

TPOs and Administrative Nullity Procedures in Brazil: Increasingly frequent attacks to patents and patent applications

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In general, third party observations (TPOs) and administrative nullity procedures (ANPs) comprise arguments, prior art documents, affidavits from experts, experimental data and any related information that can be provided to a Patent Office with the purpose of preventing an invention from being patented in view of any alleged inconsistency with the corresponding Patent Law. These general definitions and purposes are no different in Brazil.

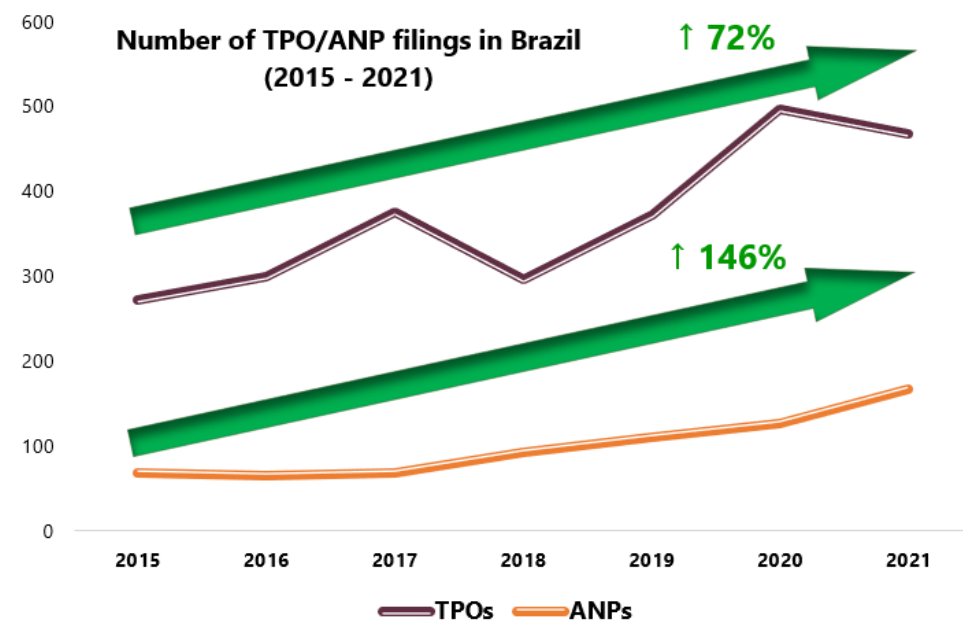
TPOs are available in Brazil, according to the provisions of Article 31 of current Brazilian Industrial Property Law 9,279/1996 (IP Law), which state that information for aiding examination may be filed by interested parties between the publication of the patent application and the end of examination thereof.

On the other hand, the legal basis for ANPs can be found in Articles 50-65 of the IP Law, which determine that the nullity of a patent can be requested by any person having legitimate interest before the Brazilian PTO and it shall be declared administratively when any one of the provisions of the IP Law has not been met, for instance, the specification and claims are contrary to Articles 24 and 25 of the IP Law (criteria of enablement, support and clear and precise definition), the granted invention extends beyond the contents of the application as originally filed or any one of the essential formalities indispensable for grant were omitted during prosecution of the application.

TPOs shall be considered by the Brazilian Examiners during examination of patent applications and cited in the official action for knowledge of the Applicant and public, even though acceptance thereof depends on the Examiners' discretion. Although TPOs are not published in the weekly Patent Gazette, they are posted at the Brazilian PTO's website shortly after their filing.

ANPs may be commenced within six months from the publication of the grant of a patent. The Patentee will be notified to respond within sixty days and, independently of a reply having been filed, the Brazilian PTO will issue an interim opinion, notifying the Patentee and the ANP filer to reply within a common period of sixty days. Even if no replies are presented, the ANP will be decided by the President of the Brazilian PTO based on an opinion issued by a Board of Examiners, thus finishing administrative instance.

From 2015 to 2021, TPO and ANP filings in Brazil increased substantially as shown below:



Moreover, only as a side note, although anonymous TPOs and ANPs are not allowable in Brazil (based on said Articles 31 and 50-55 of the IP Law), “strawman” TPOs/ANPs have been occasionally accepted by the Brazilian PTO. As also known in various jurisdictions, strawman TPOs/ANPs are often filed in Brazil in the name of law firms and even individuals in order not to disclose the actual interested party. Especially in the case of ANPs, this practice appears to be questionable.

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