Tennessee Law Review

Volume 89
Issue 3 *Spring 2022*

Article 2

2022

TAXING CREATIVITY

Xuan-Thao Nguyen

Jeffrey A. Maine

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XUAN-THAO NGUYEN & JEFFREY A. MAINE*

The recent sell offs of song catalogs by Bob Dylan, Stevie Nicks, Neil Young, and Mick Fleetwood for extraordinarily large sums of money raise questions about the law on creativity. While patent and copyright laws encourage a wide array of creative endeavors, tax laws

* Xuan-Thao Nguyen is Pendleton Miller Endowed Chair in Law, University of Washington School of Law. Jeffrey A. Maine is Maine Law Foundation Professor of Law and Associate Dean for Research, University of Maine School of Law. The authors would like to thank Colin Casey and Brendon Barry for their valuable research assistance.

governing monetization of creative works do not. The Songwriters Capital Gains Equity Act, in particular, solidifies creativity exceptionalism, exacerbates tax inequities among creators, and perpetuates racial disparities in the tax Code. This Article asserts that the law must encourage creativity from all creators. It is time to eliminate tax exceptionalism for musical compositions or expand its scope to cover a broader classification of creative property.

INTRODUCTION

In early December 2020, the country experienced the winter of despair from the COVID-19 public health pandemic,[1] steep economic declines in most sectors,[2] the worst GDP since the end of World War II,[3] and heightened political polarization after the presidential

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1. *See COVID-19 Science Update*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 1, 2020), https://www.cdc.gov/library/covid19/120120_covidupdate.html (releasing the latest studies in epidemiology, telemedicine, clinical treatment and management related to the COVID-19 pandemics); Chris Dall, *US Sees a Record Number of COVID-19 Deaths in December*, CIDRAP (Dec. 28, 2020), https://www.cidrap.umn.edu/news-perspective/2020/12/us-sees-record-number-COVID-19-deaths-december; Kelly Reinke, *December on Pace to Be Deadliest Month for COVID-19 in Indiana*, FOX59 (Dec. 22, 2020), https://fox59.com/news/coronavirus/december-on-pace-to-be-deadliest-month-for-COVID-19-in-indiana/.

2. S&P Global wrote:

> The U.S. has been unable to control the COVID-19 crisis. As hospitalizations of coronavirus patients surpass 100,000 for the first time during the pandemic and the Centers for Disease Control warns that this winter could be the "most difficult time" the country has ever faced in history, the equity of measures taken to support the economy in the past nine months and into the future is being called into question.

Molly Mintz, *Daily Update: December 3, 2020*, S&P GLOBAL (Dec. 3, 2020), https://www.spglobal.com/en/research-insight/articles/daily-update-december-3-2020. Further, in the last two weeks of November 2020, 18 public and private companies "with public debt with assets or liabilities" filed for bankruptcy bringing 2020's total bankruptcy filings to "a nine-year record." *Id.*; *see also* Daniel Bachman, *United States Economic Forecast 4th Quarter 2020*, DELOITTE (Dec. 16, 2020), https://www.deloitte.com/us/en/insights/economy/us-economic-forecast/2020-q4.html (assessing the damages incurred by U.S. businesses and workers from COVID-19).

3. *See* Jeff Cox, *U.S. Economy Closes Out 2020 with Lower Than Expected 4% Gain*, CNBC (Jan. 28, 2021), https://www.cnbc.com/2021/01/28/fourth-quarter-gdp-increased-4point0percent-vs-4point3percent-estimate.html ("The economy fell into recession in February, a month before the World Health Organization declared COVID-19 a pandemic. The 3.5% decline is the worst year for the U.S. since at least the end of World War II.").

general election.[4] Then arrived a new headline jolting everyone from the dreaded daily life of social distancing and isolated existence.[5] From music lovers to tax dodgers, all learned that Bob Dylan, the reluctant Nobel Prize winner for literature,[6] influential activist,[7]

4. Dan Balz, *After a Year of Pandemic and Protest, and a Big Election, America is As Divided As Ever*, WASH. POST (Dec. 27, 2020), https://www.washingtonpost.com/graphics/2020/politics/elections-reckoning/; Doyle McManus, *Will the 2020 Presidential Campaign Turn Out to Be the Low Point in Modern Political Civility?*, L.A. TIMES (Dec. 16, 2020), https://www.latimes.com/politics/story/2020-12-16/year-in-review-americans-polarization-2020-presidential-campaign; *see also* MARK JURKOWITZ ET AL., U.S. MEDIA POLARIZATION AND THE 2020 ELECTION: A NATION DIVIDED (2020), https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/.

5. In addition to the severe economic impact of COVID-19, people face mental health challenges in coping with social distancing to reduce the spread of the coronavirus. *See Coping with Stress*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html (last updated Mar. 25, 2022) (identifying how social distancing makes people "feel isolated and lonely" and increases "stress and anxiety"); Janelle Ringer, *Dealing with the Mental Health Impact of Social Distancing*, LOMA LINDA U. HEALTH (May 12, 2020), https://news.llu.edu/health-wellness/dealing-with-mental-health-impact-of-social-distancing; *see also* NIRMITA PANCHAL ET AL., THE IMPLICATIONS OF COVID-19 FOR MENTAL HEALTH AND SUBSTANCE USE (2021), https://www.kff.org/coronavirus-COVID-19/issue-brief/the-implications-of-COVID-19-for-mental-health-and-substance-use/ ("[During the pandemic] about 4 in 10 adults in the U.S. have reported symptoms of anxiety or depressive disorder, a share that has been largely consistent, up from one in ten adults who reported these symptoms from January to June 2019.").

6. Hannah Ellis-Petersen, *Bob Dylan Tells Nobel Prize Committee He Will Not Go to Sweden for Ceremony*, GUARDIAN (Nov. 16, 2016), https://www.theguardian.com/music/2016/nov/16/bob-dylan-tells-nobel-prize-committee-he-will-not-go-to-sweden-for-ceremony (reporting that the Nobel Prize Committee recognized Dylan's work in the same pantheon of ancient Greek writers Homer and Sappho but that it is highly unusual for a Nobel Prize winner not to attend the award in person); Sarah Lyall, *Bob Dylan Says He'll Skip Nobel Ceremony (He's Busy)*, N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/books/bob-dylan-nobel-ceremony.html.

7. Ben Corbett, *Bob Dylan and the Civil Rights Movement*, LIVEABOUT (Apr. 10, 2019), https://web.archive.org/web/20210410151729/https://www.liveabout.com/bob-dylan-and-civil-rights-movement-1322012 (recounting Dylan's "The Death of Emmitt Till" as his first protest song in 1962 during a benefit for the Congress of Racial Equality); Andy Green, *Flashback: Bob Dylan Performs at the 1963 March on Washington*, ROLLING STONE (June 9, 2020), https://www.rollingstone.com/music/music-news/bob-dylan-only-a-pawn-in-their-game-1963-martin-luther-king-1011996/; David Thurman, *An Ally in Times of Crisis: Bob Dylan's Contribution the Civil Rights Movement*, MEDIUM (June 14, 2020), https://medium.com/behind-the-lyrics/an-ally-in-times-of-crisis-bob-dylans-contribution-to-the-civil-rights-movement-1330b20634bb.

revered political dissenter,[8] and enduring iconic musician,[9] had sold out, literally, his beloved songs to Big Corporation.[10] Dylan sold the publishing rights to his impressive catalog of songs written in the last several decades, many of which are among the greatest of all time.[11] The sale fetched Dylan a reported figure of more than $300 million,

8. *See* Peter Dreier, *The Political Bob Dylan*, DISSENT (May 24, 2011), https://www.dissentmagazine.org/online_articles/the-political-bob-dylan ("Journalists and historians often treat Dylan's songs as emblematic of the era and Dylan himself as the quintessential 'protest' singer, an image frozen in time.").

9. In the 1960s, Bob Dylan already achieved his iconic status. *See generally* Nat Hentoff, *Bob Dylan, The Wanderer*, NEW YORKER (Oct. 17, 1964), https://www.newyorker.com/magazine/1964/10/24/the-crackin-shakin-breakin-sounds (assessing Dylan's songs, recordings, performance, and influence in the United States and worldwide). Throughout the subsequent decades, Dylan's "influence on music cannot be overstated . . . that songs with overtly political themes can be commercially successful; the way his music resonates just as much today as they did when recorded them." Saeed Ahmed, *Bob Dylan Songs That Changed the Course of History (an Incomplete List)*, CNN (Oct. 13, 2016), https://www.cnn.com/2016/10/13/entertainment/dylan-songs-history-trnd/index.html. Dylan is recognized as the "only one . . . whose poetry has, at times, changed the course of history." *Id.*

10. Tim Fitzsimons et al., *Bob Dylan Sells Entire Song Catalog to Universal Media Group*, NBC NEWS (Dec. 7, 2020), https://www.nbcnews.com/pop-culture/music/bob-dylan-sells-entire-song-catalog-universal-media-group-n1250190 ("[B]ack in the 80s or 90s there may have been considerable resistance to this kind of 'selling out,' but this has become a more common practice over the past couple of decades"); Jeff Haden, *An Open Letter to All the People Criticizing Bob Dylan for Selling the Rights to His Music for an Estimated $300 Million*, INC. (Dec. 11, 2020), https://www.inc.com/jeff-haden/an-open-letter-to-all-people-criticizing-bob-dylan-for-selling-rights-to-his-music-for-an-estimated-300-million.html; Tim Schneider, *The Gray Market: Why Bob Dylan's $300 Million Windfall Debunks the Myth of the Sellout Artist (and Other Insights)*, ARTNET (Dec. 14, 2020), https://news.artnet.com/opinion/gray-market-bob-dylan-sellout-myth-1931101 (stating that hardcore Dylanites greeted the news of Dylan's catalog sale news "with emotions ranging from resigned misery to visceral scorn"); Brian Warner, *Bob Dylan Sells Song Catalog to Universal Music for $300 Million*, CELEBRITY NET WORTH (Dec. 7, 2020), https://www.celebritynetworth.com/articles/music-news/bob-dylan-sells-song-catalog-to-universal-music-for-300-million/ ("Dylan fans should probably prepare themselves for the inevitable Facebook commercial set to 'Tangled Up In Blue'.").

11. Rolling Stone wrote:

> For generations to come, other artists will be turning to Bob Dylan's catalog for inspiration. From the Sixties protest anthems that made him a star through to his noirish Nineties masterpieces and beyond, no other contemporary songwriter has produced such a vast and profound body of work: songs that feel at once awesomely ancient and fiercely modern.

100 Greatest Bob Dylan Songs, ROLLING STONE (May 24, 2020), https://www.rollingstone.com/music/music-lists/100-greatest-bob-dylan-songs-65159/.

an unprecedented sum ever received by a songwriter.[12] The figure is staggering as it represents a hefty multiple of twenty-seven times the annual revenue for Dylan's songs of $11 million.[13] Certainly, $300 million is substantially more than what Dylan received when he first started out with the modest $100 advance that he obtained from a music deal in 1962.[14]

Dylan, however, is not the only musician who decided to sell off their rights in their music holdings. The veteran rock star Neil Young sold half of the rights to his catalog to Hipgnosis Songs Fund, a private investment company, for an estimated amount of $150 million.[15] Young's portfolio consists of 1,180 tracks, including well-known hits "Heart of Gold," "Rockin' in the Free World," and "Cinnamon Girl."[16]

Also, a few days before Dylan announced his deal with Universal, Stevie Nicks, the only female songwriter to have the honor of being inducted into the Rock and Roll Hall of Fame twice, sold the rights in her music catalog to Primary Wave Music.[17] The deal furnished Nicks with $100 million in exchange for the majority of the publishing rights in her catalog.[18] Nicks was the singer of the Fleetwood Mac band.

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12. Jem Aswad, *Bob Dylan Sells Entire Catalog of Songs to Universal Music Publishing*, VARIETY (Dec. 7, 2020), https://variety.com/2020/music/news/bob-dylan-sells-songs-universal-music-publishing-1234847439; Jon Blistein, *Bob Dylan Sells Entire Songwriting Catalog to Universal Music Publishing*, ROLLING STONE (Dec. 7, 2020), https://www.rollingstone.com/music/music-news/bob-dylan-songwriting-catalog-sell-universal-music-publishing-1099692/ (reporting that the acquisition covers more than 600 songs at the estimate of $300 million); Ben Sisario, *Bob Dylan Sells His Songwriting Catalog in Blockbuster Deal*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/2020/12/07/arts/music/bob-dylan-universal-music.html (reporting that the deal "may be the biggest acquisition ever of the music publishing rights of a single songwriter").

13. Ed Christman, *Bob Dylan's Next Big Deals: What's Still in Play After Landmark Publishing Sale*, BILLBOARD (Dec. 15, 2020), https://www.billboard.com/articles/business/9500077/bob-dylan-publishing-sale-whats-next/.

14. Fitzsimons et al., *supra* note 10.

15. Simon Read, *Neil Young Sells Song Rights in $150M Deal*, BBC NEWS (Jan. 6, 2021), https://www.bbc.com/news/business-55557633; Elliot Smith, *Neil Young Sells 50% of Publishing Rights to His Entire Song Catalog to UK Investment Fund*, CNBC (Jan. 6, 2021), https://www.cnbc.com/2021/01/06/neil-young-sells-50percent-of-rights-to-his-entire-song-catalog-to-uk-fund.html.

16. Lina Saigol, *Neil Young Strikes Heart of Gold With 50% Sale of Song Catalog to Publishing House*, MARKETWATCH (Jan. 6, 2021), https://www.marketwatch.com/story/neil-young-strikes-heart-of-gold-with-50-sale-of-song-catalog-to-publishing-house-11609944338?mod=article_inline.

17. *Stevie Nicks Partners with Primary Wave Music!*, PRIMARY WAVE (Dec. 4, 2020), https://primarywave.com/stevie-nicks-partners-with-primary-wave-music/.

18. Nate Day, *Stevie Nicks in $100M Publishing Rights Deal with Primary Wave Music*, FOX BUS. (Dec. 5, 2020), https://www.foxbusiness.com/lifestyle/stevie-nicks-in-

Mick Fleetwood and another former bandmate also sold their rights to music publishers.[19] As these sales show, superstar songwriters are cashing in their rights and commanding sale prices "10 to 18 times annual royalties" today, significantly more than in prior years.[20]

These recent sell offs of rights in music catalogs by the songwriters for astounding amounts reveal the new appetite of investments in streaming of music. Hipgnosis Songs Fund, for instance, a known disrupter in the industry, allows people to invest in hit songs.[21] New streaming technology advances the ease of streaming music and expansion of digital reach to fans worldwide. For instance, the global Tik Tok app became a sensation when a video emerged of a middle-aged man skating and lip-syncing to Stevie Nicks's vocals of the song "Dreams." People downloaded and viewed the video 3 billion times, which led to the streaming of the song 200 million times and 86,000 sales of the album *Rumours* in which the song first appeared after 43 years of original release.[22] Accordingly, investors are able to quantify the potential returns, compete against each other and seek to purchase rights from songwriters.

Less apparent from these recent sell offs of music, however, is a special tax break these songwriters enjoyed on their sales—a special rule that was snuck into the Tax Code back in 2005.[23] Indeed, among the reasons why superstar songwriters are selling off their rights in

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100m-publishing-rights-deal-with-primary-wave-music; Ethan Millman, *Stevie Nicks Sells a Share of Her Publishing Rights for $100 Million*, ROLLING STONE (Dec. 4, 2020), https://www.rollingstone.com/pro/news/stevie-nicks-fleetwood-mac-catalog-primary-wave-1098850/; Anne Steele, *Stevie Nicks Sells Stake in Songwriting Catalog*, WALL ST. J. (Dec. 4, 2020), https://www.wsj.com/articles/stevie-nicks-sells-stake-in-songwriting-catalog-11607095635 (reporting that the $100 million was for 80% of the ownership of Nicks's publishing rights).

19. Mark Sweney, *Going His Own Way: Mick Fleetwood Sells Hit Song Rights to BMG*, GUARDIAN (Jan. 14, 2021), https://www.theguardian.com/music/2021/jan/14/going-his-own-way-mick-fleetwood-sells-hit-song-rights-to-bmg.

20. Saigol, *supra* note 16; *see also* Tim Ingham, *Why Did Shamrock Capital Spend $300 Million on Old Taylor Swift Albums?*, ROLLING STONE (Nov. 17, 2020), https://www.rollingstone.com/pro/features/why-taylor-swift-scooter-braun-shamrock-1091742/ (observing that new investment funds are causing the publishing rights to start "selling for anywhere from 15-times to 20-times multiples on their Net Publisher Share (aka gross profit).").

21. Read, *supra* note 15 (noting that Hipnosis Song Fund "lets people invest in hit songs, has previously splashed out about £1bn snapping up rights to songs from the likes of Mark Ronson, Chic, Barry Manilow and Blondie.").

22. Sweney, supra note 19; Steele, *supra* note 18 (noting the resurgent popularity of "Dreams").

23. I.R.C. § 1221(b)(3) (added by the Songwriters Capital Gains Tax Equity Act of 2005). All references to the Code are to the Internal Revenue Code of 1986, as amended.

their music catalogs is the preferential capital gains tax treatment accorded specifically to self-created musical works.[24] This tax benefit owes its roots to country music and that industry's successful lobbying efforts to push Congress for a benefit that is not available to other creators.

Legislators from southern states championed on behalf of songwriters for the special tax break, arguing it was a necessary act of equity to balance the power between songwriters and publishers. To the contrary, this Article argues that the preferential capital gains tax treatment for songwriters actually perpetuates tax inequity among creators and worsens racial disparities in the Code. Part I details the origin of the Songwriters Capital Gains Tax Equity Act of 2005 by examining country music's lobbying power that culminated in the introduction of the legislation by then Congressman and country music guitarist Ron Lewis of Tennessee and co-sponsorship by thirty-eight other legislators primarily from the southern states. Part II constructs the law on creativity, explaining how patent and copyright laws provide legal protections to creative works. The law on creativity through the perspectives of patent and copyright laws, however, fails to provide a complete picture. Part III illustrates how the tax system is an important extension of the law on creativity. This part presents a historical context of the tax laws governing creative works more broadly, and also contextualizes the special tax break for songwriters lobbied in 2005. Part IV highlights serious problems with the special legislation, which created tax equity concerns with respect to creators and added to existing racial disparities in the Tax Code. We offer solutions in rethinking a new tax regime governing creative works—one that would promote fairness and encourage all creators in their endeavors.

I. COUNTRY MUSIC'S LOBBYING POWER

In the music industry, there are many different genres. Major music genres according to consumers in the United States cover rock,

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24. Juliana Kaplan & Hillary Hoffower, *Bob Dylan Cashing in on his Music Catalog for an Estimated $300 million is Just the Latest Example of Boomers Hoarding Wealth*, BUS. INSIDER (Dec. 8, 2020), https://www.businessinsider.com/bob-dylan-music-rights-sale-generational-wealth-inequality-boomers-millennials-2020-12; Nicole Lyn Pesce, *5 Reasons Musicians Like Bob Dylan, Neil Young and Stevie Nicks are Selling Their Song Catalogs Right Now*, MARKETWATCH (Jan. 6, 2021, 12:09 PM), https://www.marketwatch.com/story/5-reasons-why-musicians-like-bob-dylan-and-stevie-nicks-are-selling-their-song-catalogs-right-now-2020-12-15 (identifying possible reasons from technology to estate planning that artists sell their rights in their songs).

pop, country, R&B and soul, hip hop, easy listening, electronic/dance, jazz, blues, classical and opera, heavy metal and reggae.[25] Rock is the leading genre, but it was country that possessed the lobbying power for the special tax break for songwriters.

Country's lobbying power commands a closer look at its fan base. Only 35% of country listeners graduated from college.[26] The majority of them own a home but just over half are employed full-time.[27] They care about families and 87% of them state that they enjoy spending time with their families.[28] Many fans of country music are also fans of listening to their radios, and tune in on a regular basis.[29] Almost 50% of country listeners attend concerts or festivals.[30]

In the 2020 presidential election, Trump supporters were more likely to be fans of country music than Biden supporters, who opted for pop more often.[31] Indeed, country listeners tend to describe themselves as "conservatives."[32] While Black athletes take a knee at the football fields across the nation in their efforts to expose police brutality against African-Americans, country musicians are praised for standing proudly for the American flag.[33]

Unsurprisingly, with respect to racial demographics, country music is long known as the music of primarily white performers for

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25. *Leading Music Genres According to Consumers in the United States as of May 2018*, STATISTA (Jan. 8, 2021), https://www.statista.com/statistics/442354/music-genres-preferred-consumers-usa/.

26. *CMA: Millennials Remain Main Driver of Country Music Growth*, INSIDERADIO (Feb. 1, 2019), http://www.insideradio.com/cma-millennials-remain-main-driver-of-country-music-growth/article_fd9154e2-25f1-11e9-9b3d-c7034b8f54b6.html#:~:text=Some%2076%20million%20Americans%20listen,accordin g%20to%20the%20CMA%20report.

27. *Id.*

28. *Id.*

29. *Country Music Fans Tune in Longer, Diggin AM/FM*, INSIDERADIO (Mar. 8, 2018), http://www.insideradio.com/free/country-music-fans-tune-in-longer-digging-am-fm/article_eff34ce6-229b-11e8-af81-8788ad63d375.html.

30. *Id.*

31. *Colman Insights: Trump Fans Prefer Country Music, Biden Supporters Like Pop*, INSIDERADIO (May 20, 2020), http://www.insideradio.com/free/coleman-insights-trump-fans-prefer-country-music-biden-supporters-like-pop/article_72e24eea-9a7c-11ea-95f5-d3eabd3c255a.html.

32. *See CMA: Millennials Remain Main Driver of Country Music Growth*, *supra* note 26.

33. Jessica Blankenship, *Dustin Collins is Proud to Stand for the American Flag with New Single*, KY. COUNTRY MUSIC (Nov. 3, 2020), https://kentuckycountrymusic.com/2020/11/dustin-collins-is-proud-to-stand-for-the-american-flag-with-new-single.html (describing how Dustin Collins's music evokes a sense of patriotism and is emblematic of the "Stand for the Flag" movement.).

primarily white listeners.[34] Together, country musicians and their fans form a powerful political base. When country musicians and the Songwriters Association in Nashville decided to lobby to turn their ordinary income (taxed at high rates) into capital gains (taxed at lower rates), politicians in the southern states listened.

The southern states are where country artists and listeners concentrate. The Country Music Hall of Fame and Museum, chartered in 1964, is located in Tennessee, collecting, preserving, and interpreting the history and tradition of country music through exhibits, publications, and educational programs.[35] Texas country music is the distinctive red dirt style, which originally carved its roots in Stillwell, Oklahoma, beloved by Texan listeners.[36] Texas also chartered its own Texas Country Music Hall of Fame located in East Texas to honor Texans and their contributions to the country music profession.[37]

The State of Alabama's claims to fame in country music are that the state is the birthplace of country music pioneers Hank Williams, Sr. and the band Alabama.[38] Indeed, the band Alabama is deemed as "The Most Successful Band in Country Music History" with album sales exceeding those of both the Beatles and Elvis Presley combined.[39] The band's humble beginnings can be traced to their roots in Fort Payne, Alabama.[40]

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34. Malcolm Jones, *What Ken Burns' 16-Hour 'Country Music' Epic Leaves Out*, DAILY BEAST (Sept. 15, 2019), https://www.thedailybeast.com/what-ken-burns-16-hour-country-music-epic-leaves-out ("The performers were white. And so were their audiences. Likewise, the often ugly conservative and sometimes downright racist impulses articulated by more than a few performers in the '60s and '70s are glossed over almost completely.").

35. COUNTRY MUSIC HALL OF FAME & MUSEUM, https://countrymusichalloffame.org/ (last visited Feb. 13, 2022).

36. *See* Edward Mack, *15 Legendary Artists Who Shaped Red Dirt Music*, WIDE OPEN COUNTRY (Apr. 18, 2020), https://www.wideopencountry.com/tracing-history-red-dirt-music-legendary-artists/; Sam B., *Red Dirt/Texas Country Artists to Watch in 2021*, RAISED ROWDY (Jan. 11, 2021, 8:07 AM), https://www.raisedrowdy.com/2021/01/11/red-dirt-texas-country-artists-to-watch-in-2021/; Texas Music Pickers, *The Most Streamed Texas Country/Red Dirt Songs of All Time*, SPOTIFY, https://open.spotify.com/playlist/5cd2p0JBRx5u3EHuNX2mfZ (last visited Feb. 13, 2022).

37. *See* TEX. COUNTRY MUSIC HALL OF FAME & THE TEX. RITTER MUSEUM, https://www.tcmhof.com/ (last visited Feb. 13, 2022).

38. *See Musicians of Alabama*, ENCYC. ALA., http://encyclopediaofalabama.org/article/s-119 (last visited Feb. 13, 2022).

39. *ALABAMA: The Most Successful Band in Country Music History*, COUNTRY DAILY, https://www.countrythangdaily.com/alabama-successful-band/ (last visited Feb. 13, 2022).

40. *See id.*

Louisiana enjoys a proud tradition of country music, having Jimmie E. Davis as a two-term governor and acclaimed country music artist who wrote "You Are My Sunshine," one of the most recognized songs in the world.[41] Davis is among other luminaries like Johnny Cash and Kitty Wells whose origins can be traced back to Louisiana.[42]

North Carolina is where country music was first played and broadcast. "RCA Victor made the first Country recordings in Charlotte in 1927" and the famed Sugar Hill Records was founded in 1978 in Durham.[43] Early country music's origins rest in old-time and bluegrass music from the mountains of North Carolina.[44] The State of North Carolina has produced some of the best country singers, including Charlie Daniels, Luke Combs, Eric Church, Randy Travis, Scotty McCreery, and many others.[45]

The country music tradition in South Carolina rivals sister southern states with an enormous country music annual festival in Myrtle Beach.[46] The State of Georgia stakes its pride in country music by having Georgia cotton mill worker Fiddlin' John Carson as country music's first performing star and first commercially successful country recording.[47] Country music's commercial success grew in popularity following population migrations from the rural south to cities and the rise of radio as a form of entertainment.[48] The Atlanta radio station WSB's rose prominently with its promotion of country

41. *See Famous Louisiana Country Musician Biographies*, LA. TRAVEL, https://www.louisianatravel.com/music/articles/famous-louisiana-country-musician-biographies (last visited Feb. 13, 2022). Louisiana asserts that the state's artists have contributed significantly to different genres of country music. *See Country Music*, POVERTY POINT, https://www.povertypoint.us/music/country (last visited Feb. 13, 2022); *Country Music in Louisiana*, LA. TRAVEL, https://www.louisianatravel.com/music/articles/country-music-louisiana (last visited Feb. 13, 2022).

42. *See id.*

43. Bruce E. Baker & Shelby Stephenson, *Country Music*, NCPEDIA (Jan. 1, 2006), https://www.ncpedia.org/country-music.

44. *Early Country Music*, BLUE RIDGE MUSIC TRAILS OF N.C., https://www.blueridgemusicnc.com/listen-and-learn/music-styles/early-country-music (last visited Feb. 13, 2022).

45. *The Best Country Singers from North Carolina*, RANKER MUSIC (Apr. 30, 2019), https://www.ranker.com/list/best-north-carolina-country-singers/ranker-music.

46. *See* CAROLINA COUNTRY MUSIC FEST, https://carolinacountrymusicfest.com/ (last visited Feb. 13, 2022); *see also The Best Country Singers from South Carolina*, RANKER MUSIC (Apr. 24, 2019), https://www.ranker.com/list/best-south-carolina-country-singers/ranker-music ("South Carolina, particularly Myrtle Beach, has produced numerous famous country stars over the years.").

47. *See* David Fillingim, *Country Music: Overview*, NEW GA. ENCYC. (Mar. 3, 2020), https://www.georgiaencyclopedia.org/articles/arts-culture/country-music-overview.

48. *See id.*

music.[49] Georgia's country notable musicians include Chet Atkins, Alan Jackson, Brenda Lee, Pete Drake, Travis Tritt, Trisha Yearwood, Pat Alger, Tony Arata, and others.[50]

Mississippi's hills, pines, delta, river, and coast regions have each produced legendary talents who have left eternal marks in country music.[51] Jimmie Rodgers from Meridian, Mississippi is widely recognized and celebrated as the "Father of Country Music." Rodgers became the first inductee to the Country Music Hall of Fame.[52] While Mississippi is assuring its place with the "Father of Country Music," Kentucky today asserts itself as "a fertile crescent" of country music.[53] Kentucky touts U.S. Highway 23, which runs through the state, as the Country Music Highway. Along the historic highway are the birthplaces of luminous musicians such as Loretta Lynn, Crystal Gayle, The Judds, Chris Stapleton, Billy Ray Cyrus, Tom T. Hall, Ricky Skaggs, Keith Whitley, Dwight Yoakam, and Patty Loveless.[54]

Representative Ron Lewis of Kentucky was a politician who loved country music. He was not only a fan but a country guitarist and sponsored the Songwriters Capital Gains Tax Equity Act.[55] Described more fully later, the bill provided that the sale of musical compositions or copyrights in musical works created by the taxpayer's personal efforts could receive preferential capital gains rate treatment.[56]

The bill received thirty-eight co-sponsors primarily from Tennessee, Kentucky, Texas, Louisiana, Alabama, Georgia, Mississippi, North Carolina, South Carolina, Florida, and Virginia.[57]

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49. *See id.*

50. *See id.*

51. *See* MISS. COUNTRY MUSIC TRAIL, https://mscountrymusictrail.org/complete-list-of-installed-markers/ (last visited Feb. 13, 2022) (providing a list of artist names, regions, and mapping of talents to their birthplaces).

52. *Mississippi Country Music Trail*, DEEP SOUTH USA, https://www.deep-south-usa.com/mississippi/music/mississippi-country-music-trail-the-deep-south-usa-visitor-information (last visited Feb. 13, 2022); Sandra M. Buckley, *Mississippi - Behind the Evolution & Revolution of America's Music*, TODAY IN MISS., http://www.todayinmississippi.com/featured_article/article/6499 (last visited Feb. 13, 2022).

53. *Kentucky is Fueling the Country Music Insurgency*, SAVING COUNTRY MUSIC (Jan. 3, 2018), https://www.savingcountrymusic.com/kentucky-is-fueling-the-country-music-insurgency/.

54. *See Kentucky Country Music Highway*, KY. TOURISM, https://www.kentuckytourism.com/music/country-music-highway (last visited Feb. 14, 2022).

55. The Songwriters Capital Gains Tax Equity Act, H.R. 2594, 109th Congress (2005).

56. *See id.*

57. For the list of the thirty-eight co-sponsors for H.R. 2594, 109th Congress

An identical bill, S.B. 1100, sponsored by Senator Jim Bunning of Kentucky, was introduced and referred to the Committee on Finance on May 23, 2005.[58] The Songwriters Capital Gains Tax Equity Act later became a provision in the Tax Increase Prevention and Reconciliation Act of 2005, and President Bush signed the legislation into law on May 17, 2006.[59] Congress then made the songwriters' capital gains tax treatment permanent on December 9, 2006.[60]

Ron Lewis served on the important House Ways and Means Committee and was subject to lobbying efforts from the Nashville Songwriters' Association International (NSAI).[61] NSAI spent five years lobbying Congress for the passage of the legislation in favor of giving songwriters preferential rate treatment on gains realized from sales of their songs.[62] NSAI, unlike the well-oiled lobbying machination, followed an old fashion approach to getting the attention of politicians. For instance, to generate support from politicians, NSAI organized a "massive lobbying trip" to D.C., enabling songwriters to meet up with more than fifty members of Congress in their concerted efforts to narrate the songwriters' story and expose the inequity of tax treatments between songwriters and publishers.[63] In connection with the lobbying efforts in 2003 that culminated in the favorable tax treatment law, NSAI created a Songwriter's Caucus in the U.S. House of Representatives and, later, the Songwriter's Caucus in the U.S. Senate. Consequently, NSAI built permanent support among

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(2005), see *H.R.2594 - Songwriters Capital Gains Tax Equity Act*, CONGRESS.GOV, https://www.congress.gov/bill/109th-congress/house-bill/2594/cosponsors?s=3&r=422&overview=closed&searchResultViewType=expanded (last visited Feb. 15, 2022).

58. Songwriters Capital Gains Tax Equity Act, S. 1100, 109th Cong. (2005), https://www.govtrack.us/congress/bills/109/s1100.

59. Bradley M. Van Buren, *Summary of the Tax Increase Prevention and Reconciliation Act*, HOLLAND & KNIGHT, https://www.hklaw.com/en/insights/publications/2006/10/summary-of-the-tax-increase-prevention-and-reconci#:~:text=President%20Bush%20signed%20the%20bill,requirements%20of%20the%20budget%20process (last visited Feb. 28, 2022).

60. *NSAI Advocacy Overview*, NASHVILLE SONGWRITERS ASS'N INT'L, https://www.nashvillesongwriters.com/nsai-advocacy-overview (last visited Feb. 15, 2022).

61. The NSAI claims to represent all genres of music. *See id.* (claiming that it "protect[s] the rights of and serv[es] aspiring and professional songwriters in all genres of music"). Broadcast Music Incorporation, which claims to have supported NSAI's effort to pass the Songwriter's Capital Gains Tax Equity Act, also claims to represent all genres of artists. Bill Holland, *Tax Cut Contains Break for Songwriters*, BMI, (May 22, 2006) https://www.bmi.com/news/entry/20060512_tax_cut_package_contains_break_for_songwriters.

62. *See* Denis Stevens et al., *Songwriters Gain from Change in Tax Law*, ENT. L. & FIN. NEWSLETTER (Loeb & Loeb LLP, Nashville, Tenn.), July 2006, at 1.

63. *NSAI Advocacy Overview*, *supra* note 60.

politicians for the interests of songwriters' rights.[64]

By one estimate, NSAI and songwriters together made 400 visits to Washington, D.C., targeting every member of the tax committees of the House and the Senate.[65] Most importantly, NSAI aimed its efforts at the politicians from the southern states who are country listeners themselves, pushing for the special tax treatment.[66] NSAI, representing songwriters from all genres, urged the special tax treatment and succeeded.[67] With the enduring lobbying efforts, NSAI has garnered victory and influence. Today, politicians are advocating on NSAI songwriters' behalf.[68]

NSAI's successful efforts to ensure that songwriters obtain a special tax break for their creative works, and publicity surrounding the recent sales of music catalogs by Bob Dylan and other superstar songwriters, has drawn attention to the law on creative endeavors more broadly.

II. THE LAW ON CREATIVITY

Creativity is the cornerstone of human existence.[69] To encourage

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64. *Id.* In 2019, Congressman Ted Deutch of Florida and Congresswoman Martha Roby of Alabama issued a press release that they both relaunch the bipartisan Songwriters Caucus because they share an "appreciation for music and the talented artists who write the songs". Press Release, Congressman Ted Deutch and Congresswoman Martha Roby, Reps. Deutch, Roby Relaunch the Bipartisan Songwriters Caucus, (June 25, 2019), https://teddeutch.house.gov/posts/reps-deutch-roby-relaunch-the-bipartisan-songwriters-caucus. For a list of members, see *US CONGRESSIONAL SONGWRITERS CAUCUS*, http://www.ciclt.net/sn/leg_app/poc_detail.aspx?P_ID=&ClientCode=gsba&LegComID=20940 (last visited Feb. 15, 2022).

65. *See* Joseph B. Darby III, *The Tall Tax Tale of Why Country Songwriters Get Capital Gain Treatment*, LEXOLOGY (Aug. 18, 2017), https://www.lexology.com/library/detail.aspx?g=74edeed0-95a0-48e9-a9b5-2c6bc9e42a86.

66. *See id.*

67. *See id.*

68. Marsha Blackburn & Judy Chu, *Stop Short-Changing Songwriters*, THE HILL (July 30, 2013), https://thehill.com/opinion/op-ed/314531-stop-short-changing-songwriters (identifying the inequity and differences between songwriters and performers).

69. *See* Simon Worrall, *How Creativity Drives Human Evolution*, NAT'L GEOGRAPHIC (Apr. 23, 2017), https://www.nationalgeographic.com/culture/article/creative-spark-augustin-fuentes-evolution; Kojo Yelpaala, *Quo Vadis WTO? The Threat of TRIPS and the Biodiversity Convention to Human Health and Food Security*, 30 B.U. INT'L L.J. 55, 102 (2012) ("Creativity and inventiveness have been an important part of human evolution from the very beginning of the human species."). Scholars have debated the role of creativity in intellectual property protection. *See generally* Amy L. Landers, *Ordinary Creativity in Patent Law: The Artist Within the*

human creativity, the United States has enshrined a constitutional bargain with the creators.[70] The Constitution endows creators of writings and inventions legal protection for a limited time period in exchange for the promotion of science and the useful arts.[71] Congress, in its first session,[72] passed the Copyright Law to protect the creativity of content and a patent statute to protect the creativity of useful and inventive ideas.[73]

Scientist, 75 MO. L. REV. 1 (2010); Gregory N. Mandel, *Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 U.C. DAVIS L. REV. 283 (2010). Creativity today is no longer limited to humans. *See generally* Tim W. Dornis, *Artificial Creativity: Emergent Works and the Void in Current Copyright Doctrine*, 22 YALE J.L. & TECH. 1 (2020) (challenging the conventional thinking of human input as essential of creativity under Copyright law).

70. *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."). *See generally* Diane Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011) (questioning the economic incentive to create for copyright protection).

71. *See* William A. Drennan, *The Patented Loophole: How Should Congress Respond to this Judicial Invention?*, 59 FLA. L. REV. 229, 259–60 (2007) (discussing the constitutional bargain of patents); *see also* Joe Potenza et al., *Patent Misuse—The Critical Balance, A Patent Layer's View*, 15 FED. CIR. BAR J. 69, 71 (2005) (suggesting that along with doctrine of inequitable conduct to ensure the integrity of patent prosecution system, "the equitable doctrine of patent misuse must be used to protect the underlying constitutional bargain for which it was granted"); Jacob S. Sherkow, *Patent Law's Reproducibility Paradox*, 66 Duke L.J. 845, 845 (2017) (discussing the constitutional bargain that the inventors must disclose the inventions in exchange for patent protection).

72. *See* Mazer v. Stein, 347 U.S. 201, 208 (1954) (recognizing that in "1790 the First Congress conferred a copyright on 'authors of any map, chart, book or books already printed'"); Eldred v. Ashcroft, 537 U.S. 186, 197 (2003) (quoting Eldred v. Reno, 239 F.3d 372, 379 (D.C. Cir. 2001) ("[T]he First Congress made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states."); Cent. Va. Comm. Coll. v. Katz, 546 U.S. 356, 386 n.3 (2006) (Thomas, J., dissenting) (citing Act of Apr. 10, 1790, ch. 7, 1 Stat. 109) (noting "the very first Congress enacted, *inter alia*, patent and copyright legislation"); EMI Apr. Music, Inc. v. White, 618 F. Supp. 2d 497, 503 (E.D. Va. 2009) (quoting ROBERT A. GORMAN, COPYRIGHT LAW 2 (2nd ed. 2006) ("[T]he enactment by the first Congress in 1790 of the first federal statutes governing copyrights and patents.").

73. Courts have long recognized the creativity underpinning copyright and patent protections under the federal regimes. *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (stating that the "ultimate aim" of copyright law is "to stimulate artistic creativity for the general public good"); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 37 (2003) (stating that the copyright and patent laws were "designed to protect originality or creativity"); Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003) ("The Copyright Act was intended to promote creativity, thereby benefiting the artist and the public alike."); *see also* Hammond

Under patent law, creators obtain the right to exclude others from practicing the patented invention for fourteen years.[74] This monopoly in patents serves as a powerful incentive tool for creativity.[75] Patent law, however, does not want to stifle creativity by providing too much to the patent creators.[76] Patent law calibrates the balance between the creators and users by imposing various statutory requirements related to patentability to ensure the creators do not claim ideas that lack novelty,[77] possess no usefulness,[78] fail to qualify as patentable

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Buckle Co. v. Goodyear Rubber Co., 58 F. 411, 413–14 (2d Cir. 1893) (stating that the invention at issue "involve[s] an exercise of the creative faculties, and thus . . . may be patentable"); Nat'l Safety Lift Co. v. Anderson, 276 F. 696, 698 (1st Cir. 1921) ("In order to be an invention, a thing must be a discovery, a work of the inventive and creative faculty, and not merely the exercise of reason and experience, or the act of a mechanic skilled in the art."); Comm'r v. Affiliated Enters., 123 F.2d 665, 667 (10th Cir. 1941) ("A patent simply grants the exclusive right to the use of the creative idea."). Some scholars, however, challenge the creativity theory as "an insidious myth." Aaron X. Fellmeth, *Uncreative Intellectual Property Law*, 27 TEX. INTELL. PROP. L.J. 51, 51 (2019); *see also* Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don't)*, 55 HOUS. L. REV. 451, 451 (2017) ("[T]he link between copyright and creative incentives appears to be considerably less robust than theory may have led us to expect.").

74. Simon Lester & Huan Zhu, *Rethinking the Length of Patent Terms*, 34 AM. U. INT'L L. REV. 787, 788–91 (2019) (providing a history of patent terms).

75. Laura G. Pedraza-Fariña & Ryan Whalen, *A Network Theory of Patentability*, 87 U. CHI. L. REV. 63, 63 (2020) (recognizing the fundamental core of patent protection that significant inventions are protected while minor improvements rejected in order to maintain the balance "between incentivizing new innovation and providing public access to existing innovation").

76. *Id.* at 77–89 (discussing the doctrine of obviousness and how courts utilize the doctrine as gatekeeper to incentivize new innovations while ensuring users right to existing ideas).

77. The U.S. Code defines the conditions for patentability:

> A person shall be entitled to a patent unless (1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or (2) the claimed invention was described in a patent . . . or in an application for patent published . . . in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.

35 U.S.C. § 102 (2018).

78. David G. Barker, *Troll or No Troll? Policing Patent Usage with an Open Post-Grant Review*, 4 DUKE L. & TECH. REV. 1, 9 n.28 (2005) ("The grounds for a challenge could be any of the statutory standards—novelty, utility, non-obviousness, disclosure or enablement—or even the case law proscription on patenting abstract ideas and

subject matter, and are obvious to those who practice in the same area.[79]

With the patent monopoly, the patent creators can exploit the patents directly through using the patents in the making and distributing products or services embodied in the patented inventions.[80] Without the necessary capital and expertise, the creators can monetize the patents by assigning or licensing the rights in the patents to others who have resources to further research and develop the patented inventions into products.[81]

Under copyright law, creators of literary, musical, dramatic, pantomimes, choreographic, pictorial, graphic and sculptural, motion pictures, audiovisual, sound recordings, and architectural works enjoy legal protection.[82] Software is also entitled to copyright protection as literary work.[83] Videogames and apps are multimedia

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natural phenomena"); Michael A. Carrier, *Why Property Law Does Not Support the Antitrust Abandonment of Standards*, 57 HOUS. L. REV. 265, 273 (2019) (stating that "patents, like other forms of intellectual property, are subject to doctrines (like novelty, nonobviousness, the written-description and enablement disclosure requirements, and a limited 20-year term) that ensure that protections for market competition balance patents' incentive effects.").

79. Pedraza-Fariña & Whalen, *supra* note 75, at 77 (focusing on the doctrine of obviousness as a balancing calibrator); *see also* William Fisher, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1432 (2010).

80. John C. Stedman, *The U.S. Patent System and Its Current Problems*, 42 TEX. L. REV. 450, 450, 454, 456 (1964) (observing the complex conditions for patent procurement and "what one can do with a patent once it is granted"). Patentees sometimes discover that while they are attempting to manufacture patented products, competitors infringe on their patents and sell competing products in the marketplace. *See, e.g.*, Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 757–59 (2011). In recent years, procuring patents is for both offensive and defensive purposes. *See* Eagle View Techs. v. Xactware Sols., Inc., No. 15-07025, 2018 WL 6696166, at *5 (D.N.J., Dec. 20, 2018); Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 342–44 (2010) (discussing patent offensive and defensive usages).

81. Stedman, *supra* note 80, at 488–91 (explaining the complexity of R&D research with contractors and associated problems with patent ownership); *see also* Xuan-Thao Nguyen & Jeffrey A. Maine, *Attacking Innovation*, 99 B.U. L. REV. 1687, 1706–07 (2019) (identifying universities without capital and expertise for development of end products, focus primarily on basic scientific research and some applied research that may lead to patent ownership).

82. 17 U.S.C. § 102(a); *see also* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES 503.1(B) (3d ed. 2021), https://www.copyright.gov/comp3/docs/compendium.pdf.

83. 17 U.S.C. § 101; RJ Control Consultants, Inc. v. Multiject, LLC, 981 F.3d 446, 453 n.4 (6th Cir. 2020) ("[S]oftware codes may be entitled to copyright protection as 'literary works'"); Mathias Strasser, *A New Paradigm in Intellectual Property Law? The Case Against Open Sources*, 2001 STAN. TECH. L. REV. 4, 14–22 (2001) (recounting the history of copyright protection for software).

works, resulting from a combination of different types of copyrighted works from storyline, music, pictorial, graphic, to software.[84]

The rights under a copyright are a bundle of rights.[85] The copyright creators have the exclusive rights to make copies, prepare derivative works, distribute the works, publicly perform the works, and publicly display the works.[86] Moreover, the copyright creators can assign and license any of the right in the bundle of rights as part of exploiting the value of the content.[87] For instance, a songwriter like Bob Dylan can collect a royalty each time "The Times They Are a-Changin'" is played on a radio station, streamed on Spotify, recorded by a studio, performed publicly by an artist, incorporated in an advertisement, featured in a movie or audiovisual works, among others.[88]

The duration of a copyright is significantly longer compared to

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84. Georgios I. Zekos, *Copyrights and Trademarks in Cyberspace: A Legal and Economic Analysis*, 15 CHI.-KENT J. INTELL. PROP. 313, 342 (2016) ("Videogames are not considered merely as computer programs, but being complex multimedia works expressing autonomous narrative and graphic creations, such games are regarded as intellectual works protected by copyright under the InfoSoc Directive.").

85. Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 733–34 (2013) (discussing copyright law's divisibility of rights in the context of whether standing to bring a copyright infringement action is available).

86. 17 U.S.C. § 106.

87. *See* Jyh-An Lee, *Copyright Divisibility and the Anticommons*, 32 AM. U. INT'L L. REV. 117, 122 (2016) (highlighting that copyright divisibility allows copyright owners to maximize their revenue because copyright divisibility "requires users to obtain multiple licenses for any single use of a copyrighted work"); Christopher M. Newman, *A License is Not a "Contract Not to Sue": Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101, 1145 (2013) (explaining copyright divisibility and assignment of copyright in whole or in part); *see also* I.A.E., Inc. v. Shaver, 74 F.3d 768, 775 (7th Cir. 1996) ("[T]he copyright holder permits the licensee to use the protected material for a specific use and further promises that the same permission will not be given to others."); Jeff Brabec & Todd Brabec, *Buying and Selling Music Catalogues*, 36 ENT. & SPORTS L. 9 (2020).

88. Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L.J. 259, 333 (2007) (observing that for songwriters, "the revenue stream for performance rights in the underlying musical work will continue to be more important than the revenue stream from other elements in the bundle of rights"); *see* Sarah Jeong, *A 1.6 Billion Lawsuit is Based on a Law Made for Player Pianos*, THE VERGE (Mar. 14, 2018), https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer (illustrating songwriter's rights in the complex music industry due to the recent technological changes in recording and distribution); *see also* Don E. Tomlinson, *Everything that Glitters is Not Gold: Songwriter-Publisher Agreements and Disagreements*, 18 HASTINGS COMM. & ENT. L.J. 85, 108–10 (1995) (suggesting that songwriters be careful in their agreements with publishers not to assign the entire rights in the copyrights of songs because future use of the songs may impact royalties).

patent protection. Copyright law extends a term of protection for the life of the creator and seventy years beyond the author's death.[89] That means the creator's heirs can reap the benefits after the creator's life.[90] Further, copyright law allows a right of reversion that after the creator assigns the copyright in the work to others for a period of time, the creator or their heirs can seek to regain the ownership in the copyright.[91] The rationale for the long copyright term and the right of reversion centers on incentivizing creativity through affording opportunities to benefit from the copyrighted works by the creators and their heirs.[92]

Similar to patent law, copyright law addresses concerns about stifling creativity. Copyright law balances the rights of the creators and users.[93] Doctrines of fair use, parody, and copyright misuse limit

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89. 17 U.S.C. § 302(a); *see also* Elred v. Ashcroft, 537 U.S. 186, 208 (2003) (upholding the copyright extension that provides the duration of life of the author plus 70 years).

90. *See* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 673 (2014) (acknowledging that the author's renewal rights "reverted to his heirs, who could renew the copyrights unburdened by any assignment previously made by the author").

91. *See* Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 221–22 (2011) (exploring the assumptions and justifications of copyright protection during the life of the author and after the author's death); Bridget J. Crawford & Mitchell M. Gans, *Sticky Copyrights: Discriminatory Tax Restraints on the Transfer of Intellectual Property*, 67 WASH. & LEE L. REV. 25, 32–33 (2010) (explaining the reversion rights under Copyright law).

92. The Supreme Court described that underlying rationale stating:

> The principal purpose . . . was to provide added benefits to authors. The extension of the duration of existing copyrights . . . for new copyrights, and the concept of a termination right itself, were all obviously intended to make the rewards for the creativity of authors more substantial. More particularly, the termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product.

Mills Music, Inc. v. Snyder, 469 U.S. 153, 172 (1985). *See also, e.g.*, Megan Keelan, *Can't Buy Me Love, But You Can Buy My Copyrights (As Long as You Give Them Back): Finding Balance in the Era of Terminating Transfers*, 53 CREIGHTON L. REV. 575, 576 (2020) (describing copyright law's reversion right and the law's purpose); Ruth Towse, *Copyright Reversion in the Creative Industries: Economics and Fair Remuneration*, 41 COLUM. J.L. & ARTS 467, 467 (2018).

93. *See, e.g.*, Roberta R. Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1951–62 (2006); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 8 (2008); Roger Syn,

the overreaching of copyright ownership.[94] Copyrightable subject matter ensures that only works with originality and fixed in a tangible medium of expression can obtain protection.[95] Facts, data, and *scenes-à-faire* belong to the public, regardless how much creators of aggregated contents spend their efforts in collecting and crafting them.[96]

Overall, the law on creativity is one of constitutional bargain for the legal protection over a period of time to encourage creators to produce patents and copyrights.[97] However, examining the law on

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Copyright God: Enforcement of Copyright in the Bible and Religious Works, 14 REGENT U. L. REV. 1, 13–15, 27, 28 (2002).

94. Courts treat fair use as an affirmative defense in copyright infringement. *See* Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 459 (9th Cir. 2020) (affirming "the characterization of fair use as an affirmative defense"); Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 689 (7th Cir. 2012) (permitting the district court to dismiss suit on basis of affirmative defense fair use and parody at early stage of proceedings). Copyright misuse is a judicially created affirmative defense in copyright infringement. Apple Inc. v. Psystar Corp., 658 F.3d 1150, 1157 (9th Cir. 2011) ("Copyright misuse is a judicially crafted affirmative defense to copyright infringement, derived from the long-standing existence of such a defense in patent litigation."); Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 978–79 (4th Cir.1990) (holding Lasercomb misused its copyrights each time "Lasercomb sells its Interact program to a company . . . the company is required to forego utilization of the creative abilities of all its officers, directors and employees in the area of CAD/CAM die-making software.").

95. Originality encompasses creativity. *See* Feist Publ'ns, Inc. v. Rural Tele. Serv. Co., 499 U.S. 340, 345 (1991) (requiring a modicum of creativity for copyright protection); Brad Bedingfield, *Copyrighting Medieval Literature: Editing and Publishing the Pre-Modern Public Domain*, 28 COLUM. J.L. & ARTS 213, 217–18 (2005) (discussing the minimum creativity requirement); Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569, 606 (2002) ("As we have seen, courts generally view authorship, by virtue of the originality requirement, as requiring some form of intellectual labor, imagination, or planning.").

96. *See generally* Michael D. Murray, *Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 781–82 (2006) (scene-a-faire); Alan L. Durham, *Speaking of the World: Fact, Opinion and the Originality Standard of Copyright*, 33 ARIZ. STATE L.J. 791, 791 (2001) (facts); Amy C. Sullivan, *When the Creative is the Enemy of the True: Database Protection in the U.S.A. and Abroad*, 29 AIPLA Q.J. 317, 332 (2001) (data).

97. Maria A. Pallante, *Robert W. Kastenmeier Lecture: I am the Captain Now: Resisting Piracy and Contortion in the Copyright Marketplace*, 2018 WIS. L. REV. 657, 662 (2018) (stating that the Supreme Court's interpretations of copyright law suggest that publication is "most certainly part of the constitutional bargain and public benefit of incentivizing authors and creativity"). Prof. Alina Ng has commented on this bargain as well writing:

creativity only through the lenses of patent and copyright laws is deficient. The tax system related to the monetization of patents and copyrights must also be considered to best understand the law on creativity.

Part III below describes the special tax break for songwriters lobbied for in 2005. Before that, however, it places the legislation in historical context—where it fits within the overall tax system governing creative property more generally.

III. TAXATION OF SALES OF CREATIVE WORKS: HISTORICAL BACKGROUND AND THE SPECIAL RULE FOR MUSIC

Most creators would prefer that income generated from their creative works be treated as so-called "capital gains." The reason is simple: Capital gains are subject to lower tax rates than so-called "ordinary income." The top rate on most capital gains is 20% whereas the top rate on "ordinary income" is 37%—a significant rate differential for high earners.[98]

There is nothing wrong with creators wishing to achieve the desired tax rate. In the widely-quoted opinion of Judge Learned Hand:

> Protecting the copyright owner's interest—as an economic privilege to use creative works in specifically enumerated ways—fulfills the law's intent of achieving progress in science and arts through the creation of literary and artistic works more precisely because society is able to use works in ways that will advance progress as long as they fulfill the constitutional bargain and pay for using works produced and disseminated by the copyright owner.

Alina Ng, *Rights, Privileges, and Access to Information*, 42 LOY. U. CHI. L.J. 89, 139 (2010); *see also* Jerry Cohen, *The WS of Intellectual Property Practice-Who, What, When, Where, Why and Web*, 50 R.I. Bar J. 17, 20 (2002) ("The U.S. Constitutional bargain of exclusive copyright and patent rights for inventive effort, investment and disclosure or other public availability has it that the exclusive rights will be for limited times.").

98. *Compare* I.R.C. § 1(h) (capital gains rates), *with* § 1(j) (ordinary rates). The rates on "net capital gain" are 0%, 15%, or 20% depending on the taxpayer's income level (25% or 28% in special cases). I.R.C. § 1(h). Prior to 1921, Congress did not distinguish between gains from the sale of capital assets and other forms of income. As described later in this Article, however, Congress realized that gains from the sale of capital assets represented an accumulation of annual increases, propelling taxpayers to higher tax brackets and subjecting them to higher ordinary rates than they would have paid had the increases in value been taxed annual. Rather than require annual taxation of annual increases in value of the asset, Congress opted for a simpler approach of enacting a preferential tax rate on the sale of capital assets. Revenue Act of 1921, 42 Stat. 224, § 206(a)(6) (1921); *see* Howard J. Rothman, Pamela M. Capps, & Barry Herzog, *Bloomberg Tax Portfolio, Capital Assets, No. 561*, TAX MGMT. BNA PORTFOLIO 561-3d.

"Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[99] Creators wish to maximize value from their creations by managing them in a tax efficient manner. This is the stuff of legal tax planning, a term of art that refers to the structuring of a transaction or relationship to maximize its tax benefits—whether avoiding taxation, or deferring taxation to a later year, or *converting ordinary income into capital gains.*

For creators other than songwriters (and a limited number of individual inventors), however, this tax planning game cannot be played. Under the Code, a capital gain requires a "sale or exchange" of a "capital asset."[100] Creators who sit on their works and collect royalty checks lack the "sale" requirement, and, thus, must report their payments as ordinary income taxed at a high rate. Creators who decide to sell their works, in contrast, must still satisfy the "capital asset" requirement in order to receive the lower rate. What is considered a capital asset is something Congress has manipulated over the years. Indeed, the definition is now a mess. The Code defines the term "capital asset" in negative terms, i.e., all property held a taxpayer except the property specifically listed; in short, Congress created a general definition in 1921,[101] but then carved out over the years numerous exceptions and even exceptions to the exceptions.[102] These carve-outs for creative activity, which are described below, have produced the current "tax" law on creativity, which supplements the patent and copyright laws described in Part II.

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99. Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934).

100. The taxpayer must also have held onto the capital asset for more than a year before selling in order to get the lower rate. I.R.C. § 1222(3) (requiring a "sale or exchange of a capital asset held for more than one year").

101. The original 1921 definition was

> Property acquired and held by the taxpayer for more than two years (whether or not connected with his trade or business), . . . [excluding] property held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

42 Stat. 224, § 206(a)(6) (1921).

102. Changes to the definition were made in 1924, 1934, 1938, 1942, 1950, 1954, 1969, 1976, 1981, 1999, 2005, and 2017. *See* Rothman et al., *supra* note 98, § II (providing historical development of section 1221).

A. Professional Creators

A longstanding exception from the capital asset definition is inventory.[103] Specifically, a capital asset does not include "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."[104] The Supreme Court has declared that this exclusion for inventory and inventory-like property must be interpreted broadly.[105]

The exclusion for inventory and inventory-like property does not just exclude groceries sold by a market, or clothing sold by a retailer, or widgets sold by a manufacturer. It can also exclude creative works in some cases. For example, in one case, an inventor who was granted thirty-seven patents over a nineteen-year period was held to be in the business of selling and licensing his inventions.[106] Thus, his inventions were not capital assets and payments received by him from the sale of just three patents were taxable as ordinary income.[107] Courts also found that professional authors, composers, and artists were not eligible for capital gains treatment on the sale of their works, because they held their created works for sale to customers in the ordinary course of their trade or business.[108]

Under the exception for inventory just described, professional creators—those who devote a significant amount of time to creative activity, who have created a number of works, and who intend to sell such works, as opposed to using them in their business—would not qualify for capital gain treatment. Amateur creators, however, would

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103. The original definition of "capital asset" excluded "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year." 42 Stat. 224, § 206(a)(6) (1921).

104. I.R.C. § 1221(a)(1).

105. Corn Prods. Refin. Co. v. Comm'r, 350 U.S. 46 (1955).

106. Lockhart v. Comm'r, 258 F.2d 343, 348 (3d Cir. 1958).

107. *See id.* Courts have developed a facts-and-circumstances test, using as criteria the number of works created, whether the works were used in the taxpayer's business or were intended to be sold to third parties, and the scope of the taxpayer's devotion to creative activity. *Id.* at 347; *see also* First Nat'l Bank of Princeton v. United States, 136 F. Supp. 818, 825–26 (D.N.J. 1955).

108. *See* Goldsmith v. Comm'r, 1 T.C. 711, 715–16 (T.C. 1943), *aff'd*, 143 F.2d 466, 467 (2d Cir. 1944), *cert. denied*, 323 U.S. 774, 774 (1944); Fields v. Comm'r, 14 T.C. 1202, 1216 (1950), *aff'd*, 189 F.2d 950, 952 (2d Cir. 1951); *see also* Martin v. Comm'r, 50 T.C. 341, 356–57 (T.C. 1968) (holding sale of motion picture rights to a story was sale of property held primarily for sale to customers and, thus, not a capital asset).

seemingly qualify for special capital gain rate treatment since their works are not considered inventory or inventory-like property.[109]

B. Copyright Creators

In 1950, however, Congress targeted certain amateur creators by creating another exception from the capital asset definition.[110] Specifically, it excluded from the definition "a copyright, a literary, musical, or artistic composition . . . or similar property, held by a taxpayer whose personal efforts created such property."[111] Over the years, the Treasury Department and courts broadened the scope of the provision to cover not only traditional copyrighted works and property eligible for copyright protection, but also abstract ideas, such a cartoon characters and formats or ideas for television or radio shows, which are not copyrightable per se.[112]

Several justifications have been offered for why Congress targeted amateur copyright creators and subjected them, in particular, to ordinary tax rates on sales of their works. One explanation is that the new exception removed a perceived loophole and provided uniform ordinary income treatment for the sale of all self-created copyrights. Prior to the rule, if the author of a book was a professional writer, the sale of the copyright for the book resulted in ordinary income because inventory is not considered a capital asset, as discussed above. If the author was an amateur, however, the book was considered a capital asset, and the sale resulted in capital gain. By excluding from the capital asset definition self-created copyrights and similar property, Congress leveled the playing field for professional and amateur copyright creators alike.

Another justification for the 1950 self-created copyright exception is that gains from creative efforts should be taxed as ordinary income,

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109. *See* Herwig v. United States, 105 F. Supp. 384, 391 (Ct. Cl. 1952); TeLinde v. Comm'r, 18 T.C. 91, 96 (T.C. 1952).

110. Revenue Act of 1950, Pub. L. No. 81-814, § 210, 64 Stat. 906, 933 (codified as amended at I.R.C. §1221(a)(3)(A)).

111. *Id.* Note that in 1969, Congress extended the scope of the copyright exclusion to exclude from capital asset status a letter, memorandum, or similar property held by the creator. *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 514(a), 83 Stat. 487, 643 (1969).

112. *See* Treas. Reg. § 1.1221-1(c)(1) (as amended in 1975) (noting "similar property" includes "a theatrical production, a radio program, a newspaper cartoon strip, or any other property eligible for copyright protection"); *see also* Cranford v. United States, 338 F.2d 379, 384 (Ct. Cl. 1964) (holding that "format for radio or television program was 'similar property'"); Stern v. United States, 164 F. Supp. 847, 851 (E.D. La. 1958) (addressing whether the character ("Francis," the talking mule) was "similar property" and, hence, within scope of I.R.C. § 1221(a)(3)).

just like wages and salaries are taxed as ordinary income.[113] Those who choose to spend their days creating art, or music, or manuscripts, or sculptures should not be treated more favorably than working stiffs who spend their days providing labor services for their employers. The nature of the income in both cases is essentially the same, so the argument goes, and, under fairness principles, both creators and laborers should be taxed the same.[114] A flaw with the argument is that limiting the exclusion to only self-created copyrights, literary, musical, and artistic compositions, and similar property ignored many other self-created assets created by the personal efforts of the taxpayer (which were not denied capital asset status).

The most plausible justification for signaling out amateur copyright creators, however, is a political one. In 1948, President Dwight D. Eisenhower published a book of wartime memoirs, *Crusade in Europe*, and sold it at a substantial gain. Since he was an amateur and not a professional writer, he was able to enjoy capital gains treatment, saving about $400,000 in taxes.[115] An outraged Congress responded by modifying the definition of a capital asset in the Revenue Act of 1950, to exclude self-created copyrights, literary, musical, or artistic compositions, or similar property.[116] The change, commonly called the "Eisenhower Amendment" was clearly political. Indeed, "[i]t has been said that if President Eisenhower had realized similar profits from a patented invention, copyrights would still be

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113. S. REP. NO. 81-2375, at 83–84 (1950); H.R. REP. NO. 81-2319, at 91–92 (1950). In 1969, Congress amended the rule to similarly deny capital asset status to letters, memoranda, and similar property. Congress believed such property is similar to a literary or artistic composition created by personal efforts and, thus, should be tax similarly. § 514, 83 Stat. at 643. "In the one case, a person who sells a book written by or for him is treated a receiving ordinary income for the product of personal service (i.e., compensation for personal services rendered). In another case, one who sells a letter or memorandum written by or for him is treated as receiving capital gain on the sale, even though the product he is selling is, in effect, the result of personal efforts." S. REP. NO. 91-552, at 83–84 (1969), *as reprinted in* 1969-3 C.B. 423, 549.

114. As discussed later, tax rules should embrace principles of fairness. Tax fairness is usually described in terms of horizontal equity. Horizontal equity holds that persons who are similarly situated should be taxed in a similar fashion. It has been compared to the constitutional principle of equal protection under the laws. U.S. CONST. amend. XIV, § 1; JOHN A. MILLER & JEFFREY A. MAINE, THE FUNDAMENTALS OF FEDERAL TAXATION 5 (5th ed. 2018). For further treatment, *see* Xuan-Thao Nguyen & Jeffrey A. Maine, *Equity and Efficiency in Intellectual Property Taxation*, 76 BROOK. L. REV. 1, 3 (2010).

115. DAVID PIETRUSZA, 1948: HARRY TRUMAN'S IMPROBABLE VICTORY AND THE YEAR THAT TRANSFORMED AMERICA (2011).

116. I.R.C. § 1221(a)(3)(A).

treated favorably and patents would have been singled out for non-capital gains treatment."[117]

The Eisenhower Amendment left out inventions, patents, and designs created by amateurs, which, thus, remained eligible for capital gains treatment.[118] If the Eisenhower Amendment was not to be viewed as political, then some justification was needed to explain why self-created inventions deserved to be treated more favorably under tax law than self-created copyrights. The stated policy reason for according different, and preferential, treatment under the law for amateur inventors was that "the desirability of fostering the work of such inventors outweigh[ed] the small amount of additional revenue which might be obtained" by excluding inventions, patents, and designs from the capital asset definition.[119] But that still begs the question as to the desirability of fostering copyright creation—did the additional revenue gained from the Eisenhower Amendment really outweigh the desirability of fostering copyright creation?

Recall, from above, the non-political justifications for the Eisenhower Amendment. One is that amateur copyright creators (like President Eisenhower) and professional copyright creators (who are subject to the inventory exception) should be treated alike and receive uniform ordinary income treatment for the sale of their works.[120] But couldn't the same be said for amateur and professional inventors? In other words, why should equity be deemed a desirable tax policy goal for copyright creators but not for inventors?

Congress did address the disparate tax treatment of professional inventors and amateur inventors four years after the Eisenhower Amendment. Interestingly, Congress did not choose to subject amateur inventors to ordinary income treatment on the sales of their inventions, but instead chose to give professional inventors capital gain treatment on their sales.[121] It did so, not by tweaking the capital asset definition, but by enacting a new Code provision dealing

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117. JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 797 (4th ed. 2002). However, it has been noted that "sales by comedians Jack Benny and Groucho Marx of their rights to their television shows at capital gains rates may also have influenced Congress." Rothman et al., *supra* note 98, § VI.A (noting, however, that the cases involving these comedians were decided after the enactment of section 1221(a)(3)).

118. I.R.C. § 1221(a)(3)(A).

119. The House bill included the words "invention," "patent," and "design" in types of self-created property that were excluded from the capital asset definition and, thus, ineligible for preferential capital gains treatment. Ultimately, however, these references to inventions, patents, and designs were eliminated.

120. *See supra* note 114.

121. I.R.C. § 1235.

specifically with patent transfers. Section 1235, enacted in 1954, acts like a safe harbor in achieving capital gains treatment. If a number of statutory requirements are met, the transfer of a patent may qualify for capital gains treatment even though the transferor is a professional inventor (i.e., section 1235 supplies the capital asset requirement).[122]

Although the main goal of section 1235 was to encourage research and development,[123] the 1954 legislation achieved horizontal equity between professional inventors and amateur inventors, just as the 1950 legislation (the Eisenhower Amendment) achieved horizontal equity between professional copyright creators and amateur copyright creators.[124] But the legislation also solidified the disparate tax treatments of copyrights and patents.[125] Creators of copyrights and similar property were not eligible for preferential capital gains rate treatment.[126] Creators of inventions and patents were.[127]

That changed in 2017, when, once again, Congress modified the definition of capital asset.

C. Inventors and Patent Creators

In the Tax Cuts and Jobs Act of 2017 (TCJA),[128] Congress amended the capital asset definition to exclude self-created patents and similar property.[129] Under the TCJA, a patent, invention, model or design (patented or not), or secret formula or process is not a capital asset in the hands of the taxpayer whose personal efforts created the property.[130] In this remarkable shift in tax policy, gains from the sale of self-created patents and similar property will no longer be eligible for preferential capital gains treatment under general characterization principles.[131]

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122. I.R.C. § 1235. A transaction must involve the "transfer" by a "holder" of "all substantial rights" to a "patent." *Id.* If all of these mandatory statutory requirements are not satisfied, then section 1235 is completely disregarded, and general tax principles apply in determining whether or not such a transfer constitutes a sale of a capital asset held for more than a year.

123. A stated policy goal underlying section 1235's enactment was "to provide an incentive to inventors to contribute to the welfare of the Nation." S. REP. NO. 83-1622, at 439 (1954), *as reprinted* in 1954 U.S.C.C.A.N. 4621, 5082.

124. *See generally* I.R.C.

125. *Compare* I.R.C. §1221(a)(3)(A), *with* I.R.C. §1235.

126. I.R.C. § 1223(a)(3)(A).

127. I.R.C. § 1235.

128. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

129. I.R.C. § 1221(a)(3) (as amended by the TCJA).

130. *Id.*

131. *Id.*

The legislative history behind the 2017 TCJA amendment provides an explanation for why self-created patents and similar property were targeted for ordinary income treatment: "Since the intent of Congress is that profits and losses arising from everyday business operations be characterized as ordinary income and loss, the general definition of capital is narrowly applied and the categories of exclusions are broadly interpreted."[132] This stated policy rationale is seemingly legitimate. After all, the legislative history behind the 1950 Eisenhower Amendment (which excluded only self-created copyrights and similar property) similarly noted that gains from personal efforts (income from a book or other artistic work) should be treated as ordinary income regardless of whether the taxpayer was in the profession of writing books, or creating other artistic works, or was an amateur.[133]

The silent, and more likely, justification for the law change, however, was that it helped pay for some of the tax cuts in the TCJA. The TCJA, one of the most significant overhauls of the Code in more than three decades, made numerous changes to the income tax as it applies to individuals and business. The leading theme of the new law was an across-the-board reduction of rates and enhanced tax breaks for tangible capital investment. To help pay for it all, the TCJA had to amend a number of provisions to help make up tax revenue loss—one of which was the provision that defines capital asset. Ironically, the revenue impact of removing self-created patents and inventions from capital asset characterization was expected to be minimal. The Joint Committee on Taxation estimated that the amendment would only raise $500 million over ten years.[134]

With respect to patent creativity, Congress has made a proverbial "one eighty." In the 1950s, it said patents warranted capital gains treatment in order to incentivize inventive activity.[135] Seven decades later, it said patents should be subject to ordinary income treatment (under general characterization principles), noting all gains from personal efforts should be treated as ordinary income.[136]

After the Tax Cuts and Jobs Act of 2017, the definition of capital asset excludes not only inventory (which impacts professional

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132. H.R. REP NO. 115-466, at 414 (2017) (Conf. Rep.).

133. *See supra* notes 113–14 and accompanying text.

134. JOINT COMM. ON TAX'N, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" 4 (Dec. 18, 2017); *see also Tax Expenditures*, U.S. DEP'T OF THE TREASURY 21–36 (Oct. 16, 2017), https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2019.pdf (listing estimated tax expenditures for years 2017–2027).

135. *See supra* note 119 and accompanying text.

136. I.R.C. § 1221(a)(3).

creators), but also self-created patents, inventions, models or designs (whether or not patented), secret formulas or processes, copyrights, literary, musical and artistic compositions, letters or memoranda and similar property (which impacts amateur creators).[137] In short, Congress has settled on a default rule: Most creators (professional and amateur) are treated the same and should pay ordinary tax rates on their sale gains—except for one category: creators of musical compositions or copyrights in musical works.

D. Creators of Musical Works

As demonstrated above, the definition "capital asset" has an interesting history—spanning from 1921 to the present day. This is especially true when it comes to creative works inasmuch Congress created a general capital asset definition but then, over the years, carved out exceptions for creative works. In the midst of this history, however, Congress snuck in an exception to these exceptions. This special rule is a little, obscure provision enacted in 2005. It is only one sentence long, but has huge implications for the music industry:

> *"At the election of the taxpayer, paragraphs (1) and (3) of subsection (a) shall not apply to musical compositions or copyrights in musical works sold or exchanged by a taxpayer described in subsection (a)(3)."*[138]

What this sentence, which is buried in the capital asset definition provision, does is create an exception (to the capital asset exceptions for inventory and creative works) for sales of musical compositions and copyrights in musical works.[139] It is an exception to exceptions to the general definition of a capital asset. In essence, songwriters, whether they are professionals or amateurs, can elect to pay taxes at lower capital gains rates rather than higher ordinary income rates on the sales of their songs.[140]

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137. *See generally* I.R.C. § 1221.

138. I.R.C. § 1221(b)(3). The special election was added in 2005. *See* Tax Increase and Reconciliation Act of 2005, Pub. L. No. 109-222, § 204(a), 120 Stat. 345, 350. The election was made permanent in 2006. *See* Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 412, 120 Stat. 2921, 2963.

139. *See* Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 204(a)(3), 120 Stat. 345, 350, *amended by* the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 412, 120 Stat. 2921, 2963; *see also* H.R. REP. NO. 109-455, at 94 (2006) (Conf. Rep.), *as reprinted in* 2006 U.S.C.C.A.N. 234, 292.

140. Specifically, section 1221(b)(3) of the Code provides that, at the election of a

What could possibly be the justification for giving only songwriters, but not other creators such as artists and authors and sculptors and inventors, a special tax break? Ironically, the country music lobbying machine made a couple of "equity" arguments. The capital asset exceptions for both inventory and self-created copyrights described earlier were viewed as quite harsh to songwriters. Since the average annual income of songwriters was quite low and often came in spurts, some thought the taxing of gains realized from song sales should differ from the taxing of compensation earned by wage earners.[141] According to Bart Herbison, executive director of the Nashville Songwriters Association International (NSAI), it is "fair" to give songwriters preferential tax treatment because their average annual income is $4,700.[142]

Another tax equity argument made to justify the special tax break for songwriters was that the special tax break was needed "to place songwriters on 'equal footing' with music publishers. Most songwriters will 'partner' with a music publisher. Upon the sale of the publishing business, the music publisher is generally entitled to capital gains rates while the songwriters, prior to enactment of § 1221(b)(3), were required to pay ordinary income tax on their share of such sales."[143]

So, the special rule for songwriters was touted as removing perceived tax inequity facing songwriters—tax inequity between songwriters and wage earners and between songwriters and publishers. As we demonstrated earlier in this article, however, this special rule was nothing more than a response to successful lobbying efforts by the country music industry. One argument was the average

taxpayer, the section 1221(a)(1) and (a)(3) exclusions from capital asset status do "not apply to musical compositions or copyrights in musical works sold or exchanged by a taxpayer described in [section 1221(a)(3)]." The IRS has published regulations that describe the time and manner for electing capital asset treatment for self-created musical works. *See* Treas. Reg. § 1.1221-3 (as amended in 2011).

141. *See* Brady Mullins, *Music to Songwriters' Ears: Lower Taxes: Country Artists' Group Presses Lawmakers to Slash the Levy on Lyricists*, WALL ST. J., Nov. 29, 2005, at A4 (quoting Bart Herbison, executive director of the Nashville Songwriters Association International). For criticism of this argument and government response, *see* James Edward Maule, *I Sing a Song of Taxes, a Pocketful of Cries*, MAULEDAGAIN (Nov. 30, 2005, 10:39 AM), https://mauledagain.blogspot.com/2005/11/.

142. *See* Maule, *supra* note 141.

143. Another tax equity argument that has been offered is that the special tax break "was to place songwriters on 'equal footing' with music publishers. Most songwriters will 'partner' with a music publisher. Upon the sale of the publishing business, the music publisher is generally entitled to capital gains rates while the songwriters, prior to enactment of section 1221(b)(3), were required to pay ordinary income tax on their share of such sales." Rothman et al., *supra* note 98, § VI.E.

annual income of songwriters is low and comes in spurts, thus requiring tax rate relief. If it is true that their average annual income is $4,700, as suggested by the NSAI,[144] this does not justify a low tax rate for them. In fact, someone with $4,700 of income is not even subject to income tax because of the so-called standard deduction[145] and personal exemption allowances[146] in the Code.

Framed as a relief provision for songwriters (many of whom aren't even subject to significant income taxation), it actually ended up benefitting wealthy songwriters, such as Bob Dylan and Stevie Nicks, who would compose music even without the tax break. In addition, it created larger tax equity concerns with respect to creators and added to existing racial disparities in the Code. As described in Part IV below, the rule needs to be either eliminated or revised to encompass a wide array of other creative works.

IV. RETHINKING TAX RULES GOVERNING CREATIVE WORKS

A. Eliminate the Exception for Self-Created Musical Works

1. The Exception for Self-Created Musical Works Violates the Principle of Tax Equity

An ideal tax system should levy taxes commensurately with one's ability to pay those taxes.[147] As noted above, one stated reason Congress afforded songwriters a low capital gains tax rate on their song sales was because the average annual income of songwriters was shown to be quite low.[148] This stated rationale, however, does not explain why Congress failed to afford other creators *with similar incomes* the same tax break. As a result of the special rule for

144. For general salary information, see *Songwriter Job Description, Career as a Songwriter, Salary, Employment*, STATEUNIVERSITY.COM, https://careers.stateuniversity.com/pages/7981/Songwriter.html (last visited Mar. 16, 2022).

145. *See* Maule, *supra* note 141. The standard deduction was enacted to simplify compliance and enforcement. Congress assumes that all of us incur a certain amount of deductible expenses. In lieu of listing all of these deductions, the Code permits a taxpayer to take a deduction in the amount of the standard deduction. In 2020, the standard deduction was $24,800 for married couples filing jointly and $12,400 for single individuals. I.R.C. § 63; Rev. Proc. 2019-44, 2019-47 I.R.B. 1093.

146. The Code allows a special deduction for so-called personal exemptions. I.R.C. § 151. In 2018, for example, it was $4,050 for the taxpayer and each dependent of the taxpayer. I.R.C. §§ 151(c), 152. The Tax Cuts and Jobs Act of 2017 (TCJA) temporarily reduced the deduction for personal and dependency exceptions to zero for tax years 2018 through 2025. I.R.C. § 151(d)(5).

147. *See* MILLER & MAINE, *supra* note 114, at 3.

148. *See supra* note 143 and accompanying text.

songwriters, a songwriter with $50,000 of gains will enjoy a low capital gains tax rate, but an author, or artist, or sculptor with $50,000 of gains will be subject to a high ordinary income tax rate. The stated rationale also is difficult to defend when one considers that the special rule affords the same tax rate (capital gains tax rate) regardless of the songwriter's income level.[149] For example, Songwriter "A" with $100 million of gain will pay the same capital gain rate (20%) as Songwriter "B" with only $1 million of gain. Under the ability to pay principle, we should conclude that Songwriter "A" should pay more tax than Songwriter "B."[150]

Beyond ability to pay, the tax rules governing gains from creative activity should embrace the principle of fairness. While few would disagree that fairness, in the abstract, is an important feature of any tax policy, disagreement may arise over the applied meaning of the term. Tax fairness is usually described in terms of horizontal equity.[151] Horizontal equity requires that persons who are similarly situated should be taxed in a similar fashion.[152] Horizontal equity has

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149. Most capital gains are taxed at a rate of 0%, 15%, or 20%, depending on the taxpayer's income level. However, the taxable income breakpoint between the 0% and 15% rates is $38,600, and the breakpoint between the 15% and 20% rates is $425,800. I.R.C. § 1(j)(5)(B). In the example in the text above, both songwriters pay the 20% rate because their incomes, although drastically different, exceed $425,800. To give another example, a songwriter with $50,000 of income and a songwriter with $400,000 of gain would pay the same 15% rate even though their gains are very different. It should be noted that these breakpoints are indexed for inflation after 2018. I.R.C. § 1(j)(5)(C). It should be noted that a higher 28% capital gains rate applies to the sale of "collectibles" (e.g., artworks, rugs, antiques, metals, gems, stamps, coins, alcoholic beverages and other collectibles as defined by section 408(m). I.R.C. § 1(h)(1)(F), (h)(4)-(5). This 28% rate applies only if the taxpayer is in a bracket higher than 28%.

150. Recent proposals have been made to increase rates on capital gains for high income earnings. One proposal would tax capital gains at ordinary income rates for taxpayers reporting $1 million or more in adjusted gross income. *See* U.S. DEPT. OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2022 REVENUE PROPOSALS (May 2021), https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf. While proposals like this address the "ability to pay" principle, they do not necessarily help achieve equity, another goal of tax policy. In other words, taxing capital gains above $1 million at ordinary rates still doesn't address the inequities of taxing capital gains of songwriters below $1 million at preferential rates but taxing gains of other artists below $1 million at ordinary rates.

151. *See* MILLER & MAINE, *supra* note 114; Nguyen & Maine, *supra* note 114, at 3; Jeffrey A. Maine & Xuan-Thao Nguyen, *The Unequal Tax Treatment of Intellectual Property*, 130 TAX NOTES FED. 931 (2011) [hereinafter Maine & Nguyen, *Unequal Tax Treatment*].

152. Maine & Nguyen, *Unequal Tax Treatment*, *supra* note 151, at 931. Horizontal equity has been compared to the constitutional principle of equal protection under the laws. U.S. CONST. amend. XIV, § 1.

been considered the primary goal of tax policy.[153]

It can be difficult to evaluate tax rules governing creative works from an equity perspective because creativity involves such a broad range of activities that no two taxpayers will ever be situated exactly equally. For example, should an Indie developer who develops a videogame or an app developer for Google or a journalist or photographer be treated as similarly situated to a songwriter who creates a musical composition? We believe the answer is yes.

To expand, Indie developers for videogames, who infuse their creativity with long hours of labor to develop games, currently face the higher tax rate for their ordinary income. Like songwriters, however, Indie developers are creative people who work by themselves and tend to not have resources to hire employees.[154] Likewise, most indie developers rely on publishers to publish and promote the games.[155] Also, like songwriters, indie developers lose creative control over their games in most contract deals with publishers.[156] The tax exception for songwriters, however, does not include indie games developers, making it seem as though they are not considered a creative class on par with songwriters. Moreover, the captivating headlines concerning video games and capital gain tax treatment focus on the GameStop saga stock manipulations, not the true creators who crafted the video games' contents.[157]

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153. *See* RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY 160 (1959) ("Perhaps the most widely accepted principal of equity in taxation is that people in equal positions should be treated equally."); HENRY C. SIMONS, FEDERAL TAX REFORM 11 (1950) ("Equity in this primary sense must, in an advanced nation, predominate over, if not wholly override, all other objectives.").

154. Rachel Presser, *How the 2018 Tax Reform Will Change Things for Indie Developers*, GAMASUTRA (Jan. 8, 2018), https://www.gamasutra.com/blogs/RachelPresser/20180108/312633/How_the_2018_Tax_Reform_Will_Change_Things_for_Indie_Developers.php.

155. *See* Tyler Wilde, *What a Good (and Bad) Indie Game Publishing Deal Looks Like*, PC GAMER (Aug. 6, 2020), https://www.pcgamer.com/what-a-good-and-bad-indie-game-publishing-deal-looks-like/.

156. Anastasia Khomych, *Indie vs Game Publisher: What's Better for Your Game*, GETSOCIAL (May 15, 2020), https://blog.getsocial.im/indie-vs-game-publisher-whats-better-for-your-game/. Songwriters and their fans share similar fear that publishers would destroy the aesthetic of the songs during monetization. *See* Schneider, *supra* note 10 ("The prospect that Universal will take songs that have been deeply meaningful to [Dylan's fans] for decades and license them to anyone willing to pay top dollar, [will] permanently pollut[e] the aesthetic integrity of Dylan's work."); *see also* Sisario, *supra* note 12 ("[Because,] Universal now controls his work, Dylan will no longer have veto power over how his songs will be used.").

157. In January 2021, gamers and investors pooled their resources to wage a brief battle against Wall Street over GameStop's stock value. Some ordinary investors made

App developers who pour creativity and laborious hours into perfecting apps before they release on the Apple App Store or Google Play are another group of creative content creators who are similarly situated to songwriters. Congress ignored these app developers by not providing them the same tax exception given to songwriters. Similarly, journalists who investigate, hunt, research, and write stories have been contributing to the immense contents since the birth of newspapers and media. Congress ignored them too. Also, there are photographers who work solo to craft images and produce a large body of visual contents in print and digital formats. Again, Congress ignored them.

Viewing these and other creators of protectable works as equals and treating them equally for tax purposes would have unarguable appeal. As shown in Part II, the legal protections granted to certain creative works (e.g., patents and copyrights) are very similar in substance—both essentially function as grants of monopolies. If the intellectual property system views patents and copyrights similarly, then tax rules designed to support that system should also treat them similarly. A major problem with the current tax system governing creativity is inconsistency. Sales of musical compositions by professional or amateur songwriters are entitled to preferential capital gains treatment while sales of most other creative works are not. This distinction is bizarre when one considers that an amateur author is arguably more similar to an amateur songwriter (each taxed differently), than a professional songwriter is to an amateur songwriter (each taxed similarly). This equity concern should encourage policymakers to rethink the special rule for musical works and either eliminate it or expand it to include similar creative works.

We acknowledge that the design of tax rules sometimes involves tradeoffs between equity and other principles, such as efficiency or neutrality. *Efficiency* is a utilitarian concept requiring that we should

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large sums when GameStop's stock gyrated to a staggeringly high price. Greg Iacurci, *Made a Killing in GameStop? Now Comes the Tax Bomb*, CNBC (Jan. 28, 2021), https://www.cnbc.com/2021/01/28/made-a-killing-in-gamestop-now-comes-the-tax-bomb.html (reporting that the Robinhood-style shoot GameStop's stock price to more than 1,700% in less than one month). Whether these earners can avail to the lower tax rate of capital gains was subject to discussions. *See* Ann Carrns, *So You Just Made a Lot of Money on GameStop. There's One Catch: Taxes.* N.Y. TIMES, Jan. 30, 2021, at B5 ("Short-term gains—those on shares held for less than a year—don't get favorable tax treatment, but are taxed as ordinary income."); Aimee Picchi, *So You Made a Bundle on GameStop. Get Ready to Pay the Taxes*, USA TODAY (Feb. 7, 2021), https://www.usatoday.com/story/money/personalfinance/2021/02/07/gamestop-taxes-profits-selling-stocks-get-taxed/4426640001/; Jared Walczak, *What the GameStop Saga Can Teach Us About Mark-to-Market Taxation of Capital Gains*, TAX FOUNDATION (Jan. 29, 2021), https://taxfoundation.org/gamestop-capital-gains-tax/.

seek a balance between maximizing tax revenues and minimizing the social costs of taxation (i.e., the tax system should generate enough money for the government to do its job without stifling beneficial economic activity).[158] Fairness and efficiency sometimes may run counter to one another. But the government has not offered an efficiency argument to justify unequal tax treatment for creators. No one has made the case that it is efficient to tax songwriters at a lower rate of tax than other creators with equal income in order to maximize songwriting activity—even though such an approach violates horizontal equity.

The *neutrality* principle holds that the tax system should avoid unnecessarily shaping economic behavior.[159] This neutrality principal has lost ground to what might be termed "social engineering" (i.e., many tax rules have been enacted to encourage or discourage various behaviors). Again, however, the government has not offered a "social engineering" argument to justify a special tax break for songwriters that violates equity notions. No one has attempted to argue that the special tax rate for songwriters was designed to encourage people to write more songs or discourage other creators from discontinuing their creative endeavors.

The current tax scheme governing sales of creative works is the result of various legislative enactments that lack a unified rationale. The government introduced the capital asset definition in 1921. Then with each exception or exception to an exception, the government offered a unique justification. The 1950 exception to the capital asset definition for amateur copyright creators was designed to remove tax inequity between professional and amateur copyright creators. The 1954 special tax rule for inventors was designed to stimulate the development of patents, but the 2017 exception to the capital asset definition for amateur inventors was to ensure gains from personal effort were taxed like wages. Of course, the 2005 special rule for songwriters, couched as a relief provision for songwriters, was the result of successful lobbying efforts. Congress ignored all creative creators (Indie video game developers, app developers, authors, photographers, etc.) except songwriters because none of these creative creators possess the powerful lobbying power behind songwriters. These creators could not line up the support of a large voting block from the southern states whose claims are all related to the various origins of and contributions to country music. Any tax scheme built like this surely will end up raising serious equity concerns.

158. MILLER & MAINE, *supra* note 114, at 6.
159. *Id.*

2. The Exception for Self-Created Musical Works Adds Complexity and Uncertainties to the Tax Code

By creating tax distinctions across creative activity and taxpayers' characteristics, Congress has added unnecessary complexity to the tax system. Each time Congress has carved out a special rule for certain creators, definition and interpretation issues have arisen.

Consider, for example, the 1950 rule that excluded from the definition of capital asset a copyright, a literary, musical, or artistic composition, or similar property held by the creator (taxpayer whose personal efforts created the property). Traditional copyrighted works are obviously included within the scope of this copyright exception. But what does "similar property" encompass? The Treasury Department had to issue regulations to clarify, noting that "similar property" includes a "theatrical production, a radio program, a newspaper cartoon strip, or any other property eligible for copyright protection."[160]

But then another question arose. What about abstract ides, such as cartoon characters, or formats or ideas for television or radio shows, which are not copyrightable per se? Case law had to fill the gap. Indeed, several cases have held that radio and television formats are property "similar" to literary, musical, or artistic compositions and as such come within the capital asset exclusion.[161] In *Cranford v. United States*, the taxpayer argued that the term "similar property" as used in the exception means property similar to those specifically named, which are all property eligible for copyright protection. The court did not buy the argument. The court concluded that properties having important characteristics common to those named items are "similar property" within the meaning of the statute, and then proceeded to identify those important characteristics:

> *"It seems to us that the important point common to the specified categories, aside from their artistic nature, is that they are all products of personal effort. Plaintiff has not shown us any reason why copyrightable property should be singled out and be denied capital*

160. Treas. Reg. § 1.1221-1(c)(1).

161. *See, e.g.*, Kurlan v. Comm'r, 343 F.2d 625 (2d Cir. 1965); Cranford v. United States, 338 F.2d 379 (Ct. Cl. 1964) (holding that format for radio or television program was "similar property" within the statute excluding from definition of "capital asset" copyrights, literary, musical or artistic compositions, or similar property); Hill v. Comm'r, 47 T.C. 613 (T.C. 1967) (holding the "Divorce Court" television series was property similar to a literary, musical, or artistic composition and as such came within the exclusion of section 1221(a)(3)).

> *gain treatment while products of personal effort which are not subject to copyright should enjoy a tax advantage. On the contrary, capital gain treatment is an exception to the normal rule and the definition of a capital asset must be narrowly applied.*"[162]

Another issue that arose was whether the 1950 copyright exception applied where property is both patentable and copyrightable, such as design patents or computer software that are eligible for both patent and copyright protection. Regulations had to be promulgated to address that question. According to the regulations, the copyright exclusion does not apply if "a patent or an invention, or a design . . . may be protected only under the patent law and not under the copyright law."[163] Thus, design patents, which are eligible for both patent and copyright protection, would be subject to the copyright exclusion. Likewise, computer software, which is copyrightable but often protected through a trade secret agreement, would also be subject to the copyright exclusion.[164] Now that the government has expanded the copyright exclusion to cover inventions, patents, and trade secrets, the question is now moot.

With respect to the 1950 copyright exception, uncertainty still exists whether the exception applies to non-individual creators, such as corporations whose employees or independent contractors created the copyrights. The exclusion applies to "a taxpayer whose personal efforts created" the property. But who is the "creator" of a work for hire (i.e., a work prepared by an employee within the scope of his or her employment or a specially ordered or commissioned work)?[165]

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162. *Cranford*, 338 F.2d at 383. In *Stern v. United States*, another interesting case applying the self-created copyright exclusion, the court held that the character named "Francis" in a novel written by the taxpayer in which the character was the leading figure and in which it got its definition and delineation was a "literary composition" and, therefore, the taxpayer was not entitled to capital gain treatment of income from the sale of the "Francis" character. 164 F. Supp. 847 (E.D. La. 1958), *aff'd per curiam*, 262 F.2d 957 (5th Cir. 1958).

163. Treas. Reg. § 1.1221-1(c)(1).

164. *See* Levy v. Comm'r, 64 T.C.M. (CCH) 534 (T.C. 1992) (involving computer software in which only copyright protection—and not patent protection—was stressed).

165. In Revenue Ruling 62-141, the IRS applied the section 1221(a)(1) inventory exclusion to a work-for-hire creation but did not discuss the section 1221(a)(3) copyright exclusion. Rev. Rul. 62-141, 1962-2 C.B. 181, *superseding* Rev. Rul. 55-706, 1955-2 C.B. 300. In *Desilu Productions, Inc. v. Commissioner*, the Tax Court concluded gain on the sale of television films produced by the corporate taxpayer was not ordinary income under section 1221(a)(1). 24 T.C.M. (CCH) 1695 (T.C. 1965). In that

Other interpretation questions have emerged. For example, is property created by more than one person still self-created property? Is property sold by a creator but then later repurchased by the creator still self-created property? Is property self-created property if the taxpayer merely directed others in its creation? The Treasury Regulations have attempted to flesh out some of these issues.[166] Courts have generally interpreted the "personal efforts" criterion fairly narrowly.[167]

As with the 1950 self-created copyright rule, questions might arise concerning interpretation of the 2005 self-created musical composition rule. What is a "musical composition" *for purposes of taxation*? For example, does the term encompass, for tax purposes, music communicated orally? Does it only encompass patterns in accordance with prevailing conventions? If we were to sing the pages of this Article, would we now fit within the special rule for musical compositions?

According to the Tax Policy Center, "[t]he key to tax simplification is to make fewer distinctions across economic activities and taxpayers' characteristics."[168] As argued earlier, the special distinction for musical copyrights does not promote fairness or other important policy goals. Eliminating it altogether would go toward achieving another goal—tax simplification.

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case, the IRS failed to argue, and the court did not address, the application of section 1221(a)(3) copyright exclusion. The take-away from the ruling and the case might be that section 1221(a)(3) does not apply to work-for-hire creations. However, in *Chronicle Publishing Co. v. Commissioner*, the Tax Court concluded that the term "taxpayer" as used in section 1221(a)(3)(B) (taxpayer for whom a letter, memorandum, or similar property was prepared) included corporations. 97 T.C. 445 (1991). Does that suggest the term "taxpayer" as used in section 1221(a)(3)(A) (taxpayer whose personal efforts created a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property), includes corporations? *See* Martin Ice Cream Co. v. Commissioner, 110 T.C. 189 (T.C. 1998) (holding that business records created by a corporation's employee did not fall within section 1221(a)(3)(A)).

166. *See, e.g.*, Treas. Reg. § 1.1221-1(c)(3) (stating "property is created in whole or in part by the personal efforts of the taxpayer if such taxpayer performs literary, theatrical, musical, artistic, or other creative or productive work which affirmatively contributes to the creation of the property, or if such taxpayer directs and guides others in the performance of such work").

167. *See* Rothman et al., *supra* note 98 (citing Comm'r v. Ferrer, 304 F.2d 125 (2d Cir. 1962)).

168. TAX POLICY CENTER, BRIEFING BOOK 399 (May 2020).

3. The Exception for Self-Created Musical Works Adds to Racial Disparities in the Tax Code

Bob Dylan sold his entire song catalog and benefited from a special tax break lobbied by the country music industry just six months after the brutal killing of George Floyd. George Floyd's death heightened awareness of systemic racism in the United States and was catalyst for meaningful change across many systems, including the U.S. tax system.[169]

The U.S. tax system is a seemingly neutral institution, i.e., it is "race neutral" on its face. But many of its rules have a systemic racist element to them. The rules worsen longstanding racial inequities and perpetuate white advantage and black disadvantage—solidifying racialized wealth inequity. Numerous examples are discussed in the literature, including special tax breaks for home ownership,[170] retirement plans,[171] and education.[172] These tax breaks are tilted

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169. *See, e.g.*, Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J.L. & SOC. POL'Y 265 (2020); Lawrence Zelenak, *Examining the Internal Revenue Code for Disparate Racial Impacts*, 168 TAX NOTES FED. 1807 (2020); Francine J. Lipman, Nicholas A. Mirkay, & Palma Joy Strand, *U.S. Tax Systems Need Anti-Racist Restructuring*, 168 TAX NOTES FED. 855 (2020).

170. The tax deductions for home mortgage interest and property taxes, as well as the exclusion of gain from the sale of a residence are huge tax subsidies for homeownership. *See* I.R.C. § 121 (allowing exclusion of gain from the sale of a principal residence); I.R.C. § 163 (allowing tax deduction for residence interest); I.R.C. § 164 (allowing tax deduction for property taxes). These subsidies benefit white households over Black households as homeownership rates for white households are significantly higher than for people of color. *See* Courtney Connley, *Why the Homeownership Gap Between White and Black Americans is Larger Today Than it was Over 50 Years Ago*, CNBC (Aug. 21, 2020), https://www.cnbc.com/2020/08/21/why-the-homeownership-gap-between-white-and-black-americans-is-larger-today-than-it-was-over-50-years-ago.html (stating that, as of 2020, black Americans had the lowest rate of homeownership (47%) compared to all other racial groups, especially white Americans (76%)).

171. Tax breaks for contributions to and earnings from assets in retirement plans primarily benefit high income families. Indeed 60% of white families held retirement accounts compared with 34% of Black families. *Racial Disparities and the Income Tax System*, TAX POL'Y CTR. (Jan. 30, 2020), https://apps.urban.org/features/race-and-taxes/#retirement-savings (click on "Retirement savings" dropdown menu).

172. Tax subsidies for education, such as the American Opportunity Tax Credit, the Lifetime Learning Credit, and other tax preferences (e.g., for so-called 529 Plans) increase access to and encourage savings for college. *See* I.R.C. §§ 25A, 529. However, studies have shown that middle- to upper-income families, who are less likely to be families of color, receive the largest share of these benefits. *Racial Disparities and the Income Tax System*, TAX POL'Y CTR. (Jan. 30, 2020), https://apps.urban.org/features/race-and-taxes/#retirement-savings (click on "Higher education" dropdown menu).

toward higher income and higher wealth taxpayers and tend to exacerbate racial inequities.

The special tax treatment of capital gains, in general, often comes up in the discussion of the Code's disparate racial impacts because wealthy taxpayers derive much of their income from capital gains. Indeed, the Urban Institute concluded that "the top 1 percent of taxpayers by income, who are disproportionately less likely to be in households of color, received over 75 percent of total benefits from the preferential treatment of . . . capital gains[.]"[173]

We know that to have capital gains, a taxpayer must not only own property, but must also own the right kind of property—a "capital asset." These assets, typically financial or investment assets, are held by white families at a higher rather than others. Indeed, white families' holdings are up to four times higher in value than those of Black and Hispanic families.[174] Arguably, in 2005, Congress added to the list of these so-called race-based assets—musical compositions or copyrights in musical works.

The government does not make estimates of the impact by race of specific Code provisions, which poses challenges for those exploring racial equity in tax policy. So, it is difficult to understand the racial impact of the capital gains tax break for songwriters (but not other creators). And, it is concededly easy for legislators to overlook the racial impact. Nevertheless, Congress should now explore how past policy choices advance or impede racial equity. A starting point would be to consider the past justifications for all existing tax benefits, including the tax break for songwriters.[175] Observing the public announcements of recent song sales, it is likely the special break for songwriters represents yet another tax rule subsidizing creation of white wealth or sustaining white advantage. Not to be overlooked, it

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173. *See Racial Disparities and the Income Tax System*, TAX POL'Y CTR., URB. INST. & BROOKINGS INST. (Jan. 30, 2020) (citing Daniel Berger & Eric Toder, *Distributional Effects of Individual Income Tax Expenditures After the 2017 Tax Cuts and Jobs Act*, TAX POL'Y CTR., URB. INST. & BROOKINGS INST., (June 4, 2019), https://www.taxpolicycenter.org/sites/default/files/publication/157267/distributional_effects_of_individual_income_tax_expenditures_after_the_2017_tax_cuts_and_jobs_act_1.pdf), https://apps.urban.org/features/race-and-taxes/#capital-gains-and-dividends.

174. *Id.*

175. Professors Moran and Whitford propose envisioning what a Black Congress would do differently; it would not minimize black taxes, but would consider the usual justifications for existing tax benefits. *See* Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 753–54, 758–59, 765, 768, 781–83, 790–91, 797–99 (1996).

was lobbied for by an industry that has a troublesome past with respect to race and is still reckoning with racial stereotypes.[176]

Racial disparity in the music industry is prevalent.[177] Though the Songwriters Capital Gains Equity Tax Act benefits all songwriters,[178] the reality for Black songwriters is different from their white counterparts. As reported, "most Black songwriters . . . barely made a dime off of their creative work, while the white musicians found radio airtime, fame, money, and notoriety for generations using the *exact same song*."[179] For instance, a white musician receives at least 18% royalty; James Brown got a meager 3%.[180] The music industry leverages both "business structures" and copyright law to "deprive African Americans of benefits that should've flowed to them."[181] Universal and BMG notoriously imposed contract terms "heavily

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176. Katie Beekman, *Country Music: An Ugly Past and Troublesome Present*, MICH. DAILY (June 17, 2020), https://www.michigandaily.com/music/country-music-ugly-past-and-troublesome-present/; Kristin M. Hall, *Country Music Reckons with Racial Stereotypes and Its Future*, ABC NEWS (June 26, 2020, 6:28 AM), https://abcnews.go.com/Lifestyle/wireStory/country-music-reckons-racial-stereotypes-future-71468648; Isaac Himmelman, *Why Is Country Music Considered So White?*, HUFFPOST ENT. (July 17, 2019, 9:03 AM), https://www.huffpost.com/entry/country-music-black-artists_n_5d2de760e4b085eda5a25516.

177. Elias Leight, *The Music Industry Was Built on Racism. Changing It Will Take More than Donations*, ROLLING STONE (June 5, 2020, 11:48 AM), https://www.rollingstone.com/music/music-features/music-industry-racism-1010001/; David Peisner, *A New Generation Pushes Nashville to Address Racism in its Ranks*, N.Y. TIMES (Feb. 12, 2021); Lucas Shaw, *The Music Industry Wants to Fight Racism. Will It Look Inward?*, BLOOMBERG (June 7, 2020, 6:00 PM), https://www.bloomberg.com/news/newsletters/2020-06-07/the-music-industry-wants-to-fight-racism-will-it-look-inward.

178. I.R.C. § 1221.

179. Chris Jancelewicz, *The 'Whitewashing' of Black Music: A Dark Chapter in Rock History*, GLOB. NEWS (Jan. 29, 2021, 1:44 PM), https://globalnews.ca/news/4321150/black-music-whitewashing-classic-rock/; *see* Wesley Morris, *For Centuries, Black Music, Forged in Bondage, Has Been the Sound of Complete Artistic Freedom. No Wonder Everybody Is Always Stealing It*, N.Y. TIMES, (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/music-black-culture-appropriation.html; *see* Denis Oliver Velez, *Black People Create, White People Profit: The Racist History of the Music Industry*, DAILY KOS (June 14, 2020, 8:00 AM), https://www.dailykos.com/stories/2020/6/14/1948464/-Black-people-create-white-people-profit-The-racist-history-of-the-music-industry. For a list of the richest songwriters of all time, see https://worthly.com/richest/15-richest-songwriters-time/.

180. Jasmine Garsd, *Music Industry Confronts Calls to 'Make Things Right' for Black Artists*, MARKETPLACE (Aug. 6, 2020), https://www.marketplace.org/2020/08/06/music-industry-confronts-calls-make-things-right-for-black-artists/ (reporting the creation of "the Black Music Action Coalition – a group of writers, producers, musicians and others . . . calling" on the music industry "to 'make things right' for Black artists[.]").

181. *See id.*

weighted against" Black musicians.[182] Also, among the recent sales of song catalogs snatching the headlines are all of white musicians who retained the ownership of their songs in their careers, but Black songwriters don't enjoy the same privilege. Outside the studio, in country music, Black musicians who attempted to break into the genre found country fans at concerts where they perform "waving the Confederate flag and shouting the N-word at [them]."[183]

B. Expand the Exception to Cover Additional Creative Works

1. Policy Justifications for a Capital Gains Preference Apply to Creative Works

If the special break for songwriters were eliminated, for reasons such as those described above, most creative gains would be taxed as ordinary income and not capital gains. We could attempt to settle on a unified justification: gains from personal efforts should be taxed at higher rates just like wage or compensation income is.[184] This has some appeal. After all, a dollar of income is a dollar of income. Why should a creator's income be taxed at a lower rate than a working person's if they both have the same amount of income?

We agree that *royalty payments* received from creative works should be taxed as ordinary income. *Gains from the sales of certain creative works*, however, arguably require different tax treatment.

Several policy reasons have been offered for the tax rate preference accorded to capital gains in general,[185] and it could be argued that such reasons are equally applicable to sales of some creative works. For starters, it has been argued that it would be inequitable to tax capital gains at high rates in the year of disposition when those gains may have accrued over several years.[186] Under our

182. *Id.*

183. Gail Mitchell, *What It's Like to Be Black in Country Now*, BILLBOARD (Aug. 13, 2020), https://www.billboard.com/articles/columns/country/9432800/black-artists-executives-country-music-experience/.

184. Cranford v. United States, 338 F.2d 379, 383 (Ct. Cl. 1964); Stern v. United States, 164 F. Supp. 847, 851–52 (E.D. La. 1958).

185. Prior to 1921, all gains from the sale of property were taxed the same as any other income. The Revenue Act of 1921 included the first provision for special rate treatment on capital gains and it introduced the concept of capital asset. Revenue Act of 1921, Pub. L. No. 67-98, § 204(a), 206(a), 42 Stat. 227, 231–33. For a detailed treatment of the policy arguments for a capital gains preference, see Noël B. Cunningham & Deborah H. Schenk, *The Case for a Capital Gains Preference*, 48 TAX L. REV. 319, 324–29, 331–32, 334–38, 340–41, 344–46, 348–50, 353–55 (1993).

186. H.R. REP. NO. 75-1860, at 7 (1938) ("It is the opinion of the committee that too high taxes on capital gains prevent transactions and result in loss of revenue.").

tax system, gains are taxed when property is sold even though those gains may have accrued over time.[187] The accrued income, when taxed in a single transactions (sale), may push the taxpayer into a higher tax bracket—a potentially unfair result because the gain may have arisen over the life of the property. Indeed, it would have been taxed at a lower rate bracket if realized ratably during the period of ownership.[188]

This was an argument made by the Nashville Songwriters Association.[189] Specifically, it was fair to give more advantageous tax treatment to songwriters as their sales (and, hence, income) come in spurts. But this argument could be made with respect to many creative works whose value is not set or fixed in the year of creativity but whose value increases over time. Many inventions and secret processes and copyrights become more valuable over time. When all of that value is bunched and recognized in a single transaction down the road, tax relief in the form of a reduced rate is arguably justified.

It has also been contended that a high tax on capital gains may effectively "[lock] some taxpayers into their existing investments" and impair the mobility of capital, whereas a tax preference encourages "the free flow of capital into" new enterprises and productive investments, increases economic activity and growth, and ultimately creates more tax revenue for the government.[190] Creative works such

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187. I.R.C. § 61(a)(3) (including in gross income gains derived from dealings in property); *id.* § 1001(a) (requiring a "sale or other disposition" of the property).

188. *See* H.R. REP. NO. 75-1860, at 7 (1938) ("[T]here is no tax on the appreciation in value . . . unless such appreciation is realized through sale or exchange. . . . It is the opinion of the committee that too high taxes on capital gains prevent transactions and result in loss of revenue."). Another section of the federal reports is helpful:

> The sale of farms, mineral properties, and other capital assets is now seriously retarded by the fact that gains and profits earned over a series of years are under the present law taxed as a lump sum (and the amount of surtax greatly enhanced thereby) in the year in which the profit is realized. Many such sales, with their possible profit taking and consequent increase of the tax revenue, have been blocked by this feature of the present law.

H.R. REP. NO. 67-350, at 10-11 (1921).

189. *Songwriters Capital Gains Tax Equity Act*, NASHVILLE SONGWRITERS ASS'N INT'L, https://www.nashvillesongwriters.com/songwriters-capital-gains-tax-equity-act.

190. S. REP. NO. 95-1263, at 192 (1978) ("In some instances, the taxes applicable to capital gains effectively may have locked some taxpayers into their existing investments."); *see* S. REP. NO. 75-1567, at 6 (1938) ("[A]n excessive tax on capital gains freezes transactions and prevents the free flow of capital into productive

as self-created patents and copyrights serve an important public purpose. The intellectual property laws attempt to motivate the release to the public of products of creative efforts. The tax laws should attempt to motivate the transfer of the intellectual property embodying the products to those willing and able to put them to best use.

Other arguments justifying favorable tax treatment of capital gains also support favorable tax treatment of creative gains.[191] Favorable rates on creative gains would reduce the aggregate tax burden on investment returns, thus incentivizing creative activity. Favorable rates on creative gains would stimulate new creative industries. The effect of taxing creative gains at high ordinary income rates is to prevent individuals from engaging in creative enterprises.[192]

2. A Capital Gains Preference for Creative Works Supports Intellectual Property Law Goals

According "capital asset" status to an expanded classification of creative works would provide a tax reward for creative activity more broadly (i.e., a lower tax rate to sales of such property). This tax reward could be viewed as a logical extension of the underlying policy goals of the intellectual property laws themselves.

Patent and copyright laws, in general, motivate the creative activity of inventors and authors by provision of a special reward by providing limited monopolies to creators. These limited monopolies induce the "release to the public of the products of [their] creative genius[,]" which promotes the progress of science and the useful

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investments."); *see* H.R. REP. NO. 75-1860, at 7 (1938) ("It is the opinion of the committee that too high taxes on capital gains prevent transactions and result in loss of revenue.").

191. *But see* Stern v. United States, 164 F. Supp. 847, 851–52 (E.D. La. 1958).

192. In addition, reversing course now and taxing songwriters, along with other creators, at high ordinary income rates might be viewed as perpetuating racial inequity as minority songwriters are just now coming into their own. Further, it has been suggested that American music can be a means to create greater cultural inclusivity within our own country. "In Americans' willingness to mix genres while simultaneously cultivating distinct regional sounds," we can use music "both as a force for racial integration and as a celebration of diversity for centuries." Katie Koch, *The Melding of American Music*, HARV. GAZETTE (Feb. 7, 2012), https://news.harvard.edu/gazette/story/2012/02/the-melding-of-american-music/ ("While other [countries'] traditions may seek purity and perfection of form, we seek cross-pollination as an important step in achieving a more inclusive and complex musical language."). Preferential rate treatment could incentivize more output and new sounds to bolster these goals.

arts.[193] Trade secret protection also embodies the policy goal of innovation; in addition, it helps achieve efficiency through reduction of business misconduct relating to trade secret misappropriation.[194] Ironically, the current tax regime governing sales of creative works does not adequately support these intellectual property policies. It does not ideally support the creativity goals of the intellectual property system. And it does not adequately recognize the integration of different types of creativity that exists today.

Under the current tax system, the only creative works that receive a back-end tax break (i.e., a lower capital gains tax rate on sales) are self-created musical works and self-created patents in limited circumstances.[195] As discussed earlier, self-created musical works can meet the capital asset definition under *general characterization principles*. Self-created patents can receive capital gain treatment if all the requirements of section 1235, a *special characterization rule*, apply.[196] The tax break for musical works was a relief provision, as described earlier, and not as some tax incentive for songwriters to write more songs. The tax break for self-created patents, in contrast, was an incentive measure to encourage inventive activity. Unfortunately, patent creators need to jump through some hoops to obtain the special tax reward.

Self-created patents receive capital gain treatment only if the

193. Sony Corp. of Am. V. Universal City Studios, 464 U.S. 417, 429 (1984) (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("[Copyright monopoly privileges] are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward."); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius."); *see also* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 288–89 (1970) (examining the "property" right in copyrights and how the reward of "property" is "often created for reasons of efficiency").

194. The Supreme Court has long recognized that with respect to innovations not eligible for patent protection, "[t]rade secret law will encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered and the public is not deprived of the use of valuable, if not quite patentable, invention." Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 485 (1974); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. a (AM. L. INST. 1995) ("[T]he protection of trade secrets has been justified as a means to encourage investment in research by providing an opportunity to capture the returns from successful innovations.").

195. I.R.C. §§ 1221 (a), (b)(3), 1235.

196. *See* I.R.C. § 1235.

transaction involves the "transfer" by a statutorily defined "holder" of "all substantial rights" to a "patent[.]"[197] In the case of self-created patents, these hurdles to capital gains treatment can be insurmountable. For example, the term "all substantial rights" in section 1235 is unique and has special meaning. It does not mean the same as "sale" under general tax principles.[198] The transfer of a patent, which is subject to a prior, non-exclusive license, is not a transfer of "all substantial rights" within the meaning of section 1235.[199] Moreover, a transfer with a geographic limitation or field-of-use restriction does not qualify as a transfer of "all substantial rights" under section 1235.[200] As a result, these common patent transfers do not qualify for capital gains treatment under the special rule of section 1235.[201] And they do not qualify for capital gains treatment under general characterization rules because self-created patents are not capital assets.

In sum, the current tax break for songwriters was not designed to incentivize more song-writing activity. The current tax break for inventors was enacted to incentivize inventive activity, but unfortunately is circumscribed in ways that make it unavailable to many inventors. As a result, neither of these two tax breaks (exceptions to the general rule) are adequately designed to support contemporary intellectual property policies. And these two exceptions ignore a wide array of creative activity and works that are supported by the intellectual property system. Expanding capital gains treatment for other creative activity would go a long way to achieving optimal harmonization with the intellectual property scheme.[202] As

197. I.R.C. § 1235(a).

198. *See* Blake v. Comm'r, 615 F.2d 731, 734 (6th Cir. 1980).

199. *See id.* (holding that section 1235 did not apply to a transfer of rights in remaining fields of use after a prior transfer (an exclusive license subject to a field-of-use restriction)); *see also* First Nat'l Tr. & Sav. Bank v. United States, 200 F. Supp. 274, 280, 282 (S.D. Cal. 1961) (concluding that an earlier, nonexclusive license diluted the transferor's rights, thus preventing the transferor from transferring "all substantial rights" to the patent under section 1235).

200. Treas. Reg. § 1.1235-2(b)(i), (iii) (2021). For other transfers that do not result in a transfer of all substantial rights because they are limited in scope, see Treas. Reg. § 1.1235-2(b)(2)-(3) (2021).

201. For a critique of section 1235 and proposals for reform, see Xuan-Thao Nguyen & Jeffrey A. Maine, *Incentivizing Innovation*, 75 TAX LAW. 351 (2022).

202. This article focuses only on the back-end tax incentive for creative activity, specifically a low capital gains rate on sales of creative works. The tax system does offer limited front-end tax incentives for patents and patent-like property (e.g., tax deductions and credits for research and development). We have highlighted elsewhere problems with these incentives. Moreover, they do not apply to other forms of valuable

structured now, there is dissonance between the tax code and intellectual property that should be addressed.[203]

3. A Capital Gains Preference Could Be Expanded to Apply to Creative Works Protected Under Intellectual Property Law

If a taxpayer sells services, she is subject to ordinary rate treatment.[204] But what if the services are embodied in a self-produced item and the taxpayer sells that item? Should she still be subject to ordinary rate treatment? Or, should she be eligible for advantageous capital gain treatment?

There are countless self-produced items that are the product of services. We would not open the floodgates and permit capital gain treatment for all self-produced items. However, to eliminate some of the tax and racialized inequities raised earlier, and to achieve certain non-tax goals, consideration might be given to expanding the scope of capital gains treatment to cover a broader classification of creative property than just musical compositions. A classification of creative property that would be easily identifiable would be creative property protected under the intellectual property system. Such an approach would serve to further the innovation and efficiency goals inherent in the existing and established intellectual property system, and achieve tax simplification.

To avoid the definition problems that have arisen under previous tax rules governing creative property, we would not distinguish between individual creators and corporate creators. And, we would not include in the classification property that is "similar" to property protected under the intellectual property laws. For example, a copyrighted work would be considered a capital asset under general characterization principles, but an abstract idea or idea that is not copyrightable per se, would not.[205] As a further example, a patent

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intellectual property, such as copyrightable property and trademarks. As a general rule, copyright and trademark development costs must be capitalized. I.R.C. §§ 263, 263A; Treas. Reg. § 1.263(a)-4 (2021). Limited exceptions have been carved out but arguably do not go far enough to achieve optimal copyright and trademark goals. *See, e.g.*, I.R.C. § 263A(h).

203. There is a long history of dissonance between the two regimes. *See* Xuan-Thao Nguyen & Jeffrey A. Maine, *The History of Intellectual Property Taxation: Promoting Innovation and Other Intellectual Property Goals?*, 64 SMU L. REV. 795 (2011).

204. There is no "sale or exchange of a capital asset" in such case, so the capital gain preference does not come into play. I.R.C. § 1222.

205. A musical work and a song recording are two different copyrights, and under our proposal both would receive capital gains treatment upon sale.

would mean a patent granted under the provisions of Title 35 of the United States Code, but would not apply to a patentable technology for which a formal patent application has not yet been made (perfected, but unpatented invention). Of course, a payment received for intellectual property and for significant or unrelated services would have to be allocated between that portion accorded capital gain treatment and that portion taxable as ordinary income.[206]

Limiting capital gain treatment to creative works protectable under the intellectual property laws would provide much needed certainty in this area. Indeed, there is inherent difficulty in defining "creativity" and "creative works." The tax treatment recommended here would be applied to works that get intellectual property protection under the intellectual property laws. This would achieve much needed harmonization between the tax system and the intellectual property system.

Limiting capital gain treatment to creative works protectable under the intellectual property laws would also provide tax parity between creators of intellectual property and purchasers of intellectual property. Under currently law, creators (except for songwriters) are barred from capital gain treatment.[207] Purchasers of copyrights and patents are not barred from capital gain treatment on their subsequent sale of the purchased copyrights and patents. Thus, our proposal would introduce harmonization—harmonization not only between the tax and intellectual property systems, but also harmonization between creators and purchasers of creative works.

If the proposed tax scheme is perceived as harsh to creators who create something not protectable under the intellectual property system, Congress could choose to enact special characterization provisions to address that scenario.[208] So while a non-patented invention would not be considered a capital asset under *general characterization principals*, Congress could choose to grant it capital gain treatment in *special characterization rule* if to further the intellectual property goals of innovation or efficiency.

In short, the proposed tax scheme would broadly exclude from the definition of "capital asset" a category of self-produced property, but then would create an exception for self-created, protected intellectual property. The proposed tax scheme governing creative works would

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206. Such allocation would not be necessary, however, if the services rendered were ancillary to the intellectual property transfer. *See* Rev. Rul. 64-56, 1964-1 C.B. 133.

207. I.R.C. § 1221(a)-(b).

208. Congress has a history of specifically conferring capital asset status on certain assets. *See, e.g.*, I.R.C. §§ 1234B (securities futures contracts), 1231 (certain depreciable and real property used in trade or business).

come closer to achieving horizontal equity between similar taxpayers. For example, a copyrighted book would be taxed the same as a copyrighted song. Under the new scheme, however, a copyright book would not be treated the same as an idea for a book or television show about the book. By broadening the current exception for songwriters to cover intellectual property creators more broadly, any disparate racial impact of the former approach might also be reduced.

CONCLUSION

The law must encourage creativity from all creators. Carving a tax exception for one group in the name of equity, though admirable, perpetuates exceptionalism of one type of creators over the others and hardwires racial inequities among creators into the tax Code. It is time to eliminate exceptionalism for some or recognize for all.