



**LATIN AMERICA SUBCOMMITTEE
INTA INTERNATIONAL AMICUS COMMITTEE**

**Report:
A Guide to Filing *Amicus Curiae* Briefs in Latin America**

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I. Introduction

The legal term *amicus curiae* is Latin for “friend of the court,” that is, someone who, while not being party to a legal proceeding, can nonetheless present his views on the law applicable to the case to the court. The purpose is clearly to influence the court’s decision, which not only is relevant to the case that is being tried but also may have broader effects by way of the precedent that the decision generates.

Attorneys in common law jurisdictions usually are familiar with the concept, whereas civil law–trained attorneys generally are not. This may be explained by the fact that, broadly speaking, precedent plays a fundamental role in common law; while there are statutes, it is the judicial decisions in prior similar cases that shape the resolution of new ones. On the other hand, civil law relies more on the codification of the law, and the judge’s task is supposedly limited to applying its provisions to the facts of the case.

So, if the law is not shaped by precedent in civil law countries, as many people think, why bother preparing and filing an amicus brief for a third party’s case?

Despite what may be said about the method civil judges use to reach a decision in a case, written law organized in codes, as specific as it may get, cannot determine the outcome of all possible disputes in advance, and its application will always require interpretation. This is where case law can become fundamental. It would be naive to think otherwise. (See George P. Fletcher & Steve Sheppard, *American Law in a Global Context: The Basics* 30, 34 (Oxford University Press, 2005).) Any experienced advocate can attest to the utility of citing prior case law in civil law tradition courts, even when it is not binding.

This brings us to the two fundamental questions this article seeks to answer:

1. Is it possible to file amicus briefs in Latin American countries, all of which are civil law jurisdictions?
2. If filing is possible, what rules must be followed?

There is no single answer to either question. Some Latin American countries allow the filing of amicus briefs; others accept them informally by way of an affidavit, an expert opinion or a written submission; and still others do not accept them at all. Most countries that do accept them have very broad rules and no specific procedure for the filing, which is in stark contrast to the detailed rules that govern filings in the United States.

II. Latin America Survey

The INTA International Amicus Committee's Latin America Subcommittee has put together the following chart, which covers 15 of the most important Latin American jurisdictions:

Country	Is Filing Possible?	Conditions Required for Acceptance of Amicus Briefs	Court Level
Argentina	Yes.	<ol style="list-style-type: none"> 1. The filing party must justify its interest to take part in the case and identify whom it is supporting. 2. Disclosure of whether financial aid or guidance from any party has been received and whether the case may result in an economic benefit for the filing party. 3. The matter must be of public interest or collective importance. The Supreme Court will decide which cases are suitable for the filing of an amicus brief. Local practitioners understand that this requirement may exclude cases of a commercial nature, such as trademark cases. 4. The court may, <i>ex officio</i>, call upon an expert to request a specific opinion. 	<ol style="list-style-type: none"> 1. At the originating court. 2. At the appeal instance.
Bolivia	No.		

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Brazil	Yes, pending approval of the Draft Code.	As provided by the new draft Civil Procedure Code, currently in discussion in the Brazilian Congress: 1. The reporter judge may admit the intervention from agencies or entities, taking into consideration the importance of the question. 2. The requirements for intervention are: (a) The litigated question must be absolutely relevant; (b) The amicus brief must have a high degree of importance and (c) The amicus brief must be filed before the beginning of the trial.	At the Supreme Court. [The provision is currently under examination by the Court]
Chile	No.		
Colombia	Not formally.	1. Third parties may intervene with Administrative Courts in annulment proceedings grounded in a general interest in support of any of the parties involved in the action. (Art. 223 CPACA (Code of Administrative Procedure and Administrative Disputes)). Special conditions must be met if the action involves a particular (not general) interest (Art. 224 CPACA). 2. Civil courts allow a third party to intervene as long as the party shows a legitimate interest in the case (Art. 71 CGP (General Code of Procedure)). 3. In cases that involve a collective interest, third parties may intervene without the need to address a particular or legitimate interest (Art. 171 CPACA).	1. Higher Administrative Court (Council of State). 2. Supreme Higher Court. 3. Constitutional Court.

Country	Is Filing Possible?	Conditions Required for Acceptance of Amicus Briefs	Court Level
Costa Rica	Yes. Participation is feasible and available in judicial proceedings .	<p>1. In the case of judicial proceedings before the Court for Administrative Matters, Article 13 of the Administrative Procedure Law provides that any third party may request its participation and intervention before the administrative judges without the need to demonstrate a special or direct interest in the outcome of the process.</p> <p>Likewise, the third party does not need to demonstrate capacity in order to intervene in such a judicial proceeding because it is not considered a party as such. Hence, it cannot claim the payment of fees nor be condemned to pay them.</p> <p>The intervention of the amicus briefs may be subject to opposition by the parties, and a decision on this intervention is adopted by the judges within the preliminary hearing of the proceeding.</p> <p>Article 13 is also applicable at the administrative non judicial stage, such as at the Costa Rican Patent and Trademark Office.</p> <p>2. Third parties may intervene at both the judicial and the non-judicial stages in cases of annulment proceedings grounded in a general interest in support of the interest of any of the parties involved in the action (e.g., public health or consumer issues). Special conditions</p>	The intervening amicus will be part to the proceeding in the stage currently ongoing when the amicus brief is filed.

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		<p>must be met if the action involves a particular (not general) interest. Institutions, corporations and governmental institutions, representatives of general rights, and groups that defend collective interests are authorized by law to be third parties.</p> <p>The participation of the third party may be asserted at any time before the decision at first instance, and the third party will assume the process in whichever state it may be, provided this does not serve to avoid the expiration of any procedural deadlines.</p> <p>In civil proceedings, Article 112 of the Civil Procedure Code provides that any third party can intervene in an action only for the purpose of contributing to the victory of one side, as a result of its having a juridical interest in such outcome. The intervening party will be part to the proceeding in the procedural stage currently ongoing.</p>	

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Ecuador	Yes.	<p>1. At the Constitutional Court level, the only requirement to file a brief is the interest to do so, and it can be done any time before a ruling is issued. The interested party can even request an oral hearing; however, it is up to the judge to grant it.</p> <p>2. At the ordinary civil courts, contentious administrative courts or even the Patent and Trademark Office, amicus briefs may be filed by way of an expert opinion or a written submission. However, they are not expressly recognized as such.</p>	<p>1. Constitutional Court.</p> <p>2. Lower-level courts and the PTO.</p>
El Salvador	No.		
Honduras	No.		
México	Yes.	1. The amicus brief must contribute to the resolution of a constitutional dispute at the local Supreme Court or within one of its chambers/panels.	1. Supreme Court only.
Panama	Yes.	1. The amicus brief must contribute to the resolution of a constitutional dispute at the local Supreme Court or within one of its chambers/panels.	1. Supreme Court only.
Paraguay	Yes.	1. The subject matter must be of public interest. The intervention must be filed before the final ruling takes place.	<p>1. Before the final ruling.</p> <p>2. Supreme Court only.</p>

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Peru	Yes.	<ol style="list-style-type: none"> 1. Amicus briefs can be accepted under certain circumstances in trademark proceedings; however, the acceptance of this kind of brief is subject to the discretion of INDECOPI (Peruvian Patent and Trademark Office). 2. An amicus brief can be filed only in proceedings that involve a specialized discussion of matters of public interest, and by a person or entity specialized in the matters discussed in the proceeding. 	<ol style="list-style-type: none"> 1. Before the Administrative Court of Appeals of INDECOPI (Tribunal).
Uruguay	Not formally.	<ol style="list-style-type: none"> 1. Amicus briefs have been filed in a few cases, mainly related to human rights in the course of criminal procedures. 	<ol style="list-style-type: none"> 1. To date, now, amicus briefs have been accepted only in human rights processes. 2. Supreme Court.
Venezuela	Not formally.	<ol style="list-style-type: none"> 1. Third parties may participate as an interested third party or as an expert. 	<ol style="list-style-type: none"> 1. First-level appeal.

III. INTA and Amicus Briefs

INTA traditionally has been at the forefront of filing amicus briefs on trademark-related matters, particularly in the U.S. courts, where the Association has made more than 25 filings since 2000. These filings have occurred in landmark cases even at the Supreme Court level, and the court has agreed with INTA’s position on several occasions. Examples are *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, which dealt with trade dress protection issues for product features of an expired utility patent, and *Nike v. Already*, where the discussion focused on Lanham Act false advertising claims.

However, INTA has also been active in filing amicus briefs in other parts of the world, including Australia, Canada, China, the European Union, Indonesia, Japan, Korea, Mexico, New Zealand, Paraguay, the United Kingdom and Russia. The list of filed amicus briefs, with texts, is available at <http://www.inta.org/Advocacy/Pages/Amicus.aspx>.

Any individual—even a non-member—can request that INTA consider filing an amicus brief if it could be of value to a court. The International Amicus Committee is charged with the task of drafting briefs, and they are approved for filing by the Executive Committee of the Board of Directors.

INTA's policy on amicus briefs states that matters must be adjudicatory in nature and must meet the following criteria:

1. The views of the Association have been specifically requested by the tribunal; or
2. The question to be addressed directly affects the activities of the Association; or
3. The matter must involve, relate to, or potentially affect the law of trademarks, trade names, or trade dress, the law of unfair competition, or other related laws (e.g., right of publicity, false advertising, surveys, domain names), or procedural issues related to such matters (e.g., standing, jurisdiction, remedies), and a filing by INTA must be reasonably likely to advance the strategic goals and objectives of the Association.

A complete description of INTA's amicus brief policies and procedures may be found at <http://www.inta.org/Advocacy/Pages/AmicusBrief.aspx>.

IV. Conclusion

Amicus briefs can play an important role in helping courts, even those in civil law jurisdictions, in the application of trademark law.

When analyzing trademark cases, civil and criminal law courts are not highly skilled in IP legislation, doctrine and case law. Amicus briefs allow the courts to have an expert, skillfully written opinion that may constitute a guideline for the interpretation of IP law. Civil law countries should encourage amicus briefs so that experts such as INTA can intervene when the complexity of the case so requires.

INTA has filed an amicus brief only in two Latin American countries (Mexico and Paraguay). While several other important jurisdictions in this region allow their filing, the Association has received very few requests to do so.

The International Amicus Committee's Latin America Subcommittee encourages individuals to consider requesting INTA submissions when appropriate and in accordance with the Association's amicus brief policies and procedures.