

OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEMS

BRAZIL

1. Sources of Law

The Brazilian Federal Constitution is the underlying statutory support for trade secrets, whose inviolability is legally required as consistent with fair competition and communications integrity rights.

Article 153 of the Brazilian Penal Code (Decree-law no. 2,848/40) makes the unexcused disclosure of private documents and confidential correspondence a criminal offense. Similarly, Article 482(g) of the Consolidation of Labor Laws (Decree-law no. 5.452/1943) considers an employee's violation of an employer's trade secret as a non-indemnifiable fair cause for termination of the employment contract. The misappropriation of trade secrets is deemed an act of unfair competition and is a criminalized offense under Article 195(XI) and (XII) of the Brazilian Industrial Property Law ("LPI")^{1,2}

2. Definition of a trade secret

Based on the above-mentioned Articles of the LPI and Article 39 of the TRIPS Agreement, trade secret protection applies to the information that is not publicly known, subject to reasonable precautions to prevent disclosure and of commercial value.³

3. Scope of trade secret protection

Article 195(XI) and (XII) of the LPI provide a scope of trade secret protection, stating that the unauthorized disclosure, trade, or use of trade secrets is prohibited.

Article 209 LPI reserves the aggrieved party an indemnification right for losses caused by acts that harmed its reputation or business. Trade secret holders often consider the underlying rationale of Article 209 to sue what they claim are unauthorized importers or distributors of trade secret-embedded products and reverse engineers of such products.

As of July 11, 2023, the National Institute of Industrial Property (INPI) authorizes licensing of non-patented technology, such as know-how and trade secrets. According to INPI Ordinances 26 and 27, 2023, unpatented technology transfer comprises: (i) the permanent acquisition; or (ii) temporary licensing of the use of knowledge and techniques not covered by industrial property rights or the transfer of technological information to facilitate the production of goods and services.

4. Exceptions

Trade secrets disclosure may be allowed or required under qualified privilege or statutory duty/authority. Acts that use a trade secret while performing a legal duty may be excluded from trade secret protection. If a trade secret is disclosed in compliance with a court decision, this may also not be considered a misappropriation of a trade secret.⁴

¹ Available at WIPO Lex: <https://www.wipo.int/wipolex/en/legislation/details/21166>.

² This document aims to provide an overview (June 2024). It is not a complete review of the legal situation and case law. For further information, interested readers may consult: Caffé, Cândida and Abenza, Mariana and Torres, Rodrigo, Trade Secrets - Brazil (April 22, 2021). *les Nouvelles - Journal of the Licensing Executives Society*, Volume LVI No. 2, June 2021, Available at SSRN: <https://ssrn.com/abstract=3832047>.

; Jose Antonio B. L. Faria Correa, Cândida Ribeiro Caffé, and Mariana Reis Abenza in *Trade Secrets throughout the World (Jager et. al.)*, 2023, Chapter 5. Brazil.

³ Caffé et. al., *loc. cit.*, p.95.

⁴ *Ibid.*

5. Civil remedies

According to the Brazilian Civil Procedure Code (Law No.13.105/15), preliminary and permanent injunctions against trade secret misappropriation are available.⁵ Damages can be claimed and calculated according to the principles outlined in Articles 207 to 210 of the LPI.

6. Criminal sanctions

Criminal sanctions against the misuse of trade secrets are available according to Article 195(XI) of the LPI, which criminalizes the individual who divulges, exploits, or uses, without authorization, confidential knowledge, information, or data that could be used in industry, commerce, or the provision of services (excepting that which is public knowledge or which would be evident to a person versed in the subject matter), obtained by virtue of a contractual or employment relationship, even after expiration of the contract. In addition, Article 195(XII) provides that disclose, exploitation or use, without authorization, of such confidential knowledge, information or data, obtained by illicit means or accessed fraudulently is also an act of crime of unfair competition.

The crime can be punished with three months to one year of imprisonment or a fine. The destruction of goods infringing a trade secret may be possible in criminal proceedings and, theoretically, even in civil proceedings, although the latter is not shared.⁶

7. Trade secret protection in judicial proceedings

Article 206 LPI states that should information characterized as confidential, industrial, or commercial secrets be disclosed in court to defend the interests of any of the parties, the judge shall determine that the proceedings continue in judicial secrecy and the use of such information by the other party for other purposes shall also be prohibited. This may allow for *in-camera* proceedings and hinder the decision's publication.

8. Procedural provisions

If the discussion encompasses the Federal Government, its entities, or federal public companies, Federal Courts will be competent. Otherwise, State Courts will decide the matter. In case of employment relations, the Regional Labor Courts will hear the claim. Criminal Courts must handle any act that may constitute any criminally relevant act of unfair competition following a complaint by the rights holder.

Per Article 225 of the LPI, the right to pursue civil indemnification for the damages relating to a breach of intangible industrial rights expires five years from the first violation.

⁵ *Ibid.* p. 97 with further details.

⁶ *Ibid.*