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THE (UN)AVAILABILITY OF THE AUTHOR'S MORAL RIGHT: IS THE DISPOSITION OF THE AUTHOR'S MORAL RIGHT POSSIBLE?

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ABSTRACT

This article explores the relationship between moral rights and the social function of intellectual property. The methodology involves a historical analysis of the evolution of copyright from ancient Greece to the modern context, highlighting legislative frameworks and international treaties such as the Berne Convention. The research examines the Brazilian legislation, especially Law 9.610/1998, and questions the inalienability of the author's moral rights, proposing a possible flexibilization to meet contemporary economic demands. The central discussion focuses on the social function of moral rights and the possibility of their transferability, arguing that greater flexibility could benefit authors economically. The article concludes that the legal protection of copyright must balance the moral integrity of the author with the needs of the market, promoting both innovation and legal certainty.

Keywords: Copyright, Availability, Transmissibility, Social Function, Censorship.

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INTRODUCTION

For the premises of this article, it is possible to establish that private property, in the Western world, *is* a cornerstone for its development, especially with the junction of Greek philosophy, Roman Law and Judeo-Christian Ethics. (Dias; Pagani, 2022).

Since the end of the nineteenth century, there has been a clear outline of the importance of property, especially due to the clear influence of Karl Marx in the European philosophical construction around a Social Democracy and the construction of a Socialist Society (without a State, differentiating itself from the communist stage), in the direct influence of Jean Jacques Rousseau, when he understood that *justice* is to give what belongs to each one (so, every living man should own a portion of land). (Strauss, 2016).

Jean Jacques Rousseau (2014), John Locke (2007) and Thomas Hobbes (1841; 1998) are directly influenced by the Platonic vision of justice, that is, deriving their works from the notions established by Plato: To give what belongs to each one; Acting correctly or even the dominance of the stronger over the weaker (Plato, 2017).

Be that as it may, it is credible to understand that property, whether communal or private, is a central element in any legal system, across the political spectrum, establishing itself as a basic rule of coexistence between beings. Whether philosophically or anthropologically, man has been related to property since the most rudimentary societies, ideally establishing himself as a *way of separating what is mine and what belongs to the other*, in addition *to ensuring the protection* of what comes to be *understood as mine*. (Pagani, 2019).

There is only Law if there is Private Property. This statement can be extracted from Pachukanis (2017), a Soviet jurist — who was persecuted, imprisoned and killed by the Stalinist regime.

Once the parameter of private property is established as a central element of the legal system, whatever it may be, it is possible to establish such protections for the most varied properties, including intellectual property and, more specifically, copyright.

Authorial property, as it became known in Brazil, originates from the word *Urheberrecht* (Ascensão, 1997, p. 16), establishing the notion *of the protection of artistic reputation* and the *integrity of the intellectual work*, in addition to the protection *of objects of commerce* (available) and the *moral right* (inalienable) linked to the person of the author, temporarily or permanently (Strauss, 1955, p. 506).

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In this sense, it is possible to establish the first premise of this article: is *the* Author's Moral Right really unavailable? Unavailable in relation to what? Which protection does it meet? Does it perform a social function? The premise here *is not to contradict the established Law*, but to seek to establish what were the bases of a certain protection and relate it to the primary function of Law: Legal Certainty.

The integrity of the work is not discussed here, much less whether there should be protection of intellectual property, it should be emphasized, but whether or not there is a possibility of relativizing *the notion of inalienability* of Copyright, in view of the current scientific and economic development.

HISTORICAL CONSTRUCTION OF THE AUTHOR'S MORAL RIGHT

It is necessary to establish that, in the ancient world, *the idea of orality* in artistic works was common[4], however, in Greece, it was possible to recognize the beginning of an *intellectual property* of artistic performances during the middle of the first millennium after Christ, taking as an example the city of Athens, when sponsoring theatrical works, through prizes granted to the authors of the best works performed in religious festivals (Geller, 2000, p. 210-212).

It is necessary to establish that intellectual property has an *intrinsically* abstract element, that is, *there is no scarcity or the physical element*, and *the circulation of literary works* through copying is common. During the Roman Empire, it was common[5] to buy slaves for the production, maintenance, transcription, and correction of *specific papyri* (Geller, 2000, p. 213). The protection, then, of authorial property began to be outlined from the commercialization of legal works (legal doctrines) and the protection of the return on investment of publishers/authors (Dock, 1963, p. 48-50).

In Imperial China, during the first millennium, since the creation of *paper*, there is a clear protection of Copyright in specific cases, since, with its *new invention*, the cost of *copying has become increasingly higher*. In addition, the request for the protection of works by authors was recurrent to the Chinese authorities, including for the protection of *their copies of their own work* (Alford, 1995).

[4] Homer's Iliad and Odyssey are two fictional works of the Greek world that were passed through orality, until they crystallized into a written document.
[5] It is interesting to note that Gaio, in order to protect the *property* of a work of art, was not the one who was carrying the painting, but the one who painted it, on the grounds that what was most valuable was the painting and not the painting (Masterson, 1940, p. 623).

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On the other hand, the protection of copyright in the Chinese empire also favored the authorities, especially for the prohibition of the circulation of certain works that were dangerous to the Chinese regime (Alford, 1995, p. 13-17).

In the high and low Middle Ages, this conception was not entirely different, with the *economic protection* of the artistic work, but also the restriction of the circulation of *certain ideas*, acting as *censors* by controlling the manufacture and literary trade (North; Thomas, 1973, p. 79-89). This control was possible in the face of the fall of the Roman Empire and the concentration of power in the Catholic Church, after the ninth century AD[6], especially by controlling the works that were at the "service of God and the Church" (Masterson, 1940, p. 623).

However, Salathiel Masterson (1940, p. 624) establishes that:

> In this atmosphere there was no place for a concept of individual literary property, although it is no doubt true that most manuscripts were highly prized and were carefully guarded as valuable property by the monastery itself. This, however, was ***not a concept of property in the creation of literature but rather in a reliable text which represented expensive materials and laborious hours.*** The property was the particular manuscript and not the form of ideas it contained (Grifo do Autor).

This notion is fundamental to understand the protection of copyright during Medieval Europe, since, in fact, the integrity of the work was not at stake, but rather the protection of the materials and the hours worked by the scribes[7]. Peter Burke (2003, p. 119) describes that intellectual property, during the medieval period, was not considered *untouchable* or subject *to protection of integrity*, but rather as being:

> (...) The text is seen as a common property because each new product derives from a common tradition. This view was the predominant one in the Middle Ages, as the tradition of copying shows. Scribes who copied manuscripts apparently felt free to make additions and alterations. Similarly, scholars writing "new" works felt free to incorporate passages from their predecessors. The tendency towards more individualistic attitudes was stimulated by the possibility of printing, which helped at the same time to fix and disseminate the texts.

In this scenario, it is possible to understand the protection of copyright as ideological control (censorship) and the economic protection of scribes, above all, due to the strong

[6] This is due to the persecution of Christians by the Roman Empire, exiling them to the region of Greece, with Greek being the official language of the church until the eighth century.
[7] "University regulations were made governing the price (which was more often than not a rental price), the number of lines to a page, and the material to be used. Here again, however, the scribes mainly confined themselves to copying the productions of the past, and the price paid was for the manual labor of reproducing and not for the creative labor of originating" (Masterson, 1940, p. 624).

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influence of the papermakers' guilds, since at least 1403 — 70 years before the creation of the *Gutenberg press.* This influence was so great that the papermakers, after political pressure around the British royal family, approved the *Stationer's Royal Charter* in 1557. (Masterson, 1940, p. 625).

The control was so great that the protection of Copyright was restricted to internal disputes between the papermakers, as Pamela Samuelson (2003, p. 323) explains:

> Members could enter in the guild's register the names of books in which they claimed printing rights, whereupon other guild members were expected to refrain from publishing the same book. A private enforcement system enabled guild members to resolve disputes amongst themselves over rights in particular books. While some printers in this era were surely noble fellows who sought to enlighten the public, the private copyright system of the pre-modem era mainly functioned to regulate the book trade to ensure that members of the guild enjoyed monopolies in the books they printed.

The system of *copyright protection*, in fact, in the *pre-copyright era* had as its objective the economic protection of those who sold such works and the ideological censorship of *which books could circulate and which could not*[8].

From 1710 onwards, after the establishment of a new *statute of Queen Anne*, there is the beginning of the modern era, in particular, on *freedom of expression* (the repression and censorship of paper makers) and the end of the monopoly of paper makers over the publishing market, stimulating competition between presses and bookstores, establishing protection for authors and not for publishers (Samuelson, 2003, p. 324), in particular, by the institution of *the temporality of copyright*, establishing 14 years of protection for works to be commercialized and 21 years for works already commercialized (Masterson, 1940, p. 630).

Other innovative points were the promotion of knowledge, the encouragement of the writing and publication of books, as well as the establishment of copyright only in books to be released, the (un)control of the protection of all works, but only in relation to printing, in addition to the responsibility of publishers to deposit their copies in designated bookstores and the prohibition of overpriced prices (Samuelson, 2003, p. 324-325).

[8] "But of these sophisms and elenchs of merchandise I skill not. This I k now, that errors in a go o d government andina bad are equally almost incident; for what magistrate may not be misinformed, and much the sooner, if liberty of printing be reduced into the power of a few? But to redress willingly and speedily what hath been erred, and in highest authority to esteem a plain advertisement more than others have done a sumptuous bride, is a virtue (honoured Lords and Commons) answerable to your highest actions, and whereof none can participate but greatest and wisest men" MILTON, John. **Areopagitica.** Rockville: Manor, 2008. p. 62.

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There is a direct influence of the Statute of Queen Anne not only in countries such as Denmark, American Colonies (Pre-Independence), Prussia, but also directly in France, being crystallized by *the right to freedom of the press*, established in the Assembly of 1791 and 1793, after the French Revolution (Geller, 2000, p. 226).

In France, the right to freedom of the press *was recognized*, even more so, recognizing the operation of public theaters, as well as the control of the work by its own author, in 1791, and, in 1973, the control, distribution and sales of copies to the author and no longer to the publishers was established (Geller, 2000, p. 227).

Although there was a *loophole* in the Statute, in particular, about who would hold such rights, French laws resolved such issues with the creation of the *public domain*, that is, after the temporality of Copyright ceased, the work could be freely copied and distributed. In addition to the creation of the public domain, there was the creation of protection mechanisms in relation to piracy, in 1804, with the institution of the French Civil Code (Geller, 2000, p. 227-228).

In the midst of global industrialization, during the nineteenth century, a new framework for the protection of Copyright was necessary, especially for a transnational construction of publications and protection of works and authors, thus reaching a *mass market* (Geller, 2000, p. 228).

In this sense, Paul Geller (2000, p. 229) understands that:

> From the nineteenth to the twentieth century, media technology improved in great leaps forward that allowed cultural goods to be made in more easily reproduced forms and to be marketed more broadly and quickly. Culture industries arose to exploit these goods, but they had to secure returns on their investments to continue production cycles. At the same time, the very power of new media increased risks of piracy. Authors in turn had new concerns for their reputations on the mass market.

Since then, not only literary works were increasingly mass-produced, but, in the face of technological evolution, there was the expansion of other artistic media such as photography, cinema, radio, television, and many other media that needed, then, a new paradigm to protect the Author's Moral Rights, especially due to the growing confusion between *copy and inspiration*.

In this scenario, the Berne Convention was born, which began in 1886, completed in 1914, revised in 1928, 1948, 1967 and 1971, the *moral rights of the Author*, especially in Article 6 bis, where it was established that, *in verbis*:

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> (1) Irrespective of the author's property rights, **and even after the transfer of those rights, the author retains the right to claim paternity of the work and to oppose any distortion, mutilation or damage to the work that is detrimental to his honour or reputation**.
> 2) The rights recognized to the author by virtue of paragraph 1) are maintained, after his death, at least until the extinction of the patrimonial rights and are exercised by the natural or legal persons to whom the aforementioned legislation recognizes the quality to do so. However, those countries whose legislation in force at the time of ratification of or accession to this Act does not contain provisions ensuring the protection after the death of the author of all the rights recognized under paragraph 1 above, reserve the right to stipulate that some of these rights shall not be retained after the death of the author.
> (3) The remedies for safeguarding the rights recognised in this Article shall be governed by the law of the country in which protection is sought.

That said, then, in a way, *the idea* of *the right of paternity* (the ownership of the work) and the *right to the integrity of the work is born* (Strauss, 1955, p. 507).

It consists of saying, in general terms, that:

> (1) The paternity right. The paternity right is held to consist of the author's right to be made known to the public as the creator of his work, to prevent others from usurping his work by naming another person as the author, and to prevent others from wrongfully attributing to him a work he has not written (...) (2) The right to the integrity of the work. The author has the right to have the integrity of his work respected, i.e., he may prevent all deformations of it." By virtue of this right the author is also deemed to be entitled to make changes in the work or to authorize others to do so (Strauss, 1955, p. 508-509).

There is also a nuance of *German law* that allows the omission of the author's name, if the author has consented, or even the addition of another name with the artist's permission (Strauss, 1955, p. 509).

The idea of the author's moral right branches, also creating a kind of *right to produce a creative work; the right to publish a work; the right to withdraw a work from the publishing market; the prevention of excessive criticism of the work and, also, the protection of any violation of the author's personality* (Strauss, 1955, p. 511).

The creation of a *moral right of the author* is intended to protect the freedom, honor and reputation of the author (Strauss, 1955, p. 515). And due to this characteristic and nature, it would be considered inalienable, however, transferable after the death of the bearer of personality rights.

It is also possible to make exceptions to the rights of *paternity* and *integrity* for cases of *computer programs or works generated by computers*, due to the logical impossibility of *obtaining the consent of all the producers of the electronic programs*. (Dworkin, 1994, p. 252-253).

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In any case, Gerald Dworkin (1994, p. 264) establishes a relevant criticism of the all-or-nothing stance of article 6 bis of the Berne Convention, in particular, regarding its possible exceptions:

> From the authors' point of view, a preliminary question to be addressed is whether all works are worthy of the same moral rights: should there be a uniformity of approach, or is there room for exceptions? For example, even if it is widely accepted at present that computer programs or databases should be classified as literary works, it may not necessarily follow that their authors should be entitled to any, or the same, moral rights as for other works. Works produced and updated by many authors may require different consideration. A related question, though possibly outside the scope of this paper, is whether those entitled to neighbouring rights, especially performers, should also be accorded moral rights

When analyzing the American jurisprudence on the subject, it is possible to list another possible exception to the *author's moral rights*, in particular, for the category of *Work Made for Hire*, *in verbis*:

> A “work made for hire” is— (1) a work prepared by an employee within the scope of his or her employment; or (2) a work **specially ordered or commissioned for use as a contribution to a collective work**, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, **as an instructional text**, as a test, **as answer material for a test**, or as an atlas, **if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.** For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Given the historical panorama, outlining the historical industrial evolution related to copyright, as well as its possible exceptions, it is necessary to establish, for now, by methodological cut, the functionality of the Author's Moral Right within the Brazilian legal system.

THE BASES OF MORAL LAW IN BRAZIL

Given the methodological cut in relation to the origin of Copyright and the foundation of authorship as Moral Law, it is necessary to analyze intellectual property in the Brazilian legal system, especially its evolution, from its infra-constitutional and constitutional conception.

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It is necessary to establish that Brazil is a signatory to the Berne Convention, as explained above, understanding *copyright* as a *moral right*, *of a non-transferable nature*, according to Article 6 bis of the Convention. However, there are other developments and nuances that must be taken into account when it comes to Brazil.

There is also mention of the WIPO treaties (encompassing the WCT and WPPT) establishing the 'Three-Step Rule'[9].

In this sense, it must be expressed that the provision of Article 5, XXVII, that authors *have the exclusive right to use, publish or reproduce their works, transferable to the heirs for the time that the law establishes*, does not provide here for the *impossibility of the transferability of the author's moral right*. The protection by the monopoly of the rights of reproduction, use, and publication are also subject to constitutional limitations (Abboud, 2023, p. RL.1-3).

It is also possible to establish that, in Article 27 of Law 9.610/1998, it describes the impossibility of alienation and waiver of the moral right of the author, as infra-constitutional legislation.

However, it is possible to establish that Copyright as an autonomous matter is relatively new, being initially instituted in Law No. 5,988/1973. However, it was possible to establish a preliminary protection in articles 649 to 673 in the CC/16.

For Pontes de Miranda (1972, § 1.835) he understood, in reality, that the Copyright of personality would not be confused, preliminarily, with the Copyright itself, *in verbis*:

> In Brazilian law, there is: a) the copyright of personality, which is the right to identify the work, non-transferable) because it is linked to the truth and the freedom exercised; b) the (copyright) right to link the name to the work) which is not a right of personality, due to article 667 of the Civil Code, which proceeded to the audacious dissociation; e) the copyright of reproduction (publishing right); *d)* the right of ownership of each copy of the work reproduced. The right e) comprises the right of graphic reproduction (printing of the literary, artistic or scientific book, or of the play or music) and the right of sonic reproduction .

It is important to note that, in the construction of the Civil Code of 1916, Clóvis Beviláqua understood the possibility of the transferability of Copyright, crystallizing in Article 667 of the CC/16[10]. He faced several criticisms from jurists such as Carlos Alberto Bittar

[9] "The three basic conditions of the Three-Step Rule, which are cumulative, boil down to the following principles: the limitations (a) must be established according to certain special cases, (b) they cannot conflict with the normal exploitation of the work, and (c) they cannot cause unjustified harm to the legitimate interests of the owner." (Santos, 2020, p. 51).

[10] "Art. 667. The author's right to attach the name to all his intellectual products is susceptible of assignment. Paragraph 1 - The usurpation of the plaintiff's name or its replacement by another shall give rise to compensation

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and Eduardo Vieira Manso, when they described that "norms foreign to their own nature" were identified (Bittar, 1992, p. 91) and that the assignment of Copyright was ontologically unacceptable, in addition to pointing out its explicit and implicit revocation by Law No. 5,988/73 and the Berne Convention (Manso, 1989, p. 126).

This is because the current of Copyright as a Moral Right was derived, above all, from the French view, according to Pontes de Miranda (1972, § 1.835) through André Morillot, indicating a methodological and imprecise void regarding the idea of the adjective Moral, as well as the view between the author's bond and the creation of his audience, in the ideas of André Bertrand (2010, p. 229):

> The mention of the author's name on the work is essential because it creates an intangible link between the author and his audience. The omission of this mention is an objective fact, which infringes the moral rights of the author, even if only a few copies of his work have been distributed. The absence of the author's name is often raised in the case of photographs as well as architectural works, and more rarely in the case of audiovisual works. The right to a name and authorship may, however, be limited in view of the nature of the work and its technical requirements

This influence can be seen in the works of Fábio Maria de Mattia[11], and J. M. de Carvalho Santos (1934, p. 477). As Antonio Carlos Morato (2018, p. 230) understands, in fact, it would be *virtually impossible* to transmit Moral Rights, especially due to the assumption that:

> (...) the intellectual work is like a child there is an indissoluble bond "between the creator and the created work", and the assignment of paternity is truly "absurd", because "the creator cannot be forced to divest himself of his creation, under penalty of stripping himself of his own dignity" to then conclude that "the argument used by the reviewing deputy Arthur Lemos – that there are 'obscure workers of letters, working unsuccessfully and caring less for glory than for money' – was still self-righteous. The pretext of 'helping' the author was, undoubtedly, hypocritical", considering that "in practice, the permissibility of the assignment served to harm the intellectual creator – the economic underprivileged, the weaker party.

Nevertheless, Sérgio Cavalieri Filho (2011, p. 44) understands that not even the *legal entity* can be the holder of the Author's Moral Rights, *in verbis*:

> Only the natural person can be the holder of the moral copyright because only the human being is capable of creating an intellectual work. The Copyright Law, in its article 11, by saying that "an author is the natural person who creates a literary, artistic or scientific work", definitively removed the discussion prompted by the sole paragraph of article 15 of the previous Law on the possibility of the legal entity being

for damages, and there is no agreement that legitimizes it. Paragraph 2 - The author of the usurpation, or substitution, shall also be obliged to insert in the work the name of the true author."

[11] "(...) it is evident that the author has the right to have his name published in the translated work (...) the same right is conferred on the translator" (De Mattia, 1975, p. 11).

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> considered an author. It can be the holder of the author's patrimonial right, but never the moral right, simply because the legal entity is not capable of creating anything; He has no talent, no spirit, no imagination.

This is because, according to Costa Neto (2023, p. 75):

> Copyright is not interested in social position or financial condition, not literary, artistic or scientific intelligence or erudition, but creativity. And this is an inseparable attribute of the human person, and does not necessarily depend on his degree of access even to the cultural collection of previous works, of the same genre as his own, or to sophisticated resources of a material or technical nature. The essential requirement of intellectual creation is originality. Only its attainment will bring to the person who found it the condition of author of intellectual work.

However, it is clear to understand, therefore, the *nature of Moral Law* not as an *individual right* that aims to protect the *creative individual*, but if it serves a 'higher' *public interest* according to José de Oliveira Ascensão (2020, p. 14):

> In fact, there was an awareness at the beginning that the attribution of exclusive rights implied a restriction of the freedom of others. The basis was found in a reason of public interest: the restrictions should be temporary and were justified by the fact that the attribution of rights, rewarding the author, stimulates creativity. After the normal period of protection, the fall into the public domain would take place. This implied a predominance of the public interest over private interests. The extent of the protection was not dictated by them, but by the public benefit resulting from the temporary granting of the exclusive right.

This is because, in reality, there is a kind of *moral duty* (not obligation per se) when not being able to disassociate the author from his work:

> It should also be added that, once the work has been produced, its author has no way of getting rid of it, not being able to "say, without lying, that the work is not his. Nothing is capable of removing his authorship of the work, because it is a work that he actually produced. The work belongs to him by nature, just as his thoughts and conceptions also belong to him by nature (ZANINI, 2015, p. 157)

In this theoretical panorama, in a general overview, it is possible to establish that there is an *almost total adoption* of the theory of the impossibility of transferring the Author's Moral Rights, that is, *the Right of Paternity of the Work,* especially not for the protection of the *honor, economic* or even the *creativity of the creator*, but rather in a *a kind of protection of the public interest, of the 'incentive' to creativity, research and 'cultural flourishing'*.

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IS THERE A POSSIBILITY OF DISPOSITION BY THE AUTHOR?

Although the current legislation, both specific (infra-constitutional), international treaties and constitutional legislation (Article 5, XXVII of the FC) demonstrate the nature of *copyright*, it is possible to establish a change in this regard, especially due to the social function of property.

Although Article 6Bis of the Berne Convention explains that *copyright* is inalienable (followed by specific infra-constitutional legislation), such provision is not listed in the Constitutional provision, explaining the *exclusive right to use, publish or reproduce their works, transferable to the heirs for the time that the law establishes*.

Within this stigma, despite the commendable defense of the *moral right* and the protection of the author, it is necessary to establish what is the *due protection* to the author, in particular, what is his purpose in producing a creative work, especially if he earns income for his subsistence.

THE SOCIAL FUNCTION OF THE RIGHT TO PROPERTY

Within the stigma of *the exogenous* function of private property, in view of the inherently social dimension, stipulating *production* as a necessary condition for rural private property and *housing* for urban private property, it is possible to list the flexibility of the field of what comes to be a 'social function'.

First of all, it is possible to understand that private property has an essential core that performs its *endogenous social function*, that is, *the function for which the institution of private property was created to do so*, within the rules of the game of any organized, modern and prosperous society. Private property has at least three prisms through which it gives its raison d'être: political, economic and social.

In the political sphere of private property, it is possible to list the potentiality of *controlling the advance of the state in relation to the citizen*, creating a balance of power, which was evident during the glorious revolution (1688), according to Richard Pipes (2001, p. 54-55):

> (...) He who controls the wealth of the country controls its politics, largely because political power is guaranteed by military force and the armed forces have to be paid [...] Absolute monarchy results when the crown holds all or at least two-thirds of the land wealth; the aristocracy, when the nobles hold a similar share. When the people own two-thirds or more, the result is democracy.

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In this sense, we can extract that *property* (dominium) is freedom, according to Fernando Vasquez de Menchaca (1931, p. 322):

> From what has been said, it is clear what the true definition of property is: it is, therefore, a natural faculty of doing (with things) what pleases, except what either violence or law forbids. I deduce this definition from the law libertas (4), where it is said that freedom is a natural faculty of doing what pleases each one, apart from what either violence or law prevents.

Its primary function is to control the abuses of the State, especially the abuse of private power, thus preventing the concentration of property in the hands of a few, as was the case of the Soviet Union, Nazi Germany and Italian Fascism[12].

From a social perspective, it is possible to establish and link private property with the development of human personality, according to Lucas Augusto Gaioski Pagani (2019, p. 75):

> Personality flourishes as man's natural condition as he is free to dispose of his mental faculties in relation to the material world. The individual becomes a person when he can develop his natural talents in cooperation with his peers. The development of man with natural talents and faculties becomes culture. 'It is not possible to know man without knowing his culture, since culture is the living space where he acquires a conception of himself and of his common destiny' (...) The social flourishing of culture and man can only happen in regimes in which the system of private property is evident and solid. Human performance depends on the certainty that immaterial properties meet the material properties for the realization of their ideas. It is in reality that man exposes his ideas, transforming the immaterial part into the material.

From an economic point of view, it is evident that the prosperity of the West, aligned with bourgeois virtues (pagan and Christian), is closely linked to the economic development after the industrial revolution, achieving a post-1750 economic boom. This is because, in reality, the market is a process, according to Lucas Augusto Gaioski Pagani (2019, p. 70):

> From exchange, we realize that the economy is nothing more than a complex system in which agents, endowed with rationality and choice, develop and satisfy their infinite needs. For this reason, the market is a process, and not an entity that acts, only individuals can act. Because the market is a complex process, it is called Catalaxia. This process takes place through the constant exchanges between individuals. What makes exchange between economic agents possible is exactly private property. Private property is what determines for man the ends and the means to achieve his own ends.

[12] "(...) Any attack on private property is an exact attack on freedom. The function of property as a political aspect is fundamental for the consolidation of a free society that is resistant to the arbitrariness of men and firmly consolidated in an empire of laws and not of men." (Pagani, 2019, p. 73-74).

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Within these three prisms, Western society (formed by Roman Law, Greek philosophy and Judeo-Christian Ethics) was founded on private property, and was even crystallized by the Catholic religion, in the letter Rerum Novarum (1991), *in verbis*:

> It is a most important duty of governments to secure private property by wise laws. Today, especially, in the midst of such ardor of unbridled greed, it is necessary for the people to keep their duty; for if justice grants him the right to employ the means of improving his lot, neither justice nor the public good permits anyone to be injured on his farm, nor to invade the rights of others under the pretext of no equality. Certainly, the majority of the workers would want to improve their condition by honest means without harming anyone; however, there are not a few who, imbued with false maxims and desirous of novelty, seek at all costs to excite and drive others to violence. Let the authority of the state therefore intervene, and, in suppressing agitators, preserve the good workers from the danger of seduction, and the legitimate masters from being deprived of what is theirs.

Not only was the subject dealt with in Rerum Novarum (1991), but also in his commemoration of Quadragesimo ano, *in verbis*:

> It is true, and history abundantly demonstrates, that, owing to the change of conditions, only large societies can now accomplish what even small ones once could; However, that solemn principle of social philosophy remains unchanged: just as it is unjust to take away from individuals what they can do by their own initiative and industry, in order to entrust it to the collective, so to pass on to a larger and higher society what smaller and inferior societies could achieve, it is an injustice, a grave injury and a disturbance of the good social order. The natural purpose of society and its action is to assist its members, not to destroy or absorb them.

St. John Paul II (1991) describes, in *centesimus annus* , that, in fact, private property is in the *nature of man*, and, therefore, holds certain limits imposed by his own condition, understanding that, in fact, wealth is not in the earth, *but in Work and in the community of men*, *in verbis*:

> Such a process, which concretely brings out a truth of the person, incessantly affirmed by Christianity, must be viewed with attention and favor. In fact, man's main wealth is, together with the earth, man *himself.* It is his intelligence that leads him to discover the productive potential of the land and the multiple ways in which human needs can be met. It is their disciplined work, in solidarity collaboration, that allows the creation of increasingly broad and efficient working communities to operate the transformation of the natural environment and the human environment itself. Important virtues contribute to this process, such as diligence, industriousness, prudence in taking reasonable risks, trust and fidelity in interpersonal relationships, courage in the execution of difficult and painful decisions, but necessary for the common work of the company, and to face the possible setbacks of life.

Stipulating, therefore, the *nature of property* as being inherent to man, just as his *wealth is linked to the community of men* (international division of labor) and to *labor itself*,

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we must understand that, before the social sphere, the right to private property has an individual sphere, exercising its primary function: *that of being itself*.

Now, it is evident that there must be charity and solidarity in any society — and such a society only exists when there is freedom to produce and respect for private property. The social purpose of property, in its endogenous function, is to maintain the social structure that allowed the greatest technological-industrial advance in all human history in less than 200 years, *its function is precisely to keep society cohesive, in cooperation*.

The theoretical construction of the social function of property outlined by Leon Duguit (Ankerson; Ruppert, 2000; Coletta, 1998; Hale, 2000) which contrasts with the classical idea of property by the Anglo-American tradition[13], in particular, with the *slight theoretical difference* in describing that it is the *owners who hold obligations, and not the property*[14], by indicating that property *is no longer a subjective right of the owner*, but rather an *obligation-function* of the holder of wealth (Duguit, 2019).

However, for the present article, we join the Anglo-American current, where *private property* already has an essentially social function, being considered a central pillar of modern society, especially for its effects in the political, economic and social spheres, understanding its function as *endogenous* and not *exogenous*.

THE SOCIAL FUNCTION OF COPYRIGHT

For the present work, it is necessary to understand the affiliation of the *need for* the idea of intellectual property, as well as the *idea of copyright*, which is given by the protection of innovation, as well as the *economic value* of intellectual work or, on a more negative side, censorship, as demonstrated in the historical issue of intellectual property.

Be that as it may, the main idea here is that the social function of intellectual property and the recognition of *who is the owner of the creative work* has an inherently economic function, that is, *the commercial exploitation of the product created* in order to generate income for the creator.

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[13] "In principle, owners can do anything they like with what they own: use it, use it up, neglect it, destroy it, give it away entirely or for a time, lend it, sell or lease it, pledge it, leave it by will, and so on. Furthermore the owner is perfectly free to do nothing at all with the thing: in principle, the law of property imposes no positive duties on an owner" In: LAWSON, F. H.; RUDDEN, Bernard. **The Law of Property**. Oxford: Oxford University Press, 2002.

[14] This is because the words used by Leon Duguit are often like *propriété* have an ambiguity in the French language, encompassing the word owner, and is also better expressed by the idea of the English word *ownership* and not *property.* This ambiguity was correctly pointed out by M. C Mirow. In: MIROW, M. C. The social-obligation norm of property: *duguit*, *hayem,* and others. **Florida Journal of International Law,** Vol. 22, Issue 2, 2010.

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Without any economic (or political) interest, there is no sense in the existence *of the idea of intellectual property*, since the idea of economic protection also aims at the very notion of stimulating *invention* through large-scale production, as well as the *cultural dimension*, that is, *access to culture*.

In this sense, it is necessary to understand that *there is no free lunch* or unreasonable human action of any gain[15], whether philanthropic or not, and there is a facet of the need for economic exploitation so that the *collective interests of invention, access to culture and knowledge exist.*

What can be seen is that the author must earn income from his earnings, and may even, *if he so wishes*, dispose of his own work in exchange for income, as is the case with technical works (where there is no copyright per se). Why can't you do it with a creative work, such as the example of a literary novel? From a book of poems?

These are the questions that revolve around the methodological cut of this article: Why is the author's right non-transferable? Does it have its reason for being, currently? Can the author not dispose of his work through a contract stipulating clear rules, as is the case with technical work? This will be explored below.

IS IT POSSIBLE TO BE TRANSFERABLE? PROPOSAL FOR LEGISLATIVE CHANGE?

In any case, by the current legislation, in fact, there is a legal obstacle indicating that the Copyright is transferable, that is, that the *ownership* of being able to say that the *work belongs to so-and-so*, being expressly forbidden the transfer by the special legislation and the Berne Convention, in its Art. 6 bis.

However, the present work aims to criticize what are the bases that prevent the transfer of ownership of the creative work in the same way that the technical work is, understanding that the dynamics of the publishing market, especially for those who live from writing, have the opportunity to be able to dispose of their own work by selling, through a clearly stipulated contract, by transferring ownership to a third party, including with a confidentiality clause, if the parties so wish.

In view of the theoretical construction of this article, intellectual property and Copyright aim to protect the economic gain of such works by their authors and not only by publishers, as it was in Victorian England, or, in a more negative sense, the control of information, as is the case of Imperial China, or, in a more negative sense, also, the

[15] Every individual acts to move from a situation of lower satisfaction to greater satisfaction.

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incentive necessary for innovation, that is, the economic gain generated by the creative work.

In addition, the Federal Constitution does not expressly prohibit the availability of Copyright, explaining that there is the exclusive right of the author to use, publish or reproduce his works, transferable to the heirs, under the terms of Article 5, XXVII, not indicating here the *impossibility of transferability to third parties*, in a restrictive and even expansive interpretation, when understanding the nuances of free enterprise and the social function of the market, under the terms of Article 170 of the Federal Constitution.

That said, there is no legal impediment to an infra-constitutional legislative change, in addition to a due control of conventionality, by the Superior Court of Justice, for the possibility of the transferability of Copyright.

It is also important to point out that Article 6 Bis of the Berne Convention can be revoked by domestic federal law, since it does not deal exclusively with the restriction of human rights, and does not have *constitutional status in this sense*, since the constitutional matter does not delimit the impossibility of transmitting the moral rights of the author, and it is not a case of Amendment to the constitution in the absence of *supra-constitutional or constitutional* statusof the international treaty adhered to by the Brazilian State.

FINAL CONSIDERATIONS

In view of all that has been exposed in this article, it is possible to express the idea that intellectual property has had, throughout its historical history, extensive modifications, but always with the same objectives: protection against economic gain (and exploitation) or the restriction of the circulation of works and ideas, having evolved, step by step, towards a more economic protection and the guarantee of the existence of a free market of ideas, with the promotion of innovation and cultural flourishing.

Although the Berne Convention, as well as the entire theoretical-legal framework adopted by Brazil, determine the impossibility of the transferability of Copyright, it is possible to extract that in the enactment of the Civil Code of 1916, there was the legal possibility of transferability of such moral rights of the author, being reverted by the specific legislation for the proper regulation of intellectual property in the Brazilian legal system, in the 1970s.

The work proposed to question this exacerbated protection of Author's Rights, as well as the bases on which it is sustained, since the purposes of the existence of intellectual

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private property is, precisely, economic exploitation: and that there is nothing unethical or immoral in commercial practice for the gain of one's livelihood.

The social function of the Author's Moral Right, then, is to protect the author so that he can earn income and extract his livelihood from his work as a writer, understanding here the social function of private property as being itself, playing a crucial role in political, economic and social development at an individual and community level.

To exemplify, there is a need to protect the existence of whoever the author is and the need for private property when we see episodes such as the purchase of the game Tetris by Nintendo, where they negotiated not with the creator of the game, but with the Soviet government, since everything that was produced in Soviet territory belonged to the 'people' (State), leaving the creator in a situation of vulnerability and not even being able to reap the fruits of his labor.

The legal certainty around the protection of creative work, the incentive to innovation, through private property and the legal recognition of the possession/ownership of such good, allows society to prosper and, in such a scenario, to create, in connection, broad access to culture and information through the economic abundance that is created from the basic rule of the economy: a relationship between scarce ends and means with alternative uses.

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