

Copyright, Death, and Taxes

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

This time around, however, Congress faces a challenge it has never faced before. In none of the five previous copyright acts did Congress have international treaty obligations effectively limiting some of the alternatives available for reform. The Berne Convention and the TRIPS Agreement—which the U.S. joined in 1989 and 2004 respectively—set forth certain minimum standards of copyright law and restrict the scope of permissible copyright exceptions. Although these agreements do allow some flexibility for countries to shape their own copyright laws in some respects, in others, the requirements are more fixed. A number of basic features of copyright law—a set of required exclusive rights including for derivative works, a ban on formalities for foreign works, and a term that lasts at least the life of the author plus 50 years—are now all set in Berne stone.

Of course, one way of dealing with the international copyright treaties would be to modernize them as well. Indeed, some of the provisions of the Berne Convention, which date back to the early 1900s, if not earlier, may need modernizing more than the provisions of the U.S. Copyright Act. Changing international copyright treaties, however, requires a consensus of member countries to agree. And getting consensus among WTO countries about a major copyright revision—such as abandoning some of the outdated Berne features—would be difficult, to say the least. No doubt it would be more difficult than getting a simple majority of Congress to enact a revision of U.S. copyright law.

Thus, at least in terms of practical and political feasibility, Congress probably would be better off exploring options for the next major copyright revision within the current TRIPS/Berne framework. That way, the U.S. can modernize its copyright law on its own instead of waiting for foreign consensus. The downside, however, is that many U.S. reform proposals may face the same stumbling block—the Berne Convention and TRIPS Agreement restrict, if not preclude, many copyright reforms in domestic law. “Can’t do it because it’s a Berne violation” has become an all-too-common refrain to torpedo numerous ideas for improving or modernizing our copyright system. Because of these international requirements, the ability of WTO countries to enact new, innovative approaches to copyright law is circumscribed.

To deal with this problem, this Article offers a new alternative for copyright reform: tax law. I call this approach the “tax fix” for copyright law, in that tax law is used

to fix problems in our copyright system. Using the tax system as a way to update our copyright system offers several advantages over the two other paths of reform. Most important, tax law can fix problems in our copyright system without violating the Berne Convention or TRIPS Agreement, and without requiring amendment to either treaty. Tax law can also be used to incentivize the copyright industries to adopt new innovative approaches to copyright in ways that voluntary reforms like Creative Commons cannot. The tax fix has the added benefit of offering, beyond the “one size fits all” approach, greater tailoring of copyrights by both industry and individual.

Part I of this Article introduces the concept of the “tax fix” for copyright law and shows its advantages over the copyright law-based approach (reforming the copyright system by amendment to copyright law) or the practice-based approach (reform by voluntary changes to copyright practices or norms). Part II explains how the tax fix can address several of the most commonly cited problems with our copyright system: (1) orphan works and the lack of copyright registration, (2) lengthy copyright terms, and (3) the need for greater exemptions to allow for certain noncommercial uses of copyrighted works. Although the solutions offered by the “tax fix” are not perfect, they are second-best alternatives that may give Congress a more flexible way to address some of the inefficiencies of our copyright system, without requiring any change to any of our international treaty obligations. Part III addresses concerns.