

# BRAZILIAN JUDICIAL SYSTEM AND INTELLECTUAL PROPERTY

A guide with everything you need to know about the structure of the Judicial System in Brazil and how it applies to Intellectual Property cases, organized in a simple and straightforward manual.



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## 1. Judicial system

Brazil adopts a multiple court system where federal, state, labor, electoral and military matters are handled separately. While it is possible for intellectual property cases be heard before a Labor, Electoral or Military Court, the vast majority of cases are decided by Federal and State Courts.

As a general rule, matters brought before the Federal and State Courts observe the following hierarchy:

**a) Trial Courts:** are composed of a single judge who hears all pleadings (preliminary and on the merits), supervises the production of evidence and is responsible for all steps of the lawsuit until a final decision on the merits is reached;

**b) Court of Appeals:** each State has its own Court of Appeals, and there are six Federal Court of Appeals, each covering specific states. They are divided within Panels composed of either three or five judges, who decide on appeals filed against Trial Court decisions.

**c) Superior Court of Justice (STJ):** is formed of six five-judge Panels, only two with authority to rule on IP related matters. Access to it is restricted and mainly occurs when it analyzes appeals grounded on literal offense to federal law or divergence between different Court of Appeals on the same legal matter; and

**d) Supreme Court (STF):** is formed by eleven Justices divided into two five-Justice Panels. It has the authority to rule constitutional challenges, as well as appeals grounded on literal offense to the Constitution.

While the Court of Appeals are authorized to review all factual and evidentiary matters, access to the STF and the STJ is more difficult as appeals to these Courts are limited to specific situations and they are barred from reexamining factual matters.

## 2. Jurisdiction rules

A Trial Court's jurisdiction is determined based on different factors. As a general rule, the Federal Courts have jurisdiction to decide any lawsuits which the Federal Government or any of its agencies, such as the BRPTO, are parties. In case of IP-related disputes, the Federal Courts would have jurisdiction to rule on lawsuits challenging the legality of the BRPTO's decisions.

On the other hand, disputes between private entities are usually decided by State Courts, as they have residual jurisdiction over matters not subject to Federal, Labor, Electoral or Military jurisdiction. For instance, IP infringement lawsuits are usually decided by State Courts.

As to the venue, there is established case law that authorizes plaintiffs to choose the judicial district between (i) the defendant's place of residence; (ii) their own place of residence; or (iii) where the illegal act occurred.

The cause of action also plays a relevant role in determining which Trial Court within the same judicial district or Panel within the same Court of Appeals has jurisdiction. This is because some Federal and State Courts have Trial Courts and Panels specialized in IP law.

For instance, the Sao Paulo State Courts have partial specialization as they have Trial Courts and Panels with exclusive jurisdiction to decide on IP matters, except for copyright disputes. On the other hand, the Rio de Janeiro State Courts' IP specialization encompass industrial property and copyright law. There are also specialized Panels within the Federal Court of Appeals, but the Rio de Janeiro Federal Trial Courts are the only ones specialized in IP at the trial level.

Although specialized Courts exist for decades in some states, they are becoming increasingly more common in both trial and appellate level, contributing to an overall improvement of quality in IP-related decisions.

### **3. Proceedings**

Aside from special proceedings, civil lawsuits follow either the expedite or regular proceeding. Expedite proceedings are reserved for small claims lawsuits and matters of lesser complexity. It is very rare for an IP dispute to be decided by a small claims Court.

Under the regular proceeding, the lawsuit begins with the plaintiff filing a written complaint containing all factual and legal arguments, as well as the relief sought. Practically every new lawsuit is filed electronically, and automatically docket and assigned to a Trial Court. Once assigned, the judge verifies if the complaint satisfies the minimum requirements established by the Code of Civil Procedure and examines any existing request for interim relief.

While the Code of Civil Procedure provides for a mandatory conciliation hearing, most judges dispense this proceeding and simply order the defendant to be served of process and present its defense within fifteen workdays. The defense is a written document containing all factual and legal defenses and may also include a counterclaim against the plaintiff if some conditions are met.

If the defendant fails to submit a timely defense, the facts claimed by plaintiff in the complaint will be presumed to be true, and the Trial Court may issue a default judgement. If not, the plaintiff will be summoned to file a rebuttal to the defense within fifteen workdays.

After the rebuttal is filed, the parties may be summoned to inform which evidence they wish to produce, and the factual and legal matters they deem controversial and find essential for the dispute's resolution. The Trial Court then may issue a case management decision wherein: (i) the pending procedural matters will be decided, such as standing to sue and standing to be sued; (ii) list the controversial and relevant matters of the dispute; and (iii) order the production of evidence requested by the parties or that the Trial Court finds necessary.

If a case management decision is rendered and the parties produce evidence, the Trial Court may allow the parties to submit final written statements. The Trial Court may also avoid a case management decision if it finds unnecessary to produce additional evidence and render summary judgement, issuing a final decision on the merits (named "*sentença*" in Portuguese).

#### 4. Evidence

Lawsuits in Brazil follow a predominantly written procedure and Trial Courts have discretion to weigh the evidence as they seem fit. As a result, they tend to refuse the production of oral evidence when the facts can be evidenced by documents.

There is no discovery procedure in the sense of mandatory disclosure of documents, as the parties are required to produce their own evidence. However, the parties may request the Trial Court to order a third party to present specific evidence or compel the counterparty to produce specific documents if some procedural conditions are met.

Nonetheless, there is no exhaustive list of evidence that the parties may produce, and the most common ones are:

**a) Documentary evidence:** consists of any type of document or file, irrespective of the format (hardcopy or digital). The most common forms of documentary evidence are documents, emails, photos, and visual and audio recordings, among others;

**b) Notarial deed:** is a type of documentary evidence which was draw up by a Notary Public upon someone's request that has a presumption of veracity and certifies the occurrence of facts;

**c) Impartial technical examination:** it is a technical opinion prepared by an independent court-appointed expert used to subsidize the Trial Court with an impartial assessment of technical matters. The report usually answers questions submitted by the parties and the Trial Court itself. The parties may nominate their own partial technical experts to assist the court-appointed expert in their examination and are also allowed to comment on the final report and submit additional questions, if needed.

**d) Witness testimony:** is a type of oral evidence wherein the parties and the Trial Court itself ask questions to a person who is not part of the lawsuit on facts that cannot be evidenced via documents or an impartial technical examination.

**e) Personal testimony:** is similar to a witness testimony but is applied to the plaintiff and the defendant themselves to clarify important points in the lawsuit. If the party refuse to testify, the judge may presume the veracity of the facts that would be evidenced.

While trademark-related disputes are often decided based on documentary evidence alone, Trial Courts often order the production of impartial technical examination in lawsuits pertaining to patent, industrial design, copyright, and trade dress disputes.

## 5. Appeals

Almost every Trial Court decision is appealable in Brazil, and Court of Appeals decisions are further appealable to the STF and/or STJ. There are different appeals and each with their own requirements. The most usual ones are:

**a) Motion for Clarification:** is a request made to the judge who rendered the appealed decision to remedy omissions, clarify unclearness and correct clerical errors. It may be filed against any decision and has the effect of suspending the term to file most other appeals.

**b) Interlocutory Appeal:** is an appeal filed against an interlocutory Trial Court decision. It is decided by a Panel of the Court of Appeals in a public hearing, and in some circumstances, the parties may present oral arguments.

**c) Appeal on the merits:** is an appeal filed against a final decision on the merits issued by a Trial Court. It is decided by a Panel of the Court of Appeals in a public hearing, where the parties may present oral arguments. It can reexamine facts and even challenge past interlocutory decisions that were not appealed via an Interlocutory Appeal.

**d) Special Appeal:** is filed against a Panel decision and its merits are decided by the STJ. The Special Appeal has a narrow scope of admissibility as it aims to reform Panel decisions that: (i) violate a literal provision of federal law; (ii) declare the validity of an act of local government in violation of federal law; and (iii) has interpreted the Federal law differently than another Court of Appeals or the STJ itself.

**e) Extraordinary Appeal:** is filed against a Panel decision and its merits are decided by the STF. The Extraordinary Appeal has a narrow scope of admissibility as it aims to reform Panel decisions that: (i) violate a literal provision of the Constitution; (ii) declare the unconstitutionality of a treaty or federal law; (iii) declare the validity of law or an act of local government in violation of the Constitution; and (iv) declare the validity of local law challenged for violation of federal law.

**f) Appeal on the Special Appeal or Extraordinary Appeal:** as the Court of Appeals is responsible for a first analysis on the procedural requirements of both Special and Extraordinary Appeals, the decision that find them inadmissible is further appealed to each court.

**g) Intern Appeal:** is only applicable then an appeal that should be decided by a Panel is decided by the rapporteur alone. The rapporteur may reconsider their decision or submit the internal appeal for the Panel's consideration.

Despite its strict requirements, it is usual for plaintiffs and defendants alike to file Special Appeals to the STJ if they disagree with a Court of Appeals decision. However, the merits of these Special Appeals are seldomly examined.