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Copyright, Death, and Taxes

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COPYRIGHT, DEATH, AND TAXES

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The Copyright Act of 1976 is nearing its fourth decade of existence.¹ By historical standards, that longevity puts the 1976 Act “on the clock” for a major revision in the near future. Indeed, given the incredible advances in digital technologies and the Internet—all of which were unforeseen by Congress back in 1976—the need for a major revision and modernization of copyright law may already be upon us.²

This time around, however, Congress faces a challenge it has never faced before. In none of the five previous copyright acts did Congress have international treaty obligations effectively limiting the alternatives available for reform.³ The Berne Convention and the TRIPS Agreement—which the United States joined in 1989 and 2004, respectively—set forth numerous minimum standards of copyright law and restrict the scope of permissible copyright exceptions.⁴ Although these agreements do allow some flexibility for

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1. See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

2. See Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 553–54.

3. See *infra* notes 75–86 and accompanying text. The United States joined the Universal Copyright Convention (“UCC”) in 1955, but the UCC accommodated the former U.S. approach to copyright (with formalities) and lacked an enforcement mechanism to stop violations. See Universal Copyright Convention, Sept. 6, 1952, revised July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178; Robert S. Chaloupka, *International Aspects of Copyright Law*, 15 INT’L HR J. 18, 18–19 (2006); Tyler Ochoa, *Protection for Works of Foreign Origin Under the 1909 Copyright Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 285, 299–300 (2010).

4. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, 1161 U.N.T.S. 18338 [hereinafter Berne

countries to shape their own copyright laws in some respects, in other areas the requirements are more fixed.⁵ A number of basic features of copyright law—a set of required exclusive rights including rights for derivative works, a ban on formalities for foreign works, and a term that lasts at least the life of the author plus fifty years—are now all set in Berne stone.⁶ TRIPS adds to the calcification of copyright by imposing additional requirements on countries.⁷

Of course, one way of dealing with the international copyright treaties would be to modernize them as well. Indeed, some of the provisions of the Berne Convention, which date back to the early 1900s, if not earlier, may need modernizing more than the U.S. Copyright Act.⁸ Amending international copyright treaties,

Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 9–14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125, 1197–1226, 1869 U.N.T.S. 299, 304–17 (1994) [hereinafter TRIPS Agreement]. The TRIPS Agreement incorporates Articles 1 through 21 and the Appendix thereto of the Berne Convention, thereby including them within the scope of WTO enforcement proceedings. See TRIPS Agreement, *supra*, art. 9(1).

5. Peter K. Yu, *TRIPS and Its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 483–84, 492 (2010) (“[M]ore than two-thirds of the provisions [in TRIPS] sought to introduce, in a single undertaking, new substantive minimum standards on which there was no prior international consensus.”). See generally GRAEME B. DINWOODIE & ROCHELLE COOPER DREYFUSS, A NEOFEDERALIST VISION OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME: THE RESILIENCE OF THE TRIPS AGREEMENT TO TECHNOLOGICAL AND SOCIAL CHANGE (forthcoming Mar. 2012) (arguing that TRIPS is best understood as allowing considerable flexibility for member countries to meet minimum standards); Edward Lee, *The Global Trade Mark* (unpublished manuscript) (on file with the author) (discussing extent to which TRIPS allows varied approaches among members).

6. See Berne Convention, *supra* note 4, arts. 1–18, (setting forth minimum standards of copyright).

7. See TRIPS Agreement, *supra* note 4, arts. 9–14.

8. For example, the ban against formalities in Berne Article 5(2) dates back to 1908. See DANIEL CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY 96–97 (2006). Some scholars question the continuing abidance to this early twentieth century rule, which makes it difficult to identify and locate copyright owners. See Stef van Gompel, *Formalities in the Digital Era: An Obstacle or Opportunity?* in GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE 395, 395–98 (Lionel Bently et al. eds., 2010); see also STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE 15–51 (2011) (discussing how formalities function in intellectual property systems). Likewise, the rule of the shorter term in Article 7(8) requires countries to give, absent legislation to the contrary, foreign works a shorter term of copyright as set by their country of origin instead of the longer term granted to domestic works. Berne Convention, *supra* note 4, art. 7(8). This provision, which also dates back to 1908, was adopted to create a transition and an incentive for newly joining countries that had shorter terms to raise their terms to the minimum standard of the life of the author plus fifty years. See CHOW & LEE, *supra*, at 218. Because all Berne countries are now required to have a term of

however, requires agreement by a consensus or the unanimity of member countries.⁹ Getting consensus among World Trade Organization (“WTO”) countries about a major copyright revision—such as abandoning some of the outdated Berne features—would be difficult, to say the least. No doubt it would be more difficult than getting a simple majority of Congress to enact a revision of U.S. copyright law.

Thus, at least in the short-term, Congress may be better off exploring options for reforming copyright law within the current TRIPS/Berne framework, while working in the long-term with the Executive Branch and U.S. Trade Representative to modernize international IP agreements. That way, the United States can begin to modernize its copyright law instead of waiting for consensus among WTO and Berne countries on copyright reform. The downside, however, is that many U.S. reform proposals may face the same stumbling block: the Berne Convention and TRIPS Agreement may restrict, if not preclude, many copyright reforms in domestic law. “Can’t do it because it’s a Berne violation” has become an all-too-common refrain to torpedo numerous ideas for improving or modernizing our copyright system.¹⁰ Because of these international requirements, the ability of WTO countries to enact new, innovative approaches to copyright law is circumscribed.

To deal with this problem, this Article offers a new alternative for copyright reform: tax law. I call this approach the “tax fix” for copyright law, in that tax law is used to fix problems or inefficiencies in our copyright system. Using the tax system as a way to modernize our copyright system offers several advantages. Most important, tax law can fix problems in our copyright system without

at least the life of the author plus fifty years, the original reason for the rule of the shorter term is no longer relevant. Yet, a negative effect of the rule is that it puts pressure on all member countries to raise their copyright terms to whatever is the longest term recognized by any member; otherwise, the other countries’ citizens might be disadvantaged with a shorter term in the country that has a longer term. *See id.* at 219.

9. *See* Marrakesh Agreement Establishing the World Trade Organization, art. X, ¶ 8, Apr. 15, 1994, 33 I.L.M. 1144, 1867 U.N.T.S. 154 (1994) (declaring that a consensus of members is required for amendment to TRIPS Agreement); Berne Convention, *supra* note 4, art. 27(3) (declaring that “any revision of this Act . . . shall require unanimity of the votes cast”).

10. *See, e.g.,* Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311, 345 (2010); Ruth L. Okediji, *The Regulation of Creativity Under the WIPO Internet Treaties*, 77 FORDHAM L. REV. 2379, 2391 (2009); Aryeh L. Pomerantz, *Obtaining Copyright Licenses by Prescriptive Easement: A Solution to the Orphan Works Problem*, 50 JURIMETRICS J. 195, 203–04 (2010); R. Anthony Reese, *Photographs of Public Domain Paintings: How, If At All, Should We Protect Them?*, 34 J. CORP. L. 1033, 1052–53 (2009); Christina M. Costanzo, Comment, *Have Orphan Works Found a Home in Class Action Settlements?*, 83 TEMP. L. REV. 569, 586–87 (2011).

violating the Berne Convention or TRIPS Agreement, and without requiring amendment to either treaty. Tax law can also be used to incentivize the copyright industries to adopt new, innovative approaches to copyright in ways that voluntary reforms like Creative Commons cannot. The tax fix has the added benefit of offering, beyond the “one size fits all” approach, greater tailoring of copyrights by both industries and individuals—which may, in turn, lead to greater efficiency.

Part I discusses the need for a major revision of copyright law in the twenty-first century. Past historical practice and new technological changes both suggest a major revision of copyright law is due. Yet two major obstacles—political stalemate and international treaty obligations—dim the prospect for achieving the necessary modernization of copyright law.

Part II introduces the concept of the tax fix for copyright law and shows its possible advantages. Tax is one method that is given a great deal of consideration in other areas where incentives are important, but, surprisingly, is discussed hardly at all in copyright law. The tax fix is not a panacea for the inefficiencies and obsolescence in our copyright system. Nor is it meant as the sole method of modernizing copyright law. Instead, the tax fix is offered as another possible tool in the toolbox of options for Congress to modernize the copyright system.

Part III explains how the tax fix can address inefficiencies within our copyright system. Two types of tax fixes are offered: (1) a “copyright gains” tax, which establishes a preferential tax rate for income derived from certain socially beneficial initiatives related to copyrighted works, and (2) a copyright tax credit that grants a credit for such initiatives. For illustrative purposes, this Article shows how tax law can be used to reduce the problem and inefficiencies created by orphan works and the lack of copyright registration, lengthy copyright terms, and the lack of clear copyright exemptions. It also illustrates how tax law can be used to help address the problem of spiraling costs of textbooks in schools. Although the solutions offered by the tax fix are not perfect, they are second-best alternatives that may give Congress a more flexible way to address some of the inefficiencies of our copyright system, without requiring any change in our international treaty obligations. Part IV addresses possible concerns.

I. THE COPYRIGHT PARADOX: MODERNIZING COPYRIGHT LAW IN THE TWENTY-FIRST CENTURY

This Part discusses the paradox copyright law faces today: a major revision to the Copyright Act of 1976 is needed more than ever, but it is even harder to achieve such reform today. This paradox will plague Congress’s efforts to enact a major copyright

revision that can deal with the advances in technology of the twenty-first century.

A. *Need for Copyright Reform*

1. *Historical Practice: The Forty-Year Cycle of Revision*

If historical practice is a guide,¹¹ then the U.S. copyright system is due for a general revision or major updating. The Copyright Act has undergone general revisions roughly every forty years,¹² which means that the next revision should be made by 2016.

The pattern of revision is rather striking. The 1790 Act, the first copyright act in the United States,¹³ was replaced by the 1831 Act.¹⁴ The 1831 Act was replaced by the 1870 Act,¹⁵ which was later replaced by the 1909 Act.¹⁶ Finally, the 1909 Act was replaced by the current 1976 Act.¹⁷ Although the 1976 Act took longer than forty years from its predecessor to enact, Congress began studies for copyright reform overseen by the Copyright Office starting in 1955, or forty-six years from the enactment of the 1909 Act.¹⁸ (In between and after these major revisions, other amendments were enacted to the then-existing Act.)

In each revision, Congress attempted to modernize copyright law to address the changing time period and new types of works and technologies. From its inception, copyright law has struggled to keep pace with the advances in technology—for example, the printing press, pianola, camera, radio, film, television, VCR, computer, and now the Internet, digital technologies, and social media. The history of copyright suggests that Congress should begin to study whether a general revision or major updating of the Copyright Act is needed for the twenty-first century. The last general revision occurred more than thirty-five years ago, long before the incredible advances brought on by the Internet. As

11. *Cf. Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (“To comprehend the scope of Congress’ power under the Copyright Clause, ‘a page of history is worth a volume of logic.’” (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921))).

12. *See Samuelson*, *supra* note 2, at 556.

13. *See* Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831) [hereinafter 1790 Act].

14. *See* Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870) [hereinafter 1831 Act].

15. *See* Act of July 8, 1870, ch. 230, 16 Stat. 198 (repealed 1909) [hereinafter 1870 Act].

16. *See* Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976) [hereinafter 1909 Act].

17. *See* Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (effective Jan. 1, 1978) [hereinafter 1976 Act].

18. *See* Legislative Appropriations Act of 1955, ch. 568, 69 Stat. 499; Howard B. Abrams, *Copyright’s First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 221 n.33 (2010).

Pamela Samuelson encapsulates, “the 1976 Act was passed with a 1950s/60s mentality built into it, just at a time when computer and communication technology advances were about to raise the most challenging and vexing copyright questions ever encountered.”¹⁹

2. *Inefficiencies of the Copyright System in the Twenty-First Century*

The forty-year lifespan of previous copyright acts tells only half the story. The more important reason a copyright revision is needed is that the current 1976 Act is showing its age.²⁰ It has produced glaring inefficiencies, which have become more pronounced in our digital age.

a. Notice Externalities and Orphan Works

One clear deficiency is the creation of a copyright system that grants relatively long terms of copyright for all works—for individuals, the life of the author plus seventy years—while allowing those works to go unregistered, meaning there is no public record or registry identifying titles or owners of most copyrighted works.²¹ Currently, copyright registration is required in the United States only to bring a copyright infringement lawsuit for works originating in the United States.²² Foreign works are not subject to this requirement because the Berne Convention prohibits the use of formalities by member countries in such instance.²³ Copyright registration in the United States also entitles the copyright owner to elect possible statutory damages in lieu of actual damages and attorneys’ fees in successful litigation.²⁴ However, because so few copyright lawsuits are ever brought,²⁵ the incentives for registration of U.S. works are modest and are probably more relevant to the major U.S. copyright industries, such as publishing, music, and movies.

The lack of an effective registration system for copyrighted works produces substantial “notice externalities,” to borrow a term

19. Samuelson, *supra* note 2, at 555.

20. See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 3 (2010) (“The statute was not well-designed to withstand change, and has aged badly.”).

21. See 17 U.S.C. §§ 302–04, 408 (2006). For U.S. works, registration is a requirement to bring an infringement lawsuit, but relatively few copyright lawsuits are brought each year. See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1476–77 (stating that in 2006, only 4944 copyright suits were filed, with most not ever going to trial).

22. See 17 U.S.C. § 411 (2006).

23. See Berne Convention, *supra* note 4, art 5(2).

24. See 17 U.S.C. §§ 504–05.

25. See Lee, *supra* note 21, at 1476–77 (stating that just roughly 5000 suits were filed in 2006).

coined by Peter Menell and Michael Meurer.²⁶ These notice externalities impose huge external costs on the ability of the public to use and license copyrighted works. Put simply, for many works, there is no way for the public to figure out who owns the copyright.

This combination of lengthy terms and lack of registration contributes to the so-called “orphan works” problem, meaning it is practically impossible for people to locate or identify the copyright holder of many copyrighted works, especially those published decades ago, in order to seek permission to use the works.²⁷ Without registration or registry of owners, the works have become effectively “orphaned.” And, because copyright law still protects these orphan works, people who wish to utilize the works cannot do so out of fear of being sued.²⁸

A major reason for the orphan works problem is the lack of an effective copyright registration system—which is ironic with all the modern technology and vast databases we have. Even with wondrous technologies at our disposal, our copyright system is stuck in the 1908 Berne Convention world of no formalities.²⁹ In other areas of property, such as title to land, ownership of a patent, or trademark registration, a public registry facilitates transactions related to a property in the registry by enabling the public to locate the relevant owner.³⁰ Because our copyright system lacks a comprehensive database of works under copyright,³¹ the public may have no practicable way of locating the relevant owner of a work, particularly if the work was created long ago, such as in the 1920s or 1930s.

Empirical studies have identified an alarming number of orphan works both here and abroad. In response to the U.S. Copyright Office study, Carnegie Mellon University (“CMU”) conducted a three-year survey of its own collection. CMU determined that copyright owners could not be located for 22% of the books in its survey.³² The percentage of orphan works jumped to

26. See Peter S. Menell & Michael Meurer, *Notice Failure and Notice Externalities* (Bos. Univ. Sch. of Law Working Paper No. 11-58, 2011), available at <http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/MenellP-MeurerM121611.pdf>.

27. See Joshua O. Mausner, *Copyright Orphan Works: A Multi-Pronged Solution to Solve a Harmful Market Inefficiency*, 12 J. TECH. L. & POL’Y 395, 398 (2007).

28. See *id.*

29. See Berne Convention, *supra* note 4, art. 5(2).

30. See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 477 (2003) (“Equally immense tracing costs would be required to determine the ownership of a parcel of land if titles to land were not recorded in a public registry. It is not perpetual property rights but the absence of registration that creates prohibitive tracing costs.”).

31. See Mausner, *supra* note 27, at 412.

32. See Letter from Denise Troll Covey, Principal Librarian for Special Projects, Carnegie Mellon Univ., to Jule L. Sigall, Assoc. Register for Policy &

over 60% for older works published in the 1920s.³³ Moreover, even when copyright owners were identified, 36% of them did not reply at all to CMU's multiple letters.³⁴ Cornell University Library faced similar problems and could not locate the copyright owners of 58% of 343 copyrighted monographs in its collection, while spending over \$50,000 in staff time dealing with copyright issues.³⁵ The Library of Congress estimated in 1993 that 80% of films created before 1929 were orphan works and were at risk of deterioration due to the inability to get permission to preserve the films.³⁶ A study in the United Kingdom estimated that UK museums, galleries, and archives may have over 50 million orphan works.³⁷ According to a British Library estimate, 40% of all printed works are orphan works, and more than 50% of sound recordings surveyed in its collection are orphan works.³⁸

Congress is well aware of the orphan works problem, but, unfortunately, has failed to address it. In 2006, after a year of studying the issue, the Copyright Office issued its *Report on Orphan Works*, which recommended that Congress enact a copyright provision to allow good faith users to use an orphan work without a license if they could not find the copyright holder of the orphan work after a reasonably diligent search.³⁹ If the copyright holder later appeared, the user would have to pay reasonable compensation to the copyright holder for use of the work.⁴⁰ Both the House and

Int'l Affairs, U.S. Copyright Office (Mar. 22, 2005) (on file with Carnegie Mellon Univ. Libraries), *available at* <http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf>.

33. *Id.*

34. *Id.*

35. See Letter from Sarah E. Thomas, Carl A. Kroch Univ. Librarian, Cornell Univ. Library, to Jule L. Sigall, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office (Mar. 23, 2005), *available at* <http://www.copyright.gov/orphan/comments/OW0569-Thomas.pdf>.

36. See LIBRARIAN OF CONGRESS, REPORT ON FILM PRESERVATION 1993: A STUDY OF THE CURRENT STATE OF AMERICAN FILM PRESERVATION 5 (1993).

37. See JISC, IN FROM THE COLD: AN ASSESSMENT OF THE SCOPE OF "ORPHAN WORKS" AND ITS IMPACT ON THE DELIVERY OF SERVICES TO THE PUBLIC 18 (2009), *available at* <http://www.jisc.ac.uk/publications/reports/2009/infromthecold.aspx>; see also Katharina de la Durantaye, *Finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 229, 236–37 (2011) (discussing the results of various studies).

38. See GOWERS REVIEW OF INTELLECTUAL PROPERTY 69 (2006), *available at* www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf [hereinafter GOWERS REVIEW]; THE BRITISH LIBRARY MANIFESTO, INTELLECTUAL PROPERTY: A BALANCE 3 (2006), *available at* http://www.cpic.ru/news/IP_Manifesto_final.pdf.

39. REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 95 (2006) [hereinafter ORPHAN WORKS REPORT], *available at* <http://www.copyright.gov/orphan/orphan-report.pdf>.

40. See *id.* at 96.

Senate held hearings, and several bills modeled in part on the Copyright Office proposal were entertained.⁴¹ However, Congress has yet to put any of the bills to a full vote.⁴² Congress's inaction on the orphan works problem even appeared to draw thinly veiled criticism from the Department of Justice in its objection to the proposed settlement of the Google Book Search case, in which the private parties attempted to solve the orphan works problem on their own by setting up a Book Rights Registry.⁴³

b. Obsolescence in an Age of Digital Technologies

Another deficiency is the 1976 Act's construction based on a model of printing and analog technologies—a framework that translates poorly with today's digital technologies, which routinely make copies of works by their operation.⁴⁴ Not surprisingly, the two most substantial studies on copyright reform to date—Samuelson's Copyright Principles Project in the United States and Ian Hargreaves's Review in the United Kingdom—both identified the advances in digital technologies as a major reason why reform of copyright laws is needed today.⁴⁵

By their design, digital technologies produce digital copies of material incidental to their operation. For example, a digital copy of a computer's operating system is created in random-access memory ("RAM") every time a person turns on the computer.⁴⁶ Whenever a person views a website, a copy is downloaded onto the computer's

41. See Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008); see also *The "Orphan Works" Problem and Proposed Legislation: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Committee of the Judiciary*, 110th Cong. 131 (2008).

42. See Betsy McKenzie, *Orphan Works*, OUT OF THE JUNGLE (Apr. 18, 2011, 9:40 AM), <http://outofthejungle.blogspot.com/2011/04/orphan-works.html>.

43. See Statement of Interest of the United States of America Regarding Proposed Class Action Settlement, *Authors Guild, Inc. v. Google Inc.*, No. 05 CV 8136-DC (S.D.N.Y. Nov. 19, 2009), at 3 ("In particular, the rediscovery of currently unused or inaccessible works and the digitization of those works in formats that are accessible to persons with disabilities are important public policy goals. The United States believes that, although the actions of private entities and Congress (if necessary), steps should be taken to advance these objectives."), available at <http://www.justice.gov/atr/cases/f250100/250180.pdf>.

44. See Samuelson, *supra* note 2, at 554–55.

45. See IAN HARGREAVES, *DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY* 3 (2011) [hereinafter HARGREAVES REVIEW] available at <http://www.ipso.gov.uk/ipreview-finalreport.pdf>; PAMELA SAMUELSON & MEMBERS OF THE CPP, *THE COPYRIGHT PRINCIPLES PROJECT: DIRECTIONS FOR REFORM* 2–3, 18–19 (2010) [hereinafter COPYRIGHT PRINCIPLES PROJECT], available at http://www.law.berkeley.edu/files/bclt_CPP.pdf.

46. See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993).

RAM and cache or temporary Internet folder.⁴⁷ In order to access the website, copies of the webpage are transmitted internally through the Internet and an Internet service provider's lines.⁴⁸ When a person uses Google or another search engine to find a website, the ability to find the website was created by the search engine's ability to create an index of websites with digital copies stored on the search engine's servers.⁴⁹ The 1976 Act does not directly address the legality of any of these digital copies but, instead, relegates them to potential infringement claims as a violation of the right to copy.⁵⁰ Courts have struggled to make sense of when the use of digital copies (including ones internal to a machine) should be considered infringing or permissible fair use.⁵¹ This lack of clarity in the law can chill investment in and development of new digital technologies.⁵²

Even when Congress has enacted updates to the 1976 Act to address digital technologies, the results have not been reassuring. The Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") is, put charitably, a complete failure in legislative drafting. As David Nimmer put it, "[T]his amendment was by far the worst thing that had happened to date to copyright law. . . . The DPRA is a masterpiece of incoherence."⁵³ DPRA recognized a right of digital public performance for sound recordings (relevant to webcasting of music) and amended § 114 to define limitations of that right.⁵⁴ Yet the provisions defining those limitations are, to borrow the then-Register of Copyrights Marybeth Peters's assessment, "utterly incomprehensible to most people."⁵⁵

47. See John S. Sieman, Comment, *Using the Implied License to Inject Common Sense Into Digital Copyright*, 85 N.C. L. REV. 885, 891 (2007).

48. See Hannibal Travis, *Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law*, 84 NOTRE DAME L. REV. 331, 362–63 (2008).

49. See Sieman, *supra* note 47, at 889–91.

50. See 17 U.S.C. § 106 (2006). In 1998, Congress created the DMCA safe harbors for ISPs for certain activities of providing Internet access, caching, storage, and location tools. See *id.* § 512.

51. See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 546 (4th Cir. 2004); *MAI Sys.*, 991 F.2d at 522–23 (RAM copies infringing); see also Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 801–02 (2010).

52. See HARGREAVES REVIEW, *supra* note 45, at 3 ("Digital communications technology involves routine copying of text, images and data, meaning that copyright law has started to act as a regulatory barrier to the creation of certain kinds of new, internet based businesses.").

53. David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1336 (2004).

54. 17 U.S.C. §§ 106(6), 114(d) (2006).

55. See Ralph Oman, *Going Back to First Principles: The Exclusive Rights of Authors Reborn*, 8 J. HIGH TECH. L. 169, 173 (2008).

The safe harbors afforded to Internet service providers (“ISPs”) under the Digital Millennium Copyright Act of 1998 (“DMCA”) have done a better job of modernizing copyright law. The DMCA safe harbors provide ISPs immunity from copyright liability if they meet certain requirements, such as complying with the “notice-and-takedown” requirement for allegedly infringing material stored by their users on their servers.⁵⁶ The notice-and-takedown procedure—although not without its abuses and deficiencies⁵⁷—has provided a decent way to divide the burdens of monitoring possible copyright infringement online.⁵⁸ Yet, even with their successes, the DMCA safe harbors have not kept up with advances in technology. Drafted in 1998, the DMCA safe harbors did not anticipate social media and Web 2.0 technologies that encourage user sharing of and interactivity with material on the Internet.⁵⁹ The billion-dollar lawsuit against YouTube, now on appeal, is a byproduct of the lack of clarity in the DMCA safe harbors’ application to new technologies.⁶⁰

The many complex issues of copyright law raised by digital technologies demand a more comprehensive and coherent approach. In 1976, Congress did not have the opportunity to devise a copyright system specifically for our digital age.⁶¹ In the next copyright revision, Congress will have that chance.

c. “One Size Fits All” Approach

One of the lessons to draw from these examples is that copyright law must become more adept and flexible. It must be revised and modernized to address the glaring, chronic inefficiencies in the copyright system, such as the orphan works problem and

56. See 17 U.S.C. § 512 (2006).

57. See Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 176 (2010) (criticizing DMCA safe harbor process as chilling speech and raising First Amendment concerns); Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 684 (2006) (discussing a study showing copyright holders file questionable takedown notices in 22.5% of DMCA notices surveyed).

58. See Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 252–55, 259–60 (2009). Several countries have adopted similar approaches to ISP safe harbors requiring a notice-and-takedown process. See Broder Kleinschmidt, *An International Comparison of ISP’s Liabilities for Unlawful Third Party Content*, 18 INT’L J.L. & INFO. TECH. 332, 337–53 (2010) (discussing approaches in the United States, European Union, Canada, Australia, and New Zealand).

59. See Brandon Brown, *Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World*, 23 BERKELEY TECH. L.J. 437, 437 (2008).

60. *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 516, 518–19, 526–27 (S.D.N.Y. 2010); see also Lee, *supra* note 58, at 258–59.

61. See Samuelson, *supra* note 2, at 551–54.

huge notice externalities. It also must transform its monolithic approach to copyright into a more nimble approach that helps to foster innovation in both content production and technologies.⁶²

A growing body of research indicates that applying a monolithic or “one size fits all” approach to copyright for all works is inefficient, in that the social benefit of many works is not ever realized.⁶³ The orphan works problem provides one good example—granting all works the same long term of copyright protection leads to under-utilization of the works because some owners abandon them but are still protected by copyrights for their works. By some estimates, only two percent of all copyrighted works are commercially exploited,⁶⁴ yet the Copyright Act grants all works copyrights as if they all will be commercially exploited for generations. Another example of inefficiencies in our copyright system is the application of the long term of copyright (ninety-five years) to computer software, given the short shelf life of software.⁶⁵

B. *Obstacles to U.S. Copyright Law Revisions*

Although a revision of the Copyright Act is needed to modernize copyright law, two major roadblocks stand in its way: (1) politics, and (2) international treaties.

1. *Political Stalemate in Congress*

Copyright issues have become intensely politicized and polarized in the United States.⁶⁶ Copyright industries disagree with ISPs over the scope of liability or safe harbor protection for ISPs for infringing activity conducted by their users. Copyright holders want more liability and duties imposed on ISPs, while ISPs want greater

62. See generally Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 102–05 (2004) (discussing regulatory copyright and its affect on industries); Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 279 (2004) (“[T]he main challenges for twenty first century copyright are not challenges of authorship policy, but rather new and harder problems for copyright’s *communications* policy: copyright’s poorly understood role in regulating competition among rival disseminators.”).

63. See, e.g., THE STRUCTURE OF INTELLECTUAL PROPERTY LAW: CAN ONE SIZE FIT ALL? (Annette Kur & Vytautas Mizaras eds., 2011) (collecting fourteen articles on intellectual property law); Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361, 1389–90 (2009).

64. See GOWERS REVIEW, *supra* note 38, at 69.

65. See Bruce Abramson, *Promoting Innovation in the Software Industry: A First Principles Approach to Intellectual Property Reform*, 8 B.U. J. SCI. & TECH. L. 75, 135 (2002).

66. See Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313, 317 (2009); COPYRIGHT PRINCIPLES PROJECT, *supra* note 45, at 4.

protection afforded to them by the safe harbors.⁶⁷ Moreover, copyright industries typically want a broader scope and duration of copyrights and stronger enforcement provisions against infringers.⁶⁸ However, public interest groups representing libraries, educators, and users typically seek a narrower scope of copyright and a greater recognition of exemptions or activities as fair use.⁶⁹ The debates over copyright—too often called a “war”—have sometimes degenerated into name-calling and vitriol, even resulting in threats of bodily harm.⁷⁰

Disagreement among copyright stakeholders translates into political stalemate in Congress because copyright legislation is drafted by lobbyists employed by the stakeholders, not by members of Congress or their staff.⁷¹ Under this culture in which copyright lobbyists control the shape and even the language of copyright bills, the passage of a bill may depend more on getting lobbyists to agree than on the actual merits of the bill.

The Copyright Act of 1976 took decades of study, hearings, and debate before Congress eventually reached an agreement.⁷² The agreement was, in part, facilitated by the Copyright Office’s oversight in conducting meetings with and brokering compromise among various stakeholders.⁷³ In today’s even more polarized environment, one can only imagine how long it might take to reach a compromise among stakeholders on major issues needed for reform. At the 2011 Annual Meeting of the Copyright Society of the U.S.A., former Register of Copyrights Marybeth Peters applauded the discussion of reforms to the Copyright Act, but soberly admitted that we are “not ready” to undertake such reforms.⁷⁴

2. *International Obligations Under Berne/TRIPS*

Even if politics were not a major obstacle to copyright reform, international treaties pose hurdles of their own. The United States

67. See Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 337 (2002); COPYRIGHT PRINCIPLES PROJECT, *supra* note 45, at 20.

68. See Litman, *supra* note 67.

69. See Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 OHIO ST. L.J. 783, 810–14 (2001); Litman, *supra* note 66, at 315.

70. See WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 11–14 (2009); Litman, *supra* note 66, at 315.

71. See Litman, *supra* note 66, at 314.

72. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989) (stating that the 1976 Copyright Act, “which almost completely revised existing copyright law, was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress”).

73. *Id.*

74. Marybeth Peters, Statement at Annual Meeting, Copyright Society of the USA, Panel on “To Reform or Not to Reform: That Is the Question” (June 10, 2011).

is a member of the Berne Convention and the TRIPS Agreement, both of which establish “minimum standards” or requirements for copyright law.⁷⁵ TRIPS incorporates Articles 1 through 21 and the Appendix of the Berne Convention, so there is overlap between the two.⁷⁶

Given the minimum standards required by Berne and TRIPS, copyright reform in the United States cannot be written on a blank slate. Reforms must consider how a country’s international obligations will be satisfied, or the country may risk a challenge to its law before the WTO. The minimum standards of Berne apply only to foreign works (i.e., how each country treats works from foreign countries), meaning each country has discretion to use a different approach for its own domestic works.⁷⁷ More often than not, however, countries adopt a single approach under copyright law for both domestic and foreign works.⁷⁸

So how do Berne and TRIPS limit the field of options for revising or modernizing copyright law? They limit the field by codifying a particular model of copyright—what rights it entails, how long it should last, and what exceptions can be allowed. These so-called “minimum standards” of copyright allow some flexibility, but typically do not allow a dramatic departure from the conception of copyright the treaties envision.

For example, several of the minimum standards of Berne, which are also incorporated into TRIPS, present obstacles for recent proposals for copyright reform. In the debate over orphan works, some proposals seek to require registration of copyrighted works in order to create a public record of copyright owners, so that would-be licensees can seek permission from the copyright owner of a work.⁷⁹ Article 5(2) of Berne, however, prohibits “any formality,” such as registration, being imposed as a condition on “[t]he enjoyment and exercise of” copyright for foreign works.⁸⁰ To avoid this prohibition, Chris Sprigman proposes that unregistered works be subject to a “default” license that allows [third-party] use [of the unregistered

75. See ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL K WALL, INTELLECTUAL PROPERTY 218–20 (Robert C. Clark et al. eds., 2d ed. 2004).

76. TRIPS Agreement, *supra* note 4, art. 9. The key practical difference between the two is that TRIPS is subject to enforcement proceedings under the WTO’s Dispute Settlement Body, whereas the Berne Convention has no comparable enforcement body. See *Overview: The TRIPS Agreement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Feb. 10, 2012).

77. See Berne Convention, *supra* note 4, art. 5(3) (“Protection in the country of origin is governed by domestic law.”).

78. See CHOW & LEE, *supra* note 8, at 95–96.

79. See, e.g., Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 552, 555 (2004).

80. Berne Convention, *supra* note 4, art. 5(2).

works] for a predetermined fee.”⁸¹ It is at least debatable whether Sprigman’s proposal violates Berne (or Article 13 of the TRIPS Agreement, which limits copyright exceptions⁸²).

Likewise, in the debate over copyright terms, some proposals seek to shorten the term of copyright so that works that are not commercially exploited will enter the public domain sooner.⁸³ Article 7(1) of Berne, however, requires a minimum term of the life of the author plus fifty years for foreign works.⁸⁴ Unless Congress wanted to create shorter terms only for U.S. works, the proposal to reduce the copyright term below the Berne minimum standard is not a viable option. Moreover, even if Congress adopted shorter terms only for U.S. works, thus complying with Berne Article 7(1), such an amendment could disadvantage U.S. authors abroad. Article 7(8), also known as the “rule of the shorter term,” creates a default approach requiring, absent legislation to the contrary, that countries give foreign works a shorter term from their country of origin rather than a longer term that applies to domestic works.⁸⁵ The rule of the shorter term thus puts pressure on countries to increase their copyright terms to whatever is the longest term of copyright recognized by a Berne country, in order to avoid having their citizens’ works subjected to a shorter term in the longest-term country in Berne. The Sonny Bono Copyright Term Extension Act of 1998 (which extended the term of U.S. copyrights to life plus seventy years to match the European Union’s term) was justified precisely on this ground.⁸⁶

In short, given the minimum standards of copyright under Berne and TRIPS, member countries do not have complete freedom to alter dramatically their copyright laws—at least not without potentially violating international treaty obligations. The challenge for Congress is to figure out a way to modernize U.S. copyright law within the constraints set by these international agreements, or to have those agreements changed as well.

II. THE TAX FIX FOR COPYRIGHT LAW

This Part lays out the theory for using the Tax Code to achieve copyright reforms and objectives. Surprisingly, tax law has been underutilized in promoting the goals of copyright. This Part explains why Congress should consider using tax incentives to further copyright objectives and reform.

81. Sprigman, *supra* note 79, at 555.

82. See TRIPS Agreement, *supra* note 4, art. 13.

83. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 287–93 (2004).

84. Berne Convention, *supra* note 4, art. 7(1).

85. *Id.* art. 7(8).

86. See *Eldred v. Ashcroft*, 537 U.S. 186, 205–06 (2003).

A. *Using the Tax Code to Achieve Non-Tax Goals*

Historically, Congress has used the Tax Code to achieve a variety of “non-tax” goals, meaning substantive policy goals outside of taxation.⁸⁷ Indeed, the Tax Code is littered with provisions of this kind.⁸⁸ Many of these provisions offer tax incentives through “deductions, credits, exclusions, exemptions, deferrals, and preferential rates,”⁸⁹ in order to incentivize certain conduct or activity. For example, to encourage enrollment in higher education and to help offset some of its increasing costs, the Tax Code provides a modest deduction for certain tuition expenses.⁹⁰ The Tax Code also offers a modest tax credit for eligible businesses to conduct research and development.⁹¹ Sometimes, the Tax Code imposes unfavorable treatment (commonly called Pigouvian taxes after the theorist who championed their use) to discourage people from certain activities, such as smoking or excess fuel consumption.⁹² Although the substantive policy goals are quite diverse, all of these “non-tax goal” provisions typically seek to incentivize activity or conduct through the Tax Code by creating either more or less favorable treatment under the Code. When the tax incentives cost the government revenue (in terms of lost tax revenue), they are called “tax expenditures.”⁹³

Using the Tax Code as a method to address important societal issues or initiatives has become a popular option for pursuing policy and reform proposals. To address the epidemic problem of obesity in the United States, proposals to tax junk food and soda have been offered.⁹⁴ To promote more environmentally responsible or “green” technology and energy consumption, the Tax Code contains several

87. See Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 707 (1970).

88. See, e.g., I.R.C. §§ 21-26 (2006) (various personal credits); *id.* §§ 27, 30-30D (other credits); *id.* §§ 31-36A (refundable credits); *id.* §§ 38-45Q (business related credits); *id.* § 54 (credit to holders of clean renewable energy bonds); *id.* § 54A-54F (qualified tax credit bonds); *id.* § 54AA (credit for Build America bonds).

89. Surrey, *supra* note 87, at 706; see also *id.* at 713.

90. I.R.C. § 25A, 222 (2006); see also Bradley R. Palmer, *Uncle Sam, Tuition Costs, and the Changing Economy: Tax Incentives for Education Expenses and How to Improve Them*, 38 J.L. & EDUC. 345, 345 (2009).

91. I.R.C. § 41 (2006); see also Evan Wamsley, Note, *The Definition of Qualified Research Under the Section 41 Research and Development Tax Credit: Its Impact on the Credit's Effectiveness*, 87 VA. L. REV. 165, 166 (2001).

92. See A. C. PIGOU, *THE ECONOMICS OF WELFARE* 192 (4th ed. 1932); W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575, 581-83 (1999).

93. See Surrey, *supra* note 87, at 706.

94. See Jeff Strnad, *Conceptualizing the “Fat Tax”: The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1224-25 (2005).

tax credits and incentives.⁹⁵ The Obama Administration's controversial individual health care mandate attempts to fix the problem of the lack of health care insurance for millions of people and escalating health care costs by taxing individuals who choose not to have health care coverage.⁹⁶ Likewise, the preferential treatment of long-term capital gains in the Tax Code—which are taxed at a lower rate than ordinary income—is justified as a way to encourage entrepreneurial investments and risk-taking that might lead to innovation.⁹⁷ The several tax benefits for homeowners are justified as serving “important non-tax policy objectives such as encouraging investment in commodity, enhancing the stability of neighborhoods, and increasing the willingness of property owners to fund local schools through property taxes.”⁹⁸ In response to the recent housing crisis, Congress amended the Tax Code to provide tax credits for first-time and other homebuyers.⁹⁹

Of course, some tax experts are skeptical about whether the Tax Code is the proper forum for pursuing non-tax policy objectives. In his seminal article, Stanley Surrey argued that direct government expenditures to achieve a policy goal are preferable to indirect expenditures through the Tax Code because “a resort to tax incentives greatly decreases the ability of the Government to maintain control over the management of its priorities,” while complicating the Tax Code, reducing its overall transparency, and possibly entrenching certain tax exemptions that have outlived their usefulness.¹⁰⁰ Surrey's critique has generated a longstanding debate over the desirability of non-tax policy uses of the Tax Code,¹⁰¹ a debate that is likely to intensify as national debt reduction continues to be a hot button issue. This Article does not attempt to

95. See Richard P. Manczak & Jeffrey D. Moss, “Green” Tax Incentives, 90 MICH. B. J. 27, 28–29 (2011); see, e.g., I.R.C. §§ 45, 48, 136, 168 (2006).

96. See Patient Protection and Affordable Care Act, § 1501(b), 124 Stat. 244 (codified at 26 U.S.C. § 5000A), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010); *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1255–60 (11th Cir. 2011) (explaining the individual mandate in the Tax Code).

97. See *Helvering v. Hammel*, 311 U.S. 504, 509 (1941) (citing H.R. Rep. No. 67-350, at 8 (1921)) (justifying preferential rate for capital gains “as the means of encouraging profit-taking sales of capital investments”); Noël B. Cunningham & Deborah H. Schenk, *The Case for a Capital Gains Preference*, 48 TAX L. REV. 319, 340–41 (1993).

98. John G. Steinkamp, *A Case for Federal Transfer Taxation*, 55 ARK. L. REV. 1, 32 (2002). See generally Cunningham & Schenk, *supra* note 97 (discussing the arguments in favor of and opposing a lower tax rate for capital gains versus ordinary income).

99. See The Homebuyer Assistance Improvement Act of 2010, Pub. L. No. 111-198.

100. See Surrey, *supra* note 87, at 731–32.

101. For more on Surrey's view, see STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 30–31 (1973).

resolve this debate but will offer a response in Part IV to some of the concerns raised by tax expenditures. Suffice it to say, Congress has frequently used the Tax Code to further important national objectives. Using tax to further copyright objectives would not be an anomaly.

B. Current Uses of Tax Related to Copyrighted Works

1. Federal Tax Code

For whatever reason, tax incentives have rarely been used for copyright or other intellectual property objectives. Royalties from copyrights are taxed as ordinary income at the general tax rates for that income earner.¹⁰² The Code excludes copyrights from being treated as a capital asset with its potential benefit of the lower capital gains tax rate.¹⁰³ Copyrights are essentially an afterthought in the Tax Code, if a thought at all.

One small exception is the recent amendment in the Tax Code that allows sales of copyrights of musical works to be taxed at the preferential capital gains rate (currently fifteen percent¹⁰⁴). In 2005, Congress created an exception for musical works that allows songwriters to elect to receive the capital gains tax rate for sales of their compositions.¹⁰⁵ The Nashville Songwriters Association lobbied for the capital gains treatment of sales of copyrights in musical compositions, under a bill originally titled the Songwriters Capital Gains Tax Equity Act.¹⁰⁶ The Association argued that the new law would bring equity to the treatment of songwriters compared to music publishers who historically could invoke capital gains treatment for sales of their copyrighted songs.¹⁰⁷ The Association also argued that the tax break could help save the profession of songwriting given the losses allegedly caused by music file sharing.¹⁰⁸

102. I.R.C. § 61 (2006) (including royalties with gross income).

103. *See id.* § 1221(a)(3) (stating that capital asset does not include “a copyright, a literary, musical, or artistic composition”).

104. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, tit. III, sec. 301, § 301(a)(2), 117 Stat. 752, 758 (2002).

105. *See* I.R.C. § 1221(b)(3) (2006) (“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).”); Spencer Anastasio, *Copyright Tax in the New Millennium*, ENT. & SPORTS LAW., Fall 2007, at 1, 24–25 (2007) (discussing the capital gains rate tax exception for sold musical compositions or copyrights in musical works).

106. *See Capital Gains Tax Equity Act Becomes Law*, NASHVILLE SONGWRITERS ASSOC. INT’L (May 11, 2006), <http://legislative.nashvillesongwriters.com/news.php?viewStory=49>.

107. *See Tax Cut Package Contains Breaks for Songwriters*, BROADCAST MUSIC, INC., (May 11, 2006), <http://www.bmi.com/news/entry/334803>.

108. *See Capital Gains Tax Equity Act Becomes Law*, *supra* note 106.

The songwriter capital gains rate provides a poor example of using tax to achieve copyright ends. The scope of the tax break is quite limited. No other individual authors get the benefit of capital gains treatment except for songwriters.¹⁰⁹ (By contrast, all patentees are eligible for the capital gains rate for the sale of their patents.¹¹⁰) Moreover, the policy behind the songwriter capital gains rate would appear to incentivize songwriters to sell their copyrights to others, instead of retaining their works and earning income through licensing. Congress could use tax law far more comprehensively and sensibly to achieve copyright goals.

2. State Tax Codes

The states have used their tax codes in ways that more directly incentivize the creation of copyrighted works than has the federal government. That is somewhat surprising, given that copyright law for fixed works is exclusively governed by federal law.¹¹¹ Most states and Puerto Rico have special tax incentives to lure film studios to create movies within their state borders.¹¹² The primary goal of these state tax incentives is to spur the state economies with the money spent by film studios on location (e.g., food and lodging) and with the added tourism and interest drawn to the area.¹¹³ Yet an additional benefit is that the film industry receives, in effect, a state subsidy to create a film in a particular state. With the savings in expenses made possible by the tax breaks, some movie studios can presumably afford to invest in the creation of other films. As with most tax expenditures, however, the tax breaks for movies remain controversial, especially as many states face budget crises in the economic downturn.¹¹⁴

C. The Theory of the Tax Fix for Copyright Law

The popularity of state tax incentives for film creation begs the question whether Congress should consider making greater use of tax incentives for copyrighted work under federal law. Anecdotal evidence from the film industry suggests that movie studios are highly responsive to tax incentives to locate a movie production

109. Xuan-Thao Nguyen & Jeffrey A. Maine, *Equity and Efficiency in Intellectual Property Taxation*, 76 BROOK. L. REV. 1, 25 (2010).

110. I.R.C. § 1235 (2006); Nguyen & Maine, *supra* note 109, at 14.

111. See 17 U.S.C. § 301 (2006) (describing preemption of state law).

112. See Joshua R. Schonauer, *Star Billing? Recasting State Tax Incentives for the "Hollywood" Machine*, 71 OHIO ST. L.J. 381, 386 & n.29 (2010) (discussing the benefits of low-cost destinations for film shoots); PRODUCERS GUILD OF AMERICA, <http://www.filmusa.org> (displaying a chart of states with tax incentives for movies) (last visited Feb. 10, 2012).

113. Schonauer, *supra* note 112, at 387–91.

114. See, e.g., Alan Wirzbicki, *Is the Massachusetts Film Tax Credit Worth the Cost?*, BOSTON GLOBE (Jan. 14, 2011, 5:11 PM) http://www.boston.com/bostonglobe/editorial_opinion/blogs/the_angle/2011/01/film_tax_credit.html.

within a state to obtain a tax break.¹¹⁵ Although the jury is still out on whether the film tax incentives have succeeded in boosting state economies, the evidence indicates that film studios have utilized the tax breaks in various states.¹¹⁶ For example, New Mexico's twenty-five percent tax refund for in-state movie production has reportedly brought in an estimated \$600 million from 2003 to 2008 based on film productions of such high profile movies as *No Country for Old Men*, *Terminator Salvation*, *Indiana Jones and the Kingdom of the Crystal Skull*, and *Transformers*.¹¹⁷ Although these state tax incentives for film production are not copyright reforms or efforts to modernize copyright law, they do provide an example of how the tax system can be used alongside copyright law. This Part explains why Congress should go one step further and use tax incentives as a way to achieve copyright goals.

D. *Innovating Copyright Law Within International Copyright*

1. *Treaties*

A major advantage of using the tax system to modernize copyright law is the flexibility the tax system offers. By using the Tax Code instead of the Copyright Act, Congress has the freedom to consider a variety of copyright reforms that would not present any problems under international treaties. Neither the Berne Convention nor the TRIPS Agreement speaks to, much less restricts, the ability of countries to impose taxes or create tax incentives related to copyrights.¹¹⁸

Moreover, the tax fix is better than the current way typically used to get around the Berne Convention—that is, treating domestic

115. See, e.g., Michael Cieply, *Jitters Are Setting In for States Giving Big Incentives to Lure Film Producers*, N.Y. TIMES, Oct. 12, 2008, at A26.

116. See *id.* (discussing films made in Louisiana, Rhode Island, New Mexico, Michigan).

117. Schonauer, *supra* note 112, at 398–99; Cieply, *supra* note 115, at A26.

118. Although another WTO agreement does limit countries from using taxes that constitute “export subsidies,” the limitation is narrowly defined to subsidies that are “contingent . . . upon export performance.” Appellate Body Report, *United States—Tax Treatment for Foreign Sales Corporations*, ¶ 3 WT/DS108/AB/RW (Jan. 14, 2002); *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), WORLD TRADE ORG., http://www.wto.org/english/tratop_e/scm_e/subs_e.htm (last visited Feb. 10, 2012). None of the tax incentives for copyright law contemplated by this Article would fall within this definition of export subsidy. Moreover, the General Agreement on Tariffs and Trade (“GATT”) does prohibit some tax measures that discriminate against foreign goods (a violation of national treatment). See General Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188 [hereinafter GATT]; Alan C. Swan, *NAFTA Chapter 11—“Direct Effect” and Interpretive Method: Lessons from Methanex v. United States*, 64 U. MIAMI L. REV. 21, 63–64 (2009). The taxes proposed herein do not discriminate against foreigners.

and foreign works differently. Because the Berne Convention only regulates works of foreign origin, countries can impose requirements on domestic works that would otherwise violate Berne if applied to foreign works.¹¹⁹ For example, the U.S. Copyright Act requires registration as a precondition to bringing a copyright lawsuit for “United States works”—meaning works first published in the United States or, if unpublished, created by a U.S. national or resident.¹²⁰ Foreign works have no registration requirement under U.S. law because of Berne’s ban on formalities for foreign works.¹²¹ Likewise, some recent proposals to shorten the term of copyright in the United States adopt the same limitation to U.S. works, in order to avoid Berne’s minimum standard of a term that lasts the life of the author plus fifty years.¹²²

The differential treatment of domestic versus foreign works has several disadvantages. First, it complicates the Copyright Act by having a two-track system: one for domestic works and another for foreign works. Second, it has the effect of treating one’s own nationals worse than foreigners—a form of reverse discrimination that becomes less palatable as the disparities mount. In addition, it may encourage strategic behavior among some copyright holders to publish first their works abroad, so their works will be treated as foreign works for the purposes of Berne.¹²³ This strategic behavior might result in “off-shoring” of U.S. jobs and publishing resources for books, music, movies, and other works.

By contrast, the tax fix avoids these problems. A two-track system is not created in the Copyright Act. There is no reverse discrimination between nationals and foreigners. Each group would be treated the same under both copyright and tax law. Without any preferential treatment for foreign works under the law, the need for strategic behavior and off-shoring of jobs and resources outside the United States would be minimized.

2. *Incentivizing Greater Choices for Copyright Holders*

Another advantage of the tax fix is that it will help to achieve greater tailoring of copyrights to particular individuals, industries, or circumstances. As Michael Carroll and others have shown, the

119. See Berne Convention, *supra* note 4, art. 5 (“Authors shall enjoy, in respect of works for which they are protected under this Convention, *in countries of the Union other than the country of origin*, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”) (emphasis added).

120. See 17 U.S.C. § 411 (2006) (requiring registration for “United States work”); *id.* § 101 (defining “United States work”).

121. See Berne Convention, *supra* note 4, art 5(1).

122. *Id.* art. 7(1); see, e.g., Sprigman, *supra* note 79, at 554 (discussing the proposed Public Domain Enhancement Act, H.R. 2601, 108th Cong. (2003)).

123. See Berne Convention, *supra* note 4, art. 5(4)(a) (stating that a work’s country of origin is the country in which the work was first published).

“one size fits all” model of our current copyright system (by which most works are treated under the same general approach) is inefficient: “In particular, this policy imposes uniformity cost on society by failing to supply fine-grained rights tailored to the economic circumstances of different classes of authors and inventors.”¹²⁴ For example, copyright law treats computer software the same as a literary work, even though software is functional and extremely short-lived in terms of its use.¹²⁵ Likewise, small-time authors who have no intention of commercially exploiting their works and who may not even care about copyright, receive, nonetheless, the same rights under copyright as those authors who commercially exploit their works.¹²⁶

Instead of the “one size fits all” approach under the Copyright Act, tax law can give copyright holders a menu of options, with tax incentives, for how they might tailor their copyrights to their own particular circumstances. Thus, instead of Congress deciding how best to tailor copyrights among copyright holders—a task that may be fraught with error, given the huge amount of information needed—each copyright holder, who arguably has the most information related to the copyright in question, can decide whether to elect from an assortment of self-tailoring options required for the tax benefits. The tailoring by each copyright holder may lead to greater efficiency. For example, instead of a ninety-five-year copyright, software companies may opt for shorter terms of copyright that correspond to the actual life span of software. Although the Copyright Act already includes some modest tailoring with respect to sound recordings, architectural works, useful articles, and certain industry-specific exemptions,¹²⁷ tax law can provide even greater tailoring, individual taxpayer by individual taxpayer. Presumably, each copyright holder is in a better position than Congress to make the most efficient choice of how to tailor a copyright to her own circumstances.

3. *Breaking the Political Stalemate Over Copyright Revision*

A final reason Congress should consider a tax fix for copyright law is that enacting a set of copyright tax breaks may be more politically feasible than a major overhaul of the copyright system. If history is a guide, we can expect any major overhaul of the copyright system to provoke an intense battle among stakeholders. The Copyright Act of 1976 took decades of study, hearings, and debate

124. See Carroll, *supra* note 63, at 1389 (emphasis omitted).

125. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 2.04[C][2], 2.04[C][5] (Matthew Bender, rev. ed. 2011).

126. See *id.* § 5.01[A] (stating that copyright vests in the author at the time of creation without qualification).

127. See, e.g., 17 U.S.C. §§ 111, 113–114, 118–120, 122 (2006).

before Congress eventually reached an agreement.¹²⁸ The tenor of copyright debates today is even more divisive.¹²⁹

By contrast, with completely voluntary options under the proposed tax fix, copyright industries would have no reason to object. The Copyright Act would remain the same, and many copyright holders could benefit financially from the proposed tax breaks. The tax fix has the potential of undoing the stalemate that has plagued copyright debates in the past. Depending on the proposal, Congress could justify the tax breaks for copyright holders as a way to spur greater efficiency in the copyright system, as well as greater innovation in the production and use of copyrighted works.

III. PROPOSAL: THE COPYRIGHT GAINS TAX AND COPYRIGHT TAX CREDIT

This Part outlines several proposals that use tax incentives to further copyright reform objectives. Two types of tax provisions are discussed: (1) a copyright gains tax and (2) a copyright tax credit.

A. *Copyright Registration as a Prerequisite to Tax Breaks*

Before discussing the proposed copyright tax breaks, we should discuss a prerequisite that would apply in either situation. In order to obtain the copyright tax break, the copyright holder would be required to register its work in the Copyright Office.¹³⁰

This proposal would alleviate the growing orphan works problem and incentivize the registration of copyrighted works. As the Copyright Office recognized, the orphan works problem “is, in some respects, a result of the omnibus revision to the Copyright Act in 1976,” which eliminated “the requirement that a copyright owner file a renewal registration in the 28th year of the term.”¹³¹ Under the 1909 Act, the renewal registration precluded an orphan works problem in two ways: (1) works that were not renewed in the twenty-eighth year automatically forfeited their copyrights, and (2) works that were renewed could be located (along with relevant

128. U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 1:1–1:3 (Sept. 1977), *available at* <http://www.copyright.gov/reports/guide-to-copyright.pdf>.

129. *See, e.g.*, CONG. BUDGET OFFICE, COPYRIGHT ISSUES IN DIGITAL MEDIA, at viii (Aug. 2004), *available at* <http://www.cbo.gov/ftpdocs/57xx/doc5738/08-09-Copyright.pdf> (“Because of the growing number and diversity of interests with a stake in the digital copyright debate, many observers believe that the Congress may need to legislate a balance in copyright law between private incentives and societal gains.”).

130. Private registries could be also used if the Copyright Act is revised to include third-party registrations as some commentators have proposed. *See* COPYRIGHT PRINCIPLES PROJECT, *supra* note 45, at 24.

131. *See* ORPHAN WORKS REPORT, *supra* note 39, at 3.

information about the copyright owners) in the Copyright Office registry.¹³² Though renewal registration had been a feature of U.S. copyright law since 1790, Congress eliminated it in 1976 so the United States could join the Berne Convention.¹³³ Joining Berne was perceived as a way for the United States to assume “a more prominent role in the international copyright community.”¹³⁴ But, as the Register of Copyrights Marybeth Peters conceded, “there is no denying that [the changes in the Copyright Act of 1976] diminished the public record of copyright ownership and made it more difficult for the business of copyright to function.”¹³⁵

The proposal addresses this problem by requiring copyright registration as a precondition for obtaining any copyright tax break. A copyright holder would have to register its work in order to be eligible for the tax break. In order to create added incentive to register the work early in the term of copyright, Congress could set a time period for registration, such as within five years of creation of the work. The five-year window might encourage the owners of works that are not commercially exploited to register their works anyway, in the hopes of one day monetizing their creations. Copyright holders that fail to register within the first five years of copyright would not be eligible to obtain a copyright tax break. Having a uniform period for registrations of all works would make it easier to educate the public on when registration would be required to receive a tax break. The incentive to register copyrighted works under the proposal might decrease the problem of orphan works by encouraging more registrations of works over time than under the current system.¹³⁶ And it would do so without violating Berne’s prohibition on formalities. In short, a *voluntary* registration to receive a tax break is not a copyright formality.¹³⁷

132. See 1909 Act § 23, *supra* note 16 (requiring renewal registration in the twenty-eighth year of copyright).

133. See ORPHAN WORKS REPORT, *supra* note 39, at 3.

134. See *id.*

135. Register of Copyrights Marybeth Peters, *The Importance of Orphan Works Legislation*, U.S. COPYRIGHT OFFICE (Sept. 25, 2008), <http://www.copyright.gov/orphan/>.

136. The tax incentives would probably affect a much greater number of works because many more works are commercially exploited than are ever involved in a lawsuit (which requires registration as a precondition). See Lee, *supra* note 21, at 1542–43.

137. Cf. 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* §§ 6.107–6.108, at 328–29 (2d ed. 2005) (noting that countries may use “carrots” to encourage registration because Berne “merely bars making compliance [with registration] mandatory for non-domestic works”).

B. *The Copyright Gains Tax*

A preferential tax rate is one way to structure a tax incentive to pursue copyright reform objectives. Similar to the capital gains tax rate,¹³⁸ the proposed “copyright gains” tax provides a lower tax rate for income generated from copyrighted works, provided the copyright holder satisfies whatever requirements set by the copyright reform measure. I discuss below two different copyright reform proposals: (1) shorter copyright terms and (2) mass licenses of works to the public. These proposals are offered for illustrative purposes; other copyright reforms can be substituted in their place.¹³⁹ The key takeaway is seeing how tax can facilitate a more flexible approach to copyrights to achieve public ends—the constitutional goal of the Copyright Clause.¹⁴⁰

1. *Proposal 1: Opting for Shorter Copyright Terms*

Assume Congress decides to pursue the objective of encouraging shorter terms of copyright at the election of the copyright owner.¹⁴¹ This policy could yield three benefits. First, encouraging shorter copyright terms might reduce the problem of orphan works. Older copyrighted works, whose owners are more likely to have since died or become defunct, are more susceptible to becoming orphan works. Second, allowing copyright owners to choose their own copyright terms avoids the inefficiencies of the current “one size fits all” approach to copyright. Numerous works are not commercially exploited at all, and some commercial works (such as software) are exploited only for a few years. For these works, a copyright that lasts the life of the author plus seventy years (or ninety-five years in the case of works-made-for-hire) makes no economic sense. Third, shorter terms of copyright can spur, much sooner, follow-on creations and innovation based on works that have entered the public domain.

138. See I.R.C. § 1(h) (2006).

139. It goes beyond the scope of this Article to justify or debate the merits of the copyright reforms discussed. For the purposes of this Article, the merits of a particular copyright reform are not essential to understanding the method of using the Tax Code to further copyright objectives.

140. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”).

141. An extensive debate over the (de)merits of lengthy copyright terms followed the Supreme Court’s upholding of the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998, which extended the terms of copyrights by twenty more years. See *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003); see also GOWERS REVIEW, *supra* note 38, at 52 (discussing the estimated economic effects of *Eldred* on the music industry); Marshall Leaffer, *Life After Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597, 1599–1606 (2004) (discussing the *Eldred* decision and its consequences for Article I, Congress, and the First Amendment).

a. Basic Tax Structure

Instead of changing the copyright term itself in the Copyright Act, Congress could enact a special tax break for copyright holders who voluntarily shorten the length of their copyrights. Under our current law, copyright holders always have the option of choosing to abandon their copyrights or donate their works to the public domain.¹⁴² Of course, few copyright holders ever do so because they have very little incentive to donate their works to the public domain under the current system. However, the tax fix for copyright terms can provide that incentive by rewarding copyright holders who choose shorter terms of copyrights by their own initiative.

Imagine one possible scenario. Congress enacts a tax break for copyright holders who elect to give up some of their copyright terms under the following graduated series of favorable tax rates on royalties. Because the Copyright Act uses different metrics for copyright terms depending on whether the author is an individual or a corporation,¹⁴³ two tax tables are provided.

142. See *Nat'l Comics Publ'ns v. Fawcett Publ'ns*, 191 F.2d 594, 597–98 (2d Cir. 1951).

143. See generally Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1 (2003) (describing the evolution of Congress's treatment of corporate authorship under the "works made for hire" exception to the Copyright Act); see also *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (discussing the "works made for hire" doctrine).

TABLE 1: COPYRIGHT GAINS TAX RATES FOR SHORTER TERMS

Corporate Author	
Term of Copyright Chosen	Copyright Gains Tax Rate
Corporate Author elects a 1-year copyright	5% of standard rate applies
Corporate Author elects a 5-year copyright	10% of standard rate applies
Corporate Author elects a 50-year copyright	50% of standard rate applies
Corporate Author elects a 70-year copyright	70% of standard rate applies
Corporate Author keeps full term of 95 years	Standard rate applies
Individual Author	
Term of Copyright Chosen	Copyright Gains Tax Rate
Individual Author elects a 1-year copyright	5% of standard rate applies
Individual Author elects a 5-year copyright	10% of standard rate applies
Individual Author elects life term	40% of standard rate applies
Individual Author elects a 50-year copyright	50% of standard rate applies
Individual Author elects a 70-year copyright	70% of standard rate applies
Individual Author keeps full term of life plus 70 years	Standard rate applies

The proposed tax table attempts to treat individual and corporate authors the same in terms of the tax benefit gained. The one difference is that the copyright terms for individual authors are defined by the life of the author plus seventy years, whereas corporate authors have a fixed term of ninety-five years from publication of the work (or 120 years from creation, whichever is sooner). Thus, the tax table gives the option for the individual author to elect to receive a copyright for a work only during her lifetime. Of course, the number of years in the life of the author varies according to when the work is created and when the author dies.

Under the proposal, an author can elect a one-year term of copyright and receive a tax rate of 5% of the standard tax rate for royalties for the copyright holder's income tax bracket. For example, as depicted in Table 2, if an author falls within the highest tax bracket of 35%, her copyright gains tax rate would be only 2% of

income generated from the work.¹⁴⁴ If the author elects a five-year copyright, her copyright gains tax rate would be 4%. Electing a copyright for the life of the author would receive a tax rate of 14%. A fifty-year copyright would receive a tax rate of 18%, and a seventy-year copyright would receive a tax rate of 25%. If the copyright owner keeps the entire term of copyright, she would be taxed at her normal rate of 35%. In each case, the copyright owner decides whether to lower her term of copyright and receive a tax break in return.

TABLE 2: COPYRIGHT GAINS TAX FOR AUTHOR FROM
HIGHEST TAX BRACKET OF 35%

Term of Copyright Chosen	Tax Rate on Royalties
Individual Author elects a 1-year copyright	2%
Individual Author elects a 5-year copyright	4%
Individual Author elects life term	14%
Individual Author elects a 50 year copyright	18%
Individual Author elects a 70 year copyright	25%
Individual Author keeps full term of life plus 70 years	35%

The tax break afforded to the copyright holder would apply or carryover for the remainder of the copyright term on the work in question.¹⁴⁵ Congress could amend the general tax rates, which would affect the final copyright gains tax rate, but the discount percentages would remain at five, ten, forty, fifty, and seventy percent. Of course, the tax rates above are merely illustrative. The amounts can be lowered or increased, depending how much incentive Congress hoped to create. The vital point is that Congress has considerable flexibility to incentivize copyright holders to shorten their terms of copyright.

b. Advantages of Using Tax Instead of Copyright

The beauty of the tax fix is that it completely bypasses Berne. First, Berne requires countries to recognize a copyright term of at least the life of the author plus fifty years.¹⁴⁶ Thus, if Congress wanted to lower the copyright term to a shorter term for all works, Berne would forbid it. A tax incentive, however, could help to

144. For simplicity, I have rounded all percentages in the tax rates to the nearest whole number.

145. Alternatively, if Congress wanted to create a more limited tax benefit, it could limit the preferential copyright gains tax rate to one year or a few years.

146. Berne Convention, *supra* note 4, art. 7(1).

achieve the same goal of shortening copyright terms without violating Berne.

Second, Berne establishes a default rule known as the “rule of the shorter term.”¹⁴⁷ It states: “[U]nless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.”¹⁴⁸ The rule means that countries with terms longer than the life of the author plus fifty years (e.g., the European Union has a term of life of the author plus seventy years) can give a shorter term to a work whose country of origin only provides for such shorter term. For example, before Congress enacted the Sonny Bono Copyright Term Extension Act, EU countries could give U.S. works the shorter term of life of the author plus fifty years—that is, “the term fixed in the country of origin of the work.”¹⁴⁹ Even though the U.S. works in the European Union receive copyrights from EU countries, those European copyrights for the U.S. works received a copyright term shorter than what EU works received.¹⁵⁰ The shorter term puts pressure on countries in the Berne Convention to raise their copyright terms whenever one country raises its term above the rest. The United States did exactly that when the European Union raised its copyright term.¹⁵¹

The tax fix avoids the rule of the shorter term—and the disadvantage imposed on nationals from a country with a shorter term. Even if U.S. authors elect to give up part of their copyright terms, the copyright term in the Copyright Act still remains the same. Thus, the tax incentive for copyright holders to reduce their own copyright terms would not alter, in any way, “the term *fixed* in the country of origin of the work.”¹⁵² The United States could adopt the tax fix, without disadvantaging U.S. works abroad, while achieving shorter copyright terms through voluntary choice by copyright holders.

c. Hypothetical Example: *The Blair Witch Project*

To illustrate how the copyright gains tax would operate in practice, consider a hypothetical example using the independent film, *The Blair Witch Project*. The small budget movie became a

147. *Id.* art. 7(8).

148. *Id.*

149. *Id.*

150. Lisa M. Brownlee, *Recent Changes in the Duration of Copyright in the United States and European Union: Procedure and Policy*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 579, 614–15 (1996).

151. Michael Landau, *Fitting United States Copyright Law into the International Scheme: Foreign and Domestic Challenges to Recent Legislation*, 23 GA. ST. U. L. REV. 847, 858–59 (2007).

152. Berne Convention, *supra* note 4, art. 7(8) (emphasis added).

surprise box-office mega-hit, earning over \$140 million in 1999.¹⁵³ The movie cost only \$500,000 to \$750,000 to make,¹⁵⁴ so most of the earnings constituted income subject to tax (assuming no clever Hollywood accounting was used¹⁵⁵).

The high amount of income generated from the movie would put it at the highest tax rate. For simplicity, I will use the current 2011 tax rate of 35% in this hypothetical, instead of the 1999 tax rate.¹⁵⁶ Assuming the high-end estimate of the production expenses of \$750,000, and applying the income forecast method of depreciation under § 167(g) of the Tax Code,¹⁵⁷ with an assumption that most of the movie's earnings occurred within the first ten years of the movie's distribution,¹⁵⁸ most of the costs (let's say \$724,100) can be deducted immediately. The owner of the movie would have \$139,814,999 in income, subject to a 35% tax—or \$48,935,250 in tax.

Under the proposal, the copyright owner of *The Blair Witch Project* could elect to reduce its federal tax by agreeing to a shorter copyright term. The options would be as follows:

TABLE 3: *THE BLAIR WITCH PROJECT* INCOME
UNDER COPYRIGHT GAINS TAX

Copyright Term	Tax Rate	Income Tax	Tax Savings
1-year copyright	2%	\$2,796,300	\$46,138,950
5-year copyright	4%	\$5,592,600	\$43,342,650
50-year copyright	18%	\$25,166,700	\$23,768,550
70-year copyright	25%	\$34,953,750	\$13,981,500

Although the copyright holder would have to exercise its business judgment in deciding which tax incentive to select, the copyright holder might prefer a five-year copyright over a one-year copyright, or a fifty-year copyright over a seventy-year copyright.

153. See *The Blair Witch Project*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=blairwitchproject.htm> (last updated Oct. 27, 2011) (stating total domestic gross of \$140,539,099).

154. See John Young, "The Blair Witch Project" 10 Years Later, ENT. WKLY., (July 9, 2009, 8:29 PM), <http://popwatch.ew.com/2009/07/09/blair-witch/>.

155. For more on the questionable accounting methods used by Hollywood studios, see BILL DANIELS ET AL., MOVIE MONEY: UNDERSTANDING HOLLYWOOD'S (CREATIVE) ACCOUNTING PRACTICES 10 (1998); Roman M. Silberfeld & Bernice Conn, *The Red and the Black*, L.A. LAW., May 2011, at 36.

156. In 1999, the top corporate tax rate in the United States was forty percent. See Chris Edwards, *The U.S. Corporate Tax Rate and the Global Economy*, TAX AND BUDGET BULLETIN, No. 18, Sept. 2003, at 2, available at <http://www.cato.org/pubs/tbb/tbb-0309-18.pdf>. So, if I used forty percent instead of thirty-five percent, the amount of taxes would be even higher.

157. See I.R.C. § 167(g) (2006).

158. I assumed the movie made only \$5 million in profit in the nine years following its release.

The tax savings afforded by a one-year copyright over a five-year copyright is only \$2.79 million, while having four more years of copyright would enable the copyright holder to make a derivative work (e.g., a sequel) exclusively during that period. If the copyright holder desired a copyright term longer than five years, a fifty-year copyright might be preferred because it provides close to \$10 million in additional tax savings beyond a seventy-year copyright. The present value of any income derived in years fifty-one through seventy of the copyright term probably would not compare to the \$10 million in extra tax savings now.

In terms of mechanics, the copyright holder would have to register the copyright for *The Blair Witch Project* and also file notice of its decision to abandon its copyright after the chosen number of years. The public notice would be contained in the copyright registration, all accessible online, similar to disclaimers in trademark registration.

The example illustrates how tax incentives might induce copyright holders to elect to have shorter terms of copyright, perhaps even as short as five years or less. Although *The Blair Witch Project* provides an extreme example of massive profits from a work, it shows the attractiveness of a copyright gains tax. Of course, the precise tax rates set for the copyright gains tax would require further study and debate. The numbers above are meant for heuristic purposes.

2. Proposal 2: Opting for Licenses for Public Use of a Work

a. Basic Tax Structure

The copyright gains tax can also be used for other copyright objectives. Imagine Congress wanted to encourage copyright holders to allow greater exploitation of their works, including in derivative works. This initiative could spur greater follow-on creations, earlier in the term of the copyright.¹⁵⁹ Instead of having to wait until the work enters the public domain, the public could exploit the works in ways greater than allowed currently under copyright law. A copyright gains tax would apply if a copyright holder elected, within the first five years of copyright, to adopt a free, mass license to allow the public to make derivative works for the remainder of the copyright. The mass license could be a Creative Commons license, which is a popular way for copyright

159. For more on how the derivative works right can retard follow-on creations, see Christina Bohannon, *Taming the Derivative Works Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright*, 12 VAND. J. ENT. & TECH. L. 669, 677–81 (2010); Glynn S. Lunney, Jr., *Copyright, Derivative Works, and the Economics of Complements*, 12 VAND. J. ENT. & TECH. L. 779, 782 (2010); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 53 (2002).

holders to mass license their works.¹⁶⁰ For example, the Creative Commons-By license requires the follow-on user to provide attribution to the original author in using the work.¹⁶¹ The election period might be set at the first five years of copyright for a work, in order to allow the public to use the work when it is recent and to maximize the amount of time afforded to the public to utilize the work in making new, derivative works.

The precise tax rates set would require further study and debate. For illustrative purposes, the copyright gains tax for allowing derivative works could be set as follows:

TABLE 4: COPYRIGHT GAINS TAX FOR COPYRIGHT HOLDERS' MASS LICENSES

Election By Copyright Holder	Copyright Gains Tax Rate
Author elects derivative work ("DW") mass license, including commercial and noncommercial uses	60% of standard rate applies
Author elects DW mass license, only for noncommercial uses	90% of standard rate applies

Thus, the copyright holder receives a ten percent discount on the standard tax rate on income generated from a work for which it has authorized a mass license to the public to make derivative works only for noncommercial purposes. Similarly, a copyright holder receives a forty percent discount on the standard tax rate on income generated from a work for which it has authorized a mass license on the public to make derivative works for both commercial and noncommercial purposes. The greater discount is given to allowing commercial derivative works, in part because those works will possibly generate economic activity and further income subject to tax. The added tax revenue could help offset the losses in tax revenue created by the preferential copyright gains tax rate.

b. Advantages of Using Tax Instead of Copyright

As in the case of shorter copyright terms, the main advantage of using the Tax Code here is that it achieves greater flexibility without raising Berne Convention problems. Articles 12 and 14 of Berne require countries to recognize a set of adaptation rights—commonly known under the umbrella of the right to make derivative works.¹⁶² Thus, the United States could not substantially diminish

160. See Michael W. Carroll, *Creative Commons and the New Intermediaries*, 2006 MICH. ST. L. REV. 45, 47–48 (2006).

161. See *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited Jan. 17, 2012).

162. See Berne Convention, *supra* note 4, arts. 12, 14.

the right to make derivative works, at least not for foreign works, without violating the Berne Convention. Moreover, the right to make a derivative work arguably serves a useful purpose in incentivizing authors to create not only a first work but also, potentially, a derivative work. The copyright gains tax, however, could make the derivative work right more flexible. The flexibility could incentivize copyright holders to promote socially productive re-uses of their works. For example, the growth of noncommercial fan-fiction online—short stories created by third parties based on famous works like *Harry Potter*—currently occupies an uncertain status between possible infringement and fair use.¹⁶³ One easy way to clear up this uncertainty is to encourage authors themselves to mass license their works.

c. Hypothetical Example: *The Blair Witch Project*

Let us return to the example of *The Blair Witch Project*. Imagine the copyright holder grants the public a mass license to use the movie in noncommercial derivative works, such as remix videos.¹⁶⁴ The mass license would be recorded in the Copyright Office, along with the registration of the work. Copies of the work could be required to indicate a mass license has been granted to the public for reuse of the work (such as by the Creative Commons symbols). As shown in Table 5 below, under the copyright gains tax rate, the copyright holder would be taxed at 90% of the standard tax rate that applies—meaning the rate would lower from the highest tax rate of 35% to the discounted rate of 32%. Applying the preferential rate would lower the tax from \$48,935,250 to \$44,740,800, a decent savings of \$4.2 million.

The copyright holder can obtain an even larger tax benefit of 60% of the standard rate by opting to allow commercial derivative works as well. In such case, the tax rate would lower from 35% to 21%, with a tax of \$29,389,500—which equals a tax savings of \$19.6 million.

TABLE 5: *THE BLAIR WITCH PROJECT* INCOME
UNDER COPYRIGHT GAINS TAX

Mass Copyright License	Tax Rate	Income Tax	Tax Savings
Noncommercial DWs	32%	\$44,740,800	\$4,194,350
All DWs	21%	\$29,361,150	\$19,574,100

163. See Lee, *supra* note 21, at 1530–31.

164. *Id.* at 1508–09.

In essence, through the tax expenditure of the copyright gains tax, the government is investing in follow-on creations and innovation from copyrighted works.

C. Copyright Tax Credits

1. Structure of Copyright Tax Credit

Another way to use the Tax Code to further copyright objectives is through tax credits.¹⁶⁵ Typically, a tax credit would provide a smaller tax benefit than a preferential tax rate. Deductions reduce one's taxable income and thus translate into different amounts depending on the taxpayer's tax bracket; tax credits, however, offer dollar-for-dollar amounts reducing one's tax liability, irrespective of tax bracket.¹⁶⁶ A tax credit allows Congress to set fixed dollar amounts for reducing one's tax instead of having the tax benefit fluctuate, such as in a tax rate, although the amount of the tax credit could be made to change to different levels of income. For example, the child tax credit is up to \$1,000 for each qualifying child under seventeen years old.¹⁶⁷ Tax credits can also be made refundable, meaning if the amount of tax owed by the taxpayer in a given year is less than the amount of tax owed, the difference between the credit and tax owed is refunded by the federal government to the taxpayer.¹⁶⁸ Alternatively, the tax credits can be nonrefundable but subject to "carry over," or used in following tax year(s) when there is positive income.¹⁶⁹

As in the case of the copyright gains tax, the proposed copyright tax credits would be dependent on copyright registration of a work by the same year the tax credit is sought. The next step would be identifying a copyright objective worthy of a tax credit.

Imagine Congress wants to incentivize authors to allow more free uses of their copyrighted works in schools, in order to encourage learning with a greater diversity of materials and to help defray the rising costs of education.¹⁷⁰ A tax credit could be awarded to any copyright holder for each school that requested and received permission to use its work in the classroom for free. As shown in Table 6, the tax credit might be set at, let's say, \$50 per school to

165. See generally Brian H. Jenn, *The Case for Tax Credits*, 61 TAX LAW. 549 (2008) (describing the benefit of tax credits over deductions and exclusions).

166. See, e.g., Jeffrey D. Moss, *Solar Panels, Tax Incentives, and Your House*, PROB. & PROP., Jan.-Feb. 2010, at 17, 18 (2010).

167. I.R.C. § 24 (2006).

168. Janet E. Milne, *Environmental Taxation in the United States: The Long View*, 15 LEWIS & CLARK L. REV. 417, 443 n.131 (2011).

169. See, e.g., Moss, *supra* note 166, at 20 (discussing carryover for North Carolina renewable energy tax credit).

170. College tuition has risen, on average, over 136% during the past twenty years. See Laura Meckler & Stephanie Banchemo, *U.S. News: Obama Plans to Curb Tuition*, WALL ST. J., Jan. 28, 2012, at A3.

which the author granted free use—including copying, public performances, and adaptations—of part of a copyrighted work in the classroom or at school, and \$150 for each school granted free use of an entire copyrighted work. The tax credit could be in addition to any deduction allowed for donation of material to a charitable institution,¹⁷¹ given that the donation here would encompass acts of copying, performing, and adapting not measured within the amount for donation of copies of works. A cap can also be set on the maximum amount of copyright tax credits (e.g., \$15,000) that a taxpayer can claim each year.

TABLE 6: COPYRIGHT TAX CREDIT FOR
FREE EDUCATIONAL LICENSES

Free Educational License	Tax Credit	Cap
Part of work licensed	\$50 per school	\$15,000 total
Entirety of work licensed	\$150 per school	\$15,000 total

2. *Advantages of Using Tax Instead of Copyright Exemptions*

Again, the main advantage of using the Tax Code instead of copyright law is to provide greater flexibility to copyright in a way that skirts any problems with international obligations. Instead of creating broad copyright exemptions for schools that could be subject to international challenge in the WTO, Congress could use tax credits to promote the same objectives without raising any issue of compliance with the Berne Convention or the TRIPS Agreement. In addition, the proposed copyright tax credits have the added benefit of promoting education and potentially helping to address the escalating costs of education, including textbooks, which are trending to an annual cost of \$1,000 per college student.¹⁷²

171. See I.R.C. § 170 (2006) (allowing tax deductions for contributions to charitable institutions).

172. See NATSUKO HAYASHI NICHOLLS, SCHOLARLY PUBL'G OFFICE, UNIV. OF MICH. LIBRARY, THE INVESTIGATION INTO THE RISING COSTS OF TEXTBOOKS 4–5 (2009), available at <http://hdl.handle.net/2027.42/78553>; see also *id.* at 5 (“[B]etween December of 1986 and December of 2004, textbook prices have increased at twice the rate of inflation, increasing by 186 percent, whereas tuition and fees increased by 240 percent and overall price inflation grew by 72 percent. While increases in textbook prices have followed close behind tuition increases, the estimated cost of textbooks and supplies for the average four-year undergraduate student was \$898 for the academic year 2003–2004, or about 26 percent of the cost of tuition and fees at four-year public institutions.”) (citation omitted).

a. Hypothetical Example: Open-Source Textbooks

To understand how the proposed copyright tax credit would operate, imagine Author creates an “open source” digital textbook free for others to use and copy. Twenty schools adopt the textbook for use in their classrooms. The digital copies are disseminated for free to the students in each school. As depicted in Table 7, Author is able to receive a tax credit of \$3,000 (20 times \$150) for sharing her entire textbook with twenty schools. To obtain the tax credits, Author would have to register the copyright, keep proper records of the names of the schools receiving the textbook (subject to audit), and indicate, on the tax form, her election of the copyright tax credits. If the same schools use Author’s textbook the following year, Author would be entitled to the same tax credit.

TABLE 7: OPEN SOURCE TEXTBOOK WITH FREE EDUCATIONAL LICENSE IN 20 SCHOOLS

Free Educational License	Tax Credit	Schools	Total
Entirety of work licensed	\$150 per school	20	\$3,000

IV. ADDRESSING CONCERNS

This final Part addresses objections to the tax fix to copyright law. Although the tax fix affords greater flexibility to copyright initiatives without raising any international treaty concerns, it may produce other side effects worth considering.

A. *Tax Concerns*

1. *Tax Expenditures and Revenue Depletion*

The biggest objection to the proposals above is their cost. Congress must consider the costs and benefits of the proposals, informed by analysis by economists and policymakers. To be sure, the debt crisis and economic downturn in the United States pose many challenges for U.S. fiscal policy.¹⁷³ Some experts may question the desirability of tax cuts when the economy is weak and the federal government faces huge budget deficits.¹⁷⁴ The issue is at least debatable. In 2009, the Obama Administration cut taxes for

173. See Peter Coy, *Why the Debt Crisis Is Even Worse Than You Think*, BUSINESSWEEK, (July 27, 2011, 11:05 PM), <http://www.businessweek.com/magazine/why-the-debt-crisis-is-even-worse-than-you-think-07272011.html>.

174. See *The Fallacy of Using Tax Cuts to Fix Recession*, NPR (Feb. 16, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=100746977> (interview with David Cay Johnston).

the middle class in an effort to stimulate the economy.¹⁷⁵ In 2011, Democrats and Republicans both were proposing different tax cuts as a way to boost the economy.¹⁷⁶ In any event, Congress will not likely consider copyright reforms until later this decade, at a time when the U.S. economy is (hopefully) better. Congress can always adopt smaller tax breaks as a part of an incremental approach to copyright reform. And, to the extent the current debate over reforming the U.S. tax system will force Congress to make the tax system more transparent and with fewer loopholes, the current debate may pave the way for the kind of copyright reform proposed herein. From an economic view, giving preferential tax rates in a way that incentivizes the creation of more copyrighted works makes sense, given how much the copyright industries contribute to U.S. GDP and exports overseas.¹⁷⁷

The proposed copyright tax reforms may not necessarily lead to large tax expenditures over the long run. Stimulating the creation of more works much sooner during the copyright term is one of the primary goals of the proposed copyright gains tax. Copyright holders are incentivized, with a preferential tax rate, to allow their works to be used and adapted by many more people—including commercially—much sooner than before. Instead of waiting ninety-five years to see the mass public exploitation of works, now such exploitation could occur in five years or less. The potential proliferation of follow-on creations to existing, popular works could generate significant income—itsself subject to tax—that would not have been created without the copyright gains tax incentive.

Indeed, one attractive feature of the copyright gains tax is that the works that would cost the most in terms of tax expenditures (meaning they generate the most income that is then subject to a lower tax rate at the election of the copyright owner) would also have the greatest potential of spurring commercial follow-on creations that can generate even more income. The most popular works commercially are likely to be the most attractive for people to adapt and build on—and the most likely to lead to other income-generating derivative works. In other words, popularity can be monetized—and then taxed.

175. See Heidi Przybyla & John McCormick, *Poll: Americans Don't Know Economy Expanded with Tax Cuts*, BLOOMBERG, (Oct. 29, 2010, 11:19 AM), <http://www.bloomberg.com/news/2010-10-29/poll-shows-americans-don-t-know-economy-expanded-with-tax-cuts.html> (“The Obama administration has cut taxes—largely for the middle class—by \$240 billion since taking office . . .”).

176. See Opinion, *An Inferior Tax Cut: A Temporary Payroll Break Won't Help Growth or Hiring*, WALL ST. J., Aug. 20, 2011, at A12 (discussing Democrat payroll tax cut plan and Republican plan for tax cuts for individuals and businesses).

177. See INT'L INTELLECTUAL PROP. ALLIANCE (IIPA), COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2003–2007 REPORT 5–7 (2009), available at <http://www.iipa.com/pdf/IIPASiwerekReport2003-07.pdf>.

While many follow-on creations or derivative works would not generate income subject to tax, it is likely that some would. In the movie industry, Hollywood studios have routinely made large revenues from adaptations of public domain works—including the incredibly successful movies *Snow White and the Seven Dwarfs* (which grossed nearly \$185 million in 1937), *Pinocchio* (\$84 million in 1940), and *Aladdin* (\$217 million in 1992).¹⁷⁸ The proposal would enhance the possibility of income generation from derivative works because the underlying works would be more contemporary—which enhances the marketability of follow-on creations. For example, a sequel to *Harry Potter*, *Twilight*, or *Glee* would likely be more marketable today than in the year 2081.

In addition, the copyright gains tax might attract new entrants—meaning new creators—into content production, which might in turn generate even more taxable income than would otherwise have arisen. For example, the preferential copyright gains tax might make it more economically feasible for “starving artists” to make a living and pursue their passion as a profession.¹⁷⁹ Among the new entrants to creative professions may be a few who become the next J.K. Rowling or Justin Bieber, in terms of their commercial success—again generating income subject to tax.

Even if the new entrants have only modest commercial success, the number of new entrants in the so-called “long tail”¹⁸⁰ may be large enough to yield a decent source of additional income subject to tax. Also, the added incentives to register copyrighted works may lead to an increase in registrations. People who might not otherwise register their works might be induced to register, in order to preserve the possibility of a tax benefit. The fee for registration, although modest, could generate more revenues for the government in the long-term.¹⁸¹

The multiple ways in which new income streams might be generated under the copyright gains tax are arguably less prone to manipulation than under the capital gains tax. The majority of capital gains are derived from sales of stocks, and of business and rental real estate.¹⁸² Thus, the problem of “lock-in” occurs with capital investments because investors may hold on to their stocks

178. Brief for Peter Decherney as Amicus Curiae Supporting Petitioners, *Golan v. Holder*, 131 S. Ct. 1600 (2011) (No. 10-544), 2011 WL 2470832 app. A.

179. See Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381, 387–94 (2009) (arguing that the copyright system should be designed in part to facilitate professional authors).

180. See generally CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (2006).

181. The fee in 2011 is \$50 for paper registration and \$35 for electronic registration. *Registering a Work (FAQ)*, U.S. COPYRIGHT OFFICE (last modified Mar. 22, 2010), <http://www.copyright.gov/help/faq/faq-register.html>.

182. See STAFF OF S. COMM. ON THE BUDGET, 110TH CONG., *TAX EXPENDITURES* 390–91 (Comm. Print 2008).

and other investments in order to avoid having to pay tax on gains accrued from their sale.¹⁸³ By contrast, the copyright gains tax would probably not lead to a “lock-in” effect because most creators probably have an incentive to share and market their works commercially, instead of holding on to them.

The Blair Witch Project example shows how additional tax revenues might be generated from the copyright gains tax.¹⁸⁴ Imagine that the copyright owner of the movie opted for the five-year copyright, thereby saving \$43.3 million from the preferential rate of tax in 2011. That \$43.3 million represents the tax expenditure the federal government made in enacting the copyright gains tax as applied to the movie. The tax expenditure by the federal government might be recovered in several ways.

First, the copyright owner might use part of the \$43.3 million to finance a sequel. The production of the sequel would very likely pump money into local businesses where the film is produced. Even if the sequel performed only one third as well as the first movie and earned \$46.2 million at the box office, the tax owed by the copyright holder could be over \$15 million, depending on how much the sequel cost to produce. Second, the creation of other derivative works of *The Blair Witch Project*—merchandise, video games, toys, and the like—by the copyright owner or third parties could also generate more income subject to tax. According to movie industry expert Steven Gaydos, merchandising can generate between \$50 and \$200 million if the movie is popular.¹⁸⁵ For example, in 2002, the *Harry Potter* franchise generated \$11.8 million simply based on sales of *Harry Potter* cookies, candy, and gum.¹⁸⁶ In total, *Harry Potter* amassed a staggering \$7 billion in merchandising sales and \$1.5 billion in video game sales worldwide.¹⁸⁷ Third, the financial attractiveness of the copyright gains tax for *The Blair Witch Project* might lure other creators to enter the field who might not otherwise have pursued creative professions. To the extent those new entrants

183. See NONNA A. NATO, CONG. RESEARCH SERV., R41480, RAISING THE TAX RATES ON HIGH-INCOME TAXPAYERS: PROS AND CONS 17 (2010).

184. *The Blair Witch Project* is a rare example of a mega-blockbuster movie that cost very little to produce so the amount of potential tax savings for the movie may be larger than what would be typical in the “long tail” of creative productions. See generally ANDERSON, *supra* note 180 (discussing how many, smaller-income-generating works may produce substantial income in aggregate). As an example of a potentially large tax savings, it provides a good measuring stick to test the desirability of the copyright gains tax.

185. See Emma Clark, *How Films Make Money*, (Nov. 12, 2001), BBC NEWS, <http://news.bbc.co.uk/2/hi/business/1646640.stm>.

186. See Allison Linn, *Retailers Hope Harry Potter Proves Magical*, MSNBC (July 16, 2007), http://www.msnbc.msn.com/id/19745297/ns/business-us_business/t/retailers-hope-harry-potter-proves-magical/.

187. See Ethan Smith, Michelle Kung & Robert A. Guth, *Potter Studio Tries to Keep Profits from Going Poof!*, WALL ST. J., July 15, 2011, at A1.

produce taxable income from their copyrighted works, some of the loss in tax revenue from copyright holders' election of the copyright gains tax would be further offset.

Thus, the copyright gains tax can spur a greater number of creative works much sooner than under the current copyright system, without necessarily causing huge tax expenditures for the federal government. The income generated from the follow-on creations would be taxed and help to offset the loss in tax revenue from the preferential rate. Moreover, noncommercial follow-on creations provide a social benefit or positive externalities in their own right in a way that is not captured by income.

2. *Gaming the System and Tax Fraud*

As with any tax provision, the proposed copyright gains tax and copyright tax credit will be susceptible to clever attempts by some taxpayers to game the system, if not commit outright tax fraud. For example, in the past, some corporations have set up foreign companies in order to minimize or avoid U.S. tax exposure—a practice of expatriation that Congress attempted to discourage in 2004 by closing the tax loophole.¹⁸⁸ Drafters of the copyright tax breaks must vet the provisions and attempt to formulate them in a way that minimizes the potential for similar gaming of the system. But, as one court put it, “[e]ven the smartest drafters of legislation and regulation cannot be expected to anticipate every device.”¹⁸⁹ Accordingly, the IRS should monitor the implementation of the copyright tax fixes to identify any gaming of the system, so Congress might close any loopholes.

3. *Unequal Tax Treatment of Other IP*

The proposal for copyright “tax fixes” begs the question whether the Tax Code should be used in a similar way for the patent and trademark systems. As Jeffrey Maine and Xuan-Thao Nguyen have identified, principles of horizontal tax equity demand consideration of treating the taxation of income generated from different intellectual property alike, if they are truly similarly situated.¹⁹⁰ However, some of the problems addressed by the proposed tax fixes are idiosyncratic to copyright. The optional registration system, lengthy terms, and problem of orphan works are not present in the patent or trademark systems.¹⁹¹ The potential benefits from

188. See Michael S. Kirsch, *The Congressional Response to Corporate Expatriations: The Tension Between Symbols and Substance in the Taxation of Multinational Corporations*, 24 VA. TAX REV. 475, 505–07, 545 (2005); I.R.C. § 7874 (2006); see also *id.* §§ 951-65, 1291-98 (provisions governing tax treatment of controlled foreign corporations and passive foreign investment companies).

189. *ASA Investorings P'ship v. Comm'r*, 201 F.3d 505, 513 (D.C. Cir. 2000).

190. Nguyen & Maine, *supra* note 109, at 14.

191. See ORPHAN WORKS REPORT, *supra* note 39, at 15.

incentivizing greater uses of IP, though, are relevant to both copyright and patent. A similar tax incentive for patent holders authorizing mass licenses to create derivative inventions might also be considered.

B. Copyright Concerns

Some may object to the specific copyright reforms proposed, particularly the incentives for shorter terms and more liberal licenses for derivative works. Some copyright holders would argue that they need a longer term and even more rights and enforcement measures, given the ease of infringement on the Internet today. On the flip side, some public interest advocates might criticize the copyright gains tax proposals because the copyright gains tax does not reward noncommercial productions. Each objection is discussed in turn.

1. Need for Stronger Copyright?

No doubt some copyright holders may desire longer terms of copyright and even more rights. The history of copyright in the United States has demonstrated that copyright industries have been incredibly successful in obtaining expansions and extensions of copyright over time.¹⁹²

Whether or not these expansions and extensions should be ratcheted even higher in the twenty-first century is a policy debate that I do not undertake here. One attractive feature of the tax fix proposal is that it leaves the current high levels of copyright protection and long copyright term completely untouched. While the Copyright Act remains the same, the Tax Code adds greater incentives and flexibility to accommodate a diverse group of copyright holders—some of whom may prefer maximalist copyright protection, others of whom may prefer maximalist tax benefits. Under the tax fix, the “one size fits all” approach of the Copyright Act is modified, but only for those copyright holders who want to modify it. In popular parlance, the tax fix is an “opt in” system.¹⁹³

It is also important to bear in mind that the particular copyright proposals offered above are meant as illustrations of how the Tax Code can be used to facilitate copyright objectives. One need not agree with the copyright proposals in order to see the attractiveness of using the Tax Code to further copyright goals, whatever they may be.

192. See, e.g., Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256.

193. See Marc H. Greenberg, *Reason or Madness: A Defense of Copyright's Growing Pains*, 7 J. MARSHALL REV. INTELL. PROP. L. 1, 27 n.137 (2007).

2. *No Tax Help for Noncommercial Works?*

Public interest advocates might criticize the tax proposals as biased against amateur creators and noncommercial works. Creators of noncommercial works are not able to benefit from a preferential copyright gains tax rate. If no income is derived from a work, there is no “gain” to tax.

The criticism is valid, but only to some extent. Even noncommercial creators can benefit from the copyright gains tax if it is successful in inducing other copyright owners to allow their works either to enter the public domain sooner or to be mass-licensed for public use. The noncommercial creators benefit directly by having more underlying material—both commercial and noncommercial works—from which to draw. Moreover, under the copyright tax credit for educational uses of copyrighted works, the author does not need to generate income from her own works in order to benefit from the tax credit. The tax credit applies whether or not the work has generated income.

C. *Administrative Concerns*

1. *Complicating the Tax Code and Copyright Act*

Another objection to the tax fix to copyright law is that it would further complicate the Tax Code and copyright law, both of which are already complicated, if not incomprehensible, enough.¹⁹⁴ Using a tax fix—using tax law to further copyright objectives—would only exacerbate the difficulty for the public to understand tax and copyright. It may yield a “double whammy” in terms of complicating both laws.

The criticism of complexity is valid. The tax fix to copyright law will make things more complicated. Drafters of the tax fix should strive to design a copyright gains tax and credit that will be easy to understand. Also, the tax forms and schedules for the copyright gains tax and tax credit should be written in a user-friendly format. Just as with any change to the Tax Code or Copyright Act, programs should be developed to educate the public about the changes. To the

194. See Lee, *supra* note 21, at 1539 (“This inherent uncertainty makes the Copyright Act even worse than the Tax Code, which, despite its complexity, provides millions of taxpayers at least with enough certainty for them to figure out how much taxes to pay each year—even providing the public with the option of electing the simpler, standard deduction.”); Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 396 (2005) (“[T]he complexity of the copyright statute already compares unfavorably to the tax code”); see also U.S. DEP’T OF THE TREASURY, UPDATE ON REDUCING THE FEDERAL TAX GAP AND IMPROVING VOLUNTARY COMPLIANCE 25 (2009); *Tax Code Complexity: New Hope for Fresh Solutions: Hearing Before the S. Comm. on Fin.*, 107th Cong. 39–40 (2001) (statement of Richard M. Lipton, Chair, Section on Taxation, American Bar Association).

extent that complexity is unavoidable, it may be a tradeoff for making the Copyright Act more flexible for the twenty-first century. The tradeoff may be worth making if the potential social benefit is great, and the amount of complexity added is not too onerous for the public to understand.

2. *Coordination of Tax and Copyright Components*

One final objection is administrative: the tax fix will require coordination between the Internal Revenue Service and Copyright Office. Such interagency coordination may be difficult to achieve. Yet the IRS is a relatively well-functioning agency in managing tax filings of millions of U.S. residents each year.¹⁹⁵ The Copyright Office has not had as large an administrative responsibility as the IRS, but the proposals do not require the Copyright Office to do much more than overseeing the registration process—something it has historically done. The key additional component would be ensuring that taxpayers who invoke the copyright tax breaks have registered their works and recorded the relevant information concerning their copyrights (e.g., shorter term, mass licenses to the public) in the Copyright Office. But this burden can be handled by a requirement of disclosure of copyright registration on the tax form, plus the penalty of perjury that governs tax forms.¹⁹⁶ Successful coordination among patent offices in the United States, Europe, and Japan in sharing information and reviewing patent applications under the Trilateral Review suggests that interagency coordination between the IRS and Copyright Office would be feasible.¹⁹⁷ If three countries can coordinate their offices, then two agencies within the United States should be able to coordinate as well.

CONCLUSION

The U.S. Copyright Act of 1976 is due for a major revision to update copyright law and reduce the inefficiencies of the copyright system. This Article proposes using the Tax Code as an alternative way to reform or modernize copyright law. The main advantage of this approach is that it allows Congress much greater flexibility for reforms that do not implicate, much less violate, the international obligations of the Berne Convention or TRIPS Agreement. The approach also may be more efficient in allowing copyright holders to tailor copyrights to their own situations and needs, instead of imposing a “one size fits all” approach on all copyright holders.

195. See *Statistics: Individual Tax*, IRS TAX STATS (Apr. 18, 2011), <http://www.irs.gov/newsroom/article/0,,id=238634,00.html>.

196. In addition, the IRS and Copyright Office can coordinate their electronic databases to match up a tax filing to a registered copyrighted work.

197. See *Significant Achievements*, TRILATERAL, <http://www.trilateral.net/about/achievements.html> (last visited Feb. 10, 2012).