

Kluwer Patent Blog

Why Telecom Companies Must Push The Brazilian Parliament And Courts Towards Progress

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In certain technological fields, it is necessary to choose a solution and adopt it as a standard. Imagine, for example, if each electronic device came with a different socket-outlet format or if each airport in the world used a different communication system to connect its control tower with airplanes. It would be catastrophic or, at the very least, very expensive to adapt the infrastructure to accommodate so many different technologies that perform the same function. For this reason, technological standardization is relevant.

Thus, economic agents of the most diverse magnitudes come together around organizations to discuss and establish the technological standards of a given sector. These are the so-called *Standard Setting Organizations* (SSOs), which include, for example, the *International Organization for Standardization* (ISO). However, a problem arises in this context. It is common that the technologies that are essential for the adequacy of products and services to the patterns determined by the SSOs are patented.

Patents are rights conferred by the state government as a way of rewarding and encouraging the investments and efforts employed to develop a new technology. If the individual demonstrates to the competent authority that an invention (i) is new, (ii) it is not obvious to a person skilled in the art and (iii) solves an actual technical problem, the inventor/holder will receive a title that guarantees the temporary right to prevent any third party from using, producing, selling, offering or exploiting that technology in any way.

Patents are so relevant to the socioeconomic development of the country that they are considered a fundamental right in Brazil, directly provided for by the Constitution. Even in the United States of America, where the Constitution is lean and takes care of only a few issues of great relevance, patents are provided for in the constitutional text. Without patent rights, investments in research and development for certain technical solutions would be unfeasible, therefore, there would be no incentive to invest in innovation.

In this context, it is a real challenge to determine how to deal with this superpower of exclusivity over an essential technology, which could mean that the patent holder would be able to effectively choose who will compete in the market or not. With the adoption of 5G and the popularization of the Internet of Things (IoT), in which everything will be connected, an increasing number of judicial cases involving essential patents can already be seen worldwide. If everything will be

connected, this connection will need to be made in a standardized way so that there is technical compatibility between the devices.

In Brazil, there is very little case law on the subject. In a case involving two telecommunications giants, the Administrative Council for Economic Defense (CADE in Portuguese) missed the opportunity to establish clear parameters to be observed in the future. On the part of the Judiciary, there is also no precedent that solves the possible obstacles of the concrete cases, so that they will probably have to be imported from foreign judgments. The recipe for Brazilian legal uncertainty is set: it is known that it is almost inevitable that new lawsuits debating essential technologies (mainly involving technologies around 5G, as has just happened between Ericsson and Apple) will emerge. Additionally, there seems to be no effort by the Congress to bring a legislative solution in Brazil.

Apparently, unless there is a reaction from the legislators, the definition of this issue that will determine the direction of the technological and economic development of Brazil will remain in the hands of judges, who have legal training, not engineering degrees, or technical background in telecommunications or other areas that should matter the most in this debate. More than the recipe for legal uncertainty, if the Congress does not act, we may be witnessing a shift towards Brazilian technological ostracism. This is why it is so important to companies that are affected by this public policy regarding SEP take the initiative to lead the debate before the Brazilian Congress as well as the Brazilian Courts.

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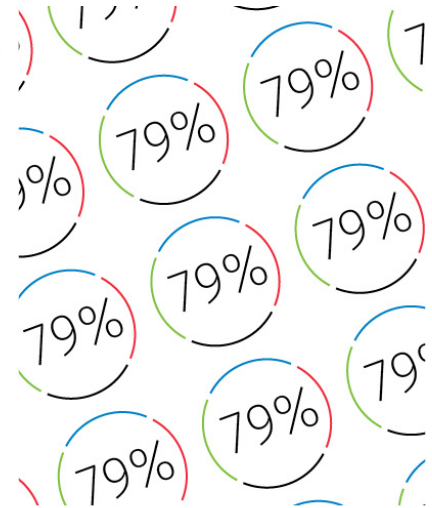
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