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Utility Models in Brazil

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This chapter describes the issuance and litigation of Utility Models in Brazil. Although considered "Patents" in Brazil, utility models have a different treatment from Patents of Invention, having some specificities such as those related to the requirements for protection and the term of duration. This chapter will provide an overview of the Brazilian Patent System by outlining the scope of protection and requirements to obtain a utility model Patent in comparison with patents on invention, and by commenting on the enforcement of these rights in the judicial and administrative spheres.

14.1 THE BRAZILIAN LEGAL FRAMEWORK ON UTILITY MODELS

Regarding the international context, although Brazil is not a party to a few IP international treaties like the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), it is a signatory to most of the main IP-related treaties including the Patent Cooperation Treaty (PCT),[1] the Berne Convention,[2] the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS),[3] and the Paris Convention,[4] among others.

Internally, the origins of the patent laws in Brazil can be traced to the year 1809 with an Order (*Alvará*) granting 14 years' "exclusive privilege" to inventors.[5] The first Brazilian Constitution of 1824 also provided that inventors would have

[1] Patent Cooperation Treaty 2001.
[2] Berne Convention for the Protection of Literary and Artistic Works 1886.
[3] Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.
[4] Paris Convention for the Protection of Industrial Property 1979.
[5] For more on this Order, see Abrantes 2014. For a comprehensive historical analysis of the patents system in Brazil, see Malavota 2011. See also, Brazil, House of Representatives 2013. Brazil 1809.

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property rights in their productions or discoveries during a limited period of time.[6] When it comes to Utility Models, although there are documented sources indicating their official recognition in Brazil during the twentieth century,[7] art. 1 of Law 3.129/1882 already contained a definition that bears resemblance to what is recognized as a utility model today:

> Art. 1[. . .] § 1 The following constitute an invention or discovery for the purposes of this law: 1- The invention of new industrial products; 2 -The invention of new means or the new application of known means to obtain an industrial product or result; 3- The improvement of an already privileged invention, if it makes the manufacture of the product or use of the privileged invention easier, or if it increases its usefulness.[8]

Currently, the Brazilian legal framework on IP includes multiple federal laws related to copyright,[9] integrated circuit topographies,[10] plant varieties,[11] and, central for the purposes of this chapter, industrial property.[12] The Brazilian Law on Industrial Property (LPI) addresses issues related to patents (both patents of inventions and utility models),[13] industrial designs,[14] trademarks,[15] geographical indications,[16] unfair competition (which may also encompass issues related to slogans, and other advertising signs, consumer confusion, and trade secrets),[17] and crimes against industrial property.[18] It also provides some regulatory aspects on licensing, and the administrative procedure carried out by the Brazilian Industrial Property Office (INPI).

The interpretation and content of all federal laws mentioned above must be in accordance with the Brazilian Federal Constitution of 1988, which also expressly

[6] Brazil 1824: "Art. 179. A inviolabilidade dos Direitos Civis, e Politicos dos Cidadãos Brazileiros, que tem por base a liberdade, a segurança individual, e a propriedade, é garantida pela Constituição do Imperio, pela maneira seguinte. [. . .] XXVI. Os inventores terão a propriedade das suas descobertas, ou das suas producções. A Lei lhes assegurará um privilegio exclusivo temporario, ou lhes remunerará em resarcimento da perda, que hajam de soffrer pela vulgarisação."

[7] See Gama et al. 2016. See also, Richards 2010.

[8] Even before 1882, there were legal texts providing definitions that may be similar to what are considered Utility Models today, as it is the case of the Law from August 28, 1830, that granted privileges related to inventions and provided in its art. 2 that "Anyone who improves a discovery or invention has the right of discoverer or inventor in the improvement." Brazil 1830.

[9] Brazil 1998a; Brazil 1998b.

[10] Brazil 2007.

[11] Brazil 1997.

[12] Brazil 1996.

[13] Brazil 1996, arts 6–93.

[14] Brazil 1996, arts 94–121.

[15] Brazil 1996, arts 122–175.

[16] Brazil 1996, arts 176–182.

[17] Brazil 1996, art. 195.

[18] Brazil 1996, arts 183–195.

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addresses Intellectual Property Rights, mainly in art. 5, XXVII, XXVIII and XXIX.[19] In Brazil, the right to property is a fundamental right (art. 5, XXII, CF88). However, this right is not an absolute one, since "property shall observe its social function" (art. 5, XXIII, CF88).[20] Several authors have argued that there is no legitimate property without it being tied to its social function,[21] agreeing with the idea that "[. . .] property endowed with a social function, which is not fulfilling it, will no longer be the object of legal protection."[22]

To exercise such a right according to its social function can be understood under a more objective lens, as it is seen in the case of rural property under art. 186 of the Brazilian Federal Constitution, as to which cumulative factors must be considered in order to assess whether the social function is met.[23] Nevertheless, the "social function" of property, and therefore intellectual property, is more than complying with a list of factors.[24] Regarding IP rights, limitations and exceptions (L&Es) can help to define the social function of property,[25] reaffirming that the property right is not absolute and must consider the social interest.[26] It becomes clear from the reading of the text of art. 5, XXIX of the Brazilian Federal Constitution that the granting

[19] Brazil 1988.

[20] Brazil 1988: "Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: [. . .] XXVII – the exclusive right of use, publication or reproduction of works rests upon their authors and is transmissible to their heirs for the time the law shall establish; XXVIII – under the terms of the law, the following are ensured: a) protection of individual participation in collective works and of reproduction of the human image and voice, sports activities included; b) the right to authors, interpreters, and respective unions and associations to monitor the economic exploitation of the works which they create or in which they participate; XXIX – the law shall ensure the authors of industrial inventions of a temporary privilege for their use, as well as protection of industrial creations, property of trademarks, names of companies and other distinctive signs, viewing the social interest and the technological and economic development of the country."

[21] Tepedino and Schreiber 2005, 111–112: "É evidente que a função social também varia de acordo com o estatuto proprietário em questão, mas o texto constitucional não deixa dúvidas de que toda propriedade tem, ou deve ter, função social."

[22] Grau 1990, 316: "[. . .] a propriedade dotada de função social, que não esteja a cumpri-la, já não será mais objeto de proteção jurídica."

[23] Brazil 1988: "Article 186. The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements: I – rational and adequate use; II – adequate use of available natural resources and preservation of the environment; III – compliance with the provisions that regulate labour relations; IV – exploitation that favours the well-being of the owners and labourers."

[24] For further information on this matter, we recommend the following works by Brazilian authors: Fachin 1995; Souza 2021; Tepedino and Schreiber 2005.

[25] Souza 2006, 282: "A efetivação da função social tem como objetivo principal a limitação da utilização social dos bens intelectuais pelo titular, em razão de diversos interesses da coletividade."

[26] Tepedino and Schreiber 2005, 111–112: "A pluralidade de manifestações do fenômeno proprietário não afasta, contudo, a necessidade de conformação do seu exercício aos interesses sociais relevantes. É evidente que a função social também varia de acordo com o estatuto proprietário em questão, mas o texto constitucional não deixa dúvidas de que toda propriedade tem, ou deve ter, função social."

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of IP rights (including those related to utility models) is subject to consideration of the social interest and the technological and economic development of Brazil.[27]

The next section will address how Patents of Invention and Utility Models are regulated under federal law, that is, the LPI, in Brazil.

14.2 PATENTS ON INVENTION AND UTILITY MODELS

Today, the LPI provides two types of patents: Patents on Invention and Utility Models. Patents on inventions are granted to those inventions "that meet the requirements of novelty, inventive step, and industrial application," [28] whereas a utility model is an "object of practical use, or part thereof, susceptible to industrial application, which includes a new form or arrangement, involving an inventive act resulting in a functional improvement to the use or manufacture."[29] Table 14.1 summarizes the principal requirements for patents on inventions and utility models in Brazil.

While the LPI formally treats "novelty" and "industrial application" in the same way,[30] the same cannot be said for the "inventive act/step." Art. 13 of the LPI clarifies the scope of "inventive step" requirement for patents on invention: "An invention is endowed with an inventive step provided that, to a technician versed in the subject, it is not derived in an evident or obvious way from the state of the art." Regarding utility models, art. 14 provides that a "utility model is endowed with an inventive act provided that, to a technician versed in the subject, it is not derived in a common or ordinary way from the state of the art."

The Utility Model Patent Examination Guidelines provided by the Brazilian Patent Office (INPI) (2012, p. 5) establish that an inventive act is characterized by the presence of an unusual difference between an already existing object in the state of the art and the new invention. In other words, the difference must not be ordinary for a person skilled in the art. The inventive act presupposes a lower degree of inventiveness:

> An inventive act is considered to exist when the modification introduced to an object results in a functional improvement in its use or manufacture, facilitating human activity, or improving its efficiency. The inventive act is of the same nature as the inventive activity, but with a lower degree of inventiveness.[31]

[27] Brazil 1988, art. 5, XXIX.

[28] Brazil 1996, art. 8.

[29] Brazil, art. 9.

[30] Brazil 1996, arts 11; 15: "11. An invention and a utility model are considered to be new if they are not part of the state of the art. [...] 15. An invention and a utility model are not considered susceptible of industrial application when they can be used or produced in any kind of industry."

[31] Independent translation. Original text available at INPI 2002: "Considera-se que existe ato inventivo quando a modificação introduzida num objeto resulta em melhoria funcional de seu uso ou fabricação, facilitando a atividade humana, ou melhorando sua eficiência. O ato inventivo é da mesma natureza que a atividade inventiva, mas com menor grau de inventividade."

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TABLE 14.1 *Requirements for Patent Protection in Brazil (patent on invention and utility model)*

Technical requirements	Formal requirements
Novelty: Everything that is not included in the state of the art is considered new, that is, made available to the general public up to 12 months before the filing of the patent application	**Descriptive Sufficiency:** The text of the Patent Application must describe the protected article or process in such a way that it can be reproduced by a person skilled in the art.
Inventive step (Patent on Invention): innovative characteristic that do not result in an evident or obvious advance over the state of the art.	**Formatting:** The text of the Patent Application must be formatted in compliance with current regulations established by the INPI
Inventive act (Utility Model): innovative characteristic that does not result in a common or vulgar advance over the state of the art.	**Unit of Invention:** the text of the Patent Application must correspond to a single invention or a group of interrelated inventions in order to comprise a single inventive concept
Industrial application: characteristic that allows the patented article or process to be used or produced in some type of industry.	**Payment of Fees:** The Patent Application must be accompanied by the fees necessary for its acceptance, in accordance with the regulations established by the INPI
Legal clearance: the innovation cannot be framed within the legal prohibitions provided for by the LPI	

Source: Oliveira 2020, 15.[32]

According to Barbosa, identifying the inventive act in utility models is a more complex endeavor than that concerning the inventive step in patents on invention:[33]

[32] Independent translation. Original at Oliveira 2020, 15: "Requisitos Técnicos: Novidade: É considerado novo tudo aquilo não compreendido no estado da técnica, isto é, disponibilizado ao conhecimento do público em geral até 12 meses antes do depósito do Pedido de Patente. Atividade Inventiva (Patente de Invenção): característica inovadora que não decorra de maneira evidente ou óbvia do estado da técnica. Ato inventivo (Modelo de Utilidade): característica inovadora que não decorra de maneira comum ou vulgar do estado da técnica. Aplicação industrial: característica que permita com o que o objeto ou processo patenteado possa ser utilizado ou produzido em qualquer tipo de indústria. Desimpedimento legal: a inovação não pode estar enquadrada nas proibições legais previstas pela LPI. Requerimentos formais: Suficiência Descritiva: O texto do Pedido de Patente deverá estar descrito de tal forma que seja hábil sua reprodução por um técnico no assunto. Formatação: O texto do Pedido de Patente deverá estar formatado de modo a cumprir com a normativa vigente instituida pelo INPI. Unidade de Invenção: o texto do Pedido de Patente deverá corresponder a uma única invenção ou a um grupo de invenções interrelacionadas de maneira a compreenderem um único conceito inventivo. Pagamento de Taxas: O Pedido de Patente deverá ser instruído das taxas necessárias ao seu aceite, de acordo com a normativa instituída pelo INPI."

[33] Barbosa 2010, 1717.

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> It is difficult, however, to discern the difference between the "evident or obvious consequence of the state of the art", typical of Patent of Inventions, and the "ordinary result of the state of the art", typical of models. Is the subjective parameter the relevant one? Would the person skilled in the art, necessary judge of the inventive step, be replaced by a layman in the case of the inventive act? What is the fine line between an invention that is evident or obvious and one that is common or vulgar? Because it is in this seamless limit that the Utility Model in its new version should exist.[34]

Despite the differences between utility models and patents on invention under Brazilian Law, there is the possibility of the conversion (usually referred to as "change of nature") of a Utility Model to a Patent on Invention and vice-versa.[35] Arts. 35, II and 36 illustrate scenarios in which such change of nature may occur:

> Art. 35. Upon technical examination, a search report and an opinion will be prepared related to: [...]
>
> II - adjustment of the application to the nature of the protection claimed;
>
> III - reformulation division of the application; or
>
> IV - technical requirements.
>
> Article 36. When the office action is for the non-patentability, or inadequacy of the application to the nature of protection claimed, or formulates any requirement, the applicant shall be notified to respond within 90 (ninety) days.
>
> Paragraph 1. Upon failure to meet the requirement, the application shall be definitively dismissed.
>
> Paragraph 2. In case the requirement is responded, even though not met, or its formulation is reconsidered and independently of arguments being filed regarding the patentability or suitability, the examination shall continue.

Finally, another difference between Patents on Inventions and Utility Models is their term or duration: "[a]n invention patent shall remain in force for a period of 20 (twenty) years, and a utility model patent for a period of 15 (fifteen) years from the date of filing."[36]

[34] Independent translation. Original text available at Barbosa 2010, 1717: "Fica difícil, porém, de discernir a diferença entre a "decorrência evidente ou óbvia do estado da arte", própria das patentes de invenção, e a "decorrência comum ou vulgar do estado da técnica", própria dos modelos. Será o parâmetro subjetivo o relevante? O técnico no assunto, juiz necessário da atividade inventiva, seria substituído por um leigo no caso do ato inventivo? Qual o tênue limite entre o invento que seja evidente ou óbvio e aquele que seja comum ou vulgar? Pois que é neste inconsútil limite que deverá existir o Modelo de Utilidade na sua nova versão."

[35] This and the other legal acts concerning the filing and obtaining of a patent are carried out before the Brazilian Patent Office (INPI), as described in the next section.

[36] Brazil 1996, art. 40. Until 2021, art. 40 of the Brazilian Industrial Property Law had a sole paragraph providing that "The term shall not be less than 10 (ten) years for an invention patent and 7 (seven) years for a utility model patent, beginning on the date of granting, unless the INPI has been prevented from examining the merits of the application by a proven pending

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14.3 ADMINISTRATIVE PROCEDURE BEFORE THE INPI

In Brazil, Patents, and therefore Utility Models, are granted by the Brazilian Patent Office (INPI). Created in 1970,[37] the INPI is the federal authority responsible for administering Industrial Property in Brazil, and for making enactments "on the advisability of signing, ratifying and denouncing conventions, treaties, covenants and agreements on industrial property."[38] In addition to analyzing applications and granting patents, the INPI is also responsible for registering trademarks, industrial designs, software,[39] geographical indications, integrated circuit topography, and technology transfer agreements.[40]

When it comes to utility model filings in Brazil, data from January and February 2022 show that 98% of the applicants are Brazilian residents, which is a very different scenario when we compare to Patents on Inventions during the same period (USA 31%, Brazil 17%, Germany 7%, China 7%, Japan 6%, Switzerland 5%, UK 4%, and France 4%).[41] With regard to the nature of the applicants, 64% of the utility model applicants for January/February 2022 were Individuals, 20% were small businesses, and individual entrepreneurs (MEI) and medium or large size companies represented 13% of the applicants.[42] In terms of overall applications, and comparing the applications filled for patents on invention and utility models it is clear that, in Brazil, patent on invention applications are substantially higher than those for utility models. These results are illustrated in Figure 14.1.

Reducing the time between filling a patent application and having it granted has been one of the priorities of the INPI, mainly for patents on invention, which may have contributed to the growth of Decisions on patents on invention between 2018 and 2020, as shown in Figure 14.1.[43] As of October–December 2022, the average time for a technical decision once the Request for Examination is filed is 2.6 years for utility models.[44] Compared to patents on invention, it is difficult to compare the pendency time of utility models and patents on invention because the pendency of patents on invention varies according to the nature of the invention. While the average time for a

judicial dispute or for reasons of force majeure." However, in May 2021, the Supreme Court extinguished the sole paragraph on the basis that it was unconstitutional (Brazil, ADI 5529). Brazil, Supreme Court, Unconstitutionality Action (ADI) n. 5529 (Action n. 4000796-72.2016.1.00.0000). https://portal.stf.jus.br/processos/detalhe.asp?incidente=4984195.

[37] Brazil 1970, art. 1.

[38] Brazil 1970, art. 2.

[39] Despite the possibility of registering a software before the INPI, software (source and object code) is protected under copyright and, therefore, registration is not mandatory.

[40] More information can be found in the INPI's website: www.gov.br/inpi/pt-br.

[41] INPI 2022a.

[42] INPI 2022a.

[43] More information can be found at: www.gov.br/inpi/pt-br/servicos/patentes/plano-de-combate-ao-backlog.

[44] INPI 2022b.

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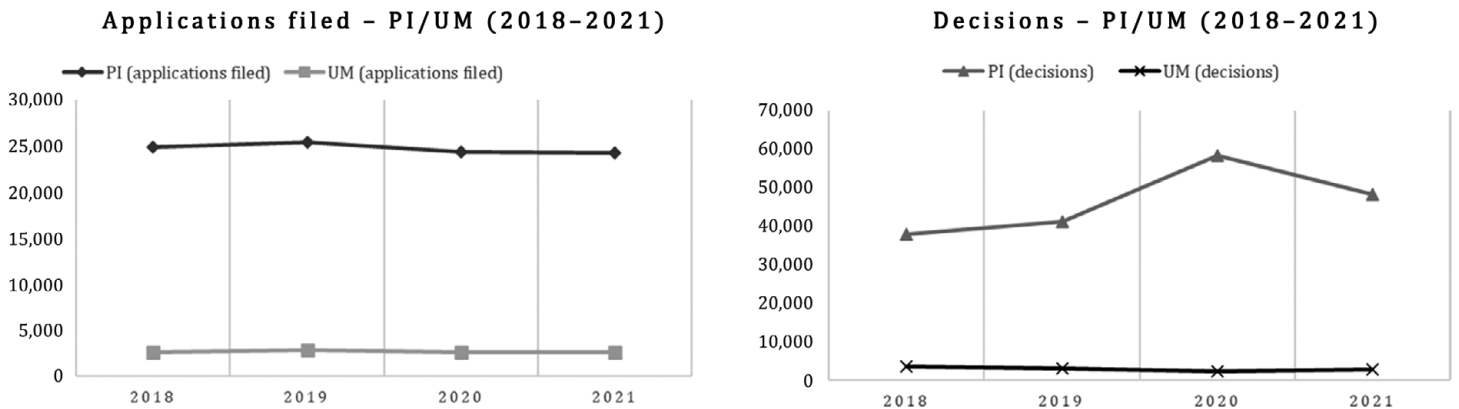


FIGURE 14.1 Patent on invention and utility model applications and decisions (2018–2021)

Source: The authors (2023) based on official data from INPI available at: www.gov.br/inpi/pt-br/central-de-conteudo/estatisticas/arquivos/publicacoes/boletim-mensal-de-propriedade-industrial-marco-de-2022.pdf

technical decision for inventions in the field of cosmetics is 2.1 years, the time for biopharmaceuticals is 5.4 years, once the Request for Examination is filed.[45]

Today, the complete administrative procedure to obtain a patent for a utility model can be carried out online via the "e-INPI" and "e-Patentes" systems.[46] Briefly stated, the user must sign in to the system, gather all relevant documentation regarding the utility model, the inventor, the applicant, the invention, pay the necessary official taxes, fill out forms and file the application online.[47] The application must be filed according to art. 19 of the LPI and "shall contain: I. the request; II. the specifications; III. the claims; IV. drawings, if applicable; V. the abstract; and VI. proof of payment of the filing fee."[48]

Once it is filed, the user can keep track of the application online and must respond to any office actions and any further requests for additional information/documentation.[49] On the INPI side,

> the Institute will carry out a preliminary formal examination of the application and, if there is full compliance with art. 19, the protocol will take place. In the event of formal failure to comply with art. 19, but the application provides data referring to the object, the applicant and the inventor, the INPI will formulate an office action to be fulfilled within 30 days, under penalty of having the application dismissed. Once the application is filed, it will be kept confidential for a period of 18 months from the filing date. It should be noted that the applicant must request the examination of the application within 36 months from the date of filing, under penalty of having the application dismissed, however, the INPI can only start the examination after 60 days from the publication of the Application.[50]

According to art. 34 of the LPI, "[a]fter the examination has been requested, [a set of documents listed art. 34] must be submitted within a period of 60 (sixty) days, whenever requested, under penalty of having the application dismissed." The technical examination will encompass the preparation of a search report and an opinion by the INPI regarding: "I. patentability of the application; II. appropriateness of the application given the nature claimed; III. reformulation or division of the application; or IV. technical requirements."[51]

In case INPI finds the "non-patentability of the application or the incompatibility of the application to the nature claimed, or makes some demand, the applicant shall be notified to submit comments within a period of 90 (ninety) days."[52] In case the

[45] INPI 2022b.
[46] The INPI's searchable database for utility models is available at: https://busca.inpi.gov.br/pePI/jsp/patentes/PatenteSearchBasico.jsp.
[47] INPI 2023a.
[48] Brazil 1996, art. 19; Oliveira 2020.
[49] INPI 2023a.
[50] Oliveira 2020; Brazil 1996.
[51] Brazil 1996, art. 35.
[52] Brazil 1996, art. 36.

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applicant does not respond to the request from the INPI, the application will be dismissed, and if there is any response, the examination will continue.[53] Finally, according to art. 37, "[o]nce the examination has been concluded, a decision shall be handed down, either approving or rejecting the patent application."

It should be noted that additional costs to those paid at the time of the patent application filing may arise from, for example, compliance with Office Actions, the issuance of the Patent Certificate, and the payment of annuities.[54] In accordance with art 9 of Law n. 5648/70,[55] all the official information provided in the online system is also published in the INPI's official gazette.[56]

14.4 ENFORCING UTILITY MODELS IN BRAZIL

Enforcing exclusive rights in Utility Models is possible both in the administrative and judicial (civil and criminal) systems in Brazil, and the choice of one does not exclude the other.[57]

14.4.1 *Administrative Procedure*

According to art. 51 of the LPI, and within six months of the date of the grant of a patent, it is possible to file an Administrative Nullity Proceeding ("ANP") on grounds that the patent (either patent on invention or utility model) is not compliant with the requirements provided in the law and administrative regulations (e.g., legal and formal requirements, specifications, and claims).[58] The "procedure may be initiated ex officio or at the request of any person with legitimate interest."[59] Once the ANP is initiated, the titleholder may submit comments after sixty days of its publication,[60] which will be followed by an Opinion of the INPI.[61] Then, both the applicant and the titleholder will have an additional sixty days to submit their final comments.[62] The final step of the administrative procedure is the analysis of the case

[53] Brazil 1996, art. 36.
[54] INPI 2023a.
[55] INPI 2023a.
[56] Available at: revistas.inpi.gov.br/rpi/.
[57] Brazil 1996, art. 207: "207. Independently of the criminal action, the aggrieved party may bring any civil suits he considers as appropriate pursuant to the Civil Procedure Code."
[58] Brazil 1996, art. 50.
[59] Brazil 1996, art. 51.
[60] Brazil 1996, art. 52.
[61] Brazil 1996, art. 53.
[62] Brazil 1996, art. 53.

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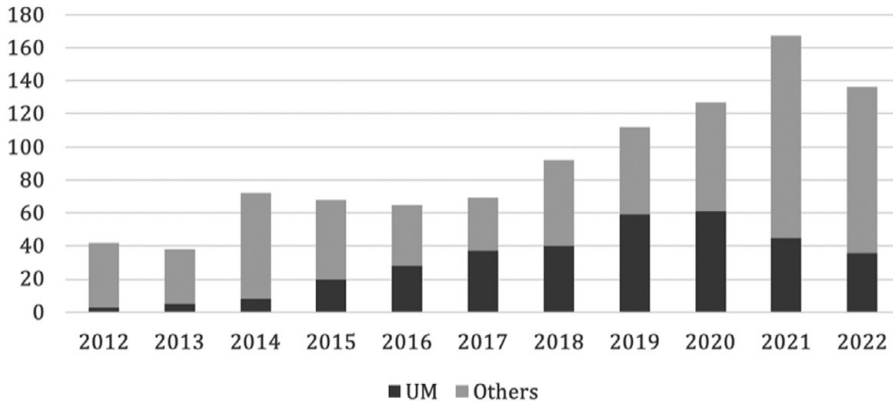


FIGURE 14.2 Total Administrative Nullity Proceedings (ANPs) (2012–2020)
Source: The authors (2023) and INPI 2023b, 132–133.

by the president of INPI.[63] Figure 14.2 shows an overview of the number of ANPs filed per year between the years 2012 and 2022.

Focusing on the acts of the utility model division, Figure 14.3 shows the INPI decisions nullifying the patent and those in which the patent was maintained (even with a restriction, which is called "partial nullity"). From the data below, it is clear that the majority of the decisions issued by the utility model Division on ANPs reject the ANP and uphold the utility model.

According to data made available by the INPI for the period between 2012 and 2022, an average of 1–2 percent of the total decisions for approval[64] (for patents on invention and utility models) are subject to an ANP.[65] When analyzed by market sector, the highest number of cases of ANPs appear in the "Division of Patents of Agriculture and Engineering Elements" ("Divisão de Patentes de Agricultura e Elementos de Engenharia") with 2.35 percent of the decisions being followed by ANPs and the Division of Utility Models Patents ("Divisão de Patentes de Modelo de Utilidade"), with 2.97 percent.

The nullity of a patent can also be judicially requested while the patent is in force, and must be filed before the Federal Court with the participation of the INPI (even

[63] Brazil 1996, art. 54.
[64] It is important to clarify that, according to art. 38 of the LPI, the patent will be granted if, after the decision for the approval, the applicant proves that the necessary official fees were paid within the legal term.
[65] INPI 2023b, 26.

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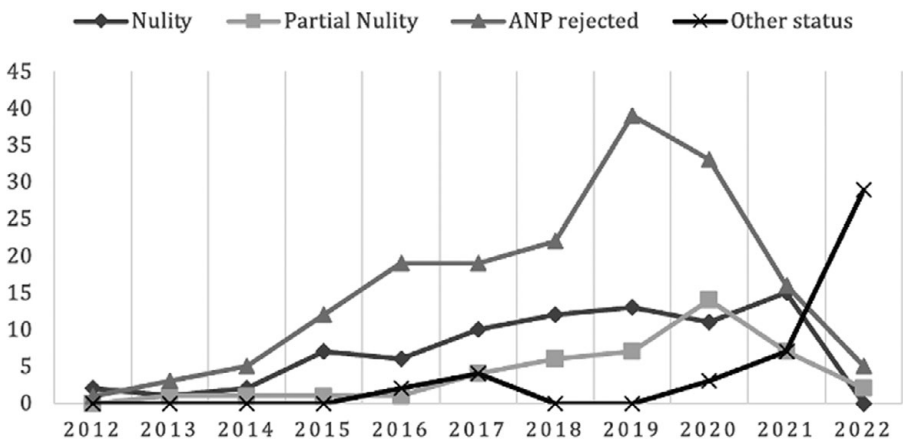


FIGURE 14.3 Decisions/status of ANPs filed at the utility model division (2012–2022)
Source: The authors (2023) and INPI 2023b, 228–229.

if it is not the plaintiff).[66] Once the Court decision is final, the INPI will make it public in its official gazette and the parties informed about it.[67]

14.4.2 *Judicial Procedure*

To better understand the current number of legal actions involving patents on invention and utility models, both in the Criminal and Civil spheres, we used a private third-party software "*webseek*" owned by LDSoft.[68] This software uses the existing data in the INPI database with the possibility of applying different filters in the searches.

For this particular purpose, we searched for all the patents and applications with decisions tagged with codes 15.23 ("*notice of legal action concerning the application*") and 22.15 ("*notice of legal action concerning the patent*") for the last thirty years (between January 1, 1993, and January 1, 2023). The results are provided in Figure 14.4.

While the above figures provide insight into the volume of legal proceedings involving patent on invention and utility models, it should be clarified that they may not reflect the exact and total number of cases discussing patents in Brazilian courts. These statistics likely only account for cases where details about the judicialization were formally documented in the administrative records of the INPI.

[66] Brazil 1996, arts 56, 57.
[67] Brazil 1996, art. 57 (2).
[68] LDSoft, n.d. www.ldsoft.com.br/webseek/.

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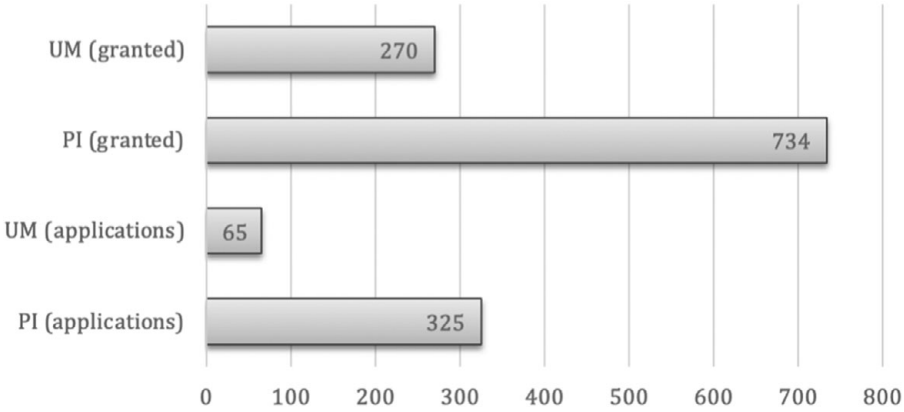


FIGURE 14.4 Notices of legal action for patents on invention and utility models (1993–2023)
Source: The authors (2024) with information from the INPI database on the number of patents and applications with decisions tagged with codes 15.23 and 22.15.

When it comes to criminal actions, the Brazilian legal framework is quite peculiar, since industrial property crimes are not listed in the Criminal Code anymore but are included in the LPI. Nevertheless, "[c]riminal action and the preliminary proceedings of search and seizure, in crimes against industrial property, shall be governed by the Criminal Procedure Code, with the modifications set forth in the Articles of this Chapter [of the LPI]."[69] Moreover, in Brazil, the procedure concerning crimes against patents usually starts with the filing of a criminal complaint by the offended, often the rightsholder, and not by initiative of the State, which can be represented by the Public Prosecutor's Office.[70]

Subject to fines, search and seizure,[71] destruction of the infringing products,[72] and even imprisonment (the penalty varies from one month to one year depending on the crime committed),[73] there are several acts like manufacturing, exporting, importing, or supplying patented products without authorization that are considered as crimes against patents in Brazil.[74] Imprisonment time can be extended when the infringer is or was a representative, agent, partner, employee, or licensee of the

[69] Brazil 1996, art. 200.
[70] Brazil 1996, art. 199.
[71] See, e.g., Brazil 1996, arts 201, 202, 203 and 204.
[72] See Brazil 1996, art. 202.
[73] It should be noted that these penalties may be increased according to art. 196 of the LPI: "196. The penalties of imprisonment for the crimes set forth in Chapters I, II and III of this Title shall be increased by one-third to one-half if: I. the offending party is, or was, the representative, mandatory, agent, partner or employee of the patentholder or titleholder of the registration or of his licensee; or II. the mark that has been altered, reproduced or imitated is famous, well known, or is a certification or collective mark."
[74] Brazil 1996, arts 183–186.

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patentee.[75] Similarly, fines could be majored in certain cases.[76] Additionally, there are unfair competition crimes that are closely related to patents. We provide a summary of these crimes in Annex I.

In addition to criminal procedures, holders of patent on invention and utility model can also file civil infringement lawsuits. If successful, these suits can result in the payment of compensation, which is "determined by the benefits that the injured party would have gained had the violation not occurred."[77] When it comes to the calculation of "lost profits," the LPI provides multiple criteria, from which the most beneficial to the injured party can be applied, these being: (i) "the benefits that the injured party would have obtained if there were no infringement";[78] (ii) "the benefits obtained by the infringing party"[79] and (iii) "the remuneration that the infringer would have paid to the rightsholder for a licensee that would allow it to lawfully use the asset."[80]

[75] Brazil 1996, art. 196.
[76] Brazil 1996, art. 197, sole paragraph.
[77] Brazil 1996, arts 207–208.
[78] Independent translation. Brazil 1996, art. 210, I.
[79] Independent translation. Brazil 1996, art. 210, II.
[80] Independent translation. Brazil 1996, art. 210, III.

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Appendix I

Crimes against patents	Legal Basis	Penalty
Manufacture "a product that is the object of an invention or utility model patent, without authorization from the titleholder";	Art. 183, I of the LPI	Imprisonment (3m–1y) or fine
Export "sells, displays or offers for sale, has in stock, conceals or receives, with a view to use for economic purposes, a product manufactured in violation of an invention or utility model patent [. . .]."	Art. 184, I of the LPI	Imprisonment (1m–3m) or fine
Import "a product that is the object of an invention or utility model patent, or obtained by a means or process patented in this country, for the purposes set forth in the preceding Item, and that has not been placed on the foreign market directly by the patentholder or with his consent."	Art. 184, II of the LPI	
Supply "a component of a patented product, or material or equipment to execute a patented process, provided that the final application of the component, material or equipment leads necessarily to the exploitation of the object of the patent."	Art. 185 of the LPI	
Crimes of unfair competition (potentially connected with patents)	**Legal Basis**	**Penalty**
Employ "fraudulent means to divert the customers of another person to his or another party's advantage."	Art. 195, III of the LPI	Imprisonment (3m–1y) or fine
Sell, display or offer "for sale a product declaring that it is object of a patent that has been filed or granted, or of an industrial design that has been registered, when it has not, or mentioning it in an advertisement or a commercial paper as being filed or patented, or registered, when it has not."	Art. 195, XIII of the LPI	
Divulge, exploit, or utilize "without authorization, results of tests or other undisclosed data whose preparation involves considerable effort and that were submitted to government agencies as a condition for obtaining approval to commercialize products."	Art. 195, XIV of the LPI	

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