaying the appearance of a renunciation of access to the local market, its purported object is to deny the "*me too"* registration of the generic companies[24] - that legitimately waited the exclusivity extinction.

The same cancelation of the regulatory register may also embody colorful ruses. For instance, after 19 years of exclusivity, an owner of a regulatory registration informed the registrar that it would cease its commercialization on account of a newly detected environmental risk for a species of bees[25].

The coincidence of patent holders in Brazil discovering hazardous side effects in exact synchrony of its patent expiration occurs in an expressive number of cases. However, its new version of the former protected active principle – in a newly granted patent, of course – becomes the only solution for resolving the efficiency problem treated by the technology without the

[22] Even when there is no intention to exercise the specific trademark, patent, industrial design, software etc. First the plaintiff files its claim or application, then, eventually, he considers negotiating the right or directly using it. This kind of posture can be questioned considering that the Brazilian Constitution determines that all property rights are submitted to a social function mandatory clause, and that inertia is incompatible with that principle/rule.

23 BARBOSA, Denis Borges and PONTE, Ana Beatriz Barbosa, Da Conferência de Bens Intangíveis ao Capital das Sociedades Anônimas à luz da Lei 11.638/07 e Pronunciamento CPC nº 04, found at http://www.denisbarbosa.addr.com/arquivos/200/societario/ativos2009.pdf, visited Aug. 10, 2015.

[24] In Brazil there is a hybrid data protection regime: for pharmaceuticals destined to human beings, the right holder has only an unfair competition protection (article 194, XIV, of 9.279/96); and, on the other hand, the clinic data produced by agrochemical industries and by producers of veterinarian pharmaceuticals is eligible for a property right protection due to Law 10.603/2002.

[25] Sometimes complete and unfavorable dossiers from unidentified origins reach environmental NGO's, exactly on time to avoid generic industries to enter that market. Then, these NGO's start legitimate lobby towards the Governmental Authorities to cease any commercialization registration towards that product. See http://www.oeco.org.br/noticias/26267-ibama-estuda-proibir-agrotoxicos-nocivos-as-abelhas.

collateral effect the state of art. This strategy (whenever successful) is very much capable of disabling the dynamic efficacy of the patent system.

It is quite apparent that in the agrochemical sector (but not only there[26]), some blockbuster inventions come to be protected by intricate patent thickets. In the issue of Fipronil[27], an analysis dating of 2014 pointed out that a thicket of than 70 patents and patent applications protected the technology. Therefore, in such a case, a competitor who patiently waited for the expiration of the patent term would be fearing considerable risks that its entry into the market would infringe other exclusivities, either through direct or equivalence violations. Thus, broad licenses with right holders (or former proprietors) are the less risky path to avoid everlasting litigation in an unpredictable result.

Some aspects of the current biotechnology market renders amateurish the prior mentioned strategies. For instance, as transgenic soybeans in Brazil[28] represent an important proportion of all beans nationally produced, for the purpose of this huge market, some players have applied locally a specific version of their worldwide licensing systems[29].

First of all, it incorporated many of the seeds distributers creating a semi-monopoly[30] in the vertical market; then it exercised its "legal know how" by elaborating adhesion contracts that incorporated clauses that obliged the seeds purchasers to: i) pay royalties in each new buy; ii) pay royalties, again, in each sell of the crop itself that previously represented the payment in the purchase; and iii) waiver the plant variety protection safeguard (Law 9.456/97) that allows the reservation of seeds for exchange (but not for selling)[31].

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[26] For a review of evergreening practices in the pharmaceutical industries operating in Brazil, see PEREIRA, Dárcio Gomes e FIUZA, Eduardo P. S., Direitos de propriedade intelectual nas estratégias de ciclo de vida para medicamentos de segunda geração: resultados parciais do inquérito brasileiro sobre a concorrência do setor farmacêutico, encontrado em http://www.ipea.gov.br/portal/images/stories/PDFs/radar/131009_radar29.pdf, visitado em 10/8/2015.

[27] Also known as Basf's Frontline.

[28] Brazil was the second largest soybeans exporter in the world in the year 2014, and in 2015 became the largest one. For an official source: https://www.embrapa.br/soja/cultivos/soja1/dados-economicos.

[29] For an analysis of such contract structure, see BARBOSA, Denis Borges, Novos Estudos de Propriedade Intelectual (2014-2015), Ed. IBPI, 2015, p. 464 seg., also found at http://www.denisbarbosa.addr.com/arquivos/200/propriedade/mnsantob.pdf, visited on Aug. 10, 2015.

[30] In this case the use of the monopoly concept doesn't mean that it's the only player in the market, but that it has enough market power to rise prices without suffering with competition: SALOMÃO, Calixto Filho. *Direito Concorrencial,* as estruturas*.* 2ª Edition São Paulo, Malheiros: 2002, p. 61.

[31] Article 10 "Doesn't violate the property right concerning the plant variety protection one that: I) reserves and plants seeds for its own use, in its establishment or on the property of others; IV – being a small country producers, multiplies seeds for donation or Exchange, exclusively to other small country producers (...)". It is important to mention that these property safeguards are *ordre public* clauses to enhance minimum trade freedom.

But the most interesting of all is that these contracts don't expose which *exclusivity rights* are pertinent for the royalties' payment, and a State Court found that Monsanto had been charging royalties even for expired (RR1) patents[32]. In a recent class action lawsuit[33] against Monsanto's RR2 contracts, Unions of Brazilian Farmers of different States obtained a court injunction that suspended – *erga omnes* – the validity of the double royalty's payment and the safeguard waivers clauses; which only confirms the probability of IP abuse and misuse by a holder[34].

Our summation of the present Brazilian IP context in our chosen fields therefore indicates the presence of a cycle that encompasses i) a tolerant though slow PTO, which makes trivial weak IP rights, to be however employed in excluding competitors), ii) Laws that mostly empower right holders, iii) accessible fees and efficient prosecution agents in Brazil.

The summation follows on: iv) there is in many areas concentrated market power, v) there is undue use of administrative or court litigation (especially towards national FDA/Environmental commercialization registrations), and vi) abusive adhesion clauses.

3. The strategic use of IP litigation in Brazil

Litigating for IP matters in Brazil is a very cheap business if you compare to an average cost that the exactly same dispute would be [35], if its venue were the United States of America[36]. For example, to invalidate the grant of a pharmaceutical patent the plaintiff (usually the competitor) would be obliged to pay less than US$1,630 considering federal court fees[37] to initiate litigation.

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[32] This is considered to be the biggest IP case in Brazil (State Court of Rio Grande do Sul, 5th Civil Chamber, Appellate number 70049447253, Farmers Union vs. Monsanto), involving circa US$2 billion in undue royalties payments. Although Monsanto was victorious to reform court level decision, an important dissenting opinion of Appellate Level Judge Jorge do Canto opened a venue to the Farmers Union appeal to an *en banc* hearing.

[33] This lawsuit has a cause value of circa US$330 million (State Court of Rio Grande do Sul, 16th Civil Court, docket number 1.15.0119574-4/2015, Farmers Union vs. Monsanto).

[34] *"Per mettere ordine nel caos economico e così per far vivere gli uomini in pace occorre sostituire l'altruismo all'egoismo, all'io il tu. Se l'economia e il regno dell'io, il regno del tu e la morale"* CARNELUTTI, Francesco. *Come Nasce Il Diritto***.** Milano: RAI, 1942, p. 14.

[35] There are some strategic family of patents that the same litigators (*exempli gratia* the Apple Inc vs. Samsung), right holder and supposed infringer, fight throughout the globe, with the same arguments, in some cases with different results in each court, and for sure, completely different costs.

[36] "A study of the results of patent litigation at the appellate level revealed that patentees only won some 25 percent of infringement cases from 2002 to 2004.1 While these statistics might seem to suggest that the scales are tipped in favor of defendants, the eye-popping cost of patent litigation in the United States – on average $3 to $10 million – can deter many accused infringers from fighting cases in court; it may just be less expensive to pay a licensing fee or royalties than to challenge a patent in court" TOWNS, Willian R. *U.S Contingency Fees – A level playing Field.* Geneva: WIPO Magazine, February 2010, number 1, p. 3.

[37] In local currency, circa R$4881, information obtained in 2nd Federal Circuit, court level site, available at http://www.jfrj.jus.br/?id_info=1257.

IP specialized attorneys, however, are usually a bit more expensive[38] than that, but if one loses the law suit, the fees due to the other litigator are estimated, at a maximum of 20% of the cause value, and is the plaintiff, himself, that fixes how much the case is deemed to be worth. In fact, actually, judicial practices rarely attribute more than 10% of the cause value previously attributed, to the lawyers of the winning party.

In Federal cases, if there is a complicated issue, the plaintiffs usually elect to indicate the maximum of US$33,000, even though claims reach a billion reais or more". This would generate the expectancy of a lawyer fee (to be paid by the succumbing party) of US$3,300. In other words, it is not exactly a big fortune or a retirement prize for the advocate.

Considering now IP violation claims, which is decided in state courts[39], in the State of Rio de Janeiro, for example, the minimum court fee is about US$20[40], and the maximum is around US$10,000 dollars[41]. In comparison, Brazilian Federal courts fees are much higher, but, again, if an international average value (considering developing and developed economic countries) was established, litigating in Brazil is just as expensive as buying a package of peanuts.

To be clear, outrageous court fees are not desirable in any judicial system that is organized to enhance a basic human right which is to access the judicial[42] power, but, on the other hand, there is also a complicated trade off in operating a legal architecture that allows inexpensive commercial law/complex litigation: frivolous and malicious law suits become more frequent. In a synthetic phrase inside an economic perspective, without considerable burdens – considering the merits of a judicial claim – it is more likely that a patent holder will file a lawsuit even if he isn't too sure of the actual violation, since the eventual loss wouldn't bring harsher consequences.

In recent researches towards the national Judiciary system (including Federal, State, Labor, Military, and Election special courts)[43] it was found that in 2015, there were *circa* 100 million

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[38] Although it is unlikely to estipulate an accurate number, it wouldn't be awkward to presume that, besides a "winning fee", an average private contract to an IP case between lawyer and client would reach values above US$20.000,00, per case.

[39] In Brazil the only opportunity that a counterfeit claim would be heard in a Federal Court would be in the hypothesis of a Foreign State that withholds a IP property right, or if the counterfeit practice was committed against or taking in consideration Federal interests; Article 109, of the Brazilian Constitution of 1988.

[40] There are another accessories fees that were not taken in consideration, but the totally of them, besides specifically the court fee itself, usually don't bypass US$60.

[41] Information available at the Court's official site: http://cgj.tjrj.jus.br/documents/1017893/1614047/novas-custas-judiciais-2015.pdf.

[42] For an acidic criticism of the strategic uses of costly court fees so that the poor couldn't reach the judiciary we recommend the Italian classical author CALAMANDREI, Piero. *Eles, os Juízes, Vistos por um Advogado.* São Paulo: Ed. Martins Fontes, 1995, p. 155.

[43] CASADO, José. *Conflagrado nos tribunais, Brasil tem um processo em andamento por cada dois habitantes*. Rio de Janeiro: Jornal O Globo, 18.07.2015, available athttp://oglobo.globo.com/brasil/conflagrado-nos-tribunais-brasil-tem-um-processo-em-andamento-para-cada-dois-habitantes-16822691#ixzz3h2dkdcrw.

lawsuits *in active* status, which results in one litigation for each two Brazilian citizens. In short terms, it is accurate to affirm that the largest South American country hosts a litigious society.

Considering violation suits – particularly when the IP right involved is a trademark, copyrights, or any other subject that doesn't demand an expert to be appointed by the court – it is relatively easy to obtain an injunction against the defendant (which is not a holder of a title). Brazilian Civil Procedural Law[44] only demands that the plaintiff, in this case the right holder, proves; i) the likelihood of obtaining a future positive result; ii) there is a risk that the property right is eroded by the conduct of the defendant during the law suit procedure (*verbi gratia* tarnishment cases); and iii) there is no chance of an irreversible damage (bankruptcy of the party that will "suffer" with the injunction).

If the plaintiff – and IP owner – is a known party and solvent, judges may to be quite prone to grant the injunction relief requested, on the grounds of protecting consumer rights, and opposing the opportunistic practice of *free riding*. State Court judges are frequently impressed with appearance of property right *per se*[45], letters patent labelled with the national colors and fancy rubberstamps. The impressive document induces the injunction even before the defendant has had the opportunity to proof that no violation was done, or that the showy title is null and void.

It is important to note that plaintiff seeking for an injunction is not required to prove *actual* damage[46], being it sufficient to demonstrate that eventual damages are at least *probable to occur*.

In these cases, usually the weaker party (the one accused of violative acts, and that was targeted in the injunction phase of the suit) simply accepts an incidental deal proposed by the

[44] Law 5.869/1973, article 273: "The judge may, if the litigator require, decide to anticipate the merits of an initial petition, if there is unequivocal evidence and is convinced of the likelihood of the plaintiffs allegation and: i) there is a reasonable fear of irreparable damages or of difficult indemnification; or ii) it is characterized the abuse of the right to a defense or the purpose of the defendant of postponing a final result"; Paragraph 2 "An injunction will not be granted when there is a danger of the irreversibility of the decision".

[45] Free translations: "Injunction granted determining that the defendant ceases to commercialize identical product to the one that is object of the plaintiff's patent (..) The fact is that the appealed has a patent and, *a priori*, it is presumed that he has a good claim" Estate Court of Rio de Janeiro, Appellate Level, 11th Civil Chamber, Appellate Level Judge Otavio Rodrigues, AI 2007.002.29251, Ruled in 21.11.2007. In another venue, *"*The alleged absence of proof of counterfeit is not enough to change the court level decision, since it concerns an argument that depends of full disclosure, including technical expertise to be produced in the future, but it doesn't change the presumption of good claim in favor of the appealed, that possess the IP right*"* Estate Court of São Paulo, 3rd Private Law Chamber, Appellate Level Judge Waldemar Nogueira, AC 395.520-4/5, Ruled in 19.09.2005.

[46] "*Si richiede dunque bensì una probabilità di danno e perciò non si fa capo alla repressione quando manchi detta probabilità, ma non si richiede l'effettiva occorrenza di un danno"* ASCARELLI, Tullio. *Teoria della concorrenza e dei Beni immateriali.* Editore Dott A. Giuffré, Milano, 1960, p. 180.

plaintiff to end litigation[47], involving clauses of abstention not only of the specific conflict litigated, but also of many other sometimes impertinent requests[48].

Some of the settlements made concern clauses of market division[49], prohibitions of entering markets (even without passing off or counterfeit acts), and many other practices that would not be justified by the scope of the IP rights at stake. After the issuance of the injunction, but before any full merits analysis of the case, the parties seal the negotiation with a non-disclosure agreement and a request that the settlement should be approved by a court order under secrecy.

Therefore, if one of the parties doesn't comply with the *gray* deal there is zero social control, or knowledge, of incidental new litigation, since the confidentiality stops third parties of taking notice of the case.

In the agrochemical and pharmaceutical sectors, such litigation has been soaring in Brazil since the new IP Laws, which conformed the architecture of national IP system towards a TRIPs compliant regime, came in the late 90'. From the attempt to postpone *old*[50] patent terms in virtue of the minimum deadline of 20 years since filing, to the eventual delay in public domain in respect of the *special patents*[51] conceded by the transitory provisions[52] (*mail box* patents and *pipeline*[53]), the slowdown of the troubled judiciary system contributed with huge insecurity for non-patent holders (such as the generics industry).

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[47] In the national procedural law system there is not an official discovery phase, and parties simply prefer to start litigating before considering negotiations.

[48] BRANCHER, Paulo. *Direito da Concorrência e Propriedade Intelectual*. São Paulo: Editora Singular, 2010, p. 182.

[49] Free translation: "Trademark law does not only focus in protecting patrimonial interests, since it is straightly related with the protection of consumer rights, which are not disposable and a matter of public interest. It is impossible to allow an agreement between parties, if it represents potential violation of public interests" 2nd Federal Circuit, 1st Specialized Court, Appellate Federal Judge Aluisio Mendes, Appellation number 2000.51.01.017652-2, ruled at 11.11.2008.

[50] *Rectius*, patents granted before the 96' Law had the term of 15 years. When Trips came in force, right holders of patents granted in the old regime filed more than 500 law suits trying to force the national PTO to extend their monopolies +5 years.

[51] In all cases using bizarre arguments that are incompatible with the free trade principle of the article 170 of the national Constitution.

[52] Since Brazil did not attribute patents for agrochemical, foods, and pharmaceutical products, from 1945 – 1996, the current Industrial Property Law allowed patents in special regimes, such as the Pipeline (revalidation of monopolies upheld abroad) and the Mail box (filed after 95', but before the new law came in force) filings.

[53] For a detailed report on the extensive litigation on the *pipeline* patents regime: A Brief Note Concerning Pipeline Patents in Brazil", published at the World Trade Organization and World Intellectual Property Organization, concerning Colloquium Papers of the Intellectual Property Law Teachers Research of 2012, December 2013, available at: http://www.wto.org/english/tratop_e/trips_e/wipo_wto_colloquium_aug12_e.pdf

Right-holders, in many cases, wait until the last day of a patent before entering a plea towards Federal Courts to extend their exclusivities, what might be held as bad faith litigation[54]. However, right holders are not scared of an eventual sanction for these practices since judges rarely apply that penalty, and when it occurs procedural law determines the *frightening* percentage of 1/100[55] considering the value of the cause (which, again, is fixed by the plaintiff party).

Even when a dubious claim – for instance, that resulting in the appropriation of material already in public domain[56], or in the unlawful extension of exclusivity – is filed in Brazil, competition remains quite cautious to enter the questioned market. Cease and desist letters by powerful parties are sufficient discouragement. Thus, in many cases exclusivity terms are further longer than the 20 years period assigned by law, in the current use of intelligent litigation tactics by deep pocket agents.

Another interesting practice of IP strategic litigation – with expressive impact on competition interests – is the *forum shopping*[57] exercised towards Federal Courts. Brazil is composed of twenty-six States and one Federal District; the five federal circuits divide the national jurisdiction within these federative compartments. Since the PTO is hosted in the city and state of Rio de Janeiro, the 2nd Federal Circuit, following a legal provision in the 96' IP Law, created four trial courts (in 1999) and two appellate courts (in 2005) specialized in intellectual property matter.

The consequence of the specialization was the average issuance of higher good quality rulings, the growing expertise of the judges and the filtering of professionals appointed by court to produce expert opinions – that are essential in invalidation cases that concern technologies. However, since the PTO is a Federal Authority suable everywhere, there isn't a legal prohibition that a plaintiff files its petition on the other Federal Circuits.

Furthermore, when the quality level of innovation proposed in a patent application is quite low, right holders may be tempted to file their plea far from the specialized 2nd Federal Circuit, to avoid criterions ruling and true experts, and increase their chances in a lawsuit. Besides of the

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[54] In this hypothesis, however, the Appellate Level suppressed a bad Faith litigation fine, with an important dissenting opinion: "the plaintiff, with the objective of prevailing erroneous interpretation of article 230 of the IP Law, filed, in the last day of its patent, plea that, consequently, would give endorsement to the illegal postponing of its monopoly while the lawsuit continues. It is verified, clearly, that the only purpose of the Plaintiff is, in fact, to obtain a *de facto* extension of the exclusivity right (...) since that the competitor companies feel prohibited to produce the drug that utilizes the technology that is subject to the patent" 2nd Federal Circuit, 2st Specialized Court, Appellate Federal Judge André Fontes, Appellation number 2000.51.01.017652-2, ruled at 31.08.2010.

[55] Article 18th of Brazilian Procedural Law.

[56] From the perspective of a broader use of patent scope: STEINBERG, Jonathan H. *Patent Misuse,* p. 188, in BENDER, David. *Intellectual Property Antirust*. New York, Practising Law Institute, 2001.

[57] "Clearly the defendant tried to evade from the jurisdiction of the IP specialized courts of this circuit, that are ruling the majority of these thesis merits, opting, deliberately, to file its case in a jurisdiction that would attend its interests, disastrous practice known as "forum shopping"" 2nd Federal Circuit, 13th Federal Court, AO 2014.51.01.002751-5, Judge Marcia Maria Nunes de Barros, ruled at 11.05.2015.

difference of judicial "know how", considering the possibility of a non-specialized judge/expert reaching the exact same conclusion that the specialist would achieve, the other Federal Circuits are much slower to adjudicate IP lawsuits; and are more willing to ignore the huge quantity of case law produced by the specialized Federal Circuit. In fact, litigation experience demonstrates that rarely good faith parties *opt* to dispute IP rights far from the specialized courts.

Thus, the combination of low quality substantive examination – or no quality at all, in cases of automatic registration – and the strategic misuse of procedural instruments[58] create serious and artificial barriers for the stability of markets, and the construction of a solid and specialized case law. The i) manipulation of court injunctions; ii) forum shopping practice; and iii) the planned use of courts delay, are some of the most common strategies litigators use in an uncompetitive manner.

4. The Shop Tour case and antitrust impacts

CADE's practice concerning IP rights could be perhaps described as rather biased for IP holders, at least until 2010[59]. Generally speaking, if there was an IP right granted, any representation/communication of supposed market's abuse was appreciated with a huge dose of *laissez-faire laissez passer.* In other words, there was a blunt view considering the internal and salutary tension[60] between IP rights, competition, and the incentive for dynamic coexistence.

However, a case concerning the misuse of an alleged copyright interest (the "creation" of a television show where goods were sold to the public) combined with a sham litigation accusation, resulted in an Antitrust decision held to be the leading case in sham litigation law.

In summary, Box 3 Video (a television producer) obtained the registration[61] of the format of a sales show ("Shop Tour"[62]) for television, at the copyright registrar. As mentioned before, in

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[58] AMERICANO, Jorge. *Do Abuso do Direito no Exercício da Demanda*. São Paulo: Saraiva, 1932; SILVA, Paula Costa e. *A Litigância de Má Fé.* Coimbra: Coimbra Editora, 2008.

[59] However, under the 1962 Antitrust Law, the Competition authority had powers to nullify Brazilian patents corresponding to foreign ones, declared null and void in foreign courts, and exercised such powers quite extensively. For an analysis of CADE IP case law before 2012, see BARBOSA, Denis Borges, Jurisprudência sobre PI do CADE (2005), found at denisbarbosa.addr.com/picade.doc, on Aug. 10, 2015. Also, on a South American perspective, Barbosa, Denis Borges, A criação de um ambiente competitivo no campo da propriedade intelectual o caso sul americano, UNCTAD, 2005, found at http://iprsonline.org/unctadictsd/docs/Barbosa%20FINAL%20formatado.pdf, visited Aug. 10. 2015.

[60] PERITZ, Rudolph J R. *Competition within Intellectual Property Regimes: de Instance of patent rights*, p. 39, in ANDERMAN, Steven & EZRACHI, Ariel. *Intellectual Property and Competition Law*; New York, Oxford University Press, 2011.

[61] Again it's important to enhance that copyrights in Brazil are independent from any registration procedure, and that a stamp from the Federal authority responsible for the National Library doesn't mean any analysis of what is printed in the piece of paper.

[62] Department of Justice (Ministério da Justiça), Antitrust Agency (Conselho Administrativo de Defesa Econômica), Procedure number 08012.004283/2000-40, Councellor Vinicius Marques de Carvalho, Ruled in 15.12.2010.

Brazil, registration of copyright is not a requirement to the full enjoyment of its set of exclusive rights. There is no substantive examination at all of the content of the items registered and among copyright lawyers it is known the story of the actual registration of the rules a numbers game, the use of it being a criminal act.

The content of the so-called copyright registration covered the – in one page– description of *television hosts promoting general sales with a relaxed and joyful approach towards consumers* (but nothing further). Notwithstanding this *amazing* creativity towards common commercial practice on mainstream media, the "copyright" holder filed more than nine different law suits (in state courts) asserting copyright *piracy acts* against competitor producers and television channels that exhibited similar programs.

Besides these litigations (which summed to dozens of interlocutory appeals etc), Box 3 also filed a trademark counterfeit law suit against the sales television channel Shoptime for the use of the valuable sign "Shop" for the activity of shopping.

In all of these cases, the alleged IP holder requested for a preliminary injunction against the defendant, and, unfortunately, in some of the suits mentioned it obtained a favorable decision[63] that prevented that the accused parties persisted in exhibiting *sales television shows* with its copyrights description during the lawsuits. Factually, in more than one case the defendant party bankrupted or lost its contracts and sponsors during the lawsuit, before any decision on the merits of the case.

Indeed, although Box 3 obtained one or other court decision in its favor, it inevitably lost all its cases (in trial court, appellate level, or in superior instances); and notwithstanding being defeated repeatedly, it didn't stop to file new lawsuits, against other players, with the same claim (or with a small variation to approach unfair competition subsidiary plead). In an economic comparison it held deeper pockets than the frail junior agents sued.

The administrative authority found that Box 3 i) had successfully abused of the judicial system, particularly through the injunction pleads, to ii) obtain an unlawful monopoly of television sales itself; since iii) the mere paper stamp by the copyright registrar could not attribute originality for such a public domain *concept*.

Furthermore, CADE found that Box 3 engaged in further anticompetitive practices, since it didn't file lawsuits aiming – properly – in the victory of its thesis, but merely to create temporary factual-exclusivities and to enlarge the defendant's costs during the frivolous suits. Thus, since it was able to bankrupt or expel from market some of the players, it achieved a higher market power,

[63] State Judiciary, with the exception of Rio de Janeiro, do not hold specialized IP courts. States like São Paulo and Rio Grande do Sul, however, have appellate courts with that specialization.

which was exactly what it intended. In the conclusion of the administrative ruling CADE imposed a (circa) US$600,000 sanction, correspondent to 5% of the net profit made by Box 3.

It is interesting to mention that besides the minority cases that the Judiciary system acknowledges bad faith litigation (in that micro analysis), the sanction of (maximum) 20%[64] of the company profits in administrative/antitrust instance is much steeper than the above mentioned Civil Procedure fine 1% of litigation expenses. Nonetheless, it's unlikely that a court judge can notice the unlawful (general market) tactics of the plaintiff, since in the majority of the cases he ignores the existence of the other frivolous suits. However, the antitrust authority had a *macro economical* view of Box 3 litigation, and could effectively notice the malicious IP and litigation strategic use.

The recent antitrust law modification, perhaps by the importance of this case, included two provisions of anticompetitive practices involving IP rights by a party that *circumvents* the legitimate use of technologies or IP safe harbors[65], or that misuses IP rights[66]. Therefore, it could be said that there is a gradual awareness of the competition risks allowed by permissive litigation, and the former radical pro-IP-holder view assumed by general public authorities in Brazil. In fact, there are at least five other big antitrust/administrative cases involving IP rights in Brazil, from data protection exclusivity matter, to sham litigation of mere patent applications, to industrial designs use to impinge must match items for automobile buyers.

5. Conclusions

There is still a timid perspective of the cross paths between IP rights and antitrust law, concerning the judiciary and the administrative branch in Brazil; however, Shop Tour case is a successful example of this rising perception of the dangerous intersection stimulated by exclusivity owners towards competition. Since there is a growing investment in lawyer's fee and judicial stratagems than in IP innovation, local authorities need, also, to be "creative" to avoid losing track of right holder's practices.

It is important to mention the positive changes present in 2011' antitrust law, so as to perceive specific hypothesis of illegal conduct in the misuse of IP rights to establish artificial competition scarcity. The ruling of a leading case – in the administrative sphere – concerning IP

[64] Brazil's actual Antitrust Law, 12.529/2011, limits this kind of sanction of moral entities to 20% of their profits. Former Antitrust Law, 8.884/93, allowed the sanction of – up to – 30%.

[65] Article 36, §3º, XIV: "Constitutes infraction towards the economic system, independently of guilt, the acts practiced by any means, that have the purpose or can produce the following effects, even if they're not achieved; §3o, XIV – engrossing the exploitation of industrial property rights, intellectual property rights, or technology".

[66] Article 36, §3º, XIX – "exercises or explore in abuse industrial property rights, intellectual property rights, technology or trademarks".

sham litigation, also contributes to "scare" new comers in the abusive litigation venue. It is also clear that litigation and/or IP enforcement, even when there is concentrated market power, are not illegal *per se*, just as it is important to have case by case approach on the lawful standards of competition to avoid an absent accuracy in eventual sanctions[67].

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