ECONOMIC, FISCAL AND BUDGETARY ASPECTS OF INTELLECTUAL PROPERTY. FROM THE INTERMEDIATION COMPANIES TO PUBLIC FINANCING.

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Abstract:
The recognition of intellectual property rights in Spain is a consolidated and unquestionable reality, though, the management of these has been the subject of controversy in recent times, yet these are not left out from the treasury. Particularly controversial is the taxation of property rights that are transmitted through Management Companies, since the General Tax Act confers the status of taxable person to those in which the increase of economic capacity is generated and do not confer to those who are mere intermediary agents.

Keywords:
Intellectual property rights, management companies of property rights, taxation.

I. PRELIMINARY NOTES

The debate on the need for the existence of a regulation that protects industrial and intellectual property is not exempt from controversy since past time, as Milton Friedman in his book Capitalism and Freedom, after pronouncing in favor of its existence, affirmed that *"on the one hand, there are many "inventions" which are not patentable. The "inventor" of the*

supermarket, for example, produced great benefits for its neighbors and for which he could not charge. In so far as the same kind of skill is required for both types of inventions, the existence of patents tends to divert activity to patentable inventions"[1]

The fact that the behavior or action of certain individuals influences positively or negatively on the welfare of other subjects implies a market failure, in the proportion that such interaction is not reflected in the prices of traded goods or factors, and this is the circumstance which may be caused by the absence of a regulation on intellectual property rights.

As of an economic point of view this truth has been termed externality, since these affect the welfare of an external agent and this change in welfare is not reflected in prices. Given this situation, it is necessary to define why the public sector must intervene in a market where the possible existence of faults, by the presence of externalities, which can be compensated through payment of a price to its author, if property rights are fully attributed.[2]

The recognition of intellectual property rights deserves a differentiated study according to those authors whose aim is achieving the widest dissemination of his work, those whose priority is to maximize their economic benefit. In this regard, the *Conferencia de Rectores de Universidades Españolas* (CRUE - Board of Deans of Spanish Universities by its initials in Spanish) proposes and supports open electronic access, especially for those texts that have been developed through public financing, which is not incompatible with copyright earnings[3]. Remarkable circumstance, since recognition and remuneration of intellectual

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[1] Cole Bowles (2002).

[2] Externalities can be positive or negative. In the case of positive externalities, such as those caused by copyright, when one person generates and its effect is perceived completely by everyone else, the externality is a pure public good but if only few are benefited, one contemplates an externality and not a pure public good. Rosen (2008).

[3] Declaration of the CRUE *"In support of the open electronic access model" adopted by the XII REBIUN General Assembly (2004) that "Urges authors, especially those who develop projects with public funding, to prioritize, when sending their work for publication, those publications that follow the model of open electronic access [...] under no circumstance, completely cede their copyright, in order to be capable of depositing copies of their work in institutional repositories for open electronic access "*. Similarly other international institutions are pronounced. European Cultural Heritage Online (ECHO) Statement of Purpose, December, 2002 http://echo.mpiwg-berlin.mpg.de/home/documents/statement Association of College & Research Libraries (ACRL) Principles and Strategies for the Reform of Scholarly Communication, August 28, 2003 http://www.ala.org Bethesda Statement on Open Access

copyrights with free access to cultural reality generated by authors are not incompatible, although it is necessary to count with a specific and different regulation from the one currently in force. Separate issue is the way in which both situations are guaranteed, ie, how to quantify the collection of copyrights with a free access to the work performed.

Therefore, the establishment of a tax system to assess the returns generated in the transfer of property rights does not respond exclusively to tax collection needs but the internalization of externalities generated in the trading of property rights which is one of the Cause of the existence of duties on the transfer or ownership of property rights.

II. TEORETHICAL BASIS OF THE INTERVENTION OF THE PUBLIC SECTOR IN THE MARKET OF PROPERTY RIGHTS.

The law governing intellectual property is an instrument of technological policy that recognizes in individuals or persons the right to ownership on their invention. It is a way of compensatory action of the externality since, the patent regulation, internalizes the possible arising externality as a result of the discovered invention.

The generation of intangible property gives its creator or owner the exclusive right to control the production or sale of the same, coalescing under the concept of intellectual property, various concepts such as; trademark, patent or intellectual property rights[4]. The

Publishing,June 20, 2003 http://www.earlham.edu/~peters Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, October 22, 2003 http://www.zim.mpg.de/openaccess-berlin UN World Summit on the Information Society Declaration of Principles and Plan of Action, December 12, 2003 http://www.itu.int - Document 1 http://www.itu.int - Document 2 Organization for Economic Co-operation and Development (OECD) Declaration on Access to Research Data From Public Funding, January 30, 2004 http://www.oecd.org The International Federation of Library Associations and Institutions (IFLA) released the IFLA Statement on Open Access to Scholarly Literature and Research Documentation, February 24, 2004. http://www.ifla.org House of Commons, Science and Technology Committee. Scientific Publications: Free for all? Tenth Report of Session 2003-04, July 7, 2004-10-04 http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/39902-htm.

[4] In this regard Bowles (2002) makes a clear and accurate differentiation between brand and patent and provides an economic argument to the existence of patents as property rights. In this regard he states that "the trademark name (or" trademark ") is a sign that distinguishes products of a manufacturer from another. The brand is register at a State registry and grants its owner the exclusive use of it. This guarantees the origin of the product endorsed by the brand, which allows consumers to buy with greater certainty (since known brand

presence of externalities can lead to a misallocation of resources if not avoided, which does not necessarily mean that the public sector should intervene, because at times the negotiation among individual agents generates lower costs of intervention.

1. The intervention of the public Sector or the negotiation between parties. Coase vs Hayek.

Property rights are legally established titles on the ownership, on the use and distribution of production factors, and on the goods and services. The establishment and delimitation of these generates efficient allocation of resources, especially those that cause externalities, which appear and produce inefficiency in absence of a clear delimitation of the rights assigned to the owners of the original idea[5].

Coase Theorem[6] provides a solution to the problem, without the need for public intervention, and states that, if property rights exist and there is a small number of

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owners will have incentives to protect the economic value for maintaining the same quality standards for their products), and protects the manufacturer of counterfeiters trying to sell their own products taking advantage of the good reputation of renowned brands. The difference between a brand and a patent is that the brand identifies the origin of the goods, but does not prohibit the manufacture of similar or even identical products), and therefore does not have the monopolistic nature of the patent. "

[5] However, in some cultures it is inconceivable that an individual exploit his creation or invention monopolistically for a time, while other laws protecting intellectual property is something protected by law and respected by most citizens. Moreover, the widespread use of the Internet has substantially changed the perspective, reducing the chances for controlling the copy of the work on behalf of the authorities. Furthermore, in the case of intellectual property of those authors whose main aim is to become known and disseminate its work, a high level of protection can slow down his objective.

[6] For Hayek – accordingly to the aim of minimizing uncertainty – once the property rights are clearly defined, these must be strictly defended and considered as given when formulating policy prescriptions. This does not mean that they should remain unchanged over time: the Austrians support endogenous and progressive changes in the structure of property rights, product from the social interaction itself and the market, but they oppose to any change *from outside* of property rights (as They believe it is not possible to have the necessary information in order to make a decision of this type). Therefore, any economic analysis must arise in the context of the existent property rights in a given time. On the contrary, for Coase property rights - in a context of high transaction costs – these would always be susceptible to modification in order to reach a more efficient outcome. The other important implication of Hayek's analysis - which separates him from Coase - is the advantage of applying the principle of objective civil liability in cases of externalities. Coase, based on the reciprocal nature of externalities, severely criticized the *Pigouvian tradition* that called for the imposition of a tax on the externality generating agent. Coase pointed out that such a solution -based on objective liability- did not necessarily lead to minimizing the cost - or maximizing the social output – what it should be done was to compare alternative institutional arrangements, in order to be capable of choosing that which allows reaching

participants in the exchange of the same, with low transaction costs, private transactions are efficient, therefore, public sector intervention is not necessary. Externalities disappear because all the parties are involved in the process and the result will be the same, regardless of the ownership of property rights.

However, in the present case on the ownership and transfer of intellectual property rights do not necessarily meet the Coasian hypothesis, for the following reason:

- First, because the number of participants in the process is not always small, therefore the negotiation between parties is not always possible. This is true especially in cases in which the author claims the widest dissemination and knowledge of his work. In addition; now days, since the dissemination thereof are especially lavished on the network, one cannot claim that the number of users is small, although some specialized texts are only of interest to the groups affected.
- Second, because property rights are not fully assigned, since accepting this hypothesis would demonstrate the absence of plagiarism. Without a pre-registration of the original idea, it would be impossible to determine who is the intellectual author of the idea or the invention[7].
- And third, perhaps this is the most distorting element, transaction costs are not always low, hence the legal and institutional framework becomes an essential element and the rules take a special role, as individuals respond to the allocation of costs and benefits, having them change the fundamentals of their initial decisions.

Therefore, it is an indisputable argument that, regardless of the criticisms about the monopolistic use of intellectual property rights from the perspective of Coase, negotiation between parties is a utopia, because the underlying assumptions for that to be a guarantee of efficiency are not met. There are transaction costs, property rights are not well defined and the number of users is not small, therefore, public intervention is imperative.

2. Possible solutions to the externality problem

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a higher total output Ramos (2001).

[7] Rosen quoted "in England and in Scotland, the private ownership of the river channel has successfully managed to prevent uncontrolled fishing and water pollution for 800 years. The owners are limited to just charge a certain amount to the other for fishing in the river area. Therefore, the owners have a financial incentive to maintain fish stocks and preserve the purity of the water. "Conda (1995).

The different alternatives offered to solve externalities from a public perspective focused on the following aspects:

- The establishment of taxes[8] will reach a more efficient solution. The so called "Pigovian" tax ensures that the taxes levied on those that generate negative externality perceive the compensated external effect. However, with regards to the present issue, the tax should be established on the purchaser of the work that bears the property rights, as it generates positive externalities, which should compensated its author. However, the recent increase in the tax rates of the Value Added Tax[9] has generated enormous social rejection because this inflationary effect clearly discourages the use of this type of consumption.
- The second commonly accepted solution in the process of internalization of externalities is the establishment of subsidies aimed at the generation of positive externalities. Just as the establishment of a Pigouvian tax can internalize negative externalities, a Pigouvian subsidy can provide a solution for the insufficient amount provided by society[10]. This solution would therefore be admissible to the extent that the establishment of taxes shall not efficiently compensate the externality.
- The third theoretical option rests on the creation of a market on the grounds of inefficiency caused by the lack of this. In this case, public intervention shall focus on the State to promote an efficient solution by selling permits or licenses. In such a way that the price paid for the acquisition of a right of use of intellectual property measures the positive effects generated by the author of the same. The price paid for the use of intellectual property should be equivalent to the compensation for the externality.
- The fourth and final option for intervention is regulation[11]. The establishment of a policy

[8] A Pigovian tax is a tax levied on the production of polluting agents in an amount equal to marginal social damage for the efficient level of output. The tax provides an incentive for them to be in the level of production that is efficient. Rosen (2008).

[9] Royal Decree-Law 20/2012, of July 13, raises the standard tax rate of 18% to 21% tax.

[10] The fact that an activity is beneficial does not mean by itself that a subsidy for efficiency required. The subsidy is appropriate only if the market does not allow those who generate the externality to appropriate the full marginal return associated with it. An excellent surgeon whose activity generates a great welfare for humanity, for example, is not creating a positive externality if his salary yet reflects the marginal value of his/her services. Rosen (2008).

[11] A paradigmatic example of regulation constitutes the Clean Air Act in force in the United States. Rosen (2008).

to assign the ownership of property rights, as well as the mode to use it is another of the questionable choices

From an economic perspective, it is always preferable to count with solutions that originate and act on the market, as they cause fewer distortions than those derived from intervention. However, regardless of the solution adopted, one of the indispensable requirements is the subsequent evaluation of the adopted measures, as well as the control of its social effectiveness and efficiency, not only economic.

III. ASSESSMENT OF THE OWNERSHIP OF THE PROPERTY RIGHTS IN SPANISH DIRECT IMPOSITION.

1. Assessment of property rights in the Income Tax for Natural Persons

The perception of industrial and intellectual property rights constitutes taxable Income Tax for natural persons. Particularly submitted to assessment are those incomes derived from the elaboration of literary, artistic or scientific works, which categorization differs depending on whether or not the operation right is assigned; typifying it in one case as work related income, and in contrast as an income derived from business activity, depending on whether the freelance categorization of the productive means exists, constituting incomes from capital those derived from the exploitation of intellectual property rights perceived by people other than the author.

Work Earned income

Article 17.2 of the Income Tax Regulating Law for natural persons, Law 22/2009, dated December 18 establishes on its wording as taxable event of income, the acquisition of yields from literary, artistic or scientific works derived from intellectual and industrial property. Although the categorization thereof is different depending on the activities where the freelance classification of productive means exist, that is to say, that the author himself exploits his work, through edition and marketing, in which case the attribution to the assessable base of the tax will be carried out as an income derived from business activity .

In any case, the compensation for private copying that an entity dedicated to the management of intellectual property pays the authors, is described as earned income, provided that they do not develop the work as the exercise of an economic activity (DGT 09/02/30)[12]

On the other hand, if the yields are assigned to a third party, and no freelance categorization of the productive means is carried out on behalf on the taxpayer, the fiscal categorization will be earned income[13], as envisaged by the Article 17.2 of the Law and Article 95.2.b of Tax Regulations approved by Royal Decree 439/2007 of March 30th. Likewise, the Directorate General of Taxes (1/7/19) also pronounced to this regards[14].

Finally, the yields that media companies will pay to a university professor for articles (as unwaged collaborator) should qualify as earned income, unless the transfer of such intellectual property is made under a professional activity (DGT 12/16/08)[15].

Income from economic activity

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[12] "According to the aforementioned, in the case of intellectual property rights paid directly to the individual author of the work, they can be considered earned income from personal work when the author assigns the publisher the right to exploit that and there is not freelance categorization human resource production on behalf of the author, or income from economic activities if there is such categorization". SG Income Tax (D.G.T. 09/30/02).

[13] For illustrative purposes, earned income are; the satisfied retribution of a company to an employee to an employee to participate in courses organized by its company (*DGT 19-12-00*), salaries paid to a staff member for conferences held abroad (06/04/01). The awards obtained by the development of educational materials to be distributed via the Internet (*DGT CV 22-7- 05*). Prize in cash in consequence of conducting a scientific presentation at an International Congress, transferring the rights of exploitation of the work (DGT14-05-08).

[14] The issue raised and resolved by the Sub-Directorate General for Income Tax relates to the rights collected by a retired writer who transfers the audiovisual rights of his novels written over 10 years ago, for a period of 17 years, being held by transferees and reverting the rights to the author or her heirs. The resolution classifies this income as income from an economic activity since these benefits from such qualification always involving *the freelance classification of the production means and the human resource or one of them, in order to intervene in the production or distribution of goods or services. (...) In the case in question, transfer of audiovisual rights of her works, written over 10 years ago by a retired writer, presumably there is no such freelance classification as referred in Article 16.3 of the Tax Law, so we can conclude that these duties collected by the author, qualify as earned income*. DGT 07/19/2001.

[15] Lefebvre (2012 a)

In those cases where the activity which bears property rights is performed in such a way to cause freelance classification of the production means and of human resources, of one or of both, in order to intervene in the production or distribution of goods or services, that is, that the author himself edits its own work, these will hold the classification of income from economic activities[16]. The Directorate General of Taxes through the Binding Query of November 25, 2008 catalogues these incomes as income from economic activity, or as income from business or professional activity, according to the actual terminology[17].

On the other hand, the Directorate General of Taxes clarifies that (DGT 30.9.02) when the industrial property right is used in an industrial or professional taxpayer procedure, yields are incomes resulting from economic[18] (DGT 29/03/00) activity[19].

Withholdings

Moreover, and like any other remuneration, the assignment of copyright is subject to withholding (DGT 07.19.01, 03.16.00) unless it is a free transfer, creditable circumstance by any type of evidence (DGT19.4.99).

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[16] Respect this effects, one should consider if ; the author participates or not on the yields of the activity, if the author counts with its own workplace for carrying out the activity, furthermore; if certain additional services such as transportation or meals are included (D.G.T.19.4.99).

[17] The Binding Query dated November 25, 2008 of the General Directorate for Taxes states that: *"the illustrator activity developed by the freelance consultant, an pursuant to which besides its own artistic activity, participates in presentations, conferences, courses and acts as jury in awards and competitions, in so far as artistic professional activity includible – therefore – the second section about Tax Rates on Economical Activities, allows the yields obtained in the exercise to be catalogued within the Income tax of Natural Persons as income from professional activities. This follows from provisions in article 95.2 a) of the of the Income Tax Law for natural persons, approved by Royal Decree 439/2007 , 30 March (BOE of the 31 day), which provides as follows: "(...) a) in general, those derived from activities included in Sections II and III of the Tax Rates on Economic Activities, approved by Royal Decree 1175/1990, 28 September .b) in particular will be considered as work-related income those obtained by: 1. The authors or translators of works, resulting from intellectual or industrial property. When the authors or translators directly edit their works, their yields will be classified within those corresponding to business activities. (…) Therefore, in the consulted case, when the consultant yields are obtained within the exercise of its artistic professional activity as illustrator, which includes both the sale of original illustrations as well as the assignment of intellectual property rights (reproduction rights) and the participation in its capacity of illustrator in courses, lectures, conferences and in contest juries, the type of applicable taxation to all these yields will be determined – as it is apparent from the reference that paragraph 2 of Article 95 makes the paragraph 1 of that article - by the provisions of this paragraph 1. As it results from the reference that Section 2 of Article 95 makes to the section 1 of that article - by the provisions of this paragraph 1*". In this regards see (D:G:T: 15-02-2000).

[18] For example the compensation received by an author, derived from the unauthorized use of its drawings, sketches and studies qualifies as income from professional activities. (DGT 05/05/11).

[19] Referred to royalties received by an economist-auditor with private office, for the elaboration of an audit manual for the Instituto de Censores Jurados de Cuentas (Institute of Chartered Accountants).

In particular, and been more specific in the classification of returns, the Directorate General of Taxation, according to Binding Query dated November 25, 2008, explains the type of applicable retention according to the classification of the income received, in response to the following: To the effect of the provision in the aforementioned paragraph (applicable withholding in professional activities) will be considered within incomes from professional activities: a) Overall, from the exercise of the activities included in Sections II and III on the Tax Rates of Economic Activities, approved by Royal Legislative Decree 1175/1990, dated 28 September. b) In particular, the consideration of work-related income obtained by: 1 The authors or translators of works from intellectual or industrial property. When authors or translators directly edit their work, their yields will be realized between the corresponding business activities. (...) 1. When incomes are the consideration of a professional activity, the rate of 15 percent of withholding tax on gross income paid be applied."

Investment income

Incomes derived from intellectual property received by a person different from the author are catalogued as Capital Income. The assignment of the exploitation rights may be done to any person and through any method of the provided in the Intellectual Property Law, not necessarily should be assignments between the author and the editing, but the assignments made to other persons such as the spouses, children or heir may also be typified as income from capital income. (D.G.T. CV 9-2-00).

Finally, and according to provisions from articles 25.4 of the I.R.P.F (Income tax of Natural Persons, by its initials in Spanish) Regulatory Law and article 25.4 a and b) of the Lax Law, incomes derived from intellectual property received by other persons other than the author, always that they are not assigned to an economic activity, are capital incomes (DGTNCV 6-8-09). When non-original incomes correspond to the assignees, successors…of the artists or interpreters, these will be considered among capital incomes (D.G.T: 15.2.00 and 30-9-02)[20].

[20] On the other hand, when the copyrights are received by a third party, different from the author, such in the case of a heir, these will constitute for the percipient income from capital, as stipulated in Article 23.4. a) of Act 40/1998.

2. Allocation of rights derived from intellectual property on Wealth Tax.

Direct taxation assesses both the procurement of the property rights, in the exercise of the economic activities, as well as the ownership of the same. The possession of the rights arising from the author's intellectual or industrial property are subject to Wealth Taxes, without prejudice to its exemption, according to article 4.6 of the Wealth Tax Law 19/1991 of June 6, modified by the Royal Legislative Decree 13/2011 of September 16, by which tax is reestablished, as of September 18, 2011, with exclusive effects for the exercises of 2011 and 2012. As of January 1, 2013 the discount of the 100% of the tax is reestablished, repealing, also, as of the same date, the formal obligations of the taxable persons as they are; the obligation for non-residents to appoint a representative, the self-liquidation of the tax and the obligation of submitting the declaration and, if applicable, payment on account.[21]
Notwithstanding the foregoing, in the tax periods in which there has not been Wealth Tax or it has not been discounted in a 100%, article 4.6 of the Law 19/1991, of June 6, provides the exemption of the rights arising from intellectual or industrial property of the author as long as they remain in his patrimony and are not used in commerce.

However, in the cases that the rights arising from the industrial property – patents, trademarks, inventions- are transferred to third parties, they must be included in his patrimony for the purchase price.
In those cases in which the ownership of the property rights remain in the patrimony of the author or inventor, but he decides to exploit the patent, and utilizes it in the context of a business activity, he will pay the tax with the criteria applicable to the assessment of the ownership of the yields of the business activity.

Notwithstanding, and as provided by article 4.eight.1) of the Wealth Tax Law, drafted in Law 62/2003, of December 30, the property and ownership rights of natural persons that are employed in business or professional activities[22] are exempted from the tax. For this, it is necessary that the activity becomes the main source of income of the taxable person, and that this be exercised in a regular, personal and direct manner.[23]

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[21] Lefebvre (2012a) marginal 2001.

[22] In this sense, the delimitation that is done on business and professional activities, is circumscribed to the following circumstances:

- The ones that have business activity nature, under the rules of IRPF.

[23] Article 11 of the Tax Law warns about those cases in which accounting does not exist, or if it is not in accordance with the Commerce Code, the elements will be assessed according to the rules of the Wealth Tax.

On the other hand, the rights arising from the intellectual or industrial property, that have been acquired by third parties, that is to say, exploited by a person different than its creator, must be included in the taxable income that constitutes the equity of the natural person that acquires it, as provided in article 22 of the Law 19/1991, of June 6, regulatory of the Wealth Tax. Though, if the property rights are exploited in the development of the business activity they will be regulated according to what is provided in article 11 of the Law, in accordance with the regulatory rules of the assessment of the taxable economic activities, in the taxable income of the tax.

If it refers to industrial property rights, when they have been acquired in the exercise of a business activity or the own inventor decides to exploit them by himself, the patent, the trademark or the invention in question will remain affected to the development of the business activity.

3. Taxation of property rights acquired in Spanish territory by individuals not resident in Spain.

The regulatory Income Tax Law for non-Residents approved by Royal Legislative Decree 5/2004, of March 5, defines the concept of canon[24] in its article 13.1.f.3º in the following terms; *"There are considered as canons or royalties the amounts of any kind paid for the use, or the concession to use of:*

- *Rights on literary, artistic or scientific works, including motion pictures.*
- *Patents, brands or business trademarks, graphics or models, drawings, secret formulas or procedures.*
- *Rights on software*[25]

[24] The intellectual property is regulated in de Royal Legislative Decree 1/1996 and the Law 5/1998, of March 6, of incorporation to the Spanish Law of the Directive 96/9/CE, of the European Parliament and the Council, from March 11, 1996, about the legal protection to the database, that considers as intellectual property that constituted by personal and patrimonial rights that assign its author full property and exclusive right of exploitation of the work. Its object may be; literary, musical, theatrical, photographic, sculptural, motion pictures, as well as projects, drawings, graphics, maps, designs, software and furthermore, certain rights relative to database or data banks.

[25] The National Court clarifies, that since the entry in force of Law 46/2002, of the partial reform of the I.R.P.F., the software programs are classified as a different category from the intellectual property rights, without, therefore, being able to extend to those programs the fiscal treatment provided for the use of intellectual property rights, and in particular, literary works. In consequence, accordingly to the provisions of

- *Information concerning to industrial, business or scientific experiences.*
- *Personal rights susceptible of being assigned, such as the image rights.*
- *Industrial, business or scientific equipment.*
- *Any rights similar to the preceding.*

In particular, this consideration is given to the amounts paid for the use or the assignment of the use of the rights protected by the Consolidated Text of the Intellectual Property Law approved by Royal Legislative Decree 1/1996, from April 12, the Patents Law 11/1986, from March 20 and the Trademark Law 17/2001, from December 7."

In consequence, notwithstanding its exemption, the tax assesses, the intellectual property, understanding as such: literary, musical, theatrical, photographic, sculptural, motion pictures, projects, drawings, software, …, the canons arising from the assignment of use of the works, retaining the assignor the ownership, but not the returns of the sales of the products.

Notwithstanding the above, in order for a return to be considered as a canon susceptible to taxation in Spain on the Income Tax of non-Residents, it is necessary to make the assignment of the use and not the transfer of the ownership, as pointed out by the Central Economic Administrative Court in Resolution from April 25, 1990. In similar terms the National Court (28-1-10) pronounces regarding the contributions to I+D, sustaining that they will have the canon's treatment if the contributor entity is not the owner of the exploitation of technology rights resulting from the investigations and works.

Furthermore, in those transfers executed in countries in which Spain has subscribed the Agreement Model OECD, the applicable criteria is that this assignments pay taxes exclusively in the State of residence of the percipient. Notwithstanding the foregoing, in the Spanish case, a series of double taxation agreements, that deviate from the general norm exist and in which the taxation occurs on a shared basis in both states. These agreements are the ones signed with: Albania, Barbados, Georgia, Hungry, Bulgaria, United Arab Emirates and Malta.

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the Spanish-American Agreement, in the absence of a precise frame of income from assignment of use of software programs in the specific categories provided by the agreement within the concept of canon, the residual category of 10% stated therein must be applied.
Lefebvre (2012b).

The taxable base is the total amount accrued, without the possibility of deducting any expenses, as provided in article 24 of the Regulatory Income Tax Law for non-Residents, exemption made as of 1-1-2011, in the case of percipients residing in another member State, the provided expenses related to incomes obtained in Spain, under the IRPF Law, may be deducted.

In general, the tax rate[26] applicable to the canons not exempt of taxation, as provided for by article 25.1 of the Regulatory Tax Law, is of 10%, without possible deductibility of

[26] According to the original wording of article 25 of the Royal Legislative Decree 5/2004, from March 5, the determination of the quota will be made taking into account the applicable tax rate to the canons or royalties paid by a company resident in Spanish territory, or by a permanent office of a company located in this territory resident company in another State member of the European Union, or to a permanent office of a company located in another member State will be 10 per cent when the following requirements are met:

1st That both companies are subject and not exempted from any of the taxes mentioned in article 3.a).iii) of the Council Directive 2003/49/CE, from June 3, 2003, regarding to a common tax regime applicable to the payments of interests and canons made between associated companies from different State members.

2nd That both companies cover any of the forms provided in the annex of the Directive 2003/49/CE.

3rd That both companies be taxable residents in the European Union and that, to the effects of an agreement to avoid double taxation on income, completed with a third State, not to be considered a residents in that third State.

4th That both companies be associated. To this effects, two companies are considered to be associated when one of them has a direct participation in the assets of the other company, of at least, 25 per cent, or that a third company possesses a direct participation in the capita/assets in each of those companies of, at least, 25 per cent. Said participation must have been held without interruption during the previous year to the day in which the payment of the returns was done or, failing that, shall be maintained during the time that is necessary to complete one year.

5th That, when circumstances exist, such amounts be deductible for the permanent office of a company that satisfies the returns in the States that is located.

6th That the company that receives those payments receives them in its own benefit and not as an intermediary or authorized agent of other person or company and that, in the case of a permanent office of a company, the amounts received be effectively related with its activity and that they constitute a computable income to the effects of the determination of its taxable income in the State where it is located. The provisions of this paragraph i) will not be applicable when most of the voting rights of the returns percipient company is possessed, directly or indirectly, by individuals or legal entities that do not reside in States members of the

donations or applied withholding, however, for the exercises 2012 and 2013 was of 24.75%, pursuant to de Additional Disposition 3ª of the Consolidated Text regulating the Income Tax of non-Residents, introduced by Royal Law-Decree 20/2011, from December 30.
In the case of canons paid among related entities or between one company and its permanent establishment, as long as the receiver resides in territory of the European Union, are exempt as of July 1, 2011, as provided for by article 14.1.m), according to the wording given by Law 39/2010, from December 22[27] .

IV. TAXATION OF TRANSFER OF INTELECTUAL PROPERTY RIGHTS.

The rendering of services subjected to the Value Added Tax, is defined in article 11 of the Tax Regulatory Law, according to the wording of Law 53/2002, December 30, that lists the operations considered as such, and among which are the transfer and assignment of author rights[28] , licenses, patents, brands and trademarks, as well as the other intellectual and industrial property rights.

European Union, except when they show evidence that they were constituted for valid economic reasons and not to improperly enjoy the regime provided in this paragraph i).

[27] The requirements established by Law 39/2010 so for entities to be exempted are the following:

1. That both companies are subject and not exempted of Company Tax, or any other identical or similar tax to this one in the country of its residence, according to Directive 2003/49/CE article 3rd.a.iii.
2. That both companies are of any of the forms provided in the annex of the said Directive.
3. That both companies are taxable residents in the EU, and are not considered residents of a third State to the effects of one *CDI*.
4. That both companies are associated, this is, one possesses directly at least 25% of the assets of the other company, or a third one possesses directly at least 25% of the company's assets of both. The said participation has been held during one year without interruption or is going to be held during such period.
5. That, if appropriate, the payments be deductible for the *EP* payer from the returns in its State of residence.
6. That the perceiver of the payments receives them as beneficiary and not as intermediary, or authorized agent of another entity. In the case that the receiver is an *EP*, the income has to be related to its activity and has to be a computable income to determine de taxable income.

This regime is no applicable when most of the voting rights of the income perceiving company is possessed directly or indirectly, by physical or legal persons that do not reside in States members of the EU, except when they show evidence that they were constituted for valid economic reasons and not to enjoy this regime.

[28] The consideration of author is given to the creators of original works and those who realize derivative or composed works from others preexisting, such as translations, adaptations, revisions, updating, annotations,

According to the provision of article 7.5th of the Law 37/1992, December 28, the activities of interpreters, artists, directors and technicians, performed in a regime of labor and administrative dependency, are not subject to taxation.
According to Article 20.one.26th, of the Law 37/1992, the exemption[29] of taxes remains in professional services rendered by plastic artists, writers, literary, graphic and photographic collaborators of newspapers and magazines, musical composers, authors of theater and argument works, adaptation, script and dialogues of audiovisual works, translators and adaptors, including those whose consideration consists of author rights. The exemption does not include delivery of goods, to the services that are not considered to be professional, performed by persons or entities different to natural persons. (DGT 19-4-99).

As to the place of the of the taxable event, the transfers and assignments of author's rights, patents, licenses, brands and trademarks and other intellectual and industrial property rights, are located at the headquarters of the recipient, as indicated in article 69.one and two of the Regulatory Law on Value Added Tax as enacted by Law 2/2010, March 1, by which certain Directives are transposed in the scope of indirect taxation.

Finally and with respect to rate tax as of September 1, 2012, the general Tax rate is applied, to the services provided by interpreters, artists, directors and technicians that are natural persons, to the producers of motion pictures that can be displayed in theaters and to the organizers of theater and musical plays, as provided by article 90 of the Regulatory Tax Law, as worded by Royal Decree 20/2012, July 13,. (D.G.T. 25-11-08).

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compendia, summaries, … in what involves his personal and original contribution different from the preexisting work.
Lefebvre (2012a)
Article 5 of the Consolidated Text of the Intellectual Property Law, approved by Royal Legislative Decree 1/1996, from April 12, addresses that "an author is consider to be a natural person that creates literary, artistic or scientific works". (D.G.T.C.V.25-11-08).
[29] This exemption is not expected to have general character in the Directive 2006/112/EC but its article 376 allows Spain to apply a series of exemptions from the general rule, in which it appears the exemption relative to the services performed by authors, artists and interpreters of works of art, in the conditions that exist on 1-1-1993.
Lefebvre (2012a).

V. ENTITIES AIM AT THE MANAGEMENT OF INTELLECTUAL PROPERTY RIGHTS.

In Spain, the amounts paid in concept of property rights, administered and collected by different societies of authors,[30] has caused some controversy regarding to their qualification as taxable persons of the Company Tax, since they are typified as partially exempted entities.

The interposition of this kind of entities for the administration and collection of the intellectual property rights poses if they are or not the owners of the author's rights, and, consequently, if this income received has to be attribute to the taxable basis of the Company Tax, as countable income, aside the consideration of its exemption.

The aforementioned entities are classified as non-profit entities and, consequently they enjoy a partial exemption of the tax, in accordance to what is provided in article 9.3 of the Law, according to the wording of the Organic Law 8/2007, from July 4, regarding to the financing to political parties. However, having in consideration the collection figures and the distribution of the corresponding amounts to the author's rights, a very wide margin is observed between the two. Thereby in 2007 the management entities distributed an 80% of the corresponding amount of collected rights. This relation was of 86.2% in 2008, of 81.5% in 2009, of 75.9% in 2010 and of 92% in 2011.[31] Notwithstanding the multiplicity of activities that these entities perform within its social objective, the key issue is to know if such difference in figures is due to the realization of costly activities of economic nature, which do not reach the scope of the exemption.

Certainly, the management entities, among their fundamental purposes they have other purposes, but maybe the discrepancy in figures has made necessary a Judgment of the Supreme Court of October 4, 2012, that denies them the ownership of the author rights, with effects of the Company Tax.

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[30] The main management entities are the following:
- Of author's rights: *SGAE, CEDRO, VEGAP y DAMA*
- Of artists, interpreters and performers: *AISGE y AIE*
- Of Production rights: *EGEDA, AGEDI*

[31] Source: *MECD.* General Sub directorate of Intellectual Property

In the case of *CEDRO* the percentage between the amounts distributed and collected in the referenced years reach the following percentages: in 2007, the 63.1%, in 2008 the 72.8%, 51.9% in 2009 and the 59.1% in 2010.

According to article 121.2 and 3 of the *LIS* the exemption do not reach the income from economic exploitations, neither the income from patrimony, as well as other capital gains. However, the Supreme Court (TS 4-10-12) does not enter the merit, but among its arguments argues that, the management activities of the intellectual property rights, carried out by the applicant entity does not have an economic nature and that the income derived from the same are subject and exempt of the Company Tax, since *"the Societies of authors are not the owners of the author's rights, since they only manage and administrate the interest of their authentic owners, so that the full collection cannot be accounted for as "income" to the effect of the Company Tax, so the annulment of the contested decision and the performed liquidation is declared."*

According to the Judgment of the Supreme Court, the discrepancy between the figures of the collection and distribution should be minimal because, because the management entities are defined as mere entities of intermediation, something difficult to apply in view of the data above mentioned.

VI. CONCLUSION.

The assignment of intellectual property rights constitutes a problem with difficult solution, especially if the technical impossibility of the negotiation between parties is admitted. From the theoretical point of view, education is a preventive element, always more effective that the subsequent punitive and coercive deterrence, in which the intervention of the public Sector in unpredictable. It is true, that the moral precepts predispose the individuals to a determined behavior and induce people to perform some behaviors that they end generalizing, but while in Spain we get the protective culture of the intellectual rights to expand in the society, it is necessary the implementation of deterrent mechanisms that recognize the intellectual property of their legitimate authors. In those cases where people cannot reach efficient solutions there are several solutions through alternative procedures.

If we admit that one of the solutions to the assignment of intellectual property rights may be in the Pigouvian subsidy an efficient solution may be reached, although in the actual time the instrument used is of tax origin.

The establishment of taxes on the ownership of property rights, is constituted as an "internaliser" instrument of the externality generated by themselves, because only the income received by persons different than the own author are object of taxation.

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