

Intervention of third parties in patent nullity actions

Lawsuit judgments tend to affect the parties of the legal proceeding only, as they have participated in the constitution of a specific *res judicata*. However, in some cases, a decision has an impact on legal positions beyond those originally part of the proceeding – namely, on third parties' legal interests.

Such far-reaching effects can occur in patent nullity actions. In general, a patent holder has the exclusive right to explore the subject protected under the patent. It is therefore possible to prevent other (unauthorised) parties from “manufacturing, using, offering for sale, selling or importing for such purposes without its consent” (Article 42 of the Industrial Property Law). However, third parties wishing to explore the subject of a patent/process or a product directly obtained by a patent process will be affected by a court's judgment on patent validity.

While a nullity action can be filed within the patent's validity term by the Brazilian National Institute of Industrial Property (INPI) or any interested party under Article 56 of the Industrial Property Law, this does not prevent third parties from suffering the effects of a *res judicata* formed in a patent nullity action.

However, the Civil Procedure Code (Articles 119 to 129) allows a third party to intervene as an assistant in an action provided that it has a legal interest in the decision to be handed down. Third parties may intervene at any time in a patent nullity proceeding and aid the applicant or defendant, entering the lawsuit at whatever stage it may be. They have the same powers as the party they aid, incurs the same litigation expenses and could even become the entity's substitute in case of a possible default or omission. Yet, third parties are prohibited from opposing the assisted, whose powers of waiving the right upon the claim by settling or recognising its validity are maintained.

Due to intervention in a nullity lawsuit, the effects of a *res judicata* cannot be discussed in a future action, especially with regard to the justice of the decision, unless there is proven prejudice on the assistant's part in the proceeding, which could potentially influence the final decision.

Even without intervention, decisions on patent nullity will affect third parties. Therefore, allowing third parties to participate in the decision is a highly effective method of ensuring a favourable outcome and, in many cases, incurring lower costs than an individual nullity action.

Finally, depending on the level of the intervention (ie, the level of the third party's legal interest and its relation to the opposing party) the assistant may be accepted as a co-party assistant, which grants it equal powers as the assisted party as a co-plaintiff.