

Image rights of supporting actors in biographical works

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The Supreme Court when judging in 2015 the Declaratory Action of Unconstitutionality No. 4.815, which relates to the interpretation of articles 20 and 21 of the Brazilian Civil Code in the context of biographical publications, ruled by the prioritization of freedom of information and artistic creation, emphasizing the unenforceability of consent of the person biographed and also the unnecessary authorization of people portrayed in the work as supporting characters.

The Supreme Court decision decided to apply a constitutional interpretation to the provisions of the Civil Code, especially the aforementioned article 20, which provides as an essential condition for "the transmission of the word, or the publication, exposure or use of the image of a person" an authorization from the person. The new understanding was very clear in the sense of ruling out the need for consent when it comes to biographical work. The Supreme Court attests with the decision the need to prioritize after consideration of constitutional principles the freedoms of speech and information, constitutionally enshrined, to the detriment of the right to privacy.

There is also a relevant element in this equation that concerns to the public interest in the content, since it relates sometimes to historical facts of great social and journalistic interest that naturally culminate in the right of the public to be informed about the facts described in the work. The Brazilian Constitution crystallizes freedom of speech and information as fundamental rights in our legal system and the public interest is inscribed as part of this equation.

It means in practice that in cases of allegation of improper use of an individual's image in a work, whether audiovisual or printed, Justice will analyze the biographical aspect of the work and, consequently, identify the presence of social and journalistic interest in the specific history. In this sense, it should be imposed the need to recognize the unenforceability of authorization, either of the person biographed or those who surround her, as supporting characters, the history represented by the biographical work.

It should also be noted that the biographical work is not restricted to that which refers to an individual specifically. It encompasses in the totality of the biographical aspect any narrative with documentary bias about the life of a person, group of people or even about a famous fact or event, such as a crime of great national repercussion or a tragedy of great proportions, both occurrences that can attract public interest.

The Supreme Court understanding has already been replicated in subsequent decisions of other courts, such as in the Superior Court of Justice

(STJ), in which the applicability of Precedent 403 of the STJ itself -, which states the unnecessary proof of damage to indemnify an individual whose image has been used without authorization - was ruled out. In the understanding issued by the STJ, "the simple representation of the image of a person in an audiovisual biographical work that has as its object the professional history of a third party does not attract the application of Precedent No. 403/STJ."¹

The state courts have also reproduced the same understanding. Recently, the 6th Chamber of Private Law of the São Paulo State Court² analyzed a case involving the use of the image of a civil police officer from São Paulo, who participated in the reconstitution of the crime portraying the victim. The reproduction of an excerpt from the reconstruction was used in the documentary "Elize Matsunaga: Era Uma vez Um Crime", which described the murder of Marcos Matsunaga, a notorious crime that gained extensive repercussion in the Brazilian media. The Court understood that there was no damage to the Author's image, and emphasized the journalistic and historiographical nature of the documentary. In the decision, several court decisions were quoted reinforcing the understanding that the representation of supporting actors in a documentary piece regarding the biography of a third party does not attract the application of Precedent 403 of the STJ.

Despite the lack of consent or authorization of secondary characters for the use of their images in biographical works, there is still the possibility for the courts to assess the use of the image as an offense to an individual's honor, which should be analyzed on a case-by-case basis by the judge.

>>> *This article belongs to the e-book: "Intellectual Property". Click here to read more articles.*

NOTES:

¹ REsp 1454016/SP, Rapp. Minister NANCY ANDRIGHI, Rapporteur for Judgment Minister RICARDO VILLAS BÔAS CUEVA, THIRD PANEL, judged on 12/12/2017, DJe 03/12/2018.

² TJSP; Civil Appeal 1136159-89.2021.8.26.0100; Rapporteur: Marcus Vinicius Rios Gonçalves; Judging Body: 6th Chamber of Private Law; Regional Forum XI - Pinheiros - 1st Civil Court; Judgment Date: 07/21/2022; Registration Date: 07/21/2022.

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