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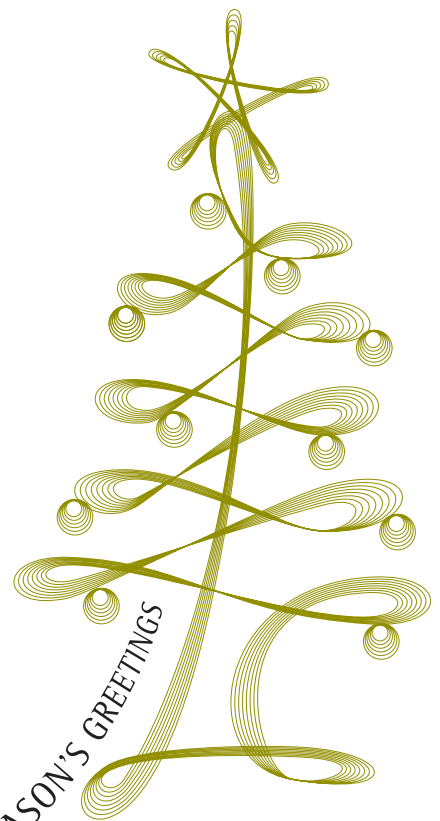
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May  
your 2004  
be filled with  
peace,  
happiness  
and success.

## COPYRIGHT LAW

### First Imprisonment in Brazil Based on the New Criminal Code Regulations

In force since August 2003, Law 10,695, which changed several provisions of the Brazilian Criminal and Criminal Procedure Codes relating to copyright violation crimes and respective procedures, as set forth in our last edition, has already been applied in practice.

At the end of August, Alberto Reichert Junior, owner of the website "MP3 Forever", was imprisoned in the city of Curitiba, State of Paraná (in the south of Brazil).

Through this site, Reichert was charging a monthly subscription, offering users the ability to access and download more than six thousand singles and two hundred and fifty albums. Moreover, subscribers to the site received from Reichert, by mail, a CD which was recorded every month with MP3 songs they had selected.

With the support and participation of the Brazilian Association for the Protection of Phonographic Intellectual Property Rights (APDIF in Portuguese) – an entity that is dedicated, amongst other things, to fighting CD counterfeiting in Brazil –, the Department of Justice and the Civil Police of the State of Paraná arrested Reichert at his residence and seized all counterfeit CD copies, as well as all the equipment used in their production.

The arrest of the website owner was based on the new procedures of the Criminal Procedure Code and the new regulations of the Criminal Code, in particular §3 of article 184, introduced by Law 10,695, relating to crimes of copyright violation over the Internet.

According to this paragraph, a crime of copyright violation is committed by any person who, for profit, directly or indirectly offers the works of another to the public via cable, optical fiber, airwave or any other system, without the authorization of the owner of the copyright, the performer, the producer or the person who represents them. The penalty provided for such violation is 2 to 4 months imprisonment plus a fine.

This provision was included by the legislature with the clear purpose of fighting the illegal commercialization of intellectual property works by means of new technologies, especially over the Internet, known as "cyber piracy", and represents a very important new tool in the fight against piracy.

In this case, Reichert was released from prison just 4 days after his arrest, having posted bail in the amount of 20 times the

minimum wage (around 4800 Brazilian Reals). His trial should take place at the beginning of next year.

Presently, the efforts of the APDIF are directed towards the prosecution of the company that hosted the site "MP3 Forever", as well as subscribers to the site, following the example of the Recording Industry Association of America (RIAA), which has successfully prosecuted users of online music sharing services.

Mariana A. G. de Souza Starling



## PATENTS

### National Phase of PCT Patent Applications (Time Limits)

According to amendments made to the Patent Cooperation Treaty (PCT), enacted on April 1, 2002, applicants no longer need to request the preliminary examination of PCT Patent Applications within a 19-month period, by filing a DEMAND, in order to be authorized to enter the national phase within 30 months from the earliest priority date (if priority is claimed). Several countries have adhered to the amendments but others have lodged notifications at WIPO concerning incompatibility with their respective national laws. Brazil is a country which has officially filed such a notification, alleging that national law would not allow the automatic applicability of the amendments to the Treaty, by which the time limits to enter the Brazilian national phase continue to be 20 or 30 months from the earliest priority date. In order to use the 30-month time limit in Brazil, it is still necessary to file a DEMAND with the appropriate international authorities within 19 months from priority (if claimed). If an applicant wishes to save expenses by not filing the DEMAND by the prescribed deadline, then the Brazilian phase of the respective PCT Application must be initiated before expiration of 20 months from the earliest priority date (Chapter I of the Treaty). Unless Brazil removes its notification at WIPO, applicants should heed carefully the applicable time limits for entering the Brazilian phase of their PCT application in order not to lose the rights on their inventions in Brazil. However, the changes reflect favorably for applicants residing in Brazil since the expense inherent in filing the DEMAND no longer exists, and a longer time limit (30 months) is guaranteed for entry of corresponding patent applications abroad.

On the other hand, several Brazilian attorneys and the Brazilian Intellectual Property Association (ABPI) maintain a position completely contrary to that officially adopted

by the Brazilian Government. According to a resolution laid down by ABPI in its August national Seminar, the Brazilian Constitution does not require a new legislative procedure for the incorporation of the new time limit of PCT Art. 22, and thus this amendment could be immediately implemented by means of a simple alteration of the Patent Office's regulations. There is no incompatibility between the amendments to the PCT and national law, and there is no reason not to apply and immediately accept the amendments. This position and resolution have already been communicated to the president of the Brazilian Patent and Trademark Office, and some other governmental authorities, in an attempt to compel the Government to remove the official notification at WIPO, and thus to adopt the consequent applicability of the 30-month deadline without the necessity for filing the DEMAND. Obviously, the time limits of 20 or 30 months are still applicable in Brazil, as in the past, until the withdrawal of the reservation is made. If, for any reason, a time limit for entering the Brazilian phase is missed, or the 30-month deadline is erroneously applied to Brazil, it is recommended that a Brazilian attorney be contacted immediately to determine if there is any other route available to cover the invention in question.

Full information regarding the countries which have filed notifications at WIPO, as well as recommendations about the subject, is available on the WIPO website (<http://www.wipo.int>), <http://www.wipo.int/pct/en> Section "Activities and Services"; item - PCT System. Any news about the possible withdrawal (if any) of the Brazilian notification at WIPO, as well as full applicability of the amendments, will probably be available on the WIPO website at the appropriate time. We will also keep our clients informed.

Carlos Cezar Cordeiro Pires



## INTERVIEW

### José Antonio B.L. Faria Correa, President of ABPI and Partner at Dannemann Siemsen

Q: After two terms as president of the Brazilian Intellectual Property Association (ABPI), what is your perception of Brazilian society's awareness with respect to Intellectual Property (IP)?

A: Brazilian society is waking up to the importance of IP in the economic political plan mainly through the prominence that this

subject has acquired in the industrialized countries. However, there are still sectors that cultivate a preconception against Intellectual Property, because they do not perceive that the effective protection of intellectual creations and of distinctive features is essential for the Brazilian businessperson and for attracting permanent investment in Brazil, because nobody will invest in a country that does not offer protection to intellectual creations.

**Q:** Nowadays, what is the role of the ABPI in proposing and following up on new government measures related to the Brazilian Intellectual Property system?

**A:** The working methodology of the ABPI consists in preparing resolutions that are sent to various sectors, including Congress. The ABPI tracks the progress of the various bills and the many proposals that it has drawn up and that are being employed.

**Q:** What is the position of the ABPI with respect to the considerable slowness in the decision-making process by the National Institute of Industrial Property (INPI – Portuguese)?

**A:** The ABPI has made enormous efforts to convince the government that without an INPI that is up and running, it is impossible to assure the entrepreneur the juridical mechanisms needed to protect his or her intellectual capital. The ABPI has vehemently voiced its protest through the press against the unbelievably destitute status of the INPI.

**Q:** Over the past few years the annual seminar organized by the ABPI has attracted a considerable number of foreign participants, not only from neighboring countries but also from Europe and North America. To what would you attribute this fact?

**A:** The seminar has shown itself to be a huge annual event in the area of Intellectual Property in Brazil, not only for its refined scientific content but also its role in promoting the meeting of professionals and businesspersons in the area.



## ENVIRONMENTAL LAW

### Public Environmental Hearings

Publicity of administrative decisions is one of the most important principles of a democratic state: the fundamental guarantee of receiving information of individual or collective interest from public agencies falls to the duty of the Public Administration to give public notice of

its acts (art. 5 (XXXIII) and art. 37 of the Federal Constitution, respectively).

As far as environmental law is concerned, publicity is a constitutional requirement of the Environmental Impact Assessment, upon commencing any work or activity that may cause significant environmental harm. Resolution no. 01/86 of CONAMA (Conselho Nacional do Meio Ambiente = National Environmental Council), in dealing with the publicity of the "RIMA" (Relatório de Impacto Ambiental = Environmental Impact Report), which reflects the conclusions of the "EIA" (Estudo de Impacto Ambiental = Environmental Impact Assessment), establishes the possibility of holding a public hearing for information about the project, and discussion of its environmental impact by public agencies and other interested parties.

The public hearing ensures knowledge of the contents of the EIA – RIMA, inviting the community to make suggestions and give opinions regarding the proposed project, supporting the decisions made by the environmental agencies and safeguarding the effective control of such administrative decisions, as one of the best practical examples of applying the publicity principle. From the point of view of the undertaker of the operation, the public hearing enables him/her to make clarifications regarding the impact caused by the activity, and the respective mitigating and compensatory measures to be taken to minimize them, heeding the principle of the social function of property, which demands the environmentally adequate use of the means of production.

CONAMA Resolution no. 9, dated December 3rd, 1987, establishes the basic guidelines for holding a public hearing, which has the purpose of "...exposing to the interested parties the contents of the product under analysis and of its RIMA, answering questions and collecting opinions and suggestions from those present" (art. 1). Regarding the call to hold the public hearing, such may be requested by force of law, or by petition (i) of a civil entity; (ii) of the Public Prosecution Service; or (iii) of 50 or more citizens (art. 2). The environmental agency, by means of a public notice or announcement in the local press, will commence a 45-day time limit from the date of receipt of the RIMA for interested parties to request that a public hearing be held. If the environmental agency does not hold a public hearing once it has been requested, any license granted shall be invalid.

In order to guarantee its advisory function and the effective participation of interested parties, the public hearing shall be held at an

accessible place. Due to the complexity of the activity, there could be more than one public hearing on the same project and the respective RIMA. At any rate, minutes shall be drawn up at the end of each public hearing, to which the documents produced or delivered during the procedure shall be attached. These will serve as a basis, together with the RIMA, for analysis and final decision by the licensing agency regarding approval or rejection of the project.

The public hearing established by CONAMA Resolution no. 9/87 is a procedure foreseen by environmental licensing which requires the EIA – RIMA, i.e., within the context of licensing activities that may cause significant environmental harm. However, nothing prevents a public hearing from being called and held by the Public Prosecution Service for activities that are located in areas of environmental sensitivity, even if they do not represent a significant harm to the environment and are thus not required to present the EIA – RIMA. Interested parties are to be present to make all necessary clarifications about the licensed activities. This procedure, outside the context of CONAMA Resolution no. 9/87, clarifies any questions from the communities located in the areas embraced by the activities, and supports the environmental agency, when the information thereby generated is incorporated into the environmental licensing procedure as one more element of analysis for the granting or not of the environmental licenses. This broadly meets the constitutional principles of publicity and preservation of the environment in a participatory and democratic way.

Luciana Bassani



## INTELLECTUAL PROPERTY LICENSING

### Bill on Innovation and Technology Law: Aspects Relating to the Law on Public Tender

The Constitution, aiming to preserve the principles of legality, equality, morality, impersonality, integrity and public assets has determined, in Art. 37, section XXI, the obligation to conduct a public tender procedure, in order to guarantee parity among parties, and the selecting of the most advantageous offer for the Administration when contracting for services, public construction, or in the acquisition or sale of any public asset.

Within this context, it is important to note that not only public construction work, acquisitions and services are subject to previous tender, but also licensing and lease

agreements, so as to guarantee equal conditions to all interested parties including, from among the administrative departments that are obligated to follow such process, all departments of direct public administration, special funding programs, special agencies, public foundations, public companies, companies sharing private and public stock, and all other entities directly or indirectly controlled by the Union, states, Capital District and municipalities. In other words, the tender requirement is meant to apply widely to all manner of public entities and to cover several kinds of transactions.

Scientific and technological institutions, such as public universities, which have the institutional goal of promoting the development of science and innovation technology, as well as performing basic or applied research activities of a scientific or technological character, are also subject to the tender rules.

At these institutions, as occurs at institutions of the same nature in developed countries, several projects are created involving complex scientific and technological processes. These are highly reputable centers of innovation, where one may find the inventors of advanced devices having strong exportation capabilities.

In accordance with article 5 of the Brazilian Industrial Property Law (Law No. 9,279/96) Patents are movable property, and therefore, in light of the provisions of the Law on Tender (Law No. 8,666/93), these inventions are classified as public movable property, since they are financed by special administrative funds. It thus follows that

these so-called public inventions must pass through the tender process in order to be licensed.

The tender rule presents to the owner of a specific invention an extensive list of obstacles difficult to overcome, which end up diminishing private investor interest in trying to acquire new public technology. An example of this is the need to evaluate new technology even before it is submitted to the Brazilian Patent and Trademark Office for examination with regard to the requirements for granting a patent, namely, novelty, inventive activity and industrial applicability. The risks involved in this type of evaluation are extremely high, since; at that point it is not yet known whether or not the right will be granted by the State. Note that these risks can be minimized by prior analysis undertaken by specialized personnel who may conduct searches to determine whether there is existing technology that could be an obstacle to the grant of such rights.

Even though the search minimizes the risks, other problems with the law on tender persist, such as delay in the process (approximately eight months) and the high costs involved.

A draft Bill for an Innovation and Technology Law (Bill No. 7282/2002), submitted by the government last year, sets forth a great number of incentive measures to support scientific and technological research and innovation, which may possibly establish a simplified process for public technology licensing. In accordance with a proposal sent to Congress by the Ministry of Science and Technology, art. 3 of the bill, referring to the rule of tender for public technology, may be

replaced by a faster and less bureaucratic process of negotiation, which nevertheless observes the constitutional principles of Brazilian administrative law. This procedure, according to a proposal drafted by the Ministry of Science and Technology, will require prior publication of a notice before the execution of a contract, which must include all relevant information on the object of the contract and be published in a widely read newspaper, a national newspaper and in the Federal Official Gazette.

It is also important to note that article 4 of the same bill dispenses with the tender of so-called public technology in non-exclusive licensing.

When the major obstacles presented by the current public tender law, with regard to public technology licensing, are removed, it is believed that public technology will be enhanced to the degree that its commercialization is facilitated.

It is hoped that with an intense commercialization of technology coming from scientific and technological institutions [after enactment of the Bill on Innovation and Technology Law], a greater interaction between private investment and the public research sector will be created and a greater sum of resources will flow into Brazilian innovation centers.

Leonardo Cassará



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