

BRAZIL

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LUXURY LAW
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1. TRADEMARK

1.1 Sources of law

The main source of law relating to trademarks in Brazil is the Brazilian Industrial Property Law. Moreover, the Brazilian Constitution is also an important source of law, since it guarantees trademark ownership in its main chapter of “Fundamental Rights and Guarantees”. Furthermore, Brazil has been an original signatory of the Paris Convention for the Protection of Industrial Property since 1883 and a signatory of the Madrid Protocol. In addition, there are also some regulations of the Brazilian Patent and Trademark Office (BPTO) that are significant sources of law.

Although the Brazilian Industrial Property Law considers as a rule that the trademark property is acquired by a validly granted registration, the law also determines that any person who, in good faith, has been using the trademark for at least six months can claim preferential right to registration.

1.2 Substantive law

Brazilian law distinguishes between well-known trademarks and highly-reputed trademarks.

Generally, the trademark registration procedure in Brazil observes the principles of territoriality and specialty. The Principle of Territoriality grants exclusive use of the registered trademark in the national territory, in other words, throughout Brazil. Whereas, the Principle of Specialty refers to the fact that the protection granted to a trademark is limited to the specific products or services identified by the trademark, that is, to the products or services related to the class in which the trademark is registered. However, there are exceptions to these principles, which are the well-known mark and highly reputed trademark. The well-known mark is an exception to the Principle of Territoriality, pursuant to Article 6-bis of the Paris Convention.

There is no broader range of protection for brands in the “luxury industry”.

1.3 Enforcement

To determine that a trademark is highly reputed and, therefore, entitled to special protection, the Brazilian Patent and Trademark Office (BPTO) presents, in Resolution No. 107 of August 19, 2013, some instructions regarding the necessary evidence. At first, it is important to emphasize that all evidence presented must be linked to three fundamental requirements, such as:

- recognition of the mark by a large portion of the general public;
- quality, reputation, and prestige that the public associates with the mark and the products or services marked by it; and
- degree of distinctiveness and exclusivity of the trademark in question.

A trademark can be enforced against a domain name as well as against a trade name, in such a way that third parties cannot register a domain name or a trade name that contains a trademark registered by another person. Besides that, there is no specific provision in Brazilian Law regarding the use of trademarks in metatags. In this view, it is understood that this use is allowed, so that it cannot be enforced. However, depending on the situation, the trademark owner may be able to enforce against this use through other provisions, such as unfair competition.

The Brazilian Industrial Property Law grants to the registrant of a trademark, or an applicant for a mark, the guaranteed right to exclusive use of the mark throughout the national territory, and also having the right to care for its material integrity or reputation. In this way, any misuse and/or unauthorized use, including on social media, can and should be opposed by the trademark owner. It is important to emphasize that the Brazilian Industrial Property Law presents some limitations to the owner's exclusive use of the trademark. For example, the law prohibits the owner from preventing accessory manufacturers from using the mark to indicate the use of the product, provided they obey fair competition practices and prevent the mention of the mark in speeches, scientific or literary works or in any other type of publication, provided that it is without any commercial connotation and without prejudice to its distinctive character.

As a rule, comparative advertising using a third party's trademark is allowed in Brazil, as long as the comparisons make use of objective facts or data that can be proven and, further, that they do not create a risk of confusion and do not violate the reputation of the third party's trademark. The Brazilian Superior Court expressed its opinion on this matter in a famous case, in which the battery trademark *Rayovac* used the competing trademark *Duracell* in an advertisement, claiming that both had the same life span. The Brazilian Superior Court held that the advertisement was promoted in accordance with what is allowed by the advertising market, pointing out that the right of the trademark holder is not absolute and unrestricted.

Brazilian legislation does not specifically set the limits of trademark use in parodies. Thus, in some cases, the Brazilian Copyright Law is subsidiarily applied, since it better determines the limits of parody, clarifying that parodies that are not true reproductions of the original work, nor that discredit it, are permitted. But, as a rule, the Brazilian courts understand that such use is seen as trademark infringement, making a broad interpretation that assures the owner of the trademark to care for its reputation.

A trademark owner can take action claiming both trademark infringement and unfair competition for the same set of facts, as well as for parasitism claims.

The piracy industry is mainly online.

The lack of regulation of position marks in Brazil is also an issue to be overcome, particularly for luxury brands. Such regulation is extremely necessary and welcome, as there are several cases of position marks that are not granted by the Brazilian Trademark Office (BTO) due to lack of regulation and, in these cases, the consequences are harmful to their holders, since third parties in bad faith can take advantage and make use of them freely.

2. COPYRIGHT

2.1 Sources of law

The main source of law governing copyright is Brazil's Copyright Act (LDA, Law No. 9.610/1998).

It should be noted that although Brazil's main source of law is indeed Law No. 9.610/1998, which regulates copyright and related rights (performers, artists, phonographic producers and broadcasting companies), other specific and

complementary legislation is still in force in Brazil in connection with copyright, which has not been expressly or tacitly revoked by Law. 9.610/1998. In this regard, a variation of other specific legislations, as well as Brazil's Civil Code (Law No. 10.406/2002) are still in force.

In addition, although Brazil's current Copyright Act (LDA) was revised and updated in 2013 by Law 12.853, said revision focused on changing the regulation related to management of collective copyrights.

Copyright protection is also guaranteed by the Brazilian Constitution, in subsections XXVII and XXVIII of section 5.

Copyright is also subject to supranational provisions contained mainly in International Treaties regarding copyright to which Brazil is a contracting party, such as the Berne Convention.

When in conflict the order of priority of relevant sources is specific regulations to general regulations, such as the Brazilian Copyright Act and the Brazilian Constitution.

2.2 Substantive law

The following are protected under copyright: the texts of literary, artistic or scientific works, lectures, addresses, sermons and other works of the same kind; dramatic and dramatic-musical works; choreographic and mimed works whose stage performance is set down in writing or otherwise; musical compositions with or without words; audio-visual works, with or without accompanying sounds, including cinematographic works; photographic works and other works produced by a process analogous to photography; drawings, paintings, engravings, sculptures, lithographs and works of kinetic art; illustrations, maps and other works of the same kind; drafts, mock-ups and three-dimensional works relating to geography, engineering, topography, architecture, park and garden planning, stage scenery and science; adaptations, translations and other transformations of original works, presented as new intellectual creations; computer programs; collections or compilations, anthologies, encyclopedias, dictionaries, databases and other works which, by virtue of the selection, coordination or arrangement of the subject matter, constitute intellectual creations. Said lists of copyrighted works is open and not thorough.

Fashion and accessory design may be copyrightable in Brazil as they can be considered as an "artistic expression". However, such will only be considered as copyrightable if they are invested with a great deal of creativity and originality.

Regarding the requirements for originality and creativity, we emphasize that these are met as long as the object contains "the creator's personal brand". The so-called "creator's personal brand" can occur even in the event of the use of elements already known to the public, provided that, with these elements, a new, individualized work is created, which is not confused with those existing ones on the market.

In this respect, to meet the basic requirement of originality, the object must have its "own contours, in terms of expression and composition" so that the work is protected by copyright.

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In Brazil, copyright is recognizable through author’s material (economic) and moral rights. The author’s material rights encompass the right to use the literary, artistic, or scientific work, to profit of such and to dispose of it. The author’s material rights include the authorization for partial or complete reproduction, adaptation, translation, incorporation into a phonogram or audio-visual work, distribution rights.

The author’s moral rights include the right to claim authorship of the work at any time, to have their name, pseudonym or conventional sign to appear or be announced as being the author’s when the work is used, to keep the work unpublished; to ensure the integrity of the work by objecting to any modification or any act liable in any way to have an adverse effect on the work or to be prejudicial to their reputation or honour as author; to amend the work either before or after it has been used; to withdraw the work from circulation or to suspend any kind of use that has already been authorized where the circulation or the use of the work is likely to have an adverse effect on the author’s reputation or image; to have access to the sole or a rare copy of the work that is lawfully in a third party’s possession with a view to preserving the memory thereof by means of a photographic process or similar or an audio-visual process, in such a way that the least possible inconvenience is caused to its possessor who shall in any event be indemnified for any damage or prejudice suffered.

The author of copyrightable work is the natural person who created it, that is, the individual.

Despite that, LDA has excepted the creations resulting from “work for hire” relationships. It is important to note that such a relationship must be established within a written contract. Moreover, the Law also accepts the authorship of legal entities in regard to the “collective works”, that is, the works of the mind created under the initiative, instructions and responsibility of a legal entity, who publishes it under its name or mark, and consists of contributions by two or more authors whose work is merged into a self-contained creation.

With regard to its employees, legal entities shall acquire the rights to the works created by the employee under the expressed provision to be included in the employment contract. It should be noted that said provision shall be explicit regarding the scope of use of the copyrightable work. In case the employee is hired to create a specific work, the legal entity shall have the rights related to such within the scope of the employment contract. It is important to emphasize that the employee’s moral rights will always remain with the employee, as these cannot be waived or assigned. The same applies to the creations of the legal entities’ consultants, shareholders, directors and suppliers.

The copyright assignment shall be written, otherwise it will not be valid. Moreover, the assignment agreement must be executed through a marginal note within the registration of the copyrightable work or, when the work is not

registered among the appropriate entities, the assignment must be registered in a Registry of Deeds and Documents. Important provisions regarding the assignment of economic rights of copyrightable work are those in which the assignment, when not explicit, is presumed to be onerous, as well as that the assignment of both the author's work, as well as of their future work, shall not exceed more than five years.

Moral rights are inalienable and irrevocable. However, upon the author's death, their moral rights are transferred to their successors.

Material rights over copyrightable works last 70 years, counted from 1 January of the year following the author's death. Then, the work enters the public domain. It should be noted that regarding copyrightable works by anonymous or pseudonymous authors, the material rights shall be exercised by the person who publishes, and within 60 years counted from 1 January of the year following the work's first publication. Regarding moral rights, these never expire and are indefeasible. Upon the death of the author, they are transferred to their successors. In addition, the Brazilian Copyright Act prescribes that it is also the State's obligation to safeguard and protect the integrity and authorship of a work that has fallen into the public domain.

2.3 Enforcement

The Brazilian Legal system does not require the registration of copyrightable works for them to be protected or enforced. The only legal requirement that authors must comply with in order to be granted protection over their artistic, literary or scientific work is that it be a result of the author's mind, expressed by any means.

Although not required, registration of a copyrightable work is highly recommended as it does contribute to the enforcement of such rights. In Brazil, copyrightable works may be registered among the following: Brazil's National Library; School of Music at the Federal University of Rio de Janeiro; School of Fine Arts of the Federal University of Rio de Janeiro; or at the Federal Council of Engineering, Architecture and Agronomy.

The protection of industrial design objects through copyright is a very controversial subject in Brazil as it was not prescribed by any regulation. In that regard, intellectual property in Brazil has long been divided whether an intellectual work can be protected under more than one institute, the so-called "overlapping of rights or overlapping protection", with some arguing that allowing copyright protection in industrial design objects would be prejudicial to competition as this extends the duration of the protected work.

However, others consider that, if industrial design objects, because of their aesthetic form, are subject to being contemplated as art objects, they will indeed be entitled to protection under copyright in Brazil.

In this regard, it is important to note that Brazilian Courts have already recognized the possibility of copyright protection over industrial design objects.

Copyright infringement can be total or partial. Under the Brazilian legal system, it is not necessary to evidence the exact copy of the work, rather to evidence the substantial similarity thereof and the unauthorized use by the infringer.

A trademark reproduces a copyrightable work, it may not be registered according to Brazilian Industrial Property Law. Likewise, copyright can indeed be enforced against the misuse of a mark that reproduces or imitates a copyrightable work.

Copyright can be enforced against a registered design/design patent, patent, domain name, trade name, a pseudonym and other IP rights.

Although the Brazilian Internet Bill of Rights (Law. No. 12.965/2014) has established that the providers of internet applications, such as social media, are only liable when they do not comply with a court order to remove unauthorized content, said provision was excepted by the very same regulation with regard to copyright infringement, which was supposed to be regulated under a specific regulation which, however, was never edited.

In this regard, in light of the absence of the specific regulation on copyright infringement through social media, the enforcement of copyright is made through cease-and-desist letters and application providers shall be considered liable if, after duly notified by the right owner, they failed to remove the infringing content, in spite of specific court order to do so.

Copyright may also be enforced against unauthorized comparative advertising through the filing of an infringement lawsuit, on the grounds of copyright infringement (potentially coupled with practice of unfair competition) as well as through the filing of a complaint before the Conselho Nacional de Autorregulamentação Publicitária (CONAR), Brazil's National Advertising Self-Regulation Council, which is responsible for supervising and regulating advertisement in Brazil.

In accordance with art. 47 of the LDA, paraphrases and parodies shall not be considered as copyright infringement as long as they are not actual reproductions of the original work and are not in any way derogatory to it. In this regard, it is important to state that the LDA has not conditioned parodies concerning its commercial use or not, the Brazilian legislator having chosen to privilege the constitutional principle of free speech.

There are some exceptions to Copyrightable works as established in article 46 of the Brazilian Copyright Law.

In Brazil, the doctrine of fair use does not exist, as the Brazilian Copyright Law has adopted the French doctrine with regard to copyright, in which the rights protected are related to the author and not the work itself. However, the situations prescribed by the LDA as non-infringement of copyrights indicate that Brazil does indeed except copyright with regard to the right of information and cultural access, as long as the use of the copyrightable work does not detrimentally affect the author or their regular exploitation of the work.

Considering that Brazil acknowledges both moral and economic rights of copyrightable work, it is important to note that the author's moral rights are always enforceable as they do not expire, ever. Although enforceable, the right to obtain compensation over said infringement of the author's moral rights expires 3 years after the violation, considering that the statute of limitations applicable to compensation related to copyright infringement is the one prescribed by Brazil's Civil Code, as the Copyright Law did not establish said deadline.

With regard to the economic rights, if the violation is due to breach of contract, the statute of limitations is of 5 years. If the violation does not result from breach of contract, the statute of limitations is of 10 years. Compensation over the violation of economic rights also expires within 3 years of the violation.

The main issue faced by luxury brands related to copyright protection of its products is regarding the fact that clothing apparel in general is deemed as too utilitarian and of industrial application to be recognizable as copyright protected. Although some courts have already recognized copyright protection on luxury handbags, the great controversy lies in whether luxury products that might be granted copyright protection are perceived, not as a contemplation object, but rather a utilitarian object, with a functional/practical character. In this regard, copyright claims over luxury items shall focus on the aesthetic aspect of the product and whether it has achieved the “contemplation” aspect.

3. DESIGN

3.1 Sources of law

Although design protection was acknowledged by the Brazilian Constitution, the main source of law that regulates design in Brazil is Title II of the Brazilian Industrial Property Law, which establishes general provisions on registration requisites, registration procedure as well as nullity procedure, and scope of protection.

International Treaties such as the Paris Convention for the Protection of Industrial Property and Agreement on Trade-Related Aspects of Intellectual Property Rights also regulate designs in Brazil.

When in conflict, the different applicable sources are prioritized as follows: the LPI and ratified international treaties in their scope of application.

3.2 Substantive law

In Brazil, design protection shall be granted over products that bear new and original ornamental plastic form or over the ornamental arrangement of lines and colours of a product, resulting in a new and original visual external configuration, with industrial appliance. It is important to emphasise that in Brazil designs must be registered in order to be granted protection and be enforceable.

In order to be granted protection, the design must be new and original.

With regard to the new/novelty requisite, the LPI clarifies that designs shall be considered new whenever they are not encompassed by the so-called “state of the art”, which consists of everything made available to the public prior to the filing date of the application, in Brazil or abroad, by use or by any other means, with the exception of the “grace period”, that is, if the disclosure of the design was made 180 days prior to the filing of the design in the BPTO either by (i) the inventor; (ii) the BPTO; or (iii) by third parties, based on information obtained directly or indirectly from the inventor or as a consequence of actions taken by him.

The originality requisite shall be considered fulfilled whenever the design results in a distinctive visual configuration, in connection to other prior objects.

In this regard, it should be noted that it is irrelevant whether the design results from a combination of a known element.

Rights to designs created by employees can be acquired by legal entities through express provisions in the employment contract.

Similarly, legal entities can acquire the rights to designs created by consultants, shareholders, directors and suppliers through contract.

In order to be valid, the assignment agreement must indicate the valid registration number of the design and such assignment must be registered before the BPTO. The payment shall also be made through a fixed fee, agreed between the parties.

It is important to include crucial clauses when drafting a design assignment agreement such as:

- a confidentiality clause regarding determined information that employees, consultants, shareholders, directors and suppliers will obtain regarding such design;
- exceptions to the assignment, if any; and
- conflicting employment and non-competition covenants.

In Brazil, designers are not entitled to “moral rights”.

The protection on industrial design registrations lasts for a period of 10 (ten) years from the date of filing, being extendable for 3 (three) successive periods of 5 (five) years each. In this connection, industrial designs may be enforceable for 25 years from the filing of the design in the BPTO.

Unregistered designs are not granted protection/are not enforceable in Brazil.

3.3 Enforcement

In Brazil, design infringement does not require the design to be identical to the registered design, but that the design has substantially the same design/format as the registered design. In this regard, the level of novelty of the registered design - how substantially similar is the protected design to the so-called “state of the art” - is taken into account as well as the existence of similar registrations. That is because if there are two similar designs registered, sufficient novelty is presumed in said designs that might prevent the finding for infringement regarding the new design that is just as similar.

A design can be enforced against a trademark (in case a trademark misuses the registered design, it may be enforced), a registered design/design patent, a patent and other IP rights.

In case there is an unauthorized reproduction of a registered design on social media, such use is considered infringement and the holder of the rights may send cease and desist letters requesting the takedown of the infringing content. In accordance with the Brazil’s Internet Bill of Rights, application providers are, however, only liable if, after court order to do so, the application providers do not remove the infringing content of the social media. It is important to note that the court order shall indicate the URL containing the infringing content for the takedown.

A design may be enforced against unauthorized comparative advertising through the filing of an infringement lawsuit, on the grounds of copyright infringement (potentially coupled with practice of unfair competition) as well

as through the filing of a complaint before CONAR, which is responsible for supervising and regulating advertisement in Brazil.

In principle, a design can be enforced against its unauthorized use in parody. Likewise, regarding comparative advertising, it should be assessed in each specific case whether the use in parody is damaging to the holder and is within the scope of freedom of speech.

A design may not be enforced against third parties that use it in an experimental or private manner, without commercial use/gain. Designs are also not enforceable if used on a product manufactured in accordance with a product that was introduced to the domestic market directly by the holder with his consent.

The BIPL also recognizes the unenforceability of the design registration by the prior *bona fide* users who were using the design in good faith prior to registration. In this case, *bona fide* users are entitled to continue to use the design in the same manner and under the same conditions as the design was being used before, without any burden to the prior *bona fide* user.

In addition, the Brazilian Industrial Property law allows arguing the nullity of the industrial design as a defence in infringement actions. In this regard, the defendant in a design infringement action is allowed to argue that the design registration being enforced is null as it does not fulfil the legal requisites for registration and thus, cannot be enforced. In this regard, it is important to emphasize that the decision in an infringement action that finds for the unenforceability of the design, since it does not meet the legal requirements, does not implicate in the nullity, *erga omnes*, of the design registration, but rather recognizes that in that specific case, the design cannot be enforced against the infringer.

The “repair clause” doctrine does not exist in Brazil.

Designs are not enforceable in the situations listed above prior *bona fide* user, private/experimental non-commercial use or when the design does not meet the legal requisites prescribed by the BIPL. Design is also not enforceable after the registration, having entered the public domain. In this regard, designs may be enforceable for 25 years from the filing of the design with the BPTO.

It is possible for a design holder to take action claiming both design as well as copyright infringement for the same set of facts. However, the multi protection of an object, such as industrial design and copyright is still a controversial subject for specialists and the courts. The Courts, however, recognized the overlapping protection of an object protected as both under copyright and industrial design. With this connection, claim of unfair competition is also possible and usual in relation to industrial design claims.

The current issue luxury brands face in expanding their design refers to the registration of new designs, as multiple registration of similar designs may diminish their protection, considering that the more registrations made with a small variation, the more incorporated into the “state of the art” the design becomes. This allows competitors to imitate it.

In addition, recently, the Brazilian Trademark Office (BTO) started a Public Consultation on the examination of applications for registration of Position Marks, enabling interested parties to contribute with criticism and suggestions regarding the regulation of the subject.

Such regulation is extremely necessary and welcome, as there are several cases of position marks that are not granted by the BTO due to lack of regulation and, in these cases, the consequences are harmful to their holders, since third parties in bad faith can take advantage of make use of them freely.

Fortunately, the public consultation carried out has the objective of hearing the opinion of specialists and those interested in the subject, so that clear rules can be created to officially regulate the matter in Brazil, thus modernizing the Brazilian Trademark system. Once the final version of the Technical Note has been approved, it will apply to applications already filed before its publication, which are pending examination by the INPI and which qualify as position marks.

It is estimated that the regulation of the subject is scheduled to come into force in 2021, although the implementation date has not been scheduled.

4. RIGHT OF PRIVACY, PUBLICITY AND PERSONAL ENDORSEMENT

4.1 Sources of law

An individual has the right to control the use of their own name, image and any other private information. In this regard, the Brazilian Constitution determines, in its chapter on Fundamental Rights and Guarantees, that the privacy, private life, honor and image of a person are inviolable. Also, the Brazilian Civil Code determines, regarding the Personality Rights, that a person's name cannot be used in commercial advertising without his or her authorization.

Brazilian law does not contain specific provisions for what is called "Right of Publicity", but rather for "Personality Rights", which are considered Fundamental Rights, and for personal data. The main sources of law for these matters are the Brazilian Constitution, the Brazilian Civil Code (Law No. 10.406, 2002), the Brazilian Internet Bill of Rights (Law No. 12.965, 2014) and the Brazilian General Data Protection Law (Law No. 13.709, 2018).

4.2 Substantive law

Any human being has the right of personality, that is, the right to have inviolable privacy, name, private life, honor and image. Always bear in mind that if the personality rights of a deceased person are being violated, the spouse, ascendants, or descendants are legitimate parties to protect these rights.

In Brazil, the existence of a natural person ends with death. However, the Brazilian Civil Code understands that it is possible for a deceased person to suffer violation of personality rights, such as violation of name, intimacy, honor, and private life. Therefore, the spouse or any relative in a direct line, or collateral to the fourth grade is allowed to demand an end to such violations. Furthermore, the Brazilian Civil Code also authorizes these relatives to prohibit the disclosure of writings, the transmission of words, or the publication, the exhibition or use of the deceased's image, to their request and without prejudice to any compensation that may be due, if affects their honor, good name or respectability, or if it is intended for commercial purposes. Besides that, the Brazilian General Data Protection Law also strengthens the legitimacy of a relative/spouse to request the non-disclosure and or the end of the processing

of a deceased relative's data, since this new law makes it clear that personal data is any information "related to an identified or identifiable natural person", so that some information of the deceased may help to identify the spouse or some relative of the deceased.

An individual can assign their right of publicity in whole or in part and it shall be inserted in the assignment agreement.

An individual can license their right of publicity and such license can be exclusive or non-exclusive. Such provision must be inserted in the assignment agreement.

To be valid, according to Brazilian Law, an agreement for the assignment/license of the right of publicity should be a typical contract, having its own unique requirements. It presents as main elements the parties, the object and written form. It can be free or onerous and, thus, respectively, it will be a unilateral or bilateral contract. The assignment/license can be partial or total.

In case of contractual breach, the licensor may withdraw consent to use the licensing object.

In the event that the licensor dies while the license agreement is still in force, his rights and obligations are transferred to his successors. This will only not occur in the event that it is specifically provided for in the contract, since the agreement binds the successors.

The same occurs in the case of the death of the Assignor: his rights and obligations are transferred to his successors.

The heirs must comply with the requirements and clauses of this contract until its termination.

If the right of publicity is related to the image of the transferor / licensor, then 70 years, counting from 1 January in the year following the death of the transferor / licensor.

4.3 Enforcement

The privacy, private life, honor and image of a person are inviolable, and can be enforced against commercial use and use that affects a person's honor, good name or respectability.

The misuse of a person's personal information can be countered regardless of who that person is and/or whether that personal data has any commercial value.

Regarding the processing of personal data, the Brazilian General Data Protection Law determines in Article 7 the "legal bases", that is, the legal grounds that can be used to justify the processing of personal data.

One of the main issues luxury brands should be concerned with when working with celebrities relates to the end of the authorized period of use, so what has been agreed should be checked. Often this agreed period is ignored and future use, without a new authorization, can be an issue.

5. PRODUCT PLACEMENT

Despite there being no current legislation/specific regulation, product placement is common in Brazil. The only regulation is provided by Brazil's National Advertising Self-Regulation Council that imposes that any

advertisement, including product placement, shall be identified/informed to the public, as advertisement.

In this regard, we cite as general provisions the obligation of a true representation of the product as well as that the ad/placement must be carried out in such a way as not to abuse the consumers' trust, not exploit their lack of experience or knowledge, and not benefit from their trust.

If a party fails to perform an agreed product placement the remedy for the brand owner shall depend on the clauses of the agreement. In case the agreement provides that the other party may cease the communication, such shall be possible. If not, damages are available.

The main concern with regard to product placement is that such is done in a manner that it does not overexpose the product or the brand, so it does not lose the "aura of luxury".

6. PROTECTION OF CORPORATE IMAGE AND REPUTATION

In Brazil, right of privacy/image/reputation is encompassed as "personality rights", with constitutional protection. Although there is some controversy among Brazilian specialists that consider the right of privacy/image as an extremely personal right, only applicable to the natural persons, the right of privacy/protection of reputation/ image of legal entities and corporations is indeed recognized by the Brazilian Courts, Brazil's Superior Court of Justice even having recognized the possibility of moral damages to be awarded to legal entities/corporations due to violation of their reputation/image.

With regard specifically to data/privacy, Brazil has only recently edited Law No. 13.709/2018, Brazil's General Law of Data Protection (LGPD) which aims to regulate and protect the collection, treatment, and use, by individuals, legal entities and/or corporations, of the personal data of individuals.

The law has specifically prescribed that the data protected under said regulation is only of natural persons and its scope is not limited to the data collected online, but rather any and all personal data, including sensitive data.

Currently, there is no equivalent regulation about the protection of data of legal entities/ corporations in Brazil. In this regard, the data of legal entities and corporations are most likely to be protected under trade secret and provisions on unfair competition.

The Brazilian legislation has not specifically provided for requisites for the protection of corporate image/reputation of legal entities/corporations. However, precedents have established that said protection shall consider the fame/notoriety of the corporation.

Moreover, the provisions on unfair competition practice of article 195, II of BIPL also aim to protect corporations' reputation/image, such as when a competitor discloses false information on the legal entity/corporation.

It is generally possible to include specific clauses in agreements aimed at protecting the corporate image/reputation of one of the parties. With regard specifically to luxury products, it is very common and recommended that

legal entities and corporations should include in distribution agreements a set of high standard requirements with regard to point of sales in order to preserve the image of luxury brands associated with the goods. Other provisions allowed in the Brazilian legal system that may be included in agreements aimed at protecting the corporate image/reputation of luxury brands are:

- Prohibition to sell the products to resellers whose image is below a certain defined standard.
- Prohibition to sell below a certain price or to do so outside of specific time periods.
- Prohibition to buy non original – but otherwise legitimate – spare parts and components.

The stipulated fine shall not be fixed at an abusive amount, that is, when obviously excessive or derisory. In this case, the Trial Court Judge may lower the amount to a sum that he considers fair.

Resale is one of the biggest concerns for luxury brands in the secondary market. That is because the resale may allow the depreciation and prestige of the luxury goods.

AUTHOR BIOGRAPHIES

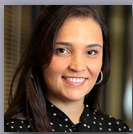


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Luiz Edgard Montauray Pimenta is a trial lawyer and the president of ABPI (Brazilian Association of Intellectual Property) since 2018. Luiz leads the IP litigation team of Montauray Pimenta, Machado & Vieira de Mello and has been representing national and international clients for over 30 years in a wide range of IP disputes covering various technologies and areas in the Federal and State Courts of Brazil.

Recognized by the most important international rankings, Luiz is an active speaker at IP events in Brazil, USA, Latin America and Europe and is the author of numerous publications in his area of expertise.



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Marianna has been working with Intellectual Property since 2000 is one of the heads of Montauray Pimenta, Machado & Vieira de Mello's litigation department. Marianna's experience covers all aspects of IP with special emphasis on civil litigation involving trademarks, copyright, industrial designs, domain names and unfair competition & trade dress, as well as in the development and enforcement of strategies for protecting these rights. She has been representing and advising clients in said fields at several Federal and State Courts across the country. In addition to participating in international conferences and seminars as a speaker or moderator, Marianna is constantly recognized for her practice in the most renowned rankings in the area.