INTELLECTUAL PROPERTY PROTECTION IN BRAZIL

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NOTICE / DISCLAIMER

This report was prepared by Advocacia Pietro Ariboni – Ariboni, Fabbri, Schmidt e Advogados Associados for the New Zealand Ministry of Foreign Affairs, which funded the study under its Investment Promotion Fund. The purpose of the report is didactic and informative. The information contained in this report is provided as general guidance for New Zealanders interested in Brazil and does not constitute, under any circumstances whatsoever, a legal opinion issued by this firm. Advocacia Pietro Ariboni strongly recommends that any individual who needs specific in-depth information about intellectual property in Brazil consult a specialized law firm. Cover photos supplied by Brazilian Ministry of External Affairs photo library.

FOREWORD

The purpose of this paper is to provide general information to New Zealand individuals and companies interested in doing business in Brazil, regarding the tools available in the Brazilian law for the proper protection of their intellectual property rights, as well as for the enforcement of such rights against their undue use by non-authorized persons in Brazil. The paper also provides information concerning the licensing of the aforesaid rights in Brazil, the supply of unpatented technology, and the tax implications related to such activities.

OVERVIEW

As a strong emerging economy, Brazil is currently attracting more international investors than ever before. After several decades of economic crisis and political instability, Brazil has managed over the past fifteen or so years to improve its financial and legal underpinnings in order to encourage more stable, long-term interaction between government and business. Such efforts have included a strong push to recognize and protect intellectual property, which is now beggining to bear fruit

Historically, Brazil has consistently shown an interest intellectual property (IP), having been a signatory of the main international treaties connected with the protection of IP rights (see Appendix A). These treaties were all ratified by our National Congress and now are part of Brazilian legislation - and therefore duly enforceable in Brazil for all legal purposes. In view of the modern standards of protection set forth in the TRIPS Agreement, Brazil has updated its legal scenario during the last 15 years, with several national laws regarding Industrial Property (patents, industrial designs, trademarks and geographical indications), Copyright, Software and Cultivar protection (see Appendix B).

After a period of adaptation, the country is still trying to make its IP legal system work properly. The Brazilian Patent and Trademark Office (BPTO) can take up to five years to grant a trademark registration or eight years to render a final decision regarding a patent application. The backlog of lawsuits in Brazilian courts also makes it harder, or at least slower, to prosecute infringers of IP and to seek relief through damages.

Recent actions by the BPTO and the National Council of Justice have been successful in reducing the backlog and providing Brazilian and foreign companies with a more time-effective process. In the near future, it can be hoped that a better performing Brazilian IP legal system will allow companies to make long–term, strategic decisions based primarily on business facts, rather than bureaucratic impediments.

This paper offers a synthetic panorama of Brazil's IP system, highlighting its characteristics, drawbacks and advantages. The aim is to provide quality information for anyone interested in investing their intellectual assets in Brazil, as well as to allow a non-expert to understand, in general lines, how the system works and, overall, how to take the best out of such system.

This booklet is in three broad sections.

The first section deals (pages 6-26) with different mechanisms for protecting or managing your intellectual property in Brazil. This section including chapters on following strategies for IP protection:

- patents,
- unpatented technology (trade secrets),
- industrial designs,
- cultivars,
- copyright,
- software
- trademarks,
- geographical indications

The second section looks at the rules in Brazil around unfair competition, and how best to enforce your IP rights.

The final section analyses issues related to the structuring of your business vis-à-vis your Brazilian enterprises – including the important matters of licensing agreements, royalty payments and fees, and the use of Brazilian subsidiaries.

The booklet concludes with short appendices which list Brazil's major IP legislation and provides links for further information.

Patents are deemed to be very strong weapons in the marketplace, but they are not easy to obtain in Brazil because of government bureaucracy. As previously mentioned, a patent application takes an average examination period of six years with the BPTO. However, it is clear that the commercial benefits of a patent largely overshadow the drawbacks of its obtainment.

It is important to highlight that only patents granted in Brazil give the owner the right to bar their use by non-authorized third parties within the Brazilian territory. Thus, if the owner of a patent applied for abroad decides to extend its protection to Brazil, he/she must file an application with the BPTO.

The applicant may benefit from the priority term guaranteed by the Paris Convention, if the application is filed within 12 months following the date of the first application made abroad. An application may be filed even after such priority period, but in this case the prevailing filing date will be the date of the actual filing with the BPTO.

In any circumstance, the patent application must be filed before the object of the patent is disclosed in any manner whatsoever anywhere. For example, publication of the patent application abroad would prevent the granting of a patent in Brazil – as the product would .lack the novelty requirement and the patent matter would become public domain in Brazil.

Types of patents

According to Brazilian Law, two types of patents are recognized. Longer protection is established for Patents of Invention, defined as new objects (or parts thereof), manufacturing processes or sequences of steps, when susceptible to industrial application. At a lower level of invention, Brazil also grants Utility Model status to objects (or parts thereof) which present a new shape or arrangement and consist of a functional improvement as regards the use or manufacture.

Requirements

Patents must:

- be new (ie not already part of “the state of the art” – ie not made public by any means in any place);
- represent an inventive step or act (a solution that is not obvious for a person skilled in the field); and
- be susceptible of reproduction on an industrial scale.

The Brazilian Law establishes a grace period comprising the 12-month period preceding the filing of the application, in which disclosures made by the inventor are allowed and not considered as to constitute an existing part “the state of the art”.

Prior User Rights

The Brazilian Law guarantees the right of exploitation of an invention/utility model to any person who has exploited the subject matter in good faith prior to the filing date of the relevant application, even if such patent is granted. Such right, however, does not apply if the user was aware of the matter through a disclosure made by the inventor, by the BPTO or as a consequence of the inventor’s acts.

What cannot be patented

The Brazilian IP Law provides a comprehensive list of objects which cannot be patented, such as:

- discoveries, scientific theories and mathematical methods;
- purely abstract concepts;
- schemes, plans, principles or methods of a commercial, accounting, financial, educational, publishing, lottery or fiscal nature;
- literary, architectural, artistic and scientific works or any aesthetic creation;
- computer programmes per se;
- rules of games;
- operating or surgical techniques and therapeutic or diagnostic methods;
- natural living beings, in whole or in part, and biological material, including the genome or germ plasma of any natural living being when found in nature, or even if isolated therefrom, and natural biological processes;
- substances, matters, mixtures, elements or products of any kind, as well as the modification of their physical-chemical properties and the respective processes to obtain or modify them, when they result from the transformation of the atomic nucleus;
- living beings, in whole or in part, except transgenic micro-organisms meeting the requirements of novelty, inventive activity and industrial application, provided they are not mere discoveries; and
- anything that is contrary to the moral, good customs and public security, order or health.

Term of Protection

Patents are protected for 20 years and utility models for 15 years, in both cases counted from the date of the filing of the application. The Brazilian law grants a minimum term of protection of 10 years for patents of invention and 7 years for utility models, in both cases counted from the date of the granting of the patent.

Scope of protection

The owner of a patent granted in Brazil is entitled to prevent any third parties from exploiting the protected matter within the Brazilian territory, regardless of the patent type.

Patent developed by an employee or by hired party

In determining whether a patent is vested in an employer or an employee, the Brazilian law establishes three different situations:

1) The property is vested exclusively in the employer when:

- (a) the patent is developed as a result of an employment or service contract, and
- (b) the employment agreement expressly provides for the performance of research or inventive activities, or the same results from the nature of the services for which the employee was hired.

2) The property is vested exclusively in the employee or the hired person, when:

- (a) the development of the patent is not connected to the employment or service contract, or
- (b) the employee or hired person does not use the resources, means, data, materials, installations or equipment of the employer.

3) The property is vested in both parties, and in equal parts, when:

- (a) the patent results from the personal contribution of the employee or hired person, and;
- (b) the employee or hired person uses the resources, data, means, materials, installations or equipment provided by the employer.

Compulsory license and lack of use

Objects under patent can be exploited before they expire, under certain circumscribed situations. In particular, the owner of a patent is subject to have it licensed on a compulsory basis if:

- (a) the patent is exploited in an abusive manner, or
- (b) the object of the patent is not exploited in the Brazilian territory due to lack of manufacture or incomplete manufacture of the patented product or full use of the patented process, or
- (c) commercialization does not meet the needs of the market.

Two years after the granting of the first compulsory license, the patent may also be cancelled *ex officio* or at the request of any party with a legitimate interest if the abuse or disuse of the patent is not remedied.

Compulsory licenses and cancellations do not apply if the owner presents legitimate reasons for the non-use (such as legal obstacles) or proves he/she has accomplished serious preparations for the exploitation of the patent.

The Brazilian IP Law establishes that the lack of manufacture or incomplete manufacture of the products, as well as the lack of full use of the patented process, in the Brazilian territory may result in a compulsory license. On the other hand, compulsory licenses do not apply when the owner has **legitimate reasons** or the operation is **economically unfeasible**. Considering that these terms are not defined in the law and that they are broad and encompass a wide range of situations, compulsory licenses are unlikely. In fact, there are no precedents in Brazil's recent history of compulsory licenses due to the lack of local manufacture.

Registration Process

Upon its filing, the BPTO keeps the patent application confidential for 18 months. Examination is carried out upon request from the applicant or from any interested party. If no request is made within 36 months of the filing date, the application is abandoned and its contents fall into the public domain. During the analysis of a patent application, the examiner may request further documents and/or issue official actions, to which the applicant must reply within 90 days.

From the publication of the application in the Official Gazette until the conclusion of BPTO's examination, any third party may present to the BPTO information and documents aimed at the rejection of the patent or at the limitation of its scope. Once the examination is concluded, the applicant has a 60-day term to:

- (a) file an appeal against a rejection decision; or
- (b) pay the final fees, in case of a granting decision.

The law does not establish any term for the conclusion of the examination by the BPTO. The usual timeframe for the granting of a patent varies greatly depending on the nature of the patent, the documentation requested by the examiner, and the information supplied by third parties. We may, however, estimate the current average timeframe as six years.

An applicant/owner domiciled abroad must appoint and maintain an attorney domiciled in Brazil, duly empowered to represent them and receive service of administrative notices and processes, from the date of application for protection.

Annuities

Annuities are due from the third year of the patent application until the end of the patent term.

PCT Applications

In 2009, the BPTO was approved as an international search authority. It is now authorized to carry out prior international searches that are required under the rules of the Patent Cooperation Treaty.

PROTECTION OF UNPATENTED TECHNOLOGY (TRADE SECRETS)

Patent protection is not always the most strategic choice to guarantee exclusivity over a given technology. In fact, there are several cases in which a given technology, even though valuable, does not meet the minimum requirements of patentability. In some instances, owners might prefer to keep the technology confidential and protect it by secrecy. The Brazilian Law not only recognizes such cases, but also provides companies with a rather broad range of legal actions in order to protect such unpatented technology. (See also section on Unfair Competition, page 27.)

What can be protected?

Nearly every piece of information may be classified as a "trade secret" - provided that it gives a competitive advantage to its holder. Brazilian courts have already acknowledged that supplier lists, client lists, distributor lists, marketing strategies, consumers' profiles, manufacturing processes and organizational structures may be considered trade secrets.

Information that at the time of the disclosure or use is already of public knowledge or obvious to a person skilled in the art is not considered a trade secret and may be used without restrictions.

However, trade secrets are protected under Brazilian law regardless of any formality or registration and the term of protection is unlimited, lasting as long as the confidentiality. Protection to such information may be perpetual if its holder manages to keep it from being disclosed to third parties.

The Brazilian law does not establish any specific requirements for the protection of unpatented technology and trade secrets. Our courts, however, apply the list of article 39.2, of the TRIPS Agreement:

- (a) the information must be secret;
- (b) the information must be valuable; and
- (c) the holder must take reasonable precautions to keep the information secret. The World Intellectual Property Organization lists, and Brazilian authorities accept, the following measures as "reasonable precautions":

> *Firstly, considering whether the secret is patentable and, if so, whether it would not be better protected by a patent. Secondly, making sure that a limited number of people know the secret and that all those who do are well aware that it is confidential information. Thirdly, including confidentiality agreements in employees' contracts. Under the law of many countries, however, employees owe confidentiality to their employer even without such agreements. The duty to maintain confidentiality on the employer's secrets generally*

remains, at least for a certain period of time, even after the employee has left the employment. Fourthly, signing confidentiality agreements with business partners whenever disclosing confidential information.

Any company following such steps in order to protect its confidential information is entitled to claim trade secret violation before the Brazilian authorities, within the scope of protection defined below.

Scope of protection

Brazilian IP law does not establish a specific system of protection of trade secrets. On the other hand, the most usual forms of violation of trade secrets (such as industrial spying, breaches of confidentiality agreements and disclosure of information by employees) have recently been included in our laws as acts of unfair competition, establishing civil and criminal penalties for the discloser of the information.

Article 195 of the Brazilian IP Law designates as a crime the disclosure, exploitation and use of trade secrets to which someone had access by licit means (contractual or labor relations) or by illicit means (tort). A violation of trade secret is not recognized if the information was found out by means of the agent's own efforts. Apart from the criminal and civil sanctions, the Brazilian Labor Law also states that the violation of a trade secret is a justified reason for an employee's dismissal.

Drawbacks and advantages

When compared to the patent system, protection of trade secrets is limited because it only applies to illegal modes of acquisition. The independent, parallel development by a third party, for example, is considered a legitimate form of obtaining information protected as trade secret. The general rule is that anyone is free to discover the secret, if possible, by examination and analysis of the product, and then use it. On the other hand, while patents fall in public domain after a given period of time, secrets may remain perpetually confidential and, therefore, exclusive. Choosing the means of protection of given information or technology requires strategic analysis of the case by the company's technical staff along with its IP lawyers.

Industrial designs are currently a trendy topic on Brazil's IP agenda due to recent conflicts between car manufacturers and independent companies that dispute the market for spare parts. At a time when aesthetics is as important as technique, the proper protection of industrial designs may become a powerful weapon in several fields, from auto parts to technological gadgets.

Object of Protection

The protection of an industrial design lies essentially on the external aesthetic form of the object and not on its functional aspects. The Brazilian law defines industrial designs as "the ornamental plastic form of an object or the ornamental arrangement of lines and colors that provide a new visual result".

Requirements

The recognition of an industrial design depends on three basic requirements:

- (i) the object must be new (ie not made public in any way or in any place);
- (ii) the object must be original, presenting a visual configuration different from any other prior art objects; and
- (iii) the object must be susceptible of reproduction on an industrial scale.

Term of protection

Industrial designs are protected for ten years counted from the filing of the application, renewable for three successive periods of five years.

Registration Process

The BPTO is the authority in charge of examining a design application and granting the registration. The applicant may request that the design be kept secret for a period of 180 days. Registration is granted upon a formal analysis, without examination of the merits. The applicant may request the merit examination, as regards the novelty and originality requirements at any time, which is recommended in order to give the owner a more consistent legal protection. The applicant/owner domiciled abroad must appoint and maintain an attorney domiciled in Brazil, duly empowered to represent them and receive service of administrative notices and processes, from the date of application and during the term of protection.

Maintenance fees

A maintenance fee must be paid for the second five-year period counted from the filing date. Payment for the second five-year period must be made during the fifth year of the first registration term. Evidence of payment of the following maintenance fees must be presented together with the renewal application.

Object of Protection

Cultivars are new plant varieties, or the essentially derived plant variety, of any kind or species of plant, that:

- are not found in nature;
- have specific characteristics resulting from research in agronomy and life sciences (genetics, biotechnology, botany and ecology);
- have not been offered for sale in Brazil for more than 12 months before the date the protection was applied for, and
- have not been offered for sale in other countries with the breeder's consent, for more than six years for tree and vine species and for more than four years for the remaining plants.

Term of Protection

As a general rule, cultivars are protected for15 years from the granting of the Provisional Certificate of Protection For vines, fruit trees, forest trees, ornamental plants and forests, the protected term is 18 years.

Scope of protection

The registration of a cultivar grants rights to inhibit the free use in Brazil of plants or of their parts of reproduction or vegetative multiplication. It also allows the producers to charge and receive royalties resulting from the licensing of the cultivar.

Registration Process

The registration application must be filed with the Department of Agriculture, through the Rural Development Office of the National Plant Variety Protection (SNPC). A particular name of the new plant must be indicated (trademarks registered in similar fields of activities are not accepted).

The SNPC analyzes the application within 60 days from its filing. If all required information is supplied, the application is published and a Provisional Certificate of Protection is issued. Oppositions may be lodged in the following 90 days, after which a decision on the merits will be rendered. If no appeals against such decision are filed by third parties within 60 days, the Protection Certificate is issued and a notice thereof is published in the Official Gazette.

An applicant/owner domiciled abroad must appoint and maintain an attorney domiciled in Brazil, duly empowered to represent them and receive service of administrative notices and processes, from the date of application for protection.

Annuities

An annual fee must be paid from the year following the granting date of the Certificate of Protection.

Priority Right

A priority right of 12 months as from the application date in the country of origin is granted to the applicant to extend its application in Brazil or abroad, provided that the country of origin has an agreement with Brazil, or with an international organization of which Brazil is a member. If the application is filed after this 12-month period, it will not benefit from the priority right and it may be rejected based on third party's rights obtained in the meantime.

Compulsory license

A compulsory license can be granted in order to ensure:

- (i) availability of the cultivar on the market at reasonable prices when the regular supply is unduly hindered by the owner of the plant variety;
- (ii) the regular distribution and quality maintenance of the cultivar; and
- (iii) reasonable remuneration to the owner of the plant variety.

The compulsory license is enforced by the Administrative Council for Economic Defense (CADE).

Brazilian copyright law is considered by most Brazilian specialists to be outdated and excessively protective of the authors' rights, to the detriment of the cultural industry and the general diffusion of knowledge. Examples of such obsolete protection are the prohibition of photocopying out-of-print books or of copying songs from a CD to an MP3-player even when there is no profit intended. The National Congress has opened a public consultation in order to amend copyright law, reviewing the extension of authors' rights and broadening the list of exceptions. Such revision of the law must not be regarded as a threat to authors' rights, but as a necessary update.

Object of Protection

Any work resulting from the creation of the human mind expressed by any means, in tangible or intangible media, is subject to copyright. Such works include, among others, literary, artistic or scientific texts, musical compositions, cinematographic works, photographs, drawings, paintings, maps, architectural projects, adaptations, translations and other transformations of original works, computer programmes, dictionaries, databases and other works which, by virtue of the selection, coordination or arrangement of the subject matter, constitute intellectual creations.

Interpretations and executions of works made by artists, as well as phonographic producers' and broadcasters' recordings or broadcasts are also protected as Related Rights.

Moral rights and economic rights

The property of a work is always vested in the individual or individuals who have created it, and they retain all relevant moral and economic rights. Moral rights cannot be assigned under any circumstances whatsoever. Economic rights can be assigned to a legal entity on exclusive basis, which thus acquires the rights to commercially exploit the work. Definite and total assignment of economic rights is allowed, provided it is made expressly in a written assignment agreement. In the absence of an express provision to the contrary, the maximum assignment period of economic rights is deemed to be five years.

Registration

Since Brazil is a member of the Berne Convention, copyright registration is not mandatory for property acquisition or for the enforcement of rights. On the other hand, registration creates a presumption of authorship regarding the registrant and the date of registration, thus reversing the burden of proof in case authorship is challenged judicially. There is no central agency where registration can be made. Instead, registration can be sought before different agencies, depending on the nature of the work (see Appendix D).

Term of protection

Copyrights remain in force for the whole life of the creator and up to 70 years counted from January 1st of the subsequent year of his/her death. Related Rights last for 70 years after January 1st of the subsequent year of the public performance, the setting of the phonogram or the broadcast takes place.

Ownership of the work made by an employee or hired person

Unlike patents, the Copyright Law does not contain any specific provision dealing with the ownership of work made under an employment contract. As a general rule, the law establishes that all rights belong to the author. Thus, if the employer wishes to retain the economic rights to the works, it is necessary to include specific provisions in the employment or service contract.

As most members of the World Trade Organization, Brazil elected to protect software under copyright law. However, due to the purpose of software, which differs from other artistic works, some provisions of the Copyright Law do not apply to software, and a specific law was enacted in order to regulate its protection.

Copyright or sui generis protection? Applicable law

Copyright provisions do not apply to software protection only in three regards:

- (a) the extent of application of moral rights connected with software is narrower than that connected with other works;
- (b) the term of protection of software is shorter; and
- (c) the Software Law has specific provisions related to ownership.

All other provisions contained in the Copyright Law apply to software.

Moral rights

Provisions related to moral rights do not apply to software, except those related to the author's right, at any time, to claim the authorship and to oppose any unauthorized changes, when said changes result in disfigurement, mutilation or any other modification of the software that may damage the author's honour or reputation.

Term of protection

Software is protected for 50 years, counted from January 1st of the year following publication or, if this is unavailable, its creation.

Ownership of the work made by an employee or hired person

The employer retains full title to the economic rights connected to the software developed and prepared throughout the duration of an agreement expressly intended for research and development, or in which the employee's or hired person's activities arise from the nature of the duties pertaining to their employment.

The rights belong exclusively to the employee or hired party, when it is generated with no connection to the employment or service agreement, and without the use of the resources, technological information, trade and business secrets, materials, facilities or equipment of the employer.

Reciprocity of protection

The rights set forth in the Software Law are granted to foreigners domiciled abroad, provided that equivalent rights are granted to Brazilians in the country of origin. Since New Zealand gives to software holders the same legal protection as Brazil and for the same term, and makes no distinction between locals and Brazilian individuals or companies domiciled in New Zealand or abroad, the provisions of Brazilian software law fully applies to New Zealand domiciles in Brazil or abroad.

Assignment of rights

Definite and total assignment of economic rights must be made expressly by means of a written assignment agreement. In the absence of an express provision to the contrary, the maximum assignment period of economic rights is deemed to be five years.

Registration

Similar to other copyrights, software does not require its registration for the purpose of acquisition of property rights; however, the registration creates a presumption of authorship as regards the creator and the date of creation, and it reverses the burden of proof in a court action. Registration is made by the filing of sealed envelopes containing the source-code of the software, and then the envelopes are hole punched by the BPTO and returned to the applicant, There is no merit examination.

If the applicant requests confidentiality, the envelopes can only be opened upon his/her request or by court order. Currently, due to bureaucratic issues, the BPTO takes approximately one year to grant a software registration.

Trademark protection in Brazil is conditioned to its registration with the BPTO, even though some rights are granted to good faith users (see Prior Use below) and applicants. Therefore, it is highly recommended that any foreign company seeking to protect its trademarks in Brazil file the relevant applications.

In recent years, several foreign companies have faced trouble in starting their businesses in Brazil due to trademark issues, such as bad faith registrations that led to time-consuming lawsuits. Our experience in this area shows that the BPTO and the Brazilian courts rule in favour of the company whose rights precede the adverse party's. The main issue, in such cases, is how long such a company has to wait until a favorable definitive decision is rendered.

What can be registered?

According to Brazilian law, only signs which are visually perceivable may be registered. The BPTO accepts applications for word marks, figurative marks or devices. Smells and sounds, for example, are not eligible for trademark protection.

Types of Marks

In Brazil, there are three different types of marks:

- Product or service marks are used to distinguish similar, identical or related goods or services from different origins;
- Collective marks identify products or services offered by members of the same entity; and
- Certification marks certify the conformity of a product or service with certain rules or technical specifications, particularly regarding quality, nature, material used and methodology employed.

Scope of Protection

The protection granted to trademark registrations in Brazil is limited to the country's territory (principle of territoriality) and to the field of activity on which the trademark is used (principle of specialty), except for two cases:

- highly renowned trademarks registered in Brazil are given widespread protection regardless of the field of activity; and
- well-known trademarks, even if not registered in Brazil, benefit from the international protection set forth in the terms of the Paris Convention.

Term of protection

Ten years as from the date of registration, renewable for unlimited successive ten-year periods.

Mandatory Use

The use of the trademark is not mandatory for application, registration or renewal purposes. However, if the owner does not start use of the trademark within five years from its registration date or if such use is suspended for more than five years at any time, the registration can be cancelled for lack of use, upon request of any interested third party.

Prior use

The trademark law gives preferential right for registration to any person that has used the trademark in good faith at least six months before the date on which an application for registration is filed for an identical or similar trademark to identify the same or related goods or services.

Registration Process

Trademark applications may be filed at any time with the BPTO. Each application may cover only goods or services pertaining to a single class, given that multi-class applications are not allowed.

After the application is published in the Official Gazette, third parties may lodge objections in a 60-day term and, in this case, the applicant is notified to present a reply within 60 days. During the analysis, the examiner may issue official actions, which must be complied with or contested within 60 days. Once the examination is concluded, the registration of the trademark is finally granted, upon payment of the final fees.

The Brazilian law does not establish any term for the conclusion of the examination by the BPTO. The usual time frame until registration is currently 24 months, provided that no opposition is filed or official action is issued. Otherwise, this period may last up to five years, as mentioned in the Overview section.

An applicant/owner domiciled abroad must appoint and maintain an attorney domiciled in Brazil, duly empowered to represent them and receive service of administrative notices and processes, from the date of application for protection.

Conflicts involving Trademarks and Domain Names

The authority in charge of registering domain names in Brazil is the Registro.br, a division of the Coordination and Information Center of Point BR (Nic.br). Unlike trademarks, registration of a domain is not preceded by any similarity search, and the registration is given to the first person who applies for it (the "first come, first served" principle). Brazil is not a signatory of the ICANN's Uniform Domain-Name Dispute-Resolution Policy (UDRP). A local alternative resolution

procedure called SACI, which is similar to UDRP, is currently being developed by the relevant authorities. Until its full implementation, however, infringers of trademarks can only be prosecuted by means of a court action.

Geographical Indications are the names of places known for the manufacture of a specific product or the rendering of a given service. Its regular protection may aggregate value to such businesses and develop the region's economy. Classic examples of GIs are cheese (Grana Padano or Parmiggiano-Reggiano) and wine (Cognac, Asti, or Champagne). Producers from several regions worldwide have united in cooperatives in order to guarantee the protection of their names, which have now become valuable assets.

Types of GIs

Brazil recognizes the two traditional types of GIs. A softer protection is granted to the indication of origin, which is just the name of a region known as a producing centre of goods or services. A broader and more formal protection is guaranteed to the designations of origin, which refer not only to the name of the place, but also to the quality or characteristics of goods or services that can only be obtained in such place.

Registration Process

The registration of the GI is made with the BPTO. Even though optional, registration is largely recommended in view of its advantages. Filing administrative oppositions or even lawsuits based on unregistered GIs entails the need to provide the examiner or judge with enough evidence that the violated geographical name meets the legal definitions of indication of origin or designation of origin. On the other hand, once a GI is registered with the BPTO, the agency takes it into consideration *ex officio* when analyzing other GIs or even trademark applications. The same applies to the filing of lawsuits. The owner of a registered GI may simply present the certificate of registration, instead of filing arduous sets of documents trying to prove that the geographical name merits GI protection.

In order to register a GI, the applicant must provide the following:

- (i) Geographical name;
- (ii) description of product or service to be identified by the GI;
- (iii) characteristics of the product or service;
- (iv) proof that the applicant is a representative of the community that operates in the production of the goods or the provision of the services to be protected;
- (v) regulation of use of the geographical name;
- (vi) formal instrument that defines the limits of the geographic area; and
- (vii) labels (if it is a figurative representation).

An applicant/owner domiciled abroad must appoint and maintain an attorney domiciled in Brazil, duly empowered to represent them and receive service of administrative notices and processes, from the date of application.

Scope of protection

The use of a given geographical indication is restricted to product manufacturers and service providers established in the respective locality. Use of a GI by any other person, in any other locality, is considered an illicit act and the titleholder can prosecute infringers both civilly and criminally. Reproductions or imitations of GIs cannot be used or registered as trademarks if the identified goods or services are not originated in the indicated territory and there is a potential risk of misleading consumers.

Object of Protection

Integrated Circuits are organized sets of interconnections, transistors and resistors, arranged in layers of three-dimensional configuration on a piece of semiconductor material (known as a 'chip'). To warrant protection, the topography of an integrated circuit must result from the intellectual effort of its creator, and must be new (that is, not obvious to a technician or manufacturer of integrated circuits at the time of creation).

Term of Protection

A topography of integrated circuits is protected for ten years from the filing or first operation, whichever occurs first.

Registration Process

The authority in charge of registration is the BPTO. The registration is granted to the topography only, and only to one topography. The protection is given to any Brazilian citizen, foreigner domiciled in Brazil, or any person domiciled in a country that, in reciprocity, grants to Brazilians or people domiciled in Brazil, equal or equivalent rights. The applicant may request that the application be kept confidential for a period of six months from the filing date. The application is submitted to a formal examination and, if properly instructed, the registration will be granted. The BPTO does not examine the merits, which may be requested in court by any interested party.

Ownership of the work made by an employee or hired person

The employer has full title to the rights connected to the topography:

- developed and prepared throughout the duration of an agreement expressly intended for research and development, or
- in which the employee's or hired person's activities arise from the nature of his/her duties.

The topography belongs exclusively to the creator if it is made at home and without using the resources of the employer. Otherwise the ownership is always vested in the employer.

Apart from violation of trade secrets, there are provisions in Brazilian IP law to prevent other acts of unfair competition, including use or exploitation of unregistered assets, such as slogans, trade dress, trademarks, shapes, etc. The definition of unfair competition encompasses the use of any fraudulent means to divert the competitor's clients.

Some such acts (listed in article 195 of the Brazilian IP Law) are considered crimes and criminal prosecution is possible. However, considering that the criminal penalties are undersized, companies affected by acts of unfair competition usually prefer to request the cessation of such acts and the relief for the damages caused by means of a civil lawsuit.

There are no written requirements as to what can be considered an act of unfair competition. Brazilian courts, however, have established three logical premises:

- there must be an act, an omission, a sequence of acts or a sequence of omissions;
- (ii) such act or omission must be necessarily unfair; and
- (iii) the agent must be a competitor operating on the same market field, at the same time and within the same geographic sphere of operation.

In order to analyze if a given act or omission is unfair, the criteria are relative. Several court decisions issued in Brazil refer to “uses and customs accepted as usual on a given market”. In view of such relativity, the same act (for instance, copying a competitor’s store trade dress) may be ruled fair in a field of activity where all the stores look alike and unfair in a different field of activity, where stores have different fixtures.

Overall, in cases of acts of unfair competition, we underline the importance of a clear set of documents proving the existence and the authorship of the act, as well as the existence of its consequences in the company’s activities.

A company whose activities are affected by acts of unfair competition is entitled to request damages for moral and material damage. While material damage must be proved by the plaintiff, the existence of moral damage is presumed by force of law and the compensation is calculated by the judge or, in some cases, by an expert.

Despite the length of a civil lawsuit in Brazil (see Enforcement of IP Rights below), injunctions may be requested and awarded to order the immediate cessation of the act. The awarding of damages, on the other hand, may only occur through a final decision by the judge.

Despite its generally modern legal framework, Brazil's IP system is often damaged by the slowness of the country's judicial system. The Brazilian Procedure Law is complex and allows conflicting parties to present numerous appeals during lawsuits, which may turn a rather simple issue into a lengthy legal discussion.

Protection of intellectual property rights may be sought through criminal actions against infringers of IP rights or civil actions aiming at:

- (a) the cessation of an infringement;
- (b) the recovery of damages;
- (c) the obtainment of an IP right; or
- (d) the cancellation of a third party IP right.

The Brazilian law also allows administrative actions before customs authorities seize counterfeit products entering the country.

The owner of a pending trademark application (and not only of a registered trademark) is entitled to file a lawsuit in order to safeguard the material integrity and reputation of the trademark. The same, however, does not apply to the owner of a pending patent application, who can only start lawsuits after the patent is actually granted by the BPTO. Nevertheless, in patent cases, the recovery of damages may be granted retroactively to the date the application was published in the Official Gazette. For this reason, a cease and desist letter must be sent to the infringer when the applicant gains knowledge of the infringement. .

Injunctions to enjoin the defendant from violating the plaintiff's rights are also available. Such injunctions may encompass the search and seizure of the counterfeited goods, and are granted in a few days. The injunctions should be confirmed by a final decision issued in court. Otherwise, the plaintiff may be exposed to the reimbursement of losses caused by the injunction. Since litigation in Brazil takes a long time, it is very important to have the injunction granted at the beginning of the case. The judge may grant injunctions in camera (ie without the defendant's prior knowledge or presence in court).

It is also possible to file an injunction to suspend the effects of a patent, design, GI or trademark registration during the course of a nullity lawsuit. However, such injunctions are granted in very

few cases, when the nullity is clearly evidenced and may be easily recognized. To have the injunction granted, the plaintiff must:

- (i) submit sufficient and indisputable evidence of his/her rights; and
- (ii) show the need of an urgent measure.

The need to stop the counterfeiting is accepted as a situation of urgency.

Damages for the violation of intellectual property rights are a controversial issue in Brazil. The Superior Courts award damages based only on the evidence of counterfeiting. State Courts, however, are divided and some judges understand that the mere act of counterfeiting, without any material or moral loss, does not suffice to award damages. Damages are determined by the most favorable criteria to the injured party, as follows:

(i) the profits that would have been obtained by the injured party if the infringement had not taken place; or

(ii) the profits obtained by the infringer; or

(iii) the royalties that the infringer would have paid to the owner of the infringed rights if a license had been granted allowing him to exploit the violated rights.

Item (iii) above endorses the aforesaid Superior Court's position, since it allows damages to be recovered without the need of proving any other loss. The mere absence of the license is deemed as sufficient basis to collect the damages. Such collection may be barred by a five-year statute of limitations (the term is suspended by the filing of the lawsuit).

The time frame of a civil lawsuit in Brazil varies depending on the evidence requested by the judge, as well as the place where the lawsuit is brought. We may estimate, however, that a lower court decision is rendered in approximately two years. State Courts take approximately four years to render their decisions. Finally, Superior Courts may take another two or three years to rule over a case.

The importance of such time frames is aggravated by the fact that the defeated party appeals in nearly every case. Appeals are also commonly used by lawyers as a way to retard a lawsuit. The Brazilian Law allows the parties to a lawsuit to appeal against every intermediate decision issued by the judge.

On a positive note, our litigation experience has shown that several lawsuits can be ended by a settlement between the parties. In such cases, the judge must be informed of the settlement and ratify it.

Foreign companies may carry out business in Brazil without having to incorporate a local subsidiary or manufacture products locally. In fact, most foreign companies that operate in Brazil do it by means of specific agreements with local companies, such as distribution agreements, agency agreements and similar commercial agreements. Bearing in mind that some of these agreements are intrinsically related to intellectual property rights, extensive caution is recommended in their negotiation and compliance.

Foreign companies which own intellectual property rights recognized or granted in Brazil (such as trademark, patents, designs, software or works) may license such rights to a Brazilian company for local exploitation. Franchise agreements are commonly used when the owner of a trademark wishes to have a broader control of the activities carried out in Brazil under its trademark. Finally, on a more technical level, Brazilian companies may also benefit from acquiring unpatented technology from foreign companies or contracting technical services that involve the transfer of any kind of know-how.

Registration

The BPTO registers five types of agreements:

- patent and design licenses;
- trademark licenses;
- franchises;
- supply of technology and rendering of technical services (provided that, in this case, it involves the transfer of any kind of know-how).
- Software license agreements (which are subject to registration whenever the licensor supplies to the licensee the source code of the computer programme).

According to Brazilian law, the registration of such agreements is mandatory for the following purposes:

(i) opposability against third parties;

(ii) deduction by the Brazilian party of the amounts paid to the foreign party for income tax purposes (registration with the Central Bank of Brazil is also required);

(iii) remittance of payments abroad (registration with the Central Bank of Brazil is also required); and

(iv) creation of a presumption of non violation of the economic order, since the BPTO is considered an auxiliary agency of the economic defense authorities.

Payment limitations

Aiming to protect national industry and develop of its internal market, Brazil's legal system has several provisions which restrict the remittance of capital abroad. Some such limitations apply

to the licensing and related agreements described under this topic. A general view of the limitations is provided in the table below:

Type of Agreement	Payment Limitation	
	Related companies	Unrelated companies[1]
Supply of Technology[2]	From 1% to 5%	unlimited
Patent Licenses[2]	From 1% to 5%	unlimited
Design Licenses[2]	From 1% to 5%	unlimited
Trademark Licenses[3]	1%	unlimited
Work Licenses	unlimited	unlimited
Software Licenses	transfer price rules	transfer price rules
Technical Services[4]	transfer price rules	transfer price rules
Franchise	From 2% to 5%	unlimited
* percentages are to be calculated on net sales		

Comment ([1]) Although Brazilian law does not establish any limitation on payments made between unrelated parties, the BPTO may request a reduction of the contractual remuneration if it considers that the amount exceeds usual market standards. Despite recent court decisions affirming that the BPTO has legitimate powers to act this way, we understand that the issue may still be challenged in court.

Comment ([2]) Payments made by a Brazilian company to a related company abroad are limited to a percentage of the net sales price of the contractual products traded by the Brazilian party. This rate varies according to the field of activity the agreement is inserted in. Areas such as telecommunications, oil and gas, mining and capital goods are considered strategic for Brazilian development and are entitled to the higher 5% limitation. The Brazilian law allows royalties for patent applications, but remittance abroad is conditioned to the granting of the patents.

Comment ([3]) The 1% limitation applies regardless of the activity to which the agreement refers. However, the trademark license must be made on a royalty-free basis if the licensed trademark refers to a product or service for which a patent license is also granted or a technology supplied under a remunerated agreement. Royalties are only allowed for registered trademarks, not for applications.

Comment ([4]) Remuneration of specialized technical services agreements must be calculated based on the actual costs of the services provided (such as person/hours, person/days, etc). A determined amount may be established, provided it is in accordance with the transfer price rules.

Apart from the comments above, it is also important to highlight that royalty payments for the licensing of patents, trademarks and industrial designs are not allowed if the Brazilian company is a branch of the foreign licensor. A branch is considered an extension of the foreign company itself and not an independent company as a subsidiary; "branches" are an unusual corporate structure in Brazil, generally adopted only by banks.

Term of agreements

Licenses of patents, designs and trademarks are limited to the term of validity of the licensed rights. For designs and trademarks, the term of the agreement may be extended upon renewal of the respective registrations.

Franchise agreements also have their term limited to the validity of the franchisor's trademarks licensed under the agreement and may also be extended for additional terms upon renewal of the trademark registrations.

The supply of technology may be agreed for a maximum initial term of five years. If the parties can evidence that the initial term was not sufficient for the proper absorption of the technology, the BPTO may allow an additional five-year period. For income tax purposes, deduction of the contractual fees is also limited to the initial term and an additional five-year term can be awarded upon prior request to the Central Bank of Brazil.

The term of technical services agreement must equal the time required for conclusion of the services. Even though a provision inserted in the Brazilian Civil Code enacted in 2002 limits the term of service agreements to four years, the BPTO still accepts services agreements agreed for up to five years.

Software, artistic and literary works may be licensed for their validity term. For software licenses involving the supply of the source code, the initial term is limited to five years.

Forbidden/ mandatory clauses

The following clauses are not acceptable under BPTO policies and/or the Brazilian law:

(i) Supply of technology, technical services and franchise - clauses that forbid the free use of the technology by the recipient party after the expiration of the agreement, or after the period of confidentially agreed by the parties (which may not exceed five years counted from the termination of the contract);

(ii) Patent license - clauses assigning to any of the parties the property rights connected to any improvement made by the other on the licensed patent. The parties may, however, agree on a right of first refusal for the granting of a license upon such improvements; and

(iii) Trademark license and franchise - clauses that prevent the trademark owner from exercising effective control over the quality of products manufactured by the licensee under the contract.

It is mandatory to identify the licensed rights (serial numbers, patent titles, trademark classes, date of filing, date of granting, etc.) in patent, design and trademark licenses, as well as in franchise agreements.

The following taxes are levied on royalties and technical fees paid by a Brazilian company to a licensor/supplier domiciled abroad:

Withholding income tax

. Rate	Generally 15%, as in the case of payments made to New Zealand.
. Tax burden	Usually, the foreign party, but the parties may agree otherwise (gross up is allowed, in case the tax burden lies on the Brazilian party).
. Compensation	New Zealand and Brazil have not signed an agreement to avoid double taxation. The possibility of tax credit should be analyzed in light of New Zealand law and fiscal policy.
. Taxable events	Licenses, services and supply of technology agreements.

Tax on financial transactions – IOF

. Rate	0.38% on the net amount remitted.
. Tax burden	The Brazilian party.
. Compensation	Not applicable.
. Taxable events	Licenses, services and supply of technology agreements.

CIDE (Contribution for Intervention in the Economic Right)

. Rate	10% on the amount due. [1]
. Tax burden	The Brazilian party.
. Compensation	Not applicable. The Brazilian party, however, is entitled to a credit on trademark and patent license payments, as from the second payment, at a rate of 30% of the amount of the first tax payment. This credit applies on royalties paid from 2009 to 2013.
. Taxable events	Licenses, services and supply of technology agreements.[2]

Service Tax – ISS

. Rate	From 0% to 5% on the amount due, depending on the place and nature of the taxable event.

[1] A recent decision issued by the 1st Panel of the 2nd Chamber of the 3rd Section of the Board of Administrative Council of Tax Appeals (CARF), ruled that CIDE must be calculated over the net amount paid (15% income tax excluded).

[2] Non incidence of CIDE on royalties paid for the software license when it does not involve transfer of technology. A recent decision rendered by of the 3rd Chamber of the Regional Federal Court ruled that CIDE does not apply to payment of services, which do not involve in transfer of know-how

. Tax burden	The foreign party, but the Brazilian party is responsible for making the payment to the competent Brazilian tax authority.
. Compensation	Not applicable.
. Taxable events	Services. The validity of such tax connected with licenses and supply of technology is under discussion by Brazilian courts.

Social Security Financing Contribution (COFINS) and Employee Profit Distribution Program Contribution (PIS)

. Rate	9.25% on the due amount.
. Tax burden	The Brazilian party.
. Compensation	Not applicable.
. Taxable events	Services. The validity of such tax connected with licenses and supply of technology is under discussion by Brazilian courts.

The following taxes are levied on royalties and technical fees paid by the licensee/recipient party to a licensor/supplier, when both are domiciled in Brazil:

Withholding Income tax - 1.5%
IOF – Not applicable.
CIDE – Not applicable.
ISS - 0% to 5% depending on the place and nature of the taxable event.
CONDECINE – Contribution for the Development of National Cinematographic Industry – 11%, applicable only to royalties paid on the licensing of certain films and videos with commercial purposes.

Considering the taxes that are levied on the payment of royalties and technical fees, as shown in the previous chapter, some investors may wish to weigh up the merits of incorporating a subsidiary rather than hiring a Brazilian licensee directly.

First, we must consider that the Brazilian subsidiary may adopt two different types of tax system: (i) presumed profit and (ii) actual profit.

In the case of presumed profit, the income tax and the CCSL (profit contribution tax) are calculated on a taxable basis that ranges from 8% to 32% on the specific revenue (royalties or technical fees). The 32% basis applies when the company renders services, as would be the case of the Brazilian subsidiary if it were constituted with the sole purpose of granting the license or rendering the services to the Brazilian licensee/service contractor. In the case of actual profit, taxes are calculated on the total actual profit of the company, after allowable deduction of expenses, and paid monthly or quarterly. The total taxes amount to approximately 35%.

Second, we must take into consideration that no income tax is currently levied on the payment of dividends from a Brazilian subsidiary to its parent company abroad.

Last, it is important to check whether the New Zealand company would be able to claim tax credits in New Zealand regarding the taxes withheld in Brazil. As far as we know, such possibility exists, even though there is no agreement to avoid double taxation between Brazil and New Zealand.

Below, we present a chart which compares the taxes that would be levied in a service agreement, in both situations:

(i) payments made directly to the New Zealand company, and
(ii) payments made to a Brazilian subsidiary of the New Zealand company that remits dividends to its parent company abroad.

Our example here shows a Brazilian subsidiary that adopts the presumed profit tax system only, since in the actual profit system, as mentioned above, the calculation basis of the income tax and the CCSL depend on the deductible expenses. For the sake of this comparison, we assume that the total service fee paid by the Brazilian party is $1,000,000.

Payment made to the Brazilian subsidiary

Service Fee	$1,000,000	
32% taxable basis	$320,000	
	$80,000	(25% Income Tax)[1]
	$28,800	(9% CSSL – Contribution on profits)[1]
	$46,500	(4.65% PIS/COFINS)[2]
	$50,000	(5% ISS)[2]
Total	$**205,000**	

([1]) calculated on the taxable basis

([2]) calculated on the total service fee

Payment made directly to supplier abroad

In this case, and provided that the contracting parties do not agree to the contrary, the foreign party will bear the withholding taxes (15% of income tax and 5% of ISS) only, totalizing **$200,000**.

Conclusions

As seen above, the tax burden seems to be quite similar in both hypotheses. It should be noted, however, that the simulation above (i) assumed that no fee is charged by the parent company to its Brazilian subsidiary, which may not be acceptable in certain circumstances under the prevailing transfer price rules; (ii) did not consider the costs involved in the incorporation and maintenance of the Brazilian subsidiary; and (iii) did not consider a possible tax credit that the New Zealand may have on the income tax withheld in Brazil (which, in our example, represents $150,000).

Thus, considering items (i) to (iii) above, it is our understanding that a direct contractual structure between the New Zealand supplier and the Brazilian party could well be more advantageous to the New Zealand company under a tax point of view. We therefore urge a detailed analysis of your company's specific situation, drawing on legal and tax experts, which also takes into account the activities the subsidiary would effectively carry out in Brazil.

APPENDIX A

MAIN INTERNATIONAL TREATIES CONNECTED WITH THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS ADOPTED IN BRAZIL

Paris Convention for the protection of industrial property, of March 20, 1883

Brazil is a party to the 1967 Stockholm Revision of Convention.

> *Guarantees a priority term counted from the first application of a patent, industrial design or trademark in the country of origin, in which the applicant can file the same patent, industrial design or trademark in any other country that is a member of the Convention; it also assures to the members the right to refrain acts of unfair competition, and other rights.*

Patent Cooperation Treaty – PCT, of June 19, 1970

Signed in Washington (and further amended)

> *Creates an unified procedure for the filing of patent applications in all countries that are members of the treaty (currently 142)*

Berne Convention for the Protection of Literary and Artistic Works, of September 9, 1886

Brazil is a party to the 1971 Paris Revision of the Convention

> *Establishes that any signatory member must recognize the copyright of works of authors from other signatory countries, in the same way as it recognizes the copyright of its own nationals, and grants automatic protection to works without any formal registration.*

TRIPS - Agreement on Trade-Related Aspects of Intellectual Property Rights, of April 12, 1994

> *Maintains the principles of national treatment (same treatment for its members), most favored nation (a benefit of a member state should be extended to the others) and those that benefit from social and economic development. The TRIPS also defines a minimum period of protection for industrial designs and patents of 10 and 20 years, respectively.*

UPOV - International Union for the Protection of New Varieties of Plants, of December 2, 1961

Brazil is a party to the 1978 Revision of the Convention

> *Establishes a basic concept of new plant variety protection that must be included in the domestic laws of the members of the Union and a minimum term of protection for breeder's right.*

Appendix B

Main domestic laws connected with the protection of Intellectual Property Rights

Federal Constitution: Article 5, XXIX - Protection of trademarks and inventions
Article 170, III - Social function of property
Article 170, IV - Free competition

Laws: Law 9279/1996 (Industrial Property Law)
Law 9609/1998 (Software Law)
Law 9610/1998 (Copyright Law)
Law 8934/1994 and Decree 1.800/1996 (Companies Registration Law)
Law 9.456/1997 and Decree 2.366/1997 (Cultivars Law)
Law 11484/2007 (Topography Integrated Circuits Law)

APPENDIX C
USEFUL LINKS

BPTO www.**inpi.gov.br**

Brazilian IP Law (in English) www.**wipo.int/clea/en/text_html.jsp?lang=EN&id=515**

Department of Agriculture www.**agricultura.gov.br**

International Union for the Protection of New Varieties of Plants www.**upov.int/index_en.html**

Paris Convention, Berne Convention and PCT www.**wipo.int/treaties/en/index.jsp**

Agency	Types of works	Website
National Library	literary works in general	www.bn.br/eda
School of Music	musical works, with or without lyrics	www.musica.ufrj.br
School of Fine Arts	designs, jewelry, pictures, aquarelles, sculpture, lithography and engravings	www.eba.ufrj.br
Federal Council of Engineering and Architecture	architectural works in general	www.confea.org.br