

Received: December 2023 Accepted: January 2024

DOI: <https://doi.org/10.58262/ks.v12i2.176>

## Indecopi and its Management of Bureaucratic Barriers

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### **Abstract**

*The article begins by highlighting Peru's tradition of innovation and the need to protect citizens' creative creations. The question arises as to whether the fees set by INDECOPI represent a bureaucratic barrier for those who wish to protect their creations. The definition of bureaucratic barriers such as excessive requirements or charges that hinder access to the market is introduced. An overview of INDECOPI's functions is provided, which include market promotion, protection of consumer rights, and protection of intellectual property. The mission and institutional vision of INDECOPI is mentioned. The article also defines the types of bureaucratic barriers, such as those unreasonable, and illegal, and analyzes the rates established by INDECOPI for various procedures, comparing them with those of other entities such as the National Superintendence of Public Registries (SUNARP). INDECOPI resolutions declaring certain procedures of other entities as illegal bureaucratic barriers are being discussed, which raises questions about the coherence between these decisions and the fees established by INDECOPI. In conclusion, the incongruity of INDECOPI in demanding high fees to defend itself from the bureaucratic barriers that they themselves impose is raised. It highlights the need to review and possibly adjust these fees to ensure equitable access to intellectual property protection in Peru.*

**Keywords:** *intellectual property, bureaucratic barriers, INDECOPI, fees, Peru*

### **Introduction**

Our country has always been characterized by being innovative, with people capable of facing economic problems through creativity; and so it is that in every corner we see designs in paint that are capable of exciting the gaze of a connoisseur in the field, or perhaps in the family the recipe of the grandmother is maintained that could undoubtedly satisfy the most demanding palates in the world; thus the question of Many of these laudable creatives about whether there is any understanding or way to protect, register or patent their own creation, well the answer is yes, we have the National Institute for the Defense of Competition and the Protection of Intellectual Property-Indecopi, which has as its mission to defend and promote free and fair competition, Intellectual Property and Consumer Rights. However, will a painter who is still starting his career, or a lady who wants to patent her homemade recipe, a student who registers his literary creation, be able to pay a higher fee of S/.500.00 soles to be able to access Intellectual Property Rights recognized by INDECOPI? Well, the answers can vary and be controversial according to the context. Thus, in this article it is appropriate to analyze whether

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the rates established by INDECOPI correspond to a bureaucratic barrier, despite the fact that it is this entity itself that protects us against them, analyzing from a doctrinal, legal and jurisprudential approach.

## **Chapter One General Considerations**

### **1.1. About Indecopi and its Functions**

From the Official Website of the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI),<sup>5</sup> you must:

Its functions are to promote the market and protect consumer rights. In addition, it fosters a culture of fair and honest competition in the Peruvian economy, safeguarding all forms of intellectual property: from distinctive signs and copyrights to patents and biotechnology.

As a result of its work in promoting the rules of fair and honest competition among the agents of the Peruvian economy, INDECOPI is currently conceived as a service entity with a marked concern to promote a culture of quality to achieve the full satisfaction of its customers: citizens, the business community and the State.

- Institutional Mission

Defend and promote free and fair competition, Intellectual Property and consumer rights, for the benefit of citizens, companies and the State, in an efficient, predictable and reliable manner.

- Institutional Vision

That citizens, consumers and entrepreneurs benefit from a market that operates without distortions, thanks to the technical, proactive, timely, predictable and reliable work of Indecopi, which guarantees an environment of free and fair competition in which the rights of Economic Agents are respected, as well as intellectual property rights."

### **1.2. What are Bureaucratic Barriers?**

According to the Manual on the Prevention and Elimination of Bureaucratic Barriers, prepared by Indecopi, bureaucratic barriers are all those demands, requirements, limitations, prohibitions and/or charges imposed by public administration entities, aimed at conditioning, restricting or hindering the access and/or permanence of economic agents in the market and/or that may affect those administered in the processing of administrative procedures subject to the rules and/or principles that ensure administrative simplification<sup>6</sup>.

In addition, (Sandoval, 2010)<sup>7</sup> the requirements established by the State must comply with certain principles that make compliance with such principles rational and efficient for society. But when requirements are set without following the principles of reasonableness, simplicity and due process, they constitute barriers to market access that discourage the conduct of business activities, which in a market economy is tremendously harmful.

In the national legal system, the legal definition of a bureaucratic barrier is established in Article 2 of Law No. 28996 "Law on the Elimination of Cost Overruns, Obstacles and Restrictions on Private Investment", which states the following: "Bureaucratic barriers are the acts and

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<sup>5</sup> Indecopi Official Website, located at: <https://www.indecopi.gob.pe/mision-y-vision>

<sup>6</sup> (MANUEL SOBRE PREVENCIÓN Y ELIMINACIÓN DE BARRERAS BUROCRÁTICAS, 2017, págs. 5-6)

<sup>7</sup> (Regulación de las barreras burocráticas, a raíz de la Resolución N° 0243-2010/CEBINDECOPI, 2010, pág. 4)

provisions of the entities of the Public Administration that establish requirements, requirements, prohibitions and/or charges for the performance of economic activities, which affect the principles and rules of administrative simplification in Law No. 27444 and which limit business competitiveness in the market."<sup>8</sup>

### 1.2.1. Fees Considered Bureaucratic Barriers

From the official website of the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI), it is clear that the fees are the taxes that must be paid for the processing of the procedures administered by the Commission for the Elimination of Bureaucratic Barriers (CEB). The amount of the fee is equivalent to 13.36% of the current Tax Unit (S/. 507.65 nuevos soles).<sup>9</sup>

In addition, (Sandoval, 2010)<sup>10</sup> points out that the requirements established by the State must comply with certain principles that make compliance with those principles **rational and efficient** for society. But when requirements are set without following the principles of reasonableness, simplicity and due process, they constitute barriers to market access that discourage the conduct of business activities, which in a market economy is tremendously harmful.

### 1.3. Types of Bureaucratic Barriers

The National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI), through the Technical Secretariat of the Commission for the Elimination of Bureaucratic Barriers of Indecopi<sup>11</sup>, supports two types of bureaucratic barriers: illegal and unreasonable.

#### A. Unreasonableness Bureaucratic Barriers

These are those Demands, Requirements, Prohibitions or Charges that do Not Have:

- A justification: They are not justified in a public interest to be protected or are not suitable to comply with it.
- Satisfactory support: Being related to a public interest, they are disproportionate (costs > benefits).
- An efficient choice: It is not the least burdensome option that exists to protect the public interest.

#### B. Illegal Bureaucratic Barriers

These are Those Demands, Requirements, Prohibitions or Charges That:

- They exceed the scope of competence of the entity that imposes them. (Substantive legality – jurisdiction).
- They do not respect the procedures and formalities necessary for their imposition. (Legality of form).
- They contravene the legal framework that promotes free private initiative and administrative simplification. (Substantive legality – due to incompatibility).

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<sup>8</sup> Law No. 28996 "Law on the Elimination of Cost Overruns, Obstacles and Restrictions on Private Investment", p. 3-4.

<sup>9</sup> Web portal of the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI): Located at <https://www.indecopi.gob.pe/web/eliminacion-de-barreras-burocraticas/tasas>

<sup>10</sup> (Sandoval, Regulación de las barreras burocráticas, a raíz de la Resolución N° 0243-2010/CEBINDECOPI, 2010, pág. 4)

<sup>11</sup> . Web Address: [https://www.mef.gob.pe/contenidos/presu\\_public/migl/metadatos/taller\\_capacitacion\\_meta24\\_5.pdf](https://www.mef.gob.pe/contenidos/presu_public/migl/metadatos/taller_capacitacion_meta24_5.pdf)(Secretaría Técnica de la Comisión de Eliminación de Barreras Burocráticas del Indecopi , 2016, págs. 11-19)

#### 1.4. Of Fees-Types of Bureaucratic Barriers

Article 277 of Andean Decision 486 of the Commission of the Andean Community<sup>12</sup>, published in the Official Gazette of the Cartagena Agreement on December 1, 2000, states that:

The competent national offices may lay down such fees as they consider necessary for the conduct of the procedures referred to in this Decision. Once the procedures have been initiated with the competent national office, the fees will not be refundable.

Based on the legal basis described above and on other articles of the same Andean Decision, the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI) has established as Processing Fees (fees) for the respective procedures, through the Single Text of Administrative Procedures, according to the following detail (only some that we consider relevant for the purpose of this article will be described):

- About Intellectual Property:

Title of the Procedure	Processing Fee in Soles	Title of the Procedure	Processing Fee in Soles
Complaint of Infringement of Rights	S/.214.78	Cancellation of Registrations	S/.526.64 (for each class against which the action is brought)
Nullity of Registrations	S/.585.75 (for each class against which the action is brought)	Modifications to Records	S/.313.25 (For each modification that is requested and for each registration involved. Within each registration a fee must be paid for each class)
Renewal of Registrations	S/.313.57(For each registration for which renewal is requested. Within each registration payment will be made for each class involved)	Registration of Trademarks for Products, Services, Collective and Certification, Trade Name and Trade Slogan	S/. 534.99
Registration of licenses, assignment of rights and other acts of transfer of Copyright and related rights.	S/.363.62	Register of Authors, Publishers or Producers (of phonograms or musical recordings or other sounds; of audiovisual works or productions, and/or of software or computer programs)	S/.210.34
Registration of artistic works and works of applied art (paintings, songs, photographs, plans, games, slogans, engravings, lithographs, choreographies, handicrafts, sculptures, drawings, etc.)	S/.195.25	Multiple registration of works or productions (collections, catalogues, albums and the like)	S/1154.13
Request for the formation of an Arbitration Committee	S/. 1,910.08	Cancellation of registration of collective knowledge of indigenous peoples	Free
Complaint for Infringement of Rights of Inventions and New Technologies	S/. 195.25	Modifications to the registry of foreign technology transfer contracts or to the list of licenses for the use of technology, technical assistance, basic and detailed engineering, management and franchising of foreign origin - Nullity of such registration	S/. 378.49
Industrial Design Registration	S/. 615.63	Invention Patent Registration	S/. 1269.13

<sup>12</sup> Andean Community, 2000. "Decision No. 486 establishing the Common Regime on Industrial Property", published by the World Intellectual Property Organization. Pag. 60-61.

- On the Defense of Competition.

Title of the Procedure	Processing fee in soles	Title of the Procedure	Processing fee in soles
Complaint for infringement of the Law on the Repression of Unfair Competition	1415.17	Procedure for the Elimination of Bureaucratic Barriers	S/. 507.65
Administrative sanctioning procedure for anti-competitive conduct initiated by a complaint by a party	S/. 2,596.04	Procedure for Avoiding and Correcting Distortions of Competition in the Market Caused by Dumping or Subsidies	S/. 3600.00

### 1.5 The Importance of Intellectual Property Registration and Consumer Protection

Regarding the Trademark, it is not a requirement to start commercial activities. However, registration confers the exclusive right to use it or license it to a third party in exchange for payment. Trademark registration offers legal certainty, so you can prevent others from registering or using signs that are confusing with your trademark, taking advantage of your efforts.

In such a way that, without adequate protection, intellectual creators would lose any stimulus and motivation to continue their creative activity and would not be able to receive the economic remuneration, translated into material well-being, that derives from the use of the works. Just as the worker is worthy of his wages, the creator or "worker" of the intellect is no less deserving of receiving the yields or fruits of his creative effort, which, moreover, is generally destined for the enjoyment of the public and constitutes a contribution to raising the cultural level of society and dignifying the human being. as it allows for greater participation of citizens in cultural goods and processes. In the same way, the granting of protection in its dual moral and patrimonial aspect is related to the protection of the human dignity of the author, who projects or embodies his person in the works he creates, and who validly aspires to maintain the conditions for exercising that creative freedom, so it has been held that the true justification of copyright is the protection of the person of the author in his or her life. A creator of literary or artistic works<sup>13</sup>.

Therefore, Copyright is a species within the institution of intellectual property, by virtue of which protection is granted to creations expressed through the literary or artistic genres, it has as its object the creations or manifestations of the spirit expressed in such a way that they can be perceived, and it is born with the work without requiring any formality for it<sup>14</sup>.

There is a fundamental similarity between copyright and industrial property, and that is that the protected legal asset is constituted by an intellectual contribution, in some cases creative and in others, at least linked to creation<sup>15</sup>. There are common aspects between both disciplines, an example of which occurs when an intellectual creation by its nature can be protected as an

<sup>13</sup> DELGADO PORRAS, Antonio, (1993). Paper. Basis and Evolution of Copyright. Report of the Seminar on Copyright and Related Rights for Mexican Federal Judges. Mexico City. Pg.71.

<sup>14</sup> ANTEQUERA PARILLI, Ricardo (1995). Copyright and Related Rights in the Framework of Intellectual Property. The Challenge of New Technologies. Adaptation or change? WIPO Course on Copyright and Related Rights. Quito.

<sup>15</sup> ANTEQUERA PARILLI, Ricardo. Intellectual Property in its various facets. Intellectual Property, Relevant Issues on the International Stage SIECA-USAIID Intellectual Property Project.p.6

artistic work and as an industrial design, or the event in which an artistic work is used as a trademark.

## **Chapter Two: Of the Legal Support for the Purpose of the Bureaucratic Barriers of Indecopi**

- The Paris Act of 1971 of the Berne Convention
  - The Berne Convention states that copyright protection cannot depend on the fulfilment of any formalities, such as the registration or deposit of copies.
  - Article 2 contains an illustrative, non-exhaustive list of protected works comprising "all productions in the literary, scientific and artistic fields, whatever the mode or form of expression". Works based on other works, such as translations, adaptations, musical arrangements and other transformations of a literary or artistic work are also protected (Article 2(3)).<sup>16</sup>
- **The Rome Convention**, which provided for the protection of performances by performers, phonograms by phonogram producers and broadcasts by broadcasting organizations. WIPO is responsible for administering the Rome Convention jointly with the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>17</sup>
  - As in the Berne Convention, the protection afforded by the Rome Convention basically consists of the national treatment accorded by a State under its domestic law to performers, producers of phonograms and broadcasting organizations who are nationals of that State (Article 2(1)). However, national treatment is subject to the minimum levels of protection specifically guaranteed by the Convention and also to the limitations provided for in the Convention (Article 2(2)). This means that, apart from the rights guaranteed by the Convention itself and constituting the minimum of protection, and subject to specific exceptions or reservations permitted by the Convention, performers, producers of phonograms and broadcasting organizations enjoyed the same rights in the Contracting States as those granted by countries to their nationals<sup>18</sup>.

### **1.1. From the Commission for the Elimination of Bureaucratic Barriers**

The Commission for the Elimination of Bureaucratic Barriers (hereinafter, the CEB) is a collegiate body of the National Institute for the Defense of Competition and the Protection of Intellectual Property (Indecopi) in charge of applying the laws that regulate the subsequent control and elimination of illegal and/or unreasonable bureaucratic barriers that condition, restrict or hinder the access and/or permanence of economic agents in the market and/or may affect those administered in the processing of administrative procedures subject to the rules and/or principles that guarantee administrative simplification<sup>19</sup>. The CEB rules on the legality and/or reasonableness of the bureaucratic barriers submitted to it within the framework of a procedure for the identification and elimination of bureaucratic barriers, which may be initiated at the request of a party or ex officio<sup>20</sup>.

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<sup>16</sup> International Bureau of WIPO. INTERNATIONAL PROTECTION OF COPYRIGHT AND RELATED RIGHTS. Pg.3-4.

<sup>17</sup> World Intellectual Property Organization (WIPO). Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

<sup>18</sup> International Bureau of WIPO. INTERNATIONAL PROTECTION OF COPYRIGHT AND RELATED RIGHTS. Pg.13-14.

<sup>19</sup> INDECOPI (2017). MANUAL ON THE PREVENTION AND REMOVAL OF BUREAUCRATIC BARRIERS. Lima, Pag. 7.

<sup>20</sup> By the Technical Secretariat of the CEB.

### **Chapter Three Indecopi Resolutions, Regarding Bureaucratic Barriers**

A. RESOLUTION No. 334-2016/INDECOPI-CUS / Exp. No. 000008-2015/CEB-INDECOPI-CUS, of May 27, 2016:

"To declare illegal bureaucratic barriers the procedures, requirements and procedural rights required by the Provincial Municipality of Cusco, in the zoning change procedure contained in its TUPA approved by Municipal Ordinance No. 103-2010-MPC and modified by Municipal Ordinance No. 039-2013-MPC."

B. The Commission for the Elimination of Bureaucratic Barriers (CEB) of the National Institute for the Defense of Competition and the Protection of Intellectual Property (Indecopi) declared as follows:

"Illegal bureaucratic barriers, with general effects, the requirements and deadlines established by the District Municipality of Breña, through Ordinance No. 037-MDB, to the administrative procedures to request the publication of advertisements."<sup>21</sup>

C. Resolution No. 0131-2016/CEB-INDECOPI (File No. 000331-2015/CEB)<sup>22</sup>

Procedural fees were declared illegal according to the value of the work, as required by the Provincial Municipality of Huaura: procedures set forth in its TUPA, approved by Ordinance No. 022-2012, published on its institutional website.

D. Resolution No. 0309-2016/CEB-INDECOPI (File No. 000103-2016/CEB)<sup>23</sup>

The requirement of processing fees greater than 1 UIT and omitting the real cost of the service: The requirement of measures by the College of Architects of Peru, contained in the National Tariff 2016", approved by its National Council through the Minutes of Session No. 8, of December 19, 2015 and published on its institutional website, was declared illegal bureaucratic barriers.

#### **Indecopi Recognises Sunarp's Rates as Rational (Lower than those of Indecopi Itself)**

The Competition Defense Chamber of the Tribunal of the Institute for the Defense of Competition and Intellectual Property (INDECOPI) has issued Resolution 1807-2006, in which it resolves that the Registry Fees that the National Superintendence of Public Registries (SUNARP) currently applies are in accordance with the law and are rational in their entirety. In other words, the costs of these fees are fully justified and what users of the Public Registries pay for them is fair. Resolution 1807-2006, which confirms that such tariffs do not represent irrational bureaucratic barriers and are legally and fully in force, was issued on November 13 and is signed by INDECOPI members Juan Francisco Rojas Leo (President), Julio Durand Carrión, Sergio León Martínez, José Oscátegui Arteta and Luis Seminario de Marzi<sup>24</sup>.

Their Rates are Detailed as Follows.

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<sup>21</sup> Web portal of the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI). News Section, Located at: [https://www.indecopi.gob.pe/noticias/-/asset\\_publisher/E4hIS8IHZWs9/content/el-indecopi-declara-barreras-burocraticas-ilegales-con-efectos-generales-los-requisitos-y-plazo-en-procedimientos-administrativos-sobre-anuncios-estab?inheritRedirect=false&redirect=https%3A%2F%2Fwww.indecopi.gob.pe%2Fnoticias%3Fp\\_p\\_id%3D101\\_INSTANCE\\_E4hIS8IHZWs9%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_col\\_id%3Dcolumn-3%26p\\_p\\_col\\_count%3D1](https://www.indecopi.gob.pe/noticias/-/asset_publisher/E4hIS8IHZWs9/content/el-indecopi-declara-barreras-burocraticas-ilegales-con-efectos-generales-los-requisitos-y-plazo-en-procedimientos-administrativos-sobre-anuncios-estab?inheritRedirect=false&redirect=https%3A%2F%2Fwww.indecopi.gob.pe%2Fnoticias%3Fp_p_id%3D101_INSTANCE_E4hIS8IHZWs9%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_col_id%3Dcolumn-3%26p_p_col_count%3D1)

<sup>22</sup> Resolution No. 0131-2016/CEB was declared consented to through Resolution No. 0244-2016/STCEB-INDECOPI.

<sup>23</sup> Resolution No. 0309-2016/CEB was declared consented to through Resolution No. 0344-2016/STCEB-INDECOPI.

<sup>24</sup> (INDECOPI: Tasas registrales de SUNARP son racionales y plenamente legales, 2007)

<b>Description</b>	<b>Processing Fee In Soles</b>
Real Estate Property Registry (non-property)	From 39 soles to 119 soles for the Public Mining Registries
Registry of Legal Entities	From 9 to 43 soles (For branches and special powers of attorney of foreign companies)
Registry of Natural Persons	From 9 to 39 soles (By incorporation of individual traders)
Registry of Movable Property	Only 9 soles
Vehicle Property Registry	Only 18 soles
For registration fees (Non-Property Property Registry)	From 9 to 72 soles (For registration and/or renewal in the verifier index.

### **Overall Conclusion**

The mission of the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI) is to defend and promote free and fair competition, intellectual property and consumer rights, for the benefit of citizens, companies and the State, in an efficient, predictable and reliable manner." To do this, you should take into consideration: The Paris Act of 1971 of the Berne Convention, which provides that copyright protection cannot depend on the fulfilment of any formalities, such as the registration or deposit of copies, as well as the Rome Convention, which is granted by a State under its domestic law to performers, who are nationals of that State; that is to say, that in the event of the violation of any Right that goes against their Intellectual Property, they can take legal measures with a due Process, in such a way that in our Country the intellect and national innovations are motivated by the correct valuation of our own creations; all of this will be true if such creations have been duly registered with INDECOPI; However, the fees of this entity to be able to carry out the due registration are not always accessible to those who are still starting out in the commercial world or perhaps want to legally protect their creation, whether literary, artistic, etc. Thus, in this article a brief comparative description has been made with another entity in which Registry procedures are also carried out, such as the National Superintendence of Public Registries; determining that the fees established in Indecopi's TUPA lack any reasonableness; It is not logical that those who want to carry out a Procedure for the Elimination of Bureaucratic Barriers, have to pay S/.507.00 soles, even worse than those who want to register Trademarks of Products, Services, Collective and Certification, Trade Name and Commercial Slogan, have to pay a fee of S/.534.99 soles, Therefore, how INDECOPI intends to achieve its Institutional Vision: "That citizens, consumers and entrepreneurs benefit from a market that operates without distortions, thanks to the technical, proactive, timely, predictable and reliable work of Indecopi, which guarantees an environment of free and fair competition in which the rights of Economic Agents are respected, as well as intellectual property rights."

Worse still, we have detailed that there are resolutions of INDECOPI or its Superior that resolves controversies regarding Bureaucratic Barriers with contradictory arguments to their fees that they demand to "protect the intellectual property of Peruvians".

So, DOES MY PROTECTOR AGAINST BUREAUCRATIC BARRIERS DEMAND THE HIGHEST FEES FROM ME TO DEFEND MYSELF AGAINST THEM? The answer would be yes, since the sum of S/.507.00 soles would have to be paid to initiate a Procedure for the Elimination of Bureaucratic Barriers, AGAINST THEMSELVES.



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