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INTELLECTUAL PROPERTY AND ANTITRUST IN BRAZIL: TRENDS

Denis Borges Barbosa

SOURCES

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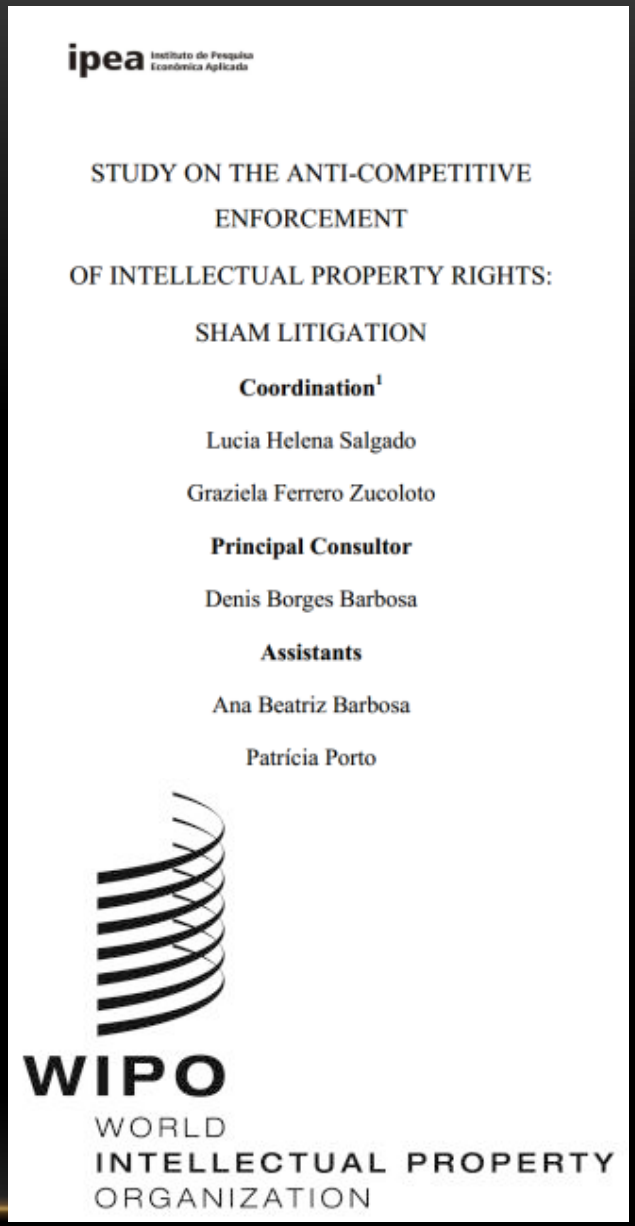
- Salgado, Lucia Helena and Morais, Rafael Pinho de, The new Brazilian Antitrust Law: beyond the basics, found at http://www.cresse.info/uploadfiles/2012_PAR2_1_PAP.pdf
- WIPO/IPEA, Study on the anti-competitive enforcement of intellectual property rights:sham litigation 2011, found at http://www.wipo.int/export/sites/www/meetings/en/2011/wipo_ip_ge_11/docs/study.pdf


ipea Instituto de Pesquisa Econômica Aplicada

STUDY ON THE ANTI-COMPETITIVE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: SHAM LITIGATION

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WIPO
WORLD INTELLECTUAL PROPERTY ORGANIZATION

1995-2012
SEVENTEEN YEARS AFTER

- The Rod Stewart episode
- Processo Administrativo nº 08000.011187/1995-13, started ex officio by SDE, the investigating authority.
- City of Rio said:
- “The copyright laws confer no rights on the copyright owners to violate the antitrust laws” Broadcast Music Inc. v. Columbia Broadcasting Services, 441 U.S. 1, 19 (1979).

1995-2012
SEVENTEEN YEARS AFTER

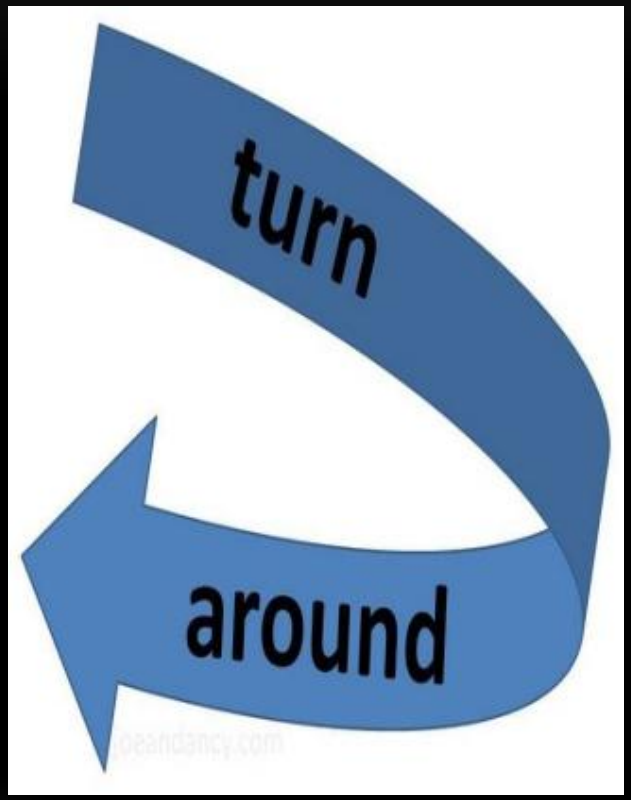
1995-2012
SEVENTEEN YEARS AFTER

- The Rod Stewart episode
- However in May 9, 2001, CADE (the adminstrative court) found that copyright collection was not an activity subject to competition concerns.
- Prices set by ECAD are not subject to examination or government control (...) "(Regulation of ECAD, Official Gazette of July 24, 1989, p. 12,332)

1995-2012
SEVENTEEN YEARS AFTER

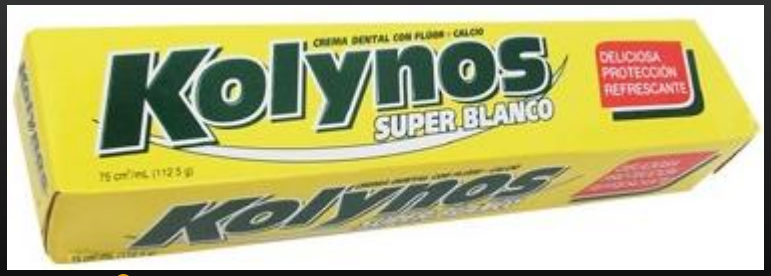
- March,20 2013
- Cade condemns CADE for cartel formation
- The Administrative Council for Economic Defense (Cade) condemned on Wednesday (20/3), the Central Bureau of Collection (ECAD) and six associations for collecting copyright through cartel formation. The collecting agency also was convicted of abuse of dominant power because of "creating barriers to entry for new associations in the market." Fines totaling R$ 38 million.

1995-2012
SEVENTEEN YEARS AFTER



WHAT CHANGED?

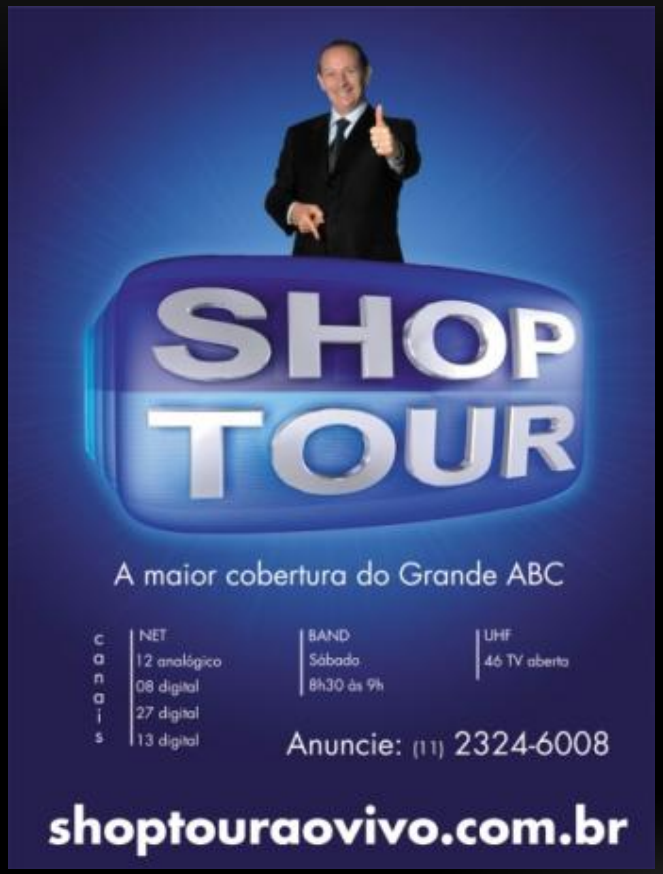
THE KOLYNOS COLGATE CASE



The intervention of Brazilian Competition Policy within the domain of
intellectual property rights started with the classical precedent of Colgate-Kolynos
merger in toothpaste, where the trademark Kolynos was suspended for four years

WHAT CHANGED?

TH SHOP TOUR CASE



- The first conviction in a purely anticompetitive litigation (or sham litigation) case in intellectual property arena dealt with the anticompetitive abuse of copyrights in sales TV channels, the Shop Tour case (PA 08012.004283/2000-40).

WHAT CHANGED?
THE SPARE PARTS CASE

- 08012.002673/2007-51, Cons. Emmanuel Joppert Carlos Ragazzo, Dec. 15, 2010.
- The exercise of an industrial property right can sometimes prove to be illegitimate and set up an illegal anticompetitive practice susceptible to intervention by the antitrust authority.

WHAT CHANGED?

THE SPARE PARTS CASE

Ragazzo, LL.M NYU

(viii) Na medida em que produz tal resultado negativo, a imposição dos registros de desenho industrial das Representadas diante dos FIAPs revela-se: (a) um exercício abusivo do direito de propriedade industrial em questão, na medida em que se desvirtua dos fins sócio-econômicos estabelecidos pela própria norma constitucional que ampara esse direito, que tem por objetivo "o interesse social e o desenvolvimento tecnológico e econômico do País" (art. 5º, XXIX); (b) juridicamente desproporcional, pois compromete severamente o direito à livre concorrência, o direito dos consumidores e a repressão ao abuso de poder econômico, sem contrapartidas em termos de benefícios visados pelos direitos de propriedade industrial; e (c) uma potencial infração à Lei nº 8.884/94, pois consubstancia abuso de posição dominante com o fim de impedir ou dificultar a atuação de concorrentes, com potenciais efeitos danosos à ordem econômica;

WHAT CHANGED?
THE SHAM LITIGATION CASES

- Finally, there had been five investigations open for years on anticompetitive litigation in the pharmaceutical industry. On December 5th 2011, three of them have been concluded and sent to CADE for judgment, with a recommendation for conviction

Salgado and Morais, cit.

REVIEW OF CONTRACTS AND LICENSING

- Since 1967 done by Central Bank and from 1972 on the Brazilian Patent Office.
- Normative Act 15 of 1975 – a copy of the Japanese rules then in force.
- A PER SE inflexible approach
- From 1992 on, a flebber approach. No list formal list of allowed practices.
- Recently some signals that INPI is contemplating to circumvent the law and free licensors from such control
- Some prosecutorial review of such eventual decision must be expected.
- Borges Barbosa, Denis , Technology Contracts in Brazil: The Patent Office Screening Rôle (May 24, 2012). Available at SSRN: http://ssrn.com/abstract=2151435 or http://dx.doi.org/10.2139/ssrn.2151435

REVIEW OF CONTRACTS AND LICENSING

- CADE has also entertained the same rôle, on other basis (rule of reason)

- Large amount of cases analyzed, specially Monsanto's

THE NEW LAW

- The legal framework, however, did not previously put the same emphasis on possible abuses in unduly obtaining or enforcing intellectual property rights.
- Law 12529/2011 introduced main changes in this respect and this is highly appreciated. The first change concerns the illustrative list of potentially anticompetitive practices in the law.
- In Law 8884/1994 there was mention to intellectual property only in one item (of article 22). The new article 36, paragraph 3, kept the same item as previously – mentioning the obstruction to the exploration of intellectual property rights – and introduced a new one. This new item (article 36, paragraph 3, XIX) mentions explicitly: "exert or explore abusively industrial or intellectual property, technology or trademark". As seen, the intended scope was as broad as possible.

Salgado and Morais,
cit.

THE NEW LAW

- As concerns mergers, the new law also prescribes expressly the possibility of “compulsory licensing of intellectual property rights” (article 61, paragraph 2nd, V). This seems to be too much of an emphasis, an unnecessary and misleading one.
  As a merger to take place – even more under pre merger review – requires CADE’s approval, there is no need to issue compulsory license in any merger. CADE can simply credibly signal towards merger rejection and the parties to the merger, if interested, will use their free will to voluntarily license the intellectual property necessary to compensate for the anticompetitive harm of the merger. Therefore, we can safely argue that theory and the Brazilian recent experience have shown that there was no need for such a legal provision, in the case of mergers.

WHAT IS TO BE EXPECTED?

- 1. A more active IP rôle for the antitrust authority
- 2. With the introduction of private antitrust suits by the new law, a more extensive usage of such instrument instead of compulsory licences
- 3. A broad usage of the sham litigation tag to counter aggressive IP litigation.
- 4. A antitrust doctrine closer to the European standards, with a more critical perspective of the special status of IP in rgeard to competition

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