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ARTICLES

SALES AND DONATIONS OF SELF-CREATED ART, LITERATURE,
AND MUSIC

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ARTICLES

SALES AND DONATIONS OF SELF-CREATED ART, LITERATURE, AND MUSIC

*Joel S. Newman**

I. INTRODUCTION

Pete Picasso, Frank Faulkner, and Bert Beethoven are, respectively, a painter, a novelist, and a composer. Each starts with physical assets (e.g., paint and paper) of negligible value.¹ Each spends a year of concerted effort,² and emerges with, respectively, a painting, a novel, and a symphony.

Each sells his creation outright, for a substantial amount, to a third party. Pete Picasso and Frank Faulkner will be taxed at ordinary income rates.³ However, Bert Beethoven can elect more favorable capital gains treatment.⁴ Why is the musical composer treated better?

What if, instead of an outright sale, each had donated all rights, title and interest in his creation to a qualified charity? In that event, each would

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¹ It is estimated that the current cost, in terms of paper and ink, of producing a Rembrandt drawing would be four cents. William A. Drennan, *It Does Not Compute: Copyright Restriction on Tax Deduction for Developer's Donation of Software*, 5 FLA. TAX REV. 547, 592 n.223 (2002).

² Typically, it takes a significant amount of time and effort to create a work of art, literature, or music. Irving Caesar, who famously wrote the lyrics to "Swanee" and "Tea For Two" in, respectively, 11 minutes and 10 minutes, is the exception. Mark Steyn, *Hail Caesar! Cornball Classics from a Tin Pan Alley Legend*, SLATE (Jan. 16, 1997, 3:30 AM), http://www.slate.com/articles/news_and_politics/after_the_ball/1997/01/hail_caesar.html.

³ I.R.C. § 1221(a)(3).

⁴ *Id.* § 1221(b)(3). For the lower rates on net capital gains, see § 1(h).

be allowed to claim a charitable contribution deduction. However, the amount of each deduction would be limited to basis—a negligible amount.⁵ This treatment would hold no matter who the charitable donee was, and no matter how the donation was used. Why are all three treated so badly? Should some of them be treated better?

This essay will address the tax treatment of outright sales and outright donations of creators' art, literature and music, and how it got there. It will then explore the relevant similarities and differences among art, literature, and music in terms of the people involved, the business practices, and the nature of the creative output, both in theory and in practice. Finally, in light of those similarities and differences, it will suggest how such sales and donations should be treated for tax purposes.

II. HISTORY

A. Sales

1. Before 1950

In the 1939 Code, “property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business,” was excluded from the definition of a capital asset.⁶ Gains on the sales of such property could not be capital gains. Instead, they were taxed as ordinary income.

Creative works in the hands of the creators were treated the same as everything else. If, over the course of a lifetime, an artist had painted and sold one painting, a novelist had sold one novel, or a composer had sold one symphony, then the gains on those sales would have been capital gains, eligible for favorable tax treatment. However, if the artist, novelist, or composer had made many of such sales, then those creative works would likely have been deemed property held primarily for sale to customers in

⁵ The amount of the deduction would be the fair market value reduced by “the gain which would not have been long-term capital gain . . . if the property contributed had been sold.” *Id.* § 170(e)(1)(A). Pursuant to § 1221(a)(3), none of the gain would have long-term capital. Therefore, the deduction would be fair market value reduced by the gain, or, in other words, basis.

⁶ I.R.C. § 117(a)(1) (1939) (current version at § 1221(a)(1)).

the ordinary course of business, and hence, excluded from capital gains treatment.⁷

2. 1950

Things changed, thanks to General Dwight Eisenhower. In 1948, he wrote a memoir, *Crusade in Europe*, and sold it for a reported \$1,000,000. General Eisenhower was, of course, a soldier, not a writer. The sale of his memoirs was a one-time event, deserving of capital gains treatment.⁸

Congress was not pleased.⁹ It enacted what is now § 1221(a)(3).¹⁰ The section provides that “the term ‘capital asset’ means property held by the taxpayer (whether or not connected with the trade or business), but does not include . . . a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property, held by a taxpayer whose personal efforts created such property.”¹¹

⁷ *Gershwin Estate v. United States*, 139 Ct. Cl. 722 (1957) (stating that music sold by estate was not held for sale to customers in the ordinary course of a trade or business); *Herwig v. United States*, 122 Ct. Cl. 493 (1952) (stating that novel was not held for sale to customers in the ordinary course of a trade or business); *Goldsmith v. Comm’r*, 143 F.2d 466 (2d Cir. 1944) (holding that there was a license, not a sale); *Estate of Chandor v. Comm’r*, 28 T.C. 721 (1957) (stating that portrait was not held for sale to customers in the ordinary course of a trade or business). Before 1950, patents were treated the same as other creative assets. *See Lamar v. Granger*, 99 F. Supp. 17 (W.D. Pa. 1951) (finding that patents were not held for sale to customers in the ordinary course of a trade or business); *Hofferbert v. Briggs*, 178 F.2d 743 (4th Cir. 1949) (same); *Myers v. Comm’r*, 6 T.C. 258 (1946) (same); *see also Avery v. Comm’r*, 47 B.T.A. 538 (1942) (finding that a patent was property held primarily for sale to customers in the ordinary course of a trade or business).

⁸ Warren Shine, *Some Tax Problems of Authors and Artists*, 13 TAX L. REV. 439 (1957–1958); Note, *A Comparison of the Tax Treatment of Authors and Inventors*, 70 HARV. L. REV. 1419, 1423 (1956–1957).

⁹ S. REP. NO. 81-2375, at 83–84 (1950).

¹⁰ Revenue Act of 1950, Pub. L. No. 81-814, § 210(a), 64 Stat. 906, 933.

¹¹ I.R.C. § 1221(a)(3); *see also id.* § 1231(b)(1)(C). In explaining § 1221(a)(3), Regulation § 1.1221-1(c)(1) provides in part:

For purposes of this subparagraph, the phrase “similar property” includes, for example, such property as a theatrical production, a radio program, a newspaper cartoon strip, or any other property eligible for copyright protection (whether under statute or common law), but does not include a patent or an invention, or a design which may be protected only under the patent law and not under the copyright law.

The House version of the 1950 legislation would have treated patents just like other creative output. H.R. REP. NO. 81-8920, at 44 (1950). However, the Senate version, and the enacted statute, did not. S.

Pursuant to § 1221(a)(3), the next general who sold his memoirs would be taxed on ordinary income, because it would have been his personal efforts that had created the property. Similarly, a painting, novel, or symphony, in the hands of its creator, would be ordinary income property. This result would hold true whether, over the course of a lifetime, they sold one painting, novel, or symphony, or dozens. Moreover, it would not matter whether the creative work was sold or exchanged, or merely licensed. In any event, capital gains treatment would not be available.¹² However, those very same properties, in the hands of anyone else, could well have been capital assets, subject to capital gains treatment if sold or exchanged.¹³

3. The Songwriters Capital Gains Tax Equity Act

Country western songwriters were not happy with the provisions of § 1221(a)(3). In the early 2000's, the Nashville Songwriters Association International (NSAI) lobbied the Tennessee and Kentucky Congressional delegations for a change.¹⁴ Congresswoman Blackburn, the head of the House Congressional Songwriters Caucus,¹⁵ was especially active.

REP. NO. 81-2375, at 83–84 (1950); see I.R.C. § 1235. Apparently, Congress felt that patents were more worthy of encouragement than art, music, and literature. Rodney P. Mock & Jeffrey Tolin, *I Should Have Been a Rockstar: Deconstructing Section 1221(a)(3)*, 65 TAX LAW. 47, 60–66 (2011); Drennan, *supra* note 1; Note, *supra* note 8. Given the reference to “a taxpayer whose personal efforts,” the provisions of § 1221(a)(3) do not apply to multiple creators, nor do they apply to corporate creators. Rev. Rul. 55-706, 1955-2 C.B. 300 (superseded on other grounds by Rev. Rul. 62-141, 1962-2 C.B. 182); see Xuan-Thao Nguyen & Jeffrey A. Maine, *Equity and Efficiency in Intellectual Property Taxation*, 76 BROOK. L. REV. 1, 25 (2010). Courts have given an expansive reading of “similar property.” Such property can include the format and structure of a radio show. *Kennedy v. Comm’r*, 24 T.C.M. (CCH) 1155 (1965); *Cranford v. United States*, 338 F.2d 379 (Ct. Cl. 1964). Or it can include the concept of Francis, the talking mule. *Stern v. United States*, 164 F. Supp. 847 (E.D. La. 1958). However, a hand-made sailboat would be stretching things too far.

¹² Capital gains cannot occur without a “sale or exchange” of a capital asset. I.R.C. § 1222. A license is neither a sale nor an exchange.

¹³ Gains on sales of works of art, not held by the artists who created them, are still subject to capital gains rates. However, they are “collectibles.” Therefore, they can be taxed at 28%. *See id.* §§ 1(h)(5), 408(m)(2). The Art and Collectibles Capital Gains Tax Treatment Parity Act, S. 374, 110th Cong. (2009), reintroduced as S. 930, 112th Cong. (2011), would have eliminated the collectibles category. It did not pass.

¹⁴ It had to help that the Senate Majority Leader was Bill Frist of Tennessee.

¹⁵ Brody Mullins, *Music to Songwriters’ Ears: Lower Taxes; Country Artists’ Group Presses Lawmakers to Slash the Levy on Lyricists*, WALL ST. J., Nov. 29, 2005, at A4; Jeanne Anne Naujeck, *Senate Ricin Scare Disrupted Events, but Writers Adjusted to Make Their Case*, THE TENNESSEAN,

Proposed legislation was drafted by Denise Stevens, of Loeb & Loeb in Nashville, working pro bono for the NSAI.¹⁶

The NSAI lobbied hard for the bill. NSAI singer-songwriter members paid their own way to Washington, and took turns performing their music for members of Congress. Sometimes, at these “guitar pulls,” the members of Congress sang as well.¹⁷

As a result, in 2005, Congress enacted the Songwriters Capital Gains Tax Equity Act, as part of the Tax Increase Prevention of Reconciliation Act of 2005.¹⁸ One year later, the provision was made permanent.¹⁹ Section 1221(b)(3), which was added by that legislation, now provides that, “[a]t 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).”²⁰

Feb. 4, 2004, at E1. Senators Lamar Alexander, Zell Miller, and Mary Landrieu founded a similar group in the Senate. Naujeck, *supra*.

¹⁶ Spencer Anastasio, *Copyright Tax in the New Millennium: TIPRA and the Songwriter’s Capital Gains Equity Act*, 25 A.B.A. ENT. & SPORTS LAW. 1, 25 (2007); Denise Stevens et al., *Songwriters Gain from Change in Tax Law*, L.J. NEWSL. ENT. L. & FIN., July 2006, at 1.

¹⁷ Jeanne Anne Naujeck, *Songwriters Snag Sponsor to Advocate New Tax Rules*, THE TENNESSEAN, Feb. 6, 2004, at E3; Kathleen Pender, *Federal Tax Bill Loophole Is Music to Songwriters’ Ears*, SFGATE.COM (May 14, 2006, 4:00 AM), www.sfgate.com/business/network/article/Federal-tax-bill-loophole-is-music-to-2497432.php. One guitar pull did not quite go as planned. About 40 songwriters came to Washington in early February 2004, only to discover that the entire Senate had been closed down due to a ricin scare. Undeterred, 15 performers squeezed their way into Congresswoman Marsha Blackburn’s office for a session of singing and lobbying. Later in the day, the group met with Senator Lamar Alexander in a “packed hotel bar.” The songwriters were not the only ones to perform. Senator Alexander, accompanying himself on the piano, himself sang “There’s a Tear in My Beer”; “Hey Good Lookin’”; and “Green, Green Grass of Home.” Naujeck, *supra* note 15.

¹⁸ Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 204(a), 120 Stat. 345. The provision was added to the House bill by Rep. Ron Lewis (R., Ky.). Pender, *supra* note 17.

¹⁹ Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 412(a), 120 Stat. 2922; *see Congress Makes Permanent “Songwriters Capital Gains Equity Act,” SONGWRITER’S HALL OF FAME* (Jan. 5, 2007), http://songhall.org/news/entry/congress_makes_permanent_songwriters_capital_gains_equity_act.

²⁰ I.R.C. § 1221(a)(3) refers to “a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property” while § 1221(b)(3) refers only to “musical compositions or copyrights in musical works.” From the language, it is unclear whether a manuscript of a musical

Thus, composers and songwriters can now elect to obtain favorable capital gains tax treatment on the sales of their works. The provision was projected to cost about \$4 million per year in foregone tax revenues.²¹ Visual artists and composers of literary works, however, were not mentioned. Therefore, artists and writers would still be taxed at ordinary income rates on sales.²² These provisions remain to this day.

B. Charitable Contributions

1. Pre-1969

Charitable contribution deductions were always available for contributions of cash or property. Originally, the amount deductible for a cash contribution was the amount of the cash; the amount deductible for a contribution of property was the fair market value of the property at the time of the contribution.²³ However, contributions of services were not deductible at all.²⁴

composition would fit into § 1221(b)(3) as a “musical composition.” Note that § 1221(a)(3) referred to “musical . . . compositions” and “letter or memorandum” separately.

²¹ Mullins, *supra* note 15.

²² The failure of the Songwriters Capital Gains Tax Equity Act to include artists and writers was criticized in Nguyen & Maine, *supra* note 11. Copyright attorney Paul Hoffman made a similar criticism in Pender, *supra* note 17. Consider also the fact that there is a tax break for depreciation of “applicable musical property” in § 167(g)(8), which is not available for art or literature. Shortly after the law was enacted, Theodore Feder, President of the Artists Rights Society, said that he planned to discuss the issue of whether the songwriters’ tax break should be extended to visual artists. *Id.* However, in an email, he had no recollection that such a discussion ever took place. E-mail from Theodore Feder to Joel Newman, Professor of Law, Wake Forest Univ. Sch. of Law (May 24, 2013) (on file with author). Perhaps, as suggested in Xuan-Thao Nguyen & Jeffrey Maine, *The History of Intellectual Property Taxation: Promoting Innovation and Other Intellectual Property Goals?*, 64 SMU L. REV. 795, 835 (2011), the songwriters had better lobbyists. Surely, the fact that they were more or less concentrated in Nashville had to make them more effective.

²³ See Roger Colinvaux, *Charitable Contributions of Property: A Broken System Reimagined*, 50 HARV. J. ON LEGIS. 263, 271 (2013) (providing the early history of this provision).

²⁴ They are still nondeductible. Treas. Reg. § 1.170A-1(g) (2008); Grant v. Comm’r, 84 T.C. 809 (1985); see also Henry Ordower, *Charitable Contributions of Services: Charitable Gift Planning for Nonitemizers*, 67 TAX LAW. 517 (2014).

2. 1969

In 1969, Congress was concerned with contributions of appreciated property. The Senate Finance Committee explained:

[I]n some cases it actually is possible for a taxpayer to realize a greater after-tax profit by making a gift of appreciated property than by selling the property, paying the tax on the gain, and keeping the proceeds. This is true in the case of gifts of appreciated property which would result in ordinary income if sold, when the taxpayer is at the high marginal tax brackets and the cost basis for the ordinary income property is not a substantial percentage of the market value. . . .²⁵

The Committee used the example of a 70% bracket taxpayer who donated an ordinary income asset with a basis of \$50 and a fair market value of \$100 to charity.²⁶ If the taxpayer had sold the asset, there would have been a gain of \$50, minus a tax of \$35, netting \$15 after-tax. If, however, the taxpayer had donated the property to a qualified charity, then the taxpayer would have avoided taxation on the gain, thus saving \$35. In addition, the taxpayer would have received a charitable contribution deduction of \$100, worth a tax savings of \$70 in the taxpayer's bracket. The combined \$105 tax benefit (\$35 + \$70) would have exceeded the \$100 the taxpayer could have received pre-tax on the sale.²⁷

Congress was also concerned with the questionable valuations of appreciated assets.²⁸ What if the asset was claimed to be worth \$100, but

²⁵ S. REP. NO. 91-552, at 2109–10 (1969). Congress was concerned with artwork, but not especially with literary or musical compositions. Mock & Tolin, *supra* note 11.

²⁶ H.R. REP. NO. 91-413, at 53–55 (1969).

²⁷ S. REP. NO. 91-552, at 2109–10. Perhaps it is not correct to count the \$35 tax revenue foregone as a direct result of the charitable contribution. The taxpayer could have achieved the same savings by holding on to the appreciated property until death. In that event, the step up in basis pursuant to current § 1014 would have ensured that no one would pay any income tax on the appreciation, anyway. See Colinvau, *supra* note 23, at 272 n.50. Note also that the government would have been better off giving the charity \$100 out of the government's own pocket, rather than giving the taxpayer combined tax benefits of \$105, in order to achieve a benefit to the intended charitable beneficiary of only \$100.

²⁸ H.R. REP. NO. 91-413, at 55.

was actually worth far less? Unscrupulous charitable donees would gladly accept the inflated valuation; it meant nothing to them.²⁹

For these two reasons, in the 1969 Tax Reform Act, contributions of appreciated ordinary income property were limited to basis.³⁰ Contributions of capital gain property were of less concern, because the tax burden on the sale of a long-term capital gain asset was much lighter.³¹ Therefore, charitable contributions of capital gain property were treated more favorably. Such contributions could be deducted at their fair market value on the date of the contribution if certain conditions were met. For example, if the property was intangible, or if the use by the donee was related to the purpose or function constituting the basis for the donee's tax exemption, the contribution was deductible at fair market value.³²

²⁹ See William Speiller, *The Favored Tax Treatment of Purchasers of Art*, 80 COLUM. L. REV. 214, 234–40 (1980). Needless to say, valuation was of particular concern with art objects, “Works of art are very difficult to value and it appears likely that in some cases they may have been overvalued for purposes of determining the charitable contribution deduction.” H.R. REP. NO. 91-413, at 1701. However, those concerns have largely been addressed by tougher certification standards and by the presence of the Art Valuation Advisory Board. I.R.C. § 170(f)(11).

³⁰ I.R.C. § 170(e)(1)(A). Apparently, in the 1969 legislation, the House would have contemplated allowing a fair market value deduction for contributed appreciated assets, but only if the contributor elected to recognize the gain. H.R. REP. NO. 91-413, at 1915. The treatment of charitable contributions of appreciated property continues to generate criticism. See Daniel Halperin, *A Charitable Contribution of Appreciated Property and the Realization of Built-in Gains*, 56 TAX L. REV. 1 (2002) (urging constructive realization of gains upon the contribution); Speiller, *supra* note 29 (providing arguments against the constructive realization approach). Constructive realization is also discussed by Colinvaux, *supra* note 23, at 319. Even since the 1969 changes, tax expenditures for charitable contributions of appreciated property have been significant. See Deena Ackerman & Gerald Auten, *Tax Expenditures for Noncash Charitable Contributions*, 64 NAT'L TAX. J. 651 (2011).

³¹ Capital gains in 1969 were taxed at 25%. H.R. REP. NO. 91-413, at 53–55. If, in 1969, a 70% bracket taxpayer had sold a long-term capital asset with a \$50 basis and a \$100 fair market value, there would have been a taxable gain of \$50, and a tax bill of \$12.50. If that asset had been contributed to charity instead, the taxpayer would have avoided the \$12.50 capital gains tax. Further, if the contribution were deductible at the asset's fair market value at the time of the contribution, the taxpayer would have obtained a deduction of \$100, which would again have saved the 70% bracket taxpayer \$70 in taxes. This time, the combined tax benefit would have been \$82.50 (\$12.50 + \$70.00). In this instance, it would have been efficient for the government to forego \$82.50 in taxes in order to achieve a \$100 benefit to charity.

³² I.R.C. § 170(e)(1)(B). However, such contributions were capped at 30% of the contribution base, unless an election was made to limit them to basis. *Id.* § 170(b)(1)(C).

3. Songwriters Capital Gains Tax Equity Act Adjustments

The tax treatment of charitable contributions of appreciated property depends upon whether the property, if sold, would have generated ordinary income or capital gain. Recall that when § 1221(b)(3) was added in 2006, musical composers could elect capital gains treatment on the sales of their compositions. Accordingly, if such an election was made, charitable contributions of those compositions could theoretically have been determined under § 170(e)(1)(B) (capital gain property), not § 170(e)(1)(A) (ordinary income property). Under § 170(e)(1)(B), musical compositions, as intangible property, would have been deductible at fair market value.³³ The original manuscripts of those musical compositions, as tangible property, might also have been fully deductible, if donated to a charity for a “related use.”³⁴

To prevent these possible consequences, the 2005 legislation added a parenthetical to § 170(e)(1)(A): “(determined without regard to section 1221(b)(3)).”³⁵ According to this parenthetical phrase, when the musical compositions described by § 1221(a)(3) are contributed to charity, the elective provisions of § 1221(b)(3) are ignored, and the property is deemed to be ordinary income property.³⁶ As such, deductions for contributions of such property are limited to basis. Indeed, the legislative history of the Songwriters Capital Gains Tax Equity Act makes it clear that no change

³³ *Id.* § 170(e)(1)(B)(i). Section 170(e)(1)(B)(iii) would limit the deductibility of a contribution of a copyright to basis, but only if the copyright were not one described in § 1221(a)(3) or its counterpart, § 1231(b)(1)(C).

³⁴ *Id.* § 170(e)(1)(B)(i)(I). The manuscript of a musical composition, just like the manuscript of a literary composition, would be excluded from capital asset treatment under § 1221(a)(3). Therefore, a contribution of such a musical manuscript would generally have been limited to basis. Would the Songwriters Capital Gains Tax Equity Act, if not for the parenthetical phrase to be discussed *infra*, have generated elective capital gains treatment for such manuscripts, and therefore, a possible charitable contribution at fair market value? That would depend upon whether such a manuscript is covered by both § 1221(a)(3) and § 1221(b)(3). *See supra* note 20.

³⁵ I.R.C. § 170(c)(1)(A).

³⁶ *Id.*

was intended to the treatment of charitable contributions of self-created musical works.³⁷

4. Legislative Proposals

Since the enactment of current § 170(e), many proposals have been made to restore the pre-1969 tax treatment of contributions of creative works. In 1983, the National Heritage Resources Act³⁸ would have allowed the creator of a “literary, musical, or artistic composition, any letter or memorandum, or similar property”³⁹ a fair market value deduction for contributions of that creative work to charity, provided that the work had been created at least a year before the donation, and that the charitable donee would put the work to a related use.⁴⁰ Similar bills have been proposed over the years.⁴¹

The most recent bill is the Artist-Museum Partnership Act of 2013.⁴² In this proposal, a “qualified artistic charitable contribution” is defined as “any literary, musical, artistic, or scholarly composition, or similar property, or the copyright thereon (or both), but only if [s]uch property was created by the personal efforts of the taxpayer making such contribution no earlier than 18 months prior to such contribution.”⁴³ A qualified artistic

³⁷ H.R. REP. NO. 109-304, at 56 (2005). The provision was made by legislative staff. Stevens et al., *supra* note 16.

³⁸ S. 427, 98th Cong. (1983); *see also* Larry D. McBennett et al., *Art Update: Tax Deductions for Self-Created Art*, 30 FED. B. NEWS & J. 342, 342 (1983).

³⁹ National Heritage Resources Act of 1983, S. 427, 98th Cong. § 2 (1983).

⁴⁰ *Id.*

⁴¹ In the 1983 proposal, the work had to have been created at least a year before the donation. *Id.* In the Art and Collectibles Capital Gains Tax Treatment Parity Act, S. 374, 110th Cong. (2009), however, the art could be donated “within 18 months of its creation.” *See* 155 CONG. REC. S2081 (daily ed. Feb. 10, 2009) (statement of Senator Leahy). However, in the most current proposal, the property must have been created “no earlier than 18 months prior to such contribution.” *See supra* note 39 and accompanying text.

⁴² H.R. 2482, 113th Cong. (2013).

⁴³ *Id.* § 2. Sean Conley points out that the use of the parenthetical “(or both)” in the proposed statute would allow the donor to donate the copyright and other components of the creative work separately, thus leading to some abuses similar to fractional giving. Sean Conley, *Paint a New Picture: The Artist-Museum Partnership Act and the Opening of New Markets for Charitable Giving*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 89 (2009); *see infra* note 94. “Scholarly composition,” which appears in the 2013 proposal, does not appear as such in § 1221(a)(3). Perhaps it is covered by “copyright.”

charitable contribution is deductible at fair market value, but only if there is a qualified appraisal⁴⁴ and a written certification from the donee that the use will be a related use.⁴⁵ In any event, the donor's increased charitable contribution deduction cannot exceed the taxpayer's "artistic adjusted gross income."⁴⁶ Recent estimates suggest that the cost of these bills would range from \$6 million to \$20 million per year.⁴⁷ So far, none of these proposals has been enacted.

III. SALES AND DONATIONS: THEORY AND PRACTICE

In theory, the most important thing about self-created art, music, and literature should be the fact that their value is the result of the taxpayer's own time and effort. As to sales, the gains should be ordinary income. As to donations, deductions should be limited to basis, though it might be relevant to know the nature of the donee, and how the donation would be used. However, in practice, it might also help to know which creative works are tangible and which are intangible, which are sold and which are licensed, which are donated and which are not.

⁴⁴ Conley, *supra* note 43, at 105.

⁴⁵ *Id.*

⁴⁶ *Id.*

"Artistic Adjusted Gross Income" is:

That portion of the adjusted gross income of the taxpayer for the taxable year attributable to

- i) income from the sale or use of property created by the personal efforts of the taxpayer which is of the same type as the donated property, and
- ii) income from teaching, lecturing, performing, or similar activity with respect to property described in clause (i).

Artist-Museum Partnership Act, S. 405, 111th Cong. § 2(a) (2009).

See *Tax Fairness for Artists and Writers: Creating America's Artistic Heritage*, THEATRE COMM. GROUP, http://www.tcg.org/pdfs/advocacy/AMPA_2014.pdf.

⁴⁷ *Tax Fairness for Artists and Writers*, *supra* note 46.

A. Sales

1. Theory

Most income is ordinary income, taxable at ordinary income rates. Compensation for services rendered is, perhaps, the most common example. Capital gains, by contrast, are supposed to be special cases. If a taxpayer purchased corporate stock, held on to it for years, and then sold it at a gain, that gain would normally be capital gain, taxable at favorable capital gains rates. To be, perhaps, simplistic, workers pay tax on ordinary income. Investors pay tax on capital gains.

Pete Picasso, Frank Faulkner, and Bert Beethoven, each create value through their labor. If they sell their works outright, their gain should still be viewed as compensation for their labor. As such, it should be taxed at ordinary income rates. Section 1221(a)(3) achieves this result. Section 1221(b)(3) does not.

2. Practice and Application

a. *Who Sells?*

Visual artists sell. The owners of manuscripts sell. Songwriters sell, sometimes. Mostly, they license. Writers of fiction and poetry, and classical music composers, usually license. Without a sale or exchange, there can be no capital gain tax treatment.⁴⁸ Therefore, only the visual artists, the owners of manuscripts, and sometimes the songwriters enjoy even the possibility of capital gains treatment when they are paid for their output. The rest, who usually license, should be taxed at ordinary income rates.

Generally speaking, the creators of tangible property, such as paintings, sculpture, and manuscripts, are more likely to sell. The creators of intangible property, such as literary and musical compositions, are more likely to license. Tangible property is more easily marketable to end users. Intangible property, by contrast, is not, though it might be marketable to

⁴⁸ Once § 1221(a)(3) was enacted, denying capital asset status to self-created artistic, literary, or musical compositions, it made no tax difference whether they were sold by their creators, or licensed. Therefore, one would not expect to see any post-1950 case law on the difference between sales and licenses of self-created art, literature, and music.

intermediaries such as publishing houses. As such, intangible property is more easily licensed.

Of course, visual artists sell. People want to own paintings and sculptures because there is something special about being face to face with an original work of art. To enjoy this experience in one's own home is even better. Reproductions, no matter how well done, are simply not the same. The *Mona Lisa* draws huge crowds at the Louvre.⁴⁹ Copies of the *Mona Lisa*, whether framed on the wall, or printed on coffee cups or tee shirts, do not do so well.⁵⁰

Manuscripts are like visual art. There is nothing quite like the original. The Charters of Freedom—the Declaration of Independence, the Constitution, and the Bill of Rights—are popular exhibits at the National Archives in Washington.⁵¹ I own a copy of the Constitution, but so far no one wants to see it. Whether the manuscript is an historical document, celebrity memorabilia, or the original copy of a famous work of literature or music, people want to own it.⁵² Therefore, the owners of manuscripts can easily sell them outright.

Creators of intangible literature and music are more likely to license. They certainly do not sell the literary or musical works outright to the

⁴⁹ For a photo of the crowds viewing the *Mona Lisa* at the Louvre, see *Musee du Louvre Photo: The Mona Lisa Draws a Crowd*, TRIPADVISOR (Oct. 2011), <http://www.tripadvisor.com/LocationPhotoDirectLink-g187147-d188757-i36007902-Musee-de-Louvre-Ile-de-France.html>. One wonders how anyone could appreciate a work of art in such a mob scene.

⁵⁰ *But see* Ciaran Giles, *Mona Lisa Copy Draws Crowds at Spain's Prado*, WASH. TIMES (Feb. 21, 2012), <http://www.washingtontimes.com/news/2012/feb/21/mona-lisa-copy-draws-crowds-at-spains-prado/?page=all>. Apparently, the copy in question was painted by one of Da Vinci's students, at more or less the same time that the original painting was created.

⁵¹ *The Rotunda for the Charters of Freedom Reopens at the National Archives*, PROLOGUE, Winter 2003, available at <http://www.archives.gov/publications/prologue/2003/winter/rededication.html>.

⁵² Manuscripts of literature and music are important in at least two ways. First, the original manuscript forecloses all debate about precisely what the writer or composer wrote. Second, multiple drafts, or manuscripts with marks of revision by the writer or composer, can give scholars crucial insights into the creative process. See DANA GIOIA, NAT'L ENDOWMENT FOR THE ARTS, REPORT ON THE TAX TREATMENT OF ARTISTS' DEDUCTIONS (2007), for a further description of the value of manuscripts to scholars. As to the general marketability of memorabilia, see Joel S. Newman, *Baseball Autographs*, 116 TAX NOTES 1078 (2007), on athletes and others who cashed in on the value of sports autographs without reporting the taxable income.

general public. A lover of literature or music does not need to own the copyright to a novel, poem, or symphony in order to enjoy it. One can appreciate a novel just as much whether one owns the copyright, owns a hardcover copy, or merely borrows it from the library. There is no retail market for end users of copyrights in literature and music.⁵³

Writers of literature generally license.⁵⁴ Poets license.⁵⁵ Composers of classical music license.⁵⁶ Popular songwriters, however, are in a different category.

⁵³ The creators of literary or musical compositions could, however, sell their creations outright to publishing companies. A publisher might well have an interest in the greater control that comes with full ownership. Especially in the modern age, a publisher might well want the copyright, so that it could deal with electronic publishing, and, in the international market, translations of literary works.

⁵⁴ Paul Aiken, Executive Director of the Authors Guild, said that authors “. . . might sell North American English text rights or, for a great advance, the world rights. But they rarely sell all rights.” Pender, *supra* note 17. Aiken planned to discuss the issue of whether the songwriters’ tax break should be extended to authors, but there is no evidence that he ever did. In the Authors Guild essay, “Improving Your Book Contract: Negotiation Tips for Nine Typical Clauses,” the Guild warns, “Although it’s necessary and appropriate to grant some exclusive rights—e.g. the right to print, publish and sell print-book editions—don’t assign or transfer your copyright and use discretion when granting rights in languages other than English . . .” *Improving Your Book Contract*, THE AUTHORS GUILD, <http://www.authorsguild.org/services/legal-services/improving-your-book-contract> (last visited Oct. 14, 2013). Writers of literature should be distinguished from other prose writers. For example, my law school casebook publishing contract explicitly states that I am transferring the copyright to the publisher. Theatrical and television writers are also in a different category. The Writers Guild of America 2011 Theatrical and Television Basic Agreement is an employment contract. See UDIA OLSEN ET AL., *THE WRITER’S HANDBOOK* (1936). Thus, it would not appear that the writers who sign those contracts are selling anything. Some successful authors, including Tom Clancy and Toni Morrison, have created and sold investment vehicles that are backed by royalty payments from their published works. However, what they are selling is bonds, not literature. Jennifer Sylva, *Bowie Bonds Sold for Far More Than a Song: The Securitization of Intellectual Property as a Super-Charged Vehicle for High Technology Financing*, 15 SANTA CLARA COMPUTER & HIGH TECH. L.J. 195 (1999); see *infra* notes 57–59 and accompanying text.

⁵⁵ Publishers of poetry do not require that the poet transfer the copyright. Interview with Candide Jones, Wake Forest University Press (Nov. 1, 2013). WFU Press specializes in Irish poetry. Ms. Jones informs me that larger poetry publishers, including Random House, also typically allow the poet to keep the copyright.

⁵⁶ Interview with Dan Locklair, Professor and Composer in Residence, Wake Forest University (Aug. 28, 2013); *Commissioning Music: A Basic Guide*, NEW MUSIC (2009), <http://www.newmusicusa.org/about/resources>; *General Royalty Information*, BROADCAST MUSIC, INC., http://www.bmi.com/creators/royalty/general_information (last visited Oct. 14, 2013); *How We Pay Royalties*, BROADCAST MUSIC, INC., http://www.bmi.com/creators/royalty/general_information/detail (last visited Oct. 14, 2013); Marc Ostrow, *Composing for Orchestras and Other Ensembles, Part 1: Getting the Gig*, BROADCAST MUSIC, INC. (July 29, 2010), http://www.bmi.com/news/entry/composing_for_orchestra_and_other_ensembles_part_1.

The most common contract signed between a songwriter and a publisher is the individual song contract. These contracts provide for the sale of the musical composition, including the copyright, to the publisher.⁵⁷ Songwriters and publishers often sign co-publishing agreements. In such agreements, the songwriter typically transfers a percentage of the copyright interest to the publisher. However, there are also restrictions and exclusions, which might make sale characterization problematic.⁵⁸ Also, songwriters working in television and theater are often covered by the “works made for hire” doctrine, in which case the employer owns the copyright.⁵⁹ Finally, some songwriters enter into administration agreements, in which the publisher administers the marketing of the music in exchange for a fee. Such administration agreements are clearly not sales.⁶⁰

A more recent device is the Bowie Bond, first popularized by singer David Bowie. In this arrangement, bonds are issued, backed by music royalties. Note that there is no sale of music; instead, the money is generated by the issuance of bonds. Therefore, § 1221(a)(3) and § 1221(b)(3) would have no application.⁶¹ Others, including James Brown, have also monetized their catalogs of songs, presumably without selling them.⁶² More famously, Michael Jackson purchased the catalog of Beatles

⁵⁷ JEFFREY BRABEC & TODD BRABEC, *MUSIC, MONEY, AND SUCCESS: THE INSIDER’S GUIDE TO THE MUSIC INDUSTRY* 14 (1994) [hereinafter BRABEC & BRABEC, *MUSIC, MONEY, AND SUCCESS*]; LIZ HENGBER, *THE DO’S & DONT’S OF MUSIC ROW* (2d ed. 2012); M. WILLIAM KRASILOVSKY ET AL., *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* (9th ed. 2003); Sylva, *supra* note 54, at 202; Todd Brabec & Jeff Brabec, *Songwriter and Music Publisher Agreements: A Relationship Necessary for Success*, AM. SOC’Y OF COMPOSERS, AUTHORS & PUBLISHERS (2008), <http://www.ascap.com/music-career/articles-advice/industryNotes/200809.aspx> [hereinafter Brabec & Brabec, *Songwriter and Music Publisher Agreements*]; Jeff Lunden, *Collecting Money for Songwriters, A 100-Year Tug of War*, NPR.ORG (Feb. 13, 2014, 2:00 AM), <http://www.npr.org/2014/02/13/275920416/collecting-money-for-songwriters-a-100-year-tug-of-war/>; *Popular Songwriters Contract*, SONGWRITERS GUILD OF AMERICA, <http://www.songwritersguild.com/sandboxsga2010/contract.pdf>.

⁵⁸ BRABEC & BRABEC, *MUSIC, MONEY, AND SUCCESS*, *supra* note 57, at 57.

⁵⁹ *Id.* at 352.

⁶⁰ *Id.* at 10; Brabec & Brabec, *Songwriter and Music Publisher Agreements*, *supra* note 57.

⁶¹ In the original Bowie bond transaction, Mr. Bowie retained the copyright to the music. Sylva, *supra* note 54, at 204.

⁶² James Damron & Joseph Labbadia, *DCR Comments on Music Royalty Securitizations*, DUFF & PHELPS CREDIT RATING CO. (Sept. 1999), <http://people.stern.nyu.edu/igiddy/cases/music.pdf>.

songs. However, he did so by purchasing the corporate entity which owned the catalog. Again, it was the corporation, not the music, which was sold.⁶³

Even those songwriters who routinely license their work might ultimately sell their entire catalog of songs. Such a sale may occur when the songwriter faces a major financial need, such as buying a house, paying college tuition for a child, or retirement.⁶⁴ It is these sales which, but for § 1221(b)(3), would have generated substantial taxes at ordinary income rates.⁶⁵ At any rate, it is easy to see why popular songwriters were more concerned about the tax treatment of sales than were poets, writers, and classical music composers.

b. Are Songwriters Different?

Why should songwriters be taxed more favorably? The following arguments have been offered to justify their differential tax treatment:

- They are poor.⁶⁶
- The government sets their royalty rates. Therefore, they have very little room to negotiate their compensation.⁶⁷

⁶³ Kevin Howlett, *How Michael Jackson Acquired the Beatles Catalog: A Short Outline*, EXAMINER.COM (June 27, 2009, 8:15 PM), <http://www.examiner.com/article/how-michael-jackson-acquired-the-beatles-catalog-a-short-outline>. One would think that these relatively sophisticated catalog monetization vehicles would be available only to the few, most highly successful musicians and composers. As to the Beatles transaction, I assume that the sales proceeds were foreign source income, and therefore not taxable by the United States.

⁶⁴ Pender, *supra* note 17.

⁶⁵ Liz Hengber, who wrote two hits sung by Reba McEntire, sold a catalog of 200 songs in 2000, and paid more than \$100,000 in taxes. Debi Cochran, who wrote an Emmy-winning song, and the number one hit “My Kind of Girl,” sung by Collin Raye, refused to sell her catalog of 300 songs because the taxes would be too high. Thus, as of 2005, she continued to sell handbags at Dillard’s Department Store. Mullins, *supra* note 15.

⁶⁶ Nguyen & Maine, *supra* note 11, at 834; Mullins, *supra* note 15; Pender, *supra* note 17.

⁶⁷ 17 U.S.C. § 101 (2012); *How Songwriters Get Paid*, NASHVILLE SONGWRITERS ASSOC. INT’L, <http://www.nashvillesongwriters.com/how-songwriters-get-paid>. (last visited Mar. 16, 2015). This argument was made to me by Denise Stevens, who drafted I.R.C. § 1221(b)(3). E-mail from Denise Stevens, Partner, Loeb & Loeb LLP, to Joel Newman, Professor of Law, Wake Forest Univ. Sch. of Law (Aug. 29, 2013) (on file with author); see Anastasio, *supra* note 16. Bart Herbison, executive director of NSAI, also makes this argument. Naujeck, *supra* note 15.

- Typically, they enter into joint ventures with publishers. When song catalogs are sold, the songwriter receives a portion of the proceeds and the co-publisher receives the rest.⁶⁸ It is anomalous that the songwriter will be taxed at ordinary income rates on her portion of the proceeds, while the co-publisher enjoys favorable capital gains rates on its portion.

These points will be addressed in order.

i. Are Songwriters Poor?

As a group, they are not rich. However, neither are painters, novelists, poets, nor, for that matter, classical composers. In fact, the average annual incomes for artists, writers, and musical composers are all between \$50,000 and \$60,000.⁶⁹ The median household income for the United States in 2012

⁶⁸ Anastasio, *supra* note 16; Naujeck, *supra* note 15; Stevens et al., *supra* note 16; *Songwriters Capital Gains Equity Act Passes Congress*, NASHVILLE SONGWRITERS ASSOC. INT'L (May 11, 2006), <https://web.archive.org/web/20060831093723/http://www.nashvillesongwriters.com/news.ez?viewStory=715>; see also Mock & Tolin, *supra* note 11, at 72; Cliff Goldmacher, *The Pros & Cons of Signing a Publishing Deal*, BROADCAST MUSIC, INC. (May 25, 2010), http://www.bmi.com/news/entry/the_pros_cons_of_signing_a_publishing_deal; Pender, *supra* note 17.

⁶⁹ The average annual income of visual artists is \$53,400. Aurelio Locsin, *Demand Media, How Much Money Do Visual Artists Make in a Year?*, HOUS. CHRON., <http://work.chron.com/much-money-visual-artists-make-year-10538.html> (last visited Mar. 16, 2015). The Bureau of Labor Statistics puts the figure at \$54,000. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES: MAY 2014, 27-1012: CRAFT ARTISTS (Mar. 25, 2015), <http://www.bls.gov/oes/current/oes271012.htm>. See generally ART WORKS, NAT'L ENDOWMENT FOR THE ARTS, ARTISTS AND ARTS WORKERS IN THE UNITED STATES, FINDINGS FROM THE AMERICAN COMMUNITY SURVEY (2005–2009) AND THE QUARTERLY CENSUS OF EMPLOYMENT AND WAGES (Oct. 2011). The average annual income of writers and authors was \$55,940 in 2012. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WRITERS AND AUTHORS, OCCUPATIONAL OUTLOOK HANDBOOK (Jan. 8, 2014), <http://www.bls.gov/ooh/media-and-communications/writers-and-authors.htm>. For poets, the figure is \$56,000. *Average Poet Salaries*, SIMPLY HIRED (Feb. 9, 2015), <http://www.simplyhired.com/salaries-k-poet-jobs.html>. The average annual income of music directors and composers in 2012 was \$53,420. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES MAY 2013: 27-2041: MUSIC DIRECTORS AND COMPOSERS (Apr. 1, 2014), <http://www.bls.gov/oes/current/oes272041.htm>. However, the Nashville Songwriters Association International, the organization that was most responsible for the Songwriters Capital Gains Equity Act, claimed that the average annual income of its members from songwriting activity was \$4,700 in 2005. Mullins, *supra* note 15. Perhaps the government figures for music directors and composers were for people who actually make their living with their music, while the NSAI figure included those who made their living doing something else, and wrote songs on the side. Another reason why songwriters do not make very much money is music piracy. See Stephen Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, IPI (Aug. 21, 2007), http://ipi.org/ipi_issues/detail/the-true-cost-of-sound-recording-piracy-to-the-us-economy. However, things may

was \$51,371.⁷⁰ Accordingly, none of these groups is doing that badly. At any rate, if their income is low, then they should pay tax at lower rates in a progressive rate structure. Low income does not justify a differential characterization of that income.

ii. Are Songwriters in an Inferior Negotiating Position?

The royalty rates of songwriters are not negotiable.⁷¹ Songwriters are indeed not on a level playing field when dealing with their industry counterparts. However, when the songwriters receive royalties, they are clearly taxable as ordinary income. Capital gains are not even possible. Non-negotiable royalties are still royalties.

Arguably, if one restricts the rate of return on an asset, then one lowers the asset's value. Therefore, if governmental restrictions lower the royalty rates on songs, then the market value of the songs is lowered as well. But how does that justify turning these already lowered profits from ordinary income to capital gain?

iii. Are Songwriters Treated Unfairly Vis-à-Vis Publishers?

It has always been true that the very same asset can be a capital asset in the hands of one taxpayer but an ordinary income asset in the hands of another. My automobile is a capital asset in my hands, but as inventory it was an ordinary income asset in the hands of the car dealer. Similarly, a painting in the painter's hands is, and should be, an ordinary income asset. Once the painter sells that painting to me, however, it is an investment, and very likely a capital asset.

It is true that before the statutory change, in the event of an outright sale the songwriters paid tax on ordinary income and the co-publishers

be improving. Ben Sisario, *Collectors of Royalties for Music Publishers May See Better Results*, N.Y. TIMES, Sept. 23, 2013, at B4.

⁷⁰ AMANDA NOSS, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, ACSBR/12-02, HOUSEHOLD INCOME: 2012 AMERICAN COMMUNITY SURVEY BRIEFS, at tbl.1 (2013), <http://www.census.gov/prod/2013pubs/acsbr12-02.pdf>.

⁷¹ This argument was made to me by Denise Stevens, as the only argument needed to justify the statute. E-mail from Denise Stevens, *supra* note 67.

likely paid tax at capital gains rates. However, the song catalogs were created by the songwriters, not the publishers. The songwriters should be taxed at ordinary income rates. The co-publishers' gains are much more akin to investment gains and should be taxed accordingly.⁷²

Ultimately, none of the arguments that purport to distinguish songwriters from other taxpayers would justify a differential tax treatment. Even when songwriters sell, they are still selling the value created by their own labors. As such, they should be taxed on ordinary income.

3. Conclusion

Outright sales of art, literature and music by the artists, writers and composers who created them should be taxable as ordinary income. Original manuscripts of the literature and music should be treated the same way. Section 1221(b)(3) should be repealed.⁷³

B. Donations

1. Theory

Contributions of services are not deductible.⁷⁴ The value of works of art, literature, and music stems from the time and effort of their creators.⁷⁵ Therefore, when those creators donate those works to charity, they are essentially donating their services. Accordingly, there should be no deduction. However, some have argued that these items should be deductible at fair market value when donated for a related use. They argue that the income tax treatment of such deductions needs to be conformed to

⁷² In addition, after 35 years, the songwriter can reclaim sole ownership. See Joel Rose, *Taking Back "Funkytown": Songwriters Prepare for a Custody Battle*, NPR (Sept. 12, 2013, 5:01 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=221750447>.

⁷³ Section 1221(b)(3) is also criticized in Calvin Johnson, *Cleaning Compensation for Services out of Capital Gain*, 126 TAX NOTES 233 (2010), and Edward Lee, *Copyright, Death and Taxes*, 47 WAKE FOREST L. REV. 1, 18–19 (2012).

⁷⁴ See *supra* note 24 and accompanying text.

⁷⁵ As to art, the 1969 House Report commented, "The large amount of appreciation in many cases arises from the fact that the work of art is a product of the donor's own efforts (as are collections of papers in many cases)." H.R. REP. NO. 91-413, at 1701 (1969).

the estate tax treatment. Moreover, they argue that the tax laws must be used to encourage such donations in order to maximize the common good.

a. General

Charitable donations should be deductible when the donated cash or assets have already been taken into account, and presumably taxed.⁷⁶ Assume that a taxpayer earns cash salary, and pays income tax. That taxpayer then donates some of that cash to a qualified charity. Of course that taxpayer deserves a charitable contribution deduction on that previously taxed salary.

Services performed by a taxpayer for free for the benefit of a charitable organization are different. They were not previously taxed. Moreover, valuing those contributed services would be difficult. Such contributed services should not be deductible.

Consider two scenarios. In the first, taxpayer performs services for a charitable organization and charges the organization \$100. The charity duly pays. Then taxpayer contributes that \$100 to the charity. In the second scenario, taxpayer provides the exact same services to the charity for free.

In the first scenario, taxpayer should have \$100 of gross taxable income that is wiped out by a \$100 charitable contribution deduction. The end result is no net income and no net deduction. The second situation should be no different—no net income and no net deduction.⁷⁷

In the case of art, literature or music, when the item is contributed by the creator, the value was created by the contributor's labor. That value, at the time of the creation, is as yet untaxed. If the value of the (untaxed) labor should not be deductible, then the value of the art, literature or music

⁷⁶ William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 371–72 (1972).

⁷⁷ Note that, by the logic of the two principles propounded—1) no charitable deduction unless the contributed items have already been taken into account by the tax system; and 2) no difference between receiving cash for the item and then contributing the cash, vs. simply contributing the item for free—there should be no deduction whatsoever for the appreciation, when one contributes (unrealized and untaxed) appreciated property.

should be nondeductible as well.⁷⁸ This result is achieved by deeming the self-created assets to be ordinary income assets. The charitable contribution deductions, therefore, are limited to basis, which is usually negligible.

b. Relation to the Estate Tax

Charitable donations during the lifetime of the donor are deductible against the donor's income.⁷⁹ Charitable bequests are deductible against the decedent's taxable estate. The amount of the deduction, however, is different. The income tax deduction for self-created art, literature or music is limited to basis, but the estate tax deduction is measured by the fair market value of the property at the time of death.⁸⁰ Some have argued that in order to be consistent, both the income tax and the estate tax should use fair market value.⁸¹

c. Related Use

Suppose that a wealthy investor wants to make a donation to an art museum. She owns a highly appreciated painting worth \$500,000 that she knows the museum would love to display in its collection. Alternatively, she could donate \$500,000 in cash to the museum. Should the tax law push her one way or the other? It does.

If the sale of the asset in question would have generated long-term capital gains, then a donation will be deductible at the asset's fair market value, provided the donee puts the donated property to a use which is

⁷⁸ See H.R. REP. NO. 91-413, at 1967; Conley, *supra* note 43, at 92-93; Drennan, *supra* note 1, at 598.

⁷⁹ I.R.C. § 170.

⁸⁰ *Id.* § 2031.

⁸¹ Senator Leahy cited this disparity in treatment when he introduced the Artist-Museum Partnership Act in the Senate. Leahy, *supra* note 41; see also *Tax Fairness for Artists and Writers: Creating America's Artistic Heritage*, *supra* note 46; Douglas Bell, Note, *Changing IRC § 170(e)(1)(A) for Art's Sake*, 37 CASE W. RES. L. REV. 536, 540 (1986).

related to the purpose or function constituting the basis for its charitable exemption (“related use”).⁸² The Regulations provide:

For example, if a painting contributed to an educational institution is used by that organization for educational purposes by being placed in its library for display and study by art students, the use is not an unrelated use; but if the painting is sold and the proceeds are used by organization for educational purposes, the use of the property is an unrelated use.⁸³

If the property is donated for a related use, the investor gets the full, fair market value deduction and avoids paying any tax on the gain.⁸⁴ Note that the creators of art, literature, and music cannot take advantage of these provisions, because their creative output in their hands is not capital gain property in the first place.

Similarly, if a corporation donates certain inventory and other property⁸⁵ to certain donees; if “the use of the property by the donee is related to the purpose or function constituting the basis for its exemption;”⁸⁶ and if the property is to be used “solely for the care of the ill, the needs, or infants,” then the amount of the charitable contribution deduction will be increased.⁸⁷ When § 170(e)(3) was added in 1976, Congress was thinking of

⁸² Section 170(e)(1)(B)(i)(I) provides for a reduction in the amount of the contribution deduction if the use by the donee was unrelated. Therefore, if the use was related, then there is no reduction, and the full fair market value is deductible. However, in such an instance, unless an election was made, such charitable contributions would be limited to a special cap of 30% of the charitable contribution base. I.R.C. § 170(b)(1)(C). In the negotiation of the 1969 Tax Reform Act, the House would have preferred a limitation of the deduction to basis in all cases. The related use concept was the result of a compromise reflected in the Conference Committee. Conley, *supra* note 43.

⁸³ Treas. Reg. § 1.170A-4(b)(3)(i) (1994). Many have accepted the related use concept. Colinvaux, *supra* note 23, at 36, points out that charitable donees would always prefer cash to in kind donations, since cash can be used in infinite ways. Except, he points out, when the in kind property can be put to a related use. *Id.* Halperin, *supra* note 30, at 36, proposes constructive realization of gain when appreciated assets are contributed to charity, but would recognize a possible exception for “unique property important to the mission of the donee.”

⁸⁴ See *supra* notes 25–30 and accompanying text.

⁸⁵ Specifically, the property must be described in § 1221(a)(1) or § 1221(a)(2).

⁸⁶ I.R.C. § 170(e)(3)(A)(i); see also H.R. 3949, 113th Cong. (2014); H.R. 4719, 113th Cong. (2014).

⁸⁷

The amount of the reduction under paragraph (1)(A) for any qualified contribution (as defined in subparagraph (A)) shall be no greater than the sum of—

“those charitable organizations that provide food, clothing, medical equipment, and supplies, etc. to the needy and disaster victims.”⁸⁸

Clearly Congress felt that in these two areas, some related use contributions should be encouraged.⁸⁹ Should the related use concept be expanded? Should some or all creators of art, literature, or music be granted more favorable charitable contribution deductions, provided that they donate their output for a related use?⁹⁰ The supporters of the Artist-Museum Partnership Acts think so.⁹¹

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- (i) One-half of the amount computed under paragraph (1)(A) (computed without regard to this paragraph), and
 - (ii) The amount (if any) by which the charitable contribution deduction under this section for any qualified contribution (computed taking into account the amount determined in clause (i), but without regard to this clause), exceeds twice the basis of such property.

I.R.C. § 170(e)(3)(B).

⁸⁸ STAFF OF JOINT COMM. ON TAXATION, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 672 (Comm. Print 1976).

⁸⁹ See Colinvaux, *supra* note 23, at 273. There have been some problems with the related use provisions. See Speiller, *supra* note 29, at 233 (explaining the ambiguity of related use). Colinvaux, *supra* note 23, at 313–14, points out that charitable organizations have incentives to claim that donated property fits their related use, even if it does not. It allows them to report an increased volume of contributions, and a lower percentage of costs as a function of the contributed amount. How do we know that the donee will in fact display the painting, or otherwise keep the related use promise? Moreover, how long must the related use go on? Congress made a partial fix in 2006, by providing for a recapture of the deduction if related use property is sold by the donee within three years of the donation. I.R.C. § 170(e)(7). Since all related use contributions are non-cash contributions, valuation problems are pervasive. See *supra* note 27 and accompanying text; see also *Lucky Stores, Inc. v. Comm’r*, 105 T.C. 420 (1995) (on the issue of the value of five-day-old bread). In light of these problems, the case for related use provisions must be especially strong.

⁹⁰ Roger Colinvaux, in searching for “theoretical support for a subsidy for property contributions,” posits “property contributions are encouraged, notwithstanding the negative effects on cash gifts, because it is specifically desirable that donee organizations receive property.” Colinvaux, *supra* note 23, at 270. Perhaps, following Professor Colinvaux, my question could be restated. When is it desirable that donee organizations receive property rather than cash? Is it when those donee organizations put the donations to a related use? Is this always true?

⁹¹ See *supra* notes 38–43 and accompanying text.

2. Practice and Application

a. Who Donates?

Most of the art on display in art museums was donated.⁹² Some of it was donated by the artists who created it. Those artists' donations are highly tax-sensitive. In the three years before the 1969 tax change, 97 artists donated 321 works of art to the Museum of Modern Art. In the three years after 1969, only fifteen artists donated 28 works of art.⁹³ Similarly, the Metropolitan Museum of Art received 321 pieces from 97 artists in the three years before 1969, but only 28 pieces from fifteen artists in the three years after.⁹⁴

Artists donate for philanthropic reasons, like the rest of us. However, it is also in their self-interest to donate. Displaying one's work in a major museum is a wonderful way to promote one's self as an artist. Accordingly, museums are careful about which art they accept. In fact, they typically reject 90% of offered donations.⁹⁵ If the donor is an established artist with a

⁹² In 1985, it was estimated that 80% of the art in art museums was donated. Bell, *supra* note 81, at 547.

⁹³ *Id.* at 548. These figures represent paintings, sculptures, drawings and prints. If one considers only paintings and sculptures, MOMA received 52 of such donations between 1967 and 1969, but only one such donation between 1972 and 1975. McBennett et al., *supra* note 38, at 347. Similarly, soon after the Tax Reform Act of 1969, representatives of the Red Cross and CARE testified before Congress that inventory contributions of food, medicine and clothing had declined precipitously. Colinvau, *supra* note 23, at 274–75.

⁹⁴ Conley, *supra* note 43, at 108. The 1969 tax change affects less traditional art forms as well. Consider Charles Carillo, a Santero—a “saint-maker.” He executed a large carving, and donated it to his church in Santa Fe, New Mexico. Carillo and the church agreed that the carving was worth \$14,000. On his income tax return, Mr. Carillo claimed a deduction, but the IRS denied it. The matter was ultimately settled when Mr. Carillo made an additional payment of \$7,000 to the IRS. GIOIA, *supra* note 52, at 2. Similarly, Stephen Powell wrote that he would have liked to exhibit his glasswork at art museums in Birmingham and Louisville. His pieces retailed between \$22,000 and \$35,000. Unfortunately, neither museum could afford to purchase his work, and presumably, due to the tax laws, Mr. Powell could not afford to donate it. *Id.*

⁹⁵ *Tax Fairness for Artists and Writers: Creating America's Artistic Heritage*, *supra* note 46. Apparently, Andy Warhol attempted to contribute an early work to the Museum of Modern Art. MOMA promptly rejected it. Warhol still proudly keeps the rejection letter. One wonders what that letter is worth today. Interview with John Curley, Professor of Art, Wake Forest Univ. (Sept. 13, 2013); David Ng, *MOMA Owns up to Warhol Rejection Letter from 1956*, L.A. TIMES (Oct. 29, 2009, 2:42 PM), <http://latimesblogs.latimes.com/culturemonster/2009/10/moma-owns-up-to-warhol-rejection-letter-from-1956>.

national or international reputation, art museums will be delighted to accept their contributions. However, if the donor is relatively new to the art world, museums might be more reluctant. It may often be the case that the artist benefits from the contribution far more than the museum.⁹⁶

Owners of manuscripts do donate them to libraries and educational institutions. These donations are also highly tax sensitive. Before 1969, Igor Stravinsky often donated the manuscripts of his musical compositions to the Library of Congress. He intended to do the same with the manuscript of his masterpiece, “The Rite of Spring.” However, when he learned that the donation would be nondeductible, he sold it instead to a private foundation in Switzerland.⁹⁷ Elliot Carter, who had donated his scores to the Library of Congress before 1969, stopped doing so after the new tax legislation. Similarly, manuscripts from Kurt Vonnegut, Garson Kanin, Vladimir Nabokov, Lillian Gish, and Gwendolyn Brooks, which were supposed to be donated to the Library of Congress, were ultimately withdrawn and sold after the Tax Reform Act of 1969. In the seven years before the 1969 Tax Reform Act, the Library of Congress received 1,200 manuscripts from living musical composers. In the 11 years after TRA 1969, it received 30.⁹⁸

As described above, composers and writers occasionally donate the original manuscripts of their works. However, they do not donate the works

⁹⁶ Interview with Professor Gordon McCray, Associate Dean, Wake Forest Univ. Sch. of Bus. (Sept. 6, 2013). Note that, while current law discourages artists from contributing their works to museums, it encourages collectors to donate those very same works. Perhaps this disparity could be justified in part because the artist’s donation might be self-interested, while the collector’s donation would not. See William Drennan, *Charitable Donations of Intellectual Property: The Case for Retaining the Fair Market Value Tax Deduction*, 2004 UTAH L. REV. 1045 (commenting on this disparity).

⁹⁷ McBennett et al., *supra* note 38; Leahy, *supra* note 41. Popular songwriters can also donate their manuscripts and memorabilia to charitable organizations. Jeff Barry, the composer of “Da Doo Ron Ron” and “Be My Baby,” contributed the Jeff Barry Collection, including photographs and other memorabilia, to the Rock and Roll Hall of Fame. Jeff Barry, Library & Archives, *Jeff Barry Collection*, ROCK & ROLL HALL OF FAME, <http://catalog.rockhall.com/catalog/ARC-0209> (last visited Feb. 15, 2015). The Morgan Library owns an autographed manuscript of the Gershwins’ Tweedledee March, from Let Them Eat Cake. It is unclear, however, how the manuscript was acquired. George Gershwin, *Let ‘em eat cake. Tweedledee for President. Vocal Score*, THE MORGAN LIBRARY & MUSEUM, <http://www.themorgan.org/music/manuscript/114514> (last visited Feb. 15, 2015).

⁹⁸ Leahy, *supra* note 41; Conley, *supra* note 43, at 108–09; McBennett et al., *supra* note 38; GIOIA, *supra* note 52.

themselves.⁹⁹ They may agree to allow charitable organizations to use their literary or musical compositions, but such “loans” would not be donations giving rise to charitable contribution deductions.¹⁰⁰ Accordingly, in light of current practice,¹⁰¹ the only ones who should care about a tax break for donations of self-created art, literature, or music would be the visual artists and the owners of manuscripts.

b. Should the Income Tax Treatment Match the Estate Tax Treatment?

Recall the performer who charges a charitable organization \$100 for her performance, and then turns around and donates that \$100 to the charity. The income tax result is \$100 of income, and then a \$100 deduction. At the end of the day, there is no net income, no net deduction.¹⁰²

The estate tax is similar. Charitable in-kind bequests are deductible against the estate tax only to the extent that the value of the donated item was included in the gross taxable estate in the first place.¹⁰³ Imagine that an artist’s estate includes a painting worth one million dollars. That painting will be included in the gross taxable estate, valued at one million dollars.¹⁰⁴ Then, if it is donated to charity, there will be estate tax deduction, again

⁹⁹ E-mail from Donna Leon, Mystery Author, to Joel Newman, Professor of Law, Wake Forest Univ. Sch. of Law (Dec. 19, 2013) (on file with author). *But see* Mason v. Innes, [1967] 3 W.L.R. 816 (U.K.) (a famous British case in which the novelist Hammond Innes gifted a novel to his parents).

¹⁰⁰ Treas. Reg. § 1.170A-7(d), ex. 1 (2008). Only when the artist’s entire rights to a painting, or an undivided fractional interest therein, are donated, does the donor avoid the tax on gain if the painting had been sold. Recall that the avoidance of that tax was a major aspect of the congressional concern, which led to the enactment of § 170(e) in the first place. These issues do not arise if the artwork is loaned. *Id.* For many years, donations of fractional interest in art were an effective tax-planning device. Congress reacted to these devices with the fractional interest rules, which effectively eliminate any deduction for loans. Conley, *supra* note 43; *see* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780.

¹⁰¹ Perhaps a change in tax law would lead to a change in practice, which might or might not be desirable.

¹⁰² *See supra* note 73 and accompanying text.

¹⁰³ I.R.C. § 2055(d).

¹⁰⁴ *Id.* § 2032; Treas. Reg. § 20.0-2 (1992).

valued at one million dollars.¹⁰⁵ One million dollars in, one million dollars out. The estate tax charitable deduction of the painting must be valued as of the date of death, because the painting was includible in the estate at that very same value. This fact does not suggest a disparity in treatment between the estate tax and the income tax.

Some have argued that the disparity between the income tax laws and the estate tax laws will lead artists, writers, and composers to hold on to their work until death. As shown above, it will not. Moreover, there are other factors, some tax and some nontax, which really do encourage such creators to hold on to their work. If there is serious concern that these people hold on to their creations for too long a time, then these other factors should be addressed first.

The tax factor is § 1014, which allows a stepped-up basis for assets received from decedents. If an artist contemplated selling the artwork, a sale during her lifetime would subject her to tax at ordinary income rates on the appreciation. However, if she held on to the artwork until death, then her beneficiaries would take a basis in the artwork equal to its fair market value on the date of the artist's death. Therefore, no one would pay income tax on the appreciation that took place during the artist's life. It is hard to imagine a greater incentive for hoarding the assets.

The nontax factor, at least for visual artists, is retirement. Most artists, being self-employed, have no retirement plan in the normal sense. Instead, many of them choose to hold back some of their creative work to fund their retirement years. Hopefully, these assets will appreciate over time, and serve as a hedge against inflation. Then, if the artist does not need to liquidate this "retirement fund" creative output during life, it can be passed on to heirs or donated to charity at death.¹⁰⁶

Thus, the claimed disparate treatment by the estate tax versus the income tax does not exist. If there are real concerns about creators holding on to their creations for too long, they would be better addressed in other ways. Perhaps the step-up in basis should be changed, or something should be done to afford creative people a more dependable mode of retirement

¹⁰⁵ I.R.C. § 2055.

¹⁰⁶ McCray, *supra* note 96.

planning. In any event, the claimed estate tax disparity does not justify a fair market value charitable deduction for donations of creative work by their creators.

c. When Would Related Use Make Sense?

All of us are better off when creative works are accessible to the public. However, public facilities need not own the works to make them accessible; they can borrow them instead. Yet, recall that only when an asset is donated to a charitable organization will a deduction be available. Loaning or licensing the work to a charitable organization will not do.¹⁰⁷ Does society always benefit when creative work is donated, not licensed, for a related use?

Assume that an art museum displays a donated painting in its collection, a library makes a donated literary work available to be read by its patrons, a symphony orchestra performs a donated musical composition, and an archive makes donated manuscripts available to the public. Technically, all of these uses are related uses. Which of these uses requires that the charitable organization actually own the creative work?

Everyone benefits if the original copies of great works of art are on public display in a museum. If the artwork is in private hands, the owners might agree to loan it to a museum, or not.¹⁰⁸ Public ownership ensures public benefit.

¹⁰⁷ Treas. Reg. § 1.170A-7(d), ex. 1 (2008); Kate Taylor, *Can Collectors Have Their Art and Lend It, Too?*, NPR (Jan. 18, 2010, 3:00 PM), <http://www.npr.org/templates/story/story.php?storyId=122619567>. In the past, donations of partial interests in property led to some abuses. These abuses were addressed in § 170(f)(3). However, a case might be made for the deductibility of loans of artwork to museums. Perhaps the annual rental value could be capped at a fixed percentage—perhaps 5%—of the appraised value. Surely, there is significant public benefit when great works of art are loaned to museums for public display. Yet, it may well be that, assuming that the donee museum agrees to maintain and insure the loaned artwork, the savings in maintenance and insurance costs might exceed the rental value. If so, there would be no net charitable contribution deduction.

¹⁰⁸ The recent practice of acquiring works of art so that the owner can deface them makes it all the more clear that it is in the public interest to keep great works of art in public hands. Tom Rachman, *Passion, Principle or Both? Deciphering Art Vandalism*, N.Y. TIMES (Oct. 1, 2013), http://www.nytimes.com/2013/10/01/arts/design/art-under-attack-at-tate-britain-explores-motives.html?pagewanted=all&_r=0.

Literature is different. To be sure, lending works of literature to library patrons is precisely a library's exempt function. However, the library does not need to own all rights to a literary work in order to make that work available to its patrons. All the library needs to do is to acquire a physical copy of the book.¹⁰⁹ It can then lend that copy without violating the copyright laws.¹¹⁰ Why would they want to own the copyright?¹¹¹

Music is similar to literature. A symphony orchestra can perform a symphony without owning it. Why should we encourage donations of the musical copyright, when the symphony does not need to own the copyright in order to perform its exempt function?¹¹²

Tangible manuscripts, however, are more like tangible, visual art than they are like intangible literature and music. Admittedly, having the original manuscript of a literary or musical work is not important to the reader or listener. I can enjoy a Mozart concerto just as much, whether the musicians are playing from the original score handwritten by Mozart, or from a score printed last year.¹¹³ And yet, original manuscripts have unique value to

¹⁰⁹ Surely, the cost of one copy of a book is far less than the cost of acquiring the copyright.

¹¹⁰ See 17 U.S.C. § 109(a) (2012) (providing the first sale doctrine).

¹¹¹ Of course, any charitable institution would love to own a valuable asset, such as the copyright to a successful novel. The charity could sell the copyright, and use the proceeds for its exempt purposes. However, sale of the copyright would not be a related use. See Drennan, *supra* note 1, at 612 (providing further analysis of problems of defining related use in the recent Artist-Museum Partnership Act bills). Theoretically, a private individual who owned the copyright to a novel could refuse to allow the public to read it. A library would never refuse to allow public access, since the exempt function of libraries is to allow such access. Therefore, it would theoretically serve the public interest for the copyright to a literary work to be owned by a library, rather than a private individual. However, it seems highly unlikely that a private individual would prohibit such access. Further, if the copyright remained in the hands of the creator, it would not be in the interests of the creator to restrict public access, for such a restriction would hamper the creator's ability to profit from his or her profession. Donations of physical books are different. Apart from those who self-publish, writers typically own some copies of their books, but not many. When I write a law school casebook, the publisher typically sends me 12 complimentary copies. I could donate some of the copies to a library. Presumably, under current law, each physical book is a literary composition within the meaning of § 1221(a)(3), and would thus be deductible only to the extent of my basis, which is zero. Also, if I were to attempt a charitable contribution deduction for donating one of these complimentary casebooks, the IRS would tax me on the original receipt of that casebook. See *Haverly v. United States*, 513 F.2d 224 (7th Cir. 1975).

¹¹² Although it is more difficult to imagine a contribution of the copyright of a popular song to a charitable organization for a related use, the same principles would apply.

¹¹³ Mozart's own violin and viola were recently played in concert in the United States. Allan Kozinn, *Mozart Never Made It to America, but His Violin and Viola Are on the Way*, N.Y. TIMES

collectors and scholars.¹¹⁴ Other people simply like to see them, and to be in the same room with them. That is why people buy them. That is also why people donate them. Society benefits when original manuscripts of literary and musical works are donated outright to libraries, museums and archives, for related uses.

3. Conclusion

When artists, writers, or composers donate their creative output to charitable organizations, they are donating value created by their labor. Therefore, there should be no charitable contribution deduction. This result is appropriately obtained by § 170(e)(1)(A).

However, it is in society's interest that our public charities have access to these creative works.¹¹⁵ If the creators of those works are not encouraged to donate them, fewer of them will find their way into the public sphere. Accordingly, the question becomes which donations of which creative output, to whom, for what use, should be encouraged, despite the fact that they are, effectively, a donation of the creator's services?

The creators of art, literature, music, and the manuscripts which relate to their output should be encouraged to donate to charitable organizations, when that charitable donee will put the donation to a related use. However, this encouragement makes sense only when the donee needs to own the

(May 29, 2013, 3:38 PM), <http://artsbeat.blogs.nytimes.com/2013/05/29/mozart-never-made-it-to-america-but-his-violin-and-violin-are-on-the-way/>. Mozart's instruments were not great, but they were not too bad, either. E-mail from Professor David Levy, Wake Forest Univ. Dep't of Music, to Joel Newman, Professor of Law, Wake Forest Univ. Sch. of Law (Oct. 3, 2013) (on file with author). Surely, hearing Mozart's music played on Mozart's own instruments did not enhance the musical experience, although it may well have had a titillating effect.

¹¹⁴ GIOIA, *supra* note 52.

¹¹⁵ Other countries have other ways of encouraging art through their tax laws. Ireland, for example, exempts sales of art, literature and music from taxation entirely. For a comparative approach, see Lucile Redmond, *Arts Councils' Policies: A Comparative Study*, 6 THE CRANE BAG 110 (1982). Sometimes, art galleries persuade their patrons to donate. Powerful art galleries can tell a new patron that they will allow the patron to purchase art from a particular artist for the patron's private use only if the first such purchase is donated to an art museum. McCray, *supra* note 96. There are other tax incentives for art donations. See § 57 and Mara Lozier, Note, *New Incentives to Give: Impacts of the 1990 Amendment to Section 57 on Charitable Contributions of Appreciated Tangible Property*, 44 TAX LAW. 885 (1991), on exemptions from the alternative minimum tax. There is also the exemption from the uniform capitalization requirements. See I.R.C. § 263A(h); LEE CAPLIN, THE BUSINESS OF ART 36 (1998).

work in order to fulfill that related use. Donations of tangible assets, including visual art and original manuscripts, fit this requirement. Donations of intangible assets, including literature and music, do not.¹¹⁶

IV. OVERALL CONCLUSION

A. Sales

Creators of intangible assets, such as literary and musical compositions, generally license them. Creators of tangible assets, such as art and sculpture, and the original manuscripts of literary and musical compositions, are more likely to sell. A license is not a sale. With no sale or exchange, the licensing of intangible creative work should result in ordinary income.

When artists and the creators of original manuscripts sell, however, then at least the “sale or exchange” requirement for capital gains treatment has been satisfied. Capital gains are also theoretically possible when songwriters sell their catalogs, or if other creators of intangible literary and musical works actually were to sell them outright. However, in these instances the value being sold is value created by the creator’s time and effort. As such, it should be taxed at ordinary income rates, just like other compensation for services rendered. Section 1221(a)(3) appropriately reaches this result.

The Songwriters Capital Gain Equity Act never made any sense. It discriminates in favor of musical composers, and against artists and writers, for no good reason. However, only the visual artists and the sellers of manuscripts have substantial cause to complain, as they are the only ones who most commonly sell, rather than license. In any event, the songwriters’ arguments—that their special status deserves special tax treatment—fails. The Songwriters Capital Gain Equity Act should be repealed.

¹¹⁶ Perhaps it follows that literary or musical compositions donated by anyone—not just those who created them—should not be deductible at more than basis, even if the donee claims to put them to a related use.

B. Donations

Generally speaking, artists, writers, and composers should not receive a charitable contribution deduction for donations of their self-created works. The value in these works derives from the labor the creators put into them. Charitable contributions of services have never been tax-deductible. However, visual artists and the creators of literary and musical manuscripts should be encouraged to donate these tangible items outright to museums and libraries so that everyone can enjoy them. These artistic creators should be allowed a charitable contribution deduction measured by the fair market value of their donations at the time of the donations, provided that they will be put to a related use.

Writers and composers of music can make no such claim. There is not sufficient public benefit for the donation, as opposed to the licensing, of literature and music to charity, even for a related use. In any event, writers and composers do not, as a rule, donate their intangible output to charity. For literature and music, then, there is no reason to change the current treatment.

The current version of the Artist-Museum Partnership Act, therefore, is flawed. It makes sense with regard to visual arts and manuscripts, but not with regard to literature and music. If its scope were limited to tangible self-created art and manuscripts, it would be far more worthy of support.