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Public Ministry Approach Towards the Civil Procedure in Trademark And Patent Conflict

Atuação do Ministério Público no Processo Civil em Lides Envolvendo Marcas e Patentes

Fiscalía en Procedimiento Civil en Litigios de Marcas y Patentes

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ABSTRACT

The Brazilian Public Ministry was conceived in the Brazilian constitution as a permanent institution whose duties are the defense of the juridical order, the democratic regime and the unavailable social and individual rights. This article seeks to analyze the intervention of the Public Ministry in actions involving trademarks and patents relating this performance in the quality of custos legis with the mission granted as a defender of society.

Keywords: National development, Social relevance.

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RESUMO

O Ministério Público Brasileiro foi concebido na constituição brasileira como uma instituição permanente que tem por atribuições a defesa da ordem jurídica, do regime democrático e dos direitos sociais e individuais indisponíveis. O presente artigo busca analisar a intervenção do Ministério Público nas ações envolvendo marcas e patentes relacionando essa atuação na qualidade de custos legis com a missão outorgada de defensor da sociedade.

Palavras-chave: Desenvolvimento nacional, Relevância social.

RESUMEN

El Ministerio Público Brasileño fue concebido en la constitución brasileña como una institución permanente cuyos deberes son la defensa del orden jurídico, el régimen democrático y los derechos sociales e individuales no disponibles. Este artículo busca analizar la intervención del Ministerio Público en acciones que involucran marcas y patentes que relacionan este desempeño en la calidad de custos legis con la misión otorgada como defensor de la sociedad.

Palabras clave: Desarrollo nacional, Relevancia social.

INTRODUCTION

Fundamental rights, in a Democratic State Ruled by Law as constitutes the Federative Republic of Brazil under the exact terms of article No. 1 of our Political Charter, are characterized, among other important aspects, by performing multifaceted functions within society and the legal order that regulates them.

Based on this multiplicity of functions, fundamental rights can be classified into three categories, namely, rights of defense, rights of participation and rights to benefits.

The rights of the defense constitute a negative status of the citizen before the State, exactly because it composes a normative complex that imposes to the State duty of abstention, of non-interference or non-intrusion in the normative space reserved for the individual's self-determination. Rights of participation are embodied in political rights, and rights to benefits ensure, on the one hand, the positive performance of the State in the granting of material benefits that are part of the existential minimum, necessary to ensure full respect for the dignity of the person, and on the other, the right to legal benefits, consisting in the editing of criminal legal norms or rules of organization and procedure by which effective protection is ensured that gives rise to fundamental rights. (MENDES, 2010, pp.332-342)

The Federal Constitution of 1988 provides as fundamental rights the inviolability of the right to life, liberty, equality, and security, ensuring also that no one will be deprived of liberty or their property without due process of law. In this regard, and by implementing several of these rights, the 1988 Constituent Assembly upheld the fundamental right to the protection of copyright (article No. 5, XXVII and XXVIII), as well as the ownership of inventions, patents and trademarks (article No. 5, XXIX).

That same Constitution, by its article No. 127, established the Public Ministry as a permanent institution, essential to the jurisdictional function of the State, which has the task of defending the legal order, the democratic regime and the unavailable social and individual rights, which accredit it as a privileged actor for the defense and affirmation of fundamental rights.

For methodological reasons, the present study will focus its analysis on the function of inspector of the law inserted in the article No. 178, item I, of the Civil Procedure Code of 2015. Having in mind the simple existence of mechanisms created in the legal universe in response to the problems of formal and material access to justice without an adequate understanding of its potentialities will not be sufficient for its realization, the axiological section of the article seeks to relate this *custos legis* intervention with the privileged position granted to the Public Ministry as a defender of society.

2.THE EMERGENCE OF THE PUBLIC MINISTRY

The study of the historical origins of the Public Ministry points to a diversity and richness of configurations in various nations around the world. Linked to the development of diverse social structures, it does not have a unique origin and has not emerged with the feature that currently bears.

Although some authors find the most remote genesis of the ministerial institution in the figure of the *magiai*[2] of ancient Egypt, the relative consensus that has been established on this theme is that the true origins of the Public Ministry are found in Philip III's France, with the creation of the office of the King's Prosecutors, who would be chosen from among those who performed the role of judge, in order to defend the interests of the King before the Courts (MAZZILLI, 1989, p.2).

The reign of Philip IV, the Fair, represents the institutionalization of these state agents, because it was in this reign that the ordinance of March 25th, 1302 was edited, reputed to be the first norm that mentions the Public Ministry and, therefore, is considered its birth certificate. The role of the King's prosecutors from the 16th century onwards "gradually widened *pari passu* with the strengthening of the dynastic powers and thus became agents of the public power before the courts." (FREDERICO MARQUES, 1958, p.239).

The important thing about the French experiment initiated with Philip III is that it made possible to move from the inquisitory system in which the figures of the

[2] The *Magiais* were public agents charged with punishing the rebels and the violent, protecting the peaceful citizens, accepting the requests of the righteous man and hearing the news of wrongdoing.

judge and the accuser were concentrated in the same state organ to the accusatory system, in which the figure of the public prosecution was organically separated from the figure of the judge, as a way to ensure and guarantee the rights of the individual.

It can be said that the solution engendered by the French system to some extent coincides with the meaning of the Modern Public Ministry. The bipartition of the only existing judiciary which consisted of dividing the members of the judiciary into two classes of agents: the sitting judges or magistrates and the king's prosecutors or magistrates. The latter were initially chosen from among those who, until then, had exercised the role of judge, so that they could exclusively exercise the task of defending the king's interests[3] before the courts, and at a later time with the strengthening of the monarch's power, defending the general interest in complying with the laws, punishing offenders and executing judgments. (GARCIA, 2005, p. 8-9)

The organic separation of the public ministry made it possible to disengage from its original function of defending the interests of the State and the emergence of a defensive institution of society, legitimized by the idea that the initiation of judicial measures aimed at the promotion, protection or reparation of fundamental rights that supersede individual interests restricted to the legal sphere of determined individuals, the so-called metaindividual rights that concern the collectivity as a whole, such as diffuse, collective rights and also the individual ones reinforced with the burden of unavailability, cannot be effectively realized only by either for lack of instrumental conditions or for exemption, nor it is reserved for the judiciary because it is essentially inert in order to preserve its impartiality.

3.THE INSTITUTIONALIZATION AND CONSOLIDATION OF THE PUBLIC MINISTRY IN THE 1988 CONSTITUTION

The Brazilian Public Ministry, a singular organ and without historical comparatives, reached its present stage after a long evolutionary course, as well as, mainly, after the debates held during the period of the Brazilian National Constituent Assembly (1987/88) - which resulted in the *Magna Carta* currently in force.

The constituent debate from which the current configuration of the Brazilian Public Ministry emerged can be observed from both the liberal and democratic perspectives, from which the constituent decision-making process culminated in a single institutional current.

At this point, it is worth mentioning the so-called "*Carta de Curitiba*", 1st National Meeting of Attorneys General and Presidents of Associations, held in 1986 (between June 20th and 22nd). In general terms, the basis for the entire constitutional process regarding the Brazilian Public Ministry emerged from this debate and resulted in the characteristics of the Institution, that is, a north that structured the debates and sought to implement them in the 1988 *Magna Carta* (GARCIA, 2005. p.38-39).

Regarding the arguments that lead to the constituent debate, the liberal, strongly defending the notion of State ruled by law (constitutional and/or legal norm), with a view to the exercise of power, sought to defend the independence of *Parquet* as a system of checks and balances in preventing or remedying abuses by the competent authorities.

> "From a liberal perspective, we start from the premise that the Montesquieu's tripartition among the Legislative, Executive and Judiciary Powers is insufficient, as exhaustive of the functions pertaining to the Modern State. Other organs, with the typical and specific task of supervising the effectiveness of the legal system, should exist to act in this sense, because the judiciary can only do so by provoking the interested parties (remaining inert in the face of violations of the law that were not requested their intervention) and with the same exemption of this Power, disrespectful to the political calculation (such as the Legislative and Judiciary) by considerations about the opportunity/convenience of its performance"(VIANNA LOPES, 2000, p. 75).

With this line of argument, the Brazilian Public Ministry would be an organ of the state and not (never) of the government. In this sense, its agents would be "agents of the law" and not "agents of the Power", guided by the purpose of avoiding the abuse of this (Power) to the detriment of the respect to the norm (constitutional or infraconstitutional). Therefore, as a state institution, it would be independent of the Powers (independent and authority of the other Powers - even allowing the defense of the possibility of being a "fourth" State Power).

This line of understanding - "fourth" Power - emerged with an emphasis on liberal debates, as shown in an article published in the *Estado de São Paulo* [State of São Paulo] in 1986:

> "If the tripartition of powers replaced the previous regime of concentration of powers, it does not mean that it represents the definitive and final solution ... The parliamentary regime, the exercise of Moderating Power and the Constitution of the Republic of China - with its five powers - seriously breached the tripartition. Nothing obliges a State to organize itself

[3] In this sense, the 2nd paragraph of the 58th article of the Brazilian Constitution of 1891 provided that the Prosecutor General would be appointed by the President of the Federal Republic from among the members of the Federal Supreme Court.

based on strict tripartition, postulating the condition of constituted power to the Public Ministry" (VIANNA LOPES, 2000, p.96).

As stated above, in addition to the classic division of Powers devised by Montesquieu (Executive, Legislative, and Judiciary), the Modern State (Rule of Law) has been relied on other institutions to equilibrate the system of checks and balance. Thus, an institution that fulfills this role is the Public Ministry, that is, the passage of an organ that was historically (nationally) protector of the defense of the State's interests, currently serves the unavailable interests of society and individuals' fundamental rights.

It can be highlighted that, under the liberal argumentative basis, the objective was to institutionalize the choice of its manager directly by the corporation in order to lead the Institution for a certain time (period of management); structural improvement was sought (its functioning); and, among others, institutional expansion (new duties).

On another basis of argumentation, it is fully necessary to emphasize the support of the democratic argument. This line of thought is also supported by the norm, but this is not the end of it, since the support of this argument lies in the defense, by an organ, of socially relevant interests, which their holders face difficulties or are unable to do so by their strength.

In the words of Julius Aurelius Vianna Lopes,

"Another argument that, in Brazil, indicated the convenience (if not urgency) of an independent Public Ministry was based on the need for specialization of an organ for the defense of socially relevant interests and whose holders, including their inherently collective condition, have difficulties or even inability to do them on their own. For this conception, legality is not an end in itself, it matters exactly in an instrument for the realization of rights related to social segments. Thus, the State would be in charge of defending groups, which, although legally protected, would be ontologically harmed in the event (or probability) of violation of their protective rules. To "*broaden the concept of citizenship and support essential interests of community life*", an agency capable of channeling the social demands affected by the breach of the Law would be essential" (VIANNA LOPES, 2000, p.104-105).

As stated by the aforementioned author, the strengthening of the Brazilian *Parquet* in this line of argumentation would result in a structural state organ, symbolically public, but, mainly, functionally social organ. In other words, it would be a structure directed to society, rather than to the State itself, always in defense of concretely collective needs (in an emerging diffuse view).

From this perspective, the current configuration of the Brazilian Public Ministry represents the construction of a specific institution that Ackerman calls the instance of integrity. This instance, with specific attributions for the defense of the juridical order in the control of the legality, the legitimacy and the fight against corruption in the public sphere and the promotion of social and fundamental rights is, according to the author, a necessary condition to ensure legitimacy to the democratic regime itself, concluding that "the mere fact that the instance of integrity does not make up the Traditional Sacred Triad should not be enough to deprive it of its place in the modern separation of powers" (ACKERMAN, 2009, p.72-74)

Given the entire context of interpretation and consolidation of legal rules, it is worth highlighting the singularities constitutionally absorbed by the Brazilian Public Ministry during the period of the National Constituent Assembly. For the historically recent institutional growth of the Public Ministry in Brazil (since its independence and autonomy conferred upon it by the 1988 Constitution) is part of a worldwide trend towards the consolidation of (state) public organs, but independent of governments, as support for the expansion of citizenship and, consequently, for the defense of the Democratic State ruled by Law.

With the institutional independence granted to the Public Ministry by the current *Magna Carta*, the State constituted in October 1988 made clear its historic commitment to promoting new relations with Brazilian society, to reverse the privatization of public space, a recurring stance in Brazilian history.

The formulation of the Democratic State ruled by Law by the Constitution was the main cause of the new position and attributions of the Public Ministry, since, although *Parquet* autonomy is variable in comparative Law, only in the Brazilian constitutional order of 1988 gave the construction of an independent institution - in structural and functional terms - of the various public authorities.

The Brazilian Public Ministry is institutionally independent precisely for the promotion of effectively republican practices, in which there is a clear delimitation between the public and private spheres, in the State and society. On the other hand, in addition to the indispensable formal dimension of the State ruled by Law, and its institutional independence is further justified by the material dimension of citizenship, as its agents are tasked, as an essential institution with jurisdiction, to promote access to unavailable interests (individual, collective and diffuse), making it a truly privileged actor for the promotion of fundamental rights and the defense of the

legal order, essential values of a Democratic State ruled by Law, as the Federative Republic of Brazil is called.

4. PROTECTION OF TRADEMARKS AND PATENTS AS A FUNDAMENTAL LAW.

In the current state of the art, the interdependence between the Constitution and Fundamental Rights is unquestionable. As Ana Paula de Barcellos (2009, p.803) teaches, "one of the fundamental traits of current constitutionalism is the normativity of constitutional dispositions, their hierarchical superiority, and centrality in the system and, from the material point of view, the incorporation of values and political options among which, in the foreground, those related to fundamental rights stand out". It is precisely this interdependence that gave the Constitution its definitive and authentic dignity as a fundamental norm.

Notwithstanding, the catalog extension of fundamental rights upheld in our Constitution does reveal some weaknesses, as some fundamental provisions have been included in the list of fundamental rights, at least subject to a certain controversy.

Speaking specifically about the category of fundamentality, Canotilho (1993, p.498) states that it "points to the special dignity of protection of rights in a formal and material sense". Formal fundamentality is referenced to positive constitutional law, with fundamental rights having the following relevant dimensions: i) they have superior normativity in the legal order; ii) they submit, for their review, to formal and material limits, among us composing the unmodifiable nucleus of the constitution, the so-called immutable clauses; iii) they are directly applicable, linking immediately the public power. In its turn, material fundamentality means that the content of fundamental rights makes up the basic structures of the State and society (CANOTILHO, 1993, p.490), that is, it is the portion of the Constitution that contains the fundamental decisions of the State and society, in some way referenced to the respect and protection of human dignity.

In this context, the constitutional provisions relating to trademark and patents contained rights in the 5th article , items XXVIII and XXIX, are of material fundamentality, at least controversial, since they are not directly related to the protection of human dignity nor derive unequivocally from the principles and regime of our Constitution as essential positions of the individual in their personal or social dimension (SARLET, 2010, p.137), sharing only the formal fundamentality peculiar to the rights accepted as fundamental in the positive text of the Constitution.

5.PUBLIC MINISTRY IN THE PROCEEDINGS INVOLVING TRADEMARKS AND PATENTS.

As based on the previous topics, the Brazilian Public Ministry presents itself as a *sui generis* institution dedicated to defending the interests of society. For this reason, the Code of Civil Procedure of 2015, as it was the case with the previous one of 1973, provided that its intervention should be mandatory in cases where there is public or social interest.

The first question that arises refers to the identification of the public interest expression meaning, a word endowed with fluidity and openness. Law is an allographer, that is, it is the result of interpretation. In this sense, every legal norm is a prescriptive proposition, although it has an empirical basis in the literality of its enunciation, it lies in the immaterial plane of meanings. Statements of the legal text prescribe conduct, but legal norms are the meanings constructed from the texts of positive law and structured according to the logic of conditional judgments. The legal text is set by the Legislative Power, but the norm that comes from it is built by the interpreter. (CARVALHO, 1998, p. 15).

According to Castanheira Neves (1993, p. 25), the law is not it before its realization, because only in its realization acquires its authentic existence and comes to its reality. Quoting Ihering, he teaches: "The law exists to be realized. The realization of law is the life and truth of law; She is the right itself. What does not come to reality, what only exists in the laws and on paper, is nothing more than a ghost of law. They are nothing but words. On the contrary, what is realized as a right is the right".

The issue is relevant because, as a rule, in trademark and patent actions, the federal autarchy of the *Instituto Nacional da Propriedade Industrial* (INPI) [National Institute of Industrial Property] is present in one of the centers. It is, therefore, necessary to define whether the mere presence of an entity with legal personality governed by public law in itself reflects the presence of a public interest capable of attracting ministerial intervention.

Administrative school doctrine is strong in distinguishing between primary public interests and secondary public interests. The former embodies the interests of the collectivity as a whole, while the latter, the interests of the public entity as the holder of their rights. (BANDEIRA DE MELLO, 1998, p.32). In this regard, it seems to us that the mere presence of the INPI federal autarchy is not sufficient to justify ministerial intervention based on the presence of public interest.

In fact, the organic separation of the Public Ministry made it possible to disengage from its original function of defending the interests of the State and the emergence of an institution defending society, legitimized by the idea that the initiative of judicial measures aimed at the promotion, protection or reparation of fundamental rights that supersede individual interests restricted to the juridical sphere of determined individuals, the so-called metaindividual rights that concern the collec-

tivity as a whole, such as diffuse, collective rights and also the individual ones reinforced with the burden of unavailability, cannot be effectively performed only by individuals, whether by the lack of interest or exemption, or for the lack of instrumental conditions of a large part of Brazilian society.

This interpretative bias on the meaning of "public interest" for the purpose of legitimizing ministerial intervention in the quality of the law's tax in actions in which individual rights are discussed, even if one of the poles is a legal entity governed by public law, it seems to find resonance in entry No. 189 of the dominant case-law summary of the Superior Court of Justice, which considers the intervention of the Public Ministry unnecessary in tax executions. Following this track, the new Code of Civil Procedure, extending the need for ministerial intervention in the actions in which the Public Treasury was the author as provided in the precedent No. 189, provided in the sole paragraph of its article No. 178, that the participation of the Public Treasury (either as an author, Defendant, assistant or opponent) does not in itself constitute a hypothesis of intervention by the Public Ministry.

Therefore, the correct exegesis for the word "public interest", in actions concerning trademarks and patents, must be obtained from a joint reading of the obligation provided in the final part of clause I of the article No. 178, which points to the necessary ministerial intervention when there is a social interest in the possibility (not obligatory) of this intervention granted by its sole paragraph, when in one of the poles of the action is the INPI. In fact, the mere presence of the INPI, by itself, is not a cause for ministerial intervention when dealing with particular interests, but if beyond the presence of the federal autarchy, the individual rights under discussion in the dispute have social relevance, it must be recognized that a "public interest" is present to legitimize the role of the Public Ministry as curator of the legal order and protector of the rights of social relevance.

The jurisprudence of the Federal Supreme Court honors this thesis. Deciding whether the Public Ministry would have legitimacy to bring public civil action against an educational institution on the grounds of abusive price increases or, if it is a discussion of tuition fees, the right in principle available, the matter would be reserved to public or private law, that sodalice in *Recurso Extraordinário* (RE) [Extraordinary appeal] No. 163,231[4] left the legitimacy of the Public Ministry based on the fact that education is a follow-up of extreme delicacy and social content that, more than it permits, requires state action. It is worth transcribing excerpt from Min. Mauricio Correa's driving vote.

> "(...) This is not the interference of the ministerial initiative in the specific area reserved for lawyers, but to defend, on a collective basis, people who are victims of arbitrariness practiced with an abusive increase in school fees. Among those affected, many of the parents would not be able to afford legal expenses and fees, such as those who sought the Public Ministry outraged and angry at the increase perpetrated; and because they could barely afford to pay for their children's studies, they were unable to afford extra expenses. Moreover, the Parquet was more than impelled to promote the action, by the duty of office, the more when it comes to interests that rise to the category of goods linked to education, protected as known, constitutionally, as the duty of the State and obligation of all (CF, article No. 205)."

It is evident, therefore, that if the Public Ministry can act as an acting organ when individual rights are socially oriented, it should be more acting as an intervening organ proposed by third parties but that discusses individual issues endowed of social relevance. Considering the qualification of only the formal fundamental law to the protection of trademark and patent property rights granted by our Basic Charter, it is possible that the individual rights litigated to these subjects may or may not have social relevance. In the first case, ministerial intervention is mandatory under the first part of article No. 178 (1), while in the second case it is unnecessary.

Besides, one can think of the need for ministerial intervention even in the absence of social features in the individual issues discussed in court. This is exceptional, but a non-existent situation, dealing with the individual interest of patent holders that have relevant effects on the country's scientific and technological development, to the point of affecting the internal market.

Indeed, article No. 219 of the Constitution states that the internal market is part of the national heritage and will be stimulated to enable the cultural, socioeconomic development, well-being of the population and the technological autonomy of the country. Thus, since the Public Ministry is a true defender of society, it is necessary to recognize the need for its intervention in hypotheses that such.

CONCLUSIONS

In conclusion, we believe that we have shown that the intervention of the Public Ministry in litigation involving issues of trademark and patent should be exceptional and limited to the hypotheses in which the decision given on the private interests that are the subject of the legal dispute affects a significant part of society, incorporating, for such reason,

[4] Rapporteur Minister Maurício Correa, Dj. on 06.29.2001.

social relevance, or even in exceptional situations that have the potential to affect the internal market and the country's technological autonomy.

As an example, one could quote a trademark lawsuit involving company names that could induce consumers into a kind of misleading advertising. Similarly, an action relating to patent ownership of medicinal products which has undeniable consequences for the right to health which, although free to private enterprise under the precise terms of the article No. 199 of the Constitution, is undoubtedly a social right, even recognized as a duty of the State.

In the above-mentioned cases and in similar hypotheses, it is the institutional duty of the Public Ministry, as a defender of society and protector of fundamental rights, to intervene in the quality of costs legislated in the article No. 178, I of the 2015 Code of Civil Procedure.

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