A variety of copyright issues come into play in determining a musical composition's tax treatment, e.g., in the form of the work's creation and distribution, including performance

Don't Sing the Tax Man's Blues

BY SHANE P. NIX

SALES OF MUSIC CATALOGS have increasingly made news in recent years for both their volume and dramatic sale prices. Publicity, however, often leads to greater scrutiny by taxing authorities. Accordingly, it is critical that sellers of music catalogs understand the tax issues associated with a catalog sale, as music industry practice and historic legal debate over certain copyright issues creates ambiguous and, sometimes uncertain, tax treatment.

From a copyright perspective, songs exist in two forms: a copyright in the musical work (i.e., original compositions) and a copyright to the sound recording (i.e., the master recording of the musical composition).[1] In the music industry, these assets generally are characterized, respectively, as publishing and recording. The publishing side generally consists of 1) a composer and/or lyricist

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(each, a "songwriter") writing a musical composition (i.e., melody, rhythm, harmony expressed in a system of musical notation and accompanying lyrics, if any) which is copyrighted upon creation in a tangible medium (recordation is not required), and 2) a music publisher that is responsible for registering the compositions with the various U.S. domestic licensing and collection organizations (e.g., American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), Society of European Stage Authors and Composers(SESAC), Global Music Rights, Harry Fox Agency) and the U.S. Copyright Office, promoting and monetizing musical compositions, and ensuring that music artists receive royalties for their compositions.[2] Although how publishers monetize musical compositions has drastically changed over the decades, a publisher's role in commercializing musical works of songwriters generally has remained constant. A publisher's most lucrative form of monetization often is for recording artists to record an expression of the musical composition, resulting in a "master recording" that is licensed to various third parties to be distributed in an audio format.

A songwriter's arrangement commonly may take the form of 1) an administration agreement, 2) a co-publishing deal, or 3) a full-publishing deal. In an administration agreement, the songwriter retains full ownership and control over the copyright in the musical work and engages the publisher to collect and audit royalties on behalf of the songwriter in exchange for a percentage (typically 10-25 percent, or less in some instances) of the publisher's share as an administration fee.[3] In a co-publishing deal, the copyright is initially held equally among the songwriter and the publisher (subject to reversion to the songwriter after a period of years less than the life of the copyright) with the songwriter's retaining 50 percent of royalties (the "writer's share") and the balance split equally among the songwriter and publisher (collectively, the "publisher's share").[4] In a full-publishing deal, the songwriter generally assigns 100 percent of the copyright in the musical work to the publisher, usually for the life of the copyright, in exchange for the writer's share, with the publisher's retaining the full publisher' share.[5]

In certain cases, songwriters may be engaged on a work-for-hire basis, particularly in the context of a composer's creating music for other media, such as film or television.[6] In a work-for-hire agreement, the party commissioning the work will own the copyright upon creation, and the songwriter is paid a "royalty" agreed upon among the parties. As a songwriter becomes more successful, he or she is in a stronger negotiating position to retain more control over the copyright and retain a larger portion of the overall royalties.

On the other hand, with respect to recording artists, ever since sound recordings became protected works under federal copyright law in the early 1970s, record labels have made an industry practice to include boilerplate language in recording agreements that the works created under the contract are works made for hire.[7] Presumably, this was a result of greater negotiation power of the record labels and a mechanism to mitigate financial risk inherent in the music industry. Although payment mechanisms may vary, record deals that shift financial risk from the record label to the recording artist often result in the recording artist's being entitled to a greater share of record royalties.[8]

Royalty Collection

One of the exclusive benefits of copyright ownership in musical works is the right to perform the song publicly.[9] To mitigate the publishers' administrative burden of obtaining thousands of licenses from all music distribution platforms for public performance of a song, songwriters and publishers affiliate with performing rights organizations, or "PROs" (e.g., BMI, ASCAP), that correspondingly issue a blanket license to the end-user in exchange for an annual fee, allowing the user to perform all compositions controlled by all songwriters and publishers affiliated with the applicable PRO.[10]

With respect to publishing deals, approximately 51.5 percent of publishing royalties are generated from nondigital performance (e.g., television and terrestrial radio) and digital performance (e.g., streaming, satellite radio) of a song.[11] The remaining publishing royalties are derived approximately equally from mechanical royalties[12] and direct licensing.[13] Harry Fox Agency and Canadian Musical Reproduction Rights Agency are two major organizations that issue mechanical licenses for publishers, enforce payment by licensees, and account to the publisher.[14] Except for digital performance recording royalties, which are collected and remitted to the recipient by SoundExchange (a nonprofit collective rights management organization), recording royalties generally are collected by the publisher, rather than the PROs, with the publisher's retaining the publisher's share of royalties and then remitting the writer's share of royalties to the songwriter. The volume and complexity of royalty collection often requires detailed auditing of royalty statements to ensure accuracy.[15]

While royalty income is subject to ordinary income tax rates (currently, a maximum federal rate of 37 percent), a sale of a music catalog may result in long-term capital gain subject to a lower tax rate (currently, a maximum federal rate of 20 percent) if held for more than one year.[16] The purpose of affording capital gain treatment at preferential rates is to ameliorate the hardship of taxation of the entire gain on the sale of property in one year to the extent that the gain is a realization of appreciation in value over a substantial period of time.[17] There are, however, important exceptions to this rule. For example, certain music assets are among the assets statutorily enumerated as ordinary assets but which may be eligible for capital gain treatment if certain requirements are satisfied.[18] In addition, courts apply the so-called "substitute for ordinary income doctrine" to prevent taxpayers from inappropriately converting what otherwise would be ordinary income into capital gain to undermine the policy for treating capital assets differently.[19] importantly, the U.S. Supreme Court has expressed that preferential capital gain treatment was intended only for dispositions of property that are not in the ordinary course of business.[20]

Expressly excluded from the definition of capital asset are "a copyright…[or] musical…composition" 1) held by a taxpayer whose "personal efforts" created such property or 2) received by such taxpayer in a carryover basis transaction (e.g., a capital contribution to a partnership).[21] Property is considered created, in whole or in part, by the personal efforts of a taxpayer if such taxpayer performs literary, theatrical, musical, artistic, or other creative or productive work which affirmatively contributes to the creation of the property, or if such taxpayer directs and guides others in the performance of such work.[22] A taxpayer, however, may elect to treat musical compositions or copyrights in musical works as capital assets in a sale or exchange under Internal Revenue Code Section 1221(b)(3).[23]

Copyright Transfers

A transfer of a copyright for the life of the copyright (or in perpetuity) is treated as a sale for income tax purposes whereas

any period less is a license.[24] The life of a copyright created by an individual author is the life of the author plus 70 years (or the life of the last surviving author in the case of joint works).[25] Thus, in an administration agreement, the songwriter owns the copyright and any rights granted to the publisher under such agreement likely is treated as a license for tax purposes. Similarly, in a co-publishing deal, the songwriter retains 50 percent ownership of the copyright and the remaining 50 percent typically reverts to the songwriter during the life of the copyright. Accordingly, to the extent a songwriter's deal is an administration agreement or co-publishing deal, a sale of the songwriter's publishing catalog likely may be treated as a sale of musical compositions or copyrights in musical works to the extent owned by the songwriter and, therefore, eligible for elective capital asset treatment.

Full-publishing deals often leave taxpayers scratching their heads as to whether capital gain treatment is available because the copyright was transferred immediately upon creation, in perpetuity, to the publisher, and they are thus selling the writer's share (not the copyright). There are no direct authorities on point, so the answer remains open for Congress or the courts to determine. The IRS Chief Counsel's Office, however, previously concluded that the writer's share is a royalty payment, rather than compensation for services, for income tax purposes, even though the songwriter receiving the writer's share was neither the direct owner of the copyright nor a direct licensor.[26] Other authorities have made clear that in order for a payment to be classified as a "royalty" for income tax purposes the recipient of the payment must have a proprietary interest in the copyright.[27] Therefore, it follows that, for income tax purposes, if a payment with respect to the writer's share is a royalty, then the writer's share likely constitutes an ownership interest in the underlying copyright. This conclusion may further be supported under copyright law when the songwriter is the beneficial owner of the musical composition immediately after the assignment of the copyright in exchange for royalties.[28] On this theory, a songwriter may be able to elect capital gain treatment upon the sale of the songwriter's writer's share.

An ambiguity arises, however, if the writer's share is not respected as an ownership interest in the copyright. In that case, it may be viewed as a contractual right to receive royalties. Even if this were the case, however, it does not conclusively follow that gain from the sale of the writer's share is ordinary income. If the writer's share does not constitute an ownership interest in copyrights, then it is not within the statutorily enumerated list of ordinary assets. An asset that is not within such list is a capital asset unless the substitute for ordinary income doctrine applies.

Under this doctrine, some courts have looked to whether the taxpayer was paid for the right to receive future ordinary income or for an increase in the value of income-producing property.[29] The question, therefore, is whether the sale proceeds received for the writer's share are a payment for future royalty income or the increase in value of income-producing property. A writer's share certainly can increase in value. For example, in 1985, Michael Jackson purchased ATV Music (which owned the Beatles' publishing catalog) for $47.5 million. Jackson sold half for $100 million in 1995 and his estate sold the remaining half for $750 million in 2016, yielding 1,600 percent appreciation.[30] Although the ATV Music assets represented the publisher's share, the value of the writer's share is intrinsically linked to the value of the publisher's share as exploitation of the sound recording correspondingly exploits the musical composition.

While the substitute for ordinary income doctrine has existed since 1941, the case law is somewhat scattered. For example, the Third Circuit has endeavored to articulate a definitive test[31] while the Ninth Circuit has generally evaluated the substitute for ordinary income doctrine on a case-by-case basis.[32] Nevertheless, based on general tax principles, treating profit from the sale of the writer's share as capital gain seems reasonably appropriate because 1) legal authorities imply that the writer's share may be a property interest in certain circumstances, 2) gain from the sale of the writer's share may represent a realization of appreciation in value in such property over a substantial period of time (as illustrated by the ATV Music example), and 3) the disposition of which is not in the ordinary course of business. Further, capital gain treatment may be appropriate under the substitute for ordinary income doctrine because the sale does not inappropriately convert what would otherwise be ordinary income to capital gain given that Congress intended for songwriters to elect to treat a property interest in a musical composition or copyright in musical work as capital gain.[33] It is reasonable that this result may also follow if a songwriter were to sell his or her non-performance writer's share and retain his or her performance writer's share, or vice versa, because each stream is attributable to separate exclusive rights of copyright—the right to reproduce and the right to perform—which are both divisible property rights.[34]

Works Made for Hire

Under the work made for hire doctrine, the hiring party is treated as the owner of the copyright from creation, rather than the songwriter or recording artist, if such musician is 1) an employee or 2) an independent contractor included in any one of nine statutorily enumerated categories and the parties expressly agree in writing that the work is a work made for hire.[35] Importantly, for this purpose, the evaluation of employee status is governed by the law of agency, not tax law, and of the nine enumerated categories, record companies have always relied on copyrights to sound recordings falling within two of the nine categories (collective works and compilations).[36] Notably, copyrights to musical works and copyrights to sound recordings are not included in the statutorily enumerated list (unless part of a motion picture or other audiovisual work), which has led to decades of debate among recording artists and record companies. This is important from a copyright perspective because, if a work is a work made for hire, the musician does not have a statutory copyright termination right. If a work is not a work made for hire, then the musician is treated as the author for copyright purposes and has a termination right that permits the musician, for no consideration, to reclaim ownership of the U.S. copyrights to the master recordings (or copyright to the musical works, as applicable) previously assigned to the record company after 35 to 40 years from the date of assignment.[37] While songwriters and recording artists should prefer that the deal not be a work made for hire so that they retain their copyright termination right, this preference is also of critical importance for capital gain treatment in the event of a sale of the musician's catalog.

The statutorily enumerated work-for-hire list was heavily debated when the Copyright Act of 1976 was drafted.[38] Coincidentally, during this period, record companies had more control over the recording process and likely viewed recording artists as employees and, therefore, did not perceive the need to include sound recordings within the enumerated

list. As new genres of music spawned throughout the 1970s, 1980s, and 1990s, record companies continued to exploit music primarily in the form of album sales (e.g., vinyl records and CDs). As recording artists trended away from employment status, record companies began to hang their proverbial hat on the enumerated categories of collective works and compilations given that music continued to be sold primarily as albums (and not as individual songs). As technology advanced, the way by which music fans consumed music shifted from purshasing albums to individual songs through digital platforms (e.g., iTunes) and, ultimately, streaming.

As a result, record companies' confidence in where they hung their hats appeared to deflate when, in the late 1990s, their lobbyists managed to arrange an amendment to the Copyright Act of 1976 to include sound recordings as the tenth enumerated work made for hire category for independent contractors in legislation intended to provide only for legislative corrections.[39] Public outcry by the recording artist community led their advocates to argue that the amendment was a substantive amendment, rather than a technical correction clarifying existing law, and was, thus, overreaching. Ultimately, the amendment to include sound recordings was repealed, suggesting that it was a substantive change and, therefore, not within the nine enumerated categories. Congress, however, added statutory language that provides that the addition and subsequent repeal should not be considered or otherwise given any legal significance or interpreted to indicate congressional approval or disapproval of any judicial determination (although courts have found otherwise).[40]

If this legislative history did not confuse the issue enough, record companies continue to negotiate language in recording agreements that the master recording is intended to be a work made for hire and, even if it were not, then the recording artist will immediately assign the master recording to the record company. Importantly, if a master recording is not a work made for hire, the recording artist is the initial owner of the sound recording, from a copyright perspective, immediately upon creation and prior to transfer; whereas, if it is a work made for hire, then the recording artist never had an ownership interest in the copyright to the master recording.

Whether a sound recording is a work made for hire is a threshold question when analyzing the character of gain in connection with master recording catalog assets. Specifically, the IRS released a general counsel memorandum in 1979 (one year after the Copyright Act of 1976 became effective) that provided that a recording royalty income stream was merely a right to receive compensation for services if the recording artist has never owned an interest in the master recording.[41] A work made for hire is the only circumstance, from a copyright perspective, in which the recording artist would never have had initial ownership of a master recording.[42] The tax court later confirmed that if a sound recording is a work made for hire, then the right to receive "royalties" is merely a right to receive compensation for personal services rendered.[43]

Courts and the IRS have not ruled on whether gain on the sale of a recording royalty stream (or a film or TV composer's writer's share) derived from a work-for-hire relationship should be treated as capital gain or ordinary income. Under the substitute for ordinary income doctrine, however, such gain may constitute ordinary income as a payment accelerating receipt of compensation unless the taxpayer can establish that, in this context, it is appropriate to treat the character of the gain as capital.

Importantly, whether a sound recording is a work made for hire is governed by copyright law rather than contract. If Congress were to determine that a sound recording is not within any of the nine enumerated work-made-for-hire categories, then the recording artist would be the initial owner of the master recording to the extent the artist is not treated as an employee. From there, the analysis generally would be similar to an assignment of a copyright in musical work to the publisher under a full-publishing deal. In this context, however, there is further ambiguity as to whether a sound recording falls within IRC Section 1221(b)(3), which generally applies to dispositions of "musical compositions or copyrights in musical works." The IRC fails to define either term. In such a case, words in a statute generally are presumed to bear their ordinary, contemporary, common meaning, and courts have consulted the definitions of those terms in popular dictionaries.[44] The *Encyclopedia Britannica,* for example, defines "musical composition" as the act of conceiving a piece of music, the art of creating music, or the finished product.[45] The general public commonly perceives the finished product to be the song they hear (e.g., the sound recording) and, therefore, under this theory, a sound recording may be eligible for elective capital gain treatment. This conclusion is further supported by the fact that a sound recording is considered a derivative work of a copyright in musical work for copyright purposes and treating a recording artist the same as a record company with respect to character of gain is consistent with the underlying legislative history of IRC Section 1221(b)(3).[46]

Sale of Assets

In addition, the overall catalog may be sold with other assets, such as the songwriter's or recording artist's trademark and name and likeness. With respect to the trademark, agreements typically are prepared as a limited assignment subject to quality control limitation approval over the use of the trademark outside of past practice. This generally constitutes the retention of a significant right and, thus, any value attributable to the trademark should be ordinary income.[47] Although gain from the sale of name and likeness generally is treated as ordinary income, such gain arguably may be capital to the extent limited to the sale and advertising of the music catalog.[48]

Parties also should not overlook the potential for net investment income tax that may arise in certain passive (investment) activities. In certain cases, an additional 3.8 percent Medicare tax applies on top of the 20 percent long-term capital gain rate to the extent that the seller is not sufficiently active in the business.[49] In order to be active, the taxpayer recognizing the gain needs to qualify under one of seven tests. The most obvious category under which a musician could qualify is if the songwriter or recording artist materially participated in performing arts activity for any three prior tax years.[50] Ambiguities do arise, however, when the musician's career has changed. For example, if the musician retires and has not toured or recorded in decades, a different test may be more applicable. In addition, some songwriters and recording artists may need to consider whether they can group their songwriting, recording, touring, and other business activities together in order to mitigate the 3.8 percent tax.[51]

Although capital gain tax treatment of a music catalog seems fairly straightforward on first glance—the sale of a "musical composition or copyrights in musical works"—the complexity of the publishing business and ambiguities

engrained in the recording business often leave taxpayers uncertain given the lack of legal authorities expressly addressing the character of gain arising from catalog sales. Given these uncertainties, taxpayers often seek an independent tax opinion to provide accountants with comfort reporting the gain as capital, and a reasoned tax opinion will relieve the taxpayer of potentially significant penalties for substantially understating taxes paid on capital gain that the IRS determines should have been taxable as ordinary income. For now, songwriters and recording artists may be left strumming a guitar or singing a cappella until there is further guidance from Congress or courts. ■

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[1] U.S. COPYRIGHT OFFICE, CIRCULAR 50: COPYRIGHT REGISTRATION FOR MUSICAL, *available at* https://www.copyright.gov/circs/circ50.pdf; U.S. COPYRIGHT OFFICE, CIRCULAR 56A: COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS, *available at* https://www.copyright.gov/circs/circ56a.pdf [hereinafter CIRCULAR 56A].

[2] *See* JAY SHANKER, ET AL., THE ESSENTIAL GUIDE TO ENTERTAINMENT LAW: DEALMAKING ¶8.1.2 (2018); Dmitry Pastukhov, *Music Publishing 101: Copyrights, Publishing Royalties, Common Deal Types, & More*, Soundcharts Blog (Nov. 20, 2019), https://soundcharts.com/blog/how-the-music-publishing-works [hereinafter Pastukhov].

[3] *Id*. (explaining that administration deals are common with well-established songwriters and recordings artists writing their own compositions).

[4] Pastukhov, *supra* note 2.

[5] Full-publishing deals were more common decades ago, whereas they are common in recent history with new and unknown artists. *See generally id*.

[6] Kevin Zimmerman, *Watch Out for Work-for-Hire*, BMI (Nov. 22, 2006), https://www.bmi.com/news/entry/Watch_Out_for_Work-for-Hire. Note that works for film and television fit squarely within the work-for-hire independent contractor framework because a work specially commissioned for use as part of a motion picture or other audiovisual work is one of the nine enumerated categories.

[7] *See generally* DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 335 (10th ed. 2019) [hereinafter PASSMAN].

[8] For example, in a traditional deal, the record company may pay the recording artist a royalty advance that covers a budget for recording and marketing costs while retaining at least 80 percent of recording royalties whereas a net profit deal may split recording royalties 50/50 after recording costs are recouped. In a distribution only indie deal (where the label acts independently from the major labels), the recording artist may have more upside and an opportunity to own master recordings, although responsible for marketing and promotion costs and no royalty advance, shifting record release cycle risk to the recording artist. *See, e.g.*, Dmitry Pastukhov, *A Hard Look at How Record Companies Make Money: Royalty Splits, Types of Record Deals, and the Label Business Model*, Soundcharts Blog (Feb. 9, 2020), https://soundcharts.com/blog/splits-and-profits-record-deals-analysis#how-do-record-labels-make-money-4-different-types-of-deals.

[9] 17 U.S.C. §106(4).

[10] PASSMAN, *supra* note 7, at 226-27.

[11] Music Publishing 101, Tunecore, https://www.tunecore.com/guides/music-publishing-101 (last visited Feb. 6, 2022).

[12] *E.g.*, a publisher licenses the copyright in the musical work to the record company to record in exchange for a royalty equal to a certain number of pennies for each record manufactured and distributed and each digital copy downloaded.

[13] *E.g.*, synchronization, master use fees from synchronization, YouTube licensing; *see also Music Publishing Revenue Topped $4B in 2020 Says NMPA Billboard*, NMPA, https://www.nmpa.org/music-publishing-revenue-topped-4b-in-2020-says-nmpa (last visited Feb. 7, 2022).

[14] PASSMAN, *supra* note 7, at 231.

[15] Interview with Tracy Liang, Senior Manager, GHJ Advisors, in Los Angeles, Cal. (Feb. 5, 2022) ("Considering the complexities in collecting and calculating royalties from various sources and territories, the volume of royalty transactions, and the constantly changing industry, it is important to develop monitoring and/or audit programs to mitigate the risk of underreporting. Verifying royalty reporting not only helps music catalog owners recover unpaid royalties and hold publishers accountable, but also provides them with more visibility into earning trends of the catalogs.").

[16] *See generally* I.R.C. §§1, 1221 1223, 1231.

[17] *See* Commissioner v. Gillette Motor Transp., Inc., 364 U.S. 130, 135 (1960).

[18] *See* I.R.C. §1221(b)(3).

[19] *See, e.g.*, Hort v. Commissioner, 313 U.S. 28 (1941); Commissioner v. P.G. Lake, Inc., 356 U.S. 260 (1958); Gillette, 364 U.S. at 135; U.S. v. Maginnis, 356 F. 3d 1179 (9th Cir. 2004); Laterra v. Commissioner, 437 F. 3d 399 (3rd Cir. 2006); U.S. v. Midland-Ross Corp., 381 U.S. 54 (1965); *but see* I.R.C. §1234A (statutorily superseding *Hort*).

[20] Corn Prods. Refining Co. v. Commissioner, 350 U.S. 46, 51-52 (1955).

[21] I.R.C. §1221(a)(3).

[22] Treas. Reg. §1.1221-1(c)(3). Section 1221(a)(3) was enacted to close a purported loophole after *The New York Times* published an article in 1948 reporting that General Dwight Eisenhower reported capital gain upon sale of his self-authored book, *Crusade in Europe*, for one million dollars because he was considered an amateur (i.e., not inventory), rather than a professional (i.e., inventory), writer. *See* Assoc. Press, *Eisenhower to Pay Tax as an "Amateur" Writer*, N.Y. TIMES, June 2, 1948, at 31; *see also* Herwig v. U.S., 105 F. Supp. 384 (Ct. Cl. 1952) (holding that the taxpayer's sale of movie rights to Twentieth Century-Fox Film Corporation constitutes a sale by an amateur and, therefore, eligible for long-term capital gain treatment).

[23] I.R.C. §1221(b)(3).

[24] Rev. Rul. 60-226, 1960-1 C.B. 26.

[25] 17 U.S.C. §302.

[26] *See generally* PMTA 2007-00007, Memorandum from I.R.S. Manager, Group 1113 (Ass't Chief Counsel) to Senior Technical Reviewer, Branch No. 1 (Assoc. Chief Counsel, Int'l) re Taxpayer: Royalty vs. Personal Service Income (Mar. 7, 1995), *available at* https://www.irs.gov/pub/lanoa/pmta00007_6889.pdf; *see also* Irving Berlin Music Corp. v. U.S., 487 F. 2d 540 (Ct. Cl. 1973).

[27] *See, e.g.*, Boulez v. Commissioner, 83 T.C. 584 (1975) ("Before a person can derive income from royalties, it is fundamental that he must have an ownership interest in the property whose licensing or sales gives rise to the income.").

[28] *See generally* Smith v. Casey, 741 F. 3d 1236 (11th Cir. 2014) *and* Cortner v. Israel, 732 F. 2d 267 (1984); *but see* Roberts v. Gordy, 359 F. Supp. 3d 1231 (S.D. FL 2019); *see also* John Wiley & Sons, Inc. v. DRK Photo, 882 F. 3d 394, 414 (2d Cir. 2018) (quoting H.R. Rep. No. 94-1476, at 159); *see also* 17 U.S.C. §501(b) (providing that the beneficial owner of the copyright is entitled to institute an action for infringement).

[29] *See, e.g.*, James E. Davis, et ux. v. Commissioner, 119 T.C. 1 (1997).

[30] *What's Behind the Boom in Song Catalog Sales?*, BILLBOARD INSIGHTS, *available at* https://static.billboard.com/files/2020/02/insights_billboard-1582901163.pdf (last accessed on Feb. 19, 2022).

[31] *See* Hort v. Commissioner, 313 U.S. 28 (1941); *see generally* Laterra v. Commissioner, 437 F. 3d 399 (3rd Cir. 2006) (adopting the "family resemblance test" which generally provides that either the asset in question has to resemble a family of assets that are capital assets that can generate ordinary income (e.g., stock) or there is a sale of 100 percent of the asset and the asset represents the right to "earn" income rather than the right to "earned" income).

[32] *See* U.S. v. Maginnis, 356 F. 3d 1179 (9th Cir. 2004) (acknowledging that, although not dispositive in all cases, the sale of a right to receive lottery ticket proceeds was ordinary income because of two critical factors: 1) the taxpayer did not make an investment in capital in return for his lottery ticket, and 2) the sale did not reflect a right of accretion in value above the cost of in any asset that the taxpayer held).

[33] Commentators have confirmed that IRC Section 1221(b)(3) resulted from significant lobbying by the Nashville Songwriters Association International on the basis that it was unfair to tax songwriters at ordinary tax rates upon sale of musical compositions or copyrights in musical works while publishers received capital gains treatment in some circumstances. *See* Kathleen Pender, *Federal Tax Bill Loophole in Music Songwriters' Ears*, S.F. GATE, May 14, 2006, at F3; Body Mullins, *Music to Songwriter's Ears: Lower Taxes – Country Artists' Group Presses Lawmakers to Slash the Levy on Lyricists*, WALL ST. J., Nov. 29, 2005; *see also* Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 204(a)(3), 120 Stat. 345, 350.

[34] 17 U.S.C. §201(d)(1); *see also* Rev. Rul. 60-226, 1960-1 C.B. 26.

[35] 17 U.S.C. §101.

[36] *See* Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[37] Shane Nix, *Taxing the Terminator*, L.A. LAWYER, May 2020, at 18.

[38] William Henslee & Elizabeth Henslee, *You Don't Own Me: Why Work for Hire Should Not Be Applied to Sound Recordings*, 10 J. MARSHALL REV. INTELL. PROP. L. 695 (2011).

[39] UNITED STATES COPYRIGHT OFFICE AND SOUND RECORDINGS AS WORKS MADE FOR HIRE: BEFORE THE SUBCOMM. ON COURTS AND INTELLECTUAL PROPERTY OF THE H. COMM. ON THE JUDICIARY, 106th Cong. 81 (2000).

[40] 17 U.S.C. §101; Ballas v. Tedesco, 41 F. Supp. 2d 531 (D. N.J. 1999).

[41] I.R.S. Gen. Couns. Mem. 37,838 (Feb. 1, 1979).

[42] *See* 17 U.S.C. §§201(a); 201(b).

[43] Boulez v. Commissioner, 83 T.C. 584 (1984).

[44] Walters v. Metro. Educ.. Enters., Inc., 519 U.S. 202, 207 (1997); Metro One Telecomms., Inc. v. Commissioner, 704 F. 3d 1057, 1061 (9th Cir. 2012).

[45] *Musical Composition*, BRITANNICA, https://www.britannica.com/art/musical-composition (last visited Feb. 4, 2022).

[46] CIRCULAR 56A, *supra* note 1.

[47] *See generally* I.R.C. §1253.

[48] *See cf.* Rev. Rul. 65-261, 1965-2 C.B. 281.

[49] *See generally* I.R.C. §1411.

[50] *See generally* Treas. Reg. §1.469-5T(d) (temporary).

[51] *See generally* Treas. Reg. §1.469-4(c)(1).