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The Unwarranted Tax Discrimination Against Creators of Copyrighted Works and Literary, Musical, or Artistic Compositions or Similar Properties

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THE UNWARRANTED TAX DISCRIMINATION AGAINST
CREATORS OF COPYRIGHTED WORKS AND LITERARY,
MUSICAL, OR ARTISTIC COMPOSITIONS OR
SIMILAR PROPERTIES*

The present system of Federal income taxation unwarrantedly discriminates against creators of copyrighted works and literary, musical or artistic compositions or similar properties.¹ Although Congress² under authority of the Constitution,³ guarantees the author of a copyrighted work an exclusive right to his work, such a guarantee is of little value if the proceeds from that exclusive right are to be taxed out of his hands immediately upon receipt. Authors often spend long periods working on a project during which they receive no income therefrom. Then, if they are fortunate enough to produce a successful work which yields returns, they often find that the compensation is "bunched" in one year. Under the present sharply graduated personal income tax rates, their net remuneration after taxes is much less than that of the ordinary taxpayer who earns the same amount in a comparable period of time.

Recognizing this inequality and attempting to alleviate it, Congress has enacted so-called "spread-back" provisions in our tax system. However, as applied to authors as a class, these provisions are so restrictive as to be of little benefit. Even under the spread-back provisions of the Internal Revenue Code of 1954, there is unwarranted discrimination against the author.

Capital gains treatment, which is afforded the inventor of a patented product, is a possible alleviation of this inequality due to bunched income. However, Congress has seen fit to categorically exclude authors from possible capital gains treatment because their compensation from the disposition of a copyright is remuneration from personal efforts. In view of the expressed policy of Congress to eliminate "loopholes" in our tax system whereby the products of personal efforts are afforded capital gains treatment, such treatment may not be the theoretically perfect solution to the presently adverse tax treatment of authors. However, it is believed that so long as capital gains treatment is not denied the products of personal

* This note has been submitted as a contribution to the Twenty-first Annual Nathan Burkan Memorial Competition sponsored by the American Society of Composers, Authors and Publishers.

¹ In this note, to prevent needless repetition, the word "copyright" will generally be used when the group consisting of copyrights, literary, musical, or artistic compositions or similar properties is referred to. Also, "authors" will be used in the generic sense to describe all creators of copyrightable works.


efforts in a multiplicity of other instances, authors should not be expressly and categorically denied the possibility of such treatment. It appears, however, that authors themselves are to a large degree responsible for their own adverse tax treatment. It is submitted that if these masters of the pen would show a little ingenuity and aggressiveness in regard to the tax treatment presently afforded them they could at least partially improve their present position.

*Copyrights and Capital Gains Taxation*

Capital gains treatment of compensation from copyrights is categorically denied both professional and amateur authors specifically by the Internal Revenue Code of 1954. Such treatment is in line with the generally expressed intent of Congress to prevent taxpayers from reporting compensation from personal efforts as capital gains. However, in many instances Congress and the courts have extended capital gains treatment to income from personal efforts, either by express affirmative action or by negative inference.

4 Int. Rev. Code, § 1221. *Capital Asset Defined.* For the purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

1. stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;
2. property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business;
3. a copyright, a literary, musical or artistic composition or similar property held by—
   (a) a taxpayer whose personal efforts created such property, or
   (b) a taxpayer in whose hands the basis of such property is determined, for the purpose of determining gains from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property;
4. accounts or notes receivable acquired in the ordinary course of trade or business for services rendered or from the sale of property described in paragraph (1); or
5. an obligation of the United States or its possessions, or of a state or territory, or any political subdivision thereof or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue. [Emphasis added.]

5 It is certainly understandable why authors seek to come within the capital gains tax structure since under it their tax rate is limited to twenty-five per cent rather than the sharply graduated ordinary income rates which rise to ninety-one per cent.

6 Although no comprehensive official statement of the congressional purposes of permitting capital gains treatment can be found see Miller, "Capital Gains Taxation of the Fruits of Personal Efforts: Before and Under the 1954 Code," 64 Yale L.J. 1, 6-7, n. 24 (1954) in which he states: The most important single statement [as to the congressional purposes in permitting capital gains treatment] appears in the 1921 Report of the Ways and Means Committee advocating favored treatment for capital
Congress has approved this extension in some instances by express declaration of the "incentive" motive⁷ or relief from "unduly harsh" taxation,⁸ while condemning it in other instances as a "loop-hole."⁹ Similarly the federal courts have repeatedly reached inconsistent holdings in similar cases as to capital asset treatment of the gains from personal efforts.¹⁰

The question presented here is why have authors been expressly singled out for adverse tax treatment while similar taxpayers whose compensation is also the result of personal efforts are often not denied the more favorable capital gains treatment. Why have their efforts to come within the capital gains category been singled out as a tax "loophole"¹¹ to be completely closed by action directed specifically at them?

Before 1950, although a professional author could not get capital gains treatment upon the disposition of his copyright,¹² an amateur author could obtain such treatment provided his disposition met the requirements of a "sale or exchange" and was not a mere "license."¹³
However, the Revenue Act of 1950 amended the Internal Revenue Code of 1939 to exclude from the definition of capital assets a copyright, a literary, musical, or artistic composition or similar property held by a taxpayer whose personal efforts created such property or by someone whose basis was determined by reference to the creator's basis.\textsuperscript{14}

Such singling out for adverse tax treatment was largely attributable to congressional disapproval of certain highly publicized transactions involving property of this nature. The most famous of which was the sale of \textit{Crusade in Europe} by now President Eisenhower for a reported $1,000,000, all of which, under a ruling of the Bureau of Internal Revenue, was taxed only as a capital gain.\textsuperscript{15} Consequently due to a few highly publicized instances like this where large sums of money were involved, Congress was motivated to categorically exclude all amateur authors from capital gains treatment while all other amateurs were left free to seek such treatment.

The House and Senate committee reports portrayed allowing amateur authors to get capital gain treatment as a "loophole" because such a taxpayer received long-term capital gains treatment on "the products of his personal efforts."\textsuperscript{16} Ostensibly this statement shows congressional disapproval of capital gain treatment of \textit{any} products of personal effort. However, in addition to the many instances in which such "disfavor" was not crystalized into effective Congressional enactments, this inference is refuted by the congressional committee reports themselves. Such is true for, in elucidating on the statutory exclusion of "similar property" from section 1221 of the Internal Revenue Code of 1954, the reports state:

\begin{quote}
The interest of a sole proprietor in such a business enterprise as a photographic studio is not 'similar property' even though the value
\end{quote}


\textsuperscript{15} The Bureau's ruling that the proceeds of the sale were taxable at capital gains rates rather than at personal income rates saved Eisenhower approximately $500,000 in tax, N.Y. Times, June 2, 1948, p. 31, col. 5. See also Herwig v. United States, 105 supp. 384 (Ct. Cl. 1952) (Sale of motion picture rights to Forever Amber by Kathleen Windsor taxable only as a capital gain).

of the business may be largely attributable to the personal efforts of the sole proprietor.\textsuperscript{17}

Thus the proceeds from the sale of the good will of a business have been allowed to fall within the capital gain classification, even though in fact such value is largely attributable to the personal efforts of the taxpayer while engaged in his trade or business.\textsuperscript{18} Relying on the basis for the increase in value, it is difficult, if not impossible, to distinguish this realized increase in value called good will from the proceeds of the sale of a copyright, even though the author thereof may in fact be a professional. Such tax treatment of the sale of the good will of a business should be compared with \textit{Stern v. United States}.\textsuperscript{19} In that case it was held that the sale, not of a book or any tangible property, but of the taxpayer's "right, title and interest . . . in and to . . . that certain character known as 'Francis' \textsuperscript{20} [the famous talking Army mule of World War II] conceived and created by" the taxpayer, despite its similarity to the good will of a business, constituted the sale of a literary composition resulting in ordinary income rather than capital gain.

An example of express congressional allowance of capital gains treatment for the proceeds of personal efforts is the restricted stock option of section 421 of the 1954 Code. When the restrictions of this provision are met, an employee who exercises an option to purchase stock of his corporate employer is allowed capital gain upon the sale of the stock.\textsuperscript{21}

Capital gain benefits are not denied to a home-owner selling his residence at a profit even though his own work and efforts so improved the property so as to lead to the gain. If an architect or grocer, on the side, builds his own house or boat and sells it after six months, the transaction is treated as the sale of a capital asset. If an amateur author goes through the throes of writing something, why should he be treated worse for tax purposes than the architect or grocer who has built his own house or boat and later sells it? Why should the amateur author be treated differently than all other amateurs?

\textsuperscript{18} See also Aaron Michaels 12 T.C. 17 (1949); Treasury Department Internal Revenue Service Publication No. 334, Tax Guide for Small Business 118 (1959).
\textsuperscript{19} 164 F. Supp. 847 (E.D. La. 1958).
\textsuperscript{20} Id. at 848.
\textsuperscript{21} See Miller, "Capital Gains Taxation of the Fruits of Personal Effort: Before and Under the 1954 Code," 64 Yale L.J. 1, 6, 50 (1954).
In many close corporations the stock of which is sold as a capital asset, it is a practical fact that the taxpayer selling the stock of such close corporation, be he the original founder or the manager of the corporation, has enhanced the value of the asset no differently than an author creates a copyrightable work. Thus, capital gains treatment may be available to the products of the personal endeavors of the stockholder, even though such products were created in his trade or business, while denied to the professional as well as the amateur author.

Section 1231 of the Internal Code of 1954 extends capital gains treatment to gain from the sale of property used in the taxpayer's trade or business which is subject to allowance for depreciation under section 167 and which has been held for more than six months\(^2\) except, logically, inventory and property held primarily for sale to customers in the ordinary course of the taxpayer's business and except, illogically, copyrights. With these exceptions, section 1231 does not differentiate between property that is acquired by purchase as against property used in trade or business that is produced by the taxpayer himself. However, Congress saw fit to expressly exclude copyrights and similar property from the benefit of 1231.\(^2\)

Thus, other taxpayers under section 1231 can transfer property largely attributable to their personal efforts to their trade or business and by reason of the use of the property for a time in their trade or business obtain capital gains treatment. This "loop-hole" is closed only to authors and is specifically closed to them. The capital gain benefit of 1231, denied both amateur and professional authors, is not denied a taxpayer such as a professional builder who constructs a building for rental purposes and, after renting such property for the required length of time, sells the rented property and enjoys capital gain thereon, even though his personal efforts may have largely been responsible for the creation of the building in question.

Perhaps even more illustrative of the dichotomic tax treatment

\(^{2}\) Section 1231 of the Int. Rev. Code of 1954, just as did its earlier counterpart under the 1939 Code, gives relief from a former rule that gains from the sale of exchange of depreciable property used in the taxpayer's trade or business were ordinary income as such property was not, and is not, included within the definition of capital assets under Int. Rev. Code of 1954, § 1221, or its 1939 counterpart. Under § 1231, known as the "taxpayer's friend," if gains from the sale of such property exceed losses from the sale of such property and the property was held more than six months, the gain may be treated as a capital gain. On the other hand if the losses under this Janus-faced island in the sea of harsh taxation exceed the gains, the losses are not treated losses from the sale or exchange of capital assets, but are considered ordinary losses.

\(^{23}\) "Your Committee has found it necessary to make a clarifying amendment . . . to Section 117 (j) of the (1939) code to prevent the creator of such property [copyrights] from obtaining capital gains treatment by reason of the use of such property for a time in his trade or business." S. Rep. No. 2375, 81st Cong., 2d Sess. 84 (1950).
given professional authors compared with persons engaged in other trades or businesses are the timber\textsuperscript{24} and unharvested crop\textsuperscript{25} situations in which, under section 1231, taxpayers are entitled to capital gain treatment even though they produced these products on their own lands for sale to customers in the ordinary course of business.

Consequently, not only have amateur authors been categorically singled out for adverse tax treatment by denying them the possibility of capital gains consideration which is denied no other class of amateurs, but also, professional authors are denied the possibility of capital gains treatment which is not denied many other taxpayers on the products of their personal efforts created in their trade or business.

However, by far the most evident example of the discrimination in tax treatment given copyrights compared with other products of personal effort is the favorable tax treatment given patents. Before 1950 capital gains taxation treatment was available to amateur inventors and authors, but not to professionals. However, the Revenue Act of 1950, which excluded copyrights, literary, musical or artistic composition or similar property held by the creator of such property or by someone whose basis was determined by reference to the creator’s basis, did not apply to patents. Thus, from 1950-1954, all authors and professional inventors were denied capital gain treatment although it remained available to amateur inventors. The Internal Revenue Code of 1954, while still excluding all copyrights and similar property, by section 1235 affirmatively extended the scope of capital gain treatment to professional as well as amateur inventors.\textsuperscript{26} Further, the Internal Revenue Code of 1954 left open the possibility of capital gain treatment on the sale of patents which do not qualify under section 1235.\textsuperscript{27}

Therefore, under the existing code all authors will be denied capital gain treatment on the transfer of copyrights while inventors usually will be able to get capital gains treatment. This analogy

\textsuperscript{24} Int. Rev. Code of 1954, § 1231(b)(2).

\textsuperscript{25} Int. Rev. Code of 1954, § 1231(b)(4). Many of these instances in which taxpayers get capital gains treatment on the products of personal efforts have been pointed out to Congress by patent interests while waging their war on ordinary income taxation. See for example, Hearing on H. R. 8920 Before the Senate Committee on Finance, 81st Cong., 2d Sess. 678-79 (1950).

\textsuperscript{26} For this history see Pilpel, "Developments in Tax Law Affecting Copyrights in 1954," 33 Taxes 271-272 (1955) and Note, 70 Harv. L. Rev. 1419, 1420-21 (1954).

is drawn to show that Congress has intentionally granted capital gain treatment to products created in substantially the same manner as copyrights, i.e. largely through the personal efforts of taxpayers. Here we have two almost identically created products being given entirely different tax treatment. This demonstrates that it would not be impossible nor too bizarre for the professional as well as the amateur author to be afforded capital gains treatment by affirmative approval of Congress.

However, authors can contest the unfavorable tax treatment given them without having to rely upon the tax treatment given inventors. This writer, unlike many other commentators on this subject, believes that adequate reasons exist to warrant the favorable tax treatment afforded inventors—compared with perhaps all other taxpayers. It is submitted that there are adequate grounds to justify Congress’ granting favorable tax treatment “to provide a larger incentive to all inventors to contribute to the welfare of the nation,” e.g. for defense and progress in general.

However, to this view authors can legitimately retort, as did Harriet F. Pilpel in “Developments in Tax Law Affecting Copyrights in 1954.”


[The desirability of fostering the work of such inventors outweighs the small amount of additional revenue which might be obtained under the House bill. . . .]

Thus inventors have apparently convinced Congress that the yield to be obtained from taxation of the disposition of a patent is small indeed compared to the possible ultimate cost to the nation which might result from the discouragement of invention by the enactment of unfavorable legislation regarding patents. See also Hearings on H. R. 8920 Before the Senate Committee on Finance, 81st Cong., 2d Sess. 601-08, 678-79, 680-81 (1950); Hearings on H. R. 8300 Before the Senate Committee on Finance, 83d Cong., 2d Sess., pts. 3, 4, at 1662-69, 1684-91, 1860-74 (1954). See also Kitchen, “Capital Gain v. Ordinary Income—Comparative Federal Income Taxation,” in Capital Gain v. Ordinary Income, Ind. St. Bar Assn. 1, 35 (1958).

Other reasons may also justify a distinction between the tax treatment given authors and inventors for as a general matter the creation of inventions takes longer than the creation of copyrights and a copyright lasts longer (28 years with a renewal option) than a patent (17 years). Furthermore, it often takes much longer after the project is completed to get a patent than to get a copyright. See Note, 70 Harv. L. Rev. 1419, 1425 (1957). Also in taxing the transfer of patents, if this actually retards the production of inventions, the Treasury may be “cutting off its nose to spite its face” as inventions often lead to whole new industries requiring great resources, e.g. labor and capital, resulting in vast new sources of taxation.

33 Taxes 271, 276 (1955).
Apparently, our Senators and Representatives, in their anxiety to foster the development of offensive and defensive weapons in this age of the atom, have forgotten that much of invention is based on the knowledge contained in writings which are the subject of copyright rather than patent.

Also as noted in 70 Harvard Law Review 1419, at 1424 (1957):

The present favorable treatment of patents seems defensible only if the activity of inventors is materially affected by tax considerations. ... In the absence of a showing that such preferential treatment materially encourages invention, ... discriminatory taxation should be avoided.

The Harvard note, after interpreting a graph presented by patent interests before Congress in 1953 to show that fluctuation in the number of patent applications by individuals between 1900 and 1950 were affected by tax rates, concluded that fluctuations in inventive output show no correlation to changes in the tax structure and are probably more closely related to general economic conditions and international events. If such be true, then the discrepancy between tax treatment given authors and inventors is unwarranted.

However, the possibility of benefit to the nation warrants the present tax treatment afforded inventors. Authors should and can stand on their own two feet and contest the unfair tax treatment given to them without riding on the coattails of the favorable tax treatment Congress has afforded inventors in the exercise of a far-reaching policy decision.

The preceding examples whereby the products of personal efforts receive capital gain treatment are merely illustrative and are by no means exclusive. Thus, it should now be quite apparent that under existing law, professional, and to an even greater degree amateur, authors are unjustifiably discriminated against by denial to them of the possibility of capital gain treatment.

In view of the fact that earnings from the sale of literary property is considered income from personal service when the amateur seeks capital gains treatment, it is most surprising to note that when it comes to the benefits which such income would otherwise enjoy under that classification, such benefits may not be available. For example, in some instances earned income is considered "retirement income" and retirement income up to a certain amount and subject

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32 For some other instances in which the products of personal efforts receive the benefits of capital gains rates see Miller, "Capital Gains Taxation of the Fruits of Personal Efforts: Before and Under the 1954 Code," 64 Yale L.J. 1-83 (1954).
to certain restrictions is exempt from taxation. As noted by Harriet F. Pilpel in "Tax Law Affecting Copyrights 1954-1956," 35 Taxes, 76, 77 (1957), "When it comes to such advantages of so-called earned income, literary property is again ruled out and for the purposes of retirement income, literary property—like the pumpkin-coach in Cinderella—turns back into a capital asset." Such is true for under a ruling of the Bureau of Internal Revenue:

Where . . . royalties are derived from the sale, leasing or renting of a book, they are not paid for personal services actually rendered but are paid for the use or sale of property and do not come within the meaning of the term 'earned income' as used in section 37(d)(2) of the Code.33

Thus, not only are authors denied capital gains treatment but they are also denied even the benefits of the favorable earned income-tax treatment.

To reiterate, so long as many other products of personal efforts are left open for possible capital gains treatment, copyrights should not be singled out for specific categorical exclusion from the capital gains classification. Much less should a double standard be applied to them adversely so that they are given earned income tax treatment in one case and capital gains treatment in another—whichever will be most adverse to them.

Nevertheless, this writer would not criticize too severely the non-application of the capital gains category to authors if spread-back provisions of the Code adequately protected authors. But, as will be shown shortly, the spread-back provisions of the Code are entirely inadequate to afford fair treatment to authors.

**Copyrights and Spread-back Provisions of the Internal Revenue Code**

Recognizing the inequality whereby an author often receives compensation in a single year which is attributable in whole or in part to work done over a period of years, Congress enacted the spread-back provisions whereby an author may spread back the income over a previous period,34 provided certain highly stringent requirements under section 1302 are met. First, the work on the copyrighted product must have covered a period of at least twenty-four months from the beginning to completion. Second, in the taxable year the gross income from the copyright must not be less than eighty per cent of the total of the gross income received therefrom in the following periods:

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the taxable year
(2) all previous taxable years, and
(3) the twelve months immediately succeeding the close of the taxable year.

If the above requirements under section 1302 are met, the tax on the income from the copyright for the year to which section 1302 applies cannot be greater than the total income taxes which would have been due if the income had been received ratably over whichever of the following periods is the shorter:

(1) the period from the beginning of the work to the close of the taxable year; or
(2) thirty-six months

For reasons to be discussed later, as a practical matter, section 1302 has been of little benefit to the majority of taxpayers.

Moreover, even if the author qualifies to come within the spread-back provisions of section 1302, he is discriminated against as compared to the spread back provisions granted similar taxpayers. Inventors may spread back the income over a period up to sixty months. Whereas an author is permitted to spread back only thirty-six months, an individual who has rendered personal services, such as a lawyer or doctor can, under Internal Revenue Code 1954, section 1301, spread back the compensation over the actual period of time consumed. Furthermore, the taxpayer qualifying under section 1301, unlike the author, in computing the eighty per cent, need take into account only all the years preceding the year in which the eighty per cent must be received and need not consider the succeeding year.

Section 1304 of the 1954 Code permits compensatory damages awarded in a civil action for patent infringement to be treated as if received ratably over the months during which the infringement actually occurred. Although there is no provision applying to copyrights similar to that of section 1304, inferentially leaving such damages to be reported as income for the year in which they are awarded, the problems arising from the infringement of patents and copyrights are similar. Consequently, a provision similar to section 1304 should be made available to copyright infringements.

However, ignoring the discrepancies of the spread-back provisions as applied to copyrights compared with their application to similar projects created over a period of years, section 1302 as a practical matter does not aid authors as a class to any great extent. Under the holding of the Supreme Court in Robertson v. United States, an

36 343 U.S. 711 (1952). The Court held that even though the taxpayer had composed a symphony during the period of 1936-39 the compensation could not
author is required to spread back the compensation over a period immediately preceding the close of the taxable year of receipt rather than over the period of actual work. Thus, as is often the case, where an author has been working and consistently turning out work over a period of years he finds that when a number of his works created over such periods are sold within a single year or within a short period of time his income is bunched within a relatively brief portion of time despite the application of section 1302.

Further, few authors can meet the stringent eighty per cent requirement as few receive eighty per cent of their income from one work in a single year. As a practical matter an author may sell a copyrightable work as a magazine serial in one year, as a book in a second year, and for a movie in a third year and in each of these years receive less than the specified eighty per cent of the total income he earns from the book, thereby never qualifying under section 1302.

In selling or licensing the use of copyrights, authors should so draft their contracts as to come within the eighty per cent requirement of section 1302. Much can be accomplished by this method; however, the taxpayer remains vulnerable to a contention of the Commissioner that the contract is a mere invalid subterfuge to avoid taxes.

be spread over that period but only over the allowable period immediately preceding the close of the taxable year of receipt, i.e. 1947.

Such is not an unusual situation for, in addition to this happening due to fortuitous circumstances, often an unknown author labors for years without selling many of his products, only to find that once he creates a book that "catches on" and which creates a name for him and a market for past works, the compensation for efforts over a considerable number of years is taxed over the thirty-six months immediately preceding the close of the taxable year in which the compensation is received.


An alleviation of the income-tax problem is the device of spreading income forward. Thus if an author, instead of making an outright sale of his copyrights works for a flat sum, contracts to receive royalties he will be taxed only on the amounts received within the year. However, as this may still cause income from the project to be bunched, authors often put a ceiling on the annual royalty they may receive within the year. Mr. Joseph F. Gelband in "How to Spread an Author’s Income Back as Well as Forward: A Specimen Contract" in 10 The Journal of Taxation 105 (Feb. 1959) presents a contract calculated to take advantage of not only the possibility of spreading income forward but also of spreading it backward to take advantage of section 1302. However, such spread forward contracts are predicated on the major premises that the contract will prevail over the possible contention of the Commissioner of constructive receipt of compensation by the author. However, the case of Oates v. Commonwealth, 207 F. 2d 711 (7th Cir. 1953), provides some assurance to authors who contract to be paid only a certain amount per year of the royalty contract. In this case, under an insurance company’s contract with its agent, the agent was to receive commissions on renewal premiums after retirement for nine years. In the normal course of events under this contractual arrangement, he would have received a large sum the first year after retirement and lesser amounts during the next eight years as the renewals lessened. The agent who was to
Thus, not only does the present tax structure categorically bar authors from the possibility of capital gain treatment of the products of their endeavors, but the spread-back provision is grossly inadequate to relieve the inequality of bunched income; i.e., it is often inapplicable and when applicable often ineffectual to put authors on a par with other taxpayers.

However, the capital gains treatment of copyrights, or rather lack of capital gains treatment, and the inadequacies of the spread-back provision of 1302 are merely illustrative of the unjustified tax differentiation against authors by our tax laws and are by no means exclusive. For example, take the instance where an author of a copyright attempts to shift the incidence of tax away from himself to another party by gift.

The shifting of the incidence of tax is ordinarily sanctioned by the courts if the proper procedures are taken and no improper subject matter is involved. However, an author, by making a gift of a copyright, may find himself in the unenviable position of having made a

retire three days later entered into an agreement with the company under which the value of his future commissions were to be paid him in equal installments of $1,000.00 per month over the nine years following retirement. A tax deficiency was assessed for the difference between the commissions which were accrued in the taxable year after retirement and the amounts actually received by the taxpayer under the second contractual arrangement. The Tax Court with the 7th Circuit affirming sustained the arrangement, holding that a bona fide agreement deferring payment due under a prior contract is effective if entered into before the date on which payments were to begin. If this case can be relied on by authors, it will be of great benefit to them in seeking to limit the amount of reportable income per year. See Pilpel, “Developments in Tax Law Affecting Copyrights in 1954,” 33 Taxes 271, 274 (1955).

In attempting to spread income forward, authors must give careful consideration to the specific installment sales provisions of section 453 of the Internal Revenue Code of 1954. Under section 453(a) a person who regularly sells personal property on the installment plan may report as income therefrom in any taxable year only that proportion of the installments payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the contract price. Thus professional authors, even though having sold their copyrighted work outright for a definite sum, can take advantage of this provision.

Of benefit to the amateur author is section 453(b) which allows similar treatment in the case of a casual sale of personal property, other than inventory, for a price in excess of $1,000.00 if the initial payment does not exceed thirty per cent of the selling price. When such a provision is complied with no question of constructive or anticipatory receipt of compensation can be raised. However, when it is not complied with the possibility of taxpayer success is practically nil. 1 P. H. Fed. Taxes para. 6691 (1959). See Pilpel, “Developments in Tax Law Affecting Copyrights in 1954,” 33 Taxes 271, 275 (1955) noting Rev. Rul. 234, 1953-2 Cu. Bull. 29, obtained by President Truman on the sale of his then unwritten memoirs under which the sale was held to have favorably fallen within the 1939 Code counterpart of Int. Rev. Code of 1954, § 453(b).

In utilizing the spread forward provisions, the author taxpayer always renders himself vulnerable to the possibility of the insolvency of the purchaser or licensee and also to changes in the tax structure and rates—the former structure having an ineradicable propensity to tighten; and the latter rates, to increase. See S. Rep. 2375, 81st Cong. 2d Sess. 85 (1950).
transfer which is subject to a gift tax but which is nevertheless ineffective to shift the income tax incidence to the donee. Such it is feared may be the case where the author of a copyrightable work makes the gift of his interest in the copyright after he has contracted to license or sell his work.\(^{40}\) That is what happened in *Sax Rohmer*\(^{41}\) where it was held that because a sale of serial rights of a copyrightable work had been made by the taxpayer before he assigned a one-half interest in the work as a whole to a donee, he had made a taxable gift. Nonetheless he was not relieved of the income tax liability on the total proceeds of the serial rights since this transaction constituted a mere "temporarily assignment of income."\(^{42}\) Some hope was held out to such taxpayers by *Commissioner v. Reece*\(^{43}\) wherein it was held that the inventor's irrevocable gift of a royalty contract to a patent was effective to shift the incidence of tax away from himself. However, the later case of *Heim v. Fitzpatrick*\(^{44}\) reached a contrary result so that it again appears dangerous for an author to attempt to shift the incidence of tax away from himself by gift after he has negotiated a royalty contract or sale.

Another example of the indefensible discrimination against copyrights involves the only parties who may now get capital gains treatment on the disposition of a copyright, i.e., the purchasers of the copyright, the author's estate\(^{45}\) or his heirs. According to the views of the Commissioner of Internal Revenue, capital gains treatment even here is available only if the consideration paid is not measured by a percentage of the receipts from the sale, performance or publication of the copyrighted work, [or] by the number of copies sold, performances given, or exhibitions made of the copyrighted work, and is not payable periodically over a period generally co-terminus with the grantee's use of the copyrighted work.\(^{46}\)

\(^{40}\) It had long been conceded that an author could shift the incidence of tax away from himself by a gratuitous assignment prior to licensing his copyrightable product, of all or part of his interest in the copyright. Pilpel, "Tax Law Affecting Copyrights: 1954-1956," 35 Taxes 76, 77 (1957).

\(^{41}\) Also in 1954 the Internal Revenue Service had ruled for the first time that there could be transferred separately the right to exploit copyright property in separate media, e.g., motion picture rights, publication rights, dramatic productions rights, etc. could be separately transferred away without the author remaining liable for the income therefrom. Rev. Rul. 54-409, 54-2 Cum. Bull. 174.

\(^{42}\) The fact that an author's estate can get capital gain treatment upon the disposition of the author's work has caused one writer to ironically comment, "From the standpoint of taxes alone, the best thing that can happen to an author is that he should drop dead." Pilpel, "Tax Aspects of Copyright Property" 1953 Copyright Problems Analyzed 177, 190 (1953).
Since the effective date of the Internal Revenue Code of 1954, patent owners qualifying under section 1235 have not needed to worry about the contingent nature of the consideration paid for their product. Now, even the Commissioner, after taking a severe beating in the courts, has ruled that the contingent nature of the consideration in patent transactions not qualifying under section 1235 will not bar capital gain treatment although he apparently still takes the obstinate view that it will in regard to copyrights.

**Reasons For The Present Tax Discrimination Against Authors**

In regard to the unwarranted tax discrimination placed upon the creators of literary works, perhaps it is unfair to blame Congress and the courts since the authors themselves are largely responsible for their present sad plight. Although authors possess the skill and eloquence necessary for effective advocacy, they have been altogether too inactive and ineffectual in regard to their own tax treatment. As one writer has commented, it is like the shoemaker's children going barefoot, the wielders of words have not used them to persuade in this area.

A comparison of authors' methods with the vociferous and persuasive methods utilized by inventors and patent interests when proposed or existing tax statutes threatened their interest is not out of place here. Between 1950 and 1954, while inventors forcefully presented their views at the congressional hearings preceding revisions of the Revenue Code, the authors were largely inactive and showed little vigor or ingenuity. As passed by the House of Representatives, the bill which later became the Revenue Act of 1950 prevented both authors and inventors from reporting profits from the sale of patents and copyrights as capital gain. As noted in 70 *Harvard Law Review* 1419, 1423 (1954), after testimony by inventors and representatives of patent organizations emphasizing the possible effect on the nation itself, the Senate amended the bill so as not to exclude capital gain treatment of the sale of a patent by an amateur.
In 1954 the patent interests not only held their own against a "loophole" closing Congress but secured such favorable tax legislation, e.g., Internal Revenue Code of 1954, section 1235, as to bring forth cries of possible distortion of the tax structure. On the other hand, authors were again inactive and ineffective when active at all. In 1954 before the Senate Committee on Finance, two representatives of professional writers submitted statements but both limited their suggestions to methods of spreading income. On the other hand, more imaginative patent interests in 1950 had eloquently lobbied for, in addition to the many concessions they succeeded in obtaining, a 27 1/2 per cent depletion allowance similar to that afforded oil interests. Of no little significance is the fact that one of these suggestions of the authors' group, to reduce the work period required for spreading income from thirty-six to twenty-four months, was adopted in section 1302 of the Internal Revenue Code of 1954.

Thus, it is submitted that the present discriminatory taxation of authors, artists and musicians largely goes back to the old adage, "If you don't toot your own horn, nobody else will." These taxpayers must themselves organize and present their case before Con-

54 As noted in 70 Harv. L. Rev. 1419, 1423 n. 35 (1954):
55 Note 70 Harv. L. Rev. 1419, 1426 (1957).
56 It should be noted that many of these arguments advanced by the patent interests are equally applicable to copyrights and have been utilized in this note. See for example Hearings on H. R. 8920 Before the Senate Committee on Finance, 81st Cong. 2d Sess. 678-79 (1950).
However, a factor which should not be overlooked in analyzing the different tax treatment afforded patents and that afforded a copyright, a literary, musical or artistic composition or similar property is the ineffable, but underlying, sense of values of the American people. In the American people's hierarchy of values, in distinguishing between "instrumentalities and products of progress" (e.g. inventions) and "things of value in the narrowly defined cultural sense" (e.g. a painting) the American people may, unfortunately but factually, give greater significance to the former. Or, to put it bluntly, we as a nation may not value what authors, artists and musicians have to contribute as much as we value what inventors have to contribute.
58 Hearings on H.R. 8920 Before the Senate Committee on Finance, 81st Cong. 2d Sess. 608-08 (1950).
59 See Note, 70 Harv. L. Rev. 1419, 1423, n. 35 (1957).
gress and before the public in such a manner as to take them out of
the least-favored-of-all tax category. As Harriet F. Pilpel has said,
"Unless authors decide to and can make Congress respond to their
tax problem, at least to the extent as inventors have [or at least
to a reasonable degree], they would be well advised to turn their
ten pens into plow shares and to patent the latter at once." 60

Linza B. Inabnit

AGENCY—AUTOMOBILE TORT LIABILITY OF THE MINOR
PRINCIPAL

Generally speaking, if two or more persons engage in a common
or joint enterprise, or other agency relationship, in which they use
and occupy a motor vehicle driven by one of their number, but in
the management of which all have equal authority and rights, each
assumes responsibility for the conduct of the one who is doing the
driving and each occupant is chargeable with the driver's negligence. 1
This generality is an overstatement, however, for many courts say
that it does not apply to the minor. 2

The scope of this paper is to examine the reasons which induced
courts to make a distinction between the infant and adult in this
area of the law and to examine the trend of recent court decisions.
It is assumed, for the purposes of this note, that a minor is engaged
in a common or joint enterprise or other agency relationship, with
the driver of a car which is involved in an accident, that the agent
driver was negligent, and that the minor is either suing or being
sued for injuries received as a result of the accident.

Early courts held that the infant's contracts were voidable in
most situations, but when they were confronted with an attempt
by a minor to appoint another to act for him in the business world
they held the relationship void. 3 In support of this position it has
been reasoned that if the acts done by the agent for the minor are
voidable at the minor's pleasure, then the power of attorney is not
operative according to its terms; whereas if the acts of the agent

60 Pilpel, "Developments in Tax Law Affecting Copyrights in 1954, 33 Taxes
271, 276 (1955).

1 2 Harper & James, Torts § 2613 (1956); Cf. Bushnell v. Bushnell, 103
Conn. 583, 131 Atl. 492 (1925).
2 Palmer v. Miller, 380 Ill. 256, 43 N.E. 2d 973 (1942); Hodge v. Feiner,
338 Mo. 268, 90 S.W. 2d 90 (1935).
3 Ibid.