

# Case Study II: The experience of a Brazilian independent producer with online distribution of audiovisual content

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## DISCLAIMER

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## TABLE OF CONTENTS

I. Introduction.....	2
II. The Brazilian Environment for AV Productions.....	3
A) Public Funding of audiovisual productions in Brazil .....	3
B) The arrival of audiovisual platforms in the Brazilian scenario .....	5
i) The digital market through the lenses of a Brazilian producer.....	6
ii) The Brazilian Legal Framework.....	7
III. Legal Considerations for a Brazilian Producer .....	8
A) Rights over the film and its different elements .....	8
i) Rights over the film .....	8
ii) Rights of Elements of the film .....	9
B) The Business of Producing for Digital Platforms .....	10
C) Peculiarities of series productions.....	11
IV. Conclusion .....	13

## I. Introduction

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This case study investigates the main shifts in the legal structuring of audiovisual production in Brazil as a result of digital distribution, following the perspective of the rights required to ensure an efficient distribution of the audiovisual work. This document also aims to point out what are the main challenges and trends of Brazilian audiovisual producers in this context.

Audiovisual production for digital distribution in Brazil comes at a time of transition from a financing model focused on independent production that was mainly based on tax incentives and public subsidies. This market scenario (running from 1993 until at least 2016) shifted to a model of heterogeneous financing, in which there are independent productions that are still financed with public resources but more productions that are fully financed with private resources. This private financing model is led by streaming platforms, cable television programmers, and other agents in the sector that

contract with Brazilian producers to produce films or series created and produced locally, destined for the first exhibition on their platforms.

In order to understand the practical implications, this case study builds on the experience<sup>1</sup> of the Brazilian producer O2 Filmes.<sup>2</sup>

## II. The Brazilian Environment for AV Productions

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### A) Public Funding of audiovisual productions in Brazil

The existing public funding mechanisms for independent productions emerged in the mid-1990s, in response to the eradication of the entire public funded cinema industry by the first democratically elected president, Fernando Collor de Mello (1990-1993), whose election came after a civil-military dictatorship (1964-1985).

The reorganization of this sector was made possible by the establishment of the so-called Audiovisual Law (Law 8.685 / 93) in 1993. This law reestablished a financing instrument based on investments in co-production through tax incentives<sup>3</sup>. The mechanism provides that foreign cinematographic distributors, who license films to be distributed in Brazil, can invest in the coproduction of Brazilian works of independent production a portion of the income tax withheld on remittances abroad for payment of royalties. According to the law, these investments must occur through co-production contracts. Furthermore, the Audiovisual Law also created an audiovisual tax incentive for every citizen who contributes to income tax as long as these taxpayers acquire securities issued by the film producer, which entitles them to a share in the revenue from the film<sup>4</sup>.

The use of these financial mechanisms in audiovisual production was essential to recapture the production of cinematographic works in Brazil. Thanks to this, the films that were produced were successful in Brazil and abroad, such as *“City of God”* by O2 Filmes, *“O Quatrilho”*, and *“Central Station”*, amongst others. As a result, the period that followed the government of ex-president Fernando Collor became known as the period of “recovery” of national cinema. This “recovery” over time has generated beneficial effects for the entire production chain, impacting other sectors in

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<sup>1</sup> The methodology for this work was a semi-structured interview , held by teleconference with Patrícia Silverstein, Director of Legal and Business Affairs at O2 Filmes.

<sup>2</sup> O2 has produced more than 30 audiovisual works comprising long feature films, tv and vod series. The company produced award winning movies such as *City of God* and *Blindness*, both directed by Fernando Meirelles, one of the company's partners, the Netflix original *Irmandade*, and co-produced with Working Title the picture *Trash*, directed by Stephen Daldry.

<sup>3</sup> The tax incentive for foreign distributors to invest in Brazilian productions already existed in Brazil between 1962 and 1969, through art. 45 of Law 4,131/62, the so-called Remittance Law (see SALINAS, Rodrigo Kopke. *The Audiovisual Coproduction Contract: a networked economic operation*. São Paulo, São Paulo Law School, Fundação Getúlio Vargas, 2016, p. 48/54).

<sup>4</sup> This is the tax incentive provided for in art. 1 of Law 8.685/93.

creative industries. Although there is no published data, it is possible to infer that this growth has had a positive impact on the market for licenses of synchronization of musical works and phonograms. In 2019, music collective management from television and cinema accounted for 40% of the collection<sup>5</sup>. At the same time, digital represented 12%. The publishing sector, on the other hand, benefited from the increase of licenses of adaptations of literary works into audiovisual works.

In 2001, the institutional environment that supported audiovisual production once again benefitted from the creation of an independent agency, the National Film Agency (“ANCINE”). This agency manages the subsidy and incentive mechanisms for audiovisual production, including regarding the fulfillment of national content quotas in the film industry<sup>6</sup> and in the home entertainment industry<sup>7</sup>. The law that created Ancine, Provisional Measure 2,228, of December 2001, brought a new legal concept for an independent production, and also new requirements for audiovisual works to be considered Brazilian<sup>8</sup>. The new notion of independent production is important to note because the standard used takes into account the ownership of copyright in the audiovisual works produced<sup>9</sup>. Consequently, all the mechanisms of tax incentives and subsidies for independent Brazilian production, whether the mechanisms of the Audiovisual Law itself, or those that follow it, can now be used only in Brazilian and independent productions that meet the requirements of new legislation. In other words, Brazilian independent producers became a key element for public funding of audiovisual productions.

The same law created a specific tax for financing the sector, by nature of a contribution intervening within the economic domain, known as the Contribution to the Development of the National Film Industry (CONDECINE). This tax must be paid by all those who own or exploit copyright in audiovisual works, in each market segment, including advertising and telecommunication companies. The piece of legislation, due to a change in its text carried out in 2002<sup>10</sup> brought an additional tax incentive benefiting foreign cable television programmers who license the original programming for their

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<sup>5</sup> Annual Report of ECAD: [Annual Report of ECAD](#)

<sup>6</sup> See art. 55 of the Provisional Measure 2.228-1/2001.

<sup>7</sup> See art. 56 of the Provisional Measure 2.228-1/2001.

<sup>8</sup> Art. 1º, IV, of MP 2.228-1/2001 defines the cinematographic and videophonographic work of independent production as “one whose production company, majority owner of the patrimonial rights on the work, does not have any association or link, directly or indirectly, with service companies broadcasting of sounds and images or operators of subscription electronic mass communication.” Art. 1º, V, of MP 2.228-1/2001 defines Brazilian cinematographic work or Brazilian videophonographic work as one that meets one of the following requirements: “a) be produced by a Brazilian production company, observing the provisions of § 1, registered with ANCINE, be directed by a Brazilian or foreign director residing in the country for more than 3 (three) years, and use for its production at least 2/3 (two thirds) of Brazilian artists and technicians or residents in Brazil for more than 5 (five) ) years; b) be carried out by a Brazilian production company registered with ANCINE, in association with companies from other countries with which Brazil maintains a cinematographic co-production agreement and in line with them; or c) be carried out, in a co-production regime, by a Brazilian production company registered with ANCINE, in association with companies from other countries with which Brazil does not maintain a co-production agreement, ensuring ownership of at least 40 % (forty percent) of the patrimonial rights of the work to the Brazilian production company and to use for its production, at least 2/3 (two thirds) of Brazilian artists and technicians or residents in Brazil for more than 3 (three) years.”

<sup>9</sup> The independent producer shall hold the major share in the copyrights of the film.

<sup>10</sup> Amended by Law 10.454/2002

Brazilian branches. This allowed these programmers to be exempt from CONDECINE if they invest a fraction of their royalty remittances abroad in the co-production of Brazilian and independent productions. As of 2006, the proceeds from CONDECINE's collection go to a public fund for the subsidy of the audiovisual sector - the Sectorial Audiovisual Fund (FSA)<sup>11</sup>.

In 2011, this legal framework was amended by Law 12.485 by introducing quotas of Brazilian, and independently producer Brazilian works. Those quotas apply to paid television channels. In addition to these quotas of Brazilian and independent Brazilian audiovisual works, corresponding in total to 3h30min (three hours and thirty minutes) of programming per week, the 2011 amendment also brought quotas for Brazilian public and independent channels, and Brazilian public and independent programmers<sup>12</sup>. In addition to these measures, other fiscal audiovisual tax incentives were created over the period between 2002 and 2010, some of which needs to be confirmed by the legislative branch periodically. For the time being -they are operative until 2024<sup>13</sup>.

Due to this articulated set of measures that foster production and demand for the acquisition of Brazilian and independent audiovisual works, there has been an enormous increase in Brazilian audiovisual production, with beneficial effects throughout the entire production chain<sup>14</sup>.

## B) The arrival of audiovisual platforms in the Brazilian scenario<sup>15</sup>

This positive scenario for the audiovisual sector was combined with the arrival of the first global streaming platforms in Brazil, for distribution of audiovisual content<sup>16</sup>. Following the global trend in this sector, and beginning in the middle of this decade, streaming platforms started to hire Brazilian producers to produce locally in order to market and publicize these creations as their own productions, the so-called "originals". These own productions are fully funded by the platforms<sup>17</sup>.

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<sup>11</sup>The FSA was created by Law 11.437/2006.

<sup>12</sup> Articles 16 to 18 of Law 12.485/2011. The quotas are limited in time. They will expire in 2023 (Sec. 41 of the statute).

<sup>13</sup> Sec.s 1A and 3A of Law 8.685/93, in addition to the financing funds of the national film industry (the "funcines"), created by art. 41 of MP 2.228.

<sup>14</sup> In 2002, Ancine issued only 1 certificate for a Brazilian independent long-feature film, and this figure jumped for 376 in 2019. Brazil released 29 domestic long-feature films in 2002 and this jumped to 167 in 2019. In 2002 there were 480 production companies registered before Ancine and 790 in 2019 (this figure was 1015 in 2018 (data available at [Mercado-audiovisual-brasileiro](#) - consulted in October, 1<sup>st</sup>, 2020).

<sup>15</sup> A detailed description of the Brazilian and Latin-American Over-the-top (OTT) market is included in the WIPO study "Audiovisual OTT business models in Latin America: Recent trends and future evolution".

<sup>16</sup> Netflix started in Brazil in 2011: <http://g1.globo.com/tecnologia/noticia/2011/09/netflix-chega-ao-brasil-por-r-15-por-mes.html>

<sup>17</sup> In 2020 alone, Netflix invested R \$ 350 million in local production. In addition, Amazon Video has also opened an office in the country and hired local productions. Along with this the largest Brazilian broadcaster, Globo, also launched its own streaming service, Globoplay in 2015, and has been contracting local producers to execute new television series programming (Valor Econômico, September 18, 2020, year 21, No. 1032, EU & Weekend, page 9).

This source of financing from digital players becomes particularly significant in Brazil after 2016, as the country continues to experience a period of prolonged economic recession with the shortening of public funding for audiovisual productions.

#### i) The digital market through the lenses of a Brazilian producer

O2 Filmes is one of the main audiovisual producers in Brazil, with more than thirty productions including films and television series for digital platforms, and within independent Brazilian productions, international co-productions, and commissioned works.

In general, O2 Filmes financially participates in two different ways in the distribution of the content:

- Those produced independently allows the producer to have a voice in the distribution process and also earns revenue at the end of the process, at the stage of payment of net production revenue, and generally this comes from all media and in all territories.

- In the case of content commissioned to O2 Filmes, it generally does not participate in the economic results and it is not a co-owner of copyright on them, nor does it follow the distribution process.

In the specific case of independent productions and in general, the revenue from the licensing of a film for digital platforms tends to be better than the revenue from licensing in the television segments. This is due to the pricing of the television licenses, and results from the number of viewers in movie theaters. With some exceptions, Brazilian films do not usually reach good box office numbers.

For a local producer such as O2 Filmes, the international dynamics of digital distribution is a positive element and international co-productions are necessary in the context of independent production. For some years now, O2 Filmes has only carried out commissioned projects, that is, financed entirely by the client. In the context of these projects, the decision on whether to carry out international co-production does not belong to O2, but to these agents financing the project. If it exists, it will occur with fully private resources and not with public resources from the independent production system<sup>18</sup>.

As for the legal structuring of productions, O2 Filmes conceives it in two different phases: first the development phase and then the production phase. For the company, the production phase will be dedicated to carrying out what was planned in the development phase.

In this vision, development is the creative phase for excellence and, therefore, requires more care and more attention. This phase also requires a more complex legal analysis from the point of view of the project's legal viability and copyright clearance - to see if the project is based on real facts or pre-existing creations, or even to ensure the chain-of-title of the production<sup>19</sup>. In O2 Filmes' experience

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<sup>18</sup>In the independent production context, international co-productions aim at raising additional financing for the production, as well as to increase its performance in revenues by broadening the film's natural markets. In an international co-production for independent movies, they are qualified as a citizen of more than one country, thus allowing the film to fulfill the quotas for domestic products in the countries of the co-producers. They also may be at an advantage if the storyline requires the shooting to take place in more than one country.

<sup>19</sup> Chain-of-title is the set of agreements which transfers to a specific producer the rights over the film or series. The chain-of-title documents may comprise the agreements related to any pre-existing work in which

producing for digital platforms, this is the one who controls the creative stage. It is in the development phase that O2's main creative decisions are made, and which must always be supported by a legal vision about the possibility of carrying out the project in the way conceived.

Moreover, in the case of productions for digital platforms, and since they are commissioned works, the governance of the legal structure is determined by the clients who are the final beneficiaries of the rights on the work produced.

However, if the production phase is less complex from a legal point of view, it also presents challenging issues for Brazilian producers. Since the risks of production with any errors, damages, or claims that occur, are the responsibility of the producers it requires very detailed and secure planning.

There is an additional obstacle in the case of productions made for global streaming platforms, which is the frequent monetary exchange fluctuations in the Brazilian currency against the US dollar. As the price of the Brazilian currency is not stable, nor is it predictable, there may be problems in financing production, as the exchange rate varies every day, up or down, generating unpredictability and, therefore, the risk of impact on the overall budget.

Furthermore, the production stage also requires the hiring of a large number of individual creators and performers, who are hired by O2 Filmes through the application of Brazilian copyright law, and in which the recognition of moral rights for both authors and performers also restricts full copyright assignment contracts. However, agreements between producers and these global platforms are usually governed by US law applies the concept of work-for-hire. Thus they are the original authors of the commissioned audiovisual works.

## ii) The Brazilian Legal Framework

Brazilian copyright law defines audiovisual work as a co-authored work co-created with the author of the literary or literary-musical argument, and the director. When dealing with an animation work and beyond the author of the script and the director, the law also considers the author of the original drawings to be a co-author. Additionally, the statute stipulates that the director will exercise the author's moral rights over the audiovisual work. In this perspective, and in order for the producer to legitimately explore this audiovisual work, he must sign copyright assignment contracts with the co-authors of the work, thereby acquiring the title derived from such rights.

In this environment, the rules applicable to the transfer of rights are also important to take into consideration. In Brazil, the legal regime of the copyright assignment contract requires the following:

(a) the written form as a condition of validity,

(b) the specification of the modalities of "use" of the work, determining in its absence, the restrictive interpretation of the contract, and by which the assignment will be valid only for only that modality which is "indispensable to fulfill the purpose of the contract";

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the film is based, and all agreements concerning the copyright of the film itself. In case of a Brazilian movie, the agreements concerning the copyright of the audiovisual work shall be the assignment agreements between the producer and the coauthors of the audiovisual work. The coauthors of an audiovisual work, according to Sec. 16 of Brazilian Copyright Law, are the director and the author of the argument, and in case of animation this shall include also the author of the drawings.

(c) the assignment of copyright will only be valid for modalities of use existing on the date of conclusion of the contract;

(d) the contract must specify in which territories the assignment of copyright will be valid .

In an audiovisual production, the producer normally signs copyright assignments or licenses with all the co-authors of the film as well as other right owners such as performers and those licensing the rights over pre-existing works such as music. In the case of a production in Brazil, those licenses or assignments will necessarily need to observe the statutory requirements contained in the Brazilian law and listed above. This is not necessarily compatible with the practice of the work-for-hire regime, in particular regarding the agreements between coauthors and the producer. The ultimate risk is that those provisions in the contract might not be considered valid before the Brazilian Courts for not fulfilling the legal requirements.

### III. Legal Considerations for a Brazilian Producer

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#### A) Rights over the film and its different elements

##### i) Rights over the film

Copyright on the film is not to be confused with copyright on the original materials on which it is based on. The original elements of the audiovisual work created during the development phase, for example, is the original script with all its revisions, and other materials prepared by the writers and creators. These are autonomous artistic works in relation to the film. For this reason, the copyright on these original materials can be sold independently of the film to be made<sup>20</sup>. This also means that those materials should be object of assignments in order to be exploited.

The copyrights that can be commercialized separately in relation to the film are generally as follows:

(a) copyrights on pre-existing creations or development materials: for example, copyrights on arguments, scripts and other pre-existing materials.

(b) copyrights on autonomous creations produced for production: characters, soundtrack and other creations, or artistic performances, which have aesthetic autonomy and, as a result, can be sold separately and constitute a source of autonomous revenue for audiovisual producers.

(c) copyrights for derivatives of the audiovisual work, such as remakes, spin-offs and other transformations, which are subsequent productions.

In the case of productions commissioned by digital platforms, when the request covers the preparation of development materials, copyright on them is usually transferred by the local producers to the platforms that placed the order. In the case of a production that benefits from Brazilian public financing or that aims at fulfilling the local independent quotas, however, the scenario is different, as the

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<sup>20</sup> The typical example is related to the format rights, which are sold separately from the actual tv show. The format rights is an industry in itself. See: [The Format Recognition and Protection Association](#)



legislation determines that the copyright on the original materials must belong to the independent Brazilian producer, since he must be the majority holder of the patrimonial rights on the work<sup>21</sup>.

## ii) Rights of Elements of the film

When it comes to the development materials, perhaps the most obvious markets for exploring these rights over them are the music industry and the character's licensing. In the case of the music rights, the audiovisual producer is the original owner of the related rights on sound recordings. Therefore, the audiovisual producer can license public performance rights on the soundtrack, and receive remuneration through the collective management system of these rights in Brazil and abroad. Eventually, the audiovisual producer will also be able to explore the copyrights on the lyrics and compositions created for the film's soundtrack.

In the case of characters' licensing, the producer may hold copyright on characters created for the film, and profit from those rights, sharing the remuneration with the respective creators, a common practice for animation.

Beyond the possibility of exploring licensing and musical rights, another very important market for audiovisual productions is derivative works from the film. These are adaptations and transformations of an original work into a new work, which will have a new author and new rights holders.

Typical example of derivative works in relation to an audiovisual work is the production of a feature film from a television series, and vice versa. A remake is also considered a derivative work, that is, the remake of a film for an updated contemporary version, or a version in another country than the original one. In addition to these cases, the so-called "spin-offs", that is, the creation of a new work from any of the characters in a pre-existing film, also are derivative works. All of these possibilities for subsequent audiovisual productions need to be licensed, in advance, by the copyright holder of the pre-existing film.

An interesting question is whether the subsequent seasons of a television series would constitute derivative works, in relation to each other. The same question could be asked in relation to the scripts, that is, if the scripts of a future season are derived in relation to the scripts of the previous season. It seems clear that each season of a series contains creative elements from the original materials, as it is in these materials that the main story and characters are created. Therefore, the chain-of-title for each of the seasons in a series should include the contracts that were made at the time of the series' development. These contracts must provide for the assignment of rights for subsequent seasons. The same provisions should be in the contracts with the writers of each season. As the subsequent

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<sup>21</sup> See "Sec. 3. *The patrimonial rights related to elements derived from the audiovisual work, including brands, characters, plot, soundtrack, among others, and the revenues resulting from their commercial exploitation, must give the proposing production company, at least, the percentage corresponding to the split of patrimonial rights on the work.*

*Sec. 4 The governing rights over the patrimony of the audiovisual work and its derivative elements, including the right to decide on the realization of new seasons of the serial work or new production of the work, must be preserved in the power of the proposing producing company.*

*Single paragraph. It is assured to the broadcaster/programming company to retain, for the term of the licensing agreement, a right of first choice and last refusal.*" (Decision nº 95/2010, from Ancine Board, available at [Llegislacao\\_deliberacoes\\_deciso-es-ancine](#))

seasons are works of the same nature, that is - audiovisual works, it seems to us that these are works written in collaboration and in continuation - and not derivative works. And so the possibility of making continuations must be provided for in the contracts with the co-authors, and writers, for the purposes of assigning copyrights, credits and remuneration. However, this is our personal opinion on the matter, and it is possible to have dissenting positions on this subject, which reinforces the need for a clear contractual treatment of subsequent seasons and derivative works.

In the example of O2 Filmes, it generally secure the rights to explore derivative works in all development contracts that are carried out for its independent productions. In the context of productions for the digital distribution market, as the productions are made tailored to the hiring platform, the copyright for derivative works will belong to these platforms; as holders or authors of the audiovisual works commissioned. Another consequence is that possible spin-offs, sequels, etc. might not necessarily be done by the same producing company as the right owner, the platform, concentrated all the rights and is entirely free to choose how to produce future content. By its turn, the audiovisual producer will only secure future opportunities if it implements the appropriate contract structure for this when producing the audiovisual work.

The possibility of selling these copyrights piecemeal on autonomous works, or copyrights for adaptation of the film, means that contracts for production must be designed for this purpose. In other words, copyright assignment contracts must stipulate that the creations or artistic contributions of those professionals can be used and marketed throughout the production chain of the audiovisual and creative industries in large - and not just for that specific production or only for the audiovisual industry.

## B) The Business of Producing for Digital Platforms

The digital distribution of audiovisual works in Brazil has had an impact on Brazilian producers, not so much because it is characterized in yet another window of commercial exploitation of audiovisual works, but because it is a new financing model.

This new financing model is characterized by the commissioning of the work made by the platform to the independent producer. The independent producer, therefore, carries out the work according to the production instructions provided by the platform. Contracts between producers and platforms must regulate the provision of services, that is, production, and the assignment of all copyrights acquired for production to the benefit of the platform, which is the customer. In this context, platforms are the real producers of audiovisual works, and the producers are considered “simply” service providers, executors of that production, and are no longer the copyright holders of the works produced.

This model differs from one that is used for independent production. In the independent production model, Brazilian producers are holders of intellectual property assets over the film, and hold both the copyright on the films produced as well as the copyright on their development materials and integral elements (soundtrack, characters, etc.). Whereas in the private financing model, led by digital platforms, Brazilian producers provide production services but do not become owners of intellectual property assets.

This difference in the financing is also reflected in the numerous contracts entered during the production. The contracts of professional creators and interpreters normally is remunerated through a single fixed amount. Independent productions may be more flexible, and high profile talents may get a fixed compensation and a share in the producer’s net profits, especially as the independent producers control the production and copyright over the final work. This flexibility is no longer the case

in recent productions for digital platforms. Applying the mentality of the "work for hire" regime, the remuneration of those involved in the production, including directors, authors and performers is through a fixed amount. Well-known directors, performers and authors no longer receive amounts based on percentage but might receive a pre-agreed amount that intend to substitute the usual percentage of the profits usually obtained in previous business models.

In addition to that, it is important to point out that there is a statutory provision in Brazil that prohibits the assignment of copyright, and determines that authors and interpreters be paid for each exhibition of the production in which they participate<sup>22</sup>. This comes from labour statute, which aims to regulate the working conditions of professionals in audiovisual productions.

With regard to productions for global digital platforms, this is an element of risk that is generally under the producers' responsibility. Platforms commissioning films expect to receive content free of any third party rights. This obviously does not eliminate mandatory obligations related to the offering in one particular country, usually a remuneration collected through collective management organizations. This is the case in Brazil with regard to the public performance of music included in the audiovisual works.<sup>23</sup>

In relation to authors and interpreters in audiovisual works, still, the absence of legal framework defining on the remuneration to be paid for exhibition, as well as the way of calculating and determining this amount, leads to contracts containing clauses providing for the inclusion of this remuneration in the fees negotiated with producers. Thus, deficiencies in the legislative design of this right might lead to a higher degree of uncertainty for local producers while, at the same time, low enforcement for the benefit of creators.

### C) Peculiarities of series productions

Perhaps one of the largest market for independent producers for digital platforms is in serialized works. The serialized works imply that the same team of authors and interpreters from the previous season will work in the subsequent ones - as is usually, the stories are a continuation and render the same characters. In contractual terms, the producer has to foresee this need through contractual mechanisms whereby artists and authors are forced to renew their contracts for subsequent seasons. This is a current practice, with the platforms holding the right to decide on whether or not to carry out a subsequent season.

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<sup>22</sup> "It will not be allowed the assignment, or promise to assign, copyright and related rights resulting from the rendering of professional services.

§ Sole Paragraph: Professional's copyrights and related rights will be due as a result of any exhibition of the work" (Sec. 13, Law 6533/78)

<sup>23</sup> Art. 86. The musical performance copyrights related to musical, literary-musical and phonogram works included in audiovisual works will be due to their owners by those responsible for the places or establishments referred to in § 3 of art. 68 of this Law, that show them, or by the television stations that transmit them.

This scenario leads to challenges for local producers to ensure this sequence of renewals. It is clear that, in this context, all business terms of the contract, such as remuneration, credits, periods of service provision lead to complex negotiations and contractual arrangements. This is even more true considering that not only the future seasons is only a possibility but that the platform is the one concentrating all the rights over the content and therefore, other producer could be commissioned to produce future sequels. Moreover, creative professionals in Brazil are not familiar with the contractual mechanisms that are required by digital platforms, in particular applying work-for-hire contractual terms. This leads to additional challenges in contractual negotiations.

Apart from the economic rights over the work, the moral rights of authors and performers is an important element of audiovisual content. Contractual arrangements with producers or platforms might overlook the issue of moral rights. In Brazil, as it is in many Latin-American countries, moral rights are inalienable and irrevocable<sup>24</sup> as provided in the copyright law. Among the moral rights recognized in Brazil<sup>25</sup>, the rights of paternity, integrity and repentance might be relevant for audiovisual production contracts, in particular when those contracts transfer to producers control over creative decisions. There seems to be little doubt that contractual clauses depriving directors (co-authors of the audiovisual work) of their moral rights are null. On the other hand, and in a practical standpoint, artistic decisions are usually shared between co-authors and producers or platforms. In the face of disagreements, the final decisions are made by the financing agents.

This being a stable market practice for commercial productions, and a fact that is already known to all agents involved - it seems clear that the general theory of contracts can offer solutions to this impasse. According to the Brazilian civil code, the Parties must behave in the execution of a contract in good faith, which means the prohibition of contradictory behaviors in contractual arrangements, the duty to take into account the interests of the other parties of the contract, and the market practices. Standard and well established business practices influence contracts and cannot be ignored. This is not to say that the director is deprived of the right to participate in creative decisions, but that he or she may not be able to control them solely – at least in commercial productions.

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<sup>24</sup> Art. 27. The author's moral rights are inalienable and cannot be renounced.

<sup>25</sup> Art. 24. The author's moral rights are: IV - to ensure the integrity of the work, opposing any modifications or the practice of acts that, in any way, may harm or affect him, as an author, in your reputation or honor; (...) VI - to withdraw the work from circulation or suspend any form of use already authorized, when circulation or use implies an affront to its reputation and image;

## IV. Conclusion

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According to the perspective of the local independent production company, the digital distribution of audiovisual works represents a new window for the sale of independent content such as movies and series. Producing for digital platforms has created a sustainable economic environment for local production companies especially in a time of financial restraint from public financing for television and cinema productions. On the other hand, the financing model carried out by digital platforms deprives the local production companies from any intellectual property assets on the content they produced, emphasizing their role as service providers.

Production companies tend to consider the development of an audiovisual work as a fundamental stage of their legal structure, and they shall design production agreements aiming at acquiring copyright on the film as well as on the intellectual property assets deriving from the production. This to make sure they benefit from the potential value of those assets in every way possible, such as through exploiting the music, characters, adaptations, licensing and merchandising.

One of the key roles of local producers is to navigate through the numerous contractual arrangements to ensure the lawful exploitation of the content, possibly globally. These arrangements must comply with local legislation that might differ in very significant aspects from foreign copyright laws.

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