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COPYRIGHT: THE (IM)POSSIBILITY OF PREVENTING CRIMINALS FROM PROFITING WITH LITERARY WORKS ABOUT THEIR CRIMES

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ABSTRACT: Intellectual creation is widely protected by national and international diplomas. This paper questions the (im)possibility of preventing criminals from profiting from the publicity of their crimes. This discussion involves collisions of rights. The research's methodological focus is on the analysis of national and international diplomas available on the subject. Solid arguments are sought in order to reconcile the public interest and the freedom of expression of the author with personality and patrimonial rights over his or her work. For this, the present study uses the dialectic method and the monographic procedure, which consists of the analysis of the norms, of the doctrine related to the topic, as well as national and foreign jurisprudence. The conclusion is that restricting the author's patrimonial right does not promote convincing public interest, according to the Brazilian legal system.

KEYWORDS: criminal; copyright; personality rights; literature; profit.

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1 INTRODUCTION

The discussion is founded on the freedom of speech right, the patrimony and author copyright, and the general social feeling that criminals should not gain rights over the crimes they had committed. It is a conflict with two poles: on the one hand, the personality rights of the creator of a literary work (among other adjoining rights); and on the other hand, the attempt to hinder one's profit for the sake of a supposed public interest.

The subject is particularly interesting because the Brazilian Senate Bill No. 50, of 2016, which seeks to amend Law No. 9,610, of February 19, 1998, is being processed in the National Congress to include the prohibition of the convicted of a crime with the use of violence or serious threat to receive financial benefits resulting of his or her work alluding to the crime committed.

Thus, this paper has the purpose of analyzing the impossibility or possibility to hinder criminals to profit from the publicity over their crimes, facing the conflicting rights related to the matter. The discussion hereby presented is split into three main topics. Firstly, a brief doctrine and law research regarding author's copyright and its consequences in social, fundamental rights. Following to that, the discussion is cleared with the demonstration of real cases and possible instruments to guide it toward solutions. Lastly, important analyses are pointed to be accomplished before defining a fundamental author's copyright. To do so, this research used the dialectic method, founded in bibliographic research about doctrine, and articles of national and foreign journals.

The intention of this research is to search for a possible solution for this ongoing conflict in the Brazilian legal order, or at least to add to the discussion. For that, this paper briefly analyzes possible questions regarding the matter and after the explanation, the conclusion comes to the impossibility of stopping criminals from profiting from the publicity of their crimes.

2 ON AUTHOR'S COPYRIGHTS AND THEIR CONSEQUENCES TO PERSONALITY LAW AND TO LITERATURE EXPRESSION

Literature is seen as an important human activity, which is proved by the countless international treaties on protecting authors' and works' copyrights, as well as how granting the freedom of expression as a whole. In the national sphere, the main legal diploma is the Copyright Law (Law no. 9.610/98), approaching the civil law branch. This law is concerned with expressly providing for provisions that protect the author in legal transactions, as in the definition of the restrictive interpretation of legal transactions on copyright law (art. 4). Intellectual creations are protected in the caput of article 7[3].

Brazil has joined the French system of author's rights (*droit d'auteur*), which protects the rights of a work's creator, unlike the Anglo-American system, with the *copyright* system, which is concerned with the work itself and its possibility of reproduction (Giacomelli, 2018, p. 17). In the adopted system, "the concept that creation is the result of freedom of expression has prevailed, thus falling within the fundamental rights of Man, because he enjoys a natural right to protect his creations" (Santos *et al.*, 2020, translated). The ownership of the author's moral and patrimonial rights over the work is a product of the freedom of expression fundamental right, which has, as a logical consequence, the protection of the economic exploitation of the creation itself.

Here, it is important to differ these concepts: author's rights and copyrights. Author's rights refer to a "branch of the legal order that rules over the acquiring of rights related to literary and art works" (Ascensão, 1997, p. 15, translated), while copyright is a genre that "also encompasses the so-called related rights, such as the rights of performers, phonogram producers and broadcasters" (Ascensão, 1997, p. 15). Thus, this paper is about the author's rights or the author's copyrights, as it is not concerned

[3] Art. 7, Copyright Law – "Protected intellectual works are the creations of the mind, expressed by any means or fixed in any support, tangible or intangible, previously known or invented in the future, such as: I - the texts of literary, artistic or scientific works" (Brasil, 1998, translated).

with related rights. The use of the term copyrights is not wrong for our discussion either since the concept of author's rights is encompassed by the concept of copyright as a whole.

The legal nature of copyright is a controversial matter, but it is essential so that the correct legal effects are achieved. For this paper, we adopt the dualistic theory of the coexistence of two integrated rights: patrimonial / property right and moral right. Both are author's rights as seen by art. 22 of the Copyright Law.

Sérgio Vieira Branco Júnior (2007, p. 49) states that these two segments are different, however intrinsically connected. This duality is reflected in counterposed rights for the formulation of a law: "(i) the immediate use by the social community of the created works, with the purpose of social promotion and development and (ii) the maintenance, by the author, of the possibility of economic exploitation of his work" (Branco Júnior, 2007, p. 26, translated).

For Carlos Alberto Bittar (2019, translated), author's moral rights can be seen as "the perennial bonds that unite the creator to his work, for the realization of the defense of his personality". The author's moral right is considered by many scholars as one of the emanations of personality rights (Branco Júnior, 2007, p. 82).

It should be pointed that, as early as 1988, Costa Netto (1988, p. 21) added the author's moral right to the traditional rights of personality provided for in the Civil Code (the right to honor, the right to name, the right to image, the right to privacy). This classification is supported until today when alleging that the intellectual work, which results from a creation of the mind, is essentially linked to the personality of its author (Costa Netto, 2018, p. 229).

Adriano de Cupis (2004, p. 337) brings a valuable distinction between the author's moral rights to the other personality rights, by considering it a relative right, by nature, to the person. The jurist states that the author's moral right is not innate – such as the other personality rights – as it comes after an act of intellectual creation. Thus, the author's moral right is not related to everyone who has a personality, but solely to those who can be previously qualified as authors. So, a person is never

born with author's copyrights granted. An intellectual creation is needed so that one can have this specific personality right.

Property right, according to Carlos Alberto Bittar (2019), is about the economical exploitation of intellectual property through all the technical processes available. The legislator states that patrimony is the author's monopoly, which means the need to submit every form of economic exploitation of a work to the author's will.

The property / patrimonial right of the author is protected both by international norms (such as the Berne Convention) and by constitutional norms. It is a fundamental right located under the Title "Fundamental Rights and Guarantees" – therefore attributed as a permanent clause – provided for in items XXVII and XXVIII, of article 5, of the Federal Constitution (Brasil, 1988, translated).

Both moral rights of author and property rights of author are absolute in that they are enforceable *erga omnes*, but not in the sense of being unrestricted (Santos et. al, 2020). However, they differ in other aspects. Author's moral rights are inalienable, undeniable, imprescriptible and unseizable (Branco Júnior, 2007, p. 30), as they are personality rights. Art. 27 of the Copyright Law is clear in the provision of the undeniable and inalienable character of the author's moral right. On the other hand, the author's property right is characterized by being transferable, waivable, temporary, non-communicable, prescriptible and movable (Coelho, 2013, p. 362).

Adriano de Cupis states that the "non-transferability and unavailability of the author's moral right corresponds to the transferability and availability of the author's property right" (De Cupis, 2004, p. 361, translated). These allowances of the author's property right are only possible if there is an act of will or when provided by law. Hence, Bittar declares that it is not permissible for a third party to make any other use of a work without prior consultation with the author and the appropriate "specific remuneration, under penalty of violation, unless, by law, a specific contract, or the circumstances of the elaboration, other rights are imputed to it" (Bittar, 2019, translated).

The possibility of transmission and availability of the property right does not mean that the legislator is allowed to impose on the author the waiver of his / her profit without any consideration. The Copyright Law gives the author the exclusive right to use, enjoy and dispose of the literary, artistic, or scientific work (Copyright Law, art. 28). What is questioned by this paper is whether the State can impose this act or effect, even if temporarily. In both hypotheses, the legal transaction must originate from an act of will and imply the express declaration of will (Reale, 2002, p. 208-209). The author's will is indispensable in carrying out a legal transaction, and the consequence of this even reflects the possibility that, at any time, the author could economically explore the work again.

José de Oliveira Ascensão (1997, p. 32-33, translated) expands on the independence between the author's copyright and the material support based on a triple statement: "(i) The author's copyright does not depend on the existence of material support; (ii) The right over the copy does not grant author's right (art. 38); (iii) Author's right does not grant rights to the copy". That is, the holder of a physical book can do with it whatever is inherent to having a printed book but does not hold copyrights of it.

Thus, intellectual protection is accomplished through national and international legislations. The restriction of such a broadly protected right demands a relevant foundation. The hypothesis discussed by this paper is not abstract. The next chapter shows that there is something of confiscation in the bill in process in Brazil and it was already a law in the United States.

3 HELPING FACTS FOR THE DISCUSSION

The Legislative Powers of Brazil and the United States have sought for ways to prevent criminals from profiting from the publicity of their crimes, that is, hindering delinquents from obtaining financial advantages from the public exposure of their crimes. Lawmakers have been looking for ways to discourage criminals from bragging about their crimes, or

from committing spectacular atrocities in order to write a thought-provoking work, or to avoid encouraging new offenses to occur.

In Brazil, Senate Law No. 50 (Brasil, 2016) is being processed in the National Congress, to include the prohibition crime convicted person with the use of violence or serious threat to obtain financial benefit from his / her work related to the crime committed and to allocate any eventual product of economic result for compensation measures for the victims.

These discussions started after real cases of freed or serving criminals (even with life imprisonment, in the case of the United States) gained high values from the commercialization of their stories about their criminal acts.

An example happened in the State of New York in the United States of America, which predicted that the profits earned with any means of publicity about crimes – books, interviews, movies, television appearances etc. – should be transferred to the Victims Council of New York and kept in custody for five years so that victims could recover any value obtained, as a way for criminals to compensate their victims. This legislative conception was developed after the serial killer David Berkowits, with the alias *Son of Sam*, gained a lot of money by exposing his own crimes, thus generating the *Son of Sam law*[4]. This original law was then ruled unconstitutional by the Supreme Court of the United States, under the argument that it was against the First Amendment, as it was too broad in restricting the rights of freedom and liberty, although that State had approved other laws with similar goals before.

In the United States case, the Supreme Court used the O'Brien test, which is a mechanism created to interpret the facts and determine whether expressive conduct or symbolic speech deserves First Amendment protection.

[4] See more: https://www.nytimes.com/2017/07/28/nyregion/new-york-today-son-of-sam-40-years-later.html.

The *Son of Sam law* was evoked in the famous case *Simon & Schuster, Inc. v. Fischetti*, in which the American mobster Henry Hill profited from exposing his life in a biography that romanticized the life of a "crime family", entitled *Wiseguy: Life in a Mafia Family*, in 1986, which later gave rise to the film *GoodFellas* in 1990 (Ecker and O'Brien, 1999, p. 1079-1080).

The limits of copyrights have been largely debated throughout the world. That is why the so-called *Three-Step Test* became internationally acknowledged since its introduction, in the Berne Convention in 1967, during the review of the Stockholm Convention, and in other international treaties such as the TRIPS of the WTO. The rule is used to this day to establish exceptions and limitations to copyrights, through the following provisions:

> Art. 9.2 of the Berne Convention: 2) The laws of the countries of the Union reserve the right to permit the reproduction of said works in certain special cases, provided that such reproduction does not affect the normal exploitation of the work or cause unjustified harm to the legitimate interests of the author (Brasil, 1975, translated).
> Art. 13, TRIPS Agreement: Members will restrict limitations or exceptions to exclusive rights to certain special cases that do not conflict with the normal exploitation of the work and do not unjustifiably harm the legitimate interests of the right holder (Brasil, 1994, translated).

The TRIPS Agreement expanded the application of the test to the whole of author's rights, not just the reproduction copyright provided for in the Berne Convention. In short, the test authorizes exceptions and limitations to author's rights and copyrights by unauthorized third parties in the following cases: (i) in certain special cases; (ii) that do not conflict with the normal commercial exploitation of the work; and (iii) do not unreasonably harm the author's legitimate interests. The "Three Steps Rule" has the purpose of enabling the promotion of public policies by Member States through limitations on property rights:

> One of the objectives of the Stockholm negotiations was to establish a general rule that would be complied with by any limitation on copyright, that is, the States Parties

> to the Berne Convention would maintain the discretion to establish exceptions to copyright; however, these would necessarily fulfill the conditions established by art. 9.2 of the Berne Convention [...] The "Three-Step Test" rule reflects the need to maintain a balance between authors' rights and the interest of the general public, that is, interests related to education, research and access to information (Canotilho et al., 2018, p. 354-355, translated).

Before the adoption of the rule, the States parties of the Berne Convention used different limitations to copyrights, so that the patrimonial rights of authors were emptied (Basso, 2007, p. 257). Therefore, from the Berne Convention and the TRIPS Agreement, "the limitations provided for in the Copyright Law must conform to the minimum levels of copyright protection established" in these documents (Basso, 2007, p. 254, translated).

The test is recognized and applied by the Brazilian Superior Court of Justice. As an example, mention is made of Resp n. 964.404 - ES (2007/0144450-5):

> SPECIAL RESOURCE. COPYRIGHT COLLECTION. CENTRAL OFFICE OF COLLECTION AND DISTRIBUTION. MUSICAL PERFORMANCES AND ENVIRONMENTAL SOUNDS. EVENT HELD AT SCHOOL, NON-PROFIT, WITH FREE ENTRY AND AN EXCLUSIVELY RELIGIOUS PURPOSE. (...). III - *Use, as a criterion for identifying restrictions and limitations, of the three-step test rule, regulated by the Berne Convention and the WTO/TRIPS Agreement. IV - Recognition, in the case of the records, in accordance with international conventions, that limiting the incidence of copyright "does not conflict with the normal commercial use of the work" and "does not unjustifiably harm the interests of the author*" (Brasil, 2011, translated, emphasis added).

Mechanisms are created in order to seek a solution to conflicts involving copyrights. In item VII of the next chapter, the test is used to help formulate a possible answer to the problem hereby analyzed.

4 THE (IM)POSSIBILITY OF PREVENTING CRIMINALS FROM PROFITING WITH PUBLICITY ABOUT THEIR CRIMES

Autobiography is a literary genre in which the person narrates the story of their own life. When the narrated fact is about a crime committed by the author, discussions arise about the custody of the State in the matter. The controversy can be seen from several angles as discussed below. It is possible for the State to adopt a posture in defense of freedom of expression or to understand the prevalence of another right such as the public interest one. To reach a possible response to the conflict, it is necessary to reflect on the rights involved and the exposed content of the work.

Besides the author's property rights mentioned in the first topic, this one focuses on other matters to foster the discussion.

A) FREEDOM OF EXPRESSION EXERCISE

Hindering Criminals to profiting from their stories, even if temporarily, can lead to latent unconstitutionality for injuring the freedom of expression provided for in article 5, item IV and IX, of the Federal Constitution. It should be noted that the legislator took care to extend as much as possible the scope of protection of freedom of expression, as clarified by Sarmento:

> In fact, although more or less restricted definitions can be established for what is an "artistic" or a "scientific" activity, the expressions "intellectual activity" and "communication" are broad enough to cover under the shelter of the fundamental law in analysis all kinds of expressions of ideas, opinions, or feelings, and also the transmission of information on any topic or subject (Sarmento, 2018, p. 282, translated).

This broad range of protection must encompass the manifestation of any matter through opinions, ideas, points of view, convictions, criticisms, value judgments on third-party opinions and propositions, to ensure maximum protection within fundamental rights (Sarlet et. al., 2014, p. 507, translated).

To certain extent, a biography – mainly about a criminal fact – is information that the public may legitimately want to have access to. As argued in *Simon & Schuster, Inc. v. Fischetti* and making an analogy to the Brazilian bill, these restrictions offend the rights of three parties, (1) the criminal, (2) the editor and (3) the public.

Copyright does not protect ideas, but the form adopted to express ideas (Coelho, 2013, p. 274). And for this expression to happen, a series of investments of time and money are needed, either by the author himself or by other team members (such as the publishing house) involved in the material production of the work.

Obstacles to the narrative must be avoided, especially when it comes to the story of one's life. As argued in *Simon & Schuster, Inc. v. Fischetti*, refusing payment for expressive activity constitute damage on that activity. A person who commits a crime and wants to narrate this fact will have their right harmed by the financial issue, which restricts them from exposing their ideas.

The American Court understood in the case *Buckley v. Valeo*[5] that the criminal's words depend on money since a criminal does not speak unless paid for. In this sense, spending money is a communicative act, as virtually all means of communicating ideas in mass society require considerable costs.

Ecker and O'Brien (1999, p. 1099) do not see it like that. By the Son of Sam Law, the publisher's and professional writer's profit is not taken away. These authors understand that the New York statute does not prohibit paying someone to publish or tell their stories, and they understand that criminals do not have to pay any amount to tell their own stories. They argue that criminals may have reasons to talk, besides profiting; there is evidence of criminals who are willing to share their stories without immediate compensation, as in the case of those who wish to publicize their side of the story (Ecker and O'Brien, 1999, p. 1101). It

[5] See more: https://www.oyez.org/cases/1975/75-436.

must be considered, however, that publishers' sources of information may be harmed due to the lack of financial incentive.

Hence, the financial aspect is important for the creation of a work. Indeed, certain authors might be less willing to share their stories without financial compensation. This can be understood as restriction and even violation to freedom of expression, hindering intellectual production. Many stories might never be written because of that.

B) Prior censorship

Prior censorship is prohibited by the Federal Constitution in two moments: (1) "the expression of intellectual, artistic, scientific and communication activities is free, regardless of censorship or license" (art. 5, IX, Federal Constitution) (Brasil, 1988, translated) and (2) "The manifestation of thought, creation, expression and information, in any form, process, or vehicle shall not be subject to any restriction, subject to the provisions of this Constitution" (art. 220, Federal Constitution) (Brasil, 1988, translated).

One of the ways to analyze the constitutionality of a law on freedom of expression is to check whether it has the intention to regulate content. In this case, normalizing the narrative made by the criminal of his / her illegal act seems to be restrictive of its content. It is not up to the State – at least it should not be the case of a society that intends to be democratic – an attempt to regulate the content of a publication. A law cannot intervene for a person, even a criminal, to re-enact their feelings, thoughts, emotions, or opinions.

The author's monopoly on his / her copyright is contained in art. 6 of the Copyright Law, which clarifies that "the works they simply subsidize will not be under the domain of the Union, the States, the Federal District or the Municipalities", that is, the provision grants ownership regardless of the production context (Coelho, 2013, p. 361).

Since the law applies only to criminals and only to the narrative of their crimes, it demonstrates clear content-based law and blatant discrimination. The criminal can boast or show remorse, which in either case the law would be regulating. A law cannot govern the content of the criminal's speech and consider it unwanted. Although the primary

purpose expressed in the law is to affect profit, it has as a secondary effect the suppression of speech.

In the hypothesis that the public interest prevails over the author's freedom of expression, there must be a difference in the treatment of each situation and provision for what is strictly necessary to achieve its purposes with the least possible damage to a fundamental right, even if it is the right of a criminal. Incidental restrictions on fundamental freedoms must not be greater than what is essential to promote the governmental interest.

The application of public interest in copyright brought by the doctrine refers to the dissemination of works and the non-permanence of the monopoly as they consider it of social relevance (Santos et al., 2020), based on the interest of the community in the dissemination and progress of knowledge. The doctrine shows the concern with copyright not to lose its function of encouraging creation (Santos et al., 2020). In the situation hereby faced, it is the opposite and distorted of legal protection and interpretation. The alleged public interest is related to placing barriers on an intellectual production. A law in this sense would have a clear aspect of prior censorship.

C) Limitations on freedom of expression exercise and the consequential liabilities

Firstly, writing a book telling a crime one committed is a freedom of expression exercise, which must not suffer prior censorship. But it does not mean that this right can be concretized without restriction. The freedom of expression exercise must respect other equally important rights, and in case of violation of the limits imposed on it, the duty of reparation is licit. Writing an autobiography does not relieve one of responsibility to the other people involved. The author must preserve the victim's rights.

On the subject, several doubts arise: can the State choose the profit of an artist, even if the author is no longer under punishment by justice? Can the State prevent a person from making profit on a lawful work, or even writing a work? Can the State discourage the writer, whatever the content of the work? In this case, would it be freedom of expression censorship, indirectly? What part of one's life narrative is possible or not

to generate profit? Is it fair to remove the profit from a book with a speech of regret and learning or about an outburst of a moment of madness? What if the exposure is limited to the prison experience, that is, facts not related to criminal conduct? To what biographical contents would profit be allowed? Would there be a gradation on the type of crimes that generate social commotion, or would they cover all crimes provided for by law? What means of crime publicity (interviews, documentaries, books, films, etc.) can be the object of profit regulation? Can the criminal profit from the work of a biographer? What about literary works based on real facts?

As mentioned, a book narrated by the criminal of his or her own crime can have several motivations and connotations: personal promotion, vanity, connotation of regret, firm innocence belief, victim of judicial error, in short, many personal reasons, even a simple way of earning income. Of course, it can be educational and inspiring so that other people do not make the same mistake. Maybe even criticism to the criminal system.

In any of the versions of a criminal's biography, the victim, in theory, could not be exposed, much less demeaned, since "the copyright cannot be exercised to the detriment of the personality right of a third party" (Costa Netto, 2018, p. 282, translated), as provided for in articles 17[6] and 20[7] of the Civil Code (Brasil, 2002), as well as in article 5, item X[8], of the Federal Constitution (Brasil, 1988). In this sense, it is the aforementioned International Covenant on Civil and Political Rights of 1966, which establishes that freedom of expression will entail special duties and responsibilities which, consequently, may be subject to certain restrictions, which must, however, be expressly provided for in law and

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6 Art. 17, Civil Code: "The person's name may not be used by others in publications or representations that expose them to public contempt, even when there is no defamatory intent" (Brasil, 2002, translated).

7 Art. 20, Civil Code: "Unless authorized, or necessary for the administration of justice or the maintenance of public order, the dissemination of writings, the transmission of the word, or the publication, exhibition or use of a person's image may be prohibited, at his/her request and without prejudice to the applicable indemnity, if they achieve honor, good reputation or respectability, or if they are intended for commercial purposes" (Brasil, 2002, translated).

8 Art. 5, item X, Federal Constitution: "intimacy, private life, honor and image of people are inviolable, ensuring the right to compensation for material or moral damage resulting from their violation" (Brasil, 1988, translated).

that are necessary to ensure respect for the rights and reputation of other people (art. 19, 3, "a") (Brasil, 1992).

In Brazil, there is the case "Doca Street". In 2006, 30 years after killing his partner, Doca Street released the book "*Mea Culpa*", in which he tells his version about the fact. He narrates negative aspects about the honor of the late Angela Diniz (Schreiber, 2014, p. 75). From this perspective, the victim's right to personality would have been damaged, giving the family the right to compensation. Anyway, the reader should keep in mind that "biographies devise the imaginary of reality and walk, in the border area, between the real and fantasy" (Fachin, 2016, p. 98, translated). The truth about the content of a work must be evaluated by the reader's discretion.

At first, there must be a contradiction in the act of publication and even the right to reply in the book itself, in respect of Article 5, item V, of the Federal Constitution[9] (Brasil, 1988). This would be a prior issue to be discussed in a lawful limitation. The right of the interested party to object to the removal of the parts that affect them is not excluded. Of course, the author does not exempt him / herself from repairing damage caused by his / her work.

It should be noted that there are situations in which there is no other way to tell something without hurting the privacy of those involved. In this case, it is possible to violate the privacy of a third party. That is, if the narrator has no other means of exposing one's own privacy – which is one's right – without touching the privacy of others, this exposure becomes inevitable. But this narrative must be cautious, informing only what is strictly necessary for the explanation of what happened. All information contained in the text is liable when excessive or morally reprehensible.

D) Hindrance of profit as an extension to the penalty

One could question whether there should be a difference in treatment between publishing a biography about the crime itself before

9 Art. 5, item V, Federal Constitution: "the right of reply is ensured, proportional to the grievance, in addition to compensation for material, moral or image damage" (Brasil, 1998, translated).

the full sentence has been served or only after it has been served. This is because the one who serves the sentence is in order with the law and with society. Therefore, the convict is given a new social opportunity, and writing a biography in this condition should be interpreted as an atonement for someone who made mistakes, paid for them, and would not go back to offending, since that criminal had supposedly been re-educated by the system.

All Brazilian legal system encompasses the re-socialization and reintegration of people. After 5 years of extinction or fulfillment of the sentence, called the correcting period, the previous sentence expires (art. 64, I, of the Criminal Code) (Brasil, 1940). The punishment becomes enough. This aspect is not to be confused with repairing the damage, which is a consequence of the person's offense, with due provision in law and in the Constitution.

Thus, if the convict who served the sentence is prevented from profiting from the biographical work of the crime, even temporarily, it can be understood as an extension of the sentence that is not provided for in law and in the Constitution. It should be noted that in the democratic rule of law, a restriction on law must at least have some provision in the legal system. A law in this sense would still be questionable under the Constitution and the principles of law.

E) Self-regulation of the market

From a strictly liberal view, in the hypotheses of the author's manifest attempt to brag about his or her own atrocity, the market itself would have the function of regulating or excluding the published material from public acceptance. Prior regulation would thus be unnecessary. At the time of the patrons, in the case of a work that was very advanced for its time, there would hardly be interest in the acquisition, sponsorship or exploration of the work (Coelho, 2013, p. 280). This could happen in current times, causing a lack of incentive for new similar productions.

F) A manual for future offenses

One could argue that these biographies could serve as a manual for future offences. However, in the current times of the world wide web, a

quick search is enough to easily find tutorials for the practice of many acts: how to make a bomb, how to develop cons, open car doors, participate in sharing prohibited material, etc. Still, there are films that tell real and fictional stories that can serve as models for crime committing. Even the dissemination of crime news is enough to replicate the *modus operandi* of similar crimes (as what happens with school shooters), as practice demonstrates. That is, that does not seem to be a reasonable argument.

There are even more reprehensible immoralities than typified crimes, and they would not suffer any restriction in their work for not being provided for in the Criminal Law or for not having a conviction. Just to illustrate, mention are recent documentaries by athletes Lance Armstrong and Ryan Lochte, in which their controversial careers are reconstructed; became worldwide scandals and of reasonable social impact.

Also worth remembering is the emblematic case of the "train robbery" that occurred in the early morning hours of August 8, 1963, when a postal train from the Scottish city of Glasgow to London was stolen by "railway pirates". Among these, Ronald Biggs stood out, who became a celebrity for being able to live peacefully for 30 years in Brazil dodging extradition attempts to Great Britain[10]. Apparently, he financially took advantage of the reputation of the crime. He told and sold the story

G) The three-step rule

In the previous chapter, we explained what the Three Step test is. As already mentioned, this rule serves as the basis for all exceptions to intellectual property rights, not limited to the right to reproduce the work. Therefore, its application in Senate Bill No. 50 of 2016 is possible.

In a simplified way, as already mentioned, the three steps extracted from art. 9.2 of the Berne Convention and art. 13 of the TRIPS Agreement are:

[10] See more: https://www.bbc.com/portuguese/noticias/2013/12/131218_ronald_biggs_obituario_fn.

For certain special cases;

(1) That do not conflict with the normal commercial exploitation of the work; and

(2) That do not unreasonably damage the legitimate interests of the author.

(3) The bill, like the original *Son of Sam law* in the US, is too broadly applicable, unlike item (1) which requires restrictions on special cases. As already demonstrated in this work, there are several variables that must be detailed in the law so that in fact only special cases are limited. As an example, these variables can be: (i) motivation (such as boasting; redeeming oneself; telling one's own version etc.); (ii) contexts (such as protest; feeling of injustice etc.); (iii) lifetime moments (such as during or after serving the sentence; fugitive; extinguishment of punishment by prescription); (iv) forms of exposure (such as vexing third parties – in which case there is already an express provision of guardianship of honor with the possibility of reparation); (v) opportunity for the contradiction of interested parties, among others.

In relation to item (2), the inhibition of profits for the criminal's intellectual production can be understood as a hindrance to the normal commercial exploitation of the work. A commercial exploration implies making a profit for the owner. In the case analyzed, the profit is subtracted from the author. Even putting intellectual work on the market is an obstacle, either because of the lack of incentive in production, or because of the lack of investments – which can be done with the application of profit – necessary to sell a work.

Item (3) questions the author's interest. As already demonstrated in this paper, there can be countless motivations. Therefore, the law must be specific in its approach.

In view of the argumentation of the Three-Steps Rule, with the applicability of the test, the Brazilian Bill of Law would be disapproved, that is, it violates constitutional rights and the principles of law.

If, even knowing all these considerations, one still chooses a means of preventing or hindering the profits of a criminal in exposing his or her crime, this imposition must be made by means of a carefully considered law in order not to harm the author's copyrights.

Sharing one's own life experiences, which can be filled with unhappiness, in any existing legal form of expression, is a right of the personality of those who wish to make their experience public. Removing the profits on a certain part of the history of someone's life is to deny them the existence of the episode experienced and even overcome.

Author's copyright is attached to all charges and bonuses arising from any creative activity. There are countless ways to disclose the crime itself, or any type of socially disapproved conduct, and this information can be profitable in different ways. Therefore, it does not seem a reasonable conclusion to prevent the author from obtaining financial, personal, and literary results, as it seems to be censorship and indirect restriction of lawful work.

5 CONCLUSION

Biography (and autobiography) is a literary genre that portrays the life of public persons that are part of history. It is a historical source so that one can understand a certain fact, past moment, or even a person. The creation of such an intellectual work involves not only fundamental rights, but also personality rights of the author and the involved parties.

Author's copyright is a personality right that grants powers to the creator over his or her work, among which, property right. Publicizing an authorial work is a right of the creator. The author has the right to profit from his or her creation. The profits are the consequence of the writer's work. Both the author's copyright and the labor right are fundamental to the human person. The aspects that involve labor grant human dignity. It is through work that minimum conditions of life are assured, and it cannot be denied to anyone at first.

Profit is part of the author's property right, as he or she imprints his or her personality in the work and grants his or her right to labor. One who chooses to show discrediting facts done by oneself bears the burden (responsibility for damages, counter reaction, etc.) and bonuses (profit, recognition, forgiveness, understanding, etc.) of the exhibition.

Author's copyrights are largely protected by specific international and national statutes. In an attempt to obtain safer responses to conflicts, the United States created the *O'Brien* test that demonstrated the need to reform the original *Son of Sam Law*. A similar technique was adopted by the Brazilian Superior Court of Justice. The application of the Three-Step Rule in Bill No. 50, carried out in the previous chapter of this paper, showed the need for changes to comply with the national legal system.

The author's freedom of expression must be preciously protected. The Federal Constitution of 1988 is meticulous in protecting the various forms of expression, whether by content, form and means of publication. The exercise of this right does not exempt one from consequent liability in the event of limit violation. In fact, the irresponsible exercise of any right generates the duty to indemnify.

A State that is discouraging of the arts, whatever the work, must be strongly avoided. It is not up to the State to regulate the content of one's expression, under penalty of incurring a manifest censorship, expressly prohibited by the Federal Constitution. It is up solely to hold responsible those who cause damage. Preventing profit, even temporarily, is a form of indirect censorship. Both prior censorship and indirect censorship should not be tolerated in a society that values the freedom of expression

It is blatantly difficult to give treatment without harming the criminal's right, who is already serving sentence. It does not seem reasonable for a State to prevent its citizens from profiting from their lawful labor; it is an indication of violation of principles of law.

A person's life is full of events that are favorable and negative to their reputation. People incur in illegalities, some with greater offensive potential, others without great legal relevance. Human life must be guided by norms of social behavior, which are sometimes deviated; for some

deviations there are penalties, which after served, must not go beyond those provided for by law and in respect of recognized principles.

It would be pessimistic to assume that all (or most) criminals would like to document the dark part of life, motivated by greed or personal promotion by a discrediting fact. There are many positive possibilities for responsible exposure. Preventing the profit would imply discouraging the publication of works, which seems unreasonable. In any case, the market tends to self-regulate through public assessment. Publishing a work requires many phases and important intellectual work. It is hard to imagine that someone writes a book with discrediting facts about themselves and cannot receive financial benefits from it, but at the same time others could get it, as in those cases in which resources were transferred to third parties.

All the questions asked throughout this paper indicate the complexity of the discussion. Depending on the answer, a customized solution by law will fit. This means that there is no ready-made solution and there is a lot to think about. It is a sensitive issue involving emotions, lives, victims, damages, and benefits surrounding an illegal act. Freedom of speech and incident regulations are in a sensitive field. All questions pertaining to the subject must be carefully scrutinized.

In the hypothesis of needing to regulate freedom of expression for the public interest, it should only be limited to what is strictly necessary to achieve the intended purpose and preserve the right, under penalty of incurring in serious violations.

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