

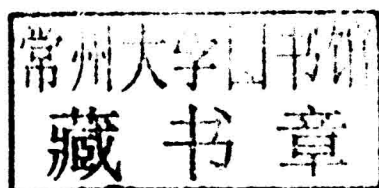


# Copyright Litigation

Jurisdictional comparisons

Second edition 2015

**General Editors:** Thierry Calame, Lenz & Staehelin  
& Massimo Sterpi, Studio Legale Jacobacci & Associati



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**Thierry Calame & Massimo Sterpi**

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# Foreword

**Thierry Calame, Lenz & Staehelin  
& Massimo Sterpi, Studio Legale Jacobacci & Associati**

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## **COPYRIGHT IS THE NEW STEEL**

In recent years, copyright has taken a central role in the global economy.

Creativity, once the elitist domain of artists, has become the bread and butter of daily life. Anyone posting a comment or a snapshot online can be an author for copyright purposes. In addition, virtually every digital start-up is based on copyrightable contents, such as graphic design, texts, images or music.

In the job market, what counts is no longer the physical energy of the worker, but rather his creativity. At the same time, trying to enlarge copyright protection for new forms of creations – such as programme formats, culinary recipes or fragrances – is a growing trend.

In such a scenario, copyright takes a fundamental role in protecting one's creativity, and often becomes the basis for one's success.

At the same time, another form of copyright protection becomes increasingly relevant, namely that afforded to databases. When data mining represents an essential prerequisite in decision-making processes, ownership of data becomes the new source of power.

However, circulation and distribution of content also raises serious and yet unresolved issues. Can an Internet Service Provider, who not only takes advantage of the circulation of content but is often actively involved in shaping such circulation, avail itself of exemptions of liability for underlying copyright infringements? Where should the limits be drawn between hosting, granting access to and transporting (infringing) content on the one hand and active participation in the content distribution on the other?

Finally, projects of massive appropriation and distribution of content (such as the scanning of entire libraries) increase the conflict between the public interest to access knowledge and the rights of the authors, originally created to enable authors to live off their creations.

A rising source of power, copyright is the steel of the current world economy.

Rome/Zurich, 29 October 2014

Thierry Calame      Massimo Sterpi



# Brazil

## Pinheiro Neto Advogados

José Mauro Decoussau Machado & Matheus Chucrí dos Santos

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### 1. SOURCES OF LAW

#### 1.1 What are the principal sources of law and regulation relating to copyright and copyright litigation?

The Brazilian legal system is based on the civil law tradition, which means that written rules are the main source of law. Notwithstanding this, precedents are secondary sources of law.

Among the written rules, the Federal Constitution is the highest law within Brazil. Below the Federal Constitution, there are supplementary laws, ordinary laws, decrees and provisional measures. International rules and treaties are only enforceable within Brazil if internalised and incorporated into the Brazilian legal system.

Pertaining to copyrights and copyright litigation, the following written rules apply: (i) the Federal Constitution, which establishes copyright as a fundamental right; (ii) international treaties such as the Berne Convention, the Washington Convention (Interamerican Convention on Copyright in Literary, Scientific and Artistic Works, or Universal Copyright Convention), the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations), the Convention on Protection of Producers of Phonograms against Unauthorised Reproduction of Phonograms, and the Treaty on International Registration of Audiovisual Works; (iii) Law No. 9,610/1998, which sets forth the rules regarding copyright in Brazil (Brazilian Copyright Law); (iv) Law No. 5,869/73, which sets forth the general rules for civil proceedings (Civil Procedure Code); (v) Decree-Law No. 2,848/1940, which establishes the criminalised conducts within Brazil, among which the copyright infringement; and (vi) Decree-Law No. 3,689/1941, which sets forth the general rules regarding criminal procedure.

#### 1.2 What is the order of priority of the relevant sources, ie which takes precedence in the event of a conflict?

Considering that the Federal Constitution is the highest and supreme law in the Brazilian legal system, it is above every law, which shall be in conformity and be construed in accordance with the constitutional provisions. In case of conflict between laws, the highest rank law will prevail. As mentioned before, below the constitution, in order of superiority, there are: (i) Supplementary Laws; (ii) Ordinary Laws; and (iii) Provisional Measures.

The secondary sources of law will only apply when the law is silent regarding a certain matter. In these cases, the precedents and general principles of law can be used to construe the rule applicable to such matters.

## **2. COURT AND ADMINISTRATIVE SYSTEM**

### **2.1 In which courts are copyrights enforced? Are they specialised copyrights courts? If not, what level of expertise can a copyright holder expect from the courts?**

Copyright cases will fall under the jurisdiction of state courts. It might, however, fall under the jurisdiction of federal courts if one of the parties involved in a copyright-related matter is the Federal Union, a federal entity or a public company.

Neither federal nor state courts are essentially copyright specialist courts, where such courts have jurisdiction over a wide range of subject matters in addition to copyright. For this reason, as a general rule, it is not possible to expect a high level of expertise regarding copyright from these courts.

### **2.2 Is there any administrative body (eg a copyright office)? If so, does it have any jurisdiction in copyright litigation?**

Not applicable.

### **2.3 To what extent are courts willing to consider, or are bound by, the opinions of other national or foreign courts that have handed down decisions in similar cases?**

In the Brazilian legal system, the precedents do not have a binding effect, which means that the judges of the lower and higher courts are not obligated to decide in accordance with precedents issued on the same matter by other courts or even by the Superior Court of Justice or the Supreme Federal Court.

Notwithstanding this, judges usually consider the precedents of the Superior Court of Justice and of the Supreme Federal Court when ruling, but since the courts are not bounded by it, the judges are free to rule according to their understanding of the law. In specific cases, due to a constitutional amendment, it was inserted into the Brazilian legal system the concept of binding precedents. When the Supreme Federal Court votes and approves a particular precedent, it acquires force of law and other courts and the public administration are bound to rule in accordance to such precedent.

Although it is not usual, the courts may take into consideration foreign decisions on similar cases to the extent that the foreign laws applying to such cases are similar to the Brazilian laws, but it is important to mention that the courts are not bound to such foreign decisions in any way.

### **2.4 Who can represent parties before the courts handling copyright litigation?**

The Brazilian Civil Procedure Code, in Article 36, establishes that only lawyers duly enrolled with the Brazilian Bar Association (OAB) are entitled to represent parties before courts and handle copyright litigation. The party may engage in litigation by itself if the amount under discussion is up to 20 times the minimum wage effective in Brazil, in the Small Claims Courts, pursuant Article 9, of Law No. 9,099/1995.



## **2.5 What is the language of the proceedings? Is there a choice of language?**

It is always Portuguese and the parties cannot choose a different language.

## **3. SUBSTANTIVE LAW**

### **3.1 What types of works are copyrightable under your law? Does your national law provide for a closed list of copyrightable works or for an open list?**

Under the Brazilian Copyright Law, all creative works howsoever fixed on a medium of expression are protected as intellectual property. Although the Brazilian Copyright Law provides a list with examples of works that are copyrightable, such list is open and any work that meets the requirements is protected under Brazilian law.

In order to be copyrightable, the work must be an original creation of the mind expressed by any means.

### **3.2 Is software considered copyrightable under your law?**

Software is copyrightable under Brazilian law and its protection is regulated by the Software Law (Law No. 9,609/1998), which provides mainly for: (a) protection of software as intellectual property; (b) the rules for marketing software, creating mechanisms for government agencies to oversee these marketing activities with a view to protecting Brazilian software; and (c) penalties of a criminal nature for cases of infringement of software copyrights and certain marketing rules. The Software Law regulates software in general, but as it is a copyright, the Copyright Law applies where the Software Law is silent.

### **3.3 Does the author of a work have to be a national of your country for the work to qualify as copyrightable or does a work qualify for copyright protection irrespective of the nationality of the author?**

The Brazilian Copyright Law is applicable to the nationals of and/or people resident in countries that assure reciprocity in terms of copyright. In other words, nationals of countries that deny copyright protection to Brazilians might not be able to claim such rights in Brazil.

### **3.4 What types of rights are covered by copyright? To what extent are moral rights covered by copyright?**

Copyright in Brazil is divided into moral rights, which are inalienable and non-transferable, and property rights (namely, the exclusive right to use and exploit one's works). Even if property rights are assigned by its author to a third party, the author remains entitled to moral rights over his work, including to have his authorship acknowledged and to oppose any changes that may affect his reputation.

The moral rights of the author comprise the following rights: (i) the right to claim authorship of the work, at any time; (ii) the right to have the author's name, pseudonym, or conventional sign indicated or announced as being that of the author, during the use of his work; (iii) the right to keep

the work unpublished; (iv) the right to ensure the integrity of the work by objecting to any changes or to the taking of actions that might in some way adversely affect it or injure the author's reputation or honour; (v) the right to change the work, before or after it is used; (vi) the right to withdraw the work from circulation or suspend any form of utilisation already authorised, when circulation or utilisation would entail an affront to his reputation or image; (vii) the right to gain access to a single, rare copy of the work when it is legitimately in the possession of another, in order to preserve its memory, doing so in a way that causes the least possible inconvenience to its holder who, in any case, shall be compensated for any loss or damage caused to him.

**3.5 What defences are available to an alleged infringer? To what extent can 'fair use' or 'fair dealing' be used as a defence? If these doctrines do not exist, are there any comparable limitations?**

'Fair use' and 'fair dealing' are not recognised doctrines under Brazilian law. The Brazilian Copyright Law sets forth specific limitations to the copyright, which are: (i) in the daily or periodical press, reproduction of a news or informative article, published in newspapers or magazines, with mention of the name of the author, if signed, and of the publication from which it was transcribed; (ii) in newspapers and magazines, reproductions of speeches given at public events of any kind; (iii) portraits or other form of representation of an image, made to order, when reproduced by the owner of the commissioned object and provided there is no objection by the person represented therein or the heirs thereof; (iv) literary, artistic, or scientific works solely for use by the visually-impaired, provided that the reproduction, for non-commercial purposes, is made by the Braille system or other procedure on any support for those intended users.

Moreover, according to the Brazilian Copyright Law the following uses do not result in infringement: (i) reproduction of a single copy of short excerpts for the private use of the copier, provided it is done by said copier on a not-for-profit basis; (ii) quotation in books, newspapers, magazines, or any other communications media, of passages of any work for purposes of study, criticism, or debate, insofar as justified by the purpose at hand, and provided the name of the author and source of the work is indicated; (iii) notes taken at educational establishments, reproduced by those to whom they are addressed; however, their publication in whole or in part without prior and express authorisation of the person who gave the class is prohibited; (iv) use of literary, artistic, or scientific works, sound recordings, and radio and television transmissions at commercial establishments, solely for demonstration to customers, provided those establishments sell the supports or equipment that permits their utilisation; (v) theatrical and musical performances taking place in the privacy of a home or, solely for teaching purposes, at educational establishments, provided no profit is sought in either case; (vi) use of literary, artistic, or scientific works to develop evidence in judicial or administrative cases; (vii) reproduction, in any work, of short excerpts of pre-existing works of any kind, or of an entire work in the case of three-dimensional art, provided the reproduction in itself is not

the principal objective of the new work and does not adversely affect the normal exploitation of the work reproduced, or cause unjustified harm to the legitimate interests of the authors.

Paraphrases and parodies that are neither true reproductions of the original work nor discredit it may be freely made and works that are situated permanently in public places may be freely represented in paintings, drawings, photographs, and audiovisual procedures without characterising copyright violation.

Besides the topics raised above, the following defences are common in copyright cases:

- statute of limitations: the defendant could allege that the author did not bring the lawsuit within the limitation period, which is explained in further detail in another question;
- prior use: the defendant may allege and try to prove that his use of the work is prior to the plaintiff's and therefore there would not be infringement; and
- invalidity of the copyright: the defendant might claim that the copyright is not valid because the work does not meet the legal requirements to obtain protection under the Brazilian Copyright Law or because it is already part of public domain.

### **3.6 Are compulsory licences available? If so, under which circumstances?**

Yes, compulsory licences are available where the holder of any intellectual property right (including copyrights) exploits such right in an abusive manner, with the possibility of causing harm to the market as a whole. In this case, one of the possible penalties to be applied is the compulsory licence of the rights unduly exploited.

### **3.7 Is there a requirement of copyright registration? Is copyright registration required to enforce a copyright, ie to obtain damages or other relief? Is a copyright deposit required? Is a copyright notice required? What are the consequences, if any, for failure to make a copyright deposit or to display a copyright notice?**

Copyright protection in Brazil is based on the declarative system. Article 18 of the Brazilian Copyright Law states that: *'The protection of the rights provided for in this Law shall be independent of registration'*. For that reason in Brazil it is not mandatory to register work in order to have legal protection.

It is possible, however, depending on the nature of the work, to obtain the registration to have evidence of the date in which it was conceived. The registration is automatic and does not depend on an analysis whether the legal requirements were fulfilled. The public entities where the registration can be made are Biblioteca Nacional (literary works), Escola de Música (musical works), Escola de Belas Artes da Universidade Federal do Rio de Janeiro (sculptures and works of art of the same nature), Instituto Nacional do Cinema (audiovisual works), and Conselho Federal de Engenharia, Arquitetura e Agronomia (artistic works related to architecture, engineering

and agronomy).

Notices are not required according to Brazilian law copyright.

### **3.8 How long does copyright protection last?**

The Brazilian Copyright Law establishes that the author's economic rights, as a rule, shall be protected for a period of 70 years from the January 1 of the year following the author's death. This protection shall be applicable to posthumous works as well.

The initial date for purposes of counting the term may change in specific cases: (i) when the work of joint authorship is indivisible, the term is counted from the death of the last author; (ii) when the work is anonymous or pseudonymous, the term begins on January 1 of the year following the publication; and (iii) when it concerns economic rights in audiovisual and photographic works, the term begins on January 1 of the year following the publication.

### **3.9 How is copyright infringement assessed? Is actual copying to be proved or is substantial similarity sufficient to establish infringement?**

In order to establish infringement, the owner must prove, by any means of evidence, that the alleged infringer used or reproduced, partially or entirely, the protected work. Thus, substantial similarity is sufficient to establish infringement. In cases where the infringement is not evident, courts usually appoint an expert to compare the works and provide elements to the judge to analyse the dispute. Of course, if the infringement is evident, the judge may rule based solely on his analysis.

### **3.10 Are there any particularities for assessing copyright infringement for specific types of works (eg software)?**

Not applicable.

### **3.11 Can a copyright be enforced against a trade mark, a domain name, a trade name, a pseudonym or other distinctive signs?**

Yes, it is possible to enforce copyright against a trade mark, domain names and trade name, if the copyright is prior to such right. That is, if a trade mark reproduces a pre-existing copyright, the trade mark is declared void.

### **3.12 On what grounds can a copyright be declared invalid?**

A Copyright can be declared invalid if the work does not meet the legal requirements for protection under the Brazilian Copyright Law, if the work is already part of the public domain and/or if the work falls under the list of exceptions that receive copyright protection.

In this sense, the following are not protected by copyright: (i) abstract ideas, regulatory procedures, systems, methods, projects, or mathematical concepts; (ii) schemes, plans, or rules for mental actions, games, or business; (iii) blank forms to be filled in with any kind of information, whether scientific or not, and the associated instructions; (iv) texts of treaties or conventions, laws, decrees, regulations, court decisions, and other official

acts; (v) information in everyday use, such as calendars, appointment books, registers, or captions; (vi) isolated names and titles; (vii) the industrial or commercial exploitation of the ideas contained in the works.

### **3.13 To what extent can enforcement of a copyright expose the copyright holder to liability for an antitrust violation?**

If the enforcement of a copyright: (i) limits, restrains or in any way injures free competition or free enterprise; (ii) results in control of a relevant market for goods or services; (iii) increases profits in an abusive fashion; and (iv) results in abuse of a dominant position, the holder can be liable for antitrust violation. It is important to mention that Law No. 12,529/2011 expressly establishes as infringement of the economic order the abusive enforcement or exploitation of intellectual property rights.

### **3.14 Are there any grounds on which an otherwise valid copyright can be deemed unenforceable, owing to misconduct by the copyright holder, or for some other reason? Is there a time limit for bringing an infringement action?**

There are no grounds on which an otherwise valid copyright would be deemed unenforceable. The statute of limitations for bringing an infringement action is three years, when the action seeks indemnification for extra-contractual damages and 10 years when the action has a nature similar to a contract. There is no time limit to enforce moral rights, as they are deemed personality rights which shall receive protection anytime they are violated.

### **3.15 Can a copyright holder bring a lawsuit claiming both copyright infringement and unfair competition for the same set of facts?**

Yes, it is possible to bring a lawsuit claiming both copyright infringement and unfair competition. It is quite common in Brazil to have this kind of approach, as the copyright violation tends to produce negative effects on the market to the copyright holder.

## **4. PARTIES TO LITIGATION**

### **4.1 Who can sue for copyright infringement (copyright holder, exclusive licensee, non-exclusive licensee, distributor)? Does a licensee need to be registered to be eligible to sue?**

The following are authorised by law to sue for copyright infringement: (i) the copyright holder, (ii) the author's successors where the author is deceased, and (iii) the Federal Union, when the work falls into the public domain.

For industrial property rights (trade marks, patents, designs etc) the law allows the licensee to receive powers to take the necessary measures to defend such rights in court. There is no similar provision related to copyrights, which prevents licensees from acting in the name of the copyright holder (the only exception applies to copyright collecting societies, which may file suits to collect amounts related to public execution of works).

**4.2 Can copyright collecting societies sue for copyright infringement to enforce their members' rights? If so, can copyright holders sue in parallel with the collecting societies or do collecting societies have an exclusive right to sue for certain types of infringement?**

Yes, copyright collecting societies sue for copyright infringement. By affiliating to the copyright collecting societies, the author grants such societies powers to adopt all actions necessary to defend his copyright, either in court or elsewhere. No action can be filed in parallel.

**4.3 Under what conditions, if any, can an alleged infringer bring a lawsuit to obtain a declaratory judgment on non-infringement?**

The possibility of filing this kind of declaratory suit is widely debated in Brazil. There are precedents on both sides. Brazilian law allows the filing of a declaratory action to evidence: (i) the existence or non-existence of a legal relationship; and (ii) to evidence the validity of a document. The debate in courts is concentrated on the arguments around whether *non-infringement* would fall or not within the concept of non-existence of a legal relationship.

**4.4 Who can be sued for copyright infringement? Can the company directors be sued personally? Under what conditions, if any, can someone be sued for inducing or contributing to copyright infringement by someone else?**

In the civil sphere any person or legal entity that infringes copyright can be sued for infringement. In the criminal sphere, in the other hand, only individuals (such as company directors, employees etc) can be held liable, but in this case their involvement with the infringement must be clear and direct. The only exception applies to public concerts and shows, as directors, managers and owners of the places where the violation occurs will be held jointly liable regardless of their actual participation in the infringement.

The intent to commit the infringement is not relevant, as the proof of direct involvement is sufficient to generate liability in criminal and civil spheres.

Brazilian law does not provide on the concept of 'contributory infringement' of copyright, therefore there are difficulties in claiming liability based either on inducement or contributory acts.

**4.5 How is the liability of Internet Service Providers (ISPs) treated? Under which conditions may they be considered jointly liable with the copyright infringer?**

Law No. 12,965/2014 (*Marco Civil da Internet*) establishes the principles, guarantees, rights and obligations pertaining the use of the internet in Brazil. According to the law, ISPs will only be liable for third party generated content if, after a specific court order and within the technical limitations of the service provided, it fails to remove the infringing content.

**4.6 Is it possible to add or subtract parties during litigation?**

The plaintiff is entitled to add parties, whether another plaintiff or defendant,

during the litigation and without the consent of any other party until the defendant is served. After the defendant is served, the plaintiff may only add new parties upon the consent of the defendant.

On the other hand, there are some cases in which the defendant is entitled to add a third party as defendant if the judge allows it.

The plaintiff, at any time, may request the exclusion of certain defendants, which will be allowed upon agreement of such parties.

## **5. ENFORCEMENT OPTIONS**

### **5.1 What options are open to a copyright holder when seeking to enforce its rights in your country?**

The holder of the copyright is entitled to bring civil and criminal lawsuits against the infringer. Among the civil measures, the Brazilian Copyright Law acknowledges the possibility of filing an action seeking moral and property damages in case of copyright infringement. In addition to this, the holder is also entitled to request an order determining the defendant to refrain from infringing the copyright.

### **5.2 Are criminal proceedings available? If so, what are the sanctions?**

According to the Brazilian Criminal Code, the violation of copyright and related rights is considered a crime, subject to a penalty of imprisonment of three months to one year or a fine. Also, (i) if a person totally or partially reproduces, with the intent of profiting directly or indirectly, by any means or process, an intellectual work, performance or phonogram, without the author's express consent; (ii) if a person, with the intent of profiting directly or indirectly, distributes, sells, offers for sale, rents, introduces in the country, acquires, conceals or has on deposit, original or copy of intellectual work or phonogram reproduced in violation of copyright; and (iii) if a person offers to the public by cable, optical fibre, satellite, waves or any other system that allows the user to select a work or production to receive it at a time and place previously determined by the one who makes the demand, with the intent of profiting directly or indirectly, without express authorisation, they are subject to a penalty of confinement of two to four years and a fine.

### **5.3 Are border measures available?**

Yes, any products may be detained at the border for copyright violation. Article 609 of Decree No. 6,759/2009 (Brazilian Customs Regulation) establishes that phonograms, books and audiovisual works, to be exported or imported, must have labels or signs of identification, issued and delivered in the form of specific legislation, to certify compliance with laws relating to copyright.

In case of any violation, Articles 605 to 608 of the Brazilian Customs Regulation allows the retention of such imported goods. After the retention, the customs authorities may notify the owner of the copyright to file a criminal complaint and to request the judicial seizure of such products.

Moreover, if there is suspicion that copyright infringing goods will be

exported or imported, the owner is entitled to request the customs authorities to retain such goods by presenting the elements that confirms his suspicions.

**5.4 Are proceedings for fast removal of infringing content from the internet available?**

The Law No. 12,965/2014 (*Marco Civil da Internet*) does not establish any extrajudicial measure for fast removal of infringing content from the internet. The aggrieved party must make such request in court and obtain an order determining the removal. Notwithstanding this, requests to remove content that violates the terms of service of a particular internet provided service could be send directly to the ISP, who may or may not remove the content, at its discretion.

**5.5 Are 'graduated response'-type sanctions (such as bandwidth reduction or temporary suspension of internet access) available against infringers online? If so, which authorities (administrative bodies or courts) are competent? How long does the procedure typically last?**

Not applicable.

**5.6 Is it compulsory to send a cease and desist letter to an alleged infringer before commencing copyright infringement proceedings? What are the consequences, if any, for making unjustified threats of copyright infringement?**

It is not compulsory to send a cease and desist letter to an alleged infringer before commencing copyright infringement proceedings. By making unjustified threats of copyright infringement, there is a risk of suffering a lawsuit claiming moral damages for undue accusations. If such accusations become public not only moral damages can be granted but also material damages if the alleged infringes manages to prove that the accusations caused financial losses.

**5.7 To what extent are courts willing to grant cross-border or extra-territorial injunctions?**

Brazilian courts tend to be very resistant to issuing decisions that produce effects outside Brazil. This possibility is more common in criminal cases to arrest fugitives from Brazil. Even so, such decisions are subject to confirmation abroad to become enforceable. In copyright cases there are no known judicial precedents.

**5.8 To what extent do courts recognise the blocking effect of 'torpedo' actions abroad?**

This is not a situation already reviewed by Brazilian courts.

**5.9 To what extent are alternative dispute resolution (ADR) methods (such as arbitration or mediation) available to resolve copyright disputes? How widespread are ADR methods and in which sectors?**

In Brazil, only private and disposable rights can be subject to ADR methods,



therefore ADR methods might be used to resolve copyright disputes. The following ADR methods are available: (i) mediation; (ii) arbitration, which can be resorted to upon mutual agreement of the parties. Due to the length of judicial proceedings, ADR methods have taken on greater importance in the business context in Brazil, in all sectors. It is worth mentioning that, during judicial proceedings, the judges usually determine a conciliation hearing for the parties to discuss a possible amicable settlement.

## **6. PROCEDURE IN CIVIL COURTS**

### **6.1 What is the format of copyright infringement proceedings?**

The format of the copyright infringement proceedings is the same as a general lawsuit under the Civil Procedure Code. The plaintiff files the complaint and the defendant is served to present a defence in 15 days. After the defendant presents the defence, the judge orders the presentation of evidence and then issue a first instance ruling based on his analysis of the facts and the evidence. If the plaintiff issues a preliminary injunction request, the judge often reviews it 10-15 days after the filing of the suit.

### **6.2 Are disputed issues decided by a judge or a jury?**

Civil and criminal matters related to copyright are always decided by a judge. The decision is issued by a single judge in the first instance and by a panel of judges in the second instance.

### **6.3 To what extent are documents, affidavits, witnesses and/or (court-appointed or private) experts used? Is it possible to cross-examine witnesses?**

Any means of proof is accepted under Brazilian law. Some pieces of evidence, such as witnesses and expert investigations, shall be authorised by the judge, but are very common in copyright cases. It is possible to cross-examine witnesses, which is usually done in a hearing session with the presence of the judge.

### **6.4 To what extent is survey evidence used (eg to prove substantial similarity)? What is its relevance in proceedings (eg party allegation, evidence)? Who decides which consumers are questioned in the survey (eg the court, court expert)? What level of cost should one expect to incur to carry out a survey? Are these costs recoverable from the losing party?**

Surveys are quite common to assess likelihood of confusion, not only in trade mark cases but also in disputes related to copyright. The judge appoints an expert to conduct the survey and such expert will be responsible for determining the methodology. Costs greatly vary according to the nature of the dispute. The costs are incurred by the party who requested the survey, but the losing party will ultimately bear the costs (refunding the other party if necessary).

### **6.5 Is evidence obtained for criminal proceedings admissible in civil proceedings, and vice versa?**

The evidence obtained for criminal proceedings is admissible in civil