

Picture This: A Call for Uniformity in the Sales Tax Treatment of Digital Photographs

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"A principle of tax policy that has long been recognized—if rarely achieved—is the need for simplicity and certainty."¹

INTRODUCTION

The United States isn't "going digital"—it has already gone. The iPod has made digital music the norm. Amazon's Kindle has been on the market only since 2007, and the company already sells more e-books than traditional books.² U.S. consumers downloaded almost 1.6 million apps for their portable digital devices in 2010.³ Yet, these purchases are taxed only in approximately half of the states.

But books and music are not the only art forms that are increasingly transmitted digitally.⁴ Photography has embraced the digital revolution perhaps more than any other industry. Digital photography has replaced the film camera, and almost all commercial photography transactions are done without the photographer ever printing an image.⁵

When selling a digital image, a photographer faces challenges beyond simply finding a buyer for his work. He must also deal with the financial components of the transaction. In order to ensure he complies with the taxation aspects of the sale, he must consult the tax codes of not only his state, but also any state to which he is sending the image to determine whether or not he is responsible for collecting sales

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1. Charles E. McLure, Jr., *Achieving a Level Playing Field for Electronic Commerce*, 14 ST. TAX NOTES 1767, 1769 (1998) [hereinafter McLure, *Achieving a Level Playing Field*].

2. *Amazon.com Now Selling More Kindle Books than Print Books*, BLOOMBERG (May 19, 2011), <http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=AMZN:US&sid=aWO88WlrZASM>.

3. Carl Howe, *The Mobile App Gold Rush Speeds Up*, YANKEE GRP. (Mar. 16, 2010), http://www.yankeegroup.com/about_us/press_releases/2010-03-16.html.

4. In this paper, the terms "digitally transmitted" and "electronically transmitted" will be used interchangeably. The authors use both to refer to works that are sent from one person to another through electronic means.

5. See *infra* note 116.

tax. Tax statutes are often vague and do not specifically address the photographer's situation. States may tax some, all or no digital transfers. The statutes may be vague, asserting that "specified digital products" are taxed but leaving the photographer to search to find out if photography is such a product.⁶

Photographers must not only look at the states' statutes, but also any official rulings or advisory opinions that may interpret the statutes specifically as they apply to photographers. Often, these rulings are not posted in the same area on a webpage as the statute and are difficult to find.⁷ The photographer may call his state's tax department, but will probably receive different answers depending on with whom he speaks.⁸

While photographers can hire tax practitioners or accountants to assist them, they often cannot afford to keep an expert on retainer to ask whether sales tax is incurred for each transaction into which they enter. When the myriad of state tax laws are inconsistent and unclear, the task becomes exponentially harder for individuals who run small businesses.

This paper will argue that states should uniformly impose the same tax treatment on digital transfers of photographs as they do on transfers made through traditional methods, such as when a negative or print is sold. The current sales tax system costs both states and photographers time and money. States suffer lost revenue through uncollected sales tax and through the time that revenue department employees spend in addressing questions from the community in an attempt to clarify confusing and unnecessarily complex laws. Photographers, in turn, must

6. See, e.g., N.J. STAT. ANN. § 54:32B-3(a) (West 2012); VT. STAT. ANN. tit. 32, § 9771(8) (2012). Terms such as "specified digital products" are also suggested by the Streamlined Sales Tax Project (SSTP). For discussion of the SSTP, see *infra* Section VI.

7. For example, New York's sales tax laws can be found at the following website: *Laws of New York*, N.Y. STATE LEGISLATURE, [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$TAXA28\\$\\$@TXTAX0A28+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=45460831+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$TAXA28$$@TXTAX0A28+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=45460831+&TARGET=VIEW) (last visited Aug. 17, 2012). However New York's tax code does not mention digital goods, let alone sales of digital photography. See N.Y. Tax Law § 28 (McKinney 2012). To find out the law regarding the transfer of digital photographs, photographers would have to find an Advisory Opinion from 1999 on a separate website. See COMM'R OF TAXATION & FIN., N.Y. STATE DEP'T OF TAXATION & FIN., TSB-A-99(48)S, ADVISORY OPINION: PETITION NO. S990316A (1999) [hereinafter COMM'R OF TAXATION & FIN., TSB-A-99(48)S], available at http://www.tax.ny.gov/pdf/advisory_opinions/sales/a99_48s.pdf.

8. While calling a state's tax department sounds like a straightforward proposition, it is anything but that. First the photographer must identify the correct agency to call. This is challenging as states vary as to what their taxing department is called. In New York, for example, the relevant government body is called the Department of Taxation and Finance; in Washington, the Department of Revenue; in Arkansas, the Department of Finance and Administration. After locating the correct agency, a photographer must call a helpline, which may result in up to a half hour's wait time. When the photographer finally makes contact with a state agent, he may still not receive a satisfactory answer and any information given is not binding on the tax department. In the authors' experience, anytime representatives of these departments are asked complex questions, they immediately say they are unable to answer technical questions and the caller should file for an official revenue ruling on the specific issue. This presents more hurdles for the individual proprietor to overcome. The photographer may not even know what such a ruling is, let alone how to file the necessary paperwork to request one be made. Moreover, even if the request is properly made, it may take weeks or months for the photographer to receive and answer.

either hire tax practitioners to sort out what taxes are owed or devote energies towards circumventing the tax laws. The current system is inefficient and should change to provide clarity and consistency among the states, creating a new regime where substance is taxed over form.

Part I of this paper will outline the history of sales tax in the United States and the policy implications of having such a tax. Part II will examine how states have developed distinctions between tangible and intangible products and how courts have struggled with this delineation. This Part will then outline and rebut some of the common rationales espoused by states that have not yet extended sales tax to all digital goods. Part III will provide an overview and brief comparative analysis of other goods that have similar sales tax implications to that of digital photography. Included in this discussion are computer software, ringtones, music and e-books. Part IV, section A will focus on the history and taxation of photography. Part IV, section B will describe the rise of digital photography and summarize the various methods through which photography can be disseminated to consumers. Part IV, section C will demonstrate how something as trivial as the method by which photographs are delivered can determine whether or not sales tax currently needs to be collected and remitted. It will also explore the problems caused by outdated tax laws that fail to account properly for the prevalence of digital sales and discuss objections to the taxation of electronically transferred photographs. Part V will detail efforts to simplify and clarify sales tax law and will highlight the efforts of the Streamlined Sales Tax Project (SSTP) to create uniformity among states' tax regimes. Finally, our conclusion will advocate that states eliminate arbitrary distinctions between digital and nondigital goods and revise their tax codes to provide photographers with clear, consistent and comprehensive guidance on when sales tax is due.

In order to make this topic manageable we acknowledge some constraints. First, in conducting interviews we contacted members of the American Society of Media Photographers (ASMP), America's largest organization representing professional commercial photographers. They, in turn, led us to a variety of photographers across the country. While we were able to garner significant anecdotal evidence, we were not able to reach out to a large enough number to complete a true empirical study of the effect of current or proposed legislation on the industry as a whole.⁹ Additionally, we will not differentiate between sales and leases of photographs. Often when a photographer "sells" an image, he or she is charging the customer for a hard copy or digital copy of the image, but retaining the copyright in the work. In addition, there is often a time limit involved. Thus, many

9. Different types of photographers tend not to think of themselves as similarly situated. Eugene Mopsik, Executive Director of ASMP, notes that there are many different groups, but the main ones are: commercial photographers (those whose projects mainly constitute work for advertising agencies and corporations), wedding and portrait photographers, nature photographers, photojournalists and photographers who take pictures "on spec" for stock image distributors. While each group has different concerns and needs, they all digitally transmit their works to their clients with varying degrees of regularity and their images are taxed in the same way. E-mail from Eugene Mopsik, Exec. Dir., ASMP, to authors (Apr. 20, 2012) (on file with authors). Therefore, the issues discussed in this paper are universal.

photographers consider transactions such as these to be leases. The states, however, normally view these transactions as different in name only and their tax treatment is generally identical.¹⁰ We also acknowledge that there are some images that are transmitted digitally but that are not taxed because they are determined to be sales for resale.¹¹ Finally, many photographers feel that they should not pay tax on their sales because they consider them a service transaction rather than a sale of goods.¹² If the item is classified as a service, a topic we will address below, then it may be removed from the tax regime and concerns about sales tax policy are moot. Our arguments are focused on those transactions which are subject to sales tax, and our position is that once an image is subject to taxation, said taxation should not differ based on the image's format.

1. HISTORY OF SALES TAX IN THE UNITED STATES

James Francis, former Director of Tax Research for the Florida Department of Revenue, wrote that the best sales taxes must be unambiguous: they must be "a series of black and white litmus tests."¹³ This may be a goal, but it is one that has not been achieved.

Unlike income taxes or payroll taxes, which are collected by both state and federal governments, sales tax is not collected at the federal level. Forty-five states and the District of Columbia currently impose a sales tax on receipts from the sale of tangible personal property.¹⁴ The first broad-based sales taxes in America were instituted during the Great Depression, although American sales taxes trace their

10. See, e.g., N.J. STAT. ANN. § 54:32B-2(e); N.Y. STATE DEP'T OF TAXATION & FIN., A GUIDE TO SALES TAX IN NEW YORK STATE (2010), available at <http://www.tax.ny.gov/pdf/publications/sales/pub750.pdf>; WIS. STAT. § 77.52(1)(a) (2012).

11. Items that are sold to an intermediary who uses the article in the production of a second, independent work are considered sales for resale. The classic example is a restaurant's purchase of raw ingredients to be used in the making of the meals it sells to its customers. See *Al-Tom Investment, Inc. v. Dir. of Revenue*, 774 S.W.2d 131 (Mo. 1989) (en banc). In the context of photography, if the photographer sells an image to a customer who intends, in his ordinary course of business, to resell the image, the photographer does not need to charge sales tax. For a detailed discussion of the sale for resale exemption in photography, see JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* § 14.02[4] (3d ed. 2010). Many photographers, however, do not qualify for this exemption, either because they are selling or licensing to an end user or fail to obtain the necessary certificate. See, e.g., N.J. DIV. OF TAXATION, *PROFESSIONAL PHOTOGRAPHERS AND NEW JERSEY SALES TAX* (2009), available at <http://www.state.nj.us/treasury/taxation/pdf/pubs/sales/anj2.pdf>.

12. It should be noted that even if states view some aspects of the making of a photograph (the setting up of the subject, the editing, etc.) as a service, most states consider the services provided to be only a portion of the transaction that is not able to be removed from the taxable event. See discussion *infra* Section II.A.

13. James Francis, *The Florida Sales Tax on Services: What Really Went Wrong?*, in *THE UNFINISHED AGENDA FOR STATE TAX REFORM* 129, 134 (Steven D. Gold ed., 1988).

14. In addition, most states impose some tax on selected services. The five states that do not impose a general sales tax are Alaska, Delaware, Montana, New Hampshire and Oregon. See HELLERSTEIN & HELLERSTEIN, *supra* note 11, § 12.02. Many local jurisdictions also levy sales taxes, but they are not within the scope of this paper. In general, while the local rates are always lower than those of the states, the terms of their taxes do not differ from those defined by the states. For an overview of local sales tax, see *id.*

origins to the nineteenth century when tariffs were imposed on certain industries.¹⁵ The first modern general sales tax was levied in Mississippi in 1932 and other states followed suit; in 1969, Vermont became the most recent state to institute such a tax.¹⁶ While starting off primarily as a limited tax on gasoline, the sales tax quickly grew to encompass most retail sales.¹⁷ As a result, sales taxes are large revenue-producers for the states. In the second half of 2010 alone, during a period of recession, state sales taxes raised \$80.5 billion.¹⁸ While still garnering less than what the states receive from personal income taxes, sales tax revenues play an important role in states' economies and are a significant source of state finance.¹⁹ In recent years, the states have needed this revenue more and more, since in the past twenty years the federal government has shifted the economic burden of public programs such as welfare and highway maintenance from Washington, D.C. to the states.²⁰

The term "sales tax" has many meanings throughout the United States. It includes retail sales taxes, manufacturers' excise taxes and gross receipt taxes.²¹ In brief, sales taxes are tariffs levied by the state on consumer expenditures. Vendors are responsible for collection of these fees from consumers who buy the vendors' products.²² All sales tax states register vendors in order to track any revenues owed, often issuing a license to permit them to operate a retail business.²³ These vendors then remit the monies collected to the state on a regular basis, normally quarterly or even monthly.²⁴

15. William F. Fox, *History and Impact of the Sales Tax*, in SALES TAXATION 9 (Jerry Janata ed., 2003).

16. JOHN F. DUE & JOHN L. MIKESSELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 3 (1983).

17. MARY E. FORSBERG, N.J. POLICY PERSPECTIVE, YOU'RE 40; NOW GET TO WORK: MAKING THE STATE SALES TAX PULL ITS WEIGHT 7 (2006).

18. *Quarterly Summary of State and Local Government Tax Revenue*, U.S. CENSUS BUREAU, <http://www.census.gov/govs/ntax/> (last visited Apr. 16, 2012). In 2009, rates ranged from a low of 2.9% to a high of 7.25%. The average sales tax was 5.79%. See *Tax Authorities*, SALES TAX CLEARINGHOUSE, <http://www.thestc.com/ta.cgi?STRates> (last visited Apr. 16, 2012).

19. Some states in the South and West generate up to 60% of their income from sales tax revenues. This is particularly true of states which do not levy personal income taxes. The State of Washington, for instance, garnered over 61% of its income from sales taxes in 2000. See THOMAS A. GARRETT, FED. RESERVE BANK OF ST. LOUIS, EVALUATING STATE TAX REVENUE VARIABILITY: A PORTFOLIO APPROACH 2 n.1 (2006).

20. DAVID BRUNORI, STATE TAX POLICY: A POLITICAL PERSPECTIVE 2-3 (3d ed. 2011).

21. HELLERSTEIN & HELLERSTEIN, *supra* note 11, § 12.01.

22. Not all states levy a sales tax per se. Hawaii, for example, imposes a general excise tax. See STATE OF HAW. DEP'T OF TAXATION, TF1996-1, TAX FACTS: GENERAL EXCISE VS. SALES TAX, available at <http://www6.hawaii.gov/tax/taxfacts/tf96-01.pdf> (last modified July 2000) (explaining the differences between a sales tax and an excise tax). On the other hand, New Mexico imposes a gross receipts tax. See *Gross Receipts*, N.M. TAXATION & REVENUE DEP'T, www.tax.newmexico.gov/businesses/gross-receipts/pages/home.aspx (last visited May 16, 2012). Although in these states the seller is required to pay the taxes, sellers generally pass the taxes on to the consumer, resulting in the tax operating similarly to a traditional sales tax.

23. HELLERSTEIN & HELLERSTEIN, *supra* note 11, § 12.02; BRUCE M. NELSON ET AL., SALES AND USE TAX ANSWER BOOK Q3.22 (2011) ("Sellers must acquire a vendor license to sell at retail, and in some states, a seller's permit or license numbers also serves as the seller's resale number.")

24. NELSON ET AL., *supra* note 23, Q10.1.

A. RATIONALES

Sales taxes have traditionally been popular with state legislators for several reasons. First of all, they are more readily accepted by voters than increases in property or income taxes.²⁵ Tax analyst David Brunori says critics of the sales tax attribute this to the fact that while property and income taxes tend to hit higher income groups with more political leverage, sales taxes are paid by high and low income groups alike; but Brunori also notes that because sales taxes are paid incrementally, voters tend not to calculate their annual tax burden and only notice the smaller amounts paid on each purchase.²⁶ High income groups do not pay enough at one time to warrant a fight for change, and lower income groups do not have the political power or wherewithal to fight the taxes, despite the fact that they bear the greater relative burden.²⁷ In addition, legislators fear raising property or corporate income tax rates because of potential repercussions, namely the relocation of area businesses or wealthy residents out of state.²⁸

Second, sales taxes also tend to generate a stable form of revenue.²⁹ Even though lower than prerecession levels, sales taxes are still a reliable and steady stream of income for the states.³⁰

B. OBJECTIONS

The primary objection to the sales tax, of course, is that it is regressive; in other words, it has a greater effect on lower income taxpayers than on those with high incomes.³¹ A 2009 Minnesota study, for example, showed that the tax accounted for 4.4% of the incomes of those in the lowest (10%) tax bracket but only 1.0% for those in the highest bracket.³² Nationally, those earning roughly \$25,000 per year

25. See *id.*, Q1.11; see also Harley T. Duncan, State and Local Retail Sales Taxes (Apr. 2005) (testimony submitted to the President's Advisory Panel on Federal Tax Reform), available at http://govinfo.library.unt.edu/taxreformpanel/meetings/pdf/Salestax_04182005.pdf.

26. See BRUNORI, *supra* note 20, at 62–63.

27. See BRUNORI, *supra* note 20, at 62–63 (explaining that most Americans are not surprised or angered by paying sales tax, as the rates are low and the burden small, while the poor who are burdened by paying sales tax are less likely to vote to change the system).

28. See DUE & MIKESSELL *supra* note 16, at 4.

29. See BRUNORI, *supra* note 20, at 62.

30. Lucy Dadayan, *Tax Revenue Keeps Rising, but Growth Again Ticks Downward*, ST. REVENUE REP. (The Nelson A. Rockefeller Inst. of Gov't, Albany, N.Y.), Jan. 2012, available at http://www.rockinst.org/pdf/government_finance/state_revenue_report/2012-01-26-SRR_86.pdf; John L. Mikesell, *State Sales Taxes in the Great Recession*, 57 ST. TAX NOTES 145 (2010) (noting that sales taxes did dip noticeably during the period from 2007 to 2009, but were still an important source of revenue for states and were still somewhat more stable than the income tax during this same period).

31. See BRUNORI, *supra* note 20, at 70. Some have argued that, despite the prevailing theory, sales taxes are not regressive. See, e.g., HELLERSTEIN & HELLERSTEIN, *supra* note 11, § 12.03. The authors would argue that a taxation on the sale of digital goods, however, is less regressive than many other sales taxes. Individuals with higher incomes tend to use digital goods and services more than those with lower incomes. Furthermore, higher income individuals tend to buy more goods on the Internet than lower income individuals.

32. TAX RESEARCH DIV., MINN. DEP'T OF REVENUE, 2009 MINN. TAX INCIDENCE STUDY 52 (2009), available at http://taxes.state.mn.us/legal_policy/Documents/other_supporting_content_2009_

bear the greatest sales tax burden, spending a greater percentage of their income on sales tax fees.³³ Yet, throughout the years, despite this concern, the sales tax has expanded, often when other sources of revenue dropped.³⁴

Another argument against the sales tax is that it is difficult to administer; generations of tax scholars have noted the difficulty of administration, reinforcing photographers' main complaint about the tariff.³⁵ The administrative costs of sales tax are incurred in almost all aspects of collection. These costs include registering with the state and then filing returns, maintaining records for each transaction, determining what is taxable (and at what rate), keeping abreast of changes in the tax law, receiving and processing tax-exempt paperwork (e.g., nonprofit or out-of-state) and, of course, dealing with the complications of an audit, should one occur.³⁶

Over the past thirty years, studies have indicated that compliance costs ranged as high as 13.47% of tax due for small retailers.³⁷ The smallest retailers contacted in this study had annual sales in excess of \$150,000, much larger than the revenue generated by most independent photographers who are grappling with how to remit sales tax.³⁸ A 1999 study by Ernst & Young found that even among those businesses that they categorized as small—those with yearly revenues totaling less than \$250,000—the compliance costs were “unacceptably high.”³⁹ The authors of this study concluded: “This high level of compliance costs suggests that, for smaller firms, the sales tax may be reaching the point where it cannot be collected at a reasonable cost.”⁴⁰

C. THE USE TAX

Because of the implications of the Commerce Clause, states cannot tax sales

tax_incidence_study_links.pdf.

33. GOV'T OF D.C., TAX RATES AND TAX BURDENS IN THE DISTRICT OF COLUMBIA—A NATIONWIDE COMPARISON appx. vii (2008), available at http://www.taxadmin.org/fta/rate/DC_Tax_Burden_07.pdf.

34. In 2009, for example, many states raised their sales taxes and eliminated some exemptions as income tax revenue and property tax revenues dropped in the face of an economic recession. See NAT'L CONFERENCE OF STATE LEGISLATURES, STATE TAX ACTIONS 2009 EXECUTIVE SUMMARY (2009), available at www.ncsl.org/issues-research/budget/state-tax-actions-2009.aspx.

35. See, e.g., ROBERT MURRAY HAIG & CARL SHOUP, THE SALES TAX IN THE AMERICAN STATES 26–29 (1934); Charles E. McLure, Jr., *Thinking Straight About the Taxation of Electronic Commerce: Tax Principles, Compliance Problems and Nexus*, 16 TAX POL'Y & ECON. 115, 118 (2002) [hereinafter McLure, *Thinking Straight*].

36. HAIG & SHOUP, *supra* note 35, at 16.

37. PRICEWATERHOUSECOOPERS, RETAIL SALES TAX COMPLIANCE COSTS: A NATIONAL ESTIMATE E-1 (2006), available at <http://www.netchoice.org/wp-content/uploads/cost-of-collection-study-sstp.pdf>.

38. For analysis of the average income of photographers, see *infra* note 135.

39. ROBERT J. CLINE & THOMAS S. NEUBIG, ECONOMICS CONSULTING AND QUANTITATIVE ANALYSIS, ERNST & YOUNG, MASTERS OF COMPLEXITY AND BEARERS OF GREAT BURDEN: THE SALES TAX SYSTEM AND COMPLIANCE COSTS FOR MULTISTATE RETAILERS appx. ii (1999), available at <http://plaza.ufl.edu/chriske2/masters.pdf>.

40. *Id.*

completed outside their borders.⁴¹ The seller is only required to charge sales tax on purchases by customers in states in which the retailer has "nexus."⁴² A consumer, therefore, has an incentive to purchase his goods from a state which either does not have a sales tax or taxes at a lower rate than his home state. For example, when a purchaser from Massachusetts travels to New Hampshire to purchase an item for use in his home in Massachusetts, that purchaser pays no sales tax on the goods bought in New Hampshire because New Hampshire does not charge sales tax. In theory, states have a mechanism through which they can be compensated for the revenue lost when a consumer leaves his home state to transact business in another jurisdiction. In the above hypothetical, the consumer has the responsibility to remit to Massachusetts the tax he would have paid had he purchased the item in his home state. This is called the "use tax." The use tax is levied in an effort to ensure that in-state merchants are not at a disadvantage vis-à-vis merchants from other states.⁴³ As more and more purchases are made over the Internet, the potential for disadvantage is growing. Furthermore, states are increasingly concerned that taxpayers are not reporting Internet purchases where no sales tax is paid, thus costing states millions of dollars in annual revenues.⁴⁴

In 2012, Minnesota updated a fifty-state survey on state enforcement of use tax.⁴⁵ It found that approximately 1.7% of taxpayers report use tax on their income tax returns in states where taxpayers are asked to report and remit use tax on their

41. See, e.g., *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330-31 (1944); HELLERSTEIN & HELLERSTEIN, *supra* note 11, § 19.02.

42. The Supreme Court has endorsed the following as indices of nexus: tangible property (real or personal), sales outlets, representatives, telephone listings or solicitors located in the state. See *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 754 (1967) (quoting *Dep't of Revenue v. Nat'l Bellas Hess, Inc.*, 214 N.E.2d 755, 757 (Ill. 1966)).

43. See 85 C.J.S. *Taxation* § 2154 (2012) (asserting that "[t]he imposition by a state with a sales tax of a corollary use tax on tangible property bought out of state in order to protect sales tax revenues and to put local retailers who are subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax is constitutional"); see also Scott W. Gaylord & Andrew J. Haile, *Constitutional Threats in the E-Commerce Jungle: First Amendment and Dormant Commerce Clause Limits on Amazon Laws and Use Tax Reporting Statutes*, 89 N.C. L. REV. 2011, 2018-19 (2011); William V. Vetter, *Preying on the Web: Tax Collection in the Virtual World*, 28 FLA. ST. U. L. REV. 649, 663 (2001).

44. See, e.g., *Facts on Internet and Mail Order Purchases*, STATE OF MICH. DEP'T OF TREASURY, <http://www.michigan.gov/taxes/0,1607,7-238-43529-155531--,00.html> (last visited Aug. 4, 2012); COMPTROLLER OF MD., MARYLAND REMOTE SALES TAX LOSS STUDY, available at http://www.marylandtaxes.com/finances/revenue/reports/salesandusereceipts/Remote_Sales_report_2011.pdf (last visited Aug. 4, 2012). In reaction, a handful of states, including California and New York, have implemented so-called "Amazon Laws" which extend nexus to any company with an affiliate in the state. This forces the seller to charge the destination state's sales tax. Affiliate programs are programs where so-called "e-tailers" contract with retailers or advertisers in a state to promote the remote seller's website and products in exchange for a percentage of any sales generated when the e-tailer's site is accessed via the affiliate's link. See Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, 52 ST. TAX NOTES 537, 537-58 (2009).

45. NINA MANZI, RESEARCH DEP'T, MINN. HOUSE OF REPRESENTATIVES, *USE TAX COLLECTION ON INCOME TAX RETURNS IN OTHER STATES* (Apr. 2012), available at <http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf>.

income tax filings.⁴⁶ We hypothesize that there are two reasons that these numbers are so low. First of all, states are often not aggressive in their enforcement of the tax.⁴⁷ They do not publicize the tax and rarely prosecute those who do not pay unless the amounts owed are large. Secondly, even taxpayers who are knowledgeable about the tax and hypothetically willing to remit the monies they owe have a hard time doing so due to the complicated nature of the tax. To correctly assess one's burden, one would have to keep a tally of items purchased outside the state and continuously used in the domiciliary state (as most states exempt purchases that are only used in the home state temporarily). This would require copious recordkeeping that the average taxpayer is rarely willing to do.

II. TAXATION OF TECHNOLOGY—TANGIBLES AND INTANGIBLES

Before examining specific states' treatment of electronically delivered photography, it is important to contextualize the issue by noting the differences between tangible and intangible property. This is a useful foundation, as most states' determinations as to whether a transaction is taxable hinge on whether there is a transfer of tangible personal property.⁴⁸

On a most basic level, *Black's Law Dictionary* defines "tangible property" as "[p]roperty that has physical form and characteristics," while "intangible property" is "[p]roperty that lacks a physical existence."⁴⁹ The definition for "tangible personal property" is only somewhat more robust and includes "[c]orporeal personal property of any kind; personal property that can be seen, weighed, measured, felt or touched, or is in any other way perceptible to the senses."⁵⁰ Some goods readily fit into these classifications: for example, furniture or cooking utensils are clearly classified as tangible, while stock options, business goodwill, trademarks, patents or franchises are most often considered to be intangible property.⁵¹

Since its inception, the sales tax has been adapted to include (and purposefully exclude) various items. Alterations to the tax base can be made because the

46. *Id.* at 7.

47. *Id.* at 4 (stating that the costs of collection could easily exceed the revenues collected, leading states to see the use tax as a tax that is impractical to enforce).

48. See, e.g., Reid S. Okimoto & G. Kent Johnson, Jr., *Sales Tax and Electronically Downloaded Music: I Hear Singing but Is It Tangible Property?*, 15 J. MULTISTATE TAX'N & INCENTIVES 20, 22 (2005) ("Under most states' statutes, the imposition of sales tax focuses on the transfer of title or possession of 'tangible personal property.'").

49. BLACK'S LAW DICTIONARY 1336, 1338 (9th ed. 2009).

50. BLACK'S LAW DICTIONARY 1337-38 (9th ed. 2009). Most states have adopted this definition in some form as well. See, e.g., CAL. REV. & TAX'N CODE § 6016 (West 1998); GA. CODE ANN. § 48-8-2 (2009); N.C. GEN. STAT. § 105-164.3 (2011); N.J. STAT. ANN. § 54:32B-2(e)(4)(G)(g) (West 2002); WASH. REV. CODE ANN. § 82.08.010 (West 2012); see also N.Y. TAX LAW § 1101 (McKinney 2012) (declining to adopt the verbatim language from *Black's Law Dictionary*, but nonetheless using a similar construction and classifying tangible personal property as "[c]orporeal personal property of any nature").

51. BLACK'S LAW DICTIONARY 1336-38 (9th ed. 2009); 14A FLETCHER CYC. CORP. § 6921.50 (2012).

government believes the changes will best serve the public good. The theory behind this approach is that if activities that the government deems unhealthy, immoral or even just unnecessary become more expensive, indulgence in such activities will decrease.⁵² But sometimes changes in consumer spending habits and advances in technology necessitate changes in the tax laws. The increased taxation of what might have once been considered intangible property is one such case.

Traditionally, states have taxed tangible personal property and not intangible property.⁵³ In an increasingly digital age, where property is often transmitted in part or exclusively over the Internet, it is frequently difficult to determine whether a sale of tangible personal property has occurred. Electronically delivered goods, be they images, music, software or literature, are arguably capable of being perceived by the senses—a digital photograph can be seen on a computer screen, a downloaded song listened to on an MP3 player, and an e-book read on an e-reader. As one treatise observed: “[t]he distinction between tangible personal property and intangible property or services continues to cause inconsistent results and confusion in [sales tax] cases.”⁵⁴

A. SEPARATING THE TANGIBLE FROM THE INTANGIBLE

In cases where courts feel that they cannot accurately parse out the intangible products from the tangible, they will consider whether one characteristic dominates the transaction. If courts find that the intangible aspect is sufficiently incidental to the tangible or vice versa, they will classify the transaction as wholly taxable or wholly exempt from tax, respectively.⁵⁵

Many states have a specific exemption for personal service transactions involving an inconsequential element of tangible personal property. For example, in the 1950s, comic strips were delivered to newspapers on fiber mats photo-

52. For instance, cigarettes are often taxed at extremely high rates in an effort to discourage smoking. See *infra* note 158 and accompanying text. Conversely, prescription drugs are tax-free in all states except for Illinois. 2012 State Sales Tax Rates and Food & Drug Exemptions, FED’N OF TAX ADM’RS (Jan. 2012), <http://www.taxadmin.org/fta/rate/sales.pdf>.

53. 85 C.J.S. *Taxation* § 2173 (2012). Some transfers of real property are also taxed in various ways, but that discussion is not within the scope of this paper.

54. 14A FLETCHER CYC. CORP. § 6921.50 (2012). In a 2010 Revenue Ruling, the Louisiana Department of Revenue noted that “[t]he action of the computer, through specific software, reading the pattern of coded instructions and translating it into the product intended to be viewed, heard or otherwise consumed, be it movie, book, music, or any other program providing interactive use, transforms the coded instructions into tangible personal property, capable of being experienced by the senses. The reconstituted matter need not be stored to be recognized as tangible personal property.” See STATE OF LA. DEP’T OF REVENUE, REVENUE RULING NO. 10-001, SALES AND USE TAX: TAXABILITY OF TRANSACTIONS FOR REMOTELY ACCESSED SOFTWARE, DIGITAL OR MEDIA PRODUCTS, AND OTHER ITEMS OF TANGIBLE PERSONAL PROPERTY, AND THE SALE, USE, OR LEASE OF SOFTWARE AND PROGRAM CONTENT (2010).

55. To see how New York deals with these issues, see *In re Lake Grove Entm’t, LLC*, 2009 WL 2360331, at *1–2 (N.Y. Tax. App. Trib. July 23, 2009); *In re Bartlett*, 2010 WL 4703771 (N.Y. Div. Tax. App. Nov. 10, 2010); *Artex Sys., Inc. v. Urbach*, 676 N.Y.S.2d 284 (App. Div. 1998). For further discussion of how intangible property fixed in a tangible medium is taxed, see *infra* Section III.A.

engraved with the cartoon.⁵⁶ In *Washington Times Herald Co. v. District of Columbia*, the D.C. Court of Appeals ruled that there should be no sales tax under the District of Columbia Use Tax Act for these cartoons because the newspaper was really paying for the artistry of the comic strip and not the mat on which it was transferred.⁵⁷ The Supreme Court of Colorado discussed this issue in a 2003 case: "If the price of the tangible personal property involved in a transaction can be meaningfully separated from the price commanded by the intangible portion of the transaction, the sales or use tax must be calculated on the purchase price of only the tangible property."⁵⁸ In another instance, *Southern Bell Telephone and Telegraph Co. v. Department of Revenue* involved a plaintiff who published the local Yellow Pages.⁵⁹ As a service to advertisers, Southern Bell hired artists to produce illustrations for advertisements. The plaintiff did not pay sales tax on these purchases and contended that the commissions were a service for its advertisers rather than a purchase of tangible property.⁶⁰ The Florida Department of Revenue argued that Southern Bell purchased title to the artwork and thus owed tax on the object.⁶¹ The court agreed with Southern Bell and ruled that that the petitioner was paying for the artist's *idea* and that the tangible personal property was incidental to the sale.⁶² The court looked at three factors in making its decision: (i) whether or not the property transferred was produced "in the course of the services rendered"; (ii) the value of the intangible service versus that of the tangible item transferred; and (iii) whether the tangible personal property was essential to the transaction.⁶³

The *Southern Bell* case and many others reflect what is known as "the true object" test. Borrowed originally from Title 18, Section 1501 of the California Code of Regulations, the test looks at whether the "true object" of a transaction is a service (and, thus, not taxed) or the property produced by the service (and, thus, taxed).⁶⁴ This distinction is what has led to digital photographs transported via CD or flash drive being taxed in states where the classification of digital photographs is specifically addressed in the state's tax code.⁶⁵ A photograph taken by a person with no talent is clearly of little commercial value. But the most talented photographer's vision is useless unless transferred into a viewable image. The

56. *Wash. Times-Herald Co. v. District of Columbia*, 213 F.2d 23, 23 (D.C. Cir. 1954).

57. *Id.* at 24.

58. *City of Boulder v. Leanin' Tree, Inc.*, 72 P.3d 361, 362 (Colo. 2003) (discussing the issue of imposition of sales tax on a broader level than on the facts of the case, i.e., the imposition of sales tax by the City of Boulder).

59. 366 So. 2d 30, 31 (Fla. Dist. Ct. App. 1978).

60. *Id.* at 31.

61. *Id.* at 32.

62. *Id.* at 31.

63. *Id.* at 32.

64. See, e.g., *Consol. Freightways Corp. v. State Dep't of Revenue & Taxation*, 735 P.2d 963, 966 (Idaho 1987); *WTAR Radio-TV Corp. v. Commonwealth*, 234 S.E.2d 245, 248-49 (Va. 1977). This test is also called the "dominant purpose" test or the "essence of the transaction" test.

65. See, e.g., ARIZ. ADMIN. CODE § 15-5-1101 (2012) (noting that "Photography" means the process of taking and supplying images to customers, using film, video or another data storage medium); CAL. CODE REGS. tit. 18, § 1540(a)(3) (2012) (classifying digital images on a compact disc as the transfer of tangible personal property).

states seem to have come to an agreement that where that vision is put on a piece of tangible personal property, it is subject to tax. The balance of this paper will address the issue of what happens when the image is not put on a piece of tangible personal property, but when it is transferred digitally, via e-mail or downloaded from a website. We will argue that the distinction is a senseless one for sales tax purposes, and that the item should be taxed in the same manner as those images delivered via traditional means.

B. TAXING DIGITALLY TRANSMITTED GOODS: THE CONCERNS

Despite the problems created by the different tax treatment of retail sales of tangible personal property and retail sales of digitally transmitted goods, there is strong opposition to any legislation that would extend sales tax to the latter.

Applying sales tax to goods that are digitally downloaded raises the concern that the price of such goods will increase.⁶⁶ While this is true, the revenue collected will help states offset huge budget deficits, thus providing benefits for all state residents.⁶⁷ Furthermore, because the newest devices upon which digitally transmitted goods can be viewed, played, read or listened to tend to be relatively expensive, those purchasing digital downloads and digitally transmitted goods presumably are most likely to be those who can afford increases in tax.⁶⁸

Some detractors of a tax on digitally transmitted goods argue that even though states will inevitably seek to tap new technologies as potential sources of revenue, digital downloads should be tax-exempt because increased digitization is beneficial. Steve DelBianco, the Executive Director of NetChoice, a tech industry group, argued:

With global warming and a world that's running out of oil, the last thing governments should do is add taxes on something that uses no oil and produces no carbon A digital download is the greenest way to buy music, movies, and software, since it requires no driving to the store, no delivery vans, and no plastics or packaging.⁶⁹

While the creation and delivery of digitally transmitted goods is certainly "greener" than that of its tangible counterparts, this does not necessarily mean the government should subsidize the digital industry by exempting digital transfers

66. See HELLERSTEIN & HELLERSTEIN, *supra* note 11, § 12.03. While it is possible that sellers of some luxury goods will not pass the costs on to consumers, generally the consumer bears the cost through an increase in prices.

67. Leslie Eaton, *More States Look to Raise Taxes*, WALL ST. J. (Apr. 9, 2009), <http://online.wsj.com/article/SB123923448796803135.html> (quoting Donald J. Boyd, Executive Director of the Task Force on the State Budget Crisis at the Rockefeller Institute of Government, who asserted: "Income taxes and sales taxes are the go-to taxes when you really need to raise a lot of money.").

68. *Survey Shows Widespread Enthusiasm for High Technology*, NPR, <http://www.npr.org/programs/specials/poll/technology> (last visited Aug. 28, 2012).

69. Stephanie Condon, *States May Tax iTunes, Other Digital Downloads*, CNET NEWS (Aug. 12, 2008), http://news.cnet.com/8301-13578_3-10013327-38. See generally Christopher L. Weber, Jonathan G. Koomey & H. Scott Matthews, *The Energy and Climate Change Impacts of Different Music Delivery Methods*, INTEL (Aug. 17, 2009), <http://download.intel.com/pressroom/pdf/cdsvsdownloadsrelease.pdf>.

from tax. While protection of the environment is always a concern, it cannot be the determining factor in tax policy in this case. Furthermore, taxing digitally transmitted goods will not discourage manufacturers from creating and marketing digital goods or from transferring goods digitally, since not offering digital products in downloadable form would put manufacturers at a competitive disadvantage.⁷⁰ In the case of digital downloads, market forces—and not subsidies—will encourage the shift away from physical goods to digitally delivered products since, even after factoring in sales tax, digital downloads are comparatively cheaper than their physical counterparts and facilitate integration across multiple devices.⁷¹

A third common objection to a tax on goods transferred digitally is that the additional tax will encourage consumers to pirate digital goods instead of buying them legally.⁷² A pamphlet disseminated by the California Chamber of Commerce

70. Several "brick-and-mortar" stores have failed as a direct result of not offering digital products in spite of increased consumer demands for such technology. See discussion of Borders, Virgin Megastore and Kodak *infra* notes 104, 111–112.

71. See *Digital Goods and Services Tax Fairness Act of 2011: Hearing on H.R. 1860 Before the Subcomm. on Courts, Commercial and Admin. Law, 112th Cong. (2011)* (testimony of Robert D. Atkinson, President and Founder, Information Technology and Innovation Foundation (ITIF)), available at <http://judiciary.house.gov/hearings/pdf/Atkinson05232011.pdf>. In his testimony, Mr. Atkinson stated:

Digital content and services . . . cost less for consumers For example, for books produced in digital form rather than in print, publishers can save by eliminating printing, storage, and shipping costs and reducing their design and marketing costs. Consumers have seen big savings: the average price of a hardback book is approximately \$26 compared to around \$13 for an e-book on the iPad or Kindle. Similarly consumers save on the purchase of digital music: the average price for a digital album is \$9.99 for a digital album on iTunes versus around \$14 for a CD.

Id.

As further evidence for this assertion, the authors performed their own empirical research by price-shopping various digital goods and their physical counterparts. At the time this paper was written, J.D. Robb's fiction piece *Celebrity in Death* was the most popular book on both the *New York Times*' "Hardcover Fiction" and "Combined Print & E-book Fiction" Best Sellers lists. See *Best Sellers*, N.Y. TIMES BOOK REV., Mar. 11, 2011, at 24, 25. At that time, *Celebrity in Death* could be found in hardcover version for \$16.00 on Amazon.com and \$16.54 at Barnesandnoble.com (before sales tax was added). See *Celebrity in Death [Hardcover]*, AMAZON.COM, http://www.amazon.com/Celebrity-In-Death-J-D-Robb/dp/0399158308/ref=sr_1_1?s=books&ie=UTF8&qid=1332688061&sr=1-1 (last visited Apr. 16, 2012); *Celebrity in Death (in Death Series #34)*, BARNESANDNOBLE.COM, <http://www.barnesandnoble.com/w/celebrity-in-death-j-d-robb/1100817730?ean=9780399158308&itm=1&usri=celebrity+in+death> (last visited Apr. 16, 2012).

The Kindle and Nook e-book versions of the novel were both being sold for \$12.99. See *Celebrity in Death [Kindle Edition]*, AMAZON.COM, http://www.amazon.com/Celebrity-In-Death-ebook/dp/B005GSZISZ/ref=sr_1_1?s=digital-text&ie=UTF8&qid=1332688225&sr=1-1 (last visited Apr. 16, 2012); *Celebrity in Death (in Death Series #34) [NOOK Book]*, BARNESANDNOBLE.COM, <http://www.barnesandnoble.com/w/celebrity-in-death-j-d-robb/1100817730?ean=9781101560365&itm=1&usri=celebrity+in+death> (last visited Apr. 16, 2012).

This price disparity also occurs in music. For example, in March 2012, James Taylor's *Mud Slide Slim and the Blue Horizon* was being sold for \$9.99 on iTunes while the physical CD was selling for \$14.86 on Amazon.com. *Mud Slide Slim & The Blue Horizon*, AMAZON.COM, http://www.amazon.com/Mud-Slide-Slim-Blue-Horizon/dp/B0015FH19A/ref=sr_1_2?s=music&ie=UTF8&qid=1332688978&sr=1-2 (last visited Apr. 16, 2012).

72. See, e.g., Letter from Grover Norquist, President, Americans for Tax Reform, et al. to

on behalf of local businesses summarizes many states' fears that there will be an increase in digital piracy resulting from the additional costs put on digital downloads.⁷³ While there is no definitive study to refute this contention, the additional revenue that could be gained from taxing digital downloads would be extensive and could potentially be used by states and local governments to fund antipiracy educational campaigns.⁷⁴ Furthermore, almost two dozen states have already begun to charge sales tax on the purchase of digital goods in some way.⁷⁵ The authors could find no reports of spikes in piracy as a result of charging sales tax on these transactions.

The final concern in taxing digitally transmitted goods is that because these transactions occur on the Internet, states will have difficulty locating where the transactions are taking place. Professor Arthur Cockfield of Queen's University in Kingston, Ontario, argues against taxation of intangibles by suggesting that it is difficult to locate their source and that they are so easily transported that there is a great incentive for sellers and purchasers alike to forum shop to find the state with the lowest tax rate.⁷⁶ This too is not a valid reason for exempting digitally transmitted goods from tax. While determining where a download occurs is admittedly more difficult than ascertaining the state to which a physical good is delivered, it is by no means an impossible task. Many states currently tax the digital download of music, and companies manage to find a way to locate the transaction for taxation purposes.⁷⁷ For example, states could adopt a variation of

Vermont House Committee on Ways and Means (Mar. 16, 2009), *available at* http://www.atr.org/userfiles/file/031609lt_vtdigitaltax.pdf (arguing that "taxing digital goods encourages consumers to turn to illegally pirated copies of music, movies, and books that are easily obtainable online"); *Digital Media Taxes: A Tax on Consumers and Innovation*, NETCHOICE, <http://www.netchoice.org/issues/digital-media-taxes-a-tax-on-consumers-and-innovation/> (last visited Aug. 27, 2012) (positing that additional sales tax imposed on digital goods "encourages consumers to look for lower-priced or untaxed items offered by digital pirates").

73. CAL. CHAMBER OF COMMERCE, E-COMMERCE TAXATION: FEDERAL-LEVEL UNIFORMITY/PREDICTABILITY BEST ROUTE TO FOLLOW (2009), *available at* <http://www.calchamber.com/governmentrelations/issuereports/documents/issuessummaries/09-issuessummaries-e-commerce-taxation.pdf> ("Increasing the cost of California digital purchases by a tax of 7 percent to 9.25 percent, depending on the applicable local sales tax rate, may encourage even more digital piracy. Digital media and its channels of delivery are especially vulnerable to theft due to increasingly faster computers. Moreover, Internet connections have made illegal downloads of software, movies, music and the like easier. Digital piracy leads to lost jobs, lost sales and lost tax revenue.").

74. See, e.g., *New York City Launches a New Campaign to Fight Digital Piracy and Content Theft*, NYC.GOV (Sept. 13, 2011), http://www.nyc.gov/html/film/html/news/090111_antipiracy_campaign_sept2011.shtml.

75. *Digital Goods and Services Tax Fairness Act of 2011: Hearing on H.R. 1860 Before the Subcomm. on Courts, Commercial and Admin. Law*, 112th Cong. 5 (2011) (testimony of Robert D. Atkinson, President and Founder, Information Technology and Innovation Foundation (ITIF)), *available at* <http://judiciary.house.gov/hearings/pdf/Atkinson05232011.pdf>.

76. Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet is Changing Tax Laws*, 34 CONN. L. REV. 333, 382 (2002).

77. In 2008, a fifty-state survey conducted by the Washington State Department of Revenue indicated that more than 19 states taxed music downloads. WASH. STATE DEP'T OF REVENUE, 50-STATE SURVEY OF TAXATION ON DIGITAL PRODUCTS EXECUTIVE SUMMARY (2008), *available at* www.dor.wa.gov/docs/reports/DigitalGoods/50statesurvey.pdf. Since then, states including Wisconsin,

the solution put forth by Amazon.com and Apple: tax digital downloads based on the ZIP code of the credit card used in the transaction.⁷⁸ While this is not a perfect solution, it is easy to implement and is highly effective, as most people are unlikely to change the billing addresses on their credit cards simply to avoid sales tax on digitally transferred goods.

III. TAXATION OF SIMILARLY SITUATED PRODUCTS

Photography is far from the only digital good whose tax treatment has caused issues for lawmakers and courts. The taxation of computer software, e-books, ringtones and music has also been an area of controversy.

A. COMPUTER SOFTWARE

Perhaps the products most similar to digital photographs for the purposes of our analysis are computer programs. This is because, like digital photographs, computer programs take great skill to create, but can be transmitted relatively easily either electronically or via tangible personal property on a DVD or CD. Like digital photographs, computer programs are created in an intangible medium and remain that way until purposefully fixed in a tangible medium.

Ever since computers became readily available for private purchase, the issue of whether to tax computer software has been hotly debated. In 1969, the Internal Revenue Service (IRS) issued Revenue Procedure 69-21, which characterized software as an intangible (mostly in an effort to disallow manufacturers from taking a series of deductions allowed for makers of tangible personal property).⁷⁹ Some states agreed with the federal government's classification of computer software as an intangible good.⁸⁰ In *Commerce Union Bank v. Tidwell*, for example, the Tennessee Supreme Court ruled that software was an intangible and not subject to sales tax.⁸¹ The court wrote: "What is created and sold here is information, and the magnetic tapes which contain this information are only a method of transmitting these intellectual creations . . ."⁸² Interestingly, in a harbinger of the debate over electronically transmitted digital photographs, the court went on to say that the magnetic tape was an inconsequential part of the sale in this instance because there

Indiana and North Carolina have added such laws and more states continue to investigate tapping into this source of revenue. See IND. CODE §§ 6-2.5-4-16(b)(1), 6-2.5-1-26.5(1) (2012); N.C. GEN. STAT. § 5, 105-164.4(6b) (2012); WIS. STAT. §§ 77.51(3pa), 77.52(1)(d) (2012). Maryland, for instance, proposed such a tax in January 2012. S.B. 152, 430th Gen. Assemb., Reg. Sess. (Md. 2012), available at <http://mlis.state.md.us/2012rs/bills/sb/sb0152f.pdf>.

78. *Terms and Conditions*, iTunes Store, <http://www.apple.com/legal/itunes/us/terms.html> (last visited Mar. 21, 2012); *Help—Sales Tax*, Amazon.com, <http://www.amazon.com/gp/help/customer/display.html?nodeId=468512> (last visited Mar. 21, 2012).

79. Rev. Proc. 69-21, 1969-2 C.B. 303, available at <http://pmstax.com/ftp/irb/rp6921.pdf> (last visited Apr. 16, 2012).

80. See, e.g., *In re State v. Cent. Computer Servs., Inc.*, 349 So. 2d 1160 (Ala. 1977); *First Nat'l Bank of Springfield v. Dep't of Revenue*, 421 N.E.2d 175 (Ill. 1981).

81. *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 408 (Tenn. 1976).

82. *Id.* at 407.

were other ways by which the information could be transferred, such as by telephone line.⁸³

Most states, however, realized that if they followed the Revenue Procedure and applied the same definition when determining whether to apply sales tax to software, they would lose out on taxing a quickly growing industry.⁸⁴ In 1983, the Maryland Court of Appeals ruled that "canned software" purchased by Equitable Bank constituted tangible personal property.⁸⁵ In declining to classify canned software as intangible property, the court aimed to avoid setting a precedent that would encourage parties to argue that the purchase of tangible personal property should be tax-free, because what was really being purchased was "intangible knowledge, information or data."⁸⁶ The court was concerned that if the programs were not treated as tangible personal property, states would then be challenged on the legitimacy of taxing films sold on videocassettes for home viewing and even books, for in these instances—as in the computer software context—the consumer was paying for the material *on* the videocassette or the paper and not the tangible item itself.⁸⁷ Since the first cases concerning computer software were decided, the commercial home video market had gained popularity, racking up millions of dollars in sales.⁸⁸ Since the items were taxable, states collected revenue from these transactions. Reasoning that "because a taxable transaction might have been structured in a nontaxable form, it does not thereby become nontaxable," the court declared canned computer software to be tangible personal property.⁸⁹

By 1984, thirty-eight states and the District of Columbia imposed a sales tax on canned computer software.⁹⁰ Of these thirty-nine jurisdictions, nineteen taxed all computer software, while the remaining twenty distinguished canned computer software from custom computer software and exempted the latter from taxation.⁹¹

83. *Id.* at 407-08.

84. Matthew A. Case, *Sales and Use Tax of Computer Software—Is Software Tangible Personal Property?*, 27 WAYNE L. REV. 1503, 1504-05 (1981). While states were eager to tax this new technology, the courts began to grapple with the question of whether computer software was tangible personal property and, thus, taxable, or an untaxed service. *Id.* at 1505, 1513.

85. *Comptroller of the Treasury v. Equitable Trust Co.*, 464 A.2d 248, 259 (Md. 1983). This case is noteworthy as it makes the distinction between "canned" and "customized" software. This distinction has become quite important in tax policy over the last thirty years. Canned software is software that is prewritten and sold to a mass-market audience, such as Microsoft Office or Microsoft Excel. The alternative is customized software which is software that is created to fulfill the specific needs and requests of a customer. *Id.* at 250; see also HELLERSTEIN & HELLERSTEIN, *supra* note 11, § 13.06[3][a]. Generally speaking, canned software is taxable as tangible personal property, while customized software is considered a service and whether or not it is taxed is dependent on the laws regarding taxation of services in the state where the sale is deemed consummated. HELLERSTEIN & HELLERSTEIN, *supra* note 11, § 13.06[3].

86. *Equitable Trust Co.*, 464 A.2d at 254.

87. *Id.*

88. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 457 (1981) (Blackmun, J., dissenting) ("The introduction of the home videotape recorder (VTR) upon the market has enabled millions of Americans to make recordings of television programs in their homes.").

89. *Equitable Trust Co.*, 464 A.2d at 261.

90. Brian G. Roskam, *The State Sales Tax Treatment of Computer Software: A State-by-State Review*, 36 TAX EXECUTIVE 239, 241 (1983-84).

91. *Id.*

Much noncustomized software is now downloadable from the Internet.⁹² Although every state that imposes sales tax does tax the sale of canned software when the software is transferred on a physical good, the treatment of canned software delivered over the Internet is less consistent.⁹³ For example, in 1993, New York defined computer software as tangible personal property, taxable no matter how transmitted to the customer.⁹⁴ The State declared canned software to be tangible personal property even if there is no physical medium that embodies the program.⁹⁵ Pennsylvania taxes canned software delivered online as well.⁹⁶ Georgia, however, does not tax software if digitally delivered, but does if delivered in tangible form.⁹⁷ The nonstandard application of sales tax to the sale of digitally transmitted computer software mirrors states' inconsistent application of sales tax to electronically delivered photographs, but does not necessarily produce the same conclusions. For example, as discussed above, New York taxes sales of computer software downloaded from the Internet; it does not, however, tax the sale of photographs downloaded in the same manner.⁹⁸

B. RINGTONES, E-BOOKS AND DIGITAL MUSIC

It is worth noting that the photography business is not the only creative industry in which the debate about how to tax digital goods has major ramifications. The "Digital Age" brought about radical changes in the way music, movies and books are bought and enjoyed.

Books, for example, are increasingly purchased in digital form. In July 2010, Amazon.com revealed that its sale of e-books had, for the three months prior, consistently outnumbered sales of its hardcover books.⁹⁹ On May 19, 2011, the company issued a press release announcing that, as of April 1, 2011, Amazon.com customers purchased "more Kindle books than all print books—hardcover and paperback—combined."¹⁰⁰

Likewise, there has been a significant surge in the last decade in downloads of

92. According to Dag Spicer, Senior Curator at the Computer History Museum, by 2001, software was downloadable from the Internet on a wide scale. E-mail from Dag Spicer, Senior Curator, Computer History Museum, to authors (Apr. 30, 2012) (on file with authors).

93. For a fifty-state survey on the taxability of prewritten computer software transmitted and accessed online as of 2010, see J.N. Endres and T.P. Noonan, *The Taxability of Software-Based Service Transactions: A Quagmire of Conflicting Authority*, 20 J. MULTISTATE TAX'N & INCENTIVES 6 (2010).

94. N.Y. STATE DEP'T OF TAXATION & FIN., TSB-M-93(3)S, STATE AND LOCAL SALES AND COMPENSATING USE TAXES IMPOSED ON CERTAIN SALES OF COMPUTER SOFTWARE (1993), available at http://www.tax.ny.gov/pdf/memos/sales/m93_3s.pdf.

95. *Id.*

96. 61 PA. CODE § 60.19(c)(2)(i) (2012).

97. GA. CODE ANN. § 48-8-3(91) (2012).

98. COMM'R OF TAXATION & FIN., TSB-A-99(48)S, *supra* note 7.

99. Claire Cain Miller, *E-Books Top Hardcover at Amazon*, N.Y. TIMES, July 20, 2010, at B1 (stating that "Amazon.com, one of the nation's largest booksellers, announced Monday that for the last three months, sales of books for its e-reader, the Kindle, outnumbered sales of hardcover books," and noting that in the month prior to the article's publication "sales rose to 180 digital books for every 100 hardcover copies").

100. *Amazon.com Now Selling More Kindle Books than Print Books*, *supra* note 2.

music and ringtones, and there is no clear consensus among states as to whether such digital audio goods should be taxed. As downloads of albums and songs continue to surpass the sales of compact discs, it is logical for states to contemplate taxing these transactions. In July 2011, Apple reported that iTunes was the nation's largest music store, beating out all digital competition and all traditional brick-and-mortar retailers, with sales of \$1.4 billion in the third quarter alone.¹⁰¹ Several states have weighed in on whether to tax these sales. About twenty states have added provisions to their codes making the sale of some or all of these goods taxable.¹⁰² However, a significant number of states still specifically exclude digital goods like e-books, ringtones or music downloads from sales taxation.¹⁰³ In this context, it is plain to see that not treating digital downloads in the same manner as tangible sales disadvantages brick-and-mortar retailers. Savvy consumers are moving to the Internet for their purchases, and local businesses pay the price.¹⁰⁴

IV. DIGITAL PHOTOGRAPHY

A. HISTORY

The electronic analog computers created after World War II paved the way for

101. *Apple Management Discusses Q3 2011 Results—Earnings Call Transcript*, SEEKING ALPHA (July 19, 2011), <http://seekingalpha.com/article/280344-apple-management-discusses-q3-2011-results-earnings-call-transcript>; see also *Amazon Ties Wal-Mart as Second-Ranked U.S. Music Retailer, Behind Industry Leader iTunes*, NPD GRP. (May 26, 2010), https://www.npd.com/press/releases/press_100526.html.

102. To the best of our knowledge, as of August 10, 2011, twenty-three states and the District of Columbia tax some, if not all, digital transfers of goods: Alabama, Arizona, Colorado, Connecticut, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Maine, Mississippi, Nebraska, New Jersey, New Mexico, North Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming. See STEVE RAUSCHENBERGER & STACEY SPRINKLE, COMMC'NS, FIN. SERVS. & INTERSTATE COMMERCE COMM., NAT'L CONFERENCE OF STATE LEGISLATURES, THE "DIGITAL GOODS AND SERVICES TAX FAIRNESS ACT OF 2011": A NATIONAL FRAMEWORK TO ENSURE FAIR TAXATION OF DIGITAL COMMERCE (2011), available at http://www.ncsl.org/documents/standcomm/sscommfc/Rauschenberger&Sprinkle_PowerPoint.pdf.

103. California, New York, Rhode Island and Massachusetts are among the states that have currently weighed in on the taxation of digital goods and determined that these digital goods are not subject to taxation. See, e.g., CAL. STATE BD. OF EQUALIZATION, GRAPHIC DESIGN, PRINTING AND PUBLISHING 49 (2011), available at <http://www.boe.ca.gov/pdf/pub37.pdf> (clarifying that the "[s]ales of eBooks published in electronic form are not taxable when they are downloaded to a computer or another hand held device and you do not provide a tangible copy as part of the sale"); STATE OF R.I. DIV. OF TAXATION, REGULATION SU 11-25, SALES AND USE TAX: COMPUTERS, SOFTWARE, AND RELATED SYSTEMS 4 (2011), available at <http://www.tax.ri.gov/regulations/salestax/11-25.pdf> (expressing that "[s]pecified digital products such as digital audio visual works, digital audio works, digital books, movies, music downloads, and ringtones which are delivered electronically, are not subject to tax . . .").

104. One needs to look no further than one's local mall or town center to see the effects. In 2009, New York City bid farewell its last major music retailer, the Virgin Megastore, having lost HMV's presence in 2004 and Tower Records in 2006. See Ben Sisario, *Retailing Era Closes with Music Megastore*, N.Y. TIMES, June 15, 2009, at C1. In 2011, Borders, the second largest bookstore chain in the United States, declared bankruptcy and closed all its stores. Mike Spector & Jeffery A. Trachtenberg, *Borders Forced to Liquidate, Close All Stores*, WALL ST. J., July 19, 2011, <http://online.wsj.com/article/SB10001424052702303661904576454353768550280.html>.

the creation of the digital camera.¹⁰⁵ Spurred by NASA's desire to photograph its explorations, advances were made in electronic imaging throughout the 1960s.¹⁰⁶ In 1975, Kodak scientist Steve Sasson developed the first digital camera prototype, but it weighed more than eight pounds, took twenty-three seconds to capture an image, and had a resolution of 0.1 megapixels.¹⁰⁷ In 1991, the world's first professional digital camera, the Kodak DCS 100, was introduced, but it was intended mainly for photojournalists, who could justify the cost of a \$20,000 camera.¹⁰⁸ The world's first consumer-priced digital camera, the Apple QuickTake 100, was introduced in 1994, but still cost close to \$1,000.¹⁰⁹ It wasn't until the twenty-first century that digital cameras commonly began to replace film cameras in American households as technology and ease of use improved and the price of manufacturing lowered.¹¹⁰ By 2009, when Kodak announced it would no longer make Kodachrome, its most famous and first commercially successful color film, it was clear that film cameras were becoming obsolete.¹¹¹ By January 2012, Kodak had declared bankruptcy, a move, analysts argued, forced by the digital revolution.¹¹²

Sam Garcia, a Nikon Technical Sales Representative who has been in the business for over thirty years, says that today almost all professional photographers shoot digitally.¹¹³ As the twenty-first century arrived, Nikon, as well as other camera manufacturers, began running seminars to train traditional film photographers in the new medium.¹¹⁴ Today, every major stock image distributor¹¹⁵ and news-gathering organization accepts digital images almost

105. NAOMI ROSENBLUM, *A WORLD HISTORY OF PHOTOGRAPHY* 637 (4th ed. 2007).

106. *Id.*

107. Krista Gleason, *A Kodak Moment with Steve Sasson*, PLUGGED IN (Sept. 24, 2008), <http://kristagleason.pluggedin.kodak.com/default.asp?item=2265372>; TODD GUSTAVSON, *CAMERA: A HISTORY OF PHOTOGRAPHY FROM DAGUERRETYPE TO DIGITAL* 336 (2009).

108. ANNE H. HOY, *THE BOOK OF PHOTOGRAPHY: THE TECHNIQUE, THE ART, THE FUTURE* 430 (2005); GUSTAVSON, *supra* note 107, at 340.

109. GUSTAVSON, *supra* note 107, at 341.

110. HOY, *supra* note 108, at 400.

111. *Kodak Retires KODACHROME Film: Celebrates Life of Oldest Film Icon in Its Portfolio*, KODAK (June 22, 2009), http://www.kodak.com/eknec/PageQuerier.jhtml?pq-path=2709&pq-locale=en_US&gpcid=0900688a80b4e692.

112. Sam Gustin, *In Kodak Bankruptcy, Another Casualty of the Digital Revolution*, TIME.COM (Jan. 20, 2012), <http://business.time.com/2012/01/20/in-kodak-bankruptcy-another-casualty-of-the-digital-revolution>.

113. Telephone interview with Sam Garcia, Technical Sales Representative, Nikon (July 9, 2009). Every photographer with whom we spoke in our research confirmed his comments. One prominent commercial photographer in Florida commented that he has shot only in digital format for years. Todd Joyce, former president of ASMP, says that he also only shoots in digital formats, which seems to be the standard practice. Telephone interview with Todd Joyce, former President of ASMP (Jan. 31, 2012). The authors do note that some fine art photography is still shot on film.

114. Telephone interview with Sam Garcia, *supra* note 113.

115. Stock image distributors are businesses that collect photos from freelance contributors to sell or license to a range of clients, including corporations and advertising agencies. The largest of these have thousands of photographers to whom they turn on a regular basis, and together they have millions of images in their databases. Some of the largest stock photo houses are Corbis, Getty Images, Magnum Photos and The Stock Market. Magnum Photos has over 500,000 images in its online collection alone. *About Magnum*, MAGNUMPHOTOS.COM, <http://www.magnumphotos.com/>

exclusively.¹¹⁶

B. TRANSFER OF DIGITAL IMAGES

Digital images can be transferred from the photographer to the purchaser—whether that purchaser is a newspaper, stock image distributor or individual—in multiple ways. The crucial determinant in choosing delivery methods is whether the image is to be printed out by the photographer and then transported, or whether the client will print the image upon receipt.

If a photographer wishes to control the printing of the image herself, she will transfer the image to paper and mail or hand deliver it to its destination. If she is confident that the purchaser will print the picture to her specifications, she can transfer the file to a jump drive, DVD or CD-ROM and transport it in this manner.

A photographer can also e-mail her work directly to her client or make images available for download through an online website or shared server. In order to e-mail particularly large photographs, a photographer can use an FTP file.¹¹⁷ Todd Joyce, former President of ASMP, describes this method as being the standard way photographers deliver their works today.¹¹⁸ There is a large advantage, he says, to this method, in that delivery is immediate and fees are limited to the capital expense of the FTP software or service.¹¹⁹

How the photograph is delivered also has great impact in some states on whether the photographer must charge sales tax in the transaction. Todd Joyce expressed concerns that this disadvantages photographers who, by choice or by request of the client, deliver their photographs in tangible form.¹²⁰ When one photographer is able to offer an item without having to charge sales tax and another photographer is not, Joyce notes that the former professional has a distinct advantage in an already competitive marketplace.¹²¹

C.aspx?VP3=CMS3&VF=MAX_2&FRM=Frame:MAX_3#/CMS3&VF=MAX_2&FRM=Frame:MAX_3 (last visited Aug. 17, 2012). Getty Images claims to have over 24 million images in its collection. *Getty Images Application*, GETTYIMAGES.COM, http://www.gettyimages.com/creative/frontdoor/iPad?isource=usa-en_rm_subfeature_iPad (last visited Aug. 17, 2012). Corbis Corporation holds the works of 30,000 different photographers in its collection. *Corbis Fact Sheet*, CORBIS (Nov. 2008), http://www.corbis.com/corporate/pressroom/pdf/corbis_corp_factsheet2.pdf.

116. Magnum Photos estimates that close to 95% of its photographers shoot and deliver their images digitally. E-mail from Sahar Roth, Publ'g and Editorial Support Assistant, Magnum Photos, to authors (Apr. 26, 2012) (on file with authors). The Associated Press states that all photos are delivered digitally and estimates that photojournalism as a whole is "99% digital." E-mail from Santiago Lyon, Vice President and Dir. of Photography, The Associated Press, to authors (Apr. 26, 2012) (on file with authors).

117. "FTP" (File Transfer Protocol) is a method that digitally transfers files, which, due to their size, cannot be sent through traditional e-mail methods.

118. Telephone interview with Todd Joyce, *supra* note 113.

119. *Id.* Services which allow photographers to upload photographs and convert them to FTP files have become prevalent in recent years. *Id.*

120. *Id.*

121. *Id.* This observation was reflected in telephone conversations we had with many photographers. For further discussion, see *infra* notes 155–157 and accompanying text.

C. TAXATION OF DIGITAL PHOTOGRAPHS

A survey of the states indicates that there are three main approaches to the taxation of downloaded digital photography (although these primary models are subject to some significant variation). States generally: (i) tax all photography no matter how it is transferred; (ii) refrain from taxing photographs digitally transferred, but tax those which are transferred as prints or via tangible personal property, such as a CD-ROM or flash drive; or (iii) clearly describe their taxation policies regarding printed photographs but fail to address the issue of digital imagery.¹²²

1. Taxation of All Photography

The first approach taxes all forms of digital photography, however transported. Alabama's code is a prime example:

The gross proceeds accruing from retail sales of photographs, blueprints and other similar articles are subject to sales or use tax, without any deduction for any part of the cost of production, whether delivered in final printed form or delivered in digital form via telephone lines, over the Internet, by e-mail, or by another alternative form of transmission.¹²³

Likewise, Maine, South Dakota, Texas, Utah, Washington and a handful of other states have issued revenue publications, decision letters and similar documents explicitly classifying digital photography that is transferred electronically as subject to sales tax.¹²⁴

122. This last situation is becoming increasingly rare. As more photographers are working in digital media, states must clarify how they are going to handle these sales. Moreover, there is a realization that there is revenue to be raised if digital transmissions are taxed. See, e.g., William F. Fox & Matthew N. Murray, *The Sales Tax and Electronic Commerce: So What's New?*, 50 NAT'L TAX. J. 573 (1997) (discussing states' efforts to increase taxation of electronic services in order to earn more revenue). In addition, as more and more states become members of the Streamlined Sales Tax Project, they are asked to clearly enunciate their position on the taxation of digital media. For a list of when states joined the SSTP, see *State Info*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=state-info> (last visited Sept. 6, 2012). Individual state statistics can be found on each state's information page.

123. ALA. DEP'T OF REVENUE, SALES AND USE TAX RULE 810-6-1-.119, PHOTOGRAPHS, PHOTOSTATS, BLUEPRINTS, ETC. (2008), available at www.revenue.alabama.gov/salestax/Rules/61119.html.

124. See, e.g., SALES, FUEL & SPECIAL TAX DIV., ME. REVENUE SERVS., INSTRUCTIONAL BULL. NO. 3: PHOTOGRAPHERS AND PHOTOFINISHERS (2008), available at <http://www.maine.gov/revenue/salesuse/Bull308.pdf>; S.D. DEP'T OF REVENUE, TAX FACT SHEET: PHOTOGRAPHERS (2011), available at <http://www.state.sd.us/drr2/business/tax/publications/taxfacts/photography.pdf>; *Photographers and Sales Use Tax*, SALES & USE TAX BULL. (Tex. Comptroller for Pub. Accounts, Austin, T.X.), Aug. 2009, available at http://www.window.state.tx.us/taxinfo/taxpubs/tx94_176.pdf; UTAH STATE TAX COMM'N, FREQUENTLY ASKED QUESTIONS: SELF-REVIEW—PHOTOGRAPHY, available at <http://tax.utah.gov/selfreviews/photography/faq.pdf> (last visited Aug. 20, 2012); *Sales of Photographs*, WASH. STATE DEP'T OF REVENUE, <http://dor.wa.gov/Content/GetAFormOrPublication/PublicationBySubject/TaxTopics/Photography.aspx> (last visited Aug. 27, 2012).

2. No Taxation of Digital Transfers

Some states completely exclude digital transactions from the state's tax regime. Interestingly, the states discussed below—California, Illinois and New York—have large concentrations of photographers, yet leave most of their transactions out of the tax base.¹²⁵

California taxes sales of photographs except for those transferred through a digital medium. Photographers who transfer their works either in tangible form or on a tangible format such as a DVD or flash drive must charge tax on the physical product transferred, the labor and services involved in the creation of the work and, in many cases, any reproduction rights associated with the sale of the photograph.¹²⁶ Most critically for purposes of this paper, sales tax is not due on photographs transferred digitally.¹²⁷ Furthermore, California has a broad interpretation of what electronic transfer means. Unlike most other states with similar electronic transfer taxation regimes, the transmission of a digital photograph in California can escape taxation even if the photograph is loaded onto a physical device to facilitate delivery, provided the photographer (or other seller) retains the storage device at the end of the transaction.¹²⁸ This seems to invite photographers to go to great lengths in order to avoid charging sales tax and favors photographers in close physical proximity to their clients over those farther away, as nearby photographers can easily visit their clients to deliver digital images in this manner.

Illinois, another state with a large concentration of photographers, also does not tax photographs transferred through electronic channels.¹²⁹ In 2008, the State

125. According to the Bureau of Labor Statistics, the states with the highest number of people self-identifying as professional photographers are (in descending order): California, Texas, New York, Florida and Illinois. See *Occupational Employment Statistics, May 2011: 27-0421 Photographers*, BUREAU OF LABOR & STATISTICS, U.S. DEP'T OF LABOR, <http://www.bls.gov/oes/current/oes274021.htm#> (last updated Mar. 27, 2012). California, Illinois and New York all have a large concentration of photographers. *Id.* All three states are also in fiscal crisis, yet continue to lose revenue based on an untenable distinction. One might assume it is because of a concerted lobbying effort on behalf of photographers in these states. However, photographers, attorneys for photographers and representatives of photographers have concurred that photographers are a very disorganized group who tend not to lobby for favorable rulings. Perhaps California's particularly generous terms towards electronic transfers were influenced not by photographers' groups, but by the film studios and computer companies headquartered in the state. This is the only explanation we can give for why California, operating with a \$19 billion deficit, has not pursued legislation amending these terms.

126. CAL. STATE BD. OF EQUALIZATION, PHOTOGRAPHERS, PHOTO FINISHERS, AND FILM PROCESSING LABORATORIES 2-3 (2011), available at <http://www.boe.ca.gov/pdf/pub68.pdf>. For a further discussion of California's tax treatment of non-electronically transferred images, see *id.* at 2-4, 10-19.

127. *Id.* at 5. Note that a photographer cannot, however, download the image to a CD and allow the client to keep the CD with the image on it. The photographer may bring the image on a CD to the client and load it onto the client's computer, but the photographer must then take the CD with him when he leaves. *Id.*

128. *Id.* This is called the "load and leave" method and is described in detail *supra* note 127. The California State Board of Equalization even suggests language that photographers should use to document such transactions in their records, lest the photographer be audited and have to explain why the transaction was not a taxable one. *Id.*

129. See *infra* note 130.

issued a General Information Letter regarding photo services that take place entirely over the Internet.¹³⁰ It answers the inquiry by citing the Illinois Administrative Code, Section 130.2105(a)(3), which states that "information or data that is electronically transferred or downloaded is not considered the transfer of tangible personal property in this State."¹³¹

The New York Department of Taxation and Finance issued an Advisory Opinion in September of 1999 explicitly interpreting New York's Tax Law as it pertains to digital photography.¹³² Sales of slides, CDs and prints are taxable, but photographic images delivered solely by electronic means are not.¹³³

3. Unclear Standards of Taxation

Some states have very vague statutes. Most of them would not have been considered vague twenty or more years ago when they were drafted, so perhaps they are better described as obsolete: they do not contemplate a world where photographs can be digitally transferred. Florida's Administrative Code provides a clear illustration:

Photographers are engaged in the sale of tangible personal property when developing or printing pictures for sale, or selling completed photographs or photostats or other tangible personal property. Such persons are required to collect and remit tax on the total amount charged to the customer for the sale of the tangible personal property.¹³⁴

This provision raises more questions than it provides answers. Can it include digital pictures that do not have a developing process? What is a "completed photograph"? Does it need to be printed to be "completed," or is the State referring

130. See ILL. DEP'T OF REVENUE, ST 08-0134-GIL, GENERAL INFORMATION LETTER 2 (2008) [hereinafter ILL. DEP'T OF REVENUE, ST 08-0134-GIL], available at <http://tax.illinois.gov/LegalInformation/Letter/rulings/st/2008/sg080134.pdf> ("Information or data that is electronically transferred or downloaded is not considered the transfer of tangible personal property in this State."). The State affirmed its position in a General Information Letter dated June 20, 2011. ILL. DEP'T OF REVENUE, ST 11-0045-GIL, GENERAL INFORMATION LETTER (2011) available at <http://tax.illinois.gov/LegalInformation/Letter/rulings/st/2011/ST-11-0045.pdf>.

131. ILL. DEP'T OF REVENUE, ST 08-0134-GIL, *supra* note 130. Interestingly, photoprocessors are also taxed differently depending on the products with which they work. Illinois Administrative Code § 130.2000(b)(3) defines photoprocessing as including, but not being limited to, "developing films, positives and negatives, transparencies, tinting, coloring and making and enlarging prints." ILL. ADMIN. CODE tit. 86, § 130.2000(b)(3) (1988). These processes are taxable, but there is no mention of taxation on manipulations made to a digital image. Illinois would probably not gain much revenue from adding a tax on digital services provided by photoprocessors, however, since most corrections made to digital images are done by the photographers themselves, according to noted photographer and attorney Alan Behr. E-mails from Alan Behr, photographer and attorney, to authors (June 22, 2010) (on file with authors). At the same time, photographers who provide "traditional photoprocessing services" are taxed on any tangible personal property sold.

132. COMM'R OF TAXATION & FIN., TSB-A-99(48)S, *supra* note 7. This position is reiterated in a 2005 Advisory Opinion. See COMM'R OF TAXATION & FIN., N.Y. STATE DEP'T OF TAXATION & FIN., TSB-A-05(34)S, ADVISORY OPINION: PETITION NO. S040707A (2005), available at http://www.tax.ny.gov/pdf/advisory_opinions/sales/a05_34s.pdf.

133. COMM'R OF TAXATION & FIN., TSB-A-99(48)S, *supra* note 7.

134. FLA. ADMIN. CODE ANN. r. 12A-1.041 (2012).

to coloring, tinting and other adjustments commonly done to polish a photo after it is taken but while it remains in digital form? What is clear, however, is that language such as this provides photographers and revenue departments little guidance in determining the taxability of digital photographs.

D. COMPLIANCE CONCERNS

These varied and complex provisions lead to serious issues with compliance. Many photographers and other purveyors of digital goods face a potential disaster if they misinterpret the complicated rules. Most photographers work alone, and the profession is not an especially lucrative one, particularly given shifts occurring in the industry.¹³⁵ Digital cameras are becoming so common that even amateurs can produce quality images, economic downturns are shrinking advertising budgets, and media conglomerates are consolidating the country's newspapers and magazines.¹³⁶ Many photographers live in fear of an audit by state tax authorities, and few have the financial capacity to hire accountants or lawyers who are well versed in the field.

A photographer in Washington says the state's current Department of Revenue (DOR) investigation into her sales tax payments could bankrupt her business.¹³⁷ She and her husband run a commercial photography agency that was audited by the DOR for failing to collect sales tax on their gross sales.¹³⁸ They were deemed to owe \$80,000 in back taxes (including interest).¹³⁹ This amount would force them to close their business.¹⁴⁰

135. According to a 2011 survey from the Bureau of Labor and Statistics, approximately 54,410 Americans work as photographers. The estimated mean annual wage is \$36,580 and the median annual wage is \$28,860. *Occupational Employment Statistics*, *supra* note 125.

136. See generally Stephanie Clifford, *For Photographers, the Image of a Shrinking Path*, N.Y. TIMES, Mar. 29, 2010, <http://www.nytimes.com/2010/03/30/business/media/30photogs.html?pagewanted=all>.

137. Telephone interview with photographer, anon. (Feb. 28, 2012); e-mails from photographer, anon., to authors (Feb. 28, 2012) (on file with authors). The photographer in question requested to remain anonymous.

138. Telephone interview with photographer, anon., *supra* note 137; e-mails from photographer, anon., to authors, *supra* note 137.

139. Telephone interview with photographer, anon., *supra* note 137; e-mails from photographer, anon., to authors, *supra* note 137. Not only would a taxpayer be liable for any unremitted sales tax owed, but she would also be liable for interest on that amount, financial penalties for failing to file and even personal criminal charges for failure to comply with state law. WASH. REV. CODE §§ 82.32.100, 82.32.050, 82.32.290(2)(a)(iii), (2)(b) (2012); WASH. ADMIN. CODE § 458-20-228 (2012). This photographer did charge sales tax, but only for the time she spent uploading the images to her FTP site. It should be noted that the four-year statute of limitations applies if taxes have been correctly filed in good faith, see WASH. ADMIN. CODE § 458-20-230(2), however, there is no statute of limitations for a taxpayer who has filed his taxes incorrectly, even if the error was an unintentional oversight, WASH. STATE DEP'T OF REVENUE, EXCISE TAX ADVISORY NO. 3042.2009, STATUTE OF LIMITATIONS IS NOT A DEFENSE WHEN A MATERIAL FACT IS MISREPRESENTED (2009). If a vendor does not file any returns, there is no statute of limitations, and the state may penalize the taxpayer for any period it wishes. WASH. ADMIN. CODE § 458-20-230(4).

140. This is but one example of many of photographers forced out of business because of sales tax liability assessed against them.

Losing one's business because of failure to pay taxes is not normally a sympathetic story. Yet, their situation is painful to hear because the photographers believed they were complying with the law due to the way the Washington statute is written.¹⁴¹ The Revised Code of Washington taxes digital goods but exempts photographers' earnings "in respect to amounts received for the taking of photographs that are transferred electronically to the customer."¹⁴² The photographers in question read this to mean they only needed to charge sales tax on the time they spent actually taking the photograph—as opposed to the time spent composing the setting or doctoring the image and then the time spent transferring the item—but the Washington DOR disagreed.¹⁴³

As we have seen above, not collecting taxes may lead to an audit, but there are drawbacks to diligently collecting as well. Clients may question the photographer who adds sales tax to the invoice, knowing that there are those whose services they can employ who do not charge tax. They may well seek services from the latter in order to cut costs.¹⁴⁴ Steve Dreiseszun, a commercial photographer in Arizona, says because Arizona's laws are unclear, he and his contemporaries often differ as to whether taxes should be levied.¹⁴⁵ He says he is losing clients to competitors who do not charge sales tax.¹⁴⁶ This situation is further complicated by the ease with which photographs can be digitally transferred. Even if Arizona's laws were clear, Dreiseszun could lose business to photographers in other states where tax is not levied.¹⁴⁷ The only solution is clear and uniform treatment of this issue across the United States.

Another drawback to unclear laws is that some photographers, unsure as to whether they are required to charge sales tax, levy it on all sales in an attempt to

141. Telephone interview with photographer, anon., *supra* note 137; e-mails from photographer, anon., to authors, *supra* note 137.

142. WASH. REV. CODE § 82.04.192(6)(b)(iv)(B).

143. Telephone interview with photographer, anon., *supra* note 137. As many professions do, photography has its own language. Washington State Department of Revenue administrators, however, do not always understand this and, therefore, use terms which may have different meanings in the industry. This leaves photographers susceptible to errors caused by differing interpretations of terminology. Taxing all digital transfers without exception would, at the very least, provide some of these users enough clarity that arcane technicalities of the Washington Code would not be as needed. At least one state recognizes this issue. Arizona does have an appeal process that allows a special interest group to appeal the application of the tax code on its entire profession. ARIZ. REV. STAT. ANN. § 42-2056 (2012). To take advantage of this, however, 60% of the cohort would have to attest that they incorrectly filed taxes for the same reason. *Id.* Steve Dreiseszun, a local photographer, says this will never happen, as photographers would have to admit they filed incorrectly and would not get amnesty if the appeal failed. Telephone interview with Steve Dreiseszun, commercial photographer (Feb. 28, 2012).

144. This statement is made based on the many telephone and e-mail conversations the authors had while researching this paper.

145. Telephone interview with Steve Dreiseszun, *supra* note 143.

146. *Id.*

147. Many photographers are searching for such legislative reform. Dreiseszun lobbied the Arizona legislature to clarify the State's tax laws as they related to photographers. He was, however, rebuffed—a reaction he attributes to a shift in politics. *Id.* "The climate," he said, "is to simplify the tax code and not amend it for special interests." *Id.* The problem is that the legislatures are not simplifying the tax code either.

ensure they are not penalized in an audit.¹⁴⁸ If the photographer is correctly interpreting the state's laws, then the money and time spent maintaining these records and filing the correct forms is well spent. If not, the money is wasted.

As a result of these tensions, some photographers choose to remove themselves from the taxing regime altogether, preferring to risk an audit than to spend the time and money on investigating and attempting to comply with confusing tax laws. For example, one commercial photographer based in Florida delivers 100% of his photographs via FTP files because he believes this absolves him of any sales tax owed.¹⁴⁹ He reports that he stopped registering his business with the Florida Franchise Tax Board over four years ago and is "thrilled" not to have to worry about the sales tax consequences of his work.¹⁵⁰ While the legality of this practice is questionable, it illustrates photographers' sentiments that compliance requirements are a burden.¹⁵¹

E. WHY IMAGES TRANSFERRED ELECTRONICALLY SHOULD BE TAXED

There are many reasons we believe that all fifty states should tax the transfer of digital photographic images. In tax policy, we search for fairness and equity. We have previously discussed vertical equity—the idea that a tax should not be regressive.¹⁵² But that is not the only form of inequity that failing to tax digital transfers of images engenders.

Horizontal equity mandates that those in equal circumstances pay equal amounts of tax.¹⁵³ Not taxing all digital photographs transferred electronically is horizontally inequitable. Some customers will pay sales tax because they are either not equipped to receive the files electronically or because the photographers cannot send them in this manner for whatever reason. Perhaps they will not have to pay taxes because the photographer can employ the "load and leave" method previously discussed in this paper, provided the photographer's location is not too far away to make this feasible.¹⁵⁴ Whether or not a transaction is subject to sales tax should not depend on such meaningless distinctions.

Another equity concept is competitive equity: the relationship among different vendors. As discussed, taxing digital photographs based solely on how they are distributed creates an unfair advantage to those photographers able to sell electronically.¹⁵⁵ As eminent tax scholar Charles E. McLure, Jr. notes: "[I]t is unfair—as well as bad economics—to give electronic commerce the advantage of a

148. For a discussion of general costs of compliance, see CLINE & NEUBIG, *supra* note 39.

149. Telephone interview with photographer, anon. (July 20, 2009); e-mails from photographer, anon., to authors (January 2012) (on file with authors). The photographer has requested to remain anonymous based on his fear of repercussions for his actions from the Florida Franchise Tax Board.

150. Telephone interview with photographer, anon., *supra* note 149; e-mails from photographer, anon., to authors, *supra* note 149.

151. For further discussion of this topic, see *supra* notes 35–36.

152. See discussion *supra* notes 31–33 and accompanying text.

153. BRUNORI, *supra* note 20, at 17–18.

154. See *supra* notes 127–128 and accompanying text for a definition of this method.

155. See discussion *supra* Part III.

tax exemption not enjoyed by its rivals.”¹⁵⁶ While this paper’s focus is not primarily on electronic commerce but on the taxation of materials in digital form, the issue is still pertinent, for the sale of digital photography is a subset of electronic commerce. There is concern that treating one format of delivery more favorably than another breeds economic disparity.¹⁵⁷ Economic neutrality—the desire for the tax regime not to interfere with market decisions—should be of paramount concern.

Sales taxes are consumption-based—they tax only purchases by an end user. When a state taxes only some of the materials consumed, it distorts choices; people will, if given the option, choose the tax-free alternative. In fact, this is how many states attempt to provide their citizens with an incentive to eat healthier foods or forego cigarettes.¹⁵⁸ It is one thing to levy different rates for policy reasons, but it is another to vary rates based solely on method of delivery.¹⁵⁹

Furthermore, it is important for long-term technological advancement that governments not give preferential treatment to one use of technology over another. McLure writes that “it is important not to distort the choice of technology used to provide particular intangible products and services.”¹⁶⁰ Written over fourteen years ago, McLure’s statement is all the more valid today.

A final reason states should uniformly tax digital transmittal of photographs is to provide clarity to the consumer and the seller. Artists and consumers should be able to clearly understand the tax obligations incurred in the transfer of digital goods the same way they do regarding the purchase of tangible personal property. Photography blogs are laced with confused professionals asking for assistance; often, these professionals receive the wrong advice from their peers, and calls to the relevant state agency may not provide a clear answer.¹⁶¹

156. McLure, *Achieving a Level Playing Field*, *supra* note 1, at 1768.

157. See, e.g., *id.*; Edward A. Morse, *State Taxation of Internet Commerce: Something New Under the Sun?*, 30 CREIGHTON L. REV. 1113, 1115 (1997).

158. BRUNORI, *supra* note 20, at 114. See generally Paul LeBel & Richard Ausness, *Toward Justice in Tobacco Policy Making: A Critique of Hanson and Logue and an Alternative Approach to the Cost of Cigarettes*, 33 GA. L. REV. 693 (1999).

159. McLure notes arguments against the taxation of electronic commerce in his article “Thinking Straight About the Taxation of Electronic Commerce.” McLure, *Thinking Straight*, *supra* note 35, at 124.

160. Charles E. McLure, Jr., *Taxation of Electronic Commerce: Economic Objectives, Technological Constraints, and Tax Law*, 52 TAX L. REV. 269, 374 (1997).

161. See, e.g., ASMP: American Society of Media Photographers—National, LINKEDIN, http://www.linkedin.com/groupItem?view=&gid=107702&type=member&item=96716394&trk=group_search_item_list-0-b-ttl&goback=gna_107702 (last visited Apr. 16, 2012); *Utah Sticks It to All Their Photographers*, APhotoEditor.com (Mar. 16, 2009), <http://www.aphotoeditor.com/2009/03/16/utah-sticks-it-to-all-their-photographers/>; *Do I Need Charge Sales Tax for Photos?*, CANON DIGITAL PHOTOGRAPHY FORUMS, <http://photography-on-the.net/forum/showthread.php?t=690583> (last updated May 10, 2009); *Question About Sales Tax or Re-Sale Tax in Texas*, CANON DIGITAL PHOTOGRAPHY FORUMS, <http://photography-on-the.net/forum/showthread.php?t=570350> (last updated Dec. 12, 2008). The authors called over fifteen departments of revenue in researching this paper—many multiple times—and often the revenue department employee would either not know if a transaction was subject to sales tax under that state’s law and recommend we file for an official ruling or give advice that blatantly contradicted the state’s tax laws. An official ruling, however, whether it be an advisory opinion, revenue ruling or directive will only apply to the specific photographer and the specific

V. ATTEMPT AT A SOLUTION: THE STREAMLINED SALES TAX PROJECT

The states are aware of the problem of having fifty separate tax codes for businesses and individuals to comprehend and follow. An inability to understand the law leads to an inefficient system—taxes are overpaid or underpaid, the state spends time and money searching for, auditing and/or prosecuting delinquent taxpayers, and, naturally, the citizenry is frustrated. In March of 2000, several states started what ultimately became the Streamlined Sales Tax Project (SSTP).¹⁶² The goals of the SSTP—now the Streamlined Sales Tax Governing Board (SSTGB)—are to simplify and modernize the administration of sales and use taxes in order to ease the burden of tax compliance and to bring attention to pressing issues in the field of sales taxation.¹⁶³ These goals also include assisting states in creating a uniform lexicon.¹⁶⁴ Forty-four states and the District of Columbia originally joined the effort to draft an agreement that would establish clear and concise guidelines on state sales taxation.¹⁶⁵ As of this year, twenty-one of those states have adopted what has become known as the Streamlined Sales and Use Tax Agreement (“SSUTA” or the “Agreement”) and implemented its language in their state codes.¹⁶⁶

In April 2002, the Project issued a white paper investigating how tangible personal property should be defined and whether digital goods should be included in this definition.¹⁶⁷ The group debated many possible definitions, including one that would include data and information—specifically including photography whether delivered physically, electronically or otherwise—as tangible personal property.¹⁶⁸ They concluded, however, that digital property did not fall under the tangible personal property rubric and mandated that states wishing to tax such items draw up separate language to do so.¹⁶⁹ In 2007, as more and more member

transaction presented. Thus, it may not provide general guidance to confused photographers and may only help the photographer who requested the opinion in one specific instance.

162. *About Us*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=About-Us> (last visited Aug. 21, 2012). As of April 2012, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont, Washington, West Virginia, Wisconsin and Wyoming were full members of the group, and Ohio, Tennessee and Utah were associate members. *State Info*, *supra* note 122.

163. *About Us*, *supra* note 162.

164. *Frequently Asked Questions*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=faqs> (last visited Aug. 21, 2012). For more discussion of issues tackled by the SSTGB, see generally *Issue Papers*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=issue-papers> (last visited Sept. 6, 2012).

165. *Frequently Asked Questions*, *supra* note 164.

166. *Id.*

167. See STREAMLINED SALES TAX PROJECT, TANGIBLE PERSONAL PROPERTY ISSUE PAPER (Apr. 15, 2002), available at http://www.streamlinedsalestax.org/uploads/downloads/IP%20Issue%20Papers/IP02003_TPP_issue_paper_4_15_02.pdf.

168. *Id.* at 10.

169. *Id.* at 2.

states began to tax digital goods, the SSTGB added definitions of some digital products to the Agreement to help states have a common language, yet digital photographs were still not among them.¹⁷⁰

The SSTGB has lofty goals and good intentions, but it does little to alleviate the inconsistencies in the law for two reasons. First, any recommendation it makes is binding only on its members, and the majority of states, including the three with the largest populations, are not members.¹⁷¹ Furthermore, while the organization's goal of a standardized vocabulary is a step forward, the Streamlined Sales and Use Tax Agreement does not define all types of goods that could be subjected to sales tax including, as mentioned above, digital photographs.¹⁷² Also, the Agreement does not mandate that each state tax similar goods in a uniform manner.¹⁷³ As a result, SSTGB member New Jersey does not tax digital images transferred electronically while Washington, also a member, does.¹⁷⁴ Therefore, even if every state joined the SSTGB, it is uncertain whether there would be any more uniformity or clarity in the taxation of electronically delivered digital products.

VI. CONCLUSION

Terms such as equity, neutrality and simplicity fill the literature as the overarching goals of tax policy. The ideal sales tax would encompass media in all forms, no matter how they were delivered to the customer.

Digital photography is an unnecessary exemption from sales tax that exists in a majority of states. Not charging tax on electronically transmitted photographs creates confusion among photographers and is anachronistic in today's digital age. Admittedly, many states have begun to confront this problem. States have either amended their tax codes to purposefully include digitally transmitted downloads among the products that are taxed, or issued a revenue ruling or some other statement classifying digital photography as a tangible good and subjecting it to the

170. *SSUTA Amendments: 2007 Amendments*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=Requests-for-Interpretations#2007-Amendments> (last visited Sept. 6, 2012). For a comprehensive list of all proposed and adopted amendments to the SSUTA, see *SSUTA Amendments*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=Requests-for-Interpretations> (last visited Sept. 6, 2012).

171. California, New York and Texas are not SSTGB members and are the most populous states in the U.S. according to the 2010 United States Census. See *Resident Population Data*, U.S. CENSUS 2010, <http://2010.census.gov/2010census/data/apportionment-pop-text.php> (last visited Mar. 29, 2012).

172. Appendix C of the Agreement defines "Specified Digital Products." This definition does not include digital photographs. STREAMLINED SALES TAX GOVERNING BOARD, INC., STREAMLINED SALES AND USE TAX AGREEMENT 146 (2011), available at <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2012-19-11.pdf>.

173. *Id.* at 7.

174. See N.J. STAT. ANN. §§ 54:32B-2, 54:32B-3(a) (2011); N.J. DIV. OF TAXATION, PUBLICATION ANJ-27, SPECIFIED DIGITAL PRODUCTS & NEW JERSEY SALES TAX (2011), available at <http://www.state.nj.us/treasury/taxation/pdf/pubs/sales/anj27.pdf> (explaining that "specified digital products" are taxable, but the sale of "other types of property that are delivered electronically, such as digital photographs, digital magazines, etc." are not subject to sales tax); WASH. ADMIN. CODE § 458-20-140 (2012).

same taxation as its physical analogue.¹⁷⁵ The remaining states should adopt statutory language that clearly mandates taxation of electronically transferred photographs. To minimize confusion, this language would be uniform and easy to understand, much like that adopted by South Dakota.¹⁷⁶

Rendering the sale of all photographs a taxable event—regardless of how the image is transmitted—would have several benefits. First, it will help raise revenue for states that desperately need additional sources of income without inciting as much negative public response as would an increase in property or income taxes. Because a tax on digital photography and other digital goods transferred electronically is not a new tax per se, but rather represents an extension of the existing tax paradigm, it is less likely to be hotly contested during its implementation.¹⁷⁷

Making digital photography taxable would also clarify existing state tax laws and help remove a pointless distinction that accomplishes nothing other than increases in photographers' compliance and legal costs and results in widespread undercollection or overcollection of monies owed. Furthermore, it would discourage unfair competition between photographers who deliver their goods solely in tangible forms, such as CDs or in print, and those who deliver digitally. If all states implement taxation that values substance over form, photographers would not be disadvantaged by their out-of-state neighbors or their online competitors who were able to offer seemingly lower prices to customers by virtue of not collecting a tax on specified goods.¹⁷⁸

Although photographers would initially be unhappy about the change in law, they would quickly realize that the extension of tax to digitally transferred photographs would have no substantial economic impact on them, and, in fact, could be beneficial for the reasons described above. Since photographers' clients—and not the photographers themselves—are the people who would actually be responsible for paying the additional taxes, the photographers would incur few, if

175. See, e.g., UTAH CODE ANN. § 59-12-103(1)(m)(i)(A) (West 2012) (imposing a tax on amounts paid or charged for a sale of a product transferred electronically; UTAH STATE TAX COMM'N, *supra* note 124, at 1 (noting that "Utah Code § 59-12-103 imposes sales tax on retail sales of tangible personal property made within the State, as well as on any electronically transferred products that would be taxable if transferred non-electronically," and explaining that although digital images are not considered tangible personal property, they are nonetheless subject to the same taxation as their physical analogues). It should be noted that statutory reform is the only way to fully address this problem. Revenue rulings and similar statements by the states' departments of finance can clarify uncertainty to some extent, but for true reform, states must change their statutes.

176. See S.D. CODIFIED LAWS § 10-45-2.4 (2011). The authors would also strongly urge states to extend this treatment to any digital good where there is an exact replica of the good available in analog format. We realize that there are also digital goods such as smartphone applications or digital codes that do not have a physical analog. The language that the authors propose is not meant to preclude taxation of such goods—it merely sets a framework to begin taxing digital goods that, but for being transmitted in electronic form, would be subject to state sales tax.

177. See BRUNORI, *supra* note 20, at 62–63.

178. Again, one cannot ignore the fact that use tax should be paid by the purchaser or licensee if no sales tax is levied. However, as discussed *supra* Part I.C, this tax often goes uncollected. Therefore, to the purchaser or licensee, a vendor who does not charge sales tax has what seems like a lower bill than one who does.

any, any additional costs in operating their businesses, provided they properly collected the taxes and maintained adequate books and records to substantiate their tax returns.¹⁷⁹

As a final matter, the authors of this paper strongly feel that any change in states' tax codes should not be retroactive and that any photographers currently liable for back taxes should be granted amnesty. The digital market has evolved rapidly and an increasing number of states have applied taxes to transactions involving digital goods.¹⁸⁰ Although some states have attempted to implement educational campaigns to alert small business owners to their tax-collecting obligations, many photographers remain confused as to how they must comply with the laws.¹⁸¹ As a result, it is possible for a photographer to owe large amounts of money in tax liabilities, the collection of which could potentially mean the end of his or her business. Because much of the confusion results from murky laws and inconsistent standards, states should forgive the amounts accrued during this transition time.

In 2003, Douglas Lindholm, then-President of the Council on State Taxation, echoed many leading economists' sentiments that the country's economy had been revolutionized.¹⁸² This "new economy," he wrote, was marked by electronic commerce and intangible assets, and states' tax systems were woefully inadequate.¹⁸³ Transactions that were once beyond the scope of the imaginable are now commonplace, and the complexity of issues, coupled with the increasing complexity of states' tax codes, has become overwhelming to the nontax professional.

Ultimately, as Justice Stevens wrote in a famous state tax case: "A bright line rule in the area of sales and use taxes also encourages settled expectations and, in

179. Not all states put the burden of the tax on the consumer. As we discussed *supra* note 22, some states have excise tax regimes whereby the seller is to pay the tax to the state government. In the end, however, it is the consumers who bear the financial burden in all forty-five of the states that collect tax on the sale of goods. Furthermore, we understand that one of photographers' main complaints with the sales tax system is how much time and effort it takes to complete all the necessary paperwork. See *supra* note 36 and accompanying text. However, we believe that increase in paperwork would be more tolerable if the system was concise and uniform. Additionally, photographers, even those who do not believe they owe sales tax, must keep comprehensive records and, thus, would have few additional obligations under this new regime. Finally, while we sympathize with their plight, we feel that one cannot ignore sound fiscal policy in order to address the needs of one interest group.

180. See, e.g., S.D. CODIFIED LAWS § 10-45-2.4; TENN. CODE ANN. § 67-6-233 (2009); VT. STAT. ANN. tit. 32, § 9771 (2012); WYO. STAT. ANN. § 39-15-101 (2012); see also Act of Mar. 18, 2010, ch. 111, 2010 Wash. Laws; H.B. 283, 60 Leg., Gen. Sess. (Wyo. 2009) (setting forth legislative history confirming the date of the change in the law to include digital goods). Connecticut and Maryland currently have such legislation pending. See Raised B. 400, 2011-2012 Gen. Assemb., Reg. Sess. (Conn. 2012); S.B. 152, 430th Gen. Assemb., Reg. Sess. (Md. 2012). For more information on states' efforts to increase revenue via taxation in the past three years, see Helen Lemmon et al., *States are Starving for Revenue*, 19 J. MULTISTATE TAX'N & INCENTIVES 20, 22 (2010).

181. See *supra* note 161.

182. Douglas L. Lindholm, 'Old Economy' Tax Systems on a 'New Economy' Stage: The Continuing Vitality of the 'Physical Presence' Nexus Requirement, COUNCIL ON STATE TAXATION, 5 (Feb. 27, 2003), <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=67392>.

183. *Id.* at 5-6.

doing so, fosters investment by businesses and individuals."¹⁸⁴ This very goal mandates that digital photographs be subject to the same tax treatment as their tangible counterparts.

184. *Quill Corp. v. North Dakota*, 504 U.S. 298, 316 (1992).