

Combating illegal Cell Phones: Striking a Balance Between Regulation and Market Freedom

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Brazil | August 6 2024

Over the last few years, the spread of counterfeit goods on online sales platforms has become a noteworthy concern for Intellectual Property (“IP”) owners, manufacturers, consumers, and regulatory authorities. Counterfeit cell phones are particularly challenging, as they can jeopardize consumer safety, violate existing IP rights as well as bring legal and financial repercussions for brand owners. These fake devices often lack essential features, use inferior materials, and fail to meet safety standards, posing risks such as data breaches and physical harm due to faulty batteries. Addressing this issue effectively can be challenging, but it certainly involves getting all stakeholders involved to cooperate; educating consumers about the associated risks and take proactive measures to protect Intellectual Property rights using all available tools to act as a deterrent.

In Brazil, in an attempt to address this major problem and protect consumers, the National Telecommunications Agency (“Anatel”) has been taking stricter measures to address the sale of uncertified devices. In addition to imposing daily fines, the agency has increased its inspections and is working to identify and remove listings for non-compliant products.

Most recently, Anatel requires marketplaces such as Amazon and Mercado Livre to comply with its regulations, aiming to curb the sale of devices that are not certified by the regulatory agency.

In summary, Anatel mandates digital platforms to identify the “ANATEL certification code” in the listing of cell phones being sold, thereby certifying the product's compliance and regularity. Furthermore, Anatel requires the removal of listings for devices that are not certified by the regulatory agency.

These obligations must be fulfilled within 15 days of the measure's publication, under penalty of a daily fine. If non-compliance continues beyond the 11th day, the fine will increase and will be combined with the requirement to remove all cell phone listings from the website. Additionally, the platform's domain will be blocked until compliance with the terms set by Anatel.

According to the President of Anatel, the responsibility of digital platforms is a critical issue. He highlights that last year, 25% of smartphones sold in Brazil lacked Anatel certification, underscoring the magnitude of the problem.

Anatel certification for smartphones is more than just a bureaucratic procedure; it ensures that devices have undergone rigorous testing to guarantee their quality and safety. The main reasons for the importance of this certification include:

1. **User Safety:** Ensures that the phone meets safety standards for electrical and radiation safety, protecting users from potential risks.
2. **Compatibility:** Confirms that the device is compatible with Brazilian networks and services, preventing connectivity issues.
3. **Quality:** Certifies that the device meets established technical and performance standards, ensuring proper functionality.
4. **Consumer Protection:** Provides an additional layer of protection for consumers by ensuring that purchased products meet specific standards and have been evaluated for compliance.
5. **Legal Compliance:** Ensures that devices comply with Brazilian legislation, avoiding legal issues for both manufacturers and consumers.

Anatel's president also draws a parallel between this issue and the spread of fake news on social media, emphasizing that both are tied to the accountability of platforms for the content they host.

In response, Amazon and Mercado Livre has recently sought preliminary injunctions in Brazilian courts against Anatel's directive.

In short, among other arguments, they stated that, as intermediaries, they should not be held accountable for the infringing/counterfeit products listed by third parties on their platforms, citing the so-called Brazilian Internet Law (in Portuguese: Marco Civil da Internet/Federal Law Nr. 12.965/2014).

Mercado Livre's request for a preliminary injunction was denied, with the final decision still pending.

On the other hand, finding that Anatel's measure lacks reasonableness and appears to exceed the regulatory authority granted to the agency, Hon. Judge Ricardo de Castro Nascimento of the 17th Federal Court of São Paulo has granted Amazon's preliminary injunction request.

This decision suspends the enforcement of Anatel's directive until the final resolution of the case. Additionally, Anatel is ordered to refrain from imposing fines, mandating the removal of listings, or blocking Amazon's domain due to non-compliance with the obligations outlined in the contested directive.

New developments in these disputes continue to unfold, but it is already clear that while addressing the issue of illegal cell phones on online marketplaces is indispensable for consumer safety and the protection of Intellectual Property rights in Brazil, it is important to take into account the complexities involved and consider the principle of reasonableness to achieve a fair and effective resolution.

Balancing efficient enforcement with maintaining a free and competitive market is essential and it seems that collaboration among all stakeholders is the most efficient way to safeguarding consumers while also supporting economic growth.

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