

The creative circle: Why the linguistic turn is of philosophical interest in copyright law

O círculo criativo: porque a viragem linguística interessa filosoficamente ao direito de autor

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Abstract

One of the most significant and most widely discussed elements of the doctrine stipulating the protection of human creations by copyright law is the justification for such protection, particularly when it allocates exclusive rights to the creator. The doctrine is principally based on economic values and does not take into account a philosophical perspective; instead, it considers the equilibrium between protection and the use of people's work for economic purposes. In general, legal scholars are divided into two groups: those who are highly protectionist and those with a more libertarian outlook who claim that what the artist receives from society and the world must be returned. This essay aims to introduce relevant elements of contemporary hermeneutics into the discussion regarding the justification for copyright protection, advancing a thesis that has not yet been proposed within the legal community. Given that hermeneutics is the fairest and most effective way to search for philosophical truth, it would be fairer and more appropriate to incorporate contemporary hermeneutics into copyright law when deciding on the allocation of exclusive rights.

Key words: hermeneutics, copyright, creation, exclusive rights.

Resumo

Um dos elementos mais significativos e discutidos nas análises doutrinárias referentes à proteção das criações humanas pelo direito de autor é a justificativa para tal proteção, em especial sob a forma de exclusividade. Os elementos trazidos à discussão pela doutrina inserem-se em valores econômicos e não exploram as condições filosóficas. Trata-se muito de discutir o equilíbrio na proteção e o uso das obras por razões econômicas. Em linhas gerais, os doutrinadores dividem-se entre alguns de tendência extremamente

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protecionista (considerados conservadores) e os que apresentam uma visão mais libertária, entendendo que o que o autor recebe da sociedade e do mundo deve ser devolvido. O autor pretende inserir na discussão sobre a justificativa para a proteção pelo direito de autor elementos da hermenêutica contemporânea, em discussão ainda não travada na comunidade jurídica. Do ponto de vista da proteção do autor, seria a hermenêutica o caminho mais justo e efetivo para a busca da verdade filosófica. A atribuição de direitos de exclusivo por meio de argumentos de ordem filosófica, seria mais justa e adequada.

Palavras-chave: hermenêutica, direito de autor, criação, direitos exclusivos.

One major issue in the field of copyright² law is the justification for allotting exclusive legal rights to creators working in the arts, culture and/or science.

This basic aspect of copyright is the very foundation of its existence: if a person is to be remunerated or rewarded for something that he has created, then this remuneration or reward must be justified from a philosophical perspective.

Previously, justifications for such rights have been offered based on the equilibrium between what the creator is “given” by society (given that the world existed before his arrival) and what the creator can create using his subjective creative abilities (in essence, taking into account his being-in-the-world as a creator).

The creator does not create “absolutely alone” (because certain things were developed before his “arrival”), but at the same time creative work is not simply ready and available for everyone to create. To translate what one senses into an intelligible medium requires subjective participation, and it is also necessary for the creator to evaluate his environment.

To understand the concept of protection, this equilibrium has been suggested to be necessary if one is to understand and properly apply copyright law. The

confrontation between the individual input of the creator and what he has received from the world in developing his creation has been perhaps the most relevant point in discussions of copyright since its effective but preliminary inception as a legal category in the early eighteenth century.

This fundamental consideration has influenced several important aspects of copyright, including limitation catalogs³ (which allow greater access to the work by third parties) and the protection period in which exclusive rights are assigned to the creator before the work enters the public domain and use requirements no longer exist.

This issue has been addressed exclusively from a commercial perspective⁴ that refers to the need for creative work to circulate in society or in the (often forcible) confrontations between liberty and the protection afforded by the typical exclusive forms of copyright (which suggests that the need to pay for use, for example, represents a violation of the right to have access to culture)⁵.

Too often, conflicts exist between trade and other interests that are still solely related to commercial or legal aspects. These conflicts, though legitimate, give

² I use the term copyright to refer to all rights and powers inherent to creators and artists, with no distinction made between copyright and related rights. However, in the text, I will use the term *droit d'auteur* when necessary to make a systemic distinction between the system originally created in France, which is used in Romanist countries, and the system created in the United Kingdom, which is used in countries that follow the common law tradition.

³ The use of limitations and exceptions is present in national laws with the *droit d'auteur* system; in countries with copyright systems, its equivalent is the fair use doctrine.

⁴ “While a furious debate rages over copyrights and patents, there is general agreement that some protection is needed to secure for inventors and creators the fruits of their labors. The rhetoric that ‘information just wants to be free’ suggests that no one should be allowed to profit from her ideas. Despite this, there does not seem to be a strong lobby arguing that while it is ok for the rest of us to benefit from the fruits of our labors, inventors and creators should have to subsist on the charity of others. For all the emotion, it seems both sides agree that intellectual property laws need to strike a balance between providing sufficient incentive for creation and the freedom to make use of existing ideas. Putting it differently, both sides agree that intellectual property rights are a ‘necessary evil’ that fosters innovation, and disagreement is over where the line should be drawn. For the supporters of intellectual property, current monopoly profits are barely enough; for its enemies currently monopoly profits are too high” (Boldrin and Levine, 2008, p. 6).

⁵ This confrontation has actually lowered the value of copyright law given that some aspects of criminal and civil offenses end up being ignored or underemphasized as illegal acts and *contrario sensu* valued as acceptable behavior, which undermines the coercive force of the law. In this sense, it is worth remembering what Peces Barba *et al.* argued in their work *Legal Theory Course*: “[...] in Law there is an interrelationship between freedom and coercion: Law can be a mechanism to ensure freedom for all, but the presence of coercive dimensions is imperative” (Peces Barba *et al.* 2000, p. 19). This is observed, for example, in the purchase of pirated products and the search for music and audiovisual digital files on the Internet. These behaviors are no longer considered grave in society, which indicates (i) that in some respects the power of copyright law has declined due to new legal relationships that must be rebalanced; and (ii) that this power must be reestablished by readjusting legal relationships through a more modern copyright law. However, libertarian or libertarianist currents should use effective, honest arguments that work from an intellectual perspective rather than resorting to rhetorical expressions such as *information must be free* or arguing that access to prior work is important for the creation of new work as if this implies that, as a consequence, the former needs to be free.

a “bath of philosophy” (to quote Streck) to only those considerations that are interesting to advocates of one thesis or another. Therefore, the discussion only considers what can be accomplished with the ideas that have been brought into the intelligible universe, whereas the discussion that I propose engages these considerations from a philosophical perspective.

For example, the interest in reducing the protection period clearly stems from an interest in releasing creative work from copyright protection or relaxing the rules surrounding its use on the Internet from within the copyright system⁶. However, the traditional justification given for such initiatives is that the author must give back to society whatever he has obtained from it and that this can occur if copyright restrictions are relaxed.

The opportunity to access creative work using new technologies is currently a popular subject of discussion. Once again, the Internet comes to mind; there seems to be a suggestion that any sort of charge by an author represents an affront to the creative liberties of others.

Nevertheless, the point that I want to emphasize is that if the justification for seeking an equilibrium is of an economic nature (as it always is, even if surreptitiously), so that it is unreasonable to expect to resolve the issue by working from a philosophical perspective⁷. Nevertheless, I propose to undertake this analysis from a philosophical perspective, working on the basis of our contemporary understanding of the hermeneutics developed by Martin Heidegger and Hans-Georg Gadamer.

If the justification for assigning exclusive rights is to be given within the realm of philosophy (as proposed by the excessively libertarian contemporary copyright trends), one should use philosophical arguments; however, the results of such analysis cannot be used with an economic bias. This issue will be discussed in this article.

Once the background of the topic under consideration has been considered, it must be remembered that even though art may appear unnecessary to the development of human beings, it is the very reason for

many people’s existence and is therefore an end in itself. However, the autopoietic quality of art leads all individuals who are part of the social-cultural context to exhibit a protective potentiality as potential authors – the authors of creations within the domain of the arts, culture and/or science.

The artist or creator translates the sensible into the intelligible, and this ability creates the issue to be resolved. Hermeneutics, as we shall see, allows this translation, which occurs through language⁸.

Artistic creation, in turn, takes place within language. Therefore, language is the *locus* of artistic and creative expression.

As mentioned above, *language is, above all, untranscendable* (D’Agostini, 2003, p. 89). Language enables the development of creation. Language, be it literary, musical or pictorial, cannot simply be considered something that mediates the relationship between the creation and the creator. Language is not a simple tool; instead, it is part of the linguistic process.

The view in contemporary hermeneutics (starting with Schleiermacher and Dilthey and becoming much more advanced in Heidegger [*in hermeneutic philosophy*] and later in Gadamer [*in philosophical hermeneutics*]) that language is a component of hermeneutics rather than a third element that exists between the subject and the object to be interpreted (but that is still a part of the hermeneutic circle) should also be observed by authorialists so that we can understand from a philosophical perspective why artistic creations must be protected by copyright and why ideas cannot⁹.

Artistic creation is the result of hermeneutics, stemming from the creator’s own factual perceptions and from the artistic sensitivity that characterizes him and his worldview (*Weltanschauung*), which the senses facilitate. Such expression makes use of language, as already mentioned. However, understanding via language is not the only issue; other concepts must be adapted for hermeneutic theories to be considered in determining why artistic creation should be protected.

⁶ Here, I refer to both systems: copyright and *droit d’auteur*.

⁷ Under the burden of artificial and shallow rhetorical statements such as *information must be free*.

⁸ I should clarify that this “passing” from the sensible to the intelligible does not represent a return to Platonic dualism. In fact, the phrase “the sensible” here refers to what is “shared *a priori*”, to “pre-understanding” or to “what is given” before the creation of a comprehensive framework”, whereas the intelligible is “the explication of that which is understood”. As Gadamer writes, interpretation is the explication of that which is understood.

⁹ The supposition that ideas are not subject to copyright protection is present in the two main systems, *droit d’auteur* and copyright. This concept has become so universal that its meaning is not open to discussion, especially from a philosophical perspective. However, it is precisely for this reason that philosophical reflections on the creative process and its foundations are pertinent. There are two important issues to be discussed. With regard to the concept of protecting the expression of ideas, the discussion centers on the object of protection or the creative subject. From a philosophical perspective and based on the concept of the hermeneutic circle, one should not draw a sharp distinction between the creation (work) and the creator (artist) because the two are intrinsically interconnected. Considering that artistic creation in my view constitutes interpretation and therefore that language is no longer a simple hermeneutic tool in the relationship between subject and object, we can consider the work to be a part of the subject and vice versa. Some authorialists have not realized that, for this reason, it is difficult to create an authorialist doctrine without disrupting the work (object)/author (subject) relationship. This division must not disrupt the philosophical notion that the creator and the creation are inextricably interconnected.

Thus, the established pattern, which suggests the need to balance copyright as providing exclusive rights with the right to access creative work or with creative liberty in general (as already observed outside the realm of philosophy), is misguided. The required balance between the use of (and previous access to) a work and its protection via exclusive rights does not take place on a solely commercial or legal level. Instead, it takes place on a philosophical level through the assertion that the individual and the fruits of his creative expression deserve protection based on the absolute freedom and existential potential of the work. Moreover, this equilibrium is sought in a creative environment that, although unrepeatable, may bear some similarity to previous ones. Because of this philosophical argument, copyright laws protect creation and condemn plagiarism.

However, for the same reasons, one cannot assign excessive exclusivity to certain forms of creation (for example, to ideas) because (recalling the lapidary remark of Heidegger) if “language is the house of being”, then becoming the “master” of ideas would require ownership of all possible modes of expression (denying their “liberation” through exclusivity rights) and over language by limiting the creation of ideas in any creative form, thus enclosing being itself in a totality that does not belong to it. Even ontological difference would be ignored in preventing new artistic and cultural creations and forms of expression because ideas would be limited by the exclusive rights assigned to the subject who would thus exist in opposition to other (potential) creators. In this case, and because *being is always the being of an entity*, the creator would only be labeled as such if he could concretize the idea(s) in a particular form. The experience of achieving one’s creative potential and moving from the universe of a simple idea to that of creating a work of art is the ontological difference between a being (the one who conceives of an idea) and an entity (the one who concretizes the idea in a certain form).

Thus, the ontological distinction would be that between being (who could potentially create something from an idea that was not concrete) and entity (as the creator-concretizer of the idea/concept).

In this sense, therefore, as mentioned previously, exclusive rights cannot be assigned to mere ideas; they can only be assigned to the form that those ideas eventually assume. For precisely this reason, the expression of the artistic feelings of the creator cannot be limited; if they were, language would be limited, and one’s potential to become a (potentially) creative being would be philosophically demolished.

From the perspective of the creative being (and of being-in), no interpretation is repeatable.¹⁰ In addition, from a philosophical perspective, no one work will ever be the same as another, and each work is allowable as long as its origins are different and if the creation process is spontaneous and philosophically free. In this sense, protection will always and only be granted to form rather than to content.

Thus, from the perspective of the “creative being” it is as though there exists a “correct answer” for each feeling that manifests itself in a certain way, under certain conditions and with a certain outcome: artistic and cultural creation. Allowing the protection of simple ideas would make it possible to ignore the ontological difference between a being (the creator of an idea with the potential to realize it) and an entity (the creator himself or herself, who makes ideas into something concrete). This would blend the concepts of creations and ideas and of creative potential and actual creation.

Intellectual artistic creation is, therefore, interpretation¹¹. It is an understanding of the world and of the perspective inherent in pre-existing works as harnessed in the generation of the creative work and the meaning with which its creator imbued it¹². It is a form of creation that emerges in the environment of the interpreter¹³ during the three fundamental stages

¹⁰ It is worth remembering that hermeneutics is connected to the production of meaning/sense – *Sinngebung*.

¹¹ The term “interpretation” here is meant to refer not to the creations that are the object of protection but rather to the philosophical concept of seeing the world.

¹² As Gadamer suggests, “Understanding is not a mental transposition. The horizon of sense of understanding can neither really be limited by what the author originally had in mind, nor by the horizon of the recipient for whom the text was originally written” (Gadamer, 2008, p. 323).

¹³ Within the many libertarian or relativist currents intended to reduce the application of the principles of copyright (especially in the *droit d’auteur* system), the arguments that lead to the reduction of applicable rights refer to inherent aspects of liberty. A Portuguese author, Vasco Pereira da Silva, notes both issues of an economic nature and issues related to liberty, and analyzes an important constitutional and fundamental bias that is frequently overlooked by authorialists. The author wishes to consider subjects who have no chance of being considered creators of the protected work. At one point, the author discusses this distinction by addressing the problem of identifying subjects associated with the constitutional protection of culture. Later, he argues that the right to cultural creation extends to other subjects in addition to the creator, who is the primary figure. The author notes that “[...] the scope of subjective protection should also be extended to all those who mediate between creation and bringing intellectual work to the public often replacing artists in the process of its publicization, promotion or even marketing [...]” (Silva, 2007, p. 95). He also names those subjects: among others, they include publishers, agents, producers and patrons. Citing Ipsen, he emphasizes that the mediators working with the artist (*Mittler der Kunst*), whose activity is a prerequisite for the completion of the work of art and its presentation to its audience, are also part of the process. With due reverence to the author, who in fact has addressed important issues associated with fundamental rights, I would argue that the fundamentals of his reasoning are incorrect: the author misidentifies the source of artistic creation. The creator is the only individual who has the ability to create artistic creations from the world of sensible psychological abstractions and from an extra-sensorial, non-palatable universe. It is impossible for someone to consider himself an author if he has not actually

indicated by Heidegger (*fore-having* – *Vorhabe*; *fore-sight* – *Vorsicht* and *fore-conception* – *Vorgriff*¹⁴). This is what justifies the view that the (exteriorized) interpretation of a specified form can be granted exclusivity as long as that exclusivity does not prevent free creation and as long as the new creation is not offensive to the previous one or a simple copy. This concept takes shape in a philosophical environment and not in an economic or commercial one¹⁵.

Given the arguments presented, it must be understood that the process of artistic creation exists in what is called the hermeneutic circle¹⁶. The concept of hermeneutic circle indicates that, from a hermeneutic perspective, the part exists within the whole, and the whole should always be interpreted in conjunction with the part. This conceptualization serves as the basis for understanding texts in their entirety and in their different parts, but it can also serve as the basis for any other act of discursive or symbolic interpretation, which should always occur within its context and environment. For this reason, highlighting a text, a remark or a signal may at times condemn the highlighted part (and its author) to (mis)interpretation if it is taken outside the context of the whole.

The concept of hermeneutic circle was developed by Schleiermacher before it was advanced by

Heidegger and Gadamer, although as a man of religion Schleiermacher considered hermeneutics insofar as it could aid in the interpretation of the scriptures. The German theologian said that “[...] as the whole is surely understood from the particular, the particular can also only be understood from the whole [...]”.

The philosopher identified “[...] the hermeneutic principle [...]”, which led him to develop the concept of the hermeneutic circle:

[...] is of such scope to this art, and so indisputable that even the first operations cannot be established without its use, as a great deal of hermeneutic rules rest more or less upon it. Consider a word whose general linguistic value is known: the part of this linguistic value that applies in the given excerpt and those which must be excluded will only be determined by other parts of the same sentence and, first, by those it holds a closer organic relationship with, which means, therefore, that it is understood as part of the whole, an element of the group. And this applies not only to the choice among the so-called multiple meanings of a word, but also to all words susceptible of different gradations, to this same gradation and, in general, to the greater or lesser emphasis given to a word (Schleiermacher, 2000, p. 47).

made possible the birth of its creation. Many arguments can be used to assign original authorship or ownership to any person other than the author, but this designation will always be a fiction of the legal universe, whether used in determining a person's rights or in considering the creations themselves. Even in the argument that creation results from human perceptions of the world and that therefore the creator is simply the conducting wire for something new in the arts, there should be no talk of assigning the role of creator to a third party rather than to the former individual, the one who made it possible to transform an artistic void – albeit one filled with the colors of previous creations – into something new and perceptible to the senses. Therefore, a patron cannot under any circumstances be compared to the creator of the work he has sponsored; however, he may be understood as having enabled the work that was created. I understand that the author argues that equal conditions are not the issue. I appreciate that the author defends his thesis (and the German authors quoted) as suggesting that cultural mediators might be viewed as holding the rights to creative work and not as creators *per se*. However, I also feel that even though they facilitate the work of creative artists, they do not deserve to be considered co-authors as a result. The most significant issue is that this artificial expansion of authorship insistently equates creators with simple mediators. However, the philosophical line of reasoning discussed in this essay has already demonstrated the impossibility of this mode of thinking; the other participants in the process, as listed by Silva, are not part of the hermeneutic circle from which the work emerges. Claiming that they are free to circulate the work does not equate the members of this circle with artists; instead, it places them in different roles as mediators, facilitators or disseminators. Therefore, it would be reasonable to describe the other participants as holding the right to the free dissemination of art, but it would be exaggerative to describe these people as holding the right to free artistic creation rather than circulation.

¹⁴ I use Ernildo Stein's translation to Heidegger *existentials* (the key principles articulated by Heidegger as existential structures of being-there), as he clarifies them quite precisely: “The philosopher (Heidegger) articulates, with his existential analytics, a set of existentials that represent the structures of being-there. But these structures are not empirical, psychological qualities, for example. Neither do they represent merely formal and logical elements, concepts only. Therefore, the understanding with the elements of fore-having (*Vorhabe*), fore-sight (*Vorsicht*) and fore-conception (*Vorgriff*) must be appreciated in its complexity” (Stein, 2007, p. 106).

¹⁵ Just as avoiding the problem of plagiarism requires a just and equitable relationship, so too does the use of work that several segments of society want not to be covered under the law.

¹⁶ On the hermeneutic circle, Lawn (2007, p. 76) says that “the notion of hermeneutic circle is the notion that the partial understanding of a portion of the text always changes the whole and the whole the parts”. On this note, I should add the following: being part of the whole makes us included in the hermeneutic circle but does not define us because the part is nothing without the whole. Therefore, the concept of *Dasein* should be incorporated into our understanding of the hermeneutic circle and of the concept of *being-there*. Tradition (as in Gadamer), in turn, also strengthens the hermeneutic circle because we can only understand tradition if we realize that the part exists within the whole. Therefore, not only is the part an ingredient of the whole, but the whole is also an ingredient of the part, especially with reference to the temporal issue. According to Gadamer, “it is precisely what we have in common with the tradition we relate to that determines our anticipations and guides our understanding” (1996, p. 59). Tradition “is” in the hermeneutic circle. In addition to the understanding that the hermeneutic circle is the *locus* of hermeneutics and of the interpretative agreement performed by the subject – that the authentic Gadamerian tradition is present in the former and that the whole exists within in the part and vice versa, yielding the circularity of the Gadamerian and Heideggerian hermeneutics – there is another aspect that should not be overlooked: the fact that theory and practice will collide in the circularity of the hermeneutic environment, or as precisely communicated by Streck, “it is possible to say that Heidegger creates a new concept that describes an environment within which theoretical and practical knowledge are related through a circularity: the hermeneutic circle” (Streck, 2011, p. 155). In addition to the part and the whole and to theory and practice, the hermeneutic circle should also consider philosophy and Law as being part of the same universe. There is no Law without philosophy, and there is no philosophy without Law, especially after the invasion of philosophy by language, which occurred to the satisfaction of Law. However, it should be clear that one does not enter the hermeneutic circle; there is neither an entrance nor an exit door, as one is always in the hermeneutic circle because of one's temporality and facticity.

Schleiermacher obviously did not consider artistic creation because that was not his concern, but because I recognize that artistic creation involves interpretation in the philosophical sense, I think that the whole can be conceived of here as a series of other observable complexities if we consider the existential seniority of works and creators, the totality of pre-existing creations, the totality and complexity of all schools and styles of artistic creation and the complex totality of potential creation.¹⁷

In other words, the hermeneutic circle can be understood as the *locus* of creation, and this *locus*, as previously noted, is not a void but rather a world of Platonic ideals waiting for a “creator-conductor” to capture it and give life to its existential fullness.

This circular concept of philosophical complexity can (and should) be considered in the context of artistic creation because an artistic creation never exists out of context. The work is part of a whole. The whole is the environment from which the work emerges and which represents its totality. The same is also true of the whole composed of all the works created by an artist.

Similarly, artistic creations that were created before the work under consideration are part of the whole. The work always relates to its creator, who, in turn, is also part of the whole. Because the “creative being” exists in a pre-existing world, he is influenced by his perceptions about previous artistic creations¹⁸. I have termed the hermeneutic circle in the context of artistic creation is the creative circle, and I have termed the inherent movement toward this *locus* creative circularity.

The hermeneutic circle, observed here as a creative circle, allows art¹⁹ (and the interpretations of the “creative being” to manifest itself through artistic creations influenced by their context. How much of this creation should be attributed to the author is not something that can be measured through copyright law without taking into account this new permutation of the hermeneutic circle. Even the origin of the work cannot be qualitatively measured by considering its context without recognizing the existence of the creative (hermeneutic) circle. The philosophical task of copyright law is to determine to what extent the creator can and should be individually protected for bringing an artistic creation into the world

¹⁷ Slightly different from this essay but working in the same vein is the article by Mário Losano (2010, p. 35): “In the world of thought, innovations rarely cancel the old, but oftentimes they overlap it, so that the reaction to a movement of thought marks the return to the ideas against which the movement itself had reacted to” (p. 320). Even though Losano’s article refers to debates that are inherent in the broad structures of Law – in particular, regarding positivism and neo-Kantism – it is clear that the same logic stems from the creative process and that which is part of the creative circle, which, to a large extent, justifies the existence of what I term cultural circle. The Cultural circle is another term that I have used in my thesis regarding the active participation of society, including the State, in circulating culture for the advancement of mankind. In this sense, it is clear that new artistic and cultural creations, as a consequence of the patterns discussed in this article, reinforce the circularity of creation.

¹⁸ Some theses that have gained popularity, especially in the United States of America, argue that the creative process should be relativized with regard to copyright protection. The theses are based on economic arguments, the concept of freedom of access to culture and the concept of creative freedom rather than on philosophical observations. Although I disagree with a significant part of his thesis, the North-American author Lewis Hyde is an exception to this rule because, in his book *The Gift*, he develops a philosophical position and deviates from the simple economic or excessively libertarian arguments of other authors. In general, the author seeks to address the question of what can be considered artistic creation and to suggest that such creation should circulate socially as a gift. In a sense, what Hyde endorses is the idea that the artistic process works better when facilitated by the transmission of gifts and that art must therefore circulate. Thus, the author suggests that once an author is understood to be the creator of a work of art, he must allow its social circulation because he could only have created it after receiving it in the form of a gift from another author who, in turn, was previously fueled by some other creation. This vicious-virtuous circle is suggested to be crucial in stimulating artistic creation and ensuring the possibility of new creations. Indeed, the author argues that a new creative process is only possible using this approach. “If the gift is not consummated, the creative spirit is consumed” (Hyde, 2011, p. 230). The author argues that only through the creative process conceived as a process of gift-giving can there be new future creation, suggesting that all works are simultaneously both original and derived. This supposition is true from a philosophical perspective because all creations originate from some previous perception and have the potential to feed future creations. In this area, we agree. Hyde claims, “Gifting creates a space through which a new energy flows. The alternative is petrification, blocking the ability to create”, “it is as if life were prevented from flowing” (Hyde, 2011, p. 231). Like the entire discussion presented here, Hyde’s thesis arises to some extent from the early debates surrounding copyright and suggests that a significant portion of what is created results from creation by previous subjects, thereby not justifying the exclusive protection of copyright. This position influences various copyright doctrines that aim to balance the relationship between exclusive protection (the broadest form of protection for intellectual property) and free use by society, as is the case of the public domain and copyright limitations. However, this libertarian position, also observed in authors such as Lawrence Lessig and in the creative commons doctrine, appears to ignore the fact that creation may occur because of motivations other than “creation by creation” (in other words, creation for the sake of creation). If Hyde believes that “by accepting what is given to him, the artist feels compelled to create a work and to offer it to the public”, may we suggest that there are artists who are givers by nature and others who are not? Furthermore, will the non-giver necessarily be a “bad creator”? Will the work of the latter be a “bad creation” in the two most obvious meanings that fit the case at hand? This logic seems to lead to a division between more and less “generous” artists and begs the question of whether some works circulate more than others because they are the objects of what the author calls gifting. Will these “other” works of art not be of the same level of quality? Is this not the same as wanting to assign a human character and characteristics to a created object (work)? Is there such a thing as a fundamentally selfish creation? These questions all appear to arise from the author’s argument, but I think that there are no answers to these questions. Even if the “gift must be kept in motion”, this does not mean that a creation that is not donated will necessarily not influence other creations or will not be part of the virtuous circle of creative influence, just as an artist who in his private life behaves like a scoundrel may not fail to influence other people. As much as it is recognized that circulation will be more carefree and uncommitted, this is not a reality that can be extended to each and every artistic creation. In this sense, it appears that Hyde was not concerned with the analysis of the subjective-objective content of the emergence of a work of art, in light of the hermeneutic circle. Considering that the book *The Gift* was written in the 1970s and 1980s, it was groundbreaking when compared with recent authors who claim to be libertarian as a result of new trends in copyright analysis, which have been excessively ideologized in my opinion, especially after the emergence of the *creative commons*. In addition to Lewis Hyde (Hyde, 2011) and the works of Lawrence Lessig in general, other texts with an excessively liberal bias, in my view, but which deserve some attention because of the studies conducted (or theses presented) are *Copyrights and copywrongs. The rise of intellectual property and how it threatens creativity* by Siva Vaidhyanathan (2007) and *The soul of creativity. Forging a moral rights law for the United States* by Roberta Rosenthal Wall (2009).

¹⁹ The knowledge and sensitive perception of the creator are also relevant.

– one that is perceptible via the senses. In this sense, I recognize that concretized creation in the creative circle requires the return to a place of origin given the possibility of cultural circularity. However, this idea cannot be examined from an economic or legal perspective without considering the philosophical concept of the moment and *locus* of creation. All of this is justified from a philosophical perspective rather than an economic or legal one.

Another important issue is that the senses can be activated differently depending on the artistic concept and work type. Thus, one cannot say that a work is protected because it takes a particular form – e.g., that sound can be protected but that literature cannot, because its abstraction does not allow us to determine when it first existed as a creation. Thus, the creative circle will be different for each mode of artistic expression. In addition, given that the creator may create in different ways, the moment at which the form of creation is chosen is also a moment of creation. All of this takes place in the creative circle; considering that the circle is composed of a whole of infinite possibilities, the various modes of artistic expression are enhanced by each potential creative subject²⁰.

In the context of the creative circle, another question that can be posited is whether the work precedes the artist²¹ – or, to put it differently, whether the artist comes before the work or whether the work already “is” (in the world). The work may not (yet) be a creation but it is potentially in the world. The work is either in the artist or “part of him”, or, as I said, just potentially in the world. Thus, from a philosophical perspective, it does not make much sense to say that a work only exists because there is an artist; indeed, the work may come into being through another artist. Furthermore, as there will always be another artist, *the work always is, although it may not have been created yet*. The creation in question would not come into being only if there were no potential inherent in it: i.e., if there were no subject, it would attract no discussion, not even that proposed here. In essence, the potential for creation is inherent in each and every subject, whether it is labeled as being able to be created or not. In this sense, one might say that the work, if it does not exist (just potentially), is nihilated; thus, every work already

exists (potentially, but in a nihilated form). In this sense, and from this philosophical perspective, every work already exists and therefore does not come from an artist; instead, it comes from an artist and from itself in its *locus*, and it is therefore part of the creative circle. At the same time, this concept justifies the protection of the creator who concretized the potentiality of the work in its pre-existing form. However, an artistic creation exists as a part within the whole that is the productive career of the artist. Referring once again to the concept of hermeneutic circle, I believe that the part of the creative circle composed of the human senses should demonstrate that the whole cannot be protected by exclusivity; if it were, no disparate parts could emerge. Conversely, the protection of the whole is not reasonable because one cannot protect everything; vague concepts such as ideas are not eligible for protection. The notion of hermeneutic circle as presented in the works of Schleiermacher, Gadamer and Heidegger, in the adapted form I term the creative circle, can be interpreted in the light of copyright law. We must always facilitate the human creative potential as much as possible, but the creator (hermeneutician) should be able to claim whatever part of the whole he brought to fruition using his interpretative ability. This concretized part of the whole should be subject to copyright protection and should therefore be concretized (for legal purposes) as an intelligible and protectable work.

In short, there are two important elements of this concept. First, all artistic creations exist in a potential, communicative-interpretative, hermeneutic/creative meta-circle. The creative universe as a whole cannot be protected, but part of it can be (i.e., the set of works created), even if the latter is part of the overall creative circle. Second, this environment makes protection possible because of the rights associated with acts of the artistic interpretation performed by the creative/hermeneutic subject; this is the protectable work. To create, this creative subject (*creative-being*) must have entered the hermeneutic circle, which in this case I term *creative circle*.

The leap into the creative circle (just as into the hermeneutic circle) can take place through a more or less original creation in the sense of known seniority (of creation)²². Because there is no “entrance door”

²⁰ Therefore, the conception and application of the exclusivity of ideas, but in such a way that it does not allow for the free creative development by others who do not own exclusivity, would create a potential for the exclusive appropriation of language to occur under various art forms. This invasion of the borders of the potentialities of any expression might lead, in the end, to such a simplification that anyone observing that an ideal expression was compatible with various forms would be appropriating artistic language in the most effective way. To be clear, anyone who intended to create a musical composition on betrayal could be the holder of this exclusivity in the musical field and, considering the potentiality and integration between forms of creation, any work of any kind that had this simple ideological mention would be enslaved in the protection of the non-concretizing idealizer.

²¹ According to Heidegger, “The artist is the origin of the work. The work is the origin of the artist. Neither is without the other. Likewise, neither of the two also carries the other alone. Artist and work are-in-themselves and in their mutual reference through a third, which is the first, i.e., through that from where artist and work have their name, through art” (2010, p. 25).

²² Because most likely a part of a creation has been pre-created/emerged (if one wants to use this concept of emergence – by another entity, as can be understood).

into the hermeneutic circle, one cannot actually determine whether the initiator of a creation has produced a “most internal” creation because he cannot be defined as the (most) original creator. From a hermeneutic perspective, no fundamental original creator exists; rather, being-there exists in the environment of creation – the interpretation of the world is a reality – and, in this case, its *Weltanschauung* leads to another creation.

If “the being is in that which the thing is”, in fact, in the present at hand (*Vorhandenheit*), then this being, the creator, develops interpretations or ideas through the creation process and creates things through interpretation. The best creator will be the best interpreter – the entity of his being (artist-author), the potential creator.²³

What copyright theory should aim to do, when properly viewed in light of the invasion of philosophy by linguistics, Gadamerian philosophical hermeneutics and Heideggerian hermeneutic philosophy, is protect the act of creation that takes place through the hermeneutic process of understanding the circumstances observed by the author-creator in a wide universe, which is conducted via hermeneutics in the process of artistic creation. The protection of potentiality (represented by the whole) is impossible; however, the protection of a part is possible (where the part refers to a concretized and exteriorized work) because the construction of the latter took place concretely, creating a work of art in hermeneutic and not merely potential terms. This also explains the notion that the hermeneutic circle exists in a context in which pre-judgments and pre-conceptions are understood from the creator perspective as part of the subjectivity that, in turn, also helps to compose the hermeneutic circle from where the work emerges as an artistic creation.

Given this overview, and having analyzed the process of artistic creation as the hermeneutics of what already exists in the world, I believe that a subject who is capable of producing artistic work deserves remuneration or compensation even though the whole cannot be protected via exclusive rights because of the risk (given a radical interpretation) of restricting language.

The task of copyright is to analyze to what degree such protection should be exclusive at the expense of potential new artistic work. The aim is to honor the value of subjective artistic work but also to avoid preventing the development of new work.

Part of the material discussed in this essay has already been addressed by authorialists, but it has never

been considered in the hermeneutic context. Using this perspective, I have aimed to show that economic issues and those of a different nature – especially legal issues – are supported by concepts from hermeneutics, which I would argue is the most fair and effective way to search for the philosophical truth. Acknowledging the linguistic turn as part of the legal world and not as a mere tool should make it possible to achieve the legal truth, even in the attempt to justify assigning exclusive protection to intellectual creations.

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²³ To better interpret, in this sense, means to interpret in the most appropriate way for that particular artistic and cultural expression and for that category (style). For that reason categories that are originally and naturally superior are used. That is why the beautiful is always beautiful.