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INTERNATIONAL PROPERTY RIGHTS INDEX 2021

THE STATUS OF INTELLECTUAL PROPERTY RIGHTS IN ARGENTINA

CASE STUDY BY: CENTRO DE PROPIEDAD INTELECTUAL E INNOVACIÓN, ARGENTINA

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Argentina has incorporated machine learning, geospatial data analysis, and cloud and mobile-based applications into its agro industry. In the last decades, the global mindset of some of Argentina’s entrepreneurs has made Argentina a home for fast-growing tech start-ups, unicorns, blockchain projects, and fintechs. The agricultural sector of the Pampas has undergone a technological revolution. Yet, despite performing well in areas of human capital and research, Argentina continues to lag behind some Latin American neighbors, as well as comparable Organization for Economic Cooperation and Development (OECD) and Asia markets.

This White Paper presents a legal and policy analysis on intellectual property (IP) protection in Argentina and its suitability for promoting innovation. Initially, the paper sets out the legal framework with a brief analysis of existing IP laws, including notions of patentability standards in Argentina. Further insight on the strength of intellectual property rights (IPR) in Argentina shall follow, indicating whether IP protection in Argentina is in line with Trade-Related Aspects of International Property Rights (TRIPS) standards, and comparing the Argentine IP regime to other countries with improved innovation policies. Finally, policy recommendations shall be listed, which, if pursued, could promote innovative activity in Argentina.

It is becoming increasingly evident that IP plays a prominent role in our globalized knowledge economy. IPR protection is vital as it enables investors to recover their investments in research and development (R&D). Strengthening IP protection could unlock Argentina’s potential and accelerate change in innovative activity and transition to a more knowledge-intensive innovation industry.

This section shall give a brief overview of the regulatory framework of IP in Argentina, first introduced by the 1853 Constitution, which states: “Every author or inventor is the exclusive owner of his work, invention or discovery, for the term granted by law.”

I. COPYRIGHT

Following the continual approach of droit d’auteur, Argentina’s Copyright Law 11723 recognizes economic rights of exploitation in favor of authors over their works, as well as moral rights, which are personal and non-transferable. Although the law dates back to 1933, its amendments have provided a system that has adequately protected authors through the years. Whether the law provides adequate solutions for contemporary social and commercial uses of the digital environment is a question that has been under discussion in recent years. Limitations to copyright protection are very limited under Argentine law. More flexible criteria, such as the fair use factors, are not present in the Argentine legal system, whereas the Berne Convention three-step rule (also present in TRIPS) is applicable.

Argentina has ratified the World Intellectual Property Organization (WIPO) treaties on copyright, which have constitutional status, and are operational and enforceable.

There are no governmental, legislative, or judicial obstacles to the defense against violations of IPR or compliance with applicable regulations. The problem in this area arises in the enforcement of the rules. Studies in recent years have indicated that 70% of software used in Argentina is pirated. Last year, the illegal download of audiovisual content in Argentina —mostly movies, series, and video games— increased almost 40% during the mandatory quarantine due to the coronavirus pandemic. Argentina is ranked 17th in the world in the use of torrents according to the statistics collected by ESET Latin America systems.

INTRODUCTION

“Argentine pixie dust”—that is the ingredient that has been mentioned internationally when judging creative industries in Argentina. Argentines have always had a creative frame-of-mind, but in order to consolidate a path of sustainable growth, it will be crucial to translate that creativity into productive innovation. The agricultural sector of the Pampas has undergone a technological revolution. Yet, despite performing well in areas of human capital and research, Argentina continues to lag behind some Latin American neighbors, as well as comparable Organisation for Economic Cooperation and Development (OECD) and Asia markets.

This White Paper presents a legal and policy analysis on intellectual property (IP) protection in Argentina and its suitability for promoting innovation. Initially, the paper sets out the legal framework with a brief analysis of existing IP laws, including notions of patentability standards in Argentina. Further insight on the strength of intellectual property rights (IPR) in Argentina shall follow, indicating whether IP protection in Argentina is in line with Trade-Related Aspects of International Property Rights (TRIPS) standards, and comparing the Argentine IP regime to other countries with improved innovation policies. Finally, policy recommendations shall be listed, which, if pursued, could promote innovative activity in Argentina.

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## INTERNATIONAL PROPERTY RIGHTS INDEX 2021

<table>
<thead>
<tr>
<th>Case Study</th>
<th>Argentina</th>
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As regards the regulation of copyrighted content on the internet, Argentina does not have a legal framework providing a solution to the question of the responsibility of intermediaries for the content of third parties. A 2016 bill, which would have made an important impact on the enforcement of IPR, insofar as it held that Internet service providers should not be liable for the content of third parties except when non-compliant with a court ordering removal or blocking,8 obtained half a sanction in the Senate; it was supported by a joint communication in April 2018 from Special Rapporteurs on the protection of the right to freedom of expression of the UN and of the Inter-American Commission on Human Rights of the Organization of American States (OAS).9 However, in the midst of strong lobbying by the copyright industry, journalistic companies, and global platforms, this bill on intermediary liability in Argentina, was dropped.10

Given the lack of legislation on the matter, discussion has centered on the interpretation of court decisions, such as the 2014 ruling “Rodriguez, María Belén v. Google Inc.”, which held that intermediaries have a subjective responsibility, which shall be decided on a case-by-case basis, and are not objectively responsible for the content generated by third parties. Currently, the companies that provide Internet services in Argentina operate within a certain uncertainty as to their liability, but rely on this ruling as a fundamental precedent (reaffirmed in the 2017 Gimbutas case).11

II. TRADEMARKS

The Argentine legal framework for trademarks does not have any particular shortcomings. Ownership of a trademark and exclusive rights to its use are obtained with the registration at Instituto Nacional de Propiedad Industrial (“INPI”). In the context of the COVID outbreak, online filing at INPI became mandatory for all applications, renewals, and opposition submissions. Also, recent modifications to the oppositions process regime are expected to substantially reduce the duration of conflict resolution.

There is no express regime for certification marks and a deficient one for collective marks, but this does not have major consequences as interested parties can always apply for a trademark and regulate use amongst the owners.

Recent amendments to Law No. 22,362,12 have aligned Argentine Trademark Law with protection trends in the international arena. Having adopted the Nice Classification of Goods and Services just over forty years ago, recently Argentina was able to do away with a long-standing practice. It is no longer possible to file for all goods and services in a given class.13 All applications must include a specification of goods and services that can be tailored following the Nice Classification.

Another recent amendment to the Trademark Law introduced a mandatory midterm sworn declaration of use. Trademark registration has a duration of 10 years as of the date it is granted. This new requirement must be submitted between the 5th and 6th year of registration. Trademarks can be indefinitely renewed for periods of 10 years provided they have been used in connection with products or services, or as a trade name within five years preceding the expiration date. In order to harmonize Argentine legislation with that of other Latin American countries, a grace period has been established in renewal proceedings. The filing for renewal of a trademark can be presented 6 months prior to the renewal deadline and up to six months after the expiration of the renewal term. This was certainly an important amendment since

11. Ibid 8
12. Trademark Law No. 22,362 was amended by Law No. 27,444 on May 30, 2018, together with its regulatory decree No. 242/2019.
Argentina was the only country in Latin America devoid of a grace period. In addition, a declaration of use must also be submitted in order to renew the trademark registration.

Any sign with distinctiveness can be registered, unless it is similar to a prior one, or it falls within the signs which registration is forbidden (names of foreign nations, international recognized organizations, national symbols, names of physical persons without their authorization or that of their heirs to the fourth degree, among others). Generic and descriptive signs, necessary shapes of products, the natural colour of the product or one colour applied to the product, one number or one letter unless it has a special design, are not recognized as distinctive signs. A court decision has recognized the secondary meaning doctrine, but there have been no other cases that permit to elaborate more on this point.

III. PATENTS

Argentina continues to present unduly broad limitations in its patent regulations. It is useful to remember that the patent regime in Argentina has had modifications by way of legislation, executive decrees, and ministerial resolutions, particularly in pharmaceutical matters.

The Argentine trademark legal framework is fully compliant with TRIPS and international standards.

Once again, often the problem of protection of trademarks arises regarding the enforcement. The 2021 Special 301 Report prepared by the Office of the United States Trade Representative (USTR) maintains that there continues to be widespread sale of counterfeit and pirated goods and services. Even though the physical markets, like that of La Salada in Buenos Aires, were closed during much of 2020, the sale of counterfeit goods was moved online through social media applications. As a result, right holders have to try to enforce their IPRs, convincing internet service providers to take down infringing works, as well as seeking injunctions in civil cases. It is also argued that as Argentine police generally do not take ex officio actions, prosecutions can stall and languish in excessive formalities.14

DISCOVERIES

Despite the fact that the Constitution recognizes the patentability of discoveries, Argentine Patent Law 244816. Sixth Section does not allow for the inclusion of discoveries within the concept of invention, even when such discoveries fulfill the requirements of novelty, inventive step, and industrial application.

RESTRICTED PATENTABILITY CRITERIA

The Argentine legal framework for patents has restricted the patentability of a wide range of pharmaceutical inventions. In May 2012, the Ministry of Industry and the Ministry of Health, together with the National Institute for Industrial Property, issued a Joint Resolution (No. 188/2012, 546/2012 and 107/2012) which contained “Guidelines for the examination of patent applications on chemical-pharmaceutical inventions in Argentina”. However, unlike ordinary guidelines, these are actually very restrictive rules forbidding the concession of patents to claims in the chemical and pharmaceutical fields, including compositions, dosages, salts, esters, ethers, polymorphs, analogous processes, active and pro-drug metabolites, enantiomers, and selection patents. As an example, new formulations and compositions as well as their preparation methods are now considered, as a general rule, obvious in light of prior art. The ability to describe and claim an invention using Markush-type claims is extremely limited. It is perplexing to find such drastic and decisive measures in guidelines put into effect by a ministerial resolution, and it has been considered detrimental to innovation in Argentina. The kind of research that the system deems unpatentable is often the entry point for the development of comprehensive medical innovations, allowing generic producers with nascent R&D capabilities to develop their own innovation capabilities.15

Scholars have argued that patent claims in the pharmaceutical field are either prohibited by these restrictions, denied, or remain buried in the bureaucratic process, featuring years of objections for lack of sufficient inventive steps, for example, without true justifications.17 It has also been stated that these guidelines constitute a discrimination regarding the patentability of a specific subject matter, contravening both Argentine Patent Law, which does not permit exclusions, and TRIPS nondiscrimination provisions.18

GENE SEQUENCING

Sequencing DNA means determining the order of the bases that make up the DNA molecule. As the third largest producer of biotech crops, Argentina could apply this kind of sequencing in its growing agricultural sector. Yet, another joint resolution from 2001 (No. 99/2001 and No. 819/2001 of the Ministry of Industry and the Ministry of Agriculture, Fisheries and Food) restricts its patentability. When a modified sequence of nucleotides or amino acids is claimed, complete disclosure of all sequences must be clearly defined, showing that they maintain the same attributed function. Sequences characterized by having only sequential and/or structural similarity cannot be claimed. Moreover, genetically modified organelles are not accepted. Any modifications of plants and animals must specify their isolated status. All of these restrictions weaken the protection of the patent.


15. Section 6 of Law 24481 reads: The following items shall not be considered inventions under this law: a) discoveries; scientific theories and mathematical methods; b) works of art or literary works, or any other aesthetic creation, as well as scientific works; c) plans, rules and methods used in intellectual activities, for games or for finance and trade, as well as computing programs; d) ways of presenting information; e) surgical, therapeutic, or diagnostic methods, applicable to the human body or to animals; f) the juxtaposition of known inventions or the mixture of known products, a change in their shape, size or materials, unless they are combined or fused in such a way that they cannot work separately, or unless their characteristic features or functions are modified to an extent that their industrial result is not of a kind that would be obvious to one skilled in the art; and, g) any type of living matter and substances preexisting in nature.


17. Idem.


19. Argentina continues to be the third largest producer of biotech crops, after the United States and Brazil, producing 12 percent of the world’s total biotech crops on an estimated 25 million hectares. Conf. Agricultural Biotechnology Annual, USDA [https://www.aphis.usda.gov/aphis/our-focus/plant-pests/phytosanitary/pap-biotech/argentina-argentina-producers-and-rights].
LIVING MATTER

Resolution 283/2015 limits the ability to patent biotechnological innovations based on living matter and natural substances. This makes it difficult for local companies to develop their own innovative capacity and to grow in the value chain. The economy as a whole suffers because the growth of high value-added knowledge-based industries is restricted.

TEST DATA

The protection of clinical test data regarding pharmaceutical and agricultural chemical products is particularly relevant when it comes to non-patented drugs. Clinical data protection is especially important for the IP of bio-medicines, given the complexity of biological developments and the limitations on the patents that protect them.

Article 39.3 of TRIPS requires World Trade Organization (WTO) members to protect secret test data against “disclosure” and “unfair commercial use”. These terms are not defined further, giving members the freedom to interpret the Article’s prohibition against disclosure and unfair commercial use. Many countries protect this IPR with over 10 years of exclusivity. The United States grants 12 years of protection, the European Union 10, Japan and Canada 8. Although TRIPS requires some form of data protection, Argentina does not protect test data.

Protecting regulated data is particularly important for small businesses and start-ups in the biotechnology industry, given the limitations of patent law to protect the significant investments made to develop these complex molecular structures, and the high cost of patent litigation. Data protection would be even more useful for the innovation of biotechnology companies in Argentina given the difficulties associated with patenting.

COMPULSORY LICENSES

Compulsory licensing has been included in the patent regime, but unlike the cases of Brazil and Chile, such licenses have never been applied in Argentina.

MANAGEMENT OF PATENT APPLICATIONS

It should also be noted that due to the patent application backlog, the process for patent approval can last over ten years (particularly in the case of pharmaceutical patents). A few years back, the Argentine government took steps to address the backlog of patent applications. Resolution P6/2016 states that patent applications with claims that are the same as for patents granted abroad can be considered through a fasttrack process. (The Guidelines on Patentability and the Resolution 283/2015 will nonetheless be applied when considering patent applications). Recently, there has also been improvement with digital applications. All applications are now processed online. Due to the COVID pandemic, administrative resolutions of patent applications are now informed digitally, and patents are granted and authenticated through digital signature. These measures are facilitating the application review process and should start tackling some of the backlog.

PATENT COOPERATION TREATY (PCT)

A final, crucial consideration: Argentina is one of the few countries that to date has not signed the PCT, which puts Argentine inventors at a disadvantage, forcing them to find an alternative channel to file for an international patent (for example, creating a company in a member country or making a partial assignment to an IP agent of a member country).

ARGENTINE IP AND INTERNATIONAL STANDARDS

Argentina is a member of most of the main international IP treaties, all of which prevail over local laws according to the Argentine Constitution. As mentioned, Argentina is not a member of the PCT, or the Madrid System Convention. So, filings of international applications for patents or trademarks are not allowed in Argentina.

In general, the provisions of international conventions are fulfilled. Yet, it has often been discussed whether Argentina has fully implemented the minimum standards established in TRIPS. According to the mentioned 301 USTR Report and the European Commission’s 2021 Report on the Protection and Enforcement of
A recent study carried out by Wilsdon, Haderi, Dobreva and Ricciardi, 25 identified two OECD countries — South Korea and Taiwan — that in the past faced similar policy challenges to Argentina and implemented policies in line with the current gaps in the innovation and IP regime in Argentina. 26 The study’s comparison of these countries with Argentina quantifies the impact of the policy changes relevant to Argentina.

The areas of alignment between Argentina, and Taiwan and South Korea involve their respective levels of education and quality of research. However, South Korea and Taiwan invest significantly more in R&D, and outnumber Argentina in other innovative outputs such as pharmaceutical patents and clinical trials. 27 It is noteworthy that the policies introduced in South Korea and Taiwan closely align with those recommended for Argentina. In Taiwan, additional IP incentives for pharmaceutical products were adopted and a regulatory data protection plan was introduced. In South Korea, the harmonization of the IP system with members of the WTO followed by the introduction of successive national science and technology plans, along with parallel changes to regulatory data protection, steered the way to a more favorable environment for innovation and resulted in increased innovative and economic activity. 28

The experience of South Korea and Taiwan before and after regulatory change indicate that these practices are conducive to spurring innovations and building a better innovation ecosystem. The study found that the mentioned policy changes had the strongest impact on the number of patents in both Korea and Taiwan (between 15% and 29% increase). Other outputs of innovation, such as clinical trials, also increased, although to a lesser degree. 29

Intellectual Property Rights in Third Countries. 23 Argentina continues to show deficiencies in the legal framework for patents.

Some have argued that local patent regulations simply make use of the flexibilities TRIPS left at the discretion of national governments. But the truth is that several Argentine regulations, such as the 2012 Joint Resolution, have gone beyond the allowed flexibilities, and are non-compliant with TRIPS, particularly those with regards to: (i) increased patentability requirements, (ii) restrictive definition of invention, and (iii) limiting patentable subject-matter. These restrictions have been discussed in the previous section. Nevertheless, it is important to recall that the TRIPS agreement establishes with absolute clarity that patents can be obtained “for all inventions, whether of products or procedures, in all fields of technology, provided they are new, involve an inventive activity and are susceptible to industrial application” (Art. 27). Consequently, it is safe to assume that patent examination guidelines which automatically reject applications for categories of pharmaceutical inventions are in violation of TRIPS.

It is discriminatory to impose on pharma and biotechnology a series of restrictions that do not apply to other technologies of a similar nature.

24 Such as, generically admitted flexibilities, transition periods (Arts. 65.2, 60.4 and 70.8 TRIPS), plants and animals (Art. 27(3) TRIPS), compulsory licenses (Art. 31 TRIPS), exception for research purposes (Art. 30 TRIPS), administrative procedure (Art. 1.1 TRIPS), exhaustion of rights (Arts. 6 and 28 TRIPS) etc.
Upon analysis of all three countries’ outcomes in the International Property Rights Index (IPRI), it would seem evident that the policy changes in both Korea and Taiwan have led to a better IPRI value and a higher ranking. While both Taiwan and the Republic of Korea are in the second quintile of the IPRI, Argentina is in the fourth. References from the 2020 IPRI, can be compared as follows:

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<th>COUNTRY</th>
<th>RANKING</th>
<th>IPRI VALUE 2020</th>
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<tbody>
<tr>
<td>Taiwan</td>
<td>22</td>
<td>7.301</td>
</tr>
<tr>
<td>Korea</td>
<td>31</td>
<td>6.675</td>
</tr>
<tr>
<td>Argentina</td>
<td>79</td>
<td>5.1112</td>
</tr>
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</table>

These results reinforce the conviction that IP rights in Argentina could be brought in line with those in other OECD countries through several proven practices. Wilsdon, Haderi, Dobrev, and Ricciardi suggest the following: (i) Introducing regulatory data protection for new medicines and indications to make Argentina more attractive for clinical trials; (ii) Broadening the types of new molecules that can be patented to include new indications, combinations, and formulations (thus repealing the restrictive 2012 Guidelines) to make early-stage research patentable and boost innovative outputs; (iii) Updating innovation and biopharmaceutical plans, with incentives for R&D to underscore the government’s commitment to innovation.30

When considering the necessary conditions to develop its knowledge economy, it is clear that Argentina has to strengthen its protection of IPRs. Although there are certain promising areas of innovation, the weak IPR framework results in the loss of much of Argentina’s potential to innovate. Public policies that generate the right incentives are particularly important.

a. Adaptation of the Regulations to International Standards
   - Adhering to PCT.
   - Eliminating the excessive limitations of patentable matter (repealing the 2012 Guidelines in Joint Resolution 118/2012, 546/2012 and 107/2012)31
     • Introducing regulatory data protection for new medicines and indications.

b. Raising IP Awareness
   - Including IP in the curricula of degrees in law, economics, engineering, and hard sciences (raising awareness about disclosures that harm novelty in the case of patents).
   - Giving greater importance to patents in university tenure rules and research guidelines, rather than solely to publications (such as the regulations for scientific and technological researchers of CONICET, and similar provincial entities).

c. Assistance, Advice, and Resources
   - Promoting special assistance and financing for local and international patenting, and tax incentives, reducing taxes on income generated by the transfer of patents.
   - Providing INPI with greater resources.

Our policy recommendations are threefold, involving first, the adaptation of Argentine regulations to international standards, second, the promotion of IP awareness and education, and finally, the assistance and provision of resources for the patentor.
CONCLUSION

According to a 2017 investment survey, one of the key reasons why Argentina is among the countries least likely to attract foreign investment in the biopharmaceutical market is due to its lack of effective IP protections. Despite its strong potential in human capital and infrastructure, Argentina lags behind Chile, Costa Rica, and Mexico in this respect. It is unlikely that an investor will risk capital to develop a drug, for example, in a country with weak IP protection.

As Krause, Otamendi and Stevens state, Argentina has many sectors that would benefit from improved IPR protection, including genetic seed development, polo horse cloning, the software industry, well-known local brands, film production and television, musicians and art creators, and even the local pharmaceutical industry.

The road ahead shall not be easy for Argentina, but it will be essential to improve the quality of its institutions, promoting greater independence of the judicial functions, guaranteeing freedom of the press, investigating and prosecuting corruption, removing restrictions and controls on economic activity, and strengthening respect for property rights.

MAIN REFERENCES


