
THE INTELLECTUAL PROPERTY REVIEW

EDITOR
ROBERT L BAECHTOLD

LAW BUSINESS RESEARCH

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ROBERT L BAECHTOLD

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EDITOR'S PREFACE

It is not an overstatement to say that essentially all business is global, and the protection of intellectual property is the lifeblood of all business. The scope and implementation of that protection, however, varies from country to country.

It would be ideal if there were one universal set of laws, rules and procedures. But, while the efforts of many dedicated individuals have accomplished much in harmonising intellectual property protection, we remain defined as much by our differences as by what we have in common. It therefore is incumbent on all of us, as advisers to our clients, to be conversant with the individual practices in each of the economically significant countries.

The goal of this review is to provide that guidance. We have assembled a body of leading practitioners to explain the opportunities for intellectual property protection in their respective jurisdictions, together with the most significant recent developments and any aspects that are unique to their country. While we have striven to make the book both accurate and comprehensive, we must note that, in light of the limited pages available, it is necessarily a summary and overview, and we strongly recommend that the reader seek the advice of experienced advisers for application of the principles to any specific factual matter.

It is our hope that the reader will find this compilation a useful and often-consulted guide.

Robert L Baechtold

Fitzpatrick, Cella, Harper & Scinto

New York

July 2012

Chapter 16

PORTUGAL

António Andrade¹

I FORMS OF INTELLECTUAL PROPERTY PROTECTION

Portuguese law – the Industrial Property Code (approved by Decree-Law No. 36/2003 of 5 March 2003), which came into force on 1 July 2003 – provides for the protection of several categories of industrial property rights, namely patents, utility models, topographies of semiconductor products, industrial designs or models, trademarks, names and emblems of establishment, logos and designations of origin and geographical indications.

Trade secrets are not specifically provided for in the Industrial Property Code; however, the infringement of non-disclosed information is deemed to be an unlawful administrative offence of unfair competition, which is similar to the concept of trade secret.

The Medicines Act lays down regulatory exclusivity as regards medicinal products protected by a patent.

Concerning the system governing the protection of industrial property rights, laid down in the Portuguese Industrial Property Code, it is necessary to take into account the possibility of applying for protection at international and European level, in particular patent applications filed under the Patent Cooperation Treaty and under the European Patent Convention; in the case of trademarks, registrations protected at international level (Madrid Agreement and Protocol) and at Community level (Community trademark); in the case of designs or models, those filed at Community level (registered and non-registered Community design or model) and, in the case of designations of origin and geographical indications, international registrations filed under the Lisbon Agreement.

1 António Andrade is an associate at Vieira de Almeida & Associados.

II RECENT DEVELOPMENTS

The latest development in terms of patent protection concerns provisional patent applications, which mainly aim at securing the priority of the application, postponing the submission of all the formal elements of a normal patent application for a period of up to 12 months.

These applications allow the respective applicants to assess, over that period, whether it is justified to convert the provisional patent application into a definitive patent application.

As regards the enforcement of industrial property rights, special attention must be given to Law No. 62/2011 of 12 December 2011, which came into force on 19 December 2011, establishing a legal system for the settlement of disputes arising from industrial property rights whenever reference medicinal products and generic drugs are involved.

In accordance with the said law, disputes arising from the claiming of property rights, including injunction proceedings relating to reference medicinal products and generic drugs, irrespective of whether they involve process, product or use patents or supplementary protection certificates, are subject to institutionalised or non-institutionalised mandatory arbitration.

This new system raises a number of serious doubts as to the scope and interpretation thereof, also raising questions as to its unconstitutionality, namely as regards the amendments to the Medicines Act.

This particular subject will be revisited in Section IV, *infra*.

Another very recent development concerns the establishment of a Court of Intellectual Property, which has been operating since 30 March 2012, with jurisdiction at national level, throughout the Portuguese territory.

The new court has jurisdiction to rule upon the following matters:

- a* actions on copyright and related rights;
- b* actions on industrial property rights;
- c* appeals against decisions of the Portuguese Patent and Trademark Office ('INPI');
- d* actions on internet domain names;
- e* appeals against decisions of the Portuguese authority responsible for domain names ('FCCN');
- f* actions on company or corporate names;
- g* appeals against decisions of the National Registry of Companies ('RNPC');
- h* actions on acts of unfair competition in the field of industrial property; and
- i* interim measures to obtain and preserve evidence and to provide information to protect intellectual property rights.

III OBTAINING PROTECTION

In accordance with the Industrial Property Code, inventions that are new, involve an inventive step and are susceptible of industrial application are patentable even if they concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used.

Under the said Code, the following are considered unpatentable:

- a* processes for cloning human beings;
- b* processes for modifying the germ line genetic identity of human beings;
- c* uses of human embryos for industrial or commercial purposes;
- d* processes for modifying the genetic identity of animals that are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes;
- e* the human body, at any stage in its formation or development, including the sequence or partial sequence of a gene (however, a new invention, involving an inventive step and being susceptible of industrial application concerning any element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, provided that the industrial application of a sequence or partial sequence of a gene is expressly stated and specifically explained in the patent application);
- f* plant or animal varieties, as well as the essentially biological processes for the production of plants or animals;
- g* methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body; however, products, substances or compositions, for use in any of these methods are patentable;
- h* it should also be mentioned that, among other subject matters, schemes, rules and methods for performing mental acts, playing games or doing business are excluded from patentability, as well as software, as such, with no contribution; and
- i* software involving a technical contribution – in particular a specific technical solution for a specific technical problem – is patentable, provided that it meets the above-mentioned general patentability requirements.

IV ENFORCEMENT OF RIGHTS

Up until the establishment of the new Court of Intellectual Property, the enforcement of IP rights in Portugal was usually based on the criterion of the defendant's domicile, the competence for ruling upon actions lying with the court with territorial jurisdiction for the area where the domicile of the defendant was located.

However, if the domicile of the defendant was located in Lisbon (and surrounding areas) or in Oporto (and surrounding areas), the Court of Commerce of Lisbon or of Vila Nova de Gaia, respectively, had jurisdiction.

Given that the large majority of the companies who were defendants in actions concerning the enforcement of IP rights (namely companies engaged in the pharmaceutical field) are domiciled in the Lisbon area, most of those actions were ruled upon by the Court of Commerce of Lisbon.

Nevertheless, in addition to having jurisdiction for actions concerning IP rights – provided that the question of the defendant's domicile was duly fulfilled – this Court also ruled upon various other subject matters, namely insolvencies, which have become very frequent in Portugal over the last few years. For this reason, there were considerable delays in the procedural stages and decision of cases involving the enforcement of IP

rights, one of the reasons moreover that led to the creation and establishment of the new Court of Intellectual Property.

Since this new court was only established on 30 March 2012, no experience is yet available on its proper functioning, either at the level of the time frames of the procedural stages and decision of cases, or at the level of the technical quality of the decisions of the court in question. Thus, it is not currently possible to anticipate what will be the new landscape as regards the enforcement of IP rights in the new Court of Intellectual Property.

However, it is worth revisiting the subject regarding the mandatory arbitrations laid down by the aforementioned Law No. 62/2011 of 12 December 2011, which came into force on 19 December 2011, establishing a legal system for the settlement of disputes arising from industrial property rights whenever reference medicinal products and generic drugs are involved.

Although the scope of disputes concerning reference medicinal products and generic drugs can itself be questioned – what exists are actually disputes based on chemico-pharmaceutical patents (rather than reference medicinal products) aiming at preventing or putting an end to their infringement by medicinal products, whether generic or not – the truth is that the legislature clearly intended to establish a specific system for the enforcement of chemico-pharmaceutical patents, the said disputes being now subject to mandatory arbitration.

Accordingly, those disputes will not be decided by the new Court of Intellectual Property, at least not while Law No. 62/2011 of 12 December 2011, which established a mandatory arbitration system, remains in force.

This is a rather unusual situation, since there is a different jurisdictional system for cases involving the enforcement of chemico-pharmaceutical patents.

i Possible venues for enforcement

In view of what was stated above, the new Court of Intellectual Property is now the appropriate forum for ruling upon the IP matters.

However, there are other routes, such as the criminal one, through criminal courts or district courts with general competence, including criminal cases.

Recourse to criminal proceedings in Portugal is mainly aimed at the most blatant cases of trademark infringement – counterfeiting – and is not at all usual for patent enforcement cases.

In fact, although the infringement of the exclusive rights of a patent constitutes, in Portugal, a criminal offence (with a prison sentence of up to three years), recourse to criminal proceedings for the enforcement of patents, namely chemico-pharmaceutical patents, is almost non-existent.

ii Requirements for jurisdiction and venue

The enforcement of IP rights in the civil courts can be made through actions aiming at preventing or putting an end to the infringement of the rights at issue.

Prior to the action, at the time of the filing thereof or while it is pending, it is possible to apply for an interim injunction seeking a provisional decision that prevents or puts an end to the infringement of an IP right.

The Industrial Property Code in force in Portugal, in implementation of the Enforcement Directive – Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 – provides for specific rules as regards the measures aiming at enforcing industrial property rights.

With regard to preliminary injunctions, the aforesaid Code lays down (Article 338-I) that ‘whenever there is infringement or a well-founded fear that a third party is causing damage to an industrial property right which is serious and difficult to repair, the court may, at the request of the interested party, order the appropriate measures to a) prevent any imminent infringement or b) prohibit the continuation of the infringement’.

Separately or within the scope of a counterclaim in an enforcement action, it is usual – especially as regards chemico-pharmaceutical patents – for the defendant to request the declaration of nullity of the patent, also usually claiming that the patent did not meet, at the time of its grant, the patentability requirements (novelty, inventive step and industrial application).

Declaratory judgment suits are also available to obtain a decision of non-infringement of an IP right, usually in anticipation – on the part of whoever intends to use or market what is protected by that right – of enforcement actions that the owner of that right may initiate.

iii Obtaining relevant evidence of infringement and discovery

The Industrial Property Code lays down specific rules as regards the rules for obtaining relevant evidence of infringement and discovery.

The possibility of requesting before the court the submission of evidence in the possession or under the control of the other party or of a third party is dependent upon the applicant providing sufficient evidence of infringement of industrial property rights. The applicant can use all the means of evidence permitted by law, namely documentary evidence and witness evidence. However, in this case, since it concerns a mere request for obtaining evidence, the most consistent and convincing type of proof would be documentary evidence, which is not always easy to obtain.

Concerning acts carried out on a commercial scale, the applicant can request before the court the submission of banking, financial, accounting or commercial documents in the possession, under the dependency or under the control of the other party or of a third party.

The defendant can plead disproportionality of the obligation to present evidence, taking account, in particular, of confidential information.

Regarding the measures of preservation of evidence, grounds and proof must be provided of a situation in which ‘there is infringement or a well-founded fear that a third party is causing damage to an industrial property right which is serious and difficult to repair’.² In this case, the interested party may request urgent and effective provisional measures to preserve the evidence of the alleged infringement.

The terms of this legal provision still give rise to a great amount of discussion in doctrine and case law, since ‘infringement or a well-founded fear that a third party is causing damage to an industrial property right which is serious and difficult to repair’ was

2 Article 338-D (1) of the Industrial Property Code

already one of the general requirements of Portuguese law for the filing of a preliminary injunction under the Code of Civil Procedure.

On the one hand, we have the case law that sees this requirement as being purely economic or financial, and considers that the applicant must prove that the defendant does not have financial capacity to pay possible compensation in the future if the injunction is not granted. On the other, there is the case law that assesses this requirement in the light of the importance of the actual IP right (as non-material property), thus attaching relevance to the cessation of the infringement (or imminent infringement) of this right.

iv Trial decision-maker

Though the Court of Intellectual Property has been established, which, in principle, would naturally mean that the judges – for the time being, only one judge has been appointed to this court – are specialised in IP law, in Portugal, there are no judges having specific training in this area. However, it is naturally expected that not only in terms of training but also in terms of the actual experience that will be built up, the judges of the new court will acquire the necessary technical expertise. Nevertheless, there is always the possibility of the court being assisted by an expert, whenever the technicality or complexity of the subject matter being ruled upon so requires.

It should be noted that, during the trial, the legal representatives of the parties may also appoint a technical expert to assist them in the questioning of witnesses in respect of technical matters with which the legal representatives are not familiar.

v Structure of the trial

Following the filing of the briefs of a typical action – statement of claim, reply, possible counter-replies and final replies – the court may set a date for a preliminary hearing so that the parties may discuss the matters of fact considered to be proven and the matters of fact that need to be subsequently proven, namely by means of testimonial evidence. The court will draft what is known as the basis for the finding of facts, which lists the questions that the witnesses will answer at the trial. In addition to the evidence submitted with the briefs, the parties may also indicate, at the preliminary hearing, the remaining evidence, namely testimonial evidence or expert evidence. The witnesses that were indicated will give evidence in respect of the matter established in the basis for the finding of facts. The concept of expert witnesses does not exist, although, in practice, many witnesses act as such, especially in actions involving particularly complex matters.

The trial may be held in one or several sessions, according to the number of witnesses to give evidence, and it ends with the oral submissions of the lawyers of the parties.

Concerning the burden of proof, we would draw attention to the rule of reversal of the burden of proof as regards process patents. Under Article 98 of the Industrial Property Code: ‘If the subject matter of a patent is a process for manufacturing a new product, the same product manufactured by a third party shall be, unless proven otherwise, considered to have been manufactured using the patented process.’ This therefore lays down a presumption of infringement of the patent, unless it is rebutted by the party against which it is invoked.

vi Infringement

The assessment of patent infringement is usually made taking into account the scope of protection defined in the claims, interpreted according to the respective description of the patent. In the case of a product patent, the assessment is naturally based on a literal interpretation of the claims. For process patents, it is necessary to take into account the argument of the defendants as to the process effectively used for manufacturing the medicinal products that constitute the subject matter of the dispute.

In this respect, although there is no regular case law concerning the consideration and application of the doctrine of equivalence of the means, recourse to this doctrine in the discussion of patent infringement is usual.

vii Defences

Usually, defences consist of:

- a* contesting the validity of the patents invoked in the dispute. In the counterclaim, arguments as to the lack of novelty, inventive step or both of the patent are usually alleged. In particular, matters relating to the scope of prior art are normally discussed, as well as issues concerning obviousness, following the practice and case law of the EPO, namely the could or would test;
- b* discussing the difference (and non-equivalence) between the patented process and the process used for manufacturing the medicinal products at issue in the dispute.

Arguments relating to compulsory licences or exhaustion of right is not usual in patent litigation.

As already mentioned, the arguments as to the validity of a patent can be decided in a separate action aiming at obtaining a declaration of nullity thereof or within the scope of a counterclaim in an infringement action.

viii Time to first level decision

No experience is yet available on the time frames for the procedural stage and decision in cases that will be decided by the Court of Intellectual Property.

As regards the mandatory arbitrations laid down for disputes over patents and generic drugs, the new voluntary arbitration law in force in Portugal (since 14 March 2012) lays down a 12-month period for the arbitration award, which may nevertheless be extended by agreement of the parties.

ix Remedies

Pursuant to Article 338-L of the Portuguese Industrial Property Code:

1 – Those who, wilfully or negligently, unlawfully infringe an industrial property right of another shall be liable to compensate the injured party for the damages resulting from the infringement.

2 – When determining the amount of the compensation for damages, the court shall consider, in particular, the profit obtained by the infringer and the actual damages and lost profits suffered by the injured party, taking into account the costs incurred with the protection, investigation and cessation of the conduct harming its right.

3 – For the purpose of calculating the compensation due to the injured party, the amount of the revenue resulting from the unlawful conduct of the infringer shall be taken into account.

4 – The court shall also consider the non-material damages caused by the infringer's conduct.

5 – Where the amount of the damage actually suffered by the injured party cannot be determined in accordance with the preceding numbers, and provided that the injured party raises no obstacle thereto, the court may alternatively set a fixed amount using the equity method, based on at least the revenue that the injured party would have obtained if the infringer had requested authorisation to use the industrial property rights in question and the costs incurred with the protection of the industrial property right, as well as with the investigation and cessation of the conduct harming its right.

6 – Where, with regard to the injured party, the infringer's conduct constitutes a recurrent practice or is found to be particularly serious, the court may set the compensation due by simultaneously applying all or some of the criteria laid down in paragraphs 2 to 5.

7 – In any case, the court shall set a reasonable amount intended to cover the duly demonstrated costs incurred by the injured party as a result of the investigation and cessation of the conduct harming its right.

First of all, the IP right holder has to prove the causality of the infringement for the damages calculation. One possible criterion is loss of profits.

Normally, lost profits must be duly proved, namely by means of expert evidence – with experts indicated by the parties and by the court – with the necessary inspection of the parties' commercial accounts. The calculation methods for infringer's profits and lost profits are different options for computing the right holder's damage claims and do not need to be accumulated.

Portuguese law does not provide for the possibility of requesting double or triple damages (punitive damages).

With regard to the calculation method 'licence analogy' (which has been considered within the scope of the concept of unjust enrichment), reasonable licences are normally evaluated by means of expert evidence. For the evaluation of the applicable royalty rate, the relevant factors include the royalty rate under other licences granted by the IP right holder and common royalty rates in the relevant business sector (if any).

The claimant can choose between the methods of calculation of damages, namely lost profits, reasonable royalties on the infringer's sales (licence analogy), or surrender of the profit generated by the infringer. Under certain circumstances, it is possible to accumulate with one of the methods the damages caused to the IP right itself, though with some difficulty.

The method or methods must be indicated in the initial brief of the action. This can be followed by the most adequate method in the phase of discovery of evidence, namely expert evidence, which can be completed up until the end of the oral proceedings, which end with the trial.

In the absence of specific evidence for the purpose of calculating the damages or regarding the total extent thereof, the decision may determine that the damages be ascertained during the phase of execution against the infringer.

x Appellate review

Appellate reviews of judicial decisions may concern matters of fact and matters of law.

The decision under appeal is assessed by a panel of three judges, one of them being the reporting judge.

In general, the time frame for a decision, at the court of second instance, is between four to six months.

xi Alternatives to litigation

The most common alternative to litigation consists of out-of-court settlements between the parties during or before judicial proceedings.

V TRENDS AND OUTLOOK

In Portugal, in view of the creation and establishment of the new Court of Intellectual Property and of the legal system governing mandatory arbitrations in respect of disputes arising from the claiming of property rights, including injunction proceedings, involving reference medicinal products and generic drugs, we are truly in a new era.

This represents developments that on the one hand may be deemed to be positive – the new court – but that on the other are somewhat uncertain, especially as regards the question of the arbitrations in that field, which will yet give rise to a great deal of discussion.

We naturally hope that the new Court of Intellectual Property will be an appropriate venue for the proper discussion of infringements of IP rights. This should naturally be reflected in the swiftness of the decisions and in the technical and legal quality thereof.

As regards litigation, we believe that in addition to the growing problem of counterfeiting – which is common to many economies – infringements in the field of the internet will tend to increase.

Copyright, technology transfer, technology and software protection, namely in the field of patents, are likely to undergo a great deal of development, which will be accompanied by corresponding litigation.

Appendix 1

ABOUT THE AUTHORS

ANTÓNIO ANDRADE

Vieira de Almeida & Associados – Sociedade de Advogados, RL

António Andrade is a managing associate in the intellectual property practice group at Vieira de Almeida & Associados. António Andrade obtained his Law degree from the University of Lisbon and is admitted to the Portuguese Bar Association. He was granted the title of Specialist Lawyer in Intellectual Property by the Portuguese Bar Association in 2006. He has been a patent, trademark and design attorney since 2007.

He joined Vieira de Almeida & Associados in 2011 and is currently a managing associate in the intellectual property practice group. In such capacity he has been involved in intellectual property litigation, such as patents (namely pharmaceuticals litigation), trademarks and designs and advising companies in all intellectual property matters.

He is a member of several IP international organisations, such as AIPPI (Portuguese Group), ECTA, FICPI, INTA, MARQUES and UNION; chair of the ECTA Design Committee; and a member of UNION Litigation Commission.

He has been a speaker and delegate at several conferences, seminars and workshops regarding intellectual property matters

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