FISCALIZATION OF COPYRIGHT. CONTRIBUTIONS TO CLARIFYING CERTAIN ISSUES REGARDING FISCALIZATION OF COPYRIGHT *(fiscus ubique praesens est)*

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Abstract

Intellectual creations and taxes have the gift (the first) and vice (the last) to be everywhere. Intellectual creations are sources of income for rights holders and the revenues incurred from their exploitation are, with some exceptions, taxed everywhere under a regime of favour. In some countries, the facilities granted are so attractive that the most important creators have established their headquarters in these „intellectual tax havens". Researching the share of tax revenues from the capitalization of intellectual property rights in the total budgetary revenues of Romania in the last years, as they are highlighted in the annual budget laws, the first words spoken were: It can not! It can not be true! We can not be so low!

According to Annex no. 1 of the state budget law, from the total amount of the planned revenues to be made in 2017, the amount of 96,825,000 lei is „income tax on the exploitation of intellectual property rights" and we find that it increased compared to 2016 with over 10,000,000 lei (from 86,384,000 lei), the forecasts for the following years being also of growth. Referring to the programmed amount to be made from the taxing of the results of the intellectual creation activity, we find that the share in the total state budget revenues is 0.082% (a sum that should not be worried by its small size only if we refer to the tax on profit of the commercial banks planned to be realized, that of 357,000,000 lei).

Keywords: *income from intellectual property rights; subjects of taxation; taxable matter; the regime of favour; collective management bodies.*

1. Questions instead of introduction

No matter how controversial Thomas Malthus[1] is for his ideas and theories, and especially for the one pursuant to which poverty, famine, disease, epidemics, climate change, calamities and wars are beneficial factors for mankind because they ensure the balance between the number of individuals and livelihood, we have to admit that he is right when he says, optimistically, that when a man is born *„God sends not only an extra mouth to be fed, but also a pair of arms that will work."* And I think we can forgive the cynicism of some of his theories in exchange for the realistic demand he made, that *„instead of poverty laws, take measures to educate the poor."* A suggestion that, when it was made, was in line with the spirit of Queen Anna's Statute of 1709, whose declared purpose was to encourage teaching and educators, not only for the benefit of the ignorant but also for the benefit of the country. What the British did in the 17th-18th centuries in the field of intellectual property and by the laws they had adopted over time in order to teach the subjects to work, and if necessary, force them to work and what Malthus said is a good and timely urge for our politicians and for that part of the population that refuses to school and work. And who should be educated to work, not to stand in the queue of social aid, taught to have an initiative, encouraged and helped to undertake when this desire exists, determined to produce goods and added value. How could they do it and we can not?

Many civil law teachers start their first course asking students the question: what did you see on the street coming to college? People and goods hurry most to respond, to the satisfaction of those for whom there is nothing else but pure civil law. The more perceptive they will say, of course, that they see around them creations of God and creations of men! Among these ones, some will continue to say: material goods and intellectual goods. And maybe some will say that all these are „goods" within the meaning of article 1 of The European Convention on Human Rights First Protocol to the Convention and, going further, they will say that upon all these we have some kind of ownership that, if we look closely we find that we are partakers of the state and not of our own. That ownership rights upon goods and/or exclusive rights on intellectual creations are not so exclusive and opposable to everyone as we would want, imagine, or affirm, since the state is entitled to a „portion" of our wealth and income.

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[1] Thomas Robert Malthus (1766-1834), a British cleric and economist, author of a theory that bears his name (Malthusianism), according to which the population grows in geometric progression while livelihood increases in arithmetic progression, this prospect is worrying in the absence of demographic controls. He was contested even during his lifetime, slandered, demonized by many, but many, lucid, admired him. However, he is topical, many are today who recognize the value of his theories and are seeking solutions to the present state of affairs (which confirms Malthus) pursuant to his ideas. His work "Essay on Population" was translated into Romanian language by Victor Vasiloiu and Elena Angelescu and published by the Publishing House *Științifică* in 1992.

Including those created as a result of performing an intellectual creation activity. We always divide our wealth and income with the state, and it seems natural for us to do it. It is true that if we did not do it, if we rebelled against this kingly right of the state, we would have soon find out how bitter the taste of this disobedience is and how „opposable" to the state is our right on what we have gained in property or over what we have created through intellectual activity. We would see how indisputable this kingly right of the state is, getting its share, and how serious this is, and not just in the eyes of the state, the fact of not giving it what is long and definitively admitted being owed to it. Why is that?

It seems to me that the Ecclesiastes has answered to all the questions. And we do not find fault with either one. We all agree that the State and the Tax are inseparable (or even one and only) that people can only live in organized communities, that living together involves spending to meet common needs, and that this requires everyone to participate supporting public spending, including creators who make revenue from exploiting their intellectual creations. We agree with the obligation principle, universality and equality in tax matters because we cannot live together otherwise and because it is moral and fair. We are unmistakably aware that the progress of mankind is due to the activity of those endowed with creative power and that our future depends on what and how much we will create. I mean the creators.

We are reserved as regards tax incentives that violate the obligation principle, universality of taxes and equality of individuals (taxpayers) against taxation. We are against social assistance for all who can work and do not because their help has perverse effects. Is this assistance the cause of laziness[2], denial of work and misery for those who can work and do not do so as a deterrent to those who work. Don't you think that Ecclesiastes (2.21) referred to this when he said: ***„for a man who has put into his work wisdom and science and has succeeded, shares it with the one who has not worked. And this is vanity and an exceeding great evil"?*** Or is the Book of Books overcome?

Albert Einstein, perhaps the greatest creator of all time, considered by the international science community „the man of the twentieth century," is a name associated with the genius. Nobel Laureate for Physics in 1921, the man who stunned the world with his theories, his findings, his scientific work, and related inventive applications[3], the man who always found light where for many only deep darkness was, said that ***„the hardest thing to understand in the world is the income tax"!*** And looking over a tax statement he stated that ***„it's too difficult for a mathematician (to fill out). I need a philosopher."*** And if for Einstein it was hard to understand, then who would understand what our taxes are all about?

Not all people can create, of course, and not all those who claim to do so are truly creators, life showing that plagiarism is not only a very shameful and old job, an act which is not forgotten, is not forgiven, and does not prescribe, but also a profit-maker (this could be one of the hypotheses where the legislator understood to allocate tax on illicit income, upon which I will return)! But with the exceptions justified by illness, disability or age, all those in power should work according to their skill, and those who lack knowledge, helped to acquire it, however in order to achieve this we need an efficient education system where the authors of works, creators in all fields and teachers are the most important contributors.

Comparative history and statistics with their insipid but convincing figures shows us what the states that have understood this simple truth have achieved. Shortly after England became the United Kingdom (1707), in 1709, the United Parliaments of England and Scotland adopted the first modern law on copyright whose title was: ***„An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the Times therein mentioned"***. Subsequently, the title of the law was adjusted and reduced to the ***„Law for the encouragement of learned people to compose and write useful books"*** or ***„The law for encouragement of teaching,"*** which is even better known in the specialized works as ***Queen Anna's Statute***. The purpose of the law derives from its very title: encouraging creative work as one that is useful to learning. In the copyright system, the **usefulness** of new and original creations is the real reason for the protection of works, and here is the fundamental distinction between this system of protection and that of the Berne Convention, at the heart of which is **the creator and its personality**. And even if we are emotionally attached to the European copyright protection system (the Berne Convention), we must admit that **the copyright system has proven its efficiency**, as it is in the states that practice it, the creative work is at higher levels than in Europe, categorically refuting the idea that the satiated creator (artist) can not create, an idea that has a long history in Europe.

The punishment was the first tax. The beneficiaries of the robbery-tax, says Mancur Olson[4]

[2] After adopting the "Law of Poverty" in England in 1601, „idleness and hatred of work were found encouraged", as in France, the establishment by the state, under the authority of the Constitution of 1848 and the ideas of Louis Blanc, of the National Workshops where work was paid by the state by day which was lasting for 10 hours, without the workers producing much, made the number of such paid persons increase, from 6,000 in March 1848 to 150,000 in June 1848, a bankrupt idea for the state. Apud Nicolae Idieru, Political Economy and Finance Studies, Carol Muller Publishing House, 1895, p. 135 et seq.

[3] A. Einstein was not an inventor in the classical sense of the word, but his theories and discoveries are inexhaustible sources of valuable inventions. Among them, the missiles, the atomic bomb.

[4] The American economist Mancur Lloyd Olson Jr. (1932-1998) in his latest paper, Power and Prosperity, and in other studies, analyzing the economic effects of various types of government (anarchy, tyranny, and democracy) distinguishes between roving bandit and stationary

were not at the beginning only a band of wandering robbers who, with time settled and started, with arms in their hands and then words that became themselves a force (the church had its role and interest), to arrogate their role as protectors of those they subjected with force, to gain legitimacy for their actions, then to organize themselves, to establish rules (one of the first being the repetitiveness of the performance, the other, the severe punishment of the one who refuses the imposed burden), institutionalize the coach and the coercive apparatus. And the little ones had finally the reasons to choose the latter as masters and to obey them, even if they made them gnashing their teeth, because their behaviour, besides offering them the safety of life, and has, and has the potential to, however, encourage economic development. The tax was born out of and through violence and is the consequence of a report of obedience, but not many are those who offer other justifications for the right to tax. It is, therefore, natural that relations between State / Tax Authorities and individuals should not be just as cordial

Individuals, unable to completely avoid paying taxes, want to give the state as little as possible (including creators, authors of the works of the spirit do that), and the state wants to take from everyone as much as possible! Individuals are seen by the state as fraudsters and not all of them are, because nowhere else, tax optimization is not evasion, but many of our **states lawyers**[5] and not a few judges (unfortunately) are determined to cut off the Romanian taxable material to make room for those who are to replace Romanian capitalists (incapable of organizing and becoming not only a voice to be heard, but also a force to be taken into account) and then expatriate their income to other lands , wondering of what will be paid for in the future prepared by them without discernment for the „good" they are doing to the country now. And the country can not strip robbers of the unjust, because the irremovability of judges is a trivial status in relation to the special status of state lawyers in Romania. The state, on the other hand, has always been seen by tax payers (a part of them) as the greatest robber! And so it is still today. The Bible tells us the same (we will return), but also Lysander Spooner[6], a genius creator, who defeated the United States in two famous trials, and whose work on the unconstitutionality of slavery offered solid arguments for its abolition.

Researching the share of tax revenues from the capitalization of intellectual property rights in the total budgetary revenues of Romania in the last years, as they are highlighted in the annual budget laws, the first words spoken were: It can not! It can not be true! We can not be so low! That's why I ask: Do you know dear politicians sent by us (wrongly?) where you are and decide on our behalf, what is the share of intellectual creation assets in performing societies and developed countries? If you know, why don't you encourage and support creative work and development research, as is the case in those countries? Do you know gentlemen politicians that we are the country with the lowest level of innovation in the European Union? If you know, why do not you do anything to fix things? Do you know that a country with such a rich culinary tradition has only four geographical indications protected at European level? Do you know it's harder to write a valuable scientific book than to produce software? If you know, why only IT programmers are exempt from income tax? But our list of questions is long. Now we end up with: Do you know that OSIM and ORDA are agonizing from your unpredictability? Do you know how incoherent, inadequate to the interests of the country and out of date (to be polite) is the Romanian legislation on intellectual property?

2. The Ubiquity of Tax Authorities and Intellectual Creations

Intellectual property and Tax Authorities or Intellectual Property and Tax Authorities have in common not only the seniority, permanence and continuous evolution, but also the gift of ubiquity, of their omnipresence at the same time. According to some authors, Intellectual Creation and the Tax Authorities have something sacred, divine[7]. And perhaps by the end of writing and / or reading and before concluding that yes, life might perhaps exist without a Tax and without intellectual creation, but it would certainly be much harder if not impossible, we

bandit, stating that a steady bandit is preferable, which, unlike the wandering one, correlates its interests with those of the population and robbers wisely in order not to remain without the wealth.

[5] This name is not good for those who should be "state attorneys", because attorneys work for the benefit, not against the interests of those who hire them. And many of these "state attorneys" do not understand their true meaning. For the statement that ***"tax avoidance is the only intellectual effort that still has a reward"***, Nobel laureate for economy, John Maynard Keynes, is likely to be declared, after the expression used by Romanian politicians to compromise competitors, and from which state lawyers they made themselves a currency, a "prisons".

[6] Lysander Spooner (January 19th, 1808 – May 14th,1887), philosopher, pamphlet, abolitionist activist, lawyer and entrepreneur, one of the most important figures in the history of American anarchism because of the consistency between written principles and values in action. He gained fame after having obtained the repeal of a regulation that forbids his lawyer access because he did not graduate from the college and after an uneven fight he conducted with the US Post Office holding the legal monopoly on postal services in the US, bankrupt the company he had created but also urged the US Congress to reduce postage rates several times. He also noted, through his belief in the primacy of the natural law of the laws created by men, that he was an opponent of slavery and defended for free the fugitive slaves, his work *"The Unconstitutionality of Slavery"* (published in 1845), sparked the admiration of slave opponents and defenders for their clarity and rigor, demonstrating that slavery is incompatible with the United States Constitution.

[7] See Ernst H. Kantorowicz, The King's Two Bodies, Polirom Publishing House. "It is, perhaps, the most important work on the history of medieval political thought, certainly the most spectacular of the past decades," wrote the American Political Science Review. The work was published in 1957 and translated into many languages. In Romanian it was published in 2014. E. H. Kantorowicz (1895-1963) was a specialist in medieval history and taught at the University of California, Berkeley.

will discover and other elements common to the two areas of social, economic and cultural life and law.

If Tax Authorities and its usual form of expression, the tax (we adopt the British model here and we understand by tax and taxes and contributions, when it will be necessary to refer explicitly to them, because they are not only conceptually different in our law, but are quite different and under the aspect of their legal regime) is „the blood of the state", intellectual creations are the „state mind" and the engine of its development. There can be no states without taxpayers' contributions to support general spending, as there can be no states that go beyond the creation of people, intellectual property.

The tax is contemporaneous with the state, and according to some authors the state is the cause of the tax, but others say that, on the contrary, the tax would be the cause of the state. Could the state and the tax appear outside the minds that have thought and put into operation these ideas (state and tax)? We do not believe it! The intellectual creation activity (not the legal institution of intellectual property, the intellectual property right) is older than the state rather than the tax, but only in organized communities (in states) and with great delay in relation to other protected social and economic values, the creation intellectual property has begun to be valued at its true value and legally protected. after the emergence of the state and on a certain level of development, theologians and scientists - creators, authors of scientific works - formulated ideas and theories, developed them broadly, not a few times with biblical arguments, and offered state reasons for justifying taxation and the right to tax. Among them, we only mention Thomas d'Aquino[8],who, inspired by Aristotle, sees in the state a necessary product because,"***man is a social creature***"[9] and asserted the right of sovereigns to collect taxes when the ordinary – areas income - was not sufficient, with the argument that the monarchs work for the general interests of the community, so that the community has a duty to contribute to their support, and so much more as a lack of means would put the sovereign in a position to contract loans, which would be likely to reduce the prestige that a state must enjoy in relation to another state.

The tax is ubiquitous and some authors (E. H. Kantorowicz among them) say that through this it resembles God. But the (intellectual, people's) creation is missing from something that satisfies people's needs today? Tax is a combination of divine and earthly evidence, proof that this is the very theory of solidarity, so often used in recent times in modern states to justify imposing, and which theory originates in the biblical commandment: help your neighbour (love your neighbour as yourself, Matthew 22:39). But is intellectual creation not the same? Has God not made us (Genesis 1: 26-27) with intellect, emotion, will, and of course, with creative power in his image and likeness? Are not we the way God wanted us to be? It is not the artistic creation a permanent mixture of divine and humanity, of grace of witch only some are gifted and of enormous human toil! He did not say in his famous aphorisms the most original plastic artist of all time, Constantin Brancuși, that he puts into his work divine fire, coincides with it and burns himself inside his work, or that to be true artist must „ *to create as a demiurge, to command a king, to work as a slave* „?

In the context it must be said that the artist of genius, whose gift made to the Romanian people in 1951 (230 sculptures according to some sources) was denied by those who then decided the destinies of the country and its culture and among which were great creators who they did not understand him[10] or they were simply afraid of his greatness, he would also deserve to be studied by jurists[11] and not just in terms of his vision of the originality of works, in which he succeeded in defeating the US customs authorities following a famous, a process that is quoted in all the important works in the field, but also many other events in our lifetime and from our life's realization, even today, for example, whether he died having or not Romanian citizenship , and whether his bones may or may not be

[8] Thomas d'Aquino Theologist (1225-1274, canonized in 1323) and medieval scholastic philosopher, author of "Summa Theologiae". He founded the philosophical system recommended in 1879 as the official philosophy of Catholicism, confirming his professor Albertus Magnus, who said that "*This silent ox will fill the world with his prick*" (The colleagues from Koln College - where he studied Aristotle - who admired d'Aquino for his qualities, called him "silent bull"). He is considered one of the greatest philosophers of the world, although his work is not explicit philosophical but theological. He built the philosophical method of harmonizing faith and reason, combining aristotelism with the dogmas of the church.

[9] Thomas d'Aquino took over from Aristotle who first said that man was a „***zoon politikon***" in his Political work and no one accused him of plagiarism. True, about the right of citation, limits and conditions quoting law speaks only in 1812 (**Charles-Emmanuel Nodier** was the first to say that "*any loans from previous works, except citations can not be excused*") and then A.C. Renouard who said in 1838 that "*to ban writers quoting predecessors, refused to advance science and public discussion using any passage from a work which is in the private sector is undoubtedly an exaggeration. It has even said that* ***an author that cites another, or he makes know the one that supports or disapproves, indicating that he did not want to take authorship of the work of another, is of course out of any conduct guilty.*** *But it can be abused by anything.* „Apud Frederic Pollaud-Dulian, Le droit d'auteur, Economic Ed., 2005, p. 508

[10] It was not the first time when Brâncuși was not understood, but the refusal of the authorities and the culture people to accept his gift, which hurt the artist who demanded French citizenship and lacked our country to have in her cultural patrimony the works offered by this.

[11] The Brâncuși process against the United States, having as object the artwork of sculpture "The bird in space", with the consequence of the duty exemption for its introduction in the US, is a lawsuit on a law problem posed by a much better known work of art , but no less important in civil law than the dispute between Joseph Kohler (1849-1919), professor in Berlin, with important contributions to the philosophy of law, intellectual property and comparative history of law, among others, authors of a work devoted to legal issues in W. Shakespeare's work ("Shakespeare vor den Forum der Jurisprudenz") and another professor at the University of Vienna Rudolf von Jhering (1818-1892), author of "Der Kampf ums Recht" , went on the edge of issue of executing a penalty clauses can not be taken out of the legal fabric of the play "The Merchant of Venice" (the punishment debtor could not meet the payment obligation of pounds of meat cut from the body of the debtor).

repatriated as some politicians and about 180 blood relatives in life say they want to do[12].

And in reverse of this state, i.e., in the dark side of the Tax Authorities and intellectual creations, there are similarities. In the consciousness of most people, the Tax Authorities has never been associated with holiness, on the contrary, and St. Augustine[13] he considered the Romanian State (and his instrument - the Tax Authorities), whose collapse he witnessed when he perfected his work as the fruit of the innate sin or instrument of Satan. In his work De Civitate Dei, St. Augustine identified the city of God with the Church, not with the State, although at that time the Christian Church, so oppressed by the State not long ago, vigorously supported the State. The Terrestrial Fortress of the People (the State), whose organization it saw, though useful, especially if it was impregnated by the Christian faith, was good only because it made possible the evolution of the people towards the City of God. We must not, of course, surprise the attribution of a divine origin to the monarchs by the monarchs, that is, by those who instituted them (the monarchy itself claiming divine origin for it, this descendancy being still affirmed in the Old Testament), for such an origin taxes, sustained, as we saw the Church, was useful for their acceptance by taxpayers and for their compliance by voluntary payment of gifts and, if necessary, by coercive measures.

And yet, those who gathered the ancient trials and were called customs officers[14], were like the robbers and sinners or the pagans, and they were hated by the people (Matthew even denied the shameful tax-collector service in the service of the Romans at the time of his calling to become a disciple of Jesus and evangelist, and in his Gospel the publican is a character negative, referring even to him as „*Matthew the Witness*", a sinner). But of those who created over time, were not some of the purifying fire given as heretics, as unbelievers, and sometimes the bows that were burned were not even made their books inconvenient to the Church? However, the fraternity of the Church and its odious Inquisition is not stranger, with the states in which the inquisitorial tribunals acted (I do not think it is a word expressing the inhuman way they did it) for punishing the subjects who were and not only of the Church? The Church was even more sympathetic to Tax Authorities and its agents than to many of the books and to many of the authors of books. The bibliocide is ancient millennia, but it is the Church that instituted a diabolical censure before the Nazis, communists or denizens, the mere possession of books forbidden by ***Index librorum prohibitorum***[15] being sufficient reason for the heretical condemnation of the banner.

Tax Authorities are omnipresent and omnipotent by that, it really resembles the Divinity. The lawyers assign ubiquity to Tax Authorities and are right about it. But ubiquity, which is an attribute of Divinity and of Tax Authorities, is also a feature of intellectual creations. These can be found anywhere, anytime and can be easily accessed by anyone and used at the same time by an indefinite number of people.

Tax is part of our lives, like days and nights, cold and heat, good and evil. And if the tax can not be included in our gene, as it would, of course, the State and Tax Authorities, it is long ago and perhaps more than the idea of ownership, part of our education, our culture acquired through reading, studying the works of others through experience. The person lacking goods or income is not and can not be sanctioned because he has no goods[16], because it does not create or because it does not have any revenue [17]. But the one who does not pay his taxes has no escape; he will be pursued by the Tax Authorities until the last possibility of realizing the fiscal claim of the state is exhausted. Is the book missing out of our lives? But our education is the product of what has been (intellectually) created throughout history and what is transmitted to us through books?

Tax is in everything we do (sometimes even without profit), and it is the instrument by which the Tax Authorities (State) takes its part, which wants continuously to increase it, from our income and wealth. We learn from early age (from books) that the one who has (or only claims) to care for us, our school, our health, our safety, our roads, that is, the state, to we are indebted and we have to return a price for the goods and utilities that he offers us so that he can take care of himself even more and better! First we learn the rule and then submit ourselves to life, the rule by which the

[12] We do not think it would be bad. It's just that we should know if Brâncuși really wanted to be buried near his mother and if not, let's not disturb his eternal sleep. I know, however, that there are two crosses in the Hobita cemetery with the name of Maria Brâncuși and it is not known where his mother is, and the house where he was born is no longer and that the one who show us that he is, is ready to collapse.

[13] Augustin de Hipona (354-430), bishop, theologian, philosopher, doctor of the Church, one of the four parents of the Western Church, alongside Ambrose, Jerome, and Gregory the Great. It was canonized (St. Augustine to the Catholics, Blessed Augustine to the Orthodox). Patron of the theologians and printers. The work of De Civitate Dei is essential for understanding the history of the Middle Ages.

[14] In the New Testament the word "tax collector" is used 22 times, never in a positive context.

[15] The list of books forbidden by the Catholic Church was promulgated in 1565 by Pope Pius V and was completed by 1948, published in 32 editions. The index was abolished only in 1966.

[16] The one who has goods "above average", according to a controversial legislative initiative that has not yet been finalized, should pay another tax, a "wealth tax" hidden under a name that wants to make it moral „solidarity tax ".

[17] By a law of June 16, 1948, a "leniency tax" was introduced in France due to males who had not reached the age of 50 who could not justify carrying out an activity likely to ensure existence. Various exemptions were provided in the law, including that of students who had not reached the age of 30 on December 31, 1947, and were enrolled at university regularly (on a regular basis). The amount due as "leniency tax" was 50,000 old francs, with overdue payment being followed by corporal constraints. In fact, the normative act adopted was aimed at taxing people who had undeclared income. Harshly criticized "leniency tax" was not applied. L. Lamarque, O. Négrin, L. Ayrault, *Droit fiscal général*, 2nd Edition, LexisNexis, Paris, 2011, p. 97. In Belarus, a draft law on the taxation of non-employed persons was announced in amount of 250 dollars per year, the declared purpose of the legislative initiative is to force everyone to work.

state is partaker of all our acts and deeds, and we must divide with it what we have gained through our physical or intellectual work, inheritance, the play of the hazard because we are under his protection or just (and certainly) in his power.

Tax is a creation of the human mind, and the Tax Authorities is as we know it today thanks to the work of intellectual creation of some of our fellow men, not just the old ones, and today they are looking for new methods of taxation. The value added tax, for example, efficient indirect taxation, was **„invented"** in France in 1954 by the Maurice Lauré[18], an engineer who came after the Second World War (that is, in times of the heaviest for public finances) general director of taxes in the French Ministry of Finance. Generalized in France in 1966, appropriated by CEE in 1967 and then generalized in the European Union (its application is condition of EU accession). VAT is therefore an intellectual creation, because it is the result of a creative work, of putting into practice an idea that has changed the existing reality. True, the „invention" of which its author was dissatisfied before his death was not and is not protected by any intellectual property right, which allowed „copying" in most states of the world without the author's permission and without remuneration for it.

We work for the state to pay taxes, just as much as for us. Some, the Nordic case, even more (statistics say up to 57%). We try to integrate (but we fail) and become the same with the average European working half a week to obtain the resources needed to meet individual needs and the other half to pay taxes, fees and other mandatory contributions, and we look yearning to the European average above which the mandatory levies on their income exceed this half. We accept the dry humour of a famous French cyclist Bernard Hinault[19], who in front of excessive taxes on his earnings said that „when I pedal four times, three times I do it for the state and once for me"[20]. It is true that from time to time we are witnessing fiscal tax anachoresis (adapted to the times in which we are, of course), known to us as ***băjenia*** (refuge), a form of disobedience to the Tax Authorities, in response to which, certain Lord of the Romanian Land[21] allocated a tax called: **năpasta (the blight),** a punishment-tax that was to be paid by the collectivity from where the ones that "fled" took part.

Nowadays, unhappy with the heavy burden of taxes, they are looking for more tax-friendly places, many choosing the way of the bloody tax havens. Among these, we recall a French genius actor, Gérard Dépardieu, who was full of the taxes he had to pay in his country (the country that gave the world VAT) and especially the solidarity tax (the wealth tax) has demanded and obtained Russian citizenship, stirring the fury of some of its fellow citizens, but also the appreciation of others who have followed suit, because more and more are those who establish their tax domiciles in friendly territories in terms of the level of income tax, thus leaving less and less money in their country[22]. In front of the offensive of fiscal anticorruption, which also takes the form of demonizing tax havens [23], new forms of organization for tax optimization have been devised lately - the case of multinationals that are virtually uncontrollable - not least by encouraging states by the facilities granted this phenomenon Ireland's case is IT-enhancing).

Most, however, under academic education or for reasons of moral, it seems natural today to work half the time to fill state coffers and we do not argue, although I have learned from history that our ancestors stood up against the state and the exploiters (boyars, noblemen, gentlemen, kings) and sometimes even for less hitting, which is true all over the world[24].

The tax not only fills the state treasury on the basis of a substantive law report of a regal nature (of divine origin and he), which is completely careless to the principle of equivalence of benefits (***do ut des***), and it also has a special symbolic value. Indeed, the tax symbolizes to a great extent the state's power over the subjects and the acceptance by the taxpayers of the ratio of obedience. Evidence: our contribution to supporting state expenditures is one of the four fundamental obligations of the constituent citizens (not just of Romania), along with the obligation of loyalty and

[18] Maurice Lauré (1917-2001), a valuable polytechnist (he is also the author of a patent for a turbine model) "invented" VAT at the same time as rock'n'roll in the United States (July 5/6, 1954 when Elvis Presley recorded his famous song That`s All Right). According to M. Cozian, *Précis de fiscalité*, p. 277. In an interview given in 2000, Maurice Lauré said he regrets that he "invented" this tax, whose virtues also bent in the period in which the Government and the French Parliament were trying to introduce. The First VAT Directive was adopted on 11 April 1967 (called the Directive on the harmonization of Member States' legislation on turnover tax). VAT is now considered to be the most evolved indirect taxation system. It was adopted in over 120 states, including China, India, Japan and Russia, but not the United States, which remained insensitive to the charms of this kind of indirect tax.

[19] Bernard Hinault has won 5 times the French Cycling Tour and is considered one of the greatest champions of this sport.

[20] M. Cozian, *Précis de fiscalité des entreprises*, Litec, Paris, 2007, p. 1.

[21] But it is known that Lord Constantin Brâncoveanu gave a letter to merchants from Câmpulung that the taxes should be paid individually, thus removing the collective burden called the blight.

[22] In France, where the solidarity tax exists, but without a "good wind from the aft" (M. Cozian, Précis de fiscalité des enterprises, chapter L 'impote de solidarité sur la fortune, p. 407 et seq.), Official statistics demonstrate in -a 10-year period, since 1998, no less than $ 125 billion have been removed from the country because of it. As far as social effects are concerned, the increase in the number of divorces is only one of them, the most important one being the tax evasion, with all the consequences of this fleeing in the medium and long term. Washington Post. Old Money, New Money Flee France and Its Welth Tax, (http://www.washingtonpost.com/ wp-dyn/content/article/2006/07/15/AR2006071501010.html).

[23] And yet, 92 countries have tax havens or they are tax havens themselves. Among them, the Netherlands (the one giving lessons to Romania), Great Britain, Malta, China (Hong Kong), Panama. The State of Delaware in the US is one of the largest tax havens.

[24] The war of independence of the United States of America stems from a fiscal dispute that ended with the emergence of a new state, at the beginning, a confederation of 13 states. But since the very beginning of its existence, the US has had a protectionist policy and encouraging intellectual creation activity, being the first (or the first) country in the world that included the authors' protection in the Constitution.

defence of the country, the latter, that of exercising in good faith rights rather than to ensure the fulfilment of the others. The state is privileged in the tax law report. The author, the creator, is also twice privileged: for the first time through the intellectual property laws, the second time, in fiscal terms, of some granted facilities, both aiming to encourage creative work.

Tax Authorities have been, are and will be everywhere and in all the times when there were and there will be states. It could not lack intellectual property and its most consistent and widely regulated part: in copyright.

We do not know exactly when intellectual property is being taxed. We know, however, that writing and book have become a good deal when the printing was invented. Fine for publishers, not for authors, because the idea that a satiety artist can not create is not even abandoned today, and from the „production" of books today the publisher wins more than the author, and publishers claim that the share of distributors is higher than their share. We also know that the privileges of the prints were used by the monarchs and the incomes they brought to their beneficiaries (but also because they allowed for effective censorship to prevent publication of inconvenient works). How do we know that the reasons for the US legal protection of software (first through the patent and later by the Copyright Act of 1976) have weighed very hard the fiscal aspects: the programs involved money and work, or expenses that companies had to deduct, the programs made and / or purchased are intangible assets that have to be accounted and depreciated, their capitalization brings revenues / profits that must also be taxed after the deduction of expenses, or all of which require the recognition of a right for the software created through intellectual creation activity. We also know that being indifferent their borders (art knows no strangers, said C. Brâncuşi), intellectual creations cause double taxation problems.

3. The state of research and the need to investigate the issue

In spite of the permanent offensive of the Tax Authorities against all kinds of taxpayers, including the offensive creators, which is based on the growing need for state resources and aims at the correct and complete identification of taxable material, the increase of taxable material through appropriate measures (but often these actions are devoid of legal and economic logic) and the collection of what is to be collected (part of taxpayers' income and wealth), the problem of copyright taxation (the creators being also the target of this offensive) reactions from journalists, and rarely creators, researchers have a rather reserved, expectant attitude. There are, however, a few exceptions, and we should remember them.

First of all, Professors Gabriel Edmond Olteanu and Sorin Domnișoru, with a very interesting and consistent study on ***„The ambiguity of the delimitation between the taxation of creativity and that of normal labour"***. A study demonstrating that it is imperative to research on the issue interdisciplinary, by intellectual property specialists and by tax specialists, as did the aforementioned authors. The two captivate by the way they dealt with issues and if they would continue, they would, I believe, do a great job to those who create both those who consume creations and those who want to tax all, that is, the Tax Authorities (the State). The authors of the remarkable study also recall and quote Alexandru Mihnea Găină from the Univeristy of Craiova when they also question the specific rules for determining the taxable income from intellectual property rights, referring to his work Tax Law and tax procedure[25], but the reference to a single page (88) of the work (which I have not been able to obtain) is likely to lead to the conclusion that the approach to the problem in the work of our colleague A. M. Gain is unfortunately reduced in size.

I also mention Cristian Râpceanu with an article on „Copyright regime in 2016"[26], a very technical and good study for all those who have to make payments to the budget, because I'm a creator and earning income "Taxation of income from copyrights" (GEO no.58/2010 by Andrei Straton[27], „Copyright less taxed" (Anonymous ?!), „Labour taxation of the blogger. Impressions from Web stock „by Emil Călinescu[28] and „Taxation of civil conventions and copyright contracts"[29] (under the name A & I consulting), Intellectual property income: social contributions payable by Mădălina Moceanu[30] are also part of the category of resources available on the Internet. Useful but small in size. He also wrote Luiza Daneliuc, but I did not (I know if) I managed to identify the correct posting [31] and there are many other technical ones.

By comparison, in the French doctrine there is a paper in 2005, having 500 pages, written by Jean-Luc Pierre and titled *„Fiscalité de la recherche de la propriété industrielle et des logiciels*"[32], dedicated, as it results from its title, only to taxation in the field of industrial property and software. Belgium seems to be champion in the field of intellectual property taxation.

[25] Published by Universul Juridic Publishing House, 2009
[26] https://republica.ro/regimul-drepturilor-de-autor-in-2016
[27] http://blogulspecialistului.manager.ro/a/important/contabilitate-si-fiscalitate/3146/fiscalizarea-veniturilor-din-drepturi-de-autor-oug-582010.html
[28] https://emilcalinescu.eu/fiscalizarea-muncii-bloggerului-webstock-2016/
[29] http://www.aiconsulting.ro/noutati/fiscalitatea-conventiilor-civile-si-a-contractelor-pentru-drepturile-de-autor
[30] https://legestar.ro/venituri-din-dreturi-de--proprietate-intelectuala-contribuții-sociale-datorate/ published on 15.09.2015
[31] http://www.luizadaneliuc.ro/anaf-raspunde-drepturi-autor-2015/
[32] Posted by Formation Enterprise, Edition 2005.

France has a wealth of jurisprudence, but also studies dedicated to this theme, many available on the Internet.

The domain is also worth exploring for us, the arguments for more extensive research are, we believe, numerous and in any case more than those we have identified. So:

According to the State Budget Law no. 6/2017[33], the state budget for 2017 was set at revenues, to the amount of 117.046.581.000 lei and to expenses, to the amount of 150.159.500.000 lei, with a deficit of 33.111.900.000 lei.

According to Annex no. 1 of the state budget law, from the total amount of the planned revenues to be made in 2017, the amount of 96,825,000 lei is **„income tax on the exploitation of intellectual property rights"** and we find that it increased compared to 2016 with over 10,000,000 lei (from 86,384,000 lei), the forecasts for the following years being also of growth. Referring to the programmed amount to be made from the taxing of the results of the intellectual creation activity, we find that the share in the total state budget revenues is 0.082% (a sum that should not be worried by its small size only if we refer to the tax on profit of the commercial banks planned to be realized, that of 357,000,000 lei).

Also according to Annex 1 of the law, in the chapter „tax revenues", in the year 2017 it is planned to make the amount of 94,000 lei as „profit tax obtained from illicit commercial activities or from non-observance of the Consumer Protection Law". It is hard to understand how the two sources could be united, because GO no. 21/1992 on the protection of consumers, in art. 55-55, establishes the contravention of the violation of the rules established by this normative act and the fines that apply. If, however, it had been taken into account that, according to Art. 61 of GO no. 21/1992 „falsified or counterfeit dangerous products are confiscated (...) and destroyed or used as appropriate, according to the legal regulations, then there are two problems:

- does the state legalize the consumption of products that can be dangerous, spurious or counterfeit, or does the state itself commit the act of putting spurious or counterfeit goods into circulation?
- if the recovery concerns only products that are not harmful (and probably this is the hypothesis envisaged by the legislator), then the income obtained is not taxable, can not be assimilated to it and is not the place next to a „tax on profit „.

As regards the first hypothesis, that of the „profit tax obtained from illicit commercial activities", here things are equally unclear, because, on the one hand, illicit commercial activities are not shown, not even exemplary, the law being in this respect and on the other hand, if we admit that, for example, the musical performances of a category of singers whose income is evaded from taxation, the programmed amount was to be paid (94.000 lei) as tax income from the tax on profit is ridiculous and demonstrates a lack of will rather than the state's impossibility to tax those incomes and those who make such incomes.

Regarding **the individual health insurance contributions due by the persons who obtain revenues from intellectual property rights**, the total intended income is to be credited by creators' contributions is 12.775.000 lei, in a total foreseen in this chapter (insurance contributions) of 23.551.730.000 lei, which represents 0.54% of the total contributions from this source.

Research revenues represent the penultimate category of size (4.000 lei), the last place, with 3.000 lei being the social stamp duty on the value of imported new cars.

If things are as they are from budget laws, then the situation is alarming for Romania. Because of these figures, the easy conclusion is that in our intellectual property, creative activity is either quantitatively reduced or worthless if viewed in its qualitative aspect. Or if we can accept that creative work with its research, development, innovation component is low and underfunded compared to other states, we still have significant activity in several areas. And we can mention here the programming activity, the creation of software, but it is immediately noticeable that this domain benefits from tax incentives that other domains are denied. This may be one of the reasons for the explosive development of IT activities in Romania, which is extremely attractive in terms of tax, but also evidence of inequality and incorrect legal behaviour.

It is, we believe, a duty of the state not only to identify the taxable matter (which is not to be confused with the taxable value, the latter being the value expressed in the unit of measure used for that, respectively the currency) in the intellectual property, correctly determine the value and subject it to taxation, how the duty of the state is to make the legal framework appropriate and where the creative work develops, and the taxable material and the tax revenues realized on the creative activity to grow.

The evolution of states' economies shows that if, over three centuries ago, wealth was based and appreciated exclusively by holding assets such as land, labor, and capital because mankind did not realize the true value of intangible assets, including intellectual creations , little by little, the economy built with primitive means has been replaced by an economy based on ideas and new creations, an economy in which wealth itself is generated by these ideas and creations, and humanity is increasingly aware of their economic value. Today, intellectual creation is, in terms of value, in terms of the effects, results and competitive advantages it derives, the most important component of the companies and even of the industrial branches as a whole. Creations and innovations related to the social

[33] At the date of presentation at the West University Conference in Timisoara in October 2016, we considered the State Budget Law for 2016, namely Law no. 339/2015. We've restored this part to update the digits at the time the article was handed over for publication.

and humanitarian domain also generate effects at least as valuable and important for the development of societies as technical inventions, some authors even claiming that „social innovation is more important than inventing the locomotive steam or the telegraph"[34]. Intellectual creations, which are not only literary and artistic creations, but also computer databases, advertising messages, trademarks, industrial designs, inventions and models, semiconductor topographies, generally all products of creative minds, constitute the heart of modern economies, are producing important incomes. In other words, they are valuable taxable items.

On the other hand, we must admit that even today, it is quite difficult to assess the contribution of intellectual property to the development of economies, among other things, and because there is no adequate way to highlight intellectual property intangible assets in the accounting balances of enterprises. However, studies on the evolution of the US Gross Domestic Product (GDP) between 1909 and 1949, by Robert Solow[35], have shown that an increase in labor and capital accounts for only a small portion of total US GDP growth, the other (estimated by no less than four-fifths), also called Solow's the result of technological progress. Subsequently, the results were confirmed by Edward Denison[36], which showed that „between 1929 - 1957, 40% of income per capita in the US growth was due to technological advances, and today these figures are probably even higher"[37].

Statistics show a steady increase in the share of intangible assets of the type of intellectual property to the detriment of tangible assets all over the world, but the highest growth is also recorded in developed countries and especially in countries allocating large R & D resources. Thus, if in the United States until 1982, about 62% of companies' assets were tangible assets; in 2000 the value of tangible assets decreased to 30%, correspondingly, the value of the intangible assets of the type of intellectual creations increased to 70%. The situation is similar in all developed countries where significant increases in gross domestic product are directly related to research and innovation, new technologies, and efficient exploitation. At present, the value of the intangible assets of the successful commercial companies' intellectual property **goes to 80% of the total assets**, their exploitation being extremely profitable, because the incomes that intellectual creations bring to those who exploit them efficiently and their authors are clearly superior income earned through physical work. In fact, the world's top wealth is lead by people who work or have intellectual property businesses, with Bill Gates (whose company, Microsoft, the second most widely spoken language in the Romanian language). At the same time, it is found that the authors of important intellectual creations are the best paid today, all over the world.

4. The legal framework of copyright taxation

Law no. 8/1996 on copyright and related rights has three texts in which it deals with tax issues.

First, is the article no 131[1], which regulates the methodologies for the use of works, and provides that, in the case of broadcasters, they must be negotiated under predictable and proportionate conditions with potential broadcast receivers, so that users can have the representation of payment obligations at the beginning of each fiscal year. It is, we believe, an application of the principle of predictability of taxation provided by art. 3 lit. e) and 4 of the Tax Code, which responds to the need for predictability, stability of taxes, taxes and contributions for a period of at least one year, for which the amendments to the Fiscal Code can not enter into force within a shorter term than 6 months from the date of its publication in the Official Gazette. Under this special provision, we believe that the negotiated methodologies can only enter into force in the year following that in which they were negotiated but not less than six months after the date of the negotiation. For example, methodologies negotiated between July and December of one year will not enter into force on January 1st of the following year. We believe, however, that this rule should apply in all cases where methodologies are negotiated in accordance with article 121 of Law no 8/1996, and not only if the payers are broadcasters, the current solution of the legislator being discriminatory.

The second is art. no 138 which establishes the attributions of the Romanian Office for Copyright (ROC) and provides that for their fulfilment the Office

[34] To be seen *I. Badâr*, The economic dimension of intellectual property, Ed. AGEPI, Chişinău, 2014.

[35] Robert Merton Solow, American economist, Nobel Prize winner for the economy (1987), decorated by President Bill Clinton with the National Science Medal (1999). The same conclusion came, independently and at the same time, Australian economist Trevor Winchester Swan, so the model is also called Solow-Swan.

[36] Edward Denison (1915-1992), American economist. He estimated the influences that various improvements in production factors had on economic growth and had the idea of taking into account the qualitative changes in the training of the labour force. Analyzing the correlations between economic growth, technological change and improving the quality of the workforce, Denison concluded that technological change and, implicitly, economic growth are not ensured simply by purchasing more efficient equipment, but only by increasing the quality of the workforce, so , the increase in education spending, which is reflected in gross domestic product growth, which means that investment in education does not mean money spent in an unproductive sector. Denison strengthened its findings by taking into account the Japanese experience in the field. The "Japanese Miracle" produced in the aftermath of the Second World War is explained by the initial increase in spending on education, which has led to the existence of people ready to quickly assimilate technological novelties. Investments in education are found in strong increases in gross domestic product, which makes education one of the most profitable economic sectors "[Apud C. Stoenescu, The New Immaterial Economy and Knowledge Management (*http://www.sferapoliticii.ro/sfera/145/art08-stoenescu.html)*].

[37] Kamil Idris, Intellectual property is a powerful tool for economic development. Translation after publication of OMPI no. 888 by Cristina Nicoleta Stamate and Ondina Chiru, OSIM Publishing House, 2006, p. 26. Kamil Idris was Director General of WIPO between 1997-2008.

has access to the necessary information operable and free of charge from the (...) National Agency for Tax Administration (...), as well as from the financial institutions -Banking, under the law. Access is justified by the ROCs control over the collecting societies, payment bodies and the budget for rights holders whose rights they collectively manage.

The third is art. 150 (2), which states that „the sums due to the authors, as a result of the use of their works, benefit the same protection as wages and can only be pursued under the same conditions. These amounts are taxable according to tax legislation in the matter „. It is a stipulation that should not be confusing, as the text assimilates the earnings of creators obtained from the valorisation of intellectual property rights with wages only when they are subjected to forced execution.

The Tax Code refers to its texts 27 times to intellectual works, also of 27 times in works of art and 7 times in copyright. The code also defines the royalty, but the term is used in at least two senses in the Tax Code, the intellectual property royalty being defined twice, in art. 7 point 36 and art. 257.

Income taxation from the exploitation of intellectual property rights is regulated in a regime that is special because it has some own rules and can be characterized as favour only because the personal deduction of 40% of the gross income for determining the taxable income is automatic, there is no need for proof from the author because we do not believe that it is really a facility in relation to other categories or that it really represents the measure of the authors' effort. Exceptions are those who earn salary or salary earnings as a result of software creation.

5. What is taxed in Intellectual Property? The object and / or material taxable

From a tax point of view, the qualification of intellectual property rights and in particular of copyright as a „property right" is of no interest. And this is because the object of taxation, the taxable matter, is not the object on which the intellectual property is exercised, that is, the good-creation, but the income deriving from the exploitation of the rights on it, which is the result of the intellectual work of the author. From this point of view, in the case of creators, the Romanian Tax seems rather attached to the idea of remuneration for work for which the author could be paid a salary, this being a sentence that has enough followers among those who demand the abolition of property rights and replacing them with a simple right to remuneration[38].

The Fiscal Code regulates the Income Tax in Title IV (Income Tax), the revenues from the capitalization of the intellectual property rights being „income from any source" within the meaning of Art. 59 fine the tax code, obtained from „independent activities", according to art. 61 lit. a) of the Fiscal Code, which are defined in article 67 of the same code. However, the tax code is not consistent, because when regulating VAT, intellectual creation activity is assimilated to service provision (otherwise, as will be shown below, VAT application to creators would be impossible).

Income from self-employment within the meaning of the Tax Code (Article 67) is, among others, income from intellectual property rights, made individually and / or in a form of association, including related activities, which means that income from the use of related rights also falls into this category.

Independent activity, within the meaning of the Tax Code (Article 7.3), means any activity performed by an individual for the purpose of obtaining income, which fulfils at least 4 of the 7 criteria listed by law: 1) has the freedom to choice of place, mode and work schedule; 2) has the freedom to conduct business for more than one client; 3) assume the risks inherent in the activity; 4) uses his / her heritage in his / her activity; 5) use for his / her activity intellectual capabilities and / or his own physical performance; 6) is part of a professional body / order with the role of representation / regulation and supervision of the profession; 7) has the freedom to carry out the activity directly with employed personnel or through collaboration with third parties under the conditions of the law. If a person does not meet at least 4 out of the 7 criteria, then it is considered to be tax-dependent, so that the taxation regime will be different, this being a controversial issue, especially for journalists, developers and presenters radio and television broadcasts, moderators, participants in such programs.

It should be noted that the Tax Code defines **the royalty** as income from the valorisation of intellectual property rights in art. 7.36, but later on it is about taxing income, without referring to it as royalties. The Tax Code also speaks of the classical royalties, that is, the sums due to the state for service or utilities provided by the state institutions or for agricultural concessions, mining, oil, etc. and which are budgetary revenues, some (the three mentioned above) assimilated from the point of view of administration and their tax revenue regime.

The Tax Code defines the royalty that is related to intellectual property rights twice, once in Art. 7.36 and the second time in Art. 257. The two definitions, although slightly different, make it possible to conclude that, from a fiscal point of view, royalties are the sums received for the use of rights, that is to say, licenses for use, those paid for the „full acquisition of any property or any property right" on creations not being royalties (Article 7.36 (2) of the Tax Code). In order to be a royalty, it is not mandatory for payment for usage or usage to be periodic. For example, licenses for software for which a single payment is made.

[38] See Gabriel Olteanu and Sorin Domnișoru, "Ambiguity of the Determination between the Taxation of Creativity and that of normal labour", Journal of Legal Sciences, Supplement, Craiova, 2015, p.83-93.

It is worth mentioning here a worrying fact (I have also noted in other papers [39]), namely, that according to the dispositions of Title VI, Chap. I, Section I, point 7 of the Methodological Norms for the application of the Tax Code [40]„,the amount to be paid for the use or right to use ideas or principles relating to software, such as logic schemes, algorithms or programming languages is a fee „, although according to art. 72 par (2) of the Law no 8/1996, „**the ideas**, processes, methods of operation, mathematical concepts and **principles** underlying any element of a software, including those underlying its interfaces, **are not protected**." And apart from the fact that the conflicting provisions show a worrying lack of correlation, it is once again remarked that Norms for the application of a law contradict the law and create a state of inexcusable confusion.

Is it then justified to define royalties? Yes, because according to art. 255 of the Tax Code, payments (...) of royalties from Romania **are exempt from any taxes** applied to those payments in Romania, either by withholding or by declaration, provided that the beneficial owner of the interest or royalties is a company in another member state (EU or EEA, n.n.) or a permanent establishment, situated in another member state, of a company in a member state, but this issue should be dealt with separately, in a study dedicated to it to identify and investigating all situations in which royalties are owed and taxed or exempt from taxation.

The object of taxation under the tax regime regulated by the Tax Code is, therefore, the income from the capitalization of the intellectual property rights, the tax being due by the holders of the rights of individuals. Legal entities, who may also be holders of intellectual property rights (in the case of works of art, software made by employees, collective works) as corporation tax payers, do not benefit from the regime of favour exclusively for the authors. The regime of favor does not apply to the successors of the authors of the works, regardless of whether they become rights holders for the cause of death or acts among the living.

6. The justification of favour regime of revenues taxation from capitalization of intellectual property rights

In the 70s, Ireland introduced a system of taxation known as the **IP Box-Regime** or **patent box**, a regime that established different, benevolent tax rules, of revenues from the capitalization of intellectual property rights and which made big IT companies (Google, Facebook, and Apple) to establish their headquarters in this country. Later, other countries have begun to apply income tax regimes to intellectual property rights, even if they have criticized the Irish solution (for example, the case of French Prime Minister Lionel Jospin between 1997 and 2002).

Generally, under this regime, income from intellectual property rights is taxed from a certain upward income or through reduced tax rates. In Ireland, the tax rate is 6.25% applied to the profit, 15% in France, 5% in the Netherlands, 9% in Spain, 8.5% in Belgium, in Belgium a deduction of 85 %, in Spain, 50% of the profit is exempt from tax. And it is possible that in the United Kingdom, which has announced that after Brexit will still be a good place for creation and protection of creations, tax benefits will be sized to make this country truly a tax haven.

In this state of affairs, we believe, is also the explanation of the exemption from the tax on the salary income of those who work in the field of software creation, but also in the flat personal deduction regulated by article 70 of the Tax Code.

The system, which has made it possible to develop tax optimization schemes, especially from multinationals, erodes the taxable base through the phenomenon of transfer of profits and a massive reduction of the state's tax revenues, and therefore worries and provoked critical reactions and proposals for measures and from the European Union and the Organization for Economic Cooperation and Development.

An OECD Plan of Measures is intended not to change the level of taxation (it is difficult to impose tax levels even in EU countries, direct taxes being, as it is known, non-harmonized and difficult to harmonize), but to establish a modal allocation of profits, the proposed plan being known as BEPS - Base erosion and profit shifting and it is expected that in the near future many double taxation avoidance treaties will be amended in this respect. Another direction of action is that of taxing corporate income at the place where the profit is made or where its actual decisions are made, although in the era of digitization and distance communication, the development of home-based work (home office) , this place will be harder to establish. Another measure that our legislators also seem to be interested in is that the preferential regime applies only to the substantial activities that generated income in the country providing the facilities.

7. Establishing income from the capitalization of intellectual property rights

Establishing annual net income from intellectual property rights, regardless of category creation is done by subtracting expenses from gross income determined by applying 40% to the gross income. In other words, it is considered deductible expenses 40% of the gross income received for making of the work, and it can not be increased even if it proves to higher expenses nor be proven.

In the case of the exploitation by **the heirs** of intellectual property rights as well as in the case of

[39] For example, in the course of Financial and Tax Law, Juridic Publishing, 2016, p. 55.
[40] Published in Official Monitor no. 22 of January 13, 2016.

remuneration for the right to sue and **the compensatory remuneration for the private copy**, the net income is determined by deducting from the gross income the amounts due to the collective management bodies or other payers such income, according to the law, without applying the flat rate of 40%, applicable only to the authors. This means that they will pay the 16% income tax on gross income earned.

For the determination of net income from intellectual property rights, taxpayers can only fill in the income part of the tax records or fulfil their reporting obligations directly on the basis of documents issued by the payer of income. Taxpayers who fulfil their declaratory obligations directly on the basis of the documents issued by the payer of income have the obligation to archive and keep the supporting documents at least within the time limit stipulated by the law and have no obligations regarding the keeping of the accounting records.

For income from intellectual property rights, payers of income, legal entities or other entities required to keep accounting records are also required to calculate, withhold and pay the tax corresponding to amounts paid by withholding, representing early payments of the income paid (Article 72 of the Tax Code). In this case, a 10% rate of income is applied and the tax to be paid in advance will be deducted at source, and for the difference of 6% the author will pay the difference after receiving the income.

This method requires a greater involvement from the holder / author, so that after deducting 10% of the contract value, it will have to submit the Declaration 200 until May 25th of the year following the receipt of the income. Only now will he be able to deduct the flat rate of 40%, and the remaining 6% will be regularized until the sum representing 16% of the declared revenues is met.

a) Taxpayers who obtain income from intellectual property rights at the time of withholding may choose to set the income tax as final tax. The option to impose the gross income is exercised in writing at the time of the conclusion of each legal report / contract and is applicable to the income generated as a result of the activity carried out on its basis.
b) Income tax is calculated by deduction at source when income payers, legal entities or other entities required keeping accounting records by applying a 16% share of the gross income from which the flat rate of deduction is deducted, as the case may be, and the mandatory social contributions withheld at source (Article 73 of the Tax Code).

8. Categories of taxpayers for income derived from the capitalization of copyrights

Tax laws (Tax Code and Tax Procedure Code) use to designate the person who, by virtue of the law, is the debtor of the state, the term „taxpayer". Thus, according to article 1 point 4 of the Tax Procedure Code and article 13 and 58 of the Tax Code, all individuals and legal entities and entities without legal personality who are liable to pay, according to the law, taxes, social taxes and social contributions are taxpayers. The term „taxpayer" covers a heterogeneous category of tax debtors: individuals, legal persons (public or private), employees, retirees, people not employed, low or large taxpayers, residents and non-residents earning income in Romania. These include, of course, creators and performers, related rights holders, and database makers who make revenue from capitalizing on their creations and their successors in rights.

Our Tax Code distinguishes between 2 categories of taxpayers, namely resident and non-resident taxpayers individuals.

A resident individual is any individual fulfilling at least one of the following conditions:

a) is domiciled in Romania;
b) **the center** of the person's vital interests is located in Romania;
c) it is **present** in Romania for a period or periods exceeding in the aggregate 183 days during any 12 consecutive months ending in the fiscal year concerned;
d) is a Romanian **citizen** who works abroad as an official or employee of Romania in a foreign state.

A non-resident individual is one who does not meet the above conditions, as well as any **individual with foreign citizenship** and diplomatic or consular status in Romania, or a **foreign citizen** who is an official or employee of an international and intergovernmental body registered in Romania or a foreign citizen who is official or employee of a foreign state in Romania and their family members.

As regards **the scope of income tax**, **resident** Romanians individuals domiciled in Romania owe income tax from any source, both in Romania and abroad.

In the case of **non-resident** individuals, they owe, as appropriate, income tax, as follows:

- **self-employed** through a permanent establishment in Romania for the net income attributable to the permanent establishment.
- in the case of **residents who are dependent** in Romania, they owe tax on the salary income from this activity. Dependent activity is any activity carried out by an individual in an income-generating employment relationship.
- in the case of non-residents who earn income from other categories of activity (CPF Article 129), they are subject to income tax determined according to the rules corresponding to the respective income category (from investments, goods recovery, etc.).

Non-residents who become residents in Romania owe income tax on income earned both in Romania and abroad, from the date they became residents, except for those who benefit from possible double taxation conventions on the basis of agreements Romania has with other states. Residents of countries with whom

Romania has concluded Double Taxation Conventions have to prove their tax residency by a certificate issued by the tax authority of the foreign state or another authority with powers in the field of residence certification.

Law no. 8/1996, in article 150 (2), as we have seen, only refers to „the amounts due to the authors as a result of the use of their works" and it is understood that they may be residents or non-residents. Taxpayers to income incurred from exploitation of intellectual property rights are not only the authors of works that are natural persons, in this category of taxpayers is falling besides the authors, their successors in rights, who are secondary subjects and who can be both natural persons or legal entities such as assignees, licensees, individuals authorized to use the works without the consent of the rights holders, employers of the authors, copyright holders of collective works. Obviously, in the case of legal entities, they will be liable to corporate income tax, but this tax is not subject to this article.

Micro-enterprises (creators may also organize themselves in an enterprise with this status) who are liable to income tax, for the case where they derive income from the exploitation of intellectual property rights, pay their tax pursuant to the taxable base determined according to article 53 of the Tax Code, without benefiting from regulated deductions for authors' earnings, the advantage of a 40% flat-rate personal income deduction from gross income cannot be cumulated with the benefits of establishing the taxable base for micro-enterprises by derogating rules and applicable only to this category of taxpayers. If the authors establish a micro-enterprise and exploit their rights through the established micro-enterprise, the authors, natural persons, cannot benefit from the personal lump-sum deductions, which are due to them in the nature of the dividends, not the revenues referred to in article 70 of the Tax Code.

9. The subjects of taxation in cases of copyright

According to tax laws, subjects of taxation are natural or legal persons or any other entity without legal personality to whom the law has imposed the obligation to pay a tax, a fee or other obligation to make a certain levy to the national public budget (into the account of the state budget, state social security budget, etc.). The law establishes payment obligations for all those who are tied to the state of income / profit.

At first sight, subjects of taxation, namely the taxpayers are all authors of works.

In reality, things must be nuanced; because authors do not always own the patrimonial rights of the author, not always that the authors of the works exploit or are able to exploit their work and the authors do not always make their income from the creative work done.

However, **the position as taxpayer is conditional on income**, not as author of works. A painting, for example, is the result of the creative work of the plastic artist, but the artist becomes a taxpayer only if, by selling his/her painting, displaying it in exhibitions, authorizing reproduction, etc., he/she earns income.

And in the context, it should be remembered that for the plastic artist the sums collected as a resale royalty are also considered revenues, although in this case the author – the plastic artist is the one who re-exploits the work.

Independent author

The author who exercises the moral right to bring the work to public knowledge and exclusive patrimonial right to decide whether, how and when his/her work will be used, including consenting to the use of the work by others, whether it earns income, regardless of the manner of use (those referred to in Article 13 of Law No. 8/1996 or others not listed by law) of his/her work. In the absence of the exercise of the rights to divulging and use the work, although the work exists, the author has only a virtual patrimonial right and this is not taxable. A tax obligation falls under the duty of the author of the work only when he/she, by exercising his/her right of divulging and the right to use the work with patrimonial consequences, derives income.

We note that under the common law, the owner of a good is a taxpayer regardless of the fact that the good (for example, an agricultural land, a construction, a motor vehicle, etc.) provides an income or not. It is the consequence of the exclusive nature of copyright and which also proves to be opposable to tax authorities, which cannot bind the author to divulging the work or to exploit it to obtain revenue, nor the price for which the use of the work may be authorized by the author.

If the author doing the work on his own (the independent author), the issue of taxation seems simple, for common and collective works, things are different.

The authors of common works

In the case of joint works, of works carried out in collaboration (art. 5 of Law no 8/1996), the use of the work shall entitle each co-author to remuneration in the agreed proportion, and in the absence of a convention, in proportion to the contribution parties or equally if the parties cannot be established. Obviously, each co-author is entitled to the deduction governed by the tax law in order to determine then the taxable income.

In the case of collective works (Article 6 of Law No. 8/1996), the law provides that „copyright" belongs to the individual or legal entity on the initiative, under the responsibility and under whose name it was created. The „copyright" to which the law refers should be understood here as the patrimonial rights (it is questionable in the copyright to which the moral rights

belong to collective works[41]), but the status of taxpayer can have two categories, namely:

Authors of collective work for payments made to them by the initiator of the work and whether such payments have been made. But these would be copyrights, and the law provides that copyrights in collective works belong to people other than authors. Thus, the originator of a collective work may be a co-author, but this is not mandatory, and sometimes it is also impossible, as is the case with the legal entity initiator;

The copyright holder, respectively, the individual or legal entity on the initiative, under the responsibility and under whose name the work was created. In this case, it is a question of whether or not the copyright owner of the collective work is entitled to a deduction of 40%, considered to be deductible expense from gross income, the tax owed to the net income thus established (Article 70 of the Fiscal Code) . The deductible amount is, however, considered as an expense for the realization of the work, and this expenditure may also be incurred by the originator, so it should also be deductible for him. This means, however, that regardless of the remuneration paid by the originator to the authors, only an amount equivalent to 40% of the gross income can be deducted from the gross income, the difference being taxable income.

The authors employed

In the case of authors employed who are employed on the basis of an individual labour contract with a creative assignment (we exclude those who do software programs who have a regime of favour, as we will see later) for which the contract stipulates that the patrimonial rights of the author (those who are interested in the fiscal aspect) belong to the employer, the authors of the works are not subject to taxation when the works are capitalized by the employer. They can become taxpayers only if they become holders of patrimonial rights on their creation as employees upon expiry of the terms provided by article 44 of the Law no 8/1996 and which is three years for the hypothesis of not having entered into the contract. The creation made by them is taxable matter in the employer's hand and to the extent that it is valued and produces income, this being the one to be taxed. The authors of the work on which the rights belong, according to the individual employment contract, to the employer; can not claim from the employer any payments other than those agreed upon. He can not benefit from the deduction of 40% of gross income for two reasons: the first is that the rights of the employer can not be redeemed by the employee who has given up his employer's rights. The second is that for the work done as an employee, he receives salary from his employer.

The author employee with a creative assignment may become the copyright holder at the end of the term for which, according to the contract, the rights are transferred (is the term used in Article 44 (2) of Law No 8/1996) or, if the term is not foreseen, on the expiry of a three-year period counted from the date of the surrender of the work.

The question is whether in this case the employee also benefits from the 40% flat-rate deduction. The argument against deduction is that the work was carried out in the performance of the service duties, respectively the creative assignment with which he was employed and for which he was paid by the employer. In fact, Article 44 (3) of the Law no. 8/1996 stipulates that upon expiration of the term for which the work is deemed to have been assigned to the employer, it is „*entitled to claim to the author a reasonable royalty of the proceeds from the use of his work to compensate for the costs incurred by the employer for the creation of the work by the employee, within the scope of the service duties* „.

The argument in favour of the right to benefit from this deduction is the silence of the law, the lack of the law of any exception to this effect in art. 70 of the Tax Code, which, in par. 2) governs three exceptions (only) from the right of deduction: in the case of heirs, the remuneration of the flat-rate and the compensatory remuneration for the private copy not benefiting from the deduction of the flat-rate in establishing the taxable income but of the amounts due to the collective management or other payers of such income. Another argument is added to it: in the previous regulation, in art. 57 of GD no. 44/2004, it was stipulated that the share of flat-rate expenses is not granted if the individuals use the material basis of the copyright beneficiary „, while the Methodological Norms for the application of the current Tax Code, in Title IV, II, Section 4, paragraph 9, no longer contains such a provision. It is, moreover, evident that the previous Methodological Norms, by the quoted provision added to the law.

The authors of works devoid of originality

Apparently, the question of the originality of the works should be of no interest to the Tax Authorities. From the point of view of the Tax Authorities, since an author has done a work and claims copyright, and the author capitalizing on his work has earned income and paid the taxes due, the question of originality should be indifferent to the Tax Authorities. This is all the more so since, according to art. 14 of the Procedure Tax Code, income is subject to tax legislation, regardless of whether it is obtained from acts or deeds that meet or fail to meet the requirements of other legal provisions. In this case, this is the condition of originality!

The Tax Authorities is and must be interested in the issue of originality, because only the original works are protected and only in their case, the original works, on the occasion of exploitation, the deductions provided by art. 70 of the Tax Code and which, for the benefit of them, the author does not have to prove them. If the „work" does not fulfil the condition of originality, the income earned on it will be taxed, but when

[41] *A. Lucas, H.-J. Lucas, A. Lucas-Schloetter,* Traité de propriété littéraire et artistique, 4e éd., LexisNexis, Paris, 2012, p. 198.

determining the net income, the expenses incurred and proven by the subject of taxation will be deducted for deduction. In other words, these „works" will be subject to deductions from the common law regime. The issue is not only of theoretical importance since the Tax Code defines copyright in art. 7.13 with express reference to the original works of intellectual creation, and the regime of favor is determined by the belonging to the category of original works protected by copyright, to the works of intellectual creation.

However, the Tax Code has a contribution to the originality of some works, following, unbelievingly, the French model. Thus, article 312 of the Tax Code, regulating the regime of second-hand goods, works of art and antiquities (governed by Title VII - Value Added Tax, Chapter XII - Special Conditions) establishes a special regime for certain categories of works of art subject to of trade. The text reminds the original of some plastic works made personally by the artist (paintings, collages, plaques, paintings and drawings, engravings, stamps, individual pieces of ceramics, statuary art or sculpture, but in the case of the last two and copies made by another artist than the author). In the case of tapestries, special arrangements are allowed for pieces made according to original models, provided that there are no more than 8 copies. In the case of copper enamels, specially executed pieces are manually executed in a maximum of 8 numbered copies and in the case of photographs a number of 30 signed and numbered by the photographer. And as you can see, there is a lack of concern about the original qualifications of works of fine art, which is in contradiction with the regulation in Directive 84/27 / the right of suite, which states that it reaffirms the principle of originality for bad plastic art works*" limited in number even by or under the guidance of the artist ... numbered, duly signed or duly authorized by the author ".*

The minor and under restriction authors

In copyright, the question is whether minors, discerners and forbidden persons have the quality of authors when they perform works in the sense of copyright law, but also that of works of no originality.

John Locke made a distinction between artisans and geniuses, and considered that special copyright protection should only be recognized for those who produce something essentially new, immaterial wealth that does not exist to them, minor authors (in the sense of worthless) who merely repeat endlessly what they exist, they and their work being deprived of sparkle that gives glow, so that the works of the latter should be subject to the common law regime. As far as minors and discerners are concerned, their quality is protected by the special laws in as much as it can not be proved that the work is the result of an act of intellectual creation made with the will to create, to make a contribution new to what exists, to alter the reality existing by its realization.

Our law does not operate on such criteria; on the contrary, it protects the works without subordinating the protection of any valuable condition. The only condition for the protection of works by copyright is originality, but this criterion is also relative and subjective. However, the abandonment of the criterion of originality is not possible.

Recently, there is also a discussion of the work done by animals, but it is difficult for them to admit that they could be protected by copyright.

Unknown authors (non-transparent and anonymous pseudonym)

The use of the work under anonymous or pseudonymous conditions does not raise tax issues, the author having the obligation to declare his income and the Tax Authorities to preserve the confidentiality of the information in his possession. The less so it does not raise the problem with the transparent pseudonym. The obligation to declare income for tax purposes is a general obligation for all income generators and if the anonymity or pseudonym is the process of avoiding tax liabilities, then the act would constitute the tax evasion offense.

Authors who make the work available to the public free of charge

There are also the category of creators who make their work available to the public free of charge. If they do not earn income, they will not have the status of taxpayers, because in copyright the owner of the patrimonial right over the created object (the work) does not give you tax obligations. Copyright derives from the fact of creation, the quality of a taxpayer in the valorisation of intellectual creation. In other words, the quality of the taxpayer is conditioned not by the realization of the object upon which the patrimonial right, the creation is exercised, but the realization of the incomes from the exploitation of the intellectual creation.

The law does not prohibit or can not prohibit the release of the work to the public free of charge, it can not prohibit the transfer of the patrimonial rights of the author free of charge, it can not intervene in establishing the price of the assignment or the license. But we do not believe that it is possible to exclude the tax authority's discretion, the right to decide whether acts and deeds of the ceding author express the reality, are not manifestations of bad faith, evasion of tax obligations.

The principle of freedom of management, applicable equally to natural and legal persons and obviously to all holders of intellectual property rights, implies that:

Taxpayers have the right to refuse to make taxable items (intellectual creation works in our case) to obtain income or taxable profit, dispose of their goods in the exercise of their right to dispose of, or to free the goods free of charge, to destroy them , abandon them, do bad business[42]. However, exceptions to this

[42] However, ICCJ has held that it is not permissible to record losses continuously and repeatedly (Decision no. 2/2001 of the Administrative and Fiscal Complaints Division).

rule. It is the case of the falsifiers who can not alienate their goods free of charge (but which, in view of the moral right of disclosure, can not be forced to sell their works or to sell their works.) The moral right of the authors of works has, as is the case he does not make public his work, who does not reveal the created work, he is the author of the work, but he does not make any income and can not be taxed. And for no reason the author of the work can not be forced to make the work known to the public. He can not be forced to make income from the exploitation of his work. He can not be subjected to enforced execution by exploiting his patrimonial rights to his undisclosed work.

Taxpayers have the right to choose the path that generates the lowest tax burden. In the recent French doctrine it is stated that *„if paying taxes is an honourable obligation, the good father and the good manager also have the duty to pay the lowest possible tax to choose the least taxable way*[43]*,"* and that *„paying the highest taxes may be for some proof of holiness or heroism, but most will be convinced that it is rather a proof of foolishness and in no way a father's model of family worthy to follow*[44]*. „.* But that was also the case two centuries ago in England, Adam Smith, whose arguments will be resumed and developed by US Supreme Court judges in a famous tax law ruling in 1935 (Helvering v. Gregory).

Taxpayers have the right, unconcerned by state authorities, to make mistakes, to do business or bad investments, to dispose of their money without profit and to oppose their decisions to the tax administration.

Authors with disabilities

In accordance with article 60 of the Tax Code are exempted from paying the income tax the individuals with serious or severe disabilities for the income from independent activities, realized individually or in a form of association.

The creator successors

Whether they are through acts between the living or the cause of death, they are secondary subjects of copyright and will be subject to taxation under the conditions of common law. There are, however, two derogatory rules.

a) **First**, the limited duration of their rights, which is 70 years from the date of copyright authors' death, a rule that knows some exceptions. Thus, in the case of works made known under the pseudonym (non-transparent) or without an indication of the author (anonymous), the duration of the rights is 70 years from the date of publication of the work, so that only within this time the heirs will enjoy the rights conferred by their authors. Otherwise, the fact that works are published under pseudonym or namelessly affects the rights of heirs only to the extent that they can not exercise moral rights whose exercise is not transmitted, including the right to name.

In the case of equivalent rights (Article 25 (2) of Law No 8/1996, the duration of the rights is 25 years, to the heirs of the holders of equivalent rights, which are transferred within the limit of this period.

For holders of related rights, the duration of the patrimonial rights is 50 or 70 days from the date of the performance or execution, and the fixation of its execution and publication (Article 102 et seq. Of Law No 8/1996) that the holders of related rights do not enjoy patrimonial rights for their performances and interpretations throughout their lives.

b) **The second** is the deduction from the gross income due to the heirs of the amounts due to the collective management bodies or other payers of such income. Whether the heir carries on his own rights to creations by his author or through a management body or other entity, the heirs do not have the right to a flat personal deduction (40%).

The tax payer

Tax laws have also introduced the „payer" institution, a person who acts on behalf of the taxpayer, but is subject to the same regime as the taxpayer, although he is not the tax payer. The payer is defined in art. 1.35 of the Code of Tax Procedure as „the person who, in the name of the taxpayer, is required by law to pay or to withhold and pay or to collect and pay, as the case may be, taxes, social contributions and taxes. It is also a payer and the secondary establishment forced, according to the law, to register as a payer of wages and salary income. „Examples of the payer: the publisher who holds the income tax at source and pays it to the budget on behalf of the author, or the secondary headquarters of a foreign production house in Romania. As regards the assimilation of the payer with the taxpayer, it follows from a numerous texts of the Tax Procedure Code, in which the terms „taxpayer" and „payer" are associated, a procedure used to exclude any doubt as to the regime to which they are subject.

Collective management bodies as „successors" of the authors without heirs

According to article 25 of Law no 8/1996, if there are no heirs, the exercise of patrimonial rights rests with the collective management body mandated during the lifetime by the author or, in the absence of a mandate, the collective management body with the largest number of members in the respective field of creation.

For this hypothesis we identified the following issues:

a) Collective management bodies exercise patrimonial rights in the absence of heirs, so they are not the rights holders. Who are the rights holders in this case? Who are the beneficiaries of the proceeds from the exploitation of patrimonial rights by the authorizing bodies? We should say that the members of the management body, but the beneficiaries should be indicated by law.
b) Exercising patrimonial rights and earning income from the valorisation of intellectual creations, who

[43] Patrick Serlooten, *Droit fiscale des affaires*, p. 25.
[44] Maurice Cozian, Précis de fiscalité des entreprises, p. 534.

owes tax? The answer is that the people to whom the amounts thus obtained are distributed, not the collective management body (of course, we take into account the hypothesis of the lawful body that allocates these amounts to its members).

c) If the rights are exercised by a body other than that designated by the deceased author or by the body with the largest number of members in the respective field of creation, the amounts are distributed to the members of this body or to all creators or to all creators from the respective creative field? Equity tells us that the amounts should benefit all creators, but the problem needs to be resolved by law.

Related rights holders

Taxation of the income of the holders of related rights (performers, interpreters or executors, producers of sound recordings and producers of audiovisual recordings for their own recordings and broadcasters for their own programs and programs services) is above any right of appeal, only that individuals right holders are income tax payers, and corporate rights holders are corporation tax payers, so that it is impossible for them to apply their flat-rate deduction provisions of 40 % benefiting only income tax payers.

Individual related rights holders will benefit from a flat-rate deduction? Article 70 of the Tax Code refers to a deduction of 40% of gross income in order to establish the taxable income without distinguishing between the quality of the holder and art. 67 paragraph (3) of the Tax Code provides that *„the proceeds of the exploitation in any way of intellectual property rights are derived from copyrights and rights related to copyright, patents, designs, trademarks and geographical indications, topographies for products semiconductors and the like „.* Hence, the conclusion is that when the owner of the intellectual property right is an individual and he obtain income from the exercise of his rights, he will be taxed under the „benefit" scheme by receiving a flat-rate deduction of 40% of the gross income in establishing taxable income.

Database makers

In the case of original databases (referred to in Article 8 letter b) of Law no 8/1996), which are copyrighted, they will be subject to the tax regime for copyrighted creations. And because the law does not distinguish, they will also benefit from a flat-rate deduction of 40% of gross incomes when determining taxable income. The duration of their protection is that provided in article 25 (the author's life plus 70 years for heirs). As the law does not regulate collective management in the case of databases, the collective management bodies will not be able to exercise the rights of the holders - authors if they have no heirs. For these databases, it is possible to choose the protection system as the holder can choose for the cumulative protection (copyright and / or sui-generis right).

Regarding the databases for which the Law no. 8/1996 regulates a sui-generis right (Articles 1221-1224), respectively, for databases which do not fulfil the condition of originality but represent databases according to the second sentence of art. 1221 paragraph 2 (2), i.e. those not protected by copyright, the duration of the rights of the manufacturers of databases shall be 15 years from January 1st of the year following its completion, substantial changes, quantitative and qualitative evaluation of the contents of the database data for which a new investment can be considered as allowing it to be assigned a lifetime protection period to the database resulting from this investment. However, this time can be invoked, according to the above-mentioned text, and by the originators of the database producers, when the manufacturer has an interest in doing so.

In accordance with article 7.13 of the Tax Code, the sui-generis rights (which protect the databases) belong to the large category of copyright (the law is not happy, but it is understood that their object is represented by the databases). Article 70 of the Tax Code (which also has an unfortunate wording) however regulates the determination of the income from intellectual property rights, which, as we know, includes industrial property rights, and the text we do not believe it can be restrictively interpreted, as referring only to copyright, related rights and sui-generis rights, although there are arguments in favour of this interpretation, in particular Art. 7.13 of the Tax Code which refers only to the rights regulated by Law no. 8/1996, and not those regulated by industrial property laws.

Of course, to benefit for a 40% deduction, the database maker must be a payer of income tax – an individual (we have seen that in the case of micro-enterprises, although they pay income tax, the deduction provided for authors-natural persons does not apply for them)

Persons exempt from the payment of income tax

Of those exempt from income tax, according to article 60 of the Tax Code are interested in the following:

serious or severe disabled individuals for the income obtained from self-employment or in a form of association (co-author of a work);

Individuals, for the income from salary income and assimilated to the salaries stipulated in art. 76 par. (1) to (3) as a result of the software development;

Individuals, for salary income and assimilated to salaries under art. 76 par. (1) - (3) as a result of carrying out the research-development and innovation activity defined according to GO no. 57/2002 regarding the scientific research and technological development, if cumulatively a number of three conditions established by art. 60 (3) of the Tax Code (applies to all persons included in the project team, within the limits of the expenditure allocated to the project and by drawing up separate payment states for each project).

The case of people working for software deserves a wider discussion.

According to article 60 of the Tax Code, individuals who earn income from salaries and assimilated to salaries, as a result of carrying out the activity of creating software do not owe income tax. This exemption is granted to Romanian citizens and citizens of the European Union Member States, the European Economic Area and the Swiss Confederation, whose diplomas are equivalent, through the specialized structures of the Ministry of National Education and Scientific Research, with the diploma awarded after the completion of a long- duration or diploma awarded after the completion of the first cycle of undergraduate studies (Article 1 (4) of the Joint Order referred to below). The text is impossible to interpret, with the benefit only of persons who earn salary income or assimilated to them. Consequently, if the program right belongs to the individual's author (either because he did it independently or under the clause in the employment contract, according to Article 74 of Law No 8/1996), the author is considered to earning the income from independent activities and consequently he will pay the taxes as a copyright owner, but once again is raised the problem of the 40% flat-rate deduction (referred to above).

The framing in the software activity is done by joint order of the Ministers of Communications, Education, Labour and Public Finance of the Work, Family, Social Protection and the Elderly, the Minister of Communications and Information Society, the Minister of National Education and Scientific Research and of the Minister of Public Finance[45].

The Tax Code contradicts its self regarding the software programs and fees for them, because on the one hand, they are naturally considered works and protected by copyright and includes them in the definition of royalties in art. 257 and article 7.36 par. 1) lit. c) And, on the other hand, by art. 7.36 par. 2) lit. b) And c*) considers that the payments made for software purchases intended to operate the program (i.e. use, n.a.) and those made for the full purchase of a copyrighted software or a limited right to copy it solely for the purpose of its use to the user is not royalties.*

Without denying the need for tax incentives to encourage important activities and the need to align with the practice of other states, we appreciate that the tax exemption provided by art. 60 of the Tax Code for the category of employees creating software programs seriously violate the principles of universality and equality in taxation.

10. Collective management and taxation of collectively managed rights

Both living authors and their successors can collectively manage copyrights and related rights. **Collective management** is, as a rule, **optional**. However, in cases expressly stipulated by law, **collective management is mandatory** and, **when mandatory**, **is even a prerequisite for the exercise of rights** for which the law imposes such a management mode. In other words, the **patrimonial right of the author or the related right for which the law has instituted compulsory collective management can not be exercised individually**, although the right is still individual. Independent whether collective management is optional or mandatory and regardless of whether a mandate contract has been concluded between the authors and the collective management body, the management body is a trustee of the authors, not a commissioner, even if the law stipulates that the body is entitled to commission for the activity which he submits.

The problem with these collective management bodies is whether they owe income tax and indirect taxes - VAT

If a collective management body is a **legal entity and is a transparent tax entity**[46] within the meaning of Art. 7 point 14 of the Tax Code, then according to art. 13 par. 1) lit. a) And art. 2 lit. j) of the Tax Code, **the collective management body is not a corporate taxpayer**, each owner of patrimonial rights of the author being distinctly taxed on the income he realizes.

The transparent tax entity, as defined in article 7, item 14) of the Tax Code is „any association, joint venture, joint venture associations, economic interest group, civil society or other entity that is not a distinct taxable person, each associate / participant subject to taxation in the sense of profit or income tax, as the case may be „.

According to article 58 and 59 of the Fiscal Code, are taxpayers and owe income tax the Romanian individuals resident , with the residence in Romania for the income obtained from any source in Romania and abroad, as well as non-resident individuals who are self-employed through a head office, are taxpayers and are liable to income tax permanently in Romania for the income attributable to the permanent establishment.

In the case of income earned abroad, taxpayers (whether residents or non-residents for the latter, but only if the income is earned through a permanent establishment in Romania), are obliged to declare them by May 25th of the year following that to achieve the income, the tax body issuing the taxing decision.

In turn, art. 67 of the Tax Code (Article 64 letter a of the Tax Code) provides that „the income from **independent activities** includes income from

[45] The Order regarding the creation of software programs is issued by: Ministry of Communications and Information Society Nr. 409 of May 11th 2017, Ministry of National Education Nr. 4020 of June 6th , 2017, Ministry of Labour and Social Justice Nr. 737 of May 24th , 2017, Ministry of Public Finance Nr. 703 of May 16th , 2017 and was published in M. Of. no 468 of June 22nd 2017.

[46] The transparent tax entity may be an entity with or without legal personality. In the case of collective management bodies, Law no 8/1996, by art. 124, requires them to be associations with legal personality.

production, trade, services, income from liberal professions and **income from intellectual property rights**, realized **individually and / or in a form of association, including related activities** „ and that „ the proceeds of the exploitation in any form of intellectual property rights in any way arise from copyrights and rights related to copyright, patents, designs and designs, trademarks and geographical indications, topographies of semiconductor products and the like. „

It follows that in the case of transparent tax management bodies, they are not corporate tax payers, and income tax is due to the rights holders who actually make the income.

The solution imposing individual right holders administering their collective property rights is correct and if we consider the nature of civil legal relationship between the collective management body and the owner of the copyright or related rights, as regulated at this time in our right and for the legal form of the current organization of these management bodies in Romania[47]. This is because the collective management body is only a trustee of the copyright holder or related rights. Moreover, in the case of compulsory collective management, these bodies also represent holders of rights which have not given them a mandate (Article 123 paragraph 2) of Law no. 8/1996), in the latter case, we believe, in the presence of a legal mandate. However, as article 130 par. 1) lit. c) of Law no. 8/1996, **the trustee concludes the legal acts on behalf of the rights holders, therefore on behalf of the principal, not on his behalf, so that the rights and obligations arising from the contract concluded by the trustee with third parties belong to the principal and, the third parties, respectively.** The trustee must manage these rights and obligations that are assumed through the license to use the work (the right) under the concluded contract. Therefore, the amounts attributable to the principal in the distribution made by the collective management body that has the status of a trustee belong to the tenant, the collective management body (the trustee) having the right to its remuneration („commission", according to the Law No. 8/1996).

Unlike the mandate contract in which the trustee concludes contracts in the name and on behalf of the principal, the commission contract has as its object the conclusion of legal acts on its own behalf but on behalf of the principal. What distinguishes the mandate contract from the commission contract is that in the case of the mandate contract the representation is direct, while in the case of the commission the representation is indirect, even if it is sometimes stated that in the case of the commission contract we have to do with a mandate without representation. The commissioner's duty is to „do", not „give," the commissioner being a service provider.

10.1. Who is the „payer" of the income tax in the case of the amounts collected by the collecting management bodies in Romanian law?

Two issues that arise in relation to the person who holds and pays the anticipated tax: the first is the payment made by the user directly to the rights holder and the second the distribution of the amounts collected by the collective management body from the users and those obliged to pay the compensatory (fair) remuneration.

In the first case (the income is paid by the user directly to the right holder) there is no doubt: the user is the one paying the rightful remuneration to the right holder, he will withhold the amount due in anticipation (10% of the paid income) that will pay it to the budget. Subsequently, the right holder will make the annual tax statement, deduct (if he is entitled, the successors do not have the right to deduct) the flat tax rate of the total income, meaning 40% of the gross income, and pay the tax difference up to 16% net income. For example, a user has to pay to a right holder the amount of 100,000 lei. He will withhold 10% of the anticipated withholding tax and will pay the amount of 10,000 lei to the budget and to the holder the amount of 90,000 lei. The holder will draw up the final tax statement and will deduct 40% of the gross income, on the difference of 60,000 lei, will calculate the tax difference of 6%, meaning 3,600 lei representing the difference of tax payable. In this case, the holder of the right will pay in the amount of 13,600 lei.

The right holder may, however, agree with the user to pay the final tax of 16% on the payment of rights on the entire income, in which case the user will withhold and pay to the budget the sum of 16,000 lei.

In the second case, when the user pays the amounts due to the right holder of a collective management body, things are more complicated, the managing bodies being considered as **income payers** and having the withholding tax on income tax (for the anticipated payments, i.e. for 10% of the right holders' income) and to pay it to the budget, but the solution seems questionable to us.

Thus, according to art 72 of the Tax Code, for the income from intellectual property rights, **the payers of the income**, the legal entities or other entities that have the obligation to keep accounting records **are also obliged to calculate, to withhold and to pay the tax corresponding to the amounts paid by detention at source, representing early payments, of the paid income.**

The tax to be withheld is determined by applying the 10% tax rate to the gross income. The withholding tax shall be paid to the state budget until the 25th of the month following that in which the income was paid. Early payer presented are not required to calculate,

[47] Implementation of the Directive no. 2006/115 of December 12th , 2001 on rental and lending right and certain rights related to copyright in the field of intellectual property could bring about amendments to Law no 8/1996, which makes possible the functioning of other forms of collective management bodies, not only of the type of transparent fiscal ones.

withhold and pay the prepayment tax on earned income **if they make payments** to non-legal partnerships (joint ventures) as well as to **entities with legal personality who organize and conduct its' own accounting, according to the law, for which the payment of income tax is made by each associate, for his own income.**

The latter appears to be, according to the tax law, the situation of the collective management bodies. For example: a user, a legal entity (a television company), submits to the collecting management body the amounts owed for the use of works. In this case, the user (the television company) will not withhold the 10% income tax on the amounts paid and the anticipated tax retention and payment (the 10% of the gross income) to be made by the collective management body. However, collective management bodies are not „income-paying" for the purposes of either common law or copyright law, and the qualification of collecting management bodies operating in our country at this date (March 31st, 2016) as **„payers of income"** right holders are wrong. This is because the Law no. 8/1996 clearly **distinguishes** between **the payments** to be made by the users of works (to the right holders or their agents - collective management bodies or other mandates) and **the allocation of the amounts collected by the collecting management bodies to the right-holders (beneficiaries).** Thus, article 130 lit. a) and lit. e) of Law no. 8/1996, stipulate, among the obligations of the collective management bodies:

- the obligation to develop methodologies for their fields of activity, including appropriate patrimonial rights, **to be negotiated with users for the payment of these rights** (by users), in the case of those works whose exploitation makes it impossible for individual holders rights (Article 130 letter a), and here is the mandatory collective management when the bodies act even on behalf of those who have not expressly given them a mandate;
- the obligation to collect the amounts owed by users and to allocate them among the right holders, according to the statutes.

Or to **allocate funds coll**ected by right holders does **not constitute payment of income**, such payment being made by users when management body is only a trustee of the holders rights in the name and on behalf of rights holders and not the collective management body.Of course, it would be otherwise if the collective management body were not a transparent tax entity and would have the legal form of a company with that object of activity when the company would act on its behalf and on its own, contracts for the use of works entrusted by right holders.

Of course, it would be otherwise if the collective management body were not be a transparent tax entity and would have the legal form of a company with that object of activity when the company would act on its behalf and on its own, contracts for the use of works entrusted by right holders.

The solution to this problem is important in cases where right holders have to collect revenues for the use of works in other countries, but also if non-resident rights holders have to pay remuneration for the use of their works in Romania because it can generate either double-taxation or non-taxable income. For example, foreign users would remit to collecting societies the amounts due for the use of works withholding tax on income on the occasion of the „payment" made to the revenue collecting body. That (foreign) body must remit the amounts received to the correspondent body in Romania, which in turn should distribute the sums to the right holders, but also withholding the tax. The reverse of this situation: a foreigner has to collect money from a user from Romania, between himself and the user interposing the management body in his country and the corresponding body in Romania. The amount of money will be remitted to the Romanian body which will also remit it to the corresponding body in the foreign country and will remit it because according to art. 72 par. 4) of the Tax Code, by making the payment to another legal person, can not withhold the income tax due to the author.

It should be noted that for those situations where income concerns residents and their income in Romania, which has to pay the tax in Romania, the problem is of importance only in terms of the (apparent) comfort it creates to the holder of the right to pay the tax by the collective management body. But also in this situation, the right holder has to complete the income statement and the final payment of the tax, because the managing body can only pay the anticipated income tax and within the limit of 10% of the tax due, pay the difference of 6% applied to the net income (i.e. after deducting the 40% flat rate tax to which **the author**, not other holders) is entitled, is made by the author.

10.2. Relevance of the form of organization in terms of VAT payment

The value added tax is, I recall, an indirect tax „invented" by a French engineer and jurist, Maurice Lauré, whom the author also regretted that he invented. This tax is borne by the final consumer of the product or service, the price of which is in fact included and which the collector body (the seller of the product, the service provider) pays to the budget. It is collected in cascade by each economic agent who participates in the economic cycle of making a product or providing a service that falls within the scope of taxation. After exercising the right of deduction, the taxable economic agents who participated in the economic cycle pay the VAT balance to the state budget. Commonly, the ratio of tax law (which is more complicated in the case of indirect taxes) is established between participants' successive cycle of production and service providers and consumer tax, on the one hand, and between these companies and state of the other. As it results from its name, VAT applies to the value added by economic agents. And the first point to make is that management

bodies, as they do work now, are not economic agents and do not add value to a product that does not belong to them, the copyright law is clear in the sense that collective management bodies they are not rights transferees, and their proceeds are not their income but their copyright holders.

The issue is to know whether the collective management bodies, in the legal form in which they are currently regulated and operated under Romanian law according to the law of copyright, corroborated with the provisions of the Tax Code, are legally payable of VAT, respectively, if they are taxable persons (VAT) within the meaning of Article 269 of the Tax Code. Adjacent to this is the question of how intellectual creation work and valorisation of intellectual creativity are qualified.

The Tax Code, defining in art. 269, taxable persons (with VAT), dispose that any person who carries out in an independent manner and irrespective of place, **economic activities**, whatever the purpose or the result of such activity, **is taxable person**, including **services** and exploitation of tangible and **intangible** assets for the purpose of **obtaining income with a continuity character.**

As regards the transactions covered by the VAT, Article 270 of the Tax Code **considers delivery of goods** the transfer of the right to dispose of goods as owner, and art. 271 of the same code **consider service rendering any operation that does not constitute delivery of goods.**

11. Conclusions

How (ever) the transfer of rights to intellectual creation does not confer on the transferee the right to dispose of the work as a landlord (I have said: fallen in the public domain, the work remains the author and no one can approach it. Aristotle's work belongs to him, Picasso's paintings, even in a certain mood of other people belong to him, the musical works of G. Enescu belong to him and no one can get them and he can not have the works of others) it results from a fiscal point of view that all transactions in the transfer of rights of use for works must be regarded as supplies of services.

The solution is expressly stated in Art. 271 par. 3 lit. (b) of the Tax Code, which provides that **is considered supply of services** any transaction which does not constitute the supply of goods, including **the transfer of intangible assets**, whether or not the subject of a property right, such as: **the transfer and / or assignment of copyrights, patents, licenses, trademarks, and other similar rights.** It is noteworthy, however, that our Tax Code sometimes treats some works of art as assets that can be disposed of as an owner (see Article 312 of the Tax Code, special schemes for second-hand goods, works of art, collectibles and antiques).

Directive no. 2006/115 of December 12th, 2001 on rental and lending right and certain rights related to copyright in the field of intellectual property, by recital (6), **stating that creative, artistic and entrepreneurial activities are largely carried out by independent persons** and considering that the exercise of these activities must be facilitated by ensuring legally harmonized protection within the Community, **considers that these activities, are mainly, services.**

Or collecting management bodies, in the legal form in which they are governed and operates in Romania at this time, not forward and does not deliver goods **that the transferees can dispose of as the owners** and **shall not assign themselves rights in works and not exploit them in fact, the works of intellectual creation** (intangible assets), **nor can they do so,** and the amounts received by these bodies are not and can not be assimilated to their income.

This conclusion is also supported by Law no 8/1996, which states, among others, that:

- Collective management bodies are directly created by copyright holders or related rights, individuals or legal entities, and act within the limits of the mandate entrusted to them (Article 125 (2));
- **the collective management mandate** of property rights, copyright or related rights, is granted directly by written contract by the right holders (Article 129 paragraph 1);
- the exercise of collective management entrusted by the mandate contract can not in any way restrict the patrimonial rights of the holders (Article 134);
- the remuneration received by the collecting management bodies are not and can not be assimilated to their income (Article 134 (3));
- the collective management bodies may not have the purpose of using the protected repertoire for which they have received a collective management mandate (Article 129 (5));
- the management bodies have the obligation to authorize users of works, by non-exclusive license, in written form to use the protected repertoire (the works entrusted by the authors) in exchange for remuneration, to collect the amounts owed by users and to **distribute them among the rights holders** (Article 130);
- the amounts resulting from the placement of unclaimed and unpaid remunerations, in bank deposits or from other transactions carried out within the scope of the object of activity, as well as those obtained as damages or damages as a result of copyright infringement or related violations, **are attributed and distributed to rights holders and can not constitute income of the collective management body** (Article 134 (f));
- in the exercise of the mandate concluded with the holders of rights to the collective management bodies, no copyright or related rights or their use (Article 134 paragraph 4) shall be transmitted.

It cannot be considered that the collective management bodies (as they are organized and operate now in Romania) would be in the hypothesis regulated by article 271 par. (2) of the Tax Code (which provides that „*when a taxable individual is **acting in its own name,** but on behalf of another person it becomes part*

of provision of services, it is deemed to have received and provided the services itself" because the essence of the mandate contract is to conclude acts **in the name of the rights holder who mandated him and on behalf of the trustee**, so **not in its own** name, article 271 paragraph 2) confers the status of taxable person (with VAT) to the person acting in its own name and for the account of another person.

It follows that the collecting societies do not deliver goods that the transferee can dispose of as an owner, do not provide services within the meaning of the Tax Code and can not be considered to act in their own name and for other persons account because under the mandate contract he acts **in the name and on the name of the rights holder**, so that in the form in which the collective management bodies are regulated and operating in Romania, they can not be taxable persons with VAT. Quality of VAT payers may have only authors, as far as creative operates independently and on a continuing basis and exploit their creations for the purpose of obtaining income on a continuing basis[48].

Another legal form of these collective management bodies, compliant and possible with the forms stipulated by the Directive (EU) No 26/2014 on the collective management of copyrights and related rights and granting multi-territorial licenses could eliminate the current state of affairs.

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[48]High Court of Cassation and Justice - The Law Enforcement Assembly, by Decision no. 48 of June 19th , 2017 (more than 6 months from the conference date and more than a year since I expressed this opinion in another paper - Intellectual Property Law, CH Beck Publishing, published in May 2016) that: "In interpreting the provisions of art. 126 para (1) letter a) and article 129 of Law no. 571/2003 regarding the Tax Code, as subsequently amended and supplemented, article 98 par (1) letter g1) and art 1065 of the Law no 8/1996 on copyright and related rights, as amended and supplemented, **the collection by the collecting society of performers remuneration due for the broadcasting or public communication of sound recordings containing the fixation of their art is not a taxable transaction from the point of view of value added tax**".