

## DOCUMENTARIES: A RISING MARKET IN BRAZIL

Streaming platforms that already landed in the Brazilian territory might be happy with the opportunity to exploit a huge and rising market. The strategy adopted by most of them was to engage in the production of tailor-made content targeted at the local consumers. The result has been the booming of the audiovisual production market in Brazil in the last years. But there are still opportunities in this field, as Brazilians are enjoying the opportunity to watch local stories told through someone else's eyes.

Among several types of audiovisual works, documentaries and fictional works based on real facts are the preferential format chosen by these new media companies. Incidentally, they have been very well accepted by the Brazilians. Two of them – The Edge of Democracy (“Democracia em Vertigem”) and Killer Ratings (“Bandidos na TV”) are among the top ten most watched programs by Brazilians through the streaming platform that produced them – and The Edge of Democracy was nominated for this year's Oscar for best documentary.

The reason behind that may be that the Brazilian economy and politics have been such a source of incredible, and sometimes bizarre, stories that they have been inspiring the producers to write interesting and informative screenplays. But are there boundaries and limits to this creativeness? How far is an author allowed to go without violating the Brazilian legal framework in regards to the freedom of expression and the right to privacy?

Brazil is a fortunate country if one considers that freedom of expression and the right to information are not only principles enshrined in its Federal Constitution but are also applied and praised by judicial courts. Nevertheless, the same Constitution guarantees the right to privacy, which encompasses the right to private life, reputation and image of any individual, as well as the right to compensation for pecuniary and moral damages resulting from their violation. Such principles may be contradictory in some concrete cases, such as in a biographical web series. How have courts been balancing them?

Since a landmark case law ruled in 2015 by the Brazilian Supreme Court, no prior authorization of the depicted individual (or of the heirs) is required to produce or publish a biography. From then on, the genre documentaries enjoy more freedom, which fostered production in this field. But it does not imply that authors have an endless creative freedom.

As a general rule, Brazilian courts (specially the appeal courts) usually favor freedom of expression and the right to information in opposition to the right of privacy if some conditions are met. The elements that are taken into account to dismiss claims related to documentaries requesting indemnification for moral damages are, quite often, the existence of public interest in the disclosure of the facts; if the publication or exhibition has a journalistic or informative nature; if the story was based on diligent research and if the person depicted is a public person or someone that apparently does not take good care of his or her intimacy. Also, courts almost always deny preliminary injunctions to halt the exhibition of a programing, and rather prefer to set an indemnification in the final ruling if a wrongdoing is confirmed.

Differently from other countries, serious insults can be a crime against a person's reputation (libel, defamation and slander) even if embedded in an artistic work, being subject to imprisonment and/or fines. However, in cases involving artistic works judges tend to resort to criminal provisions only in extreme cases.

When compared to long standing democracies, the Brazilian system may seem to fail in protecting the freedom of expression regarding documentaries, as they may need to comply with the conditions referred to above and may potentially trigger criminal consequences. It is indeed too early to believe that the artistic immunity granted to documentaries' authors under the US First Amendment would be supported by the Brazilian courts. But we are on the right path.

Brazilians are getting more used to and choosing other types of programming rather than fictional works such as soap operas. This means that there is a wide array of opportunities to foreign investors to offer this sort of entertainment in the local market as well as to invest in productions targeted to the Brazilian market. And the good news is that Brazilian legal framework, as well as case law, grants legal certainty in this area.

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